

Court of Justice EU, 21 April 2016, Austro-Mechana v Amazon



PRIVATE INTERNATIONAL LAW

All actions which seek to establish the liability of a defendant are the concept of ‘matters relating to tort delict of quasi-delict’

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

A claim seeking to obtain ‘fair compensation’ for reprographic reproduction or reproduction for private use due by virtue of national law falls within ‘matters relating to tort, delict or quasi-delict’, within the meaning of Article 5(3) of that regulation.

- In those circumstances, the answer to the question referred is that Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that a claim seeking to obtain payment of remuneration due by virtue of a national law, such as that at issue in the main proceedings, implementing the ‘fair compensation’ system provided for in Article 5(2)(b) of Directive 2001/29, falls within ‘matters relating to tort, delict or quasi-delict’, within the meaning of Article 5(3) of that regulation.

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Court of Justice EU, 21 april 2016

(R. Silva de Lapuerta, A. Arabadjiev, C. G. Fernlund, S Rodin and E. Regan)

JUDGMENT OF THE COURT (First Chamber)

21 April 2016 (*)

(Reference for a preliminary ruling — Regulation (EC) No 44/2001— Jurisdiction in civil and commercial matters — Article 5(3) — Concept of ‘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 (EC) No 44/2001)

In Case C-572/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 18 November 2014, received at the Court on 11 December 2014, in the proceedings

Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte GmbH

v

Amazon EU Sàrl,
Amazon Services Europe Sàrl,
Amazon.de GmbH,
Amazon Logistik GmbH,
Amazon Media Sàrl,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, A. Arabadjiev, C.G. Fernlund, S. Rodin and E. Regan, Judges,
Advocate General: H. Saugmandsgaard Øe,
Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 26 November 2015,

after considering the observations submitted on behalf of:

– Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte GmbH, by A. Feitsch and M. Walter, Rechtsanwälte,

– Amazon EU Sàrl, Amazon Services Europe Sàrl, Amazon.de GmbH, Amazon Logistik GmbH and Amazon Media Sàrl, by U. Börger and M. Kianfar, Rechtsanwälte,

– the Austrian Government, by C. Pesendorfer, acting as Agent,

– the French Government, by D. Segoin and D. Colas, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,

– the Finnish Government, by H. Leppo, acting as Agent,

– the European Commission, by T. Scharf and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 February 2016,

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) and 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 The request has been made in proceedings between Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte GmbH

(‘Austro-Mechana’) and Amazon EU Sàrl, Amazon Services Europe Sàrl, Amazon.de GmbH, Amazon Logistik GmbH and Amazon Media Sàrl (‘Amazon’) concerning the jurisdiction of the Austrian courts to entertain legal proceedings concerning the payment of remuneration due by reason of the placing on the market of recording materials in accordance with Austrian law.

Legal context

EU law

Regulation No 44/2001

3 Article 2(1) of Regulation No 44/2001, in Section 1, entitled ‘General provisions’, of Chapter II thereof, states:

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

4 Article 5(1) and (3) of that regulation, in Section 2, entitled ‘Special jurisdiction’, of Chapter II thereof, is worded as follows:

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

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

[...]

[...]

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

Directive 2001/29

5 Article 2 of Directive 2001/29, headed ‘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.’

6 Article 5(2) of that directive, entitled ‘Exceptions and limitations’, provides:

‘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;

...’

Austrian law

7 Paragraph 42 of the Urheberrechtsgesetz (Law on copyright) of 9 April 1936 (BGBl. 111/1936), in the version applicable to the dispute in 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, for personal use and for the purposes of research, in so far as this is justified for the pursuit of non-commercial purposes. ...’

8 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 pursuant to Paragraph 42(2) to (7), the author shall be entitled to fair remuneration (blank-cassette levy) in respect of recording material 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 material.

...’

3. The following persons shall be required to pay [fair] remuneration:

(1) as regards remuneration for blank cassettes and equipment, persons who, acting on a commercial basis and for consideration, are first to place the recording material or equipment on the market in national territory; ...’

...’

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

...’

The dispute in the main proceedings and the question referred for a preliminary ruling

9 Austro-Mechana is a copyright-collecting society whose objects include collecting the ‘fair remuneration’ provided for in Paragraph 42b(1) of the UrhG.

