

JUDGMENT OF THE COURT (Third Chamber)

12 September 2013 (*)

(Judicial cooperation in civil matters – Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters – Regulation (EC) No 44/2001 – Article 1(1) – Scope – Concept of ‘civil and commercial matters’ – Action brought by a public authority – Damages in respect of involvement in a tax fraud by a third party not subject to VAT)

In Case C-49/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Østre Landsret (Denmark), made by decision of 25 January 2012, received at the Court on 31 January 2012, in the proceedings

The Commissioners for Her Majesty’s Revenue & Customs

v

Sunico ApS,

M & B Holding ApS,

Sunil Kumar Harwani,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, E. Jarašiūnas, A. Ó Caoimh, C. Toader (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: J. Kokott,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 21 February 2013,

after considering the observations submitted on behalf of:

- Sunico ApS, M & B Holding ApS and Sunil Kumar Harwani, by O. Spiermann, advokat,
- the United Kingdom Government, by L. Christie, S. Ossowski and S. Lee, acting as Agents, and by A. Henshaw, Barrister,
- the Swiss Government, by D. Klingele, acting as Agent,
- the European Commission, by M. Wilderspin and C. Barslev, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 April 2013,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 1(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).
- 2 The request has been submitted in proceedings between the Commissioners for Her Majesty's Revenue and Customs ('the Commissioners') and Sunico ApS, M & B Holding ApS and Mr Harwani (together 'Sunico'), concerning the procedure to determine the validity of an attachment order made at the request of the Commissioners in respect of assets belonging to Sunico and situated on Danish territory.

Legal context

European Union law

Regulation No 44/2001

- 3 Recitals 6 and 7 in the preamble to Regulation No 44/2001 state:

‘6. In order to attain the objective of free movement of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a Community legal instrument which is binding and directly applicable.

7. The scope of this Regulation must cover all the main civil and commercial matters apart from certain well-defined matters.’
- 4 Article 1(1) of Regulation No 44/2001 defines the scope *ratione materiae* of the regulation as follows:

‘This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.’

The EC-Denmark Agreement

- 5 The Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Brussels on 19 October 2005 (OJ 2005 L 299, p. 62; ‘the EC-Denmark Agreement’, approved, on behalf of the European Union, by Council Decision 2006/325/EC of 27 April 2006 (OJ 2006 L 120, p. 22), is intended to apply Regulation No 44/2001 and its implementing provisions to

relations between the European Union and the Kingdom of Denmark. It entered into force on 1 July 2007, in accordance with Article 12(2) of the EC-Denmark Agreement (OJ 2007 L 94, p. 70).

- 6 The preamble to that agreement reads as follows:

‘...

Considering that the Court of Justice [of the European Union] should have jurisdiction under the same conditions to give preliminary rulings on questions concerning the validity and interpretation of this Agreement which are raised by a Danish court or tribunal, and that Danish courts and tribunals should therefore request preliminary rulings under the same conditions as courts and tribunals of other Member States in respect of the interpretation of [Regulation No 44/2001] and its implementing measures,

...’

- 7 According to Article 2(1) of that Agreement, entitled ‘Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters’:

‘The provisions of [Regulation No 44/2001], which is annexed to this Agreement and forms part thereof, together with its implementing measures adopted pursuant to Article 74(2) of the Regulation and, in respect of implementing measures adopted after the entry into force of this Agreement, implemented by [the Kingdom of] Denmark as referred to in Article 4 of this Agreement, and the measures adopted pursuant to Article 74(1) of the Regulation, shall under international law apply to the relations between the [Union and the Kingdom of Denmark].’

- 8 Under the heading ‘Jurisdiction of the Court of Justice [of the European Union] in relation to the interpretation of the Agreement’, Article 6(1) and (6) of the Agreement provides:

‘1. Where a question on the validity or interpretation of this Agreement is raised in a case pending before a Danish court or tribunal, that court or tribunal shall request the Court of Justice to give a ruling thereon whenever under the same circumstances a court or tribunal of another Member State of the European Union would be required to do so in respect of [Regulation No 44/2001] and its implementing measures referred to in Article 2(1) of this Agreement.

