Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 16 November 2017 [1]

Case C-560/16

Michael Dědouch,
Petr Streitberg,
Pavel Suda,
v
Jihočeská plynárenská a.s.,
E.ON Czech Holding AG

(Request for a preliminary ruling
from the Nejvyšší soud (Supreme Court, Czech Republic))

(Reference for a preliminary ruling — Regulation (EC) No 44/2001 — Jurisdiction in civil and commercial matters — Exclusive jurisdiction — Article 22(2) — Validity of decisions of the organs of companies or other legal persons with their seat in the territory of a Member State — Exclusive jurisdiction of the courts of that Member State — Decision of the general meeting of a company ordering the compulsory transfer to that company's principal shareholder of the shares of the company's minority shareholders and determining the consideration to be paid to them by the principal shareholder — Judicial procedure for reviewing the reasonableness of the consideration)

I. Introduction

1. This request for a preliminary ruling, received at the Registry of the Court on 4 November 2016, concerns the interpretation of Article 22(2) 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. [2]

2. The request has been made in proceedings between Michael Dědouch, Petr Streitberg and Pavel Suda ('Mr Dědouch and Others') and Jihočeská plynárenská a.s. and E.ON Czech Holding AG ('E.ON') concerning the reasonableness of the consideration which, in a procedure for removing minority shareholders ('squeeze-out'), E.ON was required to pay Mr Dědouch and Others following the compulsory transfer of their shares in Jihočeská plynárenská.

1 Original language: French.

2 OJ 2001 L 12, p. 1.

II. Legal context

A. EU law

3. In accordance with Article 2(1) of Regulation No 44/2001, '[s]ubject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State'.

4. Article 5 of Regulation No 44/2001 provides as follows:

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

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

   (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

   – in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

   – in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

   (c) if subparagraph (b) does not apply then subparagraph (a) applies;

…

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

…'

5. Under Article 6(1) of Regulation No 44/2001, a person domiciled in a Member State may also be sued, 'where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'.

6. Article 22 of Regulation No 44/2001 provides:

'The following courts shall have exclusive jurisdiction, regardless of domicile:

…

2. in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;

…'

B. Czech law

7. Paragraph 183i of Zákon č. 513/1991 Sb., obchodní zákoník (Law No 513/1991, Commercial Code), in the version applicable to the main proceedings ('the Czech Commercial Code'), provides:

'(1) A person who owns participating securities in a company (a) whose aggregate nominal value makes up at least 90% of that company's share capital, or (b) which replace participating securities whose aggregate nominal value makes up at least 90% of that company's share capital, or (c) which carry at least 90% of the voting rights in the company ("the principal shareholder") is entitled to request the board of directors to call a general meeting, at which a decision shall be made on the transfer of all the company's other participating securities to that person.

…

(3) The resolution of the general meeting shall include the identification of the principal shareholder, particulars attesting that that shareholder is the principal shareholder and the amount of consideration … as well as the time limit within which the consideration must be provided.'

8. Paragraph 183k of the Czech Commercial Code provides:

'(1) The owners of participating securities may … request a court to review the reasonableness of the consideration; …

…

(3) A court decision granting the right to a different amount of consideration shall be binding on the principal shareholder and the company as regards the basis of the right granted, as well as vis-à-vis the other owners of participating securities. …

(4) A finding that the consideration is unreasonable shall not render the resolution of the general meeting adopted under Paragraph 183i(1) invalid.

(5) An application under Paragraph 131 to declare invalid the resolution of the general meeting may not be based on the unreasonableness of the consideration.'

III. The dispute in the main proceedings and the questions referred for a preliminary ruling

9. By a resolution of 8 December 2006, the general meeting of the company incorporated under Czech law Jihočeská plynárenská, established in České Budějovice (Czech Republic), decided on the compulsory transfer of all the participating securities in that company to its principal shareholder E.ON, established in Munich (Germany).

10. The resolution stated the amount of the consideration E.ON was required to pay the minority shareholders following the transfer.

11. By an action brought on 26 January 2007 against Jihočeská plynárenská and E.ON, Mr Dědouch and Others asked the Krajský soud v Českých Budějovicích (Regional Court, České Budějovice, Czech Republic) to review the reasonableness of the consideration.

