OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 5 April 2011 [1]

1. The present reference for a preliminary ruling has its origin in a dispute between Bayer CropScience AG ('Bayer'), a German company, and Realchemie Nederland BV ('Realchemie'), a Netherlands company, before the German courts. Bayer complained that Realchemie had infringed one of its patents. In the context of those proceedings, the court had ordered Realchemie to pay a 'civil fine' in accordance with German law. Wishing to have that civil fine enforced in the Netherlands, Bayer requested that the order which had imposed the fine be recognised and enforced in that Member State and, to that end, initiated enforcement proceedings. The first question raised by the (Netherlands) referring court is whether such a fine falls within the concept of 'civil and commercial matters' within the meaning of Article 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. [2]

2. Secondly, the referring court asks the Court whether Article 14 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [3] requires Member States to make a more onerous determination of costs against a defendant in the context of enforcement proceedings to obtain recognition and enforcement of orders made in the State of origin with the aim of protecting an intellectual property right.

I — Legal framework

A — *European Union law*

1. Regulation No 44/2001

3. One of the particular objectives of Regulation No 44/2001, as laid down in recital 2 in

1 — Original language: French.
2 — OJ 2001 L 12, p. 1.
3 — OJ 2004 L 195, p. 16.

the preamble thereto, is to establish '[p]rovisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation'.

4. 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.'

5. Recitals 16 and 17 in the preamble to Regulation No 44/2001 provide:

'(16) Mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute.

(17) By virtue of the same principle of mutual trust, the procedure for making enforceable in one Member State a judgment given in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation.'

6. Recital 19 in the preamble to Regulation No 44/2001 provides that '[c]ontinuity between the Brussels Convention [of 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, "the Brussels Convention" [4]] and this Regulation should be ensured, and transitional provisions should be laid down to that end. The same need for continuity applies as regards the interpretation of the Brussels Convention by the Court …'.

7. Article 1(1) of Regulation No 44/2001 states that '[t]his Regulation shall apply in civil and commercial matters whatever the

4 — Consolidated version (OJ 1998 C 27, p. 1).

nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters'.

8. Pursuant to Article 32 of Regulation No 44/2001, '... "judgment" means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court'.

9. Article 34(2) of Regulation No 44/2001 lays down the principle that 'a judgment shall not be recognised... where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so'.

10. Article 38(1) of Regulation No 44/2001 provides that '[a] judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there'.

11. Under Article 49 of Regulation No 44/2001, '[a] foreign judgment which orders a periodic payment by way of a penalty shall be enforceable in the Member State in which enforcement is sought only if the amount of the payment has been finally determined by the courts of the Member State of origin'.

2. Directive 2004/48

12. Recital 3 in the preamble to Directive 2004/48 states that 'without effective means of enforcing intellectual property rights, innovation and creativity are discouraged and investment diminished. It is therefore necessary to ensure that the substantive law on intellectual property, which is nowadays largely part of the acquis communautaire, is applied effectively in the Community'.

13. Recitals 8 to 10 in the preamble to Directive 2004/48 read:

'(8) The disparities between the systems of the Member States as regards the means of enforcing intellectual property rights are prejudicial to the proper functioning of the Internal Market and make it impossible to ensure that intellectual property rights enjoy an equivalent level of protection throughout the Community. This situation does not promote free movement within the internal market or create an environment conducive to healthy competition.

(9) ... Approximation of the legislation of the Member States in this field is therefore an essential prerequisite for the proper functioning of the internal market.

(10) The objective of this Directive is to approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the internal market.'

14. Recital 11 in the preamble to Directive 2004/48 states that '[t]his Directive does not aim to establish harmonised rules for judicial cooperation, jurisdiction, the recognition and enforcement of decisions in civil and commercial matters, or deal with applicable law. There are Community instruments which govern such matters in general terms and are, in principle, equally applicable to intellectual property'.

15. Article 1 of Directive 2004/48 provides that that directive 'concerns the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights'.

16. Pursuant to Article 2(1) of Directive 2004/48, '[w]ithout prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for rightholders, the measures, procedures and remedies provided for by this Directive shall apply, in accordance with Article 3, to any infringement of intellectual property rights as provided for by Community law and/or by the national law of the Member State concerned'.

17. Article 14 of Directive 2004/48, entitled 'Legal costs', states that 'Member States shall ensure that reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity does not allow this'.

B — *German legislation*

18. Paragraphs 890 and 891 of the German Code of Civil Procedure (Zivilprozessordnung, 'the ZPO') read as follows:

'*Paragraph 890*

Enforcement of an obligation not to act and to tolerate an act

1. If a debtor fails to comply with his obligation not to act or with his obligation to tolerate an act, he shall, on application by the creditor, be sentenced by the court of first instance to a civil fine and, if recovery is impossible, to a term of imprisonment or to a term of imprisonment not exceeding six months. Each civil fine shall not exceed EUR 250 000, and the term of imprisonment shall not exceed two years in total.

2. The sentence must be preceded by a coercive warning issued, upon request, by the court of first instance, if such a warning is not already contained in the judgment establishing the obligation.

3. Upon application by the creditor, the debtor may also be ordered to lodge a security in respect of any subsequent damage which might, within a fixed period, result from any other failure to fulfil an obligation.

Paragraph 891

Procedure, hearing of the debtor, determination of costs

Judgments under Paragraphs 887 to 890 shall be given by means of an order....'

19. Paragraph 1 of the Regulation on the Recovery of Judicial Fines (Justizbeitreibungsordnung, the 'JBeitrO') provides:

'1. The recovery of the following debts shall be governed by this [JBeitrO] in so far as they are to be recovered by federal judicial authorities:

...

(3) civil fines and periodic payments by way of a penalty;

....

2. The [JBeitrO] shall also apply to the recovery of the debts referred to in subparagraph 1 by the judicial authorities of the Länder in so far as the debts have their basis in federal law'.

