OPINION OF ADVOCATE GENERAL LÉGER

delivered on 28 September 2006 [1]

1. This reference for a preliminary ruling concerns the interpretation of Article 34(2) of Council Regulation (EC) No 44/2001, [2] which lays down the conditions in which a Member State may oppose recognition of a judgment delivered in default of appearance in another Member State if the rights of the defence have been infringed.

2. That provision states that this ground for refusal of recognition does not apply where a defendant who did not enter an appearance failed to commence proceedings to challenge the judgment against him when it was possible for him to do so.

3. The Oberster Gerichtshof (Austria), the Austrian supreme court, seeks clarification from the Court of Justice of the meaning of the condition that it must have been possible for the defendant to commence proceedings. It seeks to ascertain whether that condition must be interpreted as meaning that it is sufficient that a defendant who has not entered an appearance was aware of the existence of the judgment given in default or whether it is necessary for that judgment to have been served on him.

I — Legal context

4. The provisions of Community law relevant for resolving the dispute in the main proceedings cover the following three points: guaranteeing the protection of the rights of the defence at the stage of the initial proceedings in the Member State of origin, similar guarantees at the stage of recognition and enforcement of the judgment in the State in which enforcement is sought and, lastly, the procedure for enforcement of that judgment.

5. Those provisions are contained principally in Regulation No 44/2001. As regards checks by the court of the Member State of origin on the service of a summons on a

1 — Original language: French.

2 — 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 2000 L 12, p. 1).

defendant who has not entered an appearance, the relevant provisions are also contained in Council Regulation (EC) No 1348/2000. [3]

6. Regulations No 44/2001 and No 1348/2000 were adopted by the Council of the European Union on the basis of the provisions of Title IV of the EC Treaty, which confer powers on the Community to adopt measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the common market.

7. Judicial cooperation in civil matters was governed by international conventions until the Treaty of Amsterdam. The Maastricht Treaty made it a matter of common interest to the Member States by including it in Title VI of that treaty, relating to cooperation in the areas of justice and home affairs, and introducing what is known as the 'third pillar' into the Community legal system.

8. The Treaty of Amsterdam, which entered into force on 1 May 1999, gave the Community powers in this matter by including it in Title IV of the EC Treaty. Recognition of the powers of the Community in this area led the Community legislature to substitute regulations for the existing international conventions.

9. Regulation No 44/2001, which entered into force on 1 March 2002, thus replaced the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters [4] in all the Member States which had opted to be involved in the measures taken under Title IV of the EC Treaty. [5]

10. Regulation No 44/2001 is based to a large extent on the Brussels Convention, with which the Community legislature intended to ensure genuine continuity. [6] The aim of the regulation is to unify the

3 — Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (OJ 2000 L 160, p. 37).

4 — OJ 1978 L 304, p. 36. Convention as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and amended text p. 77); by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1); by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1), and by the Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1). A consolidated version of the Convention, as amended by those four accession conventions, was published in OJ 1998 C 27, p. 1 (hereinafter 'the Brussels Convention').

5 — Three Member States, the United Kingdom of Great Britain and Northern Ireland, Ireland and the Kingdom of Denmark obtained an opt-out in principle from measures taken on the basis of Title IV of the EC Treaty. However, as the United Kingdom and Ireland gave notice of their wish to take part in the adoption and application of Regulation No 44/2001 (see 20th recital in the preamble to that regulation), only the Kingdom of Denmark is not bound by Regulation No 44/2001 (21st recital in the preamble to that regulation). The Brussels Convention continutes to apply between that State and the other Member States. Under Article 68 of Regulation No 44/2001, that Convention also continues to apply to the territories of the Member States which do not fall within the scope of the EC Treaty as defined in Article 299 of that Treaty. Lastly, Regulation No 44/2001 has applied since 1 May 2004 to the ten new Member States of the European Union.

6 — 19th recital in the preamble to Regulation No 44/2001.

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 in another Member State. [7]

11. It also includes most of the rules of the Brussels Convention and its provisions are in many cases similar to the corresponding articles of that convention.

12. For its part, Regulation No 1348/2000 reproduces to a large extent the content of the Convention drawn up by an act of the Council dated 26 May 1997 on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters. [8]

13. That convention, which has not entered into force, is also based on the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, concluded at The Hague on 15 November 1965. [9]

14. Regulation No 1348/2000, which entered into force on 31 May 2001, takes precedence in all the Member States except the Kingdom of Denmark, over provisions on the same matter contained in the Brussels Convention and the Hague Convention. [10]

A — *Protection of the rights of a defendant who has not entered an appearance at the stage of the initial proceedings*

15. Where a court of a Member State is seised of a case against a defendant domiciled in the territory of another Member State who fails to enter an appearance, that court is required to stay the proceedings so long as it is not shown either that the defendant has been able to receive the document instituting proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end. This requirement is laid down in similar terms in Article 26(2) of Regulation No 44/2001 and in the second paragraph of Article 20 of the Brussels Convention.

7 — Second recital in the preamble to Regulation No 44/2001.

8 — OJ 1997 C 261, p. 1.

9 — Hereinafter 'the Hague Convention'.

10 — Article 20(1) of Regulation No 1348/2000 and the 18th recital in the preamble thereto.

