



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
of 11 April 2013¹

Case C-49/12

The Commissioners for Her Majesty's Revenue & Customs
v
**Sunico ApS,
M & B Holding ApS
and
Sunil Kumar Harwani**

(Request for a preliminary ruling from the Østre Landsret, Denmark)

(Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters — Article 6 of the Agreement — Capacity of Danish courts to make references to the Court — Regulation (EC) No 44/2001 — Article 1(1) — Concept of civil and commercial matters — Action by an authority — Damages for involvement in tax evasion by a third party which is not itself a taxable person)

I – Introduction

1. This reference for a preliminary ruling focuses on the concept of ‘civil and commercial matters’ within the meaning of Article 1(1) of Regulation (EC) No 44/2001² (the ‘Brussels I Regulation’) and specifically the question whether an action brought by a State authority against private persons or private undertakings for damages arising from the involvement of those persons and undertakings in tax fraud is a ‘civil and commercial matter’. The context in which this question arises is whether a prospective judgment based on such an action in the United Kingdom is to be recognised in Denmark.

2. The case is characterised by the particularity that the Brussels I Regulation does not apply directly in Denmark³ but as an element of a parallel agreement concluded in international law between the European Union and Denmark.⁴ The reference for a preliminary ruling therefore (for the first time) submits this parallel agreement to the Court for interpretation, the principal question raised being that of the Danish courts’ capacity to refer.

¹ — Original language: German.

² — 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).

³ — See Article 1(3) of the regulation and Articles 1 and 2 of Protocol No 22 to the TFEU on the position of Denmark (OJ 2010 C 83, p. 299).

⁴ — Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 16 November 2005 (OJ 2005 L 299, p. 62) (‘the Parallel Agreement’). The Agreement entered into force on 1 July 2007 (OJ 2007 L 94, p. 70).

II – Legal framework

EU law

3. The particular element of EU law which this case concerns is the Parallel Agreement concluded with Denmark on the validity of the Brussels I Regulation,⁵ including the regulation itself as a constituent part thereof.

1. The Parallel Agreement

4. The aim of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters⁶ is, according to Article 1(1) thereof, ‘to apply the provisions of the Brussels I Regulation and its implementing measures to the relations between the Community and Denmark, in accordance with Article 2(1) of this Agreement’.

5. Article 2 relates to ‘Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters’ and reads as follows:

‘1. The provisions of the Brussels I Regulation, which is annexed to this Agreement and forms part thereof, together with its implementing measures adopted pursuant to Article 74(2) of the Regulation and, in respect of implementing measures adopted after the entry into force of this Agreement, implemented by Denmark as referred to in Article 4 of this Agreement, and the measures adopted pursuant to Article 74(1) of the Regulation, shall under international law apply to the relations between the Community and Denmark.

2. However, for the purposes of this Agreement, the application of the provisions of that Regulation shall be modified as follows:

(a) Article 1(3) shall not apply.

...’

6. Article 6 of the Agreement is headed ‘Jurisdiction of the Court of Justice of the European Communities in relation to the interpretation of the Agreement’ and provides:

‘1. Where a question on the validity or interpretation of this Agreement is raised in a case pending before a Danish court or tribunal, that court or tribunal shall request the Court of Justice to give a ruling thereon whenever under the same circumstances a court or tribunal of another Member State of the European Union would be required to do so in respect of the Brussels I Regulation and its implementing measures referred to in Article 2(1) of this Agreement.

...

6. If the provisions of the Treaty establishing the European Community regarding rulings by the Court of Justice are amended with consequences for rulings in respect of the Brussels I Regulation, Denmark may notify the Commission of its decision not to apply the amendments in respect of this Agreement. Notification shall be given at the time of the entry into force of the amendments or within 60 days thereafter.

5 — Cited in footnote 4.

6 — Cited in footnote 4.

In such a case this Agreement shall be considered terminated. Termination shall take effect three months after the notification.

...'

2. The Brussels I Regulation

7. According to recital 2 in the preamble to the Brussels I Regulation, its aim is 'to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation'.

