



The scope of judicial cooperation in civil and commercial matters within the EU in the context of the exclusion of administrative matters and *acta iure imperii*¹

Dominika Moravcová* 

* PhD student, Faculty of Law, Pan-European University, Bratislava, Slovakia. E-mail: dominika.moravec@gmail.com

Abstract

The present article focuses on the scope of the key sources of judicial cooperation in civil and commercial matters within the EU, namely the Brussels I bis, Rome I and Rome II Regulations, in the context of the activities of public authorities. The aim of the article is to identify whether a legal relationship in which one of the parties is a public authority can qualify as a civil and commercial matter within the meaning of the Regulations in question and thus be subsumed under their *ratione materiae* and, if so, under which circumstances.

Keywords

Public authority, *acta iure imperii*, Brussels I bis Regulation, Rome I Regulation, civil and commercial matters.

Introduction

The trend towards globalisation in general and the degree of economic integration achieved within the European Union means that private law entities across the EU are taking advantage of the benefits of the internal market. In the context of the free movement of persons, goods, services and capital, they are entering into relationships with a ‘foreign element’; relationships that have a certain nexus to the foreign country. Although, especially as individuals, we may often not even be aware that we are becoming a party to a relationship with a foreign element, in today’s globalised world, it is difficult in everyday life to avoid entering into relationships with a cross-border element

Such a relationship raises a number of issues, in particular which law will be applicable to the relationship, the courts of which country will have jurisdiction to adjudicate any disputes arising out of the relationship, how the foreign judgment or the authentic instrument will be treated among others. These questions are answered by the branch of law known as private international

¹ The article was supported by the Slovak Research and Development Agency under the contract No. APVV-20-0567.

law. As the name implies, it regulates private law relationships with a foreign element. We introduce the article by addressing what characterises these private law relations. The sources of private international law are the norms of national legislation and the extensive system of the Union *acquis*, as well as legal regulation through bilateral and multilateral international treaties.

The EU law takes primacy over the national legislation of the Member States.² This means that the Union legal framework also takes precedence over national norms of private international law to the extent that it regulates identical issues. This article will focus on the sources of EU law, namely the Brussels I bis,³ Rome I⁴ and Rome II⁵ Regulations, which constitute the general regime for determining jurisdiction and applicable law within the EU in civil and commercial matters.

The aim of the present article is to analyse the substantive scope of the Regulations in terms of the private law nature of regulated relationships, and to identify the circumstances under which they could fall under the scope of the selected Regulations if one of the parties is a public authority. In particular, we will refer to the case-law of the Court of Justice of the European Union (hereinafter “CJEU” or “The Court”), as it performs an indispensable role in filling legal gaps and interpreting the provisions of the EU law. We have chosen to concentrate on this specific area because civil and commercial matters in the context of some EU laws may also, in particular circumstances, include certain issues relating to administrative and fiscal law (Bělohávek, 2010, 113).

1 The nature of the relationships covered by private international law

The aim of the present article is to identify when even certain activities of public authorities may fall within the scope of selected regulations of the general regime for determining jurisdiction and applicable law within the EU. The purpose of such regulation is, *inter alia*, to establish a reasonable and predictable way of resolving disputes arising out of legal relationships that transcend national borders (Bělohávek, 2010, 170). Both the selected regulations and the international treaties of the Hague Conference on Private International Law are sources of private international law, and we therefore consider it necessary to deal at the beginning with the nature of the relationships that fall within the scope of the rules of private international law in general. Naturally, an essential element of a relationship falling under private international law is the presence of a so-called foreign element, a certain *nexus* to a foreign country. According to the case-law of the CJEU, this element is present in any case that is capable of raising questions concerning the determination of the international jurisdiction of the courts.⁶

² Judgment of 15 July 1964, *Flaminio Costa v E.N.E.L.*, C 6/64, EU:C:1964:66.

³ Regulation (EU) No 1215/2012 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 (hereinafter as “Brussels I bis”). <http://data.europa.eu/eli/reg/2012/1215/oj>

⁴ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (hereinafter as “Rome I”). <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008R0593>

⁵ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (hereinafter as “Rome II”). <https://eur-lex.europa.eu/legal-content/sk/ALL/?uri=CELEX%3A32007R0864#>

⁶ Judgment of 7 May 2020, *Rina*, C-641/18, EU:C:2020:349. See also judgment of 1 March 2005, *Owusu*, C-281/02, EU:C:2005:120.

The division between private and public law dates back to ancient Rome. Legal theory classifies these private law relationships as mainly general civil law issues, under which we also find a broad category of family law relationships and individual labour law issues, as well as regulating the status of foreigners. If we disregard the generally assumed *de facto* disadvantaged position of certain subjects in private law relations, such as the consumer *vis-à-vis* a larger company, the employee *vis-à-vis* the employer, etc., we can argue that private law relationships are those in which the subjects have an equal position. At the same time, it should be true that they cannot impose certain obligations on each other within a private law relationship, nor can they unilaterally establish them (Šmihula, 2012, 23). The autonomy of the will of the parties, which is also taken into account in the sources analysed, is naturally underlined.

