Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 16 February 2023 [1]

Case C-567/21

BNP Paribas SA
v
TR

(Request for a preliminary ruling
from the Cour de cassation (Court of Cassation, France))

(Reference for a preliminary ruling – Judicial cooperation in civil matters – Regulation (EC) No 44/2001 – Articles 33 and 36 – Recognition of judgments – Recognition as an incidental question – National rule on the concentration of claims – *Res judicata* – Defence of *res judicata* – Concepts of 'cause of action' and 'subject matter')

I. Introduction

1. In the present case, the Court has received a request from the Cour de cassation (Court of Cassation, France) for a preliminary ruling on the interpretation of Articles 33 and 36 of Regulation (EC) No 44/2001. [2]

2. The three questions for a preliminary ruling submitted by the referring court provide the Court with the opportunity to clarify the extent of the *res judicata* attached to a judgment given in a first Member State, recognition of which is raised as an incidental question in order to oppose a new action brought in a second Member State. More particularly, the Court, in such a context marked by a wealth of commentary in the literature, [3] is invited to define the parts devolved on national law and EU law respectively in the determination of the perimeter of the authority of *res judicata* by a court or tribunal of a Member State of origin. [4]

1 Original language: French.

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).

3 See, in particular, Turmo, A., *L'autorité de la chose jugée en droit de l'Union européenne*, Bruylant, Bruxelles, 2017; Kessedjian, C., 'L'autorité de la chose jugée et l'effectivité du droit européen', *ERA Forum*, No 11, 2010, p. 263 et seq.; Menétrev, S. and Cuniberti, G., 'Saisie conservatoire en France sur des biens gelés par une injonction *Mareva* chypriote: le (faible) jeu de l'autorité de chose jugée', *Revue critique de droit international privé*, 2019, p. 215 et seq.

4 It should be noted that this problem is also addressed in *Recamier* (C-707/21, currently suspended), as the referring court asks the Court 'whether the autonomous definition of *res judicata* covers all the conditions and effects of *res judicata*' or 'whether certain conditions and effects of *res judicata* may be determined by the law of the court seised and/or the law of the court which gave the decision'. See, on the latter case, Bléry, C., 'Quelle autonomie de la notion d'autorité de la chose jugée?: droit de l'Union *versus* droit français', *Dalloz actualité*, 1 December 2021.

II. Legal framework

A. European Union law

3. Articles 27, 33 and 36 of Regulation No 44/2001 are relevant to the present case.

B. National law

1. French law

4. Under the first paragraph of Article L. 1234-5 of the code du travail (Labour Code), where an employee does not work his or her notice, he or she is to be entitled to compensation, unless he or she is guilty of serious misconduct.

5. In the words of the first paragraph of Article L. 1234-9 of the Labour Code:

'An employee with a contract of employment of indefinite duration who is dismissed when he or she has worked for eight continuous months for the same employer shall be entitled, except in the case of serious misconduct, to compensation for dismissal.'

6. According to Article L. 1235-3 of the Labour Code, if an employee's dismissal is not based on an actual and serious cause, the court may propose that he or she be reinstated in the undertaking and that the advantages acquired be maintained. If either of the parties objects to reinstatement, the court is to award the employee compensation to be borne by the employer.

7. Article R. 1452-6 of the Labour Code, in the version in force prior to Decree No 2016-660, of 20 May 2016, [5] provided:

'All claims linked with a contract of employment between the same parties shall, whether made by the claimant or the defendant, be the subject matter of a single set of proceedings.

This rule shall not apply where the basis of the claims arises or comes to light after the matter has been brought before the Labour Tribunal.'

2. United Kingdom law

8. Section 98 of the Employment Rights Act 1996 provides:

'(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

[5] JORF, No 120, 25 May 2016, text No 30.

(2) A reason falls within this subsection if it –

…

(b) relates to the conduct of the employee.

…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

…'

9. Section 118 of that act provides that where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3) the award is to consist of (a) a basic award (calculated in accordance with sections 119 to 122 and 126) and (b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126).

III. The facts giving rise to the dispute, the main proceedings and the questions referred for a preliminary ruling

10. TR was employed on 25 August 1998 by BNP, which became BNP Paribas, under a contract governed by English law, to carry out the duties of 'Senior Dealer' in London.

11. On 2 April 2009, he signed with BNP Paribas a contract of indefinite duration, governed by French law, under which he was seconded to Singapore. By an amendment to his contract of employment dated 16 August 2010, he was attached to the London branch of BNP Paribas.

12. TR was dismissed on 30 September 2013, on the ground of serious misconduct relating to events that had occurred while he was on secondment in Singapore.

13. On 20 December 2013, TR applied to the Central London Employment Tribunal (United Kingdom) ('the Employment Tribunal'), which, by decision of 26 September 2014, upheld his complaint of unfair dismissal as well founded, awarded him the sum of 81 175 pounds sterling (GBP) (around EUR 94 401.77) by way of compensatory award, and adjourned to a later hearing the other issues relating to compensation.

14. The Employment Tribunal observed, in particular, that although TR had faced disciplinary action in accordance with the French Labour Code, counsel for BNP Paribas had agreed that the case should be resolved in accordance with the Employment Rights Act 1996 and the United Kingdom case-law.

15. Then, by application of 27 November 2014, TR brought an action before the conseil de prud'hommes de Paris (Labour Tribunal, Paris, France), seeking, in particular, an order that BNP Paribas pay him compensation for dismissal without actual and serious cause, compensation for dismissal, compensation in lieu of notice and various sums corresponding to bonuses and allowances provided for in the contract of employment. The conseil de prud'hommes de Paris (Labour Tribunal, Paris), by decision of 17 May 2016, declared those claims inadmissible on the ground of *res judicata*.

16. According to a judgment of 22 May 2019, the cour d'appel de Paris (Court of Appeal, Paris, France) set aside that decision in its entirety.

17. It is apparent from the grounds of that judgment that the cour d'appel de Paris (Court of Appeal, Paris) decided that the decision of the Employment Tribunal had the authority of *res judicata* in that it had considered that the dismissal was not based on an actual and serious cause. The cour d'appel de Paris (Court of Appeal, Paris) nonetheless considered that *res judicata* could not be pleaded against the claims submitted before the conseil de prud'hommes de Paris (Labour Tribunal, Paris), and ordered BNP Paribas to pay compensation for dismissal without actual and serious cause, compensation for dismissal, compensation in lieu of notice and various sums corresponding to bonuses and allowances provided for in the contract of employment.

