



Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 7 May 2015¹

Case C-47/14

**Holterman Ferho Exploitatie BV
Ferho Bewehrungsstahl GmbH
Ferho Vechta GmbH
Ferho Frankfurt GmbH**

v

Friedrich Leopold Freiherr Spies von Büllenheim

(Request for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands))

(Judicial cooperation in civil matters — Jurisdiction and the enforcement of judgments in civil and commercial matters — Regulation (EC) No 44/2001 — Article 5(1)(a) and (b) and Article 5(3) — Jurisdiction in matters relating to a contract — Jurisdiction in matters relating to tort, delict or quasi-delict — Articles 18 to 21 — Individual contract of employment — Dual capacities of managing director and director of a company — Liability for improper performance of management and administration duties)

1. This case provides the Court of Justice with an opportunity of ruling on the applicability of the special rules on jurisdiction in Article 18 et seq. ('individual contracts of employment') of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters² ('the Regulation') in circumstances in which a person is sued by a company for improper performance of his duties, not only in his capacity as the managing director of the company and an employee of the company under a contract of employment, but also in his capacity as a director of the company from a company law perspective.

2. More specifically, the Court must determine whether the scope of any employment relationship between the managing director of a company and that company is affected, for the purposes of allocating international jurisdiction under the Regulation, by the fact that there is also a relationship under company law connecting him, as a director, to that company, when liability claims are brought against him both in his capacity as managing director and in his capacity as a director.

¹ — Original language: Spanish.

² — OJ 2001 L 12, p. 1. **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 2012 L 351, p. 1) came into force on 10 January 2015 but is not applicable *ratione temporis* to this case. Essentially, Regulation No 1215/2012 repeats the provisions of the regulation at issue here.

I – Legislative framework

A – EU law

3. Recital 11 in the preamble to the Regulation states that ‘the rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor ...’, and Recital 12 goes on to mention that ‘in addition to the defendant’s domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice’.

4. Recital 13 in the preamble to the Regulation indicates that ‘in relation to ... employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for’.

5. In Section 1 of Chapter II (‘Jurisdiction’) of the Regulation, which is entitled ‘General Provisions’, Article 2(1) provides:

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

6. Article 5 of the Regulation, which comes within Section 2 of Chapter II, entitled ‘Special jurisdiction’, is worded as follows:

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

- (1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
- (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
 - in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,
 - in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,
- (c) if subparagraph (b) does not apply then subparagraph (a) applies;

...

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

...’

7. Section 5 of Chapter II of the Regulation is entitled ‘Jurisdiction over individual contracts of employment’. It includes Articles 18 and 20. Article 18(1) provides that ‘in matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5’ while Article 20(1) provides that ‘an employer may bring proceedings only in the courts of the Member State in which the employee is domiciled’.

B – *National law*

8. Article 2:9 of the Civil Code of the Netherlands (Burgerlijk Wetboek) lays down the obligation of a company director to perform his duties as a director properly.

9. When that person, as the managing director of the company, is also connected to the company by a contract of employment (which is possible under Netherlands law),³ his liability as an employee in respect of any deceit or recklessness in the performance of his contract of employment is governed by paragraph 1 of Article 7:661 of the Civil Code of the Netherlands (in conjunction with Article 6:74) in the following terms: ‘An employee who, in the course of performing his obligations under the contract, causes damage to the employer or to a third party whom the employer is required to indemnify, shall not be liable to the employer in respect thereof unless the damage is the result of his deceit or recklessness ...’

10. Furthermore, a director/managing director may incur liability for unlawful conduct under Article 6:162 of the Civil Code of the Netherlands.

II – **Main proceedings and questions referred for a preliminary ruling**

11. Holterman Ferho Exploitatie BV (‘Holterman Ferho’) is purely a holding company, whose registered office is in the Netherlands. It has three German subsidiaries, Ferho Bewehrungsstahl GmbH, Ferho Vechta GmbH and Ferho Frankfurt GmbH, all established in Germany.

12. In April 2001, the defendant in the main proceedings, Mr Freiherr Spies von Büllenheim (‘Mr Spies’), a German national resident in Germany, entered Holterman Ferho’s service as managing director under a contract, drafted in German, which the appeal court described as a ‘contract of employment’. He also had the role of a director (in the company law sense) of the company, which, as Mr Spies explained at the hearing, involved only managing the German subsidiaries of the company, of which he was also a director and authorised agent. Mr Spies indicated in paragraph 8 of his observations and confirmed at the hearing that Holterman Ferho had no other employees and that, in any case, he worked exclusively in Germany, which is not denied in Holterman Ferho’s observations. Furthermore, as Mr Spies confirmed when questioned by the Court during the hearing, in addition to being a director and the managing director of Holterman Ferho, he was also a shareholder in the company.⁴

13. On 31 December 2005 the relationship between Mr Spies and Ferho Frankfurt GmbH was brought to an end and on 31 December 2006 his relationship with the three other companies was brought to an end too. The four companies brought a declaratory action and an action for damages against Mr Spies in the Rechtbank (District Court), Almelo (Netherlands). The main argument put forward was that Mr Spies had performed his duties as director improperly, and for that reason was liable to all those companies under Article 2:9 of the Civil Code of the Netherlands. In addition, the four companies argued that, quite apart from his capacity as a director, Mr Spies acted deceitfully or recklessly in the performance of his contract of employment with Holterman Ferho and was therefore liable under

3 — The Commission points out in paragraph 15 of its observations that, in Dutch law, both managing directors and directors participate in the management of the company. However, while an individual who is simply a managing director may be removed by the board of directors, a director can only be removed by a general meeting of shareholders, so that, in principle, a director has greater freedom in the running of the company than someone who is only the managing director. A comprehensive account of the duties and liabilities of company directors under Dutch law can be found in De Beurs, S., ‘Directors’ Duties and Liability in the Netherlands’, which is part of the study which was prepared by LSE Enterprise for the European Commission, *Study on Directors’ Duties and Liability*, London, 2013, p. A609 et seq.

4 — He explained at the hearing that Holterman Ferho had only two shareholders, himself (a minority shareholder owning only 15% of the shares) and a majority shareholder who owned 85% of the shares and who also had a management role in Holterman Ferho, through another company.

Article 7:661 of the Civil Code of the Netherlands. In the alternative, Holterman Ferho and its three subsidiaries argued that, at all events, the serious irregularities committed by Mr Spies in the performance of his duties constituted unlawful conduct for the purposes of Article 6:162 of the Civil Code of the Netherlands.

