EUROPEAN BUSINESS LAW

NOVEMBER 2018 UPDATE
PART 1
ABOLITION OF RESTRICTIONS ON FREE MOVEMENT

TITLE 1
FREE MOVEMENT OF GOODS

Chapter 7
Reimbursement of improperly levied charges

7.02. Extent of reimbursement
The right to reimbursement covers all the sums paid from the implementation of the national measure unlawfully applied. The debtor Member State may however rely on the principle of legal certainty in order to limit its obligation to repay the sums paid from the judgment deciding that the measure is unlawful. Interest granted on repayment of a tax cannot however be limited to that accruing from the day following the date of the claim for repayment of that tax.

According to the theory of unjust enrichment, the Member State may also be exempted from its obligation to repay where the cost of the tax has been passed on to another operator, whether the end consumer or an operator located downstream. Passing on the amount of taxes to the end consumer through the selling price thus limits the right to repayment of the trader who would otherwise receive the repayment of a tax eventually borne by its own customers. However, the passing on of a tax in whole to the consumer, as a result of the tax being incorporated in the price of goods, does not

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1 See for an example regarding dock dues: Case C-163/90 Administration des douanes et droits indirects v Legros and others [1992] ECR I-4625, LawLex09643.
2 Case C-565/11 Mariana Irimie, LawLex131555.
3 See Case 68/79 Just [1980] ECR 501, LawLex092032 (on discriminatory internal taxation); Case 199/82 Amministrazione delle finanze dello Stato v San Giorgio [1983] ECR 3595, LawLex091643 (on taxes having an effect equivalent to customs duties); See, also, Case C-147/01 Weber's Wine World and others [2003] ECR I-11365, LawLex09576: which indicates that the State remains bound to repay the amount not passed on where the tax has been passed on only in part.
necessarily neutralize the economic effects of taxation on the taxpayer who may suffer damage as a result of a price increase and correlative fall in the volume of his sales\(^4\). National legislation which opposes the repayment of a tax on the sole ground that such tax has been integrated in the selling retail price charged and therefore passed on to third parties, is therefore incompatible with European law\(^5\).

Additionally, the possible infringement of the obligation, stemming from national legislation, to pass on the charge onto the final price of the product concerned, which has its basis in EU law, is irrelevant and cannot therefore be refused for a reason based on national law: the taxpayer, who in fact pays the charge having an equivalent effect, must be able to obtain reimbursement of the sums which it has paid by way of that charge, even in a situation where the payment mechanism for the charge has been designed in national legislation so that the charge is passed on to the consumer\(^6\).

Evidence that the tax unduly received was not passed on to other operators cannot be placed on the person who claims his right to repayment. National legislation which makes the action for repayment subject to the proof that the tax was not passed on is contrary to the principle of effectiveness\(^7\). Lastly, the fact that there is a legal obligation for the taxpayer to incorporate the charge in the cost price does not mean that the entire charge has been passed on, even where failure to comply with that obligation carries a penalty. The question whether a tax has or has not been passed on, in part or in whole, is a question of fact which falls within the jurisdiction of the national court which may freely assess the evidence\(^8\).

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\(^6\) Case C-76/17 SC Petrotel-Lukoil SA, Judgment of 1 March 2018, LawLex18352.
\(^8\) Case C-192/95 Comateb and others v Directeur général des douanes et droits indirects [1997] ECR I-165, LawLex11436.
TITLE 2
FREE MOVEMENT OF PERSONS AND SERVICES

Chapter 9
Scope of application

**Section 1 Persons**

II. Legal persons

9.08. Registered office within the Union

Under Article 54 TFEU, companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the EU are treated in the same way as natural persons who are nationals of Member States. Since it is the registered office of companies that serves as the connecting factor with the legal system of a particular State - like nationality in the case of natural persons - a Member State in which a company establishes itself cannot apply different treatment to that company solely by reason of the fact that its registered office is situated in another Member State. Thus, a host Member State cannot refuse to recognize the legal status of a company formed in accordance with the law of another Member State in which it has its registered office on the ground that the company moved its actual registered office to its territory, unless it is reincorporated under the law of the host Member State, or make the recognition of the civil or legal personality of an association subject to the presence of a member holding the

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9 Since the registered office was not adopted by the first signatories of the Rome Treaty, the Council set out in its general programme an additional condition - effective economic link with the Member State concerned - for enjoying the right of setting up a secondary establishment. The courts now considers that the connecting factor between a company and a State results solely from the compliance with the law of incorporation, see Case C-208/00 Überseering [2002] ECR I-9919, LawLex091113.

10 Paragraph 2 indicates that 'companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit making.


12 With the result that the company cannot, in the host Member State, bring legal proceedings to defend its rights, Case C-208/00 Überseering [2002] ECR I-9919, LawLex091113.
nationality of that State in the administration of that structure or a minimum and majority presence of members of that nationality.\textsuperscript{13}

Unlike natural persons who may have a personal residence distinct from their establishment, legal persons only have a professional residence: their registered office. Therefore, a company which transfers its central management and control to another Member State cannot claim that it retains the form of establishment of the State of origin.\textsuperscript{14} In effect, companies are created pursuant to a national legal system. They exist only through the various national laws which determine the incorporation and operation. In the absence of perfect harmonization of national legislation on corporate law, in particular concerning the connecting factor to the national territory, the possibility for a company to transfer its registered office or its actual head office to a Member State other than that of incorporation without losing its legal personality under the law of that State and, in certain circumstances, the rules relating to that transfer are determined by the national legislation of the Member State of incorporation, who may impose restrictions to the transfer outside its territory of the actual head office in order for it to retain its legal personality.\textsuperscript{15} In the absence of a uniform European definition of companies able to benefit from the right of establishment according to a unique connecting factor which determines the national law applicable to a company, a Member State has the power to define the connecting factor required of a company if it is to be regarded as incorporated under the national law of that Member State and the possibility not to permit a company governed by its national law to retain that status if the company intends to reorganize itself in another Member State by moving its seat to the territory of the latter.\textsuperscript{17} A Member State cannot however either adopt or maintain a regulation which provides for the taxing of added values not realized at the transfer of a company or at the transfer of the registered or actual head office of a company to another Member State without contravening its obligations under Article 49 TFEU.\textsuperscript{18} Likewise, Articles 49 and 54 TFEU preclude legislation of a Member State which provides that the transfer of the registered office of a company incorporated under the law of one Member State to the territory of another Member State, for the purposes of its conversion into a company incorporated under the law of the latter

\textsuperscript{13} Case C-172/98 Commission v Belgium [1999] ECR I-3999, LawLex071800.


\textsuperscript{15} Case C-208/06 Übereinaining [2002] ECR I-9919, LawLex091113.


\textsuperscript{17} Case C-210/06 Cartesio [2008] ECR I-9641, LawLex091115.

\textsuperscript{18} Case C-301/11 Commission v Netherlands [2013], not available in English.
Member State, in accordance with the conditions imposed by the legislation of that Member State, is subject to the liquidation of the first company.  

The freedom of establishment does not concern only the registered office of an undertaking; it is applicable to the transfer of activities of a company from the territory of a Member State to another Member State, irrespective of whether the company in question transfers its registered office and its effective management outside that territory or whether it transfers assets at the time of that transfer.

On the other hand, the provisions on the freedom of establishment cannot be relied on by a company established in a non-Member State.

Section 3 Purely internal situations

9.12. Concept

The principle of citizenship of the Union which according to Article 21 TFEU includes the right for every citizen of the Union to move and reside freely within the territory of the Member States, is not designed to extend the material scope of application of the Treaty to purely internal situations quite unconnected to European law.

Article 49 provides for the elimination of restrictions to the freedom of establishment only in favor of European nationals who wish to establish themselves 'in another Member State'. Article 56 prohibits restrictions on freedom to provide services "within the Union [...] in respect of nationals who are established in a Member State other than that of the person for whom the services are rendered".