18. In order to arrive at that conclusion, the cour d'appel de Paris (Court of Appeal, Paris) observed, in particular, that it was expressly stated in the application before the Employment Tribunal that TR had not been seeking compensation and employment-related benefits in connection with the termination of his contract of employment and that he would submit such claims before a different court. It found that the claims submitted before the French courts were not the same and did not have the same cause of action as those submitted before the Employment Tribunal.

19. BNP Paribas lodged an appeal before the Cour de cassation (Court of Cassation). In support of its appeal, the appellant relies, in particular, on Article 33 of Regulation No 44/2001 to support its assertion that, because of the decision delivered by the Employment Tribunal, the French courts could not examine TR's claims. In that respect, the appellant asserts, in the first place, that the defence, raised before a French court, that a foreign judgment constitutes *res judicata* must be assessed in the light of the authority and effectiveness which that judgment enjoys in the Member State in which it was given. In the second place, it claims that the authority of *res judicata* attached to a judgment given in one Member State precludes an action having the same subject matter and the same cause of action and involving the same parties being brought in another Member State.

20. In examining the action, the Cour de cassation (Court of Cassation) observed that BNP Paribas is relying on the 'abuse of process' rule resulting from the judgment of the Court of Chancery (England & Wales) (United Kingdom) of 20 July 1843 in *Henderson v. Henderson*, which 'requires the parties, when their question becomes the subject matter of proceedings before a competent court, to plead their entire case before that court so that all aspects of that question may be settled, subject to appeal, once and for all'.[6]

[6] Paragraph 37 of the request for a preliminary ruling. It should be observed that the detailed developments dedicated by the referring court to the presentation of the 'abuse of process' rule are in paragraph 38 of the full, non-anonymised version of the request for a preliminary ruling.

21. The Cour de cassation (Court of Cassation) also observed that, in accordance with the French legislation then in force, all claims linked with the contract of employment, whether submitted by the applicant or the defendant, are the subject matter of the same set of proceedings and that that rule does not apply where the basis of the claims arises or comes to light after the matter has been brought before the conseil de prud'hommes de Paris (Labour Tribunal, Paris).

22. In those circumstances, the Cour de cassation (Court of Cassation) decided, on 8 September 2021, to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Articles 33 and 36 of [Regulation No 44/2001] be interpreted as meaning that, where the legislation of the Member State of origin of the judgment confers on that judgment authority such as to preclude a new action being brought by the same parties for determining the claims that could have been raised in the initial proceedings, the effects which that judgment has in the Member State in which enforcement is sought preclude a court of that latter State, whose legislation, as applicable *ratione temporis*, provided in employment law for a similar obligation of concentration of claims, from adjudicating on such claims?

(2) If the first question is answered in the negative, must Articles 33 and 36 of [Regulation No 44/2001] be interpreted as meaning that an action such as a claim of unfair dismissal in the United Kingdom has the same cause of action and the same subject matter as an action such as a claim of dismissal without actual and serious cause in French law, so that the employee's claims for damages for dismissal without actual and serious cause, compensation in lieu of notice, and compensation for dismissal before the French courts are inadmissible after the employee has obtained a decision in the United Kingdom declaring that there has been an unfair dismissal and making a compensatory award in that respect? Is it necessary in that regard to distinguish between, on the one hand, the damages for dismissal without actual and serious cause that might have the same cause of action and the same subject matter as the compensatory award and, on the other, the compensation for dismissal and compensation in lieu of notice which, in French law, are payable where the dismissal is based on an actual and serious cause, but are not payable in the event of dismissal based on serious misconduct?

(3) Likewise, must Articles 33 and 36 of [Regulation No 44/2001] be interpreted as meaning that an action such as a claim of unfair dismissal in the United Kingdom and an action for payment of bonuses or allowances provided for in the contract of employment have the same cause of action and the same subject matter when those actions are based on the same contractual relationship between the parties?'

IV. The procedure before the Court

23. Written observations were lodged by the parties to the main proceedings, the French and Swiss Governments and the European Commission.

V. Legal analysis

A. Preliminary considerations

24. Before I examine the questions submitted by the referring court, it seems necessary to make a number of observations.

1. The applicability of Regulation No 44/2001

25. It must be ascertained whether Regulation No 44/2001 is applicable from both a temporal and a spatial aspect. In that regard, I note that the decision of the Employment Tribunal, recognition of which is at issue in the dispute in the main proceedings, was delivered following the action brought on 20 December 2013.

26. It follows, first of all, from that circumstance that Regulation No 44/2001 is applicable *ratione temporis* to the dispute in the main proceedings. Pursuant to Article 66(2) of Regulation (EU) No 1215/2012,[7] Regulation No 44/2001 is to continue to apply to judgments given in legal proceedings instituted before 10 January 2015.

27. It may be inferred, next, from that circumstance that Regulation No 44/2001 is applicable *ratione loci*. In order to arrive at that conclusion, I note that, in the words of Article 67(2)(a) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community,[8] 'Regulation (EU) No 1215/2012 shall apply to the recognition and enforcement of judgments given in legal proceedings instituted before the end of the transition period, and to authentic instruments formally drawn up or registered and court settlements approved or concluded before the end of the transition period'. It follows that Regulation No 44/2001 remains applicable in the United Kingdom until the end of the transition period.

28. In the light of those factors, it must be considered that Regulation No 44/2001 is applicable *ratione temporis* and *ratio loci* to the dispute in the main proceedings.

2. The interpretation of Regulation No 44/2001

29. As regards the interpretation of the provisions of Regulation No 44/2001, I recall that, according to settled case-law,[9] in so far as that regulation replaces the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters[10] ('the Brussels Convention'), the interpretation provided by the Court in respect of the provisions of that convention is valid also for those of that regulation, whenever the provisions of those EU instruments may be regarded as equivalent.

7 Regulation of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1). That regulation replaced Regulation No 44/2001.

8 OJ 2019 C 384 I, p. 1.

9 See judgment of 6 June 2019, *Weil* (C-361/18, EU:C:2019:473, paragraph 40 and the case-law cited). I observe that, when interpreting Regulation No 1215/2012, the Court applies analogous reasoning. See, to that effect, judgment of 20 June 2022, *London Steam-Ship Owners' Mutual Insurance Association* (C-700/20, EU:C:2022:488, paragraph 42 and the case-law cited).

