

## DECISIONS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN ACTIO PAULIANA DISPUTES

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**Abstract:** An attempt was made to compare the decision of the EU Court in the case/dispute with Actio Pauliana, methods of property protection to ensure the asset of obligations of the European Union member states to the loan contract, and its legal environment.

**Keywords:** *European law, civil law, loan contract, Actio Pauliana, fraudulent conveyance, fraudulent transfer*

### 1. INTRODUCTION

The Court of Justice of the European Union (hereinafter referred to as the CJEU) interprets whether EU law applies equally to all EU countries and resolves the legal disputes between national governments and EU organizations.

Besides, in certain circumstances, individuals, companies, and organizations may apply to the CJEU if they believe that the EU has violated their rights in any way.

There were around ten court decisions related to Actio Pauliana claims in the database of the Court of Justice of the European Union. Most of the court decisions refused to accept the claim and decided that the claim does not fall under international jurisdiction.

In European law, there is no direct regulation on fraudulent transfers or Actio Pauliana related disputes and is mainly used only to establish jurisdiction.

The European law does not directly codify the legal actions to be taken in the event of a false or fraudulent transfer of property to others by a debtor for the purpose of causing damage to a creditor but it is settled by the court precedent in view of the laws of the member states. I think that the court decisions for this civil case or dispute, which protects the interest of the creditor, remain a controversial topic among European lawyers.

## **2. STUDYING THE SETTLEMENTS BY THE COURT OF EUROPEAN UNION OVER ACTIO PAULIANA RELATED DISPUTES**

The Court of Justice of the European Union (hereinafter referred to as the CJEU)<sup>1</sup> interprets whether EU law applies equally to all EU Member States and resolves the legal disputes between national governments and EU organizations.

Besides, in certain circumstances, individuals, companies, and organizations may apply to the CJEU if they believe that the EU has violated their rights in any way. Pauliana claim related disputes settled by the CJEU were compared below with examples.

### **3. DISPUTE 1. THE REICHERT I CASE (C-115/88)**

The Reicherts, who live in Germany, are the owners of a real estate in the commune of Antibes in the French city of Alto-Maritimes and donated the real estate by naming their son, Mario Reichert and others as the legal owners. The Dresdner Bank, a creditor of the Reicherts, has filed a claim against the donation.

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<sup>1</sup> The Court of Justice is composed of 27 Judges and 11 Advocates General. The Judges and Advocates General are appointed by common accord of the governments of the Member States after consultation of a panel responsible for giving an opinion on prospective candidates' suitability to perform the duties concerned. They are appointed for a term of office of six years, which is renewable. They are chosen from among individuals whose independence is beyond doubt and who possess the qualifications required for appointment, in their respective countries, to the highest judicial offices, or who are of recognised competence.

The Judges of the Court of Justice elect from amongst themselves a President and a Vice-President for a renewable term of three years. The President directs the work of the Court and presides at hearings and deliberations of the full Court or the Grand Chamber. The Vice-President assists the President in the exercise of his duties and takes his place when necessary.

The Advocates General assist the Court. They are responsible for presenting, with complete impartiality and independence, an 'opinion' in the cases assigned to them.

The Registrar is the institution's secretary general and manages its departments under the authority of the President of the Court.

The Court may sit as a full court, in a Grand Chamber of 15 Judges or in Chambers of three or five Judges.

The Court sits as a full court in the particular cases prescribed by the Statute of the Court (including proceedings to dismiss the European Ombudsman or a Member of the European Commission who has failed to fulfil his or her obligations) and where the Court considers that a case is of exceptional importance.

It sits in a Grand Chamber when a Member State or an institution which is a party to the proceedings so requests, and in particularly complex or important cases.

Other cases are heard by Chambers of three or five Judges. The Presidents of the Chambers of five Judges are elected for three years, and those of the Chambers of three Judges for one year. (Source: CJEU's website)

The parents demised their property to their son and the dispute was settled by the Court of Justice of the European Communities (hereinafter Court) in 1990 when the 1968 Brussels Convention (hereinafter Brussels 1968) has not been amended yet.

