

Case C-393/21**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

28 June 2021

Referring court:

Lietuvos Aukščiausiasis Teismas (Lithuania)

Date of the decision to refer:

23 June 2021

Interested party and appellant on a point of law:

Lufthansa Technik AERO Alzey GmbH

Applicant and other party in the appeal on a point of law:Arik Air Limited**Subject matter of the main proceedings**

The main proceedings concern the legal provisions governing the stay of enforcement proceedings when a dispute has arisen in the State of origin regarding the lawfulness, interpretation and application of a European Enforcement Order.

Subject matter and legal basis of the request for a preliminary ruling

Interpretation and application of Article 23 of Regulation No 805/2004 and of Article 36(1) and Article 44(2) of Regulation No 1215/2012; third paragraph of Article 267 of the Treaty on the Functioning of the European Union (TFEU).

Questions referred for a preliminary ruling

1. How, taking into account the objectives of Regulation No 805/2004, inter alia the objective of accelerating and simplifying the enforcement of judgments of Member States and effective safeguarding of the right to a fair trial, must the term ‘exceptional circumstances’ in Article 23(c) of Regulation No 805/2004 be interpreted? What is the discretion that the

competent authorities of the Member State of enforcement have to interpret the term ‘exceptional circumstances’?

2. Are circumstances, such as those in the present case, related to judicial proceedings in the State of origin which decide a question regarding the setting aside of the judgment on the basis of which a European Enforcement Order was issued to be regarded as relevant when deciding on the application of Article 23(c) of Regulation No 805/2004? According to what criteria must the appeal proceedings in the Member State of origin be assessed and how comprehensive must the assessment of the proceedings taking place in the Member State of origin that is carried out by the competent authorities of the Member State of enforcement be?
3. What is the subject matter of the assessment when deciding on the application of the term ‘exceptional circumstances’ in Article 23 of Regulation No 805/2004: must the impact of the respective circumstances of the dispute when the judgment of the State of origin is challenged in the State of origin be assessed, must the possible potential benefit or harm of the respective measure specified in Article 23 of the regulation be analysed, or must the debtor’s economic abilities to implement the judgment, or other circumstances, be analysed?
4. Under Article 23 of Regulation No 805/2004, is the simultaneous application of several measures specified in that article possible? If the answer to this question is in the affirmative, what criteria must the competent authorities of the State of enforcement rely on when deciding on the merits and proportionality of the application of several of those measures?
5. Is the legal regime laid down in Article 36(1) of 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 to be applied to a judgment of the State of origin regarding the suspension (or cancellation) of enforceability, or is a legal regime similar to that specified in Article 44(2) of that regulation applicable?

Provisions of EU law cited

Article 47 of the Charter of Fundamental Rights of the European Union (OJ 2016 C 202, p. 389).

Article 1, Article 5, Article 10(1), Article 20(1) and Article 23 of Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ 2004 L 143, p. 15; ‘Regulation No 805/2004’).

Article 36(1) and Article 44(2) of 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, p. 1; 'Regulation No 1215/2012').

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1; 'Regulation No 44/2001').

Provisions of national law cited

Paragraph 3 of Article 13, entitled 'European enforcement order', of the Lietuvos Respublikos civilinį procesą reglamentuojančių Europos Sąjungos ir tarptautinėseisės aktų įgyvendinimo įstatymas (Law of the Republic of Lithuania on the implementation of EU and international legal measures governing civil proceedings), which provides:

3. Judgments, settlement agreements approved by a court and authentic instruments in respect of which a European Enforcement Order has been issued are enforceable instruments. They shall be enforced in accordance with the rules set out in Part VI of the Code of Civil Procedure of the Republic of Lithuania in so far as [Regulation No 805/2004] and this Law do not provide otherwise.

Paragraph 3 of Article 18, entitled 'Stay or limitation of enforcement of judgments', of that law, which provides:

3. The decisions referred to in Article 23(1)(c) of [Regulation No 805/2004] shall be taken by a competent bailiff of the place of enforcement of the judgment or authentic instrument.

Paragraph 1 of Article 625 of the Lietuvos Respublikos civilinio proceso kodeksas (Code of Civil Procedure of the Republic of Lithuania; 'the CCP'), entitled 'Deferral of enforcement measures, stay of enforcement proceedings, return of an enforcement instrument', which provides:

1. A bailiff executing an enforcement instrument may by his order, in accordance with the procedure established by this Code, either on his own initiative or at the request of the participants in the enforcement proceedings, defer enforcement measures, stay the enforcement proceedings or return the enforcement instrument to the party seeking enforcement.