C — *Netherlands legislation*

20. It is clear from the documents before the Court that the Kingdom of the Netherlands transposed Article 14 of Directive 2004/48 into its domestic legal order by means of Article 1019h of the Netherlands Code of Civil Procedure. According to the referring court, under the latter provision it is possible, in cases covered by that directive, to make orders for costs which are more onerous than ordinary orders.

II — The dispute in the main proceedings and the questions referred for a preliminary ruling

21. The dispute in the main proceedings is between Realchemie and Bayer before the Hoge Raad der Nederlanden (Netherlands) and has its origin in proceedings previously initiated by Bayer in Germany.

22. On the basis of an application brought before it by Bayer in the context of proceedings for interim measures, the Landgericht

Düsseldorf (Germany), by order of 19 December 2005 ('the basic order'), prohibited the importation into and possession or marketing in Germany of certain pesticides by Realchemie on the grounds of a patent infringement. That injunction was granted in conjunction with periodic penalty payments in the event of breach. In addition, Realchemie was required to provide details of its commercial transactions involving the pesticides concerned and its stock had to be transferred into the custody of the courts. The basic order also stated that Realchemie was required to pay the costs of the proceedings. [5]

23. On 17 August 2006, at the request of Bayer and on the basis of Paragraph 890 of the ZPO, the Landgericht Düsseldorf ordered Realchemie to pay a 'civil' fine of EUR 20 000 to the cashier of that court for breach of the injunction contained in the basic order. The order also stated that Realchemie was required to pay the costs of the proceedings. [6]

24. In a new order dated 6 October 2006, the Landgericht Düsseldorf imposed a periodic penalty payment of EUR 15 000 on Realchemie to encourage it to provide details of the commercial transactions referred to in the basic order. In addition, Realchemie was ordered to pay the costs connected with those penalty payment proceedings. [7]

25. It is not disputed that those six orders were served on Realchemie.

26. On 6 April 2007, Bayer referred the matter to the judge responsible for hearing applications for interim measures at the Rechtbank 's-Hertogenbosch (Netherlands) to obtain a declaration that all six orders adopted by the Landgericht Düsseldorf were enforceable in the Netherlands. Bayer also requested that Realchemie be ordered to pay the costs incurred in relation to those proceedings. On 10 April 2007, the judge granted Bayer's application and ordered Realchemie to pay costs in the amount of EUR 482.

27. On 14 June 2007, Realchemie brought an action under Article 43 of Regulation No 44/2001, relying on the ground for refusal laid down in Article 34(2) of that regulation. It submitted that the basic order, as the order imposing the civil fine, and the order imposing a periodic penalty payment are not capable of being recognised and enforced in another Member State because they were made without Realchemie being called to appear before the court and without an oral procedure. With regard to the decisions on costs, Realchemie further claimed that those decisions can be neither recognised nor enforced since they form an integral part of the three abovementioned orders. More specifically in relation to the order imposing the civil fine, Realchemie argued that Bayer's application

5 — The Landgericht Düsseldorf fixed the costs at EUR 7 829,60, by order dated 29 August 2006.

6 — By order of 19 September 2006, the Landgericht Düsseldorf fixed the costs at EUR 898,60.

7 — By order of 11 November 2006, the Landgericht Düsseldorf fixed the costs at EUR 852,40.

for enforcement had to be rejected because the fine, which, under the JBeitrO, is to be recovered by the German judicial authorities of their own motion, accrues not to Bayer but to the German State.

28. On 26 February 2008, having heard the parties, the civil chamber of the Rechtbank 's-Hertogenbosch dismissed the appeal lodged by Realchemie, upheld the judgment of 10 April 2007 and ordered Realchemie to pay the costs of the proceedings fixed at EUR 1 155. The Rechtbank 's-Hertogenbosch took the view that, although they had been made at the unilateral request of Bayer, the three disputed orders are indeed judgments within the meaning of Article 32 of Regulation No 44/2001. With regard to the order imposing the civil fine, the Rechtbank 's-Hertogenbosch stated that the fact that the amount of EUR 20 000 was to be paid to the 'Gerichtskasse', that is to say to the cashier of the Landgericht Düsseldorf, in no way detracted from Bayer's right to and interest in having Realchemie actually pay the fine to that cashier. The objective pursued by the fine is in fact to ensure compliance with the basic order in the interest of the successful party, namely Bayer. That party therefore does indeed have an interest in pursuing the enforcement of the order imposing the fine in the Netherlands. Finally, the Rechtbank 's-Hertogenbosch ordered Realchemie to pay the costs of the proceedings and fixed those costs under the ordinary rules and not, as Bayer had requested, by applying Article 1019h of the Netherlands Code of Civil Procedure or, at least, Article 14 of Directive 2004/48.

29. Since the judgment ruling on the appeal brought under Article 43 of Regulation No 44/2001 was subject to appeal in cassation in accordance with Article 44 of that regulation and Annex V thereto, Realchemie lodged an appeal in cassation before the Hoge Raad der Nederlanden seeking the setting aside of the judgment of the Rechtbank 's-Hertogenbosch of 26 February 2008. Bayer lodged a cross-appeal seeking the dismissal of the appeal and an order requiring Realchemie to pay the real costs of the proceedings in accordance with Article 14 of Directive 2004/48 read in conjunction with Article 1019h of the Netherlands Code of Civil Procedure.

30. On 26 June 2009, the Advocate General at the Hoge Raad der Nederlanden submitted his opinion, in which he asked that court to refer the matter to the Court before giving a ruling.

31. Thereafter, the Hoge Raad der Nederlanden identified two points on which the interpretation of the Court is required.

32. First, it raises the question whether the order imposing a civil fine can fall within the substantive scope of Regulation No 44/2001 in view of its characteristic public-law aspects. That fine is in fact the penalty for a

breach of a court injunction. It is imposed by the German court at the request of a private individual, but, after the authorities of the court have taken steps to recover it of their own motion, it must be paid to the cashier of the court for the benefit of the German State and not for that of the party at whose initiative it was imposed.

