Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 7 April 2016 [1]

Case C-102/15

Gazdasági Versenyhivatal
v
Siemens Aktiengesellschaft Österreich
(Request for a preliminary ruling

from the Fővárosi Ítélőtábla (Regional Court of Appeal, Budapest, Hungary))

(Judicial cooperation in civil matters — Regulation (EC) No 44/2001 — Article 1(1) — Scope — Concept of 'civil and commercial matters' — Article 5(3) — Jurisdiction to hear and determine matters relating to tort, delict or quasi-delict — Action for restitution on the ground of unjust enrichment)

1. The case under consideration turns upon the question whether claims in restitution on the ground of unjust enrichment come within the head of jurisdiction under Regulation (EC) No 44/2001 [2] relating to 'tort, delict or quasi-delict' (taken together: 'non-contractual liability').

2. Yet more importantly, it also provides the Court with an opportunity to clarify the scope of Regulation No 44/2001.

3. In this Opinion, I shall set out why an action such as the one in the main proceedings, which derives entirely from the imposition of a fine for breach of national competition rules, does not relate to 'civil and commercial matters' to which Regulation No 44/2001 applies. Rather, it concerns 'administrative matters' which, under Article 1(1) of that regulation, are excluded therefrom.

4. For reasons which are not obvious, the referring court has not put a question as to whether the action before it comes within the scope of the regulation. One possible explanation for this, as demonstrated at the hearing, might in fact be that, under Hungarian law, such types of action are clearly civil matters.

5. Moreover for the sake of completeness, I shall also explain why claims in restitution differ radically from claims in tort, delict or quasi-delict. This leads me to consider that Article 5(3) of Regulation No 44/2001, which confers special jurisdiction to hear and determine matters relating to tort, delict or quasi-delict, does not allow proceedings in respect of such claims to be brought in a Member State in which the defendant is not domiciled.

1 — Original language: English.

2 — Council Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

I – Legal framework

A – *Regulation No 44/2001*

6. Pursuant to Article 1(1) thereof ('Scope'), Regulation No 44/2001 applies '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.'

7. Article 2(1) of Regulation No 44/2001, which appears in Chapter II of Regulation No 44/2001 ('Jurisdiction') and, more specifically, Section 1 thereof ('General Provisions'), provides that 'subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State'.

8. Section II of Chapter II of Regulation No 44/2001 contains rules on 'special jurisdiction', including Article 5.

9. Under Article 5(1), a person domiciled in a Member State may, in another Member State, be sued 'in matters relating to a contract, in the courts for the place of performance of the obligation in question'.

10. Under Article 5(3) of Regulation No 44/2001, a person domiciled in a Member State may, in another Member State, be sued 'in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur'.

B – *Hungarian law*

11. Pursuant to Article 301(1) of the Hungarian Civil Code,[3] in the case of a pecuniary debt and unless otherwise provided, the debtor is to pay interest charged at the current base rate of the Hungarian central bank on the last day preceding the calendar half-year in which the delay occurs, even if the debt concerned does not bear interest. The obligation to pay interest is to arise even if the debtor justifies the delay.

12. Article 361(1) of the Civil Code provides that a person who obtains an economic advantage to which he is not legally entitled to the detriment of a third party is obliged to restore that advantage.

13. Under Article 83(5) of Act No LVII of 1996 on the prohibition of unfair market practices and the restriction of competition,[4] in the version applicable at the material time, if the decision of the Versenytanács (Competition Council; a body organically forming part of the Gazdasági Versenyhivatal (Hungarian Competition Authority; 'the Authority')) infringes a legal rule and if, as a result, a party is entitled to reimbursement of the fine, interest must be paid on the sum which has to be reimbursed at a rate equal to twice the current base rate of the central bank.

II – Facts, procedure and the question referred

14. Siemens Aktiengesellschaft Österreich ('Siemens'), which is domiciled in Austria, was the subject of a fine issued by the Authority in competition proceedings of HUF 159 000 000 ('the contested decision'). Siemens challenged the contested decision before the Hungarian administrative courts. As its action did not have suspensory effect, Siemens paid the fine.

3 — A Polgári Törvénykönvyről szóló 1959. évi IV. törvény.

4 — A tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról szóló 1996. évi LVII. Törvény ('Act No LVII of 1996').

15. The first-tier administrative court reduced the amount of the fine to HUF 27 300 000. That ruling was subsequently upheld by the second-tier administrative court.

16. On the basis of that second ruling, on 31 October 2008 the Authority repaid to Siemens HUF 131 700 000 as part of the sum of HUF 159 000 000 imposed as a fine and, under Article 83(5) of Act No LVII of 1996, also paid Siemens the sum of HUF 52 016 230 to cover interest.

17. The Authority brought a further appeal on a point of law to the Legfelsőbb Bíróság (Supreme Court, Hungary; now the Kúria) against the decision of the second-tier administrative court. That court held the imposition on Siemens of the fine of HUF 159 000 000 to be correct. Accordingly, on 25 November 2011 Siemens paid the remaining HUF 131 700 000 of the fine, but refused to repay the sum of HUF 52 016 230.

18. On 12 July 2013, relying on Article 361(1) of the Civil Code, the Authority brought an action against Siemens for restitution of that latter amount on the ground of unjust enrichment ('the claim at issue'), as well as interest for late repayment of that amount.