16. However, where the document instituting proceedings has had to be transmitted from one Member State to another, pursuant to Regulation No 1348/2000 or the Hague Convention, the provisions of Article 19 of that regulation or those of Article 15 of that convention apply. [11]

17. Those two articles are similar. They provide that where a writ of summons or an equivalent document has had to be transmitted to another Member State or another Contracting State for the purpose of service, under the provisions of this Regulation No 1348/2000 or the Hague Convention, and a defendant has not entered an appearance, judgment must not be given until it is established that:

— the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

— the document was actually delivered to the defendant or to his residence by another method provided for by that regulation or that convention;

and that in either of these cases the service [12] or the delivery was effected in sufficient time to enable the defendant to defend himself.

18. Both these articles also provide that each Member State or Contracting State is free to relax that rule by making provision that its courts may give judgment if all the following conditions are fulfilled:

— the document was transmitted by one of the methods provided for in Regulation No 1348/2000 or in the Hague Convention;

— a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document;

— no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities or bodies of the Member State addressed.

11 — Article 26(3) and (4) of Regulation No 44/2001. The last paragraph of Article 20 of the Brussels Convention only refers to Article 15 of the Hague Convention.

12 — The noun 'service' does not appear in the German version of Regulation No 1348/2000, but the meaning of the sentence is not altered as a result.

19. Lastly, Article 19(4) of Regulation No 1348/2000 provides, in similar terms to those of Article 16 of the Hague Convention, that:

'When a writ of summons or an equivalent document has had to be transmitted to another Member State for the purpose of service, under the provisions of this Regulation, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled:

(a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal; and

(b) the defendant has disclosed a prima facie defence to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each Member State may make it known, in accordance with Article 23(1), that such application will not be entertained if it is filed after the expiration of a time to be stated by it in that communication, but which shall in no case be less than one year following the date of the judgment.'

B — *Verification that the rights of the defendant in default have been observed at the stage of recognition and enforcement of the judgment in the State in which enforcement is sought*

20. According to Article 26 of the Brussels Convention and Article 33 of Regulation No 44/2001, a judgment given in a Contracting State or Member State is to be recognised in the other Contracting States or Member States without any special procedure being required.

21. However, the Brussels Convention and Regulation No 44/2001 give an exhaustive list of the grounds requiring derogation from this principle. One of those grounds is that, despite the assurances provided for at the stage of the initial proceedings, the rights of a defendant in default of appearance were not respected.

22. Article 27(2) of the Brussels Convention provides in that regard:

'A judgment shall not be recognised:

...

(2) where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence'.

23. Regulation No 44/2001 made several amendments to the definition of the grounds for refusal of recognition and enforcement contained in the Brussels Convention. As regards the ground of infringement of the rights of a defendant who has not appeared, Article 34(2) of Regulation No 44/2001 reads as follows:

'A judgment shall not be recognised:

...

(2) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so'.

C — *The procedure applicable to enforcement of the judgment in the State in which enforcement is sought*

24. Regulation No 44/2001 also made several amendments to the procedure applicable to enforcement of a judgment in the State in which enforcement is sought which are relevant in the present case.

25. Thus, as in the Brussels Convention, a request for authority to enforce a foreign judgment is made in a unilateral application, which can give rise to an inter parties hearing only in the case of an appeal.

26. However, unlike that Convention, Regulation No 44/2001 provides that consideration of that application will not give rise to a judgment by a court but simply to a declaration of enforceability, made either by a court or by a competent authority following purely formal checks.

27. Contrary to what is provided in the Brussels Convention, in Regulation No 44/2001 it is only where an appeal is lodged against that declaration that the grounds for refusal, such as the ground of infringement of the rights of the defence contained in Article 34(2) of that regulation, are considered by a court. According to Article 41 of Regulation No 44/2001, the judgment is to be declared enforceable immediately on completion of the formalities in Article 53 without any review of the grounds for refusal contained in Article 34, in particular, of that regulation.

28. According to Articles 53 to 55 of Regulation No 44/2001, those formalities comprise production of a copy of the judgment making it possible to establish its authenticity, and of a certificate issued by the court which delivered the judgment or the competent authority of the State of origin, or, where appropriate, an equivalent document. The certificate, which must be drawn up using the standard form attached in Annex V to that regulation, must mention in particular the date of service of document instituting proceedings where the judgment was delivered in default of appearance, and the fact that the judgment is enforceable in the State of origin.

29. However, Regulation No 44/2001 does not reproduce the condition contained in Article 47 of the Brussels Convention, that a party applying for enforcement of a judgment must also produce documents which establish that the judgment has been served according to the law of the State of origin. [13] Article 42(2) of Regulation No 44/2001 provides in that regard:

'The declaration of enforceability shall be served on the party against whom enforcement is sought, accompanied by the judgment, if not already served on that party.'

II — The main proceedings and the questions referred for a preliminary ruling

30. The present proceedings originate in a dispute between ASML Netherlands BV, [14] a company established in Veldhoven (Netherlands), and Semiconductor Industry Services GmbH (SEMIS), [15] a company established in Feistritz-Drau (Austria). They concern the enforcement in Austria of a judgment delivered in default in the Netherlands on 16 June 2004 by the Rechtbank 's-Hertogenbosch ('s-Hertogenbosch Court) ordering SEMIS to pay a sum of money to ASML.

13 — I should explain, however, that in the German version of the Brussels Convention the words 'according to the law of the State of origin' refer only to the enforceability of the judgment.

14 — 'ASML'.

15 — 'SEMIS' or 'the defendant'.

31. It is apparent from the order for reference that the summons to appear at the hearing before the Rechtbank 's-Hertogenbosch, arranged by that court for 19 May 2004 was not served on SEMIS until 25 May 2004. It is also apparent that the judgment delivered in default by the Rechtbank 's-Hertogenbosch on 16 June 2004 was not served on SEMIS.

