

OPINION OF ADVOCATE GENERAL
KOKOTT

delivered on 18 December 2008¹

I — Introduction

1. Since the intervention of Turkish troops in 1974, the island of Cyprus has been effectively partitioned into a Greek Cypriot southern area and a Turkish Cypriot northern area. The Republic of Cyprus is recognised as a State in international law by the international community and although, *de jure*, it represents Cyprus as a whole, *de facto* it controls only the southern area of the island. In the northern area, the Turkish Republic of Northern Cyprus (TRNC), recognised only by Turkey, has become established.²

2. Although the negotiations on reunification, supported by the United Nations and the EU, could not be successfully concluded, the Republic of Cyprus acceded to the European Union in 2004. The application of the *acquis communautaire* to the areas of the island over which the Republic of Cyprus does not exercise sovereign jurisdiction was suspended by a separate Protocol to the Treaty of Accession.

3. In the course of partition, a large number of members of both ethnic groups fled or were displaced. Many displaced persons claim ownership of land which they were forced to vacate.³ The land left by Greek Cypriots in the TRNC is deemed there to have passed to the State. The TRNC authorities have transferred many of those plots of land to private individuals. How displaced persons' property claims are to be dealt with is one of the unresolved issues in the negotiations on reunification.

4. The proceedings between Mr Apostolides and Mr and Mrs Orams, a British couple, are set in that sensitive context. The couple purchased a plot of land in northern Cyprus from a private vendor. Mr Apostolides, whose family was forced to leave the north, claims ownership of that land. In response to his claim, the District Court of Nicosia, a court in

¹ — Original language: German.

² — With regard to the historical background, see also the Opinion of Advocate General Gulmann in Case C-432/92 *Anastasiou* [1994] ECR I-3087, points 9 to 13.

³ — In 2005, 1 400 property cases were pending before the European Court of Human Rights, brought primarily by Greek Cypriots against Turkey (see Eur Court HR, *Xenides-Arestis v. Turkey*, judgment of 22 December 2005, no. 46347/99, § 38 — *Xenides-Arestis II* judgment).

the Greek Cypriot area, ordered the Orams to vacate the land and to make various payments. Mr Apostolides applied for the recognition and enforcement of that judgment in the United Kingdom.

II — Legal framework

A — *Protocol No 10 on Cyprus*

6. Protocol No 10 on Cyprus,⁵ which is annexed to the Act of Accession of 2003, is worded as follows:

‘THE HIGH CONTRACTING PARTIES,

5. The Court of Appeal, which is the court dealing with the enforcement proceedings, now raises the question whether courts of the United Kingdom are obliged to do so under Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.⁴ Doubts exist in that regard, first, because the judgment relates to land in an area of Cyprus in which the Republic of Cyprus does not exercise sovereign jurisdiction and in which the application of Community law is therefore largely suspended. Secondly, there were irregularities in the service of the documents which instituted the proceedings at the Orams’ place of residence in the Turkish Cypriot area.

REAFFIRMING their commitment to a comprehensive settlement of the Cyprus problem, consistent with relevant United Nations Security Council Resolutions, and their strong support for the efforts of the United Nations Secretary General to that end,

CONSIDERING that such a comprehensive settlement to the Cyprus problem has not yet been reached,

4 — OJ 2001 L 12, p. 1.

5 — Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded – Protocol No 10 on Cyprus, OJ 2003 L 236, p. 955.

CONSIDERING that it is, therefore, necessary to provide for the suspension of the application of the *acquis* in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control,

CONSIDERING that, in the event of a solution to the Cyprus problem this suspension shall be lifted,

CONSIDERING that the European Union is ready to accommodate the terms of such a settlement in line with the principles on which the EU is founded,

CONSIDERING that it is necessary to provide for the terms under which the relevant provisions of EU law will apply to the line between the abovementioned areas and both those areas in which the Government of the Republic of Cyprus exercises effective control and the Eastern Sovereign Base Area of the United Kingdom of Great Britain and Northern Ireland,

DESIRING that the accession of Cyprus to the European Union shall benefit all Cypriot citizens and promote civil peace and reconciliation,

CONSIDERING, therefore, that nothing in this Protocol shall preclude measures with this end in view,

CONSIDERING that such measures shall not affect the application of the *acquis* under the conditions set out in the Accession Treaty in any other part of the Republic of Cyprus,

HAVE AGREED UPON THE FOLLOWING PROVISIONS:

Article 1

1. The application of the *acquis* shall be suspended in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control.

2. The Council, acting unanimously on the basis of a proposal from the Commission, shall decide on the withdrawal of the suspension referred to in paragraph 1.

Article 2

1. The Council, acting unanimously on the basis of a proposal from the Commission, shall define the terms under which the provisions of EU law shall apply to the line between those areas referred to in Article 1 and the areas in which the Government of the Republic of Cyprus exercises effective control.

2. The boundary between the Eastern Sovereign Base Area and those areas referred to in Article 1 shall be treated as part of the external borders of the Sovereign Base Areas for the purpose of Part IV of the Annex to the Protocol on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus for the duration of the suspension of the application of the *acquis* according to Article 1.

Article 3

1. Nothing in this Protocol shall preclude measures with a view to promoting the economic development of the areas referred to in Article 1.

2. Such measures shall not affect the application of the *acquis* under the conditions set out in the Accession Treaty in any other part of the Republic of Cyprus.

Article 4

In the event of a settlement, the Council, acting unanimously on the basis of a proposal from the Commission, shall decide on the adaptations to the terms concerning the accession of Cyprus to the European Union with regard to the Turkish Cypriot Community.'

B — Regulation No 44/2001

7. Article 1(1) of Regulation No 44/2001 provides that the regulation is to apply to civil and commercial matters.

8. The provisions on jurisdiction are laid down in Chapter II of the regulation. Provisions on exclusive jurisdiction are contained

in Section 6 of that chapter. In particular, Article 22 provides that, ‘the following courts shall have exclusive jurisdiction, regardless of domicile:

10. The relevant passages of Article 34 are worded as follows:

‘A judgment shall not be recognised:

1. in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated. ...’
1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;
2. 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;
9. Articles 33 to 37 of the regulation deal with the recognition of judgments. Article 33 first establishes the principle that the judgments of the courts of another Member State are to be recognised without any special procedure being required. Articles 34 and 35 lay down the grounds on which recognition may, in exceptional cases, be refused. ...’

11. Article 35 deals with the significance of compliance with the rules of jurisdiction for the purposes of recognition:

‘1. Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72.

...

3. Subject to the paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in point 1 of Article 34 may not be applied to the rules relating to jurisdiction.’

III — Facts, procedure and questions referred for a preliminary ruling

12. Under the law of the Republic of Cyprus, Mr Apostolides is the owner of land in Lapithos (Lapta) in the district of Kyrenia (Girne), which is situated in the area of the Republic of Cyprus over which the Government of the Republic of Cyprus does not exercise effective control. The Orams claim to have purchased that land from a third party in

2002. They constructed a villa on it, which they frequently occupy as a holiday home.

13. Mr Apostolides brought a claim in the District Court of Nicosia against Mr and Mrs Orams. On 26 October 2004, the court served writs on the defendants. The writs, on which the Orams’ address in the United Kingdom was stated, were handed to Mrs Orams on the same day at the property in Lapta by a process server of the District Court of Nicosia. The process server did not identify himself as such, instead informing Mrs Orams that he was a ‘messenger’ and that he did not know what the papers were.

14. The writs were in the Greek language, which is not widely spoken in the northern area, but is one of the official languages of the Republic of Cyprus. The Orams do not understand Greek. Mrs Orams understood, however, that the documents were of a legal and official nature.

15. Under the law of the Republic of Cyprus, if the defendant does not enter appearance within 10 days of service of the document instituting proceedings, it is open to the claimant to apply for a default judgment. Attention was drawn to this on the face of the document in the Greek language. The entering of appearance is an act which does not involve setting out the nature of any defence.

