APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2024/139

Neutral Citation Number [2025] IECA 16

Allen J.

Butler J.

O'Moore J.

BETWEEN/

RYANAIR DAC AND RYANAIR HOLDINGS PLC

PLAINTIFFS/APPELLANTS

- AND –

THE COMPETITION AND CONSUMER PROTECTION COMMISSION

AND

AUTORITÀ GARANTE DELLA CONCORRENZA E DEL MERCATO

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 31st day of January, 2025

Introduction

1. This is an appeal by Ryanair DAC and Ryanair Holdings plc *("Ryanair")* against the judgment of the High Court (Barrett J.) delivered on 21st May, 2024 ([2024] IEHC 307) and consequent order made on 4th June, 2024 setting aside the service on Autorità Garante Della Concorrenza e del Mercato *("the AGCM")* of notice of a plenary summons and dismissing the proceedings against the AGCM for want of jurisdiction.

2. The net issue on the appeal – as it was in the High Court – is whether Ryanair's action against the AGCM is a *"civil or commercial matter"* to which Article 1(1) of Regulation (EU) No. 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters applies; or a claim arising out of the exercise of State authority – *acta iure imperii* – to which it does not apply.

Background

3. It seems rather a waste of ink – or, in a judgment which is to be delivered electronically, of ones and noughts – to say so, but Ryanair is a well-known airline.

4. The AGCM is probably less well-known. It is the Italian competition authority. In the affidavit of Mr. Guido Stazi, the AGCM's secretary general, sworn to ground the motion to dismiss, it was described as follows:-

> *"7. The AGCM is a public administrative independent authority, established in Italy under Law No.287/1990 of 10 October 1990 ... which introduced antitrust legislation in Italy and charged the AGCM with the administrative function of protecting fair competition in the marketplace.*
>
> *8. The AGCM is empowered under Italian legislation inter alia to investigate and take decisions in respect of anti-competitive agreements, abuses of dominant position [etc.] and is generally authorised to enforce competition and consumer protection laws in Italy.*
>
> *9. More specifically, the AGCM has significant enforcement powers in antitrust matters ... These enforcement powers include (by way of example) the power to issue mandatory requests to undertakings to provide information, impose financial penalties on undertakings for non-compliance with such requests, carry out inspections of business and private premises, order the discontinuance of anti-competitive conduct and levy fines … where infringements of competition law are*

found to have occurred or to be occurring. Such powers are not available to private persons in Italian law. ...

11. Article 1,§3 of Law No. 196/2009 of 31 December 2009 defines the AGCM as a public administration of the State. As far back as its judgment no.1716 of 25 November 1994, the Italian Supreme Administrative Court (the Council of State) has defined the AGCM as a State administration. More recently, the Italian Constitutional Court in its judgment no.13 of 2019 confirmed that the AGCM 'pursues a specific interest, which is that of the protection of competition and the market....'"

5. The Competition and Consumer Protection Commission *("the CCPC")* is a statutory body established by the Competition and Consumer Protection Act, 2014 to perform the functions conferred on it by that Act. It is the Irish competition authority.

6. In the Summer of 2023 the AGCM received complaints from Italian travel agency associations and Italian consumer rights organisations that Ryanair was abusing its dominant position in several markets in the air transport sector by hindering sales of Ryanair flights by both online and offline travel agencies in Italy. Ryanair, it should be said at the outset, disputes the suggestion that it is in a dominant position in the relevant market and vehemently denies any wrongdoing.

7. On 14th September, 2023 the AGCM resolved to commence an investigation in order to ascertain the existence or otherwise of infringements by Ryanair DAC of competition law under the relevant provision of Italian Law No. 287/1990 and/or Article 102 of the Treaty on the Functioning of the European Union. On 16th January, 2024 the AGCM resolved to extend the investigation to Ryanair Holdings plc. In the early stages on the investigation the AGCM issued a number of requests for information to Ryanair, which Ryanair is adamant that it fully and promptly complied with.

8. On 16th January, 2024 the AGCM issued a request to the CCPC for investigative assistance. The request was made pursuant to Article 22(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and Article 24 of the ECN+ Directive, that is Directive (EU) 2019/1 of the European Parliament and Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

9. On 8th March, 2024 the CCPC obtained a warrant from the Dublin Metropolitan District Court pursuant to s. 37 of the Act of 2014 to enter and search Ryanair's offices at Airside Business Park, Swords, County Dublin. In the early afternoon of the same day some 35 authorised officers of the CCPC attended at the Ryanair's offices to carry out the inspection, which went on until late in the evening. Among the 35 CCPC authorised officers were six AGCM officers who had been appointed as CCPC officers with effect from 29th February, 2024 until 30th March, 2024. The investigation team identified and copied a variety of material which was determined to be relevant to the AGCM investigation which, at the end of the inspection, was given to the AGCM officers who took it away to Italy.

The High Court proceedings

10. Ryanair is aggrieved by the manner in which the unannounced inspection was carried out and, indeed, by the fact that it was carried out at all. Ryanair is adamant that it had fully cooperated with the AGCM investigation; that it had promptly and comprehensively addressed the requests for information; that there was no justification for the request by the AGCM to the CCPC for investigative assistance; that there was a failure to disclose all relevant information to the District Court judge; and – apart altogether from its complaint that the search should never have taken place – that material was seized which ought not to have been seized.

11. By plenary summons issued on 21st March, 2024 Ryanair issued proceedings against the CCPC and the AGCM claiming an order of *certiorari* quashing the search warrant, a series of declarations in relation to the obtaining and execution of the warrant and the material seized, a series of declarations as to alleged breaches of Ryanair's rights under Irish and EU law – including Ryanair's rights under the Constitution – injunctions restraining the CCPC and the AGCM from accessing or reviewing the seized material and requiring its return, and damages.

12. The summons was endorsed with a statement that the court had power and jurisdiction to hear and determine the claim under the provisions of European 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 (recast), *("Brussels I recast")* and in particular pursuant to Articles 7(2) and/or 8 thereof; and that there were no proceedings between the parties concerning the cause of action pending in any other Member State of the European Union.