10 OJ 1978 L 304, p. 36.

30. I note that, on the one hand, Articles 26 and 29 of the Brussels Convention and, on the other hand, Articles 33 and 36 of Regulation No 44/2001, the interpretation of which is requested by the referring court, are drafted in virtually identical terms and that the judgments in which the Court interpreted the Brussels Convention can constitute a relevant basis on which to answer the questions put by the referring court. [11]

3. The delimitation of the questions referred for a preliminary ruling

31. In the first place, I observe that it is apparent from the information provided by the referring court that BNP Paribas is relying on the decision of the Employment Tribunal as the basis for its assertion that the action which TR subsequently brought in France is inadmissible. In my view, such a situation corresponds to the situation referred to in Article 33(3) of Regulation No 44/2001, which covers a situation in which the outcome of proceedings in a Member State depends on the determination of an incidental question of recognition before a court of a Member State. As emphasised in the report drawn up by P. Jenard, [12] that rule applies to a case in which a party relies on recognition as a defence of *res judicata*.

32. In that regard, I note that while recognition is not to be confused with *res judicata*, [13] those two concepts are linked. Thus, *res judicata* is one of the facets of recognition. More specifically, recognition may, as *res judicata*, have either a positive aspect, in that it allows the legal situation created by a judgment given in a first Member State to be introduced in a second Member State, or a negative aspect, in that, as *res judicata*, it prohibits the judgment given in the first Member State being called in question in a second State by claims relating to points identical to those settled by that judgment. [14]

33. It follows that the dispute in the main proceedings must be seen from the perspective of the second aspect of the rules on recognition laid down in Regulation No 44/2001. To my mind, that framework sets a twofold problem. First, it calls for clarification of the bases on which the authority of a judgment given in a first Member State, recognition of which is relied on before a court or tribunal of a second Member State, is defined. Second, it means determining how that judgment must be related to the action brought in that second Member State, so that it may be ascertained whether that new procedure is inadmissible, in whole or in part, on account of the *res judicata* attached to the judgment given in the first Member State.

34. In the second place, I note that the respondent in the main proceedings, disputing the referring court's presentation of the United Kingdom 'abuse of process' rule, contends that that rule is applicable only in situations in which the claimant has committed an abuse of procedure, with the consequence that the respondent in the main proceedings would not be prohibited from initiating a second procedure. However, I recall that, according to the Court's settled case-law, questions on the interpretation of EU law referred by a national court in the legislative and factual context which that court is responsible for defining, and the accuracy of which is not a

[11] It should also be borne in mind that the wording of Article 33(1) and Article 36 of Regulation No 44/2001 is very similar to that of Articles 36 and 52 of Regulation No 1215/2012.

[12] Report of Mr P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1979 C 59, p. 66) ('the Jenard Report').

[13] In that regard, P. Jenard observes out that 'the words "*res judicata*" which appear in a number of conventions have expressly been omitted, since judgments given in interlocutory proceedings and *ex parte* may be recognised, and these do not always have the force of *res judicata*'. Jenard Report, p. 43.

[14] These arguments are taken from the following works: Gaudemet-Tallon, H. and Ancel, M.-É., *Compétence et exécution des jugements en Europe*, LGDJ, 6th Edition, 2018, p. 583, and Alexandre, D. and Huet, A., *Répertoire de procédure civile, compétence judiciaire européenne, reconnaissance et exécution des décisions en matière civile et commerciale*, 2021, paragraph 335 et seq.

matter for the Court of Justice to determine, enjoy a presumption of relevance.[15] It seems to me, therefore, that the Court must adjudicate solely by reference to the elements of law and of fact provided by the referring court.

B. The first question

35. By its first question, the referring court seeks, in essence, to ascertain whether Articles 33 and 36 of Regulation No 44/2001 must be interpreted as meaning that they preclude a decision delivered in one Member State from having the consequence that claims brought before a court or tribunal of another Member State are inadmissible on the ground that the laws of each of those States provide for a procedural rule governing the concentration of all claims that could have been submitted in the initial proceedings.

36. In other words, that question entails a determination of whether, in order for the rules on recognition laid down in Regulation No 44/2001 to be applicable, the *res judicata* of the judgment given in the original State must be defined by reference to a domestic rule on the concentration of claims.

37. In order to answer that question, it seems necessary first to define the boundaries of the concept of 'recognition'. In that respect, it should be observed that recognition is not defined as such in Regulation No 44/2001, which merely states in Article 33(1) that 'a judgment given in a Member State shall be recognised in the other Member States without any special procedure being required' and in Article 36 that 'under no circumstances may a foreign judgment be reviewed as to its substance'.

38. However, I recall that, according to the Court's settled case-law, in order to interpret the meaning and the scope of a provision of EU law, it is necessary to consider not only the wording of that provision but also its context and the objectives pursued by the rules of which it is part.[16]

39. As regards, first of all, the objectives of Regulation No 44/2001, it follows from recitals 2, 6, 16 and 17 of that regulation that it seeks to ensure the free movement of judgments from Member States in civil and commercial matters,[17] by establishing unified rules on jurisdiction and simplifying the formalities with a view to their rapid and simple recognition and enforcement.[18]

40. As regards, next, the system introduced by Regulation No 44/2001, recitals 16 and 17 of that regulation underline the importance of the principle of mutual trust between the courts of the Member States in the recognition and enforcement of judgments, which implies that the concepts contained in that regulation are not to be interpreted restrictively.[19]

[15] Judgment of 20 October 2022, *Koalitsia 'Demokratichna Bulgaria – Obedinenie'* (C-306/21, EU:C:2022:813, paragraph 27 and the case-law cited).

[16] Judgment of 27 October 2022, *Orthomol* (C-418/21, EU:C:2022:831, paragraph 24 and the case-law cited). More precisely, the provisions of Regulation No 44/2001 must be interpreted independently, by reference to its scheme and purpose. See, to that effect, judgment of 7 March 2018, *E.ON Czech Holding* (C-560/16, EU:C:2018:167, paragraph 25 and the case-law cited).

[17] I note that in his report, P. Jenard emphasised that the Brussels Convention 'seeks to facilitate as far as possible the free movement of judgments, and should be interpreted in this spirit' (Jenard Report, p. 42).

[18] Judgment of 4 October 2018, *Società Immobiliare Al Bosco* (C-379/17, EU:C:2018:806, paragraph 45 and the case-law cited).

[19] Judgment of 15 November 2012, *Gothaer Allgemeine Versicherung and Others* (C-456/11, EU:C:2012:719, paragraph 28; 'the judgment in *Gothaer*').

