Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 2 April 2014 [1]

Case C-112/13

A
v
B and Others

(Request for a preliminary ruling from the Oberster Gerichtshof (Austria))

(Area of freedom, security and justice — Regulation (EC) No 44/2001 — Cooperation in civil matters — Jurisdiction — Prorogation of jurisdiction where the defendant enters an appearance — Court-appointed representative in absentia for the defendant — Article 47 of the Charter — Primacy of EU law)

1. In the present case, the Court is first of all asked to rule on the question whether an appearance entered by a representative *in absentia* appointed for the defendant in accordance with national law can be assimilated to the entry of an appearance for the purposes of Article 24 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. [2]

2. That question is important because the entry of an appearance for the purposes of Article 24 of Regulation No 44/2001 automatically entails the prorogation of the jurisdiction of the court seised, even if that court does not have jurisdiction under the rules laid down in that regulation.

3. The Oberster Gerichtshof (Supreme Court, Austria) also wishes to know whether, in cases where national courts consider a national statute to be contrary to the Charter of Fundamental Rights of the European Union ('the Charter'), they are compelled by the principle of equivalence to refer the question of its constitutionality to a constitutional court, with a view to having that statute generally struck down and may not instead refrain from applying it, in accordance with the principle of the primacy of EU law.

4. In this Opinion, I shall set out the reasons why I consider that Article 24 of Regulation No 44/2001, read in the light of Article 47 of the Charter, must be interpreted as meaning that the appearance before a national court of the representative *in absentia* for the defence, appointed in accordance with national law, cannot be assimilated to the entry of an appearance by the defendant for the purposes of Article 24 of that regulation.

5. I shall then explain why I believe that, within the scope of EU law, the principle of equivalence does not require national courts, in circumstances such as those of the case before the referring court, to refer to a constitutional court the question of the constitutionality of a national statute that they consider to be contrary to the Charter, with a view to having that statute generally struck down. A

1 — Original language: French.
2 — OJ 2001 L 12, p. 1.

provision of national law entailing such an obligation is not contrary to EU law provided that it does not give rise to any abolition, suspension, diminution or deferral of the national court's duty to apply the provisions of EU law and to ensure their full effectiveness — if need be, by refraining of its own motion from applying any provision of national legislation that is contrary to EU law — or of its right to make a reference to the Court for a preliminary ruling.

I – **Legal context**

A – *Regulation No 44/2001*

6. Under Article 1(1) of Regulation No 44/2001, that regulation applies in civil and commercial matters, whatever the nature of the court or tribunal.

7. Article 2(1) of Regulation No 44/2001 provides that, subject to that regulation, persons domiciled in a Member State are to be sued in the courts of that Member State, whatever their nationality.

8. In Section 7 of Regulation No 44/2001, entitled 'Prorogation of jurisdiction', Article 24 provides:

'Apart from jurisdiction derived from other provisions of this Regulation, a Court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another Court has exclusive jurisdiction by virtue of Article 22'.

9. Article 26(1) of Regulation (EC) No 44/2001 provides:

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

10. In Chapter III of Regulation No 44/2001, which is entitled 'Recognition and Enforcement', point 2 of Article 34 provides that a judgment is not to be recognised 'where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so'.

B – *Austrian law*

1. Constitutional law

11. Under Paragraph 89 of the Federal Constitutional Law (Bundes-Verfassungsgesetz; 'the B-VG'), neither the ordinary courts nor the Oberster Gerichtshof (Supreme Court) — by virtue of Paragraph 92 of the B-VG, the highest civil and criminal court in the land — have jurisdiction to strike down ordinary laws as unconstitutional. If those courts have doubts as to the constitutionality of an ordinary statute, they are under a duty to make an application in that connection to the Verfassungsgerichtshof (Constitutional Court).

12. Under Paragraph 140(6) and (7) of the B-VG, the striking down of a statute by the Verfassungsgerichtshof is effective *erga omnes* and is binding on the ordinary courts.

13. In accordance with settled case-law, it has been the practice of the Oberster Gerichtshof to refrain on a case-by-case basis — without consulting the Verfassungsgerichtshof — from applying statutory provisions that are contrary to directly applicable EU law, thereby giving effect to the principle of the primacy of EU law. Likewise, the Verfassungsgerichtshof has hitherto held that any contradiction between an Austrian statute and EU law must be resolved in accordance with that principle. Thus, such a contradiction does not lead the statute to be struck down on grounds of unconstitutionality for the purposes of Paragraph 140 of the B-VG.