32. Upon application by ASML, the judgment delivered in default was declared enforceable by order of 20 December 2004 of the Bezirkgericht Villach (District Court Villach), the Austrian court seised at first instance, on the basis of a certificate drawn up by the Rechtbank 's-Hertogenbosch dated 6 July 2004 declaring the default judgment 'provisionally enforceable'. The Austrian court also ordered the enforcement of that judgment.

33. A copy of that order was served on SEMIS. The judgment in default was not served at the same time as the order.

34. On appeal from SEMIS against that order, the Landesgericht (Regional Court) Klagenfurt (Austria) dismissed the application for enforcement on the ground that the condition that it must have been possible to commence proceedings to challenge the default judgment within the meaning of Article 34(2) of Regulation No 44/2001, requires, in its view, that the judgment must have been served on the defendant. The Landesgericht Klagenfurt rejected ASML's argument that the exception to the ground for non-recognition contained in Article 34(2) did apply because SEMIS was aware both of the proceedings instituted against it in the Netherlands, since it had been served with the writ of summons of 25 May 2004, and of the existence of the judgment in default, since it had been served with the order delivered by the Bezirksgericht Villach on 20 December 2004.

35. Ruling on the appeal on a point of order brought by ASML, the Oberster Gerichtshof considers that the outcome of the dispute depends on whether the condition for the exception to the ground for non-recognition contained in Article 34(2) of Regulation No 44/2001 should be regarded as having been met, that is to say whether or not it is to be accepted that SEMIS failed to commence proceedings to challenge the default judgment when it was possible for it to do so.

36. The Oberster Gerichtshof has therefore decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the phrase "... unless [the defendant] failed to commence proceedings to challenge the judgment *when it was possible for him to do so"* in Article 34(2) of [Regulation No 44/2001] to be

interpreted as meaning that the "possibility" of such a challenge is in any event dependent on the due service on the defendant in accordance with the applicable law on service of an office copy of an appealable default judgment delivered in a Member State?

(2) If question 1 is answered in the negative:

Would the service of an office copy of the order on the application for a declaration of enforceability in Austria of the default judgment of the regional court in 's-Hertogenbosch of 16 June 2004 ... and for an execution order following the foreign order for execution declared enforceable necessarily already have put the defendant and judgment debtor (the defendant in the original proceedings) on notice not only of the existence of that judgment but also of the availability of a legal remedy under the legal order of the State in which the judgment was delivered, so that it would be aware as a result of the possibility of challenging the judgment which is a prior condition for the applicability of the exception to the bar to recognition under Article 34(2) of Regulation No 44/2001?'

III — Analysis

37. It is common ground that the ground for non-recognition contained in Article 34(2) of Regulation No 44/2001 applies in the present case. That provision states that a judgment will not be recognised, where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence.

38. It is apparent from the information supplied by the court making the reference that the summons to appear at the hearing before the Netherlands court, arranged for 19 May 2004, was not served on the defendant in Austria until 25 May 2004, which was after the hearing, and that the Rechtbank 's-Hertogenbosch delivered its judgment in default, ordering SEMIS to pay a sum of money to ASML, on 16 June 2004. SEMIS was therefore not served with the document which instituted the proceedings in sufficient time to enable it to arrange for its defence.

39. The purpose of the present reference for a preliminary ruling is to determine whether the conditions are met for the exception to application of that ground for non-recognition. Article 34(2) of Regulation No 44/2001 provides that the ground for non-recognition based on infringement of the rights of the

defence must be rejected if the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.

40. By the two questions it has referred, which I suggest the Court should consider together, the court making the reference seeks to ascertain whether the condition that it must have been possible for a defendant who has not entered an appearance to commence proceedings to challenge a judgment in default means that it should have been possible for that defendant to be aware of the content of that judgment, with the result that the judgment ought to have been served on him, or whether it is sufficient for him merely to have been aware of the judgment's existence.

41. Thus it asks, in essence, whether Article 34(2) of Regulation No 44/2001 must be interpreted as meaning that the exception it contains, that the ground for non-recognition based on infringement of the rights of the defence does not apply if the defendant in default of appearance failed to commence proceedings to challenge the judgment when it was possible for him to do so, requires the judgment to have been served on him, or whether it is sufficient that he was aware of the judgment's existence.

42. The views put forward in the course of the present proceedings may be combined in two opposing theories.

43. On one hand, ASML and the United Kingdom Government maintain that the exception contained in Article 34(2) of Regulation No 44/2001 does not require service of the judgment. In that Government's view, to accept such a requirement in every case would be to misconstrue the intention of the Community legislature, which abolished the condition laid down in Article 27(2) of the Brussels Convention that the document which instituted the proceedings must have been duly served. The United Kingdom Government therefore considers that it is sufficient for the party seeking enforcement of the judgment to inform a defendant in default of appearance of the existence of that judgment and that it is incumbent on that defendant to determine whether he can challenge it. It is therefore for the court of the State in which enforcement is sought to assess, in the individual circumstances of each case, whether it was reasonably possible for the defendant to institute proceedings.

44. On the other hand, the German, Netherlands, Austrian and Polish Goverments, together with the Commission, maintain that in order to be able to bring proceedings to challenge a judgment it is necessary to be aware of its content. Merely being aware of its existence is not sufficient. They are therefore of the opinion that the exception contained in Article 34(2) of Regulation No 44/2001 requires that the judgment should have been served on the defendant.

