



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

16 July 2015*

(Reference for a preliminary ruling — Judicial cooperation in civil matters — Regulation (EC) No 44/2001 — Recognition and enforcement of judgments — Grounds for refusing enforcement — Infringement of public policy in the State in which recognition is sought — Judgment given by a court in another Member State contrary to EU law on trade marks — Directive 2004/48/EC — Enforcement of intellectual property rights — Legal costs)

In Case C-681/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Netherlands), made by decision of 20 December 2013, received at the Court on 23 December 2013, in the proceedings

Diageo Brands BV

v

Simiramida-04 EOOD,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, S. Rodin, E. Levits, M. Berger (Rapporteur) and F. Biltgen, Judges,

Advocate General: M. Szpunar,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 December 2014,

after considering the observations submitted on behalf of:

- Diageo Brands BV, by F. Vermeulen, C. Gielen and A. Verschuur, advocaten,
- Simiramida-04 EOOD, by S. Todorova Zhelyazkova, advokat, and by M. Gerritsen and A. Gieske, advocaten,
- the German Government, by T. Henze and J. Kemper, acting as Agents,
- the Latvian Government, by I. Kalniņš and I. Nesterova, acting as Agents,
- the European Commission, by A.-M. Rouchaud-Joët and G. Wils, acting as Agents,

* Language of the case: Dutch.

after hearing the Opinion of the Advocate General at the sitting on 3 March 2015,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 34(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1), and of 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 (OJ 2004 L 157, p. 45).
- 2 The request has been made in proceedings between Diageo Brands BV ('Diageo Brands') and Simiramida-04 EOOD ('Simiramida') concerning a claim for damages made by Simiramida for the injury caused to it by a seizure carried out at the request of Diageo Brands of goods which were intended for it.

Legal context

Regulation No 44/2001

- 3 According to recital 16 in the preamble to Regulation No 44/2001, '[m]utual trust in the administration of justice in the [European Union] justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute'.
- 4 Chapter III of Regulation No 44/2001, which is entitled 'Recognition and Enforcement', is divided into three sections. Section 1, itself entitled 'Recognition', includes, inter alia, Articles 33, 34 and 36 of that regulation.
- 5 Article 33(1) of Regulation No 44/2001 provides:

'A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.'
- 6 Under Article 34 of that regulation:

'A judgment shall not be recognised:
 1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;
...'
- 7 Article 36 of the regulation states:

'Under no circumstances may a foreign judgment be reviewed as to its substance.'

Directive 89/104/EEC

8 First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), as amended by the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) ('Directive 89/104'), was repealed by Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (Codified version) (OJ 2008 L 299, p. 25). Nevertheless, having regard to the date of the facts, Directive 89/104 is still applicable to the dispute in the main proceedings.

9 Article 5 of that directive provided:

'1. The registered trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:

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

...

3. The following, inter alia, may be prohibited under paragraphs 1 and 2:

(a) affixing the sign to the goods or to the packaging thereof;

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

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

...'

10 Article 7 of Directive 89/104, entitled 'Exhaustion of the rights conferred by a trade mark', stated in paragraph 1:

'The trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in a Contracting Party [of the European Economic Area] under that trade mark by the proprietor or with his consent.'

Directive 2004/48

11 Recital 10 in the preamble to Directive 2004/48 states that the objective of the directive is to approximate the legislative systems of the Member States 'so as to ensure a high, equivalent and homogeneous level of protection in the internal market'.

12 Recital 22 in the preamble to the same directive states that, among the measures which the Member States must provide, '[i]t is also essential to provide for provisional measures for the immediate termination of infringements, without awaiting a decision on the substance of the case ... and providing the guarantees needed to cover the costs and the injury caused to the defendant by an unjustified request'.

13 According to Article 1, Directive 2004/48 concerns 'the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights', it being made clear that, under that same provision, the term 'intellectual property rights' includes 'industrial property rights'.