14. The court of first instance held that, as Mr Spies had argued, it lacked international jurisdiction to hear the case. On appeal, the *Gerechtshof* (Regional Court of Appeal), Arnhem upheld the judgment of the *Rechtbank Almelo*. The *Gerechtshof* distinguished between:

- (1) The claims made by Holterman Ferho based on Mr Spies's failure to perform the obligations associated with his position as managing director and director of the company. In that regard, the *Gerechtshof* took the view that:
 - the parties being bound by a contract which the court considered to be a 'contract of employment', the special rules on jurisdiction set out in Article 18 et seq. of the Regulation applied in respect of the claims based on improper performance of the contract of employment and in relation to those based on tort, delict or quasi-delict too, because they were closely linked to the performance of the contract. The German courts therefore had jurisdiction, by virtue of Article 20(1) of the Regulation, Germany being the Member State in which the employee was domiciled;
 - in respect of the claims based in a general way on Mr Spies' failure to perform his duties as a director of the company correctly but unrelated, in the *Gerechtshof's* estimation, to any underlying contract, the applicable rule was the general one set out in Article 2 of the Regulation, which also confers jurisdiction on the German courts.
- (2) The claims made by the three German subsidiaries against Mr Spies based on contract and on tort or delict. In relation to these claims, the *Gerechtshof* held that in no circumstances did the jurisdictional rules in Article 5(1) and (3) of the Regulation confer jurisdiction on the courts of the Netherlands.

15. The four companies brought an appeal before the court making the reference against the judgment of the *Gerechtshof* only in respect of the claims made by Holterman Ferho against Mr Spies.

16. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) has stayed the proceedings and referred the following questions for a preliminary ruling:

- '(1) Must the provisions of Section 5 of Chapter II (Articles 18 to 21) of Regulation (EC) No 44/2001 be interpreted as precluding the application by the courts of Article 5(1)(a) or of Article 5(3) of that Regulation in a case such as that at issue here, where the defendant is sued by the company not only in his capacity as director of that company on the basis of the improper performance of his duties or on the basis of unlawful conduct, but quite apart from that capacity, is also held liable by that company on the basis of deceit or recklessness in the performance of the contract of employment entered into between him and the company?
- (2) (a) If the answer to Question 1 is in the negative, must the term "matters relating to a contract" in Article 5(1)(a) of Regulation (EC) No 44/2001 then be interpreted as also applying to a case such as that at issue here, where a company sues a person in his capacity as director of that company on the basis of the breach of his obligation to perform his duties properly under company law?
- (b) If the answer to Question 2(a) is in the affirmative, must the term "place of performance of the obligation in question" in Article 5(1)(a) of Regulation (EC) No 44/2001 then be interpreted as referring to the place where the director performed or should have

performed his duties under company law, which, as a rule, will be the place where the company concerned has its central administration or its principal place of business, as referred to in Article 60(1)(b) and (c) of that Regulation?

- (3) (a) If the answer to Question 1 is in the negative, must the term “matters relating to tort, delict or quasi-delict” in Article 5(3) of Regulation (EC) No 44/2001 then be interpreted as also applying to a case such as that at issue here, where a company sues a person in his capacity as director of that company on the basis of the improper performance of his duties under company law or on the basis of unlawful conduct?
- (b) If the answer to Question 3(a) is in the affirmative, must the term “place where the harmful event occurred or may occur” in Article 5(3) of Regulation (EC) No 44/2001 be interpreted as referring to the place where the director performed or should have performed his duties under company law, which, as a rule, will be the place where the company concerned has its central administration or its principal place of business, as referred to in Article 60(1)(b) and (c) of that Regulation?

17. Mr Spies, Holterman Ferho (on behalf of its subsidiaries also), the German Government and the European Commission have submitted written observations in these proceedings. Mr Spies and the Commission attended the hearing held on 20 January 2015, focusing their arguments on Question 1, as requested by the Court.

III – Analysis

A – *The first question*

18. By the first question referred for a preliminary ruling, the referring court is essentially asking whether, in a situation in which a person is sued by a company both in his capacity as a director of that company for improper performance of his duties under company law or for unlawful conduct and, simultaneously, in his capacity as managing director for deceit or recklessness in the performance of the contract of employment between him and the company under which he was appointed managing director, the criteria for determining jurisdiction laid down in Section 5 of Chapter II (‘Jurisdiction over individual contracts of employment’, Articles 18 to 21) of the Regulation are applicable.

1. Summary of the parties’ positions

19. Mr Spies takes the view that Articles 18 to 21 of the Regulation preclude the application of Article 5 in the circumstances of this case, even when the duties assigned to the managing director under the contract of employment are limited to duties relating to his capacity as a director for the purposes of company law: if the managing director is, as well as a director, an employee of the company, the special rules set out in Articles 18 to 21 of the Regulation must be applied.

20. The German Government, whose observations are focused exclusively on this question, proposes that the answer should be that the provisions of Articles 18 to 21 of the Regulation preclude the application by the courts of Article 5(1)(a) or of Article 5(3) of that Regulation in a case such as that at issue here. The German Government takes the view that the wording of the Regulation is sufficiently clear on this point and that the existence of a contract of employment — irrespective of whether there may also be a relationship based on company law — means that the criterion for the conferring of jurisdiction set out in Article 20(1) (the place where the employee being sued is domiciled) must be applied, which is moreover consistent with protecting the weaker contracting party, the objective pursued by the special rules on the conferring of jurisdiction.

21. The written observations of Holterman Ferho (also acting on behalf of its subsidiaries) simply repeat sections of the opinion delivered by the Netherlands Advocate General in the main proceedings. Holterman Ferho takes the view that, in respect of the actions relating to breach of obligations deriving from the contract of employment, the special rules on the conferring of jurisdiction set out in Articles 18 to 21 of the Regulation apply, but that in respect of the action relating to Mr Spies' failure to perform the duties of a director of Holterman Ferho, Article 5(1) must apply, meaning that the courts of the Netherlands will have jurisdiction in this respect because the company is established in the Netherlands (in its view, the place of establishment of the company is the place of performance of the obligation in question within the meaning of Article 5(1)(a) of the Regulation).

