Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 2 April 2020[1]

Case C-186/19

Supreme Site Services GmbH,
Supreme Fuels GmbH & Co KG,
Supreme Fuels Trading Fze
v
Supreme Headquarters Allied Powers Europe

(Request for a preliminary ruling
from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands))

(Reference for a preliminary ruling — Judicial cooperation in civil matters — Jurisdiction and the enforcement of judgments in civil and commercial matters — Regulation (EU) No 1215/2012 — Scope — Article 1(1) — Concept of 'civil and commercial matters' — Provisional, including protective, measures — Proceedings to lift an interim garnishee order — Action brought by an international organisation — Acts and omissions in the exercise of State authority — Definition — Substantive proceedings seeking recognition of the existence of a contractual claim — Supply of fuel as part of a peacekeeping mission — Immunity from execution enjoyed by that international organisation)

I. Introduction

1. This request for a preliminary ruling, from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), concerns the interpretation of Article 1(1) and Article 24(5) of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[2]

2. The request was made in the course of an application for the adoption of interim measures brought by Supreme Headquarters Allied Powers Europe ('SHAPE'), an international organisation, to lift an interim garnishee order levied on an escrow account by Supreme Site Services GmbH, Supreme Fuels GmbH & Co KG and Supreme Fuels Trading Fze, three companies established in Switzerland, Germany and the United Arab Emirates respectively (together, 'Supreme'), and the prohibition on Supreme levying new orders on the same grounds. The interim garnishee order was authorised following an application, also brought before the court hearing the application for interim measures, by Supreme, pending the settlement of a contractual dispute with SHAPE concerning the payment for fuel supplied for the purposes of a peacekeeping operation led by the North Atlantic Treaty Organisation (NATO) in Afghanistan.

1 Original language: French.

2 Regulation of the European Parliament and of the Council of 12 December 2012 (OJ 2012 L 351, p. 1).

3. In that context, the national court has referred a number of questions to the Court. In particular, by its questions, that court seeks to ascertain whether, having regard to the fact that the escrow account on which the interim garnishee order was levied was opened with a bank in Belgium, the Belgian courts have exclusive jurisdiction, under Article 24(5)[3] of Regulation No 1215/2012, to decide on whether that order is lifted.

4. That question involves determining, first, whether an action for interim measures such as that at issue in the main proceedings falls within the scope of 'civil and commercial matters' and, accordingly, the scope *ratione materiae* of Regulation No 1215/2012, as defined in Article 1(1). The referring court's doubts in that regard stem from the fact that, in support of its action for interim measures, SHAPE has relied on immunity from execution under international law.

5. As requested by the Court, this Opinion will focus on the question referred by the national court which concerns the interpretation of Article 1(1) of Regulation No 1215/2012.

6. At the end of my analysis, I will propose that the Court hold that the question as to whether an action for interim measures such as that at issue in the main proceedings, which seeks to lift an interim garnishee order, falls within the scope of 'civil and commercial matters' within the meaning of Article 1(1) of that regulation depends on the nature of the right that that garnishee order sought to safeguard and whether that right arises from an exercise of public powers or a legal relationship characterised by an exercise of public powers, which must be ascertained by the referring court, in the light of the exclusion relating to 'acts and omissions in the exercise of State authority' laid down in that provision.

7. In particular, I shall explain why, in my view, the fact that an international organisation has relied on immunity which it claims to have under international law is not decisive for the purposes of that analysis and cannot prevent the national court from assuming international jurisdiction under Regulation No 1215/2012.

II. Legal framework

A. Regulation No 1215/2012

8. Recital 10 of Regulation No 1215/2012 states:

'The scope of this Regulation should cover all the main civil and commercial matters apart from certain well-defined matters …'

9. Article 1(1) of that regulation provides:

'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*).'

3 As a reminder, Article 24(5) of Regulation No 1215/2012 provides, in essence, that, in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment is to be enforced are to have jurisdiction, regardless of the domicile of the parties.

B. Netherlands law

10. Article 700 of the Nederlandse Wetboek van Burgerlijke Rechtsvordering (Netherlands Code of Civil Procedure; 'the Code of Civil Procedure') provides:

'1. A garnishee order shall require the authorisation of the judge responsible for hearing applications for interim measures of the court in whose jurisdiction one or more of the goods affected are located and, if the order does not relate to goods, the court where the debtor or the person or one of the persons against whom the order is levied is domiciled.

…'

11. Under Article 705(1) of the Code of Civil Procedure:

'The court hearing the application for interim measures which authorised the order may, in interim proceedings, annul the order at the request of any interested party, subject to the jurisdiction of the ordinary court.'

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

12. SHAPE is an international organisation established by the Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty, signed in Paris on 28 August 1952 ('the Paris Protocol').[4] A regional headquarters, the Allied Joint Force Command Brunssum ('JFCB'), which is under the authority of SHAPE, was established in Brunssum (Netherlands).

13. On the basis of two Basic Ordering Agreements ('BOA'), Supreme supplied fuel to SHAPE for the purposes of the NATO International Security Assistance Force ('ISAF') mission in Afghanistan.

14. In November 2013, JFCB and Supreme signed an escrow agreement which provided for the opening of an escrow account with a bank in Belgium to cover the claims for compensation or the other adjustments which may be payable to Supreme by NATO-approved customers.

15. At the end of 2015, Supreme brought proceedings against SHAPE and JFCB before the rechtbank Limburg (District Court, Limburg, Netherlands) requesting that various amounts be taken out of the funds deposited in the escrow account ('the substantive proceedings'). Supreme substantiated its request by claiming that it had supplied fuel to SHAPE on the basis of BOAs for the purposes of the ISAF mission in Afghanistan and that SHAPE and JFCB had not fulfilled their payment obligations.

16. SHAPE and JFCB raised an incidental objection of lack of jurisdiction, invoking that, as international organisations, they enjoyed immunity from jurisdiction under international law. By decision of 8 February 2017, the rechtbank Limburg (District Court, Limburg) held that it had jurisdiction to hear the claims brought by Supreme. On 4 May 2017, SHAPE lodged an appeal against that decision.

17. Two sets of proceedings have subsequently been brought before the rechtbank Limburg (District Court, Limburg) alongside the substantive proceedings, first by Supreme and then by SHAPE.

4 Text available at the following address: https://www.nato.int/cps/en/natolive/official_texts_17300.htm.

18. In the first place, as requested by Supreme, by decision of 14 April 2016, the judge responsible for hearing applications for interim measures at the rechtbank Limburg (District Court, Limburg) authorised Supreme, on the basis of Article 700 of the Code of Civil Procedure, to levy an interim garnishee order on the funds deposited in the escrow account. The interim garnishee order was made on 18 April 2016.

19. In the second place, on 17 March 2017, SHAPE brought an action for interim measures before the same court in order to lift the interim garnishee order levied on the escrow account and to prohibit Supreme from levying such orders again on the same grounds. In support of its action, SHAPE relied on immunity from execution under Article XI(2) of the Paris Protocol, which states, in essence, that no measure of execution can be taken against an Allied Headquarters set up pursuant to the North Atlantic Treaty.