45. The German and Austrian Governments contend, however, that the formal require-

ments for such service should be comparable to those provided for by the Community legislature in Article 34(2) of Regulation No 44/2001 as regards documents introducing the proceedings, so that a purely formal irregularity which does not affect the rights of the defence should not be sufficient to preclude application of the exception.

46. I subscribe to the second of these two theories. The condition that it must have been possible to commence proceedings assumes, in my view, that the defendant in default has been able to become acquainted with of the content of the judgment in question. That condition therefore means that the judgment must have been served on him, with the same requirements as those contained in Article 34(2) of Regulation No 44/2001 as regards the document which instituted the proceedings, that is to say, a purely formal irregularity which does not affect the rights of the defence should not be sufficient to preclude application of the exception.

47. I base my view, first of all, on the origin of Article 34(2) of Regulation No 44/2001, then on the provisions of that regulation concerning enforcement, in particular, Article 42(2), and lastly on the fundamental principle of the rights of the defence.

1. The origin of Article 34(2) of Regulation No 44/2001

48. The content of Article 34(2) of Regulation No 44/2001 does not in fact provide any indication as to the answer to be given to the question under consideration in the present proceedings. However, the origin of this provision does allow us to assess the scope of the amendments which the Community legislature wished to make to the content of the ground for non-recognition based on infringement of the rights of the defence.

49. By making provision that that ground for non-recognition does not apply where a defendant in default of appearance has failed to commence proceedings against the judgment at issue when it was possible for him to do so, the Community legislature undoubtedly sought to restrict the scope of that ground as it was laid down in Article 27(2) of the Brussels Convention.

50. The reasons for such restriction do not appear expressly in the preamble to Regulation No 44/2001. None the less, they appear very clearly in the commentary on Article 41(2) of the proposal for a regulation submitted by the Commission of the Eur-

opean Communities to the Council on 14 July 1999. [16] That commentary would appear to be relevant for the interpretation of Article 34(2) of Regulation No 44/2001, since that provision is almost identical to the Commission proposal. [17]

51. According to the commentary, the removal of the adverb 'duly' and the insertion of the contested exception into Article 34(2) of Regulation No 44/2001 were intended to overcome two results inferred by the Court from the content of Article 27(2) of the Brussels Convention.

52. The first of those results, made clear in Case C-305/88 *Lancray*, [18] is that a judgment given in default of appearance may not be recognised where the document instituting the proceedings was not served on the defendant in due form, even though that irregularity has not harmed the interests of the defendant and even though the latter had sufficient time to enable him to arrange for his defence. [19] According to the Court, the conditions laid down in Article 27(2) of the Brussels Convention with regard to service of the document instituting the proceedings, concerning due form (indicated by the adverb 'duly') and time (indicated by the words 'in sufficient time'), must both be met in order for a foreign judgment given in default to be recognised in the State in which enforcement is sought.

53. The second of those results was made apparent in Case C-123/91 *Minalmet*. [20] In that case, a company governed by the law of England and Wales wished to obtain enforcement in Germany of a judgment in default delivered in the United Kingdom ordering a German company to pay it a sum of money. The document instituting the proceedings had not been duly served on the defendant. However, the judgment in default had been duly served on it.

54. The Court of Justice held that Article 27(2) of the Brussels Convention must be interpreted as precluding recognition of a judgment given in default of appearance where the defendant was not duly served with the document which instituted the proceedings, even if he subsequently became aware of the judgment which was given and did not avail himself of the legal remedies available under the law of the State where the judgment was delivered.

16 — Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM(1999) 348 final).

17 — The only differences from the text of Article 34(2) of Regulation No 44/2001 are purely formal, since Article 41(2) of the Commission proposal reads as follows: 'where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so'.

18 — [1990] ECR I-2725.

19 — The failure to observe due form in *Lancray* was the absence of a translation of the document instituting the proceedings although the language of that document was used by the parties in their business relations.

20 — [1992] ECR I-5661.

55. The same view was taken in Case C-78/95 *Hendrikman and Feyen* [21] where a defendant was unaware of proceedings initiated against him but was represented by a lawyer without his authority. The Court held that such a defendant must be considered to be in default of appearance within the meaning of Article 27(2) of the Brussels Convention and that this view was not affected by the fact that the defendant had had the opportunity to bring an action to have that judgment set aside on the ground of lack of representation.

56. As the Commission has stated, that case-law could create the risk of encouraging a debtor to be passive or even to act in bad faith. [22] Thus it was in the interests of a debtor who had no seizable assets in the State of origin not to appeal against a judgment delivered in that State and also to object to the order to enforce it by relying on the fact that he was not served with the document which instituted the proceedings in sufficient time to enable him to arrange for his defence.

57. It should be pointed out in that regard that the Court has held that an applicant who has obtained a judgment in his favour in one Contracting State, for which an enforcement order may be issued in another Contracting State, may not institute fresh proceedings against his debtor concerning the same subject-matter in that State. [23] In the light of that case-law, if the enforcement order is not issued in the State in which enforcement is sought it is impossible for the applicant to obtain in that State either enforcement of the judgment obtained in the State of origin or a fresh judgment that is enforceable.