- 14 Article 2(1) of that directive states that the measures, procedures and remedies provided for by the directive are to 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’.
- 15 In accordance with Article 3(2) of that directive, the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights which the Member States are required to adopt must be ‘effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse’.
- 16 To that end, Article 7(1) of Directive 2004/48 requires Member States to ensure that the competent judicial authorities may, in certain circumstances, ‘order prompt and effective provisional measures to preserve relevant evidence in respect of the alleged infringement’. That provision states that those measures may include ‘the physical seizure of the infringing goods’. According to Article 9(1)(b) of that directive, Member States must ensure that the judicial authorities may, at the request of the applicant, ‘order the seizure or delivery up of the goods suspected of infringing an intellectual property right’. Articles 7(4) and 9(7) of that directive provide that, ‘where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right’, the judicial authorities are to have the authority ‘to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by those measures’.
- 17 With regard to legal costs, Article 14 of Directive 2004/48 provides:
- ‘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.’

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

- 18 Diageo Brands, which has its registered office in Amsterdam (Netherlands), is the proprietor of the trade mark ‘Johnny Walker’. It places that brand of whisky on the market in Bulgaria through a local exclusive importer.
- 19 Simiramida, established in Varna (Bulgaria), trades in alcoholic beverages.
- 20 On 31 December 2007, a container holding 12 096 bottles of whisky of the ‘Johnny Walker’ brand, intended for Simiramida, arrived from Georgia in the port of Varna.
- 21 Taking the view that the importation into Bulgaria of that consignment of bottles without authorisation constituted an infringement of the trade mark of which it is the proprietor, Diageo Brands requested and obtained, by order of 12 March 2008, permission from the Sofiyski gradski sad (Sofia City Court, Bulgaria) to have it seized.
- 22 On 9 May 2008, ruling on an appeal lodged by Simiramida, the Sofiyski apelativen sad (Court of Appeal, Sofia) annulled that order.
- 23 By judgments of 30 December 2008 and 24 March 2009, the Varhoven kasatsionen sad (Bulgarian Supreme Court) dismissed, on formal grounds, the appeal in cassation brought by Diageo Brands.
- 24 The seizure of the consignment of bottles of whisky carried out at the request of Diageo Brands was lifted on 9 April 2009.

- 25 In the substantive proceedings brought by Diageo Brands against Simiramida for infringement of the trade mark of which it is the proprietor, the Sofiyski gradski sad dismissed Diageo Brands' claims by judgment of 11 January 2010. That court held that it followed from an interpretative decision delivered by the Varhoven kasatsionen sad on 15 June 2009 that the import into Bulgaria of goods placed on the market outside the European Economic Area (EEA) with the permission of the proprietor of the trade mark does not infringe the rights conferred by the trade mark. The Sofiyski gradski sad considered itself bound by that interpretative decision by virtue of Bulgarian procedural law.
- 26 Diageo Brands did not bring any appeal against the judgment of the Sofiyski gradski sad of 11 January 2010, which has become final.
- 27 In the case in the main proceedings, Simiramida requests the Netherlands courts to order Diageo Brands to pay it, by way of compensation for the damage it claims to have suffered as a result of the seizure carried out at the request of the latter company, a sum that it assesses at over EUR 10 million. Simiramida bases its claim on the judgment given on 11 January 2010 by the Sofiyski gradski sad, in that that judgment held that seizure to be unlawful. In its defence, Diageo Brands submits that that judgment cannot be recognised in the Netherlands on the ground that it is manifestly contrary to public policy in the Netherlands, within the meaning of Article 34(1) of Regulation No 44/2001. Diageo Brands claims that, in that judgment, the Sofiyski gradski sad manifestly misapplied EU law by basing its ruling on the interpretative decision of the Varhoven kasatsionen sad of 15 June 2009, which is vitiated by a substantive error and, moreover, had been adopted in breach of the obligation incumbent on the latter court to refer a question for a preliminary ruling pursuant to Article 267 TFEU.
- 28 By judgment of 2 March 2011, the Rechtbank Amsterdam (District Court, Amsterdam) upheld the arguments advanced by Diageo Brands and dismissed Simiramida's claim.
- 29 Ruling on an appeal brought by Simiramida, by judgment of 5 June 2012 the Gerechtshof te Amsterdam (Court of Appeal, Amsterdam) overturned the judgment of the Rechtbank Amsterdam and ruled that the judgment of 11 January 2010 of the Sofiyski gradski sad had to be recognised in the Netherlands, but did not give a ruling on the claim for damages.
- 30 It was in those circumstances that the Hoge Raad der Nederlanden (Supreme Court), to which Diageo Brands appealed on a point of law against the judgment of the Gerechtshof te Amsterdam, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- '1. Must Article 34(1) of Regulation (EC) No 44/2001 be interpreted as meaning that that ground for refusal is also applicable in a case where the decision of the court of the Member State of origin is manifestly contrary to EU law, and that fact has been recognised by that court?
 - 2(a) . Must Article 34(1) of Regulation No 44/2001 be interpreted as meaning that successful reliance on that ground for refusal is precluded by the fact that the party which has recourse to that ground for refusal failed to make use of the legal remedies available in the Member State of origin of the decision?
 - 2(b) . If the answer to Question 2(a) is in the affirmative, would the position be different if the use of the legal remedies in the Member State of origin of the decision was pointless because it has to be assumed that it would not have led to any different decision?
 3. Must Article 14 of Directive 2004/48/EC be interpreted as meaning that that provision is also applicable to the costs incurred by the parties in the context of proceedings for damages brought in a Member State if the claim and the defence relate to the alleged liability of the defendant by reason of the seizures which it made and the notices which it served with a view to enforcing its