Relationships that are public law relationships, in which, for example, an administrative authority imposes a certain obligation on another entity, are naturally excluded from the scope of private international law due to their non-private law nature. What is not excluded and what will be dealt with in this article are relations of a private law nature, in which one of the parties is a private law subject, for example a natural or legal person, and the other party is a public authority such as an administrative authority. Legal theory knows several approaches to the question. Those authors who state that the boundary between a private and a public law relationship lies in the nature of the specific obligation are the those with we most agree. Insofar as the public law body in question acts within the limits of its ordering powers, this relationship cannot be subsumed under the rules of private international law. It is not the nature of the subject but the nature of the legal relationship under consideration that determines the private law character (Fábry & Krošlák, 2007, 49). We therefore put the theory based on the nature of the parties on the back burner.

We have decided to address this topic in the context of the EU and selected regulations in the field of judicial cooperation in civil matters because EU law has to be interpreted in an autonomous way to ensure uniform application. The selected regulations do not define of the private law relationships covered by their provisions directly.

2 *Ratione materiae* of the selected regulations

The EU regulations discussed in this article are legally binding and directly applicable acts of the EU *acquis*⁷ and bear the aforementioned primacy over the rules of private international law of all Member States insofar as they regulate identical issues and with an identical scope. The present article examines the topic in the context of the Brussels Ibis, Rome I and Rome II Regulations, which constitute the general regime for judicial cooperation in civil and commercial matters within the EU. Although in theory we classify them as sources of private international law, we do not find a definition of a private law relationship in their wording. Autonomous interpretation at the EU level, to provide unification and uniform application within the EU, requires us to forget the limits of our national legislation when interpreting them and to examine the scope of the Regulations in the light of the EU, Community law.

Which relations fall under the given regulations by their nature is sought through the substantive scope, *ratione materiae*, of the Regulations. This is defined both positively in the regulations, meaning which relations fall within the scope, and also negatively, those that are excluded from the scope. The positive definition of the scope of this general regime are civil

⁷ Art. 288 of the Treaty on the Functioning of the European Union (hereinafter as “TFEU”). <https://bit.ly/42NJJld>

and commercial matters. This is stated in all three Regulations in Article 1(1). As we have mentioned, they are classified by theory under private law. The substantive scope further requires the aforementioned foreign element, which, for the purposes of the Regulations, is referred to as “cross-border implications” or “conflict of laws”.⁸ With regard to the applicable law, the substantive scope is further extended by the contractual and non-contractual obligation and the use of Rome I and Rome II is differentiated accordingly.

Selected regulations apply within the limits of their scope. Unless their temporal scope is given, the previous arrangements – the Brussels Convention,⁹ Brussels I¹⁰ and the Rome Convention¹¹ – are still in force. The CJEU’s interpretative material, to which we refer in this article, often concerns the provisions of these very sources, because it is necessary to ensure continuity of interpretation across all the provisions have remained adopted, which means that the concept of civil and commercial shall be interpreted identically for all these sources. Equally, interpreting the Roman and Brussels regimes in relation to each other is needed.¹² Since the substantive scope is regulated in the same way as we will examine it, we will not distinguish between which source a particular judgment is related in this article.

We can so far conclude that, in order to identify whether a case falls under civil and commercial matters, we are only interested in the nature of the relationship in question and not in the nature of the subjects. In light of the case law of the CJEU, in order to ensure a uniform interpretation at the EU level and to avoid giving irreconcilable judgments, it is crucial to interpret the notion of civil and commercial matters in an extensive manner (Garayová, 2019). The autonomous concept of civil and commercial matters must be interpreted in the light of the teleology and systematics of EU law but, in accordance with the case law of the CJEU, the general principles stemming from the corpus of the national legal systems as a whole also have an impact on their interpretation,¹³ supported by general principles derived from the corpus of Member States’ legal systems. By contrast, reference to the national law of a Member State is inadmissible because it would undermine the uniformity of the Union *acquis*. These difficulties would be caused in particular by the fact that the Community is enlarging, and more Member States means more national legislations, in which there may be considerable disparities in some areas of law (Magnus & Mankowski, 2007, 50).

As the Schlosser report also points out, the division between civil and commercial law on the one hand and public law on the other itself is well-known in the legal systems of the original Member States. Although there are some differences between the legal systems, it was

⁸ Recital 3 of Preamble to the Brussels I bis. Art. 1(1) of the Rome I and also Rome II.

⁹ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter as “the Brussels Convention”). <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX-%3A22007A1221%2803%29>

¹⁰ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter as “the Brussels I”). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001R0044>

¹¹ Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (hereinafter as “the Rome Convention”). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX-%3A41980A0934>

¹² Recital 34 of Preamble to the Brussels I bis.

¹³ Judgment of 28 February 2019, *Gradbeništvo Korana*, C-579/17, EU:C:2019:162. See also: Judgment of 18 May 2006, *ČEZ*, C-343/04, EU:C:2006:330.

essentially divided on the basis of similar criteria. As such, the concept of civil matters in the context of the analysed regime also included selected branches that are not public law, such as individual labour law.¹⁴ Individual employment contracts are regulated separately within the regulations, taking into account the *de facto* weaker position of one of the parties, the employee.