...

6. If the provisions of the [EC] Treaty ... regarding rulings by the Court of Justice are amended with consequences for rulings in respect of [Regulation No 44/2001], [the Kingdom of Denmark] may notify the Commission of its decision not to apply the amendments in respect of this Agreement. Notification shall be given at the time of the entry into force of the amendments or within 60 days thereafter.

In such a case this Agreement shall be considered terminated. Termination shall take effect three months after the notification.’

Danish law

- 9 Article 634(1) of the Code of Civil Procedure provides:

'Within one week of the attachment, the creditor shall initiate proceedings on the claim in respect of which the attachment was effected, unless the debtor waives any challenge during or after the attachment procedure. During these proceedings, the creditor shall also lodge a specific claim for confirmation of the attachment.'

- 10 Article 634(5) of the Code of Civil Procedure provides:

'If a case relating to the claim in question is pending before a foreign court the ruling of which is expected to have binding effect in Denmark, proceedings brought under subparagraph 1 shall be stayed until a ruling having legal force has been given in the foreign case. However, the court may immediately rule on questions regarding the confirmation of an attachment order.'

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

- 11 Following an alleged value added tax ('VAT') 'carousel' type fraud which had permitted evasion of output VAT, to the detriment of the United Kingdom treasury, the Commissioners brought court proceedings in the United Kingdom and in Denmark.
- 12 As regards the proceedings initiated in the United Kingdom, the Commissioners brought an action on 17 May 2010 before the High Court of Justice (England and Wales), (Chancery Division) (United Kingdom) against a number of natural and legal persons established in Denmark, including Sunico.
- 13 The question which gave rise to debate before that court was whether the Commissioners could claim from non-residents, such as Sunico, in a claim for damages, damages corresponding to the amount of VAT not paid by a person subject to VAT in the United Kingdom, on the ground that those non-residents had taken part in a 'tortious conspiracy to defraud' within the meaning of English law. More specifically, the Commissioners maintained that those non-residents were guilty, on the territory of the United Kingdom, of a VAT 'carousel' type fraud. The Commissioners also submitted that those non-residents, who were not subject to VAT in the United Kingdom, had been the real beneficiaries of the sums obtained by that tax evasion mechanism.
- 14 The person subject to VAT in the United Kingdom who was involved in that VAT carousel is not a party to the proceedings before the High Court of Justice or to the main proceedings.
- 15 Since the non-residents in question did not incur liability under the United Kingdom VAT legislation, the Commissioners based their action before the High Court of Justice on the English law of tort, which was applicable to the unlawful means conspiracy.

- 16 At the time when the decision to request a preliminary ruling was taken, the action before the High Court of Justice was still pending.
- 17 Before that action was commenced, the Danish tax authorities, at the Commissioners' request, had supplied the Commissioners with information about the non-residents sued in the High Court of Justice, on the basis of Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92 (OJ 2003 L 264, p. 1).
- 18 The Commissioners also initiated proceedings in Denmark.
- 19 On 18 May 2010, upon application by the Commissioners, the fogedret i København (Bailiff's Court, Copenhagen (Denmark)) made attachment orders in respect of assets belonging to Sunico and situated on Danish territory, in order to secure payment of the Commissioners' claim for damages.
- 20 Sunico's appeal against those attachment orders was dismissed by the Østre Landsret (Denmark) on 2 July 2010.
- 21 By separate application, lodged on 25 May before the Københavns byret (District Court, Copenhagen (Denmark)), the Commissioners, acting on the basis of Article 634(1) of the Code of Civil Procedure, asked that court to confirm the attachment orders authorised by the fogedret i København and also claimed payment of the sum of GBP 40 391 100.01, corresponding to the amount of VAT evaded.
- 22 Sunico submitted that the Commissioners' claim for payment should be rejected as inadmissible or, at least, as unfounded and, furthermore, as regards the part of the application relating to the attachments, that those protective measures should be lifted.
- 23 By order of 8 September 2010, the Københavns byret transferred the case to the referring court.
- 24 The referring court decided to deal separately with the question whether, pursuant to Article 634(5) of the Code of Civil Procedure, it should stay the proceedings before it until the proceedings pending before the High Court of Justice had been completed.
- 25 The referring court is uncertain, in particular, whether an action such as that lodged on 17 May 2010 before the United Kingdom courts falls within the scope of Regulation No 44/2001, so that a judgment delivered by those courts might be recognised and enforced in Denmark, in application of that regulation and the EC-Denmark Agreement.
- 26 In those circumstances, the Østre Landsret decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 44 of [Regulation No 44/2001] be interpreted as meaning that its scope extends to cover a case in which the authorities of a Member State bring a