22. Lastly, the Commission is of the opinion that it must be established whether the 'contract' (within the meaning of the Regulation) by which the parties are bound is an 'individual contract of employment' for the purposes of the Regulation — in which case the rules on the conferring of jurisdiction laid down in Article 18 et seq. must apply — or whether it is a contract of another kind, which would mean that Article 5(1), in conjunction with the general rule contained in Article 2 of the Regulation, may be applied. To this end, the Commission lists various elements that must be present before it can be concluded that there is a contract of employment, including the relationship of subordination of the employee vis-à-vis the employer, which, in the Commission's view, is lacking in the relationship between the managing director of a company and the company.⁵

2. Assessment

23. The referring court states that on 7 May 2001 the parties entered into a 'contract of employment' by virtue of which Mr Spies assumed the status of managing director of Holterman Ferho. Given that the Regulation requires an independent interpretation of the concept of a 'contract of employment',⁶ the decisive factor in ascertaining the nature of the contract for the purposes of the Regulation is not how it is designated by the parties nor what classification it is given under national law. As the Court of Justice has held, the concepts referred to in Regulation No 44/2001 must be interpreted independently, by reference to the Regulation's scheme and purpose,⁷ in order to ensure that it is applied uniformly in all the Member States.⁸

5 — In this case, the parties do not dispute the fact that for a certain period of time, Mr Spies performed services (relating to the running of its German subsidiaries) for Holterman Ferho in return for which he received remuneration. What is disputed here is the relationship of subordination which would make Mr Spies subject to the 'direction' or instructions of Holterman Ferho. More specifically, the Commission claims that this element is lacking in this case (paragraph 35 of its written observations), whereas Mr Spies indicated at the hearing that the contract between himself and Holterman Ferho shows that there was indeed a relationship of subordination vis-à-vis the shareholders, under whose instructions he operated.

6 — See, inter alia, judgments in *Mahamdia*, C-154/11, EU:C:2012:491, paragraph 42; *Kainz*, C-45/13, EU:C:2014:7, paragraph 19; *Zuid-Chemie*, C-189/08, EU:C:2009:475, paragraph 17; and *Pinckney*, C-170/12, EU:C:2013:635, paragraph 23.

7 — For the nature of 'the Regulation's scheme and purpose', I would look primarily to Recitals 11 and 12 in the preamble: 'The rules of jurisdiction must be *highly predictable* and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor ... In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a *close link between the court and the action* or in order to *facilitate the sound administration of justice*' (emphasis added). The Court of Justice has also held that the objective of the Regulation is to unify the rules on jurisdiction of the Contracting States, so as to avoid as far as possible the multiplication of the bases of jurisdiction in relation to one and the same legal relationship and to reinforce the legal protection available to persons established in the European Union by, at the same time, allowing the plaintiff easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued (judgments in *Mulox IBC*, C-125/92, EU:C:1993:306, paragraph 11, and *Rutten*, C-383/95, EU:C:1997:7, paragraphs 12 and 13, which relate to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 97), as amended by the successive conventions relating to the accession of new Member States to that convention ('the Brussels Convention'). In so far as the Regulation now replaces, in relationships between Member States, the Brussels Convention, the interpretation provided by the Court in respect of the provisions of the Brussels Convention is also valid for those of the Regulation whenever the provisions of those instruments may be regarded as equivalent (judgments in *Brogssitter*, C-548/12, EU:C:2014:148, paragraph 19, and *ÖFAB*, C-147/12, EU:C:2013:490, paragraph 28)).

8 — See, in particular, judgments in *Brogssitter*, C-548/12, EU:C:2014:148, paragraph 18, and *ÖFAB*, C-147/12, EU:C:2013:490, paragraph 27.

24. To date, the Court of Justice has not had occasion to interpret the concept of a ‘contract of employment’ within the specific framework of the Regulation. It has merely stated in *Shenavai*,⁹ in connection with the application of Article 5(1) of the Brussels Convention, which also covers such contracts, that ‘contracts of employment, like other contracts for work not on a self-employed basis, differ from other contracts — even those for the provision of services — by virtue of certain particularities: they create a lasting bond which brings the worker to some extent within the organisational framework of the business of the undertaking or employer’.

25. This is the only contribution that the case-law of the Court of Justice makes to the definition of this concept for the purposes of the Regulation. Of course, there is plenty of case-law interpreting the concept of ‘worker’ in EU law, particularly in connection with what is now Article 45 TFEU,¹⁰ but also in connection with individual pieces of secondary legislation.¹¹ Nor is there any question but that this case-law can provide interpretations which may legitimately be applied in other spheres.¹² Nevertheless, it is still the case that the interpretation of a concept in the context of the fundamental freedoms in the FEU Treaty or of individual measures of secondary legislation pursuing very specific objectives will not necessarily be the same as the meaning of that concept in other areas of secondary legislation.¹³

26. Section 5 of the Regulation covers ‘jurisdiction over individual contracts of employment’ and Article 18 stipulates that ‘in matters relating to individual contracts of employment, jurisdiction shall be determined by this Section ...’. As we shall see, the German language version is a little more specific, providing that ‘if the subject-matter of the proceedings is an individual contract of employment or *claims deriving from an individual contract of employment*, jurisdiction shall be determined in accordance with this Section’.¹⁴ The decisive factor for the purposes of applying Section 5 of the Regulation is therefore, in my opinion, that the defendant is being sued in his capacity as a party to an ‘individual contract of employment’ within the meaning of the Regulation (and this is, in principle, irrespective of the fact that the defendant may also be connected to the claimant by a legal relationship of a different kind) and that, as is particularly clear from the German language version, the claim which is the subject-matter of the proceedings is derived from that contract.

27. My starting point in interpreting the term ‘individual contract of employment’ for the purposes of the Regulation is that it is in principle clear to me that, by a contract of employment, one person undertakes to another to perform a particular activity in return for remuneration. To this must, however, be added a further element allowing us to distinguish an ‘individual contract of employment’ under Article 18 et seq. of the Regulation from the other types of ‘provision of services’ to which

9 — 266/85, EU:C:1987:11, paragraph 16.

10 — For example, judgment in *Lawrie-Blum*, 66/85, EU:C:1986:284, paragraphs 16 and 17.

11 — See, in particular, the Court’s definition of the concept of ‘worker’ in the judgment in *Danosa*, C-232/09, EU:C:2010:674, paragraph 39 et seq., where the question was whether a member of the Board of Directors of a company was a ‘worker’ for the purposes of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (OJ 1992 L 348, p. 1), and could therefore benefit from the protection that the directive offered to persons having the status of ‘worker’. Of the many other cases, see for example judgments in *Union syndicale Solidaires Isère*, C-428/09, EU:C:2010:612, paragraph 28 (in relation to **Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time** (OJ 2003 L 299, p. 9)), and *Kiiski*, C-116/06, EU:C:2007:536, paragraph 25 (in relation to Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40)), and the case-law referred to therein.

