Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 23 April 2020[1]

Case C-73/19

Belgische Staat, represented by the Minister van Werk, Economie en Consumenten, responsible for Buitenlandse handel,
Belgische Staat, represented by the Directeur-Generaal van de Algemene Directie Economische Inspectie,
Directeur-Generaal van de Algemene Directie Economische Inspectie
v
Movic BV,
Events Belgium BV,
Leisure Tickets & Activities International BV

(Request for a preliminary ruling
from the hof van beroep te Antwerpen (Court of Appeal of Antwerp, Belgium))

(Reference for a preliminary ruling — Judicial cooperation in civil matters — Jurisdiction and the enforcement of judgments in civil and commercial matters — Concept of 'civil and commercial matters' — Action for an injunction brought by a public authority to protect the interests of consumers)

I. Introduction

1. In its judgment of 1 October 2002, *Henkel*,[2] the Court held that the concept of 'civil and commercial matters', which defines the scope of the majority of EU instruments of private international law, encompassed proceedings in which an action for an injunction preventing the use of unfair terms was brought by a consumer protection association. By this reference for a preliminary ruling, the referring court asks the Court to determine whether that concept also encompasses proceedings in which the public authorities of a Member State bring an action in relation to unfair market and/or commercial practices.

1 Original language: French.

2 C-167/00, EU:C:2002:555, paragraph 30.

II. Legal background

A. EU law

2. Article 1(1) of Regulation (EU) No 1215/2012[3] provides that 'this Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)'.

B. Belgian law

1. The Law of 30 July 2013

3. Article 5(1) of the loi du 30 juillet 2013 relative à la revente de titres d'accès à des événements (Law of 30 July 2013 on the resale of event admission tickets) (*Moniteur Belge* of 6 September 2013, p. 63069; 'the Law of 30 July 2013') prohibits the regular resale of event admission tickets, the regular display of such tickets with a view to resale, and the provision of means which will be used for the purposes of the regular resale of such tickets. Furthermore, Article 5(2) of that law prohibits the occasional sale of admission tickets at a price greater than their fixed price.

4. Under Article 14 of that law, it is for the President of the Commercial Court to make findings that conduct has taken place which constitutes an infringement of Article 5 and to order its cessation. Article 14 of the law also provides that actions for cessation orders are brought at the request of the Minister, of the Director-General of the Directorate-General for Inspection and Mediation of the Federal Public Service for the Economy, SMEs (small and medium-sized enterprises), Middle classes and Energy, or of the interested parties.

2. The Code of Economic Law

5. Book VI of the Code of Economic Law of 28 February 2013 (in the version applicable at the material time; 'the CEL') contains a Title 4 which in turn contains a Chapter 1 concerning 'Unfair business-to-consumer commercial practices'. Articles VI.92 to VI.100 of that chapter implement Directive 2005/29/EC.[4] In that context, certain unfair commercial practices are defined, in particular, by Articles VI.100, VI.97, VI.99 and VI.93 of the CEL.

6. Under Article XVII.1 of the CEL, it is generally (there are exceptions for certain specific actions) for the President of the Commercial Court to make findings that conduct has taken place which constitutes an infringement of the CEL, even where such conduct is punishable as a matter of criminal law, and to order its cessation. Article XVII.7 of the CEL provides for actions based on Article XVII.1 of that code to be brought at the request, inter alia, of the interested parties, of the Minister or the Director-General of the General-Directorate for Inspection and Mediation of the Federal Public Service for the Economy, SMEs, Middle classes and Energy, or of a consumer protection association acting in defence of the collective interests of consumers as defined by statute.

3 Regulation 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 (OJ 2012 L 351, p. 1).

4 Directive of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22).

III. The main proceedings, the question referred for a preliminary ruling and procedure before the Court

7. In 2016 the Belgian authorities brought two cessation actions, by a procedure enabling interim orders to be made, against the defendants Movic BV, Events Belgium BV and Leisure Tickets & Activities International BV, all of which are companies incorporated under Netherlands law.

8. The relief sought in those actions was,

– first, a declaration that the defendants were offering event admission tickets for resale in Belgium, via websites managed by them, at a price greater than that stated by the original seller, having erased the original price and the name of the original seller, and that in doing so they were infringing Articles 4§1, 5§1 and 5§2 of the Law of 30 July 2013 and Articles VI.100, VI.97, VI.99 and VI.93 of the CEL, read, where applicable, in conjunction with Articles 193b to l93g of Book 6 of the Nederlands Burgerlijk Wetboek (Netherlands Civil Code);

– secondly, a cessation order in respect of that infringement;

– thirdly, an order for the decision of the court to be publicised at the expense of the Netherlands companies;

– fourthly, the imposition of a penalty payment of EUR 10 000 for every infringement which might be found to have taken place after service of the judgment;

– fifthly (and finally), a ruling permitting the fact of such infringement to be certified simply by means of a report drawn up by an official, on oath, of the Algemene Directie Economische Inspectie (Directorate-General for Economic Inspection), in accordance with Article XV.2 et seq. of the CEL.

9. The defendants raised an objection of lack of international jurisdiction of the Belgian courts, maintaining that the Belgian authorities had acted in the exercise of State authority, so that the actions did not fall within the scope of Regulation No 1215/2012. The objection was upheld at first instance.

10. The applicants brought an appeal before the hof van beroep te Antwerpen (Court of Appeal of Antwerp, Belgium). In those circumstances, that court decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

‘Is an action concerning a claim aimed at determining and stopping unlawful market practices and/or commercial practices towards consumers, instituted by the Belgian Government in respect of Dutch companies which from the Netherlands, via websites, focus on a mainly Belgian clientele for the resale of tickets for events taking place in Belgium, pursuant to Article 14 of [the Law of 30 July 2013] and pursuant to Article XVII.7 [of the CEL], a civil or commercial matter within the meaning of Article 1(1) of [Regulation 1215/2012], and can a judicial decision in such a case, for that reason, fall within the scope of that regulation?’

11. Written observations were lodged by the applicants, the Belgian Government and the European Commission. Those same interested parties appeared at the hearing of 29 January 2020.