58. The purpose of Article 34(2) of Regulation No 44/2001 is, therefore, on one hand to prevent the possibility that a purely formal irregularity in the document which instituted the proceedings may result in the refusal of an enforcement order where that irregularity did not prevent the defendant from arranging for his defence. On the other hand it is intended to prevent a defendant in default from waiting for the recognition and enforcement proceedings in the State in which enforcement is sought in order to claim infringement of his rights of defence when it had been possible for him to defend his rights by bringing proceedings to challenge the judgment in question in the State of origin.

59. It is simply a matter of avoiding abuse of process. By choosing to put an end to the case-law arising out of the ruling in *Minalmet*, the Community legislature sought to prevent a defendant in default from deriving benefit from his own negligence in defending his rights by exercising the remedies that were available to him.

21 — [1996] ECR I-4943.

22 — Commission communication to the Council and the European Parliament 'towards greater efficiency in obtaining and enforcing judgments in the European Union (OJ 1998 C 33, p. 3).

23 — Case 42/76 *De Wolf* [1976] ECR 1759.

60. However, the Community legislature did not, in my view, wish to oblige the defendant to take additional steps that went beyond normal diligence in defence of his rights, such as seeking delivery of a decision in another Member State, whose language he does not necessarily understand and with whose legal system he is unfamiliar. Requiring a defendant in default to take such steps would, in my view, manifestly exceed the scope of the exception at issue.

61. By providing that the judgment delivered in default must be recognised in the State in which enforcement is sought if the defendant has failed to commence proceedings against that judgment, the Community legislature considered that the infringement of the rights of the defence vitiating the the original proceedings could be compensated for by exercise of that remedy, and that the latter would allow the defendant to defend his rights properly before the court of the State of origin.

62. The Community legislature has thus overturned the reasoning behind the Court's position in *Minalmet* that the proper time for a defendant to be able to defend himself is when proceedings are commenced, and the possibility of having recourse at a later stage to a legal remedy against a judgment given in default of appearance which has already become enforceable cannot constitute an equally effective alternative to defending proceedings before judgment is delivered. [24]

63. This new approach by the Community legislature leads to the conclusion that a defendant in default of appearance may indeed be in a position comparable to that in which he finds himself when he is summoned to appear for the first time before the court of the State of origin. To that extent, a decision delivered in default plays the same role as the document which instituted the proceedings. It must enable the defendant in default to be informed of the elements of the claim and give him the opportunity to arrange for his defence. [25]

64. It is therefore essential that a defendant in default should be able to acquaint himself with the content of that judgment. In order for him to have the opportunity to exercise an effective remedy that will enable him to defend his rights as he could have done at the original hearing if he had been duly served with the document which instituted the proceedings he must therefore be able to acquaint himself with the grounds of the judgment delivered in default in order to combat them effectively.

24 — *Minalmet*, paragraph 19. In support of this view, the Court held that, once a judgment has been delivered and has become enforceable, the defendant can obtain suspension of its enforcement, if suspension is appropriate, only in more difficult circumstances and may also find himself confronted by procedural difficulties. The possibility for a defaulting defendant to defend himself is thus considerably diminished (paragraph 20).

25 — Case C-172/91 *Sonntag* [1993] ECR I-1963, paragraph 39.

65. It follows logically from this that that judgment must be served on him, as must the document which instituted the proceedings. The exception to application of the ground for non-recognition introduced by Regulation No 44/2001 leads necessarily to establishing a parallel between the document instituting the proceedings and the judgment delivered in default of appearance. That exception cannot therefore apply if the defendant in default has merely been informed of the existence of the judgment delivered in default, as in this case, by being served with the declaration of its enforceability.

66. As provided in Regulation No 1348/2000, a defendant in default must be able to accept service of that judgment in a language he understands. As stated in Article 8 of that regulation, a defendant in default must be informed that he may refuse to accept the judgment to be served if it is in a language other than the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected, or a language of the Member State of transmission which the addressee understands.

67. Also, although Regulations No 1348/2000 and No 44/2001 do not contain any requirements to this effect, I am inclined to think, as does the Polish Government, that at the time the judgment is served the defendant should also be informed of the remedies available for challenging it. The condition that a person should be able to exercise a remedy also means, in my view, that he should be aware what remedies are available to challenge the judgment enforcement of which is sought.

68. Clearly, as the United Kingdom Government contends, such a requirement constitutes an onus on the person seeking enforcement. However, that onus must be assessed in the light of the respective situations of the parties concerned and the search for a fair balance between their obligations. It is agreed that one or other of the parties concerned must necessarily decide what remedies are available against the judgment delivered in default. I am of the view that the person seeking enforcement is best placed to take this decision. First, those remedies will for the most part be those under that person's national law. Second, he has a definite interest in the application of the contested exception and ensuring that it has been possible without doubt for the defendant in default to commence proceedings to challenge the judgment delivered in default.

69. Lastly, as the German and Austrian Governments have emphasised, the formal requirements with regard to service on a defendant in default of the judgment enforcement of which is sought must be comparable to those laid down by the Community legislature in Article 34(2) of Regulation No 44/2001 with regard to the documents initiating the proceedings. A purely formal

irregularity which does not affect the rights of the defence, that is to say, the capacity of the defendant in default to have knowledge of the elements of the claim and to defend his rights, should not be sufficient to preclude application of the exception.

70. It follows, with regard to the origin of Article 34(2) of Regulation No 44/2001, that the condition for the exception, that it must have been possible for the defendant in default of appearance to commence proceedings to challenge the judgment delivered in default, demands that the latter should have been served on him.

71. This view is confirmed, in my opinion, by the provisions of Regulation No 44/2001 concerning the enforcement procedure, in particular Article 42(2).