12 — For an in-depth discussion on this point see Lüttringhaus, J.D., ‘Übergreifende Begrifflichkeiten im europäischen Zivilverfahrens- und Kollisionsrecht — Grund und Grenzen der rechtsaktübergreifenden Auslegung, dargestellt am Beispiel vertraglicher und außervertraglicher Schuldverhältnisse’, *Rebels Zeitschrift für ausländisches und internationales Privatrecht*, Vol. 77, 2013, p. 50.

13 — Judgments in *Martínez Sala*, C-85/96, EU:C:1998:217, paragraph 31 et seq.; *von Chamier-Glisczinski*, C-208/07, EU:C:2009:455, paragraph 68; and *van Delft and Others*, C-345/09, EU:C:2010:610, paragraph 88. See also the observations of Knöfel, O.L., ‘Kommendes Internationales Arbeitsrecht — Der Vorschlag der Kommission der Europäischen Gemeinschaft vom 15.12.2005 für eine “Rom I”-Verordnung’, *Recht der Arbeit* 2006, particularly at pp. 271 and 272, relating specifically to the concept of ‘worker’.

14 — ‘Bilden ein individueller Arbeitsvertrag oder Ansprüche aus einem individuellen Arbeitsvertrag den Gegenstand des Verfahrens, so bestimmt sich die Zuständigkeit ... nach diesem Abschnitt’ (emphasis added).

Article 5(1) applies. To that end, having regard to the scheme and purpose of the Regulation, sight should not be lost of the objective of protecting the weaker party in the relationship, which is the basis upon which the legislature created the specific criteria for the conferring of jurisdiction laid down in Article 18 et seq.

28. In my view, the differentiating factor distinguishing a contract of employment from the provision of services for the purposes of the Regulation is the fact that, in the case of a contract of employment, the person providing the service is, to a greater or lesser degree, under the power of management and instructions of the other party to the contractual relationship, which puts the former in a subordinate position vis-à-vis the latter. It is this subordinate position that makes it necessary, in principle, to provide particular protection for the weaker party, which is the reason for the special rule in Article 20(1) of the Regulation that when a defendant is an ‘employee’, he may be sued only in the courts of the Member State in which he is domiciled.¹⁵

29. In the particular context of the interpretation of the Rome Convention on the law applicable to contractual obligations,¹⁶ Advocate General Trstenjak shared this assessment in her Opinion in *Voogsgeerd*.¹⁷ The Jenard/Möller report on the 1988 Lugano Convention, a parallel convention to the Brussels Convention which was the predecessor of the Regulation, also specifically refers to a ‘relationship of subordination’, stating that ‘although there is as yet no independent concept of what constitutes a contract of employment [for the purposes of that Convention], it may be considered that it presupposes a relationship of subordination of the employee to the employer’.¹⁸

30. The fact that a contract of employment may assign to a person duties associated with the management of a company does not necessarily exclude the element of subordination, although this may, in certain circumstances, be reduced or weakened in the case of managerial staff. I am of the view that this element is present if the person who has managerial duties is under the instructions of the other contractual party or of any of its organs, even if the employee enjoys substantial freedom, may even have wide decision-making powers in the day-to-day performance of his duties and does not generally act under the direct supervision of the employer.¹⁹

31. Furthermore, in the specific case of a managing director who acts under the instructions of the shareholders of the company he manages, I do not think that the fact that the managing director has a shareholding in the company automatically means that the relationship cannot be considered a ‘contract of employment’ for the purposes of the Regulation. However, if that shareholding were so great that that person could have a decisive influence on the content of the instructions given to him

15 — I am also of the opinion that the ‘subordination’ criterion is sufficiently clear to satisfy the requirement, laid down in Recital 11 in the preamble to the Regulation and in the case-law referred to at point 23 of this Opinion, that jurisdictional rules must be predictable: by applying this criterion to establish whether a contract of employment exists, the plaintiff can easily identify the court before which he may bring an action and the defendant is able reasonably to foresee the court before which he may be sued.

16 — The old Rome Convention of 19 June 1980 and Regulation No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6), may be used as reference points when interpreting the Regulation because, as the Court of Justice has held, the interpretation of a concept within the context of one of these instruments of private international law must not disregard that relating to the criteria set out in the other where they lay down the rules for determining jurisdiction for the same matters and set out similar concepts (judgment in *Koelzsch*, C-29/10, EU:C:2011:151, paragraph 33).

17 — C-384/10, EU:C:2011:564, point 88: ‘the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration. It follows from this that the fact that the employee acts *under direction* is a characteristic feature of any employment relationship which, in essence, requires that the person concerned should work *under the direction or supervision of another person* who determines the services to be performed by him and/or his working hours and with whose instructions or rules the employee must comply’ (the emphasis is mine).

18 — OJ 1990 C 189, p. 73, paragraph 41.

19 — On this point see De Val Tena, Á., *El trabajo de alta dirección. Caracteres y régimen jurídico*, Civitas, Madrid, 2002, p. 111.

by the shareholders in his capacity as managing director of the company, then, in practice, he would be subject to his own instructions and his own operating criteria. In that case, I think that the shareholders' power to give him directions disappears, and with it the relationship of subordination.²⁰

32. The answer to the question whether or not there exists a 'contract of employment' within the meaning of the Regulation must be given, in every particular case, on the basis of all the factors and circumstances characterising the relationship between the parties,²¹ an assessment that it is in principle for the referring court to make. When doing so, it must examine, in this case, not only the factual circumstances but also, essentially, two legal documents: the articles of association of Holterman Ferho and the contract between that company and Mr Spies. On the basis of these two documents it will be able to establish whether or not, in the performance of his duties, Mr Spies was acting under the direction of another organ of the company not controlled by him, in short, whether there was ultimately a relationship of subordination. In order to do so, in addition to looking at whether the contract governs the matters usually found in an employment relationship (salary, holidays etc.),²² that court might consider, inter alia, from whom Mr Spies received instructions, what their scope was and to what extent he was bound to comply with them, who monitored his compliance with them and what the consequences were of any failure to do so and, in particular, whether he could be removed from his post for failing to comply with them. In this context, the national court will also have to decide the extent to which any relationship of subordination that may exist is affected by the fact that the managing director is also a shareholder of the company in question, as was the case here with Mr Spies, which will in essence depend on the ability of that individual as a shareholder to influence the decisions of the organ from which he received instructions.

33. As I have already mentioned, the determining factor for the application of Section 5 of the Regulation is not only that the defendant is being sued in his capacity as a party to an 'individual contract of employment'. The logical consequence of this is that the claim which is the subject-matter of the proceedings should derive from that very contract, a condition to which the Commission also drew attention at the hearing.