19. Moreover, the Authority claims payment, under Article 301(1) of the Civil Code, of HUF 29 183 277 as interest for late payment of the outstanding amount of the fine of HUF 131 700 000 covering the period between and including 2 November 2008 and 24 November 2011. In support thereof, the Authority argues that the contested decision was declared to be lawful and effective *ex tunc*, with the result that the remainder of the fine ought to have been in the Authority's possession on the first working day (2 November 2008) following the date when it was wrongly returned (31 October 2008).

20. The Authority considers that unjust enrichment is a matter relating to quasi-delict. Consequently, in its view, the special head of jurisdiction laid down in Article 5(3) of Regulation No 44/2001 grants the referring court the necessary jurisdiction in the main proceedings.

21. Objecting to that line of reasoning, Siemens argues that Article 5(3) of Regulation No 44/2001 is not applicable to this case since, under Hungarian law, the obligation to provide restitution for unjust enrichment is not based on unlawful conduct, but arises from the absence of legal entitlement to the economic advantage. As regards the Authority's claims for interest for late payment, Siemens argues that interest for late payment does not constitute compensation for harm since payment is not dependent on whether any harm has been caused.

22. On 12 June 2014, the Fővárosi Törvényszék (Municipal Court, Budapest, Hungary) decided to discontinue the proceedings, as it considered that unjust enrichment cannot be regarded as pertaining to non-contractual liability. In the view of that court, unjust enrichment is not a situation in which liability is engaged, nor is there any harm, only an economic loss and absence of legal entitlement.

23. The Authority brought an appeal against the decision of 12 June 2014 to the referring court, submitting that the Fővárosi Törvényszék (Municipal Court, Budapest) does have jurisdiction. The referring court now has to review the decision to discontinue the proceedings owing to lack of jurisdiction.

24. Entertaining doubts as to the correct interpretation of Article 5(3) of Regulation No 44/2001, the referring court decided on 2 March 2015 to stay the proceedings and to refer the following question for a preliminary ruling:

'Does the concept of a claim in matters relating to quasi-delict under Article 5(3) of [Regulation No 44/2001] cover a claim which has its origin in the reimbursement of a fine imposed in competition proceedings and paid by a party domiciled in another Member State — the reimbursement to whom was subsequently held to be unjustified —, which the competition authority makes against that party in order to obtain the return of interest which must legally be paid on reimbursement and which was paid by the authority concerned?'

25. Written submissions were lodged by Siemens, the Authority, the Hungarian, German and Italian Governments, and by the Commission. At the hearing held on 14 January 2016, oral argument was presented by all those parties except for the Italian Government.

III – Analysis

26. As mentioned, by its question the referring court essentially wishes to know whether a claim for reimbursement of a payment made to a party established in a different Member State, on the ground that the payment proved subsequently to be unjustified, is a matter which the courts of the Member State in which the claimant is established are entitled to hear under the rule on special jurisdiction set out in Article 5(3) of Regulation No 44/2001 relating to non-contractual liability.

27. However, as also mentioned, 'administrative matters' as used in Article 1(1) of Regulation No 44/2001 fall outside the scope of that regulation. In that light, before answering that question of substance, it is necessary to address whether the claim at issue, which derives from a fine imposed by a national competition authority in administrative proceedings for breach of domestic competition rules, comes within the scope of Regulation No 44/2001.

A – *Scope of Regulation No 44/2001*

1. Introductory remarks

28. From the outset, the subject matter of Regulation No 44/2001 is limited to 'civil and commercial matters'. Under consistent case-law, the concepts of 'civil and commercial matters' and, conversely, of 'administrative matters' are autonomous concepts of EU law. [5]

29. Accordingly, whether, under Hungarian law, the main action might be considered to be administrative or civil and commercial in nature has no bearing on the applicability of Regulation No 44/2001. Hence, neither the fact that the order for reference contains no question on the scope of Regulation No 44/2001, nor that all the parties participating in this preliminary ruling procedure agree that, pursuant to Hungarian law, the main action is a civil matter, have the effect of rendering the regulation applicable.

5 — See, to that effect, judgments in *LTU*, 29/76, EU:C:1976:137, paragraph 3, and *flyLAL-Lithuanian Airlines*, C-302/13, EU:C:2014:2319, paragraph 24.

30. In that connection, the fact that no question has been asked on the scope of Regulation No 44/2001 does not prevent the Court from addressing that issue. There are in fact several viable options open to the Court. *First*, the Court may decline jurisdiction where it is obvious that the provision of EU law referred to the Court for interpretation is incapable of applying.[6] *Second*, the Court may alternatively declare the matter to be inadmissible under Article 94(c) of the Rules of Procedure of the Court of Justice ('the RoP').[7] *Third*, the Court could instead perceive the inapplicability of Article 5(3) of Regulation No 44/2001 as relating not to the admissibility of the request for a preliminary ruling but instead to the substance thereof.[8]

31. For my part, I would point out that, should the Court agree with me that the subject matter of the main proceedings lies beyond the scope of Regulation No 44/2001, this would in any event have the effect of resolving the dispute in the main action. It would therefore *de facto* provide a substantive answer to the question referred. Moreover, the order for reference appears to satisfy the other formal requirements listed in Article 94(a) and (b) of the RoP. In that light, and taking due account of the spirit of cooperation which must prevail in the operation of the preliminary reference procedure — a cooperation which calls upon the Court to provide the referring court with a useful answer — I propose that the Court reformulate the question referred so as to address the issue of whether the main action comes within the scope of Regulation No 44/2001.

2. Consideration of the scope of Regulation No 44/2001

32. Containing no question to that effect, the order for reference is silent as to whether the claim at issue falls within the scope of Regulation No 44/2001. In spite of this, relying mainly on the judgment in *Sapir and Others*,[9] the Authority, the Hungarian Government and the Commission argue that the claim at issue does not constitute an 'administrative matter' (the Hungarian Government at length). At the oral hearing, Siemens rather remarkably echoed that point of view, as did the German Government.