20. By decision of 12 June 2017, the rechtbank Limburg (District Court, Limburg) upheld SHAPE's claims.

21. That decision was confirmed on 27 June 2017 by the Gerechtshof 's-Hertogenbosch (Court of Appeal, 's-Hertogenbosch, Netherlands).

22. On 21 August 2017, Supreme brought an appeal against that judgment before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), which raised of its own motion the question of whether the Netherlands courts had international jurisdiction under Regulation No 1215/2012 to hear the action for interim measures brought by SHAPE.

23. In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer, inter alia, the following questions to the Court for a preliminary ruling:

'(1) (a) Must Regulation [No 1215/2012] be interpreted as meaning that a matter such as that at issue in the present case, in which an international organisation brings an action to

(i) lift an interim garnishee order levied in another Member State by the opposing party, and

(ii) prohibit the opposing party from levying, on the same grounds, an interim garnishee order in the future

and bases those claims on immunity from execution, must be wholly or partially considered to be a civil or commercial matter as referred to in Article 1(1) of [that regulation]?

(b) In answering question 1(a), what significance, if any, should be attached to the fact that the court of a Member State has granted leave to attach for a claim which the opposing party alleges to have against the international organisation, a claim in respect of which substantive proceedings are pending in that Member State, relating to a contractual dispute over the payment for fuels supplied for a peace operation carried out by an international organisation connected to the international organisation concerned?'

(2) (a) If question 1(a) is answered in the affirmative, must Article 24(5) of the Regulation No 1215/2012 be interpreted as meaning that, in a case in which the court of a Member State has granted leave to levy an interim garnishee order and that garnishee order has subsequently been levied in another Member State, the courts of the Member State where the interim garnishee order was levied have exclusive jurisdiction to hear a claim for the lifting of that garnishee order?

(b) In answering question 2(a), what significance, if any, should be attached to the fact that the international organisation has based its action to lift the interim garnishee order on immunity from execution?

(3) If, in answering the question of whether a civil or commercial matter as referred to in Article 1(1) of Regulation No 1215/2012 is at issue, or alternatively, the question of whether a claim falling within the scope of Article 24(5) of Regulation No 1215/2012 is at issue, significance is attached to the fact that the international organisation has based its claims on immunity from execution, to what extent is the court seised of the matter obliged to assess whether the reliance on immunity from execution is effective, and in that regard does the rule apply that it must assess all the evidence available to it, including, in the present case, the objections raised by the respondent, or any other rule?'

24. Supreme, SHAPE, the Netherlands, Belgian, Greek, Italian and Austrian Governments and the European Commission submitted written observations before the Court.

25. Supreme, SHAPE, the Netherlands, Belgian, Greek and Austrian Governments and the Commission attended the hearing held on 12 December 2019.

IV. Analysis

A. Preliminary remarks

26. By its first question, which is divided into two parts, the referring court seeks to ascertain whether an action for interim measures, such as that brought by SHAPE, falls within the scope of 'civil and commercial matters' within the meaning of Article 1(1) of Regulation No 1215/2012 and, accordingly, the scope *ratione materiae* of that regulation.

27. More specifically, that court asks, in essence, if the question of whether an action of that kind falls within the scope *ratione materiae* of Regulation No 1215/2012 depends on whether the substantive proceedings themselves fall within that scope *ratione materiae* (Question 1(b)). In addition, it seeks to clarify whether, where an international organisation relies on immunity from execution which it has under international law, that immunity automatically prevents its action from falling within the scope *ratione materiae* of that regulation or must, at least, mean that it falls under the exclusion relating to 'acts and omissions in the exercise of State authority', within the meaning of Article 1(1) of that regulation (Question 1(a)).

28. Before analysing those issues in turn, I shall first make a few brief remarks with regard to the admissibility of the present request for a preliminary ruling.

B. Admissibility of the request for a preliminary ruling

29. In its written observations, SHAPE submits that the present request for a preliminary ruling and, more specifically, the first and second questions raised by the referring court, are inadmissible in so far as they concern its action to lift the interim garnishee order levied by Supreme on the escrow account. Those questions have, in part, become hypothetical since the Belgian courts have already authorised the enforcement of the decisions of the rechtbank Limburg (District Court, Limburg) of 12 June 2017 and the Gerechtshof 's-Hertogenbosch (Court of Appeal, 's-Hertogenbosch) of 27 June

2017, in accordance with a convention between Belgium and the Netherlands,[5] and the interim garnishee order levied by Supreme on the escrow account has already been the subject of an order to lift it.

30. In that regard, I must clarify that, in accordance with the settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the ruling sought by that court on the interpretation or validity of EU law bears no relation to the actual facts of the main action or its purpose, or where the problem is hypothetical.[6]

31. In my view, that is not the situation in the present case. In that regard, I would simply note that, in the context of the application for the adoption of interim measures brought before it, in the appeal in cassation the referring court must rule on the two abovementioned decisions, the enforcement of which has led to the interim garnishee order levied by Supreme on the escrow account being the subject of an order to lift it. In that context, the question as to whether the Netherlands courts have international jurisdiction under Regulation No 1215/2012 to decide on whether that order is lifted is to me neither hypothetical nor is it obviously unrelated to the actual facts of the main action or its purpose.

32. That said, the question also arises as to whether the request for a preliminary ruling should also be regarded as inadmissible since the main proceedings are devoid of purpose following the judgment of the Gerechtshof 's-Hertogenbosch (Court of Appeal, 's-Hertogenbosch) of 10 December 2019, as the parties pointed out at the hearing.

33. I should point out that, in that judgment, that court confirmed that the rechtbank Limburg (District Court, Limburg) had jurisdiction, in the context of the substantive proceedings, while finding that, in so far as the immunity from jurisdiction invoked by SHAPE and JFCB concerned the performance of their official duties, that immunity had to be regarded as absolute. Aside from the fact that the interim garnishee order levied on the escrow account has already been the subject of an order to lift it, it is therefore questionable whether the Netherlands courts are still able to authorise new levying orders on the escrow account in the future.

34. In that regard, it is true that the Court itself has sometimes held, in certain cases, that the dispute before the national court had become devoid of purpose and has considered the questions referred to it for a preliminary ruling to be inadmissible on that ground.[7]

35. However, in the present case, it is clear from the information provided by the parties at the hearing that the judgment of 10 December 2019 of the Gerechtshof 's-Hertogenbosch (Court of Appeal, 's-Hertogenbosch) is the subject of appeal proceedings pending before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands). Since, in its action for interim measures, SHAPE expressly requested that the Netherlands courts prohibit Supreme from levying new garnishee orders on the escrow account, I doubt that, until that court has answered conclusively the question as to whether SHAPE is entitled to rely on its immunity from jurisdiction in the substantive proceedings and whether that immunity, in itself, precludes the authorisation of new orders on the escrow account, the dispute in the main proceedings could be regarded as having become devoid of purpose.

5 Convention on jurisdiction, bankruptcy, and the validity and enforcement of judgments, arbitration awards and authentic instruments, signed at Brussels on 28 March 1925 (Stb. 1929, 405).

