Court of Justice EU, 16 May 2013, Melzer v MF Global

TRADEMARK LAW - LITIGATION

No jurisdiction based on place where a harmful event occurred which is imputed to a presumed co-perpetrator of damage with respect to other presumed perpetrators

- **It follows from the foregoing that, in circumstances such as those in the main proceedings, in which only one among several presumed perpetrators of the alleged harmful act is sued before a court within whose jurisdiction he has not acted, an autonomous interpretation of Article 5(3) of Regulation No 44/2001, in accordance with the objectives and general scheme thereof, precludes the event giving rise to the damage from being regarded as taking place within the jurisdiction of that court.**
- **Accordingly, the answer to the question referred is that Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that it does not allow the courts of the place where a harmful event occurred which is imputed to one of the presumed perpetrators of damage, who is not a party to the dispute, to take jurisdiction over another presumed perpetrator of that damage who has not acted within the jurisdiction of the court seised.**

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Court of Justice EU, 16 May 2013
(A. Tizzano, A. Borg Barthet, J.-J. Kasel, M. Safjan and M. Berger)
In Case C-228/11,
REQUEST for a preliminary ruling under Article 267 TFEU,
from the Landgericht Düsseldorf (Germany),
made by decision of 29 April 2011,
received at the Court on 16 May 2011, in the proceedings
Melzer
v
MF Global UK Ltd,
THE COURT (First Chamber),
composed of A. Tizzano, President of the Chamber, A. Borg Barthet, J.‑J. Kasel, M. Safjan (Rapporteur) and M. Berger, Judges,
Advocate General: N. Jääskinen,
Registrar: C. Strömholm, Administrator,

The Court having regard to the written procedure and further to the hearing on 5 July 2012, after considering the observations submitted on behalf of:
– Mr Melzer, by S. Volaric-Huppert, F. Marzillier, G. Guntner and W.A. Meier, Rechtsanwälte,
– MF Global UK Ltd, by C. Gierets, Rechtsanwalt,
– the German Government, by T. Henze, K. Petersen and J. Kemper, acting as Agents,
– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,
– the Portuguese Government, by L. Inez Fernandes, acting as Agent,
– the Swiss Government, by D. Klingele, acting as Agent,
– the European Commission, by A.-M. Rouchaud-Joët and W. Bogensberger, acting as Agents,
after hearing **the Opinion of the Advocate General** at the sitting on 29 November 2012, gives the following
Judgment
1 This request for a preliminary ruling concerns 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).
2 The request has been made in proceedings between Mr Melzer and MF Global UK Ltd (‘MF Global’) concerning a claim for damages in relation to trading in stock market futures.
Legal context
European Union law
3 Recital 2 in the preamble to Regulation No 44/2001 states that that regulation is intended, in the interests of the sound operation of the internal market, to implement ‘provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation’.
4 Recitals 11, 12 and 15 in the preamble to that regulation state:
‘(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.
(12) In addition to the defendant’s domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.
[…]
(15) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States […]’

5 The rules of jurisdiction are set out in Chapter II of that regulation.
6 Article 2(1) of Regulation No 44/2001, which comes under Section 1 of Chapter II, entitled 'General provisions', is worded as follows:
'Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'
7 Article 3(1) of that regulation, which appears in the same section, provides:
'Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.'
8 Article 5(1) and (3) of Regulation No 44/2001, which comes under Section 2 of Chapter II, concerning 'Special jurisdiction', provides:
'A person domiciled in a Member State may, in another Member State, be sued:
1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
– in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,
– in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,
(c) if subparagraph (b) does not apply then subparagraph (a) applies;
[...]
3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.'
9 Article 6(1) of that regulation, which appears in the same section, is worded as follows:
'A person domiciled in a Member State may also be sued:
1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'.

German law

10 Under Paragraph 830 of the Civil Code (Bürgerliches Gesetzbuch), entitled 'Joint participants and common purpose':
'(1) Where several persons have caused damage by the commission of an unlawful act undertaken in common, each of them shall be liable for that act. That is also the case even where it is impossible to determine which of the persons involved caused the damage by his act.
(2) Instigators and accomplices shall be treated as joint participants of the act.'

Dispute in the main proceedings and the question referred for a preliminary ruling

11 The order for reference discloses that Mr Melzer, who is domiciled in Berlin (Germany), was solicited as a client by telephone and his file was managed by Weise Wertpapie]r Handelsunternehmen ('WWH'), established in Düsseldorf (Germany). That company opened an account for Mr Melzer with MF Global, a brokerage company established in London (United Kingdom). MF Global traded in futures for Mr Melzer in return for remuneration.
12 In the period from 2002 to 2003 Mr Melzer paid a total of EUR 172 000 into a specific account. From that amount MF Global repaid him EUR 924.88 on 9 July 2003. Mr Melzer claimed the difference, that is EUR 171 075.12, as damages.
13 MF Global invoiced Mr Melzer for USD 120 by way of commission. It retained USD 25 and transferred the difference, namely USD 95, back to WWH.
14 Mr Melzer takes the view that he was not sufficiently informed about the risks of trading futures on stock exchanges either by WWH or by MF Global. He was also not effectively informed about the 'kick-back' agreement entered into between MF Global and WWH, and the conflict of interest which results from it. He claims that MF Global is liable for damages for assisting WWH deliberately and unlawfully to cause unfair harm.
15 The Landgericht Düsseldorf considers that the German courts have jurisdiction under Article 5(3) of Regulation No 44/2001 as the damage occurred in Germany. The financial loss which Mr Melzer seeks to have made good occurred in Germany because that is the Member State in which he made the payments into his account in London, and the loss sustained was to his bank account managed by a banking institution.
16 Nonetheless, the referring court is unsure about its jurisdiction under Article 5(3) of Regulation No 44/2001. Since the loss was sustained in Berlin and not Düsseldorf, the place where the harmful event occurred is therefore decisive. Since MF Global only trades in London, the jurisdiction of the courts in Düsseldorf may be based only on the activities of WWH.
17 According to the referring court, such a connecting factor as an alternative to the place where the harmful event, which was committed by joint perpetrators or accomplices, occurred, is admissible under German civil procedure and is, in the light of Mr Melzer's allegations, conceivable in the present case.
18 In those circumstances, the Landgericht Düsseldorf decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:
'In the context of jurisdiction in matters relating to tort or delict under Article 5(3) of Regulation [No 44/2001], where there is cross-border participation of several persons in a tort or delict, is reciprocal attribution of the place where the event occurred admissible for determining the place where the harmful event occurred?'