33. I would call to mind that the scope of Regulation No 44/2001, being limited to 'civil and commercial matters', is defined essentially by the elements which characterise the nature of the legal relationships between the parties to the dispute or the subject matter thereof. Although certain actions between a public authority and a person governed by private law may come within the scope of that regulation, it is otherwise where the public authority is acting in the exercise of its public powers.[10] The decisive issue is whether the action is founded on provisions by which the legislature conferred on the public body a prerogative of its own.[11]

6 — See, to that effect, judgment in *Woningstichting Sint Servatius*, C-567/07, EU:C:2009:593, paragraphs 42 and 43, concerning a request for the interpretation of Article 86(2) EC. See also, by analogy, judgment in *Romeo*, C-313/12, EU:C:2013:718, paragraph 20 (concerning a purely internal situation), and order in *Parva Investitsionna Banka and Others*, C-488/13, EU:C:2014:2191, paragraph 26 (concerning the interpretation of secondary EU legislation adopted in the field of judicial cooperation in civil matters).

7 — Compare, for instance, the order of manifest inadmissibility delivered in *SKP*, C-433/11, EU:C:2012:702 (paragraphs 32 to 38), on the one hand, with the order of manifest lack of jurisdiction delivered in *Pohotovosť*, C-153/13, EU:C:2014:1854 (paragraphs 22 to 25), regarding the same instrument of secondary EU legislation.

8 — See, to that effect, judgment in *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461, paragraph 30.

9 — C-645/11, EU:C:2013:228.

10 — Judgment in *Sunico and Others*, C-49/12, EU:C:2013:545, paragraphs 33 and 34.

11 — See judgment in *Baten*, C-271/00, EU:C:2002:656, paragraph 37.

34. While it is clear to me that 'private' actions brought in connection with the enforcement of competition law fall within the scope of Regulation No 44/2001,[12] it is equally evident that a penalty imposed by an administrative authority in the exercise of the regulatory powers conferred upon it under national legislation comes within the concept of 'administrative matters'. That latter situation most certainly includes fines for breaching national rules prohibiting restrictions on competition, which in my view amounts to a 'hard-core' exercise of public powers.

35. To be sure, the situation which has given rise to the main proceedings is not exactly straightforward. Indeed, the claim at issue is not for payment of the fine itself, but a claim for restitution consisting of (i) repayment of the (punitive) interest at twice the base rate of the central bank paid initially by the Authority following the outcome of the domestic proceedings for judicial review, (ii) interest for late repayment of that amount and (iii) interest for late payment of the outstanding amount of the fine itself.

36. In addition, the case-law of the Court on this issue is casuistic in nature,[13] making it difficult to adopt a generalised approach.

37. Nevertheless, in respect of the predecessor to Regulation No 44/2001, namely the Brussels Convention,[14] 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'.[15]

38. In my view, the essence of the statement mentioned in the previous point still rings true today: debts which arise from an act of public authority — that is to say, the exercise of public powers — do not come within the scope of Regulation No 44/2001. Accordingly, put in terms of the matter under consideration, an analysis of the main action brought by the Authority and the rules applicable thereto leads me to take the view that the claim at issue and the other claims, which all derive from the fine imposed by the Authority, do not amount to 'civil and commercial matters':

39. In the case under consideration, the reduction of the fine issued by the Authority had the automatic side effect, under the Hungarian legislation governing the effects of the decisions taken by the Authority — namely Article 83(5) of Act No LVII of 1996 — of generating the claim at issue. More specifically, the claim at issue is the combination of a number of features specific to Hungarian law, namely that (i) the action for judicial review brought against the contested decision did not suspend the application of the latter; (ii) following the review of the second-tier administrative court, the Authority was obliged, under the said provision, to pay interest to Siemens on the amount of the fine repaid at twice the base rate of the central bank; and (iii) the decision of the Kúria (Supreme Court) took effect *ex tunc*. Indeed, it seems to me that every time a fine imposed by the Authority is quashed or reduced by the administrative courts, and then subsequently upheld, the combination of the aforementioned elements of Hungarian administrative procedure will generally produce the same

12 — See to that effect, inter alia, judgments in *flyLAL-Lithuanian Airlines*, C-302/13, EU:C:2014:2319, paragraphs 28 and 29, and *CDC*, C-352/13, EU:C:2015:335, paragraph 56. However, in the latter case, Advocate General Jääskinen, while considering the actions at issue in that case to concern 'civil and commercial matters', also took the view that the application of Article 5(3) of Regulation No 44/2001 to those actions was problematic; see Opinion in *CDC*, C-352/13, EU:C:2014:2443, points 8 to 10, 33, 39, 52 and 53.

13 — For cases which the Court held did not come within the concept of a 'civil and commercial matter' see, inter alia, judgments in *LTU*, 29/76, EU:C:1976:137 (recovery of charges due for use of Eurocontrol's services and equipment); *Rüffer*, 814/79, EU:C:1980:291 (recovery of costs linked to the removal of a wreck); and *Lechouritou and Others*, C-292/05, EU:C:2007:102 (claims for payment of compensation by Germany due to acts committed during the occupation of Greece by armed forces of the Third Reich). For cases which the Court held did come within that concept see, inter alia, judgments in *Sonntag*, C-172/91, EU:C:1993:144 (a claim for damages brought against a State school teacher for negligence during an excursion leading to a student's death); *Henkel*, C-167/00, EU:C:2002:555 (an action brought by a consumer protection organisation seeking to prevent a trader from using unfair terms in consumer contracts); and *Baten*, C-271/00, EU:C:2002:656 (subrogation in maintenance claims in respect of a former spouse and child). See also the decisions mentioned below in points 44 and 45.