8. Recitals 6 and 7 in the preamble to that regulation read as follows:

- '(6) In order to attain the objective of free movement of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a Community legal instrument which is binding and directly applicable.
- (7) The scope of this Regulation must cover all the main civil and commercial matters apart from certain well-defined matters.'

9. Recital 19 in the preamble to the regulation relates to the relationship to the Brussels Convention⁷ and reads:

'Continuity between the Brussels Convention and this Regulation should be ensured, and transitional provisions should be laid down to that end. The same need for continuity applies as regards the interpretation of the Brussels Convention by the Court of Justice of the European Communities ...'

10. Article 1 defines the scope of the regulation as follows:

'1. 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.

...

3. In this Regulation, the term "Member State" shall mean Member States with the exception of Denmark.'

Danish legislation

11. Paragraph 634 of the Lov om rettens pleje (Danish Code of Civil Procedure, 'the Code of Civil Procedure') provides inter alia as follows:

'(1) Within one week of the attachment, the creditor shall initiate proceedings on the claim in respect of which the attachment was effected, unless the debtor waives any challenge during or after the attachment procedure. During these proceedings, the creditor shall also lodge a specific claim for confirmation of the attachment.

⁷ — Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 27 September 1968 (OJ 1978 L 304, p. 32) ('the Brussels Convention').

...

(5) If a case relating to the claim in question is pending before a foreign court the ruling of which is expected to have binding effect in Denmark, proceedings brought under subparagraph 1 shall be stayed until a ruling having legal force has been given in the foreign case. However, the court may immediately rule on questions regarding the confirmation of an attachment order.’

III – Facts and the question referred for a preliminary ruling

12. The applicant in the action before the Østre Landsret⁸ (the referring court) is the Commissioners for her Majesty’s Revenue and Customs (‘HMRC’), the tax authority of the United Kingdom. Its action is directed inter alia against the companies Sunico ApS, Sunico Holdings ApS and M&B Holding ApS,⁹ which are established in Denmark, and against two private persons resident in Denmark.

13. The subject-matter of the proceedings is a claim for damages of GBP 40 391 100.01 by reason of the fact that the defendants allegedly took part in what, under English law, is a tortious conspiracy to defraud by withholding value added tax in the United Kingdom in 719 cases in which goods were sold through a transaction chain of companies in the United Kingdom, but the British companies omitted to pay to the applicant the value added tax collected on the sales.¹⁰

14. On 17 May 2010, HMRC accordingly brought proceedings for damages before the High Court of Justice (England & Wales) in regard to the loss it had incurred. The defendants in that action are the abovementioned parties,¹¹ none of which is liable for value added tax in the United Kingdom. HMRC has not brought any claim against the companies involved in the transaction chain which exported the goods out of the United Kingdom and obtained reimbursement of value added tax. The claim made rests on that part of the English law on damages in tort which relates to unlawful means conspiracy. The proceedings before the High Court of Justice were still pending when the reference for a preliminary ruling was lodged. It is common ground between the parties that the High Court of Justice has international jurisdiction to deal with the case.

15. Before commencing proceedings in Denmark, HMRC asked the Danish tax authorities for information on the defendants, which was provided to it under Council Regulation No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax.¹²

16. Subsequently, as security for the claim for damages it had brought, the applicant applied to the Fogedret i København¹³ for an attachment of the defendants’ assets. That attachment was granted on 18 May 2010 and, following an appeal by the defendants, was upheld by the Østre Landsret on 2 July 2010.

17. HMRC then duly, within one week, initiated proceedings on the claim before the Københavns Byret¹⁴ on 25 May 2010, pursuant to paragraph 634(1) of the Code of Civil Procedure and during those proceedings again applied for payment by the defendants of GBP 40 391 100,01. On 8 September 2010, the Københavns Byret referred the case to the Østre Landsret, which now has to rule on the claim for payment and the lawfulness of the attachment order.

8 — Eastern Regional Court.