10 Amazon, which has its headquarters in Luxembourg and Germany, belongs to an international group which sells goods through the internet, including the recording materials mentioned in that provision. According to Austro-Mechana, Amazon is first to place recording materials on the market in Austria, and as a result is liable to pay that remuneration.

11 The dispute between the parties concerns whether the Austrian courts have international jurisdiction under Article 5(3) of Regulation No 44/2001 to entertain the legal proceedings brought by Austro-Mechana seeking payment of that remuneration from Amazon.

12 Austro-Mechana’s action was dismissed by the court of first instance on the ground that it lacked international jurisdiction.

13 The dismissal of Austro-Mechana’s action was confirmed on appeal on the ground that the dispute

between it and Amazon did not fall within Article 5(3) of Regulation No 44/2001.

14 Austro-Mechana brought an appeal by way of Review before the Oberster Gerichtshof (Supreme Court, Austria) by which it asks that court to apply that provision.

15 In those circumstances the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings before it 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]?''

Consideration of the question referred for a preliminary ruling

16 By its question, the referring court asks essentially whether Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that a claim for payment of remuneration, such as that at issue in the main proceedings, due by virtue of a national law implementing Article 5(2)(b) of Directive 2001/29, falls within 'tort, delict or quasi-delict' within the meaning of Article 5(3) of that regulation.

17 As a preliminary point it must be recalled that, according to settled case-law, where Member States decide to introduce the exception, provided for in Article 5(2)(b) of Directive 2001/29, to the right of reproduction for copying for private use ('the private copying exception') into their national law, they are required, in particular, to provide, pursuant to that provision, for the payment of fair compensation to holders of the exclusive right of reproduction ([see judgment of 5 March 2015 in Copydan Båndkopi, C-463/12, EU:C:2015:144, paragraph 19 and the case-law cited](#)).

18 Since the provisions of that directive do not provide any further details concerning the various elements of the fair compensation system, the Member States enjoy broad discretion in that regard. It is for the Member States to determine, inter alia, who must pay that compensation and to establish the form, detailed arrangements for collection and the level of compensation (see judgment of [5 March in Copydan Båndkopi, C-463/12, EU:C:2015:144, paragraph 20 and the case-law cited](#)).

19 The system on which fair compensation is based and the notion and level of that compensation are linked to the harm resulting for the author from the reproduction for

private use of his protected work, without his authorisation. From that perspective, fair compensation must be regarded as recompense to rightholders for the harm suffered by them (see, to that effect, [judgments of 21 October 2010 in Padawan, C-467/08, EU:C:2010:620, paragraph 40](#); [16 June 2011 in Stichting de ThuisKopie, C-462/09, EU:C:2011:397,](#)

[paragraph 24](#); [11 July 2013 in Amazon.com International Sales and Others, C-521/11, EU:C:2013:515, paragraph 47](#); [2013/10 April 2014 in ACI Adam and Others, C-435/12, EU:C:2014:254, paragraph 50](#); and [5 March 2015 in Copydan Båndkopi, C-463/12, EU:C:2015:144, paragraph 21](#)).

20 The Court also held that Article 5(2)(b) of Directive 2001/29 imposes on a Member State which has introduced the private copying exception into its national law an obligation to achieve a certain result, in the sense that that State must ensure, in accordance with its territorial competence, the effective recovery of the fair compensation for the harm suffered by the holders of the exclusive right of reproduction on the territory of that State ([see, to that effect, judgments of 16 June 2011 in Stichting de ThuisKopie, C-462/09, EU:C:2011:397, paragraphs 34 to 36, 39 and 41, and 11 July 2013 in Amazon.com International Sales and Others, C-521/11, EU:C:2013:515, paragraphs 32 and 57 to 59](#)).