Literal interpretation means that those texts do not apply to activities where all the elements are situated within only one Member State, i.e. purely internal situations. Thus, the provision of services

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23 Case 52/79 Procureur du Roi v Debaue [1980] ECR 833, LawLex092034; See, also, Case C-54/88 Criminal proceedings against Nino, Prandini and others [1990] ECR I-3537, LawLex09518, on a purely internal situation where all the accused are Italian nationals, residing in Italy and qualified as professionals in Italy and who have been charged on the basis of provisions of the Italian Criminal Code as a result of treatment administered within the Italian territory; Case C-108/98 R.I.S.A.N. [1999] ECR I-5219, LawLex071788, which indicates that Article 51 TFEU, as an exemption to the provisions of the Treaty on the freedom of establishment, does not apply in a situation in which all the facts are confined to within a single Member State; Case C-134/94 Esso Española v Comunidad Autónoma de Canarias [1995] ECR I-4223, LawLex09530, for a purely internal situation relating to the extension within the territory of a Member State of the activities of a company having its head office in that State and pursuing its activities there; Case 204/87 Criminal proceedings against Bekael [1988] ECR 2029, LawLex091655, on a national of a Member State who has never resided or worked in any other Member State; Case C-152/94 Openbaar
by operators established in Gibraltar to persons established in the United Kingdom constitutes, under EU law, a situation confined in all respects within a single Member State24.
Chapter 11
Exceptions to the prohibition

Section 2 Rule of reason

11.04. Indistinctly applicable measures

The principle laid down by the Cassis de Dijon judgment - according to which a non-discriminatory national measure avoids the prohibition where it meets mandatory requirements - has been extended by the European courts to the free movement of persons and services. Restrictions to the freedom of establishment and the freedom to provide services that the States impose irrespective of nationality are therefore not necessarily contrary to the Treaty and must be assessed in the light of a rule of reason. To be accepted, "national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by overriding reasons in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it".

Given that the justifications are put forward as part of a rule of reason, they must satisfy the conditions of causal link, necessity and proportionality inherent to that rule. Only 'reasonable' derogations are tolerated.

The measure must be objectively necessary. It must take into account the obligations to which the national is already subject in the Member State where he is established and not duplicate controls which have already been carried out in the same State or in another Member State. A real need must be demonstrated. The fact that a Member State has chosen a protection system which is different

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from that adopted by another Member State has no impact on the assessment of the necessary and proportionate character of the provisions concerned, which must only be examined in view of the objectives pursued by the national authorities of the Member State in question and the level of protection they intend to ensure. National legislation which lays down, as an essential criterion for determining whether a need for the establishment of a new pharmacy exists, a rigid limit on the "people remaining to be served", where the competent authorities cannot depart from that limit to take account of particular local geographical conditions violates Article 49 TFEU.

Only national measures appropriate for securing the attainment of the objective which they pursue may be justified. A causal link between the restrictive measure and the alleged overriding reason must therefore exist. This is the case for national legislation which:

- is intended to protect the recipients of legal services against the harm which they could suffer as a result of legal advice given to them by persons without the necessary professional and personal qualifications;

- makes the issue of licences for new pharmacies in the same geographical area subject to the number of pharmacies per inhabitant to ensure that the population as a whole has adequate access to pharmaceutical services and to improve the reliability and the quality of the provision of medicinal products;

- imposes payment of a charge for vessel traffic service only to vessels who benefit from that service in order to maintain public security in the coastal waters as well as in ports; and

- fixes a minimum level of fees for lawyers in order to ensure a high qualitative standard of professional services, given the very large number of lawyers who are enrolled and practising, where price competition could deteriorate the quality of the services provided.

31 Case C-367/12 Sokoll-Seebacher, Judgment of 13 February 2014, LawLex14256.
33 Case C-353/89 Commission v Netherlands [1991] ECR I-4069, LawLex09459, which underlines that to safeguard the freedom of expression of the various (in particular social, cultural, religious or philosophical) components, it is not necessary to require broadcasting bodies to have all or some of their programmes produced by a national undertaking; Case C-79/01 Payroll and others [2002] ECR I-8923, LawLex091177, which rejects the existence of a causal link between the protection of workers and a law which reserves the outside data-processing of pay slips for undertakings with less than 250 employees to data-processing centres exclusively staffed by persons registered in the associations of certain professions, where those administrative tasks do not require any specific qualification. 
35 Cases C-570/07 and C-571/07 Blanco Pérez [2010] ECR I-4629, LawLex11287, provided that this quota does not prevent the establishment of a sufficient number of pharmacies to ensure adequate pharmaceutical services in any geographical area which has special demographic features.
Lastly, even when objectively necessary, the measure must not be disproportionate in relation to the objective pursued. The proportionality criterion involves checking that the public interest could not have been protected by measures that are less restrictive of the freedom of establishment or the freedom to provide services. A national rule may thus prohibit an undertaking established in another Member State from engaging in a judicial recovery of debts owed to other persons because such an activity carried out professionally, is reserved for lawyers, even if less strict measures are adopted by other Member States. The legislation of a Member State which, for all lawyers providing services on its territory, applies maximum tariffs to their fees is lawful insofar as, by making it possible to go beyond them in numerous situations, it is characterized by a flexibility which gives lawyers of other Member States the opportunity of gaining access to the national market under conditions of normal and effective competition. An operator can be required to have both a license and a police authorization in order to access the betting and gaming market insofar as this requirement is not in itself disproportionate in the light of the objective pursued, which is to combat criminality linked to that sector or the controlled expansion of games of chance. A Member State having a federal structure may, by legislation common to the majority of the federal entities, in principle prohibit the organization and facilitation of games of chance via the internet, even if, for a limited period, a single federal entity has maintained in force more liberal legislation. By contrast, checking the background of a person or an undertaking may be made by a less restrictive measure than the obligation of residence. Likewise, the prohibition for credit institutions to remunerate sight accounts is disproportionate in relation to the objective of protection of consumers against an increase in the cost of basic banking services or a charge for cheques. The fight against criminality also does not justify reserving games of chance to operators having their head office on the national territory. In a review of proportionality of restrictive legislation, the approach taken by the national court must be dynamic.

40 Case C-660/11 Biasci, Judgment of 12 September 2013, LawLex131284.
41 Case C-3/17 Sporting Odds Ltd, Judgment of 28 February 2018, LawLex18343.
45 Case C-64/08 Engelmann [2010], ECR I-8219, LawLex11291; Case C-186/11 Stanleybet International Ltd and others, Judgment of 24 January 2013, LawLex13247.
rather than static in the sense that it must take account of the way in which circumstances have developed following the adoption of the legislation concerned\textsuperscript{46}.

\textsuperscript{46} Case C-685/15 Online Games Handels GmbH, Judgment of 14 June 2016, LawLex171047.
Chapter 12
Liberalization directives

Section 1 Services Directive

12.03. Scope of application

The Services Directive applies to a wide range of services but there are some exceptions (Art. 2)\(^{47}\). The handbook on the implementation of the directive, published by the Commission in 2007, states that the directive applies to all services which are not explicitly excluded from it\(^{48}\).

The concepts of "establishment", "service", "provider" or "recipient" are defined in Article 4. The concept of 'services' is defined as at the very least "any self-employed economic activity, normally provided for remuneration", as referred to in Article 57 TFEU\(^{49}\). The directive does not cover non-economic services of general interest\(^{50}\), or areas governed by a European provision relating to the aspects of access to an activity of services or its performance in areas or for specific professions (Art. 2)\(^{51}\).

Requirements relating to access or provision of a service activity or its completion on the territory of the Member State are subject to the same legal regime and establishment is clearly distinguished from the provision of cross-border services\(^{52}\). In line with the case law of the Court of Justice, the Services Directive defines establishment as "the actual pursuit of an economic activity, as referred to in Article 43 [49 TFEU] of the Treaty by the provider for an indefinite period and through a stable infrastructure from where the business of providing services is actually carried out"\(^{53}\), "provider" as any natural person who is a national of a Member State or any legal person as referred to in Article 54 of the Treaty and established in a Member State, who offers or provides a service and "recipient" as any natural person who is a national of a Member State or who benefits from rights conferred upon him by

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\(^{47}\) Financial services, transport, temporary work, healthcare services, audiovisual, gambling, social services are excluded.

\(^{48}\) Pt 21.1.

\(^{49}\) Directive No 2006/123, Art. 4(1).

\(^{50}\) The handbook on the implementation underlines that these are services which are not provided for economic consideration and must not be mixed up with services of general economic interest which are provided for a consideration and thus, in principle, fall within the scope of application of the directive.

\(^{51}\) The directive does not apply to the areas governed by specific EU provisions: financial services, transport, audiovisual services.

\(^{52}\) Handbook on implementation of the Services Directive, pt 7.1.1.

EU acts, or any legal person as referred to in Article 54 of the Treaty and established in a Member State, who, for professional or non-professional purposes, uses, or wishes to use, a service. The service activities may involve services requiring the proximity of provider and recipient, services requiring travel by the recipient or the provider and services which may be provided at a distance, including via the Internet. The Services Directive only applies to "services supplied by providers established in a Member State" (Art. 2). The EU court interprets the notion of provision of service broadly. National legislation which makes the storage of pyrotechnic articles intended for the retail trade subject to dual authorization therefore falls within the scope of the directive even though it does not relate to access to the activity of retail trade in those articles, insofar as the storage of pyrotechnic articles to be sold constitutes, for the "operators", a prerequisite to that activity of retail trade, which itself constitutes a service.

