Etikettenschwindel or creative government: using private law to collect public law money claims (a cross-border perspective)

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Aukje van Hoek and Cathalijne van der Plas

1 Introduction

In 2000 the European Commission filed a suit against several American tobacco companies, amongst which RJR Nabisco, Inc., accusing them of participating in a scheme for smuggling cigarettes[1] into the EU, thereby causing harm to the financial interests of the (then) European Community. At the time the Tobacco case was first filed, one of the authors of this contribution (Aukje van Hoek) worked in the Center for the Enforcement of European law which was run by John Vervaele. In a meeting organized at the Center on the Tobacco case, she invited the other author, Cathalijne van der Plas, to join the discussion. Cathalijne was at the time working on her PhD on the state as defendant and claimant in cross border civil procedures. This meeting was the start of a life-long collaboration and an ongoing common interest in the interaction between private law and public law – which we have John and his Center to thank for. We thought it fitting to take inspiration from this case for our contribution to the book in his honour.

In the said Tobacco case, the European Commission tried to avail itself of the opportunities offered by the American Racketeer Influenced and Corrupt Organizations Act, which act allows victims of a RICO crime to claim treble damages from the perpetrators. The case, filed in District Court for the Eastern District of New York, proved a *Fundgrube* for the problems that arise when public law and private law meet in the international arena. The first question to be answered would be a question of domestic US law: can *public authorities* avail themselves of the victim protection scheme of RICO to claim damages? Even if the

1. Law school case brief to *RJR Nabisco, Inc. v. European Cmty*. – 136 S. Ct. 2090 (2016), www.lexisnexis.com/community/casebrief/p/casebrief-rjr-nabisco-inc-v-european-cmty. See on the submission date of the original claim Syllabus to Supreme Court, Certiorari to the United States Court of Appeals for the second circuit No. 15–138. Argued March 21, 2016 – Decided June 20, 2016 p. 4.

answer is yes, the position of *foreign authorities* raises additional questions: can the US court hear the claim of the European Community, despite its underlying public law character or is such claim barred for reasons of act of state (courts do not judge on the validity of the acts of foreign states), the revenue rule (US courts do not assists foreign states in collecting taxes), the doctrine of political questions (courts should not judge on issues within the realm of politics) or even immunity?[2] But also: what is the basis for jurisdiction of the US courts in that case, and does the RICO act have extraterritorial application.

In a 2016 judgment the Supreme Court of the USA ended the Tobacco saga by deciding that although the RICO act does have some extraterritorial effect, the treble damages scheme is not available for damages sustained outside the US. This judgment seems to fit into a more general trend in which US courts decline to hear cases against American companies for crimes and torts committed abroad (compare the developments regarding the Alien tort statute). That parochial turn is, however, not the subject of our contribution. We would like to take the case as a starting point for looking in the possibilities to use private international law cooperation schemes for enforcing and collecting public law debts. Our focus will be on the Brussels I bis regulation which allows creditors under a judgment of a court of an EU Member State to enforce their claim in all other Member States.[3]

2 The advantages of being civil

Since the treaties of Amsterdam/Maastricht gave the EU powers to regulate issues of private international law, the EU has promulgated a large number of regulations that cover the full range of the subject matter: jurisdiction, applicable law, recognition and enforcement and judicial cooperation. The most important instrument in this context is the Brussels I bis regulation, which deals with both jurisdiction and enforcement. If a judgment comes within the scope of application of this regulation, it can be enforced in the entire EU. This is extremely helpful if the judgement debtor is not domiciled in the member state of the rendering court and doesn't have assets there. The ease of recognition under the Brussels I bis regulation doesn't have an equivalent in administrative law, making it attractive for administrations to use the private law route.[4] But the cooperation in civil matters also offers possibilities to gather information over assets held abroad, for

2. See extensively: C.G. van der Plas, *De taak van de rechter en het IPR*, Deventer, Kluwer, 2005, Ch. 4.2.
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, *OJ* 2012 L 351/1-32.
4. In cases that come within the scope of application of the regulation, courts of Member States can only base their jurisdiction over EU defendants on the rules of the regulation. This might be a problem in the TIR cases discussed below.

example under the European Account Preservation Order or the European Insolvency Regulation.[5]

All EU private law instruments restrict their application to civil and commercial matters. In a range of cases the CJEU has elaborated the criteria national courts should use to determine whether a specific claim comes within the concept of civil and commercial matter. The latest case on this concept – concerning surcharges for not paying road toll – was dealt with by order of the court as the case was not deemed to raise any issues which were not already acte éclairé.[6]

According to the established case law, in order to determine whether a legal action comes within the scope of the concept of 'civil and commercial matters'… , it is necessary to determine the nature of the legal relationships between the parties to the action and the subject matter of that action or, alternatively,[7] the basis of the action and the detailed rules applicable to it.

