Reports of Cases

Judgment of the Court (First Chamber)

25 October 2012*

(Area of freedom, security and justice — Jurisdiction in civil and commercial matters — Special jurisdiction in tort, delict or quasi-delict — Action for a negative declaration ('negative Feststellungsklage') — Whether a person alleged to have committed a harmful act may bring a person who might be adversely affected before the courts with jurisdiction for the place where the act allegedly occurred or may occur, seeking a declaration that there is no liability in tort or delict)

In Case C-133/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Germany), made by decision of 1 February 2011, received at the Court on 18 March 2011, in the proceedings

Folien Fischer AG,

Fofitec AG

v

Ritrama SpA,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, A. Borg Barthet, J.-J. Kasel, M. Safjan (Rapporteur) and M. Berger, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 15 February 2012,

after considering the observations submitted on behalf of:

— Folien Fischer AG and Fofitec AG, by G. Jaekel, Rechtsanwalt,

— Ritrama SpA, by J. Petersen, Rechtsanwalt,

— the German Government, by T. Henze and J. Kemper, acting as Agents,

— the French Government, by G. de Bergues and B. Beaupère-Manokha, acting as Agents,

— the Netherlands Government, by C. Wissels and B. Koopman, acting as Agents,

* Language of the case: German.

— the Polish Government, by M. Szpunar, acting as Agent,

— the Portuguese Government, by L. Inez Fernandes, acting as Agent,

— the Swiss Government, by D. Klingele, acting as Agent,

— the European Commission, by W. Bogensberger and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 April 2012,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of point (3) of Article 5 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

2 The reference has been made in proceedings between, on the one hand, Folien Fischer AG ('Folien Fischer') and Fofitec AG ('Fofitec'), established in Switzerland, and, on the other, Ritrama SpA ('Ritrama'), established in Italy, concerning the application submitted by Folien Fischer and Fofitec for a negative declaration, relating to the absence of liability in tort or delict in competition matters.

Legal context

3 It is apparent from recital 2 in the preamble to Regulation No 44/2001 that the regulation aims, in the interests of the proper functioning of the internal market, to put in place '[p]rovisions 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'.

4 Recital 11 to that regulation states:

'The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and 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. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.'

5 Recital 12 to Regulation No 44/2001 states:

'In addition to the defendant's domicile, there should be 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.'

6 Recital 15 to Regulation No 44/2001 states:

'In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States. ...'

7 According to recital 19 to that regulation:

‘Continuity between the [1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36), as amended by the successive conventions relating to the accession of new Member States to that convention (“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 …’

8 The rules of jurisdiction are set out in Chapter II of Regulation No 44/2001, in Articles 2 to 31.

9 In Section 1 (‘General provisions’) of Chapter II of Regulation No 44/2001, Article 2(1) provides:

‘Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.’

10 In the same section of that regulation, Article 3(1) provides:

‘Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.’

11 In Section 2 (‘Special jurisdiction’) of Chapter II of Regulation No 44/2001, Article 5(3) provides:

‘A person domiciled in a Member State may, in another Member State, be sued:

…

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.’

12 Under Article 27 of Regulation No 44/2001:

‘1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.’

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

13 Folien Fischer, a company established in Switzerland, develops, manufactures and sells laminated paper goods and adhesive film. It distributes base material for continuous card forms in Germany among other places.

14 Fofitec, which also has its registered office in Switzerland and is part of the Folien Fischer group of companies, holds several patents protecting special forms for sending a letter together with, inter alia, a membership card, and the base material for those card forms.

15 Ritrama, a company established in Italy, develops, produces and distributes various kinds of laminates and multilayer film.

16 By letter of March 2007, Ritrama claimed that Folien Fisher's distribution policy and its refusal to grant patent licences were contrary to competition law.

17 After receiving that letter, Folien Fischer and Fofitec brought an action before the Landgericht Hamburg (Regional Court, Hamburg) (Germany) for a negative declaration stating that (i) Folien Fischer was not obliged to desist from its sales practice in relation to the granting of discounts and the terms of its distribution contracts and (ii) Ritrama had no right either to have that sales practice terminated or to obtain compensation on grounds of that sales practice. Folien Fischer and Fofitec also sought a declaration that Fofitec was under no obligation to grant a licence for the two patents, held by that company, which protect the manufacture of forms and the base materials for their manufacture.

