OPINION OF ADVOCATE GENERAL TRSTENJAK delivered on 12 January 2010[1]

Table of contents

1 — Original language: Slovene.

I — Introduction

1. Following the judgments in *Color Drack*,[2] *Falco Privatstiftung and Rabitsch* ('*Falco*')[3] and *Rehder*,[4] the present case gives the Court another opportunity to interpret the special rules on jurisdiction in cases relating to a contract. In this case, the question arises how the second indent of Article 5(1)(b) 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[5] ('Regulation No 44/2001') is to be interpreted where services are provided in several Member States. If that is the case, it must be borne in mind that such services

2 — Case C-386/05 [2007] ECR I-3699.

3 — Case C-533/07 [2009] ECR I-3327.

4 — Case C-204/08 [2009] ECR I-6073.

5 — OJ 2001 L 12, p. 1.

can also be provided using the internet and modern means of communication such as e-mail.

2. In the present case, the referring court essentially seeks to ascertain whether jurisdiction in the case of a commercial agency contract between contracting parties from different Member States, under which commercial agency services were provided in several Member States, is to be determined by reference to the second indent of Article 5(1)(b) of Regulation No 44/2001 and what criteria are relevant in determining jurisdiction. The questions arise in a dispute between a commercial agent, Wood Floor Solutions Andreas Domberger GmbH ('the applicant'), having its registered office in Austria, and a principal, Silva Trade SA ('the defendant'), having its registered office in Luxembourg.

II — Legislative framework

A — *Community law*

1. Primary law

3. Article 68(1) EC, which comes under Title IV of the EC Treaty ('Visas, asylum, immigration and other policies related to free movement of persons') provides:

'Article 234 shall apply to this Title under the following circumstances and conditions: where a question on the interpretation of this Title or on the validity or interpretation of acts of the institutions of the Community based on this Title is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.'

2. Regulation No 44/2001

4. Recital 11 in the preamble to Regulation No 44/2001 states:

'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. …'

5. Chapter II ('Jurisdiction') of Regulation No 44/2001 contains rules of jurisdiction.

6. Article 2(1) of Regulation No 44/2001, which is in the chapter on jurisdiction under Section 1 ('General provisions'), provides:

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

7. In the same section of Regulation No 44/2001, Article 3(1) 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.'

8. Article 5, which is part of Section 2 ('Special jurisdiction') of the chapter on 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;

…'

B — *National law*

9. Paragraph 528(2)(2) of the Austrian Zivilprozessordnung (Code of Civil Procedure) provides:

'An appeal on a point of law shall in any case be inadmissible, however,

…

2. if the contested order at first instance has been upheld in its entirety, unless the action was dismissed on procedural grounds without a decision on the merits,

…'

10. Paragraph 23 of the Austrian Handelsvertretergesetz (Law on commercial agents) states:

'1. … If one party terminates the contractual relationship prematurely without a just cause, the other party may demand performance of the contract or compensation for the damage caused to him. …

…'

11. Paragraph 24(1) of the Austrian Handelsvertretergesetz provides:

'After termination of the contractual relationship, the commercial agent shall be entitled to make an appropriate compensatory claim if and to the extent that

1. he has brought the principal new customers or has significantly expanded business connections,

2. it is to be expected that the principal or his legal successor will be able to derive considerable advantage from those business connections even after termination of the contractual relationship, and

3. payment of compensation is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with the customers in question.

…'

III — Facts, main proceedings and questions referred for a preliminary ruling

12. The applicant in the main proceedings, Wood Floor, has its registered office in Amstetten (Austria), whilst the defendant, Silva Trade, has its registered office in Wasserbillig (Luxembourg). According to the order for reference, Wood Floor's manager, Andreas Domberger, initially operated in a personal capacity as the commercial agent of Silva Trade, but subsequently acted as a commercial agent through Wood Floor. The commercial agency contract in the present case was concluded orally. [6]

13. The applicant operated as a commercial agency in Austria, Italy, the Baltic States, Poland [7] and Switzerland. According to the referring court, it had contacted customers mainly by telephone or by e-mail from its registered office, but sometimes travelled personally to the customers' registered office or domicile. In all, 70% of agency business was

6 — The fact that the commercial agency contract was concluded orally is not evident from the order for reference, but from the statements made by the applicant in the main proceedings at the hearing. See point 32 of this Opinion.

7 — The fact that the commercial agent also operated in Poland is not evident from the order for reference, but from the statements made by the defendant in the main proceedings. See point 30 of this Opinion.

carried out at the applicant's registered office in Austria and 30% abroad.

14. By letter of 2 April 2007, the defendant, Silva Trade, unilaterally terminated the commercial agency contract. Because, in the view of the applicant (commercial agent), the contract had been terminated prematurely in an unlawful manner, on 21 August 2007 the applicant brought an action before the court of first instance (Landesgericht (Regional Court) Sankt Pölten) in Austria pursuant to Paragraph 23 of the Austrian Handelsvertretergesetz in respect of damages amounting to EUR 27 864,65 which it had incurred as a result of the premature termination of the contract. In addition, in the action it claimed to be owed compensation, pursuant to Paragraph 24 of the Austrian Handelsvertretergesetz, in the sum of EUR 83 593,95. In support of the jurisdiction of the Austrian court, the applicant relied on Article 5(1)(b) of Regulation No 44/2001, for it carried out its commercial agency business at its registered office in Austria. In its defence, the defendant objected on the basis of the lack of local jurisdiction and international jurisdiction on the ground that the applicant had generated only 24,9% of its turnover through business in Austria, whereas the remainder of the turnover was generated abroad.

15. By order of 10 October 2008, the court of first instance held that it had local and international jurisdiction. In the grounds of the order, it stated that the concept of 'services' for the purposes of Article 5(1) of Regulation No 44/2001 must be interpreted broadly and covered a commercial agent's business. It justified its jurisdiction on the ground that the centre of the applicant's business was in Amstetten (Austria).

16. The defendant brought an appeal against that decision on jurisdiction before the referring court (Oberlandesgericht Wien (Higher Regional Court, Vienna)) on the ground that, if the places of performance of the contractual obligations are in several Member States, the applicant may bring proceedings in just one Member State with regard to all the contractual obligations only if the court's jurisdiction is determined under Article 2 of Regulation No 44/2001, that is to say, by reference to the defendant's domicile. If the action is not brought before the court of the defendant's domicile, in the event that there are several different places of performance of the contractual obligations in several Member States, the courts in each of those Member States have jurisdiction only for those obligations which are performed in that Member State.

17. In connection with the entitlement to refer a question for a preliminary ruling by

virtue of Article 68(1) EC in conjunction with Article 234 EC, the referring court states that it proposes to confirm the decision of the court of first instance and that there is no judicial remedy against that decision. It must therefore be possible to regard the referring court as a court or a tribunal within the meaning of Article 68(1) EC in conjunction with Article 234 EC against whose decisions there is no judicial remedy under national law.

18. The referring court therefore considers that it has jurisdiction in the present case, on the ground that Article 5(1)(b) of Regulation No 44/2001 is to be given an autonomous interpretation and the place where the services were actually provided is relevant. In this regard, it relies on *Color Drack*,[8] in which the Court interpreted the first indent of Article 5(1)(b) of Regulation No 44/2001 in a case in which goods were supplied in various places in a Member State. In *Color Drack* the Court stated that that article must be interpreted in the light of the origins, objectives and scheme of the regulation[9] and that where there are several places of delivery within a single Member State one court must have jurisdiction to hear all the claims arising out of the contract.[10] In addition, the Court ruled in that judgment that the first indent of Article 5(1)(b) of Regulation No 44/2001 must be regarded as applying whether there is one place of delivery or several[11] and that where there are several places of delivery of the goods, 'place of performance' must be understood as the place with the closest linking factor between the contract and the court having jurisdiction which will, as a general rule, be at the principal place of delivery.[12] If it is not possible to determine the principal place of delivery, the plaintiff may bring proceedings in the court for the place of delivery of its choice on the basis of the first indent of Article 5(1)(b) of Regulation No 44/2001.[13]

19. In the view of the referring court, the principles established by the Court in *Color Drack* may also be applied to contracts for the provision of services under which services are provided in several Member States. In that case, jurisdiction is to be determined on the basis of the closest linking factor to the place where the person providing services has his centre of activity. In the view of the referring

8 — Cited in footnote 2.
9 — Ibid., paragraph 18.
10 — Ibid., paragraph 38.
11 — Ibid., paragraph 28.
12 — Ibid., paragraph 40.
13 — Ibid., paragraph 42.

court, the applicant provided the commercial agency services primarily from its registered office in Austria, which is to be regarded as the centre of its activity, and for that reason the Austrian courts have jurisdiction in the present case.

20. Furthermore, the referring court does not consider that the principles laid down in the judgment in *Besix* [14] can be transposed to the present case. The judgment in *Besix* related to an undertaking not to do something which was not subject to any geographical limit, whilst in the present case the places where the services were provided were geographically limited.