14 — Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36).

15 — Judgment in *Rüffer*, 814/79, EU:C:1980:291, paragraph 15. Emphasis added.

result: that the undertaking concerned has received interest pursuant to Article 83(5) of Act No LVII of 1996 which the Authority seeks to recover. This result therefore appears to be an inalienable part of the review of the administrative decision under Hungarian law. The fact that the Authority has brought an action before the Hungarian civil courts against Siemens does not do away with the public law origin of the dispute between the parties.

40. To illustrate my point, a simpler example seems appropriate: had the dispute in the main proceedings instead only concerned the Authority's claim, referred to above at point 19, for payment of interest due to Siemens' belated payment of the outstanding part of the fine, I doubt that the matter under consideration would have posed any problem. Such a claim would undoubtedly arise from the exercise of public authority. And so, although the claim at issue constitutes a rather complex one of restitution, the fact remains that just as the other claims sought by the Authority in the main action, it derives entirely from the administrative penalty which the Authority imposed on Siemens.

41. However, supported on this point by the Hungarian Government, the Authority argues that it attempted — presumably after the contested decision was upheld by the Kúria (Supreme Court) — in vain, to enforce its claim for repayment of interest paid pursuant to Article 83(5) of Act No LVII of 1996 in an administrative enforcement procedure before the közigazgatási és munkaügyi bíróság (administrative and labour court, Hungary). This was allegedly refused on the basis that the claim at issue did not follow directly from the contested decision and was therefore not enforceable. Siemens confirms this description of events. The Authority therefore argues that it cannot enforce its claim administratively.

42. Apart from the fact that those allegations are not reproduced in the terms of the order for reference and are therefore not confirmed, from the outset I would point out that the refusal to enforce the contested decision in relation to the claim at issue is understandable. Indeed, at the time a given decision imposing a fine is issued, it is uncertain whether it will be challenged and, if so, whether the administrative courts will set it aside and even less whether it will be confirmed on appeal. In other words, given that Siemens had fully paid the fine, the contested decision had been enforced according to its terms. Still, I believe that this argument confirms my view: the Authority normally has exceptional powers of enforcement by comparison with the rules applicable to relationships between persons governed by private law. The fact that this power did not, in this instance, extend to the claim at issue is irrelevant, just as the determination of the correct forum under Hungarian law for the recovery of the claim at issue is not decisive for the application of Regulation No 44/2001. In fact, for the purpose of recovery, the line of argument suggested by the Authority would only lead to imposing symbolic (administrative) fines assorted, however, with draconian (civil and commercial) interest rates.

43. In addition, I am not convinced by the argument submitted by the Hungarian Government that the Kúria (Supreme Court) has reportedly held that 'judicial review is not a stage of the administrative procedure, it is not the extension thereof, but is independent of the latter, not only on an organisational but also on a procedural level' and that 'those two procedures are distinct from one another and the administrative procedure comes to an end with a final decision'. [16] Apart from the fact that a decision is only final if it has not been set aside in the course of judicial review, the way in which a procedure is perceived at the national level has no bearing on the scope of Regulation No 44/2001. The regulation cannot be interpreted solely in the light of the division of jurisdiction between the various types of courts existing in certain Member States. [17] Indeed, to be blunt, several Member States do not even operate, in their legal systems, a separation between a civil court system and an administrative court system. [18]

16 — Kfv. No II. 37. 671/2014/12., decision of 12 November 2014.

17 — See, by way of analogy, *Rüffer*, 814/79, EU:C:1980:291, paragraph 14.

18 — That is the case, inter alia, for Denmark, Ireland and the United Kingdom.

44. At this juncture, I would also point out that a number of elements emphasised in the relevant authorities lend support to my view. *First*, the claim at issue is not the result of a separate and freely undertaken obligation independent of the fine at issue.[19] *Second*, the fine from which the claim at issue derives does not reflect a typical 'civil and commercial matter' within the meaning of Regulation No 44/2001 — quite the opposite.[20] *Third*, and crucially, the sum involved in the claim at issue was not paid by mistake to Siemens. It was not the result of a simple error on the part of the Authority of the type that any private party could have made (commonly known as a claim of *condictio indebiti*). On the contrary, the claim at issue arose purely and simply by operation of the law applicable to the administrative procedure at issue in the main proceedings.[21]

45. Lastly, the judgment in *Sunico and Others*, which admittedly concerned a situation of alleged value added tax ('VAT') 'carousel' type fraud, does not shake me in my view. In truth, the Court does appear in that case to have placed great emphasis on national law when holding that the regulation applied. However, it ought not to be overlooked that the legal basis of the UK authorities' claim against Sunico was based not on VAT law, but on Sunico's alleged non-contractual liability (in the form of a 'tortious conspiracy to defraud'), giving rise to the possible payment of damages. Moreover, no administrative relationship existed between Sunico and the UK authorities, as the former was not liable to pay VAT in the UK.[22]

46. It follows from the above that the action for payment of the claim at issue brought in the main proceedings amounts to an administrative matter which, under Article 1(1) of Regulation No 44/2001, falls outside the scope of that regulation. Consequently, the Court ought to answer the question referred to the effect that an action for restitution on the basis of unjust enrichment which has its origin in the repayment of a penalty imposed in competition proceedings, such as the one at issue in the main action, does not constitute a 'civil and commercial matter' for the purpose of Article 1 of Regulation No 44/2001.

