JUDGMENT OF THE COURT (First Chamber)

14 December 2006 *

In Case C-283/05,

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC, by the Oberster Gerichtshof (Austria), made by decision of 30 June 2005, received at the Court on 14 July 2005, in the proceedings

ASML Netherlands BV

v

Semiconductor Industry Services GmbH (SEMIS),

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Lenaerts (Rapporteur), J.N. Cunha Rodrigues, M. Ilešič and E. Levits, Judges,

* Language of the case: German.

Advocate General: P. Léger,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 6 July 2006,

after considering the observations submitted on behalf of:

— ASML Netherlands BV, by J. Leon, Rechtsanwalt,

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

— the German Government, by M. Lumma, acting as Agent,

— the Netherlands Government, by H.G. Sevenster, C. ten Dam and M. de Grave, acting as Agents,

— the Polish Government, by T. Nowakowski, acting as Agent,

— the United Kingdom Government, by T. Harris, acting as Agent and K. Bacon, Barrister,

— the Commission of the European Communities, by A.-M. Rouchaud-Joët, W. Bogensberger and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 September 2006,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of 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 (OJ 2001 L 12, p. 1).

2 The reference was made in the course of proceedings between ASML Netherlands BV ('ASML'), a company established in Veldhoven (Netherlands), and Semiconductor Industry Services GmbH ('SEMIS'), a company established in Feistritz-Drau (Austria), concerning the enforcement in Austria of a judgment given in default of appearance by the Rechtbank 's-Hertogenbosch (Netherlands) ordering SEMIS to pay ASML the sum of EUR 219 918.60 together with interest and the costs of the proceedings.

Legal background

Regulation No 44/2001

3 Article 26(1) and (2) of Regulation No 44/2001 provides:

'1. Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation.

2. The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the 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'.

4 By virtue of Article 26(3) of that regulation, Article 19 of 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) is to apply instead of the provisions of Article 26(2) if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to that regulation.

5 Under Article 33(1) of Regulation No 44/2001, '[a] judgment given in a Member State shall be recognised in the other Member States without any special procedure being required'.

6 However, Article 34(2) of Regulation No 44/2001 provides that a judgment is not to 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, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so'.

Regulation No 1348/2000

7 Article 19(1) of Regulation No 1348/2000 is worded as follows:

'Where 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 the defendant has not appeared, judgment shall not be given until it is established that:

(a) the document was served by a method prescribed by the internal law of the Member State addressed for the service of documents in domestic actions upon persons who are within its territory;

(b) the document was actually delivered to the defendant or to his residence by another method provided for by this Regulation;

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

The main proceedings and the questions referred for a preliminary ruling

8 By judgment given in default of appearance of 16 June 2004 the Rechtbank 's-Hertogenbosch ordered SEMIS to pay ASML the sum of EUR 219 918.60 together with interest and the costs of the proceedings ('the default judgment').

9 It is apparent from the order for reference, first, that the summons to the hearing before the Rechtbank 's-Hertogenbosch, fixed by the latter for 19 May 2004, was not served on SEMIS until 25 May 2005 and, second, that the default judgment was not served on SEMIS.

10 On the application of ASML, the default judgment was declared enforceable by order of 20 December 2004 of the Bezirksgericht Villach (District Court, Villach) (Austria), the court in which recognition is sought at first instance, on the basis of a certificate drawn up by the Rechtbank 's-Hertogenbosch on 6 July 2004 declaring the judgment 'provisionally enforceable'. The Bezirksgericht Villach also ordered enforcement of that judgment.

11 A copy of the order was served on SEMIS. The default judgment was not included.

12 On appeal by SEMIS against that order, the Landesgericht Klagenfurt (Regional Court, Klagenfurt) (Austria) dismissed the application for enforcement of the default judgment on the ground that, for it to be 'possible' to commence proceedings to challenge the judgment, within the meaning of Article 34(2) of Regulation No 44/2001, that the judgment must have been served on the defendant. The Landesgericht Klagenfurt dismissed ASML's argument that the exception to the

ground of non-recognition contained in Article 34(2) was applicable because SEMIS was aware both of the proceedings brought against it in the Netherlands, since it had been served on 25 May 2004 with a summons to the hearing, and of the existence of the default judgment as a result of service of the order of the Bezirksgericht Villach of 20 December 2004 declaring that judgment enforceable.

13 Ruling on the appeal on a point of law brought by ASML, the Oberster Gerichtshof (Supreme Court) observes that, in this case, SEMIS was not served with the document which instituted the proceedings or with an equivalent document in sufficient time for it to arrange for its defence, since the summons to the hearing from the Rechtbank 's-Hertogenbosch was not served on it until after the date on which the hearing took place. According to the referring court, the ground for non-recognition and non-enforcement set out in Article 34(2) of Regulation No 44/2001 is, therefore, applicable in these proceedings, unless the conditions for the exception to that ground are satisfied, that is, it is established, as provided in the last sentence of Article 34(2), that SEMIS 'failed to commence proceedings to challenge the judgment when it was possible for [it] to do so'.