Article 626 of the CCP, entitled 'Compulsory stay of enforcement proceedings and compulsory suspension of enforcement measures', which provides:

1. A bailiff must stay the enforcement proceedings in the following cases:

(1) upon the death of the debtor or the party seeking enforcement as well as after the reorganisation or winding-up of the legal person which is the debtor or the party seeking enforcement if, having regard to the legal relations, the taking over of rights and obligations is possible;

(2) if the debtor has lost legal capacity;

(3) if insolvency or restructuring proceedings have been instituted against the debtor. ...

(4) if a restriction of activity (moratorium) has been announced in respect of the debtor by a bank or the Centrinė kredito unija (Lithuanian Central Credit Union);

(5) if the bailiff has received a settlement agreement concluded between the party seeking enforcement and the debtor;

(6) where the period for filing an appeal has been renewed if the basis for issuing the enforcement order was the decision appealed against (except for immediately enforceable decisions).

...

Article 627 of the CCP, entitled ‘Right to stay enforcement proceedings or to defer enforcement measures’, which provides:

A bailiff may stay enforcement proceedings in whole or in part or defer enforcement measures in the following cases:

(1) when the party seeking enforcement so requests in writing;

(2) when the debtor has become seriously ill provided the illness is not chronic, upon receipt of a document from a medical institution;

(3) when the debtor is being treated in a hospital;

(4) when a search for the debtor is announced (Article 620 of this Code);

(5) in the event of eviction proceedings, if the debtor or a member of his family becomes ill provided the illness is not chronic, upon receipt of a document from a medical institution;

(6) when the court has demanded and obtained the enforcement proceedings;

(7) when, pursuant to the provisions of the Lietuvos Respublikos finansinio tvarumo įstatymas (Law of the Republic of Lithuania on Financial Sustainability), the debtor or the party seeking enforcement is undergoing actions for the reorganisation of a financial sector entity.

Succinct presentation of the facts and the procedure in the main proceedings

- 1 In enforcement proceedings, a bailiff operating in Lithuania is executing an order of the Amtsgericht Hünfeld (Local Court, Hünfeld, Germany) of 14 June 2019, on the basis of which an enforcement order of 24 October 2019 and a European Enforcement Order certificate of 2 December 2019 regarding the recovery of a debt of EUR 2 292 993.32 from the debtor, *Arik Air Limited* (the applicant at first instance), for the benefit of the party seeking enforcement, *Lufthansa Technik AERO Alzey GmbH* (the interested party and appellant on a point of law), were issued.
- 2 The debtor, *Arik Air Limited*, applied to the Landgericht Frankfurt am Main (Regional Court, Frankfurt am Main, Germany) for withdrawal of the European Enforcement Order certificate of 2 December 2019 and termination of enforcement. It claimed that the certificate had been issued unlawfully because the procedural documents of the Local Court, Hünfeld, had not been duly served on it, causing it to miss the time limit for lodging objections. In an order of 9 April 2020, that court stated that execution of the enforcement order of 24 October 2019 would be stayed if *Arik Air Limited* paid a security of EUR 2 000 000. Otherwise, the request for the stay of enforcement should not be upheld because the debtor had not proved that the enforcement order was issued unlawfully.
- 3 The debtor, *Arik Air Limited*, requested the bailiff to stay the enforcement proceedings in the Republic of Lithuania until the debtor's claims for withdrawal of the European Enforcement Order certificate and termination of enforcement had been examined in a final procedural decision of the court in Germany. At present, the civil case is before the German courts on appeal.
- 4 The bailiff refused to stay the enforcement proceedings, on the basis that Articles 626 and 627 of the CCP do not provide for the procedural possibility of staying the enforcement of a final judgment on the ground that claims for withdrawal have been made before a court of the State of origin.
- 5 By order of 11 June 2020, the Kauno apylinkės teismas (District Court, Kaunas, Lithuania), before which an action regarding this refusal was brought, did not uphold the action. The court stated that the debtor's request had already been examined by a court of the State of origin in the order of 9 April 2020 and, therefore, it had no grounds to examine it.
- 6 By order of 25 September 2020, the Kauno apygardos teismas (Regional Court, Kaunas), exercising appellate jurisdiction, set aside the order of the court of first instance, upheld the action brought by *Arik Air Limited*, and ordered the stay of the enforcement proceedings pending a full examination of the applicant's claims by a final judgment of the German court that had jurisdiction. The appellate court stated that, in view of the disproportionately great harm which might be caused in the enforcement proceedings, an application regarding a European Enforcement Order certificate to a court of the State where it was issued was a sufficient ground

for staying the enforcement proceedings. Taking the view that there was nothing in the case file to confirm that the security specified in the order of the Regional Court, Frankfurt am Main, of 9 April 2020 had been paid, the appellate court, contrary to the court of first instance, concluded that there was no ground to believe that the question of the suspension of enforcement measures in the enforcement proceedings had been examined by the court of the State origin.

