Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 9 December 2014[1]

Joined Cases C-226/13, C-245/13, C-247/13 and C-578/13

Stefan Fahnenbrock (C-226/13),
Holger Priestoph and Others (C-245/13),
Rudolph Reznicek (C-247/13),
Hans-Jürgen Kickler and Others (C-578/13)
v
Hellenic Republic

(References for a preliminary ruling by the Landgericht Wiesbaden and the Landgericht Kiel)

(Regulation No (EC) No 1393/2007 — Service of documents — Concept of 'civil and commercial matters' — Actions for performance of contract and damages brought against the Greek State by holders of Greek bonds following the devaluation, without their consent, of the value of those bonds)

1. The references for a preliminary ruling concern the interpretation of Article 1 of Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000.[2]

2. Those references, made in the context of proceedings between the Greek State and, in Case C-226/13, Mr Fahnenbrock, in Case C-245/13, Mr H. Priestoph and Mr M.A. Priestoph and Ms Priestoph, in Case C-247/13, Mr Reznicek and in Case C-578/13, Mr Kickler and Mr Wöhlk and the Zahnärztekammer Schleswig-Holstein, Versorgungswerk, involving actions for damages and for performance of contract, afford the Court the opportunity of defining, in the context of Regulation No 1393/2007, the concept of 'civil and commercial matters', of which the Court determines the scope *ratione materiae*.

3. In this Opinion, I shall argue that the concept of 'civil and commercial matters' within the meaning of Article 1(1) of Regulation No 1393/2007[3] must be interpreted as not including an action by which an individual holder of bonds issued by a Member State brings an action against that Member State for damages because of the exchange of those bonds for bonds of a lower value, imposed on that individual as a result of the adoption by the national legislature of a law unilaterally and retrospectively amending the conditions applicable to the bonds by inserting into that law a collective action clause permitting a majority of the holders of those bonds to impose such an exchange on the minority.

1 — Original language: French.

2 — OJ 2010 L 324, p. 79.

3 — Although the title of the regulation uses the words 'civil *or* commercial matters', that provision uses the wording 'civil *and* commercial matters' (emphasis added). The difference in the coordinating conjunction does not, in my view, affect the meaning of the expression.

4. I shall argue, to that effect, that the use by a Member State issuing debenture loans under its sovereign power by means of legislative action with the specific aim of directly damaging the system of the bonds issued, by requiring minority holders to subject themselves to the will of the majority, constitutes the exercise of powers going beyond those existing under the rules governing relations between individuals.

5. I shall conclude that an action brought by minority holders against the Member State following the exchange of the securities necessarily puts in issue the liability of the State for an action committed in the exercise of State authority, even though that exchange, intended to reduce the par value of those securities, required a majority vote.

I – Legal background

A – *EU law*

6. Recitals 2, 6 and 9 in the preamble to Regulation No 1393/2007 state:

‘(2) The proper functioning of the internal market entails the need to improve and expedite the transmission of judicial and extrajudicial documents in civil or commercial matters for service between the Member States.

[...]

(6) Efficiency and speed in judicial procedures in civil matters require that judicial and extrajudicial documents be transmitted directly and by rapid means between local bodies designated by the Member States. [...]

[...]

(9) The service of a document should be effected as soon as possible, and in any event within one month of receipt by the receiving agency.’

7. Article 1(1) of that regulation defines the scope of the regulation as follows:

‘This Regulation shall apply in civil and commercial matters where a judicial or extrajudicial document has to be transmitted from one Member State to another for service there. It shall not extend in particular to revenue, customs or administrative matters or to liability of the State for actions or omissions in the exercise of State authority (“acta iure imperii”).’

8. Article 3 of that regulation provides:

‘Each Member State shall designate a central body responsible for:

a) supplying information to the transmitting agencies;

b) seeking solutions to any difficulties which may arise during transmission of documents for service;

c) forwarding, in exceptional cases, at the request of a transmitting agency, a request for service to the competent receiving agency.

[...]’

9. According to Article 6(3) of that regulation:

'If the request for service is manifestly outside the scope of this Regulation or if non-compliance with the formal conditions required makes service impossible, the request and the documents transmitted shall be returned, on receipt, to the transmitting agency, together with the notice of return using the standard form set out in Annex I.'

10. The notice of return, a standard form of which appears at annex I to Regulation No 1393/2007, states at paragraph 9.1, as a ground for return, the fact that '[t]he request is manifestly outside the scope of the Regulation', inter alia, because 'the document is not civil or commercial'. [4]

B – *Greek law*

11. Law No 4050/2012 of 23 February 2012, with the title 'Rules on the amendment of securities issued or guaranteed by the Greek State with the consent of the bondholders', [5] lays down the detailed rules for restructuring that State's bonds. That law provides, in essence, for the submission of an offer to restructure to the holders of certain bonds issued or guaranteed by the Greek State and the insertion of a restructuring clause enabling the conditions of the restructuring proposed in the offer to be imposed on all the bondholders if they are accepted by a qualified majority.

12. Under Article 1(4) of Law No 4050/2012, the amendment of the relevant securities necessitates observance of a quorum equal to half of the total of the amount of the bonds concerned and the agreement of a qualified majority representing at least two thirds of the capital.

13. Article 1(9) of Law No 4050/2012 provides that the decision adopted at the conclusion of that process applies *erga omnes*, is binding on all the debenture holders concerned and repeals any law, whether general or particular, any administrative decision and any contract that might be contrary thereto. Under that provision, in the event of the exchange of eligible securities, the issue of new securities is to cancel previous securities.