trade mark rights in another Member State, and in that connection a question arises concerning the recognition in the former Member State of a decision of the court in the latter Member State?’

The request seeking the reopening of the oral part of the procedure

- 31 After the oral part of the procedure was closed on 3 March 2015 following the presentation of the Advocate General’s Opinion, Diageo Brands requested the reopening of that oral part by letter of 6 March 2015, lodged at the Court Registry on 20 March 2015.
- 32 In support of that request, Diageo Brands submits, in the first place, that, in point 27 et seq. of his Opinion, the Advocate General called into question the accuracy of the assumptions upon which the Hoge Raad der Nederlanden based its order for reference, namely, first, that a manifest and conscious breach of a fundamental principle of EU law follows from the interpretative decision of the Varhoven kasatsionen sad of 15 June 2009, confirmed by a second decision of 26 April 2012, and from the judgment of the Sofiyski gradski sad and, secondly, that the use of a legal remedy before the Varhoven kasatsionen sad was pointless for Diageo Brands. According to Diageo Brands, in the event that the Court should consider that the accuracy of those assumptions may still be the subject of a debate between the parties, that debate should meet the requirements of the fundamental principle *audi alteram partem* laid down in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and in Article 47 of the Charter of Fundamental Rights of the European Union.
- 33 In the second place, Diageo Brands maintains that it had no opportunity to submit observations on certain documents lodged by the European Commission at the hearing.
- 34 In that regard, it must be recalled that, under Article 83 of the Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular where it considers that it lacks sufficient information, where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the persons referred to in Article 23 of the Statute of the Court of Justice of the European Union (see judgment in *Commission v Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13 P, EU:C:2014:2456, paragraph 27 and the case-law cited).
- 35 In the present case, the Court considers, having heard the Advocate General, that it has sufficient information to give a ruling and that the present case does not need to be decided on the basis of arguments which have not been debated between the parties. The assumptions of the referring court’s reasoning to which Diageo Brands refers were mentioned and were the subject of an exchange of arguments at the hearing.
- 36 As for the documents submitted by the Commission at the hearing, they have not been lodged and do not form part of the case-file.
- 37 In addition, it should be borne in mind that, pursuant to the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice, require the Advocate General’s involvement. However, the Court is not bound either by the Advocate General’s Opinion or by the reasoning on which it is based (see judgment in *Commission v Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13 P, EU:C:2014:2456, paragraph 29 and the case-law cited).

