Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

15 March 2012*

(Jurisdiction and the enforcement of judgments in civil and commercial matters — Public notification of legal documents — Lack of known domicile or place of abode of the defendant in the territory of a Member State — Jurisdiction 'in matters relating to tort, delict or quasi-delict' — Infringement of the right to protection of personality liable to have been committed by the publication of photographs on the internet — Place where the harmful event occurred or may occur)

In Case C-292/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Landgericht Regensburg (Germany), made by decision of 17 May 2010, received at the Court on 11 June 2010, in the proceedings

G

v

Cornelius de Visser,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Safjan (Rapporteur), A. Borg Barthet, J.-J. Kasel and M. Berger, Judges,

Advocate General: P. Cruz Villalón,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 25 May 2011,

after considering the observations submitted on behalf of:

— the Danish Government, by C. Vang, acting as Agent,

— Ireland, by D. O'Hagan, acting as Agent and A. Collins, SC, and M Noonan, Barrister-at-law

— the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Varone, avvocato dello Stato,

— the Luxembourg Government, by C. Schiltz, acting as Agent,

— the Hungarian Government, by Z. Fehér, K. Szíjjártó and K. Molnár, acting as Agents,

* Language of the case: German.

— the Netherlands Government, by C. Wissels, acting as Agent,

— the European Commission, by M. Wilderspin and S. Grünheid, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 6 TEU and 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), Article 3(1) and (2) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1), Articles 4(1), 5(3) and 26(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) and Article 12 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).

2 The reference has been made in proceedings between Ms G and Mr de Visser concerning an action for liability arising from the uploading onto an internet site of photographs in which she appears partly naked.

Legal context

European Union law

Directive 2000/31

3 The 23rd recital in the preamble to Directive 2000/31 states:

'This Directive neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of Courts; provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide information society services as established in this Directive.'

4 In accordance with Article 1 thereof, the directive seeks 'to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States'.

5 Article 1(4) of the directive is worded as follows:

'This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts.'

6 Article 3 of the directive, entitled 'Internal market', provides in paragraph 1:

'Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.'

7 Article 3(2) of Directive 2000/31 provides:

‘Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.’

Regulation No 44/2001

8 Recital 2 in the preamble to Regulation No 44/2001 states:

‘Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential.’

9 Article 2 of that regulation provides:

‘1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.’

10 Article 3(1) of that regulation provides:

‘Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.’

11 Article 4 of the regulation is worded as follows:

‘1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State.

2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in Annex I, in the same way as the nationals of that State.’

12 In Chapter II, section 2, entitled ‘Special jurisdiction’, Article 5(3) of Regulation No 44/2001 provides:

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

…

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

13 Article 26 of that regulation, in section 8, entitled ‘Examination as to jurisdiction and admissibility’ of that Chapter, reads as follows:

‘1. Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation.

2. The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

3. Article 19 of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters [OJ 2000 L 160, p. 37] shall apply instead of the provisions of paragraph 2 if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to this Regulation.

4. Where the provisions of Regulation No 1348/2000 are not applicable, Article 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ['the Hague Convention 1965'] shall apply if the document instituting the proceedings or an equivalent document had to be transmitted pursuant to that Convention.'

14 In Chapter III of Regulation No 44/2001, entitled 'Recognition and enforcement', Article 34(2) provides that a judgment is not to be recognised:

'where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.'

15 Article 59 of Regulation No 44/2001 provides:

'1. In order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law.

2. If a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State.'

Regulation No 805/2004

16 Pursuant to Article 1 thereof, the purpose of Regulation No 805/2004 is to create 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.

17 Article 5 of that regulation, entitled 'Abolition of exequatur', is worded as follows:

'A judgment which has been certified as a European Enforcement Order in the Member State of origin shall be recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition.'

18 Article 12(1) of that regulation reads as follows:

'A judgment on a claim that is uncontested within the meaning of Article 3(1)(b) or (c) can be certified as a European Enforcement Order only if the court proceedings in the Member State of origin met the procedural requirements as set out in this Chapter.'