2. The rules concerning the enforcement procedure

72. As I stated above, Regulation No 44/2001 does not reproduce the requirement expressly laid down in Article 47(1) of the Brussels Convention, that the party seeking enforcement of a judgment must produce any document likely to establish that that judgment has been served in accordance with the law of the State of origin.

73. Regulation No 44/2001 requires, as does the Brussels Convention, that an applicant for recognition and enforcement of a judgment delivered in another Member State should produce a copy of the judgment satisfying the conditions necessary to establish its authenticity. It also requires production of a certificate issued by the court or competent authority of the State where the judgment was given or, where appropriate, an equivalent document showing in particular the date of service of the document instituting the proceedings where judgment was given in default of appearance.

74. It also provides that the judgment whose enforcement is sought is declared enforceable once those formalities have been completed. Article 42(2) of Regulation No 44/2001 provides lastly that '[t]he declaration of enforceability shall be served on the party against whom enforcement is sought, accompanied by the judgment, if not already served on that party'.

75. I am of the opinion that the 'judgment' referred to in that provision in the part of the sentence 'accompanied by the judgment, if not already served on that party' can only be the judgment enforcement of which is sought and the enforceability of which is recognised in the State in which enforcement is sought. That interpretation is also sup-

ported by the Commission, as it stated at the hearing in response to a question raised by the Court.

76. Two conclusions may, in my view, be drawn from the content of Article 42(2) of Regulation No 44/2001.

77. The first of these is that Regulation No 44/2001 thus accepts that service of the judgment of which enforcement is sought does not constitute a prior requirement for lodging an application for enforcement in the State in which enforcement is sought and that that judgment may be served on the defendant at the same time as the declaration of enforceability in that State.

78. This first consequence, in my opinion, gives due effect to the interpretation of Article 47(1) of the Brussels Convention given by the Court in *Van der Linden*.[26]

79. In that case, Mr Van der Linden, domiciled in Belgium, challenged enforcement in that State of two judgments delivered against him in default by a German court ordering him to pay sums of money to an insurance company established in Germany. Mr Van der Linden argued that no proof of service of those judgments had been produced at the time the application for enforcement was lodged.

80. However, the insurance company had arranged for those judgments to be served again, under the rules of Belgian law, during the appeal proceedings brought by Mr Van der Linden against the judgment recognising their enforceability in Belgium. It was therefore a question of whether Article 47(1) of the Brussels Convention is to be interpreted as meaning that proof of service of the judgment of which enforcement is sought can be produced after the application for enforcement has been lodged, in particular during the course of appeal proceedings brought by the defendant in default against the judgment authorising enforcement in the State in which enforcement is sought.

81. The Court answered that question in the affirmative, relying on the objectives underlying the requirement regarding service laid down in Article 47(1) of the Brussels Convention. It noted that the purpose of that requirement is, first, to inform the defendant of the judgment given against him and, second, to give him the opportunity to satisfy it voluntarily before enforcement can be applied for.[27] It inferred from this

26 — Case C-275/94 [1996] ECR I-1393.

27 — Paragraph 15.

that, where the domestic procedural rules so permit, proof of service of the judgment may be produced after the application has been made, in particular during the course of appeal proceedings brought by the defendant against the enforcement authority in the State in which enforcement is sought, provided that he is given a reasonable period of time in which to satisfy the judgment voluntarily and that the party seeking enforcement bears all costs unnecessarily incurred.

82. It also agreed, implicitly, that such service may take place in accordance with the rules applying in the State in which enforcement is sought, and not only according to the law of the State of origin, as mentioned in Article 47(1) of the Brussels Convention.

83. Article 42(2) of Regulation No 44/2001 thus converts into a Community rule the possibility accepted by the Court in *Van der Linden* in the context of the Brussels Convention.

84. The second conclusion which, in my view, is to be drawn from the content of Article 42(2) of Regulation No 44/2001 is that the judgment forming the subject of the application for enforcement must necessarily be served at some point on the party against whom such enforcement is sought.

85. This view is borne out by the difference between the words used in Article 42(1), which concerns the applicant for enforcement, and in Article 42(2), which applies to the defendant. Article 42(1) thus provides that the decision on the application for a declaration of enforceability is to be 'brought to the notice' of the applicant for enforcement forthwith. Article 42(2) uses the word 'served'.

86. As the Netherlands Government observes, it is therefore clear from Article 42(2) of Regulation No 44/2001 that service of the judgment of which enforcement is sought must be effected prior to the lodging of an application for enforcement in the State in which enforcement is sought. Failing this, it may none the less take place at the same time as the declaration of enforceability is served.

87. In accordance with to the enforcement procedure laid down in Regulation No 44/2001 and the position taken by the Court in *Van der Linden* it is for the person seeking enforcement to provide proof that service has been effected.

88. Where a judgment in default has been served at the same time as the declaration of enforceability, a defendant in default must,

according to the position taken by the Court in *Van der Linden*, have sufficient time in which to satisfy the judgment voluntarily. He must also have sufficient time to lodge an appeal against that judgment in the Member State of origin.