33. Secondly, the Hoge Raad der Nederlanden expresses doubts as to whether Article 14 of Directive 2004/48 is applicable in the main proceedings. Although the view may be taken that that directive seeks to guarantee the effective enforcement of intellectual property rights and that the recognition and enforcement of a judgment concerning such rights may constitute one aspect of the effective enforcement of those rights, Directive 2004/48 states that the measures, procedures and remedies which it provides apply to any infringement of an intellectual property right. [8] However, enforcement proceedings, in so far as they consist in a court's establishing that the conditions for recognition and enforcement are satisfied, do not fall within the scope of that directive.

34. Faced with a difficulty in interpreting European Union law, the Hoge Raad der Nederlanden therefore decided, by order for reference received at the Court Registry on 21 October 2009, to stay the proceedings and to refer the following two questions to the Court for a preliminary ruling under Article 234 EC:

'(1) Is the phrase "civil and commercial matters" in Article 1 of … Regulation [No 44/2001] to be interpreted in such a way that [that] Regulation applies also to the recognition and enforcement of an order for payment of "Ordnungsgeld" (an administrative fine) pursuant to Paragraph 890 [of the ZPO]?

(2) Is Article 14 of … Directive [2004/48] to be interpreted as applying also to enforcement proceedings relating to:

(a) an order made in another Member State concerning an infringement of intellectual property rights;

(b) an order made in another Member State imposing a penalty or fine for breach of an injunction against infringement of intellectual property rights;

(c) costs determination orders made in another Member State on the basis of the orders referred to at (a) and (b) above?'

8 — See Article 2(1) of Directive 2004/48.

III — Procedure before the Court

35. Realchemie, the Netherlands and German Governments and the European Commission submitted written observations before the Court.

36. At the hearing, which was held on 25 January 2011, Realchemie, the German Government and the Commission presented oral argument.

IV — Legal analysis

A — *The first question*

37. After making some preliminary remarks, I shall analyse the legal rules governing civil fines as conceived under German law before assessing the characteristic features of those rules in the light of the case-law of the Court.

1. Preliminary remarks

38. By its first question, the referring court asks whether the order made in Germany requiring Realchemie to pay a civil fine in accordance with Paragraph 890 of the ZPO is capable of being recognised and enforced in the Netherlands on the basis of Regulation No 44/2001. The Court is therefore asked to determine whether such a fine falls within the concept of 'civil and commercial matters' within the meaning of Article 1 of that regulation.

39. To begin with, I would like to make two sets of remarks.

40. First, the continuity which exists between the Brussels Convention and Regulation No 44/2001, to which reference is made in recital 19 in the preamble to that regulation, must be borne in mind. [9] The Court has logically inferred that 'in so far as Regulation No 44/2001 now replaces the Brussels Convention in the relations between Member States, the interpretation provided … in respect of the [provisions of that Convention] is also valid for [the provisions of that regulation] whenever both sets of provisions may be regarded as equivalent.' [10] This is the case in relation to Article 1 of Regulation No 44/2001, the wording of which is identical

9 — See point 6 of this Opinion.

10 — Case C-167/08 *Draka NK Cables and Others* [2009] ECR I-3477, paragraph 20.

to that of Article 1 of the Brussels Convention. Case-law established on the basis of the Convention may therefore be relied upon effectively in the context of this reference for a preliminary ruling. This is equally true of the various explanatory reports produced on this matter. [11]

41. Secondly, I would point out that Article 1 of Regulation No 44/2001, read in conjunction with recital 7 in the preamble thereto which makes clear the importance of including within the scope of that regulation 'all the main civil and commercial matters', supports an interpretation of such matters which seeks to cover what lies at their heart in the view of European States and in European opinion. [12] Such 'civil and commercial matters' are therefore an autonomous concept of European Union law which is independent from the national classifications assigned by each Member State to judicial acts and procedures capable of recognition and enforcement and must be interpreted by reference to the origin, objectives and scheme of that regulation. [13]

2. The legal rules governing the civil fine under German law

42. According to the consistent submissions of the referring court, Realchemie and the German Government, the civil fine provided for in Paragraph 890 of the ZPO pursues the enforcement of a right to tolerance or to forbearance, in accordance with German law, previously established by judicial decision. If the debtor breaches his obligation to refrain from acting or to tolerate an act, he must be required to observe the initial obligation. That requirement is enforced by means of Paragraph 890 of the ZPO which lays down a 'call to order' taking one of two forms: a civil fine or a term of imprisonment. It is also clear from Paragraph 890 that the court may opt to order imprisonment immediately without necessarily having previously ordered payment of a civil fine.

43. Further pursuant to Paragraph 890 of the ZPO, the call to order is issued on the

11 — In addition to the report by Jenard, J., on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1979 C 59, p. 54) ('the Jenard Report') and the report by Schlosser, P., on the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, and to the Protocol concerning its interpretation by the Court of Justice (OJ 1979 C 59, p. 71) ('the Schlosser Report'), reference will also be made to the explanatory report by Pocar, F., on the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007 (OJ 2009 C 319, p. 1) ('the Pocar Report'), since Regulation No 44/2001 served as the basis of that convention.

12 — Case C-292/05 *Lechouritou and Others* [2007] ECR I-1519, paragraph 28.

13 — In relation to Article 1 of the Brussels Convention, see Case 29/76 *LTU* [1976] ECR 1541, paragraph 3; Case 814/79 *Rüffer* [1980] ECR 3807, paragraph 7 and case-law cited; and Case C-172/91 *Sonntag* [1993] ECR I-1963, paragraph 18. With regard to Regulation No 44/2001, see *Draka NK Cables and Others*, paragraph 19 and case-law cited, and Case C-533/07 *Falco Privatstiftung and Rabitsch* [2009] ECR I-3327, paragraph 20 and case-law cited.

application of the creditor. A call to order may be imposed only if it is preceded by a coercive warning informing the debtor of the risks of failing to fulfil his obligation. [14] Once the obligation has been breached, and after the matter has been referred to it by the creditor and it has heard the debtor, [15] the German court may issue a call to order, which, in this case, consisted in Realchemie being ordered to pay a civil fine of EUR 20 000 for failure to fulfil its obligation arising from the basic order.