6 See, to that effect, judgments of 22 May 2008, *citiworks* (C-439/06, EU:C:2008:298, paragraph 32) and of 27 June 2018, *Altiner and Ravn* (C-230/17, EU:C:2018:497, paragraph 22 and the case-law cited).

7 See, to that effect, judgments of 12 March 1998, *Djabali* (C-314/96, EU:C:1998:104, paragraphs 20 and 21), and of 20 January 2005, *García Blanco* (C-225/02, EU:C:2005:34, paragraphs 29 to 31).

36. In those conditions, the present request for a preliminary ruling, in my opinion, must be declared admissible.

C. The impact of the substantive proceedings (Question 1(b))

37. By Question 1(b), the referring court asks, in essence, whether, in order to determine whether an action for interim measures, such as that brought by SHAPE, is covered by 'civil and commercial matters' and, accordingly, falls within the scope *ratione materiae* of Regulation No 1215/2012, it must take into consideration whether the substantive proceedings themselves fall within the scope *ratione materiae* of that regulation.

38. I would point out that, according to the information provided by the referring court, the interim garnishee order that SHAPE has requested be lifted in its action for interim measures was levied in respect of a claim that Supreme alleges to have against SHAPE in connection with the contractual dispute in the main proceedings.

39. In that regard, the Court has stated that the expression 'provisional, including protective, measures' must be understood as referring to measures which are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case. [8]

40. There is little doubt in my mind that that definition covers an interim garnishee order such as that levied by Supreme in the circumstances of the main proceedings and any interim garnishee order for which it may request authorisation in the future, on the same grounds, from the Netherlands courts.

41. With that clarification, I consider that, since it seeks to lift the interim garnishee order levied by Supreme and to prohibit that party from levying additional orders on the same grounds, an action for interim measures such as that brought by SHAPE must be regarded as relating to 'provisional, including protective, measures'. [9]

42. As regards the method used to determine whether an action for interim measures such as that at issue in the main proceedings, which relates to 'provisional, including protective, measures', falls within the scope *ratione materiae* of Regulation No 1215/2012, I note that three different arguments were put forward at the hearing.

43. First, Supreme, supported on this point by the Greek Government, submitted, in essence, that the application of Regulation No 1215/2012 to an action for interim measures such as that brought by SHAPE depends on whether the substantive proceedings themselves fall within the scope of that regulation and, therefore, the features of such proceedings. [10]

8 See, to that effect, judgments of 26 March 1992, *Reichert and Kockler*, (C-261/90, EU:C:1992:149, paragraph 34), and of 28 April 2005, *St. Paul Dairy* (C-104/03, EU:C:2005:255, paragraph 13). I note that, as is apparent from the *travaux préparatoires*, the aim of Regulation No 1215/2012 was inter alia to clarify the conditions for the circulation of provisional and protective measures in the European Union (see also recital 33 of that regulation). However, there is nothing to indicate that the EU legislature intended to alter the definition of 'provisional and protective measures' given in the Court's case-law. In that connection, I note that, although recital 25 of that regulation sets out certain specific cases which must be covered by that concept, it does not provide a clear definition of it.

9 In that regard, I would point out that, under Article 705(1) of the Code of Civil Procedure, 'the court hearing the application for interim measures which authorised the order may, in interim proceedings, annul the order at the request of any interested party, subject to the jurisdiction of the ordinary court'. Therefore, it seems to me that proceedings such as those brought by SHAPE on the basis of that provision are not only in direct response to the proceedings which led to the authorisation to levy the interim garnishee order being granted, but must also be regarded as being inextricably linked to those proceedings. In my eyes, those two types of proceedings concern the same 'provisional and protective measure': one concerns the authorisation to levy the interim garnishee order, whereas the other seeks to lift that order and prohibit new orders from being levied on the same grounds.

10 For the sake of completeness, I would point out that, in its written observations, Supreme notes that Regulation No 1215/2012 applies to an action which relates to provisional and protective measures if the aim of those measures is to safeguard the rights that fall within its scope *ratione materiae*. According to Supreme, it follows that the decisive factor is whether the substantive proceedings themselves fall within the scope of 'civil and commercial matters', within the meaning of Article 1(1) of that regulation.

44. Secondly, SHAPE submitted that it cannot be determined whether an action which, like the action it has brought, relates to provisional, including protective, measures is civil or commercial in nature by the fact that the substantive proceedings are civil or commercial in nature: this must be assessed independently of those proceedings.

45. Thirdly, the Netherlands and Belgian Governments and the Commission took the view that, although the features and the classification of the substantive proceedings are not decisive, it must however be examined whether the rights that the interim garnishee order sought to safeguard in the context of the main proceedings fall within the scope of 'civil and commercial matters', within the meaning of Article 1(1) of Regulation No 1215/2012.

46. I agree with that third argument.

47. I note that, with regard to the interpretation of the legislation that preceded Regulation No 1215/2012 and, in particular, the Brussels Convention,[11] the Court has held that, as provisional or protective measures can serve to safeguard a variety of rights, their inclusion in the scope of the convention is determined not by their own nature but by the nature of the rights which they serve to protect and which are the subject of the substantive proceedings.[12]

48. Without moving away from that rule,[13] the Court has had occasion to specify that, contrary to the view taken by Supreme and the Greek Government, its purpose was not to link the treatment of a claim for provisional, including protective, measures to that of the substantive proceedings.[14]

49. In the judgment in *Cavel II*,[15] the Court therefore recalled that it held in the judgment in *Cavel I*[16] that an application in the course of divorce proceedings for placing assets under seal that was excluded from the scope of the Brussels Convention itself fell outside of that scope not on account of its ancillary nature, but because it appeared that, having regard to its true function, it concerned, in that case, rights in property arising out of the spouses' matrimonial relationship. It also took the view that a different provisional measure, that nevertheless was linked to the same substantive proceedings, could be treated differently, in so far as it sought to ensure the maintenance of the spouse in need and, therefore, fell under the subject of maintenance obligations, which, for its part, fell within the scope of that convention.[17]

11 Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36; 'the Brussels Convention'). In that regard, I would note that, according to the case-law, an interpretation given by the Court concerning the provisions of that convention also applies to the provisions 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) where the provisions may be treated as equivalent (see judgment of 18 October 2011, *Realchemie Nederland*, C-406/09, EU:C:2011:668, paragraph 38 and the case-law cited). That is the case with regard to Article 1(1) of that regulation and the first subparagraph of Article 1 of that convention. Likewise, Article 1(1) of that regulation and of Regulation No 1215/2012 may be regarded as equivalent (see judgment of 15 November 2018, *Kuhn*, C-308/17, EU:C:2018:911, paragraphs 31 and 32 and the case-law cited). Accordingly, in the remainder of this Opinion, all references will be to Regulation No 1215/2012 only, although I will cite the case-law relating to the instruments which preceded it.