IV. Analysis

12. By the question it has referred for a preliminary ruling, the national court is seeking to establish whether the expression 'civil and commercial matters' in Article 1(1) of Regulation No 1215/2012, encompasses proceedings between the authorities of a Member State and private law entities established in another Member State, in which those authorities seek, first, findings of infringement in respect of conduct constituting, inter alia, unfair commercial practices, secondly, an order for the cessation of such infringement, thirdly, an order for publicity measures to be taken at the expense of the defendants; fourthly, the imposition of a penalty payment in a fixed sum, due in respect of each and every infringement which may be found to have taken place after service of the judgment, and fifthly, permission for the fact of such infringement to be certified simply by means of a report drawn up by a sworn official of one of the authorities in question.

13. Although it seems that the actions relate either to unfair market practices or to unfair commercial practices, the referring court has not explained how the practices in question are interrelated. At the hearing, the Belgian Government and one of the defendants observed that the Law of 30 July 2013 constituted *lex specialis* with respect to the CEL. I infer from that that, in the absence of such *lex specialis*, any infringement would constitute an unfair commercial practice. Furthermore, it seems that the two legislative instruments have the same objective (namely to protect the interests of consumers), and that they follow similar logic.

14. Moreover, although the wording of the question referred might suggest that the referring court is concerned only about the claims which relate to determining that infringement has taken place and stopping such infringement, that court must, if it is to be able to declare itself to have jurisdiction to hear the main proceedings under one of the grounds of jurisdiction provided for by Regulation No 1215/2012,[5] satisfy itself that none of the Belgian authorities' heads of claim takes those proceedings outside the material scope of that regulation, either in whole or in part.

15. Furthermore, it is apparent from the wording of the question referred that the national court also wishes to establish whether the substantive determination made in the main proceedings will fall within the material scope of Regulation No 1215/2012. While it may be doubted whether it is necessary to answer that question in order to enable the national court to determine the plea of lack of international jurisdiction, it must be borne in mind that the substantive determination will relate to all the heads of claim raised before that court.

16. It is apparent from the reference for a preliminary ruling and from the parties' observations that there is a fundamental point of uncertainty, as to whether the exercise of a public authority's power to bring proceedings with a view to the cessation of conduct infringing the Law of 30 July 2013 and the provisions of Book VI of the CEL is an act done in the exercise of State authority. In that context, the following points have been the subject of argument: first, unlike any other person, the Belgian authorities are not required to demonstrate that they have an interest of their own in bringing proceedings of the kind illustrated by the main proceedings, secondly, their powers of investigation are not available to legal persons governed by private law, and thirdly, they also have enforcement powers which are not available to such persons.

5 I must also note that the referring court does not expressly state which of the grounds of jurisdiction provided for by Regulation No 1215/2012 is relied on by the Belgian authorities in the main proceedings. At the hearing, the Belgian authorities stated that the matter had been brought before the referring court under Article 7(2) of that regulation, or in other words on the basis that, in matters relating to tort, delict or quasi-delict, it was the court for the place where the harmful event occurred or may occur. Having said that, that statement has no impact on the answer to be given to the question referred in this matter. As I have observed previously, in a different context, the material scope of Regulation No 1215/2012, as defined by Article 1 of that regulation, is the same in relation to all of the grounds of jurisdiction for which it provides. See my Opinion in *Rina* (C-641/18, EU:C:2020:3, point 23).

17. I will begin my answer to the question referred by setting out the relevant case-law on the interpretation of 'civil and commercial matters' within the meaning of Article 1(1) of Regulation No 1215/2012 (in Section A below). I will then consider, in the light of that case-law, the matters which have been the subject of argument between the parties and their impact on the answer to be given to the question referred. Those matters relate to the interest pursued by a public authority (Section B), the powers of investigation enjoyed by such an authority (Section C) and its enforcement powers (Section D).

A. Civil and commercial matters

18. Article 1(1) of Regulation No 1215/2012 provides that that regulation applies in civil and commercial matters (first sentence), but that it does not extend to revenue, customs or administrative matters, or to the liability of the State for *acta iure imperii* (second sentence).

19. The concept of 'civil and commercial matters' thus defines the material scope of Regulation No 1215/2012 in contrast to public law concepts. The distinction between proceedings which fall within the scope of 'civil and commercial matters' and proceedings which do not is drawn on the basis that it is the exercise of public powers by one of the parties to the case that excludes such a case from the material scope of that regulation. [6]

20. Following that line of reasoning, the Court has repeatedly held that although certain actions between a public authority and a person governed by private law may fall within the scope of Regulation No 1215/2012, it is otherwise where the public authority is acting in the exercise of its public powers. [7]

21. In order to determine whether that is the case, it is necessary to examine the features which characterise the nature of the legal relationships between the parties to the action and the subject matter of the action, [8] or alternatively, as appears from certain judgments of the Court, [9] the basis of the action and the detailed rules applicable to it.

22. The exercise of public powers, which is liable to result in proceedings falling outside the scope of Regulation No 1215/2012, may occur either in the context of the pre-existing legal relationship between an authority and a person governed by private law which gives rise to the proceedings, or in the procedural context of those proceedings. [10]

23. In the light of the clarifications provided by that case-law, and with regard to the main points in dispute between the parties, it must be determined whether the dispute in the main proceedings falls within the scope of 'civil and commercial matters'.

6 See my Opinion in *Rina* (C-641/18, EU:C:2020:3, point 59).

7 See judgments of 11 April 2013, *Sapir and Others* (C-645/11, EU:C:2013:228, paragraph 33 and the case-law cited), and of 12 September 2013, *Sunico and Others* (C-49/12, EU:C:2013:545, paragraph 34).

8 See judgment of 18 October 2011, *Realchemie Nederland* (C-406/09, EU:C:2011:668, paragraph 39 and the case-law cited).

9 See, in particular, judgment of 28 July 2016, *Siemens Aktiengesellschaft Österreich* (C-102/15, EU:C:2016:607, paragraph 33 and the case-law cited).

