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*Court procedural documents*

**TO THE PRESIDENT AND MEMBERS OF  
THE COURT OF JUSTICE**

**WRITTEN OBSERVATIONS**

submitted by the **EUROPEAN COMMISSION**, represented by Muriel Heller and Michael Wilderspin, of its Legal Service, acting as Agents, with a postal address for service in Brussels at the Legal Service, Greffe Contentieux, BERL 1/169, 200, rue de la Loi, 1049 Brussels, who consent to service by e-Curia,

**in Case C-491/17**

**Hoteles Pinero Canarias**

in which the Supreme Court of the United Kingdom has requested a preliminary ruling pursuant to Article 267 TFEU on the interpretation 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.

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## I. Legal background: EU Law

### **Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>1</sup>**

#### 1. Recital 13

*"In relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for."*

#### Recital 15

*"In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States. There must be a clear and effective mechanism for resolving cases of lis pendens and related actions and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For purposes of this Regulation that time should be defined autonomously. "*

#### Article 8

*"In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5."*

#### Article 9

*"1. An insurer domiciled in a Member State may be sued:*

- (a) in the courts of the Member State where he is domiciled, or*
- (b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled,*
- (c) if he is a co-insurer, in the courts of a Member State in which proceedings are brought against the leading insurer.*

*2. An insurer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State."*

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<sup>1</sup> [2001] OJ L 12/1.

### Article 11

*"1. In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured.*

*2. Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.*

*3. If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them."*

### Article 65

*"1. The jurisdiction specified in Article 6(2), and Article 11 in actions on a warranty of guarantee or in any other third party proceedings may not be resorted to in Germany and Austria. Any person domiciled in another Member State may be sued in the courts:*

*(a) of Germany, pursuant to Articles 68 and 72 to 74 of the Code of Civil Procedure (Zivilprozessordnung) concerning third-party notices,*

*(b) of Austria, pursuant to Article 21 of the Code of Civil Procedure (Zivilprozessordnung) concerning third-party notices.*

*2. Judgments given in other Member States by virtue of Article 6(2), or Article 11 shall be recognised and enforced in Germany and Austria in accordance with Chapter III. Any effects which judgments given in these States may have on third parties by application of the provisions in paragraph 1 shall also be recognised in the other Member States."*

### **Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations<sup>2</sup> (Rome II)**

#### 2. Article 18

*"Direct action against the insurer of the person liable*

*The person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides."*

## **II. Facts and procedure before the national court**

3. The dispute is between the claimant, Keefe (United Kingdom), and the second defendant, Hoteles Pinero Canarias SL (Spain).

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<sup>2</sup> OJ L 199, 31.7.2007, p. 40-49.

4. The second defendant is a hotel company that operates a hotel in Spain. The first defendant is the public liability insurer of the second defendant. Both defendants are domiciled in Spain.
5. The claimant suffered a serious injury in an accident at the second defendant's hotel in 2006. The second defendant had a public liability insurance cover with the first defendant. On 28 October 2011, the claimant issued proceedings in England against the first defendant pursuant to Article 11(2) of Regulation 44/2001, relying on a direct right of action against the insurer under Spanish law<sup>3</sup>.
6. On 6 July 2012, the claimant applied to join the hotel company as second defendant to his claim by virtue of Article 11(3) of that Regulation. It would appear that the reason lies in the considerable difference between the amount of damages that the claimant sought and the insured amount under the liability insurance policy concluded between the first and second defendants.
7. The second defendant challenged the international jurisdiction of the UK courts. The challenge having been dismissed at first instance and on appeal, the second defendant appealed to the Supreme Court.
8. The Supreme Court of the United Kingdom has stayed its proceedings and referred the following questions for a preliminary ruling:

*“1. Is it a requirement of Article 11.3 that the injured person's claim against the policy holder/insured involves a matter relating to insurance in the sense that it raises a question about the validity or effect of the policy?”*

*2. Is it a requirement of Article 11.3 that there is a risk of inconsistent judgments unless joinder is permitted?”*

*3. Does the court have a discretion whether or not to permit joinder of a claim which falls within Article 11.3?”*

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<sup>3</sup> Referral point 7.