9 — Formerly Sunico A/S, Sunico Holdings A/S and M&B Holding A/S.

10 — A detailed explanation of so-called carousel fraud may be found in the Opinion of Advocate General Poiares Maduro in Case C-354/03 *Optigen and Others* [2006] ECR I-483, point 7, to which the United Kingdom Government refers in its written observations.

11 — See point 12 of this Opinion.

12 — Council Regulation No 1798/2003 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).

13 — Bailiff’s Court, Copenhagen.

14 — District Court, Copenhagen.

18. Thus, when the reference for a preliminary ruling was lodged at the Registry of the Court, two sets of proceedings were dependent on the claim for damages: one before the High Court of Justice in the United Kingdom and one before the Østre Landsret in Denmark.

19. This situation is governed by paragraph 634(5) of the Code of Civil Procedure, which provides that, if a case relating to the claim in question is pending before a foreign court the ruling of which is expected to have binding effect in Denmark, proceedings pending under paragraph 634(1) (in the present case the proceedings before the Østre Landsret) are to be stayed.

20. The Østre Landsret therefore decided to rule first on the question whether the case pending before it should be stayed pending a final decision from the High Court of Justice on the claim under paragraph 634(5). That would be the case if the decision of the High Court of Justice could have binding effect in Denmark. This would be so if the proceedings in the United Kingdom fell within the scope of the Brussels I Regulation. Under the national law of Denmark, recognition of the judgment of the High Court of Justice does not appear to be possible.

21. The Østre Landsret therefore stayed the proceedings by order of 18 January 2012, received at the Court on 2 February 2012, and referred the following question to the Court for a preliminary ruling:

Must Article 1 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters be interpreted as meaning that its scope extends to cover a case in which the authorities of a Member State bring a claim for damages against undertakings and natural persons resident in another Member State on the basis of an allegation – made pursuant to the national law of the first Member State – of a tortious conspiracy to defraud consisting in involvement in the withholding of VAT due to the first Member State?

22. Sunico ApS, the British Government and the European Commission have submitted written and oral observations in the proceedings before the Court. The Government of the Swiss Confederation has participated only in the written procedure.

IV – Legal assessment

Capacity to refer

23. Since the Brussels I Regulation is applicable to Denmark only as part of a parallel agreement concluded in international law,¹⁵ there may be doubts as to the Østre Landsret's capacity to refer. As an agreement concluded by the Community, it is true that the Parallel Agreement forms an integral part of the Union's legal order and can therefore be the subject of a request for a preliminary ruling within the meaning of Article 267 TFEU.¹⁶ Because of Denmark's special position¹⁷ with regard to the area of freedom, security and justice, to which the judicial cooperation relevant in the present case belongs,¹⁸ in considering the Danish courts' capacity to refer questions relating to the Parallel Agreement for a preliminary ruling, account should, however, be taken of Article 6 thereof.

15 — See Article 2(1) of the Parallel Agreement, cited in footnote 4. Under it, the Brussels I Regulation forms part of the Agreement and under international law is to apply to the relations between the Community and Denmark. See also footnote 3.

16 — Case C-533/08 *TNT Express Nederland* [2010] ECR I-4107, paragraph 60 and the case-law cited.

17 — See also, in this regard, the preamble to the Parallel Agreement: 'Referring to the jurisdiction conferred to the Court of Justice of the European Communities ... to give rulings on preliminary questions relating to the validity and interpretation of acts of the institutions of the Community based on Title IV of the [EC] Treaty, including the validity and interpretation of this Agreement, and to the circumstance that this provision shall not be binding upon or applicable in Denmark, as results from the Protocol on the position of Denmark, ...'

18 — See Article 2 of Protocol No 22, cited in footnote 3, which refers to Part Three, Title V of the TFEU.

24. Article 6(1) of the Parallel Agreement provides that, where a question on the validity or interpretation of the Agreement is raised in a case pending before a Danish court or tribunal, that court or tribunal is to request the Court of Justice to give a ruling thereon ‘whenever under the same circumstances a court or tribunal of another Member State of the European Union would be required to do so in respect of the Brussels I Regulation ...’

