Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 17 February 2016[1]

Case C-572/14

Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH
v
Amazon EU Sàrl,
Amazon Services Europe Sàrl,
Amazon.de GmbH,
Amazon Logistik GmbH,
Amazon Media Sàrl
(Request for a preliminary ruling from the

Oberster Gerichtshof (Supreme Court, Austria))

(Reference for a preliminary ruling — Regulation (EC) No 44/2001 — Jurisdiction in civil and commercial matters — Article 5(3) — Concept of 'matters relating to tort, delict or quasi-delict' — Directive 2001/29/EC — Harmonisation of certain aspects of copyright and related rights in the information society — Article 5(2)(b) — Reproduction right — Exceptions and limitations — Reproduction for private use — Fair compensation — Non-payment — Whether included in the scope of Article 5(3) of Regulation No 44/2001)

I – **Introduction**

1. By order of 18 November 2014, received at the Court on 11 December 2014, the Oberster Gerichtshof (Supreme Court) has referred, for a preliminary ruling, a question concerning the interpretation of Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1), and of Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

2. This question has arisen in the course of litigation between Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH ('Austro-Mechana') and Amazon EU Sàrl, Amazon Services Europe Sàrl, Amazon.de GmbH, Amazon Logistik GmbH and Amazon Media Sàrl (together, 'Amazon EU and Others') concerning the international jurisdiction of the Austrian courts to entertain legal proceedings by which Austro-Mechana seeks to obtain payment from Amazon EU and Others of the remuneration due by reason of the first placing of recording media on the domestic market, in accordance with Austrian legislation.

1 — Original language: French.

II – **Legal framework**

A – *EU law*

1. Regulation No 44/2001

3. Regulation No 44/2001 has been repealed by Article 80 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and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 (OJ 2012 L 351, p. 1). Nonetheless, by virtue of the second paragraph of Article 81 of that regulation, it is applicable only from 10 January 2015. Since the main proceedings pre-date 10 January 2015, it is Regulation No 44/2001 which is applicable in the present case.

4. Article 2(1) of Regulation No 44/2001, which belongs to Section 1, entitled 'General provisions', of Chapter II of that regulation, provides:

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

5. Article 5(1) and (3) of that regulation, which form part of Section 2, entitled 'Special jurisdiction', of Chapter II, read as follows:

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

(1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

…

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

2. Directive 2001/29

6. Article 2 of Directive 2001/29, entitled 'Reproduction right', provides:

'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works;

(b) for performers, of fixations of their performances;

(c) for phonogram producers, of their phonograms;

(d) for the producers of the first fixations of films, in respect of the original and copies of their films;

(e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.'

7. Article 5 of that directive, entitled ‘Exceptions and limitations’, provides in paragraph 2 thereof:

‘Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

…

(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject matter concerned;

…’

B – *Austrian law*

8. Article 42 of the Austrian Law on Copyright (Urheberrechtsgesetz) of 9 April 1936 (BGBl. 111/1936), in the version applicable to the main proceedings (‘the UrhG’), provides:

‘1. Any person may make single copies, on paper or a similar medium, of a work for personal use.

2. Any person may make single copies, on media other than those stipulated in subparagraph 1, of a work for personal use and for the purposes of research, in so far as this is justified for the pursuit of non-commercial purposes. …

…’

9. Paragraph 42b of the UrhG provides:

‘1. Where it is to be anticipated that, by reason of its nature, a work which has been broadcast, made available to the public or captured on an image or sound recording medium manufactured for commercial purposes will be reproduced for personal or private use by being recorded on an image- or sound-recording medium in accordance with Article 42(2) to (7), the author shall be entitled to fair remuneration (blank-cassette levy) upon recording material being placed on the domestic market on a commercial basis and for consideration; blank image or sound recording media suitable for such reproduction or other sound or image recording media intended for that purpose shall be deemed to constitute recording media.

…

3. The following persons shall be required to pay the remuneration:

(1) as regards the blank cassette levy and the equipment levy, persons who, acting on a commercial basis and for consideration, are first to place the recording material or reproduction equipment on the market from a place located within or outside the national territory; …

…

5. Copyright-collecting societies alone can exercise the right to remuneration laid down in subparagraphs 1 and 2.

…’

III – **The main proceedings and the question referred**

10. Austro-Mechana is a copyright-collecting society established under Austrian law. Its objects include collecting the remuneration provided for in Article 42b of the UrhG. The referring court states that that article is intended to implement the requirement of fair compensation provided for in Article 5(2)(b) of Directive 2001/29.