14. However, in a judgment of 14 March 2012, the Verfassungsgerichtshof departed from that case-law and ruled that the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), is directly applicable in Austria and enjoys the same status as the Austrian Constitution. The rights which it protects are themselves guaranteed by the B-VG. It is therefore necessary — the Verfassungsgerichtshof went on to state — to examine in the light of the principle of equivalence how, and in accordance with what procedure, rights under the Charter may be asserted on the basis of national law.

15. The Verfassungsgerichtshof added that the system of legal remedies provided for under the B-VG is predicated on the principle that the Verfassungsgerichtshof is the only court required to rule on the unlawfulness of general statutory provisions — that is to say, laws and regulations — and the only court with jurisdiction to strike down such provisions.

16. The Verfassungsgerichtshof therefore concluded that, under national law, the principle of equivalence means that the rights guaranteed by the Charter also constitute, within the scope of that instrument, an assessment criterion in proceedings for the general review of statutory provisions, in accordance specifically with Paragraphs 139 and 140 of the B-VG.

17. Lastly, the Verfassungsgerichtshof pointed out that there is no obligation for a national court to request the Court of Justice for a preliminary ruling if the question is not relevant for the purposes of deciding the dispute before it, that is to say, if the answer to that question, whatever it may be, cannot have any influence on the outcome of the dispute. In the context of the Charter, that will be the position if a right guaranteed by the B-VG — especially a right under the ECHR — has the same scope as a right under the Charter. In that case, the decision of the Verfassungsgerichtshof will be based on Austrian constitutional law, with any need for a preliminary ruling under Article 267 TFEU.

18. The referring court goes on to state that this arguably means that, if an Austrian statute is contrary to EU law and, specifically, to the Charter, no remedy is available directly through ordinary proceedings in which the principle of the primacy of EU law is applied and that, without prejudice to the possibility of making a reference to the Court of Justice for a preliminary ruling, the ordinary courts are compelled by the principle of equivalence to make an application to the Verfassungsgerichtshof.

2. Code of Civil Procedure

19. Under Paragraph 115 of the Code of Civil Procedure (Zivilprozessordnung; 'the ZPO'), in the version applicable to the main proceedings, in the case of persons whose address is unknown, service is as a general rule to be effected by public notice. It is also stated that the notice must be entered in a legal notices database.

20. Paragraph 116 of the ZPO provides that, in the case of persons on whom service can be effected only by public notice because their address is unknown, the court is to appoint, of its own motion or following a request, a representative *in absentia* if, as a result of the service to be effected on them, those persons have to perform a procedural act in order to protect their rights and, in particular, if the documents to be served contain a summons requiring them to appear in court. Under Paragraph 117 of the ZPO, the appointment of the representative must be published by official notice in the legal notices database, which can be consulted by the public by automated data transfer.

21. Lastly, under Paragraph 230 of the ZPO, the court seised must first verify whether it has international jurisdiction. If it transpires that it does not, the court of first instance must dismiss the action of its own motion. On the other hand, if that court does have jurisdiction, it must serve the documents instituting proceedings on the defendant, to enable that party to submit observations.

II – **Facts**

22. On 12 October 2009, B and Others brought an action for damages against A before the Landesgericht Krems an der Donau (District Court, Krems an der Donau), the court of first instance. They maintain that A abducted their husbands or their fathers in Kazakhstan. They argue that the Austrian courts have jurisdiction on the ground that A has his normal place of domicile in Austrian territory.

23. After several unsuccessful attempts to serve the documents instituting proceedings, the Landesgericht Krems an der Donau established that A was no longer domiciled at the addresses given for service and, at the request of B and Others, it therefore appointed a representative *in absentia*, by order of 27 August 2010 under Article 116 of the ZPO, to act on behalf of the defendant.

24. On being served the documents instituting proceedings, the representative *in absentia* lodged a statement of defence contending that the action should be dismissed and raising numerous counter-arguments to the substantive claims made. The representative did not, in that statement, challenge the international jurisdiction of the Austrian courts.