### III. Legal Analysis

#### **1. Introductory remarks**

9. As the English courts have correctly pointed out, the relevant EU legislation is Regulation 44/2001, which is applicable *ratione temporis*, since proceedings were instituted before 10 January 2015 (Article 66 (1) of Regulation (EU) No 1215/2012.<sup>4</sup>)
10. Under the scheme of that Regulation, the basic rule is that a defendant domiciled in a Member State is to be sued in that Member State unless the Regulation provides otherwise (Article 2). This rule would designate the courts of Spain as having jurisdiction in the dispute between the claimant and the second defendant. In addition, the courts of Spain would have jurisdiction by virtue of Article 5(3) (*forum delicti*).
11. As regards insurance, Recital 13 provides that "the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for". Those rules are contained in Section 3, entitled "Jurisdiction in matters relating to insurance". In interpreting Section 3, the Court has reiterated the concern to protect the weaker party but, at the same time, has stressed that the rules of special jurisdiction should not be extended to persons for whom such protection is not justified (C-77/04, GIE Réunion européenne, para. 18; Case C-463/06, Odenbreit v FBTO Schadeverzekeringen [2007] ECR I-11321, para. 28).

#### **2. First question**

12. By its first question, the referring court wishes to know in essence whether, where a claimant has seised a court of a Member State pursuant to Article 11(2) in conjunction with Article 9 (1) b) of Regulation 44/2001, Article 11(3) of the same Regulation, allows the claimant to join to those proceedings the insured person, and if so in what circumstances.
13. In the present case, there appears to be no doubt that if the second defendant had not been covered by liability insurance, it could have been sued only in Spain (pursuant to

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<sup>4</sup> [2012] OJ L 351/1.

Article 2 or 5(3) (*forum delicti*)).<sup>5</sup> The question then is whether the fact that the liability insurer may be sued in the UK pursuant to Article 11(2) in conjunction with Article 9 (1) b) makes Section 3 of Chapter II of the Regulation applicable to the action brought by the injured party against the insured, thus entailing the conclusion that Article 11(3) permits the injured party to join the insured as a party to the direct action against the insurer. In the Commission's view, while the point is not an easy one, this is not the case.

14. In order to reply to that question, it is necessary to consider first the purpose and the structure of Section 3 of Chapter II of the Regulation, jurisdiction in matters relating to insurance, and its relationship to the other rules of jurisdiction contained in the Regulation.
15. Section 3, like Sections 4 (consumer contracts) and 5 (individual employment contracts) contains a special regime applicable to contracts in which one party is systematically weaker than the other. It aims to redress this imbalance by creating a jurisdictional regime that is more favourable to the weaker party, in principle by giving that party the option of suing the "stronger" party either "at home" (i.e. before the courts of the Member State of his domicile) or in the Member State of the defendant's domicile, while at the same time guaranteeing that the weaker party can be sued only in his home Member State.
16. The Court has confirmed on a number of occasions that the rules contained in Section 3 reflect the need to protect the economically weaker party (Odenbreit, paragraph 18 and references cited therein). This concern is also mentioned in recital 13, which draws attention to the parallelism between the jurisdictional rules relating to insurance with those relating to consumer contracts and to individual employment contracts. In the latter two categories, it is clearly the case that the consumer and employee respectively are the parties considered weaker in relation to the professional and the employer respectively. In the case of insurance, the relationships may be more

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<sup>5</sup> It is possible that the claimant could have brought an action against the hotel for breach of an implied term of his contract with the hotel to take reasonable care. A priori, such an action could have been brought in the United Kingdom if the conditions of Article 15 of the Regulation, as interpreted by the Court in its *Pammer and Alpenhof* case law were met. However, the claimant does not appear to have explored this avenue.

complex and thus the category of weaker parties is broader.<sup>6</sup> Article 9(1)(b) therefore designates the policyholder, the insured and the beneficiary of the policy as worthy of protection and thus, within the logic of Section 3, as weaker parties in relation to the insurer, who is the stronger party.