11. Amazon is an international group of companies which sells books, music and other products on the internet. Of the five group companies which are defendants in the main proceedings, three are governed by Luxembourg law and have their headquarters in Luxembourg, and two are governed by German law and have their headquarters in Germany. None of those companies has headquarters or an establishment in Austria. Before the referring court, Austro-Mechana submitted that those companies, acting together, were first to place recording media on the market in Austria, and as a result are jointly liable to pay the remuneration provided for in Article 42b of the UrhG.

12. Before the referring court, Austro-Mechana stated that Amazon EU and Others sell recording media in Austria which is either installed in mobile telephones enabling music to be reproduced, or used to expand the memory of such telephones. On that basis, Austro-Mechana sought payment from Amazon EU and Others of the remuneration provided for in Article 42b of the UrhG. For the purposes of determining the amount due from Amazon EU and Others by way of that remuneration, Austro-Mechana requested them to provide it with the relevant accounting information concerning the recording media which Amazon EU and Others had sold in Austria since 1 October 2010.

13. At this stage of the main proceedings, the dispute between the parties relates solely to whether the Austrian courts have international jurisdiction to entertain the legal proceedings commenced by Austro-Mechana with a view to obtaining payment from Amazon EU and Others of the remuneration provided for in Article 42b of the UrhG.

14. Austro-Mechana asserted before the referring court that, according to the case-law of the Court of Justice, the right to fair compensation under Article 5(2)(b) of Directive 2001/29 is intended to compensate for the 'harm' suffered by the holder of copyright or related rights ('the rightholder') by reason of copies being made for private use. Consequently, Austro-Mechana contends that the legal proceedings brought by it are a liability action in tort, delict or quasi-delict falling within Article 5(3) of Regulation No 44/2001, and that the Austrian courts have international jurisdiction to entertain those proceedings.

15. Amazon EU and Others objected that Article 5(3) of Regulation No 44/2001 is applicable only where the action relates to tort, delict or quasi-delict. They claim that that is not true of the obligation to pay the remuneration provided for in Article 42b of the UrhG, on the basis that that obligation is intended to compensate rightholders for the consequences of certain acts which are permitted by law, namely the making of copies for private use, by way of derogation from the rightholders' exclusive reproduction right.

16. By order of 30 April 2014, the Handelsgericht Wien (Commercial Court, Vienna) accepted the arguments of Amazon EU and Others and dismissed the action brought by Austro-Mechana on the ground of lack of international jurisdiction.

17. By order of 26 June 2014, the Oberlandesgericht Wien (Higher Regional Court, Vienna), ruling as an appellate court, upheld the dismissal of the action brought by Austro-Mechana on the following grounds. First, Amazon EU and Others were under an obligation to pay remuneration imposed by law. Secondly, the harm suffered by the rightholders was not caused by the conduct of Amazon EU

and Others, but by that of third parties using the recording media marketed by Amazon EU and Others to make private copies. Lastly, such use of the recording media sold by Amazon EU and Others to make private copies is not prohibited. It was consequently held that the action brought by Austro-Mechana did not fall within the scope of Article 5(3) of Regulation No 44/2001.

18. Austro-Mechana brought an appeal by way of 'Review' before the referring court against the order of the Oberlandesgericht Wien (Higher Regional Court, Vienna).

19. Holding that the correct interpretation of Article 5(3) of Regulation No 44/2001 was not so obvious as to leave no room for reasonable doubt, and having regard to its status as a court of final instance, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does a claim for payment of "fair compensation" under Article 5(2)(b) of Directive [2001/29] which, in accordance with Austrian law, is directed against undertakings that are first to place recording material on the domestic market on a commercial basis and for consideration constitute a claim arising from "tort, delict or quasi-delict" within the meaning of Article 5(3) of [Regulation No 44/2001]?'

IV – **Procedure before the Court**

20. The reference for a preliminary ruling was lodged at the Court Registry on 11 December 2014.

21. Written observations were submitted by Austro-Mechana, Amazon EU and Others, the Austrian, French, Italian and Finnish Governments and the European Commission.

22. The representatives of Austro-Mechana and Amazon EU and Others, as well as the Finnish Government and the Commission, attended the hearing of 26 November 2015 to make oral observations.