21. In those circumstances, by order of 23 December 2008, the national court stayed the proceedings and referred the following questions to the Court for a preliminary ruling pursuant to Article 68 EC in conjunction with Article 234 EC: [15]

'1. (a) Is the second indent of Article 5(1)(b) 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 ("Regulation No 44/2001") applicable in the case of a contract for the provision of services also where the services are, by agreement, provided in several Member States?

If the answer to that question is in the affirmative:

Should the provision referred to be interpreted as meaning that

(b) the place of performance of the obligation that is characteristic of the contract must be determined by reference to the place where the service provider's centre of business is located, which is to be determined by reference to the amount of time spent and the importance of the activity;

(c) in the event that it is not possible to determine a centre of business, an action in respect of all claims founded on the contract may be brought,

14 — Case C-256/00 [2002] ECR I-1699.

15 — [This footnote concerns only the Slovene version of the Opinion.]

at the applicant's choice, in any place of performance of the service within the Community?

2. If the answer to the first question is in the negative:

Is Article 5(1)(a) of Regulation No 44/2001 applicable in the case of a contract for the provision of services also where the services are, by agreement, provided in several Member States?'

IV — Procedure before the Court of Justice

22. The order for reference was received at the Court on 15 January 2009. In the written procedure, observations were submitted by the parties to the main proceedings, the German Government, the United Kingdom Government and the Commission. At the hearing on 29 October 2009, the representatives of the parties to the main proceedings, the German Government and the Commission presented oral argument and answered questions from the Court.

V — Arguments of the parties

A — *Admissibility*

23. Questions of admissibility are dealt with in the written observations only by the *Commission*, which states that under Article 68 EC only references for preliminary rulings from courts or tribunals against whose decisions there is no judicial remedy under national law are admissible. The decision whether a body is a court of last instance depends on specific circumstances, that is to say, on whether there is a remedy against the court's decision in the proceedings concerned.

24. Having regard to the specific circumstances of the present case, there is no remedy against the decision by the referring court. An appeal on a point of law is inadmissible

under Paragraph 528(2)(2) of the Austrian Zivilprozessordnung if the contested order at first instance has been upheld in its entirety. Because the referring court proposes to confirm the decision on jurisdiction by the court of first instance, its decision cannot be challenged by an appeal on a point of law. The questions referred are therefore admissible, in the view of the Commission.

B — *First question*

1. Application of the second indent of Article 5(1)(b) of Regulation No 44/2001 to contracts for the provision of services in several Member States (Question 1(a))

25. The *applicant in the main proceedings*, the *German Government*, the *United Kingdom Government* and the *Commission* propose that the Court answer the first question to the effect that the second indent of Article 5(1)(b) of Regulation No 44/2001 is applicable to contracts for the provision of services also where the services are provided in several Member States. The parties essentially argue that the Court's decision in *Color Drack* may also be relied on where contractual obligations must be fulfilled in several Member States. The statements made by the applicant in the main proceedings, the German Government and the Commission at the hearing also show that they consider that the Court has already answered the question referred in its judgment in *Rehder*.

26. The applicant in the main proceedings adds that the application of the second indent of Article 5(1)(b) of Regulation No 44/2001 to the present case also takes account of the aim of predictability, since it is clear from the contract concluded between the parties to the main proceedings in which Member States the applicant provides services. This is also the crucial difference from *Besix*,[16] where it was not possible to determine in which Member States the contractual obligations should be fulfilled, because the contractual obligation consisted in an undertaking not to do something.

27. The German Government further states that the court which has the closest linking factor to a contractual relationship has

16 — Cited in footnote 14.

jurisdiction in relation to all claims stemming from the contractual relationship.

28. The United Kingdom Government takes the view that Article 5(1)(b) of Regulation No 44/2001 should be applied to contracts for the provision of services irrespective of whether the services are performed in one or more than one Member State. Such an interpretation is consistent with the wording of Article 5(1)(b) of Regulation No 44/2001 and with the relevant policy considerations. First of all, Article 5(1)(b) of Regulation No 44/2001 ought to be applied where reasonably possible. Secondly, in the interests of predictability it should be possible to identify easily which court has jurisdiction in any particular case. Thirdly, it is desirable to avoid different courts dealing with different aspects of what is essentially the same litigation and, fourthly, the answer proposed to the questions referred would have to be consistent with the solution which the Court of Justice has arrived at under Article 5(1) of the Brussels Convention. [17]

29. The Commission argues that it is not clear from the wording and the scheme of Article 5(1)(b) of Regulation No 44/2001 that jurisdiction in relation to contracts for the sale of goods or the provision of services may be determined under that provision only if the contractual obligation is fulfilled in just one Member State. Furthermore, such a restriction of the scope of Article 5(1)(b) of Regulation No 44/2001 runs counter to the aims of that regulation. It is clear from recitals 2, 6 and 8 in the preamble to that regulation that, in order to guarantee the sound operation of the internal market, provisions must be adopted to unify the rules on jurisdiction where the defendant resides in one Member State and the case has a cross-border link. In the view of the Commission, it would not be compatible with that aim if the special jurisdiction for contracts for the sale of goods or the provision of services were restricted to the supply of goods and the provision of services in one Member State. Furthermore, such a restriction of the scope of that article would significantly impair the effectiveness of that provision since it would no longer be applicable if only a small proportion of the goods were supplied in another Member State or only a proportion of the services were provided in another Member State. Nor would this be consistent with the drafting history of the provision. Article 5(1) of Regulation No 44/2001 differs from Article 5(1) of the Brussels Convention, which applied previously, in that the place where the characteristic obligation under the contract is performed is defined as the 'place of performance' within the meaning of that article for the sale of goods and the provision of services. That provision is therefore intended to make it easier to determine the court having jurisdiction on the basis of the place where the characteristic obligation under the contract is

17 — 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 Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and — amended version — p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1).

performed for the most common contracts with a cross-border connection.

30. Unlike all the other parties, the *defendant in the main proceedings* takes the view that the second indent of Article 5(1)(b) of Regulation No 44/2001 is not applicable to contracts for the provision of services if the services are provided in several Member States. The approach adopted in *Color Drack*, which related to a contract for the supply of goods in a single Member State, cannot be applied to the present case, which concerns a contract for the provision of services in several Member States, because that would not satisfy the aim of the predictability of the court having jurisdiction. As the applicant generated the majority of turnover in other Member States and not in Austria (the defendant states that most turnover had been generated in Poland), the court having jurisdiction is not predictable. In this connection, the defendant relies on the Opinion of Advocate General Bot in *Color Drack*, [18] who took the view that where the places of performance of the contractual obligations are in more than one Member State, jurisdiction cannot be determined on the basis of Article 5(1)(b) of Regulation No 44/2001. [19] In addition, in the defendant's view, the wording of Article 5(1) of Regulation No 44/2001 refers to a single place of performance, because the word 'place' is always used in the singular. Relying on *Besix*, [20] the defendant also argues that the disadvantages which could stem from different courts dealing with different aspects of the same litigation could be avoided by the applicant bringing proceedings at the place where the defendant has its registered office.

2. Determination of jurisdiction under the second indent of Article 5(1)(b) of Regulation No 44/2001 (Question 1(b))

31. The *applicant in the main proceedings* and the *Commission* take the view that the forum is to be determined by reference to the place where the service provider has its *centre of business*.

32. The applicant also points out that the contracting parties could easily determine the centre for the provision of services in advance in the contract and that the determination of

18 — Opinion of Advocate General Bot in Case C-386/05 *Color Drack* [2007] ECR I-3699.

19 — Ibid., footnote 30.

20 — Cited in footnote 14.

jurisdiction would thereby satisfy the aim of predictability, because the applicant would know exactly the courts before which he could bring proceedings and the defendant would in turn know the court before which he could be sued. At the hearing, the applicant stated that the commercial agent provided services on the basis of the oral contract, by bringing the principal new customers and fostering contacts with existing customers, negotiating with customers prior to the conclusion of contracts, concluding contracts, receiving complaints and providing general assistance to the principal in connection with the sale of its products. Because it largely provided those services at its registered office in Austria, an Austrian court must have jurisdiction to hear the dispute.

33. In the view of the Commission, determination of jurisdiction by reference to the centre of business of the service provider is consistent with the various aims pursued by the determination of jurisdiction of the appropriate court. First of all, it is consistent with the aim of having all disputes arising from a contract heard by the same court. Secondly, it meets the aim of predictability of jurisdiction. Thirdly, this determination of jurisdiction meets the aim of proximity between the contract and the court having jurisdiction and, fourthly, such a rule on jurisdiction also safeguards the 'equality of arms' between the parties, because the applicant is given the opportunity to bring proceedings at the court of the place of performance and, on the other hand, the defendant may be sued in just one Member State. It must be examined in which Member States the services were mainly provided; in this regard, account must be taken of all the circumstances, for example the place where the majority of the contracts were concluded and the place where the highest turnover was generated. In this specific case, the place where the provision of services was centred is in Austria because the commercial agent provided 70% of its commercial agency services in Austria and only 30% abroad. The fact that the applicant supposedly realised only 25% of its profits in Austria does not preclude an Austrian court having jurisdiction because the applicant organised its business from its registered office in Amstetten (Austria).