25. Subsequently, after learning of the proceedings brought against him, A announced that he had instructed a law firm to represent him and asked that, in future, all service of documents be effected on that firm. A also stated that he was challenging the international jurisdiction of the Austrian courts on the ground that the circumstances material to the proceedings had occurred in Kazakhstan. In his view, the lack of jurisdiction of those courts could not be cured through the intervention of a representative *in absentia* for the defence, with whom A had had no contact and who was unacquainted with the facts. A also stated that, given that his life was in danger, he was not obliged to disclose his address and that he had permanently left Austria long before the action was lodged.

26. The Landesgericht Krems an der Donau accordingly declared that it did not have international jurisdiction and dismissed the action on the ground that A was domiciled in Malta and that the entry of an appearance by the representative *in absentia* for the defence could not be deemed to constitute the entry of an appearance for the purposes of Article 24 of Regulation No 44/2001.

27. B and Others lodged an appeal against that judgment. The appeal court upheld that appeal and rejected the objection as to lack of international jurisdiction. In its view, Regulation No 44/2001 does not place the court under an obligation to verify its international jurisdiction only if there is a failure to enter an appearance for the purposes of Article 26 of that regulation; it is only if the defendant objects that the court is under a duty to examine its international jurisdiction. The appeal court added that, under Austrian law, the procedural acts of a court-appointed representative *in absentia*, who is under a duty to safeguard the interests of the defendant, have the same legal effect as those of an ordinary legal representative.

28. A therefore appealed to the referring court on a point of law ('Revision') against that judgment, arguing that it fails to observe the rights of the defence under Article 6 of the ECHR and Article 47 of the Charter, inasmuch as the defendant does not know that proceedings have been brought against him.

29. B and Others, on the other hand, contend in their statement in reply that the appointment of a representative to act *in absentia* on behalf of the defendant ensures that their fundamental right to an effective remedy, which is also enshrined in those provisions, will be observed.

30. Doubts as to the proper interpretation of Article 24 of Regulation No 44/2001 and Article 47 of the Charter moved the Oberster Gerichtshof to stay the proceedings and to refer a number of questions to the Court for a preliminary ruling.

III – **The questions referred for a preliminary ruling**

31. The Oberster Gerichtshof referred the following questions to the Court:

'1. In the case of rules of procedural law under which the ordinary courts called upon to decide on the substance of cases are also required to examine whether legislation is unconstitutional but are not empowered to strike down legislation generally, this being reserved for a specially organised constitutional court, does the "principle of equivalence" in the implementation of [EU] law mean that, where legislation infringes Article 47 of the [Charter], the ordinary courts are also required, in the course of the proceedings, to request the constitutional court to strike down the legislation generally, and cannot simply refrain from applying that legislation in the particular case concerned?

2. Is Article 47 of the Charter to be interpreted as precluding a procedural rule under which a court which does not have international jurisdiction appoints a representative in absentia for a party whose place of domicile cannot be established and that representative can then, by "entering an appearance", confer binding international jurisdiction on that court?

3. Is Article 24 of [Regulation No 44/2001] to be interpreted as meaning that "a defendant enters an appearance", for the purposes of that provision, only where that procedural act was carried out by the defendant himself or by a legal representative authorised by him, or does the foregoing obtain without restriction also in the case of a representative in absentia appointed under the law of the Member State in question?'

IV – **My analysis**

32. As a preliminary point, I believe that — as A, the Austrian and Italian Governments and the European Commission have suggested — it is necessary to reply first to Questions 2 and 3, which will prompt the Court to interpret Article 24 of Regulation No 44/2001 in the light of Article 47 of the Charter, and only then to address Question 1, which is relevant only if the answer to Questions 2 and 3 is that EU law precludes national legislation such as that at issue in the main proceedings.

A – *Questions 2 and 3*

33. By its second and third questions, which I propose to address together, the referring court essentially seeks to know whether Article 24 of Regulation No 44/2001, read in the light of Article 47 of the Charter, must be interpreted as meaning that the entry of an appearance before the national court by a representative *in absentia* appointed in accordance with national law to act on behalf of the defendant can be assimilated to the entry of an appearance by the defendant for the purposes of Article 24 of that regulation, thereby entailing the tacit acceptance of the international jurisdiction of that court.

34. In the main proceedings, a representative *in absentia* was appointed in accordance with Paragraph 116 of the ZPO to act on behalf of the defendant since, in the absence of an address for service, it proved impossible to serve the documents instituting the proceedings brought by B and Others.