V – **Analysis of the referred question**

A – *Preliminary considerations*

23. By its question, the referring court asks the Court, essentially, whether Article 5(3) of Regulation No 44/2001 is to be interpreted as meaning that matters 'relating to tort, delict or quasi-delict' within the meaning of that provision include legal proceedings seeking payment of the fair compensation provided for in Article 5(2)(b) of Directive 2001/29, which is payable under national law by undertakings that are first to place recording media on the domestic market for consideration on a commercial basis.

24. At this stage of the main proceedings, the dispute between the parties relates solely to the applicability of Article 5(3) of Regulation No 44/2001 to the action brought by Austro-Mechana against Amazon EU and Others.

25. If I am not mistaken, none of the parties which submitted observations to the Court has disputed that, if Article 5(3) of Regulation No 44/2001 is applicable to the action brought by Austro-Mechana against Amazon EU and Others, the Austrian courts will have international jurisdiction to entertain it as 'the courts for the place where the harmful event occurred or may occur' within the meaning of that provision.

26. Thus, the disagreement between the parties which submitted observations to the Court is limited to the following question: does the action brought by Austro-Mechana against Amazon EU and Others constitute a matter 'relating to tort, delict or quasi-delict' within the meaning of Article 5(3) of Regulation No 44/2001?

27. Before answering this question, I think it is useful to describe the operation of the private copying exception provided for in Article 5(2)(b) of Directive 2001/29. It is important to identify the precise legal consequences of a decision by a Member State to implement this exception, in order to determine whether legal proceedings based on a breach of the fair compensation obligation relate to 'tort, delict or quasi-delict'.

B – *Operation of the private copying exception provided for in Article 5(2)(b) of Directive 2001/29*

28. The private copying exception is an exception to the reproduction right provided for in Article 2 of Directive 2001/29, which — in principle — is exclusive to rightholders.

29. By virtue of Article 5(2)(b) of that Directive, Member States have the option to provide for exceptions or limitations to that reproduction right, in respect of reproductions made by a natural person for private use and for ends that are neither directly nor indirectly commercial ('private copies'), provided that the rightholders receive fair compensation.

30. It is important at this stage to identify the precise legal consequences of the implementation of the private copying exception by a Member State, given that that exception was implemented by the Austrian legislature in Articles 42 and 42b of the UrhG.

31. Under the 'ordinary' arrangements established by Article 2 of Directive 2001/29, holders have the exclusive right to authorise or prohibit the reproduction of works or other subject matter protected by copyright or a related right which fall within one of the categories referred to in that article ('protected works'). Users have a corresponding obligation to refrain from reproducing protected works unless so authorised. In the event of breach of that obligation, the rightholder may bring an action seeking compensation for the actual loss suffered by reason of the unauthorised reproduction. According to the settled case-law of the Court, such an action falls within Article 5(3) of Regulation No 44/2001. [2]

32. Where the 'exceptional' arrangements provided for by Article 5(2)(b) of Directive 2001/29 are implemented under the national law of a Member State, the rightholders' exclusive right of reproduction and the users' corresponding obligation to refrain from reproducing protected works are extinguished in so far as private copies are concerned. As was noted by all the parties which submitted observations to the Court, under those arrangements, users are granted the right to make private copies of protected works, such copies being expressly authorised. Accordingly, rightholders may no longer rely on their exclusive right of reproduction to oppose the making of private copies.

33. However, to compensate for the extinction of the rightholders' exclusive right of reproduction and the users' corresponding obligation to refrain from reproducing protected works, Article 5(2)(b) of Directive 2001/29 creates a new right in favour of rightholders by requiring that they 'receive fair compensation'.

2 — See, in particular, judgments in *Pinckney* (C-170/12, EU:C:2013:635, paragraph 47); *Hi Hotel HCF* (C-387/12, EU:C:2014:215, paragraph 40); and *Hejduk* (C-441/13, EU:C:2015:28, paragraph 38).

34. The Court has held that, since the person who causes harm to the holder of the exclusive reproduction right is the person who, for his private use, reproduces a protected work without seeking prior authorisation from the rightholder, it is, in principle, for that person to make good that harm by financing the compensation which is to be paid to the rightholder. [3]

35. Thus, the implementation of the private copying exception provided for in Article 5(2)(b) of Directive 2001/29 under the national law of a Member State leads to the substitution of one legal relationship for another:

— the rightholders' exclusive right of reproduction, and the users' corresponding obligation to refrain from reproducing protected works are extinguished in so far as private copies are concerned, and

— in return for this, the rightholder's right to fair compensation is created, along with the corresponding obligation, borne in principle by users, to finance such fair compensation.

