European Union, CJEU, A v. B and Others, judgment of 11 September 2014

Deciding bodies and decisions

CJEU, judgment of 11 September 2014, Case C?112/13, *A v. B and Others,* EU:C:2014:2195

The ECJ decided on a reference for preliminary ruling issued by the *Oberster Gerichtshof* (Supreme Court, Austria).

Area of law

Effective Judicial Protection

Subject matter

Action for damages

The European Court of Justice clarified whether national courts consider that a national provision is not only in contrast with the Charter, but also unconstitutional, those national courts remain free:

- to make a reference to the Court at whatever stage of the proceedings they consider appropriate, and even at the end of the interlocutory procedure for the review of constitutionality, in respect of any question which they consider necessary;
- to adopt any measure necessary to ensure interim judicial protection of rights conferred under the EU legal order;
- to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law.

The CJEU also considered that the appearance entered by a court?appointed representative, in a case where the documents instituting the proceedings could not be served to the defendant, does not amount to an appearance being entered by that defendant for the purposes of the EU Regulation No 44/2001, interpreted in the light of EU fundamental rights (notably Article 47 of the EU Chater).

Summary Facts Of The Case

On 12 October 2009, Mr B and Others instituted an action for damages against Mr A before the *Landesgericht Wien*

(Regional Court, Vienna), submitting that A had his normal place of domicile within that court's jurisdiction. They claimed that Mr A had abducted their familiars to Kazakhstan. After numerous attempts at service, which revealed that A was no longer domiciled at the addresses indicated for service, a representative *in absentia* (Mr A's representative) was appointed in accordance with Paragraph 116 of the *Zivil Process Ordnung*. Mr A's representative argued that the action should be dismissed on the merits, but did not contest the jurisdiction of the Austrian courts.

Later on, a lawyer instructed by Mr A intervened, on his behalf to challenge the international jurisdiction of Austrian courts. He claimed that, since the representative *in absentia* had not been in contact with A and had no knowledge of the relevant circumstances of the facts, his defence could not form the basis of the international jurisdiction of Austrian courts. Indeed, since the main proceedings has any link whatsoever with Austrian territory that could establish the jurisdiction of Austrian courts, unless A had entered an appearance before the court seised for the purposes of Article 24 of Regulation No 44/2001.

The *Landesgericht Wien* endorsed this claim and declared that it lacked jurisdiction.

On appeal, the *Oberlandesgericht Wien* (Higher Regional Court, Vienna) took the view that the lower court was not under a duty to examine its international jurisdiction, in accordance with Article 26 of Regulation No 44/2001, because, under Austrian law, the procedural acts of a court?appointed representative have the same legal effect as those of an ordinary legal representative.

Before the *Oberster Gerichtshof*, Mr A claimed that his rights of defence, as guaranteed by Article 6 ECHR and Article 47 CFR had been infringed. At the same time, Mr B and Others contended that the appointment of a representative *in absentia* was necessary to safeguard the right to an effective remedy, which is equally protected by the ECHR and the CFR, of the defendant, in accordance with Paragraph 116 of the ZPO. Yet, the *Oberster Gerichtshof* upheld Mr A's claim.

As regards the implications of this finding, the *Oberster Gerichtshof* stated that the primacy of EU law would have required it not to apply, on a case?by?case basis, national provisions that are contrary to EU law. Yet, it observed that a corollary of judgment U 466/11 of 14 March 2012 of the *Verfassungsgerichtshof* (the Constitutional Court of Austria) was that national courts are precluded from leaving unapplied, in the proceedings pending before them, a statutory provision that they consider to be incompatible with the Charter. By contrast, they must apply to the Constitutional Court by virtue of the procedure for the general striking down of legislation under Paragraphs 89 and 140 of the B-VG. The *Oberster Gerichtshof* also pointed out that, according to the *Verfassungsgerichtsho*f, when a right guaranteed by the Austrian Constitution has the same scope as a right guaranteed by the Charter, it is not necessary to make a request to the CJEU for a preliminary ruling under Article 267 TFEU, in order to decide whether a national statute shall be

struck down, that being a decision which may be given on the basis of rights guaranteed by the Austrian Constitution.