38 The request seeking the reopening of the oral part of the procedure must therefore be dismissed.

Consideration of the questions referred

The first and second questions

39 By those questions, which it is appropriate to examine together, the referring court asks, in essence, whether the fact that a judgment of a court of a Member State is manifestly contrary to EU law and was delivered in breach of procedural safeguards constitutes a ground for refusal of recognition under Article 34(1) of Regulation No 44/2001. The referring court also seeks to ascertain whether, in such a context, the court of the Member State in which recognition is sought must take account of the fact that the person opposing that recognition failed to make use of the legal remedies provided for by the law of the State of origin.

Preliminary observations

40 It should be noted at the outset that the principle of mutual trust between the Member States, which is of fundamental importance in EU law, requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (see, to that effect, Opinion 2/13, EU:C:2014:2454, paragraph 191 and the case-law cited). As is stated in recital 16 in the preamble to Regulation No 44/2001, the rules of recognition and enforcement laid down by that regulation are based, precisely, on mutual trust in the administration of justice in the European Union. Such trust requires, inter alia, that judicial decisions delivered in one Member State should be recognised automatically in another Member State (see judgment in *flyLAL-Lithuanian Airlines*, C-302/13, EU:C:2014:2319, paragraph 45).

41 In that system, Article 34 of Regulation No 44/2001, which sets out the grounds on which the recognition of a judgment may be opposed, must be interpreted strictly, inasmuch as it constitutes an obstacle to the attainment of one of the fundamental objectives of that regulation. With regard, more specifically, to the public-policy clause in Article 34(1) of the regulation, it may be relied on only in exceptional cases (see judgment in *Apostolides*, C-420/07, EU:C:2009:271, paragraph 55 and the case-law cited).

42 In accordance with the Court's settled case-law, while the Member States in principle remain free, by virtue of the proviso in Article 34(1) of Regulation No 44/2001, to determine, according to their own national conceptions, what the requirements of their public policy are, the limits of that concept are a matter of interpretation of that regulation. Consequently, while it is not for the Court to define the content of the public policy of a Member State, it is none the less required to review the limits within which the courts of a Member State may have recourse to that concept for the purpose of refusing recognition of a judgment emanating from a court in another Member State (see judgment in *flyLAL-Lithuanian Airlines*, C-302/13, EU:C:2014:2319, paragraph 47 and the case-law cited).

43 In that connection, it should be observed that, by disallowing any review of a judgment delivered in another Member State as to its substance, Article 36 of Regulation No 44/2001 prohibits the court of the State in which recognition is sought from refusing to recognise that judgment solely on the ground that there is a discrepancy between the legal rule applied by the court of the State of origin and that which would have been applied by the court of the State in which recognition is sought had it been seised of the dispute. Similarly, the court of the State in which recognition is sought may not review the accuracy of the findings of law or fact made by the court of the State of origin (see judgment in *flyLAL-Lithuanian Airlines*, C-302/13, EU:C:2014:2319, paragraph 48 and the case-law cited).

- 44 Recourse to the public-policy clause in Article 34(1) of Regulation No 44/2001 may therefore be envisaged only where recognition of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the State in which recognition is sought, inasmuch as it would infringe a fundamental principle. In order for the prohibition of any review of the substance of a judgment of another Member State to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which recognition is sought or of a right recognised as being fundamental within that legal order (see judgment in *flyLAL-Lithuanian Airlines*, C-302/13, EU:C:2014:2319, paragraph 49 and the case-law cited).
- 45 It is in the light of those considerations that it is necessary to examine whether the matters indicated by the referring court are such as to prove that the recognition of the judgment of the Sofiyski gradski sad of 11 January 2010 constitutes a manifest breach of public policy in the Netherlands, within the meaning of Article 34(1) of Regulation No 44/2001.
- 46 Those matters concern the breach, in that judgment, of a rule of substantive law and the breach, in the procedure which led to that judgment, of procedural safeguards.