89. This view is borne out by Article 46(1) of Regulation No 44/2001, which deals with the consequences of an appeal against the declaration of enforceability of a foreign judgment lodged by the party against whom enforcement of that judgment is sought. According to that provision, the court with which that appeal is lodged may stay the proceedings if an ordinary appeal has been lodged against the judgment in the State of origin. Again according to that provision, if the time for such an appeal has not yet expired, that court may specify the time within which the defendant is to lodge such an appeal. [28]

90. In this situation, in order for the exception to application of the ground for non-recognition provided for in Article 34(2) of Regulation No 44/2001 to apply, the court of the State in which enforcement is sought, which has given the defendant in default a time limit for lodging an appeal, must ascertain whether that defendant has been able to obtain, if he so wishes, service of the judgment forming the subject of the application for enforcement in a language which he understands, in accordance with Article 8 of Regulation No 1348/2000, [29] and, in my view, whether he has been informed of the remedies available in the State of origin against the judgment in question.

91. At any event, therefore, under Article 42(2) of Regulation No 44/2001, if the judgment of which enforcement is sought has not been served prior to the lodging of the application for enforcement, it must be served at the same time as the declaration of enforceability in the State in which enforcement is sought.

92. According to the information provided by the court making the reference, that requirement was not complied with in the present case. The Oberster Gerichtshof states in its order for reference [30] that SEMIS was served only with a copy of the order of the Austrian court of first instance of 20 December 2004 declaring the default judgment of 16 June 2004 enforceable in Austria.

28 — It is also appropriate to take into account the provisions of Article 19(4) of Regulation No 1348/2000 which, as we saw above, lays down the conditions in which such an appeal may still be allowed although the time for appeal in the Member State of origin has expired. It requires, first, that the defendant, without any fault on his part, did not have knowledge of the writ of summons in sufficient time to defend, or knowledge of the judgment delivered against him in sufficient time to appeal, second, that he has disclosed a prima facie defence to the action on the merits and third that his application for relief has been filed within a reasonable time after he had knowledge of the judgment.

29 — See to that effect, Case C-443/03 *Leffler* [2005] ECR I-9611, paragraph 68.

30 — Point A, paragraph 4, pages 3 and 4.

93. That is why the Oberster Gerichtshof has sought a ruling from the Court on whether the condition that it must have been 'possible' for the defendant to commence proceedings to challenge the default judgment can be met where the defendant was merely made aware of the existence of that judgment as a result of service of the declaration of enforceability of that judgment.

94. However, to accept that that condition is met in such a situation would mean interpreting Article 34(2) of Regulation No 44/2001 in a way that conflicted with the provisions of Article 42(2) of that regulation.

95. That last provision therefore confirms that the condition for the exception that it must have been possible for the defendant in default to commence proceedings to challenge the default judgment requires the latter to have been served on him.

96. Lastly, this view appears to me to be valid in the light of the requirements imposed by the fundamental principle of the rights of the defence.

3. The rights of the defence

97. The simplification of the formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals must not be pursued by undermining in any way whatsoever the right to a fair hearing. This settled case-law, which has guided the Court in the interpretation of Article 27(2) of the Brussels Convention, [31] may in my view be transposed to the context of the interpretation of Article 34(2) of Regulation No 44/2001.

98. The latter article, like Article 27(2) of the Brussels Convention, aims to protect those rights by providing that a judgment is not to be recognised or enforced in the State in which enforcement is sought if the defendant has not had the possibility of defending himself before the court of the State of origin. [32]

99. Article 34(2) of Regulation No 44/2001 introduced an exception to that ground for non-recognition. As I explained above, the Community legislature considered that the rights of a defendant in default of appearance could be compensated for by the possibility of lodging an appeal before a court of the State of origin. It stipulated that if a

31 — See in particular Case C-3/05 *Verdoliva* [2006] ECR I-1579, paragraph 26 and case-law cited therein.

32 — See, with regard to the Brussels Convention, Case C-522/03 *Scania Finance France* [2005] ECR I-8639, paragraph 16 and case-law cited.

defendant in default has failed to lodge such an appeal he can no longer validly plead infringement of his rights during the initial proceedings. The loss of this possibility is the result, in the scheme of the contested exception, of the failure by the defendant in default to commence proceedings when it was 'possible for him to do so'.

100. To accept in this context that it was possible for a defendant in default to commence such proceedings when he had not be able to acquaint himself with the content of the judgment delivered in default would, in my view, be contrary to the case-law of the European Court of Human Rights.

101. Moreover, having regard to the fact that within the system of recognition and enforcement introduced by Regulation No 44/2001 consideration of the grounds for non-recognition no longer constitutes a precondition for recognition of enforceability but merely occurs in the event of a challenge by a defendant, the argument put forward by ASML and the United Kingdom Government creates too great an imbalance to the detriment of the defendant in default.

102. With regard to the first point, according to settled case-law fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories, which include the European Convention on Human Rights and Fundamental Freedoms, [33] which has particular significance. [34]

103. The Court has expressly recognised the general principle of Community law that everyone is entitled to fair legal process, which is inspired by those fundamental rights. [35] It has held that respect for the rights of the defence is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law. [36]

104. For an interpretation of the scope of that fundamental principle the Court takes into consideration the case-law of the European Court of Human Rights relating to Article 6 of the ECHR. [37]

33 — Hereinafter, 'the ECHR'.

34 — Case C-7/98 *Krombach* [2000] ECR I-1935, paragraph 25.

35 — Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraphs 20 and 21, and Joined Cases C-174/98 P and C-189/98 P *Netherlands and Van der Wal* v *Commission* [2000] ECR I-1, paragraph 17. This right is also contained in Article 47 of the Charter of Fundamental Rights of the European Union (OJ 2000 C 364, p. 1), proclaimed in Nice on 7 December 2000.

36 — *Krombach*, paragraph 42 and case-law cited therein.