When public authorities enter a claim against a private party, the court should check whether the public authority is exercising powers that fall outside the scope of the ordinary legal rules applicable to relationships between private individuals. The public purpose underlying the claim is not relevant, the rules applying to it, are.[8] When private entities are authorized to perform public functions, the same test is applied to them.[9]

With these criteria in mind, the court has in the past looked at such diverse issues as costs of wreck removal, recovery of social support payments, traffic charges, taxes, fines and recovery of undue payments. In this contribution we will focus on traffic charges and taxes.

3 Traffic charges

One of the oldest cases on the concept of 'civil and commercial' concerned the payment of charges due to Eurocontrol for making use of the air traffic control services of this international organization.[10] Eurocontrol had obtained a payment

5. Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, *OJ* 2014 L 189/59-92. *Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ* 2015 L 141/19-72.
6. Order of the Court (Sixth Chamber) of 21 September 2021 in *Case C-30/21*, *Nemzeti Útdíjfizetési Szolgáltató Zrt. v. NW*, [2021] ECLI:EU:C:2021:753.
7. The precise meaning of the word 'alternatively' gives rise to further questions which we will leave aside in this contribution.
8. Judgment of 3 September 2020 in *Case C-186/19, Supreme Site Services and Others*, [2020] EU:C:2020:638, par. 66 and the case-law cited. This approach is very similar to the civil law approach taken by the Institut de Droit International as described in Van der Plas, 2005, par. 4.1.1-4.1.2.
9. See for example Judgment of 5 February 2004 in *Case C-265/02*, *Frahuil/Assitalia*, [2004] ECLI:ECLI:EU:C:2004:77, par. 20.
10. Judgment of 14 October 1976 in *Case 29-76*, *LTU v. Eurocontrol*, [1976] ECLI:EU:C:1976:137. See for information on the position of Eurocontrol also Judgment of 19 January 1994 in *Case C-364/92*, *SAT v. Eurocontrol*, [1994] ECLI:EU:C:1994:7.

order from the Belgian courts against the German carrier LTU and tried to enforce this order in Germany, the country of domicile of LTU. The court judged the claim to fall outside the scope of application of the Brussels Convention. The court referred to the fact that in this case a public authority is providing a service the use of which is obligatory and exclusive. Moreover, in this case the rate of the charges, the methods of calculation and the procedures for collection were fixed unilaterally by the public authority. All this led the court to the conclusion that the relationship between LTU and Eurocontrol was not civil and commercial.

This line of reasoning seemed to exclude a wide range of public charges from the application of the Brussels Convention and the later European private international law regulations (Brussels I and Brussels I bis). The problems this posed for the collection of parking tickets and congestions charges is illustrated by the Sparks project: a project started in London with the specific aim of enabling civic traffic enforcement across Europe.[11] One way the authorities tried to achieve this, was to introduce a private party into the equation. In a position paper of March 2008, the British parking association concluded however that 'Private companies established to pursue payment of cross border penalties have had only limited success due to lack of enabling legislation'.[12] That this method or privatizing traffic charges could actually work, became clear when the CJEU rendered judgment in the Pula Parking case in 2017.[13]

In the Pula Parking case a private company tried to enforce a Croatian payment order in Germany. The payment order concerned the charges for parking in a public car park in the Croatian city of Pula. Although the company was fully owned by the city of Pula, derived its mandate from that city and performed its task in the public interest, according to the CJEU the claim itself was still civil and commercial, as the company that operated the parking site did not exert any powers beyond that of a normal service provider. The referring court had to check however 'that the parking debt claimed by Pula Parking is not coupled with any penalties that may be considered to result from a public authority act of Pula Parking and is not of a punitive nature but constitutes, therefore, mere consideration for a service provided'.[14] In practice however, the claims enforced by Pula Parking were not restricted to the price of the day ticket.[15] Adding additional