25. Under Article 267(3) TFEU, only a court or tribunal of a Member State against whose decisions there is no judicial remedy is required to bring the matter before the Court. There is therefore in any case a duty to refer as regards questions relating to the interpretation of the Agreement¹⁹ and hence, naturally, also have a capacity to refer in the case of Danish courts giving a *final ruling at last instance*.

26. At the request of the Court, the Østre Landsret stated that it was ruling in the context of the confirmatory proceedings (*Justifikationssag*),²⁰ not at last instance. Rather, there was a possibility of an appeal before the Højesteret (Danish Supreme Court). In the present case, however, this reply does not advance the situation, since the categorisation of a court as one against whose decisions there is no judicial remedy is based on a case-specific approach.²¹ The crucial factor is not, therefore, whether the decision of the Østre Landsret in the context of the confirmatory proceedings, that is to say, the decision on the claim for damages itself, may be challenged. Rather, the relevant question is whether there may be a judicial remedy against the decision to stay the proceedings under paragraph 634(5) of the Code of Civil Procedure until a final judgment is given by the High Court of Justice.

27. Admittedly, it does not follow that every procedural measure which a court adopts as an order and which cannot be challenged makes that court one against whose decisions there is no judicial remedy for the purposes of Article 267 TFEU. Rather, that interim decision which is incapable of challenge must conclude an independent procedure or a particular stage of the proceedings and the question referred must concern precisely that procedure or stage of the proceedings.²² However, that is not the case here.

28. The decision to stay the proceedings concludes a particular stage of those proceedings. Moreover, the decision to stay may mean that no decision on the substance of the case will be given by the Østre Landsret in the context of the confirmatory proceedings. The decision to stay the proceedings is also dependent on the answer given by the Court to the question referred for a preliminary ruling. Finally, that interpretation also corresponds to the aim of the regulation, as it prevents there being divergent rulings from different Member States. The Østre Landsret’s decision to stay the proceedings should therefore be taken as a basis for assessing the capacity to rule at last instance.²³

29. It cannot be conclusively determined on the basis of the information available to the Court whether the Østre Landsret has ruled that the proceedings should be stayed by means of a decision that is not open to appeal and hence was ruling at last instance. In so far as it is possible to determine matters relating to Danish procedural law in this forum, it appears possible that there is a judicial remedy (*Kære*) before the Højesteret against the Østre Landsret’s decision to stay under paragraph 392(2) of the Code of Civil Procedure only if the appeal is allowed by the

19 — This follows from the use of the term ‘ebenfalls’ in the German version and from the wording of the English version ‘...that court or tribunal *shall request* the Court of Justice to give a ruling thereon whenever under the same circumstances a court or tribunal of another Member State of the European Union would be required to do so ...’ (emphasis added).

20 — This refers to the action under paragraph 634(1) of the Code of Civil Procedure, that is to say, the action in which the claim for damages is settled.

21 — See my Opinions in Case C-283/09 *Weryński* [2011] ECR I-601, point 15 et seq., and Case C-175/06 *Tedesco* [2007] ECR I-7929, point 21 et seq. and the case-law cited.

22 — See my Opinion in *Tedesco*, cited in footnote 21, point 26.

23 — See, again, my Opinion in *Weryński*, cited in footnote 21, point 15 et seq.

Processbevillingsnævnet (Appeals Permission Board). As regards the question of the capacity to rule at last instance in the present case, the crucial factor is whether the Appeals Permission Board itself can or cannot be regarded as a court or tribunal within the meaning of Article 267 TFEU.²⁴ It is not possible to make that assessment in the present case because there is insufficient information.

30. However, even if the Østre Landsret were not ruling at last instance, Article 6(1) of the Parallel Agreement would not preclude its capacity to refer, as follows from the background to the provision and the wording and aim of that agreement.