Breach of the rule of substantive law in Article 5 of Directive 89/104

- 47 In the case in the main proceedings, the referring court starts from the premiss that, by ruling, in its judgment of 11 January 2010, that the import into Bulgaria of goods placed on the market outside the EEA with the permission of the proprietor of the trade mark concerned does not infringe the rights conferred by that trade mark, the Sofiyski gradski sad manifestly misapplied Article 5(3) of Directive 89/104.
- 48 In that regard, it should be noted first of all that the fact that the alleged manifest error which was made by the court of the State of origin concerns, as in the case in the main proceedings, a rule of EU law, and not a rule of national law, does not alter the conditions for reliance upon the public-policy clause for the purpose of Article 34(1) of Regulation No 44/2001. It is for the national court to ensure with equal diligence the protection of rights established in national law and rights conferred by EU law (see, to that effect, judgment in *Renault*, C-38/98, EU:C:2000:225, paragraph 32).
- 49 It must next be recalled that the court of the State in which recognition is sought may not, without challenging the aim of Regulation No 44/2001, refuse recognition of a judgment emanating from another Member State solely on the ground that it considers that national or EU law was misapplied in that judgment. On the contrary, it must be considered that, in such cases, the system of legal remedies established in every Member State, together with the preliminary ruling procedure provided for in Article 267 TFEU, affords a sufficient guarantee to individuals (see, to that effect, judgment in *Apostolides*, C-420/07, EU:C:2009:271, paragraph 60 and the case-law cited).
- 50 Consequently, the public-policy clause would apply only where that error of law means that the recognition of the judgment concerned in the State in which recognition is sought would result in the manifest breach of an essential rule of law in the EU legal order and therefore in the legal order of that Member State.
- 51 As the Advocate General has observed in point 52 of his Opinion, the provision of substantive law at issue in the main proceedings, namely, Article 5(3) of Directive 89/104, is part of a directive seeking to achieve minimal harmonisation whose purpose is in part to approximate the different trade mark laws of the Member States. Although it is true that the enforcement of the rights conferred by Article 5 of that directive on the proprietor of a trade mark, and the proper application of the rules relating to the exhaustion of those rights, laid down in Article 7 of that directive, have a direct effect

on the functioning of the internal market, it cannot be inferred from this that an error in the implementation of those provisions would be at variance to an unacceptable degree with the EU legal order inasmuch as it would infringe a fundamental principle of that legal order.

52 It must, on the contrary, be held that the mere fact that the judgment given on 11 January 2010 by the Sofiyski gradski sad is, according to the court of the State in which recognition is sought, vitiated by an error as regards the application to the circumstances in the main proceedings of the provisions governing the rights of the proprietor of a trade mark, as laid down in Directive 89/104, cannot justify that judgment's not being recognised in the State in which recognition is sought, where that error does not constitute a breach of an essential rule of law in the EU legal order and therefore in the legal order of the Member State in which recognition is sought.

Breach of procedural safeguards

53 In the present case, the referring court states that the error made, in its opinion, by the Sofiyski gradski sad originates in the interpretative decision delivered on 15 June 2009 by the Varhoven kasatsionen sad, in which the latter court gave an interpretation to Article 5(3) of Directive 89/104 which was manifestly erroneous, but binding on lower courts. The referring court adds that, in all likelihood, the Varhoven kasatsionen sad could not have been unaware of the manifestly erroneous nature of that interpretation, since several members of that court expressed, by means of dissenting opinions, their disagreement with that interpretation.

54 In that regard, it should be observed that the mere fact that, in accordance with the procedural rules in force in Bulgaria, several members of the Varhoven kasatsionen sad issued, in the interpretative decision at issue, a dissenting opinion from that of the majority cannot be regarded as evidence of a deliberate intention of that majority to infringe EU law, but must be regarded as the reflection of the debate to which the examination of a complex point of law could reasonably have given rise.