11. 'Sparks project', www.london.gov.uk, www.london.gov.uk/questions/2006/0501-0 (last accessed 30 August 2022); 'Eight European countries join forces to launch EUROSPARKS project' (*Parking Network*, 21 May 2007), www.parking.net/parking-news/eight-european-countries-join-forces-to-launch-the-europsarks-project (last accessed 30 August 2022).
12. 'Position paper 17, March 2008', www.britishparking.co.uk.
13. Judgment of 9 March 2017 in *Case C-551/15, Pula Parking*, [2017] ECLI:EU:C:2017:193.
14. *Case C-551/15, Pula Parking*, in particular par. 36-37 of the judgment. A similar case reached the CJEU in 2019, this time with regard to a parking space on the public road in Zadar, Croatia: Judgment of 25 March 2021 in *Case C-307/19, Obala v. NLB Leasing*, [2021] ECLI:EU:C:2021:236.
15. Which was 100 Kuna or approx. 13 Euro.

costs and expenses, the bill could run as high as EUR 300 compared to the EUR 13 of the ticket itself.[16]

The availability of the civil law route for traffic charges is confirmed in the case of *Nemzeti Útdíjfizetési Szolgáltató Zrt. v. NW*,[17] which concerned the recovery of a charge relating to the use of a toll road in Hungary. The CJEU decided to deal with the preliminary question by way of order of the court as the case was deemed not to present relevant new questions. In this case the conditions for use of the road were specified in a national law, including the rates for use and non-payment. A ticket, which is valid for 1 week, costs 2975 forint (HUF) – which is approx. 10 Euro. In case a toll road is used without prepaid ticket the charge is approx. 50 Euro; after 60 days the fee is raised to 190 Euros. In the case leading to the preliminary question, the surcharge was collected from a German domiciliary. On top of the basic charge, the firm entrusted with collecting the fees charged costs of recovery raising the total sum to 260.76 Euro.[18] The referring (German) court was of the opinion that the supplementary charge must be regarded as constituting a penalty imposed unilaterally on the basis of a rule of public law and is not limited to mere consideration for a service provided, taking the claim outside the scope of application of the Brussels I Regulation. The CJEU disagreed and did not even see a relevant question here, although, also according to the CJEU the amount of the supplementary charge is set by law and is automatically imposed in case of non-payment. Moreover, the supplementary charge entails a significant increase in the sum initially due and doesn't cover the costs for debt collection as these costs are charged separately. But this, again according to the CJEU, doesn't make the surcharge a penalty – the surcharge is collected under the rules for private law debts and there is a separate system of public fines: under Hungarian law the public authorities may also impose a fine varying from HUF 10000 to HUF 300000 (approximately EUR 25 to EUR 830), in case the owner of the vehicle fails to comply with his or her obligation to pay the toll. So also this claim was enforceable under the Brussels I bis regime.

Accordingly paid parking and other traffic charges can easily be turned into a civil and commercial matter, by turning the use of public facilities into a service provided by a private company. The company can impose a supplementary charge in case the facilities are used without a ticket, in addition to charging costs for recovery. Though public law fines cannot be imposed, the extra charges plus the costs incurred in the civil law enforcement process seem at least as high as the public law fines and could be even more effective in their dissuasive effect on non-payment.

16. 'Parkeerboete uit Kroatië leidt tot hoge dwangsom', www.eccnederland.nl (last accessed 30 August 2022).
17. *Case C-30/21, Nemzeti Útdíjfizetési Szolgáltató Zrt. v. NW*.
18. According to the order, the firm added processing fees, fees to identify the holder of the vehicle, a flat-rate fee for expenses and value added tax to the amount due under the Hungarian law.

It is clear from other case law that also the provision of airport facilities is a commercial service, the fees charged for this a commercial debt coming within the scope of application of Brussels I bis Regulation. It would seem however, that air traffic control is still a public service. In the FlyLAL case the CJEU explicitly stated that 'so far as air navigation charges are concerned, the Court has held that the control and surveillance of air space are activities which in essence fall within the remit of the State and which, in order to be carried out, require the exercise of public powers'.[19] This means that the Brussels I bis system is (still?) not available for the enforcement and collection of these charges.[20]

In the cases described above, a public law money claim was turned into a private law debt by changing the claimant. This works in case of the provision of services, but only if the system is effectively set up in the guise of civil law. It is not feasible to do this when the claim is decidedly public – like taxes. Yet also in these cases, the authorities have been successful in rebranding the debt – most often by changing the defendant.