21 Although the Court has interpreted that provision as meaning that, in principle, it is for the person who has caused the harm to the holder of the exclusive right of reproduction, that is the person who, for his private use, reproduces a protected work without seeking prior authorisation from that rightholder, to make good the harm related to that copying by financing the compensation which will be paid to that rightholder (see judgments of [11 July 2013 in Amazon.com International Sales and Others, C-521/11, EU:C:2013:515, paragraph 23](#), and [10 April 2014 in ACI Adam and Others, C-435/12, EU:C:2014:254, paragraph 51](#)), it has however accepted that, given the practical difficulties in identifying private users and obliging them to compensate the holders of the exclusive right of reproduction 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 the digital reproduction equipment, devices and media and who, on that basis, in law or in fact, make that equipment available to private users or who provide copying services for them. Under such a system, it is the persons having that equipment who must discharge the private copying levy (see, in particular, [judgments of 11 July 2013 in Amazon.com International Sales and Others, C-521/11, EU:C:2013:515, paragraph 24, and 5 March 2015 in Copydan Båndkopi, C-463/12, EU:C:2015:144, paragraph 23](#)).

22 In that connection, the Court has explained 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 right of reproduction and those of the users of the

protected subject matter ([see judgments of 16 June 2011 in Stichting de ThuisKopie, C-462/09, EU:C:2011:397, paragraph 28, and 11 July 2013 in Amazon.com International Sales and Others, C-521/11, EU:C:2013:515, paragraph 25](#)).

23 That is the case with regard to the system put in place by the Republic of Austria, which chose to implement the exception of private copying laid down in Article 5(2)(b)

of Directive 2001/29, which the Court has already had the opportunity to examine in its judgment of [11 July 2013 in Amazon.com International Sales and Others \(C-521/11, EU:C:2013:515\)](#).

24 Under the system established by Paragraph 42b of the UrhG for the financing of fair compensation referred to in Article 5(2)(b) of Directive 2001/29, the private copying levy is payable by those who make available, for commercial purposes and for consideration, recording media suitable for reproduction ([see judgment of 11 July 2013 in Amazon.com International Sales and Others, C-521/11, EU:C:2013:515, paragraph 26](#)).

25 In principle, such a system, as already stated in paragraph 22 of the present judgment, enables the persons responsible for payment to pass on the amount of that levy in the sale price of those media, 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 ([see judgment of 11 July 2013 in Amazon.com International Sales and Others, C-521/11, EU:C:2013:515, paragraph 27](#)).

26 Furthermore, under Paragraph 42b(5) of the UrhG, the person to whom that levy is owed is not the holder of the exclusive reproduction right, but a copyright-collecting society, in this case Austro-Mechana.

27 As regards the jurisdiction of the Austrian courts to entertain Austro-Mechana's claim for payment of the remuneration provided for under Paragraph 42b of the UrhG, it must be recalled 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 (see judgments of [16 May 2013 in Melzer, C-228/11, EU:C:2013:305, paragraph 23](#); [3 October 2013 in Pinckney, C-170/12, EU:C:2013:635, paragraph 24](#); [5 June 2014 in Coty Germany, C-360/12, EU:C:2014:1318, paragraph 44](#); and [22 January 2015 in Hejduk, C-441/13, EU:C:2015:28, paragraph 17](#)).

28 Thus, Article 5(3) of Regulation No 44/2001 lays down a rule of special jurisdiction under which 'in matters relating to tort, delict or quasi-delict', 'a person domiciled in a Member State may, in another Member State, be sued ... in the courts for the place where the harmful event occurred or may occur'.

29 The rule of special jurisdiction laid down by that provision must be interpreted independently and strictly

(see judgments of 28 January 2015 in Kolassa, C-375/13, EU:C:2015:37, paragraph 43, and 21 May 2015 in CDC Hydrogen Peroxide, C-352/13, EU:C:2015:335, paragraph 37).

30 In that connection, it must be recalled that, according to settled case-law, the rule of 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 judgments of 16 May 2013 in Melzer, C-228/11, EU:C:2013:305, paragraph 26](#); [3 October 2013 in Pinckney, C-170/12, EU:C:2013:635, paragraph 27](#); [5 June 2014 in Coty Germany, C-360/12, EU:C:2014:1318, paragraph 47](#); [22 January 2015 in Hejduk, C-441/13, EU:C:2015:28, paragraph 19](#); and 28 January 2015 in Kolassa, C-375/13, EU:C:2015:37, paragraph 46).