Looking further back in history to the adoption of the Brussels Convention in 1968, neither the authors of the original wording of the Convention, nor the Jenard report included a definition of civil and commercial matters, and it was assumed that the Brussels Convention also applied to the decisions of criminal and administrative courts, provided that they were given on civil or commercial matters. The case law of the Court of Justice and the aforementioned accession of new members with disparities between their legal systems and those of the original members finally persuaded the Working Party to determine the jurisdiction of customs revenue and administrative matters as being excluded from the scope of civil and commercial matters.¹⁵

2.1 Exclusion of revenue, customs, administrative matters, and *acta iure imperii* from the scope of the Regulations

As already mentioned in the article, the substantive scope is also defined negatively in the analysed regulations. They consistently exclude, among other areas, all revenue, customs and administrative matters, as well as the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).¹⁶ It follows that the activities of public authorities and, for example, administrative authorities as well, are excluded from the scope of the Regulations. Even so, what does the concept of administrative matters cover? Is it any relationship where it acts as a party? Where is the limit of the exercise of *iure imperii* by a public authority? In defining the merits of the problem under discussion, we are inclined to the theory of the nature of the legal relationship. The application of the Regulations in practice has given rise to a number of preliminary questions, and we, therefore, consider it important to identify, which relationships fall within the scope of the selected Regulations and which do not. We will try to find the answer through the case-law of the CJEU, which fills the legal vacuum in particular provisions of the Regulations with a comprehensive interpretative material. Naturally, a legislator at the time of drafting a law, cannot anticipate all the relationships that will arise in practice, and all the more so with a unified regulation for many different states, and we would therefore like to highlight the possibility of preliminary questions from EU Member States to clarify problematic issues relating to the EU law, because only in this way we can ensure uniform application within the Union

In the following part of the article, we will examine the judgments that concern both applicable law and jurisdiction, since the Regulations are considered to have the same scope.¹⁷ The interpretation we will present in the article is therefore relevant for the application of all the selected Regulations. As we have already mentioned, it is essential to ensure continuity in the field of interpretation with the predecessors of the Regulations we are analysing. The

¹⁴ Report by Professor Dr Peter Schlosser on the Convention of 9 October 1978 (hereinafter as “the Schlosser report”). <https://bit.ly/42Mmyrp>

¹⁵ Report by Mr P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter as “the Jenard report”). <https://bit.ly/46pv7vx>

¹⁶ Art. 1(1) of the Brussels I bis.

¹⁷ Judgment of 16 November 2016, *Schmidt*, C-417/15, EU:C:2016:881.

Brussels Convention played a key role in the development of judicial cooperation, and we deal with judgments concerning the interpretation of the Convention because, to the extent that the regulations have replaced it and to the extent that the provisions are retained and equivalent, it is essential to respect this continuity of interpretation.¹⁸ The same applies in the case of the Brussels I Regulation.¹⁹

The Brussels Convention formulated the negative scope in Article 1 to a more limited degree than it is today. Article 1(1) referred only to the exclusion of revenue, customs and administrative matters.²⁰ Judicial practice showed it was necessary to add the most important outcome of the case-law of the Court of Justice in the area under analysis to this section, and the negative delineation of *acta iure imperii* was enshrined. The performance of *iure imperii* had to be explicitly removed from the scope of the Regulations, as it underlines the respect for the sovereignty and immunity of the State in the exercise of its sovereign powers. The CJEU's judgment in the 1976 *LTU v Eurocontrol* case played a key role in modifying the wording of Article 1(1). The Court declared that selected proceedings between a public authority and a private law party may fall within the *ratione materiae* of the Convention. The decisive element is whether, in the context of the case in question, the public authority is exercising its powers. The concept of civil and commercial matters within the scope cannot be interpreted by reference to the law of one of the Member States, which underlines the necessity of an autonomous interpretation and which was also confirmed by the Court of Justice in the judgment in question. The dispute in the *LTU v Eurocontrol* case concerned the recovery of fees payable by LTU to Eurocontrol, a public body, for the use of the equipment and services provided by that body. Moreover, this usage was of an exclusive and compulsory nature. In this case, the public authority unilaterally set the amount of the charges and the relevant rates. Unilaterally imposed obligations, as we have already mentioned in the article, are a typical feature distinguishing a private-law relationship from a public-law relationship, and therefore the Court of Justice decided that, in this case, the public authority had clearly acted within the limits of the exercise of its powers.²¹ The *LTU v Eurocontrol* judgment has therefore undoubtedly influenced the amended wording of Article 1. We reiterate that the mere fact that a public authority was one of the parties was not declared a reason for the exclusion of *acta iure imperii*. The Court focused its attention solely on the nature of the relationship in question and whether the public body was acting within the limits of *iure imperii*.

The practice of the courts of the Member States within the EU has been significantly facilitated by this landmark judgment, but also by the introduction of *acta iure imperii* in the Brussels I wording. However, the explicit exclusion of the exercise of *iure imperii* from the scope of the Regulation began to raise a number of questions in practice. We therefore, consider it necessary to pay attention to the boundaries of when we can and when we can not speak of the performance of *iure imperii*, in other words, when we can use the Regulation and get the body in question, for example, also in proceedings in which the courts of another Member State have jurisdiction. It is essential in practice to strike a balance between the jurisdictional immunity of the Member States in the area under analysis and the legitimate expectations of the private law party as regards determining jurisdiction and the law applicable to the disputes arising. The

¹⁸ Judgment of 16 June 2016, *Universal Music International Holding*, C-12/15, EU:C:2016:449.

¹⁹ Judgment of 16 November 2016, *Schmidt*, C-417/15, EU:C:2016:881.

²⁰ Art. 1(1) of the Brussels Convention.

²¹ Judgment of 14 October 1976, *LTU v Eurocontrol*, C-29/76, EU:C:1976:137.

limits of public law authority cases can only be found in the case-law of the Court of Justice, which has dealt with this issue in a number of key judgments.