claim for damages against undertakings and natural persons resident in another Member State on the basis of an allegation – made pursuant to the national law of the first Member State – of a tortious conspiracy to defraud consisting in involvement in the withholding of VAT due to the first Member State?’

Consideration of the question referred

- 27 As a preliminary point, it must be held that the Court has jurisdiction to give a preliminary ruling on the question referred to it.
- 28 As the Commission confirmed at the hearing before the Court, following the entry into force of the Treaty of Lisbon, which repealed Article 68 EC, the Kingdom of Denmark did not take advantage of the opportunity provided for in Article 6(6) of the EC-Denmark Agreement to notify the Commission of its decision not to apply that amendment of the EC Treaty within 60 days following the entry into force of that amendment. Consequently, following the repeal of Article 68 EC, the extension of the right to refer questions for a preliminary ruling in relation to judicial cooperation in civil matters to courts against whose decisions there is a judicial remedy also applies to the referring court.
- 29 By its question, the referring court seeks to ascertain, in essence, whether the concept of ‘civil and commercial matters’ within the meaning of Article 1(1) of Regulation No 44/2001 is to be interpreted as meaning that it includes an action whereby a public authority of one Member State claims, from natural and legal persons resident in another Member State, damages in respect of loss caused by a conspiracy to commit VAT fraud in the first Member State.
- 30 Sunico, which maintains that the proceedings before the referring court should be continued, claims that a judgment delivered by the United Kingdom courts in the action for damages brought against it is not capable of producing binding effects in Denmark. Such a judgment would not be enforceable in Denmark under Regulation No 44/2001, in so far as the Commissioners’ claim for damages is based on the fact that a third party subject to VAT in the United Kingdom did not pay that tax, so that that claim is governed by United Kingdom VAT law. Accordingly, in Sunico’s submission, such an action does not come within the scope of that regulation, since actions in revenue matters are expressly excluded.
- 31 The Commissioners, who submitted that the proceedings pending before the referring court should be stayed, claim that a judgment delivered by the United Kingdom courts in the action for damages against Sunico should be enforceable in Denmark, in application of Regulation No 44/2001 and the EC-Denmark Agreement.
- 32 As a preliminary point, it must be recalled that, in so far as Regulation No 44/2001 now replaces the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36; ‘the Brussels Convention’) in relations between Member States, an interpretation given by the Court concerning that convention also applies to the regulation, where its provisions and those of the Brussels Convention may be treated as equivalent (see, in particular, Case C-645/11 *Sapir and Others* [2013])

ECR I-0000, paragraph 31). Furthermore, is clear from recital 19 in the preamble to Regulation No 44/2001 that continuity in interpretation between the Brussels Convention and that regulation should be ensured.