12 See judgment of 27 March 1979, *de Cavel* (143/78, EU:C:1979:83, paragraph 8).

13 See, inter alia, judgments of 26 March 1992, *Reichert and Kockler* (C-261/90, EU:C:1992:149, paragraph 32); of 17 November 1998, *Van Uden* (C-391/95, EU:C:1998:543, paragraph 33); and of 18 October 2011, *Realchemie Nederland* (C-406/09, EU:C:2011:668, paragraph 40).

14 See judgment of 6 March 1980, *de Cavel* (120/79, EU:C:1980:70, paragraphs 8 and 9).

15 Judgment of 6 March 1980, *de Cavel* (120/79, EU:C:1980:70).

16 Judgment of 27 March 1979, *de Cavel* (143/78, EU:C:1979:83). I note that, under Article 1(2)(a) of Regulation No 1215/2012, that regulation does not apply inter alia to the status or legal capacity of natural persons and rights in property arising out of a matrimonial relationship.

17 See judgment of 6 March 1980, *de Cavel* (120/79, EU:C:1980:70, paragraphs 11 and 12).

50. The Court has also subsequently held that, where the subject matter of an application for provisional measures related to a question falling within the scope *ratione materiae* of the Brussels Convention, that convention was applicable even where proceedings had already been or may be commenced on the substance of the case and even where those proceedings had to be conducted before arbitrators and, on that basis, excluded from the scope of that convention. [18]

51. According to the general trend that can be seen in the light of that case-law, [19] it seems to me that the nature of the rights the recognition of which is sought in the substantive proceedings and which the provisional or protective measures requested seek to safeguard is decisive. In particular, it cannot be considered that every application for 'provisional, including protective, measures' must, depending on whether or not the substantive proceedings fall within the scope of Regulation No 1215/2012, automatically fall within or be excluded from that scope solely because it is ancillary in nature. [20] It must also be ascertained whether or not the subject matter of those measures, that is to say the rights that they seek to safeguard, constitutes 'civil and commercial matters' which fall within that scope.

52. I would add that that approach seems to me to be consistent with the case-law, in accordance with which Article 24 of the Brussels Convention (now Article 35 of Regulation No 1215/2012), which authorises a court of a Contracting Member State to rule on an application for a provisional, including protective, measure even though it does not have jurisdiction to hear the substance of the case, can be relied on to bring within the scope of that convention only those measures in areas which fall within its scope *ratione materiae*, as defined in Article 1 thereof. [21]

53. In the circumstances of the case in the main proceedings, since, in accordance with the information provided by the referring court, the interim garnishee order was authorised in respect of a claim that Supreme alleges to have against SHAPE in connection with the contractual dispute that is the subject of the substantive proceedings, I consider that the question as to whether an action for interim measures such as that brought by SHAPE, which seeks to lift an interim garnishee order, does or does not fall within the scope of Regulation No 1215/2012 must be determined in the light of the nature of the claim that that garnishee order sought to safeguard in the context of those proceedings.

D. The impact of international law on immunities (Question 1(a))

54. By Question 1(a), the referring court is asking the Court, in essence, to determine whether the fact that an international organisation relies on immunity from execution in support of its claims, in the context of an action for interim measures such as that at issue in the main proceedings, automatically precludes the application of Regulation No 1215/2012, or must, at least, mean that an action of that kind falls under the exclusion relating to 'acts and omissions in the exercise of State authority', within the meaning of Article 1(1) of that regulation.

18 Judgment of 17 November 1998, *Van Uden* (C-391/95, EU:C:1998:543). I should point out that, in his Opinion in that case (C-391/95, EU:C:1997:288, point 62), Advocate General Léger stated that the subject matter of the application for provisional measures to the court hearing the interim application was in no way that of arbitration and was, rather, a claim in a matter relating to a contract in the sense that 'the basis for [it was] the failure to comply with a contractual obligation'. Moreover, I note that, under Article 1(2)(d) of Regulation No 1215/2012, arbitration falls outside the scope *ratione materiae* of that regulation.

19 To my knowledge, the Court has not expressly departed from that general trend except in the judgment of 31 March 1982, *W.* (25/81, EU:C:1982:116, paragraph 8), in which it held that an application for provisional measures to secure the delivery up of a document in order to prevent the statements which it contained from being used as evidence in an action concerning the management of the wife's property by the husband also had to be considered to be connected with rights in property arising out of a matrimonial relationship within the meaning of the Brussels Convention because of its *ancillary nature*.

20 With regard to the more general question of whether the provisions of the Brussels Convention, in so far as its field of application is concerned, connect the treatment of ancillary claims to the treatment of principal claims, I note that, in his Opinion in *Cavel I* (*de Cavel*, 143/78, EU:C:1979:50), Advocate General Warner referred inter alia to Article 5(4) of that convention (now Article 7(3) of Regulation No 1215/2012), which was said to give a court seised of criminal proceedings jurisdiction to hear civil claims for damages or restitution based on the act giving rise to those proceedings, by stating that that was a case where that convention 'expressly applie[d] to an ancillary proceeding, although the main proceedings clearly fall outside its scope'.

21 See to that effect, judgment of 28 April 2005, *St. Paul Dairy* (C-104/03, EU:C:2005:255, paragraph 10 and the case-law cited).

55. Specifically, it seems to me that the issue with which the referring court is faced stems inter alia from the fact that, as is set out in Article 1(1) of Regulation No 1215/2012, the exclusion relating to 'acts and omissions in the exercise of State authority', is linked to the concept of '*acta iure imperii*', a concept which is also used in international law in respect of the principle of State immunity.

56. My analysis shall be conducted as follows. In the first place, I shall set out some general thoughts on the concept of '*acta iure imperii*' and the distinction between the immunity of States and the immunity of international organisations under international law. In the second place, I shall examine whether that distinction must mean that disputes involving international organisations automatically fall outside the scope of Regulation No 1215/2012. The answer to this will be no, but I will point out, in the third place, that the acts or omissions of international organisations may, in my opinion, fall within the scope of the exclusion relating to 'acts and omissions in the exercise of State authority' within the meaning of Article 1(1) of that regulation. Finally, I shall set out the criteria laid down in the case-law in order to draw the conclusion that an act or omission stems from the exercise of State authority, before explaining the reasons why I take the view that the fact that an international organisation relies on immunity from jurisdiction or from execution is not decisive for the purposes of assessing those criteria.

57. I would add, as a preliminary point, that, in its written observations, Supreme submits that the immunity from execution invoked by SHAPE in support of its action for interim measures is irrelevant. However, it does raise the question as to whether, since the applicability of Regulation No 1215/2012 to an action such as that brought by SHAPE depends on whether the substantive proceedings themselves fall within the scope *ratione materiae* of that regulation, the immunity from jurisdiction claimed in those proceedings is or is not able to prevent an action of that kind from being covered by 'civil and commercial matters', within the meaning of Article 1(1) of that regulation.

58. In that regard, I should note that the question as to the impact of international law on immunities on the scope *ratione materiae* of Regulation No 1215/2012 does not, in my view, require a different response depending on whether that international organisation relies on immunity from execution or from jurisdiction. I shall also endeavour to shed light on this in my analysis of that issue.