13. The indorsement as to jurisdiction did not precisely mirror that required by O. 4, r. 1A(1) of the Rules of the Superior Court, which requires that where the summons concerns a claim which the court has power to hear and determine by virtue of Regulation 1215/2012, it should be indorsed with a statement that the court has the power under Regulation 1215/2012 to hear and determine the claim, and should specify the particular provision or provisions of Regulation 1215/2012 under which the court should assume jurisdiction.

14. In another case the point might be unremarkable, but in this case the indorsement as to jurisdiction betrays a misunderstanding of the scheme of the Regulation. Article 7(2) – the courts of the place where the harmful event occurred – and Article 8(1) – the courts of the place where one of a number of defendants is domiciled – do not by themselves confer jurisdiction but only apply to matters to which the Regulation applies.

15. Article 1 (1) of the Brussels I recast provides that:-

"1. This Regulation 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 or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii)."

16. Thus, the starting point is whether the claim or claims are civil and commercial matters, on the one hand, or *acta iure imperii*, on the other. Unless the matters are matters to which the Regulation applies, the provisions of Section 2 of the Regulation which confer special jurisdiction are not engaged.

The motion to set aside service and dismiss

17. On 5th April, 2024 a conditional appearance was entered on behalf of the AGCM, solely to contest the jurisdiction of the court, and by notice of motion issued on 29th April, 2024 the AGCM applied for an order pursuant to O. 12, r. 26 setting aside the service on it of the notice of the plenary summons, and an order pursuant to the inherent jurisdiction of the court dismissing or striking out the proceedings for want of jurisdiction.

18. The AGCM's motion was grounded on an affidavit of Mr. Stazi who largely focussed on the role and legal status of the AGCM in Italian law, and shortly summarised the investigation being conducted by the AGCM, including the AGCM's request to the CCPC for investigative assistance which prompted the inspection at Ryanair's premises in Swords. At para. 21 of his affidavit, Mr. Stazi deposed that:-

"21. An unannounced inspection of [Ryanair's] premises took place later that day pursuant to Irish national law, conducted exclusively by officers appointed by the CCPC, and concluded on the same day ('the Inspection'). For the avoidance of any doubt, I wish to confirm that, while officers of the AGCM were present at the inspection, none took any role or part in the activities constituting the Inspection or in approving or executing any act which took place in the context of the Inspection."

19. This averment provoked a puzzled riposte from Ryanair's Director of Competition and Regulatory, Mr. Eoin Kealy – in which he was supported by three solicitors from Arthur Cox – in which he emphasised that Mr. Stazi was not among those who were present at the inspection and in which he identified six officers of the AGCM who were; and who, he said, had actively participated in the inspection. What happened in fact – as Mr. Kealy acknowledged – was that the CCPC, in exercise of the power conferred by s. 35(1) of the Act of 2014 had appointed the six AGCM officers to be authorised officers of the CCPC with effect from 29th February, 2024 until 30th March, 2024 for all of the purposes of all of the relevant statutory provisions referred to in section 35(1). On the AGCM's side there appeared to be a determination to distance the AGCM officers from the inspection; and on Ryanair's side a determination – while acknowledging that the officers were not exercising the administrative powers of the AGCM under Italian law – to describe them as *"AGCM officials"* and *"AGCM authorised officers"* and to emphasise the central role which they played in the inspection.

20. It seems to me that Mr. Kealy's criticism of Mr. Stazi's account of the inspection was not without substance. On 8th March, 2024 the six – to use a neutral word – Italian officers were both AGCM officers and CCPC authorised officers. Their appointment as CCPC authorised officers was made in accordance with Irish law and was entirely consistent with the European Competition Network recommendation on assistance in inspections conducted under Article 22(1) of Regulation (EC) No 1/2003, that the officials of, and persons authorised by, the requesting national competition authority *("NCA")* should, to the greatest extent possible, enjoy investigative powers equivalent to those of the officials of, and persons authorised by, the assisting NCA under its national law. For the purposes of the inspection, the Italian officers were CCPC authorised officers. At the conclusion of the inspection, the

Italian officers received the seized material from the CCPC warrant holder in their capacity as AGCM officers, which they took and carried away to Rome.

21. To the extent that Mr. Stazi's account of the search suggested that the Italian officers were merely observers, it was not correct. However, neither the status of the Italian officers nor the extent of their participation in the search is relevant to the question of whether the Irish courts have jurisdiction to hear and determine Ryanair's action against the AGCM.

22. There was a great deal said in the High Court and on the appeal about the previous engagement between Ryanair and the AGCM and the circumstances in which the District Court warrant was obtained and executed but the only real issue was whether the High Court had jurisdiction to deal with the action. Much of the evidence was directed to establishing that the events complained of took place in Dublin – a fact which was undisputed – which appears to have been based on the same fundamental misunderstanding which I have identified in the indorsement as to jurisdiction, namely, that jurisdiction might be founded on place where the allegedly harmful events occurred.

23. The High Court heard the motion on 16th May, 2024 and a written judgment was delivered very promptly on 21st May, 2024.

The High Court judgment

24. The High Court judge identified the central question before him – which he characterised as a simple question – as being whether the proceedings were (1) civil or commercial matters, or (2) concerned *"revenue, customs or administrative matters or … the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii)."*

25. The judge first set out the facts and summarised what had been said on either side in the course of the exchange of affidavits, and then the claims as set out in the general indorsement of claim. Starting at para. 12, he carefully and comprehensively reviewed the

caselaw, in which he identified the applicable principles. Bringing those principles to bear, the judge, at para. 18, accepted the AGCM's submissions that all of the actions taken by the AGCM and all of the reliefs claims against the AGCM were inextricably bound up in the exercise by the AGCM of its public law powers, and specifically with its request to the CCPC under Regulation No 1/2003 and the ENC+ Directive for investigative assistance. He found that the actions of the AGCM were definitively not actions which would have been available to a private person or interested party other than a national competition agency; that the AGCM must properly be regarded as a public administrative authority exercising public law powers; and that to the extent that Ryanair wished to pursue any matter against the AGCM arising out of its actions, it could do so before the Italian courts.