In response to a question regarding the scope of application of the directive, the Court of Justice clarified the extent of the exclusions set out in Article 2. Social services thus cover any activity intended to assess, maintain or restore the state of health of patients, where that activity is carried out by healthcare professionals recognized as such by the Member State concerned and any activity relating to the care and assistance of elderly persons, where that activity is carried out by a private service provider which has been mandated by the State by means of an act conferring, in a clear and transparent manner, a genuine obligation to provide such services under specific conditions. According to the Court of Justice, the concept of services in the field of transport covers roadworthiness tests for motor vehicles which are ancillary to the transport service and take place as a pre-condition, indispensable to the exercise of the main activity of transport. On the other hand, an activity which consists in providing, for payment, a service of carrying passengers on a boat for a waterway tour of a city for event-related purposes is excluded from the scope of the Services Directive, insofar as it is intended to provide the recipients of that service with the pleasant context of a celebration rather than point-to-point transport in the city in question. This is also the case for an intermediation service.

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54 Directive No 2006/123 of 12 December 2006, Article 4(2) and (3).
56 Case C-137/17 Van Gennip BVBA, Judgment of 26 September 2018, LawLex181407.
57 Case C-57/12 Fédération des maisons de repos privées de Belgique, Judgment of 11 July 2013, LawLex131135.
59 Cases C-340/14 and C-341/14 Trijber, J. Harmsen v Burgemeester van Amsterdam, College van burgemeester en wethouders van Amsterdam, Judgment of 1 October 2015, LawLex151178.
the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys.\(^{60}\)

The directive entered into force on 28 December 2006 and had to be transposed by 28 December 2009\(^{61}\), with the Member States having to remove discriminations prohibited per se and send a report to the Commission - and to the other Member States - concerning the requirements subject to evaluation they wish to safeguard. Through this cooperation mechanism, the Commission should be able to propose additional harmonization provisions.

**Section 2 Sectoral directives**

**I. Financial services**

**A Banking**

**12.17. Prudential supervision**

According to Article 49 of Directive No 2013/36, the prudential supervision of a credit institution is the responsibility of the competent authorities of the home Member State both in respect of activities carried out on its own territory and those carried out on the territory of another Member State under freedom of establishment or freedom to provide services. Nevertheless, pending further coordination, Member States retain responsibility, in cooperation with the competent authorities of the home Member State, for the supervision of the liquidity of the branches of credit institutions (Art. 50). Where the supervision relates to the activities of credit institutions operating, in particular through a branch, in Member States other than that in which their head offices are situated, the competent authorities of the Member States concerned collaborate closely and supply one another with all information concerning the management and ownership of those institutions that is likely to facilitate their supervision and the examination of the conditions for their authorization, and all information likely to facilitate the monitoring of such institutions, in particular with regard to liquidity, solvency, deposit guarantees, the limiting of large exposures, administrative and accounting procedures and internal control mechanisms. The competent authorities and their staff are bound by the obligation of

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\(^{60}\) Case C-434/15 Asociación Profesional Elite Taxi, Judgment of 20 December 2017, LawLex1832.

\(^{61}\) On 1 December 2010, 15 out of 27 States had transposed the directive: Germany, Austria, Belgium, Bulgaria, Cyprus, Denmark, Spain, Ireland, Italy, the Netherlands, Poland, Romania, Sweden, the Czech Republic, United Kingdom. To facilitate transposition, the Commission used the comitology procedure to adopt certain implementation measures. On 16 October 2009 it took a decision aimed at facilitating the cross-border use by undertakings of points of single contact, which obliges Member States to establish, update and publish "trusted lists" containing essential information on providers of certification services issuing Qualified Certificates to the public. On 2 October 2009, it issued a decision on the internal market information system (IMI) to be used for the purposes of cooperation between the Member States.
professional secrecy (Art. 53 et seq.). However, Article 53(1) of Directive No 2013/36 does not preclude the competent authorities of the Member States from disclosing confidential information to a person who so requests in order to be able to institute civil or commercial proceedings with a view to protecting proprietary interests which were prejudiced as a result of the compulsory liquidation of a credit institution, bearing in mind that it is for the competent authorities and courts to weigh up the interest of the applicant in having the information in question and the interests connected with maintaining the confidentiality of the information covered by the obligation of professional secrecy, before disclosing each piece of confidential information requested.\(^{62}\)

The credit institution must have sufficient own funds to cover the risks related to the activity of banking. The object of prudential supervision is to ensure that that requirement is met. The amount of own funds, the constituent elements of which are defined in Article 92 of Regulation No 575/2013, is calculated on an individual basis or where appropriate, consolidated. Taking its inspiration from the ratio devised by the Basel Committee\(^{63}\), recital 40 of the regulation sets out the minimum own fund requirements balancing the assets and off balance sheet elements depending on the degree of risk incurred.\(^{64}\) Thus, for credit risk, the credit institution's own risk must be permanently equal to or more than 8% of the total of their risk-weighted asset or off balance sheet items. A credit institution's exposure to a client or group of connected clients is considered a large exposure to risk where its value is equal to or exceeds 10% of its own funds (Regulation No 575/2013, Art. 392) and must be notified to the competent authorities (Art. 394). A credit institution may not incur an exposure to a client or group of connected clients the value of which exceed 25% of its own funds and in no circumstance may it incur large exposures which in total exceed 100% of its own funds (Art. 395). Apart from the prudential supervision of the competent authorities of the home Member State, the credit institutions must themselves have in place sound, effective and complete strategies and processes to assess and maintain on an ongoing basis the amounts, types and distribution of internal capital that they consider adequate to cover the nature and level of the risks to which they are or might be exposed (Directive No 2013/36, Art. 73). Where the competent authorities find that a credit institution does not meet the requirements of the directive, they can, by virtue of Article 104 of the directive, not only require the

\(^{62}\) Case C-594/16  Enzo Buccioni, Judgment of 13 September 2018, LawLex181289.

\(^{63}\) Committee for regulation and best practice in banking and supervision of transaction founded in 1974 by the central bank Governors of the G10 nations. It is a permanent forum for international cooperation in the field of banking supervision, whose work has led, inter alia, to the establishment at EU level of a solvency ratio and the setting up of a mechanism to combat money laundering.

\(^{64}\) The risks incurred in the context of banking activities are credit risk, position risk, settlement and counter-party risk, large exposures, foreign exchange risk, commodities risk and operational risk.
institutions to take the necessary actions or steps to address the situation, but also oblige them to hold own funds in excess of the minimum level laid down in Article 128 et seq. and in Regulation No 575/2013; require the reinforcement of the arrangements, processes, mechanisms and strategies implemented to comply with Articles 73 and 74; require credit institutions to apply a specific provisioning policy or treatment of assets in terms of own funds requirements; restrict or limit the business, operations or network of credit institutions; and require the reduction of the risk inherent in the activities, products and systems of credit institutions.

B. Investment services

12.20. Scope of application and definitions

Directive No 2014/65 applies to investment firms and regulated markets and credit institutions when providing one or more investment services and/or performing investment activities (Art. 1). An investment firm is any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis (Art. 4(1)(1)). Natural persons may also be considered as an investment firm if their legal status ensures a level of protection for third parties' interests equivalent to that afforded by legal persons and they are subject to equivalent prudential supervision appropriate to their legal form (Art. 4(1)(1)(a) and (b)). Reception and transmission of orders in relation to one or more financial instruments, execution of orders on behalf of clients, dealing on own account, portfolio management, investment advice\textsuperscript{65}, underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis, placing of financial instruments without a firm commitment basis and the operation of a Multilateral Trading Facility (MTF) or an organized trading facility (OTF) are considered as investment services and activities\textsuperscript{66}. On the other hand, the conversion of amounts expressed in a foreign currency into the domestic currency by a credit institution for the purpose of calculating the amount of a loan and repayment instalments cannot be classified as an investment service in the absence of trading resulting in the conclusion of transactions in one or more financial instruments\textsuperscript{67}. The same applies for brokering with a view to concluding a contract covering portfolio

\textsuperscript{65} Case C-604/11 Genil 48 SL, Judgment of 30 May 2013, LawLex13877, which classifies as investment advice the offering of a swap agreement to a client in order to cover the risk of variation of interest rates on a financial product for which that client has subscribed, provided that the recommendation to subscribe to such a swap agreement is made to that client in his capacity as an investor, it is presented as suitable for that person or based on a consideration of the circumstances of that person and it is not made solely through distribution channels or intended for the general public.

\textsuperscript{66} See section A of Annex I of Directive No 2014/65, which refers to Art. 4(1)(2).

\textsuperscript{67} Case C-312/14 Banif Plus Bank Zrt., Judgment of 3 December 2015, LawLex151636.
management services. Article 2 lists those persons or undertakings not falling within the scope of application of the directive which include, inter alia, insurance undertakings, persons which provide investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings, persons providing an investment service where that service is provided in an incidental manner and persons who do not provide any investment services or activities other than dealing on own account.