18 After the action for a negative declaration had been brought, Ritrama and Ritrama AG, a subsidiary established in Switzerland, brought an action for performance before the Tribunale di Milano (District Court, Milan) (Italy), arguing that the conduct of Folien Fischer and Fofitec was anti-competitive and seeking an award of damages as well as an order requiring Fofitec to grant licences for the patents in question. At the hearing before the Court of Justice, Ritrama stated that those proceedings had been stayed.

19 The action for a negative declaration brought by Folien Fischer and Fofitec was dismissed as inadmissible by the Landgericht Hamburg. On 14 January 2010, that decision was confirmed on appeal by the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) (Germany).

20 In its judgment, the appeal court declined to recognise that the German courts had jurisdiction, on the ground that the jurisdiction in matters relating to tort or delict provided for in point (3) of Article 5 of Regulation No 44/2001 cannot be applied in the case of an action for a negative declaration, such as that brought by Folien Fischer and Fofitec, since the very purpose of such an action is to establish that no tort or delict has been committed.

21 The Bundesgerichtshof (Federal Court of Justice) (Germany), before which Folien Fischer and Fofitec have brought an appeal on a point of law, raises the question whether the jurisdiction provided for in point (3) of Article 5 of Regulation No 44/2001 is also established where the potential injuring party brings an action for a negative declaration seeking a declaration that the potential injured party has no claim based on a tort or delict. In those circumstances, the Bundesgerichtshof decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling,

'Is point (3) of Article 5 of … Regulation No 44/2001 … to be interpreted as meaning that jurisdiction in matters relating to tort or delict also exists in respect of an action for a negative declaration in which a potential injuring party asserts that the party potentially injured by a particular situation has no claim in tort or delict (in this case, infringement of the provisions of competition law)?'

The question referred for a preliminary ruling

Admissibility

22 Ritrama challenges the relevance of the question referred for the purposes of deciding the dispute in the main proceedings. Its letter of March 2007, to which the referring court refers, is not a letter of formal notice but merely an invitation to enter into negotiations to settle the dispute. That letter is neither an appropriate basis in terms of procedure nor an appropriate reason for involving Ritrama in legal proceedings. Folien Fischer and Fofitec therefore have no legal interest in bringing proceedings.

23 Ritrama also argues that, in light of the fact that it is not in competition with Folien Fischer and Fofitec in Germany, the unlawful act at issue could not have occurred in that Member State for the purposes of procedural law. As a result, point (3) of Article 5 of Regulation No 44/2001 cannot provide a legal basis for attributing jurisdiction to the German courts.

24 In that regard, it should be stated that Ritrama seeks to challenge Folien Fischer's and Fofitec's interest in pursuing the action in the proceedings before the referring court and contests the relevance of the question referred. However, as the Court has held, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law (see Case C-11/07 *Eckelkamp and Others* [2008] ECR I-6845, paragraph 32, and Joined Cases C-165/09 to C-167/09 *Stichting Natuur en Milieu and Others* [2011] ECR I-4599, paragraph 47).

25 It should also be stated that, in any event, according to settled case-law, it is solely for the national court to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (Case C-439/08 *VEBIC* [2010] ECR I-12471, paragraph 41, and Case C-118/11 *Eon Aset Menidjmunt* [2012] ECR, paragraph 76 and the case-law cited).

26 The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted (see, inter alia, Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 27, and Case C-41/11 *Inter-Environnement Wallonie and Terre wallonne* [2012] ECR, paragraph 35).

27 However, that is not the position in the circumstances, as the referring court has clearly set out the reasons for which it has referred the question for a preliminary ruling and for which a response to that question is necessary in order to enable it to give judgment in the case before it.

28 In those circumstances, the request for a preliminary ruling must be held to be admissible.

Substance

29 By its question, the national court seeks to ascertain, in essence, whether point (3) of Article 5 of Regulation No 44/2001 must be interpreted as meaning that an action for a negative declaration, seeking to establish the absence of liability in tort or delict, falls within the scope of that provision.