The question referred for a preliminary ruling

19 By its question, the referring court asks essentially whether Article 5(3) of Regulation No 44/2001 must be interpreted as permitting the courts of the place where a harmful event occurred which is imputed to one of the presumed perpetrators of damage who is not a party to

the dispute, to take jurisdiction over another presumed perpetrator of that damage who has not acted within the jurisdiction of the court seised.
20 In its order for reference, that court takes the view that German law allows for such a possibility by way of a 'reciprocal attribution to the place where the event occurred'. Therefore it asks about the possible application mutatis mutandis of that rule to the case before it.
21 As a preliminary point, it must be noted that, according to the referring court, despite the contractual nature of the relationship between Mr Melzer and MF Global, the action in the main proceedings is based solely on the law of tort or delict. Therefore, the question referred for a preliminary ruling is limited to the interpretation of Article 5(3) of Regulation No 44/2001.
22 It must also be recalled that the provisions of Regulation No 44/2001 must be interpreted independently, by reference to its scheme and purpose (see, inter alia, Case C-189/08 Zuid-Chemie [2009] ECR I-6917, paragraph 17 and the case-law cited, and Joined Cases C-509/09 and **C-161/10 eDate Advertising and Others [2011] ECR I-0000, paragraph 38**).
23 That being the case, it must be stated that it is only by way of derogation from that fundamental principle laid down in Article 2(1) of Regulation No 44/2001, attributing jurisdiction to the courts of the defendant's domicile, that Section 2 of Chapter II thereof makes provision for certain special jurisdictional rules, such as that laid down in Article 5(3) of that regulation. 24 In so far as the jurisdiction of the court of the place where the harmful event occurred or may occur constitutes a rule of special jurisdiction, it must be interpreted restrictively and cannot give rise to an interpretation going beyond the cases expressly envisaged by Regulation No 44/2001 (see, by analogy, Zuid-Chemie, paragraph 22).
25 The fact remains that the expression 'place where the harmful event occurred or may occur' in Article 5(3) of Regulation No 44/2001 is intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the applicant, in the courts for either of those places (**Case C-523/10 Wintersteiger [2012] ECR I-0000, paragraph 19 and the case-law cited**).
26 In that connection, according to settled case-law, the rule of special jurisdiction laid down in Article 5(3) of Regulation No 44/2001 is based on the existence of a particularly close connecting factor between the dispute and the courts of the place where the harmful event occurred or may occur, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings (see, to that effect, Zuid-Chemie, paragraph 24, and **eDate Advertising and Others, paragraph 40**).
27 In matters relating to tort, delict and quasi-delict, the courts for the place where the harmful event occurred are usually the most appropriate for deciding the case, in particular on the grounds of proximity and ease of taking evidence (see, to that effect, Case C-167/00 Henkel [2002] ECR I-8111, paragraph 46, and Zuid-Chemie, paragraph 24).
28 Since the identification of one of the connecting factors recognised by the case-law set out in paragraph 25 of this judgment thus enables the court objectively best placed to determine whether the elements establishing the liability of the person sued are present to take jurisdiction, the relevant connecting factor must be situated within the jurisdiction of the court seised (see, to that effect, **Case C-133/11 Folien Fischer and Fofitec [2012] ECR I- 0000, paragraph 52**).
29 It must be stated in that regard that the question referred does not concern the identification of the place where the damage occurred but, as the Advocate General observed in point 40 of his Opinion, the interpretation of the concept of 'the place of the event giving rise to the damage', in a situation in which the legal person sued before the referring court is not sued because of an act it committed within the jurisdiction of that court, but because of an act allegedly committed by another.
30 In circumstances such as those described in the order for reference, in which only one among several presumed perpetrators of an alleged harmful act is sued before a court within whose jurisdiction it has not acted, the connecting factor based on the defendant's acts is, as a matter of principle, absent.
31 In those circumstances, the court seised must, in order to take jurisdiction under Article 5(3) of Regulation No 44/2001, establish why the place of the event giving rise to the damage must none the less be regarded as having taken place within its jurisdiction. That would require an assessment similar to that to be undertaken in order to examine the substance of the dispute even at the stage of examining jurisdiction.
32 The question might arise under what conditions, where there are a number of perpetrators, the acts of one of them could be imputed to the others in order to sue the latter before the courts in whose jurisdiction those acts have taken place. In the absence of a concept common to the national legal systems and the European Union enabling such imputation to be made, the national court would probably refer to its national law.
33 That is demonstrated by the fact that the alternative connecting factor to the place of the event giving rise to the damage committed by another that the referring court envisages for that purpose is based on a rule of German law on civil liability, namely Paragraph 830 of the Civil Code.
34 The use of national legal concepts in the context of Regulation No 44/2001 would give rising to different outcomes among the Member States liable to compromise the aim of unifying the rules of jurisdiction pursued by that regulation, as is clear from recital 2 in the preamble thereto (see, by analogy, Case C-543/10 Refcomp [2013] ECR I-0000, paragraph 39).
35 Furthermore, a solution which consists in making the identification of the connecting factor dependent on

assessment criteria having their source in national substantive law would be contrary to the objective of legal certainty since, depending on the applicable law, the actions of a person which took place in a Member State other than that of the court seised might or might not be classified as the event giving rise to the damage for the purpose of the attribution of jurisdiction under Article 5(3) of Regulation No 44/2001. That solution would not allow the defendant reasonably to predict the court before which he might be sued.

36 Moreover, in so far as it would lead to allowing the presumed perpetrator of a harmful act to be sued before the courts of a Member State within whose jurisdiction he has not acted, on the basis that the event giving rise to the damage occurred there, that solution would go beyond the situations expressly envisaged in that regulation and, consequently, would be contrary to its general scheme and objectives.

37 That being said, it must be recalled that the fact that it is impossible for the court within whose jurisdiction the presumed perpetrator did not himself act to take jurisdiction on the ground that it is the place of the event giving rise to the damage in no way compromises the applicability of the rules of jurisdiction, both general and special, laid down by Regulation No 44/2001, in particular that in Article 5(1) thereof.

38 The fact remains that the perpetrator of a harmful act may always be sued, pursuant to Article 5(3) of that regulation, before the courts in whose jurisdiction he acted or, otherwise, in accordance with the general rule, before the court for the place where he is domiciled.

39 Furthermore, as the Advocate General observed, in point 53 of his Opinion, the attribution of jurisdiction to hear disputes against persons who have not acted within the jurisdiction of the court seised remains possible under Article 6(1) of Regulation No 44/2001, in so far as the conditions laid down in that provision, in particular the existence of a connecting factor, are fulfilled.

40 It follows from the foregoing that, in circumstances such as those in the main proceedings, in which only one among several presumed perpetrators of the alleged harmful act is sued before a court within whose jurisdiction he has not acted, an autonomous interpretation of Article 5(3) of Regulation No 44/2001, in accordance with the objectives and general scheme thereof, precludes the event giving rise to the damage from being regarded as taking place within the jurisdiction of that court.