36. Accordingly, the Court has held, that the purpose of fair compensation is to compensate rightholders for private copying of their protected works, meaning that it must be regarded as recompense for the harm suffered by rightholders resulting from such copying which is not authorised by them. [4]

37. Under the arrangements put in place by the Austrian legislature, which were the subject of the judgment in *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515), the right of users to make private copies is established by Article 42 of the UrhG. The fair compensation obligation is implemented by Article 42b(1) of the UrhG, under which 'the author shall be entitled to fair remuneration (blank-cassette levy)'.

38. I must nevertheless emphasise that, under those arrangements, the remuneration provided for in Article 42b of the UrhG is not paid directly by the users making private copies to the rightholders concerned.

39. First, the person to whom the remuneration obligation provided for in Article 42b of the UrhG is owed is not the rightholder whose protected work is being privately copied. Under Article 42b(5) of the UrhG, the remuneration must be paid to a copyright-collecting society. It is pursuant to that provision that the copyright-collecting society Austro-Mechana claims such remuneration in the main proceedings.

40. Second, the person liable for the remuneration obligation provided for in Article 42b of the UrhG is not the user who makes private copies of the protected work. By virtue of Article 42b(3) of the UrhG, the persons required to pay that remuneration are those who, acting on a commercial basis and for consideration, are first to place recording media or equipment on the market in national territory. It is under that provision that an action has been brought against Amazon EU and Others in the main proceedings, by reason of the alleged marketing in Austria of recording media that is installed in mobile telephones enabling music to be reproduced or is used to expand the memory of such telephones.

41. This aspect of Austrian legislation was considered by the Court in *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515).

3 — See the judgments in *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515, paragraph 23); *ACI Adam and Others* (C-435/12, EU:C:2014:254, paragraph 51 and the case-law cited); and *Copydan Båndkopi* (C-463/12, EU:C:2015:144, paragraph 22 and the case-law cited).

4 — See, to that effect, judgments in *VG Wort and Others* (C-457/11 to C-460/11, EU:C:2013:426, paragraph 31 and the case-law cited), and *ACI Adam and Others* (C-435/12, EU:C:2014:254, paragraph 50).

42. The Court observed that it was in principle for those making private copies to finance the fair compensation to be paid to the rightholders. [5]

43. Nonetheless, it is well established case-law that, given the practical difficulties in identifying private users and obliging them to compensate the rightholders of the exclusive reproduction right for the harm caused to them, it is open to the Member States to establish a 'private copying levy' for the purposes of financing fair compensation, chargeable not to the private persons concerned but to those who have digital reproduction equipment, devices and media and who, on that basis, in law or in fact, make such equipment, devices and media available to private users or provide copying services to them. Under such a system, it is the persons having such reproduction equipment, devices and media who must pay the private coping levy. [6]

44. The Court has also pointed out that, since that system enables the persons responsible for payment to pass on the amount of the private copying levy in the price charged for making the reproduction equipment, devices and media available, or in the price for the copying service supplied, the burden of the levy will ultimately be borne by the private user who pays that price, in a way consistent with the 'fair balance' between the interests of the holders of the exclusive reproduction right and those of the users of the protected works. [7]

45. In relation more specifically to the system established by Article 42b of the UrhG, the Court observed that the private copying levy is payable by those who make available, for commercial purposes and for consideration, recording media suitable for reproduction. [8]

46. The Court stated that, in principle, such a system enables the persons responsible for payment to pass on the amount of that levy in the sale price of recording media suitable for reproduction, so that the burden of the levy is ultimately borne, in accordance with the requirement of a 'fair balance', by the private user who pays that price, if such a user is the final recipient. [9]

47. The 'financing mechanism' established by Article 42b of the UrhG therefore involves four categories of participant and can be summarised as follows.

48. Sellers who are first to place the recording media used to make private copies on the market in national territory are formally obliged to pay the 'blank cassette levy'.

49. Such sellers may nevertheless pass on the cost of that levy in the sale price of such recording media, so that users who make private copies indirectly finance the levy when they purchase such media.