II – The cases in the main proceedings and the questions referred for a preliminary ruling

14. In February 2012, pursuant to Law No 4050/2012, the Greek State made Mr Fahnenbrock, Mr H. Priestoph and Mr M.A. Priestoph and Ms Priestoph, Mr Reznicek, Mr Kickler, Mr Wöhlk and the Zahnärztekammer Schleswig-Holstein, Versorgungswerk, all of whom are holders of bonds issued by the Greek State, an offer for the exchange of those bonds for new bonds at a significantly lower par value.

15. Although the applicants in the main proceedings did not accept that offer, the Greek State none the less proceeded to exchange the securities originally issued for securities with a value significantly lower than their par value and a deferred redemption date.

4 — Point 9.1.1 of that annex.

5 — FEK A' 36/23.2. 2012, 'Law No 4050/2012'.

16. The applicants in the main proceedings then brought actions seeking to obtain either the restitution of the original securities on the basis of Articles 858, 861, 869[6] and 985[7] of the German Civil Code (Bürgerliches Gesetzbuch),[8] or the payment of damages on the basis of Articles 280(3) and 281 of the BGB[9] or Article 826 of the BGB.[10] The applicants in Case C-578/13 also requested contractual performance in respect of the original bonds which had matured.

17. In the context of the procedure for service of the originating applications on the Greek State, the question arose whether the subject-matter of the applicants' action in the main proceedings was an act or omission of the State, in this case the Greek State, committed in the exercise of State authority, within the meaning of Article 1(1) of Regulation No 1393/2007.

18. In particular, in Cases C-226/13, C-245/13 and C-247/13, the Bundesamt für Justiz (Federal Justice Office) expressed doubts as to whether those actions could be regarded as civil and commercial matters within the meaning of the regulation, and made continuation of the procedure for service subject to the condition that the Landgericht Wiesbaden (Germany) should first have determined the nature of the action.

19. In Case C-578/13, the Landgericht Kiel (Germany), taking the view that Regulation No 1393/2007 was not applicable in the case in point, ordered the Bundesministerium für Justiz (Federal Justice Ministry) to serve the application by diplomatic means. The Ministry none the less returned the application for service without effecting service, referring to the requests for a preliminary ruling in Cases C-226/13, C-245/13 and C-247/13.

20. The two national courts therefore seek to ascertain whether the cases in the main proceedings fall within the definition of civil and commercial matters within the meaning of Article 1(1) of Regulation No 1393/2007. In their decisions for reference, they consider that the Court has not yet answered the question whether the interpretation of that concept depends exclusively on the legal basis of the claims or rather on what is 'at the heart', or is 'the essence', of the action. Observing that the cases entail assessment of the validity and lawfulness of Law No 4050/2012, they are both inclined to exclude the application of Regulation No 1393/2007, taking the view that the actions put in issue the liability of the State for acts committed in the exercise of State authority, for the purpose of the second sentence of Article 1(1) of that regulation.

21. In those circumstances, the Landgericht Wiesbaden, in Cases C-226/13, C-245/13 and C-247/13, decided to stay the proceedings and refer the following question to the Court for a preliminary ruling. The question is stated in identical terms in each of the three cases:

'On a proper construction of Article 1 of Regulation … No 1393/2007 … is an action by which, when the applicant has not accepted an offer made by the defendant at the end of February 2012 to exchange bonds issued by the defendant, purchased by the applicant and kept in the latter's securities deposit with [his bank], the applicant seeks compensation for loss in the amount of the difference in value arising from the exchange of the bonds, economically disadvantageous to the applicant, that was none the less effected in March 2012, to be regarded as a "civil and commercial matter" within the meaning of the regulation?'

6 — Action for establishing possession brought by the person dispossessed as a result of tortious interference with goods.

7 — Action for restitution based on the right to property.

8 — The 'BGB'.

9 — Damages for breach of obligation in lieu of performance.

10 — Compensation for damage caused by an unlawful act.

22. The Landgericht Kiel in Case C-578/13 also decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

‘(1) On a proper construction of Article 1 of Regulation … No 1393/2007 …, is an action by which the purchaser of State bonds issued by the defendant asserts claims, against the defendant, for performance of contract and damages to be regarded as a “civil and commercial matter”, within the meaning of the first sentence of Article 1(1) of the regulation, when the purchaser did not accept the offer of exchange made by the defendant at the end of February 2012, and made possible by […] Law No 4050/2012 […]?

(2) Does an action essentially based on the ineffectiveness or invalidity of [Law No 4050/2012] put in issue the liability of a State for actions or omissions in the exercise of State authority, within the meaning of the second sentence of Article 1(1) of Regulation […] No 1393/2007?’

23. By order of the President of the Court of 5 June 2013, Cases C-226/13, C-245/13 and C-247/13 were joined for the purposes of the written and oral procedure and of the judgment. By order of the President of the Court of 10 December 2013, Case C-578/13 was also joined to those cases for the purposes of the oral procedure and of the judgment.