41 Accordingly, the answer to the question referred is that Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that it does not allow the courts of the place where a harmful event occurred which is imputed to one of the presumed perpetrators of damage, who is not a party to the dispute, to take jurisdiction over another presumed perpetrator of that damage who has not acted within the jurisdiction of the court seised.

Costs

42 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

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 2001 must be interpreted as meaning that it does not allow the courts of the place where a harmful event occurred which is imputed to one of the presumed perpetrators of damage, who is not a party to the dispute, to take jurisdiction over another presumed perpetrator of that damage who has not acted within the jurisdiction of the court seised.

* Language of the case: German.

OPINION OF ADVOCATE GENERAL JÄÄSKINEN

delivered on 29 November 2012 (1)

Case C‑228/11

Melzer

v

MF Global UK

[Reference for a preliminary ruling

from the Landgericht Düsseldorf (Germany)]

“Jurisdiction in civil and commercial matters – Interpretation of Article 5(3) of Regulation (EC) No 44/2001 – Special jurisdiction in tort or delict – Cross‑border participation of several people in the same allegedly harmful act – Possible option of establishing the jurisdiction of a court of a Member State with regard to a defendant domiciled in another Member State by reason of the place where an event giving rise to such act may has been committed by a purported joint participant or accomplice who is not being sued for damages”

I – Introduction

1. The reference for a preliminary ruling made by the Landgericht Düsseldorf (Germany) concerns 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, (2) and in particular the definition of ‘the place where the harmful event occurred’, for the purposes of the rule of jurisdiction in matters relating to tort or delict laid down in that provision, where elements constituting such an event have purportedly occurred both in two different Member States and within one of them.

2. Being seised of a cross-border action for tort, the national court seeks to ascertain, in order to establish its own jurisdiction ratione loci to adjudicate in that action, whether one of the persons presumed to be liable for the alleged damage, who is domiciled in one Member State, (3) may be sued in a court sitting in another Member State because it is the place where an accomplice or a joint participant has committed a harmful act, although that accomplice or joint participant is not a defendant in the action.

3. In its order for reference, the Landgericht Düsseldorf suggests that the Court should establish a new ground of jurisdiction, which would offer claimants a further option (4) in addition to the main alternative resulting from the distinction that has for a long time been drawn in case-law, where the events constituting the alleged tort occurred at a distance from each other, between the place where the damage occurred and the place of the event giving rise to it, (5) namely, jurisdiction founded on the place of the act committed by another participant in the harmful event besides the defendant, in accordance with a rule that exists in German domestic law. (6)

4. The present case reveals once again the propensity of some courts of Member States to consider that Regulation No 44/2001 may be interpreted in the light of national particularities, and the Court is called upon to accept that such specificities have crossborder effects (7) despite the fundamentally unifying purpose of that measure of European Union law. Besides its notable importance from that theoretical point of view, it would appear that the case ought also to have significant impact at a practical level, according to the documents supplied to the Court by the parties. (8)

II – Legal context

5. According to recital 2 in the preamble to Regulation No 44/2001, that regulation is intended, in the interests of the sound operation of the internal market, to implement *'provisions to unify the rules of conflict of jurisdiction in civil and commercial matters[…]'*.

6. Recital 11 in the preamble to that regulation states, *'[t]he rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor'*.

7. Recital 12 in the preamble to Regulation No 44/2001 states that *'[i]n addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice'*.

8. Recital 15 in the preamble to that regulation states that *'[i]n the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States[…]'*.

9. The rules of jurisdiction are set out in Chapter II of Regulation No 44/2001.

10. Article 2(1) of that regulation, which comes under Section 1 of Chapter II, entitled 'General provisions', reads as follows: *'Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State'*.

11. Article 3(1) of that regulation, which comes under the same section, provides that *'persons domiciled in a Member State may only be sued in the courts of another Member State by virtue of the rules set out in Sections 2 to 7 of this Chapter'*.

12. Article 5(1) and (3) of Regulation No 44/2001, which comes under Section 2 of Chapter II, concerning 'Special jurisdiction', provides as follows:

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

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

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

– in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

– in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;

(c) if subparagraph (b) does not apply then subparagraph (a) applies;

[…]

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

13. Article 6(1) of Regulation No 44/2001, which comes under the same section, states that *'[a] person domiciled in a Member State may also be sued […] where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'*.

III – Dispute in the main proceedings, question referred for a preliminary ruling and procedure before the Court

14. Mr Melzer, who is domiciled in Berlin, was solicited as a client and looked after by telephone by the company Weise Wertpapier Handelsunternehmen ('WWH'), whose registered office is in Düsseldorf. That company opened an account for Mr Melzer with MF Global UK Ltd ('MF Global UK'), a brokerage house located in London, which traded in stock market futures for Mr Melzer in return for corresponding fees.

15. In the period from 2002 to 2003, Mr Melzer paid into that account sums amounting to a total of EUR 172 000. On 9 July 2003, MF Global UK paid him back a sum of EUR 924.88. It also invoiced him for USD 120 in commission, from which it retained USD 25 and transferred the balance of USD 95 back to WWH.

16. Mr Melzer brought proceedings before the Landgericht Düsseldorf claiming that MF Global UK should be ordered to pay him damages equivalent to the difference between what he had paid out and what he had received in the context of those transactions, namely the sum of EUR 171 075.12, with interest. (9)

17. In support of his claims, Mr Melzer maintained that he had not been sufficiently informed about the risks involved in futures trading, so far as options contracts were concerned, either by WWH or by MF Global UK.

In his view, the documents sent by WWH (10) did not meet the need to sufficiently inform a client about the risks, as required by case-law. Nor was he provided with objective information about the *'kick-back'* agreement between MF Global UK and WWH or the conflict of interests which it involved. Moreover, Mr Melzer claimed that the commission quoted by MF Global UK was excessive. He maintained that MF Global UK was therefore liable to pay him damages, with interest, for deliberately and unlawfully assisting WWH in causing the damage.

18. MF Global UK challenged the jurisdiction ratione loci of the Landgericht Düsseldorf and contended that the application should be dismissed on substantive grounds.

19. The national court states that the provisions of Regulation No 44/2001 are applicable in the context of the main proceedings since the defendant is a legal person with its registered office in a Member State. While making clear that no jurisdiction clause is likely to be agreed in the present case, (11) it considers that the international jurisdiction of the German courts is well-founded under Article 5(3) of that regulation, since the damage occurred in Germany. It states that, according to Mr Melzer, the financial loss which he seeks to have made good occurred in Germany, since it was from there that the payments were made into his account in London, and the loss to his assets was sustained by his bank account in that Member State.