17. Article 11 contains special rules relating to liability insurance. Article 11(2), in conjunction with 9(1)(b), of the Regulation allows the injured party to bring an action directly against the liability insurer in the courts for the place in a Member State where the injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State (Odenbreit, *supra*, paragraph 31).<sup>7</sup> An injured party is thereby also treated as a weaker party, not only in relation to his own insurer, but also as regards the liability insurer of a party that has caused him injury.
18. Article 11(3) provides that "if the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them". However, this wording does not specify explicitly which party is entitled to joining the insurer as third party to the proceedings.
19. It is not disputed that in such circumstances the insurer may join its insured as a party, provided that the other conditions of Article 11(3) are met, but it is much less clear whether the injured party may do the same. The wording of Article 11(3) is not clear on the point.
20. It is consequently necessary to analyse which interpretation is more consistent with the scheme and purpose of Section 3 and the Regulation in general. As a first step, it must be examined whether an action brought by an injured party against the insured/tortfeasor falls within the scope of Section 3 as a "matter relating to insurance".
21. Advocate General Bobek assessed the notion of "matters relating to insurance" in his opinion in C-340/16, KABEG v MMA. He pointed out that the notion was not defined

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<sup>6</sup> Opinion of Advocate General Bobek in Case C-340/16, *infra*, para. 47.

<sup>7</sup> Article 11(2) does not specify which law governs whether the direct action is permitted. Article 18 of the Rome II Regulation allows a direct action if this is permitted by either the law applicable to the non-contractual obligation or the law applicable to the insurance contract. In either case, it is Spanish law that would be applicable. Although the Rome II Regulation is not applicable *ratione temporis*, as the national court has noted, it has nevertheless held Spanish law to be applicable.



in Regulation No 44/2001 or its predecessors, but was of the opinion that the expression must be interpreted autonomously and uniformly.<sup>8</sup> He came to the conclusion that "for the purpose of international jurisdiction, the basis for ascertaining what is a 'matter relating to insurance' is essentially 'title-based'. Is the title for which an action is launched against a specific defendant (in other words, the cause of that action) the ascertaining of rights and duties arising out of the insurance relationship? If yes, then the case can be deemed as a matter relating to insurance".<sup>9</sup> Moreover, Advocate General Bobek considered that "a subject matter of a claim falls within the scope of the notion of 'matter relating to insurance' [...] if it concerns rights and duties arising out of an insurance relationship".<sup>10</sup>

22. Therefore, in the present case the question is whether or not the action brought by the injured claimant against the insured arises out of an insurance relationship.
23. Any action against the insured is primarily a matter of tort because the claimant was injured and he alleges that the insured is liable for the injury. The relationship between the tortfeasor and the injured party is in principle not directly connected with insurance since, whether the tortfeasor is liable to compensate the claimant is entirely independent from the question whether the tortfeasor's own liability is insured in whole or in part, which is a question pertaining to the relationship between the insured tortfeasor and its liability insurer. Had the tortfeasor (second defendant) in the present case not been covered by liability insurance, it is clear that it could only have been sued in Spain. It is difficult *a priori* to understand why the fact that it has such cover should expose it to the risk of being sued in the UK. To allow this would run counter to the policy of Section 3, which is to give protection to the weaker party: however, in a tortious claim the injured party is not considered to be weaker in relation to the tortfeasor.
24. That this is the correct interpretation appears to be treated as axiomatic by the authors of the Jenard Report on the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters,<sup>11</sup> which clearly states that

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<sup>8</sup> AG Bobek Opinion in Case C-340/16, paras 30-1.

<sup>9</sup> *Ibid* at 36.

<sup>10</sup> *Ibid* at 39.

<sup>11</sup> [1979] OJ C 59/1.