III – Analysis

A – *Admissibility of the questions referred*

24. The European Commission raises, as its principal plea, the objection that the requests for a preliminary ruling in Cases C-226/13, C-245/13 and C-247/13 are inadmissible, relying on the inadequate description of the factual context regarding, in particular, the detailed arrangements for the offer of exchange and the circumstances in which that exchange was effected. Stating that the Bundesamt für Justiz, in its capacity as a central body, had refused to transmit the originating applications under Regulation No 1393/2007 because it entertained doubts as to whether the applications constituted civil matters, the Commission maintains, moreover, that the questions referred are irrelevant to the resolution of the cases in the main proceedings, for it is not for the Bundesamt für Justiz to block the transmission of documents, adding that, not being acquainted with the defendant’s arguments, the national court does not have the information necessary to decide whether the cases are civil and commercial matters and, therefore, to decide the issue of jurisdiction.

25. With regard, in the first place, to the argument that the description of the factual context was inadequate, it is to be recalled that it is settled case-law that the necessity of providing an interpretation of EU law that will be of use to the national court requires the latter to define the factual and legislative context of the questions it asks or, at the very least, to explain the factual circumstances on which those questions are based.[11] The Court modulates the need of precision according to the complexity of the factual and legal situations in the areas concerned.[12]

26. The information provided by the national court must, in addition, give the Governments of the Member States and the other interested parties the opportunity of submitting observations pursuant to Article 23 of the Statute of the Court of Justice of the European Union.[13]

11 — See, in particular, judgment in *Woningstichting Sint Servatius* (C-567/07, EU:C:2009:593, paragraph 50 and case-law cited.

12 — Ibid. (paragraph 53).

13 — See, in particular, order in *3D I*, C-107/14, EU:C:2014:2117, paragraph 9.

27. In the circumstances, the decisions for reference in Cases C-226/13, C-245/13 and C-247/13 do provide the Court with sufficient factual and legal information and indicate the reasons why the Landgericht Wiesbaden was prompted to refer a question for a preliminary ruling, making clear the link between the provisions of EU law of which interpretation is requested and the cases in the main proceedings. However regrettable it may be, the description, succinct as it is, of the procedure following which the exchange of bonds issued by the Greek State took place did not prevent the applicants in those cases, the Greek Government or the Commission actually stating their position on the questions raised, as is clear from their observations submitted to the Court.

28. With regard, in the second place, to the relevance of the questions referred, it is to be remarked, as a preliminary point, that it does not seem to me correct to state, as the Commission does, that the Bundesamt für Justiz blocked the transmission of documents in its capacity as the central body. In fact, it is clear from the information communicated by the Federal Republic of Germany to the Commission under Article 23 of Regulation No 1393/2007 [14] that Germany conferred the role of central body on courts designated by the government of each Land. The Commission's argument relying on the fact that a central body within the meaning of Article 3 of that regulation may not block the transmission of documents therefore seems to me to be unfounded.

29. On the other hand, like the Commission, I have some reservations as to whether the procedure for serving documents abroad can be blocked *ab initio* because of doubts as to the scope *ratione materiae* of Regulation No 1393/2007. In this connection, I wonder more specifically about the admissibility of references for a preliminary ruling in the light of the requirement that there be a case pending before the national court giving a decision in the exercise of its judicial functions.

30. It is in fact settled case-law, beginning in the judgment in *Job Centre*, [15] that the national courts may refer a question to the Court only if there is a case pending before them and if they are called upon to give judgment in proceedings intended to lead to a decision of a judicial nature. [16]

31. Thus, when it exercises administrative authority without at the same time being required to settle a case, within the meaning of the Court's case-law, the referring body cannot be regarded as exercising a judicial function. That applies, in particular, to courts within the meaning of national law, which, without at the same time being required to determine a case, are responsible for keeping a register, such as the companies register, [17] examining an application for registration in the land register [18] or adopting an administrative decision relating to civil status. [19]

32. With more particular regard to applications for service of judicial or extrajudicial documents, in *Roda Golf & Beach Resort*, [20] the Court declared that it had jurisdiction to reply to questions referred for a preliminary ruling relating to the scope of Regulation (EC) No 1348/2000, [21] relying on the fact that, unlike a judicial officer [Secretario judicial] dealing with an application for service under Regulation No 1348/2000, who was exercising administrative authority without at the same time being called upon to decide a case, a court adjudicating on an appeal against that officer's refusal to effect the service of documents requested was hearing an action and exercising judicial functions. [22]

14 — Information available on the Commission's website in the European Judicial Atlas in Civil Matters at the following address: http://ec.europa.eu/justice_home/judicialatlascivil/html/ds_centralbody_de_fr.htm.

15 — C-111/94, EU:C:1995:340.

16 — See judgment in *Torresi* (C-58/13 and C-59/13, EU:C:2014:2088, paragraph 19 and case-law cited.

17 — See judgment in *Cartesio* (C-210/06, EU:C:2008:723, paragraph 57).

18 — See judgment in *Salzmann* (C-178/99, EU:C:2001:331, paragraphs 15 to 17).

19 — See judgment in *Standesamt Stadt Niebüll* (C-96/04, EU:C:2006:254, paragraphs 14 to 17).

20 — C-14/08, EU:C:2009:395.

21 — Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (OJ 2000 L 160, p. 37).

22 — See, to that effect, judgment in *Roda Golf & Beach Resort* EU:C:2009:395, paragraph 37.

33. The application of the line of case-law begun in that judgment to the references for a preliminary ruling made in Cases C-226/13, C-245/13 and C-247/13 could lead the Court to declare that it does not have jurisdiction on the grounds that the national court, seised before the originating applications were served, exercises purely administrative functions without, at that stage, being seised of actions between the parties relating to the rules governing service.