16. According to her own account, on Friday 29 October 2004, Mrs Orams took the first steps towards finding a lawyer who could represent her. It was not until 2 November 2004 that she obtained an appointment for a consultation with the lawyer, Mr Liatsos. On that day, Mr Liatsos translated the document instituting proceedings for her in outline but told her that he was not able to act for her because he was not licensed to practise before the courts of the Republic of Cyprus. He advised Mrs Orams to consult Mr Osman, the lawyer who had acted in the purported purchase of the land, but he had retired. Mrs Orams was able to see his daughter, who had taken over his practice, on 3 November 2004. She informed Mrs Orams that she was not entitled to practise in the courts of the Republic. Mrs Orams was then referred to Mr Gunes Mentès.

17. It was not until Friday 5 November 2004 at 17.00 hrs that Mrs Orams was able to obtain an appointment with Mr Mentès, who, she claims, was one of the few lawyers in the northern area licensed to practise before the courts of the Republic of Cyprus and who had some understanding of the Greek language. Mrs Orams retained Mr Mentès to act on behalf of herself and her husband in the matter. Mr Mentès told Mrs Orams that he would attend at the District Court of Nicosia on the following Monday, 8 November 2004, to enter appearance.

18. Since no appearance was entered in the proceedings on behalf of the defendants on Tuesday, 9 November 2004, the court gave a default judgment against them, ordering that they:

- (1) demolish the villa, swimming pool and fencing which they had erected on the land,
- (2) deliver immediately to Mr Apostolides free possession of the land,
- (3) pay to Mr Apostolides various sums by way of special damages and monthly occupation charges (that is, rent) until the judgment was complied with, together with interest,
- (4) refrain from continuing with the unlawful intervention on the land, whether personally or through their agents, and
- (5) pay various sums in respect of the costs and expenses of the proceedings (with interest on those sums).

19. On 15 November 2004, appearances were entered in the proceedings and applications to set aside the default judgments were made on behalf of Mr and Mrs Orams.

20. Under the law of the Republic of Cyprus, in order to obtain the setting aside of a default judgment, the defendant must show an arguable defence to the claim against him. On 19 April 2005, after evidence and argument had been heard, the District Court of Nicosia held that there was no arguable defence to the claim. The Orams' appeal against that judgment was rejected by the Supreme Court of the Republic of Cyprus on 21 December 2006.

21. On 18 October 2005, Mr Apostolides applied under Regulation No 44/2001 for the enforcement of (i) the default judgment of 9 November 2004 and (ii) the judgment of the District Court of Nicosia of 19 April 2005. On 21 October 2005, a Master of the Queen's Bench Division of the High Court of England and Wales ordered that the judgments be enforceable in England.

22. The Orams brought a successful challenge against that order before a High Court Judge (Mr Justice Jack) under Article 43 of Regulation No 44/2001. Mr Apostolides contested that judgment by an appeal under Article 44 of Regulation No 44/2001 to the Court of Appeal which, by order of 19 June 2007 (received on 14 September 2007), referred the following questions to the Court of Justice for a preliminary ruling:

'1. Does the suspension of the application of the *acquis communautaire* in the

northern area by Article 1(1) of Protocol No 10 of the Act of Accession 2003 of Cyprus to the EU preclude a Member State court from recognising and enforcing a judgment given by a court of the Republic of Cyprus sitting in the Government-controlled area relating to land in the northern area, when such recognition and enforcement is sought under Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which is part of the *acquis communautaire*?

2. Does Article 35(1) of Regulation No 44/2001 entitle or bind a Member State court to refuse recognition and enforcement of a judgment given by the courts of another Member State concerning land in an area of the latter Member State over which the Government of that Member State does not exercise effective control? In particular, does such a judgment conflict with Article 22 of Regulation No 44/2001?
3. Can a judgment of a Member State court, sitting in an area of that State over which the Government of that State does exercise effective control, in respect of land in that State in an area over which the Government of that State does not exercise effective control, be denied recognition or enforcement under Article 34(1) of Regulation No 44/2001

on the grounds that as a practical matter the judgment cannot be enforced where the land is situated, although the judgment is enforceable in the Government-controlled area of the Member State?

44/2001, on the ground that he was not served with the document which instituted the proceedings in sufficient time and in such a way as to enable him to arrange for his defence prior to the entry of the original default judgment? Does it make a difference if the hearing entailed only consideration of the defendant's defence to the claim.?

4. Where –

- a default judgment has been entered against a defendant;
- the defendant then commenced proceedings in the court of origin to challenge the default judgment; but
- his application was unsuccessful following a full and fair hearing on the ground that he had failed to show any arguable defence (which is necessary under national law before such a judgment can be set aside),

can that defendant resist enforcement of the original default judgment or the judgment on the application to set aside under Article 34(2) of Regulation

5. In applying the test in Article 34(2) of Regulation No 44/2001 of whether the defendant was “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” what factors are relevant to the assessment? In particular:

- (a) Where service in fact brought the document to the attention of the defendant, is it relevant to consider the actions (or inactions) of the defendant or his lawyers after service took place?
- (b) What, if any, relevance would particular conduct of, or difficulties experienced by, the defendant or his lawyers have?

- (c) Is it relevant that the defendant's lawyer could have entered an appearance before judgment in default was entered?

No 44/2001 and the *reference area* of proceedings or judgments in respect of which the regulation lays down provisions.

23. In the proceedings before the Court, Mr Apostolides, Mr and Mrs Orams, the Greek, Polish and Cypriot Governments and the Commission of the European Communities submitted observations.

IV — Legal assessment

A — *The first question*

24. By the first question, the Court of Appeal wishes to know whether the suspension of the application of the *acquis communautaire* in the northern area of Cyprus pursuant to Article 1(1) of Protocol No 10 precludes the recognition and enforcement under Regulation No 44/2001 of a judgment relating to claims to the ownership of land situated in that area.

25. In answering this question, attention must first be drawn to the difference between the territorial *scope* of Regulation

26. Under Article 299 EC, the territorial scope of Community law corresponds to the territory of the Member States with the exception of certain regions specified in that provision. However, the provisions of Title IV of Part Three of the EC Treaty concerning the area of freedom, security and justice apply to the United Kingdom, Ireland and Denmark only as provided for in Article 69 EC in conjunction with the Protocols cited in that article. On that basis, the United Kingdom and Ireland opted for the application of Regulation No 44/2001 and Denmark opted against it.⁶ The regulation therefore applies in the United Kingdom and, subject to Protocol No 10, in the Republic of Cyprus.

27. Regulation No 44/2001 regulates, first, the jurisdiction of courts within its territorial scope and, secondly, the recognition and enforcement of judgments of those courts in a Member State other than that in which the judgment was given. However, the regulation contains no provisions on the recognition and enforcement of judgments from non-member States in the Community or of judgments of

⁶ — See Article 1(3) of Regulation No 44/2001 and recitals 20 and 21 in the preamble.

the courts of Member State in non-member States.

28. It is necessary to differentiate the territorial scope of Regulation No 44/2001 from its *reference area*, that is, the area to which judgments of a court of a Member State, which are to be recognised and enforced under the regulation, may relate. The reference area is broader than the territorial scope and also covers non-member States. The regulation therefore also applies to proceedings which include a non-member-country element.

29. This was confirmed by the Court in *Owusu*⁷ and in its *Opinion on the Lugano Convention*.⁸ According to that case-law, a relevant international element for the purposes of the application of the regulation may also exist by virtue of the place of occurrence of the events at issue in a non-Contracting State.⁹ The regulation is intended to eliminate obstacles to the functioning of the internal market which may derive from disparities between national legislations on international jurisdiction and on the recognition and enforcement of judgments given by foreign courts. In the Court's view, those disparities have a detrimental effect on the internal market even when they concern judgments which have a bearing only on a non-member State.¹⁰

30. It must now be ascertained what effect Protocol No 10 has with regard to the scope and reference area of Regulation No 44/2001.