10 In that regard, academic commentators have observed that, in principle, there do not seem to be circumstances in the case-law of the Court in which either the subject matter of the action, or the basis of the action and the detailed rules applicable to it, operate to exclude a dispute from the scope of Regulation No 1215/2012. See Van Calster, G., *European Private International Law*, Hart Publishing, Oxford, Portland, 2016, p. 38.

B. The interest pursued by a public authority in bringing proceedings

24. A particular issue in dispute between the parties is whether the particular nature of the interest pursued by the Belgian authorities results in the proceedings they have brought, seeking findings of unfair market and/or commercial practices together with orders for the cessation of those practices, falling within the scope of 'civil and commercial matters'.

25. The defendants submit that the Belgian authorities bring cessation actions to protect the general interest. To that end, they argue, the authorities have powers which have been directly conferred on them by the national legislature, and thus act in the exercise of State authority. Unlike any other person wishing to bring a cessation action under Article 14 of the Law of 30 July 2013 and Article XVII.7 of the CEL, the Belgian authorities are not required to establish an interest of their own.

26. The Belgian Government admits that the Belgian authorities act in defence of a general interest. It submits nonetheless that that interest consists in ensuring compliance with the legislation concerning commercial practices, which is intended to protect the private interests of both businesses and consumers.

27. It is thus necessary to determine whether proceedings necessarily fall outside the scope of 'civil and commercial matters' where, first, they are brought by a public authority seeking to protect a general interest, secondly, the legislature has specifically conferred a power to bring such proceedings on that authority, and thirdly, any other person wishing to bring such proceedings must possess an interest of his own.

1. The performance of a public function in the general interest

28. In the judgment in *Pula Parking*,[11] the Court held that a dispute relating to the collection of parking fees by a company owned by a local authority, which had given rise to the request for a preliminary ruling, fell within the scope of 'civil and commercial matters', even though the administration of public parking and the collection of parking fees were, as is apparent from the judgment, tasks carried out in the local interest.

29. It is thus clear from that judgment that 'acting in an interest comparable to the general or public interest' does not automatically mean 'acting in the exercise of State authority' within the meaning of the case-law on Article 1(1) of Regulation No 1215/2012.[12]

2. Powers conferred directly by a legislative act

30. One of the defendants seems to understand the case-law of the Court as enabling a distinction to be drawn between two situations in which proceedings do not fall within the scope of 'civil and commercial matters'. The first is where an authority uses special powers that go beyond those arising from the rules which apply in relations between individuals, and the second, illustrated by the judgments in *Baten*[13] and *Blijdenstein*,[14] is where the powers of an authority are based on provisions

11 See judgment of 9 March 2017 (C-551/15, EU:C:2017:193, paragraph 35).

12 See also my Opinion in *Rina* (C-641/18, EU:C:2020:3, point 79).

13 Judgment of 14 November 2002 (C-271/00, EU:C:2002:656).

14 Judgment of 15 January 2004 (C-433/01, EU:C:2004:21).

by which the legislature has specifically conferred on that authority a prerogative of its own. The defendant in question thus seems to argue that if the Belgian authorities are acting solely on the basis that the legislature has assigned that function to them, it follows that they are acting in the exercise of public powers.

31. Nevertheless, in its judgment in *Pula Parking*,[15] the Court has held that it does not follow, simply from the fact that certain powers have been conferred, or even delegated, by an act of public authority, that their exercise requires the use of public authority powers. In the same vein, although the status of official is conferred by an act of public authority, the Court has held, in the judgment in *Sonntag*,[16] that the fact that a teacher in a State school has the status of official, and acts in that capacity, is not conclusive; it does not follow that an action for damages brought against such a teacher falls outside the scope of 'civil and commercial matters'.

32. With regard, more specifically, to the legislative origin of a power exercised by a public authority in relation to Regulation (EC) No 1393/2007,[17] which also employs the concept of 'civil and commercial matters' to define its scope, the Court held in the judgment in *Fahnenbrock and Others*,[18] that the fact that a power was introduced by a law is not, in itself, decisive in order to conclude that the State acted in the exercise of State authority. That conclusion was not called into question in the judgment in *Kuhn*,[19] which relates to the interpretation of 'civil and commercial matters' in the context of Regulation No 1215/2012. In that judgment, the Court, which held that the proceedings did not fall within the scope of 'civil and commercial matters', did not content itself with the observation that a State had exercised a power directly conferred by national law, but went on to examine the position in which that State found itself, by reason of the exercise of that power, vis-à-vis individuals.[20]

33. Furthermore, it is indisputable that in the judgments in *Baten*[21] and *Blijdenstein*,[22] which have been cited by one of the defendants, the Court held that where an action is founded on provisions by which the legislature has conferred on the public body a prerogative of its own, that action cannot be regarded as falling within the scope of 'civil and commercial matters' within the meaning of the case-law relating to that concept.

34. Nevertheless, it does not follow from those two judgments that the mere fact of exercising a *power* which the legislature has specifically conferred on a public authority automatically involves the exercise of *public powers*. In the judgments referred to, the Court held that the actions in question fell within the scope of 'civil and commercial matters' even though the authorities had exercised rights of action which had been conferred on them directly by the legislature, under provisions relating only to public authorities.[23] The decisive factor, in reaching the conclusion that those particular actions fell within the scope of that concept, was that, because they made the rules of civil law applicable, those provisions did not put the public authorities in a legal situation which derogated from the general law. Accordingly, the authorities were not exercising public powers.