20. However, the national court expresses doubts as to whether it has territorial jurisdiction under Article 5(3) of Regulation No 44/2001. It points out that under that provision a defendant may be sued, according to the choice of the claimant, either in the courts for the place where the damage occurred, or in the courts of the place of the event giving rise to the damage, provided those places are not the same. That court considers that the damage occurred in Berlin, where Mr Melzer is resident, and not in Düsseldorf, where the court sits. Given that location of the *'place where the damage occurred'*, the decisive factor in this case is the *'place of the event giving rise to the damage'*. As MF Global UK operated exclusively in London, territorial jurisdiction can be founded only on the activities of WWH in Düsseldorf. 21. According to the national court, such a linking factor exists under German law, since the latter provides that where several persons have participated in a harmful act each participant is jointly liable for the contribution of any other participant in carrying out that act. In the present case, in view of Mr Melzer's claim that MF Global UK, deliberately, at least assisted WWH in committing the unlawful acts which the latter carried out in Germany, and in Düsseldorf in particular, it is conceivable that the jurisdiction of that court might be founded on the place where the actions of that joint participant or accomplice took place. (12)

22. Since Regulation No 44/2001 contains no particular provisions on attribution of third party acts to justify international or local jurisdiction, the question arises whether Article 5 (3) of that regulation ought to be interpreted as meaning that the tortious act of a principal or an accomplice can also found international or territorial jurisdiction with regard to the person being sued. The national court states that there is a difference of opinion on that subject both in German case-law and in academic legal writing.

23. Against that background, by order lodged on 16 May 2011, the Landgericht Düsseldorf decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'In the context of jurisdiction in matters relating to tort or delict under Article 5(3) of Regulation [No 44/2001], where there is cross-border participation of several people in a tort or delict, is reciprocal attribution of the place where the event occurred admissible for determining the place where the harmful event occurred?'

24. Written observations were submitted to the Court by Mr Melzer and MF Global UK, by the German, Portuguese and Czech Governments, by the Swiss Confederation and by the European Commission.

25. Only Mr Melzer, MF Global UK, the German Government and the Commission were represented at the hearing, which took place on 5 July 2012.

IV – Analysis

26. In view of the way the question referred is framed, which may appear to be somewhat vague, it seems to me necessary to begin by defining the purpose and issues of that reference for a preliminary ruling before suggesting what form of a reply should be given to it.

A – Scope of the question referred

27. The present case has been brought in connection with an action for liability in tort. It is clear from Article 2 in conjunction with Article 5(3) of Regulation No 44/2001 that in this matter a person domiciled in a Member State may be sued, according to the choice of the claimant, either in the courts of the Member State where that person is domiciled, or in a court located in another Member State, namely the court for 'the place where the harmful event occurred', or 'may occur'.

28. The words *'may occur'*, which extend the jurisdiction of the court that may entertain the action for tort to hear preventive actions, constitutes the only addition to Article 5(3) of Regulation No 44/2001 as compared to Article 5(3) of the Brussels Convention, (13) which that regulation replaced. Despite that additional element, (14) which is not however relevant in the present case, those provisions are in essence equivalent, as has been accepted by the Court, so that the case-law concerning the interpretation of the rule of jurisdiction laid down in the Convention also applies as regards interpretation of the regulation. (15)

29. Since in the dispute in the main proceedings Mr Melzer is undoubtedly bound by a contract to MF Global UK and WWH, it may at first sight seem surprising that the national court did not consider that Article 5(1) of Regulation No 44/2001, which concerns jurisdiction in matters relating to a contract, might appropriately apply in the present case, at least to the same extent as Article 5(3), which concerns jurisdiction in matters relating to tort or delict. (16) MF Global UK

makes preliminary observations to that effect, considering that it is appropriate to draw a distinction between the respective scopes of Article 5(1) and Article 5(3) of that regulation. Notwithstanding this comment, it is clear in any event, from established case-law, that the national court alone establishes the subject-matter of its reference for a preliminary ruling and that since the question referred is not framed in that way by the national court there is no need for the Court to rule on a point raised by one of the parties to the main proceedings. (17)

30. The national court states first of all that the international jurisdiction of the German courts, taken together, does not raise any problems for it. It considers that such jurisdiction is an incontrovertible fact, given that, according to that court, the place where the harmful event occurred, within the meaning of Article 5(3) of Regulation No 44/2001, is Berlin, the city in which both Mr Melzer's place of residence and his bank account from which the contested transactions were funded are situated.

31. The Commission, however, expressed the opposite view, contending that the judgment in Kronhofer (18) precludes jurisdiction being conferred on the court for the place where the claimant is domiciled in so far as it is the place *'where his assets are concentrated'*, by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another Member State, while all of the elements giving rise to liability are situated in the territory of the latter. (19)

32. I agree with the Commission that the financial damage for which Mr Melzer claims compensation, namely the loss of a portion of the capital he invested, appears to me to have occurred in London and not in Berlin. The contested funds were put into an account with the brokerage house in London and that is where they were lost, since performance of the option contract, or expiry of the option period, resulted in the sums repaid to that account being less than the sums invested.

33. It is apparent from its order for reference that the national court is merely seeking clarification about its own *'territorial'* jurisdiction or, in other words, jurisdiction at national level, in so far as it is asking whether it is indeed that court which, of all the German courts, should adjudicate in the present case in pursuance of Article 5(3) of Regulation No 44/2001.

34. In that connection I note the difference in wording between provisions of that regulation, such as, on the one hand, Article 2(1), which establishes the jurisdiction of all the courts of a Member State, (20) and, on the other hand, Article 5(1) and (3), which identify a particular court, defined on the basis of a place to which the dispute is specifically linked. (21) Thus, the provision for which interpretation is sought effectively allows, as the national court is seeking, identification of the jurisdiction ratione loci of a particular court from among all the courts of a Member State that have jurisdiction ratione materiae, and does so directly. Hence, to use the concept of international jurisdiction as a preliminary step in the reasoning to be adopted in applying that provision, as the national court has done, appears to me to be pointless or even wrong.

35. Specifically, the difficulty for that court lies in knowing whether, in the cross-border dispute before it, it is possible to establish in Düsseldorf, the place where one of the two purported participants in the harmful event acted – that city being the place where WWH has its registered office –, jurisdiction with regard to the other participant in the harmful event – namely, MF Global UK –, which appears to have operated only from the United Kingdom.

36. In that regard, it should be noted in this connection that Regulation No 44/2001 provides that a person seeking compensation in an action based on tort has two main options, namely to bring proceedings in the courts for the place where the defendant is domiciled, in accordance with Article 2 of Regulation No 44/2001, or to avail himself of the special jurisdiction based on Article 5(3) of that regulation.