3 Possibility to subsume the relationship with the public authority under the *ratione materiae* of the Regulations

Although it is clear from what has been discussed so far that the substantive scope of the Brussels I bis Regulations and, by analogy, of Rome I and Rome II, does not include the exercise of public authority in the form of the performance of *iure imperii*. Since the landmark judgment in the *LTU v Eurocontrol* case, the practice of the judicial authorities in the Member States has shown that, despite a clear definition, there may be situations that cannot be brought within the scope of the Regulation beyond reasonable doubt. It is precisely these disputes and proceedings before the Court of Justice that will be the focus of this part of the article, with the aim of identifying the *iure imperii* cases and administrative cases that are excluded from the scope of the selected Regulations.

Following the above-mentioned judgment in the *LTU v Eurocontrol* case, the Court of Justice confirmed the jurisprudence in the *Rüffer* judgment, in which it declared that the determining factor for the scope of civil and commercial matters is either the reason for the legal relations between the parties or the subject matter of the action.²² With this, it clearly favoured the former over the latter. That judgment concerned an action brought by an agent responsible for the management of public waterways against the person responsible for the management for the purpose of recovering the costs incurred in the removal of a wreck, which the agent had carried out in the exercise of a public authority. That dispute was excluded from the scope of the Brussels Convention by virtue of the *iure imperii* principle.²³

We would also like to mention in this section the relatively recent judgment in the *Eurelec Trading* case, which concerned an infringement of the competition rules by Eurelec in Belgium in relation to suppliers from France. The French Minister for Economic Affairs and Finance investigated the practices of the company in question and brought an action before a French court to declare that Eurelec subjected the trading partners to obligations that resulted in a substantial imbalance of rights and obligations between the parties, to require them to terminate the practices and to impose a civil penalty on them. The question was whether the situation that arose fell within the scope of civil and commercial matters within the meaning of the Brussels I bis Regulation. The Court later addressed whether the authority in question had acted *iure imperii*. The determination presupposes an examination of the legal relationship between the parties, the subject matter, and, where appropriate, the basis for bringing the action. It pointed out that the Minister's investigatory powers must be approved by the court and thus become extraordinary and inaccessible to private law persons. It is always for the national court hearing the case to verify the circumstances. In the operative part of the judgment, The Court declared that an action such as that in question in the main proceedings could not be subsumed under civil and commercial matters, insofar as a public authority exercises an extraordinary power of investigation or an extraordinary power of action over and above the law applicable in private law relations between individuals.²⁴

²² Judgment of 16 December 1980, *Netherlands v Rüffer*, C-814/79, EU:C:1980:291.

²³ Judgment of 16 December 1980, *Netherlands v Rüffer*, C-814/79, EU:C:1980:291.

²⁴ Judgment of 22 December 2022, *Eurelec Trading*, C-98/22, EU:C:2022:1032.

This is a very interesting judgment from the aspect that even the same conduct and the nature of the relationship can have a dual character, which is also influenced by the availability of possibilities for private law persons. This brings us to a similar judgment where the situation was different on precisely this point. This is the judgment in *Movic and Others*, to which The Court referred in the *Eurelec* judgment in part. The action was brought by the Belgian public authorities responsible for consumer protection against the companies, seeking a declaration from the court that there had been unfair commercial practices against consumers and an order requiring them to cease such practices. The Court of Justice reiterated that the court hearing the case must consider whether there are grounds for exclusion from the material scope of the Regulation. The interpretation from the previous case was largely applied to the present dispute, but The Court declared that the mere fact that jurisdiction was conferred by statute was not in itself conclusive on whether the authority was acting in the exercise of public power. Other persons having a legitimate interest in the matter, or even consumer protection associations, may bring the same action before The Court as persons having an active interest in the matter. It is to the position of the consumer protection association that the Court of Justice has compared the position of the Belgian authorities in the present proceedings, without any advantage being given to the conditions for bringing the action. However, if, for example, the authorities in question had used the exercise of public authority to obtain evidence, their position and action would not be comparable to that of another entity that would not have had access to the evidence in question without the exercise of public authority, and that would have changed the situation. In any event, this dispute has been classified by The Court as falling within the scope of civil and commercial matters.²⁵ As we can see in these two judgments, even the same subject matter of the dispute does not automatically guarantee both would fall within the scope of the Regulations, and an important determinant is also whether the authority is empowered – in terms of the relevant law – to take actions which, for example, a private law person is not, whether it will avail of these possibilities, or, on the contrary, whether its position in the proceedings is the same as it would be if another private law person, or an association of interests, were in its place.

In practice, the question of the interpretation of civil and commercial matters and the exclusion of *acta iure imperii* also raised doubts about the performance of contracts concluded on the basis of public procurement. The interpretation was provided by the Court of Justice in the *TOTO* judgment, in which a public entity, the General Director of Roads of Poland, was a party to the dispute as the contracting authority. The dispute concerned proceedings on an application for interim measures in respect of penalties relating to the performance of a road construction contract concluded on the basis of a public procurement procedure. In that judgment, again, the Court of Justice held that, in order to exclude the scope of the Regulation, the exercise of power must go beyond what is permitted in relations between individuals within the limits of civil and commercial law. He added that, as in the *Supreme Site Services* judgment, the public purpose of certain actions is not sufficient *per se* for those actions to qualify as an exercise of *iure imperii*, since they did not correspond to an exercise of powers that went beyond the rules applicable in relations between individuals.²⁶ Accordingly, he indicated that the dispute in question related to the performance of a contract concluded on the basis of public procurement and, by an expansive interpretation of Art. 1(1) of the Regulation, the case fell within its material scope.²⁷

²⁵ Judgment of 16 July 2020, *Movic and Others*, C-73/19, EU:C:2020:568.