15 See judgment of 9 March 2017 (C-551/15, EU:C:2017:193, paragraph 35).

16 See judgment of 21 April 1993 (C-172/91, EU:C:1993:144, paragraph 21).

17 Regulation 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 (OJ 2007 L 324, p. 79).

18 See judgment of 11 June 2015 (C-226/13, C-245/13 and C-247/13, EU:C:2015:383, paragraph 56).

19 Judgment of 15 November 2018 (C-308/17, EU:C:2018:911).

20 See judgment of 15 November 2018, *Kuhn* (C-308/17, EU:C:2018:911, paragraphs 37 and 38).

21 See judgment of 14 November 2002 (C-271/00, EU:C:2002:656, paragraph 36).

22 See judgment of 15 January 2004 (C-433/01, EU:C:2004:21, paragraph 20).

23 See judgments of 14 November 2002, *Baten* (C-271/00, EU:C:2002:656, paragraph 32), and of 15 January 2004, *Blijdenstein* (C-433/01, EU:C:2004:21, paragraph 21). See also Briggs, A., *Civil Jurisdiction and Judgments*, Informa law from Routledge, 6th edition, Taylor & Francis Group, New York, 2015, p. 61. As regards the judgment in *Baten*, see, to that effect, Toader, C., 'The Concept of Civil and Commercial Matters', *Europa als Rechts- und Lebensraum: Liber amicorum für Christian Kohler zum 75. Geburtstag am 18. June 2018*, Hess, B., Jayme, E., Mansel, H.-P., Verlag Ernst und Werner Gieseking, Bielefeld (Eds), 2018, p. 523.

35. Accordingly, it is not sufficient to make a finding that, pursuant to national legislation, a public authority enjoys certain powers which are not available, under that legislation, to all persons governed by private law. In order for the application of Regulation No 1215/2012 to be ruled out, that public authority must possess a public power in the sense established by the case-law of the Court. It is important not to lose sight, in this context, of the fact that the concept of 'civil and commercial matters' is an autonomous concept of EU law. The issue of whether the exercise of a power involves the use of public powers cannot be resolved solely by examining the national legislation to which a public authority is subject and concluding that that legislation provides for differences in comparison to the legal rules applicable to certain persons,[24] albeit that it may be useful to refer to that legislation for the purposes of determining the range of the powers exercised by the public authority.[25] Furthermore, it is often sufficient to refer to just one legislative text in order to determine what powers are generally available to persons governed by private law.

36. It only remains for me to determine whether the fact that a public authority is exempted from the obligation to demonstrate that it has an interest of its own in bringing a cessation action constitutes a public power within the meaning of the case-law of the Court.

3. Does exemption from the requirement for an applicant to demonstrate an interest of its own constitute a public power?

37. Under Belgian legislation, a public authority appears to be exempt from the obligation to demonstrate that, in bringing a cessation action, it is defending an interest or right of its own. By contrast, in order to commence such an action, a private individual must be an 'interested party' within the meaning of the Law of 30 July 2013 and the CEL.

38. It is apparent from the reference for a preliminary ruling however that, at least as regards the CEL, which implements Directive 2005/29, a cessation action may also be brought by associations with legal personality and, subject to certain conditions, consumer protection associations. A consumer protection association does not act in defence of an interest or right of its own. Rather, it acts in defence of the collective interests of consumers or of the general interest, and it is the legislature which empowers it to bring a cessation action under provisions such as Article XVII.7 of the CEL.

39. As regards the interest in bringing proceedings and, therefore, the procedural issues which depend on the interest pursuant to which an action is brought, such as *locus standi* or admissibility of the action, the legal position of a public authority is thus comparable to that of a consumer protection association. Such an association can also bring a cessation action in the absence of any interest of its own.

40. Against that background, it is relevant to note that in the judgment in *Henkel*,[26] the Court ruled that proceedings in which an association brings an action in the collective interest of consumers fall within the scope of 'civil and commercial matters', as such an action does not in any way concern the exercise of special powers that go beyond those arising from the rules of general law applicable to relations between private individuals.

24 If that interpretation were followed strictly, the decisions made by the legislature of a single Member State as to the range of powers of a public authority, in comparison to those available to persons governed by private law, would determine the applicability of Regulation No 1215/2012. However, it is apparent from the case-law that the applicability of that regulation cannot depend on whether a power is classified as public under the legislation of a single Member State. See, to that effect, judgments of 16 December 1980, *Rüffer* (814/79, EU:C:1980:291, paragraph 11), and of 21 April 1993, *Sonntag* (C-172/91, EU:C:1993:144, paragraphs 22 and 25). Furthermore, while it would probably be straightforward to identify a single national legislative text of relevance to the recognition and enforcement of judgments, the same cannot be said in relation to the examination which is conducted at the commencement of proceedings, to determine whether the court before which the matter has been brought has jurisdiction to hear it.

25 See my Opinion in *Rina* (C-641/18, EU:C:2020:3, point 89 and the academic commentary referred to).

26 See judgment of 1 October 2002 (C-167/00, EU:C:2002:555, paragraph 30).

41. It could be argued that the case which gave rise to the judgment in *Henkel*[27] related to an action seeking to prevent the use of unfair terms, based on Directive 93/13/EEC,[28] while the present case relates to an action seeking to prevent unfair commercial practices, based on Directive 2005/29. However, it must be borne in mind that the Court has affirmed the interpretation adopted in the judgment in *Henkel*[29] in the context of another instrument of EU private international law, namely Regulation (EC) No 864/2007,[30] and that the concepts of that regulation and those of Regulation No 1215/2012 are to be interpreted in a consistent manner.[31] More specifically, the Court held that an 'action for an injunction [preventing the use of unfair terms] under Directive [2009/22/EC]'[32] falls within the scope of 'civil and commercial matters'.

42. In that regard, according to Article 1(1) of Directive 2009/22, the purpose of that directive is to harmonise the national legislation of the Member States relating to actions for injunctions aimed at the protection of the collective interests of consumers included in the directives listed in Annex I. It is apparent from that provision that an action for an injunction in respect of unfair commercial practices within the meaning of Directive 2005/29 is also within the scope of Directive 2009/22.

43. Moreover, the fact that it was the public authorities which brought the main proceedings before the referring court is irrelevant. First, under Article 3 of Directive 2009/22, read in conjunction with Article 2 of that directive, actions for injunctions may be brought before the courts or administrative authorities which a Member State has designated for that purpose by 'qualified entities', which are, first, one or more independent public bodies, in Member States where such bodies exist and/or, second, organisations whose purpose is to protect the collective interests of consumers. Actions for injunctions brought by such entities may pursue the same objective, namely the cessation of certain practices in the collective interest of consumers. Within that legal framework, an independent public body may thus perform, vis-à-vis businesses, the same role as consumer protection organisations, whose actions fall within the scope of 'civil and commercial matters'.