44. That fine could therefore be imposed only following Bayer's application. The fine is not, however, imposed for Bayer's benefit. The civil fine must be paid to the cashier of the court so that it may accrue to the public purse. It is recovered automatically. The president of the court is the authority responsible for its enforcement. [16]

45. Realchemie adds that the order issuing the call to order does not in itself constitute an enforcement order, a point which has not been developed by the other interested parties. In its view, the order has merely declaratory force. It claims that it is only when a civil fine includes a determination of the costs of the proceedings, which identifies the creditor, the amount and the time-limits fixed, that there exists an enforcement order which is capable of being recognised and enforced in the State in which enforcement is sought. [17]

3. Legal assessment

(a) The irrelevance of the main and ancillary criterion

46. One of the particular features of the situation at issue in the main proceedings stems from the fact that the dispute which led to the adoption of the order imposing the civil fine in Germany concerns provisional measures.

47. In relation to such measures, the attitude of the Court has been to hold that 'as provisional or protective measures may serve to safeguard a variety of rights, their inclusion in the scope of the Convention is determined not by their own nature but by the nature of the rights which they serve to protect.' [18]

14 — The documents before the Court show that the basic order did indeed contain such a coercive warning addressed to Realchemie.

15 — Paragraph 891 of the ZPO.

16 — Paragraph 1(1)(3) of the JBeitrO.

17 — The written observations submitted by Realchemie show that the authority responsible for the enforcement of the civil fine did in fact provide a determination of costs on 23 August 2006.

18 — Case 143/78 *de Cavel* [1979] ECR 1055, paragraph 8; Case C-261/90 *Reichert and Kockler* [1992] ECR I-2149, paragraph 32; and Case C-391/95 *Van Uden* [1998] ECR I-7091, paragraph 33.

48. In the situation at issue here, the order imposing the civil fine was made in the context of 'main' proceedings for provisional measures to enforce, on an interim basis, an intellectual property right, a right which is clearly civil in nature. Since the order imposing the civil fine could not have been made without the basic order, the former is ancillary to and its existence is dependent on the latter. According to this argument, the civil nature of the basic order determines the nature of the order imposing the civil fine. Thus, as the German Government proposes, in order to answer the first question referred, it is sufficient to ascertain whether the basic order is capable of being recognised and enforced pursuant to Article 1 of Regulation No 44/2001. Since that is in fact the case, the order imposing the administrative fine likewise falls within the scope of civil and commercial matters.

49. That proposition is attractive as it has the merits of simplicity and effectiveness. It must, however, be rejected immediately because application of the ancillary criterion conflicts with one particularly striking aspect of the case at issue here. The civil fine is indeed, as set out above, a call to order under German law, but it is not the only form which that call to order may take, since it is also possible for the German court to order a term of imprisonment. Taken to the extreme, the line of reasoning proposed could lead to the conclusion that a term of imprisonment falls within the scope of Article 1 of Regulation No 44/2001 where it is imposed in the context of main proceedings concerning interim measures adopted to put an end to the infringement of a right which is civil in nature. Since such a situation can clearly be ruled out, the Court must use an alternative criterion as part of its analysis.

(b) The effects of the civil fine on the nature of the legal relationships between the parties to the action or on the subject-matter of the action

(i) The guidelines provided by the case-law of the Court

50. Since the specific criterion developed by the Court in relation to provisional measures is of no assistance in the context of this reference for a preliminary ruling, regard must be had to the general guidelines which it has provided as part of its established case-law regarding Article 1 of the Brussels Convention.

51. It is clear from that settled case-law that the concept of 'civil and commercial matters' is to be interpreted by taking the view that 'certain types of judicial decision must be excluded from the area of application of the Convention, either by reason of the legal relationships between the parties to the action

or of the subject-matter of the action.' [19] Those two criteria – nature of the legal relationships between the parties and subject-matter of the action – have to date served as the dividing line between, on the one side, disputes falling within 'civil and commercial matters' because they concerned a legal relationship governed by private law and, on the other side, those concerning a public-law relationship.

52. With regard to the first criterion, the Court has stated that it is necessary to 'identify the legal relationship between the parties to the dispute and to examine the basis and the detailed rules governing the bringing of the action.' [20] It thus held that the legal relationship between the parties to a dispute was a relationship governed by private law where it was between two private individuals and in so far as the party which brought the action had therefore exercised a legal remedy which was open to it through a legal subrogation provided for in a civil provision without that action amounting to the exercise of powers falling outside the scope of rules applicable to relationships between private individuals. [21] A similar ruling was given in an action brought not against conduct or procedures which involve an exercise of public powers by one of the parties to the case, but against acts carried out by individuals. [22]

53. Moreover, the mere fact that one of the parties to the dispute is a body governed by public law does not automatically mean that the dispute is excluded from the scope of Regulation No 44/2001. It is only where the public authority, as a party to a dispute with a private individual, is acting in the exercise of its public powers that that dispute will be so excluded. [23] 'The exercise of public powers by one of the parties to the case, because it exercises powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals, excludes such a case from civil and commercial matters within the meaning of Article 1(1) of Regulation 44/2001.' [24]

54. As for the second criterion laid down as such, I would point out that it has been the subject of far less of the Court's case-law. On one wholly isolated occasion, and in contradiction to its earlier case-law, the Court held in a judgment given in 1991 that '[i]n order to determine whether a dispute falls within

19 — *LTU*, paragraph 4; Case C-271/00 *Baten* [2002] ECR I-10489, paragraph 29; Case C-266/01 *Préservatrice foncière TIARD* [2003] ECR I-4867, paragraph 21; and *Lechouritou and Others*, paragraph 30.

20 — Case C-265/02 *Frahuil* [2004] ECR I-1543, paragraph 20 and case-law cited.

21 — *Ibid*., paragraph 21.

22 — Case C-420/07 *Apostolides* [2009] ECR I-3571, paragraph 45.

23 — *LTU*, paragraph 4; *Rüffer*, paragraph 8; *Sonntag*, paragraph 20; *Baten*, paragraph 30; *Préservatrice foncière TIARD*, paragraph 22; *Lechouritou and Others*, paragraph 31; and *Apostolides*, paragraph 43.