35. The term 'appearance' as used in Article 24 of Regulation No 44/2001 is not defined anywhere in that regulation. In my view, it must have an autonomous definition under EU law inasmuch as that regulation is intended to improve the sound operation of the internal market by putting in place provisions to unify the rules of conflict of jurisdiction in civil and commercial matters.[3] If that term were to be interpreted in different ways, the attainment of that aim could be jeopardised. Article 24 of Regulation No 44/2001 must therefore be construed in the light of the scheme and objectives of that regulation.

36. Article 24 of Regulation No 44/2001 entails a tacit prorogation of the jurisdiction of the court before which the defendant enters an appearance, even where, strictly speaking, that court does not have jurisdiction under the rules laid down in that regulation. That exception, which does not apply to the rules laid down in Article 22 of Regulation No 44/2001 governing exclusive jurisdiction, is a departure from the jurisdictional scheme established by Regulation No 44/2001 and must accordingly be narrowly construed.

37. The rules laid down in Regulation No 44/2001 are intended to establish a high level of predictability for the individuals subject to that legislation and devolve from the basic principle that the courts of the defendant's place of domicile should have jurisdiction,[4] consistently with the long-established rule of civil procedure known as *actor sequitur forum rei*. That general jurisdictional rule was preferred to any other because it is presumed that, in principle, the court of the defendant's place of domicile has the closest links with the dispute.

38. In so far as that presumption is not always accurate, Regulation No 44/2001 lays down special jurisdictional rules to apply if the subject-matter of the dispute or the autonomy of the parties warrants a different linking factor.[5] In particular, the jurisdictional rules established in relation to insurance, consumer contracts and employment are designed to protect the weaker party by means of rules which are more favourable to that party's interests.[6] It is therefore all the more essential that Article 24 of Regulation No 44/2001 be narrowly construed because the interpretation given to that provision may lead to a less than full application of more protective jurisdictional rules.

39. The tacit prorogation of the jurisdiction of the court before which the defendant has entered an appearance is a mechanism intended to facilitate the rapid recognition and enforcement of judgments delivered by a court whose jurisdiction both parties have accepted — even where that court did not really have jurisdiction to determine the dispute. Accordingly, in cases where the court dealing with

3 — See recitals 1 and 2 in the preamble to Regulation No 44/2001.

4 — See Article 2 of that regulation and recital 11 thereto.

5 — See recital 11 to that regulation.

6 — See recital 13 to that regulation.

enforcement is moved to verify the jurisdiction of the court which handed down the decision,[7] that mechanism is designed to prevent the former from challenging the jurisdiction of the latter on the basis of Regulation No 44/2001, even though the parties to the dispute have agreed to that jurisdiction since the defendant has entered an appearance without raising any objection in that regard. As the Commission has pointed out, it is therefore the conduct of the defendant alone that will determine the jurisdiction of the court in such circumstances.

40. This makes it clear how important it is for the defendant who enters an appearance to decide, in full knowledge of the facts, on the tacit prorogation of the jurisdiction of a court which would not normally have jurisdiction. Let us take the example of a dispute concerning an agreement entered into by a consumer, who is later sued by the professional party to the contract before the courts of the Member State on whose territory the professional is domiciled. Normally, Article 16(2) of Regulation No 44/2001 would preclude those courts from having jurisdiction because the consumer is the weaker party and the court with jurisdiction is that of the Member State in whose territory the consumer is domiciled. However, if the consumer deliberately enters an appearance before the courts of the former Member State without challenging their jurisdiction, those courts will indeed have jurisdiction in accordance with Article 24 of Regulation No 44/2001[8] and the judgment will therefore have to be recognised by the court dealing with enforcement.

41. The importance of ensuring that the defendant is aware of the consequences brought about by 'entering an appearance' for the purposes of Article 24 of Regulation No 44/2001 has now been made clear by the instrument recasting that regulation, that is to say, by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[9] Article 24 of Regulation No 44/2001 has been amended and a second paragraph has been added to that provision, under which '[i]n matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the defendant, the court shall, before assuming jurisdiction under paragraph 1, ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance'.[10]

42. It therefore appears essential that the tacit prorogation of the jurisdiction of the court of a Member State be accepted only if all the parties to the dispute — and, above all, the defendant — have deliberately chosen that jurisdiction instead of the court which would normally have jurisdiction under the rules laid down in Regulation No 44/2001.