- 7 On 16 December 2020, the interested party, *Lufthansa Technik AERO Alzey GmbH*, brought an appeal on a point of law before the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania).

Principal arguments of the parties in the main proceedings

- 8 *Arik Air Limited* submits that the fact that the debtor has challenged the judgment certified as a European Enforcement Order or has applied for rectification or withdrawal of a European Enforcement Order certificate is sufficient for a competent bailiff or court of the State of enforcement to be able to apply the measures provided for in Article 23 of Regulation No 805/2004. Furthermore, if a debtor challenges a judgment in the State of origin on the ground that he was not duly informed of the judicial proceedings, the view is to be taken that there are exceptional circumstances within the meaning of Article 23(c) of Regulation No 805/2004.
- 9 The interested party, *Lufthansa Technik AERO Alzey GmbH*, contends that the actions brought by the debtor before the German courts are irrelevant to the enforceability of the judgment of the Local Court, Hünfeld, confirmed by a European Enforcement Order and that the debtor is only protracting the judicial proceedings. Furthermore, the interpretation of the concept of exceptional circumstances, which are referred to in Article 23(c) of Regulation No 805/2004, is legally irrelevant because their presence or absence is a matter of fact and not of interpretation of law.

Succinct presentation of the reasons for the request for a preliminary ruling

- 10 The referring court has first of all drawn attention to recitals 8, 9 and 20 of Regulation No 805/2004 and to the purpose of the regulation stated in Article 1, which is the creation of a European Enforcement Order for uncontested claims to permit, by laying down minimum standards, the free circulation of judgments, court settlements and authentic instruments throughout all Member States without any intermediate proceedings needing to be brought in the Member State of enforcement prior to recognition and enforcement.
- 11 Compared to Regulation No 44/2001, which pursued that objective by establishing an *exequatur* procedure, Regulation No 805/2004 lays down an alternative method of enforcing a judgment given in another Member State, under which judgments in cases concerning uncontested claims may be certified as a

European Enforcement Order. Therefore, it distributes jurisdiction between the courts of the State of origin and the courts of the State of enforcement. It is the court of the State of origin that must satisfy itself that certain conditions laid down in the regulation are met, including minimum procedural requirements intended to safeguard, inter alia, the rights guaranteed by Article 47 of the Charter, while competence to apply the grounds set out in Article 23 of Regulation No 805/2004 lies with the authorities of the State of enforcement.

- 12 Also, according to case-law of the Court of Justice, the procedure for the certification of a court decision as a European Enforcement Order appears, functionally, not as a procedure which is distinct from the earlier judicial procedure, but as the final phase of that procedure, necessary in order to ensure that it is fully effective, by allowing the creditor to proceed with the recovery of his debt (judgment of the Court of 16 June 2016, *Pebros Servizi*, C-511/14, paragraph 29). Therefore, a proper procedure for execution of the European Enforcement Order is directly associated with ensuring an effective right to judicial protection.
- 13 The referring court wishes to ascertain the relationship between the judicial proceedings that take place in the Member State of origin where the European Enforcement Order is issued and concern the judgment on the basis of which the European Enforcement Order is issued and the enforcement proceedings in the Member State in which enforcement measures under the European Enforcement Order are instituted. The referring court observes that there is no case-law of the Court of Justice in that regard.
- 14 The referring court states that Article 23 of Regulation No 805/2004 has not been interpreted in the case-law of the Court of Justice. The application of the measures laid down in Article 23 of Regulation No 805/2004 in the event of an appeal against a judgment in the State of origin is relevant to the present case.
- 15 The verb ‘may’ used in Article 23 of Regulation No 805/2004 indicates that that provision concerns a certain discretion of the competent court or authority (bailiff) and not an obligation to apply or not to apply the measure in question. Therefore, it is important to determine the extent of that discretion and to specify the criteria on the basis of which the court or bailiff must decide on the application of those measures, having regard to the objectives of Regulation No 805/2004 and to safeguarding an effective right to a fair trial.
- 16 It is apparent from the case file that there are sets of proceedings before the courts of the State of origin concerning an appeal against a judgment certified as a European Enforcement Order, and that the parties are in disagreement as to the substance, expediency, and prospects as to the outcome, of the judicial proceedings taking place in the State of origin. The referring court observes that the need to analyse the legal rules of another Member State on appealing against judgments, taking into account differences between the legal systems and linguistic differences, may be very resource-consuming, and this may not always

be compatible with the objective of prompt enforcement of a judgment of another Member State. Therefore, it is important to ascertain how these values should be reconciled and the extent of the assessment that the competent authorities of the Member State of enforcement should carry out.