19 Under Article 14(1) and (2) of Regulation No 805/2004:

‘1. Service of the document instituting the proceedings or an equivalent document and any summons to a court hearing on the debtor may also have been effected by one of the following methods:

(a) personal service at the debtor’s personal address on persons who are living in the same household as the debtor or are employed there;

(b) in the case of a self-employed debtor or a legal person, personal service at the debtor’s business premises on persons who are employed by the debtor;

(c) deposit of the document in the debtor’s mailbox;

(d) deposit of the document at a post office or with competent public authorities and the placing in the debtor’s mailbox of written notification of that deposit, provided that the written notification clearly states the character of the document as a court document or the legal effect of the notification as effecting service and setting in motion the running of time for the purposes of time limits;

(e) postal service without proof pursuant to paragraph 3 where the debtor has his address in the Member State of origin;

(f) electronic means attested by an automatic confirmation of delivery, provided that the debtor has expressly accepted this method of service in advance.

2. For the purposes of this Regulation, service under paragraph 1 is not admissible if the debtor’s address is not known with certainty.’

Regulation (EC) No 1393/2007

20 In accordance with Article 1(2) of Regulation (EC) No 1393/2007 of the European Parliament and of 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), that regulation does not apply where the address of the person to be served with the document is not known.

21 Article 19 of Regulation No 1393/2007, headed ‘Defendant not entering an appearance’, is worded as follows:

‘1. Where a writ of summons or an equivalent document has had to be transmitted to another Member State for the purpose of service under the provisions of this Regulation and the defendant has not appeared, judgment shall not be given until it is established that:

(a) the document was served by a method prescribed by the internal law of the Member State addressed for the service of documents in domestic actions upon persons who are within its territory; or

(b) the document was actually delivered to the defendant or to his residence by another method provided for by this Regulation;

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

2. Each Member State may make it known, in accordance with Article 23(1), that the judge, notwithstanding the provisions of paragraph 1, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled:

(a) the document was transmitted by one of the methods provided for in this Regulation;

(b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document;

(c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities or bodies of the Member State addressed.

3. Notwithstanding paragraphs 1 and 2, the judge may order, in case of urgency, any provisional or protective measures.

4. When a writ of summons or an equivalent document has had to be transmitted to another Member State for the purpose of service under the provisions of this Regulation and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiry of the time for appeal from the judgment if the following conditions are fulfilled:

(a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal;

(b) the defendant has disclosed a prima facie defence to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each Member State may make it known, in accordance with Article 23(1), that such application will not be entertained if it is filed after the expiry of a time to be stated by it in that communication, but which shall in no case be less than one year following the date of the judgment.

5. Paragraph 4 shall not apply to judgments concerning the status or capacity of persons.'

National law

22 Paragraphs 185, 186 and 188 of the German Code of Civil Procedure (Zivilprozessordnung) contain the following provisions on notification by publication:

'Paragraph 185 Service by public notice

Service may be effected by public notice (service by public notice) if:

1. the abode of a person is unknown and it is not possible to serve the documents upon a representative or authorised recipient;

2. it is not possible to serve documents upon legal persons obliged to register a domestic business address with the Commercial Register, either at the address entered therein or at the address entered in the Commercial Register of a person authorised to receive service of documents, or at any other domestic address obtained without any investigations having been carried out;

3. it is not possible to serve documents abroad, or if such service is unlikely to offer any prospect of success; or

4. the documents cannot be served because the place of service is the residence of a person who, pursuant to Paragraphs 18 to 20 of the Law on the constitution of courts [Gerichtsverfassungsgesetz], does not fall within the jurisdiction.

Paragraph 186 Approval and implementation of service by public notice

(1) The court hearing the case shall decide whether or not to approve service by public notice. The decision may be given without a hearing being held.

(2) Service by public notice shall be implemented by affixing a notice to the court's bulletin board or by publishing the notice in an electronic information system that is publicly accessible in the court. Additionally, the notice may be published in an electronic information and communications system established by the court for such notices. The notice must state:

1. the person on whose behalf the documents are to be served,

2. the name of the party to whom documents are to be served and the address last known,

3. the date, the reference number of the document, and the designation of the subject matter of the proceedings, and

4. the office at which the document may be inspected.