55 Furthermore, it must be observed that, in the written observations which it submitted to the Court, the Commission stated that it had examined, in the context of an infringement procedure which it had opened in respect of the Republic of Bulgaria, the compatibility with EU law of the interpretative decisions delivered by the Varhoven kasatsionen sad on 15 June 2009 and 26 April 2012. The Commission added that, following that examination, it concluded that those two decisions were consistent with EU law and terminated that infringement procedure.

56 Those differences of opinion, on which it is not for the Court to rule in the context of the present case, show, at the very least, that it may not be alleged that the Varhoven kasatsionen sad committed, and imposed on the lower courts, a manifest breach of a provision of EU law.

57 As the referring court states, Diageo Brands also contends that the Bulgarian courts infringed the principle of cooperation between the national courts and the Court of Justice, a principle which, according to Diageo Brands, takes the form of an obligation to make use of the preliminary ruling procedure and is a specific expression of the principle of sincere cooperation between the Member States, enshrined in Article 4(3) TEU.

58 In that regard, it is important to note, first, that the Sofiyski gradski sad, which gave the judgment in respect of which recognition is sought, is a court of first instance, whose judgments may be subject to a judicial remedy under national law. Therefore, in accordance with the second paragraph of Article 267 TFEU, that court may, but need not, request the Court to rule on a question referred for a preliminary ruling.

- 59 Next, it should be noted that the system established by Article 267 TFEU with a view to ensuring that EU law is interpreted uniformly throughout the Member States institutes direct cooperation between the Court of Justice and the national courts by means of a procedure completely independent of any initiative by the parties. The system of references for a preliminary ruling is thus based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether a reference is appropriate and necessary (see judgment in *Kelly*, C-104/10, EU:C:2011:506, paragraphs 62 and 63 and the case-law cited).
- 60 It follows that, even if the question of the interpretation of Article 5(3) of Directive 89/104 had been raised before the Sofiyski gradski sad, that court was not required to refer to the Court a question on this point.
- 61 In that context, it should be observed that, according to the information provided to the Court, the judgment of the Sofiyski gradski sad of 11 January 2010 was capable of being the subject of an appeal, which could have been followed, if necessary, by an appeal to the Varhoven kasatsionen sad.
- 62 However, it is apparent from the order for reference that Diageo Brands did not use, against that judgment, the legal remedies available to it under national law. Diageo Brands justifies its failure to act by the fact that that exercise would have been pointless, because it could not have resulted in a different judgment by the higher courts, a claim which the referring court considers not to be unfounded.
- 63 In that respect, as was noted in paragraph 40 of this judgment, the rules on recognition and enforcement laid down by Regulation No 44/2001 are based on mutual trust in the administration of justice in the European Union. It is that trust which the Member States accord to one another's legal systems and judicial institutions which permits the inference that, in the event of the misapplication of national law or EU law, the system of legal remedies in each Member State, together with the preliminary ruling procedure provided for in Article 267 TFEU, affords a sufficient guarantee to individuals (see paragraph 49 of this judgment).
- 64 It follows that Regulation No 44/2001 must be interpreted as being based on the fundamental idea that individuals are required, in principle, to use all the legal remedies made available by the law of the Member State of origin. As the Advocate General has observed in point 64 of his Opinion, save where specific circumstances make it too difficult or impossible to make use of the legal remedies in the Member State of origin, the individuals concerned must avail themselves of all the legal remedies available in that Member State with a view to preventing a breach of public policy before it occurs. That rule is all the more justified where the alleged breach of public policy stems, as in the main proceedings, from an alleged infringement of EU law.
- 65 As regards the circumstances relied upon by Diageo Brands in the main proceedings in order to justify its failure to exercise the legal remedies available to it, it should be noted, in the first place, that it is apparent from the file that it cannot be excluded that, in its judgment of 11 January 2010, the Sofiyski gradski sad misapplied the interpretative decision adopted on 15 June 2009 by the Varhoven kasatsionen sad. However, if Diageo Brands had brought an appeal against that judgment, such an error, assuming that it was made, could have been corrected by the appeal court. In any event, Diageo Brands would have had the right, in case of doubt as to the merits of the legal ruling of the Varhoven kasatsionen sad, to refer to the Court a question of interpretation of the point of EU law concerned by that legal ruling (see, to that effect, judgment in *Elchinov*, C-173/09, EU:C:2010:581, paragraph 27).
- 66 In the second place, if an appeal had then been brought before the Varhoven kasatsionen sad, that court, as a national court against whose decisions there is no judicial remedy under national law within the meaning of the third paragraph of Article 267 TFEU, would, in principle, have been required to make a reference to the Court of Justice if a doubt as to the interpretation of Directive 89/104 had arisen (see, to that effect, judgment in *Köbler*, C-224/01, EU:C:2003:513, paragraph 35).