31. There is no dispute between the parties that the suspension of the application of the *acquis communautaire* in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control, provided for in Article 1(1) of the Protocol, restricts the territorial scope of Regulation No 44/2001. Consequently, the recognition and enforcement of a judgment of a court of a Member State in the northern area of Cyprus cannot be based on the regulation. Nor does it appear possible, under the regulation, for a judgment of a court situated in that area of Cyprus to be recognised and enforced in another Member State.

32. However, the dispute before the Court of Appeal does not involve either of those situations. Rather, it is required to rule on the application for the enforcement in the United Kingdom of a judgment of a court situated in the area controlled by the Government of the Republic of Cyprus. The restriction of the territorial scope of Regulation No 44/2001 by Protocol No 10 does not, therefore, affect the present case.

33. Mr and Mrs Orams alone take the view that the Protocol also precludes the applica-

7 — Case C-281/02 *Owusu* [2005] ECR I-1383, paragraph 29.

8 — Opinion 1/03 [2006] ECR I-1145, paragraph 143.

9 — *Owusu*, cited in footnote 7, paragraph 26, and Opinion 1/03, cited in footnote 8, paragraph 145.

10 — *Owusu*, cited in footnote 7, paragraph 34.

tion of the regulation to judgments which were given within its territorial scope and are also intended to be recognised and enforced there, but which concern a legal relationship with a bearing on the parts of the country not controlled by the Government of the Republic of Cyprus.

(including the Protocols) is to prevail over secondary legislation. However, the regulation is ultimately intended to achieve the objectives of the EC Treaty itself.¹²

34. As the other parties point out, the wording of Article 1(1) of the Protocol of itself precludes such an interpretation. That provision states that the *acquis communautaire* is to be suspended *in* that area and not *in relation* to that area.

35. In addition, it is settled case-law that provisions in an Act of Accession which permit exceptions to or derogations from rules laid down by the Treaty must be interpreted restrictively with reference to the Treaty provisions in question and must be limited to what is absolutely necessary.¹¹

36. Even though the suspension of the *acquis communautaire* does not, in this case, directly concern primary Community legislation, but Regulation No 44/2001, that observation can be applied to it. It is true that, in terms of the hierarchy of norms, the Act of Accession

37. Accordingly, Article 65 EC, on which Regulation No 44/2001 is based, expressly grants authority to adopt measures for the improvement and simplification of the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases, *in so far as necessary for the proper functioning of the internal market*. Indeed, the clear delimitation of the jurisdiction of the courts in the Community together with the recognition and enforcement of judgments promotes the exercise of the fundamental freedoms. It facilitates the enforcement of claims in connection with cross-border supplies of goods, provision of services or capital transfers as well as the exercise of the freedom of movement for persons.

38. Protocol No 10 must therefore be interpreted as meaning that the suspension of the application of Regulation No 44/2001 is to be limited to what is absolutely necessary. In particular, in this regard, the meaning and purpose of the Protocol must be borne in mind.

11 — See Case 231/78 *Commission v United Kingdom* [1979] ECR 1447, paragraph 13; Joined Cases 194/85 and 241/85 *Commission v Greece* [1988] ECR 1037, paragraphs 19 to 21; Case C-3/87 *Agegate* [1989] ECR 4459, paragraph 39; and Case C-233/97 *KappAhl* [1998] ECR I-8069, paragraph 18.

12 — See recital 2 in the preamble to Regulation No 44/2001, which refers to the connection with the establishment of the internal market.

39. It is the shared view of the parties that the suspension of the *acquis communautaire* is intended to enable the Republic of Cyprus to accede to the EU even though the negotiations on reunification could not be successfully concluded beforehand. The intention is to avoid a situation in which the Republic of Cyprus, as a Member State, infringes Community law because it is effectively in no position to apply the provisions of the *acquis* throughout its national territory.

40. As the Commission in particular points out, however, it was not the intention to exclude the application of all provisions of Community law with a bearing on areas under the control of the Turkish Cypriot community. Accordingly, Article 3(1) of the Protocol provides that the suspension of the *acquis communautaire* is not to preclude measures with a view to promoting the economic development of the areas referred to.¹³ In addition, on the basis of Article 2 of the Protocol, rules for the movement of goods and persons between the different areas were laid down by Council Regulation (EC) No 866/2004.¹⁴

41. Those rules do not conflict with the Protocol's objective of enabling the Republic of Cyprus to accede to the Union notwith-

standing the limited effective control over its national territory, but rather promote the growing together of the two parts of the country.

42. The abovementioned objective of the Protocol does not require the suspension of the application of Regulation No 44/2001 in the situation at issue in this case either. In particular, the recognition and enforcement of the judgments of the District Court of Nicosia in the United Kingdom does not give rise to any unrealisable obligations for the Republic of Cyprus in relation to Northern Cyprus which bring it into conflict with Community law. On the contrary, only the courts in the United Kingdom are required to act.

43. Mr and Mrs Orams refer, however, to the Protocol's further objective of bringing about a comprehensive settlement of the Cyprus problem, consistent with relevant United Nations Security Council resolutions,¹⁵ which is enunciated, in particular, in recital 1 in the preamble to the Protocol. The judgment of the District Court of Nicosia at issue anticipates a comprehensive settlement of property questions. Its recognition and enforcement would therefore conflict with the objectives of the Protocol and of the relevant United Nations resolutions.

13 — This objective is pursued by Council Regulation (EC) No 389/2006 of 27 February 2006 establishing an instrument of financial support for encouraging the economic development of the Turkish Cypriot community and amending Council Regulation (EC) No 2667/2000 on the European Agency for Reconstruction (OJ 2006 L 65, p. 5).

14 — Council Regulation (EC) No 866/2004 of 29 April 2004 on a regime under Article 2 of Protocol 10 to the Act of Accession (OJ 2004 L 161, p. 128, with corrigendum OJ 2004 L 206, p. 51).

15 — The Security Council Resolutions concerning Cyprus are all listed together on the Internet page of the United Nations Peacekeeping Force in Cyprus (UNFICYP): www.unficy.org/nqcontent.cfm?a_id=1636.

44. However, that objection cannot have the effect of generally disapplying Regulation No 44/2001 in Member States whenever judgments of a Member State court contain references to the northern area of Cyprus.

relationships in which the recognition and enforcement in other Member States of judgments given by courts of the Republic of Cyprus and the application of the rules on jurisdiction in the regulation are also of interest to parties residing in the northern area.

45. It is certainly true that the Security Council has repeatedly called for the preservation of peace in Cyprus and of the country's territorial integrity. In that context, the international community has also made calls to refrain from any action which might exacerbate the conflict.¹⁶ However, it is not possible to infer from those rather general appeals any obligation to refrain from recognising judgments of Greek Cypriot courts which relate to claims to ownership of land in the Turkish Cypriot area.

47. Consequently, it is also a matter of dispute between the parties as to whether the recognition and enforcement of the judgment at issue here would be detrimental or conducive to a final settlement of the property questions. Accordingly, Mr Apostolides submits that the sale of expropriated land in the TRNC to nationals of other Member States makes its restitution in the course of a subsequent consensual solution more difficult. If people in his position could enforce claims by reason of ownership of such land in other Member States, that would deter potential acquirers.

46. Moreover, it is by no means clear that, taken overall, the application of the regulation exacerbates the Cyprus conflict. It may equally well have the opposite effect and promote the normalisation of economic relations. It is precisely because the line between the two areas of Cyprus has been opened up for the movement of goods and persons¹⁷ that it is possible to envisage many different legal

48. It is not necessary here to determine definitively what effect the suspension of the application of the regulation to cases involving elements with a bearing on northern Cyprus has on the political process for resolving the conflict. The application of the regulation cannot be made dependent on such complex political assessments. That would be contrary to the principle of legal certainty,

16 — See inter alia Resolutions 353 (1974) of 20 July 1974, 541 (1983) of 18 November 1983 and 1251 (1999) of 29 June 1999.