26. Starting at para. 19, the judge identified twelve principal submissions made by Ryanair and what he considered to be the deficiencies in those submissions. I will deal with these in the course of my substantive consideration of the arguments advanced on the appeal.

27. The judge concluded that Ryanair's claims against the AGCM did not arise out of civil or commercial matters but out of the exercise of public law powers – which were excluded from Regulation No. 1215/2012 – and dismissed the action. Since the action was not one to which Regulation No. 1215/2012 applied, it followed that Ryanair was not entitled to have served notice of the plenary summons under O. 11A, and that the service was invalid.

The appeal

28. By notice of appeal filed on 11th June, 2024 Ryanair appealed against the judgment and order of the High Court on four grounds. In the ordinary way there was an exchange of written legal submissions and the books of appeal filled two bankers boxes.

29. The written submissions filed on behalf of Ryanair correctly identified the issue as being whether the proceedings were civil or commercial proceedings, or concerned the liability of the Italian state – or the AGCM as an Italian state authority – for acts and

omissions within the meaning of Article 1(1) but went on to emphasise that the events complained of took place in Dublin and to contend that the AGCM was a necessary and proper party to the proceedings against the AGCM. It was further emphasised that among the rights which it claims were infringed were Irish law rights which – it was said – had no equivalent in Italian law. It was suggested that the unavailability in Italian law of the rights it asserted left Ryanair between a rock and a hard place which, it was said, cannot have been the intended effect of Regulation No 1/2003.

30. At the oral hearing of the appeal it was submitted on behalf of Ryanair that the nub of the point was that the judge focussed on who the AGCM is, rather than on what were the matters in issue. The judge, it was said, never got away from the idea that the AGCM is a public authority exercising its powers under Italian legislation. That, it seems to me, is plainly wrong. There was no issue but that the AGCM is a public authority. The judge's analysis of the authorities was clearly directed to identifying the principles to be applied in determining whether the acts and omissions complained arose out of the exercise of public law powers.

31. It was suggested at para. 56 of Ryanair's written submissions, that it can be seen from para. 20 of the judgment that the judge concluded that the AGCM was exercising public power *"in what it did"* and that it was acting in a way in which a private individual could not also act. That is not strictly speaking correct. At para. 20 of his judgment the judge was not expressing conclusions but – by reference to the authorities which he had analysed at paras. 12 to 17 – formulating as questions the principles which he had already identified and applied. What the judge said at para. 20 was:-

> *"The Questions Arising for Determination*
>
> *20. First, the questions arising here for determination, i.e. the questions which determine the issue of jurisdiction are relatively simple. Was the AGCM exercising*

public law powers in what it did? And if it was, was it doing so only in a way that any private individual could also do? If the answer to those questions is that the AGCM was exercising public law powers in what it did and that it was exercising powers of the type that a private individual does not have, then the authorities are clear: the Irish courts have no jurisdiction. That is the test and, with respect, after a day's hearing and despite comprehensive and interesting submissions, Ryanair has not engaged with the test. It has pointed to how the impugned events have taken place largely in Ireland, it has pointed to aspects of the Competition and Consumer Protection Act 2014 as provisions which would fall to be applied in the event that the Irish courts have jurisdiction. But these are not issues that fall to be applied in the test as to jurisdiction."

32. I will come to the arguments as to whether the High Court judge was right or wrong in his analysis and conclusions but I have to say that I see no justification whatsoever for the suggestion that the judge never got away from the idea that the AGCM is a public authority exercising its powers under Italian legislation.

The authorities

33. The High Court judge, as I have said, examined a number of authorities which he considered to be of assistance in deciding whether Ryanair's proceedings were *"civil and commercial matters".*

34. The first of these was Case C-645/11 *Sapir and Others*. The judge set out the factual background in detail but the main proceedings were in essence an action by the state of Berlin, in the Berlin courts, to recover from persons who were not domiciled in Germany an overpayment of monies paid out by mistake in the course of making restitution for property which had been expropriated initially in the 1930s and later by the former German

Democratic Republic. On a reference as to whether the proceedings were within the scope of Regulation No 44/2001 (the predecessor of Regulation No 1215/2012) the CJEU said that:-

> *"32 ... [I]t must be stated that the scope of Regulation No 44/2001 is, like that of the Brussels Convention, limited to the concept of 'civil and commercial matters'. It follows from settled case-law of the Court that that scope is defined essentially by the elements which characterise the nature of the legal relationships between the parties to the dispute or the subject-matter thereof ...*
>
> *33 The Court has thus held that, although certain actions between a public authority and a person governed by private law may come within the scope of Regulation No 44/2001, it is otherwise where the public authority is acting in the exercise of its public powers ...".*

35. The Court found, in effect, that the action to recover the erroneous overpayment was a civil or commercial matter within the meaning of Article 1(1) of Regulation No 44/2001.

36. The next was Case C-292/05 *Lechouritou* in which – to make a long story short – the Court ruled that *"civil matters"* in Article 1 of the Brussels Convention did not cover an action by natural persons brought in one Contracting State against another Contracting State for compensation in respect of loss or damage suffered by the successors of the victims of acts perpetrated by armed forces in the course of warfare in the territory of the first state.

37. The next was Case C-102/15 *Siemens Aktiengesellschaft Österreich* in which the Court ruled that an action claiming the repayment of monies formulated as a claim for unjust enrichment did not fall within Article 1(1) of Regulation No 44/2001. The background was a little complicated, but the claim could be traced back to the repayment of a fine imposed in by the Hungarian competition authority.