An unjustified failure on the part of that court to fulfil that requirement would have resulted in rendering the Republic of Bulgaria liable in accordance with the rules established in this respect by the case-law of the Court of Justice (judgment in *Köbler*, C-224/01, EU:C:2003:513, paragraphs 50 and 59).

67 In those circumstances, it is not apparent that the Bulgarian courts manifestly infringed the principle of cooperation between the national courts and the Court of Justice or that Diageo Brands was deprived of the protection guaranteed by the system of legal remedies in that Member State, as supplemented by the preliminary ruling procedure provided for in Article 267 TFEU.

68 In the light of all the foregoing considerations, the answer to the first and second questions is that Article 34(1) of Regulation No 44/2001 must be interpreted as meaning that the fact that a judgment given in a Member State is contrary to EU law does not justify that judgment's not being recognised in another Member State on the grounds that it infringes public policy in that latter State where the error of law relied on does not constitute a manifest breach of a rule of law regarded as essential in the EU legal order and therefore in the legal order of the Member State in which recognition is sought or of a right recognised as being fundamental in those legal orders. That is not the case of an error affecting the application of a provision such as Article 5(3) of Directive 89/104.

When determining whether there is a manifest breach of public policy in the State in which recognition is sought, the court of that State must take account of the fact that, save where specific circumstances make it too difficult, or impossible, to make use of the legal remedies in the Member State of origin, the individuals concerned must avail themselves of all the legal remedies available in that Member State with a view to preventing such a breach before it occurs.

The third question

69 By that question, the referring court asks, in essence, whether Article 14 of Directive 2004/48, according to which the unsuccessful party must, as a general rule, bear the expenses incurred by the successful party, must be interpreted as applying to the legal costs incurred by the parties in the context of an action for damages, brought in a Member State, to compensate for the injury caused as a result of a seizure carried out in another Member State, intended to prevent an infringement of an intellectual property right, when, in connection with that action for damages, a question arises concerning the recognition of a judgment given in that other Member State declaring that seizure to be unjustified.

70 In order to answer that question, it must be determined whether the main proceedings fall within the scope of Directive 2004/48.

71 As stated in recital 10 in the preamble thereto, the objective of Directive 2004/48 is to approximate the legislative systems of the Member States as regards the means of enforcing intellectual property rights so as to ensure a high, equivalent and homogeneous level of protection in the internal market.

72 For that purpose, and in accordance with Article 1 thereof, Directive 2004/48 concerns all the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights. Article 2(1) of that directive states that those measures, procedures and remedies apply to any infringement of those rights as provided for by EU law and/or by the national law of the Member State concerned.

73 The Court has held that the provisions of Directive 2004/48 are not intended to govern all aspects of intellectual property rights, but only those aspects inherent, first, in the enforcement of those rights and, secondly, in infringement of them, by requiring that there must be effective legal remedies

designed to prevent, terminate or rectify any infringement of an existing intellectual property right (see judgment in *ACI Adam BV and Others*, C-435/12, EU:C:2014:254, paragraph 61 and the case-law cited).