²⁶ Judgment of 3 September 2020, *Supreme Site Services and Others*, C-186/19, EU:C:2020:638.

²⁷ Judgment of 6 October 2021, *TOTO*, C-581/20, EU:C:2021:808.

Another category of interpretative material from the analysed area is labour disputes arising from individual employment contracts. As we have mentioned in the previous chapters, although labour law is a separate branch in various Member States' legal systems, by an autonomous interpretation of civil and commercial matters the legislator has placed the field of individual contracts of employment under both the Brussels I bis Regulation and the Rome I Regulation.²⁸ The employee, like the consumer, is *de facto* in a weaker position in the dispute in question, which stems from the generally less economically and legally experienced nature of that person. In relation to the topic under discussion, we are interested in whether employment disputes between an employer that is a public authority and employees of those authorities fall within the Regulations dealt with in this article. In our opinion, based on what has been stated so far, it is clear that disputes arising out of an individual employment contracts fall within their scope, since the public authority is acting in the same manner as any other employer, whether in the public or private sector. It is, of course, essential to respect that the dispute cannot be one that relates directly to activities connected with the exercise of public authority. Employment contracts involving the staff of the various authorities, whether professional, technical or other staff, ought to be governed by the same rules as for all other employees. In the well-known *Mahamdia* judgment, the Court of Justice provided an interpretation of the Rome I Regulation, without calling into question the scope of the Regulation, even though it concerned an employee of the Ministry of Foreign Affairs of the People's Democratic Republic of Algeria, who was a driver for embassy staff in Berlin.²⁹ The Court of Justice also addressed a dispute between the Bulgarian Consulate General and a worker who provided administrative services there.³⁰

Perhaps one of the most famous judgments in the area examined in the present article is the well-known *Pula Parking* judgment, which concerned the interpretation of several provisions of the Brussels I bis Regulation, among them the substantive scope in relation to the activities of Pula Parking, a company owned by the City of Pula, Croatia. The company undertook the administration, supervision, maintenance and collection of parking fees in all the paid public parking areas in the town, by the decision of the municipality, headed by the mayor of the town. Mr. Tederahn, a German national, failed to pay the parking fees within the prescribed period and Pula Parking applied to the local notary for enforcement based on an "authentic document" which was to be a verified statement of the accounting records. The Court declared that although Pula Parking had been given powers by the public authority, the nature of the action and the terms of the application had to be examined. It stated that it is for the national court to ascertain whether the action is of an administrative nature, whether the dispute does not involve a penalty that would be categorised as arising from an act of public authority, and whether or not it is of a punitive nature typical of a public-law relationship. In the present case, there was no penalty imposed by a public authority, but only compensation for a service, which is essentially a legal relationship of a private-law nature and therefore falls within the scope of the Regulations.³¹

A very analogous case from Zadar, Croatia, in which the commercial company Obala, established by the municipality – the City of Zadar, was empowered to collect parking fees on public roads. As in the previous case, on the basis of an authentic instrument, the company initiated proceedings for the recovery of the fees corresponding to the parking ticket. The court

²⁸ Section 5 of the Brussels I bis and art. 8 of the Rome I.

²⁹ Judgment of 19 July 2012, *Mahamdia*, C-154/11, EU:C:2012:491.

³⁰ Judgment of 3 June 2021, *Generalno konsultstvo na Republika Bulgaria*, C-280/20, EU:C:2021:443.

³¹ Judgment of 9 March 2017, *Pula Parking*, C-551/15, EU:C:2017:193.

hearing the case did not know whether it could apply the interpretation given in the Pula Parking judgment, since in that case the user had to collect the ticket when entering the car park, whereas in the present case the charge had to be paid in advance for a certain period and, once that period was exceeded, a daily ticket, which was already punitive in nature, became payable. The Court of Justice again emphasised the need for an extensive interpretation in order to avoid the giving of irreconcilable judgments between the judicial authorities of different Member States. It also recalled the interpretative *materia* of the *Movic* judgment already mentioned. Statutory default interest in the event of non-payment of the parking charge in question is a consequence of national legislation on liabilities, which enshrines the creditor's right to compensation, and *de lege*, therefore, we cannot speak of a penalty for a traffic offence in the present case either. The claim for payment of the daily parking ticket cannot qualify as an exercise of public authority within the meaning of the autonomous interpretation of the Union *acquis* and therefore, as in the case of Pula Parking, falls within the scope of civil and commercial matters within the meaning of the Regulations.³²

Following from the Pula Parking judgment, we consider that one of the most important decisions in the analysed area is The Court's order in *Nemzeti Útdíjfizetési Szolgáltató* case, which concerned the recovery of a fee that was unilaterally imposed by a public law act. That case concerned the holder of a vehicle registered in Germany who drove a vehicle along a short stretch of a toll road in Hungary without purchasing the necessary vignette. The court hearing the case was familiar with the judgment in Pula Parking, but it was not clear to it whether the charge fell within the concept of civil and commercial matters, as was also the case in Pula Parking. It reiterated, as in previous judgments, that a public purpose *per se* was not sufficient to qualify the action as *iure imperii*. The Court clarified that this case did not involve a punitive mechanism or issuing a payment order. Indeed, the applicant did not exercise any discretion and sued for the payment of a fee increased by an amount that is stipulated in the relevant national legislation, and we cannot say that the body in question has exercised *iure imperii*. An action on the merits to recover a fee for the use of a toll road through legal proceedings “brought by a company authorised in accordance with the law, which classifies the relationship arising from that use as being governed by private law” falls within the scope of civil and commercial matters within the meaning of Brussels I bis.³³