38. The next was Case C-98/22 *Eurelec Trading* in which the Court ruled that Article 1(1) of Regulation No 1215/2012 did not include an action by a public authority of a Member

State against companies established in another Member State seeking a declaration of the existence of restrictive practices, an order penalising those practices, and an order that they cease in relation to suppliers established in the first Member State, where that public authority exercises powers to bring proceedings or powers of investigation falling outside the scope of the ordinary legal rules applicable to relationships between private individuals. In that case the Court distinguished its earlier judgment in Case C-73/19 *Movic and Others* on the ground that in *Movic* the competent authorities had not requested the imposition of a fine, but only the making of a cessation order in respect of the infringements, which was a power which interested persons and consumer protection association also had.

39. In his examination of each of the CJEU decisions which he looked at, the High Court judge identified the principles which they established and applied. The judge then recalled that in his judgment in *Colclough v. Association of Chartered Certified Accountants* [2018] IEHC 85 he had drawn together the strands of the cases until then or – as he put it – undertaken a synthesis of the principles, which he set out at paragraph 17.

Failure to interpret Article 1(1) restrictively

40. The first ground of appeal is that the High Court judge erred in failing to appreciate and apply what was said to be a requirement that exclusions from the scope of Brussels I recast are to be interpreted restrictively.

41. Ryanair points to a *dictum* in the judgment of the CJEU in Case C-302/13 *flyLAL-Lithuanian Airlines* to the effect that *"exclusions from the scope of Regulation No 44/2001 are exceptions which, like all exceptions, and in the light of the objective of that regulation, which is to maintain and develop an area of freedom, security and justice by facilitating the free movement of judgments, must be strictly interpreted"* and to the observation in *Movic* that the concept of *"civil and commercial matters"* is to be given a broad interpretation to ensure the harmonious administration of justice.

42. In its written submissions, Ryanair suggests that there is *"an interesting, though semantic question as to whether the matters to which the Regulation is stated not to extend should strictly be described as 'exclusions' … or whether it is simply a matter of interpreting the scope of the phrase 'civil and commercial matters', having regard to the fact that revenue matters etc. do not qualify as civil and commercial matters in the first place (and so are not excluded from the general definition)."* I do not understand. The premise of the argument is that the liability of the State in respect of *acta iure imperii* is excluded. It seems to me that if the effect of Article 1(1) is that such liability is not included in the first place, there is no basis for the argument that exclusions from the scope of the Regulation must be interpreted restrictively. In other words, the question is not semantic.

43. Ryanair then immediately goes on to suggest that there is no difference in substance between the two approaches. Again, I fail to understand. The ground of appeal is that the judge erred in the approach which he took. If the notice of appeal does not spell it out, the point of the argument can only be that if the judge had taken a different approach – specifically the approach which Ryanair contends he should have taken – the outcome would have been different. Yet, the position taken in the written submissions is that it makes no difference. The argument then goes on to suggest that the judge erred in failing to recognise that Ryanair's claims are civil matters, as distinct from public law matters: but that is directed to the conclusion and not the approach. And as I will come to, the argument focusses on the form rather than the substance of the claims which is contrary to all of the authorities.

44. There is in the textbooks an interesting academic argument as to whether the effect of the second sentence of Article 1(1) is to exclude liability for the acts and omissions of State authorities, or to mark a line of demarcation between two spheres: encompassing matters which are either inside or outside the domain of the Regulation. The Court was referred to Briggs, *Civil Jurisdiction and Judgments (7th Ed) (2024)* at para. 5.07 and Dickinson and

Lein, *The Brussels I Regulation Recast* (2015). However, since Ryanair, variously, contends that there is no difference in substance between the two approaches and does not identify how the approach for which it contends could have led to any other outcome, it does not appear to be necessary or useful to dwell on it.

45. I would, however, say that Prof. Briggs – who contends for a line of demarcation – appears to me to have very much the better end of the argument.

Discussion

46. The central tenet of Ryanair's appeal is that the judge failed to recognise the difference between an action by or against a state authority and an action arising out of the exercise by a state authority of the authority of the state – *acta iure imperii.* With no disrespect, this is not only wrong but without foundation.

47. *"It is established",* says Ryanair, citing Plender and Wilderspin, *The European Private Law of* Obligations, (6th Ed.), at p. 534, *"that a claim does not involve State authority within the meaning of the Regulation simply because the act was committed by an agent or emanation of the State, such as a public authority."* That is so. *"State authority is involved only when the claim is based on a sovereign act of the State."* That is so. *"If this is not the case, i.e. if state liability for an act iure gestionis is involved (an act performable by private citizens), the application of the Regulation is not excluded."* I have addressed the argument, as far as it went, that liability is respect of the exercise of State authority is properly to be regarded as *"excluded"*, but the essential proposition that State liability for an act *iure gestionis* is a civil or commercial matter is correct.

48. In my firm view there is simply no warrant for Ryanair's contention that the judge failed to recognise the distinction. That distinction was the common theme of all the authorities which the judge examined and was clearly identified by the judge at para. 17(2)

where he recalled – as the second point of his synthesis in *Colclough* – the statement in the opinion of Advocate General Colomer in Case C-292/05 *Lechouritou* that:-

> *"In order to determine whether an act is an act iure imperii and, therefore, not subject to the Brussels Convention, regard must be had, first, to whether any of the parties to the legal relationship are a public authority, and, second, to the origin and basis of the action brought, specifically to whether a public authority has exercised powers going beyond those existing, or which have no equivalent, in relationships between private individuals."*

49. The fifth point of the judge's synthesis in *Colclough* was:-

> *"'Actions between a public authority and a person governed by private law fall outside the scope of the Brussels convention only in so far as that authority is acting in the exercise of public powers' (Case C-167/00 Verein für Konsumenteninformation v. Henkel, para. 26)."*

50. I fail utterly to see how the judge could have made himself clearer.

51. Then, at para. 18, the first of the judge's conclusions – borrowed, as he said, from the AGCM's written submissions, was:-

> *"All actions taken by the AGCM to date which [Ryanair] seek to challenge in the within proceedings and all reliefs sought by [Ryanair] from the Irish courts in respect of the AGCM's actions are inextricably bound up with the exercise by the AGCM of its uniquely public law powers to carry out the investigation commenced by it and specifically to request assistance from the CCPC under Regulation 1/2003 and the ECN+ Directive."*

52. In all of the authorities the common denominator is that one or other party was a public authority. That is necessarily so, since otherwise no issue could arise as to whether the matter under consideration was related to the exercise of a sovereign power. The authorities

speak of the exercise of public powers. On one view it might be said that all of the powers of State authorities are public powers, in the sense that the powers will have been conferred by public law. It is a common feature of public law bodies that their power to act in all senses will have been conferred on them by public law; in Irish law, usually by statute or a statutory instrument. However, not all powers conferred on public bodies involve the exercise of state authority. For example, the power conferred on the Electricity Supply Board by statute to compulsorily acquire land for the purpose of building electricity infrastructure is a public law power. But the power conferred on the Electricity Supply Board – also by statute – to enter contracts is not.