34. In its judgment in *Weryński*,[23] on the interpretation of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters,[24] the Court held, however, that the term 'to give judgment' within the meaning of Article 267(2) TFEU must be interpreted broadly as encompassing 'the entire process of creating the judgment',[25] and found that a reference for a preliminary ruling could be held admissible even if it related to a question other than that at issue between the parties to the proceedings.

35. Furthermore, it follows from the judgment in *Corsica Ferries*[26] that the reference to the Court is not subject to there having been an inter partes hearing in which the national court refers the questions for a preliminary ruling.[27]

36. In this instance, the questions raised in Cases C-226/13, C-245/13 and C-247/13 as to the form that service on the defendant of originating applications must take, constitute preliminary issues that must be resolved before the case in the main proceedings can be disposed of. Contrary to what the Commission maintains in its written observations, not without a certain contradiction with the assertion that that assessment of the concept of 'civil and commercial matters' under Regulation No 1393/2007 is without prejudice to jurisdiction under Regulation (EC) No 44/2001,[28] it is for the national court, not, at a stage of the proceedings when the defendant is by definition precluded from stating its view, to determine whether it has jurisdiction, but solely to determine how service of the applications on that party is to be effected.

37. While it is important not to encourage administrative obstacles to the procedures for service of judicial and extrajudicial documents, it none the less seems to me consistent with the requirements of the sound administration of justice that there should, as swiftly as possible, be available an interpretation applicable *erga omnes*, that makes it possible to know the precise scope *ratione materiae* of Regulation No 1393/2007, and to determine, in consequence, by what means service can be effected. That applies *a fortiori* when, as in the cases in the main proceedings, several similar applications are made to different courts which are preparing to adopt divergent decisions. In short, the possibility of referring a question for a preliminary ruling at an early stage in the proceedings seems to me to be intrinsic to the very purpose of the questions, which relates to the determination of the rules for serving originating applications.

38. It is for those reasons that I propose that the Court reject the pleas of inadmissibility raised by the Commission and declare that it has jurisdiction to rule on all the requests for a preliminary ruling.

23 — C-283/09, EU:C:2011:85.

24 — OJ 2010 L 174, p. 1.

25 — Paragraphs 41 and 42 of the judgment.

26 — C-18/93, EU:C:1994:195.

27 — Paragraph 12 and case-law cited. See also, to this effect, judgment in *Roda Golf & Beach Resort* EU:C:2009:395, paragraph 33.

28 — 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).

B – *Merits*

39. By their questions, the two referring courts are essentially asking the Court whether the concept of 'civil and commercial matters', within the meaning of Article 1(1) of Regulation No 1393/2007, must be interpreted as including an action by which an individual holder of bonds issued by a Member State takes action against that State on the basis of contractual or tortious liability by reason of the exchange of those bonds for bonds of a lower value, imposed on that individual as a result of the adoption by the national legislature of a law unilaterally and retroactively amending the conditions applicable to those securities by inserting in them a collective action clause enabling a majority of the holders to impose such an exchange on the minority.

40. The applicants in the main proceedings in Case C-578/13, the Greek Government and the Commission agree that the term 'civil and commercial matters' within the meaning of Article 1(1) of Regulation No 1393/2007 must be given an independent interpretation, account being taken of the interpretation of the same words used in Article 1(1) of Regulation No 44/2001. Moreover, all the parties having submitted observations to the Court agree that an action brought against a State is excluded from the ambit of Regulation No 1393/2007 only if it is founded on actions performed in the exercise of State authority. Their observations differ, however, with regard to the inferences to be drawn from the fact that, by Law No 4050/2012, the Greek State unilaterally and retrospectively amended the conditions applicable to securities issued or guaranteed by it, by inserting into it, *a posteriori*, a restructuring clause allowing decisions adopted by a majority only of the holders to be imposed on all the holders.

41. The applicants in the main proceedings in Cases C-226/13, C-245/13 and C-247/13 argue that the cases in those proceedings are matters of purely private law, proceedings having been brought against the Greek State not for exercising its powers of State authority but for infringing the applicants' right to property by tortious interference. They maintain that Law No 4050/2012 does not reveal a context of public law concerning the subject-matter of their action, inasmuch as that law governs, not public-law relationships, but classic private-law relationships and does not effect expropriation for the purposes of German case-law, because it was not adopted with a view to the performance of a particular public-interest duty. Failing an action *jure imperii*, it is a court of another Member State that must be held to have jurisdiction and the Greek State cannot invoke immunity. Moreover, in similar proceedings brought before the Greek courts, the Greek Government has expressly acknowledged that the actions taken were not connected to the exercise of State authority.

42. The applicants in the main proceedings in Case C-578/13 maintain that their action is directed against the Greek State as a private debtor which has, by issuing bonds, placed itself under the sway of civil law. Taking the view that account must be taken of the subject-matter of the dispute and the origin of the claim, they believe that their action is based on their right to repayment of the bonds issued by that State according to the rules of private law and add that, although, in the alternative for two of them, they have also based their action on the provisions of the German civil code on tortious liability, the fact remains that what they complain of is not expropriation, but intentional, fraudulent conduct on the part of that State as debtor.

43. On the other hand, according to the Greek Government, that legislative measure, and the implementing provisions subsequently adopted by the Council of Ministers in order to lay down the conditions for the exchange of existing securities in the context of the restructuring of the public debt approved by a unanimous decision of its partners in the European Union, constitute acts of State authority effected by the competent organs of the State and intended for the protection of the general interest. Under the cloak of a civil action, the applicants in the main proceedings are indirectly challenging the validity of those acts, thus putting in issue the liability of the State for acts or omissions committed in the exercise of State authority.