41. Last, the Jenard Report defined the consequences of recognition, making clear that recognition 'must have the result of conferring on judgments the authority and effectiveness accorded to them in the State in which they were given'. [20]

42. Referring explicitly to that last proposition, the Court set out, in the judgment in *Hoffmann*, [21] the effects of recognition, holding that a foreign judgment which has been recognised pursuant to Article 26 of the Brussels Convention must in principle have the same effects in the State in which enforcement is sought as it does in the State in which judgment was given. [22]

43. Ruling, next, in the context of the enforcement in one Member State of a judgment given in another Member State, the Court decided, again making reference to the Jenard Report, [23] that 'although recognition must have the effect, in principle, of conferring on judgments the authority and effectiveness accorded to them in the Member State in which they were given, there is however no reason for granting to a judgment, when it is enforced, rights which it does not have in the Member State of origin or effects that a similar judgment given directly in the Member State in which enforcement is sought would not have'. [24]

44. It follows from those judgments that, in accordance with the actual scheme of Regulation No 44/2001, which, essentially, separates the rules governing recognition from those governing the enforcement of judgments, [25] the Court draws a distinction according to which of those concepts is central to a dispute.

45. As regards the enforcement of judgments, which entails the implementation of coercive measures in order to ensure the application of a right embodied in a decision, [26] the Court refers expressly to the law of the State of origin and to that of the State in which enforcement is sought to adapt the effects of the foreign judgment to the effects which a national judgment would have. [27]

46. As regards the recognition of judgments, on the other hand, I note that in the judgments cited above the Court refers solely to the law of the Member State in which the judgment was delivered. It follows, to my mind, that recognition consists in extending to a Member State the rules which the laws of the State of origin attach to judgments given in that State. Thus, it is appropriate, according to that solution, described in the literature as the 'extension of effects' rule, to refer to the law of the Member State of origin in order to determine the effects of the judgment relied on

[20] Jenard Report, p. 43.

[21] Judgment of 4 February 1988 (145/86, EU:C:1988:61).

[22] Judgment of 4 February 1988, *Hoffmann*, (145/86, EU:C:1988:61, paragraphs 10 and 11). See also, to that effect, the judgment in *Gothaer*, paragraph 34.

[23] Jenard Report, p. 48.

[24] Judgments of 28 April 2009, *Apostolides* (C-420/07, EU:C:2009:271, paragraph 66); of 13 October 2011, *Prism Investments* (C-139/10, EU:C:2011:653, paragraph 38); and of 4 October 2018, *Società Immobiliare Al Bosco* (C-379/17, EU:C:2018:806, paragraph 40).

[25] Although the rules on recognition and enforcement are brought together in Chapter III of Regulation No 44/2001, they are, apart from the common provisions set out in Section 3 of that chapter, subject to specific rules referred to in distinct sections of that regulation.

[26] See, for a definition of enforcement, Alexandre, D. and Huet, A., *Répertoire de procédure civile, compétence judiciaire européenne, reconnaissance et exécution des décisions en matière civile et commerciale*, 2021, paragraph 335, and Requejo Isidro, M., *Brussels I Bis: A Commentary on Regulation (EU) No 1215/2012*, Elgar Commentaries in Private International Law Series, 2022, p. 550.

[27] Incidentally, that solution is enshrined in Regulation No 1215/2012, Article 54 of which states: 'if a judgment contains a measure or an order which is not known in the law of the Member State addressed, that measure or order shall, to the extent possible, be adapted to a measure or an order known in the law of that Member State which has equivalent effects attached to it and which pursues similar aims and interests'.

in a second Member State, including, in particular, the points resolved by that judgment, the rights established therein and the practical consequences for the legal situation of the parties. [28]

47. In my view, since the judgments cited above were delivered, that case-law has not been altered in such a way that it might be called in question.

48. Indeed, I observe that, in the judgment in *Gothaer*, the Court decided, in particular, that 'Articles 32 and 33 of Regulation No 44/2001 must be interpreted as meaning that the court before which recognition is sought of a judgment by which a court of another Member State has declined jurisdiction on the basis of a jurisdiction clause is bound by the finding – made in the grounds of a judgment, which has since become final, declaring the action inadmissible – regarding the validity of that clause'. [29]

49. It follows from that judgment that, independently of the scope conferred on them by national laws, the grounds of a decision declining jurisdiction on the basis of a jurisdiction clause do not constitute *res judicata*. At first sight, such a solution might suggest that, in relation to recognition, the Court abandoned the reference to the law of origin in favour of an autonomous concept of *res judicata*. It seems to me, however, that, on reading the reasoning adopted by the Court, such an analysis cannot be accepted.

50. In that regard, it should be noted that that judgment was given in the particular context of recognition of a judgment given in a Member State which had declined jurisdiction on the basis of a jurisdiction clause. In such a context, the Court considered, in essence, that the principle of mutual trust and the prohibition on reviewing a judgment as to its substance would be undermined if the court of a Member State were authorised to review the judgment of a court of another Member State that applied the provisions of Regulation No 44/2001 in order to decline or accept jurisdiction. The Court inferred that such considerations made it necessary to take an autonomous approach to the *res judicata* defined at EU level, independently of the national rules. [30]

51. I also note that the Court not only made explicit reference to the judgment in *Hoffmann* [31] but also took care to emphasise that the recognition of judgments handed down by Member State courts declining jurisdiction under Regulation No 44/2001, which are delivered pursuant to common rules of jurisdiction provided for by EU law, is governed by its own *sui generis* system. [32] It follows that, as the French Government maintains, the Court intended to confine the scope of that solution to that specific situation. [33]

[28] For a presentation of the rule governing the extension of the effects and the consequences arising therefrom, see Gaudemet-Tallon, H. and Ancel, M.-É., *Compétence et exécution des jugements en Europe*, op. cit., p. 550; Requejo Isidro, M., *Brussels I Bis: A Commentary on Regulation (EU) No 1215/2012*, op. cit., p. 551; and Dickinson, A., Lein, E. and James, A., *The Brussels I Regulation Recast*, Oxford University Press, 2015, paragraph 13.33 et seq.

[29] The judgment in *Gothaer*, paragraph 43.

[30] The judgment in *Gothaer*, paragraphs 35 to 39.

[31] Judgment of 4 February 1988 (145/86, EU:C:1988:61, paragraph 34).

[32] The judgment in *Gothaer*, paragraph 42.

[33] See, concerning the scope of that judgment, Requejo Isidro, M., *Brussels I Bis: A Commentary on Regulation (EU) No 1215/2012*, op. cit., p. 552; Dickinson, A., Lein, E. and James, A., *The Brussels I Regulation Recast*, op. cit., paragraph 13.51 et seq.; Voulgarakis, K.D., 'Reflections on the Scope of "EU Res Judicata" in the Context of Regulation 1215/2012: Case C-456/11 (*Gothaer*)', *Journal of Private International Law*, 2020, 16: 3, pp. 451-464; Nioche, M., 'Reconnaissance d'une décision étrangère d'incompétence prise sur le fondement d'une clause attributive de juridiction', *Revue critique de droit international privé*, 2013, p. 686 et seq.; and di Noto, R., 'Règlement Bruxelles I: à propos de la reconnaissance et de l'autorité de la chose jugée d'une décision nationale d'incompétence', www.gdr-elsj.eu.