1. Review of the international law on immunities

59. In their written observations, the Netherlands, Belgian and Austrian Governments consider that the concept of '*acta iure imperii*', which allows a distinction to be made, in international law, between acts in the exercise of State authority and the private or commercial acts of a State (*acta iure gestionis*), is relevant only where State immunity is invoked. In particular, those governments consider that the immunity of international organisations applies to all of the acts they carry out, provided that they are closely linked to the objectives they pursue or necessary for the performance of their duties.

60. With regard to State immunity, I note that, in its judgment in *Mahamdia*,[22] the Court took the view that, in the present state of international law, immunity from jurisdiction, which seeks to prevent a State from being sued before the court of another State, is not absolute and may be excluded if the legal proceedings relate to acts performed *iure gestionis* which do not fall within the exercise of public powers.

22 See judgment of 19 July 2012 (C-154/11, EU:C:2012:491, paragraphs 54 and 55).

61. As Advocate General Szpunar rightly stated in his Opinion in *Rina*,[23] the Court has thus implicitly recognised the principle already enshrined in customary international law in accordance with which the States enjoy relative immunity from jurisdiction, based on a distinction made between acts performed *iure imperii* and acts performed *iure gestionis* where immunity from jurisdiction generally does not apply.

62. Furthermore, I note that the immunity of States from execution has also been qualified in legal literature and international law. Accordingly, whereas the property and assets of a State that are related to activities connected to State sovereignty are protected against any enforcement by the authorities of another State, the situation is different in respect of property and assets used or intended to be used for commercial purposes.[24]

63. With regard to the immunity of international organisations, the distinction between acts performed *iure imperii* and those performed *iure gestionis*, is, by contrast, only of limited relevance.[25]

64. As the Netherlands, Belgian and Austrian Governments rightly note, the immunities of international organisations follow a different logic from the immunities of States. Unlike States the immunities of which derive from the principle *par in parem non habet imperium*,[26] the immunities of international organisations are, as a general rule, conferred by the treaties establishing those organisations, multilateral agreements or bilateral agreements concluded between the Member States of the same organisation.[27] Those immunities are functional in nature, since their aim is to ensure that those organisations are able to perform the tasks for which they were established, completely independently.[28]

2. No need to automatically exclude disputes involving international organisations from the scope ratione materiae of Regulation No 1215/2012

65. In view of the fact that the immunities of international organisations differ from the immunities of States and are functional in nature — which means that, in theory, they may extend to all of the acts that those organisations carry out in the exercise of their duties — it is necessary to ask whether, as the Austrian Government submits, the involvement of an international organisation in a dispute should invariably lead to that dispute falling outside the scope of Regulation No 1215/2012.

23 See Opinion of Advocate General Szpunar in *Rina* (C-641/18, EU:C:2020:3, points 35 to 38). Judgment has not yet been delivered in that case. See also Lalive, J.-F., 'L'immunité de juridiction des États et des organisations internationales', R.C.A.D.I, vol. 84, 1953-III, p. 215.

24 See, inter alia, Fox, H., Webb, P., *The Law of State Immunity*, Oxford University Press, Oxford, 2013, p. 509 et seq.

25 See Fox, H., Webb, P., op. cit., p. 570 et seq. According to some authors, the distinction between acts performed '*iure imperii*' and those performed '*iure gestionis*' should be extended to international organisations. Nevertheless, the case-law of the national courts is not conclusive in that regard (see, inter alia, Gaillard, E., Pingel-Lenuzza, I., 'International organisations and immunity from jurisdiction: to restrict or to bypass', I.C.L.Q, vol (51)1, 2002, p. 9).

26 See judgment of 19 July 2012, *Mahamdia* (C-154/11, EU:C:2012:491, paragraph 54). According to that principle, no sovereign State can claim jurisdiction over another.

27 See Dominicé, C., 'L'immunité de juridiction et d'exécution des organisations internationales', R.C.A.D.I, vol. 187, 1984-IV, p. 163.

28 See El Sawah, S., 'Chapitre 3 — Les immunités des organisations internationales', *Les immunités des États et des organisations internationales*, Brussels, Éditions Larcier, 2011, pp. 210 and 211. See also Fox, H., Webb, P., op. cit., p. 571 et seq, and Blokker, N., 'International Organizations: the Untouchables?', *International Organizations Law Review*, vol. 10, 2013, p. 260. In that regard, I would note that the European Court of Human Rights has already had occasion to point out that 'the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations' (ECtHR, 18 February 1999, *Waite and Kennedy v. Germany*, CE:ECHR:1999:0218JUD002608394, § 63).

66. I must confess that I find it difficult to identify the principles or obligations under which disputes involving international organisations should, as that government proposes, be automatically excluded from the scope of Regulation No 1215/2012. In particular, the possibility of that regulation applying to such disputes does not appear to me to jeopardise the European Union's obligation laid down in Article 3(5) TEU to observe international law in its entirety when it adopts an act. [29]

67. As far as a dispute between an international organisation and private individuals is concerned, as is the case in the main proceedings, I consider that the mere fact that the national court assumes international jurisdiction on the ground that such a dispute falls within the scope *ratione materiae* of Regulation No 1215/2012 is not capable of adversely affecting the protection of immunity under international law invoked by the international organisation that is party to that dispute.

68. In order to ensure that *immunity from jurisdiction* is observed, the national court must, however, refuse to exercise the jurisdiction which it derives from that regulation where required by such immunity. [30] Moreover, at the end of its analysis of the dispute in the main proceedings or on a provisional basis, it must refuse to make the international organisation subject to enforcement measures where this is necessary, in the light of the *immunity from execution* which that organisation enjoys. [31]

69. On that point I would add that, as Supreme, the Netherlands Government and the Commission stated in their written observations and at the hearing, the question as to whether or not the immunity invoked by an international organisation must preclude the exercise of jurisdiction or the adoption of implementing measures against an organisation of that kind does not arise, in my view, at the stage of determining jurisdiction under Regulation No 1215/2012 and has an impact only after the court has assumed international jurisdiction. [32]

70. That question calls for the parameters of the international organisation's immunity from jurisdiction or from execution to be defined and the merits of the parties' claims in that regard to be assessed. Specifically, it requires determining whether the immunity claimed does exist. It is therefore different from the question as to whether the dispute falls under civil and commercial matters and within the scope *ratione materiae* of Regulation No 1215/2012, which must be answered first, without the national court having to consider the substance of the case. [33]

71. In the circumstances of the case in the main proceedings, it seems to me that, to address the concerns raised by the Austrian Government, the application of Regulation No 1215/2012 by itself would not therefore prevent inter alia the Netherlands courts, before which SHAPE's action for interim measures has been brought, from prohibiting the adoption of provisional or protective measures which may, in some circumstances, interfere with its immunity from execution.

29 See judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraph 101 and the case-law cited).

30 Incidentally, I would note that this is the approach taken by the Gerechtshof 's-Hertogenbosch (Court of Appeal, 's-Hertogenbosch) in its judgment of 10 December 2019, which concerned the substantive proceedings. First, that court found that the fact that SHAPE and JFCB had relied on immunity from jurisdiction was not sufficient to conclude that they had sought to challenge the jurisdiction of the Netherlands courts, including under Regulation No 1215/2012 (paragraph 6.5.3.4) Then, as has already been stated in point 33 of this Opinion, that court held that, in so far as that immunity was related to the performance of official duties, it had to be regarded as absolute (paragraph 6.7.9.1).