34. In order to determine whether the claim which is the subject-matter of the proceedings derives from the 'individual contract of employment' within the meaning of the Regulation, it seems to me appropriate to repeat here what was said by the Court of Justice in *Brogstetter*, in order to establish whether or not a civil liability claim falls under 'matters relating to a contract' within the meaning of Article 5(1) of the Regulation: such a claim will concern 'matters relating to a contract' within the meaning of Article 5(1)(a) of the Regulation or, in this case, will be a claim which derives from the 'individual contract of employment', only if the conduct complained of may be considered a failure to perform contractual obligations, which may be established by taking into account the purpose of the

20 — Of the same view in this respect are Weber, J., 'Die Geschäftsführerhaftung aus der Perspektive des Europäischen Zivilprozessrechts', *IPRax — Praxis des Internationalen Privat- und Verfahrensrechts*, 1/2013, p. 70; Bosse, R., *Probleme des europäischen Internationalen Arbeitsprozessrechts*, Peter Lang, Frankfurt, 2007, p. 67 et seq.; and Mankowski, P., 'Organpersonen und Internationales Arbeitsrecht', *RIW-Recht der internationalen Wirtschaft*, 3/2004, p. 170. It should be noted that the Court of Justice has already ruled, in a case in which it was necessary to determine whether an individual had the status of a 'worker' or a 'service provider' for the purposes of primary law, that the director of a company of which he is the sole shareholder does not carry out his activity in the context of a relationship of subordination, and so is not to be treated as a 'worker' within the meaning of primary law (judgment in *Asscher*, C-107/94, EU:C:1996:251, paragraph 26, and Opinion of Advocate General Léger in the same case, EU:C:1996:52, point 29).

21 — Judgment in *Danosa*, C-232/09, EU:C:2010:674, paragraph 46.

22 — See, in this respect, **Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship** (OJ 1991 L 288, p. 32), which obliges employers to notify employees of the essential aspects of the contract or employment relationship.

contract (in this case, of the contract of employment in question). That will, *a priori*, be the case if the interpretation of the contract linking the defendant to the applicant is indispensable in order for it to be established whether the conduct imputed to the former by the latter is lawful or not,²³ which it is a matter for the national court to determine.

35. I am, in short, of the view that the mere fact that there exists a contract of employment between the parties is not sufficient to justify application of the special rules on the conferring of international jurisdiction laid down in Section 5 of the Regulation when the claim brought does not derive from the ‘contract of employment’ in the terms just outlined.

36. It is for the referring court to determine whether, in the present case, having regard to the considerations set out in the foregoing points, the defendant is being sued as a party to an ‘individual contract of employment’ within the meaning of the Regulation. To that end, it will have to take into consideration that the fact that an individual is given managerial duties within a company does not necessarily exclude the subordination that is characteristic of the employment relationship, nor does the fact that the managing director is a shareholder in the company that he manages necessarily prevent the relationship between them being categorised as a ‘contract of employment’ for the purposes of the Regulation. Similarly, it is for the referring court to determine whether the claim brought derives from the ‘individual contract of employment’, in other words, whether the conduct complained of may be considered failure to perform contractual obligations, which may be established by taking into account the purpose of the contract of employment in question. If both elements are satisfied, the special rules on the conferring of jurisdiction contained in Section 5 of the Regulation will apply, irrespective of any relationship of a different kind that may exist between the parties (deriving, for example, from the fact that, from a company law point of view, the defendant is also a director of the company).

3. Provisional conclusion

37. In the light of the foregoing considerations, I propose that the Court of Justice answer the first question referred for a preliminary ruling to the effect that the provisions of Section 5 of Chapter II (Articles 18 to 21) of the Regulation apply

- if the defendant is being sued as a party to an ‘individual contract of employment’ within the meaning of the Regulation, that is to say, an agreement whereby one person undertakes to another, under whose power of management and instructions he is to act, to perform a particular activity in return for remuneration; and
- if the claim brought derives from the ‘individual contract of employment’, in other words, if the conduct complained of may be considered failure to perform contractual obligations, which may be established by taking into account the purpose of the contract of employment in question,

and it is for the referring court to reach a decision on both those points.

23 — Judgment in *Brogstetter*, C-548/12, EU:C:2014:148, paragraphs 23 to 25. On this point, see also the comments of Weber, who argues that the forum specified in Article 20(1) of the Regulation will oust the other rules on the conferring of jurisdiction only if the obligation at issue is dependent on the contract of employment itself. Thus, if the obligation is directly dependent on the relationship between the applicant and the defendant under company law and the contract of employment is not an essential condition for ascertaining its content, then the obligation in itself cannot be regarded as ‘employment-related’ even where the contract of employment reiterates the obligations created under company law (Weber, J., ‘Die Geschäftsführerhaftung aus der Perspektive des Europäischen Zivilprozessrechts’, *IPRax — Praxis des Internationalen Privat- und Verfahrensrechts*, 1/2013, pp. 70 and 71).

B – *The second question*

38. The answer I have proposed above makes it unnecessary to answer the second and third questions. Nevertheless, in case the Court of Justice were to conclude that, in a case such as this, the provisions of Section 5 of Chapter II (Articles 18 to 21) of the Regulation do not apply, I shall now consider the second question referred for a preliminary ruling.

39. By its second and third questions, the Hoge Raad der Nederlanden seeks to ascertain whether the terms ‘matters relating to a contract’ and ‘matters relating to tort, delict or quasi-delict’ used in Article 5(1)(a) and (3) respectively must be interpreted as applying also to a case in which a company sues a person in his capacity as director of that company for breach of his obligation to perform his duties under company law properly or for unlawful conduct. If so, it goes on to ask whether, by the ‘place of performance of the obligation in question’ in Article 5(1)(a) of the Regulation or the ‘place where the harmful event occurred or may occur’ in Article 5(3), reference is made to the place where the director performed or should have performed the duties imposed on him under the articles of association of the company and/or under company law.

1. Summary of the parties’ positions

40. Mr Spies takes the view that only Article 5(1) of the Regulation (‘matters relating to a contract’) is applicable, given that the parties have freely assumed obligations towards one other, which in his opinion means that the matters in question cannot be said to relate to ‘tort, delict or quasi-delict’. In those circumstances, in order to determine the place of performance of the obligation in question for the purposes of Article 5(1)(a) of the Regulation, he looks to the place where the alleged breaches took place, namely, Germany, since those breaches relate to the management of the German subsidiaries of Holterman Ferho. Mr Spies further states that he performed no managerial duties in the Netherlands.