17 — With regard to developments concerning the movement of persons and goods, see Communication from the Commission — Annual Report on the implementation of Council Regulation (EC) 866/2004 of 29 April 2004 and the situation resulting from its application (COM(2008) 529 final).

respect for which is one of the objectives of the regulation.¹⁸ Accordingly, the rules of jurisdiction in the regulation must enable, in a clearly predictable manner, the court having jurisdiction to be determined.¹⁹ Furthermore, the claimant in proceedings before a court of a Member State must be able to foresee with sufficient certainty whether, on the basis of the regulation, a judgment concluding proceedings is enforceable in another Member State, in so far as none of the grounds for non-enforcement provided for in the regulation is present.

occupation of northern Cyprus are invalid and do not call into question the ownership positions of displaced refugees.²¹ The denial of access to and use of the property is therefore in breach of Article 1 of Protocol No 1 to the European Convention on Human Rights (ECHR) and the right to respect for the home (Article 8(1) of the ECHR), in so far as the persons concerned own a home on the land.²² However, the European Court of Human Rights has also recently acknowledged that the Immovable Property Commission established in the meantime by the TRNC satisfies, in principle, the requirements of the ECHR; it nevertheless awarded the applicant in the proceedings themselves compensation for the infringement of her rights under the ECHR.²³

49. Mr Apostolides goes even further. He submits that the application of Regulation No 44/2001 is necessary in order to take account of the requirements of the Loizidou judgment of the European Court of Human Rights.²⁰

50. In that and other decisions, the European Court of Human Rights has held that the expropriations carried out following the

51. In this regard, it must first be observed that none of the judgments cited related to the situation of Mr Apostolides himself. There is therefore no existing finding by the European Court of Human Rights concerning his specific property claims which would have to be complied with directly.

18 — With regard to the Brussels Convention, see Case C-440/97 *GIE Groupe Concorde and Others* [1999] ECR I-6307, paragraph 23; Case C-256/00 *Besix* [2002] ECR I-1699, paragraph 24; and *Owusu*, cited in footnote 7, paragraph 38; with regard to Regulation No 44/2001, see Case C-462/06 *Glaxosmithkline and Laboratoires Glaxosmithkline* [2008] ECR I-3965, paragraph 33.

19 — See, to that effect, recital 11 in the preamble to Regulation No 44/2001; *Glaxosmithkline and Laboratoires Glaxosmithkline*, cited in footnote 18, paragraph 33; and, with regard to the Brussels Convention, *Owusu*, cited in footnote 7, paragraphs 39 and 40.

20 — Eur. Court HR, *Loizidou v. Turkey* judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI.

21 — Eur Court HR, *Loizidou* judgment (cited in footnote 20, § 46). See also Eur Court HR, *Cyprus v. Turkey* judgment of 10 May 2001, no. 25781/94., *Reports of Judgments and Decisions* 2001-IV.

22 — Eur Court HR, *Loizidou* judgment (cited in footnote 20, § 64) and *Xenides-Arestis II* judgment (cited in footnote 3): infringement of Article 1 of Protocol No 1 and violation of Article 8(1) of the ECHR (right to respect for the home) with further references.

23 — Eur Court HR, *Xenides-Arestis v. Turkey* judgment, no. 46347/99, §§ 37 and 42 — *Xenides-Arestis III* judgment. The European Court of Human Rights had ordered the respondent to introduce a general remedy satisfying the requirements of the Convention (*Xenides-Arestis II*, cited in footnote 3, § 40); see also the *Xenides-Arestis v. Turkey I* decision on admissibility of 14 March 2005.

52. At the most, it would have to be considered whether the right to a fair hearing and to effective legal protection, embodied in Article 6(1) of the ECHR, actually requires that the judgment of the District Court of Nicosia, which directly concerns the claims of Mr Apostolides, be enforced.²⁴ However, the European Court of Human Rights has until now, so far as is apparent, recognised such a right only in relation to enforcement in the State where the judgment was given.²⁵ Whether Article 6(1) of the ECHR also makes the recognition and enforcement of foreign judgments obligatory can remain an open question here, since Regulation No 44/2001 is, for the reasons set out, applicable in any case and confers a corresponding right. In any event, Article 6(1) of the ECHR would not lead to any result other than an appropriate application of the regulation consistent with respect for human rights.

53. In conclusion, the first question should be answered as follows:

The suspension of the application of the *acquis communautaire* in the areas of the

Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control, provided for in Article 1(1) of Protocol No 10 to the Act of Accession of 2003, does not preclude a court of another Member State from recognising and enforcing, on the basis of Regulation No 44/2001, a judgment given by a court of the Republic of Cyprus involving elements with a bearing on the area not controlled by the Government of that State.

B — Second to fifth questions

54. By the second to fifth questions, the Court of Appeal requests the interpretation of Articles 35(1) and 34(1) and (2) of Regulation No 44/2001 with regard to possible grounds for non-recognition and non-enforcement within the meaning of those provisions. Before those questions can be answered, it must be established whether this case falls within the scope of the regulation. The Commission has expressed doubts as to whether this case is a civil and commercial matter within the meaning of Article 1(1) of the regulation.

1. Preliminary observation on the scope of the regulation

55. It is true that the Commission acknowledges that the dispute between Mr

24 — See, in that regard, Matscher, F., Grundfragen der Anerkennung und Vollstreckung ausländischer Entscheidungen in Zivilsachen, in: *Zeitschrift für Zivilprozess (ZZP)* 1990, pp. 294, 318; by the same author, Die indirekte Wirkung des Art. 6 EMRK bei der Anerkennung und Vollstreckung ausländischer Entscheidungen, in: *Festschrift für Helmut Kollhoser*, 2004, pp. 427, 444 et seq.; Geimer, R., Menschenrechte im internationalen Zivilverfahrensrecht, in: *Aktuelle Probleme des Menschenrechtsschutzes, Berichte der deutschen Gesellschaft für Völkerrecht*, Vol. 33, Heidelberg 1994, p. 219 et seq.

25 — See Eur Court HR, *Hornsby v. Greece* judgment of 19 March 1997, no. 18357/91, *Reports of Judgments and Decisions* 1997-II, § 40, and *Burdov v. Russia* judgment, no. 59498/00, *Reports of Judgments and Decisions* 2002-III, § 34.

Apostolides and Mr and Mrs Orams is a dispute between private parties. However, it submits that it should be placed in a wider context and that account should be taken of the fact that the disputes over land owned by displaced Greek Cypriot refugees have their origin in the military occupation of northern Cyprus.

56. In the Commission's view, it accords with international practice to assign the resolution of individual property disputes following armed conflicts to specialised institutions, as was provided for by the Annan Plan for the reunification of Cyprus. After the failure of that plan, the TRNC enacted legislation satisfying the requirements of the European Court of Human Rights²⁶ for the settlement of compensation claims and established an Immovable Property Commission. The claims to restitution of property and compensation for denial of its use, which that legislation covers, come under public law.

57. The Commission submits that, when applying Regulation No 44/2001, it should be borne in mind that an alternative legal remedy which accords with the ECHR is available. Article 71(1) of the regulation provides that it is not to affect any conventions which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments. The compensation regime introduced under the supervision of the European Court of Human Rights can be construed as such a convention.

26 — See, in that regard, the references in footnote 23.

58. Attention should first be drawn in this connection to the settled case-law that 'civil and commercial matter' is an independent concept to be interpreted by referring, first, to the objectives and scheme of Regulation No 44/2001 or of the Brussels Convention and, second, to the general legal principles which stem from the corpus of the national legal systems.²⁷

59. Only actions between a public authority and a person governed by private law fall outside the scope of the Brussels Convention, and only in so far as that authority is acting in the exercise of public powers.²⁸ Thus, the *Lechouritou* case,²⁹ to which the Commission refers, concerned the legal action brought by a private individual against the Federal Republic of Germany in respect of the damage suffered as a result of war crimes committed by the German armed forces.