34. In the opinion of the *German Government*, in the case of commercial agency business in several Member States the refutable presumption must be adopted that the place where the services are, by agreement, provided and by reference to which the court having jurisdiction is

determined is where the commercial agent has its 'main office'.

35. In response to these statements made by the German Government, at the hearing the Commission argued that it does not agree with making such a refutable presumption, since it runs counter to the purpose of Article 5(1)(b) of Regulation No 44/2001, within the framework of which jurisdiction must be determined on the basis of factual circumstances. The national court would examine those circumstances only if the defendant contested the presumption, so that the burden of proof was laid on it. A refutable presumption gives excessive preferential treatment to the commercial agent, which can always bring proceedings and be sued at the place where it has its registered office, [21] whilst for the defendant such a refutable presumption has the same effect as if jurisdiction were determined by reference to the general rule under Article 2(1) of Regulation No 44/2001.

36. The *United Kingdom Government* considers that it is not correct to define jurisdiction according to the centre of the service provider's business. It understands this as defining the general centre of business of the service provider. The place for the provision of services must be the place where the services under the relevant contract were actually provided, which is for the national court to determine on the basis of relevant factual (including economic) factors.

21 — At the hearing, the Commission did not use the term 'main office', but 'place of business' and 'principal place of business'.

3. Determination of jurisdiction where the centre of business cannot be determined (Question 1(c))

37. The *applicant in the main proceedings* and the *German Government* consider that Question 1(c) — the question whether, in a case where it is not possible to determine the centre of business, an action may be brought, at the applicant's choice, in any place of performance of the service within the Community — should be answered in the affirmative.

38. In contrast, the *United Kingdom Government* takes the view that Article 5(1)(b) of Regulation No 44/2001 is not applicable if services are provided in more than one Member State and no principal place of

performance can be identified, since offering an option to choose between courts before which the applicant may bring an action would lead to any court having jurisdiction, with the result that jurisdiction would be extremely unpredictable for the defendant.

39. In the light of its answer to Questions 1(a) and 1(b), the *Commission* does not give an answer to Question 1(c).

C — *Second question*

40. In the opinion of the *applicant in the main proceedings* and the *Commission*, there is no need to answer the second question because the first question is to be answered in the affirmative.

41. The *defendant in the main proceedings* takes the view that Article 5(1)(a) of Regulation No 44/2001 is not applicable in the present case, because it is not possible with the determination of jurisdiction under subparagraph (a) — like under Article 5(1)(b) — to guarantee predictability and legal certainty in the determination of jurisdiction.

42. The *United Kingdom Government* considers that in a case where Article 5(1)(b) of Regulation No 44/2001 is not applicable since the place of performance of the services cannot be identified, Article 5(1)(a) applies. In its arguments, it relies on Article 5(1)(c), which provides that if subparagraph (b) does not apply then subparagraph (a) applies.

43. The *German Government* does not submit observations on the second question.

VI — Advocate General's assessment

A — *Introduction*

44. In the present case, the Court is required to interpret the second indent of Article 5(1)(b) of Regulation No 44/2001 in connection

with a commercial agency contract [22] under which the commercial agent provides services in several Member States. The Court will therefore have the opportunity to rule on the question of jurisdiction to hear legal disputes arising from contracts for the provision of services in several Member States, which has already been highlighted for some time in legal literature. [23] This question has already arisen in connection with an air transport contract in *Rehder*, [24] in which the fact that services were provided in several Member States did not raise particular problems, however, because the number of possible places of the provision of services was limited to two — the place of departure and the place of arrival. The present case is therefore the first in which the Court will have to rule on the question of jurisdiction where services are provided at numerous places in different Member States.

45. However, the present case is not the only case pending which raises these issues. I would point out that another case raising similar problems is currently pending before the Court, namely *Hölzel*, [25] which also concerns the determination of jurisdiction where services are provided in several Member States. The decision in the present case will also influence the decision in *Hölzel*.

46. I would like to point out that the contracts in connection with which the question of determination of jurisdiction may arise on account of the possibility of providing services in several Member States are very different. Such a question may also arise, for

22 — The Court has already dealt with questions of jurisdiction to hear legal disputes arising from commercial agency contracts in connection with the interpretation of Article 5(1) of the Brussels Convention in Case C-420/97 *Leathertex* [1999] ECR I-6747. However, that judgment is not relevant to the present case because jurisdiction under Article 5(1) of the Brussels Convention is given a different definition to jurisdiction under Article 5(1)(b) of Regulation No 44/2001. The counterpart to Article 5(1) of the Brussels Convention is the current Article 5(1)(a) of Regulation No 44/2001; jurisdiction under that article is determined by reference to the place of performance of the obligation in question under the law applicable to the contractual relationship *(lex causae)*; in turn, it is for the national court before which the matter has been brought to establish the substantive law applicable to the contractual relationship, in the light of the rules of conflict of laws of its legal system. With regard to determination of jurisdiction under Article 5(1)(a) of Regulation No 44/2001, see also footnote 76 of this Opinion.

23 — Attention is drawn to this question in legal literature, for example Gaudemet-Tallon, H., *Compétence et exécution des jugements en Europe. Règlement n° 44/2001, Conventions de Bruxelles et de Lugano*, 3rd edition, Librairie générale de droit et de jurisprudence, Paris, 2002, p. 159, paragraph 199, Mankowski, P., in Magnus, U. and Mankowski, P. (eds), *Brussels I Regulation*, Sellier. European Law Publishers, Munich, 2007, p. 147, paragraph 120 et seq., and Leible, S., 'Zuständiges Gericht für Entschädigungsansprüche von Flugpassagieren', *Europäische Zeitschrift für Wirtschaftsrecht*, No 16/2009, p. 573.

24 — Cited in footnote 4.

25 — Case C-147/09; the questions referred were published in OJ 2009 C 153, p. 27. In *Hölzel* the applicant, who is domiciled in Austria, initially granted the defendant, who is domiciled in the Czech Republic, a power of attorney to perform various business (for example, banking, arranging for carers, a place in a home) and subsequently a general power of attorney to represent her in all her affairs. The referring court states that it is not possible to determine whether the defendant attended to the majority of the applicant's affairs in Austria or in the Czech Republic. For the facts of the case, see the order of the Oberlandesgericht Wien (Austria) of 27 February 2009.

example, in relation to a contract of engagement between a lawyer and his client. [26] If, for example, a legal practice with its registered office in Luxembourg represents a client from Germany in proceedings in France and a dispute arises between the client and the legal practice, the question of the court which has jurisdiction to hear that dispute will arise in the same way. It may be equally difficult to determine jurisdiction in the case of a brokerage contract if the broker acts on behalf of the client in several Member States. The Court will therefore also have to take into consideration, for the decision in the present case, any consequences which that decision might have for other types of contract for the provision of services in several Member States.

B — *Admissibility*

47. Under Article 68(1) EC in conjunction with Article 234 EC, only a court or a tribunal against whose decisions there is no judicial remedy under national law may refer questions for a preliminary ruling on the interpretation of Title IV of the EC Treaty ('Visas, asylum, immigration and other policies related to free movement of persons') or on the validity or the interpretation of the acts of the Community organs adopted on the basis of that title. [27] Regulation No 44/2001, which was adopted on the basis of Article 61(c) EC and Article 67(1) EC, comes under the acts of the Community organs adopted on the basis of that title.

48. In the present case, the answer to the question whether the referring court is to be regarded as a court or a tribunal 'against whose decisions there is no judicial remedy under national law' actually depends on the decision which will be taken in the appeal proceedings against the decision on jurisdiction pending before the referring court. [28]

26 — See also Mankowski, loc. cit. (footnote 23), p. 147, paragraph 120.

27 — It should be pointed out that, in Article 67(2), the Treaty of Lisbon, signed at Lisbon on 13 December 2007 (OJ 2007 C 306, p. 1), which amended the Treaty on European Union and the Treaty establishing the European Community, repeals the previous Article 68 EC. This means that with the entry into force of the Treaty of Lisbon on 1 December 2009 all courts and tribunals in the Member States and not only the courts and tribunals against whose decisions there is no judicial remedy under national law may refer questions in this area for a preliminary ruling. Because the admissibility of requests for preliminary rulings is to be assessed on the basis of the date of the reference to the Court, that provision of the Treaty of Lisbon cannot yet be taken into consideration in the present case.

28 — It must be stressed that the assessment of whether a body is a court or a tribunal against whose decisions there is no judicial remedy under national law must not be abstract, but specific and depends on whether the judicial remedy is available in the case at issue. Thus, the Court regarded references for preliminary rulings as inadmissible on the basis of the assessment of specific circumstances, for example, in its orders in Case C-51/03 *Georgescu* [2004] ECR I-3203, paragraphs 29 to 32, and Case C-555/03 *Warbecq* [2004] ECR I-6041, paragraphs 12 to 15. In legal literature, with regard to the specific assessment of the notion of court or tribunal against whose decisions there is no judicial remedy under national law, see, for example, Rossi, M., in Calliess, C. and Ruffert, M. (eds), *EUV/EGV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta. Kommentar*, 3rd edition, Beck, Munich, 2007, p. 951, paragraph 4.