41. The Commission states that the relationship between a company director and the company is contractual, within the meaning of the case-law of the Court of Justice, given that both parties have freely assumed obligations. Regarding the application of the rule in Article 5(1) of the Regulation, the Commission takes the view that, first of all, it must be established whether in this case it is really subparagraph (a) that is applicable, as the referring court seems to think, or whether it is subparagraph (b), which is the view to which the Commission tends as it considers the contract at issue to be a contract for the provision of services. In its opinion, the place in a Member State where, under the contract, the services were provided is the place from which the company was administered, which the Commission identifies as the place where it has its central administration within the meaning of Article 60(1)(b) of the Regulation.

2. Assessment

a) Nature of the obligation for the purposes of the Regulation

42. As I observed at point 23 of this Opinion, the terms ‘matters relating to a contract’ and ‘matters relating to tort, delict or quasi-delict’ within the meaning of Article 5(1) and (3) of the Regulation, respectively, must be interpreted independently, by reference to the scheme and purpose of the Regulation, in order to ensure that the latter is applied uniformly in all the Member States. Thus, the classification under the relevant national law of the legal relationship on which the court with jurisdiction must rule plays no role.

43. Furthermore, as I have already mentioned, in so far as the Regulation now replaces, in relationships between Member States, the Brussels Convention, the interpretation provided by the Court in respect of the provisions of the Brussels Convention is equally valid for those of the Regulation whenever the provisions of those instruments may be regarded as equivalent. This is the case for Article 5(1)(a) and (3) of the Regulation in relation to Article 5(1) and (3), respectively, of the Brussels Convention.²⁴

44. It may be inferred from settled case-law that ‘matters relating to tort, delict and quasi-delict’ within the meaning of Article 5(3) of the Regulation cover all actions which seek to establish the liability of a defendant and which are not related to a ‘contract’ within the meaning of Article 5(1) of the Regulation,²⁵ so that if a matter is classified as ‘relating to a contract’ it cannot be classified as ‘relating to tort, delict and quasi-delict’ when the liability claims derive from a ‘contract’ within the meaning of the Regulation.²⁶

45. It is therefore necessary to check, in the first place, whether, in this case, regardless of the classification under national law, there is a ‘contract’ within the meaning of the Regulation. It has been consistently held by the Court of Justice in relation to Article 5(1) of the Brussels Convention that the expression ‘matters relating to a contract’ presupposes the existence of an obligation freely assumed by one party towards another.²⁷

46. In my view, Mr Spies and Holterman Ferho did indeed freely assume mutual obligations (Mr Spies undertook to manage and administer the company, while the company undertook to remunerate him for those services), which permits the inference that their relationship — not only that deriving from the contract under which he took on the role of managing director but also that deriving from company law under which he became a director — is contractual in nature for the purposes of the Regulation.²⁸

47. However, as the Court of Justice held in *Brogsitter*, the mere fact that one of the parties to the main proceedings brings a civil liability claim against the other is not sufficient to consider that the claim concerns ‘matters relating to a contract’ as referred to in Article 5(1) of the Regulation. That will be the case only if the conduct complained of may be considered failure to perform contractual obligations, which may be established by taking into account the purpose of the contract. That will, *a priori*, be the case if the interpretation of the ‘contract’ (within the meaning of the Regulation) linking the defendant to the applicants is indispensable in order for it to be determined whether the conduct complained of is lawful or unlawful.²⁹

24 — On this point, see judgment in *ÖFAB*, C-147/12, EU:C:2013:490, paragraph 29.

25 — On this point, see, in particular, judgments in *Kalfelis Schröder*, 189/87, EU:C:1988:459, paragraph 17; *Reichert y Kockler*, C-261/90, EU:C:1992:149, paragraph 16; *Réunion Européenne and Others*, C-51/97, EU:C:1998:509, paragraph 22; *Henkel*, C-167/00, EU:C:2002:555, paragraph 36; *Egler*, C-27/02, EU:C:2005:33, paragraph 29; and *Brogsitter*, C-548/12, EU:C:2014:148, paragraph 20.

26 — Judgment in *Brogsitter*, C-548/12, EU:C:2014:148, paragraph 21 et seq. See Haubold, J., ‘Internationale Zuständigkeit für gesellschaftsrechtliche und konzerngesellschaftsrechtliche Haftungsansprüche nach EuGVÜ und LugÜ’, *IPRax — Praxis des Internationalen Privat- und Verfahrensrechts*, 5/2000, p. 378; Geimer, R., and Schütze, R., ‘Verordnung (EG) 44/2001 — Art. 5’, *Europäisches Zivilverfahrensrecht*, 3rd edition, C.H. Beck, Munich, 2010, paragraph 220, and Wendenburg, A., ‘Vertraglicher Gerichtsstand bei Ansprüchen aus Delikt?’, *Neue Juristische Wochenschrift*, 2014, p. 1633 et seq.

27 — See, inter alia, judgments in *Handte*, C-26/91, EU:C:1992:268, paragraph 10; *Réunion Européenne and Others*, C-51/97, EU:C:1998:509, paragraph 15; and *Tacconi*, C-334/00, EU:C:2002:499, paragraph 23.

28 — The Commission also takes this approach in its observations (paragraph 25 et seq.), stating that ‘the fact that many of the rights and, even more importantly, the obligations of the director are not dependent only on the written agreement with the company but also on ordinary company law makes no difference [to the fact that the relationship between Mr Spies and Holterman Ferho is contractual for the purposes of the Regulation]. By accepting the duties of a director, the individual in question is accepting the duties as described in ordinary company law and in the specific rules governing the company in question, including its articles of association. If the director also enters into a contract with the company — sometimes called a ‘management contract’ and in this case called a ‘contract of employment’ — then there are additional terms, such as those relating to the remuneration due during the period when the duties are performed and the compensation payable when they come to an end’.

29 — Judgment in *Brogsitter*, C-548/12, EU:C:2014:148, paragraphs 23 to 25.