44. Next, Article 11(1)(a) of Directive 2005/29 requires Member States to ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of that directive in the interest of consumers. Those means must include legal provisions under which persons or organisations regarded under national law as having a legitimate interest in combating unfair commercial practices, including competitors, may, first, take legal action against such unfair commercial practices, and/or, second, bring such unfair commercial practices before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings. The EU legislature thus envisages one model for the implementation of consumer protection, amongst others, in which administrative authorities are not competent to hear actions against unfair commercial practices. Those authorities must instead bring proceedings before national courts in defence of consumer interests, which puts them on the same footing as the other persons or organisations referred to in Article 11(1) of Directive 2005/29.

45. Finally, it is also the case outside the context of consumer protection that the legislation of the Member States sometimes empowers public authorities to bring proceedings before national courts in the absence of any interest of their own, in defence of a general, collective or even individual interest — particularly in matters concerning a person governed by private law who would be

27 Judgment of 1 October 2002 (C-167/00, EU:C:2002:555).

28 Council Directive of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

29 See judgment of 1 October 2002 (C-167/00, EU:C:2002:555, paragraph 29).

30 Regulation of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ 2007 L 199, p. 40).

31 See judgment of 28 July 2016, *Verein für Konsumenteninformation* (C-191/15, EU:C:2016:612, paragraph 39).

32 Directive of the European Parliament and the Council of 23 April 2009 on injunctions for the protection of consumers' interests (OJ 2009 L 110, p. 30).

regarded as being in a position of weakness in the context of such proceedings.[33] To treat such a situation as being outside the scope of Regulation No 1215/2012 would reduce the role of the public authorities in cross-border situations, despite the fact that it is difficult to distinguish such proceedings from proceedings brought by persons governed by private law.

46. Thus, in the light of what can be learned from the Court's case-law on 'civil and commercial matters', a public authority or consumer protection association which brings an action for an injunction is in a position comparable to that of any interested party. It is of course exempted from the obligation to demonstrate that it is acting in its own interest. However, that exemption does not mean that it enjoys a prerogative under which it has powers altering the civil or commercial nature of its legal relationship with the private law entities, or the subject matter of the proceedings in which a cessation action is brought.[34] Similarly, it has no such powers as regards the procedural framework within which the proceedings arising out of those relationships are heard, which is identical whatever the status of the parties to the proceedings may be.[35]

4. Preliminary conclusion

47. To summarise this part of my analysis, I consider that the fact that an action is brought in the general interest or the interest of others does not automatically exclude it from the scope of Regulation No 1215/2012.[36] Equally, an action is not automatically excluded from the scope of that regulation simply because a power has been exercised which was conferred directly by legislative act.[37] It is irrelevant, furthermore, that a public authority's ability to bring proceedings is not conditional on it having an interest of its own. In order for proceedings to be excluded from the scope of Regulation No 1215/2012, such powers must be special powers that go beyond those arising from the rules of general law applicable to relations between private individuals.[38] As is apparent from my analysis, at least in relation to actions concerning unfair commercial practices, the exercise of powers which relate to aspects other than the interest pursued by a public authority in bringing proceedings, *locus standi* and admissibility of the action brought does not, in principle, constitute the exercise of special powers of that kind. Accordingly, subject to the matters to be verified in relation to powers of investigation and enforcement, to which I will return below, there is nothing to indicate that the main proceedings relate to special powers.

C. Powers of investigation

48. In the judgment in *Sunico and Others*,[39] the Court ruled on the effect of the exercise of powers of investigation on the classification of disputes as civil and commercial matters. Accordingly, that judgment will inform the examination of an argument which has been advanced by one of the defendants, to the effect that the Belgian authorities are able to use their own written findings and declarations as evidence, and the crucial documents in the file are therefore a series of reports and written findings produced by civil servants. It is submitted that the Belgian authorities also produce documentary evidence in the form of consumer complaints, to which they have access via their own website/email address, in their capacity as 'authorities'.

33 In my own legal system (the Polish system) this is the case where a prosecutor intervenes in civil proceedings.

34 There is undoubtedly argument as to whether the Belgian authorities possess powers of investigation and enforcement which can be regarded as special powers (see Sections C and D of this Opinion). However, even if the authorities do possess such powers, it is not because they are exempted from the obligation to demonstrate that, in bringing a cessation action, they are defending an interest or right of their own.

35 See, by analogy, judgment of 11 April 2013, *Sapir and Others* (C-645/11, EU:C:2013:228, paragraph 36).

36 See point 29 of this Opinion.

37 See point 35 of this Opinion.

38 See point 46 of this Opinion.

39 Judgment of 12 September 2013 (C-49/12, EU:C:2013:545).

1. The judgment in Sunico and Others

49. In the case which gave rise to the judgment in *Sunico and Others*,[40] a public authority of one Member State requested information on the defendants from the authorities of another Member State, in accordance with Regulation No 1798/2003/EC,[41] before bringing proceedings before a national court seeking damages in respect of loss caused by value added tax fraud. In that context, the question arose of whether the request for information affected the nature of the legal relationship between the parties to the dispute, so as to take it outside the scope of 'civil and commercial matters'.[42]

50. In her Opinion in that case,[43] Advocate General Kokott indicated that it was not clear from the information before the Court whether or to what extent the request for information was also relevant for the main proceedings. The Advocate General pointed out, however, that a request for information is an instrument that is not available to a private applicant. Thus, if it were admissible in national procedural law for the public authority to use that information and evidence obtained in the exercise of its powers in the relevant proceedings, the public authority would not vis-á-vis the defendants, be in the same position as a private person.

