OPINION OF ADVOCATE GENERAL JACOBS

delivered on 14 March 2002 [1]

1. In this reference for a preliminary ruling from the Oberster Gerichtshof (Supreme Court), Austria, the Court is asked whether an action brought by a consumers' association under national consumer protection legislation to obtain an injunction prohibiting the use of unlawful or unconscionable general contractual terms and conditions is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. [2]

The Brussels Convention

2. The first paragraph of Article 1 of the Convention states:

'This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.'

3. Title II of the Convention allocates international jurisdiction between the Contracting States and in some cases to local courts within the relevant Contracting State. The basic rule of the Convention is that the courts of the Contracting State in which the defendant is domiciled have jurisdiction (Article 2). However, by way of exception to that rule other courts may or must have jurisdiction to hear certain types of action.

4. Article 5(1) of the Convention confers jurisdiction 'in matters relating to a contract [on] the courts for the place of performance of the obligation in question'. Article 5(3) confers jurisdiction 'in matters relating to tort, delict or quasi-delict [on] the courts for the place where the harmful event occurred'. It is clear from the wording of Articles 2 and 5 that in both those cases the jurisdiction supplements rather than replaces that conferred by Article 2.

1 — Original language: English.

2 — Convention of 27 September 1968. A consolidated version of the Convention as amended by the four subsequent Accession Conventions is published in OJ 1998 C 27, p. 1.

5. On 1 March 2002 Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [3] entered into force, replacing the Convention for all Member States with the exception of Denmark. [4]

6. Article 5(3) of Regulation No 44/2001 confers jurisdiction 'in matters relating to tort, delict or quasi-delict [on] the courts for the place where the harmful event occurred or may occur'.

The Consumer Contract Directive

7. Directive 93/13 on unfair terms in consumer contracts [5] seeks to approximate the laws of Member States relating to unfair terms in consumer contracts. [6] The preamble states that 'it is the responsibility of Member States to ensure that contracts concluded with consumers do not contain unfair terms'. [7] Article 6 requires Member States to lay down that unfair terms in consumer contracts are not to be binding on the consumer.

8. Article 7 provides, in so far as relevant:

'1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

2. The means referred to in paragraph 1 shall include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.'

3 — Council Regulation (EC) No 44/2001 of 22 December 2000, OJ 2001 L 12, p. 1.

4 — Article 1(3).

5 — Council Directive 93/13/EEC of 5 April 1993, OJ 1993 L 95, p. 29.

6 — Article 1(1).

7 — Fourth recital.

The background to the question referred

9. Article 7(2) of Directive 93/13 is implemented by Paragraphs 28 and 29 of the Austrian Konsumentenschutzgesetz (Consumer Protection Law).[8] Paragraph 28(1) provides that an injunction may be sought against anyone who in commercial dealings lays down, in general terms and conditions which he uses as a basis for contracts concluded by him or in forms used for contracts in that connection, conditions which are contrary to a statutory prohibition or are unconscionable, and against anyone who recommends such conditions for commercial dealings. Paragraph 29 states that the injunction may be sought by a number of Austrian bodies including the Verein für Konsumenteninformation (Association for Consumer Information; 'the Consumers' Association').

10. Mr Henkel, the defendant in the main proceedings, is domiciled in Germany and has no agency or establishment in Austria. The main proceedings concern the general terms and conditions used by Mr Henkel in commercial dealings with several consumers domiciled in Vienna regarding trips organised as part of a sales promotion. The Consumers' Association considers that those terms and conditions infringe the Consumer Protection Law and national data protection and competition law and is seeking an injunction under Paragraph 28 of the Consumer Protection Law.

11. The Handelsgericht (Commercial Court), Vienna, dismissed the application for an injunction on the ground that the Austrian courts had no jurisdiction: Article 5(3) of the Convention did not apply because the Consumers' Association had not pleaded any harm arising from a tortious act.

12. The Oberslandesgericht (Higher Regional Court), Vienna, allowed the Consumer Association's appeal. In its view, the Court of Justice interprets the concept 'matters relating to tort, delict or quasi-delict' in Article 5(3) of the Convention autonomously and broadly so as to encompass all actions which seek to establish the liability of a defendant and which are not related to a contract within the meaning of Article 5(1) of the Convention.[9] The concept should also cover an action brought in the public interest by an association in respect of unlawful behaviour notwithstanding the absence of damage.

13. Mr Henkel appealed to the Oberster Gerichtshof. That court is unsure whether the statutory action for an injunction falls

8 — BGBl. 1979/140.