12. In those proceedings E.ON raised an objection that the Czech courts lacked jurisdiction, arguing that, in view of the location of its seat, only the German courts had international jurisdiction.

13. By order of 26 August 2009, the Krajský soud v Českých Budějovicích (Regional Court, České Budějovice) dismissed the objection, on the ground that the Czech courts had jurisdiction on the basis of Article 6(1) of Regulation No 44/2001 to hear the action brought by Mr Dědouch and Others.

14. E.ON appealed against that decision to the Vrchní soud v Praze (High Court, Prague, Czech Republic), which by order of 22 June 2010 held that the dispute before it fell within Article 22(2) of Regulation No 44/2001 and, in view of the location of the seat of Jihočeská plynárenská, it was the Czech courts that had international jurisdiction.

15. On appeal by E.ON, the Ústavní soud (Constitutional Court, Czech Republic) by judgment of 11 September 2012 set aside that order and referred the case back to the Vrchní soud v Praze (High Court, Prague).

16. By order of 2 May 2014, the Vrchní soud v Praze (High Court, Prague) found that the Czech courts had jurisdiction under Article 5(1)(a) of Regulation No 44/2001.

17. E.ON appealed against that order to the referring court.

18. In those circumstances, the Nejvyšší soud (Supreme Court, Czech Republic) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must Article 22(2) of [Regulation No 44/2001] be interpreted as also covering proceedings for the review of the reasonableness of the consideration which the principal shareholder is required to provide, as equivalent value for participating securities, to the previous owners of participating securities which were transferred to it as a result of a decision at a general meeting of a public limited company on the compulsory transfer of the other participating securities to the principal shareholder (otherwise known as a “squeeze-out”), where the resolution of the general meeting of the public limited company determines the amount of reasonable consideration and where there is a court decision granting entitlement to a different amount of consideration which is binding on the principal shareholder and on the company as regards the basis of the right granted, as well as vis-à-vis the other owners of participating securities?

(2) If the answer to the preceding question is in the negative, must Article 5(1)(a) of [Regulation No 44/2001] be interpreted as also covering proceedings for review of the reasonableness of the consideration described in the previous question?

(3) If the answer to both the preceding questions is in the negative, must Article 5(3) of [Regulation No 44/2001] be interpreted as also covering proceedings for review of the reasonableness of the consideration described in the first question?’

IV. Procedure before the Court

19. Mr Dědouch and Others, E.ON, the Czech Government and the European Commission submitted written observations. Since no reasoned request for a hearing was submitted and the Court considered that it had sufficient information, it was decided not to arrange a hearing.

V. Analysis

20. By its questions the referring court essentially asks whether an action concerning the reasonableness of the consideration the principal shareholder in a company will have to pay per share to the minority shareholders in the company in a 'squeeze-out' operation falls within the exclusive jurisdiction of the courts for the company's seat (Article 22(2) of Regulation No 44/2001), or within the special jurisdiction of the courts for the place of performance of the contractual obligation (Article 5(1) of Regulation No 44/2001), or within the special jurisdiction of the courts for the place where the harmful event occurred or may occur (Article 5(3) of Regulation No 44/2001).

21. The present request for a preliminary ruling highlights a structural problem of Regulation No 44/2001 (which continues to exist under 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[3]), namely the absence of a basis of jurisdiction dedicated to the resolution of internal disputes within companies, such as disputes between shareholders or between shareholders and directors or between the company and its directors.[4]

22. Article 22(2) of Regulation No 44/2001 relates only to questions of 'the validity of the constitution, the nullity or the dissolution of companies … or of the validity of the decisions of their organs'. However, company law disputes do not necessarily involve a question of the validity of a decision of the company's organs, still less the validity of the constitution, the nullity or the dissolution of the company. That is so in the present case, in which the main proceedings, in accordance with Paragraph 183k(4) of the Czech Commercial Code, challenge not the validity of the resolution of the general meeting on the removal of the minority shareholders but only the amount of the consideration which the principal shareholder will have to pay them in order to acquire their shares.

23. The problem of the lack of a basis of jurisdiction for disputes of this kind is further complicated in view of the difficulty of applying the provisions of Article 5(1) and (3) to the dispute in the main proceedings, since the removal of the minority shareholders and the consideration decided by a resolution of the general meeting are neither a contract nor a tort, delict or quasi-delict.