31 In his Opinion in *Mahamdia* (C-154/11, EU:C:2012:309, point 28), Advocate General Mengozzi pointed out that the purpose of immunity from execution is precisely to exclude the party concerned from any administrative or judicial constraint resulting from the application of a judgment.

32 See, by analogy, with regard to immunity from jurisdiction raised by the States, the Opinion of Advocate General Szpunar in *Rina* (C-641/18, EU:C:2020:3, point 42), in which he stated that the question of whether Regulation No 44/2001 may apply *ratione materiae* in a dispute in which immunity from jurisdiction is raised by a State must, a priori, be distinguished from the question of whether the jurisdiction derived from that regulation may be exercised with regard to that dispute or whether immunity prevents it.

33 See judgment of 28 January 2015, *Kolassa* (C-375/13, EU:C:2015:37, paragraph 61 and the case-law cited).

72. The foregoing considerations lead me to conclude that the immunity invoked by an international organisation under international law does not automatically preclude the application of Regulation No 1215/2012. In order to determine whether or not a dispute involving an international organisation falls within the scope *ratione materiae* of that regulation, it is, on the other hand, necessary to ascertain whether that dispute falls under one of the exclusions provided for in Article 1 thereof.

3. Can disputes involving international organisations fall within the scope of the exclusion relating to 'acts and omissions in the exercise of State authority'?

73. I note that, in accordance with Article 1(1) of Regulation No 1215/2012, the regulation is to apply in civil and commercial matters. However, it does not cover inter alia 'the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)'.

74. As the referring court observes, the question arises as to whether that exclusion applies solely to States or whether it may also cover acts or omissions of international organisations such as SHAPE.

75. In that regard, I consider it useful to point out that the concept of 'public powers', developed by the case-law of the Court, already covered, under the aegis of the Brussels Convention, situations where an international organisation acts in the exercise of its powers. [34]

76. I would also observe that, as was initially set out in the case-law, the concept of 'public powers' referred not only to the 'liability of the State', as is now the case for Article 1(1) of Regulation No 1215/2012, but more generally to situations where 'the public authority' is acting in the exercise of its public powers. [35]

77. In that regard, I note that the addition of the reference to 'the liability of the State for acts and omissions in the exercise of State authority' in Article 1(1) of that regulation, the only amendment made in that regulation to the wording of Article 1(1) of Regulation No 44/2001, was intended merely to clarify the concept of 'civil and commercial matters'. [36]

78. Moreover, the list in Article 1(1) of Regulation No 1215/2012 is preceded by 'in particular'. In my view, the reference to the 'liability of the State' in that provision may, therefore, be understood as a non-exhaustive illustration of the types of situations which may be characterised by the exercise of State authority. [37]

79. On that point, I should note that recital 10 of that regulation, which provides that the intention of the legislature was for the scope of that regulation to cover 'all the main civil and commercial matters apart from certain well-defined matters' would appear to me to refer to the exclusions laid down in Article 1(2) of that regulation, rather than the matters listed in Article 1(1), which, in any event, fall outside the scope of Regulation No 1215/2012 since they are not 'civil and commercial matters'.

34 See judgment of 14 October 1976, *LTU* (29/76, EU:C:1976:137), in which the Court excluded from the scope of the Brussels Convention a dispute concerning the recovery of charges payable by a person governed by private law to an international body governed by public law (namely the European Organisation for the Safety of Air Navigation, Eurocontrol).

35 See, inter alia, judgments of 14 October 1976, *LTU* (29/76, EU:C:1976:137, paragraph 4), and of 12 September 2013, *Sunico and Others* (C-49/12, EU:C:2013:545, paragraph 34 and the case-law cited).

36 See, to that effect, Rogerson, P., 'Article 1er', *Brussels I bis Regulation*, edited by U. Magnus, P. Mankowski, Otto Schmidt, Cologne, 2016, p. 63, point 13. In that regard, I should note that Article 1(1) of Regulation No 44/2001 provided solely that that regulation did not extend, in particular, to 'revenue, customs or administrative matters'. Therefore, until the entry into force of Regulation No 1215/2012, the exception relating to the exercise of State authority existed solely in the case-law of the Court.

37 For example, a State may delegate its powers of public authority to public or private entities.

80. In the light of those factors, I consider that the concept of 'State authority' contained in Article 1(1) of Regulation No 1215/2012 may cover the acts or omissions of international organisations. Where that is the case, such acts or omissions do not fall under 'civil and commercial matters' and are excluded from the scope *ratione materiae* of that regulation.

81. In the remainder of my analysis, I shall first set out the criteria identified by the case-law of the Court for the purposes of determining whether an act or omission was in the exercise of State authority. I shall then set out the reasons why I consider that the immunity invoked by an international organisation such as SHAPE is not decisive for the purposes of establishing whether the exclusion relating to 'acts and omissions in the exercise of State authority' applies.

4. The Court's case-law on the concept of 'acts and omissions in the exercise of State authority'

82. I note that, in accordance with the Court's settled case-law, the question as to whether an action is excluded from the scope of Regulation No 1215/2012 must be assessed on the basis of the elements which characterise the nature of the legal relationships between the parties to the dispute or the subject matter thereof. [38]

83. Thus, the Court has held that, although certain actions involving a public authority and a person governed by private law may come within the scope of Regulation No 1215/2012, this is not so where the public authority is acting in the exercise of its public powers. [39] The exercise of public powers by one of the parties to the case, because it exercises powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals, excludes such a case from civil and commercial matters within the meaning of Article 1(1) of that regulation. [40]

84. To determine whether that is the case, the Court has held that it is necessary to identify the legal relationship between the parties to the dispute and to examine the basis of and the detailed rules governing the bringing of the action. [41] In the light of that case-law, it would appear that those three criteria — 'legal relationship between the parties', 'basis of the action' and 'detailed rules governing the action' — should be examined cumulatively. However, some judgments make no reference to the criterion of the legal relationship between the parties to the dispute. [42] Moreover, in other judgments,

38 See, inter alia, judgments of 14 October 1976, *LTU* (29/76, EU:C:1976:137, paragraph 4), and of 14 November 2002, *Baten* (C-271/00, EU:C:2002:656, paragraph 29).

39 See, inter alia, judgments of 14 October 1976, *LTU* (29/76, EU:C:1976:137, paragraph 4), and of 11 April 2013, *Sapir and Others* (C-645/11, EU:C:2013:228, paragraph 33 and the case-law cited).

40 See, inter alia, judgments of 21 April 1993, *Sonntag* (C-172/91, EU:C:1993:144, paragraph 22), and of 28 February 2019, *Gradbeništvo Korana* (C-579/17, EU:C:2019:162, paragraph 49).