31 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 judgments of 25 October 2012 in Folien Fischer and Fofitec, C-133/11, EU:C:2012:664, paragraph 38; [16 May 2013 in Melzer, C-228/11, EU:C:2013:305, paragraph 27](#); 18 July 2013 in ÖFAB, C-147/12, EU:C:2013:490, paragraph 50; and 21 May 2015 in CDC Hydrogen Peroxide, C-352/13, EU:C:2015:335, paragraph 40).

32 According to settled case-law, the concept of 'matters relating to tort, delict or quasi-delict' covers all actions which seek to establish the liability of a defendant and do not concern 'matters relating to a contract' within the meaning of Article 5(1)(a) of Regulation No 44/2001 ([see judgments of 27 September 1988 in Kalfelis, 189/87, EU:C:1988:459, paragraphs 17 and 18](#); 13 March 2014 in Brogsitter, C-548/12, EU:C:2014:148, paragraph 20; and 28 January 2015 in Kolassa, C-375/13, EU:C:2015:37, paragraph 44).

33 Therefore, it is appropriate to determine, first of all, whether Austro-Mechana's claim for payment of the remuneration provided for in Article 42b of the UrhG concerns a 'matter relating to contract' within the meaning of that provision.

34 In that connection, the Court has held that the conclusion of a contract is not a condition for the application of Article 5(1) of Regulation No 44/2001 (see judgment in of 28 January 2015 in Kolassa, C-375/13, EU:C:2015:37, paragraph 38).

35 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, to identify an obligation, since the jurisdiction of the national court under that provision is determined by the place of performance of the obligation in question. Thus, the concept of 'matters relating to contract' within the meaning of that provision is not to be

understood as covering a situation in which there is no obligation freely assumed by one party towards another (see judgment of 14 March 2013 in *Česká spořitelna*, C-419/11, EU:C:2013:165, paragraph 46).

36 Consequently, the application of the rule of special jurisdiction providing for matters relating to a contract in Article 5(1)(a) of Regulation No 44/2001 presupposes the establishment of a legal obligation freely consented to by one person towards another and on which the claimant's action is based (see judgments of 14 March 2013 in *Česká spořitelna*, C-419/11, EU:C:2013:165, paragraph 47, and 28 January 2015 in *Kolassa*, C-375/13, EU:C:2015:37, paragraph 39).

37 In the case in the main proceedings, the obligation to pay Austro-Mechana the remuneration provided for in Paragraph 42b of the UrhG, which is intended to implement Article 5(2)(b) of Directive 2001/29 was not freely consented to by Amazon. It was imposed on that company by Austrian law by reason of the making available, for

commercial purposes and for consideration, of recording media suitable for reproduction of protected works.

38 It follows that Austro-Mechana's claim for payment of that remuneration does not concern a 'matter relating to contract' within the meaning of Article 5(1)(a) of Regulation No 44/2001.

39 Second, it must be determined whether a claim such as that at issue in the main proceedings aims to establish the liability of the defendant, within the meaning of the case-law cited in paragraph 32 of the present judgment.

40 Such is the case where a 'harmful event', within the meaning of Article 5(3) of Regulation No 44/2001, may be imputed to the defendant.

41 Liability in tort, delict or quasi-delict can only arise provided that a causal connection can be established between the damage and the event in which that damage originates (see [judgments of 30 November 1976 in *Bier*, 21/76, EU:C:1976:166, paragraph 16](#), and 5 February 2004 in *DFDS Torline*, C-18/02, EU:C:2004:74, paragraph 32).

42 In the present case, the action brought by Austro-Mechana seeks to obtain compensation for the harm arising from non-payment by Amazon of the remuneration provided for in Paragraph 42b of the UrhG.

43 In that connection, it must be recalled that the 'fair compensation' referred to in Article 5(2)(b) of Directive 2001/29, according to the case-law of the Court mentioned in paragraph 19 of the present judgment, intends to compensate authors for the private copy made without their authorisation of their protected works, so that it must be regarded as compensation for the harm suffered by the authors resulting from such unauthorised copy by the latter.

44 Therefore, the failure by Austro-Mechana to collect the remuneration provided for in Paragraph 42b of the UrhG constitutes a harmful event within the meaning of Article 5(3) of Regulation No 44/2001.