- 17 It is clear from the wording of Regulation No 805/2004 that limitation of the enforcement proceedings to protective measures and making enforcement conditional require a judgment to be challenged and/or rectification or withdrawal of a European Enforcement Order certificate to be applied for, while stay of the enforcement proceedings additionally requires ‘exceptional circumstances’.
- 18 On the one hand, the use of the words ‘challenged’ and ‘including’ in Article 23 of Regulation No 805/2004 implies that that rule covers all means of appeal in the State of origin; therefore, on the basis of the documents submitted by the parties to the present case, it appears that this condition is met. On the other hand, in the light of the wording used in Article 23 of Regulation No 805/2004, it seems that the mere fact that a judgment certified by a European Enforcement Order is simply being appealed against in the State of origin is not sufficient to stay enforcement proceedings, while the term ‘exceptional circumstances’ presupposes that there must be certain circumstances not typical of normal situations. Consequently, the meaning of the term ‘exceptional circumstances’ in the event of an appeal against a judgment of the State of origin is not entirely clear and in the present case it is important for the referring court to ensure that this term used in Article 23(c) of the regulation is interpreted uniformly in the Member States.
- 19 First and foremost, it would be beneficial to the referring court to have guidance on the assessment of ‘exceptional circumstances’, including the subject matter of the assessment, that is to say, whether its subject matter is constituted by the possible prospects as to the outcome of the proceedings taking place in the State of origin, the potential benefits and harm of the measure whose application is sought, and other relevant circumstances. Second, in the light of the objectives pursued by Regulation No 805/2004 and the need to reconcile the rights and legitimate interests of the party seeking enforcement and the debtor, it is also relevant to appraise what the scope must be of the verification of the appeal that is carried out by the court of the State of enforcement in order to determine the existence of ‘exceptional circumstances’, and to ascertain how the burden of proof must be allocated.
- 20 In deciding on the application of the measures provided for in Article 23 of Regulation No 805/2004, the referring court also raises the question whether only one of those measures or several of them together may be applied in a particular case. Under the law of the Republic of Lithuania, the attachment of property and stay of enforcement proceedings at the same time is possible. When analysing the wording of Article 23 of Regulation No 805/2004 and comparing it with the wording of Article 44 of Regulation No 1215/2012, it should be noted that in Regulation No 805/2004 all three measures are separated by the conjunction ‘or’,

although the conjunction ‘or’ separates only points (b) and (c) of Article 44(1) of Regulation No 1215/2012.

- 21 It appears that the legislature sought to lay down in Regulation No 805/2004 that only one measure at a time can be applied. Accordingly, if a bailiff has applied the attachment of property (or a ‘protective measure’ within the meaning of the regulation), another measure cannot be applied simultaneously. It is apparent from the wording ‘upon application by the debtor’ that measures cannot be taken on the initiative of a court or a bailiff. Having regard to the differences between EU and national law, the referring court needs clarification of the relationship between the various measures provided for in Article 23 of the regulation.
- 22 Finally, it must be noted that, unlike Regulation No 1215/2012, and specifically Article 44(2) thereof, Regulation No 805/2004 does not explicitly regulate the issue of suspension of the enforcement proceedings where the enforceability of a judgment is suspended in the Member State of origin. Regulation No 805/2004 does not establish whether, when the enforceability of a judgment has been suspended in the State of origin, enforcement of that judgment in another Member State should be automatically suspended, or whether in that regard a decision by the competent authority of the State of enforcement is required. In other words, it is not clear whether the legal regime laid down in Article 36(1) of Regulation No 1215/2012 is applicable to a judgment on the suspension of enforceability.
- 23 A judgment on the suspension of enforceability affects the rights and obligations of the parties. If the general rule laid down in Article 36(1) of Regulation No 1215/2012 were applied, such judgments could in principle circulate without any special procedure. However, the decision of the legislature to separate such judgments in a separate rule indicates that the suspension in the State of enforcement must be carried out by active steps of the competent authorities of that State. Therefore, the Court of Justice is asked whether that legal logic is relevant to the application of Article 23 of Regulation No 805/2004 or whether a mechanism similar to that laid down in Article 44(2) of Regulation No 1215/2012 should be applied.