37. The latter ground of jurisdiction may itself be divided into two main subdivisions, even more if account is taken of the specific cases in which the Court has set out additional linking criteria, (22) where the elements constituting the tort or delict, and hence the linking factors, are spread over different Member States. The Court has repeatedly interpreted the words *'place where the harmful event occurred'*, used in Article 5(3) of Regulation No 44/2001, as meaning in such a situation both the place where the damage occurred, that is to say, the Member State in which the harmful event directly had injurious effects for the victim and the place of the event giving rise to the damage, that is to say, the Member State where the harmful event originated by reason of the acts committed by the perpetrator of the tort or delict. (23) The result is that a defendant may be sued, according to the choice of the claimant, before the courts for either of those places.

38. In the present case, the details relating to the case in the main proceedings are as follows. The place where the damage occurred is in Germany, according to the national court, which considers that the alleged harm occurred specifically in Berlin, on the ground that that is where Mr Melzer has his residence and his bank account was debited there, (24) and not in Düsseldorf. Consequently, in order to establish its particular jurisdiction, the Landgericht Düsseldorf seeks to identify whether there exists in the present case a ground of jurisdiction that might be based on the second of the abovementioned subdivisions, in view of the wrongful acts committed by the purported participants in the tort. In that regard, the place of the events giving rise to the damage could either be London, since it was there that the brokerage transactions were carried out by MF Global UK, or Düsseldorf, since it is in that city that WWH, a company that is not being sued but which did collaborate with the sole defendant, had its registered office.

39. More specifically, it is a matter of determining whether the acts carried out by the company which is established in Düsseldorf, namely soliciting and looking after the client or indeed the fact of encouraging him to act in too risky a manner, might be regarded as constituting events that led to the harm sustained by that client. Above all, the Court is requested to rule on whether the place where those acts occurred might in itself provide a basis on which the Landgericht Düsseldorf could adjudicate on the liability in tort of the company established in the United Kingdom, which is the only party being sued, owing to the attribution to that company of the actions of the German company, which is the other party purported to have participated in the tort.

40. Thus, it appears that the question referred for a preliminary ruling is confined to interpretation of the concept of the place of the event giving rise to the damage in a situation in which three elements of complexity are combined: first, the places of the events giving rise to the damage are in different Member States; secondly, there is a convergence of liabilities, that is to say, this is a case in which there is not just one perpetrator of the acts, but several persons who are joint participants or accomplices; and thirdly, the claimant has brought proceedings against only one of the purported participants in the tort and has done so in the Member State in which another of the participants carried on its business. Although the first two of those factors have already been considered from different angles in the case law of the Court, they have not so far been combined with the third factor.

41. In the light of the documents before the Court, I would point out a particular problem with regard to identifying the respective legal positions of MF Global UK and WWH, in so far as, in the observations that have been submitted to the Court, confusion often occurs between the main participant and the accomplice or joint participant in the civil tort at issue. It is clear from the order for reference that, although Mr Melzer claims compensation only from MF Global UK, which he must therefore consider to have played a decisive role in causing the damage, WWH is in fact the main participant, whilst MF Global UK is at the very least an accomplice, according to the assertions and claims made by the applicant. Be that as it may, the question referred for a preliminary ruling is worded sufficiently broadly to include either case, whether the person not being sued is an accomplice or a joint participant. Consequently, the answer proposed in the present Opinion will be given in the light of this dual aspect.

42. Thus, the national court is seeking to ascertain in essence whether it is possible to bring an action in the courts for the place where an accomplice or joint participant committed its wrongful actions in the case of multiple events giving rise to damage which occurred in different Member States. That means, specifically, taking into account the place of the event giving rise to the damage caused by one of the participants in the tort, and doing so without the alleged victim being obliged to sue that accomplice or joint participant, as is the case in the dispute in the main proceedings.

43. In other words, the national court would like the Court to establish an additional option for selecting a court in a situation where defendants domiciled in different Member States are jointly responsible for a tortious act, by adopting a ground of 'reciprocal attribution to the place where the event occurred' in the words of the reference for a preliminary ruling. As a result of introducing the new ground of jurisdiction which is proposed here, there would be an extension of the options which have hitherto been available to a claimant according to the case-law of the Court. In my view, that does not really involve the creation of a new main subdivision in addition to 'the place where the damage occurred' and 'the place of the event giving rise to the damage'. What is proposed by that court is more a broad interpretation of the second of those subdivisions, which might mean accepting that, where there is cross-border participation by several people in a tort or delict, the place of the acts giving rise to the damage committed by one of them may provide a basis for the jurisdiction of a court with regard to another of those participants.

B – The answer to the question referred for a preliminary ruling

1. The different positions adopted

44. Two differing viewpoints emerge from the observations submitted to the Court: Mr Melzer, the German, Czech and Portuguese Governments and the Swiss Confederation propose that the new ground of jurisdiction envisaged by the national court should be accepted, whilst MF Global UK and the Commission consider that the answer to the question referred should be negative.

45. It is apparent from the reasoning on which its order is based that, for its part, the national court tends to favour the possibility of attributing international jurisdiction, which it describes as *'reciprocal attribution'*, to the place of the event giving rise to the damage that has been caused by a presumed joint participant or accomplice, even though the latter is not a defendant in the action that has been brought.

46. That approach, and indeed the rationale of the question referred, is explained in view of the information supplied by the Landgericht Düsseldorf concerning the content of the national law. It appears that Paragraph 830 of the German Civil Code (Bürgerliches Gesetzbuch) provides that where several people participate jointly in an act of tort or delict, each participant or accomplice is considered to be liable for the part played by any other of those persons in that act. Moreover, the national court states that, according to Paragraph 32 of the German Code of Civil Procedure (Zivilprozessordnung), jurisdiction in matters relating to tort or delict may be founded on infringements committed by any of the various joint participants, since they may all be held mutually liable for such acts.

47. Thus, if the dispute in the main proceedings had been purely internal, in view of the claims made by the

applicant, Mr Melzer, against the defendant, MF Global UK, and against its purported joint participant or accomplice, WWH, (25) the court for the place where any one of the participants in the alleged tort acted could, on that ground, have declared that it had jurisdiction to adjudicate in the action for liability in tort brought against any of the joint participants. (26)

48. However, the outcome is a lot less clear where, as in the present case, the situation has links with the territories of more than one Member State instead of being confined to Germany. The order for reference highlights the fact that differences exist in that regard both in German case-law and in academic legal writing. It states that some courts have held that Article 5(3) of Regulation No 44/2001 allowed a cross-border dispute to be linked to the place where a joint participant or accomplice committed the act giving rise to the damage on the ground that that was where the centre of the tortious act or omission lay. (27) Such decisions have been supported by the assenting opinions of some academic legal writers, whilst a number of others have disagreed with the decisions, putting forward arguments to which I shall revert in detail later on since I share the views of the dissenting group.