45 The fact that, under the Austrian system relating to the financing of that 'fair compensation', the latter must be paid not to the holders of an exclusive reproduction right that it aims to compensate, but to a copyright-collecting society is irrelevant in that respect.

46 As is clear from paragraph 26 of the present judgment, according to Paragraph 42b of the UrhG, only copyright-collecting societies may rely on the right to remuneration referred to in Paragraph 42b. Therefore, as the Austrian copyright-collecting society, only Austro-Mechana may rely on that right under that system.

47 Similarly, taking account, in particular, of the case-law cited in paragraph 21 of the present judgment, the fact that Amazon is not a final user who has made, for his private use, copies of protected works does not prevent the remuneration provided for in Paragraph 42b of the UrhG from being charged to Amazon under the system provided for by Austrian law.

48 Furthermore, although it is true, as Amazon argues, that the making available of recording media does not in itself constitute an unlawful act and that as the Republic of Austria has decided to implement the private copying exception provided for in Article 5(2)(b) of Directive 2001/29, the making of copies for private use by means of such media is an act authorised by Austrian law, the fact remains that under that provision Austrian law subjects the making of those private copies to the condition that rightholders are to receive 'fair compensation', that is, in the present case, the remuneration provided for in Paragraph 42b(1) of the UrhG.

49 By its claim, Austro-Mechana does not criticise Amazon for making available recording media in Austria, but for failing to comply with the obligation to pay the remuneration it is required to pay under the UrhG.

50 Thus, Austro-Mechana's claim seeks to establish the liability of the defendant, since that claim is based on an infringement by Amazon of the provisions of the UrhG imposing that obligation on it, and that that infringement is an unlawful act causing harm to Austro-Mechana.

51 Accordingly, such a claim falls within Article 5(3) of Regulation No 44/2001.

52 It follows that, if the harmful event at issue in the main proceedings occurred or may occur in Austria, which is for the national court to ascertain, the courts of that Member state have jurisdiction to entertain Austro-Mechana's claim.

53 In those circumstances, the answer to the question referred is that Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that a claim seeking to obtain payment of remuneration due by virtue of a national law, such as that at issue in the main proceedings, implementing the 'fair compensation' system provided for in Article 5(2)(b) of Directive 2001/29, falls within 'matters relating to tort, delict or quasi-delict', within the meaning of Article 5(3) of that regulation.

Costs

54 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 must be interpreted as meaning that a claim seeking to obtain payment of remuneration due by virtue of a national law, such as that at issue in the main proceedings, implementing the ‘fair compensation’ system 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, falls within ‘matters relating to tort, delict or quasi-delict’, within the meaning of Article 5(3) of that regulation.

**OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 17 February 2016¹**

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.

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;

¹ Original language: French.

(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’.

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)*.

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 copying levy.⁶

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 \(C-441/13, EU:C:2015:28, paragraph 38\)](#).

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 \(C-435/12, EU:C:2014:254, paragraph 50\)](#).

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 \(C-521/11, EU:C:2013:515, paragraph 23 and the case-law cited\)*](#); see also judgments in [ACI Adam and Others \(C-435/12,](#)

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.

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.

⁷ [EU:C:2014:254, paragraph 51](#), and [Copydan Båndkopi \(C-463/12, EU:C:2015:144, paragraph 22\)](#)

⁸ [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 \(C-463/12, EU:C:2015:144, paragraph 22\)](#)

⁹ [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 \(C-463/12, EU:C:2015:144, paragraph 22\)](#)

¹⁰ *Ibid.* (paragraph 27).

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

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 [Brosgitter, 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; [Brosgitter \(C-548/12, EU:C:2014:148, paragraph 20\)](#), 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.

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.

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,

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).

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

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.

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 \(C-168/02, EU:C:2004:364, paragraph 18\)](#).

¹⁹ See points 33 to 37 of this Opinion.

²⁰ See points 38 to 40 of this Opinion.

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.

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 44/2001²¹ 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, judgements in [Folien Fischerand Fofitec \(C-133/11, EU:C:2012:644, paragraph 38](#) and the case law cited), and [Melzer \(C-228/11, EU:C:2013:305, paragraph 27\)](#).