The notice must indicate that a document is being served by public notice, that this service may cause time periods to elapse, and that once the time-limits have expired, the party to whom the documents are being served in this way may have forfeited rights. When serving summonses in this way, the notice must indicate that the document contains a summons to a hearing and that, should the party fail to comply with it, such failure may be to the party's legal detriment.

(3) The files shall record when the notice was displayed on the bulletin board and when it was removed.

…

Paragraph 188 Time at which service by publication has been effected

The document shall be deemed served when one month has elapsed since the notice was first displayed on the bulletin board. The court hearing the case may set a longer period.'

23 Paragraph 331 of the German Code of Civil Procedure, entitled 'Default judgment against the defendant', provides:

'1. If the applicant seeks default judgment against the defendant because the latter has failed to appear at the hearing, it shall be presumed that the facts as submitted to the court by the applicant in oral argument have been admitted. This shall not apply to any submissions to the court regarding its jurisdiction pursuant to Paragraphs 29(2) or 38.

2. In so far as the claim for relief is justified by the facts as submitted to the court by the applicant, the court shall decide in accordance with the application filed; where this is not the case, the action shall be dismissed.

3. If the defendant has failed, contrary to the first sentence of Paragraph 276(1) and (2), to notify the court of his intention to defend himself against the action, the court shall take its decision, upon application by the applicant, without a hearing; this shall not apply if the defendant's declaration is received before the judgment signed by the judges has been forwarded to the court registry. Such an application may already be made in the statement of claim. The court may also take a decision without a hearing where the submission made to the court by the applicant does not justify a demand for relief in an ancillary claim, provided that the applicant has been made aware of this option prior to the decision being delivered.'

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

24 Mr de Visser is the owner of a domain name and runs the internet site www.*****.de. Under the link 'Fotos und Videos' (photos and videos) of that internet site, it is possible to see a photograph of Ms G. After having clicked on the link 'für weitere Fotos hier klicken' (click here for more photos), it is possible to see various photographs of her in which she is shown partly naked.

25 That situation arises from the fact that, in about 2003, Ms G was interested in the internet site and the services offered by Mr de Visser and contacted him for that reason. Subsequently, Mr de Visser, through a colleague and a photographer instructed by him, took photographs of Ms G in Germany, with their intended use being 'für eine Party' (for a party). Nevertheless, Ms G never agreed that those photographs should be published. The question of putting those photographs online on the internet was, in addition, never discussed with her and so is not the subject-matter of any specific agreement.

26 It was not until 2009 that Ms G was shown the photographs in question online on the internet by work colleagues.

27 Both the legal information of the internet site in question and the DENIC database (domain registry of .de) give as 'Admin-C' (administrative contact) Mr N*****, with an address in Dortmund in Germany. However, there is no registration under that name in the Dortmund telephone directory.

28 The location of the server hosting the internet site in question is unknown.

29 In the legal information of the internet site www.*****.de, Mr de Visser is registered as owner of the domain with an address in Terneuzen and a postal address in Venlo. It has not, however, been possible to effect service at those addresses in the Netherlands, since both letters were returned marked 'Unknown at this address'. The Consulate of the Kingdom of the Netherlands in Munich stated, on request, that Mr de Visser was not listed in any population register in the Netherlands.

30 After the grant of legal aid to Ms G, the national court ordered, on 8 February 2010, service by public notice of the initiating application and a preliminary written procedure. Previously, in the context of the application proceedings for legal aid, attempts had been made in vain to send Mr de Visser the draft initiating application by standard post to various addresses.

31 Service by public notice of the initiating application, in accordance with the German Code of Civil Procedure, was effected by affixing a notice of that service to the bulletin board of the Landgericht Regensburg from 11 February to 15 March 2010. On the date of adoption of the decision for reference, the time-limits set for Mr de Visser in that notice by which he was to inform the court whether he would defend the action had expired without reaction from him. According to the national court, having regard to the circumstances, it is necessary to assume that, at that date, he was not aware of the proceedings commenced before it.

32 That court adds that if the possibility of service by public notice of the initiating application under national law were to have to give way to the rules of European Union law, the only possibility remaining for Ms G would be for her to give other addresses for Mr de Visser at which service could

be effected, and she will be unable to do so without knowing those addresses or being able to discover them. That would be likely to be incompatible with the first paragraph of Article 47 of the Charter, since Ms G would then be de facto deprived of her guaranteed right to an effective legal remedy.