According to Paragraph 528(2)(2) of the Austrian Zivilprozessordnung, there is no judicial remedy (appeal on a point of law) against the decision by the referring court if that court confirms the contested decision on jurisdiction at first instance. *A contrario*, this means that if the referring court does not confirm the decision at first instance, there is a judicial remedy (appeal on a point of law) against that decision.

49. The referring court states that it proposes to confirm the decision of the court of first instance on jurisdiction and that there is therefore no judicial remedy against its decision. [29] I would like to point out, however, that the content of that decision does not depend on the assessment by the referring court, but above all on the Court's answers to the questions referred. If the Court's answers correspond substantively with the decision by the Austrian court of first instance, there is no judicial remedy against the decision by the referring court; however, if the Court decides otherwise, a judicial remedy against the decision by the referring court will be possible and in that case it will not be a court or a tribunal 'against whose decisions there is no judicial remedy under national law'.

50. Nevertheless, the questions referred in the present case are admissible in my opinion. The main argument to be cited in support of this view is the consequences which would arise if the questions were regarded as inadmissible. In that case, the referring court alone would decide and confirm the decision at first instance. Consequently, the referring court would be a court or a tribunal 'against whose decisions there is no judicial remedy under national law'. If the questions were regarded as inadmissible, the decision on the merits by the Court — and therefore by the referring court — in the present case would be prejudiced, since it would ultimately be presumed that the Court — and therefore the referring court — would reach a different decision from that reached by the Austrian court of first instance. Whilst there is merely a *possibility* in the present case that the referring court is the last instance, that possibility must be sufficient for the admissibility of references for preliminary rulings, as it cannot yet be known, at the stage of the examination of admissibility, what decision will be taken

29 — It should be added that in Austrian legal literature the question of admissibility under Article 68(1) EC in connection with Paragraph 528(2)(2) of the Austrian Zivilprozessordnung is discussed by Tarko, I., in Mayer, H., *Kommentar zu EU- und EG-Vertrag*, Manz'sche Verlags- und Universitätsbuchhandlung, Vienna, 2003, Kommentar zu Artikel 68 EG, paragraph 8, who explains that the national appeal court may refer a question for a preliminary ruling in a case like the present one only if it proposes to confirm the decision made at first instance and the appeal on a point of law is therefore inadmissible; in the author's view, this would have to be stated in the order for reference.

on the substance. I therefore take the view that it should be decided that the reference is admissible and that the referring court should be provided with all the elements of interpretation which it requires to adjudicate in the present case.

51. In my opinion, the questions referred in the present case are therefore admissible.

C — *First question*

52. The first question is divided into several parts. Question 1(a) asks whether the second indent of Article 5(1)(b) of Regulation No 44/2001 is applicable to contracts on the basis of which services are provided in several Member States, like the commercial agency contract in the present case. Question 1(b) relates to the determination of jurisdiction in the case of a commercial agency contract where the commercial agency services are provided in several Member States; more specifically, it asks whether the place of performance of the obligation that is characteristic of the contract must be determined by reference to the place where the service provider has his centre of business. Question 1(c), on the other hand, revolves around whether in the event that it is not possible to determine a centre of business, an action in respect of all claims founded on the contract may be brought, at the applicant's choice, in any place of performance of the service within the Community.

53. In carrying out this assessment, first of all the main characteristics of the commercial agency contract, which is a contract for the provision of services within the meaning of the second indent of Article 5(1)(b) of Regulation No 44/2001, will be presented; I will then turn to the answer to be given to the question asked by the referring court.

1. Introductory remarks on the commercial agency contract

(a) Characteristics of the commercial agency contract

54. The Member States' legislation in relation to commercial agency contracts was harmonised, as far as the main characteristics of such contracts were concerned, by Council Directive 86/653/EEC on the coordination of the laws of the Member

States relating to self-employed commercial agents [30] ('Directive 86/653').

55. Under Directive 86/653, 'commercial agent' means a self-employed intermediary who has continuing [31] authority to negotiate the sale or the purchase of goods on behalf of another person (principal) or to negotiate and conclude such transactions on behalf of and in the name of that principal. [32] A commercial agent must make proper efforts to negotiate and, where appropriate, conclude the transactions he is instructed to take care of, communicate to his principal all the necessary information available to him, and comply with reasonable instructions given by his principal. [33] In performing his activities a commercial agent must look after his principal's interests and act dutifully and in good faith. [34]

56. On the other hand, under Directive 86/653 a principal has a duty to provide his commercial agent with the necessary documentation relating to the goods concerned and obtain for his commercial agent the information necessary for the performance of the agency contract; furthermore, he must notify the commercial agent if he establishes that the volume of commercial transactions will be significantly lower than that which the commercial agent could normally have expected. [35] In his relations with his commercial

30 — Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (OJ 1986 L 382, p. 17). As the second recital in the preamble to that directive states, the differences in national laws concerning commercial representation inhibit the conclusion and operation of commercial representation contracts where principal and commercial agents are established in different Member States. It should be mentioned that the directive was transposed into Austrian law, for example by the Handelsvertretergesetz, into Belgian law by the Loi relative au contrat d'agence commerciale, into French law by the Code de commerce (Articles L 134-1 to L 134-17), into Italian law by the Codice Civile (Articles 1742 to 1753), into German law by the Handelsgesetzbuch (Paragraphs 84 to 92c), into Slovene law by the Obligacijski zakonik (Articles 807 to 836) and into United Kingdom law by Statutory Instrument 1993 No 3053 — The Commercial Agents (Council Directive) Regulations 1993.

31 — It must be stressed that commercial agency contracts constitute continuing contractual relationships, as is clear from the wording of Directive 86/653. The continuing nature of the contractual relationship is also evident from the wording of the rules of some Member States which transposed the directive into national law. For example, Paragraph 1(1) of the Austrian Handelsvertretergesetz states: 'Handelsvertreter ist, wer von einem anderen mit der Vermittlung oder dem Abschluss von Geschäften … *ständig* betraut ist …' In Belgian law, Article 1 of the Loi relative au contrat d'agence commercial provides: 'Le contrat d'agence commerciale est le contrat par lequel … l'agent commercial est chargée *de façon permanente* … de la négociation et éventuellement de la conclusion d'affaires … du commettant.' In French law, Article L 134-1 of the Code de commerce provides: 'L'agent commercial est un mandataire qui … est chargé, *de façon permanente*, de négocier et, éventuellement, de conclure des contrats …' In Italian law, Article 1742 of the Codice Civile states: 'Col contratto di agenzia una parte assume *stabilmente* l'incarico di promuovere, per conto dell'altra … la conclusione di contratti …' In German law, Paragraph 84(1) of the Handelsgesetzbuch provides: 'Handelsvertreter ist, wer … *ständig* damit betraut ist, für einen anderen … Geschäfte zu vermitteln oder in dessen Namen abzuschließen …' In Slovene law, Article 807 of the Obligacijski zakonik provides: 'S pogodbo o trgovskem zastopanju se zastopnik zaveže, da bo *ves čas* skrbel za to, da bodo tretje osebe sklepale pogodbe z njegovim naročiteljem …' In English law, Article 2(1) of the Commercial Agents (Council Directive) Regulations 1993 states: '"[C]ommercial agent" means a self-employed intermediary who has *continuing* authority to negotiate the sale or purchase of goods on behalf of another person …' (My emphasis.).

32 — See Article 1(2) of Directive 86/653.

33 — See Article 3(2) of Directive 86/653. Article 5 of the directive further provides that the parties may not derogate from the provisions of Articles 3 and 4, which lay down the rights and obligations of the commercial agent and the principal.

34 — See Article 3(1) of Directive 86/653.

35 — See Article 4(2) of Directive 86/653.

agent a principal must act dutifully and in good faith. [36]

57. The commercial agent is entitled to commission for his activities. [37] Normally, the level of remuneration will be agreed between the contracting parties; in the absence of any such agreement, and without prejudice to the application of the compulsory provisions of the Member States concerning the level of remuneration, a commercial agent is entitled to the remuneration that commercial agents are customarily allowed in the place where he carries on his activities. [38]

58. Directive 86/653 does not expressly provide that the commercial agency contract must be concluded in writing, but the Member States do have the option to provide that an agency contract is not valid unless evidenced in writing. [39] Furthermore, under the directive each party is entitled to receive from the other on request a signed written document setting out the terms of the agency contract including any terms subsequently agreed. [40] Waiver of this right is not permitted under the directive. [41]

(b) The commercial agency contract as a contract for the provision of services

59. In the present case, it must be established that the commercial agency contract is a contract for the provision of services within the meaning of the second indent of Article 5(1)(b) of Regulation No 44/2001. [42] As the

36 — See Article 4(1) of Directive 86/653.