43. Consequently, I do not see how it is possible to accept that, in a situation where, not only has the defendant not entered an appearance in person, but also the defendant is unaware of the proceedings brought against him, that party can be said to have accepted in full knowledge of the facts and 'deliberately', to borrow the adverb used by the Court in *ČPP Vienna Insurance Group*,[11] the jurisdiction of the court before which he has not entered an appearance.

44. That consideration is in no way altered by the fact that a court-appointed representative has entered an appearance on behalf of the defendant.

7 — That possibility now exists only in the case of disputes concerning insurance or consumer law, and matters coming under exclusive jurisdiction. See Article 35(1) and (2) of that regulation.

8 — See, in that regard, *ČPP Vienna Insurance Group* (C-111/09, EU:C:2010:290, paragraphs 25 to 30).

9 — OJ 2010 L 351, p. 1.

10 — See Article 26(2) of Regulation No 1215/2012.

11 — EU:C:2010:290.

45. In *Hendrikman and Feyen*,[12] the Court stated that, where proceedings are initiated against a person without his knowledge and a lawyer appears before the court first seised on his behalf but without his authority, such a person is quite powerless to defend himself. That person must therefore be regarded as 'a defendant in default of appearance' within the meaning of Article 27(2) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters,[13] even if the proceedings before the court first seised became, in point of form, proceedings *inter partes*.[14] The case that gave rise to that judgment turned on the question whether the court of the Member State requested could refuse to recognise judgments handed down by the court of another Member State where those judgments were delivered against a defendant who had not been duly served with, or notified of, the document instituting proceedings in sufficient time and who was not validly represented during those proceedings, albeit that the judgments handed down were not delivered in default of appearance, because someone purporting to represent the defendant had appeared before the court first seised.

46. The approach adopted by the Court is that even a judgment described as having been delivered in proceedings *inter partes* cannot be recognised if the defendant has not himself instructed a lawyer and the proceedings have been conducted without his knowledge. Admittedly, although the case before the referring court differs in procedural terms from the case that gave rise to the judgment in *Hendrikman and Feyen*,[15] to the extent that the former is in its initial stages and the latter at the stage of enforcement, it is none the less true that in both cases the rights of the defence guaranteed by Article 47 of the Charter may be affected.

47. I do not believe that a representative *in absentia* appointed for the defendant in circumstances akin to those of the case before the referring court can possibly be the person best placed to protect the defendant's interests and thus to ensure observance of the rights guaranteed by Article 47 of the Charter. That representative has available to him only partial information concerning the dispute, that is to say, information provided by the applicant. He is therefore unable to present a proper defence. By the same token, he does not seem to me to have access to certain key information which would enable him, where appropriate, to challenge the international jurisdiction of the court seised by the applicant, the question of jurisdiction in international law never being a simple matter. The defendant, having been unaware of the proceedings and, as a consequence, scarcely in a position to choose his own lawyer, cannot be validly represented before the court in question.

48. Not only would a defendant who, like A in the dispute before the referring court, is informed at a later stage of the proceedings brought against him no longer be able to challenge the jurisdiction of the courts seised; also, a decision would be handed down which would be valid throughout the territory of the European Union but which would be based on proceedings that are not in conformity with Article 47 of the Charter, which is unacceptable.

49. To my mind, *Hypoteční banka*[16] does not call those findings in question. In that judgment, the Court ruled that to pursue proceedings without the defendant's knowledge by means of the notification of the action served on a guardian *ad litem* appointed by the court seised constitutes a restriction of the defendant's rights of defence. That restriction is justified, however, in the light of an applicant's right to effective protection, given that, in the absence of such proceedings, that right would be meaningless.[17] The Court went on to state that, in contrast to the situation of the defendant, who, if

12 — C-78/95, EU:C:1996:380.

13 — OJ 1972 L 299, p. 32. Convention as amended by the successive conventions on accession of new Member States to that convention.

14 — Paragraph 18 of that judgment.

15 — EU:C:1996:380.

16 — C-327/10, EU:C:2011:745.