37 — Ibid., paragraph 39.

105. It can be seen from that case-law that the rights of the defence, which are derived from the right to fair legal process, require specific protection intended to guarantee effective exercise of the defendant's rights. [38] It held in a criminal case that the defendant's lack of awareness of the grounds of the judgment of an appeal court within the period allowed for bringing an appeal against that judgment before the court of cassation constituted an infringement of the combined provisions of Article 6(1) and (3) of the ECHR because the person concerned had been unable to bring an appropriate and effective appeal. [39]

106. The European Court of Human Rights has also held, along the same lines, that the right to adversarial proceedings, which is one of the elements of a fair hearing within the meaning of Article 6 § 1 of the ECHR, means that each party to a trial, be it criminal or civil, must in principle have the opportunity to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision. [40]

107. In my view, it would conflict with that case-law to accept that a defendant in default was able to bring proceedings against the judgment in default merely because he had been informed of the existence of that judgment without being able to become acquainted with its content.

108. On the second point, the aim of Regulation No 44/2001, as we saw above, is to facilitate the movement of judgments within the Union by simplifying the formalities for their recognition and enforcement. By introducing the contested exception in Article 34(2) of that regulation, the Community legislature sought to avoid the barriers to such movement which arise from unlawful conduct.

109. However, that exception must not, in my view, be given a scope which exceeds that objective.

110. In order to assess the implications of the present case for the rights of the defence it is appropriate to take full account of the fact that, within the scheme of Regulation No 44/2001, consideration of the grounds for non-recognition, such as the ground of infringement of the rights of the defence, no longer constitutes a precondition for the establishment of the enforceability of the judgment delivered in the State of origin. The Community legislature has thus passed

38 — See *Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, § 33, and *T. v. Italy*, judgment of 12 October 1992, Series A no. 245 C, § 28.

39 — See *Hadjianastassiou v. Greece*, judgment of 16 December 1992, Series A no. 252, §§ 29 to 37.

40 — See *Pellegrini v. Italy*, judgment of 20 October 2001, *Reports of Judgments and Decisions* 2001-VIII, § 44.

through a significant new stage in the recognition of judgments delivered in another Member State. Once a judgment has become enforceable in the State of origin it must thereafter be recognised virtually automatically in any State in which enforcement is sought.

111. It is only if the defendant brings proceedings to challenge that declaration of enforceability that the court of the State in which enforcement is sought, adjudicating in those proceedings, may consider a ground for non-recognition such as the one contained in Article 34(2) of Regulation No 44/2001.

112. We know that this ground for non-recognition is intended to enable the court of the State in which enforcement is sought to review observance of the rights of the defence at the initial proceedings stage, although such review is also incumbent on the court of the State of origin under Article 26(2) of Regulation No 44/2001. The Contracting States in the Brussels Convention, and the Community legislature in Regulation No 44/2001, have thus provided that observance of the rights of the defence should be subject to double review. [41] It is important in my view, following this new stage in the recognition of judgments delivered within the Union, not to reduce too quickly the scope of that double review. The present case provides a good illustration of the need to retain such review by the court of the State in which enforcement is sought.

113. Thus, when we consider the procedure which culminated in the judgment delivered in default on 16 June 2004, there is good reason to believe that it does not meet the requirements of Regulation No 1348/2000, which are applicable in the present case. It is clear from Article 19 of that regulation that where a defendant has not entered an appearance judgment must not be given until it is established that the document initiating the proceedings or an equivalent document was served on, or delivered to, that defendant in sufficient time to enable him to defend. Judgment may not be given, where appropriate, until a period of not less than six months has elapsed since the date of the transmission of the document and provided the other conditions laid down in Article 19(2) of that regulation are met.

114. The court making the reference does not state whether before delivering its judgment by default on 16 June 2004 the Rechtbank 's-Hertogenbosch had received proof that the document instituting the proceedings had been served on SEMIS on 25 May 2004. Even if that court had been informed that that document had been served, I am of the opinion that it ought to have found that SEMIS had not been summoned in sufficient time to enable it to defend, and that it ought to have made arrangements, in accordance with its national rules of procedure, for that party to have been summoned to attend a hearing at a later date.

41 — See to that effect, Case 228/81 *Pendy Plastic* [1982] ECR 2723, paragraph 13.

115. I would point out in that regard that the Netherlands Government stated at the hearing that Netherlands procedure had not been correctly followed.

116. To accept that a judgment delivered in those circumstances should be enforced in the State in which enforcement is sought, when SEMIS had merely been informed of the existence of that judgment and had not brought any proceedings, would deprive the double review of observance of the rights of the defence of much of its scope and would, in my view, lead to imposing excessive obligations on a defendant in default, obligations exceeding those that might legitimately be expected of a normally diligent defendant.

117. That is why I propose that the answer to the questions referred should be that Article 34(2) of Regulation No 44/2001 must be interpreted as meaning that the exception for which it provides, that the ground for non-recognition based on infringement of the rights of the defence does not apply where a defendant in default of appearance has failed to commence proceedings to challenge the judgment when it was possible for him to do so, requires that he should have been served with that judgment.

IV — Conclusion

118. In the light of all these considerations, I propose that the Court should answer the questions referred by the Oberster Gerichtshof as follows:

Article 34(2) 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 exception for which it provides, that the ground for non-recognition based on infringement of the rights of the defence does not apply where a defendant in default of appearance has failed to commence proceedings to challenge the judgment when it was possible for him to do so, requires that he should have been served with that judgment.