44. The Commission, for its part, argues, as a preliminary matter, for reasons based on both the requirements of economy of procedure and of observance of the rights of the defence, and on the objectives of Regulation No 1393/2007, that it is only if a prima facie examination enables the conclusion to be drawn that the application is manifestly not a civil or commercial matter that service of the originating application may be refused in accordance with that regulation. After recalling that, when they are refinanced on the financial markets, States act as legal persons governed by private law would and are therefore subject only to the laws of the market, it argues, on the merits, that merely inserting a restructuring clause *a posteriori* does not in itself constitute a decision adopted in the exercise of State authority. In fact, such a clause, frequently used in commercial transactions between private parties, merely had the ancillary function of enabling bondholders to adopt a coordinated decision compatible with the market concerning the offer of exchange. According to the Commission, by unilaterally introducing the restructuring clause, the Greek State ultimately did no more than bring the terms of the contract involving the State, which enjoyed a special status, into line with the terms applicable to persons governed by private law. The mere fact that, to that end, it used instruments of public law is not in itself sufficient to form the basis of an act *jure imperii* when, furthermore, the entire legal relationship is seen to be one of private law within the sphere of *acta jure gestionis*.

45. In order to answer the questions raised by the national courts, it must, in the first place, be determined whether the words 'civil and commercial matters' in Article 1(1) of Regulation No 1397/2007 are to be interpreted in the same way as the words referring to the same concept in Article 1(1) of Regulation No 44/2001. After answering that first question in the affirmative, I shall, in the second place, consider how the Court's case-law on the interpretation of the concept of 'civil and commercial matters' for the purposes of Regulation No 44/2001 now stands. Then, in the third place, I shall apply the criteria under that case-law in order to determine whether the cases in the main proceedings are such matters within the meaning of Regulation No 1397/2007.

1. Conditions for interpreting the concept of 'civil and commercial matters' in Regulation No 1393/2007

46. The delimiting of the scope of Regulation No 1393/2007 by the reference to civil and commercial matters originates in the classic model under the Conventions on Private International Law drafted in connection with the Hague Conference on Private International Law and with the European Communities. The same is true, in particular, of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters, which does not apply, as is clear from the title itself, beyond that twofold sphere. That is also true of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters,[29] which was replaced by Regulation No 44/2001, which in turn, on 10 January 2015, will be replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[30]

29 — OJ 1978 L 304, p. 32, 'the Brussels Convention'.

30 — OJ 2010 L 351, p. 1 with the exception of Articles 75 and 76 of Regulation No 1215/2012 which have applied since 10 January 2014.

47. The concept of civil and commercial matters, now appearing in many instruments of EU law,[31] has not been given a positive definition. It must be assessed having regard to the express exceptions non-exhaustively set out in those instruments which, for the most part, exclude from their ambit 'revenue, customs or administrative matters'[32] and 'the liability of the State for acts and omissions in the exercise of State authority'.[33]

48. Given that the concept of 'civil and commercial matters' has been repeated in wording identical to that used in the Brussels Convention and then in Regulation No 44/2001, the case-law relating to those instruments provides a particularly appropriate criterion for interpretation. To use it as a guide for the interpreting of Article 1 of Regulation No 1393/2007 satisfies the requirements of legal certainty and of the coherence of the legal order of the Union in the area of judicial cooperation in civil matters. Furthermore, it is to be observed that the reasoning in the judgment in *Lechouritou and Others*[34] militates in favour of a common interpretation of the various instruments in that area for, in order to interpret the concept of 'civil matters' within the meaning of the first sentence of Article 1 of the Brussels Convention, the Court has taken account of the exclusion of acts *jure imperii*, which did not appear in that convention but in other regulations.[35]

49. Establishing a suitable criterion therefore entails using solutions identified in the interpretation of the concept of 'civil and commercial matters' in the first sentence of Article 1 of the Brussels Convention and Article 1(1) of Regulation No 44/2001, having recourse, in accordance with firmly established case-law,[36] both to the definition of the term 'independent', which is founded on considerations of effectiveness linked to the requirement of uniformity in the application of EU law, and to the legal technique of teleological interpretation, which enables the specific objectives of Regulation No 1393/2007 to be taken into account.[37]

2. Interpretation of the term 'civil and commercial matters', for the purposes of the Brussels Convention and of Regulation No 44/2001

50. It is settled case-law that 'civil and commercial matters' in Article 1 of the Brussels Convention and of Regulation No 44/2001 must be regarded as an independent concept to be interpreted by referring, first, to the objectives and scheme of those instruments and, second, to the general principles of the national legal systems.[38]

31 — See, in particular, Article 2(1) of Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ 2004 L 143, p. 15); Article 2(1) of Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (OJ 2007 L 199, p. 1); Article 1(2) of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (OJ 2008 L 136, p. 3), and Article 2(1) of Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters (OJ 2014 L 189, p. 59).

32 — Introduced by the Council Convention 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 on its interpretation by the Court of Justice (see Article 3 of that convention), those words were repeated in Article 1(1) of Regulation No 44/2001.

33 — That clarification does not appear in the Brussels Convention nor in Regulation No 44/2001. It was however inserted into Regulation No 1215/2012 (see Article 1(1) second sentence of that regulation).

34 — C-292/05, EU:C:2007:102.

35 — Paragraph 45.

36 — See point 50 of this Opinion.