Jurisdiction was denied by Reicherts, however, the Court held that it had jurisdiction on the grounds that the objective of the case is the transfer of an immovable property that is situated on the territory of Contracting States. Therefore, the Court has exclusive jurisdiction, regardless of the nationality of the parties. Court held that Article 16 of Brussels 1968 should not be interpreted widely. Therefore, jurisdiction is best determined by the location of the property (*locus rei sitae*). However, Article 16(1) Brussels 1968 means that Contracting State where the property is situated has the jurisdiction but only in measures that come under Brussels 1968 and regarding actions that seek to determine the extent, content, ownership or possession of named property and the rights and obligations of the right holders. Consequently, such an action, brought by a creditor against a contract of sale of immovable property entered into, or a donation thereof made, by his debtor, does not come within the scope of Article 16(1) Brussels 1968. Creditors request regarding Actio Pauliana does not come under the scope of Article 16(1) Brussels 1968.

#### **4. DISPUTE 2. CASE C-339/07 SEAGON V DEKO MARTY BELGIUM**

The Frick Teppichboden Supermärkte GmbH (hereinafter Frick), a German-registered company, transferred 50,000 euros to Deko Marty Belgium NV (hereinafter Deko), a Belgian-based company. Two and a half months later, an insolvency proceeding was opened in Germany at the request of Frick. Since the case of the avoidance of obligations was settled under the Insolvency Law of Germany, the bailiff filed a claim at the German court seeking a refund for the payment to Deko from Frick.

Only the bailiffs were authorized to take this action and it was the only action that could be taken. The German court ruled that the claim was stateless and dismissed the case. Eventually, the case was transferred to the Court by the Federal Court of Justice of Germany (*Bundesgerichtshof*). The Federal Court of Justice of Germany transferred the case to the Court to get settled the following issues:

1. Do the courts of the Member State within the territory of which insolvency proceedings regarding the debtor's assets have been opened have international jurisdiction under Regulation No 1346/2000<sup>2</sup> (hereinafter European Insolvency Regulation) in respect of an action in the context of the insolvency to set a transaction aside that is brought against a person whose registered office is in another Member State?

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<sup>2</sup> Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160, 30. 6. 2000, pp. 1–18.

2. If the first question is to be answered in the negative, does the action in the context of the insolvency to set a transaction aside fall within Article 1(2)(b) of Regulation No 44/2001?<sup>3</sup>

The CJEU got the case settled by the Federal Court of Justice of Germany, which filed the bankruptcy case and postponed the transfer. In other words, the CJEU confirmed that Article 3(1) of the European Insolvency Regulation must be interpreted as meaning that the courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction to decide an action to set a transaction aside by virtue of insolvency that is brought against a person whose registered office is in another Member State. This means that a third party has to accept the fact that the courts of the centre of the main interest of the debtor Member State are competent to hear and determine recovery actions. (Linna, 2014, p. 78).

### **5. DISPUTE 3. CASE C-337/17 FENIKS**

Feniks, a Polish investor, had signed a construction contract with the Coliseum Company (hereinafter Coliseum), established also in Poland. However, due to the insolvency of the Coliseum, Feniks was obliged to pay the debt of the Coliseum to subcontractors under the applicable Polish laws. As a result, the Coliseum was indebted to Feniks for the amount paid to subcontractors. During this process, the Coliseum sold its real estate located in Szczecin (Poland) to Azteca, a company established in Spain. Actio Pauliana claim was filed at a Polish court against the Spanish company to repeal the sale of the real estate by opposing this transfer as it adversely affected Feniks's chance to take back the payment.

The court of Poland transferred the case to the CJEU to clarify whether it falls under international jurisdiction.

The CJEU reviewed the dispute and accepted the claim of Feniks claim, stating that '[t]he case applies to the Regulation 1215/2012 (EU)<sup>4</sup> adopted on December 12, 2012, on the court decision on jurisdiction, civil, and commercial issues. Therefore, the international jurisdiction set forth in Article 7 (1) (a) of this regulation, jurisdiction and court decisions may be enforced and approved.'<sup>5</sup>

The decision of the CJEU contradicts the opinion of the Advocates General (hereinafter AG)<sup>6</sup> of the Court and divided the lawyers. For example, researcher

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<sup>3</sup> 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 L 12, 16. 1. 2001, pp. 1–23.

<sup>4</sup> 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), OJ L 351, 20. 12. 2012, pp. 1–32.

<sup>5</sup> It should be emphasized that the Brussels Convention has not yet been amended when the case of Case C-115/88 or the case of the Richards which is similar to this case.