50. That levy, which is intended to compensate for the harm suffered by rightholders as a result of the making of private copies, must be paid by sellers of recording media to a copyright-collecting society, corresponding in the main proceedings to Austro-Mechana. According to the referring court, it is one of the objects of Austro-Mechana to collect the levy provided for in Article 42b of the UrhG.

5 — Judgment in *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515, paragraph 23 and the case-law cited); see also judgments in *ACI Adam and Others* (C-435/12, EU:C:2014:254, paragraph 51), and *Copydan Båndkopi* (C-463/12, EU:C:2015:144, paragraph 22).

6 — Judgment in *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515, paragraph 24 and the case-law cited); see also, to that effect, judgments in *ACI Adam and Others* (C-435/12, EU:C:2014:254, paragraph 52), and *Copydan Båndkopi* (C-463/12, EU:C:2015:144, paragraph 23).

7 — Judgment in *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515, paragraph 25 and the case-law cited); see also, to this effect, the more recent judgments in *ACI Adam and Others* (C-435/12, EU:C:2014:254, paragraph 52), and *Copydan Båndkopi* (C-463/12, EU:C:2015:144, paragraph 53).

8 — Judgment in *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515, paragraph 26).

9 — Ibid. (paragraph 27).

51. The question whether the action brought by Austro-Mechana against Amazon EU and Others, seeking payment of the levy provided for in Article 42b of the UrhG, falls within Article 5(3) of Regulation No 44/2001 must be considered in the light of that legislative context.

C – *Applicability of Article 5(3) of Regulation No 44/2001*

52. Article 5(3) of Regulation No 44/2001 provides that a person domiciled in a Member State may be sued in another Member State, in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.

53. That provision and Article 5(3) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36), as amended by the successive conventions on the accession of new Member States to that convention ('the Brussels Convention'), which it replaced, have been considered in numerous cases. [10]

54. This rule of special jurisdiction is a derogation from the fundamental principle set out in Article 2(1) of Regulation No 44/2001, under which persons domiciled in a Member State are to be sued, whatever their nationality, in the courts of that Member State.

55. Given that the rule that the court of the place where the harmful event occurred or may occur is the court with jurisdiction constitutes a rule of special jurisdiction, it must be interpreted narrowly and cannot justify an interpretation going beyond the cases expressly envisaged by that regulation. [11]

56. According to settled case-law, the concept of 'matters relating to tort, delict or quasi-delict' within the meaning of Article 5(3) of Regulation No 44/2001 covers all actions which seek to establish the liability of a defendant and which do not concern 'matters relating to a contract' within the meaning of Article 5(1)(a) of that regulation. [12]

57. In the light of that case-law, it is necessary to consider, first, whether legal proceedings seeking payment of the fair compensation provided for in Article 5(2)(b) of Directive 2001/29, such as the main proceedings, concern 'matters relating to a contract' within the meaning of Regulation 5(1)(a) of Regulation No 44/2001. [13] If that is not the case, it will then be necessary to determine whether such proceedings can be regarded as a claim seeking to establish the liability of a defendant. [14]

1. The action brought in the main proceedings does not concern 'matters relating to a contract' within the meaning of Article 5(1)(a) of Regulation No 44/2001

58. Under Article 5(1)(a) of Regulation No 44/2001, a person domiciled in a Member State may be sued in another Member State, in matters relating to a contract, in the courts for the place of performance of the obligation in question.

10 — It may be recalled that the interpretation provided by the Court in respect of the provisions of the Brussels Convention is equally valid for those of Regulation No 44/2001 whenever the provisions of those instruments may be regarded as equivalent. Article 5(1)(a) and (3) of that regulation may be regarded, respectively, as equivalent to Article 5(1) and (3) of the Brussels Convention (judgment in *Brogsitter*, C-548/12, EU:C:2014:148, paragraph 19 and the case-law cited).

11 — See, inter alia, judgments in *Kronhofer* (C-168/02, EU:C:2004:364, paragraph 14 and the case-law cited) as to the interpretation of Article 5(3) of the Brussels Convention; *Pinckney* (C-170/12, EU:C:2013:635, paragraph 25 and the case-law cited), and *Hi Hotel HCF* (C-387/12, EU:C:2014:215, paragraph 26).