41 See, inter alia, judgments of 15 May 2003, *Préservatrice foncière TIARD* (C-266/01, EU:C:2003:282, paragraph 23 and the case-law cited), and of 28 February 2019, *Gradbeništvo Korana* (C-579/17, EU:C:2019:162, paragraph 48 and the case-law cited). I note that, in her Opinion in *flyLAL-Lithuanian Airlines* (C-302/13, EU:C:2014:2046, point 23), Advocate General Kokott stated that it is necessary 'to ascertain first of all the factors that shape the legal relationships between the parties to the main proceedings … and then — with a view to determining the subject matter of the dispute in the main proceedings … — the facts behind the claim in question, and also to examine the basis of the action brought and the detailed rules governing the bringing of it'. She therefore implied that the aim of the criterion relating to the basis of and the detailed rules governing the action is, quite simply, to clarify the elements that must be taken into account in order to determine 'the subject matter of the dispute'.

42 That is the case in the judgment of 14 November 2002, *Baten* (C-271/00, EU:C:2002:656, paragraph 37), in which the Court held that the action under a right of recourse whereby 'a public body seeks from a person governed by private law recovery of sums paid by it by way of social assistance … *provided that* the basis and the detailed rules relating to the bringing of that action are governed by the rules of the ordinary law' fell within the scope of 'civil and commercial matters' (emphasis added). I note that, in the judgment of 11 April 2013, *Sapir and Others* (C-645/11, EU:C:2013:228, paragraphs 34 to 38), the Court also did not make reference to the legal relationship between the parties to the dispute and solely examined the basis of and the detailed rules governing the bringing of the action.

the Court has dealt with the criteria relating to the legal basis of the action brought and the legal relationship between the parties as criteria which overlap.[43] Therefore, it seems to me that the Court does not draw a consistent distinction between 'the legal relationship between the parties', the 'basis of the action brought' and 'the subject matter of the dispute'.[44]

85. Beyond the details of the reasoning adopted by the Court in those judgments, it seems to me that, ultimately, the decisive factor is that the basis of the action is a right which arises from an exercise of public powers or a legal relationship characterised by an exercise of public powers.[45]

86. The Court has held that 'the fact that in recovering … costs the administering agent acts pursuant to a debt which *arises* from an act of public authority is sufficient for its action, *whatever the nature of the proceedings* afforded by national law for that purpose, to be treated as being outside the ambit of the Brussels Convention'.[46]

87. In my view, that case-law also highlights the fact that the criterion relating to the detailed rules governing the action is not relevant in all cases.[47]

88. Therefore, it seems to me that the fact that the action uses the classic forms of civil law cannot prevent it from being excluded from the scope of Regulation No 1215/2012 where it can be established, in the light of other factors, that the basis of the action is a right which arises from an exercise of public powers or a legal relationship characterised by an exercise of public powers.[48]

89. In that regard, I consider it necessary to emphasise that the criterion relating to the detailed rules governing the action was introduced by the judgment in *Baten*,[49] and was reproduced, inter alia, in the judgments in *Sapir*,[50] *Sunico*,[51] *Pula Parking*[52] and *Gradbeništvo Korana*,[53] in the specific context of disputes in which, in the light of other features, the basis of the action did not appear to be a right which arose from an exercise of public powers or a legal relationship characterised by an exercise of

43 See judgment of 12 September 2013, *Sunico and Others* (C-49/12, EU:C:2013:545, paragraphs 37 to 40), in which the Court first set out the factual and legal basis of the claim before finding that it followed inter alia from the information set out in that regard that the legal relationship between the parties was not a legal relationship involving the exercise of powers of a public authority. A similar approach appears to have been followed in the judgment of 9 March 2017, *Pula Parking* (C-551/15, EU:C:2017:193, paragraphs 35 to 38).

44 In that regard, I note that, even before the emergence of criteria regarding the basis of and the detailed rules governing the bringing of the action, the distinction between the 'subject matter of the dispute' and the 'legal relationship between the parties' was not always strictly drawn. Accordingly, in the judgment of 1 October 2002, *Henkel* (C-167/00, EU:C:2002:555, paragraph 30), the Court, in essence, combined those two criteria and held that the *subject matter* of the dispute was not an exercise of public powers since the action pending before the national court sought to make *relationships governed by private law* subject to review by the courts. By contrast, in the judgment of 28 July 2016, *Siemens Aktiengesellschaft Österreich* (C-102/15, EU:C:2016:607, paragraph 31), the Court emphasised that, in order to determine whether a matter fell within the scope of Regulation No 44/2001, 'the elements which characterise[d] the nature of the legal relationships between the parties to the dispute *or* the subject matter thereof' had to be examined, which would imply that the criteria relating to the legal relationship and the subject matter of the dispute should be applied cumulatively (emphasis added).

45 See, to that effect, Opinion of Advocate General Bot in *Kuhn* (C-308/17, EU:C:2018:528, point 61).

46 See judgment of 16 December 1980, *Rüffer* (814/79, EU:C:1980:291, paragraph 15). Emphasis added. In his Opinion in *Siemens Aktiengesellschaft Österreich* (C-102/15, EU:C:2016:225, point 38), Advocate General Wahl stated that the reasoning adopted in the judgment in *Rüffer* still rang true. In the judgment of 28 July 2016, *Siemens Aktiengesellschaft Österreich* (C-102/15, EU:C:2016:607, paragraph 40), the Court echoed that reasoning.

47 See judgments of 16 December 1980, *Rüffer* (814/79, EU:C:1980:291, paragraph 15), and of 15 February 2007, *Lechouritou and Others* (C-292/05, EU:C:2007:102, paragraph 41). In the latter judgment, the Court held that, in so far as the acts relied on that were at the origin of the loss had to be regarded as resulting from the exercise of public powers on the part of the State, the fact that the proceedings brought before the referring court were presented as being of a civil nature was entirely irrelevant.

48 See, to that effect, Opinion of Advocate General Bot in *Fahnenbrock and Others* (C-226/13, C-245/13, C-247/13 and C-578/13, EU:C:2014:2424, point 57).

49 Judgment of 14 November 2002 (C-271/00, EU:C:2002:656, paragraph 31).

50 Judgment of 11 April 2013 (C-645/11, EU:C:2013:228, paragraph 34).

51 Judgment of 12 September 2013 (C-49/12, EU:C:2013:545, paragraph 35).

52 Judgment of 9 March 2017 (C-551/15, EU:C:2017:193, paragraphs 35 to 37).

53 Judgment of 28 February 2019 (C-579/17, EU:C:2019:162, paragraphs 55 to 61).

public powers, in order to prevent situations where the body governed by public law would have the option to adopt a public law measure, which is enforceable in itself, and would therefore have powers which allow it to avoid the rules of ordinary law, nevertheless being included in the scope of Regulation No 1215/2012.

90. In the light of the foregoing, I conclude that, in general, in order to determine whether a dispute must be excluded from the scope of Regulation No 1215/2012 on the ground that it concerns 'acts and omissions in the exercise of State authority', it is necessary to examine whether the basis of the action is a right which arises from an exercise of public powers or a legal relationship characterised by an exercise of public powers. In that regard, an indicator could be the fact that the public authority has the power to adopt a public law measure, which is enforceable in itself, and therefore it is in a legal position which derogates from the rules of ordinary law regulating the detailed rules governing the bringing of the action. However, the fact that the action uses ordinary legal remedies is not decisive.