47. However, should the Court hold the main action to concern a 'civil and commercial matter', in what follows I shall explain why in any event I do not believe that Article 5(3) of Regulation No 44/2001 confers special jurisdiction upon the referring court to rule upon the merits of the main action.

B – *Substance*

1. Introductory remarks

48. The case under consideration gives the Court an opportunity to provide some much needed general clarification on the interrelationship between Articles 2(1), 5(1) and 5(3) of Regulation No 44/2001. I shall commence my assessment by recalling the guiding principles applicable to this issue.

19 — See judgment in *Préservatrice Foncière Tiard*, C-266/01, EU:C:2003:282, paragraphs 29 to 34, concerning a guarantee for the payment of customs duties that the French insurance company had undertaken vis-à-vis the Netherlands.

20 — See judgments in *Realchemie Nederland*, C-406/09, EU:C:2011:668, paragraph 41, concerning a fine imposed by a German court in relation to a patent infringement and, conversely, *Bohez*, C-4/14, EU:C:2015:563, paragraph 40, relating to a penalty payment imposed by a court in order to ensure compliance with the rights of access granted in respect of children.

21 — See judgment in *Sapir and Others*, C-645/11, EU:C:2013:228, paragraph 37, concerning a claim for the recovery of a mistaken overpayment (*condictio indebiti*) made by the Land Berlin in the framework of an administrative procedure designed to provide compensation for loss of real property under the Nazi regime.

22 — Judgment in *Sunico and Others*, C-49/12, EU:C:2013:545, paragraphs 13 and 36 to 38.

49. Regulation No 44/2001 aims to make the rules on jurisdiction both highly predictable and also founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction must always be available on this ground, save in a few well-defined situations in which the subject matter of the litigation or the autonomy of the parties warrants a different linking factor (exclusive jurisdiction) — for instance in proceedings relating to rights *in rem* in immovable property. Moreover, in addition to the defendant's domicile, certain alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice ought to be available (special jurisdiction) — for example the courts of the place of performance of a contractual obligation. [23]

50. Still, that does not alter the fact that Regulation No 44/2001 is premised on the idea that proceedings are to be initiated at the court of the domicile of the defendant.

51. Not surprisingly therefore, the Court has held that the system of common rules of conferment of jurisdiction laid down in Chapter II of Regulation No 44/2001 is based on the general rule, set out in the first paragraph of Article 2(1), that persons domiciled in a Member State are to be sued in the courts of that State, irrespective of the nationality of the parties. It is only by way of derogation from that fundamental principle attributing jurisdiction to the courts of the defendant's domicile that Section 2 of Chapter II of Regulation No 44/2001 makes provision for certain special jurisdictional rules, such as those laid down in Article 5 of that regulation. [24]

52. Now, the rules on special jurisdiction, which supplement the general rule in Article 2(1) of Regulation No 44/2001, ought to be given their proper meaning, determined in the light of their purpose and wording and the scheme and object of the regulation, rather than being interpreted in a way which would deprive them of their effectiveness. [25] However, the fact nevertheless remains that they must be interpreted narrowly in relation to the general rule and cannot, in any event, give rise to an interpretation going beyond the cases expressly envisaged by the regulation. [26] By way of example, the Court has held that an action for damages founded on the defendant's alleged pre-contractual liability (*culpa in contrahendo*) cannot be based on Article 5(1) of the Brussels Convention but must, where possible, be based on Article 5(3) thereof. [27] It is on the basis of these general considerations that the answer to the question referred must be determined.

53. That answer is not exactly unequivocal. The wording of Article 5(3) of Regulation No 44/2001 does not mention the concepts of 'restitution' or 'unjust enrichment' on a par with 'tort, delict or quasi-delict', nor does it provide any immediate indication that an action for restitution on that ground would fall within its scope. The neat division between the positions of the parties who have submitted observations to the Court in these proceedings also testifies to this uncertainty: Siemens and the German and Italian Governments take the view that an action for payment of the claim at issue does not fall within the scope of Article 5(3) of Regulation No 44/2001. The Authority, the Hungarian Government and the Commission take the opposite view.

54. However, my view on this matter is unfaltering: claims in restitution based on unjust enrichment do not fall within the ambit of Article 5(3) of Regulation No 44/2001.

23 — See recitals 11 and 12 of Regulation No 44/2001.

24 — Judgment in *ÖFAB*, C-147/12, EU:C:2013:490, paragraph 30 and the case-law cited.

25 — See, by analogy, Opinion of Advocate General Jacobs in *Henkel*, C-167/00, EU:C:2002:171, point 33, and, to that effect, judgment in *Zuid-Chemie*, C-189/08, EU:C:2009:475, paragraph 31.

26 — Judgment in *ÖFAB*, C-147/12, EU:C:2013:490, paragraphs 31 and 32 and the case-law cited.

27 — Judgment in *Tacconi*, C-334/00, EU:C:2002:499, paragraphs 26 and 27.

2. Is restitution on the ground of unjust enrichment a 'matter of tort, delict or quasi-delict'?

55. For a matter to be classified as non-contractual for the purpose of Article 5(3) of Regulation No 44/2001, consistent case-law requires [28] two conditions to be met: *first*, the action at issue must seek to establish the liability of a defendant and *second*, it must not concern 'matters relating to a contract' as used in Article 5(1)(a) of that regulation.