17 — Paragraph 53.

deprived of the opportunity to defend himself effectively, will have the opportunity to ensure respect for the rights of the defence by opposing, in accordance with point (2) of Article 34 of Regulation No 44/2001, recognition of the judgment issued against him, the applicant runs the risk of being deprived of all possibility of recourse.[18]

50. Whilst the Court's desire in that judgment to uphold both the rights of the defence and those of the applicant, for whom it does not wish to deny a judicial remedy, the significant difference between that case and the case currently under consideration is the fact that the defendant here — namely, A — can no longer challenge the jurisdiction of the Austrian courts if the representative *in absentia* for the defendant is deemed to have entered an appearance for the purposes of Article 24 of Regulation No 44/2001. Moreover, it must not be forgotten that, in the case currently under consideration and in contrast to the facts in *Hypoteční banka*,[19] A's domicile is known and is situated in the territory of another Member State. It is open to B and Others, therefore, to bring proceedings before the courts of the Member State in whose territory A is domiciled, that is to say, before the Maltese courts.

51. Accordingly, I do not believe that the same line of reasoning as that followed in *Hypoteční banka* can be applied in the present case.

52. Furthermore, there is another factor in favour of the argument that I am putting forward: it is the rationale underlying Article 26 of Regulation No 44/2001.

53. In Section 8 of Chapter II of Regulation No 44/2001, which is entitled 'Examination as to jurisdiction and admissibility', the EU legislature was at pains to insert that provision, paragraph 1 of which provides that, where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court is to declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the terms of that regulation.

54. In the Report on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, by Mr Jénard[20], which preceded Regulation No 44/2001, the provision equivalent to Article 26 of that regulation was described as 'one of the most important' provisions in the Convention.[21] It is also stated in that document that failure on the part of the defendant to enter an appearance is not equivalent to a submission to the jurisdiction; that it is not sufficient for the court to accept the submissions of the plaintiff as regards jurisdiction; and that the court must itself ensure that the plaintiff proves that that court has international jurisdiction. The reason for this is to ensure that, in the event of failure by the defendant to enter an appearance, the court giving judgment does so only if it has jurisdiction, and so to safeguard the defendant as fully as possible in the original proceedings.[22]

55. However, the effectiveness of Article 26 of Regulation No 44/2001 — and, accordingly, of the guarantee that the rights of the defence will be observed — would be compromised if an appearance before the court, for the purposes of Article 24 of that regulation, by a representative *in absentia* for the defendant were to be accepted as a sufficient basis for jurisdiction, notwithstanding the fact that, indisputably, that court does not have jurisdiction to determine the dispute.

56. Lastly, the present case itself is a good example, to my mind, of what the EU legislature was attempting to avoid by establishing the system of jurisdictional rules as laid down in Regulation No 44/2001. It is common ground in this case that A is not domiciled in Austrian territory. If it were to be accepted that an appearance entered by the representative *in absentia* of the defendant can be

18 — Paragraph 54.

19 — EU:C:2011:745.

20 — OJ 1979 C 59, p. 1.

21 — See commentary on Article 20 (p. 39 of that report).

22 — Idem.

assimilated to an appearance entered by the defendant for the purposes of Article 24 of that regulation, that would be tantamount to recognising the jurisdiction of a court of a Member State which has no connecting factor whatsoever with the actual dispute. I would recall that B and Others are Kazakh nationals and resident in Kazakhstan; that A is also of Kazakh nationality and is resident in Maltese territory; and, lastly, that the facts material to the main proceedings occurred in Kazakh territory.

57. To construe Article 24 of Regulation No 44/2001 in that way would in reality amount to accepting that that court has international jurisdiction in every case, in disregard of the rules established by that regulation and despite the fact that a foreign court is more appropriate owing to the links that it may have with the dispute.

58. For all those reasons, I believe that Article 24 of Regulation No 44/2001, read in the light of Article 47 of the Charter, should be interpreted as meaning that an appearance entered before a national court by a representative *in absentia* appointed for the defendant in accordance with national law cannot be deemed to constitute an appearance entered by the defendant for the purposes of Article 24 of that regulation.

B – *Question 1*

59. By its first question, the national court is asking the Court whether the national courts are compelled by the principle of equivalence to make a reference to a constitutional court regarding the constitutionality of a national statute which they consider to be contrary to the Charter, with a view to having that statute struck down, and may not instead refrain from applying it, in accordance with the principle of the primacy of EU law.

60. The reason why the referring court is putting that question to the Court is to be found in the case-law of the Verfassungsgerichtshof, which has held that, whilst the rights guaranteed by the ECHR may, by dint of their constitutional status, be invoked before it, the principle of equivalence requires that recourse to the Verfassungsgerichtshof should also be available in the case of rights guaranteed by the Charter. The Oberster Gerichtshof infers from this that it is now no longer possible to refrain from applying the statute considered contrary to EU law in the proceedings before it, in accordance with the principle of the primacy of EU law; rather, the national courts are now obliged to seek a ruling from the Verfassungsgerichtshof as to the constitutionality of the statute that they consider to be contrary to that law.