37 — Article 7(1) and (2) of Directive 86/653 provide that a commercial agent is entitled to commission on commercial transactions concluded during the period covered by the agency contract where the transaction has been concluded as a result of his action or where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind, but also where he is entrusted with a specific geographical area or group of customers or where he has an exclusive right to a specific geographical area or group of customers. In certain exceptional cases, however, a commercial agent is entitled to commission on commercial transactions concluded after the agency contract has terminated (see Article 8 of Directive 86/653).

38 — See Article 6(1) of Directive 86/653.

39 — See Article 13(2) of Directive 86/653.

40 — See Article 13(1) of Directive 86/653. It should be noted that, for example, the French, the Italian, the German and the Slovene legislatures have availed themselves of that option; the rules in those Member States do not expressly provide that the commercial agency contract must be concluded in writing, but only that one contracting party may request from the other a copy of a signed document setting out the terms of the contract. With regard to Belgian law, see Article 5 of the Loi relative au contrat d'agence commerciale, with regard to Italian law Article 1742 of the Codice Civile, with regard to French law Article L 134-2 of the Code de commerce, with regard to German law Paragraph 85 of the Handelsgesetzbuch, and with regard to Slovene law Article 808 of the Obligacijski zakonik.

41 — See Article 13(1) of Directive 86/653.

42 — This view is also taken in literature; see, for example, Gaudemet-Tallon, H., 'Du 5 octobre 1999. — Cour de justice des Communautés européennes ... [Commentary on the judgment in *Leathertex*]', *Revue critique de droit international privé*, No 1/2000, p. 88; Emde, R., 'Heimatgerichtsstand für Handelsvertreter und andere Vertriebsmittler?', *Kommunikation & Recht*, No 7/2003, p. 508; Mankowski, loc. cit. (footnote 23), p. 131, paragraph 89; Fach Gómez, K., 'El Reglamento 44/2001 y los contratos de agencia comercial internacional: aspectos jurisdiccionales', *Revista de derecho comunitario europeo*, No 14/2003, p. 208; Berlioz, P., 'La notion de fourniture de services au sens de l'article 5-1 b) du règlement "Bruxelles I"', *Journal du droit international (Clunet)*, No 3/2008, paragraph 45.

Court explained in *Falco*, the concept of service 'implies, at the least, that the party who provides the service carries out a particular activity in return for remuneration.' [43] This condition is satisfied in the present case because the commercial agent brought new customers to the principal and fostered contacts with existing customers, negotiated with customers prior to the conclusion of contracts, concluded contracts, received complaints and provided general assistance to the principal in connection with the sale of its products. [44] It provided those services in return for remuneration because it received a commission for its activities. The requirement of the existence of a contract for the provision of services is therefore undoubtedly satisfied in the present case.

2. Application of the second indent of Article 5(1)(b) of Regulation No 44/2001 to contracts for the provision of services in several Member States (Question 1(a))

60. By Question 1(a), the referring court seeks essentially to ascertain whether the second indent of Article 5(1)(b) of Regulation No 44/2001 is applicable to a contract for the provision of services, like the commercial agency contract in the present case, on the basis of which services are provided in several Member States.

61. The second indent of Article 5(1)(b) of Regulation No 44/2001 provides that unless otherwise agreed the place of performance of the obligation in question (at which a person may be sued even if he is domiciled in another Member State [45]) is, 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. In my opinion, it is not clear from the wording of that article whether it is applicable only to contracts for the provision of services in a single Member State or also to contracts for the provision of services in several Member States. The use of the term 'Member State' in the singular cannot be relevant either. [46]

43 — See *Falco*, cited in footnote 3, paragraph 29. See also the Opinion of Advocate General Trstenjak of 27 January 2009 in Case C-533/07 *Falco Privatstiftung and Rabitsch* [2009] ECR I-3327, point 57, and the literature cited therein.

44 — See also the applicant's arguments in point 32 of this Opinion.

45 — See the introductory paragraph of Article 5 of Regulation No 44/2001.

46 — On the basis of a very strict grammatical interpretation, it could perhaps be argued that the use of the term 'Member State' in the singular indicates that the second indent of Article 5(1)(b) of Regulation No 44/2001 is applicable to cases where services are provided in a single Member State, but, in my opinion, this would run counter to the purpose of that article, which is to determine jurisdiction for all kinds of contracts for the provision of services. A grammatical interpretation can only form the starting point for the interpretation and must, above all, be supplemented by a teleological and schematic interpretation. With regard to the importance of the different types of interpretation in Community law, see, for example, Riesenhuber, K., in Riesenhuber, K. (ed.), *Europäische Methodenlehre. Handbuch für Ausbildung und Praxis*, De Gruyter Recht, Berlin, 2006, p. 250 et seq. See also Delnoy, P., *Éléments de méthodologie juridique*, 2nd edition, Larcier, Brussels, 2006, p. 93, who stresses that even a clear wording must be interpreted, from which we can conclude that a purely grammatical interpretation is not sufficient for the correct understanding of the wording.

62. Nevertheless, I believe that this question should be answered in the affirmative. This answer follows from the Court's previous case-law, specifically from *Color Drack* [47] and *Rehder*. [48] Whilst *Color Drack* did not relate to a contract for the provision of services, but to a contract for the sale of goods, it is relevant to the present case because in *Rehder* the Court subsequently extended the principles developed in that judgment to contracts for the provision of services.

63. In *Color Drack* the Court ruled on the application of the first indent of Article 5(1)(b) of Regulation No 44/2001 to cases in which goods were supplied on the basis of a contract in different places in *a single* Member State. The Court found that that provision applies where there are several places of delivery within a single Member State and that, in such a case, the court having jurisdiction to hear all the claims based on the contract for the sale of goods is that for the principal place of delivery, which must be determined on the basis of economic criteria. [49] In the absence of determining factors for establishing the principal place of delivery, the applicant may sue the plaintiff in the court for the place of delivery of its choice. [50] In that judgment, the Court expressly stated that these considerations apply solely to the case where there are several places of delivery within a single Member State and are without prejudice to the answer to be given where there are several places of delivery in a number of Member States. [51]

64. In *Color Drack* Advocate General Bot took the view that jurisdiction cannot be determined in the case of places of delivery in *different* Member States on the basis of Article 5(1)(b) of Regulation No 44/2001, because the objective of predictability would not

47 — Cited in footnote 2.

48 — Cited in footnote 4.

49 — *Color Drack*, cited in footnote 2, paragraph 45. For a commentary on that judgment, see, for example, Huber-Mumelter, U. and Mumelter, K.H., 'Mehrere Erfüllungsorte beim forum solutionis: Plädoyer für eine subsidiäre Zuständigkeit am Sitz des vertragscharakteristisch Leistenden', *Juristische Blätter*, No 130/2008, p. 566 et seq.; Mankowski, P., 'Mehrere Lieferorte beim Gerichtsstand des Erfüllungsortes unter Artikel 5 Nr. 1 lit. B EuGVVO', *Praxis des Internationalen Privat- und Verfahrensrechts*, No 5/2007, p. 409 et seq.; Gardella, A., 'The ECJ in Search of Legal Certainty for Jurisdiction in Contract: The Color Drack Decision', *Yearbook of Private International Law*, 2007, p. 445 et seq.; Do, T.U., 'Libre circulation des marchandises. Arrêt "Color Drack"', *Revue du droit de l'Union européenne*, No 2/2007, p. 471.

50 — *Color Drack*, cited in footnote 2, paragraph 45.

51 — *Color Drack*, cited in footnote 2, paragraph 16. It should be added that after the judgment was delivered in *Color Drack* the question has therefore arisen whether jurisdiction is to be determined differently in the case of places of delivery in just one Member State than in places of delivery in different Member States. In legal literature, see, for example Leible, loc. cit. (footnote 23), p. 572.

be achieved. [52] In that case, jurisdiction is also not determined by reference to Article 5(1)(a) of Regulation No 44/2001, but pursuant to Article 2 of Regulation No 44/2001 the court with jurisdiction is the court of the defendant's domicile. [53]

65. In the recent *Rehder* case, [54] however, in which the judgment was delivered after the referring court had asked its questions in the present case, the Court has already answered the question whether the second indent of Article 5(1)(b) of Regulation No 44/2001 is applicable where services are provided in several Member States. It ruled that the considerations set out in *Color Drack* 'are also valid with regard to contracts for the provision of services, including the cases where such provision is not effected in one single Member State'. [55] The Court also pointed out that rules of special jurisdiction provided for by Regulation No 44/2001 for contracts for the sale of goods and the provision of services 'have the same origin, pursue the same objectives and occupy the same place in the scheme established by that regulation'. [56] Furthermore, in the view of the Court, where the services in question are provided at several places in different Member States, 'a differentiated approach cannot be applied to the objectives of proximity and predictability, which are pursued by the centralisation of jurisdiction in the place of the provision of services under the contract at issue and by the determination of sole jurisdiction for all claims arising out of that contract'. [57] The Court held that apart from the fact that 'there is no basis for it in the provisions of Regulation No 44/2001', such a differentiated approach would contradict the purpose of the regulation. [58]

66. In *Rehder* the Court has therefore already answered the question whether the second indent of Article 5(1)(b) of Regulation No 44/2001 is applicable to contracts for the provision of services in several Member

52 — Opinion of Advocate General Bot in *Color Drack*, cited in footnote 18, point 30.