48. It is for the referring court to determine whether the actions brought by the applicant in the main proceedings constitute a claim for liability that might reasonably be considered to be based on a failure to respect the rights and obligations under the ‘contract’ (for the purposes of the Regulation) between the parties to the main proceedings, with the result that it is indispensable to consider that ‘contract’ in order for the case to be resolved. If that is so, such actions will concern ‘matters relating to a contract’ within the meaning of Article 5(1) of the Regulation.³⁰ Otherwise, they will have to be regarded as falling under ‘matters relating to tort, delict and quasi-delict’ within the meaning of Article 5(3) of the Regulation. The agreements requiring interpretation for these purposes will be those binding Holterman Ferho and Mr Spies, which will not necessarily be entirely in writing, as well as the rules of company law which determine the nature of the duties freely assumed by Mr Spies.

b) Place of performance of the obligation under Article 5(1) of the Regulation

49. If Article 5(1) of the Regulation should be applicable, the next step is to determine, on the basis of where it has its seat, the court having jurisdiction to hear and determine the case. Although the referring court’s second question mentions only Article 5(1)(a) of the Regulation, it must necessarily be asked, as the Commission points out in its observations, whether the applicable provision is not rather Article 5(1)(b), in particular the second indent, which specifically covers contracts for the provision of services.³¹ In such cases, a person domiciled in a Member State may be sued in the place in another Member State where, under the contract, the services were provided or should have been provided.

50. As to whether the activities carried out by Mr Spies in the service of Holterman Ferho can be classified as a ‘provision of services’ for the purposes of the second indent of Article 5(1)(b) of the Regulation, the term ‘services’ used (but not defined) in the Regulation must be interpreted independently, without reference to the meanings attributed to it under the national laws of the Member States, in order to ensure that it is applied uniformly in all of them.

51. Although the Court of Justice has previously indicated that no element in the broad logic and scheme of Article 5(1) of Regulation No 44/2001 requires the term ‘provision of services’ appearing in the second indent of Article 5(1)(b) of that Regulation to be interpreted in the light of the Court’s approach to the freedom to provide services within the meaning of Article 56 TFEU,³² some features of the ‘provision of services’ in primary law are applicable to the ‘provision of services’ under the second indent of Article 5(1)(b), specifically, the actual activity carried out by the defendant and the remuneration received by him for doing so.³³

52. However, as Advocate General Trstenjak pointed out in her Opinion in *Falco Privatstiftung and Rabitsch*,³⁴ the abstract definition of the concept in question permits us only to determine its outer limits. In every dispute it will be necessary to decide, case by case, whether or not a specific activity falls within the concept of ‘services’.

53. In this case I am inclined to agree with the Commission that the activities of a company director can be classified as ‘the provision of services’ for the purposes of the second indent of Article 5(1)(b) of the Regulation. That would exclude the application in that case of the jurisdictional rule in Article 5(1)(a).

30 — This does not signify that the court which eventually has jurisdiction to hear the case will have to apply contract law in order to give judgment on the substance of the dispute, because it may be that, under the national law applicable to the case, the claim is not of a contractual nature, but that is not relevant for the purposes of providing the referring court with an answer in respect of the Regulation.

31 — On this point, see judgment in *Corman Collins*, C-9/12, EU:C:2013:860, paragraph 42.

32 — Judgment in *Falco Privatstiftung and Rabitsch*, C-533/07, EU:C:2009:257, paragraph 33 et seq. See also the Opinion of Advocate General Trstenjak in this case, EU:C:2009:34, particularly point 63.

33 — Judgment in *Falco Privatstiftung and Rabitsch*, C-533/07, EU:C:2009:257, paragraph 29. See also judgment in *Corman Collins*, C-9/12, EU:C:2013:860, paragraph 37.

34 — C-533/07, EU:C:2009:34, point 57.

54. Under Article 5(1)(b), jurisdiction to hear actions based on contracts for the provision of services is conferred on the courts of the place in a Member State where, under the contract, the services were provided or should have been provided.

55. The Commission,³⁵ which, taking as its starting point the manner in which the referring court phrases the question, links its response to Article 60 of the Regulation, is of the opinion that the services of a managing director are provided in the place where he manages the company, which the Commission takes to be the place where the company has its central administration, which is an expression referring to the place from which the company is administered and managed and is not necessarily the same as that of its 'statutory seat' (Article 60(1)(a) of the Regulation), which will be specified in its articles of association or contract of incorporation, or that of its 'principal place of business' (Article 60(1)(c) of the Regulation).

56. I agree, however, with the point made by Mr Spies in paragraph 38 of his observations that the answer to the question raised by the referring court will not necessarily be provided by an interpretation of Article 60 of the Regulation.³⁶ On the contrary, I think that it is necessary to look to the criteria that the Court of Justice has formulated in its case-law on the interpretation of the second indent of Article 5(1)(b) of the Regulation in cases in which there are several places where the services are provided.³⁷

57. In this regard, the referring court will first of all have to investigate whether the 'contract' (within the meaning of the Regulation) between Holterman Ferho and Mr Spies³⁸ gives any indication of the place of the main provision of services (the administration of the holding company Holterman Ferho).³⁹ Failing that, it will be necessary to determine the place where he has in fact for the most part carried out his activities in the performance of the contract,⁴⁰ (provided that the provision of services in that place is not contrary to the parties' intentions as they appear from the agreement between them). For that purpose, it is permissible to take into consideration, in particular, the time spent in those places and the importance of the activities carried out there, it being for the national court to determine whether it has jurisdiction in the light of the evidence submitted to it.⁴¹

35 — At paragraph 42 of its observations.

36 — Article 60(1) of the Regulation specifies where a company or other legal person or association of natural or legal persons is domiciled (namely, the place where it has its statutory seat, central administration or principal place of business). I think that the place referred to in Article 5(1) of the Regulation should be determined independently of Article 60, notwithstanding the fact that it may ultimately be one of the places specified in that article.

37 — See judgments in *Car Trim*, C-381/08, EU:C:2010:90, paragraph 54 et seq. (in relation to the first indent of the provision in question) and *Wood Floor Solutions Andreas Domberger*, C-19/09, EU:C:2010:137, paragraph 38 et seq., as well as the analysis of Francq, S. et al., 'L'actualité de l'article 5.1 du Règlement Bruxelles I: Évaluation des premiers arrêts interprétatifs portant sur la disposition relative à la compétence judiciaire internationale en matière contractuelle', *Cahiers du CeDIE Working Papers*, No 2011/02, p. 17 et seq.

38 — Once again, the agreements requiring interpretation by the national court for these purposes are those that bind Holterman Ferho and Mr Spies, which will not necessarily be entirely in writing, as well as the rules of company law which determine the nature of the duties freely assumed by Mr Spies.