4 Unpaid taxes

The levying of taxes is *par excellence* a government prerogative. Though some mutual assistance schemes do exist in the EU,[21] governments may be tempted to avail themselves of the private law route for the collection of tax claims. That this is indeed a feasible route, became clear in the TIR case.[22] In this case the Netherlands brought proceedings against PFA, a French insurance company, claiming payment of the import or export duties and taxes owed by companies that had imported goods under a Dutch TIR carnet. In accordance with art. 6 of the TIR Convention,[23] the Dutch government had authorized Dutch associations of carriers to issue TIR carnets, under the condition that those associations undertake unconditionally to pay the duties and taxes due from the holders of the TIR carnets, for which they become jointly and severally liable. The associations must provide a guarantee to that end, which in this case was furnished by PFA. PFA had bound itself vis-à-vis

19. Judgment of 23 October 2014 in *Case C-302/13*, *flyLAL v. Air Baltic Corporation*, [2014] ECLI:EU:C:2014:2319, par. 32 (referring to *Case C-364/92*, *SAT v. Eurocontrol*, in particular par. 28 that in turn refers to *Case 29-76*, *LTU v. Eurocontrol*).
20. We will not further discuss the special position of Eurocontrol (and the charges imposed by it) here.
21. See for an overview: https://taxation-customs.ec.europa.eu/taxation-1/tax-co-operation-and-control/general-overview_en.
22. Judgment of 15 May 2003 in *Case C-266/01*, *PFA v. Staat der Nederlanden*, [2003] ECLI:EU:C:2003:282. See extensively: Van der Plas, 2005, par. 4.1.3.2. Interestingly enough in this case it was the French defendant that wanted to rely on the Brussels I regulation and not the Dutch government.
23. The Customs Convention on the international transport of goods under cover of TIR carnets, 14 November 1975. On the TIR system, see Conclusion A-G Léger of 5 December 2002, ECLI:EU:C:2002:727, par. 6-8.

the Dutch State both as guarantor and as joint debtor.[24] According to the Court the claim of the Dutch government under the guarantee falls within the scope of the Brussels Convention, assuming that the proceedings have been brought against PFA only in its capacity as guarantor and not as joint debtor. The Court underlines the fact that the legal relationship between PFA and the Netherlands is not governed by the TIR Convention and that PFA's undertaking vis-à-vis the Netherlands was freely given.[25] The fact that the principal (public law) obligations of the users of the carnets and the authorized Dutch associations of carriers are identical (as to the monies due) to the commitments undertaken by PFA, does not make this any different.[26]

It is interesting to note that also in the TIR case, public authorities set up a system in which a public law claim is effectively turned into a civil claim. The third party who gives security for the taxes does so on the basis of a contract, but this third party in practice performs a crucial role in the handling of import duties in the EU. In case of non-payment the government can choose to enforce the debt against the original debtor, on the basis of public law, or enforce the same against the third party on the basis of private law, even though the underlying debt is still very much the tax itself.[27]

The latter is also true in the Sunico case – a case which in many respects is similar to the Tobacco case. The Danish company Sunico SpA was accused of being involved in a so-called VAT carousel – a construction set up to evade taxes. Under this scheme the English tax authorities were defrauded of a considerable amount of VAT. The English tax authorities claimed this amount as damages in a tort claim against the non-resident company, which they deemed to be the direct beneficiary of the scheme. The CJEU judged the claim to be civil and commercial, despite the decidedly public law character of the underlying debt. The crucial paragraph of the judgment runs as follows:

> 41 Admittedly, it is apparent from the order for reference that the amount of the damages claimed by the Commissioners corresponds to the amount of output VAT payable by a taxable person in the United Kingdom. However, the fact that the extent of Sunico's tortious liability towards the Commissioners and the amount of the Commissioners' tax claim against a taxable person are the same cannot be regarded as proof that the Commissioners' action before the High Court of Justice involves the exercise by them of public authority vis-à-vis Sunico, since it is common ground that the legal relationship between the Commissioners and Sunico is not governed by United Kingdom VAT law but by the law of tort of that Member State.

24. See *Case C-266/01, PFA v. Staat der Nederlanden*, in particular par. 9-10.
25. See *Case C-266/01, PFA v. Staat der Nederlanden*, in particular par. 32-33.
26. *Case C-266/01, PFA v. Staat der Nederlanden*, in particular par. 34.
27. In this contribution we will not go into the private or public law character of the debt owed by the associations that issue the TIR carnets.