51. The Court affirmed, in the judgment in *Sunico and Others*,[44] that it was not apparent from the documents in the file before the Court that in the main proceedings, the public authority had used evidence obtained in the exercise of its powers as a public authority. The Court held that it was for the referring court to 'ascertain whether that was the case and, *if appropriate*, whether the [public authority was] in the same position as a person governed by private law in [its] action against [the defendants in the main proceedings]'.[45]

52. Although in that judgment, reference is made to the specific point of the Advocate General's Opinion, it has been suggested by academic commentators that the Court took a less categorical approach than she had proposed.[46]

53. I also understand that judgment as holding that, in order to exclude proceedings from the scope of 'civil and commercial matters', it is not sufficient to identify national provisions which, *in abstracto*, authorise a public authority to gather evidence through the use of its public powers and to use such evidence in legal proceedings. Equally, it is not sufficient to find that that evidence has in fact been used in the proceedings. In order to exclude the proceedings from the scope of that expression, it must also be determined, *in concreto*, whether, by virtue of having used that evidence, the public authority is not in the same position as a person governed by private law in analogous proceedings.

2. Application of the guidance in the judgment in Sunico and Others

54. It should be stated at the outset that the fact that the Belgian authorities have produced consumer complaints as evidence does not mean that they have put themselves in a position which differs from that of a person governed by private law in analogous proceedings. While a consumer protection association may be a private law body not exercising public powers, it can gather such complaints and use them in proceedings against businesses.

40 Judgment of 12 September 2013 (C-49/12, EU:C:2013:545).

41 Council Regulation of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92 (OJ 2003 L 264 p. 1).

42 See judgment of 12 September 2013, *Sunico and Others* (C-49/12, EU:C:2013:545, paragraph 42).

43 See Opinion of Advocate General Kokott in *Sunico and Others* (C-49/12, EU:C:2013:231, point 45).

44 Judgment of 12 September 2013 (C-49/12, EU:C:2013:545).

45 See judgment of 12 September 2013, *Sunico and Others* (C-49/12, EU:C:2013:545, paragraphs 42 and 43). My emphasis.

46 See, to that effect, De Troyer, I., '"De fiscus in burger": nieuwe wegen voor de inning van belastingen in het buitenland?', *Tijdschrift voor fiscaal recht*, 2015, vol. 481, p. 426, paragraph 10.

55. Uncertainty may nevertheless arise, in that context, from the fact that a public authority possesses powers of investigation, in the strict sense of that term, which enable it to obtain evidence in a similar manner to the police. I consider that the use of such powers involves the exercise of public powers. Proceedings against a public authority in which the victim seeks compensation for harm caused by the gathering of evidence would not, in principle, fall within the scope of Regulation No 1215/2012, because the alleged liability would relate to acts or omissions in the exercise of State authority.

56. Nonetheless, the fact that evidence gathered through the exercise of public powers is used in proceedings does not automatically affect the legal relationship between the parties to those proceedings, or the subject matter of those proceedings.

57. A person governed by private law can also use evidence which has been gathered by a public authority through the exercise of its public powers. For example, in proceedings against the person responsible for a road traffic accident, the person harmed by the accident can produce documents created by the police. If such documents are not available to that person, he can, in principle, ask a national court to require an authority to produce them for the purposes of the proceedings. Similarly, in competition law proceedings, a market operator may bring a 'follow-on' action and produce, in support of that action, a decision making a finding of infringement of that branch of law.[47] It is clear that such proceedings remain within the scope of 'civil and commercial matters' and of Regulation No 1215/2012.

58. The fact that special probative force may attach to a document which has been drawn up by a public authority in the exercise of its powers does not make this any less clear. The rules under which such force is given to certain types of evidence are equally applicable in proceedings between private persons.

59. Furthermore, to hold that proceedings brought by a public authority are outside the scope of Regulation No 1215/2012 where the authority has used evidence gathered by virtue of its public powers would undermine the practical effectiveness of one of the models of implementation of consumer protection envisaged by the EU legislature.[48] In that model, in contrast to the one in which it is the administrative authority itself that determines the consequences that are to follow from an infringement, an administrative authority is assigned the task of defending the interests of consumers before the national courts.

60. That being so, a public authority may have powers enabling it to use evidence which is not available to persons governed by private law. For example, national law may provide for evidence gathered by an authority to be confidential and for that authority to decide whether or not it is disclosed. Similarly, under national procedural law, different arrangements may apply where the same evidence is challenged by the other party to the proceedings, depending on whether it has been produced by a public authority or a person governed by private law.

61. In my opinion, these situations correspond to the one envisaged in the judgment in *Sunico and Others*,[49] in which the fact that a public authority has used certain evidence means that it is not in the same position as a person governed by private law in analogous proceedings. However, there is nothing to indicate that the main proceedings involve a situation which could take those proceedings outside the scope of the regulation.

47 See, for an illustration of this situation, judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraph 10).

48 See point 44 of this Opinion.

49 Judgment of 12 September 2013 (C-49/12, EU:C:2013:545).

62. For the sake of completeness, I would add that it is important not to lose sight of the fact that the situation envisaged in *Sunico and Others*[50] was one in which proceedings falling, a priori, within the scope of 'civil and commercial matters' are taken out of the scope of that expression by reason of one of the parties to those proceedings having made use of certain evidence. I take the view that in the majority of cases, the fact that certain evidence is only available to a public authority is due to the relationship between that authority and an individual being, *ab initio*, unlike a relationship between individuals.

D. Enforcement powers

63. Under their fourth head of claim, the Belgian authorities asked the referring court to impose a penalty payment in a fixed amount in respect of every infringement found to occur after service of the judgment handed down at the conclusion of the main proceedings. Under their fifth head of claim, they sought a ruling permitting the fact of such infringement to be certified simply by means of a report drawn up by an official on oath. This last head of claim implies, according to one of the defendants, that the Belgian authorities also possess enforcement powers which are not available to ordinary parties to civil and commercial matters.

64. Neither the referring court nor the parties have suggested, in contrast, that the head of claim relating to penalty payments in respect of future infringements might take the main proceedings, and the decision handed down at the conclusion of those proceedings, outside the scope of Regulation No 1215/2012. However, the head of claim relating to penalty payments is connected to the head of claim seeking permission for the fact of future infringement to be certified by an official report. I will first consider whether proceedings seeking the imposition of such penalty payments are within the scope of the regulation.