33 Having certain doubts, in addition, as to the applicability and interpretation of Regulation No 44/2001 and the determination of the substantive law applicable to the case in the main proceedings, the Landgericht Regensburg decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling.

'(1) Does the first half-sentence of the first subparagraph of Article 6(1) [TEU], in conjunction with the first sentence of the second paragraph of Article 47 of the Charter …, or other European legislation preclude 'service by public notice' under national law (pursuant to Paragraphs 185 to 188 of the German Zivilprozessordnung, through the posting for one month of the notification of the service on the notice board of the court ordering the notification) if the opponent in a civil action (in its very early stages) gives an address in the territory of the European Union ('Union territory') on his website, but service is not possible because the defendant's whereabouts in the Union territory are not known and it cannot otherwise be established where he is currently residing?

(2) If the answer to Question [(1)] is in the affirmative:

Must the national court refuse, in accordance with past case-law of the Court (most recently Case C-341/06 *Petersen* [[2010] ECR I-47]), to apply national rules permitting service by public notice even if national law grants such power of rejection only to the (German) Bundesverfassungsgericht (Federal Constitutional Court)?

and

Should the applicant communicate to the court a new address at which a further attempt can be made to serve the application on the defendant to enable her to assert her rights, since under national law the trial could not be conducted without service by public notice and without knowledge of the defendant's whereabouts?

(3) If the answer to Question [(1)] is in the negative: Is, in the present case, a default judgment pursuant to Paragraph 331 of the Zivilprozessordnung, that is an enforcement order for uncontested claims within the meaning of [Regulation No 805/2004], precluded by Article 26(2) of [Regulation No 44/2001], in so far as an order is sought for the payment of compensation for pain and suffering amounting to at least EUR 20 000 plus interest and legal costs of EUR 1 419.19 plus interest?

The following questions are referred subject to the condition that it is possible for the applicant to continue the action in accordance with the Court's answers to Questions [(1)] to [(3)]:

(4) Having regard to Article 4(1) and Article 5(3) of Regulation No 44/2001, is that Regulation also applicable in cases in which the whereabouts of the defendant in a civil action, who has been sued for an injunction, information and compensation for pain and suffering because of the operation of a website, who is (presumed to be) a Union citizen within the meaning of the second sentence of Article 9 TEU, are unknown, it therefore being conceivable, but by no means certain, that he is currently residing outside the Union territory and also outside the residual treaty area governed by the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, done at Lugano on 16 September 1988 ('Lugano Convention'), and the precise location of the server on which the website is stored is also unknown, although it seems logical to assume that it is in the Union territory?

(5) If Regulation No 44/2001 is applicable in this case, is the phrase 'the place where the harmful event … may occur' in Article 5(3) of that Regulation to be interpreted as meaning, in the event of (possible) infringements of personality by means of content on an Internet website,

that the person concerned ('the applicant') may also bring an action for an injunction, for information and for compensation for pain and suffering against the operator of the website ('the defendant'), irrespective of where the defendant is established (in or outside the Union territory), in the courts of any Member State in which the website may be accessed,

or

is it necessary, in order to establish jurisdiction of the courts of a Member State in which the defendant is not established or there are no indications that he is resident, that there be a special connection between the contested content of the website and the State of the court seised (domestic connecting factor) going beyond technically possible accessibility?

(6) If such a special domestic connecting factor is necessary: What are the criteria which determine that connection?

Does it depend on whether the intention of the operator is that the contested website is specifically (also) targeted at Internet users in the State of the court seised or is it sufficient for the information which may be accessed on the website to have an objective connection to the State of the court seised, in the sense that in the circumstances of the individual case, in particular on the basis of the content of the website to which the applicant objects, a collision of conflicting interests — the applicant's interest in respect of her right to protection of personality and the operator's interest in the design of his website — may actually have occurred or may occur in the State of the court seised or has occurred, in that one or more acquaintances of the person whose right to protection of personality has been infringed have taken note of the content of the website?