<sup>6</sup> The Advocates General assists the Court. They are responsible for presenting, with complete impartiality and independence, an 'opinion' in the cases assigned to them.

*Tobias Lutzi* criticised that the CJEU settled the case of *Feniks* as ‘[f]orcing a square peg into a round hole’. (Lutzi, 2018). The decision was made against the proposal of the AG. This decision was different from similar cases that have been settled before, so it has been criticized.

Researcher *Michiel Poesen* concluded the court decision “The notion of ‘matters relating to a contract’ within the meaning of Article 7(1) of the Brussels I Regulation Recast underwent an evolution in the recent case law of the ECJ the decision in *Feniks* confirming and advancing its broadening. It is worth noting that the ramifications of this evolution are not isolated to the topic of jurisdiction under the Brussels I Regulation Recast. (...) As for now, it appears that there are good arguments to assume that third parties who are even remotely involved in the contractual dealings of others are at risk of being sued in the contract.” (Poesen, 2019)

#### **6. DISPUTE 4. CASE C-722/17 REITBAUER**

Mr. Casamassima and Ms. Isabel C., citizens of Rome, lived together until the spring of 2014. In 2010, they bought a house in Villach, Austria. Although Mr. Casamassima paid for the house, Ms. Isabel C. was registered as the sole owner at the registration office. With the help of Mr. Casamassima, Ms. Isabel C. signed a contract with Reitbauer and others (hereinafter referred to as Reitbauer) and started renovating the house. Payment to the Reitbauer was suspended because the cost of the renovation far exceeded the budget. Since 2013, the Reitbauer has sued Ms. Isabel C. at the Austrian court. In 2014, the decision of the primary court settled the case in Reitbauer’s favor. But Ms. Isabel C. appealed against the decision.

Meanwhile, Mr. Casamassima sued Ms. Isabel C. on May 7, 2014 at the court of Rome to enforce payment of the house which he bought in Villach. Ms. Isabel C. accepted the claim and agreed to apply for a mortgage on his house in Villach for ensuring the payment for the claim. Accordingly, the debt and collateral certificates were notarized and the settlement was confirmed on June 13, 2014, in Vienna. On June 18, 2014 a mortgage was signed for the house in Villach.

From that day on, the court decision for the Reitbauer could not be enforced. The Reitbauer pledged Isabel C.’s house under the law enforcement decision but now it was ranked behind Mr. Casamassima’s mortgage agreement.

In February 2016, Mr. Casamassima filed a lawsuit in the district court of Villach, Austria, demanding that the house in Villach be put up for auction and getting an ordinance issued related to Ms. Isabel C. Then the house was sold at an auction in the autumn of 2016. According to the order in which the land was registered, the revenue from the sale of the collateral was decided to be transferred in full to Mr. Casamassima.

In order to prevent this, the Reitbauer filed a complaint against Mr. Casamassima and Ms. Isabel C. in June 2016 at the court in Klagenfurt, Austria. However, Mr. Casamassima and Ms. Isabel C. were not residents of Austria, therefore the complaint was rejected. The Reitbauer believed that Ms. Isabel C. and Mr.

Casamassima had forged the house documents and it was a form of Actio Pauliana. The Reitbauer, therefore, requested the CJEU to review whether the court decision is acceptable and shall be followed in connection with the regulations No (EX) 24 (1) and (5) issued by the European Parliament and Council on December 12, 2012. The CJEU reviewed the dispute and ascribed that the actions of Mr. Casamassima and Ms. Isabel C. were not related to the evasion of payment and that the claim was inadmissible and does not apply to the court of the Member State where the real estate is located.

### **7. DISPUTE 5. CASE C-394/18 I.G.I v CICENIA**

The Costruzioni Ing. G. Iandolo Srl, a construction company in Italy, was reorganized, and a new company, I.G.I, was incorporated from it and a part of the assets was transferred to it. However, some creditors objected, claiming that they were ‘losing a significant portion of their assets’ and filed a claim to the district court of Avellino, Italy, to delay the transfer of assets of the two companies. The district court accepted the creditor’s claim and made a decision to delay the division of the assets. The two reorganized companies objected and appealed to the Naples City Court of Appeals. They said that ‘[u]nder the Italian and EU laws, creditors could have exercised their right to get a court decision issued before reorganizing and registering the split company’. They also protested that ‘separation’ cannot be considered ‘invalid’ after the official requirements have been met, and that ‘measures to delay the transfer of assets will not be accepted’. The court of appeals upheld the decision and addressed it to the CJEU.