5. The impact of the immunity of international organisations on the concept of 'acts and omissions in the exercise of State authority'

91. At this stage of the analysis, I think it is useful to respond to the arguments put forward by the Greek Government and SHAPE in accordance with which the immunity from jurisdiction or from execution that international organisations enjoy is part of the privileges which derogate from the usual rules governing relations between persons governed by private law and undeniably places them in a dominant position vis-à-vis their contractual partners. In the view of those parties, a dispute such as that at issue in the main proceedings, in which an international organisation relies on its immunity from jurisdiction or from execution, thus falls under the exception in relation to 'the exercise of State authority'.

92. On that point I would reiterate that, as is clear from point 90 above, the question as to whether a public body is in a legal position which derogates from the rules of ordinary law regulating the detailed rules governing the bringing of the action depends on its ability to adopt a public law measure which is enforceable in itself. In other words, it is necessary to examine whether that body has powers which enable it to issue binding decisions in respect of individuals, outside of the normal legal channels.

93. Neither immunity from execution nor immunity from jurisdiction is intended to confer such powers. As I stated in point 68 of this Opinion, immunity from jurisdiction requires the national court only to refuse to exercise the jurisdiction which it derives from Regulation No 1215/2012 or other instruments. Figuratively speaking, the immunity acts as a 'shield' for the entity entitled to it, in order to prevent it from being sued, but does not confer on that entity any power to make decisions of its own. The same applies with regard to immunity from execution, which requires only that the court refuse to make the entity entitled to that immunity subject to enforcement measures.

94. Consequently, unless I am mistaken, just because one of the parties to the dispute relies on immunity from jurisdiction or from execution does not mean that the legal relationship between them is necessarily characterised by an exercise of public powers. In the circumstances of the case in the main proceedings, it cannot be inferred simply from the fact that SHAPE is relying on immunity from jurisdiction or from execution before the Netherlands courts that the contractual obligations between SHAPE and Supreme were not entered into freely and are characterised by the exercise of a unilateral decision-making power [54] or special powers. [55]

54 See judgments of 14 October 1976, *LTU* (29/76, EU:C:1976:137, paragraph 4), and of 15 February 2007, *Lechouritou and Others* (C-292/05, EU:C:2007:102, paragraph 37).

55 See judgment of 15 May 2003, *Préservatrice foncière TIARD* (C-266/01, EU:C:2003:282, paragraph 30).

95. Therefore, I do share the view taken by the Greek Government and SHAPE. I consider that the mere fact that an international organisation has relied on immunity does not mean that that organisation has powers that go beyond those existing under the rules applicable to relations between private individuals.

96. Moreover, even if the immunity raised by a State may indicate that that State has acted in the exercise of State authority,[56] that, in any event, is not the case where an international organisation relies on its immunity from jurisdiction or from execution. Since those immunities are not limited to *acta iure imperii*, they offer no assistance, in my opinion, with regard to the question as to whether or not that organisation has acted in the exercise of State authority.

E. Does an action such as that at issue in the main proceedings fall within the scope ratione materiae of Regulation No 1215/2012?

97. I would recall, first, that, as stated in point 90 of this Opinion, in order to determine whether a dispute must be excluded from the scope of Regulation No 1215/2012 on the ground that it concerns 'acts and omissions in the exercise of State authority', it is necessary to examine whether the basis of the action is a right which arises from an exercise of public powers or a legal relationship characterised by an exercise of public powers. Secondly, whether or not an action which relates to 'provisional, including protective, measures' falls within the scope of that regulation depends, as I stated in point 47 of this Opinion, on the nature of the rights that those measures seek to safeguard.

98. Together, in the circumstances of the case in the main proceedings, those two criteria mean that it must be determined whether the interim garnishee order which forms the subject matter of the action for interim measures brought by SHAPE sought to safeguard a right which arises from an exercise of public powers or a legal relationship characterised by an exercise of public powers.

99. In that regard, I would point out that the referring court itself has stated that that interim garnishee order sought to safeguard the contractual claim that Supreme alleges to derive from the BOAs concluded with SHAPE.

100. Unless it can be demonstrated that the contested contractual terms reflect the exercise of powers going beyond those existing under the rules applicable to relations between private individuals, which must be ascertained by the referring court, I take the view that that contractual relationship is not characterised by an exercise of public powers.

101. Supreme has itself acknowledged that the obligations between the parties were freely consented to. Moreover, it is common ground between the parties that BOAs are agreements that reflect the market conditions and they were concluded following a tendering procedure.

102. To me, those findings do not appear to be called into question by the fact that, under those agreements, Supreme supplied fuel to SHAPE for the purposes of a NATO-led military operation to maintain peace and security in Afghanistan.

56 In this regard, I refer to points 60 and 61 of this Opinion. I note that, according to some authors, the distinction drawn in customary international law between *acta iure imperii* and *acta iure gestionis* is far from obvious (see, inter alia, Yang, X., *State Immunity in International Law*, Cambridge Studies in International and Comparative Law, Cambridge University Press, 2012, p. 60). In his Opinion in *Mahamdia* (C-154/11, EU:C:2012:309, point 23), Advocate General Mengozzi also stated that no theory of State immunity from jurisdiction had really emerged and that national approaches were very varied, giving preference to 'sometimes … the nature of the functions performed, sometimes the purpose of those functions and sometimes the nature of the contract' or even considering those criteria cumulatively in order for immunity to be waived.

103. As the Commission rightly submits, how SHAPE subsequently used the fuel supplied has no bearing on the contractual legal relationship between the parties. That background enables the context in which that relationship has arisen to be understood, but does not in itself make it possible to establish whether it is characterised by the exercise of powers going beyond those existing under the rules applicable to relations between private individuals.

104. In the light of those factors, I consider that an action for interim measures such as that brought by SHAPE, which seeks to lift an interim garnishee order, must be regarded as falling within the scope of 'civil and commercial matters' within the meaning of Article 1(1) of Regulation No 1215/2012 to the extent that that garnishee order sought to safeguard a right which arises from a contractual legal relationship which is not characterised by an exercise of public powers, which must be ascertained by the referring court.

V. Conclusion

105. In the light of all the foregoing, I propose that the Court should answer the first question referred for a preliminary ruling by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) as follows:

(1) 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 the question as to whether an action for interim measures, which seeks to lift an interim garnishee order, falls within the scope of 'civil and commercial matters' within the meaning of that provision depends on the nature of the right that that garnishee order sought to safeguard and whether that right arises from an exercise of public powers or a legal relationship characterised by an exercise of public powers, which must be ascertained by the referring court, in the light of the exclusion relating to 'acts and omissions in the exercise of State authority' laid down in that provision.

(2) The fact that the international organisation has relied on immunity which it claims to have under international law is not decisive for the purposes of that analysis and cannot prevent the national court from assuming international jurisdiction under Regulation No 1215/2012.