52. I infer from all of those considerations that, as the Court's case-law now stands, it is necessary in principle, when recognition is relied on, to refer to the law of the Member State in which a judgment was given in order to determine the effects of that judgment. It follows that, in the dispute in the main proceedings, the law of the United Kingdom must be taken into consideration for the purpose of determining the authority and the effectiveness that attach to the decision delivered by the Employment Tribunal.

53. That being the case, it is also necessary that, by its nature and its purpose, the law of the Member State of origin is capable of having an impact on the definition of the authority and the effectiveness of that decision. However, in my view, the procedural rule on the concentration of claims laid down in the law of the United Kingdom, as presented by the referring court, cannot have such an implication.

54. In that respect, it is apparent from the information provided by the referring court [34] that the 'abuse of process' rule, under which the parties are required to concentrate all the pleas and claims [35] which they might have maintained in the proceedings leading to the initial decision, is not based on the concept of *res judicata*. According to the referring court, it is in the nature of a 'public policy rule based on the desirability, in the general interest as much as that of the parties themselves, that the proceedings should not be drawn out and that the defendant should not be subject to several successive cases when one might have been sufficient. That is the abuse against which the rule is directed'.

55. Regard being had to those characteristics, it seems to me that that procedural rule is justified by a concept, specific to the United Kingdom, of the scheme of the process, in that it is intended to prevent the applicant from improperly initiating a new procedure.

56. It follows that, from the perspective of the recognition in a Member State of a judgment given in a first Member State, the rule on the concentration of claims does not in any way relate to the points already settled as to their substance by the judgment given in the first Member State, the rights established in that judgment and their practical implications for the legal situation of the parties.

57. It follows, to my mind, that such a rule has no effect on the authority and the effectiveness of the judgment recognition of which is sought.

58. It seems to me, moreover, that a conclusion contrary to that which I have just reached would not be consistent with the scheme of Regulation No 44/2001.

59. It should be borne in mind that that regulation aims to facilitate the free movement of judgments by laying down unified rules governing jurisdiction and simplifying the formalities with a view to rapid and simple recognition and enforcement of those judgments. As the Court has emphasised, the rules on jurisdiction and those relating to the recognition and enforcement of judgments do not constitute distinct and autonomous systems but are closely linked. [36]

[34] I refer to paragraph 38 of the full, non-anonymised version of the order for reference.

[35] It should be borne in mind that the referring court considers that the French law applicable *ratione temporis* establishes a similar rule on the concentration of claims.

[36] See, to that effect, the judgment in *Gothaer*, paragraph 35 and the case-law cited.

60. In that regard, consideration, at the stage of the recognition of a judgment, of a national rule on the concentration of claims, laid down in the law of the Member State from which the judgment comes, might compromise the subsequent application of the rules set out in Chapter II of Regulation No 44/2001. More precisely, that regulation lays down, in Sections 5 and 9, respectively, of that chapter, specific rules governing jurisdiction over individual contracts of employment and provisions governing situations of *lis pendens* and related actions.

61. I consider that the obligation at issue in the dispute in the main proceedings, in that it requires that all claims be made on the occasion of a single action, is liable to interfere with the mechanisms provided for in that regulation. Such an obligation might have the consequence of preventing a party from raising new claims in a court designated by Regulation No 44/2001 to determine them, or of avoiding the autonomous provisions of that regulation specifically intended to preclude concurrent proceedings capable of resulting in contradictory judgments.

62. Unless the objective of the free movement of judgments is to be disregarded, the application of the provisions of Regulation No 44/2001 cannot depend on the content of the procedural rules of a Member State.

63. Nor, I would add, is that conclusion called in question by the fact that the law of the Member State in which recognition is claimed contains a similar rule on the concentration of claims. For the reasons which I have just stated, the mere fact that the laws of the two Member States provide for such an obligation in a similar way cannot justify the neutralisation of the rules on jurisdiction laid down in Regulation No 44/2001.

64. In the light of all of the foregoing considerations, I propose that the Court's answer to the first question should be that Articles 33 and 36 of Regulation No 44/2001 must be interpreted as meaning that the recognition of a judgment given in a Member State, the law of which establishes a rule requiring the concentration of claims that prohibits the same parties from bringing a new action relating to claims that could have been raised in the initial proceedings, does not – even where the law of the Member State in which recognition is asserted imposes a similar requirement for the concentration of claims – preclude the court of the second State from adjudicating on such claims.

65. In so far as a national procedural rule requiring the concentration of claims does not constitute a decisive criterion for the purpose of determining the authority attached to a judgment given in a Member State, the bases on which such a judgment must be related to the claims made in new proceedings initiated before a court in a second Member State remain to be determined, as requested by the second and third questions.

C. The second and third questions

1. The reformulation of the questions

66. The second question put by the referring court, which is divided into two parts, is submitted in case the answer to the first question is in the negative.

67. In the first place, the referring court seeks to ascertain whether an action such as a claim of unfair dismissal in the United Kingdom has the same cause of action and the same subject matter as an action such as a claim of dismissal without actual and serious cause in French law, so that the

employee's claim for damages for dismissal without actual and serious cause, compensation in lieu of notice and compensation for dismissal which is raised before the French courts after that employee has obtained a judgment in the United Kingdom declaring that there has been an unfair dismissal and making a compensatory award in that respect would be inadmissible.

68. In the second place, the referring court wonders whether, in that respect, a distinction must be drawn between (i) the damages for dismissal without actual and serious cause that might have the same cause of action and the same subject matter as the compensatory award and (ii) the compensation for dismissal and compensation in lieu of notice which, in French law, are payable where the dismissal is based on actual and serious cause but which are not payable in the event of dismissal for serious misconduct.

69. By its third question, which is also submitted in case the first question is answered in the negative, the referring court wishes to ascertain whether Articles 33 and 36 of Regulation No 44/2001 must be interpreted as meaning that an action such as a claim of unfair dismissal in the United Kingdom and an action for payment of bonuses or allowances provided for in the contract of employment have the same cause of action and the same subject matter when those actions are based on the same contractual relationship.