The Court of Appeals of Naples stayed the proceedings and referred two questions to the Court of Justice for a preliminary ruling with regards to Articles 12 and 19 of Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies (‘the Sixth Directive’).

CJEU revised the case and considered it possible for creditors to file an Actio Pauliana claim against the split company. In other words, it was settled that the Actio Pauliana claim can be lodged with the purpose of not letting the activities of the two companies that resulted from the reorganization of the company can not cause harm to creditors and taking coercive and protective measures related to the assets transferred to the newly established company and Actio Pauliana would not affect the reorganization of the company but would eliminate the solvency to the creditors and that the creditors are able to claim to delay the transfer of assets even after the company is reorganized.

### **8. CONCLUSION**

There were around ten court decisions related to Actio Pauliana claims such as C-115/88, C-339/07, C-337/17, C-722/17, C-394/18, C-213/10, C-157/13, C-256/00, C-274/16, and C-133/78 in the database of the CJEU. Most of the court decisions refused to accept the claim and decided that the claim does not fall under

international jurisdiction. Therefore, I have selected and compared five specific disputes with the court decisions that accepted the claims, establishing international jurisdiction, and refusing to accept the claim, as well as attracted the attention of lawyers and researchers.

Two of the disputes involved family members and people who had family relations. The other three cases were related to the claims lodged by the people against the transfer of real estate and payments from one company to another (bankruptcy, reorganization, etc.). In other words, these are the disputes with Actio Pauliana claims against cross-border actions between citizens and legal entities of the EU member states.

Lawyers and researchers Tuula Linna, Michiel Poesen, Tobias Lutsi, and Nicola De Luca have variously interpreted the court decisions as examples.

But for me, I do not consider court decisions to be right or wrong because I have made my study to seek answers to the questions: Is there Actio Pauliana regulation in the laws of Europe? What regulation was used by the Court of Justice of the European Union to settle the disputes related to Actio Pauliana and how were the cases settled?

When I studied the disputes, the courts of the Member States addressed the CJEU to clarify ‘whether the Actio Pauliana falls under the jurisdiction of an international regulation (hereinafter referred to as the EU law) in accordance with the Brussels Convention, whether a claim in regard to the fraudulent transfer could be settled by the court of a member state, the court decision of a member state can be enforced in another member state, and how to understand the provisions of the EU law’. For example, the following articles and provisions of the EU law were explained whether those are related to Actio Pauliana and how to understand:

1. In the dispute C-115/88, Article 16(1) of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, September 27, 1968;
2. In the dispute C-339/07, Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings and Article (2)(b) of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters;
3. In the dispute C-337/17, Article 7(1)(a) of the 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;
4. In the dispute C-722/17, Article 24(1) and (5) of the 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;
5. In the dispute C-394/18, Articles 12 and 19 of the Directive 2007/63/EC of the European Parliament and of the Council of 13 November 2007 amending Council Directives based.

Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies.

The court decisions acknowledged and interpreted the Actio Pauliana related insolvency claims in the legal regulation pertaining to the insolvency and reorganization of the companies. However, the Actio Pauliana claims between the family members were rejected and the cases were dismissed.

In European law, there is no direct regulation on fraudulent transfers or Actio Pauliana-related disputes and is mainly used only to establish jurisdiction. In other words, it is not legalized. Only in the case of C-394/18, 2020, it was explained whether Actio Pauliana could be used after the reorganization or division of the company for EU law and the laws of Italy.

Maybe there was no other way because the EU member states have different regulations for Actio Pauliana or fraudulent transfers in their civil laws. Besides, some researchers of the European Union intend to codify the EU's Civil Code but have not yet reached any result. This is due to the fact that researchers and lawyers of the member states have different views on this issue.

Moreover, I conclude that the Court of Justice of the European Union should make flexible and balanced decisions based on the interests of the parties, weigh the real interests of the parties, and have a neutral position.

Finally, I would like to note that decisions of the EU courts show that the EU regulations have been modified and amended constantly and gradually and that positive steps have been taken to interpret Actio Pauliana-related disputes and to determine its jurisdiction. In other words, the EU law Union has been updated year by year in connection with the integration of the European Union.

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