In another of its decisions, in an action by a private party against the state as an issuer of state bonds, the Court of Justice used the argument that these matters fell within the concept of civil and commercial matters “insofar as it does not appear that they are manifestly outside the concept of civil or commercial matters.”³⁴ We find the judgment most interesting because it implies, to some extent, that unless we can clearly classify a dispute as falling within the enumerated cases of being out of scope, there is a presumption that it falls within civil and commercial matters. On the contrary, the dispute, which concerned a unilateral and retroactive amendment of the terms by the State by legislation in order to reduce the nominal value of the bonds to prevent the insolvency of the State, namely Greece, was clearly an expression and exercise of the public power of the State and, consequently, the dispute could not be subsumed within the scope of the Regulation.³⁵ We reaffirm that the relevant difference is whether the dispute arises

³² Judgment of 25 March 2021, *Obala i lučice*, C-307/19, EU:C:2021:236.

³³ Order of 21 September 2021, *Nemzeti Útdíjfizetési Szolgáltató*, C-30/21, EU:C:2021:753.

³⁴ Judgment of 11 June 2015, *Fahnenbrock and Others*, C-226/13, EU:C:2015:383.

³⁵ Judgment of 15 November 2018, *Kuhn*, C-308/17, EU:C:2018:911.

out of an action or measure that is better available for all equal parties to the dispute in question, or whether it is a measure peculiar to a public authority and, by its use, it is exercising public power and performing an act *iure imperii*.

To conclude this part of the article, we would like to mention one of the key judgments in the *Rina* case, which was not directly about a public law entity, but about a delegation by the State to carry out the acts of classification and certification of ships. The judgment also concerns a non-EU State, which distinguishes it from most of the decisions mentioned. These acts were carried out by *Rina* under the authority of the Republic of Panama and, as a result, it is argued that they were an exercise of the sovereign powers of the authorising State. *Rina*, based in Italy, relied on the jurisdictional immunity of the authorising State within the meaning of the customary rules of public international law. The proceedings against *Rina* were brought by family members of the victims and passengers who survived the sinking of the ship in the Red Sea and who claimed damages on the basis of *Rina*'s civil liability. This action was based on the provisions of the Italian Civil Code on both non-contractual and contractual liability. The court hearing the case had to examine whether the classification and certification of ships can be classified as the mere exercise of *iure imperii*. The Court stated a key point, namely that acting on behalf of the State does not automatically constitute the exercise of public authority. It also pointed out that the activity in question must also be examined in the light of international agreements, in particular the Montego Bay Convention and the SOLAS Convention. The Court concluded that this dispute and its nature could not be regarded as an act *iure imperii* within the meaning of the EU *acquis*.³⁶ Nevertheless, “the rules of customary international law...are binding upon the Community institutions and form part of the Community legal order”.³⁷ Moreover, as part of the primary law of the EU, the Charter of Fundamental Rights of the EU is also binding and therefore the right to a fair trial within the meaning of Article 47 of the Charter cannot be omitted in this case. Jurisdictional immunity, which as a rule has completed the process of customary norm-making based on the principle of *par in parem non habet imperium*, is not absolute in nature and relates exclusively to the performance of *iure imperii* in the exercise of the sovereign power of the State concerned. It is therefore for the court hearing the case to ascertain whether, not only under the EU law but also under public international law, an act is one of *iure imperii*. Compensation for damages against a private-law body, such as that at issue in the main proceedings, can also be characterised under international law as not being an exercise of public authority.³⁸ As we have already stated several times, it is always for the national court to verify those requirements and factors after a detailed ascertainment of the facts of each case.

However, *Rina* case sparked a debate on the effect of international public law in defining civil and commercial matters. The international law of sovereign immunities can be considered to some extent vague, and individual states regulate these issues at the national level. If the Court of Justice were to interpret the concept of civil and commercial matters in the context of international law, this would have a negative impact on the law of sovereign immunities of the EU Member States, and the competence of The Court to make such a harmonisation is questionable. At the same time, the nature of the two spheres is different (Cuniberti, 2021). However, this is an area that stimulates debate beyond the scope of this part of the present article and will therefore not be discussed in depth.

³⁶ Judgment of 7 May 2020, *Rina*, C-641/18, EU:C:2020:349.

³⁷ Judgment of 25 February 2010, *Brita*, C-386/08, EU:C:2010:91.

³⁸ Judgment of 7 May 2020, *Rina*, C-641/18, EU:C:2020:349.

The Rina judgment concludes this section of the article. Through the case-law of the Court of Justice, we have identified the boundaries between the performance of *iure imperii* and the exercise of the public authority's powers on the one hand, and the actions that fall within the scope of the analysed Regulations, despite the negative delineation of the scope of application to revenue, customs and administrative matters and, in the Brussels I bis Regulation, also *acta iure imperii*. In the following chapter, we briefly review how civil and commercial matters are interpreted in the context of the key sources of private international law adopted under the auspices of the Hague Conference.