24 — *Lechouritou and Others*, paragraph 34, and *Apostolides*, paragraph 44. For a systematic analysis of the case-law of the Court on this issue, I refer to the Opinion of Advocate General Ruiz-Jarabo Colomer in *Lechouritou and Others*, and, more specifically, to point 37 et seq. of that Opinion.

the scope of the Convention, reference must be made *solely* to the subject-matter of the dispute.' [25] That solution has not been repeated since then, and the Court simply stated in a later case that 'if, by virtue of its subject-matter, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the court must resolve in order to determine the dispute cannot, whatever that issue may be, justify application of the Convention.' [26] Subsequently, the Court has reiterated the criteria previously established, referring both to the legal relationship between the parties and the subject-matter of the dispute. [27]

55. Accordingly, it is necessary to establish, in the light of the foregoing, whether any public powers were exercised in the proceedings which gave rise to the adoption of the order imposing the civil fine by assessing the nature of the legal relationship between the parties and the subject-matter of the dispute.

(ii) Application to the present case

56. The Commission has essentially submitted that the order imposing the civil fine cannot be regarded in isolation, and that the parties to the original proceedings and to those which gave rise to the civil fine are the same, in particular since Bayer alone has the power to initiate the proceedings relating to that fine. For its part, the German Government has taken the view that the right relied upon is the right to enforcement of Bayer's intellectual property right, and therefore does not have its origin in an act of purely public power. In the case of proceedings resulting in the imposition of the civil fine, the German State is merely assisting the creditor to enforce his right and the fine reinforces the prohibition order. For this reason, the substantive right established in the basic order must determine the nature of the dispute.

57. I cannot concur with that analysis.

58. The civil fine as structured and implemented under German law is made up both of elements of a civil nature, which fall under private law, and elements of public law. As a result of that mixed composition, each of those elements must be balanced in order to answer the question referred.

59. It is true that the civil fine was ordered because Realchemie had failed to observe the obligations imposed on it by the basic order. Quite clearly, Realchemie's observance of those obligations will contribute to achieving

25 — Case C-190/89 *Rich* [1991] ECR I-3855, paragraph 26. Emphasis added.

26 — Case C-129/92 *Owens Bank* [1994] ECR I-117, paragraph 34.

27 — See case-law cited in footnote 19.

the provisional protection of the intellectual property right held by Bayer, who is, furthermore, the only party able to demand that the German court impose a civil fine.

60. However, it cannot be ignored that, in view of the function of and objective pursued by the civil fine, its actual beneficiary and its means of recovery, the public law elements are the decisive elements and argue in favour of the exclusion of the civil fine from the concept of 'civil and commercial matters' within the meaning of Article 1 of Regulation No 44/2001.

61. As far as the function of and objective pursued by the civil fine are concerned, it is in my view insufficient to stop at the conclusion that the fine pursues no other objectives than that of the effective protection of Bayer's right recognised in the basic order. The situation is patently less clear-cut.

62. The civil fine is a coercive measure which naturally has a repressive aspect. The interested parties have at length expressed their views on whether the civil fine was primarily of a preventive or repressive nature, advancing the argument that if the preventive aspect were to win out, the civil fine would fall within the concept of 'civil and commercial matters'.

63. To my mind, a distinction must be drawn between two periods of time: the preventive aspect applies for the period from making the basic order – which contains the coercive warning – to the bringing of the proceedings which are to result in the imposition of the fine. During that period of time, the unsuccessful party – Realchemie – is perfectly aware of the risk it runs if it fails to observe the obligations laid down in the basic order. The mere existence of the coercive warning may suffice to dissuade the debtor from infringing the order made. However, where that debtor commits a breach of the terms of that basic order, it is clear that the imposition of the civil fine is essentially repressive in nature. First, it is neither the function nor object of the civil fine to make good the harm suffered by Bayer or to compensate it for the continued infringement of its intellectual property right by Realchemie, notwithstanding the injunctions contained in the basic order. Secondly, nor is it the fact that Realchemie has persisted in its alleged [28] infringement of the right held by Bayer which is in fact being penalised. On the contrary, by ordering the civil fine, the German court is rather penalising the failure to comply with an order made by the judicial authorities, in this case the order to observe the obligations set out in the basic order. The

28 — It must be borne in mind that the basic order is merely an interim measure giving an interim ruling on an alleged – but not yet fully proven – infringement of an intellectual property right committed by Realchemie.

object of the proceedings which result in the imposition of the civil fine is therefore in fact the penalty imposed, in the broad sense, for failure to comply with a court injunction. Accordingly, it may no longer be argued that the criterion which must take priority is that of the substantive right at issue in the basic order, because that criterion has no bearing whatsoever on the imposition of the civil fine: the sole decisive factor is that there has been a breach of a court order to do or to refrain from doing something. The private interest retreats in favour of the public interest in the observance of judicial decisions.

64. For this reason, it cannot be claimed, in my view, that the nature of the legal relationship between the parties to the dispute did not change in the context of the proceedings which gave rise to the imposition of the fine as compared with the main proceedings which led to the adoption of the basic order. Quite clearly, the imposition of a fine must be requested by Bayer. It is true that that penalty may be ordered only where Bayer's interest in enforcing the basic order coincides with the interest of the State in enforcing its judicial decisions. In accordance with German law, the successful party in the original proceedings can therefore assist in achieving a public interest by initiating the proceedings leading to the fine, though this is only a discretionary power and the court cannot act of its own motion to impose the civil fine. Nevertheless, that power is nothing but a manifestation of the profoundly mixed nature of the civil fine and must not be regarded as the decisive element.

65. Indeed, once imposition of the civil fine has been requested, Bayer no longer has any role to play in the proceedings; it is entirely removed from them. Even though, at the outset, the original proceedings were between Realchemie and Bayer as parties to the dispute, as far as the proceedings resulting in the imposition of the fine are concerned the case now concerns only Realchemie and the court, that is to say the party which failed to comply with the judicial decision and the authority which adopted that decision. It is clear that the dispute has shifted from a relationship governed strictly by private law – the resolution of the original dispute between Realchemie and Bayer – to a relationship which undeniably presents elements of public law, namely the imposition of a penalty for failure to comply with a judicial decision.