70. On examining those questions, I note, first of all, that the second question invites the Court to consider in detail the compensation provided for in United Kingdom law and French law in order to determine whether the claim for unfair dismissal and the claim for dismissal without actual and serious cause are based on the same cause of action and the same subject matter. I note, next, that, in so far as it relates to the identity of cause of action and of subject matter that might exist between the claim for unfair dismissal and the action for payment of bonuses or allowances provided for in the contract of employment, the third question also presupposes an analysis of the substantive content of the laws at issue in the dispute in the main proceedings.

71. It follows, to my mind, that those questions make it necessary to undertake the delicate exercise of comprehending, and then comparing, technical provisions provided for in the United Kingdom and French regulations at issue in the dispute in the main proceedings. Yet, according to settled case-law, the Court has no jurisdiction to interpret national law, such interpretation being exclusively a matter for the national court. [37]

72. It must be borne in mind, however, that, according to equally settled case-law, in the context of the cooperation between national courts and the Court laid down in Article 267 TFEU, it is for the Court to provide the national court with an answer which will be of use to it and enable it to decide the case before it. To that end, the Court should, where necessary, reformulate the questions referred to it. [38]

73. In the present case, it is apparent from the wording of the order for reference [39] that, beyond the comparison of the content of the national laws at issue in the dispute in the main proceedings, the referring court is asking, in a context where recognition is raised as an incidental question, about the interpretation of the concepts of 'cause of action' and 'subject matter' [40] in the light of Articles 33 and 36 of Regulation No 44/2001. More specifically, it is asking, in essence,

[37] See, to that effect, judgment of 7 April 2022, *IFAP* (C-447/20 and C-448/20, EU:C:2022:265, paragraph 100 and the case-law cited).

[38] See, to that effect, judgment of 13 October 2022, *DN (Recovery of family benefits)* (C-199/21, EU:C:2022:789, paragraph 47 and the case-law cited).

[39] I refer more particularly to paragraph 43 of the order for reference.

[40] It should be emphasised that in the present case the concept of 'identity of the parties' is not at issue.

whether, for the purpose of determining whether the cause of action and the subject matter of actions linked with the same contract of employment are identical, it is necessary to distinguish between actions relating to obligations inherent in the performance of the contract of employment and those relating to obligations specific to the breach of that contract.

74. In so far as, independently of the literal wording of the second and third questions, those questions relate to the interpretation of EU law, I propose, in order to provide the referring court with an answer that will be of use to it, to reformulate those questions in these terms:

Must Articles 33 and 36 of Regulation No 44/2001 be interpreted as meaning that, where the recognition of a judgment given in a first Member State is raised as an incidental question before the court of a second Member State, the actions based on the same contract of employment, some of which relate to obligations arising from the performance of that contract and the others to obligations arising from the breach of that contract, have the same cause of action and the same subject matter?

2. The reformulated questions

(a) Preliminary considerations

75. It should be observed that the referring court proceeds on the assumption that, in order to assess the admissibility of the claims put forward in a second Member State, it is necessary to refer to the criterion of identity of parties, cause of action and subject matter. Thus, before even beginning to examine the question as reformulated, it seems necessary to determine whether such a criterion applies.

76. On that point, it should first of all be observed that Articles 33 and 36 of Regulation No 44/2001 make no reference whatsoever to the concepts of 'identity of parties', 'cause of action' and 'subject matter'. On the other hand, those concepts are a central element of the application of Article 27 of that regulation, applicable to the situation of *lis pendens*. [41]

77. *Lis pendens* assumes that two courts in the European Union designated as both having jurisdiction are seised of the same dispute. In such a situation, Article 27(1) of Regulation No 44/2001 provides that 'where proceedings involving the same cause of action and between the same parties are brought before 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'. As stated in recital 15 of that regulation, the *lis pendens* rules were laid down in order to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments are not given in two Member States.

78. The provisions relating to *lis pendens* therefore correspond with the general scheme of Regulation No 44/2001. Indeed, the principle of mutual trust between the courts of the Member States and the objective of free movement of judgments would be jeopardised by the absence of an autonomous mechanism capable of preventing the development of concurrent proceedings concerning the same dispute. [42]

[41] For a presentation of the general scheme of *lis pendens*, see Dickinson, A., Lein, E. and James, A., *The Brussels I Regulation Recast*, op. cit., 2015, paragraph 11.01 et seq.

[42] See, to that effect, judgment of 20 June 2022, *London Steam-Ship Owners' Mutual Insurance Association* (C-700/20, EU:C:2022:488, paragraphs 56 and 70).

79. Thus, *lis pendens* is closely linked with the negative aspect of *res judicata*.[43] The *res judicata* attached to a judgment recognition of which is raised as an incidental question ensures that a dispute settled by a court of a first Member State cannot be the subject matter of new proceedings brought before a court of a second Member State.

80. It follows that the rules on *lis pendens* and on recognition have the common purpose of contributing to the full authority of the judgment given in the Member State of origin, which must not be capable of being called in question by a judgment given by a court of another Member State.[44]

81. Furthermore, the Court has referred to that link as the basis for its decision that to accept the admissibility of an action concerning the same subject matter and brought between the same parties as an application upon which judgment has already been delivered by a court in another Member State would be incompatible with the provisions governing recognition.[45] In support of its reasoning, the Court added, in essence, that the incompatibility of such an action is the consequence of the provisions governing *lis pendens* covering cases in which proceedings 'involving the same cause of action and between the same parties are brought in the courts of different Member States' and requiring that a court other than the first seised is to decline jurisdiction in favour of that court. The Court inferred that those provisions are evidence of the concern to prevent the courts of two Member States from giving judgment in the same case.[46]

82. Furthermore, as the Court has held in essence, the provisions governing *lis pendens* are intended to facilitate the recognition of judgments by preventing the risk that a judgment given in the State of origin will not be recognised on the ground that it is incompatible with a judgment given between the same parties in another Member State.[47]

83. In that regard, I recall that the grounds set out in Article 34 of Regulation No 44/2001 on which a judgment is not to be recognised include, first, the fact that it is irreconcilable with a judgment between the same parties given in the Member State in which recognition is sought[48] and, second, the fact that it is irreconcilable with an earlier judgment given in another State.[49]

43 See, on that point, Turmo, A., *L'autorité de la chose jugée en droit de l'Union européenne*, op. cit., p. 182 et seq.

44 This is the consequence of the prohibition, in Article 36 of Regulation No 44/2001, of any review of the foreign judgment as to its substance.

45 Judgments of 30 November 1976, *de Wolf* (42/76, EU:C:1976:168, paragraph 10), and of 8 December 1987, *Gubisch Maschinenfabrik* (144/86, EU:C:1987:528, paragraph 9; 'the judgment in *Gubisch*').