The directive regulates three methods of negotiation. Governed by the provisions of Title III, the regulated market is defined as a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments - in the system and in accordance with its non-discretionary rules - in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorized (Art. 4(1)(21)). A trading system in which multiple fund agents and brokers represent, respectively, "open end" investment funds and investors, the sole purpose of which is to facilitate those investment funds in their obligation to execute the purchase and selling orders for shares placed by those investors, constitutes a regulated market within the meaning of the directive on markets in financial instruments. A multilateral trading facility (MTF) is a multilateral system and can be operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments - within the system and in accordance with non-discretionary rules - in a way that results in a contract according to the rules set out in Title II of the directive (Art. 4(1)(22)).

An OTF (Organized trading facility) is a multilateral system which is not a regulated market or an MTF and in which multiple third-party buying and selling interests in bonds, structured finance products, emission allowances or derivatives are able to interact in the system in a way that results in a contract (Article 4(1)(23)). The directive also refers to a form of bilateral trading, systematic internalizers which are investment firms which, on an organized, frequent and systematic basis, deal on own account by executing client orders outside a regulated market or an MTF or an OTF without operating a multilateral system (Art. 4(1)(20)). The enshrining of this mode of negotiation has put an end to the French order concentration rule on regulated markets.

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68 Case C-678/15 Khorassani v Planz, Judgment of 14 June, LawLex171045.
69 Case C-658/15 Robeco Hollands Bezit NV e.a., Judgment of 16 November 2017, LawLex171864.
III. Lawyers

12.46. Freedom to provide services

Directive No 77/249 of 22 March 1977 which is limited to activities of the provision of services restricts itself to laying down the principle of mutual recognition of lawyers as defined in the various Member States. A person entitled to pursue his professional activities as a "lawyer" in one Member State may thus exercise that activity in another Member State (Art. 2), adopting the professional title used in the Member State from which he comes with an indication of the professional organization by which he is authorized to practice or the court of law before which he is entitled to practice (Art. 3).

The directive's aim is specifically to facilitate the exercise of the profession of lawyer with regard to the rules of professional conduct by subjecting the activities of the lawyer to different regimes depending on whether they are of a judicial or extrajudicial nature.

Judicial activities (representation of clients in legal proceedings) must be exercised in each host Member State under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional organization, in that State (Art. 4(1)). Thus, the refusal, on the part of the competent authorities of a Member State, to issue a router for access to the private virtual network for lawyers to a lawyer duly registered at a Bar of another Member State, for the sole reason that that lawyer is not registered at a Bar of the Member State in which he wishes to practise his profession as a free provider of services, in situations where the obligation to work in conjunction with another lawyer is not imposed by law, constitutes a restriction on the freedom to provide services. Required to submit to a dual set of rules, a lawyer pursuing these activities must observe the rules of professional conduct of the host Member State, without prejudice to his obligations in the Member State from which he comes (Art. 4(2)). Thus, a lawyer bound to observe the rules of professional conduct in force in the host Member State under Articles 4 and 7 of Directive No 77/249 of 22 March 1977 may not rely on the provisions of this Directive where he has been barred from access to the legal profession by the latter Member State for reasons relating to dignity, good repute and integrity. The host Member State may require lawyers to be introduced, in accordance with local rules or customs, to the presiding judge and, where appropriate, to the President.

70 For an example of its application, see Case 292/86 Gullung [1988] ECR 111, LawLex091823, confirming that a person who is a national of two Member States and who is admitted to the legal profession in one of those states may rely on the provisions of Directive No 77/249 to facilitate the effective exercise by lawyers of freedom to provide services in the territory of the other Member State.

71 Case C-99/16 Lahorgue, Judgment of 18 May 2018, LawLex181470.

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of the relevant Bar in that State and to work in conjunction with a lawyer who practices before the judicial authority in question and who would, where necessary, be answerable to that authority, or with an "avoué" or "procuratore" practising before it (Art. 5). A national law may however require the lawyer providing the service to be accompanied by a resident lawyer for judicial actions for which mandatory assistance by a lawyer is not required\(^{73}\). Likewise, where recourse to a lawyer established in the place of the court before which the proceedings have been brought is required, a national law which excludes the costs associated with the appointment of a European lawyer from the amount to be paid by an unsuccessful party to a dispute, obstructs the freedom to provide services. Parties to legal proceedings would in effect be strongly discouraged from having recourse to lawyers established in other Member States if they had to bear their costs regardless of the outcome of the dispute\(^{74}\). Lastly, a Member State may only exclude lawyers who are in the salaried employment of a public or private undertaking from pursuing activities relating to the representation of that undertaking in legal proceedings if lawyers established in that State are not permitted to pursue those activities (Art. 6).

For the pursuit of activities not relating to the representation of a client in legal proceedings or before public authorities, the lawyer is subject to the conditions and rules of professional conduct of the home Member State and must also observe the rules governing the profession in the host Member State\(^{75}\), where they are capable of being observed by a lawyer who is not established in the host Member State and to the extent to which their observance is objectively justified to ensure, in that State, the proper exercise of a lawyer’s activities, the standing of the profession and respect for the rules concerning incompatibility (Art. 4(4)).

Finally, in conformity with Article 51 TFEU, which excludes from the scope of application of the right to establishment and by referral from Article 62, the freedom to provide services, "activities which in that State are connected, even occasionally, with the exercise of official authority"\(^{76}\), the

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\(^{73}\) Case 427/85 Commission v Federal Republic of Germany [1988] ECR 1123, LawLex11627, holding that a national law that requires, without any possible exception, that the lawyer providing services is to be accompanied by a national lawyer if he visits a person held in custody and is not to correspond with that person except through the said lawyer is also in violation of Directive No 77/249. See also Case C-294/89 Commission v France [1991] ECR I-3591, LawLex11473, holding that the rule of territorial exclusivity which reserves the right to plead to lawyers before a court within whose area of jurisdiction they are established, cannot be applied to activities of a temporary nature pursued by lawyers established in other Member States, since the conditions of law and fact which apply to those lawyers are not in that respect comparable to those applicable to lawyers established on the host territory.

\(^{74}\) Case C-289/02 AMOK Verlags v A &amp; R Gastronomie [2003] ECR I-15059, LawLex091411.

\(^{75}\) Especially those concerning the incompatibility between exercising the activity of lawyer and that of other activities in that State, professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and publicity.

\(^{76}\) See esp. Case 2/74 Reyners v Belgian State [1974] ECR 631, LawLex091650, holding that the most typical activities of the profession of lawyer such as consultation and legal assistance and also representation and the defense of parties in court cannot be considered as connected with the exercise of official authority.
directive allows Member States to "reserve to prescribed categories of lawyers the preparation of formal documents for obtaining title to administer estates of deceased persons, and the drafting of formal documents creating or transferring interests in land" (Art. 1(1)).

77 This provision would appear to take into account the aptitude recognized for solicitors in the UK and Ireland to prepare formal documents and therefore gives the possibility to the other Member States not to allow them to prepare for such documents on their territory.
II. Limits of procedural autonomy

B. Duties of national courts

16.12_01. Right or obligation to refer questions to the Court of Justice

The fact that a national court which, in a case concerning EU law, considers that a provision of national law is not only contrary to EU law, but also unconstitutional, does not make it lose the right or escape the obligation to refer questions to the Court of Justice on the interpretation or validity of EU law by reason of the fact that the declaration that a rule of national law is unconstitutional is subject to a mandatory reference to the constitutional court. The functioning of the system of cooperation between the Court of Justice and the national courts established by Article 267 TFEU requires, as does the principle of precedence of EU law, the national court to be free to refer to the Court for a preliminary ruling any question that it considers necessary, at whatever stage of the proceedings it considers appropriate, even at the end of an interlocutory procedure for the review of
constitutionality \(^78\). When there is no judicial remedy under national law against the decision of a court or tribunal of a Member State, that court or tribunal is obliged to bring the matter before the Court of Justice for a preliminary ruling where a question relating to the interpretation of EU law is raised before it \(^79\). Thus, even if in the course of the same national proceedings, the constitutional court of the Member State concerned has assessed the constitutionality of national rules in the light of regulatory parameters with content similar to rules under EU law, a national court against whose decisions there is no judicial remedy is required, in principle, to refer a question for a preliminary ruling concerning the interpretation of EU law \(^80\).