9 — Case 189/87 *Kalfelis* [1988] ECR 5565, paragraph 17 of the judgment.

within the scope of 'matters relating to tort, delict or quasi-delict' within the meaning of Article 5(3) of the Convention and has accordingly sought a preliminary ruling on the question set out in paragraph 1 above.

14. In the order for reference the Oberster Gerichtshof makes the following two points.

15. First, the Consumers' Association does not plead any damage to its property. Its right to bring an action is laid down by statute and serves to avert future damage to consumers; that damage results, however, from contract, which suggests that the action might be covered by Article 5(1) of the Convention if the Consumers' Association is regarded as the lawful representative of the consumers. Alternatively in the case of actions by associations the undermining of legal stability by unfair terms may be regarded as the unlawful act. The Court of Justice has not yet decided whether the fact that the right to bring the action stems from statute and not from a contract means that the action is not 'related to a contract'.

16. Nor, second, has the Court of Justice decided whether preventive actions in general, that is to say those brought before any damage occurs, can fall within the scope of Article 5(3) of the Convention, which takes as a basis the place where the harmful event occurred and thus, according to its wording, presupposes that damage has already occurred.

17. Written observations have been submitted by the Consumers' Association, Mr Henkel, the Austrian, French, German and United Kingdom Governments and the Commission. The Consumers' Association, the French and United Kingdom Governments and the Commission were represented at the hearing.

Application of the Brussels Convention *ratione materiae*

18. The United Kingdom submits that an action such as that brought by the Consumers' Association in the main proceedings is not within the material scope of the Brussels Convention at all. In its view, a consumer protection organisation exercising powers pursuant to Paragraph 29 of the Consumer Protection Law is a public authority and the right to obtain an injunction to prohibit the use of unlawful or unconscionable general terms and conditions provided for in Paragraph 28 of the Consumer Protection Law is a public

power. On the basis of the Court's case-law on Article 1 of the Convention, [10] the United Kingdom concludes that an action brought by the Consumers' Association pursuant to Paragraphs 28 and 29 of the Consumer Protection Law and in accordance with Article 7(2) of Directive 93/13 is not a civil or commercial matter falling within the scope of Article 1 of the Convention.

19. The German Government, in contrast, considers that the Convention applies on the basis that the Consumers' Association's supervision of general conditions derives from the protection conferred by civil law on consumers, while the Consumers' Association and the Commission submit that the Consumers' Association is a private law association under Austrian law, that Directive 93/13 permits Member States to grant a right of action under Article 7(2) to organisations other than public authorities provided that they have a legitimate interest in protecting consumers and that actions brought by the Consumers' Association pursuant to Paragraphs 28 and 29 of the Consumer Protection Law are 'civil and commercial matters' within the meaning of Article 1 of the Convention.

20. I agree that the Convention clearly applies to a case such as the present.

21. The Court has held, as the United Kingdom notes, that 'certain types of judicial decision must be regarded as excluded from the area of application of the Convention, either by reason of the legal relationships between the parties to the action or of the subject-matter of the action', and that, although 'certain judgments given in actions between a public authority and a person governed by private law may fall within the area of application of the Convention, this is not so where the public authority acts in the exercise of its powers'. [11] Although that principle was developed in the context of disputes as to recognition and enforcement of judgments pursuant to Title III of the Convention, I agree with the United Kingdom that the principle concerns the scope of Article 1 and is equally applicable to disputes as to jurisdiction pursuant to Title II of the Convention.

22. The distinction between civil and commercial matters on the one hand and matters of public law on the other is familiar in the legal systems of the civil-law Member States, although it may not always be easy to distinguish between instances in which the State and its independent organs act in a private law capacity and those in

10 — Case 29/76 *Eurocontrol* [1976] ECR 1541 and Case 814/79 *Rüffer* [1980] ECR 3807.

11 — *Eurocontrol*, cited in note 10, paragraph 4 of the judgment.

which they act in a public law capacity. [12] In the present case, however, the Consumers' Association is clearly not an organ of the State: it is a non-profit-making private organisation established in accordance with the Austrian Vereinsgesetz (law governing associations) 1951.

23. The status of the Consumers' Association may be contrasted with that of the bodies involved in the two decisions of the Court cited by the United Kingdom in support of its submissions on this point. *Eurocontrol* [13] concerned proceedings brought by the European Organisation for the Safety of Air Navigation, an international organisation of States set up by a multilateral treaty, while *Rüffer* [14] concerned proceedings brought by the Netherlands State.