31. The background to Article 6(1) was the legal situation which existed when the Agreement entered into force.²⁵ As regards references for a preliminary ruling on questions of judicial cooperation in civil and criminal matters and on measures adopted under the Title in question, including the Brussels I Regulation, Article 68 EC contained a special rule on the competence of the Court. Under it, by way of derogation from Article 234 EC, only courts of last instance had the capacity to refer. In order to create the same conditions for references for a preliminary ruling on the interpretation of the Parallel Agreement as for references for a preliminary ruling from other Member States on the interpretation of the Brussels I Regulation, Article 6(1) and (3) of that agreement should confer jurisdiction on the Court to the same extent as the former Article 68 EC.²⁶ At that time, lower Danish courts did not therefore have the capacity to refer questions concerning the interpretation of the Parallel Agreement.

32. With the entry into force of the Lisbon Treaty, however, Article 68 EC was repealed without being replaced, so that lower courts now also have the capacity to refer questions concerning judicial cooperation in civil matters to the Court for a preliminary ruling. As rightly submitted by HMRC in the proceedings before the Østre Landsret and by the Commission in those before the Court, this change also applies to the Parallel Agreement.

33. In principle, the abolition of Article 68 EC does not automatically have an effect on the Parallel Agreement, as it is an international treaty that can be amended only by the contracting parties.²⁷ However, Article 6(6) of that agreement provides that, if the provisions of the Treaty establishing the European Community regarding rulings by the Court of Justice are amended with consequences for rulings in respect of the Brussels I Regulation, those amendments also apply to Denmark in so far as Denmark does not notify the Commission within 60 days of those amendments entering into force that it will not apply them.

34. Denmark has not notified the Commission to that effect.²⁸ Accordingly, the abolition of Article 68 EC also affects the Danish courts' capacity to refer and means that the extension of the capacity to refer to lower courts also applies to requests for a preliminary ruling from Danish courts on the interpretation of the Parallel Agreement.

35. It is true that, according to the wording of Article 6(1) of that agreement, it governs only the parallel nature of the duty of Danish courts and courts in other Member States to refer (see Article 6(1) *in fine* 'would be required'). According to its purpose and objective, the amendment clause in Article 6(6) must not, however, be interpreted so as to cover only changes relating to the

24 — See, in that regard, Case C-99/00 *Lyckeskog* [2002] ECR I-4839, paragraphs 16 and 17, in which the Court had to rule on the capacity to rule at last instance of a Swedish court whose judgments could also be challenged only after permission was granted to bring an appeal. The Court based its ruling on whether the body deciding on the admissibility of appeal was a court or tribunal within the meaning of Article 267 TFEU.

25 — The Agreement entered into force on 1 July 2007, see footnote 4.

26 — See the preamble to the Parallel Agreement: 'Considering that the Court of Justice of the European Communities should have jurisdiction under the same conditions to give preliminary rulings on questions concerning the validity and interpretation of this Agreement which are raised by a Danish court or tribunal, and that Danish courts and tribunals should therefore request preliminary rulings under the same conditions as courts and tribunals of other Member States in respect of the interpretation of the Brussels I Regulation and its implementing measures' and Jayme/Kohler, IPrax 2005, *Europäisches Kollisionsrecht* 2005, 485 et seq., 486.

27 — See also, as regards the termination of the Parallel Agreement, Article 11(2) thereof.

28 — Otherwise the Agreement would be terminated under the third sentence of Article 6(6) thereof.

duty to refer of the courts of other Member States, but must also be construed so as to include the extension of the capacity to refer to lower courts by the Lisbon Treaty. The Parallel Agreement thus seeks to confer jurisdiction on the Court to the same extent for Denmark as for the other Member States and ensure the uniform application and interpretation of the Brussels I Regulation in all Member States. This requirement of parallel application also follows from the preamble to the Parallel Agreement.²⁹

36. Until the entry into force of the Lisbon Treaty, this involved only the regulation of the Danish courts' duty to refer. At that time, there was no need for a rule on capacity to refer because the EC Treaty also did not provide for lower courts to have the capacity to refer. As the Commission has rightly stated, since the entry into force of the Lisbon Treaty, lower Danish courts have also therefore had the capacity to refer questions on the interpretation of the Parallel Agreement to the Court under the preliminary ruling procedure.