24. On the one hand, there is no 'obligation freely assumed by one party towards another'[5] which would trigger the application of Article 5(1) of Regulation No 44/2001. The principle of a procedure for squeezing out the minority shareholders is that the principal shareholder can start it without their consent.

25. On the other hand, even if, according to settled case-law of the Court, 'Article 5(3) of Regulation No 44/2001 applies to all actions which seek to establish the liability of a defendant and do not concern "matters relating to a contract" within the meaning of Article 5(1) of the regulation',[6] the procedure at issue in the main proceedings does not seek to establish the liability of the principal shareholder. On the contrary, it concerns the reasonableness or otherwise of the consideration determined in accordance with Paragraph 183i(3) of the Czech Commercial Code by the general meeting (and thus not necessarily or not solely by the principal shareholder).

3 OJ 2012 L 351, p. 1.

4 See, to that effect, Paschalidis, P., *Freedom of Establishment and Private International Law for Corporations*, Oxford University Press, 2012, points 2.09 to 2.29.

5 Judgment of 10 September 2015, *Holterman Ferho Exploitatie and Others* (C-47/14, EU:C:2015:574, paragraph 52 and the case-law cited).

6 Judgment of 10 September 2015, *Holterman Ferho Exploitatie and Others* (C-47/14, EU:C:2015:574, paragraph 68 and the case-law cited).

26. This problem is not specific to the squeeze-out procedure but arises in connection with several other concepts of company law, for example the duty of care owed by the directors. On the basis of the settled case-law of the Court which I referred to in point 24 above, the duty of care is an obligation assumed by a director towards the company when he freely agrees to take on his duties. In that sense, an action by the company or a shareholder seeking to establish a breach of that obligation by a director would fall within Article 5(1)(a) of Regulation No 44/2001, but that obligation does not have a specific place of performance within the meaning of that provision, as it applies throughout the world. It is therefore not possible on the basis of that provision to establish the jurisdiction of the courts of any particular State.

27. Where no basis of exclusive or special jurisdiction is applicable, one must normally revert to the general rule in Article 2(1) of Regulation No 44/2001, under which persons domiciled in a Member State, whatever their nationality, are to be sued in the courts of that Member State. [7]

28. In that case a strict interpretation of Article 22(2) of Regulation No 44/2001 might be contemplated. [8] However, such an interpretation excluding the dispute in question from its scope (because, in accordance with Paragraph 183k(4) of the Czech Commercial Code, the dispute does not challenge the validity of the resolution of the general meeting deciding to remove the minority shareholders) would be contrary to the general scheme and purpose of the regulation, by which, according to the Court's case-law, the interpretation of Article 22 of Regulation No 44/2001 must be guided. [9]

29. On this point, I note that the Court has already had occasion to interpret Article 22(2) of Regulation No 44/2001. While, as far as I know, it has not yet had an opportunity to do so in the context of an internal dispute within a company, governed by company law, that has not prevented it from setting out in that case-law the principles to be followed in interpreting that provision. [10]

30. To that effect, as the Court held in its judgment of 2 October 2008, *Hassett and Doherty* (C-372/07, EU:C:2008:534), 'as [the provisions of Article 22 of Regulation No 44/2001] introduce an exception to the general rule governing the attribution of jurisdiction, they must not be given an interpretation broader than is required by their objective, since their effect is to deprive the parties of the choice of forum which would otherwise be theirs and, in certain cases, they result in the parties being brought before a court which is not that of the domicile of any of them'. [11]

7 See judgments of 13 July 2006, *Reisch Montage* (C-103/05, EU:C:2006:471, paragraph 22), and of 12 May 2011, *BVG* (C-144/10, EU:C:2011:300, paragraph 30).

8 See judgments of 13 July 2006, *Reisch Montage* (C-103/05, EU:C:2006:471, paragraph 22), and of 12 May 2011, *BVG* (C-144/10, EU:C:2011:300, paragraph 30).

9 See judgments of 2 October 2008, *Hassett and Doherty* (C-372/07, EU:C:2008:534, paragraph 19), and of 12 May 2011, *BVG* (C-144/10, EU:C:2011:300, paragraphs 29 and 30).