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79 Case C-160/14 João Filipe Ferreira da Silva e Brito e.a., Judgment of 9 September, LawLex18465.
80 Case C-322/15 Global Starnet Ltd, Judgment of 20 December 2017, LawLex1833.
Section 1 Legal publication

19.02. Purpose, terms and sanctions

The first directive of the "company package" established, with respect to any capital company, several measures for the disclosure to third parties of the basic documents of the company and certain information concerning it and restricted to the greatest possible extent the grounds on which obligations entered into in the name of the company are not valid, as well as the cases in which nullity can arise. Due to successive amendments, this directive has been codified and repealed by Directive No 2009/101 which was then also repealed and codified by Directive No 2017/1132 of 14 June 2017 relating to certain aspects of company law. Article 14 of the directive draws up a non-exhaustive list of documents and particulars which are subject to compulsory disclosure. The following documents and particulars are mentioned: instrument of constitution, statutes if contained in a separate instrument, capital subscribed, balance sheet and profit and loss statement for each financial year, change of the registered office, any declaration of nullity of the company by the courts, any instrument and decision regarding duration, winding-up and liquidation of the company. Compulsory disclosure

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81 Directive No 68/151/EEC of 9 March 1968 on co-ordination of safeguards for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, OJ L 65 of 14.03.1968, 8.
82 Directive No 2009/101/EC of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent, OJ L 258 of 01.10.2009, 11.
83 OJ L 169 of 30 June 2017.
84 The directive specifies that compulsory disclosure relating to companies must "at least" relates to the listed documents and particulars.
also extends to the appointment, termination of office and particulars of the persons who either as a body constituted pursuant to law or as members of any such body are authorized to represent the company in dealings with third parties and in legal proceedings. The same system has been established for persons taking part in the administration, supervision or control of the company. Disclosure measures must indicate whether the persons who are authorized to represent the company may do so alone or must act jointly. Subject to a number of exceptions, Article 47 of the Fourth Directive\(^85\) extends the disclosure duty laid down by the First Directive to duly approved annual accounts and the annual report. Article 38 of the Seventh Directive\(^86\) applies the same rule to consolidated accounts, duly approved, and the consolidated annual report. Those provisions have been incorporated in Articles 30 to 31 of Directive No 2013/34 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings\(^87\), which repeals the Fourth and Seventh Directives. Lastly, Article 2 of the Eleventh Directive\(^88\) required disclosure of a number of particulars relating to branches, under conditions referred to in Article 3 of the First Directive. This publication requirement is now included in Article 136 of Directive No 2017/1132, which repeals and replaces the Eleventh Directive. Due to the exhaustive harmonization carried out by that directive, a Member State cannot sanction the non-publication of information not provided for by it\(^89\). Assuming that the obligations to disclosure might to a certain extent undermine the protection of business secrets, the principle of free competition or property rights, they do not constitute excessive and unacceptable intervention which undermines the very substance of those rights, since they pursue a general interest objective of protection of third parties against the financial risks associated with corporate forms which offer only share assets as guarantees to third parties\(^90\).

There are three disclosure formalities. Firstly a file must be opened for the company in an official register - central register, commercial register or companies register - (Directive No 2017/1132, Article 16). Documents and particulars subject to disclosure may be forwarded by paper means or by electronic means and must be kept in electronic form. Interested parties must be able to obtain a copy


\(^{87}\) OJ L 182 of 26 June 2013.


\(^{89}\) Case C-167/01 Inspire Art [2003] ECR I-10155, LawLex09669.

of these documents by either means. Then, disclosure of the filing is effected by publication in a national official gazette, which may be kept in electronic form, either of the full text or of a partial text, or by means of a reference to the document which has been deposited in the file in the register. The requirement of payment of an advance on the costs of the publication imposed by the First and Eleventh Companies Directive, calculated on the basis of the publication of the full text of the objects of the company, where it merely reflects the actual administrative costs of such a publication, cannot constitute a restriction on freedom of establishment insofar as it neither prohibits, impedes nor renders less attractive the exercise of that freedom. Moreover, a company cannot rely on information which has not been disclosed in the national gazette as against third parties. This unenforceability may be set aside where the company establishes that the third parties had knowledge of the omitted information. Conversely, if the third parties prove that it was impossible for them to have had knowledge of the published information the latter may not be relied on as against them. Lastly, pursuant to Article 26 of the directive, companies are required to state in the commercial documents in paper form or any other medium, their legal form, the location of their registered office, the register and registration number.

The organization of disclosure measures falls within the jurisdiction of the Member States, in particular regarding the determination of which persons should carry out formalities (Directive No 2017/1132, Article 27). Article 28 of the directive also requires the Member States to provide for penalties relating to failure to disclose documents. Both the absence of any disclosure of annual accounts and the case of the disclosure of annual accounts which have not been drawn up in conformity with Union law in regard to the content of such accounts must be penalized. A Member State cannot justify the lack of penalties by the fact that a large number of companies established on its territory do not disclose their accounts and application of penalties to each of them would create considerable difficulties for its administrative authorities which would be disproportionate to the aim pursued by the Union legislature. Any person should be able to act before the courts to establish the failure of a company to fulfill its obligations regarding publication. Thus, a national provision which restricts to its members or creditors, the central works council or the companies works council the right to apply for imposition of the penalty in the event of failure by the company to disclose its annual accounts may be set aside where the company establishes that the third parties had knowledge of the omitted information. Conversely, if the third parties prove that it was impossible for them to have had knowledge of the published information the latter may not be relied on as against them.

accounts, does not comply with the directive. However, the provisions of Article 28 cannot be relied on against accused persons by the authorities of a Member State within the context of criminal proceedings insofar as a directive cannot, of itself and independently of domestic legislation adopted by a Member State for its implementation, have the effect of determining or increasing the criminal liability of those accused persons.

Section 2 Validity of corporate commitments and nullity of the company

19.03. Objective of certainty of legal relationships

In order to guarantee the protection of third parties and ensure certainty in the law as regards relations between the company and third parties, and also between members, the cases in which corporate commitments are invalid and nullity of companies arises are strictly limited by Directive No 2017/1132. Thus, pursuant to Article 7(2), the company is responsible for the commitments taken by its organs when it is being formed and before it has acquired legal personality, if it assumes them. No irregularity in the appointment of its representatives can be relied upon as against third parties unless the company proves that such third parties had knowledge thereof (Article 8). The company cannot either rely on the fact that acts done by its organs are not within the objects of the company, unless such acts exceed the powers that the law allows to be conferred on those organs or the national law provides to the company the possibility to prove that the third parties knew that the act was outside those objects or could not in view of the circumstances have been unaware of it (Article 9). Any conflict of interests between the represented company and its organs falls within the jurisdiction of the national authorities since the directive does not cover that issue.

To ensure that existing situations are stable, automatic nullity is excluded, since the nullity must be ordered by a court of law (Article 11(a)), and the cases of nullity are exhaustively listed: no instrument of constitution or non-compliance either with the rules of preventive control or the requisite legal formalities; the objects of the company are unlawful or contrary to public policy; the instrument of constitution or statutes do not state the name of the company, the amount of subscription of capital, the amount of the capital subscribed or the objects of the company; failure to comply with the provisions of national law concerning the minimum amount of capital to be paid up; incapacity of all

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96 Case C-387/02 Berlusconi and others [2005] ECR I-3565, LawLex09587; C-23/03, LawLex09508.
the founder members; the number of founder members is less than two. These provisions being strictly interpreted\(^98\), companies cannot be subject to any other cause of non-existence, absolute nullity, relative nullity or declaration of nullity. Lastly, the rules on nullity do not apply where the formalities for incorporation required by national law have not been completed\(^99\). Like dissolution, nullity entails the winding-up of the company (Article 12). It does not have the effect of releasing shareholders from payment of the capital subscribed but not paid up. Enforceability to third parties is subject to the publication of the decision ordering the nullity, as provided for in Article 16 of the directive. The effects of nullity between members fall within national law. Where an issuing company disseminates inaccurate information contrary to the law governing capital markets, the cancellation of the share purchase contract can be retroactive\(^100\).

**Section 3 Corporate governance**

**19.04. Annual accounts**

The Fourth Companies Directive No 78/660\(^101\), which, with the Seventh Directive No 83/349\(^102\) - both of which have been repealed and replaced by Directive No 2013/34 of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings\(^103\) - the "Accounting Directives" pack, is aimed at coordinating the laws of the Member States concerning annual accounts by establishing the minimum legal requirements as regards the extent of financial information to be made available to the public by capital companies.

Included in the information which must be made public under the directive\(^104\), are: the annual accounts, comprising the balance sheet, the profit and loss account and the annex (Directive No 2013/34, Article 4(1)). The presentation of the balance sheet (Article 13 and Annex IV), and the profit and loss account (Article 13 and Annexes IV and V), may take place according to various layouts

\(^{99}\) Case 136/87 Ubbink Isolatie v Dak- en Wandtechniek [1988] ECR 4665, LawLex091545: third parties can legitimately rely on information concerning a company only when that information has been the subject of disclosure in accordance with the rules; moreover, the directive states that where the national law does not provide for preventive control, administrative or judicial, at the time of formation of a company, the instrument of constitution, the company statutes and any amendments to those documents shall be drawn up and certified in due legal form, Directive No 68/151, Article 10.
\(^{100}\) Case C-174/12 Alfred Hirnmann, Judgment of 19 December 2013, LawLex131870.
\(^{103}\) OJ L 182 of 26 June 2013.
\(^{104}\) Directive No 78/660/EEC, Article 47, which refers to Article 3 of Directive No 2009/101/EC.
that the directive leaves to the Member States' choice. Pursuant to Article 6(1), the items shown in the annual accounts must be valued in accordance with six general principles: (i) the company must be presumed to be carrying on its business; (ii) the methods of valuation must be applied consistently from one financial year to another; (iii) a prudent basis must always be observed; (iv) account must be taken of income and charges relating to the financial year to which the accounts relate, irrespective of the date of receipt or payment of such income or charges; (v) the components of asset and liability items must be valued separately and (vi) the opening balance sheet for each financial year must correspond to the closing balance sheet for the preceding year.