(7) Does the determination of the special domestic connecting factor depend upon the number of times the website to which the applicant objects has been accessed from the State of the court seised?

(8) If the referring court has jurisdiction for the action according to the above questions: Do the legal principles laid down in the Court's judgment in Case C-68/93 *Shevill and Others* [1995] ECR I-415 also apply in the case described above?

(9) If no special domestic connecting factor is required in order to make a positive finding on jurisdiction, or if it is sufficient for the presumption of such a special domestic connecting factor that the information to which the applicant objects has an objective connection to the State of the court seised, in the sense that in the circumstances of the individual case, in particular on the basis of the content of the website to which the applicant objects, a collision of conflicting interests may actually have occurred or may occur in the State of the court seised or has occurred, in that one of more acquaintances of the person whose right to protection of personality has been infringed have taken note of the content of the website, and the existence of a special domestic connecting factor may be presumed without requiring a finding as to a minimum number of times the website to which the applicant objects has been accessed from the State of the court seised, or if Regulation No 44/2001 is in no way applicable to the present case:

Must Article 3(1) and (2) of [Directive 2000/31] be interpreted as meaning that those provisions should be attributed with a conflict-of-laws character in the sense that for the field of private law also they require the exclusive application of the law applicable in the country of origin, to the exclusion of national conflict-of-law rules,

or

do those provisions operate as a corrective at a substantive law level, by means of which the substantive law outcome under the law declared to be applicable pursuant to the national conflict-of-law rules is altered and adjusted to the requirements of the country of origin?

(10) In the event that Article 3(1) and (2) of [Directive 2000/31] have a conflict-of-laws character:

Do those provisions merely require the exclusive application of the substantive law applicable in the country of origin or also the application of the conflict-of-law rules applicable there, with the consequence that a renvoi under the law of the country of origin to the law of the target State remains possible?

(11) In the event that Article 3(1) and (2) of [Directive 2000/31] have a conflict-of-laws character:

Must the designation of the place of establishment of the service provider be geared to his (presumed) current whereabouts, his whereabouts when the publication of the photographs of the applicant first began or the (presumed) location of the server on which the website is stored?'

34 By letter of 28 October 2011, the Registry of the Court sent the national court a copy of the judgment in Joined Cases C-509/09 and C-161/10 *eDate Advertising and Others* [2011] ECR I-10269, requesting it to state whether, in the light of that judgment, it wished to maintain Questions (5) to (11) in its reference for a preliminary ruling.

35 By decisions of 10 and 16 November 2011, received by the Court on 10 and 16 November 2011 respectively, the national court stated that it withdrew Questions (5) to (10) but wished to maintain Question (11), reformulating it as follows:

'Taking account of the judgment … in Joined Cases C-509/09 and C-161/10 *eDate Advertising and Others*, are Articles 3(1) and (2) of [Directive 2000/31] to be interpreted as meaning that, if the place of establishment of the service provider is unknown and it is possible that he is outside the territory of the European Union, the law to be applied in the coordinated field is to be derived solely from the law of the Member State in which the injured person has his domicile or permanent residence, or

must it be ensured in the coordinated field under [Directive 2000/31] that the provider of an electronic commerce service is not made subject to stricter requirements than those provided for by the substantive law applicable in the Member State whose nationality the service provider probably holds, or

in this case, must it be ensured in the coordinated field under [Directive 2000/31] that the provider of an electronic commerce service is not made subject to stricter requirements than those provided for by the substantive law applicable in all of the Member States?'

36 In those circumstances, the Court is called upon to rule only on the first four questions initially referred and the last question as reformulated.

Consideration of the questions referred

The fourth question

37 By its fourth question, which it is appropriate to consider first, the national court asks, in essence, whether, in circumstances such as those of the main proceedings, Article 4(1) of Regulation No 44/2001 is to be interpreted as precluding the application of Article 5(3) of that regulation to an action for liability arising from the operation of an internet site brought against a defendant who is probably a European Union citizen but whose whereabouts are unknown.