37. The reference from the Østre Landsret is therefore admissible.

The question referred

38. By the question referred, the Østre Landsret wishes to know whether the proceedings pending before the High Court of Justice are a civil and commercial matter within the meaning of Article 1(1) of the Brussels I Regulation and the regulation is therefore applicable in the present case as part of the Parallel Agreement.

39. That question is not without difficulty, because the proceedings concern a claim by a public authority against private persons or private companies for the payment of damages which the United Kingdom has incurred as a result of tax fraud. However, under the second sentence of Article 1(1) of the Brussels I Regulation, tax matters and disputes in public law expressly do not fall within its scope.

40. It is clear from the Court's settled case-law that 'civil and commercial matters' must be regarded as an independent concept within the Union to be interpreted by reference to the objectives and scheme of the Brussels I Regulation and to the general legal principles which stem from the corpus of the national legal systems.³⁰ This case-law related only in part to the interpretation of the Brussels Convention.³¹ Since, however, in relations between the Member States, the Brussels I Regulation replaces the Brussels Convention,³² an interpretation given by the Court concerning the provisions of that Convention also applies to the provisions of the Brussels I Regulation, where its provisions and those of the Brussels Convention may be treated as equivalent.³³ This is the case as regards Article 1(1) of the Brussels I Regulation, since the provision occupies the same place and fulfils the same function as Article 1(1) of the Brussels Convention. Moreover, the wording of those two provisions is identical.³⁴ Finally, it is clear from recital 19 in the preamble to the regulation that continuity in interpretation between the Brussels Convention and that regulation should be ensured.³⁵ Reference may therefore be made to the case-law of the Court on the Brussels Convention.

29 — See footnote 26.

30 — See Case 29/76 *LTU* [1976] ECR 1541, paragraph 3; Case 814/79 *Rüffer* [1980] ECR 3807, paragraph 7; Case C-172/91 *Sonntag* [1993] ECR I-1963, paragraph 18; Case C-271/00 *Baten* [2002] ECR I-10489, paragraph 28; Case C-266/01 *Préservatrice Foncière TIARD* [2003] ECR I-4867, 'TIARD', paragraph 20; Case C-433/01 *Blijdenstein* [2004] ECR I-981, paragraph 24; Case C-292/05 *Lechouritou and Others* [2007] ECR I-1519, paragraph 29; and Case C-420/07 *Apostolides* [2009] ECR I-3571, paragraph 41.

31 — Cited in footnote 7.

32 — See Article 68(1) of the Brussels I Regulation.

33 — Case C-167/08 *Draka NK Cables and Others* [2009] ECR I-3477, paragraph 20; Case C-111/08 *SCT Industri* [2009] ECR I-5655, paragraph 22; Case C-292/08 *German Graphics Graphische Maschinen* [2009] ECR I-8421, paragraph 27; and Case C-406/09 *Realchemie Nederland* [2011] ECR I-9773, paragraph 38.

34 — See, to that effect, in regard to Article 1(2)(b), *SCT Industri* cited in footnote 33, paragraph 23.

35 — See *Draka NK Cables and Others*, cited in footnote 33, paragraph 20; *SCT Industri*, cited in footnote 33, paragraph 22; *German Graphics Graphische Maschinen*, cited in footnote 33, paragraph 27; and *Realchemie Nederland*, cited in footnote 33, paragraph 38.

41. According to that case-law, judicial decisions may be excluded from the scope of the Brussels I Regulation owing either to the legal relationships between the parties to the action or to its subject-matter.³⁶ In order to establish whether proceedings relate to civil and commercial matters, it is therefore necessary to identify the legal relationship between the parties to the dispute and to examine the basis and the detailed rules governing the bringing of the action.³⁷ In the present case this means that the Brussels I Regulation is applicable, since both the legal relationship between the parties and the subject-matter of the dispute fall under civil law.