24. Nor does it follow from the fact that the Consumers' Association is among the entities designated for the purpose of Article 7(2) of Directive 93/13 that it is a public authority: it is apparent from the terms of that provision [15] that, as the Consumers' Association and the Commission submit, Member States may determine the type of entity on which to confer the requisite power to take action under that provision and indeed that private entities are primarily envisaged.

25. I am accordingly of the view that an action such as that brought by the Consumers' Association pursuant to Paragraphs 28 and 29 of the Consumer Protection Law and in accordance with Article 7(2) of Directive 93/13 is within the scope of 'civil and commercial matters' for the purpose of Article 1 of the Convention.

Application of Article 5(3) of the Convention

26. The Court is asked essentially whether the Austrian courts have jurisdiction pursuant to Article 5(3) of the Convention over an action brought by a consumer protection organisation for an injunction to prohibit the use in Austria of unlawful or unconscionable terms and conditions where the defendant is domiciled in another Member State and where the right of action is derived from statute.

27. Mr Henkel and the French Government submit that such an action does not fall

12 — Report by Professor Schlosser on the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, OJ 1979 C 59, p. 71, paragraphs 23 and 25.

13 — Cited in note 10.

14 — Cited in note 10.

15 — See also the penultimate recital in the preamble to Directive 93/13.

within the scope of Article 5(3) on two grounds. First, it follows from its terms as interpreted by the Court [16] that that provision cannot apply where the claimant has not alleged that it has suffered any damage or, *a fortiori*, where no damage has yet arisen. Second, the Court has held that Article 5(3) covers all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 5(1); [17] the action brought by the Consumers' Association, however, arises out of a contractual relationship such as that brought by the Consumers' Association (i) is not a matter 'relating to tort, delict or quasi-delict' and (ii) is not in any event within the terms of Article 5(3) because it seeks the prevention of future acts rather than redress for a past act.

The meaning of 'tort, delict or quasi-delict'

28. The Consumers' Association, the Austrian and German Governments and the Commission are of the view that such an action falls within the scope of Article 5(3). The United Kingdom Government also takes that view in the alternative (namely if the Court does not accept its submission that the action is outside the scope of the Convention altogether).

29. That to my mind is the correct position.

30. It may be helpful to consider separately the two principal arguments advanced in support of the contrary view: an action

31. While it may be true, in the words of Advocate General Warner, that 'no one has ever succeeded, even in the context of any national legal system, in formulating an accurate definition of tort that did not beg one or more questions. Like the proverbial elephant, tort is easier to recognise than to define', [18] the Court has none the less provided some guidance.

32. In particular it has stressed that the concept of matters relating to tort, delict or quasi-delict must be regarded as an autonomous concept which is to be interpreted principally by reference to the scheme and objectives of the Convention in order to ensure that the latter is given full effect. [19]

16 — Case 21/76 *Mines de Potasse d'Alsace* [1976] ECR 1735.

17 — *Kalfelis*, cited in note 9, paragraph 17 of the judgment.

18 — *Rüffer*, cited in note 10, pp. 3834-5.

19 — *Kalfelis*, cited in note 9, paragraph 16 of the judgment; Case C-261/90 *Reichert and Kockler* [1992] ECR I-2149, paragraph 15.

33. The French Government submits that, as derogations from the general rule that the courts of the defendant's domicile have jurisdiction, the special rules set out in Article 5 of the Convention should be interpreted restrictively. I do not accept that argument. Restrictive interpretation of a derogation is sometimes justified: for example a derogation from a fundamental right must as such be restrictively interpreted. But that approach should not in my view be generalised to all exceptions. A legislative exception, like any other legislative provision, should be given its proper meaning, determined in the light of its purpose and wording and the scheme and object of the instrument of which it forms part. I prefer the alternative formulation used in the context of the Brussels Convention by the Court, which has stated that 'the jurisdictional rules which derogate from that general principle must not lead to an interpretation going beyond the situations envisaged by the Convention'. [20] The Court has moreover recognised that the situations envisaged by Article 5(3) are varied, stating that, 'by its comprehensive form of words, Article 5(3) of the Convention covers a wide diversity of kinds of liability'. [21]

34. That approach is reflected in the Court's ruling in *Kalfelis* [22] that the concept covers 'all actions which seek to establish the liability of a defendant and which are not related to a "contract" within the meaning of Article 5(1)'.