38 In the decision for reference, that court states that, despite the fact that many factors indicate that the defendant is in the territory of the European Union, that is not absolutely certain. It therefore has questions particularly as regards the interpretation of the criterion 'is not domiciled in a Member State' which would, by virtue of Article 4(1) of Regulation No 44/2001, require the application of national rules of jurisdiction rather than the uniform rules of that regulation.

39 In that regard, it must be borne in mind, firstly, that where the domicile of a defendant who is a Member State national is unknown, the application of the uniform rules of jurisdiction established by Regulation No 44/2001 instead of those in force in the different Member States meets the essential requirement of legal certainty and the objective, pursued by that regulation, of strengthening the legal protection of persons established in the European Union, by enabling the applicant to identify easily the court in which he may sue and the defendant reasonably to foresee before which court he may be sued (see, to that effect, Case C-327/10 *Hypoteční banka* [2011] ECR I-11543, paragraph 44).

40 Secondly, the expression 'is not domiciled in a Member State', used in Article 4(1) of Regulation No 44/2001, must be understood as meaning that application of the national rules rather than the uniform rules of jurisdiction is possible only if the court seised of the case holds firm evidence to support the conclusion that the defendant, a citizen of the European Union not domiciled in the Member State of that court, is in fact domiciled outside the European Union (see, to that effect, *Hypoteční banka*, paragraph 42).

41 In the absence of such firm evidence, the international jurisdiction of a court of a Member State is established, by virtue of Regulation No 44/2001, when the conditions for application of one of the rules of jurisdiction laid down by that regulation are met, including in particular that in Article 5(3) thereof, in matters relating to tort, delict or quasi-delict.

42 In the light of the foregoing, the answer to the fourth question is that, in circumstances such as those in the main proceedings, Article 4(1) of Regulation No 44/2001 must be interpreted as meaning that it does not preclude the application of Article 5(3) of that regulation to an action for liability arising from the operation of an internet site against a defendant who is probably a European Union citizen but whose whereabouts are unknown if the court seised of the case does not have firm evidence to support the conclusion that the defendant is in fact domiciled outside the European Union.

The first question and the first part of the third question

43 By its first question and the first part of its third question, which it is appropriate to consider together, the national court asks, in essence, whether European Union law must be interpreted as precluding the delivery of a judgment by default against a defendant on whom, because it was impossible to locate him, the document instituting proceedings was served by public notice under national law.

44 In that regard, it must be pointed out from the outset that the purpose of Regulation No 44/2001, like the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36), as amended by the successive conventions relating to the accession of new Member States to that convention, is not to unify the procedural rules of the Member States, but to determine which court has jurisdiction in disputes concerning civil and commercial matters in relations between Member States and to facilitate the enforcement of judgments (*Hypoteční banka*, paragraph 37).

45 While, in the absence of systematic regulation of national procedures by European Union law, it is therefore for the Member States, in the context of their procedural autonomy, to lay down the procedural rules applicable to actions brought before their courts, those rules must not infringe European Union law, including, in particular, the provisions of Regulation No 44/2001.

46 It follows that, within the scope of that regulation, a national court, by virtue of a provision of its domestic law, may carry on proceedings against a person whose domicile is unknown only if it is not precluded by the rules of jurisdiction laid down in that regulation.

47 As regards the requirements to be met during the proceedings, it must be borne in mind that all the provisions of Regulation No 44/2001 express the intention to ensure that, within the scope of the objectives of that regulation, proceedings leading to the delivery of judicial decisions take place in such a way that the rights of the defence are observed (see Case 125/79 *Denilauler* [1980] ECR 1553, paragraph 13, and Case C-394/07 *Gambazzi* [2009] ECR I-2563, paragraph 23).

48 None the less, the requirement that the rights of the defence be observed, as also stated in Article 47 of the Charter, must be implemented with due regard to the applicant's right to bring an action before a court to rule on the merits of his claim.

49 In that regard, the Court has held, in paragraph 29 of the judgment in *Gambazzi*, that fundamental rights, such as respect for the rights of the defence, do not constitute unfettered prerogatives and may be subject to restrictions. However, such restrictions must in fact correspond to the objectives of public interest pursued by the measure in question and must not constitute, with regard to the aim pursued, a disproportionate breach of those rights.