66. That analysis is confirmed by the fact that Bayer is not the beneficiary of the civil fine, which must be paid to the cashier of the court for the benefit of the public purse. The recovery of the civil fine is a matter for the judicial authorities alone, to the exclusion of any intervention by the party which initiated the proceedings. The combination of those elements provides proof that the enforcement of the civil fine serves to give effect to the State's right to punish actions or omissions which are contrary to the orders made,

and not Bayer's right to enforce its intellectual property right.

67. Without going so far as to assert that the civil fine is wholly comparable to a judgment which is criminal in nature, I believe that the guidance provided in the Schlosser Report [29] to explain the distinction between civil law and criminal law may provide useful clarification on the very issue of what attitude to adopt when faced with such an ambiguous case. Paragraph 29 of the report states that 'criminal proceedings and criminal judgments of all kinds are excluded from the scope of the [1968] Convention … This applies not only to criminal proceedings *stricto sensu*. Other proceedings imposing sanctions for breaches of orders or prohibitions intended to safeguard the public interest also fall outside the scope of civil law. Certain difficulties may arise in some cases in classifying private penalties known to some legal systems … Since in many legal systems criminal proceedings may be brought by a private plaintiff, a distinction cannot be made by reference to the party which instituted the proceedings. The decisive factor is whether the penalty is for the benefit of the private plaintiff or some other private individual. Thus the decisions of the Danish industrial courts imposing fines, which are for the benefit of the plaintiff or some other aggrieved party, certainly fall within the scope of the [1968] Convention'.

68. If applied to this case, the Schlosser Report confirms my initial approach. This case does indeed concern proceedings involving the imposition of sanctions for the breach of an order. The criterion of the person who initiated the proceedings must be regarded as secondary, the decisive factor being who benefits from the penalty and whether the fine is paid for the benefit of the person who applied for it, a private individual. Here, Bayer has the right to initiate proceedings, but it cannot be said that the penalty is for its benefit since the fine is not paid to it. Accordingly, not all the conditions are met for the view to be taken that the civil fine is covered by the concept of 'civil and commercial matters' and, therefore, falls within the scope of Regulation No 44/2001.

c) Comparative analysis of the civil fine and the periodic payment by way of penalty as provided for in Article 49 of Regulation No 44/2001

69. The interested parties are likewise divided on whether the civil fine may be regarded as a periodic payment by way of a penalty under Article 49 of Regulation No 44/2001. The German Government in particular is of the opinion that the analogy is perfectly possible given that, under German law, there is

29 — Cited in footnote 11.

hardly any difference between a periodic penalty payment and a civil fine, since both have to be paid for the benefit of the State and the text of that regulation itself makes no distinction according to whether the periodic penalty payment is paid to the State or to a private individual.

70. However, it must be observed that Article 49 of that regulation did not concern the German understanding of a periodic payment by way of a penalty. This is clear, in any event, from paragraph 213 of the Schlosser Report which describes the periodic penalty payment as follows: '[t]he defendant is ordered to perform the act and at the same time to pay a sum of money to the plaintiff to cover a possible non-compliance with the order. … However, the [1968] Convention leaves open the question whether such a fine for disregarding a court order can also be enforced when it accrues not to the judgment creditor but to the State'. Accordingly, even if the Court were to take the view that the civil fine is comparable to a periodic penalty payment, which I doubt, that finding would still not enable the question to be resolved solely on the basis of Article 49 of Regulation No 44/2001 since, according to the Schlosser Report, the European Union legislature did not intend to cover in this way situations in which the periodic penalty payment or a comparable measure is paid for the benefit of the State in the event of non-compliance with a judicial decision.

71. Furthermore, the Pocar Report [30] makes clear that the fact that periodic payments by way of a penalty paid to the State for infringement of a judicial decision were not included amongst the measures covered by Regulation No 44/2001 is not the result of the drafters' ignorance as to the existence of such a mechanism, but rather an expression of their will. With regard to Article 49 of Regulation No 44/2001, the report states that '[i]t has been pointed out that this provision leaves open the question whether it covers financial penalties imposed for disregarding a court order that accrue not to the creditor but to the State'. [31] It goes on to explain that '[d]uring the work of revision it was suggested that the wording could usefully be clarified to that effect. The *ad hoc* working party preferred, however, not to change the wording so as to include penalty payments to the State expressly, because a judgment in favour of the State may have a criminal character, so that a change here might introduce a criminal aspect into a Convention devoted to civil and commercial matters. The provision can therefore be taken to contemplate penalty payments to the State only if they are clearly of a civil character, and provided that their enforcement is requested by a private party in the proceedings for a declaration of enforceability of the judgment regardless of the fact that the payments are to be made to the State'.

30 — Cited in footnote 11.

31 — Paragraph 167 of that report.

However, as I have shown, the civil nature of the fine, as provided for in Paragraph 890 of the ZPO, is far from clear.

72. I would also point out that, unlike that civil fine, the periodic payment by way of a penalty within the meaning of Regulation No 44/2001 – and therefore as necessarily distinguished from the German understanding of that concept – has the objective of encouraging the defendant to put an end to the infringement of the applicant's right. Whereas the civil fine is ordered in the form of a fixed sum, the periodic penalty payment involves payment of a 'sum of money for each day of delay, with the intention of getting the judgment debtor to fulfil his obligations.' [32] In particular, the debtor has the opportunity to avoid payment of the periodic penalty payment by complying with his obligations. As far as the civil fine is concerned, the attitude of the debtor once it has been ordered is irrelevant: the civil fine is payable from the time it is imposed, irrespective of whether the debtor eventually observes his obligations. This is a key factor which, having regard also to the remarks made in the Schlosser Report, should provide convincing proof that the question referred cannot be answered in the light of Article 49 of Regulation No 44/2001.