35. That broad wording clearly seems apt to cover an action such as that brought by the Consumers' Association in the main proceedings. In particular 'liability' — and the equivalent French term 'responsabilité' — comfortably encompasses types of legal liability other than the obligation to make financial reparation, for example the obligation at issue in the present case to refrain from certain types of unlawful conduct. [23]

36. In *Mines de Potasse d'Alsace* [24] — the first case on Article 5(3) — the Court explained that the option conferred on the plaintiff by that provision was 'introduced having regard to the existence, in certain clearly defined circumstances, of a particularly close connecting factor between a dispute and the court which may be called upon to hear it, with a view to the efficacious conduct of the proceedings'. [25] The two connecting factors (place of harmful event and place of consequential dam-

20 — Case C-26/91 *Handte* [1992] ECR I-3967, paragraph 14 of the judgment.

21 — *Mines de Potasse d'Alsace*, cited in note 16, paragraph 18 of the judgment.

22 — Cited in note 9, paragraph 17 of the judgment.

23 — See also the Opinion of Advocate General Geelhoed in Case C-334/00 *Fonderie Officine Meccaniche Tacconi* delivered on 31 January 2002 ECR I-7357, I-7359, paragraph 76 the Advocate General expresses the view that failure to comply with a legal rule regulating conduct is a tort, delict or quasi-delict within the meaning of Article 5(3).

24 — Cited in note 16.

25 — Paragraph 11 of the judgment.

age) were subsequently explained as 'particularly helpful from the point of view of the evidence and of the conduct of the proceedings'.[26] The rationale of the special jurisdiction conferred by Article 5(3) thus appears to be that the courts for the place where the harmful event occurred are, for reasons relating to the sound administration of justice and the efficacious conduct of proceedings,[27] best placed to hear actions arising therefrom. To my mind that objective is manifestly better served if the court for the place where the alleged harmful event occurs has jurisdiction to hear actions for an injunction preventing unlawful conduct.[28] That will follow if actions such as the present case are regarded as 'matters relating to tort, delict or quasi-delict' within the meaning of Article 5(3).

37. It has been objected however that the action brought by the Consumers' Association concerns 'matters relating to a contract' since it concerns allegedly unlawful contractual terms and conditions. On that basis, it is argued, the action could not fall within Article 5(3) as interpreted by the Court.

38. I am not convinced by that argument. It is clear from a reading of the judgment in *Kalfelis* — and in particular from the French text of the judgment — that what is meant is that the concept of tort, delict and quasi-delict covers all actions which seek to establish the liability of a defendant and which are not 'matters relating to a contract' within the meaning of Article 5(1). As to the latter, it follows from the judgment of the Court in *Handte*[29] that the phrase 'matters relating to a contract' covers only situations in which an obligation is freely assumed by one party towards another. The Consumers' Association's action in the present case is not however a 'matter relating to a contract' in that sense: the Consumers' Association is rather — as pointed out by the Austrian and German Governments and the Commission — asserting a right, specifically conferred on it by statute, to seek an order preventing unlawful conduct. The United Kingdom moreover notes that the Consumers' Association is described by the referring court as enjoying a right 'to prevent damage to consumers', which it considers seems most naturally to be described as a matter of tort, delict or quasi-delict; I agree with that proposition.

39. The French Government invokes the judgment of the Court in *Reichert and Kockler*[30] as authority for the proposition that actions which do not seek financial reparation cannot be within the scope of Article 5(3).

40. That proposition however cannot to my mind be derived from that decision, which concerned the status under the Brussels Convention of the *action pau-*

26 — Paragraph 17 of the judgment.

27 — Case C-220/88 *Dumez France and Tracoba* [1990] ECR I-49, paragraph 17 of the judgment.

28 — I discuss below the question whether an action to prevent the occurrence of a future such act is within the scope of Article 5(3).

29 — Cited in note 20, paragraph 15 of the judgment.

30 — Cited in note 19.

lienne in French law, whereby a creditor may have a disposition of a right *in rem* in immovable property rendered ineffective as against him on the ground that it was made to the detriment of his rights by his debtor. That action may be instituted both against dispositions made for consideration by the debtor when the beneficiary acts in bad faith and against transactions entered into without consideration by the debtor even if the beneficiary acts in good faith. A reading of the judgment suggests that that latter point was decisive: an action which may be directed against a third party who has not committed any wrongful act cannot be regarded as an action 'which seeks to establish the liability of a defendant'.[31] That reasoning clearly cannot be transposed to the present case, where Mr Henkel is alleged to have contravened statutory prohibitions on certain types of contractual clauses.

41. In my view therefore an action such as that brought by the Consumers' Association in the main proceedings is a 'matter relating to tort, delict or quasi-delict' within the meaning of Article 5(3).

The application of Article 5(3) to purely preventive actions

42. The second principal objection raised against the application of Article 5(3) to the action brought by the Consumers' Association in the present case is that that action seeks to prevent a future allegedly harmful event whereas Article 5(3) is by its terms limited to actions in respect of a harmful event which has already occurred.