Preliminary remarks

30 First of all, it should be borne in mind that the provisions of Regulation No 44/2001 must be interpreted independently, by reference to the scheme and purpose of that regulation (see, inter alia, Case C-189/08 *Zuid-Chemie* [2009] ECR I-6917, paragraph 17 and the case-law cited, and Joined Cases C-509/09 and C-161/10 *eDate Advertising and Others* [2011] ECR I-10269, paragraph 38).

31 Additionally, in so far as Regulation No 44/2001 replaces, in the relations between Member States, the Brussels Convention, the interpretation provided by the Court in respect of the provisions of the Brussels Convention is also valid for those of the regulation whenever the provisions of those instruments may be regarded as equivalent (*Zuid-Chemie*, paragraph 18, and *eDate Advertising and Others*, paragraph 39).

32 The provisions of Regulation No 44/2001 relevant to the present case — namely, point (3) of Article 5(3) and Article 27 — reflect the same system as those of the Brussels Convention and are framed, moreover, in almost identical terms. In the light of the similarity thus established, it is necessary to ensure, in accordance with recital 19 to Regulation No 44/2001, continuity in the interpretation of those two instruments (see *Zuid-Chemie*, paragraph 19).

33 Secondly, it should be borne in mind that Regulation No 44/2001 pursues an objective of legal certainty which consists in strengthening the legal protection of persons established in the European Union, by enabling the claimant to identify easily the court in which he may sue and the defendant reasonably to foresee before which court he may be sued (see, inter alia, Case C-533/07 *Falco Privatstiftung and Rabitsch* [2009] ECR I-3327, paragraph 22 and the case-law cited, and Case C-327/10 *Hypoteční banka* [2011] ECR I-11543, paragraph 44).

34 Also, the provisions of Regulation No 44/2001 establishing special jurisdiction must be interpreted in the light of the objective of facilitating the sound administration of justice, in accordance with recital 12 to that regulation.

35 It is in light of those considerations that point (3) of Article 5 of Regulation No 44/2001 should be interpreted.

The scope of point (3) of Article 5 of Regulation No 44/2001

36 It should be noted that, according to the wording of point (3) of Article 5 of Regulation No 44/2001, the rule establishing special jurisdiction which is laid down in that provision is envisaged, in general terms, for 'matters relating to tort, delict or quasi-delict'. Given that formulation, therefore, the possibility that an action for a negative declaration might fall within into the scope of that provision cannot automatically be excluded.

37 It is settled case-law that the rule establishing special jurisdiction laid down, by way of derogation from the principle that jurisdiction lies with the courts of the defendant's place of domicile, in point (3) of Article 5 of Regulation No 44/2001 is based on the existence of a particularly close connecting 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 (see *Zuid-Chemie*, paragraph 24, and *eDate Advertising and Others*, paragraph 40).

38 In matters of tort or delict, the courts of the place where the harmful event occurred or may occur are usually the most appropriate for deciding the case, in particular on grounds of proximity and ease of taking evidence (see, to that effect, Case C-167/00 *Henkel* [2002] ECR I-8111, paragraph 46, and *Zuid-Chemie*, paragraph 24).

39 It should also be noted that the expression 'place where the harmful event occurred or may occur' in point (3) of Article 5 of Regulation No 44/2001 is intended to cover both the place where the damage occurred and the place of the event giving rise to that damage and, in consequence, the defendant may be sued, at the option of the applicant, in the courts of either of those places (Case C-523/10 *Wintersteiger* [2012] ECR, paragraph 19 and the case-law cited).

40 Accordingly, one of those two points of connection must be identified by a national court before it can claim jurisdiction to hear a dispute relating to tort, delict or quasi-delict.

41 It is therefore a question of deciding whether, notwithstanding the special nature of an action for a negative declaration, jurisdiction to hear such an application can be attributed on the basis of the criteria laid down out in point (3) of Article 5 Regulation No 44/2001.

42 In that regard, it should be noted that the special nature of an action for a negative declaration arises from the fact that the claimant is seeking to establish that the pre-conditions for liability, as a result of which the defendant would have a right of redress, are not satisfied.