37 — That is in fact the reasoning followed by the Court in its judgment in *C*, C-435/06, EU:C:2007:714. In that judgment, having set out the interpretation of the concept of 'civil and commercial matters' within the meaning of the Brussels Convention, the Court interpreted the concept of 'civil matters' within the meaning of Article 1(1) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2000 L 338, p. 1), as amended by Council Regulation (EC) No 2116/2004 of 2 December 2004 (OJ 2004 L 367, p. 1), taking account of the specific objectives pursued by Regulation No 2201/2003.

38 — See, inter alia, judgments in *Lechouritou and Others* (EU:C:2007:102, paragraph 29) and *flyLAL-Lithuanian Airlines* (C-302/13, EU:C:2014:2319, paragraph 24 and case-law cited).

51. According to the Court, that independent interpretation results in determining the scope of the Brussels Convention and of Regulation No 44/2001 on the basis of 'the matters characterising *the legal relationships between the parties to the action* or *the subject-matter of the action*'.[39]

52. With regard to proceedings between a public entity and a person governed by private law, several decisions, revealing a very clear tendency in favour of rejecting a criterion based purely on the nature of the entity, have established a criterion that draws a distinction according to whether or not the public authority in question has exercised its powers of State authority. Thus, in *LTU*[40] and *Rüffer*,[41] the Court held that civil and commercial matters do not include actions between a public authority and a private individual, 'if the public authority *acts in the exercise of its public authority powers*'.[42] That criterion has been recapitulated, in statements that sometimes differ in their formulation but always agree in substance, in several subsequent decisions excluding from civil and commercial matters actions corresponding to 'the exercise of powers going beyond those existing under the rules applicable to relations between private individuals'.[43]

53. In addition, in order to determine whether an action is in fact between a private individual and a public authority acting in the exercise of its public authority powers, the Court has stated that '*the basis and the detailed rules governing the bringing of th[e] action*'[44] must be examined. On the basis of that criterion, in its judgment in *Baten*,[45] the Court classified as a civil matter an action for indemnity under a right of redress, brought by a public social assistance body having paid sums of money to a divorced woman and her child, against the divorced spouse and father of that child on the grounds of his maintenance obligations.[46] In reaching that conclusion, the Court relied on the fact that the action, though brought by a public body, was based on a statutory maintenance debt governed by civil law which determined the conditions and limits of that debt and that it had been brought before the civil courts pursuant to the rules of civil procedure.[47]

54. Again as regards identifying the basis for an action, and the detailed rules governing the bringing of that action, the Court held in *Préservatrice foncière TIARD*[48] that the term 'civil and commercial matters' covered a claim by which a contracting State sought to enforce, against a person governed by private law, a private-law guarantee contract concluded in order to enable a third person to supply a guarantee required and defined by that State, provided that the legal relationship between the creditor and the guarantor, under the guarantee contract, did not entail the exercise by the State of powers going beyond those existing under the rules applicable to relations between private individuals.[49]

55. In that line of case-law, the Court held, in *Sapir and Others*,[50] that the concept of 'civil and commercial matters' included an action for recovery of an amount unduly paid brought by a public body following administrative proceedings seeking compensation for damage caused by the loss of a property at the time of persecution under the Nazi regime. The Court held to be relevant evidence the fact that the right to compensation underlying the action was based on identical national provisions for all owners of property subject to restitutionary rights and that the administrative procedure was identical whatever the status of the owner of the property concerned who had no

39 — Ibid., paragraphs 30 and 26 respectively and case-law cited. Emphasis added.
40 — 29/76, EU:C:1976:137.
41 — 814/79, EU:C:1980:291.
42 — See paragraphs 4 and 8 of those judgments, respectively. Emphasis added.
43 — See, in particular, *Préservatrice foncière TIARD* (C-266/01, EU:C:2003:282, paragraph 30).
44 — See judgment in *Baten* (C-271/00, EU:C:2002:656, paragraph 31). Emphasis added.
45 — EU:C:2002:656.
46 — Paragraph 37.
47 — Paragraph 33.
48 — EU:C:2003:282.
49 — Paragraph 36.
50 — C-645/11, EU:C:2013:228.

special right to a decision with regard to the determination of the victim's rights to restitution. It also took into account the fact that the action for recovery of an amount unduly paid was not part of the administrative procedure, had to be exercised before the civil courts and had as its legal base the rules of the German Civil Code. [51]

56. Finally, in its judgment in *Sunico and Others*, [52] the Court held that an action by which a public authority of one Member State claimed, from legal and physical persons residing in another Member State, damages in compensation for damage caused by conspiracy to commit fraud in relation to value added tax in the first Member State did fall within the scope of Regulation No 44/2001. The Court examined the factual and legal basis of the application and the legal relationship between the parties to the proceedings, seeking to establish whether or not the public authority, in the context of that relationship, exercised exceptional powers by comparison with the rules applicable to relationships between persons governed by private law. [53]

57. The criterion relating to the basis of and rules governing the action, introduced by the judgment in *Baten* [54] and repeated in the judgments in *Préservatrice foncière TIARD*, [55] *Frahuil*, [56] *Sapir and Others* [57] and *Sunico and Others*, [58] appears, however, to be only secondary, in the sense that it comes into play only when it is not established that the substantive basis of the claim is an act in the exercise of public powers.