12 — See, inter alia, judgments in *Kalfelis* (189/87, EU:C:1988:459, paragraph 17) as to the interpretation of Article 5(3) of the Brussels Convention; *Brogsitter* (C-548/12, EU:C:2014:148, paragraph 20), and *Kolassa* (C-375/13, EU:C:2015:37, paragraph 44).

13 — See points 58 to 61 of this Opinion.

14 — See points 62 to 90 of this Opinion.

59. According to well-established case-law, although Article 5(1)(a) of Regulation No 44/2001 does not require the conclusion of a contract, it is nevertheless essential, for that provision to apply, for an obligation to be identified, since the jurisdiction of the national court under that provision is determined by the place of performance of the obligation in question. Therefore, the application of the rule of special jurisdiction provided for matters relating to a contract in Article 5(1)(a) presupposes the establishment of a legal obligation freely consented to by one person towards another on which the claimant's action is based. [15]

60. In the main proceedings, the obligation to pay fair compensation is established by Article 42b of the UrhG, which implements the requirement for fair compensation laid down in Article 5(2)(b) of Directive 2001/29. It follows from the way in which that obligation is established by law that it was not freely consented to by Amazon EU and Others vis-à-vis Austro-Mechana within the meaning of the case-law referred to above, but was imposed on sellers of recording media by the Austrian legislature when it exercised the option provided for in Article 5(2)(b) of Directive 2001/29.

61. Consequently, legal proceedings seeking payment of the fair compensation provided for in Article 5(2)(b) of Directive 2001/29, such as the main proceedings, do not concern 'matters relating to a contract' within the meaning of Article 5(1)(a) of Regulation No 44/2001, as Austro-Mechana, the French Government and the Commission rightly submitted in their written observations.

2. The main proceedings seek 'to establish the liability of a defendant'

62. In order to decide whether the legal proceedings brought by Austro-Mechana concern 'matters relating to tort, delict or quasi-delict' within the meaning of Article 5(3) of Regulation No 44/2001, it is also necessary, pursuant to the case-law referred to in point 56 of this Opinion, to determine whether they constitute a 'claim seeking to establish the liability of a defendant'.

63. I consider, as was submitted by Austro-Mechana, the Austrian, French and Italian Governments and the Commission, that the proceedings brought by Austro-Mechana do seek to establish liability on the part of Amazon EU and Others and, accordingly, concern 'matters relating to tort, delict or quasi-delict' within the meaning of Article 5(3) of Regulation No 44/2001.

64. As a preliminary matter, it is worthwhile to observe that, having regard to its comprehensive formulation, Article 5(3) of Regulation No 44/2001 embraces a wide diversity of types of liability. [16]

65. Furthermore, Article 5(3) of Regulation No 44/2001 confers jurisdiction to entertain claims relating to tort, delict or quasi-delict on the courts for the place where the harmful event occurred or may occur. It follows from this wording that a claim relating to tort, delict or quasi-delict must necessarily be based on a 'harmful event'.

66. In this regard, the Court has held that liability in tort, delict or quasi-delict can arise only on condition that a causal connection can be established between the damage and the event in which that damage originates. [17] It has also stated that the event giving rise to the damage and the occurrence of the damage represent all the elements which give rise to liability. [18]

15 — See, inter alia, judgments in *Engler* (C-27/02, EU:C:2005:33, paragraphs 50 and 51 and the case-law cited) as to the interpretation of Article 5(1) of the Brussels Convention; *Česká spořitelna* (C-419/11, EU:C:2013:165, paragraphs 46 and 47), and *Kolassa* (C-375/13, EU:C:2015:37, paragraph 39).

16 — See, to that effect, judgment in *Bier* (21/76, EU:C:1976:166, paragraph 18) as to the interpretation of Article 5(3) of the Brussels Convention.

17 — Judgments in *Bier* (21/76, EU:C:1976:166, paragraph 16), as to the interpretation of Article 5(3) of the Brussels Convention, and *DFDS Torline* (C-18/02, EU:C:2004:74, paragraph 32).

18 — Judgment in *Kronhofer* (C-168/02, EU:C:2004:364, paragraph 18).

67. It follows from the foregoing that a 'claim seeking to establish the liability of a defendant', within the meaning of the case-law set out in point 56 of this Opinion, must be based on a harmful event, that is to say, an event attributed to the defendant which is alleged to have caused damage to another party.

68. There is no real doubt, in my view, that the action brought by Austro-Mechana in the main proceedings is based on such a harmful event.