14 Taking the view that an interpretation of Article 34(2) of Regulation No 44/2001 is necessary in order to resolve the dispute before it, the Oberster Gerichtshof decided to stay proceedings and to 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 July 2004 ... and for an execution order following the foreign order for execution declared enforceable necessarily already have put the defendant and judgment debtor ... 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 the Regulation?'

The questions referred for a preliminary ruling

15 By its two questions, which should be examined together, the national court asks essentially whether Article 34(2) of Regulation No 44/2001 must be interpreted as meaning that the condition that it must be 'possible', within the meaning of that provision, to commence proceedings to challenge the default judgment in respect of which enforcement is sought, requires that the judgment should have been duly served on the defendant, or whether it is sufficient that the latter should have become aware of its existence at the stage of the enforcement proceedings in the State in which enforcement is sought.

16 In that regard, it must be observed first of all that the wording of Article 34(2) of Regulation No 44/2001 does not, in itself, enable an answer to be given to the questions raised.

17 Article 34(2) sets out an express requirement for service on a defendant in default of appearance only with respect to the document which instituted the proceedings or an equivalent document and not as regards the default judgment.

18 Next, it must be observed that the wording of Article 34(2) of Regulation No 44/2001 differs significantly from the equivalent provisions of the Convention of 27 September 1968 on the jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32), 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 version — 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) ('the Brussels Convention').

19 Article 27(2) of the Brussels Convention provides that a judgment is not to be recognised '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'.

20 By contrast, Article 34(2) of Regulation No 44/2001 does not necessarily require the document which instituted the proceedings to be duly served, but does require that the rights of defence are effectively respected.

21 Finally, Article 34(2) provides an exception to ground for refusal of recognition or enforcement of a judgment, that is to say, in the case where the defendant has failed to commence proceedings to challenge the judgment when it was possible for him to do so.

22 Therefore, Article 34(2) of Regulation No 44/2001 must be interpreted in the light of the objectives and the scheme of that regulation.

23 First, as regards the objectives of that regulation, it is clear from the 2nd, 6th, 16th and 17th recitals in the preamble that it seeks to ensure the free movement of judgments from Member States in civil and commercial matters by simplifying the formalities with a view to their rapid and simple recognition and enforcement.

24 However, that objective cannot be attained by undermining in any way the right to a fair hearing (see, in particular, Case 49/84 *Debaecker and Plouvier* [1985] ECR 1779, paragraph 10, Case C-522/03 *Scania Finance France* [2005] ECR I-8639, paragraph 15, and Case C-3/05 *Verdoliva* [2006] ECR I-1579, paragraph 26).

25 The same requirement appears in the 18th recital in the preamble to Regulation No 44/2001, pursuant to which respect for the rights of defence means that the defendant should be able to appeal in an adversarial procedure, against the declaration of enforceability of a decision, if he considers one of the grounds for non-enforcement to be present.

26 According to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures (see, in particular, Opinion of the Court 2/94 [1996] ECR I-1759, paragraph 33). 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. In that regard, the European Convention for the Protection of Human

Rights and Fundamental Freedoms ('ECHR') has special significance (see, in particular, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18, and Case C-7/98 *Krombach* [2000] ECR I-1935, paragraph 25).

27 It follows from the ECHR, as interpreted by the European Court of Human Rights, that the rights of the defence, which derive from the right to a fair legal process enshrined in Article 6 of that convention, require specific protection intended to guarantee effective exercise of the defendant's rights (see Eur. Court H.R., *Artico* v *Italy* judgment of 13 May 1980, Series A No 37, § 33, and Eur. Court H.R., *T* v *Italy* judgment of 12 October 1992, Series A No 245 C, § 28).

28 As the Advocate General has pointed out, in point 105 of his Opinion, the European Court of Human Rights also held, albeit 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 (see Eur. Court H.R. judgment in *Hadjianastassiou* v *Greece* of 16 December 1992, Series A. No 252, § 29 to 37).

29 Second, in relation to the scheme established by Regulation No 44/2001 as regards recognition and enforcement, it must be observed, as the Advocate General has done in point 112 of his Opinion, that the observance of the rights of defence of a defendant in default of appearance is ensured by a double review.

30 In the original proceedings in the State in which the judgment was given, it follows from the combined application of Articles 26(2) of Regulation No 44/2001 and Article 19(1) of Regulation No 1348/2000, that the court hearing the case must stay the proceedings so long as it is not shown that the defendant has been able to receive the document which instituted the 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.

31 If, during recognition and enforcement proceedings in the State in which enforcement is sought, the defendant commences proceedings against a declaration of enforceability issued in the State in which the judgment was given, the court hearing the action may find it necessary to examine a ground for non-recognition or enforcement, such as that referred to in Article 34(2) of Regulation No 44/2001.

32 It is in light of those considerations that it must be established whether, where the default judgment has not been served, the mere fact that the person against whom enforcement of the judgment is sought was aware of its existence at the stage of enforcement is sufficient to justify the conclusion that that it was possible for him, within the meaning of Article 34(2) of Regulation No 44/2001, to commence proceedings to challenge that judgment.