Pursuant to Article 4(3), annual accounts must give a true and fair view of the company's assets, liabilities, financial position and profit and loss. This principle prevails on any other aspect. Thus, additional information must be given where the application of the directive is not sufficient to give a true and fair view (Article 4(3)). Likewise, it is possible to depart from the provision of the directive which would be contrary to the objective of true and fair view. By establishing the principles of true and fair view and prudence, the directive, when valuing items appearing in the annual accounts, sets forth to take account of all risks which have arisen during the financial year or a previous financial year, even if those risks are known only between the balance sheet date and the date on which it is drawn up. Taking into account all the items which truly relate to the financial year in question therefore seems indispensable to guarantee that the principle of a true and fair view is observed. It results that the profits made by a subsidiary for a financial year and appropriated to its parent company on the last day of that financial year must be shown in the balance sheet of the parent company for the financial year in respect of which the subsidiary has appropriated them. The compliance with the principle of prudence and the principle of a true and fair view also implies that a provision intended to cover possible losses or debts arising from a commitment is entered on the liabilities side of the balance sheet only if the loss or debt in question may be characterized as 'likely or certain' at the balance-sheet date. Lastly, the principle of a true and fair view must guide the court when applying

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105 This principle takes direct inspiration from English law ("true and fair view"). Thus, European law has chosen a less formalist and more pragmatic approach of accounting which requires active participation of undertakings to the implementation of the rules. The method sets forth that the application in good faith of the applicable procedures may be insufficient to comply with the law. Where the enforcement of the legal provision does not reflect its true financial position, the undertaking shall communicate additional information or even depart from the legal obligation in order to take account of reality.


107 Case C-306/99 BIAO [2003] ECR I-1, LawLex091448: the EU court also states in this decision that where the repayment of a loan after the balance-sheet date does not constitute a fact necessitating retrospective reassessment of the value of a provision relating to that loan, where it does not relate to the financial year in question, the compliance with the principle of true and fair view of the assets and liability requires that mention of the disappearance of the risk be made in the annual accounts.
Article 6(1)(c) of the directive, which sets forth that the components of assets and liabilities must be valued separately. Thus, where a separate valuation does not give the truest and fairest view of the real financial position of the company in question, Article 4(4), making it possible to depart from paragraph 1 in exceptional cases, should be applied\(^\text{108}\). The true and fair view principle does not however permit the principle of valuation of assets on the basis of their acquisition price or their production cost, contained in Article 6(1)(i) of the directive, to be departed from in favor of a valuation on the basis of their real value, where the acquisition price or the production cost of those assets is manifestly lower than their real value\(^\text{109}\).

The annual report, along with the annual accounts, must also comply with the principle of true and fair view of the development of the company’s business and its position. This report must give an indication of important events that have occurred since the end of the financial year, the company’s likely future development and activities in the field of research and development (Directive No 2013/34, Article 19). Although the Member States may permit the annual report not to be published, it must however be made available to the public at the company’s registered office in the Member State concerned and a copy of all or part of any such report may be obtained upon request (Article 47). The annual accounts must be audited by the persons authorized by national law to audit accounts (Article 34). These persons must verify the lawfulness of the audited accounts and also that the annual report is consistent with the annual accounts for the same financial year. The obligations to publish and audit the accounts are more flexible for small and medium-sized companies\(^\text{110}\).

Under Article 37, Member States need not apply the provisions of the directive concerning the content, auditing and publication of annual accounts to companies governed by their national laws which are subsidiary undertakings. However, it precludes the national legislation of a Member State which exempts a subsidiary undertaking governed by the law of that State from the provisions of that directive concerning the content, auditing and publication of annual accounts only if the parent company is also governed by the law of that State\(^\text{111}\).

\(^{108}\) Case C-275/97 DE + ES Bauunternehmung [1999] ECR I-5331, LawLex071894: the fact that a single provision is made for potential liabilities under warranties as obligations arising in law before the date of the balance sheet but whose effects will not become apparent until after that date must be authorized where a global valuation is the most appropriate way of ensuring that the expenditure to be shown under ‘Liabilities’ represents a true and fair view of its amount.

\(^{109}\) Case C-322/12 Belgian State v GIMLE SA, Judgment of 3 March 2013, LawLex14208.

\(^{110}\) A small company within the meaning of Directive No 2013/34 must have at least two of the following characteristics: total of balance sheet less than or equal to EUR 4,400,000, net amount of turnover less than or equal to EUR 4,400,000, less than 50 employees. A medium company within the meaning of Directive No 78/660/EEC must have at least two of the following characteristics: total of balance sheet less than or equal to EUR 17,500,000, net amount of turnover less than or equal to EUR 8,800,000, less than 250 employees.

\(^{111}\) Case C-528/12 Mômax Logistik GmbH, Judgment of 6 February 2014, LawLex14195.
19.05. Consolidated accounts

The Seventh Companies Directive No 83/349112, replaced by Directive No 2013/34113, coordinates the legislation of the Member States governing consolidated accounts. The consolidation is required where, in accordance with Article 22(1), an undertaking (a parent undertaking):

- a) has a majority of the shareholders’ or members' voting rights in another undertaking (a subsidiary undertaking); or

- b) has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another undertaking (a subsidiary undertaking) and is at the same time a shareholder in or member of that undertaking; or

- c) has the right to exercise a dominant influence over an undertaking (a subsidiary undertaking) of which it is a shareholder or member, pursuant to a contract entered into with that undertaking or to a provision in its memorandum or articles of association; or

- d) is a shareholder in or member of an undertaking, and: i) a majority of the members of the administrative, management or supervisory bodies of that undertaking (a subsidiary undertaking) who have held office during the financial year, during the preceding financial year and up to the time when the consolidated accounts are drawn up, have been appointed solely as a result of the exercise of its voting rights; or ii) controls alone, pursuant to an agreement with other shareholders or members of that undertaking (a subsidiary undertaking), a majority of shareholders' or members' voting rights in that undertaking.

Furthermore, the Member States may require any undertaking governed by their national law to draw-up consolidated accounts and a consolidated annual report if the parent undertaking holds a participating interest in another undertaking and it actually exerts a dominant influence over it or that it or the subsidiary undertaking are managed on a unified basis by the parent undertaking. Regardless of where the registered offices of the subsidiaries are situated, the parent undertaking and all of its subsidiary undertakings shall be undertakings to be consolidated (Article 22(6))114. The obligation to consolidate is however required only if the parent undertakings or several of its subsidiaries are capital companies within the meaning of Article 21 of the directive. Groups that do not exceed thresholds set

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114 For such purposes, any subsidiary of a subsidiary undertaking shall be considered a subsidiary undertaking of the parent undertaking which is the parent of the undertakings to be consolidated.
by the directive or those formed of subsidiaries which are not material, both individually and collectively (Article 6(1)(j)), may also be exempted from the obligation to consolidate.

As for annual accounts, the consolidated accounts comprise the consolidated balance sheet, the consolidated profit-and-loss account and the notes on the accounts and must comply with the principle of true and fair view (Article 4). They also go along a consolidated annual report which must include a fair review of the development of the business, the results and the position of all the undertakings included in the consolidation, as well as an indication of the main risks and uncertainties which they have to face (Article 19(1)). These accounts are audited by one or more persons authorized to audit accounts under the laws of the Member State which govern the parent undertaking. These persons must also give an opinion on whether the consolidated annual report is consistent with the consolidated accounts for the same financial year\textsuperscript{115}. Pursuant to Article 30 of the directive, duly approved consolidated accounts, and the consolidated annual report, together with the opinion submitted by the person responsible for auditing the consolidated accounts, are published according to the terms and conditions provided for in Article 16 of Directive No 2017/1132.