69. Austro-Mechana's action is based on the new legal obligation which was created upon the introduction by the Austrian legislature of the private copying exception, namely the obligation to pay fair compensation, known as the 'blank cassette levy'. [19]

70. In the main proceedings, Article 42b of the UrhG imposes this obligation on sellers placing on the market for the first time recording media used to make private copies, as is claimed in respect of Amazon EU and Others, for the benefit of the copyright-collecting society Austro-Mechana. [20]

71. Accordingly, if it were demonstrated that Amazon EU and Others had in fact placed such recording media on the market for the first time, the failure by Amazon EU and Others to pay the remuneration provided for in Article 42b of the UrhG would cause damage to Austro-Mechana in the form of non-collection of the 'blank cassette levy'.

72. In my view, it follows from the foregoing that the 'harmful event' within the meaning of Article 5(3) of Regulation No 44/2001 on which the action brought by Austro-Mechana is based consists in the fact that Amazon EU and Others failed, as is alleged, deliberately or through negligence, to pay the levy provided for in Article 42b of the UrhG, thus causing damage to Austro-Mechana.

73. In my opinion, this interpretation is supported by the case-law cited in point 36 of this Opinion, according to which the purpose of fair compensation is precisely to compensate rightholders for the private copies which are made, without their authorisation, of their protected works.

74. It is simply necessary to adapt the principle established by that case-law to the context of the main proceedings, given that Article 42b of the UrhG provides that the levy is not to be paid directly to the rightholders, but to a copyright-collecting society such as Austro-Mechana. On that basis, the damage caused by any refusal to pay the remuneration is sustained by Austro-Mechana and thus also, indirectly, by the rightholders.

75. In my view, a case of this type is an absolutely quintessential instance of a matter relating to tort or delict, given that a refusal to pay the remuneration provided for in Article 42b of the UrhG infringes Austrian law and causes damage to Austro-Mechana.

76. I think it is nevertheless useful to address certain arguments advanced by Amazon EU and Others and the Finnish Government, according to which the action brought by Austro-Mechana does not fall within Article 5(3) Regulation No 44/2001.

77. Amazon EU and Others maintain, first, that the only act that is relevant in determining whether the Austrian courts have international jurisdiction is the placing on the market of mobile telephones in Austria, which, they claim, does not constitute tort, delict or quasi-delict within the meaning of Article 5(3) of Regulation No 44/2001.

19 — See points 33 to 37 of this Opinion.

20 — See points 38 to 40 of this Opinion.

78. Next, the fair compensation obligation is an obligation to pay remuneration in respect of copying that is authorised by law, not an obligation to pay compensation for acts which are prohibited by law. Accordingly, an action for payment of such fair compensation does not seek to 'establish the liability of a defendant' within the meaning of the case-law referred to in point 56 of this Opinion.

79. Lastly, Amazon EU and Others claim that the right to fair compensation provided for in Article 5(2)(b) of Directive 2001/29 is not based on infringement of any right held by rightholders, who, by virtue of Article 42 of the UrhG, no longer have the right to prohibit or authorise private copies.

80. It is unquestionably true that the marketing of mobile telephones and the private copying to which Article 42 of the UrhG relates are lawful acts in Austria. However, it does not follow from the fact that those acts are lawful that a breach by Amazon EU and Others of the obligation to pay the levy provided for in Article 42b of the UrhG is also lawful.

81. In particular, although Amazon EU and Others are correct in observing that the obligation to refrain from making private copies is extinguished, this argument has no relevance as Austro-Mechana's action is based on a breach of the 'replacement' legal obligation, namely the obligation to pay the levy provided for in Article 42b of the UrhG upon the first placing on the market of recording media in Austria.

82. I see no reason why the breach of this remuneration obligation cannot 'establish the liability of a defendant' and thus fall within Article 5(3) of Regulation No 44/2001, as it constitutes a harmful event within the meaning of that provision, that is, an event attributed to the defendant (Amazon EU and Others) which is alleged to have caused damage to another party (Austro-Mechana).

83. I therefore consider the arguments advanced by Amazon EU and Others to be unfounded.

84. In its written observations, the Finnish Government asserted that there was no causal link between the event giving rise to damage and the damage on which the action brought by Austro-Mechana in the main proceedings is based, as required by Article 5(3) of Regulation No 44/2001. According to the Finnish Government, the action seeks to recover statutory compensation from undertakings marketing recording media, whereas the damage sustained by the rightholders is caused not by those undertakings, but by the fact that individuals use the media to copy protected works.