33 It is common ground that, in the case in the main proceedings, the default judgment was not served on the defendant, so that the latter was unaware of its contents.

34 As the Austrian, German, Netherlands and Polish Government and the Commission of the European Communities have rightly argued in their observations submitted to the Court, the commencement of proceedings against a judgment is possible only if the person bringing those proceedings was able to familiarise himself with its contents, the mere fact that the person concerned is aware of the existence of that judgment being insufficient in that regard.

35 In order for the defendant to have the opportunity to bring proceedings enabling him to assert his rights, as provided for in the case-law set out in paragraphs 27 and 28 of this judgment, he should be able to acquaint himself with grounds of the default judgment in order to challenge them effectively.

36 It follows that only knowledge by the defendant of the contents of the default judgment guarantees, in accordance with the requirements of respect for the rights of defence and the effective exercise of those rights, that it is possible for the defendant, within the meaning of Article 34(2) of Regulation No 44/2001, to commence proceedings to challenge that judgment before the courts of the State in which the judgment was given.

37 That conclusion cannot call into question the effectiveness of the amendments made by Article 34(2) of Regulation No 44/2001 to the equivalent provisions in Article 27(2) of the Brussels Convention.

38 As the Advocate General has pointed out, in points 58 and 60 of his Opinion, Article 34(2) of Regulation No 44/2001 is intended, in particular, to prevent a defendant from waiting for the recognition and enforcement proceedings in the State in which enforcement is sought in order to claim infringement of the rights of defence, when it had been possible for him to defend his rights by bringing proceedings against the judgment concerned in the State in which the judgment was given.

39 Article 34(2) of Regulation No 44/2001 does not mean, however, that the defendant is required to take additional steps going beyond normal diligence in the defence of his rights, such as those consisting in becoming acquainted with the contents of a judgment delivered in another Member State.

40 Consequently, in order to justify the conclusion that it was possible for a defendant to commence proceedings to challenge a default judgment against him, within the meaning of Article 34(2) of Regulation No 44/2001, he must have been aware of the contents of that decision, which presupposes that it was served on him.

41 However, it must be observed, as the Austrian, German and United Kingdom Governments have done in their observations submitted to the Court, that due service of a default judgment, that is to say, compliance with all the rules applicable to those formalities, does not constitute a necessary condition in order to justify the conclusion that it was possible for the defendant to bring proceedings.

42 As the Advocate General has observed, in paragraph 65 of his Opinion, Article 34(2) of Regulation No 44/2001 leads to the establishment in that regard of a parallel between the document instituting the proceedings and the judgment delivered in default of appearance.

43 It is service of the document instituting proceedings and the default judgment, as provided for in Article 34(2), in sufficient time and in such a way as to enable the defendant to arrange for his defence which afford him the opportunity to ensure that his rights are respected before the courts of the State in which the judgment was given.

44 Therefore, the broad logic of Regulation No 44/2001 does not require service of a default judgment to be subject to conditions more stringent than those provided for in Article 34(2) as regards service of the document instituting proceedings.

45 As far as concerns the document instituting proceedings or an equivalent document, Article 34(2) of Regulation No 44/2001 removes the necessary condition for due service laid down in Article 27(2) of the Brussels Convention, as has been stated in paragraph 20 of this judgment.

46 The exception to the ground justifying non-recognition and enforcement laid down in that provision is not, therefore, necessarily due service in all respects, but the defendant must, at least, be acquainted with the contents of the judgment in sufficient time to arrange for his defence.

47 Therefore, as the Advocate General has observed, in point 69 of his Opinion, the formal requirements which service must satisfy must be comparable to those provided for by the Community legislature in Article 34(2) of Regulation No 44/2001 as regards documents instituting proceedings, so that a mere formal irregularity, which does not adversely affect the rights of defence, is not sufficient to prevent the application of the exception to the ground justifying non-recognition and non-enforcement.

48 Consequently, in order to justify the conclusion that 'it was possible', within the meaning of Article 34(3) of Regulation No 44/2001 for the defendant to bring proceedings to challenge a default judgment against him, he must have been aware of its contents so that he could, in sufficient time, have exercised his rights effectively before the courts of the State in which the judgment was given.

49 In the light of all the foregoing considerations, the answer to the questions referred must be that Article 34(2) of Regulation No 44/2001 is to be interpreted as meaning that it is 'possible' for a defendant to bring proceedings to challenge a default judgment against him only if he was in fact acquainted with its contents, because it was served on him in sufficient time to enable him to arrange for his defence before the courts of the State in which the judgment was given.

Costs

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

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

Article 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 is to be interpreted as meaning that it is 'possible' for a defendant to bring proceedings to challenge a default judgment against him only if he was in fact acquainted with its contents, because it was served on him in sufficient time to enable him to arrange for his defence before the courts of the State in which the judgment was given.

[Signatures]