58. Thus, in its judgment in *Rüffer*, [59] which concerned an action brought by the Netherlands State against the owner of a boat that had run into another boat and caused it to sink, seeking recovery of the costs of raising the wreck, the Court held that the fact that the State, as administering agent, sought to recover those costs on the basis of a right of recovery arising from an act of public authority was sufficient to exclude the matter from the ambit of the Brussels Convention, even though the procedure open to it for that purpose under national law was not an administrative process but a claim for redress under ordinary law. [60]

59. Still more significant is the judgment in *Lechouritou and Others*, [61] by which the Court held that an action brought against a State for compensation for damage suffered by persons claiming under victims of acts perpetrated by armed forces in the course of operations conducted during the Second World War was not a civil matter. The Court, focusing exclusively on defining the factual basis of the action, noted that such operations 'are one of the characteristic emanations of State sovereignty, in particular inasmuch as they are decided upon in a *unilateral* and *binding manner* by the competent public authorities and appear as inextricably linked to States' foreign and defence policy'. [62] The Court took care to observe too that it was irrelevant that the proceedings were presented as being of a civil nature in so far as they sought financial compensation for the material loss and non-material damage caused to the plaintiffs. [63]

51 — Paragraphs 35 to 37.
52 — C-49/12, EU:C:2013:545.
53 — Paragraphs 36 to 40.
54 — EU:C:2002:656.
55 — EU:C:2003:282.
56 — C-265/02, EU:C:2004:77.
57 — EU:C:2013:228.
58 — EU:C:2013:545.
59 — EU:C:1980:291.
60 — Paragraphs 13 and 15.
61 — EU:C:2007:102.
62 — Paragraph 37. Emphasis added.
63 — Paragraph 41.

60. It also seems to me important to note that all the judgments that focus on determining the legal basis of the action, and the rules governing bringing it, with the exception of *Frahuil*,[64] concern actions, for redress or in subrogation, in particular, brought by a public body. In that case, it is reasonable to concentrate on the basis of, and rules governing the bringing of, the action in order to determine whether, by the very bringing of the action, the public authority has made use of its position of State authority. On the other hand, when an action for compensation is brought by an individual against a public authority, the fact that the action uses in national law the classic forms of civil law is not decisive, especially when the law applicable has not yet been determined.[65] It is, on the other hand, important to verify whether the substantive origin of the claims is or is not an act in the exercise of State authority.

3. Application of the case-law criteria to the cases in the main proceedings

61. The analysis progressively developed by the Court by means of the various judgments mentioned above does not give a clear answer to the question concerning us here. That can be accounted for by the particular circumstance that the actions brought against the Greek State by the German holders of Greek securities have, in reality, a twofold basis: on the one hand, the issue of debenture loans and, on the other, the amendment of the conditions of issue of those debentures in the process of being effected following the intervention of the Greek legislature.

62. Debenture loans issued by States are considered to fall within the class of acts performed *jure gestionis* and subject to the general rules applicable to that type of operation.[66] It must also be found that the Greek Government does not claim that those loans were issued in the exercise of State authority powers.

63. If, however, the issue of a debenture loan by a State constitutes an act *jure gestionis*, the subsequent exercise by the State of its legislative power which, in contrast, constitutes an act *jure imperii* must also be taken into account, for it is clear that the actions for damages brought against the Greek State are based not only on the original securities but also, and especially, on Law No 4050/2012, of 14 February 2012, which enabled the exchange of the securities and consequently the reduction of the debt by introducing collective action clauses into the debenture conditions. In that particular situation, how is the Court to analyse the legal relationship that follows not only from the issue of State bonds but also from the unilateral legislative amendment of the conditions attaching to those bonds? When the State presents the dual aspect of contracting party and of public authority, is the action for damages brought against it directed against those acts it performed *jure gestionis* or against those acts it performed *jure imperii*? In my view, the reply to that question calls for a distinction to be drawn according to the rules governing the exercise by a sovereign State of its legislative power.

64. If the State adopts an abstract general provision applying to the contracting parties, which may indirectly lead to alteration of the conditions of the contract, such as a change in tax legislation, that legislative act by the State may be distinguished and dissociated from its actions as a contracting party, without altering the nature of the legal relationships under the original contract.

64 — EU:C:2004:77. These were proceedings between two persons governed by private law.

65 — It must be pointed out, in particular, that it has not been established that the rules of international private law would designate German law as the law applicable in the cases in the main proceedings.

66 — See, to that effect, O'Keefe, R., Tams, C.J., and Tzanakopoulos, A., 'The United Nations Convention on Jurisdictional Immunities of States and Their Property — A Commentary', Oxford University Press, 2013, p. 64, and Report of the Working Group on Jurisdictional Immunities of States and their Property annexed to the Yearbook of the International Law Commission, 1999, vol. II, second part [A/CN.4/SER.A/1999/Add.1 (Part 2)], p. 157, sp. p. 170, paragraph 54.

65. If, on the other hand, the issuing State avails itself of its sovereign power to adopt, not an abstract general provision but a concrete, specific provision whose purpose and effect is directly to damage the system of the bonds issued, it does not seem to me that its action as a public authority can be dissociated from its actions as a contracting party. In fact, in that situation the contracting State avails itself of its sovereign power with direct regard to the contract. The action taken by the Greek legislature by means of Law No 4050/2012 falls within that second case. The Greek State, unilaterally, retroactively and compulsorily, took action to amend the conditions for the issue of debenture loans by inserting into them a collective action clause making it possible for minority holders of securities to be compelled to submit to the will of the majority. In order to be persuaded that that action comes within the category of acts *jure imperii*, it suffices to ask the question whether the rules normally applicable to relations between individuals would allow a party to a contract, once the latter had been concluded, to insert such a clause into it retroactively and without the agreement of the other party. In those particular circumstances of a targeted intervention, it does not seem to me possible to take the view that the action for damages against the Greek State could be regarded as not calling in question acts performed in the exercise of State authority.