39 — Mr Spies asserts at paragraph 37 of his observations that the obligation in question was performed in Germany and that the parties had not agreed that it was to be performed anywhere else. Mr Spies maintains that all the breaches of which he is specifically accused and on which the claim is based related to the management of the German subsidiaries of Holterman Ferho, although it is apparent from paragraph 2.9 of the observations of Holterman Ferho that the parties to the main proceedings do not agree on this point, as Holterman Ferho takes the view that Mr Spies' failure properly to perform his duties also related to the management of the Dutch holding company.

40 — In the judgment in *Wood Floor Solutions Andreas Domberger*, C-19/09, EU:C:2010:137, paragraph 33, the Court held that, for the purposes of the application of the rule in the second indent of Article 5(1)(b) of the Regulation, the place with the closest linking factor, will, as a general rule, be at the place of the main provision of services.

41 — Judgment in *Wood Floor Solutions Andreas Domberger*, C-19/09, EU:C:2010:137, paragraph 40.

3. Provisional conclusion

58. In the light of the foregoing considerations, I am of the view that, in the alternative, the term ‘matters relating to a contract’ in Article 5(1) of the Regulation applies also to a case in which a company sues a person in his capacity as director of that company for breach of his obligation to perform his duties under company law properly. It is for the referring court to determine the place where, under the contract, the services were provided or should have been provided for the purposes of Article 5(1)(b) of the Regulation, which will be the place of the main provision of services as specified in the ‘contract’ (within the meaning of the Regulation), or, failing that, the place where the company director has in fact for the most part carried out his administration activities, provided that the provision of services in that place is not contrary to the parties’ intentions as they appear from the agreement between them.

C – The third question

59. Having established the foregoing, I shall now, for the sake of completeness, give a brief answer to the third question referred for a preliminary ruling.

1. Summary of the parties’ observations

60. Concerning the third question referred, Mr Spies, whose position is that Article 5(3) of the Regulation is not applicable to the present case, does not consider it necessary to have recourse to Article 60 of the Regulation, as the referring court seems to indicate, in order to answer it, if, indeed, the Court ultimately does so: the result of applying the rules on the place where the harm occurred which have been developed by the Court in connection with Article 5(3) of the Regulation would also be that jurisdiction would fall to the German courts.

61. Holterman Ferho takes the view that Article 5(3) of the Regulation (‘matters relating to tort, delict or quasi-delict’) is not applicable in this case.

62. The Commission does not rule out the possibility of an action claiming non-contractual liability in so far as this is available under national law. In that case, pursuant to the case-law of the Court of Justice, the applicant in the main proceedings may elect to bring the action in the place where the harm occurred or in the place where the event giving rise to it occurred which, the Commission submits, is in both cases the same as the place where Holterman Ferho has its central administration.

2. Assessment

63. In the further alternative, if the referring court, having examined the claim for liability in the terms set out in points 47 and 48 of this Opinion, should consider that it falls under ‘matters relating to tort, delict or quasi-delict’, within the meaning of Article 5(3) of the Regulation, then, according to that provision, ‘the courts for the place where the harmful event occurred or may occur’ will have jurisdiction. The Court of Justice has already held that this ‘is intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the applicant, in the courts for either of those places’.⁴²

64. It is, in short, for the referring court to identify, in the light of the facts of this case, the place of the event giving rise to the damage and the place where the damage occurred.

42 — Judgments in *Coty Germany*, C-360/12, EU:C:2014:1318, paragraph 46, and *Hejduk*, C-441/13, EU:C:2015:28, paragraph 18.

65. As far as the place of the event giving rise to the damage is concerned, it is to be assumed that this is the place where Mr Spies habitually carried out his duties as director of the Holterman Ferho holding company (which, Mr Spies has told the Court of Justice, was Germany, and this has not been denied by Holterman Ferho).

66. As far as the place where the damage occurred is concerned, in circumstances such as those in the main proceedings, the courts of the Netherlands will have jurisdiction as long as the event that took place in Germany gave rise to or may give rise to damage in the Netherlands. In this regard, it is for the court seised of the case to assess, in the light of the evidence at its disposal, the extent to which the unlawful act committed by Mr Spies in the performance of his duties as a director of Holterman Ferho was capable of giving rise to damage in that Member State. In doing so, it will have to have regard to the fact that, as the Court has held, the term ‘place where the harmful event occurred’ is not to be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere. In particular, this concept cannot be construed as including the place where the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Member State.⁴³ As the Court of Justice has indicated in *Kronhofer*,⁴⁴ such an interpretation, which would make the determination of the court having jurisdiction depend on the place where the victim’s ‘assets are concentrated’, would be liable in most cases to give jurisdiction to the courts of the place in which the claimant was domiciled. The Regulation⁴⁵ does not favour that solution except in the cases where it expressly so provides.

IV – Conclusion

67. In the light of the above, I propose that the Court reply to the Hoge Raad der Nederlanden as follows:

- (1) The provisions of Section 5 of Chapter II (Articles 18 to 21) 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 apply
 - if the defendant is being sued as a party to an ‘individual contract of employment’ within the meaning of Regulation No 44/2001, that is to say, an agreement whereby one person gives an undertaking to another, under whose power of management and instructions he is to act, to perform a particular activity in return for remuneration; and
 - if the claim brought derives from the ‘individual contract of employment’, in other words, if the conduct complained of may be considered failure to perform contractual obligations, which may be established by taking into account the purpose of the contract of employment in question,

and it is for the referring court to reach a decision on both those points.

In the alternative, and supposing the provisions of Section 5 of Chapter II (Articles 18 to 21) of Regulation No 44/2001 were to be held to be inapplicable:

- (2) The term ‘matters relating to a contract’ in Article 5(1) of Regulation No 44/2001 applies also to a case in which a company sues a person in his capacity as director of that company for breach of his obligation to perform his duties under company law properly. It is for the referring court

43 — Judgment in *Marinari*, C-364/93, EU:C:1995:289, paragraphs 14 and 15.

44 — C-168/02, EU:C:2004:364, paragraph 20.

45 — Or, in that case, the Brussels Convention.

to determine the place where, under the contract, the services were provided or should have been provided for the purposes of Article 5(1)(b) of the Regulation, which will be the place of the main provision of services as specified in the ‘contract’ (within the meaning of the Regulation), or, failing that, the place where the company director has in fact for the most part carried out his administration activities, provided that the provision of services in that place is not contrary to the parties’ intentions as they appear from the agreement between them.

- (3) Once again in the alternative, if the claim for liability is held to fall under ‘matters relating to tort, delict or quasi-delict’, within the meaning of Article 5(3) of Regulation No 44/2001, it is for the referring court to identify, in the light of the facts of the case, the place of the event giving rise to the damage and the place where the damage occurred.