56. Notwithstanding the fact that Siemens was, according to the observations of the Authority, penalised for having participated in an anticompetitive agreement, it is common ground that the main action does not relate to a contract. That is undoubtedly correct, as the main action instead concerns a claim for restitution based on an alleged unjust enrichment of Siemens at the expense of the Authority with no contractual basis.

57. The issue that therefore remains to be uncovered is whether the action seeks to establish liability on the part of Siemens.

58. That is not the case.

59. *First*, I would call to mind that it is settled case-law that the rule on special jurisdiction laid down in Article 5(3) of Regulation No 44/2001 is based on the existence of a particularly close linking factor between the dispute and the courts of the place where the harmful event occurred or may occur, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings. In matters relating to tort, delict and quasi-delict, the courts for the place where the harmful event occurred or may occur are usually the most appropriate for deciding the case, in particular on the grounds of proximity and ease of taking evidence. The expression 'place where the harmful event occurred or may occur', appearing in that provision, is intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the applicant, in the courts for either of those places. [29] Moreover, non-contractual liability can arise only on condition that a causal connection can be established between the damage and the event in which that damage originates. [30]

60. It follows from this that the rule on special jurisdiction laid down in Article 5(3) of Regulation No 44/2001 requires the occurrence of a 'harmful event' giving rise to 'damage' — in other words, a loss. [31]

61. By contrast, an action for restitution on the basis of unjust enrichment is not based on loss. Although Regulation No 44/2001 contains no definition of 'restitution' or 'unjust enrichment', I would venture to describe it in the following terms. Unlike an action seeking to establish the defendant's non-contractual liability, which aims to undo damage or loss suffered by the applicant and for which the defendant is alleged to be liable owing to his conduct or omission or other reasons attributable to him, an action for restitution based on unjust enrichment aims to restore to the applicant a benefit which the defendant has acquired illegitimately at the former's expense (or the payment of its monetary equivalent). As essentially argued by the German Government, restitution on the ground of

28 — See, among many, judgments in *Kalfelis*, 189/87, EU:C:1988:459, paragraph 17, and *Kolassa*, C-375/13, EU:C:2015:37, paragraph 44 and the case-law cited.

29 — Judgment in *CDC*, C-352/13, EU:C:2015:335, paragraphs 38 to 40 and the case-law cited.

30 — Judgment in *ÖFAB*, C-147/12, EU:C:2013:490, paragraph 34 and the case-law cited.

31 — Advocate General Gulmann (as he was then) suggested in his Opinion in *Reichert and Kockler* (C-261/90, EU:C:1992:78, p. 2169) that 'the various language versions of Article 5(3) [of the Brussels Convention] have in any case two features in common. One is that there must have been "wrongful" conduct, and the other that that conduct must have caused a "harmful event".'

unjust enrichment therefore inherently focuses on *the gain acquired by the defendant rather than the loss suffered by the applicant*.[32] Unjust enrichment is the cause of action, and restitution the remedy. Hence, I do not subscribe to a vision according to which the mere non-receipt of a contested claim amounts to a 'harmful event' giving rise to a loss.[33]

62. Moreover, although restitution on the basis of unjust enrichment requires the enrichment to be illegitimate, this does not coincide with non-contractual liability. Apart from requiring a loss and a causal link to the behaviour of the defendant, non-contractual liability also presupposes that there is some ground for holding the defendant responsible for the loss sustained by the applicant, be it in the form of intent, negligence or even strict liability. In contrast, the recovery of a sum paid unjustly does not necessarily depend on whether the recipient's actions were beyond reproach. In a similar fashion, as a matter of EU law, where charges have been levied by a Member State in a manner incompatible with EU law, the repayment thereof is not premised on any liability on the part of that Member State.[34] Conversely, the right to damages from a Member State owing to its liability for breach of EU law presupposes that certain well-known criteria laid down by the Court have been met.[35] It follows that, contrary to what the Hungarian Government has suggested in its written observations, the fact that it may not be entirely possible, under Hungarian law, to distinguish between the illegitimacy of a given enrichment, on the one hand, and a loss on the other, is of no relevance since, once again, national law is not decisive when interpreting Regulation No 44/2001.[36]

63. Although the Court was not called upon to interpret Article 5(3) of Regulation No 44/2001 in *Sapir and Others*,[37] which also concerned a matter of restitution, other rulings of the Court provide a certain measure of support for my view.

64. In *Kalfelis*,[38] the Court was asked, inter alia, whether 'Article 5(3) of the [Brussels Convention] confer[s], in respect of an action based on claims in tort and contract *and for unjust enrichment*, accessory jurisdiction on account of factual connection even in respect of the claims not based on tort' (emphasis added), to which the Court answered that 'a court which has jurisdiction under Article 5(3) over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based'. Admittedly, the Court did not indicate whether it considered unjust enrichment to amount to a tort, delict or quasi-delict: it simply excluded the possibility that Article 5(3) could cover an action which was not based on non-contractual liability.[39] However, the ruling does bear witness to an awareness of the inherent differences between the various types of legal relationships.

32 — See, inter alia, Goff & Jones, *The Law of Restitution*, 4th edition, 1993, London, Sweet & Maxwell, p. 16, who argue that 'a restitutionary claim is for the *benefit*, the *enrichment*, gained by the defendant at the plaintiff's expense; it is not one for loss suffered' (emphasis in the original). Concurring, see Virgo, G., *The Principles of the Law of Restitution*, 3rd edition, 2015, OUP, p. 3, according to whom '[t]he law of restitution is concerned with the award of a generic group of remedies which arise by operation of the law and which have one common function, namely to deprive the defendant of a gain rather than to compensate the claimant for loss suffered'. In relation to claims to recover monies paid pursuant to EU legislation following irregularities, such irregularities involve 'the withdrawal of the advantage wrongly obtained, in particular by an obligation to pay the amounts due or repay the amounts wrongly received'; see judgment in *Somvao*, C-599/13, EU:C:2014:2462, paragraph 35.