53 — Ibid.

54 — Cited in footnote 4.

55 — *Rehder*, cited in footnote 4, paragraph 36.

56 — Ibid.

57 — Ibid., paragraph 37.

58 — Ibid.

States. It should be mentioned that the view is also taken in legal literature that that article also applies to contracts for the provision of services in several Member States. [59]

67. In my opinion, Question 1(a) must therefore be answered to the effect that the second indent of Article 5(1)(b) of Regulation No 44/2001 is applicable to a contract for the provision of services, like the commercial agency contract in the present case, on the basis of which services are provided in several Member States.

3. Determination of jurisdiction under the second indent of Article 5(1)(b) of Regulation No 44/2001 (Question 1(b))

68. By Question 1(b), the referring court seeks essentially to ascertain whether the second indent of Article 5(1)(b) of Regulation No 44/2001 is to be interpreted to the effect that, in determining jurisdiction to hear disputes arising from a contract for the provision of services in several Member States, the place where the services were provided for the purposes of that article must be determined by reference to the place where the service provider has his centre of activity.

69. I would first like to point out in connection with this question that the Court must take two principles into consideration in determining jurisdiction in the present case.

70. First of all, the jurisdiction of the court must be *predictable*, [60] which is an expression

59 — See, for example, Leible, loc. cit. (footnote 23), p. 572. Implicitly — with regard to determination of jurisdiction for contracts for the provision of services in several Member States under the second indent of Article 5(1)(b) of Regulation No 44/2001 — see also Gaudemet-Tallon, loc. cit. (footnote 23), p. 159, paragraph 199; Mankowski, loc. cit. (footnote 23), pp. 147 and 148, paragraphs 120 and 121.

60 — See recital 11 in the preamble to Regulation No 44/2001, which states that the rules of jurisdiction must be highly predictable. For case-law see, for example, *Falco*, cited in footnote 3, paragraph 21, and Case C-98/06 *Freeport* [2007] ECR I-8319, paragraph 36. In legal literature, see, for example, Gsell, B., 'Autonom bestimmter Gerichtsstand am Erfüllungsort nach der Brüssel I-Verordnung, *Praxis des Internationalen Privat- und Verfahrensrechts*, No 6/2002, pp. 488 and 489; Kropholler, J., *Europäisches Zivilprozeßrecht. Kommentar zu EuGVO und Lugano-Übereinkommen*, 7th edition, Verlag Recht und Wirtschaft, Heidelberg, 2002, p. 125, paragraph 1. In connection with the Brussels Convention — for which regard may be had on grounds of continuity of interpretation between that convention and Regulation No 44/2001 — see, for example, Hill, J., "Jurisdiction in Matters Relating to a Contract under the Brussels Convention', *International and Comparative Law Quarterly*, No 3/1995, p. 605.

of the principle of legal certainty.[61] According to the Court's case-law, Regulation No 44/2001 pursues an objective of legal certainty which consists in strengthening the legal protection of persons established in the European Community, by enabling both the claimant easily to identify the court in which he may sue and the defendant easily to foresee the court in which he may be sued.[62]

71. Secondly, jurisdiction must be determined by reference to the place with the *closest linking factor* between the contract and the court having jurisdiction.[63]

72. Having regard to these principles, it must be examined whether the answer to Question 1(b) can already be inferred from previous case-law.

73. In determining jurisdiction under the second indent of Article 5(1)(b) of Regulation No 44/2001, the Court has already ruled in *Rehder* that, where there are several places where services are provided in different Member States, it is necessary to identify the place with the closest linking factor between the contract and the court having jurisdiction.[64] In the view of the Court, this is in particular the place where, pursuant to that contract, the main provision of services is to be carried out.[65]

74. It must be borne in mind that in *Rehder* the Court did not find that the place where the main provision of services is to be carried out represents the only possible criterion for determining jurisdiction under the second indent of Article 5(1)(b) of Regulation

61 — With regard to the predictability of jurisdiction as an expression of the principle of legal certainty, see, for example, Case C-4/03 *GAT* [2006] ECR I-6509, paragraph 28; Case C-539/03 *Roche Nederland and Others* [2006] ECR I-6535, paragraph 37; Case C-281/02 *Owusu* [2005] ECR I-1383, paragraph 41; and *Besix*, cited in footnote 14, paragraphs 24 to 26. This case-law relates to the Brussels Convention, but must be taken into consideration in interpreting the regulation on grounds of continuity of interpretation between that convention and Regulation No 44/2001.

62 — See Case C-103/05 *Reisch Montage* [2006] ECR I-6827, paragraphs 24 and 25; *Color Drack*, cited in footnote 2, paragraph 20; and *Falco*, cited in footnote 3, paragraph 22. See also the Opinion of Advocate General Mazák of 24 September 2009 in Case C-381/08 *Car Trim* [2009] pending before the Court, point 34.

63 — See *Color Drack*, cited in footnote 2, paragraph 40, and *Rehder*, cited in footnote 4, paragraph 38. See also the Opinion of Advocate General Mazák in *Car Trim*, cited in footnote 62, point 35. In legal literature, see, for example, Lynker, T., *Der besondere Gerichtsstand am Erfüllungsort in der Brüssel I-Verordnung (Artikel 5 Nr. 1 EuGVVO)*, Lang, Frankfurt, 2006, p. 141.

64 — *Rehder*, cited in footnote 4, paragraph 38. For comparison, with regard to jurisdiction in relation to the supply of goods under the first indent of Article 5(1)(b) of Regulation No 44/2001, see *Color Drack*, cited in footnote 2, paragraph 40, in which the Court pointed out that jurisdiction 'is warranted, in principle, by the existence of a particularly close linking factor between the contract and the court called upon to hear the litigation.'

65 — *Rehder*, cited in footnote 4, paragraph 38.

No 44/2001. The Court held that it is necessary to identify the place with the closest linking factor between the contract and the court having jurisdiction, *in particular* the place where, pursuant to that contract, the main provision of services is to be carried out. [66] The main criterion is therefore the closest linking factor between the contract and the court having jurisdiction; that linking factor exists in particular at the place where, pursuant to that contract, the main provision of services is to be carried out.

75. In my opinion, the Court's findings in *Rehder* may also be applied to the present case. However, it must be borne in mind in this connection that in the present case the commercial agency contract did not fix the place or the Member States in which the main provision of the services was to be made. The orally [67] concluded contract defined only the Member States in which the commercial agent was required to provide commercial agency services. [68] Consequently, in the present case, it is necessary to develop the principles set out in *Rehder* to the effect that, if it cannot be determined where pursuant to the contract the services are to be mainly provided, jurisdiction must be determined by reference to the place where the services were mainly provided. [69]

76. I therefore take the view that in the present case it is the court of the place where the commercial agent mainly provided the services that has jurisdiction. This assessment must be made by the referring court on the basis of facts, although the Court must define the criteria which must be taken into consideration by the referring court in making its assessment. Where that place cannot be determined, the Court must provide the referring court with additional subsidiary criteria to determine the court having jurisdiction which, in exactly the same way, are consistent with the principles of predictability and the closest linking factor between the contract and the court having jurisdiction.

77. In the present case, it is necessary to establish, first of all, the criteria on the basis of which the place where the services were mainly provided is to be determined.

66 — *Rehder*, cited in footnote 4, paragraph 38 (my emphasis). For comparison, it should be noted that the Court had already taken the view in *Color Drack* — albeit in connection with jurisdiction in relation to the supply of goods under the first indent of Article 5(1)(b) of Regulation No 44/2001 — that the place with the closest linking factor between the contract and the court having jurisdiction will, *as a general rule*, be at the place of the principal delivery (see *Color Drack*, cited in footnote 2, paragraph 40 (my emphasis)). By using the expression 'as a general rule,' the Court wished to indicate that there may also be other places with the closest linking factor between the contract and the court having jurisdiction.

67 — With regard to the oral conclusion of the contract, see points 12 and 32 of this Opinion.

68 — With regard to the Member States in which the commercial agent provided commercial agency services, see point 13 of this Opinion.

69 — In legal literature, see, for example, Takahashi, K., 'Jurisdiction in matters relating to contract: Article 5(1) of the Brussels Convention and Regulation', *European Law Review*, No 5/2002, p. 539; Fach Gómez, loc. cit. (footnote 42), p. 211; Rauscher, T. (ed.), *Europäisches Zivilprozeßrecht. Kommentar*, 2nd edition, Sellier. European Law Publishers, Munich, 2006, p. 183, paragraph 55; Gaudemet-Tallon, loc. cit. (footnote 42), p. 88.