\subsection*{19.06. Statutory audit of accounts}

The accounting system set up by the Fourth\textsuperscript{116} and Seventh\textsuperscript{117} directives - now replaced by Directive No 2013/34\textsuperscript{118} - has been supplemented by the Eighth Directive\textsuperscript{119}, now superseded by Directive No 2006/43\textsuperscript{120}. The Eighth Directive merely fixed the conditions of approval of persons responsible for carrying out the statutory audit of accounts provided for by the accounting directives. Directive No 2006/43 goes further and is aimed at further harmonization of the quality of the statutory audit of accounts in the EU and at reinforcing confidence in audits, in particular by applying a unique system of international accounting standards, the updating of requirements regarding training, the definition of ethics and the practical implementation of cooperation between the Member States’ competent authorities and between these authorities and those of non-member countries. Directive No 2006/43

\begin{footnotesize}
\begin{enumerate}
\item Directive No 2013/34, Article 34.
\item Directive No 2013/34 of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertaking, OJ L 182 of 26 June 2013.
\end{enumerate}
\end{footnotesize}
was amended by Directive No 2014/56\textsuperscript{121} in order to take account of the public interest\textsuperscript{122}. The provisions concerning public-interest entities were further developed in a specific regulation\textsuperscript{123} and those provided for in the directive will apply to statutory auditors and audit firms only insofar as they carry out statutory audits of such entities.

According to Article 3 of Directive No 2006/43, a statutory audit of the accounts can be carried out only by statutory auditors or audit firms that are approved by the Member State requiring the audit. Each Member State designates the competent authority to be responsible for approving statutory auditors and audit firms. The approved auditors must be of good repute (Article 4), must have the educational qualifications defined in Article 6 and must have passed an examination of professional competence, covering the subjects listed in Article 8, supplemented by practical training of at least three years (Article 10). Under Article 3(a), an audit firm which is approved in a Member State is entitled to perform statutory audits in another Member State provided that the key audit partner who carries out the statutory audit on behalf of the audit firm fulfills those conditions and is registered with the competent authority in the host Member State which checks that the firm is in fact registered in its home Member State. Pursuant to Article 14, the Member States must establish procedures for the approval of statutory auditors who have been approved in other Member States, which cannot go beyond a requirement to pass an aptitude test or to complete an adaptation period which covers only the adequate knowledge of the laws and regulations of the Member State concerned insofar as the knowledge is relevant to statutory audits. For reasons of protection of third parties, all approved statutory auditors and audit firms must be entered in a public register accessible to the public and containing essential information on the statutory auditors and audit firms (Articles 15 to 20).\textsuperscript{124} They are subject to principles of professional ethics, covering at least their public-interest function, their integrity and objectivity and their professional competence and due care (Article 21), as well as strict rules of confidentiality and professional secrecy (Article 23).\textsuperscript{125} Directive No 2014/56 has added to the


\textsuperscript{122} Defined in point 13 of Article 2 as entities governed by the law of a Member State whose transferable securities are admitted to trading on a regulated market of any Member State; credit institutions as defined in point 1 of Article 3(1) of Directive No 2013/36/EU other than those referred to in Article 2 of that directive; insurance undertakings within the meaning of Article 2(1) of Directive No 91/674/EEC or, entities designated by Member States as public-interest entities, for instance undertakings that are of significant public relevance because of the nature of their business, their size or the number of their employees.

\textsuperscript{123} Regulation No 537/2014 of 16 April 2014, OJ L 158, 77.

\textsuperscript{124} In exceptional circumstances, Member States may disapply these requirements but only to the extent necessary to mitigate an imminent and significant threat to the personal security of any person.

\textsuperscript{125} Where a statutory auditor or an audit firm carries out a statutory audit of an undertaking which is part of a group whose parent undertaking is situated in a third country, the confidentiality and professional secrecy rules shall not impede the transfer by the statutory auditor or the audit firm of relevant documentation concerning the audit work performed to the group auditor situated in a third country if such documentation is necessary for the performance of the audit of consolidated financial statements of the parent undertaking.
principle of professional ethics, the maintaining of professional scepticism. The statutory auditor or the audit firm must, when carrying out the statutory audit, maintain professional scepticism throughout the audit, recognizing the possibility of a material misstatement due to facts or behavior indicating irregularities, including fraud or error, notwithstanding the statutory auditor's or the audit firm's past experience of the honesty and integrity of the audited entity's management. The statutory auditor or the audit firm must maintain professional scepticism when reviewing management estimates relating to fair values, the impairment of assets, provisions, and future cash flow. In all events, statutory auditors and audit firms must be strongly independent of an audited entity and must not be involved in the decision-making process of that entity (Article 22 and 22(b)). Article 22(a) furthermore strictly controls the recruitment by audited entities to key management or administration positions of former statutory auditors or of employees of statutory auditors or audit firms of audited entities. Such employment is only possible after at least one year has elapsed since the person was directly involved in the statutory audit engagement.

Article 24(a) added by Directive No 2014/56 regulates the internal organization of statutory auditors and audit firms, which must comply with certain organizational requirements. The audit firm must establish appropriate policies and procedures to ensure that its owners or shareholders, as well as the members of the administrative, management and supervisory bodies of the firm, or of an affiliate firm, do not intervene in the carrying-out of a statutory audit in any way which jeopardizes the independence and objectivity of the statutory auditor who carries out the statutory audit on behalf of the audit firm. Sound administrative and accounting procedures, internal quality control mechanisms, effective procedures for risk assessment, and effective control and safeguard arrangements for information processing systems must be put in place. The organizational requirements also concern, inter alia, the appropriate knowledge and experience for the duties assigned to employees as well as the coaching, supervising and reviewing of their activities, the outsourcing of audit functions, the prevention of any threats to the independence of firms and the establishment of internal quality control systems. Such policies and procedures must be documented and communicated to the employees of the statutory auditor or the audit firm. Article 24(b) deals with the organization of the work and provides that, when the statutory audit is carried out by an audit firm, that firm must

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126 Professional scepticism is defined in Article 21(2) as an attitude that includes a questioning mind, being alert to conditions which may indicate possible mistatement due to error or fraud, and a critical assessment of audit evidence.

127 Independence is required at least during both the period covered by the financial statements to be audited and the period during which the statutory audit is carried out. The statutory auditor or the audit firm must not carry out a statutory audit if there is any threat of self-review, self-interest, advocacy, familiarity or intimidation created by financial, personal, business, employment or other relationships.
designate at least one key audit partner to whom it grants sufficient resources to carry out his/her duties appropriately. When carrying out the statutory audit, the statutory auditor must also devote sufficient time to the engagement and assign sufficient resources to enable him or her to carry out his or her duties appropriately. The statutory auditor or audit firm must maintain a client account record which includes the data set out in the directive\textsuperscript{128} and an audit file for each statutory audit.

Article 25(a) fixes the scope of the statutory audit which may not include assurance on the future viability of the audited entity or on the efficiency or effectiveness with which the management or administrative body has conducted or will conduct the affairs of the entity. To guarantee the permanent and high quality of all statutory audits of accounts required by EU law, they must be in compliance with international auditing standards the definition of which is delegated to the Commission (Article 26). Article 29 also imposes on Member States to set up a system of quality assurance so that each individual auditor is subject to review at least every six years. Lastly, the Member States must organize an effective system of public oversight for the activity of statutory auditors and audit firms based on the principle of oversight by the initial Member State and governed by non-practitioners who are knowledgeable in the areas relevant to the statutory audit (Article 32).

**Section 4 Capital increases and decreases**

19.07. Absolute discretionary power of the general meeting

In order to take account of the various amendments to the Second Companies Directive No 77/91\textsuperscript{129}, which with a view to coordinating national provisions governing the formation of public limited liability companies, aimed at ensuring equivalent protection for both shareholders, particularly minority shareholders\textsuperscript{130}, and creditors of the company, by setting forth minimum requirements relating to equity capital, distributions to shareholders, increases and decreases of capital, the

\textsuperscript{128} i.e. the name, the address and the place of business; in the case of an audit firm, the name(s) of the key audit partner(s); the fees charged for the statutory audit and the fees charged for other services in any financial year.

\textsuperscript{129} Directive No 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, OJ L 26 of 31.1.1977, 1.

\textsuperscript{130} See Case C-101/08 Audiolux and others [2009] ECR I-9823, LawLex11631, indicating, however, that there is not general principle of EU law establishing equality between shareholders and underlining that the provisions relating to equality in Directive No 77/91/EEC are strictly limited to cases specifically referred to in Articles 20 and 42.
Commission recast the directive and adopted Directive No 2012/30\(^{131}\), which has itself since been replaced by Directive No 2017/1132\(^{132}\).