33 — Contrast, in that regard, with the Opinion of Advocate General Saugmandsgaard Øe in *Austro-Mechana*, C-572/14, EU:C:2016:90, point 86.

34 — See, inter alia, judgment in *Fantask and Others*, C-188/95, EU:C:1997:580, paragraph 38 and the case-law cited.

35 — See judgment in *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 51.

36 — It is settled case-law that Article 5(3) of Regulation No 44/2001 is (also) to be interpreted autonomously; see, inter alia, judgment in *Holterman Ferho Exploitatie and Others*, C-47/14, EU:C:2015:574, paragraph 74 and the case-law cited. For an apparently different view, see Opinion of Advocate General Saugmandsgaard Øe in *Austro-Mechana*, C-572/14, EU:C:2016:90, point 85.

37 — C-645/11, EU:C:2013:228, where the Court instead interpreted Article 6 of Regulation No 44/2001 concerning actions brought against several defendants.

38 — 189/87, EU:C:1988:459.

39 — By contrast, Advocate General Darmon had suggested that jurisdiction under Article 5(1) of the Brussels Convention — that is to say, contractual matters — ought to 'channel' other claims based on tort and unjust enrichment; see Opinion of Advocate General Darmon in *Kalfelis*, 189/87, EU:C:1988:312, points 25 to 31.

65. Moreover, in *Reichert and Kockler II*, the Court held that Article 5(3) of the Brussels Convention did not provide special jurisdiction for a particular type of action of a quasi-restitutional nature under French insolvency law (*actio pauliana*). That action aimed not to have the debtor ordered to make good the damage caused his creditor by his fraudulent conduct, but to render ineffective, as against his creditor, a disposition made by the debtor, also in respect of third parties. [40]

66. I therefore do not agree with the view of Advocate General Darmon when he in a later case argued that the Court had, by the definition of a matter relating to tort, delict and quasi-delict given in the judgment in *Kalfelis*, [41] 'include[d] under matters relating to tort a claim based on unjust enrichment'. [42] In any event, the Court held that it was not necessary to give a ruling on the questions put to the Court in that case and did not take a position on the Advocate General's view. [43]

67. For the sake of completeness, I would add that several supreme courts of the Member States have held an action based on restitution for unjust enrichment not to involve a matter relating to tort, delict or even quasi-delict. [44] Unsurprisingly, commentators have also been reluctant to classify claims in restitution per se as claims relating to non-contractual liability. [45]

68. *Second*, interpreting Article 5(3) of Regulation No 44/2001 so as to include actions for restitution on the basis of unjust enrichment would mean interpreting the rules on special jurisdiction broadly, contrary to accepted interpretative norms. Moreover, it would distort the system which the regulation brings about, mentioned above at points 49 to 52.

69. In point of fact, the answers given to questions put to the parties at the hearing do not enable me to discern a link between the main action and the Hungarian courts which is closer than that with the Austrian courts. On the contrary, it is legitimate to infer from the omission made in Article 5(3) of claims based on restitution that this is precisely due to the absence of any close connecting factor consistently linking such claims to any jurisdiction other than the defendant's domicile. [46] In fact, the only real element which links the claim at issue with the Hungarian courts is the fact that it derives from the fine imposed by the Authority — which however merely goes to show the administrative nature of the matter under consideration, as explained above. Therefore, it seems to me that the answer sought by the Authority, the Hungarian Government and the Commission would amount to interpreting that provision beyond what is possible.

70. In the same vein, I am even less convinced by the argument put forward by the Commission, that there cannot be a legal void between Articles 5(1) and (3) of Regulation No 44/2001. Nothing in the wording of Regulation No 44/2001 suggests this. The fact that Article 5(3) comes into play only when the action does not concern a contractual matter does not exclude the possibility of an action which

40 — Judgment in *Reichert and Kockler*, C-261/90, EU:C:1992:149, paragraphs 19 and 20.

41 — 189/87, EU:C:1988:459 (see point 55 above).

42 — See the Opinion of Advocate General Darmon in *Shearson Lehman Hutton*, C-89/91, EU:C:1992:410, point 102.

43 — Judgment in *Shearson Lehman Hutton*, C-89/91, EU:C:1993:15, paragraph 25 (see, in particular, the fourth question referred).

44 — See the decisions of the House of Lords (United Kingdom) of 30 October 1997 in *Kleinwort Benson Ltd v. City of Glasgow District Council* [1997] UKHL 43; the Oberster Gerichtshof (Supreme Court, Austria) of 13 January 1998 in case 7 Ob 375/97s; and the Högsta Domstolen (Supreme Court, Sweden) of 31 August 2009 in case Ö 1900-08 (NJA 2000:49).

45 — See, inter alia, Mankowski, P., in Magnus, U., and Mankowski, P. (eds.), *Brussels Ibis Regulation*, European Commentaries on Private International Law, Volume I, 2016, Dr. Otto Schmidt, Cologne, point 245; and Hertz, K., *Bruxelles I-forordningen med kommentarer*, 2nd ed., 2015, Jurist- og Økonomforbundets Forlag, Copenhagen, p. 172.