1. Penalty payments in respect of future infringements

65. It is apparent from the judgment in *Realchemie Nederland*[51] that whether a judicial decision imposing a penalty payment for breach of a prohibition in another judicial decision falls within the scope of Regulation No 1215/2012 is determined not by that measure's own nature, but by the nature of the rights that it serves to protect. Following the same reasoning in the judgment in *Bohez*,[52] the Court held that, by reason of the nature of the rights which a penalty payment serves to protect, the enforcement of a penalty payment imposed in a decision concerning rights of custody and access, with a view to ensuring that the parent with custody had due regard for those rights of access, fell outside the scope of 'civil and commercial matters' for the purposes of the predecessor of Regulation No 1215/2012. Under that judgment, such enforcement would fall within the scope of Regulation (EC) No 2201/2003,[53] however.

50 Judgment of 12 September 2013 (C-49/12, EU:C:2013:545).

51 See judgment of 18 October 2011 (C-406/09, EU:C:2011:668, paragraphs 40 to 42 and 44).

52 See judgment of 9 September 2015 (C-4/14, EU:C:2015:563, paragraphs 33, 37 and 39).

53 Council Regulation 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 2003 L 338, p. 1).

66. It is true that the line of case-law to which those judgments belong was developed principally in the context of references for preliminary rulings relating to protective [54] or interim [55] measures which were either covered by a separate decision which the applicant was seeking to enforce, [56] or sought in separate interim proceedings. [57] In contrast, the present reference for a preliminary ruling does not state in express terms that a protective or interim measure is sought in the main proceedings.

67. However, in that context, the judgment in *Bohez* [58] must be distinguished; it related to the enforcement of a penalty payment imposed by a court of the Member State of origin, which had given a substantive judgment concerning rights of access, in order to ensure that those rights were effective. The penalty payment was in a fixed sum payable in respect of every day of the child's non-appearance.

68. It does seem to me that the Belgian authorities are making a similar claim in the main proceedings. The referring court does not give any further information concerning the head of claim relating to the penalty payment. As for the Belgian Government, it explains that it would only apply to infringements which had been defined by the national court at the conclusion of the main proceedings. It is also apparent from the wording of the relevant head of claim that the penalty payment is intended to secure the effectiveness of the judicial decision which is sought by the Belgian authorities, to the extent that that decision relates to the cessation of unfair market and/or commercial practices.

69. Furthermore, in Chapter XXIII of the Belgian Judicial Code, which is headed 'Penalty payments', Article 1385*bis* provides that on the application of one of the parties, the court may order the other party to pay a sum of money, known as a penalty payment, if the principal obligation laid down in the judgment has not been performed, without prejudice to damages, where appropriate. Under Article 1385*ter* of that code, the court may (amongst other things) set the penalty payment in a fixed amount per infringement. Although the referring court does not state whether the Belgian authorities' claim is based on that provision, the order they are seeking seems to correspond perfectly to its terms. That being so, the judgment in *Bohez*, [59] which concerned a penalty payment imposed on the basis of Article 1385*bis* of the Belgian Judicial Code, is of even greater relevance to this reference for a preliminary ruling.

70. It may be argued, in the light of the line of case-law including the judgment in *Bohez*, [60] that if proceedings in which the authorities seek a finding that unfair market and/or commercial practices have taken place, together with an order for the cessation of such practices, fall within the scope of 'civil and commercial matters', this must remain the case if and when the court is asked to impose a penalty payment so as to ensure compliance with the judicial decision which is handed down at the conclusion of those proceedings.

71. It is certainly important not to lose sight of the possibility, mentioned in point 22 of this Opinion, of proceedings falling outside the scope of Regulation No 1215/2012 by reason of the basis on which the action is brought or the detailed rules applicable to it. However, it is apparent from Article 1385 *bis* of the Belgian Judicial Code that the penalty payment which the Belgian authorities ask the

54 See judgment of 27 March 1979, *de Cavel* (C-143/78, EU:C:1979:83, paragraph 2), cited by the Court in the judgment of 18 October 2011, *Realchemie Nederland* (C-406/09, EU:C:2011:668).

55 See judgment of 17 November 1998, *Van Uden* (C-391/95, EU:C:1998:543, paragraph 33), cited by the Court in the judgment of 18 October 2011, *Realchemie Nederland* (C-406/09, EU:C:2011:668).

56 See judgments of 27 March 1979, *de Cavel* (C-143/78, EU:C:1979:83, paragraph 2), and of 18 October 2011, *Realchemie Nederland* (C-406/09, EU:C:2011:668, paragraph 35).

57 See judgment of 17 November 1998, *Van Uden* (C-391/95, EU:C:1998:543, paragraph 33).

58 See, also, judgment of 9 September 2015, *Bohez* (C-4/14, EU:C:2015:563, paragraph 49).

59 Judgment of 9 September 2015 (C-4/14, EU:C:2015:563). As regards that provision of the Belgian judicial code, see also my Opinion in *Bohez* (C-4/14, EU:C:2015:233, point 42 and the academic commentary cited).

60 Judgment of 9 September 2015 (C-4/14, EU:C:2015:563).

referring court to impose is a normal measure of civil procedure which is equally available to private individuals. Accordingly, neither the fact of seeking the imposition of such a penalty payment nor the fact of seeking enforcement of the judicial decision imposing it constitutes the exercise of public powers.

72. In the light of the foregoing, an action in which public authorities seek the imposition of a penalty payment in a fixed amount, payable in respect of every infringement found to occur after service of the judicial decision, falls within the scope of 'civil and commercial matters' where, first, the purpose of the penalty payment is to ensure the effectiveness of the judicial decision given in the proceedings, which fall within the scope of that expression, and secondly, the penalty payment is a normal measure of civil procedure which is also available to private individuals, or which is imposed without exercising special powers that go beyond those arising from the rules of general law applicable to relationships between private individuals. [61]

2. Certification of the fact of infringement by an administrative authority

73. The referring court does not give detailed information as to where doubt arises in relation to the fifth head of claim, by which permission is sought for the fact of future infringement to be certified simply by an official report drawn up by an official on oath. Consequently, in order to provide the referring court with a useful answer, I will make some general observations in relation to that head of claim, on the basis of the observations of the parties.