66. What is more, it is to be stressed that the Greek legislature's action was taken in the exceptional context of an operation restructuring Greek private debt in order to prevent default by Greece by compelling creditors to accept a debt reduction.

67. In that connection, after a first extraordinary summit of the European Union held on 21 July 2011, following which a plan was drawn up in favour of the Hellenic Republic entailing 'exceptional voluntary participation by the private sector',[67] the heads of State or of Government of the Member States of the euro zone, at a fresh summit held on 26 and 27 October 2011, invited the Hellenic Republic, private investors and all the parties concerned to put in place a 'voluntary' exchange[68] of bonds with a nominal devaluation of 50% of the notional value of the Greek debt held by private investors.[69] It was in response to those decisions that Law No 4050/2012 was adopted.

68. Those actions, undertaken in order to safeguard the financial and economic structure of the Hellenic Republic and, more broadly, to preserve the financial stability of the euro zone as a whole, and appearing inextricably linked to the monetary policy of the Union, are characteristic manifestations of national sovereignty.

69. I must make it clear that it is not from the adoption of collective action clauses that I infer a manifestation of State authority. Those clauses have been standard in financial transactions since the 1990s and the successive sovereign debt crises in the countries of South America.[70] The Treaty establishing a European Stability Mechanism attests to the importance of those clauses which are now compulsorily inserted in debt agreements by Member States in the euro zone when they borrow from

67 — See pp. 6 and 7 of the document entitled 'The European Council in 2011' available at: http://www.european-council.europa.eu/media/555288/qcao11001frc.pdf.

68 — One commentator has classified the restructuring of the Greek debt as 'voluntarily compulsory'. See De Vauplane, H, 'Le rôle du juge pendant la crise : entre ombre et lumière', R.A.E. — L.E.A. 2012/4, p. 773, sp. p. 775. It could also be classified as 'compulsorily voluntary'.

69 — See document entitled 'The European Council in 2011', mentioned in footnote 67, paragraph 12, p. 65, of the 'Statement by the euro area heads of state or government of 26 October 2011'.

70 — Treaty establishing the European Stability Mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland, done at Brussels on 2 February 2012.

private creditors.[71] The retroactive, compulsory insertion of those clauses in the conditions for the issue of current bonds for reasons relating to the higher interests of the Greek State, and of the Member States in the euro zone as a whole, on the other hand, constitutes a manifestation of State authority.

70. I infer from this that the action brought by the minority holders against the Member State following the exchange of the securities necessarily puts in issue the liability of the Greek State for acts performed *jure imperii*, and it is of no avail to argue that that exchange, intended to reduce the par value of those securities, required a majority vote. In that connection, the Commission's reasoning, which seems to be that the actions of the Greek State would have spilled over into the sphere of acts performed *jure imperii* if, instead of inserting a restructuring clause, the Greek State had more brutally imposed the alteration of its debt without the agreement of the creditors, appears to me to be questionable in that it makes the classification of the legal relationship dependent on the seriousness of the infringement by the State of the rights of the other contracting parties.

71. For those reasons, I consider that the actions brought by the applicants in the main proceedings do not fall within the ambit of Regulation No 1393/2007.

72. I have already, in examining the admissibility of the these requests for a preliminary ruling, explained the reasons why the national courts are, in my view, justified in conducting, even at an early stage of the proceedings, a review of the substantive scope of Regulation No 1393/2007, if need be referring a question to the Court for a preliminary ruling.[72] I shall merely add that the opinion expressed by the Commission, to the effect that the national court ought to do no more than conduct a prima facie review, is based on no legislative foundation.[73]

IV – Conclusion

73. In view of all the foregoing considerations, I propose that the Court give the following reply to the questions referred by the Landgericht Wiesbaden and the Landgericht Kiel:

The term 'civil and commercial matters', within the meaning of Article 1(1) of Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, must be interpreted as not including an action by which an individual holder of bonds issued by a Member State brings an action against that State for damages on the grounds that those bonds had been exchanged for bonds of lesser value, that exchange having been imposed on that individual as a result of the adoption by the national legislature of a law unilaterally and retroactively amending the conditions applicable to the bonds by inserting a collective action clause enabling a majority of the bondholders to impose such an exchange on the minority.

71 — See Article 12(3) of that Treaty, which sets out the principles to which the support of the stability is subject. The systematic inclusion of collective action clauses in the wording of the conditions of State securities in euros was one of the measures decided on by the heads of State or government of the Member States of the euro area on 9 December 2011 in order to respond to the sovereign debt crisis (see document entitled 'The European Council in 2011', mentioned in footnote 67, paragraph 15, p. 71, of the 'Statement by the euro area heads of state or government' of 9 December 2011').

72 — See point 37 of this Opinion.

73 — In that connection, Regulation No 1393/2007 limits only the powers of appraisal of the receiving agency, which may return the request for service to the transmitting agency only if the latter is 'manifestly outside the scope of [that] regulation'. Conversely, Regulation No 1393/2007 sets no limit to the power of interpretation of the transmitting agency or, *a fortiori*, of the Court seised of the case when, as is the case under German law, that court may be called upon to determine beforehand the ambit of that regulation.