4 Civil and commercial matters in the context of the international conventions adopted under the auspices of the Hague Conference

The Hague Conference on Private International Law (hereinafter “the Hague Conference” or “Conference”), as an intergovernmental organisation, works to unify selected issues of private international law. Various states from all over the world are part of the Conference, as well as the EU Member States and, since 3 April 2007, the EU itself has been a regular member (EUR-Lex, 2017). There are even states that are bound by some of the Conventions but are not part of the Conference as such. The issue of disparities between the legal systems of the members is much more intense regarding the global scope of the Conference than among the EU Member States, whose legal systems show more similarities. It is precisely for this reason that it is essential that the Conference continually seeks a compromise between States (Štefanková et al., 2011, 54).

The Hague Conference has also adopted a number of conventions, the scope of which is limited to civil and commercial matters. In particular, we have chosen to examine the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters³⁹ and the Convention of 30 June 2005 on Choice of Court Agreements⁴⁰ because their content is most relevant to the Regulations, which we have dealt with in the previous part of this article, and also because the European Union itself is one of the contracting parties. The exception is Denmark, which has made use of its opt-out clause and does not participate in this form of judicial cooperation.

The Judgments Convention is a relatively new instrument; although the Council has adopted the EU's accession to the Convention, the Convention has not yet entered into force, but it should happen on 1.9.2023.⁴¹ It follows the 2005 Choice of Court Convention and therefore it is necessary to ensure consistency in the interpretation of the articles, which are identically framed. A positive definition of *ratione materiae* is found under Article 1, which states that the Convention shall apply to the recognition and enforcement of judgments in civil or commercial matters. Excluded from the scope are, *inter alia*, revenue, customs and administrative

³⁹ The Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (hereinafter as “the Judgments Convention“). <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137>

⁴⁰ The Convention of 30 June 2005 on Choice of Court Agreements (hereinafter as “the Choice of Court Convention“). <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98>

⁴¹ Rozhodnutie Rady (EÚ) 2022/1206 z 12. júla 2022 o pristúpení Európskej únie k Dohovoru o uznávaní a vykonávaní cudzích rozsudkov v občianskych alebo obchodných veciach. <https://bit.ly/3qPqKcP>

matters.⁴² Again, it is necessary to forget the interpretation according to national law, and the interpretation of this provision must be given in the light of the teleology and objectives of the Convention.⁴³ Interestingly, the direct wording of the Convention enshrines that “A judgment is not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, was a party to the proceedings.”⁴⁴ The Convention thus makes it clear that the theory of subjects has absolutely no place in this context, and the mere fact that a public authority stands on one side does not affect its application. Moreover, within the scope of the Convention itself, it is necessary to identify whether the decision in question falls within the concept of a judgment as defined in Article 3(1) (b) of the Convention.⁴⁵ The test of whether we have a judgment that falls within the definition may make it easier in practice to find the limits of the Convention’s material scope in disputes in which a public authority is a party. Moreover, in the context also of the aforementioned Rina judgment of the CJEU, the Convention makes it clear that the privileges and immunities of States or international organisations are not affected by the provisions of the Convention.⁴⁶

The interpretation of the scope of jurisdiction is clearly elaborated in the Explanatory Report, which states that the determination of the scope of jurisdiction depends on the nature of the claim or action that is the subject of the judgment, and the fact that the State or public authority is acting as one of the parties to the dispute is not a decisive element. Nor does it matter whether the civil or commercial action has been brought before a civil or administrative court. The key to assessing the scope of application in the area under analysis is to identify whether the public authority in question is exercising the power conferred on it in the matter in question and whether that power is not open to ordinary persons. If the action arises out of such a procedure, including regulatory powers, the scope of the Convention is not satisfied. This report also gives a typical example of the exercise of public power, the recovery of a claim by means of administrative proceedings, without any requirement for judicial proceedings. Orders by governments or governmental agencies, claims against public officials in person acting on behalf of the State, and liability for the acts of public authorities are also excluded from the scope. Conversely, even if a party is not acting within the limits of public authority, the scope is established, for example “when a governmental agency is acting on behalf of private parties, such as consumers or investors”, on condition that it is not acting within the exercise of its public powers.⁴⁷

As was the case at the Union level, it is essential to ensure uniformity of interpretation of the equivalent provisions of the different Conventions at the Hague Conference. Therefore, the same definition of civil and commercial matters applies to the scope of the Choice of Court Convention as to the Judgments Convention, and the wording itself contains a provision that the mere fact that a public authority stands on one side does not mean that material scope cannot be given.⁴⁸ The negative definition of revenue, customs, or administrative matters themselves,

⁴² Art. 1(1) of the Judgments Convention.

⁴³ Explanatory Report by Francisco Garcimartín & Geneviève Saumier. <https://assets.hcch.net/docs/a1b0b0fc-95b1-4544-935b-b842534a120f.pdf>

⁴⁴ Art. 2(4) of the Judgments Convention.

⁴⁵ Art. 3(1)(b) of the Judgments Convention.

⁴⁶ Art. 2(5) of the Judgments Convention.

⁴⁷ Explanatory Report by Francisco Garcimartín & Geneviève Saumier. <https://assets.hcch.net/docs/a1b0b0fc-95b1-4544-935b-b842534a120f.pdf>

⁴⁸ Art. 2(5) of the Choice of Court Convention.

emphasises the focus on the nature of the legal relationship and not on the branch of law, which can be determined in different ways in legal systems around the world. Based on this, we can say that both *iure imperii* and administrative matters can be included under the analysed Conventions under approximately similar conditions as in the case of the EU Regulations under examination.