53. The jurisprudence of the CJEU defines public powers as those falling outside the scope of the ordinary legal rules applicable to relationships between private individuals. Perhaps the distinction might be more clearly expressed in Irish law terms by describing the sovereign power as a public law power.

54. Ryanair contends that the judge *"misunderstood [Eurelec Trading] by implicitly suggesting that it supported the finding of any involvement of public power or an agent of the State comes within the meaning of acts 'in the exercise of State authority.'"* To be clear, the judge suggested no such thing: implicitly or explicitly.

55. Among the authorities upon which particular reliance was placed by Ryanair on the appeal was the judgment of the CJEU in Case C-73/19 *Movic and Others*. That was a case in which the Belgian State authorities had commenced proceedings in the Belgian courts against three Netherlands registered companies to restrain ticket touting. At para. 47, the Court recalled that:

> *"47. In that respect, the Court has previously held that the fact that a power was introduced by legislation is not, in itself, decisive in order to conclude that a State authority acted in the exercise of public powers (see, by analogy, regarding the*

concept of 'civil and commercial matters' within the meaning of Regulation (EC) No 1393/2007 of the European Parliament and the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 (OJ 2007 L 324, p. 79), judgment of 11 June 2015, Fahnenbrock and Others, C-226/13, C-245/13 and C-247/13, EU:C:2015:383, paragraph 56)."

56. It is long and well settled that the fact that one of the parties to the litigation is a public authority is not determinative. Similarly, it is long and well established that the fact that the public authority is exercising a power conferred by legislation – which, it seems to me, must invariably be the case – is not decisive. That principle was entirely uncontroversial and was plainly recognised, acknowledged, and applied by the High Court judge.

57. Later in *Movic*, at para. 56 – in a passage which counsel for Ryanair emphasised – the Court said:-

"56. As noted by the Advocate General in point 59 of his Opinion, to hold that proceedings brought by a public authority are outside the scope of Regulation No 1215/2012 merely because of the use by that authority of evidence gathered by virtue of its public powers would undermine the practical effectiveness of one of the models of implementation of consumer protection envisaged by the EU legislature. In that model, in contrast to the one in which it is the administrative authority itself that determines the consequences that are to follow from an infringement, in circumstances such as those in the main proceedings the public authority is assigned the task of defending the interests of consumers before the courts."

58. In *Movic* the Belgian public authorities had public law powers of investigation which they had exercised to gather information. They then used the information so gathered to launch proceedings against the re-sellers to restrain the infringements which – by the

investigation – they had established were taking place. The focus of the Court, however, was on the nature of the proceedings rather than the source of the evidence deployed. The infringement proceedings were proceedings which might equally have been brought by a consumer protection association and thus were civil and commercial proceedings within the meaning of Article 1.

59. As I have said, *Movic* was distinguished in *Eurelec Trading* because the proceedings in the latter case included a claim for the imposition of a fine, which was not something that could have been sought by a person governed by private law.

60. In this case, Ryanair's challenge is not to the use of the seized material for the purposes of infringement or enforcement proceedings which might otherwise have been brought by a private entity but to a request by the AGCM, in the exercise of a uniquely public law power, for assistance with an investigation which it was conducting in the exercise of uniquely public law powers, into complaints of alleged anti-competitive behaviour.

61. Counsel for Ryanair quoted extensively from *Eurelec Trading*.

> *"21. In that regard, it is apparent from the Court's case-law that, although certain actions, where the opposing parties are a public authority and a person governed by private law, may come within the scope of Regulation No 1215/2012, it is otherwise where the public authority is acting in the exercise of its public powers (judgment of 16 July 2020, Movic and Others, C-73/19, EU:C:2020:568, paragraph 35 and the case-law cited).*
>
> *22. The exercise of public powers by one of the parties to the action, because it exercises powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals, excludes such an action from 'civil and commercial matters' within the meaning of Article 1(1) of Regulation No 1215/2012*

(judgment of 16 July 2020 Movic and Others, C-73/19, EU:C:2020:568, paragraph 36 and the case-law cited).

23. It follows that, in order to determine whether or not a matter falls within the scope of the concept of 'civil and commercial matters' within the meaning of Article 1(1) of Regulation No 1215/2012, and, consequently, whether it comes within the scope of that regulation, it is necessary to determine the nature of the legal relationships between the parties to the action and the subject matter of the action or, alternatively, the basis of the action and the detailed rules applicable to it (judgment of 16 July 2020, Movic and Others, C-73/19, EU:C:2020:568, paragraph 37 and the case-law cited).

24. Accordingly, an action where the opposing parties are the authorities of a Member State and businesses established in another Member State, in which those authorities seek, primarily, findings of infringements constituting allegedly unlawful unfair commercial practices and an order for the cessation of such infringements and, as ancillary measures, an order for publicity measures and the imposition of a penalty payment, falls within the scope of the concept of 'civil and commercial matters'."

62. In oral argument, counsel focussed in particular on the reference in para. 24 to actions *"… in which [State] authorities seek primarily findings of infringements …"* and submitted that that was what the investigation of Ryanair was about. This struck me at the time as clearly wrong and it prompted a number of questions from the Court. On reflection my initial impression has only hardened.