85. In this regard, it suffices to note that the causal link between Amazon EU and Others' alleged refusal to pay the levy provided for in Article 42b of the UrhG and the damage alleged to have been sustained by Austro-Mechana has been established by the Austrian legislature itself. Article 42b(5) of the UrhG provides that that levy is to be paid, not directly to rightholders, but to a copyright-collecting society such as Austro-Mechana, with the consequence that the damage caused by any refusal to pay the levy is sustained by that society, not directly by the rightholders.

86. Accordingly, as I explained in point 72 of this Opinion, the 'harmful event' which forms the basis of the action brought by Austro-Mechana consists in the fact that Amazon EU and Others failed, as alleged, deliberately or through negligence, to pay the levy provided for in Article 42b of the UrhG, thus causing damage to Austro-Mechana.

87. At the hearing, the Finnish Government also asserted that the scope of Article 5(3) of Regulation No 44/2001 cannot be extended to lawful acts of private copying.

88. In this regard, the interpretation I advocate is to bring within the scope of Article 5(3) of Regulation No 44/2001, not lawful acts of private copying, but any breach of the obligation to pay the levy provided for in Article 42b of the UrhG.

89. I should also emphasise that this interpretation does not call into question the lawfulness of private copies made in accordance with Article 42 of the UrhG. That article does not make the lawfulness of private copies dependent on compliance with the remuneration obligation laid down in Article 42b of the UrhG.

90. It follows from the foregoing that legal proceedings seeking payment of the fair compensation provided for in Article 5(2)(b) of Directive 2001/29, such as the main proceedings, constitute a 'claim seeking to establish the liability of a defendant' within the meaning of the case-law referred to in point 56 of this Opinion.

D – *Practical consequences*

91. I have set out the reasons why I consider that legal proceedings seeking payment of the fair compensation provided for in Article 5(2)(b) of Directive 2001/29, such as the main proceedings, do not concern 'matters relating to a contract' within the meaning of Article 5(1)(a) of Regulation No 44/2001 [21] and constitute a claim seeking to establish the liability of a defendant. [22] Under the case-law referred to in point 56 of this Opinion, such proceedings therefore relate to 'tort, delict or quasi-delict' within the meaning of Article 5(3) of Regulation No 44/2001.

92. It follows that the Austrian courts have international jurisdiction to entertain those proceedings if the harmful event occurred or may occur in the Republic of Austria, which is a matter for the referring court to determine. [23]

93. It would, moreover, be consistent with the objective pursued by Article 5(3) of Regulation No 44/2001 for the Austrian courts to have international jurisdiction in the main proceedings. The Court has had occasion to state that, in matters relating to tort, delict or quasi-delict, the courts of the place where the harmful event occurred or may occur are usually the most appropriate for deciding the case, in particular on grounds of proximity and ease of taking evidence. [24]

VI – **Conclusion**

94. Having regard to the foregoing, I propose that the Court should answer the question referred for a preliminary ruling by the Oberster Gerichtshof (Supreme Court) as follows:

Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that legal proceedings seeking payment of the fair compensation provided for in Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, which, under national law, is payable by undertakings that are first to place recording media on the domestic market for consideration on a commercial basis, constitute a matter relating to 'tort, delict or quasi-delict' within the meaning of Article 5(3).

21 — See points 58 to 61 of this Opinion.

22 — See points 62 to 90 of this Opinion.

23 — As may be recalled, it is apparent from settled case-law that the expression 'place where the harmful event occurred or may occur', in Article 5(3) of Regulation No 44/2001 refers to both the place where the damage occurs and the place of the event giving rise to that damage, so that the defendant may be sued, at the claimant's option, in the courts for either of those places (see, inter alia, judgments in *Bier*, 21/76, EU:C:1976:166, paragraph 24, as to the interpretation of Article 5(3) of the Brussels Convention; *Kronhofer*, C-168/02, EU:C:2004:364, paragraph 16 and the case-law cited, and *Hejduk*, C-441/13, EU:C:2015:28, paragraph 18 and the case-law cited).

24 — See, inter alia, judgments in *Folien Fischer and Fofitec* (C-133/11, EU:C:2012:664, paragraph 38 and the case-law cited), and *Melzer* (C-228/11, EU:C:2013:305, paragraph 27).