43 In that context, as the Advocate General observed in point 46 of his Opinion, an action for a negative declaration entails a reversal of the normal roles in matters relating to tort or delict, since, in such an action, the claimant is the party against whom a claim based on a tort or delict might be made, while the defendant is the party whom that tort or delict may have adversely affected.

44 However, that reversal of roles is not such as to exclude an action for a negative declaration from the scope of point (3) of Article 5 Regulation No 44/2001.

45 The objectives, pursued by that provision and repeatedly stressed in case-law (see Case C-292/10 *G* [2012] ECR, paragraph 39, and *Wintersteiger*, paragraph 23), of ensuring that the court with jurisdiction is foreseeable and of preserving legal certainty are not connected either to the allocation of the respective roles of claimant and defendant or to the protection of either.

46 Specifically, point (3) of Article 5 of Regulation No 44/2001 does not pursue the same objective as the rules on jurisdiction laid down in Sections 3 to 5 of Chapter II of that regulation, which are designed to offer the weaker party stronger protection (see Case C-111/09 *ČPP Vienna Insurance Group* [2010] ECR I-4545, paragraph 30 and the case-law cited).

47 In consequence, as has been correctly pointed out by Folien Fischer, Fofitec, the German, French, Dutch and Portuguese Governments, and by the European Commission, the application of point (3) of Article 5 is not contingent upon the potential victim initiating proceedings.

48 Admittedly, there is a difference between, on the one hand, the interests of the applicant in an action for a negative declaration and, on the other, the interests of the applicant in proceedings seeking to have the defendant held liable for causing loss and ordered to pay damages. In both cases, however, the examination undertaken by the court seised essentially relates to the same matters of law and fact.

49 Furthermore, according to paragraph 45 of the judgment in Case C-406/92 *Tatry* [1994] ECR I-5439, which concerns the interpretation, inter alia, of Article 21 of the Brussels Convention relating to *lis pendens* (now Article 27 of Regulation No 44/2001), an action seeking to have the defendant held liable for causing loss and ordered to pay damages has the same cause of action as an action brought by that defendant seeking a declaration that he is not liable for that loss.

50 It should further be stated that, during the stage at which jurisdiction is verified, the court seised does not examine either the admissibility or the substance of the application for a negative declaration in the light of national law, but identifies only the points of connection with the State in which that court is sitting, which support its claim to jurisdiction under point (3) of Article 5 of Regulation No 44/2001.

51 In those circumstances, the special nature of the action for a negative declaration, referred to in paragraph 42 above, has no bearing on the examination that the national court must carry out in order to determine whether it has jurisdiction in matters relating to tort, delict or quasi-delict, since the only matter to be established is whether there is a point of connection with the Member State in which the court seised is sitting.

52 If, therefore, the relevant elements in the action for a negative declaration can either show a connection with the State in which the damage occurred or may occur or show a connection with the State in which the causal event giving rise to that damage took place, in accordance with the case-law set out in paragraph 39 above, then the court in one of those two places, as the case may be, can claim

jurisdiction to hear such an action, pursuant to point (3) of Article 5 of Regulation No 44/2001, irrespective of whether the action in question has been brought by a party whom a tort or delict may have adversely affected or by a party against whom a claim based on that tort or delict might be made.

53 Where, on the other hand, the court cannot identify, in the State in which that court is sitting, one of the two points of connection referred to in paragraph 39 above, it cannot claim jurisdiction without failing to have regard for the objectives of point (3) of Article 5 of Regulation No 44/2001.

54 It follows from the foregoing that, for the purposes of determining the jurisdiction of national courts, an action for a negative declaration cannot be excluded from the scope of point (3) of Article 5 of Regulation No 44/2001.

55 Consequently, the answer to the question referred is that point (3) of Article 5 of Regulation No 44/2001 must be interpreted as meaning that an action for a negative declaration seeking to establish the absence of liability in tort, delict, or quasi-delict falls within the scope of that provision.

Costs

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

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

Point (3) of Article 5 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 an action for a negative declaration seeking to establish the absence of liability in tort, delict, or quasi-delict falls within the scope of that provision.

[Signatures]