63. The AGCM investigation is just that: an investigation. It may or may not lead in the end to findings of infringement but if it does, those findings will be made by the AGCM and not by any court. By clear contrast with *Eurelec Trading*, this is not a case in which a State

authority is in the same position as a private individual. To borrow from Butler J. an observation made in the course of argument:-

> *"The AGCM is not seeking [a finding of infringement] from the court. It is a statutory body which, under Italian law, is authorised to make a finding and that is different to circumstances in which it might be a party before a court asking the court to make that finding."*

64. Ryanair's submission was clearly presented and easy enough to follow but it was hard to see where it was going. As the French public authorities in *Eurelec Trading* had used their public law powers to conduct an investigation, the AGCM in this case had used and was using its public law powers to conduct an investigation, including its public law lower to request international assistance from the CCPC for the purposes of that investigation. As I understand the argument it was that because in *Eurelec Trading*, the previous exercise of public law powers to investigate did not preclude the proceedings from being civil and commercial proceedings, neither could the fact that the AGCM was using its public law investigative powers preclude Ryanair's action from being civil and commercial proceedings. That, with no disrespect, is clearly wrong. I am uncertain whether the argument puts the cart before the horse or simply fails to distinguish the two. In *Movic* the infringement claims were claims brought by public authorities that might equally have been brought by an individual or body regulated by private law. In the case at hand – so the argument goes – the claims are claims that Ryanair is entitled to bring. What is missing, however, is any identification or assessment of the nature or the acts and omissions relied upon as a basis for the reliefs claimed.

65. What the AGCM has done is first of all to decide to open an investigation. That is unquestionably the exercise of a public law power. I do not understand Ryanair to object to the fact of the investigation but it is not said and could not, I think, sensibly be said, that the

resolution to open the investigation was not *acta iure imperii*. In the course of its investigation, the AGCM decided to make a mutual assistance request to the CCPC under Regulation No 1/2003 and Article 24 ECN+. That was a request by the competition authority of one Member State to the competition authority of another Member State. It was quintessentially *acta iure imperii*. The unannounced inspection was carried out by the CCPC in the exercise of its statutory powers and under the authority of a District Court warrant. That was quintessentially the exercise of public law powers. Ryanair's attempt to focus on the consequences of the acts complained of fails to engage with the nature of those acts.

66. As it was put by counsel for the AGCM, what Ryanair's argument boiled down to was that because the events occurred in Ireland, there must be something that Irish law can do about it. That, I agree, is a fallacy. The fundamental premise of the demarcation in Article 1 is that acts and omissions in the exercise of State authority may have consequences elsewhere than in the Member State in which that authority is established. In its clear terms, Brussels I recast does not extend to such matters.

67. I accept also the submission on behalf of the AGCM that the fact that Ryanair does not have a remedy in Ireland does not mean that it does not have a remedy; and that it simply does not follow from the fact – if it be the fact – that Ryanair does not have in Italy equivalent remedies to those which might be available to it in Ireland if the Irish courts had jurisdiction to hear the claims that it does not have an effective remedy. Once it is recognised that the fact that the events complained of occurred elsewhere than in Italy does not create jurisdiction, it becomes evident that the premise of Ryanair's argument is that there is no effective remedy in Italy for anyone in respect of any acts or omissions of the AGCM. By the way, that that is not so is evident from the fact that immediately after the delivery of the High Court judgment Ryanair has in fact invoked the jurisdiction of the Italian courts to temporarily restrain the AGCM from accessing the seized material and, presumably, to

ultimately resolve the dispute as to its entitlement to do so. It was also indicated in the course of argument by counsel for Ryanair that it has obtained an order in Italy for the disclosure of the mutual assistance request. The basis on which that order was obtained is, of course, a matter of Italian law but in principle, the premise of the order for disclosure of the mutual assistance request much be that the Italian courts have jurisdiction either to review it or to adjudicate on a dispute as to the fruits of the request.

68. At the oral hearing of the appeal it was submitted that the application to the District Court judge for the search warrant was *"in essence"* no different to an application made by a private party. Leaving aside the fact that the application to the District Court was made by the CCPC rather than the AGCM, this is plainly wrong. All of the powers conferred by s. 37 of the Act of 2014 on authorised officers are public law powers, which are conferred for public law purposes. A District Court warrant under that section is demonstrably unavailable to a private person.

69. Separately, it was suggested that the District Court warrant was analogous to an *Anton Piller* order. It is not. In the first place, the object of the warrant was to facilitate an investigation, not to advance litigation. Secondly, there was no suggestion in this case – nor is it a requirement under s. 37(3) – of any apprehension that material might be destroyed. Thirdly, the object of the search for information was to further a public law investigation by a public law body in the exercise by it of public law powers. Fourthly, an *Anton Piller* order is an order made in aid of the enforcement of private law rights.

70. In oral argument, the appointment of the Italian officers as CCPC authorised officers was variously described as a fiction and a get-out-of jail card. I do not understand either suggestion. It was not suggested that the appointment of the Italian officers was invalid or that the participation of those officers in the search was unlawful. In fact, as I have said, the appointment and participation of the Italian officers was entirely consistent with the ECN

recommendations as to the assistance and participation of officers of the requesting national competition authority. As to the get-out-of-jail argument, the warrants issued by the CCPC to the Italian officers – in precisely the same way as the warrants issued to all of its other officers – were issued in the exercise of a statutory power for statutory purposes and entitled them to do what they would not otherwise have been entitled to do. The appointments were an authorisation, not a pardon.

71. The proposition was formulated by Butler J. in the course of argument rather than by counsel for Ryanair, but when it was put to counsel as a question, counsel agreed that his argument was that a step in an investigation conducted by a public authority using statutory powers and invoking European legal instruments to allow what was effectively mutual assistance was the equivalent of civil litigation. As I am sure was intended by Butler J. in formulating the question, the proposition needs only to be stated to be seen to be untenable.