The *Oberster Gerichtshof* doubted the compatibility of this approach with EU law, noting, in particular, that the formal correspondence between a Charter right and a constitutional right does not rule out the possibility of divergent interpretation of the two provisions by, respectively, the CJEU and the Constitutional Court. The latter's interpretation could then encroach on obligations flowing from EC Regulation No 44/2001.

Accordingly, the *Oberster Gerichtshof* decided to suspend the proceedings and to send a reference for preliminary ruling to the CJEU asking, in essence:

1. *whether EU law precludes national provisions under which ordinary courts hearing an appeal or adjudicating at final instance are under a duty, if they find that a national statute is contrary to Article 47 CFR, to apply, in the course of the proceedings, to the Constitutional Court for that statute to be generally struck down, and may not simply refrain from applying that statute in the case before them;*

2.whether Article 24 of EC Regulation No 44/2001, considered in the light of Article 47 CFR, must be interpreted as meaning that, if a national court appoints, in accordance with national law, a representative in absentia for a defendant upon whom the document instituting proceedings has not been served because there is no known place of residence for him, the appearance entered by the courtappointed representative amounts to an appearance being entered by the defendant, thus establishing the international jurisdiction of that court.

As regards the first question, the CJEU restated its established case?law on the primacy of EU law and the powers and duties of national courts under the preliminary reference procedure, pointing out, notably, that national courts:

- Have the widest discretion in referring a preliminary reference to the CJEU, when they consider that the case pending before them raise issues involving the interpretation or validity of EU law;

- Are under a duty to give full effect to EU law provisions, if necessary refusing of their own motion to apply any conflicting national provisions, even if adopted subsequently, without being it necessary to request or await the prior setting aside of such a provision by legislative or other constitutional means;

Therefore, it would be incompatible with EU law a national legislation that, in the event of a conflict between EU law and national law, did reserve the solution of the conflict to an authority other than the national court before whom the case is pending.

As regards the specific situation in which a national court considers that a national provision is not only in contrast with the Charter (notably, its Article 47), but also unconstitutional, the CJEU reaffirmed the position expressed in *Melki and Abdeli*, leaving it to the Oberster Gerichtshof the task to verify whether the national legislation at issue could be interpreted in a way such as that the conditions identified in that judgment were satisfied, notably that national court remains free:

- To make a reference to the Court at whatever stage of the proceedings it considers appropriate, and even at the end of the interlocutory procedure for the review of constitutionality,in respect of any question which the national court considers necessary;

- To adopt any measure necessary to ensure interim judicial protection of rights conferred under the EU legal order;

- To disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if the national court considers it to be contrary to EU law.

Interestingly, at the beginning of the analysis of the first preliminary question, the CJEU had pointed out that, in judgment U 466/11, whose text was amongst the documents submitted to the CJEU, the *Verfassungsgerichtshof* had referred to the *Melki and Abdeli* judgment, quoting the abovementioned conditions for the compatibility with EU law of an interlocutory procedure for constitutional review. According to the CJEU, this shows that the Verfassungsgerichtshof considers it important that the CJEU is not deprived of the possibility of reviewing EU secondary legislation in the light of primary law and the Charter.

As regards the second preliminary question, the CJEU observed that EC Regulation No 44/2001 must be interpreted in the light of EU fundamental rights, stressing, in particular, that its provisions aim at ensuring that judicial proceedings covered by the Regulation’s scope take place in such a way that the rights of the defence enshrined in Article 47 CFR are observed.