- 74 It is apparent from the measures, procedures and remedies provided for in Directive 2004/48 that the legal remedies designed to ensure the protection of intellectual property rights are supplemented by actions for damages which are closely linked to them. Thus, whereas Articles 7(1) and 9(1) of that directive provide for provisional and precautionary measures intended, in particular, to prevent any imminent infringement of an intellectual property right, which include, inter alia, the seizure of goods suspected of infringing such a right, Articles 7(4) and 9(7) of that directive provide, for their part, for measures enabling the defendant to claim compensation where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right. As is apparent from recital 22 in the preamble to that directive, those compensation measures constitute guarantees which the legislature deemed necessary as a counterweight to the prompt and effective provisional measures for which it made provision.
- 75 In the present case, the procedure at issue in the main proceedings, which concerns compensation for the injury caused as a result of a seizure at first ordered by the judicial authorities of a Member State for the purpose of preventing an imminent infringement of an intellectual property right, then annulled by those same authorities on the grounds that the existence of an infringement had not been established, is the corollary of the action brought by the proprietor of the intellectual property right for the purpose of obtaining the imposition of a measure with immediate effect which enabled it, without awaiting a decision on the substance of the case, to prevent any possible infringement of its right. Such an action for compensation corresponds to the guarantees laid down by Directive 2004/38 in favour of the defendant, as a counterweight to the adoption of a provisional measure which affected its interests.
- 76 It follows that a procedure such as that at issue in the main proceedings must be considered to fall within the scope of Directive 2004/48.
- 77 As regards Article 14 of Directive 2004/48, the Court has already held that that provision aims to strengthen the level of protection of intellectual property, by avoiding the situation in which an injured party is deterred from bringing legal proceedings in order to protect his rights (see judgment in *Realchemie Nederland*, C-406/09, EU:C:2011:668, paragraph 48).
- 78 Having regard to that objective and the broadly framed and general wording of Article 14 of Directive 2004/48, which refers to the ‘successful party’ and the ‘unsuccessful party’, without providing detail or setting a limitation on the type of procedure to which the rule laid down therein must be applied, it must be held that that provision is applicable to the legal costs incurred in the context of any procedure falling within the scope of that directive.
- 79 In that regard, the fact that, in the case in the main proceedings, the assessment of the justified or unjustified nature of the seizure at issue raises the question of the recognition or the refusal of recognition of a judgment given in another Member State is irrelevant. Such a question is ancillary in nature and does not alter the subject-matter of the dispute.
- 80 In the light of all the foregoing considerations, the answer to the third question is that Article 14 of Directive 2004/48 must be interpreted as applying to the legal costs incurred by the parties in the context of an action for damages, brought in a Member State, to compensate for the injury caused as a result of a seizure carried out in another Member State, which was intended to prevent an infringement of an intellectual property right, when, in connection with that action for damages, a question arises concerning the recognition of a judgment given in that other Member State declaring that seizure to be unjustified.

Costs

⁸¹ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Article 34(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that the fact that a judgment given in a Member State is contrary to EU law does not justify that judgment's not being recognised in another Member State on the grounds that it infringes public policy in that State where the error of law relied on does not constitute a manifest breach of a rule of law regarded as essential in the EU legal order and therefore in the legal order of the Member State in which recognition is sought or of a right recognised as being fundamental in those legal orders. That is not the case of an error affecting the application of a provision such as Article 5(3) of Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, as amended by the Agreement on the European Economic Area of 2 May 1992.**

When determining whether there is a manifest breach of public policy in the State in which recognition is sought, the court of that State must take account of the fact that, save where specific circumstances make it too difficult, or impossible, to make use of the legal remedies in the Member State of origin, the individuals concerned must avail themselves of all the legal remedies available in that Member State with a view to preventing such a breach before it occurs.

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 must be interpreted as applying to the legal costs incurred by the parties in the context of an action for damages, brought in a Member State, to compensate for the injury caused as a result of a seizure carried out in another Member State, which was intended to prevent an infringement of an intellectual property right, when, in connection with that action, a question arises concerning the recognition of a judgment given in that other Member State declaring that seizure to be unjustified.**

[Signatures]