72. Not the least peculiarity in the submissions on behalf of Ryanair was that on the one hand it was alleged that the information provided to the District Court judge was incomplete – counsel was so bold as to suggest that the application for the warrant was disingenuous – while on the other hand complaint was made that Ryanair was not provided with a copy of the information. It seems to me that if Ryanair does not know what the District Court judge was told, it cannot sensibly be heard to complain that she was not given the information which she should have been given, still less that she was misled.

73. As in the High Court, the argument on the appeal strayed into the question of the possible personal liability of the Italian officers. It was suggested that Ryanair had decided not to sue the individual Italian officers because that would look like it was just targeting a private individual. For my own part, I am not persuaded that an action against an authorised officer, duly authorised pursuant to s. 35(1) of the Act of 2014 for all of the purposes of all of the relevant statutory provisions, in respect of actions taken in that capacity in the execution

of a search warrant issued by the District Court could properly be characterised as – or would look remotely like – an action against a private individual. Leaving that to one side, any possible vicarious liability of the AGCM in Irish law for the actions of its officers could not be the foundation of a jurisdiction which is not to be found in the Regulation. Still less could any jurisdiction of the Irish courts be founded on a decision not to sue the individual officers. More than once, reference was made in argument to the AGCM circumventing its exposure in respect of what was done and not done in the course of the request for assistance, the application to the District Court for the search warrant, and the conduct of the unannounced inspection. That, however, misses the point that the issue on the appeal – as it was in the High Court – was not the rights and wrongs of what was done or not done but whether the Irish courts had jurisdiction to hear and determine the claims.

74. Emphasising again that the events underlying Ryanair's complaints had all occurred in Dublin and that the reliefs claimed by Ryanair against the AGCM were reliefs that could be claimed against a private law person, what was in issue, it was said, was a tort; a breach of Ryanair's legal and constitutional rights. The fundamental error in this argument, however, was that it concentrated on the remedies sought rather than the acts and omissions of the AGCM on which the claims were based. It was ultimately acknowledged by counsel for Ryanair that the focus of the assessment to be made by the Court was properly on the actions of the AGCM which were said to have given rise to the claims, rather than on the reliefs claimed by Ryanair. It was also accepted that the presence or absence of jurisdiction depended on the nature of acts and omissions complained of rather than the nature of the claims. The alleged acts and omissions on the part of the AGCM at the bottom of Ryanair's complaints were all rooted in the request for assistance under Article 22(1) of Regulation (EC) No 1/2003.

75. Ryanair placed particular reliance on the judgment of the CJEU in Case C-49/12 *Sunico*. That was a request by a Danish court for a preliminary ruling concerning the interpretation of Article 1(1) of Regulation No 44/2001. In proceedings brought in the United Kingdom and Denmark, The Commissioners for Her Majesty's Revenue and Customs *("HMRC")* sought to recover from a number of Danish natural and legal persons an amount equivalent to the amount of VAT which ought to have been paid by a person liable to VAT but had been evaded by what the judgment describes as a *"'carousel' type fraud."* The defendants were not liable for U.K. VAT but were said by HMRC to have participated in a tortious conspiracy to defraud, from which they had benefitted.

76. Ryanair submits that *Sunico* is a vivid illustration of the principle that where a claim against a public authority arises from breach of a general duty also imposed upon private persons, the claim will fall within the scope of Brussels I recast. So, I suppose, it does: but I do not see how it advances Ryanair's argument.

77. Ryanair points to the findings of the CJEU at paras. 36 to 41. Before making those findings, the Court recalled the principles to be applied. The scope of Regulation No 44/2001, like that of the Brussels Convention which preceded it – and Regulation 1215/2012 which succeeded it – is limited to *"civil and commercial matters"*. That scope is defined essentially by the elements which characterise the nature of the legal relationship between the parties to the dispute or the subject matter thereof. Although certain actions between a public authority and a person governed by private law may come within the scope of the Regulation, it is otherwise where the public authority is acting in the exercise of its public [law] powers. In order to determine whether that is the case, it is necessary to examine the basis of, and the detailed rules applicable to, the action.

78. The Court in *Sunico* found that the factual basis of the main proceedings was alleged fraudulent conduct which allowed tax payable by a taxable person to be evaded, to the benefit

of the defendants; and that the legal basis of the action was not U.K. VAT law but U.K. tort law. In the context of the legal relationship between HMRC and the defendants, HMRC had not exercised any exceptional powers by comparison with the rules applicable to relationships between persons governed by private law. It followed, the Court said, that the legal relationship between HMRC and the defendants was not one based on public law.

79. Ryanair submits that HMRC's statutory status and powers were, on any view, significant background factors, without which – it is said – the claim could not have been advanced. The statutory powers – it is said – were a *sine qua non* of the private law claim. It is submitted that on this analysis, Ryanair's claims against the AGCM are private law claims, founded upon principes which are generally applicable as between private persons.

80. After careful consideration I am satisfied that Ryanair's reliance on *Sunico* is misplaced. *Sunico* is no more or less than an application of established principles. The fundamental flaw in Ryanair's argument is that it conflates its claims with the reliefs which it seeks. I quite accept that the remedies claimed – damages and the return of documents which belong to Ryanair – are remedies that could be claimed in private law litigation against a person governed by private law. On one view, inasmuch as Ryanair invokes Irish tort law, the action against the AGCM might be said to be *"based"* on Irish tort law but what is entirely absent from the analysis put forward is any consideration of whether in doing what it did the AGCM was acting in the exercise of its public law powers.

81. I should say that I do not overlook Ryanair's exclusive focus on the private law remedies claimed to the exclusion of what appear to me to be the very much public law remedies of the declarations sought. The point is that neither the manner in which the case is pleaded nor the formulation of the reliefs or remedies claimed is reliable indicator of the substance of dispute.