46 Judgment of 30 November 1976, *de Wolf* (42/76, EU:C:1976:168, paragraphs 11 and 12).

47 The judgment in *Gubisch*, paragraphs 8 and 18.

48 Article 34(3) of Regulation No 44/2001.

49 According to Article 34(4) of Regulation No 44/2001, the judgment is not to be recognised if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed. The concepts of '*cause*' (cause of action) and '*objet*' (subject matter) referred to in the French version of that article must be given the same interpretation as that given in the context of *lis pendens*. See, on that point, Gaudemet-Tallon, H. and Ancel, M.-É., *Compétence et exécution des jugements en Europe*, op. cit., p. 645; Requejo Isidro, M., *Brussels I Bis: A Commentary on Regulation (EU) No 1215/2012*, op. cit., p. 661; and Dickinson, A., Lein, E. and James, A., *The Brussels I Regulation Recast*, op. cit., paragraph 13.366.

84. That objective and the fact that it is impossible to infer a common meaning of *lis pendens* from a comparison of the various national provisions,[50] led the Court to establish an autonomous interpretation of the concepts of 'identity of parties', 'cause of action' and 'subject matter'.[51]

85. Nonetheless, the rules governing *lis pendens* and the refusal to recognise a judgment do not cover the specific situation referred to in Article 33(3) of Regulation No 44/2001.

86. In fact, although the purpose of *lis pendens* is to prevent the occurrence of incompatible judgments, and therefore cases in which the defence of *res judicata* might be raised, there are situations in which Article 27 of that regulation does not apply, either because the application of that provision was omitted by the court seised in the second place, or because, in the absence of parallel proceedings, *lis pendens* could not be effectively relied on.

87. Likewise, a refusal of recognition is applicable only in a situation in which the defence of *res judicata* was not previously raised in a second action and two judgments, which have actually been given, are irreconcilable.

88. The case referred to in Article 33(3) of Regulation No 44/2001 corresponds to a situation which is both intermediate and autonomous where the recognition of a judgment given in a first Member State is raised as an incidental question to counter claims submitted in proceedings before the court of a second Member State.

89. In such a situation, the court before which the defence of *res judicata* is raised must have simple criteria of comparison that enable it to rule on the admissibility of the claims raised before it. From that perspective, the central element of that comparison consists in the identity between the contentious matters settled by the judgment given in the Member State of origin and those submitted to the court of the other Member State. In view of the purpose common to the mechanisms to which I have just referred, such identity logically assumes a connection between the parties, the cause of action and the subject matter at issue in each of the proceedings.

90. Thus, to my mind the transposition of the criterion of identity of parties, cause of action and subject matter applicable to *lis pendens* is an appropriate means of providing the national court with an instrument defined by EU law[52] that meets the requirement to ensure that a dispute which has already been settled by another court in the European Union is not revived.

91. That being so, it should be emphasised that that criterion has no purpose other than to allow the court to ascertain whether the action before it has already been settled by a court of a Member State, and its implementation cannot therefore have any impact on the effects of recognition, which belong to a separate regime.

[50] I observe, in that regard, that the French words '*cause*' (cause of action) and '*objet*' (subject matter) do not appear in several of the language versions of Article 27 of Regulation No 44/2001. The English, German and Estonian versions use, respectively, the terms 'same cause of action', '*desselben Anspruchs*' and '*hagide põhjal menetlusi*'. Those differences reflect the fact that the various national legal orders do not take a single approach to the concept of '*lis pendens*'.

[51] The judgment in *Gubisch*, paragraphs 10 and 11.

[52] That autonomous approach seems all the more necessary because, owing to the divergence in approaches between the domestic legal systems, the national courts and tribunals must have a homogeneous instrument of comparison.

92. In other words, I consider that although the assessment of the admissibility of the claims submitted before the court of a Member State presupposes a comparison based on the identity of parties, cause of action and subject matter, the effects produced by the initial judgment, recognition of which is raised as an incidental question, must, in accordance with the Court's consistent case-law, still be determined solely by reference to the law of the State of origin.

93. To my mind, those two solutions fit together in a coherent manner. I consider that that comparative approach is capable of preserving the authority and the effectiveness which a judgment enjoys in the Member State in which it was given by precluding any possibility that it might be called in question by an action brought in a second Member State.

94. In the light of all of those considerations, it seems to me that the questions, as reformulated, should be examined on the basis of the transposition, in the light of the rules governing recognition, of the interpretation of the concepts of cause of action and subject matter established by the Court for the application of Article 27 of Regulation No 44/2001.

(b) The identity of the cause of action and of the subject matter

95. As regards the identity of the cause of action, the Court has considered that, for the purposes of the rules governing *lis pendens*, that condition is satisfied provided that the disputes in which the parties are involved are based on the same contractual relationship.[53] Taking a more general approach, the Court considers that the 'cause of action' comprises the facts and the legal rule relied on as the basis of the action.[54]

96. Having regard to that definition, I consider that there can be little doubt that the claims settled by the Employment Tribunal and those submitted before the French courts have the same cause of action, since their factual basis lies in the breach of the contract of employment between the parties and their legal basis lies in the obligations arising under that contract.

97. As regards the identity of the subject matter for the purposes of Article 27 of Regulation No 44/2001, the Court has first of all stated that it cannot be restricted so as to mean two claims which are entirely identical.[55]

98. In that regard, the Court has considered that in the case of a contract for the international sale of moveable property, the action to enforce the contract is aimed at giving effect to it and that the action for its rescission or discharge is aimed precisely at depriving it of any effect. It inferred that the question whether the contract is binding therefore lies at the heart of the two actions, as both actions were based on the same subject matter.[56]

[53] The judgment in *Gubisch*, paragraph 15. In that case, the disputes related to the same contract for the international sale of moveable items.

[54] See judgment of 19 October 2017, *Merck* (C-231/16, EU:C:2017:771, paragraph 36 and the case-law cited). On the basis of that definition, the Court has held, for example, that actions brought on the basis of shipping contracts which are separate but in identical terms, concerning the same cargo transported in bulk and damaged in the same circumstances, have the same cause of action. See also judgment of 6 December 1994, *Tatry* (C-406/92, EU:C:1994:400, paragraph 40).

[55] The judgment in *Gubisch*, paragraph 17.

[56] The judgment in *Gubisch*, paragraph 16. That solution, however, has been criticised in the literature, notably on the ground that the subject matter of an action for annulment and the subject matter of an action to enforce an agreement are fundamentally different and that recourse to the question whether the contract is binding may have the consequence that a situation of *lis pendens* is found to exist whenever two claims relate to the same contract. See, on that point, Gaudemet-Tallon, H. and Ancel, M.-É., *Compétence et exécution des jugements en Europe*, op. cit., p. 353.