1. Nature of the legal relationship

42. It is true that a public authority is a party to the proceedings before the High Court of Justice, but this alone does not automatically preclude the application of the Brussels I Regulation. In principle, proceedings between a public authority and a private person may also fall within the scope of the regulation.³⁸ The crucial factor is rather whether, in the dispute in question, the public authority is acting in the exercise of its public powers;³⁹ that is not the case as regards the proceedings before the High Court of Justice.

43. First, the authority's action has not been brought against the tax debtor but a third party. Moreover, Sunico ApS and the other defendants are all established or resident in Denmark and are not liable for value added tax in the United Kingdom, so that there is no direct legal relationship in the exercise of public powers between them and HMRC.

44. The Commission and the United Kingdom further submit that, in the present legal dispute, HMRC is not exercising powers going beyond those existing under the rules applicable to relations between private individuals.⁴⁰ Rather, HMRC and the defendants are acting as two private persons. The same procedural rules apply as for anyone else, and the proceedings are governed by civil procedure. In particular, contrary to customary practice in the exercise of public powers and especially in tax law, HMRC cannot itself enforce and execute the claim but must pursue it through the general courts of law.

45. However, the fact that, before applying for the attachment order in Denmark, HMRC requested information on the defendants from the Danish authorities under Regulation No 1798/2003⁴¹ might give rise to difficulties. The request for information is an instrument that is not available to a private applicant. It is not, however, clear from the information before the Court whether or to what extent the request for information was also relevant for the proceedings before the High Court of Justice. In any case, if it were admissible in national procedural law for HMRC to use that information and evidence obtained in the exercise of its powers in the proceedings before the High Court of Justice, HMRC would not be acting against the defendants as a private person. Whether and to what extent that is the case must be determined by the referring court.

36 — See *LTU*, cited in footnote 30, paragraph 4; *Baten*, cited in footnote 30, paragraph 29; *TIARD*, cited in footnote 30, paragraph 21; *Lechouritou and Others*, cited in footnote 30, paragraph 30; *Apostolides*, cited in footnote 30, paragraph 42; and *Realchemie Nederland*, cited in footnote 33, paragraph 39.

37 — *Baten*, cited in footnote 30, paragraph 31; *TIARD*, cited in footnote 30, paragraph 23; and Case C-265/02 *Frahuil* [2004] ECR I-1543, paragraph 20.

38 — *LTU*, cited in footnote 30, paragraph 4; *Rüffer*, cited in footnote 30, paragraph 8; and *Baten*, cited in footnote 30, paragraph 30.

39 — *LTU*, cited in footnote 30, paragraph 4; *Rüffer*, cited in footnote 30, paragraph 8; *Baten*, cited in footnote 30, paragraph 30; *TIARD*, cited in footnote 30, paragraph 22; and *Lechouritou and Others*, cited in footnote 30, paragraph 31.

40 — See, to that effect, *LTU*, cited in footnote 30, paragraph 4; *Sonntag*, cited in footnote 30, paragraph 22; *TIARD*, cited in footnote 30, paragraph 30; *Lechouritou and Others*, cited in footnote 30, paragraph 34; and *Apostolides*, cited in footnote 30, paragraph 44.

41 — Cited in footnote 12.

2. Subject-matter of the dispute

46. The subject-matter of the dispute also does not bring it outside the scope of the Brussels I Regulation. In determining the subject-matter of the dispute, it is essential to have regard to the facts underlying the claim in question, as the Court has previously done in *Rüffer* and *Lechouritou and Others*.⁴² Only if the claim being enforced stems from the exercise of public powers is it *not* a civil and commercial matter.⁴³ However, not every connection with the exercise of public powers is sufficient. Rather, as is clear from the case-law of the Court,⁴⁴ the crucial factor is that the claim in question arises from an act in the exercise of public powers.