60. In this case, however, Mr Apostolides is not making any claims for restitution or compensation against a government authority, but a civil claim for restitution of land and further claims connected with loss of enjoyment of the land against Mr and Mrs Orams.

27 — Case 29/76 *LTU* [1976] ECR 1541; Case 814/79 *Rüffer* [1980] ECR 3807, paragraph 7; Case C-271/00 *Baten* [2002] ECR I-10489, paragraph 28; Case C-266/01 *Préservatrice foncière TIARD* [2003] ECR I-4867, paragraph 20; Case C-343/04 *CEZ* [2006] ECR I-4557, paragraph 22; and Case C-292/05 *Lechouritou and Others* [2007] ECR I-1519, paragraph 29.

28 — See, with regard to the Brussels Convention, Case C-167/00 *Henkel* [2002] ECR I-8111, paragraph 26.

29 — Cited in footnote 27.

61. Those claims do not alter in nature as a result of the possibility that Mr Apostolides may have alternative or additional claims under public law outstanding against the TRNC authorities. There is therefore no need here to decide whether those alternative or additional claims did in fact already exist when, by litigation before the District Court of Nicosia, Mr Apostolides obtained the judgment whose enforcement is now sought.³⁰

62. It is true that the Court has held that the fact that an action is brought on the basis of a claim which arises from an act in the exercise of public powers is sufficient for that action, whatever the nature of the proceedings afforded by national law for that purpose, to be excluded from the scope of the Brussels Convention.³¹ It could be considered in that regard that the interference with property has its origins in the measures taken by the Turkish armed forces and/or the TRNC authorities. However, that finding by the Court applies only to an action between a public authority and a person governed by private law.³²

63. Where there are multiple relationships involving a party who is a public authority and a person governed by private law, as well as only parties governed by private law, it is necessary to take into account the legal

relationship between the parties to the dispute, the basis of the action brought and the detailed rules governing the bringing of that action.³³ In the main action, a private applicant is asserting claims governed by private law against other private persons before a civil court, so that, on the basis of all the relevant circumstances, the action is clearly a civil law dispute.

64. It would probably be possible to exclude such civil claims by means of a provision of national or international law and to confine the parties concerned solely to a claim for restitution or compensation against the State. That could mean that access to the civil courts would no longer be available.

65. However, the Republic of Cyprus has clearly not availed itself of that possibility. Nor, as yet, is there any equivalent agreement under international law. In any event, the District Court of Nicosia and the subsequent courts did not refer to any such exclusion of civil claims or of recourse to the civil courts in their judgments. Even if this was erroneous in point of law, the Court of Appeal ought not, in principle, in enforcement proceedings, to review either the jurisdiction of the District Court of Nicosia (Article 34(3) of Regulation No 44/2001) or the substantive lawfulness of the judgment whose recognition is sought (Articles 36 and 45(2) of the regulation).

30 — The relevant provisions, which, in the view of the European Court of Human Rights, satisfy in principle the requirements of the ECHR, did not enter into force until 22 December 2005 and 30 March 2006 (see *Xenides-Arestis III* judgment, cited in footnote 23, § 11).

31 — *Riiffer*, cited in footnote 27, paragraph 15, and *Lechouritou*, cited in footnote 27, paragraph 41.

32 — See *Riiffer*, cited in footnote 27, paragraph 8.

33 — See *Baten*, cited in footnote 27, paragraph 31; *Préservatrice foncière TIARD*, cited in footnote 27, paragraph 23; and Case C-265/02 *Frahuil* [2004] ECR I-1543, paragraph 20.

66. The Commission, however, appears to take the view that the exclusion of civil claims has occurred, as it were, by operation of international law, since the TRNC has enacted compensation legislation approved, in principle, by the European Court of Human Rights.

adopted by internationally non-recognised State entities can be regarded as valid so as to avoid disadvantages for the population concerned.³⁷ To argue that the compensation scheme validly precludes civil claims at the expense of the persons concerned and without agreement with the Republic of Cyprus would be going far beyond that.³⁸

67. I cannot agree with that reasoning.

68. The *Xenides-Arestis III* judgment,³⁴ in which the European Court of Human Rights took a positive view of the compatibility of the compensation regime with the ECHR, gives no indication that the legislation in question validly excludes the prosecution of civil claims under the law of the Republic of Cyprus. On the contrary, the European Court of Human Rights expressly rejected the argument that the applicant was obliged to bring the matter of compensation before the Immovable Property Commission, and instead itself awarded her compensation.³⁵

70. The Commission's argument that, pursuant to Article 71(1) of Regulation No 44/2001, the regulation is overridden by the compensation scheme approved by the European Court of Human Rights is also untenable.

69. It is also doubtful whether a different view would be tenable. That is because, in the absence of international recognition of the TRNC, the European Court of Human Rights itself denies the expropriations made by the TRNC any legal validity in principle.³⁶ It merely recognises that certain provisions

71. That provision states that the regulation is not to affect 'any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments'.

³⁴ — Cited in footnote 23.

³⁵ — *Xenides-Arestis III* judgment, cited in footnote 23, § 37.

³⁶ — See the references in footnote 21.

³⁷ — See *Loizidou* judgment, cited in footnote 20, § 45, and *Xenides-Arestis I* decision, cited in footnote 23.

³⁸ — This does not of course necessarily mean that an aggrieved party can at the same time demand both the restitution of his land in the civil courts and the payment of compensation as a consequence of expropriation. In so far as parallel proceedings are possible, any payments obtained in one set of proceedings may be taken into account in the other, in order to prevent unjust enrichment.

72. The TRNC's compensation scheme, the judgments of the European Court of Human Rights concerning it and even the ECHR itself clearly do not fall within that definition. While the ECHR is a convention, it does not lay down any specific provisions on jurisdiction or the recognition or enforcement of judgments in respect of particular legal fields which fall within the scope of the regulation. The unilateral provisions of the TRNC are not a convention. Moreover, the judgments of the European Court of Human Rights regarding them say nothing about the recognition and enforcement of civil judgments.

of that Member State does not exercise effective control.

75. Before answering this question, it should be noted that, according to recitals 2, 6, 16 and 17 in its preamble, the regulation seeks to ensure the free movement of judgments from Member States in civil and commercial matters by simplifying the formalities with a view to their rapid and simple recognition and enforcement.³⁹

73. It must therefore be concluded that the judgment whose recognition is sought in the main proceedings concerns a civil matter within the meaning of Article 1(1) of Regulation No 44/2001 and thus falls within the scope of the regulation.

76. In accordance with that objective, Article 33(1) of Regulation No 44/2001 provides that a judgment given in a Member State is to be recognised in the other Member States without implementing any special procedure. Recognition may be refused only in the circumstances specified in Articles 34 and 35.

2. The second question

74. The second question seeks to ascertain whether Article 35(1) in conjunction with Article 22(1) of Regulation No 44/2001 entitles or binds a Member State court to refuse recognition and enforcement of a judgment given by the courts of another Member State concerning land in an area of the latter Member State over which the Government

77. Pursuant to Article 38(1) of Regulation No 44/2001, a judgment given in a Member State and enforceable in that State is to be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there. Article 45(1)

39 — Case C-283/05 *ASML* [2006] ECR I-12041, paragraph 23.

of the regulation likewise entitles the court before which an appeal is brought to refuse a declaration of enforceability only on the grounds specified in Articles 34 and 35.

78. In that regard, Article 35(3) of the regulation establishes the principle that the jurisdiction of the court of the State of origin of the judgment may not be reviewed. Under Article 35(1), an exception applies with regard to infringement of the rules allocating exclusive jurisdiction to certain courts, including the rule specifying the jurisdiction of the courts of the place where immovable property is situated, laid down in Article 22(1) of the regulation.