- 33 In that regard, it must be stated that the scope of Regulation No 44/2001 is, like that of the Brussels Convention, limited to ‘civil and commercial matters’. It follows from settled case-law of the Court that that scope is defined essentially by the elements which characterise the nature of the legal relationships between the parties to the dispute or the subject-matter thereof (see, in particular, Case C-406/09 *Realchemie Nederland* [2011] ECR I-0000, paragraph 39, and *Sapir and Others*, paragraph 32).
- 34 The Court has thus held that, although certain actions between a public authority and a person governed by private law may come within the scope of Regulation No 44/2001, it is otherwise where the public authority is acting in the exercise of its public powers (see, in particular, *Sapir and Others*, paragraph 33 and the case-law cited).
- 35 In order to determine whether that is the case in a dispute such as that in the main proceedings, it is necessary to examine the basis of, and the detailed rules applicable to, the action brought by the Commissioners, in the United Kingdom, before the High Court of Justice (see, by analogy, Case C-271/00 *Baten* [2002] ECR I-10489, paragraph 31, and Case C-266/01 *Préservatrice foncière TIARD* [2003] ECR I-4867, paragraph 23).
- 36 In that regard, it should be noted that the factual basis of the claim before that court is the alleged fraudulent conduct of Sunico and the other non-residents sued in that court, who are alleged to have been involved on the territory of the United Kingdom in a chain of transactions involving the sale of goods with the aim of setting up a ‘VAT carousel’ type tax evasion mechanism, which enabled output tax payable by a taxable person in that Member State to be evaded, and thus to have been the real beneficiaries of the sums obtained by means of that tax evasion.
- 37 So far as the legal basis of the Commissioners’ claim is concerned, their action against Sunico is based not on United Kingdom VAT law, but on Sunico’s alleged involvement in a conspiracy to defraud, which comes under the law of tort of that Member State.
- 38 Likewise, it is clear from the decision for reference that Sunico and the other non-residents sued in the High Court of Justice are not subject to VAT in the United Kingdom and are therefore not liable to pay VAT under the laws of that Member State.
- 39 As the Commission and the United Kingdom Government have observed, in the context of that legal relationship, the Commissioners do not exercise any exceptional powers by comparison with the rules applicable to relationships between persons governed by private law. In particular, as the Advocate General has stated at point 44 of her Opinion, the Commissioners cannot, as they are generally able to do in the exercise of their powers as a public authority, themselves issue the enforceable document that would enable them to recover

their debt, but, in order to do so in a context such as that of the main proceedings, must proceed through the normal legal channels.

- 40 It follows that the legal relationship between the Commissioners and Sunico is not a legal relationship based on public law, in this instance tax law, involving the exercise of powers of a public authority.
- 41 Admittedly, it is apparent from the order for reference that the amount of the damages claimed by the Commissioners corresponds to the amount of output VAT payable by a taxable person in the United Kingdom. However, the fact that the extent of Sunico's tortious liability towards the Commissioners and the amount of the Commissioners' tax claim against a taxable person are the same cannot be regarded as proof that the Commissioners' action before the High Court of Justice involves the exercise by them of public authority vis-à-vis Sunico, since it is common ground that the legal relationship between the Commissioners and Sunico is not governed by United Kingdom VAT law but by the law of tort of that Member State.
- 42 Last, as to whether the request for information which the Commissioners addressed to the Danish authorities on the basis of Regulation No 1798/2003 before bringing proceedings before the High Court of Justice affects the nature of the legal relationship between the Commissioners and Sunico, it should be observed that it is not apparent from the documents in the file before the Court that in the proceedings pending before the High Court of Justice the Commissioners used evidence obtained in the exercise of their powers as a public authority.
- 43 However, as the Advocate General has stated at point 45 of her Opinion, it is for the referring court to ascertain whether that was the case and, if appropriate, whether the Commissioners were in the same position as a person governed by private law in their action against Sunico and the other non-residents sued in the High Court of Justice.
- 44 In the light of the foregoing, the answer to the question referred for a preliminary ruling must be that the concept of 'civil and commercial matters' within the meaning of Article 1(1) of Regulation No 44/2001 must be interpreted as meaning that it covers an action whereby a public authority of one Member State claims, as against natural and legal persons resident in another Member State, damages for loss caused by a tortious conspiracy to commit VAT fraud in the first Member State.

Costs

- 45 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 (Third Chamber) hereby rules:

The concept of 'civil and commercial matters' within the meaning of Article 1(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that it covers an action whereby a public authority of one Member State claims, as against natural and legal persons resident in another Member State, damages for loss caused by a tortious conspiracy to commit value added tax fraud in the first Member State.

[Signatures]