47. In *Rüffer*, the claim being enforced related to compensation for costs incurred in the exercise of public powers,⁴⁵ and in *Lechouritou and Others*, the damages arose directly from the exercise of public powers by a State.⁴⁶ In both cases, the Court refused to accept that a dispute in civil law existed, because the acts giving rise to the claims were characterised by the exercise of public powers.

48. The position is different in the present case, however. The underlying facts consist in the alleged fraudulent conduct of the defendants, giving rise to a tortious claim for damages by the State. The claim for damages in question does not accrue to the State in its capacity as an organ of sovereign power. On the contrary, it is based on an alleged infringement of a legally-protected right by the defendants and hence from an act whose victim can in principle be anyone, since suffering an infringement of a legally-protected right is precisely not a genuine sovereign act.

49. A connection with public powers might, however, arise from the fact that, behind the damages arising, there ultimately lies a tax claim and hence a sovereign relationship that is crucial to the amount of the claim being enforced. The claim for damages corresponds, in terms of its amount, to the value added tax lost. However, in assessing the question whether it is a civil and commercial matter, only the actual subject-matter of the dispute must be taken into account,⁴⁷ and not its background.

50. That applies all the more as, in the present case, the connection between the two claims is merely factual in nature and exists exclusively in relation to the amount of damages. In response to questions put at the hearing, the United Kingdom Government submitted that the tax claim against the taxable persons was not affected by any payment of damages by the defendants. Rather, the tax claim would continue to stand even in the event of payment and could be further enforced. It follows that the claim enforced does not serve to replace the amount of tax lost but rather has the aim of remedying an infringement of a legally-enforceable right.

42 — Both cited in footnote 30.

43 — *Rüffer*, cited in footnote 30, paragraph 15, and *Lechouritou and Others*, cited in footnote 30, paragraph 41.

44 — See *LTU*, cited in footnote 30, paragraph 4; *Rüffer*, cited in footnote 30, paragraph 15, and *Lechouritou and Others*, cited in footnote 30, paragraph 41.

45 — More specifically, the removal of a shipwreck in a public waterway.

46 — From the conduct of armed forces during a military intervention.

47 — See *TIARD*, cited in footnote 30, paragraph 42.

51. It is therefore not possible to speak of there being an accessory relationship between the tax claim and the claim for damages, as was the case in *TIARD*⁴⁸ as regards the relationship between a guarantee and a secured claim. However, even in that case, where there was a legal accessory relationship, the Court categorised the action against the guarantor as falling under civil law despite the fact that the main claim was of a public-law nature.⁴⁹ If, however, this applies even in cases where there is a legal accessory relationship between the claim enforced and a public-law claim, the same must apply *a fortiori* in a case such as the present one.

52. In the case of HMRC therefore the same rules apply as for private persons both as regards the legal basis for the claim and as regards the rules governing the bringing of the action.⁵⁰ For this reason, the proceedings before the High Court of Justice are not a dispute in connection with the exercise of public powers but a civil and commercial matter within the meaning of Article 1(1) of the Brussels I Regulation.

V – Conclusion

53. I therefore propose that the Court answer the question referred for a preliminary ruling as follows:

Article 1(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that its scope extends to cover a case in which the authorities of a Member State bring a general claim for damages (an act also open to private persons) against undertakings and natural persons resident in another Member State on the basis of an allegation – made pursuant to the national law of the first Member State – of a tortious conspiracy to defraud consisting in involvement in the withholding of value added tax due to the first Member State.

48 — Cited in footnote 30. That case involved a contract of guarantee in private law intended to guarantee the payment of a customs debt.

49 — See, again, *TIARD*, cited in footnote 30, paragraph 36. The fact that a guarantee is a commitment entered into voluntarily does not alter the assessment of the facts available. Rather, unlawful acts are also covered by the Brussels I Regulation, see, in particular, Article 5(3). The voluntary nature of a commitment and of the expression of free will are no determinative. The Court laid down this criterion in *TIARD* only in order to define the unilateral determination of the content of the contract by the Netherlands State, which would have constituted an act in the exercise of public powers.

50 — See *TIARD*, cited in footnote 30, paragraph 23.