79. Under Article 22(1), in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated are to have exclusive jurisdiction, regardless of domicile. That provision would be infringed, for the purposes of Article 35(1), if the judgment concerned rights *in rem* in land situated, not in the State of origin, the Republic of Cyprus, but in another Member State.

80. As Mr Apostolides, the Greek and Cypriot Governments and the Commission

correctly submit, under international law the Republic of Cyprus is the only recognised State on the island of Cyprus.⁴⁰ Its territory also includes the northern area of the island, in which the land at issue in this case is situated.⁴¹ The TRNC, which effectively controls that area, has not been recognised by any other State apart from Turkey.⁴² It follows from Protocol No 10 that the Contracting States to the Act of Accession also regarded the north of Cyprus as part of the territory of the Republic of Cyprus and therefore as part of the acceding territory. Otherwise it would have been unnecessary to suspend the application of the common *acquis* in that part of the island.

81. The judgment in regard to which the referring court is required to decide whether to issue a declaration of enforceability relates at least partly⁴³ to rights *in rem*, namely the ownership of land situated in the Republic of

40 — See *Anastasiou and Others*, cited in footnote 2, paragraph 40.

41 — See inter alia Tomuschat, C., 'The Accession of Cyprus to the European Union', in: Häberle, P., Morlock, M., Skouris, V. (ed.), *Festschrift für D. Tsatsos*, Baden-Baden, 2003, pp. 672, 676.

42 — See the Opinion of Advocate General Gulmann in *Anastasiou*, cited in footnote 2, point 12. The United Nations Security Council expressly condemned the proclamation of the Republic and called for the non-recognition of the TRNC (see Resolutions 541 (1983) of 18 November 1983 and 550 (1984) of 11 May 1984, which can be found at: www.unficy.org/nqcontent.cfm?a_id=1636). By declarations of 16 November 1983 (*Bulletin of the European Communities* No 11/1983, 2.4.1) and 27 March 1984 (*Bulletin of the European Communities* No 3/1984, 2.4.3), the Ministers for Foreign Affairs of the Member States, in the framework of European Political Cooperation, also condemned the proclamation of secession. On the question of recognition, see also Talmon, S., *Kollektive Nichtanerkennung illegaler Staaten*, Tübingen, 2008, p. 41 et seq.

43 — In so far as compensation for use is awarded, Article 22(1) could be inapplicable (see Case C-292/93 *Lieber* [1994] ECR I-2535, paragraph 15).

Cyprus. On a literal interpretation of Article 22(1) of Regulation No 44/2001, there is therefore no doubt as to the exclusive jurisdiction of the courts of that Member State.

be interpreted restrictively and does not accord jurisdiction to the courts of the Republic of Cyprus for actions in connection with rights in land in the northern area. In the absence of effective control over that area, the courts of the Republic of Cyprus do not in fact have the advantage of particular proximity.

82. However, Mr and Mrs Orams submit that the meaning and purpose of the provision preclude that conclusion.

83. According to settled case-law, the essential reason for the exclusive jurisdiction of the courts of the State where the property is situated is that a court of the place where property is situated is best placed to deal with matters relating to rights *in rem* in immovable property.⁴⁴ Such matters must generally be decided by applying the law of the State where the property is situated. They also frequently require an on-the-spot investigation of the facts. The assignment of exclusive jurisdiction to the court of the place where the property is situated, for reasons of proximity, therefore satisfies the need for the proper administration of justice.⁴⁵

84. The Orams infer from this that Article 22(1) of Regulation No 44/2001 must

85. Whether that view, which finds no support in the wording of the provision, is correct can, in the final analysis, remain open. Article 22(1) of Regulation No 44/2001 would be infringed only if, instead of the courts of the Republic of Cyprus, the courts of another *Member State* were to have jurisdiction by virtue of the place where the property is situated. It is not apparent which Member State that should be. Leaving aside its position under international law, the highest that can be said of the TRNC is that it should be treated in the same way as a non-member State. However, on that premise, since Article 22(1) does not directly confer any exclusive jurisdiction on courts of a non-member State, that provision itself cannot be infringed.

86. It is admittedly disputed in academic writings whether Article 22(1) produces a 'reflex effect' in favour of non-member States.⁴⁶ However, the Court appears to reject such an effect. Accordingly, in the *Lugano Opinion*, it stated that the exclusive

44 — See, with regard to the Brussels Convention, Case 73/77 *Sanders* [1977] ECR 2383, paragraphs 10 and 11; Case C-115/88 *Reichert and Kockler* [1990] ECR I-27, paragraph 10; Case C-73/04 *Klein* [2005] ECR I-8667, paragraph 16; and Case C-343/04 *ČEZ* [2006] ECR I-4557, paragraph 28. The Jenard Report on the Brussels Convention (OJ 1979 C:59, p. 1, at p. 35) takes a similar view.

45 — See, in particular, *ČEZ*, cited in footnote 44, paragraph 29.

46 — With regard to the state of the debate, see Rauscher/Mankowski, *Europäisches Zivilprozessrecht*, 2nd edition., Munich, 2006, Art. 22 Brüssel I-VO, paragraph 26; Layton/Mercer, *European Civil Practice*, 2nd edition, London, 2004, paragraph 19.010.

jurisdiction of the courts of the place where immovable property is situated in a non-member country overrides the jurisdiction, under Article 2 of the regulation, of the courts of a defendant's place of residence only because the Lugano Convention contains a provision identical to Article 22 of the regulation; it is only under the regulation that the appropriate forum remains the courts of the place of residence in the Community.⁴⁷

87. It would in any case be wrong to allow such a reflex effect to apply also in relation to Article 35(1) of Regulation No 44/2001. It follows from the interaction of Article 35(1) and (3) that the refusal of recognition and enforcement on account of infringement of the rules of jurisdiction is permissible only in exceptional circumstances. The scope of Article 35(1) must therefore not be extended by also allowing encroachment on the jurisdiction of courts in non-member States which are not parties to the Lugano Convention to become a ground for non-recognition.

88. For the sake of completeness, mention should be made of the consequences which would ensue if the TRNC — contrary to the view taken here — were to be treated analogously to a non-member State. The courts of the Republic of Cyprus would then not have exclusive jurisdiction under Article 22(1) of Regulation No 44/2001 for disputes in connection with land situated in the TRNC. The general rules of jurisdiction would therefore come into operation. Whether or not the District Court of Nicosia

actually had jurisdiction under those rules⁴⁸ would, under Article 35(3) of the regulation, have no bearing on the recognition and enforcement of its judgment.

89. The answer to the second question must therefore be that Article 35(1) in conjunction with Article 22(1) of Regulation No 44/2001 does not entitle a Member State court to refuse recognition and enforcement of a judgment given by the courts of another Member State concerning land in an area of the latter Member State over which the Government of that Member State does not exercise effective control.

3. The third question

90. The third question concerns the interpretation of the public policy proviso in Article 34(1) of Regulation No 44/2001. The referring court asks whether recognition and enforcement of a judgment must be refused

⁴⁷ — Opinion 1/03, cited in footnote 8, paragraph 153.

⁴⁸ — However, under Article 2(1) of Regulation No 44/2001, jurisdiction at the defendant's place of residence would be a possibility. To what extent the holiday home in Lapta can be regarded as a further place of residence in addition to the place of residence in the United Kingdom is governed, pursuant to Article 59(1) of the regulation, by the internal law of the Member State where the court is situated. However, because of the location of the place of residence in Northern Cyprus, a similar problem exists here as with the application of Article 22(1).

on the basis of that proviso where that judgment cannot in practice be enforced in the State where the judgment was given itself, because it relates to land in an area of that State over which the Government of that State does not exercise effective control.

91. Article 34(1) of Regulation No 44/2001 provides that a judgment must not be recognised if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought.