82. The *ratio* of *Sunico* was that the substance of the action in that case was not a claim for VAT but a claim for damages for conspiracy. In this case, the substance of the action as far as the AGCM is concerned is a challenge to the request by the Italian competition authority to the Irish competition authority for assistance with an investigation being conducted in Italy by the AGCM in the exercise of public law powers conferred by Italian law, and a challenge to the application for a search warrant which was not available to a private entity. The *"elements which characterise the legal relationships"* between Ryanair and the AGCM are that Ryanair is a private law entity which – rightly or wrongly – is the subject of an investigation by a public law authority using public law powers which – on any view – are exceptional powers by comparison with the rules applicable to relationships between persons governed by private law. The principles stated in *Sunico* are perfectly consistent with the principles stated in the earlier and later cases and so it is entirely unsurprising that the outcome is the same.

Preliminary reference

84. The fourth ground of appeal is that the High Court judge erred in considering that the matter did not require a preliminary reference pursuant to Article 267 TFEU.

85. The judge dealt with the request for a preliminary reference at paras. 33 and 34. He considered that it was clear from settled case-law how he should approach the matter in order to give a proper and correct judgment. He also had something to say about the then proposed question.

86. The question proposed to the High Court (which is the first of two questions proposed to this Court) was, and is:-

> *"(1) Where:*
>
> - *A competition authority of a Member State ("First Competition Authority") in its own territory ("First Member State") carries out an inspection under its*

national law on behalf and for the account of the competition authority of another Member State ("Second Competition Authority") under Article 22 of Council Regulation (EC) No 1/2003;

- *The party subject to the inspection ("Plaintiff") issues proceedings in the First Member State against the First Competition Authority and, pursuant to Council Regulation (EU) No 1215/2012, the Second Competition Authority to challenge the validity of the inspection and the acts carried out thereunder, including the seizure of documents ("Seized Documents"), under the national law of the First Member State, including a claim for damages;*
- *The Seized Documents have been transferred from the First Competition Authority to the Second Competition Authority and only the Second Competition Authority is in possession of the Seized Documents,*

Does the right to an effective remedy under Article 47 of the EU Charter of Fundamental Rights and under Article 19 of the Treaty on European Union preclude the Second Competition Authority avoiding the jurisdiction of the courts of the First Member State in the proceedings by seeking to rely on Article 1(1) of Council Regulation (EU) No 1215/2012.

87. The judge considered the question to be based on two false assumptions: the first that the AGCM was somehow seeking to avoid a court battle with Ryanair, and the second that the allocation of jurisdiction necessarily involved denying a party a remedy.

88. In my view the question as formulated is hopelessly jumbled. It supposes first – in the second indent – that the proceedings issued against the AGCM were issued pursuant to Regulation No. 1215/2012 and then that the AGCM might somehow be using Article 1(1) to avoid a jurisdiction that the Irish courts might somehow or other otherwise have. As the judge observed, the premise of the proposed question is that the allocation of jurisdiction

necessarily involved denying a party a remedy. As formulated, it appears to be premised on the unavailability of an effective remedy elsewhere than in Ireland. It seems to me that what is suggested is either that the exclusion of jurisdiction by Regulation No 1215/2012 in relation to liability for acts and omissions of state authorities might be set at nought by reference to the Charter or the Treaty; or that the demarcation of jurisdiction by Article 1(1) of Brussels I recast is to be adjusted by reference to Article 47 of the Charter.

89. I am by no means sure that the first question as formulated admits of an answer. If it does, it is not an answer necessary to allow this Court to give judgment.

90. The second question now proposed – which was not proposed to the High Court – is whether:-

> *"(2) In circumstances where Directive 2014/104/EU ("the Damages Directive") provides that individual claimants who present a reasoned justification sufficient to support a claim for damages within the requirements of Article 5(1) are entitled to an order from a national court requiring a defendant suspected of a breach of Article 102 TFEU to disclose relevant evidence which lies in their control, is a challenge relating to the seeking of documents in the context of a competition law investigation by public authorities a matter which falls within 'revenue, customs or administrative matters or … the liability of the State for acts and omissions in the exercise of State authority' within the meaning of Article 1(1) of the Regulation (EU) No 1215/2012*

91. Leaving aside the fact that the question is not one which it was suggested was necessary for the High Court to ask, it fails distinguish between remedies and jurisdiction. Let me just – in the modern language – unpack the question. The starting point is the Damages Directive. The question contemplates that Ryanair has, or will be able to establish that it has, a good case under the Damages Directive. But the invitation to the Court to say

that Ryanair has, or may be able to establish that it has, a good case must be premised on the existence of jurisdiction to decide whether it does or not. So the question becomes: does the Court have jurisdiction to decide a case which is has jurisdiction to decide? Or perhaps: does the Court have jurisdiction to decide a case which it otherwise does not or might not have jurisdiction to decide if it is a good case?

92. Unsurprisingly, the request for a preliminary reference was not pressed in oral argument.

Summary

93. The net question in this case is whether the Irish courts have jurisdiction under Article 1(1) of Regulation 1215/2012 to hear and determine Ryanair's claims against the AGCM.

94. That question is to be answered by applying well established principles.

95. The principles are clear, and the nature of the claims is clear. For all the reasons given, I am satisfied that the claims are claims in respect of the liability of the Italian State for acts and omissions in the exercise of Italian State authority *(acta iure imperii).*

96. Even if the demarcation in Article 1(1) were to be read as an exclusion, no amount of restrictive interpretation could change the nature of the claimed liability of the AGCM.

97. The order pursuant to O. 12, r. 26 setting aside service of notice of the plenary summons follows from the conclusion that there is no jurisdiction to hear and determine the proceedings.

98. I see no basis whatsoever for a reference to the CJEU.

99. I would dismiss the appeal and affirm the order of the High Court.

100. Ryanair having been entirely unsuccessful on the appeal, the AGCM is presumptively entitled to an order for its costs of the appeal. If Ryanair wishes to contend for any other order, I would allow a period of fourteen days within which it may file and serve a short

written submission (not to exceed 1,000 words), in which event the AGCM will have fourteen days to respond.

101. As this judgment is being delivered electronically Butler and O'Moore JJ. have authorised me to say that they agree with it.