78. In my opinion, the following criteria will be relevant in determining jurisdiction in the case of the commercial agency contract: the expenditure incurred and the efforts made by the commercial agent, the time required for the individual services, the length of the negotiations with individual customers, the expenses incurred by the commercial agent in representing the principal, the place from which the commercial agent organised its activity, and the turnover generated by the commercial agent. More specifically, the referring court must bear in mind the place where the commercial agent provided specific services, such as establishing contacts with potential buyers, sending material, making personal calls on customers, negotiations, preparing contracts in the case of written contracts, concluding contracts and receiving possible complaints. It will also have to be taken into consideration that commercial agent's duties may be very different and that the agent may carry out representation in different ways: by post, telephone, fax, e-mail or other modern means of communication, but also personally at its registered office, at the customer's registered office or at some other place. Furthermore, the referring court will have to bear in mind that the commercial agency contract is a continuing relationship; [70] it does not therefore concern the negotiation or the conclusion of just one contract between the principal and a customer, but the negotiation or the conclusion of several contracts between the principal and the customers. The referring court will therefore have to bear in mind where the commercial agent provided services over a lengthy period.

79. With regard to turnover as a criterion for determining jurisdiction it should be added that the referring court must bear in mind that turnover may actually indicate where the commercial agent provided commercial agency services, but it must always be seen in conjunction with other criteria. Turnover cannot therefore be the only relevant criterion for determining jurisdiction, prevailing over other criteria. The amount of turnover is extremely unpredictable because it can quickly change with the conclusion of a contract between the principal and a customer. If, for example, the referring court were to find that the commercial agent performed the majority of its work in one Member State, but the highest turnover was generated in another Member State, the amount of turnover cannot be relevant to the extent that the courts in the Member State in which the highest turnover was generated would have jurisdiction. The referring court must take into consideration all the criteria and, on the basis of

70 — See footnote 31 of this Opinion. With regard to the continuing nature of the commercial agency contract, see, for example, in Italian legal literature Comba, D. and Samarotto, P., 'Il contrato internazionale di agenzia', *Il Sole 24 Ore*, Milan, 1999; in Slovene legal literature Zabel, B., in Juhart, M. and Plavšak, N. (eds), *Obligacijski zakonik (posebni del) s komentarjem*, GV založba, Ljubljana, 2004, introductory comments on the chapter on commercial agency contracts, p. 421; in Spanish legal literature Fach Gómez, loc. cit. (footnote 42), p. 206.

such an overall assessment, determine a place where the services were mainly provided.

80. Having regard to the considerations set out in points 69 to 79 of this Opinion, I consider that the answer to Question 1(b) is that the second indent of Article 5(1)(b) of Regulation No 44/2001 must be interpreted as meaning that, in determining jurisdiction to hear disputes arising from a contract for the provision of services performed in several Member States, like the commercial agency contract in the present case, the place where the services were provided for the purposes of that article must be determined by reference to the place where the services were mainly provided. That assessment must be made by the national court.

4. Determination of jurisdiction if the place where the services were mainly provided cannot be determined (Question 1(c))

81. By Question 1(c), the referring court seeks essentially to ascertain how the court having jurisdiction is determined if it is not possible to determine a place where the services were mainly provided. In this connection, the referring court asks whether in that case an action in respect of all claims founded on the contract may be brought, at the applicant's choice, in any place of performance of the service within the Community.

82. Even though in the order for reference the referring court has already stated its position on the place where the commercial agent's services were mainly provided,[71] I take the view that an answer should be given to this question. It is not quite inconceivable that the referring court will reach a different decision when it applies the criteria provided by the Court. The Court must therefore provide the referring court with all those elements for the interpretation of Community law which may be of assistance in adjudicating on the case pending before it.

83. If the court having jurisdiction cannot be determined by reference to the place where the services were mainly provided, there are several possible solutions for determining jurisdiction in the present case.

71 — See points 13 and 19 of this Opinion.

84. The first option is the solution proposed by the referring court, whereby the courts in each Member State in which some of the services were provided have jurisdiction in respect of all claims, at the applicant's choice. While this solution would mean that the principles laid down in *Rehder* are extended to the present case and logically continued, I do not consider it to be appropriate in the present case, for several reasons. First of all, that solution is not consistent with the aim of predictability, for it permits (too) many forums. [72] Secondly, this solution gives excessively preferential treatment to the applicant, who can choose the place to bring proceedings, and thus creates a considerable danger of forum shopping. [73] Thirdly, the solution adopted by the Court in *Rehder* related to a specific situation, namely air transportation services from one Member State to another. In *Rehder* there was no danger of forum shopping, for the applicant had only two places at which it could bring proceedings, whereas there are several such places in the present case.

85. The second solution is that the courts in each Member State in which some of the services were provided have jurisdiction, but only for those services which were provided in that Member State. [74] This solution may appear to be dogmatically correct at first sight, but is equally contentious since it makes jurisdiction too fragmented and makes it disproportionately difficult for the applicant who would then have to bring a very large number of proceedings in different Member States. Furthermore, this option creates the danger of contradictory decisions on the same contractual relationship. [75]

86. The third possible solution for determining jurisdiction is that, by virtue of Article 5(1)(c), subparagraph (a) applies. [76] In my opinion, however, this solution is not appropriate either. Subparagraph (a) applies only to contracts which do not concern the sale of goods

72 — See, to that effect, for example, Kropholler, loc. cit. (footnote 60), p. 141, paragraph 42; Rauscher, loc. cit. (footnote 69), p. 183, paragraph 55.

73 — The risk of forum shopping in such cases is discussed in legal literature by Leible, loc. cit. (footnote 23). Mankowski, loc. cit. (footnote 23), p. 148, paragraph 121, raises the question of excessive preferential treatment given to applicants.

74 — This solution is sometimes referred to in legal literature as 'mosaic theory' or the 'mosaic solution'. See, for example, Rauscher, loc. cit. (footnote 69), p. 183, paragraph 55, and Kropholler, loc. cit. (footnote 60), p. 141, paragraph 42.

75 — See Rauscher, loc. cit. (footnote 69), p. 183, paragraph 55.

76 — This solution is advocated in legal literature by, for example, Gaudemet-Tallon, loc. cit. (footnote 23), p. 159, paragraph 199. Mankowski, loc. cit. (footnote 23), pp. 147 and 148, paragraphs 120 and 121, mentions this solution only as one option, but rejects it. It should be added that jurisdiction under Article 5(1)(a) of Regulation No 44/2001 is determined in three steps. The court must first ascertain the contractual obligation that is the subject of dispute between the parties to the contract. It must then determine, on the basis of its own rules of private international law, the substantive law applicable to the legal relationship between the parties (*lex causae*). Finally, it must determine, by reference to that law, the place of performance of the contested contractual obligation. See Case 14/76 *De Bloos* [1976] ECR 1497, paragraph 13, and Case 12/76 *Industrie Tessili Italiana Como* [1976] ECR 1473, paragraph 13. See also the Opinion of Advocate General Trstenjak in *Falco Privatstiftung and Rabitsch*, cited in footnote 43, point 81.

or the provision of services,[77] or where the place of performance of the contractual obligation is not in one of the Member States[78] (with the exception of Denmark, for which the Brussels Convention continues to apply[79]). In the case of a contract for the provision of services — which the commercial agency contract undoubtedly is[80] — jurisdiction must be determined pursuant to the second indent of Article 5(1)(b) and not subparagraph (a) of that article.

87. The fourth possibility for determining jurisdiction, where this cannot be done by reference to the place where the services were mainly provided, is to refrain entirely from applying Article 5(1) of Regulation No 44/2001 and to determine jurisdiction under Article 2 of that regulation in accordance with *Besix*.[81] In *Besix* the Court ruled in connection with Article 5(1) of the Brussels Convention that jurisdiction is not determined under that provision when the place of performance of the obligation in question cannot be determined because the latter consists in an undertaking not to do something which is not subject to any geographical limit, and which may, therefore, be performed in numerous places.[82] In such a case, jurisdiction is determined under Article 2(1) of the convention. However, in my opinion it is not appropriate in the present case to determine jurisdiction in accordance with the decision in *Besix* and, therefore, on the basis of Article 2 of Regulation No 44/2001.

88. First of all, determination of jurisdiction in accordance with *Besix* would make it impossible to determine jurisdiction under the second indent of Article 5(1)(b) of Regulation No 44/2001 in the case of many commercial agency contracts under which

77 — One example of a contract which does not relate to the sale of goods or the provision of services and in respect of which jurisdiction is determined under Article 5(1)(a) of Regulation No 44/2001 is a contract under which the owner of an intellectual property right grants its contractual partner the right to use that right in return for remuneration (see *Falco*, cited in footnote 3, paragraph 58). In legal literature see Berlioz, loc. cit. (footnote 42), paragraphs 85 to 95. Takahashi, loc. cit. (footnote 69), p. 534, states that jurisdiction is determined under Article 5(1)(a) of Regulation No 44/2001 in the case of a barter contract, for example.