The CJEU then pointed out that the first sentence of Article 24 of the Regulation lays down a rule on the tacit prorogation of the jurisdiction of a court that, otherwise, would not have jurisdiction under the Regulation, or of a court that was seized in breach of the Regulation. Since this tacit prorogation of jurisdiction is based on a deliberate choice made by the parties to the dispute, it presupposes that the defendant was aware of the proceedings brought against him. Thus, it cannot apply when the defendant is absent, because it was not possible to serve him the documents instituting the proceedings. Nor an appearance entered by a court?appointed representative, with the defendant being unaware of this and, therefore, unable to provide him the

necessary information to arrange his defence effectively, be regarded as tacit acceptance, by the defendant, of the jurisdiction of that court.

Thus, the CJEU considered that the appearance entered by a court?appointed representative, in a case where the documents instituting the proceedings could not be served to the defendant, does not amount to an appearance being entered by that defendant for the purposes of Article 24 of that regulation.

Finally, the CJEU highlighted that the need to safeguard the right to an effective remedy of the applicants could not support a different interpretation either. In this regard, the CJEU distinguished the case at issue from those that led to its judgments in *Hypote?ní banka* (EU:C:2011:745) and *G* (EU:C:2012:142), where it had found that Regulation No 44/2001, interpreted in the light of Article 47 CFR, did not preclude a procedure against an absent defendant in which the latter was deprived of the opportunity to defend himself effectively, on the grounds that he would have had the opportunity to ensure respect for the rights of the defence by opposing the recognition of the judgment, based on Article 34(2) of the Regulation.

The Court observed that the ground for non?recognition laid down by that provision presupposes that the defendant failed to enter an appearance and that the procedural steps taken by the representative *ad litem* or the court?appointed representative *in absentia* do not amount to an appearance having been entered by the defendant for the purposes of that regulation. By contrast, under Paragraph 116 of the ZPO, A must be regarded as having entered an appearance before the court seized.

Relation to the scope of the Charter

- Right to an effective remedy and to a fair trial (Article 47 EU Charter)

The relevance of the Charter stemmed from the fact that the dispute at stake fell under EC Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation).

Relation between the Charter and EHCR

Article 47 of the EU Charter is based on Article 13 of the ECHR, while the second paragraph corresponds to Article 6 (1) of the ECHR. With regard to the third paragraph, the explanation of Article 52(3) points out that “Article 47(3) corresponds to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation”. Thus, the scope of legal aid under the Charter is broader than under the ECHR. It follows from Article 52(3) of the EU Charter and the related official explanation that Charter provisions that correspond to fundamental rights already granted by the ECHR shall be interpreted as having the same scope and meaning afforded by the ECHR to their correspondents, taking into account also the case law of the European Court of Human

Rights. However, a higher level of protection can be granted under EU law (meaning that the ECHR only sets a minimum standard of protection – non-derogable *in peius* – for corresponding Charter provisions.

Impact on Legislation / Policy

Impact at the EU level

At the beginning of its reasoning, the CJEU reaffirmed the position expressed inn *Melki and Abdeli* case, which is another interesting case where the ECJ examined the compatibility of EU law of a national legislation granting priority to an interlocutory procedure for the review of constitutionality.

- ECJ, *Melki and Abdeli*, Joined Cases C?188/10 and C?189/10, EU:C:2010:363

The case concerned, in particular, a French legislation requiring national courts, in case of doubts concerning the compatibility of a national provision with both the Constitution and EU law, to rule as a matter of priority on whether to refer to the Constitutional Court (notably, the *Conseil Constitutionnel*) a question on whether the provision at issue is consistent with the Constitution.

Such interlocutory procedures of constitutional review are compatible with EU law only insofar as they don not compromise the power and duties of national courts under Article 267 TFEU, which governs the preliminary reference procedure, ie the mechanism of cooperation *par excellence* between national courts and the CJEU. It is convenient to recall, in this respect, in particular, Article 267 TFEU confers jurisdiction on the CJEU to give preliminary rulings concerning both the interpretation of the Treaties and EU acts and provisions, as well as on the validity of those acts and provisions. According to its second paragraph, a national court or tribunal may refer such questions to the Court, if it considers that a decision on the question is necessary to enable it to give judgment, whereas the third paragraph provides that the national court or tribunal is bound to make a reference if there is no judicial remedy under national law against its decisions.