Article 10(3) is meant to cover the joinder *by the insurer* of the policy-holder or the insured:

*Under the last paragraph of Article 10,<sup>12</sup> the insurer may join the policy-holder or the insured as parties to the action brought against him by the injured party. In the interests of the proper administration of justice, it must be possible for the actions to be brought in the same court in order to prevent different courts from giving judgments which are irreconcilable. This procedure will in addition protect the insurer against fraud.<sup>13</sup>*

25. Other aspects of Section 3 tend to corroborate this conclusion.
26. First, Article 12 specifies that, without prejudice to Article 11(3), the liability insurer may sue a defendant policyholder, insured or beneficiary in the Member State of domicile of that defendant. However, no such provision is made as regards any action brought by the injured party against the tortfeasor. This omission can only be explained on the basis that such an action does not fall within the scope of Section 3.
27. Second, Article 13 contains provisions restricting the parties' freedom to depart from the provisions of Section 3. No specific provision is made in respect of actions brought by an injured party against the insured/tortfeasor. Thus, if the claimant's contention as to the interpretation of Article 11(3) were correct, and for example claimant and tortfeasor had concluded a jurisdiction agreement before the dispute arose, the jurisdiction agreement would be applicable if the claimant sued the second defendant directly but would not be effective if he availed himself of the possibility (allegedly) opened by Article 11(3). It is difficult to imagine that the legislator intended such a result, which is another factor pointing to the conclusion that Article 11(3) does not allow this possibility.
28. Third, the conclusion is corroborated at least indirectly by Article 65 of the Regulation. Article 65(1) of the Regulation provides that "the jurisdiction specified in Article 6(2), and Article 11 in actions on a warranty of guarantee or in any other third party proceedings" may not be resorted to in Germany and Austria.

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<sup>12</sup> Now Article 11 of Regulation 44/2001. The relevant provisions of the Brussels Convention are substantially unchanged in Regulation 44/2001.

<sup>13</sup> Jenard Report, *supra* at p. 32.

29. This formulation suggests that the legislature worked on the basis that the procedural mechanism of Article 11(3) is the same as under Article 6(2) of the Regulation on third party proceedings.
30. Consequently, the Court's case law on the interpretation of Article 6(2) may give some clue to the meaning of "joined as a party" within the meaning of Article 11(3). Of particular relevance is the judgment in *GIE Réunion européenne v Zurich España, supra*, which concerned third party proceedings between insurers; more precisely, a tortfeasor who had accepted liability to the injured party sued its insurers for indemnification of its liability and the insurers sought to join, as third party, the insurer of the injured party. The Court held that Article 6(2) applied to the third party proceedings and, more particularly, that "an action within the meaning of Article 6(2) is defined as brought against a third party by the defendant in an action for the purpose of being indemnified against the consequences of that action", referring as authority for this proposition to the Jenard Report. Applying this reasoning *mutatis mutandis* to Article 11(3), this would imply that the court having jurisdiction over the insurer in the direct action would have jurisdiction over the insured only if the latter were joined as third party by the *insurer* (which is defendant in the action brought by the injured party).
31. Thus a consideration of both the underlying purpose and structure of Section 3, its wording and the Explanatory Report point to the more restrictive interpretation of Article 11(3).
32. On the other hand, the claimant argues that considerations of economy of procedure would tend to militate in favour of allowing the action against the insured to be heard in the same forum as the action against the liability insurer.<sup>14</sup>
33. The danger of irreconcilable judgments is admittedly acute in a case that concerns liability insurance where both the tortfeasor and his insurer may be defendants. If the injured claimant has to bring suit in two different jurisdictions, irreconcilable judgments cannot be ruled out.

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<sup>14</sup> In this regard, Recital 12 of the Regulation stipulates that there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice. Equally, Recital 15 states that one of the aims is to ensure that irreconcilable judgments will not be given in two Member States.

34. In the present case, the claimant has been put to proof of causation and the amount of his loss by the insurer. Consequently, to win the lawsuit against the insurer, the injured claimant has to prove that he was injured by the insured, which is a question that will also need to be determined in any proceedings against the tortfeasor. Equally, it appears to be common ground that the insurance policy may not cover the whole of the second defendant's liability to the claimant, in particular if the claim is determined in England. If one claim is heard in England and the other in Spain, there is clearly a danger of inconsistent judgments, *a fortiori* since the national court has determined that the damages awarded will be much higher in England than in Spain.<sup>15</sup>
35. Nevertheless, while avoiding irreconcilable judgments is a laudable goal, it does not of itself permit derogation from the normal rules of the Regulation. Where the Regulation allows this factor to be taken into consideration as a condition it does so specifically (see for example Article 6(1) and Article 28 (3)). No such provision is made in Article 11. Thus, this consideration is not sufficiently strong to give a wide interpretation to Article 11(3) so as to allow the injured party to join the insured to an action that he may bring, pursuant to Article 11(2) in conjunction with Article 9 (1) b) against the insured's liability insurance.
36. In conclusion, the fact that the issue between the claimant and the second defendant does not primarily relate to insurance, the strength of the basic rule in Article 2 weighed against the fact that the rules contained in Section 3 are derogations from this rule and the clearly expressed view of the authors of the Explanatory Report, taken together, outweigh the considerations of economy of procedure.
37. In summary, the Commission agrees with the arguments of the second defendant in the main proceedings, set out in para. 22 of the judgment of the Court of Appeal<sup>16</sup> in the present case.
38. Given the suggested reply to Question 1, i.e. that Article 11(3) does not apply in the present case, there is no need to reply to Questions 2 and 3. However, in order to assist the Court, the Commission will briefly examine these questions.