Conclusion

The present article focuses on the examination of the scope of selected sources of private international law from the perspective of the participation of an administrative or other public authority in the proceedings as a party to the dispute. As we have demonstrated, even disputes that may, at first sight, appear to be public law disputes may fall within the scope of the analysed instruments, if certain conditions are met. We have focused in particular on the Brussels I bis and the Rome I, II Regulations, which form the general core of judicial cooperation in civil and commercial matters within the EU. These regulations define their *ratione materiae* in both positive and negative ways. It must be a civil or commercial matter and revenue, customs and administrative matters are excluded from the scope of application, along with, in Brussels I bis, *acta iure imperii*. As we have shown in the relevant case-law of the Court of Justice, the scope and concept of civil and commercial matters must be interpreted in an autonomous manner, teleologically, systematically, and, moreover, in the light of the general principles arising from all the national rules of the Member States, thus underlining the need for a uniform interpretation and a unified application throughout the EU.⁴⁹ The legislator was interested in preserving a broad concept of civil and commercial matters⁵⁰ and therefore an expansive interpretation is required in order to avoid irreconcilable judgments being issued within the EU.

Based on the case-law of the Court of Justice, we have identified the need to classify the legal relationship and to define its nature, but also to examine the cause of action and the conditions for the application of the action as key elements for assessing whether the substantive scope is given. It must be an exercise of *iure gestionis* and not an exercise of public authority, *acta iure imperii*. It is also necessary to analyse whether the authority in question is exercising certain powers which are exceptional in comparison with those ordinarily available in relations between individuals governed by private law. Nor is the public purpose of the exercise alone sufficient for the dispute in question to qualify as a performance of *iure imperii* and to exclude it from the scope of application.⁵¹ Nor does it automatically mean that an act on behalf of the state by an authorised entity, nor does the purpose of the exercise in the interest of the state, constitute an act *iure imperii*.⁵² Thus, if a party is acting, for example, as an employer of cleaning staff, or, say, as a purchaser of office equipment and the like, its position is completely different from that of a unilateral order within the limits of the *iure imperii*. The court hearing the case is obliged to take all these criteria into account and, on that basis, to decide whether to apply the Regulations in question to the present dispute, of course, if all conditions of scope are met. Judicial cooperation in civil and commercial matters within the EU consists not only of the general regime, which we have discussed in this article, but also of other sources. Insofar as these

⁴⁹ Judgment of 25 March 2021, *Obala i lučice*, C-307/19, EU:C:2021:236.

⁵⁰ Judgment of 7 May 2020, *Rina*, C-641/18, EU:C:2020:349.

⁵¹ Judgment of 25 March 2021, *Obala i lučice*, C-307/19, EU:C:2021:236.

⁵² Judgment of 7 May 2020, *Rina*, C-641/18, EU:C:2020:349.

sources are limited to civil and commercial matters, the interpretation we have outlined in the article is applicable, within the limits of the equivalent provisions on scope, to other relevant sources of the EU *acquis*.

We have devoted the last part of the article to the effects of the international conventions adopted under the auspices of the Hague Conference on the EU legal order in order to compare the interpretation of the concept of civil and commercial matters in the context of the selected Conventions. As we have shown, also with the Conventions, the key focus is on the nature of the claims or action that is the subject of the judgment and the nature of the parties in dispute is irrelevant. As part of *de lege ferenda* considerations, we could take inspiration at the Union level from the aforementioned Hague Conventions and add to the text of the Regulations a provision on the irrelevance of the nature of the parties to a dispute for the determination of the *ratione materiae* of the Regulations. In our view, it would also speed up the decision-making process in the national courts if the relevant provisions were expanded to include the most relevant conclusions from the interpretative material of the CJEU's case-law in the area concerned.

Naturally, the legislator cannot think of all situations that may arise in practice and therefore, in the conclusion of the article, we would like to highlight the irreplaceable role of the case-law of the Court of Justice, the interpretative material of which substantially complements the sources of the EU *acquis* and fills gaps in some vague provisions and thus clearly facilitates the application of the analysed Regulations in practice.

References

- Bělohávek, A. J. (2010). *Rome Convention Rome I Regulation*. Juris.
- Cuniberti, G. (2021, February 9). *Sovereign Immunities and the Scope of the Brussels Ibis Regulation after Rina and SHAPE*. The European Association of Private International Law. Online: <https://bit.ly/3pbw9KK>
- EUR-Lex. (2017). *EU involvement in efforts to unify the rules of private international law*. Online: <https://bit.ly/3pc0A3n>
- Fábry, B., & Krošlák, D. (2007). Verejné a súkromné právo – nové výzvy v systematike práva. In P. Škultéty (Ed.), *Acta facultatis iuridicae Universitatis Comenianae, Tomus XXV* (pp. 47–54). Online: <https://bit.ly/43Mijxv>
- Garayová, L. (2019). Sources of EU Law. In: A. Erdősová, L. Garayová, & P. Potásch (Eds.), *Selected sources of law – past and current perspectives* (pp. 59–62). Paneurópska vysoká škola.
- Magnus, U., & Mankowski, P. (2007). *Brussels I Regulation*. Sellier European Law Publishers. <https://doi.org/10.1515/9783866538894>
- Šmihula, D. (2012). Úvod do teórie medzinárodného práva súkromného. Epos.
- Štefanková, N. et al. (2011). *Medzinárodné právo súkromné*. C.H.Beck.