In particular, the CJEU affirmed that:

Article 267 TFEU precludes national legislation under which ordinary courts must apply to the Constitutional Court in order to obtain the setting aside of the provision in contrast with EU law, without they being free to submit a reference for preliminary reference to the CJEU, either before the submission of the interlocutory procedure for constitutional review or after it.

However, such an interlocutory procedure would not be incompatible with EU law if national courts

remained free:

- To make a reference to the Court at whatever stage of the proceedings they consider appropriate, and even at the end of the interlocutory procedure for the review of constitutionality, in respect of any question which they consider necessary;

- To adopt any measure necessary to ensure interim judicial protection of rights conferred under the EU legal order;

- To disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law.

The CJEU drew this conclusion as a corollary of a set of principled points well established in its case law (paras. 41?45). In *Melki and Abdeli* the CJEU made a precision concerning the role of the preliminary reference procedure as an instrument to ensure the review of EU law provision in light of EU fundamental rights (paras. 55?56):

"[t]o the extent that the priority nature of an interlocutory procedure for the review of constitutionality leads to the repeal of a national law - which merely transposes the mandatory provisions of a European Union directive – on the basis that that law is contrary to the national constitution, the Court could, in practice, be denied the possibility, at the request of the courts ruling on the substance of cases in the Member State concerned, of reviewing the validity of that directive in relation to the same grounds relating to the requirements of primary law, and in particular the rights recognised by the Charter of Fundamental Rights of the European Union, to which Article 6 TEU accords the same legal value as that accorded to the Treaties.

Before the interlocutory review of the constitutionality of a law – the content of which merely transposes the mandatory provisions of a European Union directive – can be carried out in relation to the same grounds which cast doubt on the validity of the directive, national courts against whose decisions there is no judicial remedy under national law are, as a rule, required – under the third paragraph of Article 267 TFEU – to refer to the Court of Justice a question on the validity of that directive and, thereafter, to draw the appropriate conclusions resulting from the preliminary ruling given by the Court, unless the court which initiates the interlocutory review of constitutionality has itself referred that question to the Court pursuant to the second paragraph of Article 267 TFEU. In the case of a national implementing law with such content, the question of whether the directive is valid takes priority, in the light of the obligation to transpose that directive. In addition, imposing a strict time-limit on the examination by the national courts cannot prevent the reference for a preliminary ruling on the validity of the directive in question".

Sources - EU and national law
National Law

- Paragraphs 89(1) and (2), 92(1) and Paragraph 140(1), (6) and (7) of the Federal Constitutional Law (*Bundes-Verfassungsgesetz;* 'the B-VG');
- Paragraphs 115, 116, 117 of the Code of Civil Procedure *(Zivilprozessordnung*; 'the ZPO');
- Judgment U 466/11 of 14 March 2012 of the *Verfassungsgerichtshof* (the Constitutional Court of Austria)

EU law

- EC Regulation 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, Brussels I Regulation). Since 10 January 2015, Regulation Brussels I has been replaced by EU Regulation No. 1215/2012 (Brussels I *bis*) (OJ 2012 L 351, p.1)

Sources - CJEU Case Law

On the primacy of EU law and the powers and duties of national courts under the preliminary reference procedure

- Joined Cases C?188/10 and C?189/10, *Melki and Abdeli*, EU:C:2010:363
- C-348/89, *Mecanarte*, EU:C:1991:278
- C-210/06, *Cartesio*, EU:C:2008:723
- C-106/77, *Simmenthal*, EU:C:1978:49
- C-314/08, *Filipiak*, EU:C:2009:719
- C-617/10, *Åkerberg Fransson*, EU:C:2013:105

On the interpretation of the EU Regulation No 44/2001

- C-327/10, *Hypote?ní banka*, EU:C:2011:745
- C?292/10, *G*, EU:C:2012:142