92. In the leading case of *Krombach*,⁴⁹ the Court held that Article 27 of the Brussels Convention — the predecessor to Article 34 of Regulation No 44/2001 — must be interpreted strictly. The provision constitutes an obstacle to the attainment of one of the fundamental objectives of the Convention, which is to create an autonomous and complete system which ensures the free movement of judgments in the Community. More specifically, recourse to the public policy clause in Article 27, point 1, of the Brussels Convention is therefore to be had only in exceptional cases.⁵⁰

93. The Court drew from that the following conclusion:⁵¹

‘Recourse to the clause on public policy in Article 27, point 1, of the Convention can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.’

94. Finally, the Court further held that, while the Contracting States remain free in principle, by virtue of the proviso in Article 27, point 1, of the Brussels Convention, to determine according to their own conception what public policy requires, the limits of that concept are a matter of interpretation of the Convention.⁵² Consequently, while it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition of a judgment emanating from another Contracting State.⁵³

49 — Case C-7/98 *Krombach* [2000] ECR I-1935, paragraphs 19 to 21. See also Case C-38/98 *Renault* [2000] ECR I-2973, paragraph 26.

50 — *Krombach*, cited in footnote 49, paragraph 21, and *Renault*, cited in footnote 49, paragraph 26, with reference to Case 145/86 *Hoffmann* [1988] ECR 645, paragraph 21, and Case C-78/95 *Hendrikman and Feyen* [1996] ECR I-4943, paragraph 23.

51 — *Krombach*, cited in footnote 49, paragraph 37, and *Renault*, cited in footnote 49, paragraph 30.

52 — *Krombach*, cited in footnote 49, paragraph 22, and *Renault*, cited in footnote 49, paragraph 27.

53 — *Krombach*, cited in footnote 49, paragraph 23, and *Renault*, cited in footnote 49, paragraph 28.

95. In the light of those findings, it must be examined whether the factual non-enforceability of a judgment in the State where it was given can be regarded as a manifest contravention of public policy, as referred to in Article 34(1) of Regulation No 44/2001, precluding recognition and enforcement in another Member State.

96. As the Greek Government and the Commission correctly point out, the enforceability of a judgment in the State where it was given is already, under Article 38(1) of Regulation No 44/2001, a condition for a declaration of enforceability by a court of another Member State. An enforceable instrument should therefore not have a more far-reaching effect in the State in which enforcement is sought than in the State of origin.⁵⁴

97. In *Coursier*,⁵⁵ the Court interpreted the corresponding passage in Article 31 of the Brussels Convention to the effect that the term ‘enforceable’ refers solely to the enforceability, in formal terms, of foreign decisions and not to the circumstances in which such decisions may be executed in the State of origin. Formal enforceability is lacking if an appeal has been lodged against or still lies from the judgment and the judgment has not been declared provisionally enforceable.

98. It would be inconsistent with the objective of Regulation No 44/2001 of ensuring the free movement of judgments by simple recognition and enforcement⁵⁶ if the declaration of enforceability were to be dependent on the factual conditions for the enforcement of the judgment in the State of where it was given. Unlike enforceability in the formal sense, a certificate of the kind referred to in Article 54 of the regulation would not automatically make it possible to confirm, in particular, whether and under what conditions a judgment is enforceable in practice in the State where it was given. Moreover, factual grounds for non-enforcement do not in any way alter the legal effect of the judgment.

99. This case itself illustrates the potential imponderables which taking into account factual enforceability would entail. It is true that some of the claims legally enforceable by execution are currently not enforceable in Cyprus, since the Republic of Cyprus is unable to exercise sovereignty in the area in which the land concerned is situated. On the other hand, enforcement of the pecuniary claims would be perfectly possible in the part of the island controlled by the Republic of Cyprus, in so far as the Orams have assets at their disposal there, such as credit balances with banks or other receivables.

100. Since the enforceability of the foreign judgment in the State of origin as a condition for a declaration of enforceability by the

⁵⁴ — See the commentary in the Jenard Report, cited in footnote 44, p. 47 et seq.

⁵⁵ — Case C-267/97 [1999] ECR I-2543, paragraph 29.

⁵⁶ — See above, point 75 of this Opinion.

courts of another Member State is laid down definitively in Article 38(1) of the regulation, the same condition cannot be taken up with a different meaning in the context of the public policy proviso. Following this line of thought, the second sentence of Article 35(3) of Regulation No 44/2001, for example, also expressly precludes lack of jurisdiction, which under Article 35 may not be reviewed, from nevertheless being considered as a contravention of public policy of the kind referred to in Article 34(1).

101. The Commission and also, taking up its line of reasoning, the Orams additionally raise the question as to whether a different ground of public policy may be put forward against enforcement. They submit that the recognition and enforcement of the District Court of Nicosia's judgment may contravene 'international public policy' by undermining the efforts of the international community to find a solution to the Cyprus problem.

102. It should first be noted in this regard that the referring court itself did not consider any such ground for refusing recognition and enforcement in the United Kingdom. In principle, the Court is bound by the subject-matter of the reference for a preliminary ruling, which the referring court has determined in its order for reference. The parties are normally not authorised to submit addi-

itional questions to the Court which go beyond that subject-matter.⁵⁷

103. That is particularly true with regard to the interpretation of the concept of 'public policy' in Article 34(1) of Regulation No 44/2001, since it is a matter for the Member States to determine according to their own conception what public policy requires.⁵⁸ There is also the fact that the United Kingdom Government has not participated in these proceedings. The Court therefore lacks any reliable information as to whether the grounds raised by the Commission are to be regarded as public policy in that Member State.

104. However, the Commission expressly relies on *international* public policy. It does concede that Article 34(1) takes into account only public policy *in the Member State* in which recognition of the judgment is sought. In its view, however, there is no reason why grounds of international public policy should not at the same time also be regarded as national public policy.

⁵⁷ — Case 44/65 *Singer* [1965] ECR 965, 970; Case C-412/96 *Kainuun Liikenne and Pohjolan Liikenne* [1998] ECR I-5141, paragraph 23; Case C-296/08 *PPU Santesteban Goicoechea* [2008] ECR I-6307, paragraph 46; and Case C-404/07 *Katz* [2008] ECR I-7607, paragraph 37.

⁵⁸ — See above, point 94 of this Opinion and the references in footnote 52.

105. Should the Court find it appropriate to discuss this aspect, although it is not the subject-matter of the reference for a preliminary ruling, I would make the following observations in regard to it.

106. In *Krombach*, the Court regarded it as its task to review the limits within which the courts of a Contracting State to the Brussels Convention may have recourse to the concept of public policy for the purpose of refusing recognition of a judgment emanating from a court in another Contracting State.⁵⁹ Since fundamental rights, as enunciated in the ECHR, form an integral part of the general principles of law, it concluded that a court of a Member State is entitled to refuse recognition of a foreign judgment which was arrived at in manifest breach of fundamental rights.⁶⁰

107. To that extent, the Court has thus, it is true, established a link between the fundamental rights protected by the ECHR at international level and national public policy. Refusal of recognition of a foreign judgment will therefore satisfy the requirements of Article 34(1) of the regulation, in any event where the requirements of national public policy are used as a basis for remedying a manifest infringement of the fundamental rights embodied in the ECHR.

⁵⁹ — *Krombach*, cited in footnote 49, paragraph 23.

⁶⁰ — *Krombach*, cited in footnote 49, paragraphs 25 to 27 and 38 to 40.

108. It has not yet been definitively ascertained whether the courts are not only entitled, but even bound, to refuse enforcement of a foreign judgment which manifestly infringes Community fundamental rights. Support for such a position is to be found in the fact that, according to settled case-law, the national courts are bound by fundamental rights when they are dealing with a situation which falls within the scope of Community law.⁶¹

109. In this case, however, the Commission does not contend that the judgment whose enforcement is sought infringes fundamental rights. In its view, the issue is instead the requirements of international policy regarding the Cyprus problem. Those requirements have to a certain extent acquired legally binding status in so far as they have become established in United Nations Security Council resolutions.⁶² That applies, for example, to the obligation on States to refrain from any action which might exacerbate the Cyprus conflict.