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<sup>15</sup> Article 15 of the Rome II Regulation, which refers to the applicable law the assessment of damage, is not applicable *ratione temporis*.

<sup>16</sup> 2015 EWCA Civ 598.

### **3. Second question**

39. By its second question, the referring court asks whether Article 11(3) of the Brussels I Regulation, applies only to proceedings when there is a risk of inconsistent judgments unless joinder is permitted.
40. In the Commission's view, since certain other provisions of the Regulation, such as Articles 6(1) (co-defendants) and 28(3) (related actions), stipulate explicitly as a condition of their application a close connection and risk of irreconcilable judgments, it must be concluded *a contrario* that this requirement is not a condition for the application of Article 11(3). Instead, recital 11 stipulates that the rules of jurisdiction must be highly predictable. Thus the imposition of a further condition that is not literally laid out in Article 11(3) would not be coherent with the Regulation.
41. Thus it can be concluded that it is not a requirement of Article 11(3) that there be a risk of inconsistent judgments unless joinder is permitted.

### **4. Third question**

42. By its third question, the referring court is asking whether the court has discretion whether or not to permit joinder of a claim which falls within Article 11(3).
43. The Schlosser Report on the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters<sup>17</sup> confirms that the courts do not have any discretion when, under the 1968 Convention, they have jurisdiction and are asked to adjudicate.<sup>18</sup> It is further stated: "Article 21 expressly prohibits a court from disregarding the fact that proceedings are already pending abroad. For the rest the view was expressed that under the 1968 Convention the Contracting States are not only entitled to exercise jurisdiction in accordance with the provisions laid down in Title 2; they are also obliged to do so. A plaintiff must be sure which court has jurisdiction. He should not have to waste his time and money risking that the court concerned may consider itself less competent than another."<sup>19</sup>

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<sup>17</sup> OJ C 59/97, 5.3.1979.

<sup>18</sup> Schlosser Report, para 76-78.

<sup>19</sup> *Ibid.*

44. The Court has also confirmed the general principle that if jurisdiction is conferred by the Regulation and the national court is properly seised, it must accept jurisdiction; it does not enjoy a discretion to decline jurisdiction.<sup>20</sup>
45. Therefore, it can be presumed that the court does not have discretion (apart from the discretion that may exist under substantive law governing such direct actions) whether or not to permit joinder of a claim which falls within Article 11(3).

#### **IV. Conclusion**

46. In the light of the foregoing, the Commission respectfully suggests that the Court reply as follows to the questions referred by the Supreme Court:

Article 11(3) of Regulation (EC) No 44/2001 does not allow an injured party to join the insured/policyholder as a party to a direct action brought against the insurer pursuant to Article 11(2) of that Regulation.

It is not a requirement of Article 11(3) of the Regulation that there be a risk of inconsistent judgments unless joinder is permitted.

Article 11(3) of the Regulation does not grant a court discretion as to whether or not it will permit joinder of a claim which falls within Article 11(3) of the Regulation.

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<sup>20</sup> See, e.g., Case C-281/02 *Owusu v Jackson*, [2005] ECR I-01383, para 46. Cf. Article 28(2), the *forum non conveniens* provision of the Regulation, which explicitly allows a court second seised of a related action, to decline jurisdiction in certain clearly defined circumstances.