78 — Article 5(1)(b) of Regulation No 44/2001 requires that the place of performance of the obligation in question (supply of goods or provision of services) is a place in a Member State. *A contrario*, where the place of performance is not in a Member State, Article 5(1)(a) of that regulation applies. In legal literature, see, for example, Micklitz, H.-W. and Rott, P., 'Vergemeinschaftung des EuGVÜ in der Verordnung (EG) Nr. 44/2001', *Europäische Zeitschrift für Wirtschaftsrecht*, No 11/2001, p. 329, and Takahashi, loc. cit. (footnote 69), p. 540.

79 — As recital 21 in the preamble to Regulation No 44/2001 states, Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, did not participate in the adoption of the regulation, and is therefore not bound by it nor subject to its application. According to recital 22 in the preamble to Regulation No 44/2001, the Brussels Convention remains in force in relations between Denmark and the Member States that are bound by the regulation. Article 1(3) of Regulation No 44/2001 provides that in the regulation the term 'Member State' means Member States with the exception of Denmark.

80 — See point 59 of this Opinion.

81 — Cited in footnote 14.

82 — *Besix*, cited in footnote 14, paragraph 55.

services are provided in several Member States. This would run counter to the purpose of Article 5(1)(b), which was inserted into the regulation specifically so that the place of performance of the obligation may be determined autonomously for two types of contract, contracts for the supply of goods and contracts for the provision of services, [83] but it would also run counter in general to the purpose of Article 5(1), which is to define special jurisdiction for contractual disputes. [84]

89. Furthermore, applying the principles developed in *Besix* to the present case would be contrary to the scheme of Article 5(1) of Regulation No 44/2001. Even if it were assumed that subparagraph (b) of that article is not applicable when it is not possible to determine the place of performance of the obligation characteristic of the contract, [85] in accordance with Article 5(1)(c) jurisdiction would be determined on the basis of subparagraph (a) of that article. [86] Only if it were not possible to determine jurisdiction under subparagraph (a) of that article could jurisdiction be determined on the basis of Article 2 of Regulation No 44/2001. By determining jurisdiction on the basis of Article 2, this intermediate step would be omitted and Article 5(1)(c) of Regulation No 44/2001, and thus the scheme of that article, would be utterly disregarded.

90. Lastly, it should be borne in mind that the nature of the contractual obligations in the present case is not comparable with that in *Besix*. The situation in *Besix* concerned a contract which related to an undertaking not to do something which was not subject to any geographical limit. [87] That contract was not therefore a contract for the provision of services like the one in the present case. If

83 — With regard to this purpose of Article 5(1)(b) of Regulation No 44/2001 see for example the Opinion of Advocate General Trstenjak in *Falco Privatstiftung and Rabitsch*, cited in footnote 43, point 85.

84 — In legal literature see, for example, Kropholler, loc. cit. (footnote 60), p. 141, paragraph 42, who argues against the option of precluding determination of jurisdiction under the rules on special jurisdiction for contractual disputes, that is under Article 5(1), for contracts for the sale of goods or for the provision of services in several Member States.

85 — As I stated in point 86 of this Opinion, I take the view that this position is not tenable and jurisdiction must also be determined under Article 5(1)(b) of Regulation No 44/2001 if it is not possible to determine a place where the services were mainly provided.

86 — The failure to have regard to the scheme of Article 5(1) of Regulation No 44/2001 in this solution is also criticised by Mankowski, loc. cit. (footnote 23), p. 148, paragraph 121.

87 — *Besix*, cited in footnote 14, paragraphs 7 and 8. As can be seen from the description of the facts in paragraphs 7 and 8 of that judgment, the parties concluded a contract whereby they undertook to submit a joint tender in response to a public invitation to tender, to cooperate with one another exclusively and not to commit themselves to other partners.

Besix had been decided after the entry into force of Regulation No 44/2001, the undertaking not to do something would not have been regarded as a contract for the provision of services within the meaning of the second indent of Article 5(1)(b) of that regulation, [88] but jurisdiction would be assessed on the basis of subparagraph (a) of that article, which is the counterpart to Article 5(1) of the Brussels Convention, the provision interpreted in *Besix*. I therefore take the view that the decision in *Besix* cannot be applied to the present case.

91. The fifth possible solution, if it is not possible to determine a place where the services were mainly provided, is to determine jurisdiction by reference to the place where the commercial agent, that is the contracting party which performs the obligation that is characteristic of the contract, has its registered office. In my opinion, this solution is the most appropriate, for several reasons.

92. First of all, this solution is consistent both with the objective of predictability and with that of a close linking factor between the contract and the court having jurisdiction. This solution offers predictability, because the place of the court having jurisdiction — the court at the place where the commercial agent has its registered office — is clear and because that court hears all the claims in connection with a single commercial agency contract. A close linking factor exists because the evidence is generally also available at the place where the commercial agent has its registered office.

93. Secondly, this solution is appropriate because jurisdiction is still determined under the second indent of Article 5(1)(b) of Regulation No 44/2001. Admittedly, this solution diverges in part from the wording and purpose of the second indent of Article 5(1)(b) of Regulation No 44/2001, by virtue of which jurisdiction is determined by reference to the place where, under the contract, the services were provided or were to have been provided. This is the place where the services were *actually* provided, which means that that article uses a criterion, in determining jurisdiction, which depends on factual circumstances. [89] In reality, the proposed solution means that a factual criterion is replaced by an abstract

88 — As I stated in point 59 of this Opinion, according to *Falco* the concept of service 'implies, at the least, that the party who provides the service carries out a particular *activity* in return for remuneration' (see *Falco*, cited in footnote 3, paragraph 29 (my emphasis)). In the case of an undertaking not to do something, on the other hand, the person who gives the undertaking does not carry out any activities, so an undertaking not to do something cannot, in my opinion, be regarded as a contract for the provision of services within the meaning of the second indent of Article 5(1)(b) of Regulation No 44/2001. With regard to the definition of 'service' see also the Opinion of Advocate General Trstenjak in *Falco Privatstiftung and Rabitsch*, cited in footnote 43, point 57, and the literature cited therein.

89 — In legal literature see, for example, Mankowski, loc. cit. (footnote 23), p. 134, paragraph 96. See also Micklitz and Rott, loc. cit. (footnote 78), p. 328.

criterion. However, the solution based on the abstract criterion applies only if it is not possible to determine a place where the services were mainly provided. [90] I therefore take the view that this solution is nevertheless the most appropriate.

94. In my opinion, Question 1(c) asked by the referring court must therefore be answered to the effect that, if it is not possible to determine a place where the services were mainly provided, in the case of a commercial agency contract the place where the commercial agent has its registered office is to be regarded as the place of the provision of services.

D — *Second question*

95. By the second question, the referring court seeks essentially to ascertain whether — if Question 1(a) is answered in the negative — Article 5(1)(a) of Regulation No 44/2001 is applicable to contracts for the provision of services in several Member States, like the commercial agency contract in the present case.

96. The referring court asks the second question only if the answer to Question 1(a) is in the negative, that is to say, if the second indent of Article 5(1)(b) is to be interpreted as *not* being applicable to contracts for the provision of services, like the commercial agency contract in the present case, on the basis of which services are provided in several Member States.

97. As was stated in point 67 of this Opinion, I consider that Question 1(a) should be answered in the affirmative, with the result that there is no need to answer the second question, which is asked only in the alternative.

90 — From this perspective, this solution is more appropriate than the solution proposed by the German Government, whereby in the case of a commercial agency contract the refutable presumption must categorically be adopted that the place where the services were, by agreement, provided and by reference to which the court having jurisdiction is determined is where the commercial agent has its 'main office' (see point 34 of this Opinion). The solution proposed by the German Government is based on an abstract criterion and takes the specific criterion into consideration only if the presumption is refuted. Furthermore, in the solution proposed by the German Government, the defendant bears the risk of the consequences of the failure to provide proof if the presumption has not been refuted.

E — *View*

98. Having regard to the foregoing considerations, I consider that the second indent of Article 5(1)(b) of Regulation No 44/2001 is applicable in the case of a commercial agency contract under which the commercial agent provides services in several Member States, and must therefore be interpreted to the effect that jurisdiction is to be determined by reference to the place where the services were mainly provided. This assessment being made on the basis of facts, it must be made by the national court. If it is not possible to determine a place where the services were mainly provided, I consider that in the case of a commercial agency contract the place where the commercial agent has its registered office is to be regarded as the place of the provision of services.

VII — Conclusion

99. In the light of these considerations, I propose that the Court answer the questions referred by the Oberlandesgericht Wien as follows:

(1) The second indent of Article 5(1)(b) 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 is applicable to a contract for the provision of services, like the commercial agency contract in the present case, on the basis of which services are provided in several Member States.

(2) The second indent of Article 5(1)(b) of Regulation No 44/2001 must be interpreted as meaning that, in determining jurisdiction to hear disputes arising from

a contract for the provision of services performed in several Member States, like the commercial agency contract in the present case, the place where the services were provided for the purposes of that article must be determined by reference to the place where the services were mainly provided. That assessment must be made by the national court.

(3) If it is not possible to determine a place where the services were mainly provided, in the case of a commercial agency contract, like that in the present case, the place where the commercial agent has its registered office is to be regarded as the place of the provision of services.