46 — On this point I concur with the judgment of Lord Goff in *Kleinwort Benson Ltd v. City of Glasgow District Council* [1997] UKHL 43, decision of 30 October 1997.

concerns neither contractual nor non-contractual matters. Verily, a seamless continuum between Articles 5(1) and (3), as the Commission suggests, would involve raising those exceptions to the rank of a general rule, thereby depriving Article 2 of all practical effect as concerns the law of obligations. [47]

71. *Third*, a contextual analysis, which includes an overview of other rules of EU private international law, confirms the view taken above.

72. Indeed, in the first place, as argued by the German Government, it follows from Article 10(1) of Regulation (EC) No 864/2007 [48] that, compared to contractual and non-contractual matters, in the default scenario, EU private international law regards unjust enrichment as being in a category of its own. Although Regulation No 44/2001 predates Regulation No 864/2007, the EU legislature has considered that the substantive scope and provisions of the one ought to be consistent with those of the other. [49]

73. In the second place, both Article 5(4) of Regulation No 44/2001 and Article 7(3) of the recast version of that regulation, namely Regulation (EU) No 1215/2012, [50] contain heads of special jurisdiction relating to 'civil claim[s] for damages *or restitution* which [are] based on an act giving rise to criminal proceedings, in the court seised of those proceedings' (emphasis added) instead of merging them with the general head of jurisdiction relating to non-contractual liability. Moreover, Regulation No 1215/2012 now also provides for a head of special jurisdiction relating to 'civil claim[s] for the *recovery*, based on ownership, of a cultural object as defined in point 1 of Article 1 of [Directive 93/7] [[51]] … in the courts for the place where the cultural object is situated at the time when the court is seised' (emphasis added). In both examples, there is a clear connecting factor linking such proceedings for restitution or recovery with the courts of a Member State other than that of the defendant's domicile; a link which differs from that mentioned above at point 59. It is also worth taking note of the fact that the wording of Article 7(2) of Regulation No 1215/2012 shows that the EU legislature has not deemed it necessary to widen the head of special jurisdiction relating to non-contractual liability. All this confirms the view that claims for recovery or restitution are systematically dealt with in a manner distinct from claims for payment of damages arising from non-contractual liability.

74. *On a final note*, the Authority argues that if the main action does not fall within the scope of Article 5(3) of Regulation No 44/2001, there would be no court before which it could bring an action — or rather, as the Authority explained at the hearing, no court in Hungary before which it could bring proceedings against all the participants in the anticompetitive infringement which lies at the root of the matter under consideration. The Authority claims that this would run counter to the aim of procedural simplification which the regulation brings about. On those points, I would call to mind, *first*, that although it is true that disadvantages might arise from different aspects of the same dispute being adjudicated upon by different courts, an applicant is always entitled to bring his action

47 — In the judgment in *Brogsitter* (C-548/12, EU:C:2014:148), paragraph 27, the Court stated that if the main proceedings did not concern a contractual matter, they had to concern a non-contractual matter. However, that statement was premised on the idea that the applicant in that case, which concerned claims for various purposes as a result of damage suffered from the defendant's conduct allegedly amounting to unfair competition, sought to establish the liability of the defendant. Similarly, in the currently pending case of *Granarolo* (C-196/15), the Court is asked to determine whether an action for damages — and not restitution — for the abrupt termination of an established business relationship, amounts to a contractual or a non-contractual matter.

48 — Regulation of the European Parliament and of the Council of 11 July 2011 on the law applicable to non-contractual obligations (Rome II) (OJ 2007 L 199, p. 40). Article 10(1) of Regulation No 864/2007 ('Unjust enrichment') provides: 'If a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship.' See also Article 2 of that regulation.

49 — See recital 7 of Regulation No 864/2007.

50 — Regulation of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (OJ 2012 L 351, p. 1).

51 — Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State (OJ 1993 L 74, p. 74).

in its entirety before the courts for the domicile of the defendant.[52] The Authority therefore does have a court before which it can bring its claim. In any event, should the Austrian courts refuse to hear the case owing to the public law origin of the claim at issue, that consequence would follow inherently from the interplay between, on the one hand, the extent of the harmonisation achieved under that regulation and, on the other hand, national procedural rules (*in casu* the Hungarian administrative enforcement rules). *Second*, as for the aim of simplification to which the Authority refers, it follows from recital 11 of the regulation that, for reasons of foreseeability, the main principle which underpins it is that the courts of the defendant's domicile have jurisdiction and, conversely, that special or exclusive seats of jurisdiction are conceivable to a limited degree only. That aim would therefore in fact contradict the Authority's view.

75. On the basis of all the foregoing, an action for restitution on the ground of unjust enrichment does not amount to a 'matter relating to tort, delict or quasi-delict' within the meaning of Article 5(3) of Regulation No 44/2001.

IV – Conclusion

76. For the reasons given above, I propose that the Court ought to answer the question referred by the Fővárosi Ítélőtábla (Regional Court of Appeal, Budapest, Hungary) in Case C-102/12 to the effect that an action for restitution on the ground of unjust enrichment which has its origin in the repayment of a penalty imposed in competition proceedings, such as that at issue in the main action, does not constitute a 'civil and commercial matter' for the purpose of 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.

77. In the alternative, I propose that the Court answer the question referred to the effect that, on a proper construction of Article 5(3) of Regulation No 44/2001, an action for restitution on the ground of unjust enrichment does not constitute a 'matter relating to tort, delict or quasi-delict' within the meaning of that provision.

52 — Judgment in *Kalfelis*, 189/87, EU:C:1988:459, paragraph 20.