50 In that regard, it must be borne in mind that the Court has already held that the objective of avoiding situations of denial of justice, which the applicant would face should it not be possible to determine the defendant's domicile, constitutes such an objective of public interest (*Hypoteční banka*, paragraph 51).

51 The requirement relating to the need to avoid a disproportionate interference with the rights of the defence is expressed by the rule in Article 26(2) of Regulation No 44/2001, pursuant to which a court must stay the proceedings so long as it has not been established that that defendant has been able to receive the document instituting proceedings or an equivalent document in sufficient time to enable him to arrange for his defence or that all necessary steps have been taken to this end.

52 Firstly, it must be noted from the outset that, in circumstances such as those in the main proceedings, the applicability of that provision is not precluded by the rules referred to in Article 26(3) and (4) of Regulation No 44/2001, namely Article 19 of Regulation No 1393/2007 or Article 15 of the 1965 Hague Convention.

53 It is true that the question whether the document instituting proceedings was duly served on a defendant in default of appearance must be determined in the light of the provisions of that convention, (Case C-522/03 *Scania Finance France* [2005] ECR I-8639, paragraph 30) and, a fortiori, in the light of the provisions of that regulation. Nevertheless, that rule applies only in so far as those provisions apply. Both Article 1(2) of Regulation No 1393/2007 and the second paragraph of Article 1 of the 1965 Hague Convention specify that those instruments 'shall not apply where the address of the person to be served with the document is not known'.

54 The view must therefore be taken that, in circumstances such as those of the main proceedings, neither Article 19 of Regulation No 1393/2007 nor Article 15 of the 1965 Hague Convention is applicable, failing knowledge of the defendant's address.

55 As regards, secondly, the interpretation of Article 26(2) of Regulation No 44/2001, that provision must be understood, as the Court has recently held, as meaning that a court having jurisdiction pursuant to that regulation may reasonably continue proceedings, in the case where it has not been established that the defendant has been enabled to receive the document instituting the proceedings, only if all necessary steps have been taken to ensure that the defendant can defend his interests. To that end,

the court seised of the matter must be satisfied that all investigations required by the principles of diligence and good faith have been undertaken to trace the defendant (see *Hypoteční banka*, paragraph 52).

56 It is true that, even if those conditions are satisfied, the possibility of taking further steps in the proceedings without the defendant's knowledge by means, as in the main proceedings, of 'service by public notice' constitutes a restriction of the defendant's rights of defence. That restriction is, however, justified in the light of an applicant's right to effective protection, given that, failing such service, that right would be meaningless (see *Hypoteční banka*, paragraph 53).

57 In contrast to the situation of the defendant, who, when deprived of the opportunity to defend himself effectively, will have the opportunity to ensure respect for the rights of the defence by opposing, in accordance with Article 34(2) of Regulation No 44/2001, recognition of the judgment issued against him, the applicant runs the risk of being deprived of all possibility of recourse (see *Hypoteční banka*, paragraph 54).

58 It is apparent, furthermore, from the case-law of the European Court of Human Rights that the right to a fair trial, guaranteed by Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, which corresponds to the second paragraph of Article 47 of the Charter, does not preclude 'summons by public notice', provided that the rights of those concerned are properly protected (see judgment of the European Court of Human Rights in *Nunes Dias v. Portugal*, *Reports of Judgments and Decisions* 2003-IV).

59 The answer to the first question and the first part of the third question is therefore that European Union law must be interpreted as meaning that it does not preclude the issue of judgment by default against a defendant on whom, given that it is impossible to locate him, the document instituting proceedings has been served by public notice under national law, provided that the court seised of the matter has first satisfied itself that all investigations required by the principles of diligence and good faith have been undertaken to trace the defendant.

The second question

60 In view of the reply given in the above paragraph to the first question, it is unnecessary to answer the second question.

The second part of the third question

61 By the second part of its third question, the national court wishes to know, in essence, whether European Union law must be interpreted as precluding certification as a European Enforcement Order within the meaning of Regulation No 805/2004 of a judgment by default issued against a defendant whose address is unknown.