61. As regards the steps to be taken by a national court in the event of a conflict between provisions of its domestic law and rights guaranteed by the Charter, where the latter applies, it is settled case-law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such a provision by legislative or other constitutional means. [23]

62. The obligation that national law takes upon itself, with respect to national legal situations falling within the ambit of EU law, to comply with the requirements of the Charter is attributable solely to the will of the Member State concerned and reflects its sovereignty.

23 — See *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 45 and the case-law cited).

63. In that respect, the detailed arrangements for the implementation of that internal constitutional obligation are also a matter for national law, subject to one fundamental reservation, that is to say, implementation of that choice must not conflict with the principles laid down in *Simmenthal*[24] and subsequent case-law, as expressed, for instance, in *Melki and Abdeli*.[25]

64. In its judgment in *Melki and Abdeli*, the Court recalled its settled case-law to the effect that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of EU law by withholding from the national court with jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent EU rules from having full force and effect are incompatible with those requirements, which are the very essence of EU law. That would be the case in the event of a conflict between a provision of EU law and a national law, if the solution of the conflict were to be reserved to an authority with a discretion of its own, other than the court called upon to apply EU law, even if such an impediment to the full effectiveness of EU law were only temporary.[26]

65. It follows that the procedure adopted by domestic constitutional law for the implementation of its principles cannot have the effect of abolishing, suspending, diminishing or deferring the right of the national court seised to exercise its duty, under the abovementioned case-law, to disregard and to refrain from applying a national law that is contrary to EU law.

66. Application of the principle of equivalence does not in any way call in question that case-law.

67. According to that principle, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions.[27]

68. In the circumstances, I do not see how refraining, in a given dispute, from applying a national statute that is contrary to EU law would be less favourable for the individual than initiating an interlocutory procedure for the review of constitutionality with a view to having that statute struck down. On the contrary, as the referring court itself points out, the implementation of such a procedure is relatively cumbersome, involving expense and additional delays for the parties to the proceedings, whereas the national court is able, directly in the course of the proceedings before it, to establish that a national statute is incompatible with EU law and to disregard that statute, thus securing immediate protection for the parties.

69. Accordingly, as it would have the paradoxical effect of weakening the principle of the primacy of EU law, the principle of equivalence, as construed in the order for reference and in a situation such as that described, has no place here.

70. Consequently, in the light of the foregoing, I am of the view that, within the scope of EU law, the principle of equivalence does not, in circumstances such as those of the case before the referring court, require national courts to make a reference to a constitutional court regarding the constitutionality of a national statute which they consider to be contrary to the Charter, with a view to having that statute generally struck down. A provision of domestic law imposing such an obligation is not contrary to EU law, provided that it does not give rise to any abolition, suspension, diminution or deferral of the duty of the national court to apply the provisions of EU law and to ensure their full effectiveness — if need be, by refraining of its own motion from applying any provision of national legislation that is contrary to EU law — or of its right to make a reference to the Court for a preliminary ruling.

24 — 106/77, EU:C:1978:49.

25 — C-188/10 and C-189/10, EU:C:2010:363.

26 — Paragraph 44 and the case-law cited.

27 — See *Agrokonsulting-04* (C-93/12, EU:C:2013:432, paragraph 36).

V – **Conclusion**

71. I accordingly propose that the Court reply to the Oberster Gerichtshof as follows:

(1) Article 24 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, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that an appearance entered before a national court by a representative *in absentia* appointed for the defendant in accordance with national law cannot be deemed to constitute an appearance entered by the defendant for the purposes of Article 24 of that regulation.

(2) Within the scope of EU law, the principle of equivalence does not, in circumstances such as those of the case before the referring court, require national courts to make a reference to a constitutional court regarding the constitutionality of a national statute that they consider to be contrary to the Charter, with a view to having that statute generally struck down.

A provision of domestic law imposing such an obligation is not contrary to EU law, provided that it does not give rise to any abolition, suspension, diminution or deferral of the duty of the national court to apply the provisions of EU law and to ensure their full effectiveness — if need be, by refraining of its own motion from applying any provision of national legislation that is contrary to EU law — or of its right to make a reference to the Court for a preliminary ruling.