32 — Jenard Report, cited above, p. 54.

4. Concluding remarks

73. In the light of all the foregoing, I propose that the first question be answered to the effect that a judgment by which the debtor of an obligation contained in an earlier judicial decision is ordered, on the ground that he has failed to comply with that obligation and on the application of the other party to the dispute, to pay to the cashier of the court a 'civil' fine as provided for in Paragraph 890 of the ZPO does not fall within the concept of 'civil and commercial matters' within the meaning of Article 1 of Regulation No 44/2001.

74. If the Court were to find otherwise, and even though only the issue of the scope of Article 1 of Regulation No 44/2001 has been raised by the referring court, I consider it necessary for the Court to point out to the referring court that it is not enough that a judgment falls within the concept of 'civil and commercial matters' for it to be recognised and enforced in the State in which enforcement is sought. The referring court must rather satisfy itself that the order forming the subject-matter of the enforcement proceedings was made in the State of origin in observance of the rights of the defence, that the order is in fact an enforceable title and that the party applying for recognition and enforcement in the requested State is indeed an 'interested party' within the meaning of Article 38 of Regulation No 44/2001.

75. On these three points, I will limit myself to indicating the elements in the case file to which the attention of the referring court must be directed in particular.

76. With regard to observance of the rights of the defence, the Court has already held that 'the provisions of the Convention as a whole … manifest an intention to ensure that, within the scope of the objectives of the Convention, proceedings culminating in judicial decisions are conducted in such a way that the rights of the defence are observed.' [33] In that connection, Realchemie claims in its written observations that the basic order was made without an oral hearing and in *ex parte* proceedings. Furthermore, it was unaware of the order imposing the fine until after it had been adopted. However, Paragraph 891 of the ZPO, [34] according to the information provided by the German Government, requires that the debtor be heard in advance where the court intends, at the prior request of the applicant, to impose a civil fine on the basis of Paragraph 890 of the ZPO.

77. With regard to the enforceability of the order imposing the civil fine, Realchemie has stated that that order is not, as such, an enforceable title, and that the determination of costs alone has that quality, in particular because, unlike the order, it identifies the creditor: the public authority. When questioned on this point at the hearing, the German Government was unable to provide any clarification to the Court. It must therefore simply be stated that Article 38 of Regulation No 44/2001 provides, in that connection, that a judgment given in a Member State and enforceable in that State may be enforced in another Member State only when it has been declared enforceable there; [35] assessment of the enforceability of the disputed order must be left to the referring court.

78. Finally, even if the order imposing the fine were in fact enforceable in the State of origin, the question of whether Bayer may request that order's enforcement in the requested State, in other words whether it is an 'interested party' within the meaning of Article 38 of Regulation No 44/2001, still remains to be determined. I note that the German legislation appears to state clearly that the president of the court which made that order is alone responsible for its enforcement. It is unclear from a reading of the documents before the Court whether Bayer has the right, in Germany, to pursue the enforcement of the order

33 — Case C-474/93 *Hengst Import* [1995] ECR I-2113, paragraph 16 and case-law cited.

34 — See point 18 of this Opinion.

35 — The Jenard Report states in relation to such enforceability that '[i]t is an essential requirement of the instrument whose enforcement is sought that it should be enforceable in the State in which it originates. … there is no reason for granting to a foreign judgment rights which it does not have in the country in which it was given' (p. 48). See also Case C-267/97 *Coursier* [1999] ECR I-2543, paragraph 23, and, citing the Jenard Report in relation to this issue, *Apostolides*, paragraph 66.

on behalf of the judicial authority. Given these circumstances, the referring court will have to call to mind the guidance provided in the Jenard Report, which states that '[t]he expression "on the application of any interested party" implies that any person who is entitled to the benefit of the judgment in the State in which it was given has the right to apply for an order for its enforcement.' [36]

79. In view of the uncertainties and ambiguities in the documents before the Court – which can be explained by the fact that the referring court chose to focus its question on Article 1 of Regulation No 44/2001 –, the Court is unable to provide definitive answers, but will rather have to draw the attention of the referring court to these three points if it were to find, contrary to my proposal, that the disputed order does indeed fall within the concept of 'civil and commercial matters' within the meaning of Article 1 of Regulation No 44/2001.

B — *The second question*

80. In its cross-appeal before the referring court, Bayer contended that the appeal brought by Realchemie should be dismissed and that Realchemie should be ordered to pay the 'real' costs of the proceedings pursuant to Article 14 of Directive 2004/48 read in conjunction with Article 1019h of the Netherlands Code of Civil Procedure, which is intended to transpose it into the Netherlands legal order. Article 1019h provides for a more onerous order for costs than ordinary costs orders in cases falling within the scope of Directive 2004/48. [37]

81. By its second question to the Court, the referring court is essentially seeking to ascertain whether the costs linked to enforcement proceedings initiated in the Netherlands, in the course of which recognition and enforcement of six orders made in Germany in the context of an action brought to enforce an intellectual property right were sought, are covered by the provisions of Article 14 of Directive 2004/48, which requires Member States to ensure that legal costs incurred by the successful party are, in principle, borne by the unsuccessful party. This therefore involves establishing whether such enforcement proceedings fall within the scope of Directive 2004/48.

82. Well before the adoption of Directive 2004/48, the Community had concluded the Agreement on Trade-Related Aspects of

36 — Jenard Report, cited above, p. 49.

37 — I would point out that the case-file does not contain any information on the exact wording of this provision of Netherlands law or, therefore, on the difference between an ordinary costs order and the costs order as laid down in Article 1019h.

Intellectual Property Rights,[38] Article 41 of which provides that 'Members shall ensure that enforcement procedures … are available in their law so as to permit effective action against any act of infringement of intellectual property rights …'. In pursuit of the objective of increasing the effectiveness of the protection of intellectual property rights, Article 45 of the Agreement lays down the principle that the judicial authorities are to have the authority to order the infringer to pay legal costs, in the broad sense, to the holder of the intellectual property right infringed.