74. The purpose of the Belgian authorities' fifth head of claim seems to be to enable the authorities themselves to certify that infringements punishable by the penalty payment have taken place, without needing to use the services of a bailiff or other means for that purpose. Similarly, the Belgian Government stated at the hearing that if the national court were to dismiss the fifth head of claim, the Belgian authorities would have to use the services of a bailiff in order to have the fact of infringement certified. Likewise, the defendants maintain that, unlike a Belgian authority, a person governed by private law would need to use the services of a bailiff, for example, and in certain circumstances would be required to prove the infringements before the court hearing the matter.

75. I reiterate that in the judgment in *Henkel*, [62] the Court held that an action for an injunction brought by a consumer protection association fell within the scope of 'civil and commercial matters' on the ground that the court hearing such an action is invited to review relationships governed by private law. However, it is apparent from the observations made by the parties and referred to in the foregoing points of this Opinion that, by their fifth head of claim, the Belgian authorities ask to be empowered to certify the fact of future infringements. This head of claim, seeking as it does, essentially, to subject legal relationships involving the defendants to review by the Belgian authorities, accordingly involves the exercise of public powers.

76. Furthermore, under Article XV.2 of the CEL, reports drawn up by officials are binding unless and until the contrary is proved. A document drawn up by a private person would not enjoy such probative force. Thus, while it seems that the reports would be used in connection with enforcement proceedings, drawing them up is better seen as a matter of gathering evidence. As I stated in point 55

61 While neither the referring court nor the parties have expressed any doubt in relation to measures of publicity, I observe for the sake of completeness that, similarly, these are not excluded from the scope of Regulation No 1215/2012. Provision is made for such measures in Article 14(1)(2) of the Law of 30 July 2013, inter alia, and they appear to be a normal measure of civil procedure which is available to private individuals. Proceedings in which such measures are sought thus do not in any way concern the exercise of powers derogating from the rules applicable to relationships between private individuals. Furthermore, while these measures are not the same as penalty payments, they are intended to ensure the effectiveness of a judicial decision finding that unfair commercial practices have taken place. In that regard, Article 11(2) of Directive 2005/29 provides that, with a view to eliminating the continuing effects of unfair commercial practices the cessation of which has been ordered by a final decision, Member States may confer powers to require the publication of that decision or of a corrective statement. There is nothing to indicate that such measures are to be limited to public authorities.

62 See judgment of 1 October 2002 (C-167/00, EU:C:2002:555, paragraph 30).

of this Opinion, the exercise of evidence-gathering powers, involving the use of special powers that go beyond those arising from the rules applicable to relationships between private persons, amounts to the exercise of public powers. The same is true where, inter alia, a public authority exercises a power by which it seeks to substitute itself for a bailiff, and establish that infringements have taken place by means of a document which it has drawn up. Proceedings in which the grant of such a power is sought relate to special powers that go beyond those arising from the ordinary rules applicable to relationships between private individuals, and consequently cannot be said, given their subject matter, to fall within the scope of 'civil and commercial matters'.

77. It is not inconceivable that the grant of such a power would reinforce the effectiveness of a judicial decision given at the conclusion of proceedings falling within the scope of 'civil and commercial matters'. Nonetheless, the fifth head of claim does not relate to a protective or to an interim measure or to a measure that is to be analysed as ordering a party to the proceedings to pay a fine [63] or penalty payment [64] which might or might not fall within the scope of Regulation No 1215/2012, depending on the nature of the rights which that charge or that measure serves to protect.

E. Final considerations

78. It is apparent from my analysis that, first, the particular features of the interest of a public authority in bringing an action are not such as to take proceedings such as those before the referring court outside the material scope of Regulation No 1215/2012. [65] Secondly, the fact that such an authority has powers of investigation which are not available to persons governed by private law, and that it makes use of evidence gathered by virtue of those powers, equally does not take such proceedings automatically outside the scope *ratione materiae* of Regulation No 1215/2012. [66] Thirdly, such proceedings fall outside the scope of that regulation in so far as they relate to an action in which the public authorities ask to be granted special powers that go beyond those arising from the rules applicable to relationships between private individuals, here the power to certify that infringements have occurred. [67]

79. I must also make clear that while the main proceedings do not fall within the scope of Regulation No 1215/2012 as regards the fifth head of claim, that does not mean that they fall outside the scope of that regulation as regards the other heads of claim. [68]

V. Conclusion

80. In the light of the foregoing considerations, I propose that the Court should give the following reply to the question referred for a preliminary ruling by the hof van beroep te Antwerpen (Court of Appeal of Antwerp, Belgium):

Article 1(1) of 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 must be interpreted as meaning that proceedings relating to an action brought by

63 See judgment of 18 October 2011, *Realchemie Nederland* (C-406/09, EU:C:2011:668, paragraph 44).

64 See judgment of 9 September 2015, *Bohez* (C-4/14, EU:C:2015:563, paragraph 35).

65 See point 47 of this Opinion.

66 See points 60 to 61 of this Opinion.

67 See points 75 and 77 of this Opinion.

68 It can be seen from the judgment of 21 April 1993, *Sonntag* (C-172/91, EU:C:1993:144, paragraphs 6, 14 to 16 and 21) that Regulation No 1215/2012 also applies to decisions given in civil matters by a criminal court, containing criminal and civil provisions. In such a case, only the civil provisions fall within the scope of the regulation. Furthermore, on my reading of the judgment of 27 February 1997, *van den Boogaard* (C-220/95, EU:C:1997:91, paragraph 21) it is equally possible for only certain aspects of a decision given by a civil court to fall within the scope of that regulation. In principle, the same must apply where only certain aspects of the proceedings fall within the scope of 'civil and commercial matters'.

the public authorities of a Member State against persons governed by private law established in another Member State, in which a declaration is sought that infringements constituting unfair commercial practices have taken place, together with an order for the cessation of those practices, an order for measures of publicity at the expense of the defendants, and an order for penalty payments to be made in a fixed amount in respect of every future infringement, fall within the scope of 'civil and commercial matters' within the meaning of that provision.

On the other hand, such proceedings do not fall within the scope of that expression in so far as they relate to an action in which the public authorities seek the grant of special powers that go beyond those arising from the rules applicable in relationships between private individuals.