43. Admittedly, Article 5(3), which in 'matters relating to tort, delict or quasi-delict' confers jurisdiction on 'the courts for the place where the harmful event occurred', might appear to apply only where the harmful event which is the basis of the claim has already occurred.

44. Even if that were the correct interpretation, I do not see that it should prevent application of Article 5(3) in the present case, where it appears from the order for reference that the action brought by the Consumers' Association has been prompted by the use by Mr Henkel on several occasions of the allegedly unlawful terms and conditions. Both the Consumers' Association and the Austrian Government make this point. It might be expected moreover that such actions will normally be triggered by actual use of allegedly unlawful contractual clauses.

45. In any event, however, I do not consider that it can be consistent with the scheme and purpose of the Convention for

31 — See paragraphs 18 to 20 of the judgment.

Article 5(3) to be interpreted so as to exclude actions for injunctions seeking to prevent purely future damage. That is also the view of the Consumers' Association, the Austrian and German Governments and the Commission.

46. It may be noted that Professor Schlosser stated in his Report: [32]

'There is much to be said for the proposition that the courts specified in Article 5(3) should also have jurisdiction in proceedings whose main object is to prevent the imminent commission of a tort.'

47. As indicated above, [33] the Court in *Mines de Potasse d'Alsace* [34] explained that the option conferred on the plaintiff by that provision was 'introduced having regard to the existence, in certain clearly defined circumstances, of a particularly close connecting factor between a dispute and the court which may be called upon to hear it, with a view to the efficacious conduct of the proceedings', in particular from the point of view of the evidence and of the conduct of the proceedings. [35] The special jurisdiction conferred by Article 5(3) is therefore justified by the fact that the courts for the place where the harmful event occurred are, for reasons relating to the sound administration of justice and the efficacious conduct of proceedings, [36] best placed to hear actions arising therefrom. That rationale applies equally to actions seeking the prevention of such harmful events.

48. Mr Henkel invokes the decision of the Court in *Reichert and Kockler* [37] in support of his submission that Article 5(3) applies only where harm has already been caused by a tortious act. For the reasons I have already given, however, I do not consider that that judgment supports any general propositions about the scope of Article 5(3). [38]

49. Moreover it is apparent that the equivalent provision (also Article 5(3)) of Regulation No 44/2001, [39] which has now as between most Member States superseded the Convention, applies to actions to prevent a threatened harmful act. In the absence of any clear and compelling reason for interpreting the two provisions differ-

32 — Cited in note 12, paragraph 134.2.

33 — See paragraph 36.

34 — Cited in note 16.

35 — Paragraphs 11 and 17 of the judgment.

36 — *Dumez France and Tracoba*, cited in note 27, paragraph 17 of the judgment.

37 — Cited in note 19.

38 — See paragraph 40 above.

39 — Cited in note 3. See paragraph 6 above.

ently, I consider it appropriate to interpret them in the same way. Certainly the Commission in its proposal for the Regulation took the view that the revised wording was necessary in order to remove an ambiguity in the interpretation of the provision rather than to extend its scope. [40]

50. It would furthermore manifestly be unsatisfactory if — again in the absence of any clear and compelling reason — the otherwise identical Article 5(3) in the Convention had a more limited scope vis-à-vis Denmark, the only Member State which is not bound by the Regulation. The same point may be made with regard to the parties to the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, [41] Article 5(3) of which is in identical terms to Article 5(3) of the Brussels Convention and which remains in force between Member States and Iceland, Norway and Switzerland.

51. Finally I would note that the French Government submits that Article 5(3) cannot be applicable to purely preventive actions because such actions are the subject of Article 24 of the Convention. Article 24 provides:

'Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.'

52. As the Commission pointed out at the hearing, that provision is not applicable in the present case since the Consumers' Association is not seeking a provisional measure in the main proceedings. [42]

53. I am accordingly of the view that an action to prevent the commission of a tort, delict or quasi-delict is a 'matter relating to tort, delict or quasi-delict' within the meaning of Article 5(3) of the Brussels Convention.

40 — Explanatory memorandum to Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(1999) 348 final.

41 — Convention of 16 September 1988, OJ 1988 L 319, p. 9.

42 — See further *Reichert and Kockler*, cited in note 19, paragraph 34 of the judgment.

Conclusion

54. For the reasons given above I conclude that the question referred by the Oberster Gerichtshof should be answered as follows:

An action brought by a consumers' association under national consumer protection legislation to obtain an injunction prohibiting the use of unlawful or unconscionable general contractual terms and conditions is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.