83. Directive 2004/48, as recitals 4 and 5 in the preamble thereto make clear, is in line with the international obligations binding on the Community to which I have just referred. Recognising the importance of the protection of intellectual property to promoting innovation and creativity, as well as to developing employment and improving competitiveness,[39] the European Union legislature established the need 'to ensure that the substantive law on intellectual property … is applied effectively in the Community'.[40] Since the disparities between Member States weaken the content of that substantive law,[41] that directive seeks to guarantee, through approximation of the legislation in this field, the enforcement of intellectual property rights for the holders of such rights by establishing measures, procedures and remedies necessary to that end.[42] Pursuant to Article 2 of that directive, 'the measures, procedures and remedies … shall apply … to any infringement of intellectual property rights as provided for by Community law and/or by the national law of the Member State concerned'. Where such measures, procedures and remedies are necessary to enforce an intellectual property right, Directive 2004/48 provides that 'Member States shall ensure that reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party …'.[43]

84. Since the aim of the European Union legislature was to provide increased protection for the holders of intellectual property rights, it could be argued that, since the dispute between Bayer and Realchemie in Germany

38 — Annex 1C to the Agreement establishing the World Trade Organisation, signed in Marrakesh on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

39 — See recitals 1 and 2 in the preamble to Directive 2004/48.

40 — Recital 3 in the preamble to Directive 2004/48.

41 — See recitals 7, 8 and 9 in the preamble to Directive 2004/48.

42 — Article 1 of Directive 2004/48.

43 — Article 14 of Directive 2004/48.

concerned the protection of an intellectual property right, the enforcement proceedings initiated in the Netherlands by Bayer are in some way the extension of that dispute and may likewise be regarded as concerning an infringement of an intellectual property right for the purposes of Directive 2004/48, which Bayer intends to end by the recognition of the enforceability of the orders made in Germany. Those proceedings would, therefore, be proceedings covered by that directive and Article 14 of that directive would accordingly apply.

85. I am, however, unconvinced by that approach for three main reasons.

86. First, it is not in my view possible to state that the object of enforcement proceedings is, strictly speaking, the protection of any substantive right. Their purpose is rather to establish whether the conditions required for the recognition and enforcement of the judicial decisions in question in the State in which enforcement is sought are objectively met. Those proceedings form a stage prior to the enforcement stage, the purpose of which is indeed to pursue the protection – initiated in the Member State of origin – of the right in question.

87. Secondly, the entire justification for Article 14 of Directive 2004/48 lies in the particular nature of proceedings concerning intellectual property rights. The Commission argued in its written observations – in my view rightly – that the objective of that article is to ensure that holders of intellectual property rights are not deterred from bringing a legal action by the – potentially high – cost of the proceedings. In order to be effective, intellectual property rights must naturally enjoy legal protection. By establishing the measures, procedures and remedies necessary to that end and by asserting the principle that the legal costs must, in principle, be borne by the unsuccessful party, Directive 2004/48 lays down favourable conditions to allow individuals able to rely on those conditions to bring legal proceedings. Accordingly, the *raison d'être* of Article 14 lies in the specific nature of the proceedings and evidence in the field of intellectual property, since the investigation costs and costs of expert opinions may prove to be very high. [44] However,

44 — As the Commission pointed out in its explanatory memorandum, see Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights [COM(2003) 46 final] of 30 January 2003, p. 9.

the level of costs incurred in the context of enforcement proceedings is not comparable to those incurred in proceedings for the declaration of an infringement of an intellectual property right, and does not appear to me liable to dissuade an injured party from initiating enforcement proceedings. [45] The recognition of any element specific to enforcement proceedings concerning orders made in another Member State in relation to an intellectual property right cannot be justified.

88. Thirdly, that interpretation is confirmed by the clarification in recital 11 in the preamble to Directive 2004/48 that it 'does not aim to establish harmonised rules for judicial cooperation, jurisdiction, the recognition and enforcement of decisions in civil and commercial matters, or deal with applicable law. There are Community instruments which govern such matters in general terms and are, in principle, equally applicable to intellectual property'. If that directive does not aim to establish harmonised rules for the recognition and enforcement of decisions in civil and commercial matters, it therefore seems to me that it does not seek, *a fortiori*, to establish a general rule governing costs orders in enforcement proceedings.

89. Recital 11 in the preamble to Directive 2004/48 presupposes that that directive applies without prejudice to Regulation No 44/2001. For the purposes of Regulation No 44/2001, this examination must be limited to whether the order relates to a civil and commercial matter. If the view were taken that Article 14 of that directive requires a different determination of the costs where the recognition and enforcement of an order relating to the infringement of an intellectual property right is concerned, this would entail, in some way or other, consideration of the substance of that order, which would go beyond the mere review required under Article 1 of Regulation No 44/2001. The requirement of simple and rapid enforcement proceedings, as laid down by Regulation No 44/2001, [46] would likewise be jeopardised, without there being any particular justification for this.

90. For all these reasons, I propose that Article 14 of Directive 2004/48 is to be interpreted as meaning that it is not intended to apply in the context of enforcement proceedings which concern the recognition and enforcement of orders relating to the infringement of an intellectual property right.

45 — Furthermore, I would like to make the point that, in the main proceedings, Realchemie was ordered to pay the costs associated with the enforcement proceedings, but that Bayer is seeking a more onerous costs order.

46 — *Draka NK Cables and Others*, paragraphs 26 and 30.

V — Conclusion

91. In the light of the foregoing, I propose that the Court answer as follows the two questions referred by the Hoge Raad der Nederlanden for a preliminary ruling:

(1) A judgment by which the debtor of an obligation contained in an earlier judicial decision is ordered, on the ground that he has failed to comply with that obligation and on the application of the other party to the dispute, to pay to the cashier of the court a 'civil' fine as provided for in Paragraph 890 of the German Code of Civil Procedure (Zivilprozessordnung) does not fall within the concept of 'civil and commercial matters' within the meaning of Article 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.

(2) Article 14 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights is to be interpreted as meaning that it is not intended to apply in the context of enforcement proceedings which concern the recognition and enforcement of orders relating to the infringement of an intellectual property right.