Interesting in this line of reasoning is the emphasis the court lays on the fact that Sunico was a non-resident company,[28] and was not itself subject to VAT in the UK. This suggests that if the debtor of the tax and the perpetrator of the fraud are identical, the court might be less willing to overlook the public law character of the claim.

This can also be deduced from the case of Gazdasági Versenyhivatal v. Siemens Aktiengesellschaft Österreich.[29] In that case, Siemens was fined by the Hungarian competition authority for infringement of the rules on competition law. When Siemens challenged the order of the competition authority, the administrative court reduced the fine, upon which the authority repaid part of the original fine plus interest (as is due under Hungarian administrative law). Upon further appeal by the competition authority the Hungarian supreme court, however, reinstated the original fine. Siemens paid up the full amount of the fine but refused to pay back the interest. The competition authority then entered a claim for recovery of (inter alia) the paid-out interest on the ground of undue enrichment – a private law basis. The court of appeals send the case to the CJEU, as it was not sure whether it had jurisdiction under Article 5(3) of the Brussels I Regulation (the provision on torts). The CJEU however, decided that the question on Article 5 was moot, as the claim did not come within the scope of application of the regulation to begin with. It did not go along with the reasoning that the change in legal basis was enough to change the public law character of the claim. The fine itself was decidedly administrative and also the interest payable by Siemens was a direct consequence of the application of administrative law.[30] As the dispute before the courts was intrinsically linked to the fine and to the dispute between the parties in the main proceedings concerning its legality, it joined in the latter's public law character.

It is tempting to deduct from this case law that the CJEU employs a reasoning which is similar to the Dutch theory regarding the 'two avenues' – which basically puts limits on the freedom of authorities to choose between public law measures and private law measures in order to obtain a certain result in the public interest.[31] If the authorities have public law means to enforce a public law claim against a specific debtor, the private law route seems to be closed as far as international

28. Judgment of 12 September 2013 in *Case C-49/12, The Commissioners for Her Majesty's Revenue & Customs v. Sunico ApS*, [2013] ECLI:EU:C:2013:545, par. 36 and operative part.
29. Judgment of 28 July 2016 in *Case C-102/15, Gazdasági Versenyhivatal v. Siemens*, [2016] ECLI:EU:C:2016:607.
30. Interestingly the court refers to Rüffer (Judgment of 16 December 1980 in *Case C-814/79, Netherlands State v. Rüffer*, [1980] ECLI:EU:C:1980:291 on recovery of costs for wreck removal) for support of their position and distinguishes Sapir (Judgment of 11 April 2013 in *Case C-645/11, Land Berlin v. Sapir*, [2013] ECLI:EU:C:2013:228), which concerned the recovery of amounts paid in error by the public authority).
31. See Van der Plas, 2005, par. 5.2.3.4 with regard to the similarity between the reasoning of the US courts in the *Tobacco*-case and this Dutch theory.

cooperation is concerned.[32] By changing the debtor, however, the authorities can once more rely on civil law to collect their due.

5 Conclusions

When the British parking association published its working paper in 2008, the chances of using the private law enforcement mechanisms for cross border enforcement of traffic charges seemed rather slim. Today the landscape looks fundamentally different. As long as the legislator or local authority creates a framework that doesn't deviate from general contract law, the CJEU accepts the ensuing claim as 'civil and commercial' in the meaning of the Brussels I bis regulation. This is true even when the public authority retains the possibility to impose administrative sanctions in case of non-payment of the 'private law money claim'.

Whereas public services can to some extent by privatized, taxes are decidedly public law money claims. But even in tax cases we found examples where the public claim was deemed to be 'private' for the purpose of private international law. Taxes can be privately secured and in cases of conspiracy to defraud recovered from a third party. In the TIR case, the guarantee given by the private insurance company is closely linked to the TIR system itself, but is not a necessary part thereof. In fraud cases the authorities rely on the general rules of tort law. When the tort claim is entered against a third party – not subject to the tax itself – the CJEU accepts the private law character of the resulting claim. It is not entirely clear yet, whether the option to collect by way of tort claim would also be open in case the defendant is also the direct creditor of the tax. So there might still be a limit to the creativity in enforcement the CJEU will accept as effectively engaging the private law cooperation mechanisms.

32. But this might be reading too much into a single case.