99. The Court then made clear that the subject matter consists in the end the action has in view and that the concept of 'subject matter' cannot be restricted so as to mean two claims which are formally identical, and that it is necessary, in that regard, to take account of the respective claims of the applicants in each of the disputes.[57] On the basis of such an interpretation, the Court considers that that concept is to be interpreted broadly.[58]

100. On the basis of that definition, the Court has taken a casuistic approach to the concept of 'subject matter'.[59] It thus considered that a claim seeking a declaration that a defendant was liable for causing loss, and ordering him or her to pay damages, has the same cause of action and the same subject matter as earlier proceedings brought by that defendant seeking a declaration that he was not liable for that loss.[60] The same applies, a fortiori, when the claims seek compensation for the same harm.[61] On the other hand, the Court found that there was no rejected identity of subject matter when there were two claims, one seeking to have a defendant declared liable and the other seeking to limit the amount of damages in the event that the defendant should be declared liable.[62]

101. It follows from those examples that, in the context of a broad interpretation of the concept of 'subject matter', the Court analyses the end which the claims seek to achieve in the light of the potential effects of the future judgments, in order to preclude any risk of incompatibility between judgments given in two Member States.

102. That being so, it is appropriate to transpose that definition of identity of subject matter to the rules governing recognition. In that respect, I observe that *lis pendens* assumes that proceedings are brought at the same time before two courts designated by Regulation No 44/2001 as having jurisdiction. In such circumstances, where two sets of proceedings take place in parallel, it is logical to take into account the ends which the proceedings that are pending simultaneously seek to achieve.

103. In a situation in which recognition is relied on as a defence of *res judicata*, it is essentially necessary to ascertain that the claims submitted before a court of a second Member State do not overlap with the matter previously determined in a first Member State.

104. To my mind, such a task entails determining whether the result which the applicant hopes to achieve by bringing a new action does not collide, even potentially, with the content of the dispute settled by the initial judgment.

57 Judgment of 19 October 2017, *Merck* (C-231/16, EU:C:2017:771, paragraphs 39 and 41 and the case-law cited). However, it should be emphasised that account should be taken only of the claims of the respective applicants, to the exclusion of the defence submissions raised by a defendant. See judgment of 8 May 2003, *Gantner Electronic* (C-111/01, EU:C:2003:257, paragraph 32). More recently, the Court has again stated that a counterclaim is not indissociable from a mere defence. See judgment of 13 October 2022, *Gemeinde Bodman-Ludwigshafen* (C-256/21, EU:C:2022:786, paragraph 38).

58 See, to that effect, judgment of 22 October 2015, *Aannemingsbedrijf Aertssen and Aertssen Terrassements* (C-523/14, EU:C:2015:722, paragraph 45).

59 It seems to me that, in that respect, the judgments whereby, after recalling the definition of 'cause of action' within the meaning of Article 27 of Regulation No 44/2001, the Court identified the identity of the subject matter by reference to the rules on *lis pendens* specific to other instruments of EU law. That is the case, in particular, of the judgment of 19 October 2017, *Merck* (C-231/16, EU:C:2017:771), where the Court adjudicated on the identity of actions on the basis of the EU and national trade marks by reference to Article 109(1)(a) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1).

60 Judgment of 6 December 1994, *Tatry* (C-406/92, EU:C:1994:400, paragraph 45). See, to the same effect, judgments of 25 October 2012, *Folien Fischer and Fofitec* (C-133/11, EU:C:2012:664, paragraph 49), and of 19 December 2013, *Nipponkoa Insurance Co. (Europe)* (C-452/12, EU:C:2013:858, paragraph 42).

61 See, by analogy, judgment of 22 October 2015, *Aannemingsbedrijf Aertssen and Aertssen Terrassements* (C-523/14, EU:C:2015:722, paragraph 46).

62 Judgment of 14 October 2004, *Mærsk Olie & Gas* (C-39/02, EU:C:2004:615, paragraph 35).

105. It follows that, in the context of recognition raised as an incidental question, the identity of subject matter must be determined by means of a strict comparison between, on the one hand, the claims submitted before the court of the first Member State and settled by that court and, on the other, the content and the purpose of the claims submitted in the proceedings brought before the court of the second Member State.

106. On the basis of those factors, it seems to me that, in principle, there is no identity of subject matter between the actions in respect of the breach of the contract of employment and those relating to the performance of the contract of employment. The dispute relating to the breach of the contract of employment and the financial consequences of that breach, which was settled by a court of a Member State, has no impact on claims for payment of sums due under that contract in respect of the performance of the service of work.

107. Nonetheless, a difference in the subject matter does not in any way detract from the obligation placed on the court of the second Member State to take account, when it adjudicates on the substance, of the effects arising from the judgment given in the first Member State. Thus, in a situation such as that in the main proceedings, the court dealing with claims for payment of remuneration in respect of the performance of a contract of employment would be required to take into consideration any implications that the initial judgment might have for the applicant's claims in respect of pay. [63]

108. Having regard to all of those considerations, I propose that the Court's answer to the second and third questions, as reformulated, should be that Articles 33 and 36 of Regulation No 44/2001 must be interpreted as meaning that in a case where the recognition of a judgment given in a first Member State is raised as an incidental question before the court of a second Member State, the actions based on the same contract of employment, some relating to the obligations arising from the performance of that contract and others to the obligations arising from the breach of that contract, have the same cause of action but do not have the same subject matter.

VI. Conclusion

109. In the light of the foregoing considerations, I propose that the questions for a preliminary ruling referred by the Cour de cassation (Court of Cassation, France) be answered as follows:

(1) Articles 33 and 36 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 the recognition of a judgment given in a Member State, the law of which establishes a rule requiring the concentration of claims that prohibits the same parties from bringing a new action relating to claims that could have been raised in the initial proceedings, does not – even where the law of the Member State in which recognition is asserted imposes a similar requirement for the concentration of claims – preclude the court of the second State from adjudicating on such claims.

(2) Articles 33 and 36 of Regulation No 44/2001

[63] That would be the case of the determination by the initial judgment, in accordance with the law of the State of origin, of the date of the breach of the contract of employment, which would be liable to have an impact on the duration of the period during which remuneration is payable.

must be interpreted as meaning that in a case where the recognition of a judgment given in a first Member State is raised as an incidental question before the court of a second Member State, the actions based on the same contract of employment, some relating to the obligations arising from the performance of that contract and others to the obligations arising from the breach of that contract, have the same cause of action but do not have the same subject matter.