110. The preservation of peace and the restoration of the territorial integrity of Cyprus are certainly noble causes. However,

⁶¹ — See Joined Cases 201/85 and 202/85 *Klensch and Others* [1986] ECR 3477, paragraphs 8 to 10; Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 19; Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 42 et seq.; Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 75; and Case C-13/05 *Chacón Navas* [2006] ECR I-6467, paragraph 56. See, to that effect, inter alia Jayme, E., Kohler C., *Europäisches Kollisionsrecht 2000: Interlokales Privatrecht oder universelles Gemeinschaftsrecht?*, in: *Praxis des Internationalen Privat- und Verfahrensrechts — IPRax*, 2000, pp. 454, 460.

⁶² — See above, point 45 of this Opinion and the references in footnote 16, together with my Opinion of today's date in Case C-394/07 *Gambazzi*, not yet published in the ECR, point 43.

whether those goals can be regarded as a 'rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order' within the meaning of the *Krombach* case-law⁶³ is extremely doubtful.

111. As already observed, however, the requirements and appeals contained in the Security Council resolutions on Cyprus are in any case much too general to permit the inference of a specific obligation not to recognise any judgment given by a court of the Republic of Cyprus relating to property rights in land situated in northern Cyprus. Apart from that, it is also by no means clear whether recognition of the judgment in the present context would be beneficial or detrimental to solving the Cyprus problem and whether it is even necessary for the protection of the fundamental rights of Mr Apostolides.⁶⁴

112. The answer to the third question must therefore be that a court of a Member State may not refuse recognition and enforcement of a judgment on the basis of the public policy proviso in Article 34(1) of Regulation No 44/2001 because the judgment, although formally enforceable in the State where it was given, cannot be enforced there for factual reasons.

4. The fourth question

113. The fourth question seeks to ascertain whether recognition of a default judgment can be refused, in accordance with Article 34(2) of Regulation No 44/2001, on account of irregularities in the service of document which instituted the proceedings, where the judgment has been reviewed in proceedings instituted by the defendant to challenge it.

114. Under Article 34(2), a judgment is not to be recognised if the defendant was not served with the document which instituted the proceedings in sufficient time and in such a way as to enable him to arrange for his defence. However, under that provision, such irregularities in service cannot be pleaded where the defendant failed to commence proceedings to challenge the default judgment when it was possible for him to do so.

115. In this case, the Orams did in fact commence proceedings to challenge the default judgment before the District Court of Nicosia. Their appeal was dismissed after a full and fair court hearing, on the ground that they had no arguable defence to the claim. They nevertheless plead a number of circumstances in connection with the service of the state-

⁶³ — *Krombach*, cited in footnote 49, paragraph 37, and *Renault*, cited in footnote 49, paragraph 30.

⁶⁴ — See above, points 45, and 49 to 52 of this Opinion.

ment of claim which made it more difficult for them to arrange for their defence in due time, and refer in that regard to the case-law on Article 27(2) of the Brussels Convention.⁶⁵

116. In *ASML*,⁶⁶ however, the Court drew attention to the differences between Article 34(2) of Regulation No 44/2001 and Article 27(2) of the Brussels Convention. Under Article 27(2) of the Brussels Convention, a judgment is not to be recognised ‘where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings ... in sufficient time to enable him to arrange for his defence’.

117. By contrast, under Article 34(2) of Regulation No 44/2001, whether the document which instituted the proceedings is duly served is not necessarily the decisive factor.⁶⁷ Rather, what matters is that the rights of the defence are effectively respected. If the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so, Article 34(2) of Regulation No 44/2001 now presumes that the rights of the defence have been respected notwithstanding the irregularities in service.

118. Consequently, the case-law cited in relation to Article 27(2) of the Brussels Convention is not applicable to Article 34(2) of Regulation No 44/2001.⁶⁸

119. The new version of the provision takes greater account of the objective of facilitating the recognition and enforcement of judgments, but without undermining the right to a fair hearing, which, according to settled case-law, is one of the fundamental rights whose observance the Court ensures.⁶⁹

120. In this case, the Orams had the opportunity of commencing proceedings to challenge the default judgment of the District Court of Nicosia, and they availed themselves of that opportunity. That being so, it is clear from Article 34(2) of Regulation No 44/2001 that recognition and enforcement cannot be refused, especially not on the basis of irregularities in the service of the writ.

121. That is true in any event where the right to a fair hearing is not undermined because of particular circumstances, such as the organisation of the appeal proceedings. However,

65 — Case C-305/88 *Lancray* [1990] ECR I-2725, paragraph 23; Case C-123/91 *Minalmet* [1992] ECR I-5661, paragraph 21; *Hendrikman and Feyen*, cited in footnote 50, paragraph 18; and Case C-3/05 *Verdoliva* [2006] ECR I-1579; paragraph 29.

66 — Cited in footnote 39, paragraph 19 et seq.

67 — *ASML*, cited in footnote 39, paragraph 20.

68 — In the view of Advocate General Léger, it is clear from the origin of Regulation No 44/2001 that the new version was specifically intended to overcome the consequences arising from the case-law cited in relation to Article 27(2) of the Brussels Convention (see Opinion in *ASML*, cited in footnote 39, point 51 et seq.).

69 — See *ASML*, cited in footnote 39, paragraph 23 et seq.

there are no indications in the main proceedings that that right was undermined. According to the findings of the referring court, the Orams were able to put forward their legal arguments in full and fair court proceedings. Yet a further appeal, to the Supreme Court, against the judgment on the first challenge was even available, which the Orams — albeit unsuccessfully — lodged.

123. The answer to the fourth question should therefore be that Article 34(2) of Regulation No 44/2001 is to be interpreted as meaning that recognition and enforcement of a default judgment may not be refused by reference to irregularities in the service of the document which instituted the proceedings if it was possible for the defendant, who initially failed to enter an appearance, to commence proceedings to challenge the default judgment, if the courts of the State where the judgment was given then reviewed the judgment in full and fair proceedings and if there are no indications that the defendant's right to a fair hearing was infringed in those proceedings.

122. The fact that, under Cypriot law, the defendant must put forward an arguable defence in order to obtain the setting aside of a default judgment likewise did not, so far as is apparent, significantly undermine the Orams' rights as defendants. Nor, pursuant to Article 36 and Article 45(2) of the regulation, may the fact that they were unable to convince the Cypriot courts dealing with the substance of the case of their legal arguments be taken into consideration in the proceedings for recognition and enforcement.

5. The fifth question

124. In view of the answer to the fourth question, there is no need to answer the fifth question.

V — Conclusion

125. In the light of the foregoing considerations, I propose that the replies to the questions referred by the Court of Appeal should be as follows:

1. The suspension of the application of the *acquis communautaire* in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does

not exercise effective control, provided for in Article 1(1) of Protocol No 10 to the Act of Accession of 2003, does not preclude a court of another Member State from recognising and enforcing, on the basis of Regulation No 44/2001, a judgment given by a court of the Republic of Cyprus involving elements with a bearing on the area not controlled by the government of that State.

2. Article 35(1) in conjunction with Article 22(1) of Regulation No 44/2001 does not entitle a Member State court to refuse recognition and enforcement of a judgment given by a court of another Member State concerning land in an area of the latter Member State over which the Government of that Member State does not exercise effective control.
3. A court of a Member State may not refuse recognition and enforcement of a judgment on the basis of the public policy proviso in Article 34(1) of Regulation No 44/2001 because the judgment, although formally enforceable in the State where it was given, cannot be enforced there for factual reasons.
4. Article 34(2) of Regulation No 44/2001 is to be interpreted as meaning that recognition and enforcement of a default judgment may not be refused by reference to irregularities in the service of the document which instituted the proceedings, if it was possible for the defendant, who initially failed to enter an appearance, to commence proceedings to challenge the default judgment, if the courts of the State where the judgment was given then reviewed the judgment in full and fair proceedings, and if there are no indications that the defendant's right to a fair hearing was infringed in those proceedings.