10 The case in which judgment was given on 2 October 2008, *Hassett and Doherty* (C-372/07, EU:C:2008:534), concerned disputes between a professional organisation governed by English law and its members on the basis of a contract concluded between them. It was thus not a dispute falling under English company law. The same is true of the case in which judgment was given on 22 March 1983, *Peters Bauunternehmung* (34/82, EU:C:1983:87), which concerned a dispute relating to a contract of joining an association. The question of the exclusive jurisdiction of the courts for the seat of the association was not even raised. The case in which judgment was given on 12 May 2011, *BVG* (C-144/10, EU:C:2011:300), concerned a dispute between a company incorporated under German law and a debtor relating to a financial derivative contract. The German company contested the validity of the contract as an *ultra vires* act, pleading breach of its statutes by its organs. So this was not an internal dispute within the company, since the company law issue, namely the question of whether the conclusion of the contract by the German company was *ultra vires*, was only incidental. The case in which judgment was given on 23 October 2014, *flyLAL-Lithuanian Airlines* (C-302/13, EU:C:2014:2319), concerned a dispute between an airline company incorporated under Lithuanian law on the one hand and an airline company incorporated under Latvian law and the company incorporated under Latvian law which managed Riga airport (Latvia) on the other. The Lithuanian airline company sought compensation for damage caused by infringements of competition law by the defendants. It was therefore a case neither of an internal dispute within a company nor of a question of company law.

11 See paragraph 19 and the case-law cited.

31. As the Court said, 'by introducing such an exception in the case of companies, whereby exclusive jurisdiction is attributed to the courts of the Member State in which the company has its seat, the essential objective pursued is one of centralising jurisdiction in order to avoid conflicting judgments being given as regards the existence of a company or as regards the validity of the decisions of its organs'.[12]

32. I consider that that objective would be better served if Article 22(2) were to be given an interpretation in accordance with the essential objective pursued instead of a strict and formalistic interpretation of its wording.

33. As the Court has held, 'the courts of the Member State in which the company has its seat appear to be those best placed to deal with … disputes [concerning the existence of companies and the validity of decisions of their organs], inter alia because it is in that State that information about the company will have been notified and made public. Exclusive jurisdiction is thus attributed to those courts in the interests of the sound administration of justice'.[13]

34. In my opinion, that is also true of the Czech courts for the dispute in the main proceedings. As it concerns a procedure for squeezing out the minority shareholders in a company incorporated under Czech law by the principal shareholder, and the principal shareholder E.ON does not dispute that Czech law is the law applicable to the substance of the dispute even if the case were to come within the jurisdiction of the German courts on the basis of Article 2 of Regulation No 44/2001, I believe that the Czech courts are best placed to hear the case and resolve it in accordance with Czech law.

35. I consider, moreover, that jurisdiction of the courts for the seat of the company whose internal affairs are the subject of the dispute, under Article 22(2) of Regulation No 44/2001, would not harm the objective of foreseeability pursued by Regulation No 44/2001,[14] since the shareholders in a company, especially the principal shareholder, can easily foresee that the courts for the company's seat will be the courts with jurisdiction to decide any internal dispute within the company. In the present case, the Czech courts are the natural forum for resolving the dispute between Mr Dědouch and Others and E.ON.

36. For those reasons I consider that the present case gives the Court an opportunity to clarify the applicability of Article 22(2) of Regulation No 44/2001 to internal disputes within companies. I propose that it should be interpreted as meaning that those disputes, in particular those between a principal shareholder and the minority shareholders in a company in the context of a squeeze-out, fall within its scope.

VI. Conclusion

37. In the light of the above considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Nejvyšší soud (Supreme Court, Czech Republic) as follows:

Article 22(2) 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 being applicable to proceedings for review of the reasonableness of the consideration which the principal shareholder is required to pay to the former holders of participating securities (minority

12 Judgment of 2 October 2008, *Hassett and Doherty* (C-372/07, EU:C:2008:534, paragraph 20).

13 Judgment of 2 October 2008, *Hassett and Doherty* (C-372/07, EU:C:2008:534, paragraph 21 and the case-law cited).

14 See recital 11 of Regulation No 44/2001. See also, to that effect, judgment of 12 May 2011, *BVG* (C-144/10, EU:C:2011:300, paragraphs 33 and 35).

shareholders) as the equivalent value of those securities which have been transferred as a consequence of a resolution of the general meeting of a public limited company requiring the transfer of the other participating securities to the principal shareholder.