49. It is against that very particular background that the reasoning for the reference for a preliminary ruling is set. However, the Court is by no means bound by the approach favoured at national level. It is settled case-law that the concepts used in Regulation No 44/2001 must be interpreted independently in order to ensure that it is uniformly applied in all the Member States. (28)

2. The interpretation proposed

(a) Guidelines for the interpretation

50. Certainly the concept of 'the place where the harmful event occurred' contained in Article 5(3) of Regulation No 44/2001 must be interpreted independently of the content of the legal systems of Member States, since the implementation of the rules of jurisdiction which that regulation lays down must not depend on national specificities, in order to avoid the unification they seek to achieve losing its effectiveness. (29)

51. According to the case-law of the Court, it is necessary to interpret the content of a provision of Regulation No 44/2001 in the light not only of its wording but also of the system established by that regulation and the objectives it pursues. (30)

52. I must state from the outset that I do not favour an interpretation of Article 5(3) of Regulation No 44/2001 which would, as is envisaged by the Landgericht Düsseldorf, lead to accepting that the applicant could validly choose to bring proceedings before that court as being the court for the place where an accomplice or joint participant, who was not being sued, took part in committing the alleged harmful act, and not merely opt for the courts of the place where the defendant is domiciled, or of the place where the damage occurred, or of the place of the event giving rise to that damage, as customarily interpreted in case-law. I consider such an interpretation would be too broad, in the light of the following systemic and teleological factors of analysis. (31)

(b) Interpretation by reference to the scheme of Regulation No 44/2001

53. First of all, I note that Regulation No 44/2001 contains provisions, namely those of Article 6(1), which expressly state the option that a defendant may be sued in a court that is connected to the proceedings concerning the defendant through another person, but that secondary jurisdiction exists solely where there are a number of defendants and there is the risk of irreconcilable judgments, (32) which is not the case in the dispute in the main proceedings. For some reason not explained in the order for reference, (33) Mr Melzer chose to sue before the Landgericht Düsseldorf only MF Global UK, whose registered office is in London, and not WWH, which is established in Düsseldorf, even though he appears to claim that the London firm was merely an accomplice. By making that choice, for which he must bear any negative consequences, the applicant has forfeited the opportunity to avail himself of the extension of jurisdiction based on the place of domicile of a third party, and thus in practice of the acts which that party may have committed in that place, which is allowed under Article 6.

54. Moreover, the general rule of jurisdiction laid down in Article 2(1) of Regulation No 44/2001, the purpose of which is to protect the interests of the party which has not taken the initiative in the cross-border action, states that in principle it is the courts of the Member State in which the defendant is domiciled which have jurisdiction. According to settled caselaw, since a provision such as Article 5(3) of that regulation lays down a rule of jurisdiction which allows departure from that general principle, by giving the claimant an option as to which courts may be seised, it must be interpreted narrowly or even restrictively. (34) Hence, the scope of that article must not be given an interpretation which goes beyond the situations expressly envisaged in Regulation No 44/2001, (35) in order not to undermine the effectiveness of Article 2 to that extent or to exceed the intention of the European Union legislature. The Court having ruled that the concept of 'place where the harmful event occurred' cannot be interpreted too broadly as regards the link to the place where the damage occurred, (36) the same should apply as regards the link to the place of the event giving rise to the damage, so that it should not be permitted for a court to have jurisdiction in a matter of tort on the basis of the fact that a defendant is held responsible for acts committed by a third party in another Member State.

55. Moreover, as I stated above, the rule laid down in Article 5(3) of Regulation No 44/2001 allows a specific court to be identified from among all the courts of the Member States having jurisdiction ratione materiae, unlike Article 2 of that regulation. It is apparent from recital 12 in the preamble to that regulation that, by that process, Article 5 of the regulation seeks to designate the court that is geographically close to the dispute and hence in the best position to adjudicate on the matter.

56. The Court has thus repeatedly held that that rule is based on the existence of a particularly close connecting factor between the dispute and the courts of the place where the harmful event occurred, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings, in particular on grounds of proximity and ease of taking evidence. (37)
57. If the new ground of jurisdiction proposed by the national court were to be adopted, that reasoning would mean that, in a situation such as that at issue in the main proceedings, the court declared competent by reason of the actions of a third party that was not being sued, in this case the German court, would be called upon to decide on the liability of a defendant, in this case one established in the United Kingdom, whose purportedly wrongful acts were thus committed not close to but far from the territorial area of jurisdiction of that court, since it is not disputed that MF Global UK operated solely on British territory. In the absence of a sufficiently significant link with the dispute that court would not, objectively, be in the best position to rule in such circumstances.
58. Consequently, it seems to me to be contrary to the scheme of Regulation No 44/2001 to accept the jurisdiction of the courts of the place where any accomplice or joint participant of the main participant in the tort is established as an alternative to the place of the event giving rise to the damage, and to do so even where the main place of the event giving rise to the damage is in another Member State. That approach is borne out by other considerations relating to the purpose of that regulation.
(c) Interpretation by reference to the objectives of Regulation No 44/2001
59. First of all, with regard to the procedural arguments concerning the objective of sound administration of justice referred to in recital 12 in fine of Regulation No 44/2001, I do not see how, where, as in the present case, there is a single defendant, a broad conferral of jurisdiction on the basis of the actions of another participant, deliberately not proceeded against, would directly meet that objective. It would clearly be a different matter if several proceedings against a number of defendants before a single court were being combined, but such centralisation of jurisdiction is by no means at stake in the present case. (38)
60. As the German Government implies, it is true that opening up an additional option, under the conditions suggested by the question referred for a preliminary ruling, might satisfy the, at first sight laudable, concern to extend the choice of the alleged victim of a tort in order to avoid him having to bring an action in a place where it would be more costly or more chancy to do so, in particular as regards the bringing of evidence. However, concern to favour the victim does not constitute the basis of the rule of jurisdiction laid down in Article 5(3) of Regulation No 44/2001. The Court has held that, unlike other provisions of that regulation, Article 5(3) does not pursue the objective of offering protection to the weaker party to the proceedings. (39)
61. The requirement of facilitating referral of the matter to the court 'closest' to the facts of the dispute, which is expressly stated in recital 12 in *limine*, is more likely to lead to a negative answer to the question referred in the present case. In my view, it is appropriate to confine within certain limits the jurisdiction options offered to the claimant, even if the latter is the party claiming injury, in order to reduce the risk of forum shopping. (40)
62. Moreover, it is essential to ensure compliance with the principle of legal certainty which guided the authors of Regulation No 44/2001. (41) The requirement that the rules of jurisdiction must be *'highly predictable'* is thus stated in recital 11 in the preamble to that regulation. According to the case-law of the Court, the principle of legal certainty requires that jurisdictional rules which derogate from the general rule of jurisdiction laid down in Article 2 of that regulation should be interpreted in such a way as to enable a normally well informed defendant reasonably to foresee before which courts, other than those of the Member State in which he is domiciled, he may be sued. (42)
63. I would add that the intention to adopt uniform rules in order to *'ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage'* (43) was in the minds of the people who drafted Regulation No 44/2001. (44) The search for that balance should, in my view, also guide the Court in its work of interpreting Article 5(3) of that regulation.
64. A degree of predictability of the jurisdiction applying in matters of tort and delict is necessary for the person purported to have committed a tort, since a lack of it might discourage economic operators from carrying on cross-border activities. The fact of allowing a claimant to bring proceedings in any court of a Member State in whose area of jurisdiction any joint participant or accomplice has committed a tort or delict, without himself being sued, thus appears to me to be excessive in the light of the principles of legal certainty and balance between the interests of the parties.
65. As was noted in the report on its specific application, (45) an almost limitless multitude of grounds of jurisdiction applying in matters of tort or delict is likely to force a person facing liability to need to defend himself before the courts of various Member States and, hence, under a multitude of legal systems, the most restrictive of which is likely to dominate.
66. It is clear that Article 5(3) of Regulation No 44/2001 has already been interpreted with a certain amount of flexibility. However, there is a risk that by multiplying new points of connection the Court is not only building up case-law that is becoming difficult to understand because of its tentacular nature, but is also surreptitiously rewriting Article 5(3) of Regulation No 44/2001. If such a tendency to opt for an extensive approach to that provision were to continue without the