62 A judgment by default is indeed one of the enforcement titles within the meaning of Article 3 of that regulation which may be certified as a European Enforcement Order. As recital 6 in the preamble to Regulation No 805/2004 states, the absence of objections from the debtor as stipulated in Article 3(1)(b) of that regulation can take the shape of default of appearance at a court hearing or of failure to comply with an invitation by the court to give written notice of an intention to defend the case.

63 Nevertheless, under Article 14(2) of that regulation, 'for the purposes of this Regulation, service under paragraph 1 is not admissible if the debtor's address is not known with certainty'.

64 It is therefore apparent from the very wording of Regulation No 805/2004 that a judgment by default issued in circumstances where it is impossible to ascertain the domicile of the defendant cannot be certified as a European Enforcement Order. That conclusion also follows from an analysis of the objectives and scheme of that regulation. The regulation institutes a derogation from the common system of recognition of judgments, the conditions of which are, as a matter of principle, to be interpreted strictly.

65 Thus, recital 10 in the preamble to Regulation No 805/2004 states that where a court in a Member State has given judgment on an uncontested claim in the absence of participation of the debtor in the proceedings, the abolition of any checks in the Member State of enforcement is inextricably linked to and dependent upon the existence of a sufficient guarantee of observance of the rights of the defence.

66 As is clear from paragraph 57 of the present judgment, the defendant, by opposing, in accordance with Article 34(2) of Regulation No 44/2001, recognition of the judgment issued against him, will have the opportunity to ensure respect for his rights of defence. That guarantee would, however, be lacking if, in circumstances such as those of the main proceedings, a judgment by default issued against a defendant who was unaware of the proceedings was certified as a European Enforcement Order.

67 It should therefore be held that a judgment by default issued against a defendant whose address is unknown must not be certified as a European Enforcement Order within the meaning of Regulation No 805/2004.

68 Consequently, the answer to the second part of the third question is that European Union law must be interpreted as precluding certification as a European Enforcement Order within the meaning of Regulation No 805/2004 of a judgment by default issued against a defendant whose address is unknown.

The eleventh question

69 By its 11th question, the national court asks, in essence, whether Article 3(1) and (2) of Directive 2000/31 is to be interpreted as meaning that it applies in a situation where the place of establishment of the information society service provider is unknown.

70 In that regard, it is clearly apparent from the judgment in *eDate Advertising and Others* that the establishment of the provider in another Member State constitutes both the reason for and the condition for application of the mechanism laid down in Article 3 of Directive 2000/31. That mechanism seeks to ensure the free movement of information society services between Member States by making those services subject to the legal system of the Member State in which their providers are established (*eDate Advertising and Others*, paragraph 66).

71 Since application of Article 3(1) and (2) of that directive is thus subject to the identification of the Member State in whose territory the information society service provider is actually established (*eDate Advertising and Others*, paragraph 68), it is for the national court to ascertain whether the defendant is actually established in the territory of a Member State. In the absence of such establishment, the mechanism laid down in Article 3(2) of Directive 2000/31 does not apply.

72 In those circumstances, the answer to the 11th question is that Article 3(1) and (2) of Directive 2000/31 does not apply to a situation where the place of establishment of the information society services provider is unknown, since application of that provision is subject to identification of the Member State in whose territory the service provider in question is actually established.

Costs

73 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **In circumstances such as those in the main proceedings, Article 4(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that it does not preclude the application of Article 5(3) of that regulation to an action for liability arising from the operation of an Internet site against a defendant who is probably a European Union citizen but whose whereabouts are unknown if the court seised of the case does not hold firm evidence to support the conclusion that the defendant is in fact domiciled outside the European Union.**

2. **European Union law must be interpreted as meaning that it does not preclude the issue of judgment by default against a defendant on whom, given that it is impossible to locate him, the document instituting proceedings has been served by public notice under national law, provided that the court seised of the matter has first satisfied itself that all investigations required by the principles of diligence and good faith have been undertaken to trace the defendant.**

3. **European Union law must be interpreted as precluding certification as a European Enforcement Order, within the meaning 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, of a judgment by default issued against a defendant whose address is unknown.**

4. **Article 3(1) and (2) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market does not apply to a situation where the place of establishment of the information society services provider is unknown, since application of that provision is subject to identification of the Member State in whose territory the service provider in question is actually established.**

[Signatures]