necessary restraint it might lead to complete reversal of the central mechanism of Regulation No 44/2001, by relegating to second place the fundamental principle that persons domiciled in the territory of a Member State must normally be sued in the courts of that State. (46) In my view, the Court must take care not to go too far down that path in its interpretation of that article.

67. Consequently, I consider that the requirements of both the scheme and the objectives of Regulation No 44/2001 would best be served by giving a negative answer to the question referred for a preliminary ruling by the national court.

V – Conclusion

68. In the light of the foregoing considerations, I propose that the Court should reply in the following terms to the question referred for a preliminary ruling by the Landgericht Düsseldorf:

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 the special rule of jurisdiction in matters or tort or delict contained in that provision is not applicable where, in a case in which several people acting in different Member States took part in allegedly harmful events, the action brought against one of them can be linked to the court seised only on the basis of the place of the event giving rise to the damage that is attributable to an accomplice or joint participant who is not being sued in that same court.

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1 – Original language: French.

2 – OJ 2001 L 12, p. 1.

3 – In this Opinion, the term 'Member State' refers to all the Member States of the European Union with the exception of the Kingdom of Denmark, in accordance with Article 1(3) of Regulation (EC) No 44/2001.

4 – An option described as 'reciprocal attribution' by the national court.

5 – Case 21/76 Bier [1976] ECR 1735, paragraph 19, introduced the distinction between 'the place where the damage occurred' and 'the place of the event giving rise to it', recently recalled in Case C-133/11 Folien Fischer and Fofitec [2012] ECR I-0000, paragraph 39 and the case-law cited.

6 – The national court relies on the concept of 'wechselseitige Handlungsortzurechnung' which, freely translated, corresponds to 'reciprocal attribution of the place where the event occurred'.

7 – Thus, the Bundesgerichtshof suggested that the Court should rule that the action known in German law as a 'negative Feststellungsklage' (action for a negative declaration) fell within the scope of application of Article 5(3) of Regulation No 44/2001, whilst the French Cour de cassation questioned the Court as to whether 'a clause conferring jurisdiction … agreed, in a chain of contracts under Community law, between a manufacturer of goods and a buyer in accordance with Article 23 of Regulation [No 44/2001] [was] effective as against the sub-buyer', as would be possible under French domestic law. With regard to those questions, see the Opinions I delivered in Folien Fischer and Fofitec and in Case C-543/10 Refcomp, still pending.

8 – At the hearing, the representative of MF Global UK stated that the Court's answer was eagerly awaited since proceedings had been brought against a large number of stockbrokers in cases of the same type, stating that some 150 similar cases to that in the main proceedings were pending in his own firm of solicitors.

9 – At the hearing Mr Melzer's representative stated that the decision had been taken not to sue WWH because that company was insolvent at the time of Mr Melzer's action (the date on which the proceedings were brought before the Landgericht Düsseldorf is not stated in the order for reference, but since that order is dated 29 April 2011, it would appear that proceedings were brought at around that time), whilst in his observations he stated that MF Global UK had been insolvent since 31 December 2011.

10 – The order for reference cites in that regard the 'Contract for negotiating stock market futures', the paper 'Overview of the risks of futures transactions' and the leaflet 'Important information on the risk of losses in futures trading'.

11 – Since a jurisdiction clause was contained in one of the contracts signed, the national court thus indirectly rules out a contractual basis for the liability claimed.

12 – I would observe at this point that it would appear from the order for reference that there is uncertainty as to the respective roles played by MF Global UK and WWH as main participant or accomplice in the harmful act.

13 – Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32), as amended by successive conventions on the accession of the new Member States to that convention ('the Brussels Convention').

14 – An element whose novelty is only relative since the principle had already been established in the case-law of the Court relating to the interpretation of the Brussels Convention, even though a certain amount of ambiguity remained in that regard according to the Commission [COM (1999) 348 final, p. 15].

15 – See Folien Fischer and Fofitec, paragraphs 31-32 and the case-law cited.

16 – Indeed, the dolus or culpa in contrahendo claimed by Mr Melzer takes place here in a context in which negotiations between the parties resulted in the conclusion of a contract. With regard to the opposite situation, in Case C-334/00 Tacconi [2002] ECR I-7357, the Court held that where no agreement is reached following negotiations with a view to the formation of a contract an action founded on the pre-contractual liability of the defendant is a matter relating to a contract and not a matter relating to tort, delict or quasi-delict.

17 – See, inter alia, Case C-435/97 WWF and Others [1999] ECR I-5613, paragraph 29, and Case C-352/95 Phytheron International [1997] ECR I-1729, paragraph 14.

18 – Case C-168/02 Kronhofer [2004] ECR I-6009, paragraph 18 et seq.
19 – The Commission states that even if the injurious effects of the harmful acts, that is to say the high-risk stock market transactions carried out by MF Global UK in the United Kingdom, are as a consequence felt by Mr Melzer in Germany, that fact cannot, according to the case-law of the Court, provide a point of connection to found the jurisdiction of the German courts on the basis of Article 5(3) of Regulation No 44/2001, when the event giving rise to the damage occurred, and all the damage was sustained, in the United Kingdom.
20 – The terminology used in that provision, namely 'the courts of that Member State', indicates that it lays down a general rule of jurisdiction, in so far as it designates the legal system of a Member State as a whole, with jurisdiction at local level being determined by reference to the national procedural rules defining the concept of 'domicile', in accordance with Article 59 of Regulation No 44/2001.
21 – In stating that the claimant may bring proceedings 'in the courts' for the place where the obligation is to be performed and where the harmful event occurred, respectively, those provisions lay down a special rule of jurisdiction.
22 – The case-law has developed especially due to the particular problems raised regarding the localisation of torts committed in the press or in telecommunications (radio, television or the internet), starting with Case C-68/93 Shevill and Others [1995] ECR I-415. Thus, in the event of an infringement of personality rights by means of content placed online on a website, the Court has held that the court of the place in which the victim's centre of interests was based might also have jurisdiction (see Joined Cases C-509/09 and C-161/10 eDate Advertising and Martinez [2011] ECR I-0000, paragraph 47 et seq.).
23 – A dual option which has been available to a claimant since the judgment in Bier, paragraph 19, concerning the interpretation of Article 5(3) of the Brussels Convention, and has been restated many times, inter alia, in Folien Fischer and Fofitec, paragraphs 39-40.
24 – For the reasons set out in points 31 and 32 of the present Opinion, the fact that the bank account of the purported victim is located in the territory of a Member State does not constitute a sufficient linking factor to found the jurisdiction of the courts of that State, in view of the totally random nature of such a criterion.
25 – According to the order for reference, Mr Melzer claims, first, that WWH failed to comply with its duty to provide information and deliberately and unlawfully caused him harm by undertaking option transactions without any chance of success, in breach of Paragraph 826 of the German Civil Code, and secondly, that MF Global UK, deliberately, at the very least provided assistance in the commission of that tort in Germany.
26 – The Landgericht Düsseldorf states that if German domestic law were applied it would have jurisdiction ratione loci to adjudicate on the action before it since WWH committed its harmful act, namely recruitment of Mr Melzer as a client, in Düsseldorf.
27 – The order for reference states in particular that, in a situation like that at issue in the main proceedings, it is in Germany that it is necessary to overcome the decisive hurdle of the recruitment of the purported victim and the opening by the claimant of an account with the foreign brokerage house, the transfer of options contracts to that account, and making funds available for placing options without allowing the amount of positions taken to be paid.
28 – See Case C-190/11 Mühlleitner [2012] ECR I-0000, paragraph 28, and Folien Fischer and Fofitec, paragraph 30 and the case-law cited in those judgments.
29 – See recital 2 in the preamble to that regulation.
30 – See, inter alia, Case C-619/10 Trade Agency [2012] ECR I-0000, paragraph 27.
31 – As regards the legal history of Article 5(3) of Regulation No 44/2001, to my knowledge there are no relevant factors which could be derived from it in order to answer the question referred, given that that provision is brief in its current state. See on that subject the overview given by Professor F. Pocar in his explanatory report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed at Lugano on 30 October 2007 (OJ 2009 C 319, p. 1, paragraph 58 et seq.).
32 – According to that provision, where there are several defendants, the courts for the place where any one of them is domiciled have jurisdiction to adjudicate on actions brought by the same claimant against different defendants, provided there is a connection of such a kind that it is expedient to determine those actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings, even if their legal bases are different (Case C-98/06 Freeport [2007] ECR I-8319, paragraph 38 et seq.).
33 – With regard to the reasons given in that connection by Mr Melzer's representative, see footnote 9 above.
34 – See, inter alia, Case C-189/08 Zuid-Chemie [2009] ECR I-6917, paragraph 22.
35 – See, by analogy, Case C-347/08 Vorarlberger Gebietskrankenkasse [2009] ECR I-8661, paragraph 39, and Case C-144/10 Berliner Verkehrsbetriebe [2011] ECR I-0000, paragraph 30.
36 – In Kronhofer, paragraph 19, the Court held that that term cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere.
37 – See, inter alia, Case C-523/10 Wintersteiger [2012] ECR I-0000, paragraph 18, and Folien Fischer and Fofitec, paragraphs 37-38.
38 – See, by analogy, Kronhofer paragraph 18, in which the Court held that to confer jurisdiction to the courts of a Contracting State other than that on whose territory the event which resulted in the damage occurred and the damage sustained would not meet any

objective need as regards evidence or the conduct of the proceedings.
39 – See Folien Fischer and Fofitec, paragraphs 45-46 and the case-law cited.
40 – This problem was envisaged by the European Parliament, which during the current work on recasting Regulation No 44/2001, proposed introducing the requirement of 'a sufficient, substantial or significant link' in order to 'restrict the possibility for forum shopping' in matters of tort. See Resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 (2009/2140(INI), P7_TA(2010)0304, recital Q and paragraph 25).
41 – Thus, in its proposal which led to the adoption of Regulation No 44/2001 (COM(1999) 348 final, point 1.1), the Commission referred to 'legal certainty as regards jurisdiction' and the objective of 'creat[ing] clear rules on jurisdiction'.
42 – See, inter alia, Case C-281/02 Owusu [2005] ECR I-1383, paragraph 40. The objective of legal certainty cannot be construed as being intended merely to enable the claimant to identify the court in which he may sue, as noted inter alia in Kronhofer, paragraph 20, and Folien Fischer and Fofitec, paragraph 33.
43 – According to the wording of recital 16 in the preamble to Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 (Rome II), OJ 2007 L 199, p. 40. 44 – The Commission proposal which resulted in Regulation No 44/2001 'incorporates the substance of the agreement reached in the Council on the balance needed between the interests of the different parties who might be involved in litigation' (COM(1999) 348 final, paragraph 2.1).
45 – See the objections raised against what is known as the 'mosaic theory' approach emerging from Shevill, Hess, B., Pfeiffer, T., and Schlosser, P., Report on the Application of Regulation Brussels I in the Member States, Study JLS/C4/2005/03, Final Version September 2007, paragraph 214.
46 – See, by analogy, Case C-462/06 Glaxosmithkline and Laboratoires Glaxosmithkline [2008] ECR I-3965, paragraph 32, in which the Court held that '[t]he transformation by the Community courts of the rules of special jurisdiction, aimed at facilitating sound administration of justice, into rules of unilateral jurisdiction protecting the party deemed to be weaker would go beyond the balance of interests which the Community legislature has established in the law as it currently stands'.