Within the territory of the EU, the statutes or the instrument of incorporation of a public limited liability company must enable any interested party to know the essential characteristics of that company and in particular what its capital is actually comprised of. Therefore, they must contain the mandatory indications (Articles 3 and 4)\(^{133}\), and their publication must be carried out according to the terms and conditions contained in the First Directive. Article 45 fixes the minimum capital of a public limited liability company at EUR 25,000\(^{134}\), which may be formed only of assets capable of economic assessment (Article 46). The capital issued for a consideration must be paid up at no less than 25% at the time the company is incorporated while shares issued for a consideration other than in cash must be transferred in full within five years of the incorporation (Article 48). Moreover, the directive, which intends to maintain the share capital that constitutes the creditors’ security, in particular prohibits any reduction thereof by distribution to shareholders where it would make the net assets become lower than the amount of the subscribed capital (Article 56 and 57) or by imposing limits on the company’s right to acquire its own shares (Articles 59 et seq.)\(^{135}\).

In the case of a serious loss of the subscribed capital, the general meeting of shareholders must consider whether the company should be wound up or any other measures taken, such as an increase in capital (Article 58). Pursuant to Article 68 of the directive, it is also for the general meeting to decide on the increase in capital. Such a measure cannot be decided by the public authorities without the general meeting intervening, even if that measure is aimed at ensuring the survival and continuation of the activity of an undertaking which, as a result of its burden of debt, is in an exceptional circumstance\(^{136}\). Without abusing any right, a shareholder may contest the decision, even if he acts in

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131 Directive No 2012/30/EU of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent. OJ 14 Nov. 2012, 74.
133 List of information regarding the company (type and name of the company, objects, etc.) which must appear in the statutes or the instrument of incorporation of the company, as well as information subject to the principle of required publication (registered office, form of the shares, amount of the subscribed capital, etc.).
134 The amount will be revised if necessary every five years by the European Parliament and the Council, acting on a proposal from the Commission, in the light of economic and monetary trends in the Union and of the tendency to allow only large and medium-sized undertakings to opt for the types of company listed in Annex I.
135 In order to avoid diversions of that rule, Directive No 92/101/EEC of 23 November 1992 (OJ L 347 of 28 November 1992, 64) extends its application to all capital companies concerned by Directive No 68/151/EEC in which the company indirectly holds a majority of the voting rights or on which it can directly or indirectly exercise a dominant influence, even if that other company is governed by the law of a non-member country, provided that it has a comparable legal form.
136 Case C-441/93 Pafitis and others [1996] ECR I-1347, LawLex09833; C-367/96 Kefalas and others v. Elliniko Dimosio and Organismos Oikonomikis Anasygkrosis Epicheiriseon [1998] ECR I-2843, LawLex09543; C-19/90 Karella and others v Ypourgio viomichanias,
his own benefit to the detriment of the undertaking’s viability\textsuperscript{137}. Abuse is characterized only where, of the remedies available, the shareholder has chosen a remedy that will cause such serious damage to the legitimate interest of others that it appears manifestly disproportionate\textsuperscript{138}.

Whenever the capital is increased by consideration in cash, a right of subscription on a pre-emptive basis inures to the benefit of shareholders in proportion to the capital represented by their shares (Article 72). Such a right may be extended by Member States to consideration in kind\textsuperscript{139}. An offer of subscription on a pre-emptive basis and the period of time during which this right is to be exercised, must be published in a national gazette, unless all the shares in the company are registered shares, since in this case all the shareholders must be informed in writing\textsuperscript{140}. The right of pre-emption may be restricted or withdrawn only by decision of the general meeting, following a written report by the administrative or management body indicating the reasons for restriction or withdrawal of the right of pre-emption, and justifying the proposed issue price (Article 72(4)).

Like increases, reductions in capital fall within the decision-making powers of the general meeting (Article 34). However, such a decision must not undermine the interests of the company’s creditors (Article 75), unless its purpose is to offset losses incurred or to include sums of money in a reserve. The amount of such reserve cannot however be more than 10\% of the reduced subscribed capital (Article 76). In all events, the subscribed capital may not be reduced to an amount less than the minimum capital laid down in accordance with Article 45 (Article 77).

Where companies are authorized to issue redeemable shares, certain conditions are imposed (Article 82). Redemption must be authorized by the company’s statutes or instrument of incorporation before the redeemable shares are subscribed for and the shares must be fully paid up. Notifications of redemption, like increases or decreases, are published.

\textsuperscript{137} Case C-367/96 Kefalas and others v. Elliniko Dimosio and Organismos Oikonomikis Anasygkrotisis Epicheiriseon [1998] ECR I-2843, LawLex09543: even if the shareholder has not exercised his preferential right on the new shares issued on this occasion.

\textsuperscript{138} Case C-373/97 Diamantis [2000] ECR I-1705, LawLex09580.

\textsuperscript{139} Case C-42/95 Siemens v Nold, Judgment of 19 November 1996, LawLex09782.

\textsuperscript{140} Case C-441/93 Pafitis and others [1996] ECR I-1347, LawLex09833: publication of an offer of subscription in daily newspapers does not meet that condition.
Section 6 External growth

19.09. National and cross-border mergers

The Third Directive No 78/855, which was codified by Directive No 2011/35, itself replaced by Directive No 2017/1132, applies to mergers of public limited liability companies established on the territory of a same Member State, which give rise either to absorption of one or more companies by another, or merger by the formation of a new company (Directive No 2017/1132, Article 88). Irrespective of the form, the merger process follows three steps.

Firstly, the administrative and management bodies of merging companies must draw up draft terms of merger which specify, in particular, the type, name and registered office of the merging companies, as well as the share exchange ratio and the amount of any cash payment. The draft terms of merger are published in the manner prescribed by the laws of each Member State at least one month before the date of the general meeting which is to decide thereon. Since the coming into force of Directive No 2009/109, the publication may be made on the website of the companies concerned, provided that it is available free of charge for a continuous period of one month before the day fixed for the general meeting, or, if Member States prefer, via the central electronic platform referred to in Article 3(4) of the First Directive (Directive No 2017/1132, Article 92).

Then, the merger must be approved by the general meeting of each company at a majority of not less than two thirds of the votes attaching either to the shares or to the subscribed capital represented. The shareholders are notified of the draft terms of merger by reports drawn up both by the administrative or management bodies and by independent experts (Directive No 2017/1132, Articles 95 and 96). In order to reduce administrative burdens weighing on the competitiveness of undertakings, Directives No 2009/109 and 2007/63, replaced by Directive No 2017/1132, have however made it facultative to draw up these reports, provided that the shareholders have so agreed. Moreover, all shareholders must be entitled to inspect the documents referred to by the directive at

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144 Article 87 empowers the Member States however to exclude public limited companies from the scope of the regulation (para. 2) or companies that are the subject of bankruptcy proceedings (para. 3).
145 As an exception, the Member States may require only a simple majority where at least half of the subscribed capital is represented.
146 Directive No 2017/1132, Article 95(3).
least one month before the merger either at the registered office of the undertaking or on its website.\textsuperscript{148}

Lastly, the merger is carried out after the vote of the shareholders and it entails transfer, both as between the companies and as regards third parties, of all the assets and liabilities of the company being acquired to the acquiring company, or of the merged companies to the new company (Article 19) and the companies being acquired cease to exist.\textsuperscript{149} Pursuant to Article 104 of the directive, the merger must be publicized in accordance with Article 89 of the First Directive.

For purposes of protection of the members and third parties, the directive sets up a very restrictive system for nullity of the merger. Nullity, which may be ordered only in a court judgment (Directive No 2017/1132, Article 108(1)(a)), can only take place in the case of a defect in the implementation of the judicial or administrative preventive supervision of their legality, or in the act drawn up and certified in due legal form, or if it is shown that the decision of the general meeting is void or voidable under national law (Article 108(1)(b)). Furthermore, the action must be brought within six months after the date on which the merger becomes effective as against the person alleging nullity (Article 108(1)(c)). Where the defect may be remedied, the court must grant the company involved a period of time within which to rectify the situation.\textsuperscript{150}

In parallel, the Tenth Directive No 2005/56, also replaced by Directive No 2017/1132, extends the European rules on mergers to cross-border mergers. The objective sought by the provision is to facilitate mergers between companies of the European Union by reducing the cost of such transactions, by guaranteeing legal certainty and by allowing the greatest number of undertakings, above all those which do not wish to form a European company, to benefit from it. The directive applies to mergers of limited liability companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union, provided at least two of them are governed by the laws of different Member States (Directive No 2017/1132, Article 118). Companies the object of which is the collective investment of capital (Article 120(3)) and, if Member States so decide, cross-border mergers involving a cooperative society (Article 120(2)) shall be excluded from the scope of application. The procedure and consequences of

\textsuperscript{148} Directive No 2017/1132, Article 97.
\textsuperscript{149} Case C-343/13 Modelo Continente Hipermercados, Judgment of 5 March 2015, LawLex15274, stipulating that the transfer to the acquiring company includes the obligation to pay a fine imposed by final decision adopted after the merger by acquisition for infringements of employment law committed by the acquired company prior to the merger.
\textsuperscript{150} Directive No 2017/1132, Article 108 (1)(d).
the merger are governed by the same rules as those applicable to the simple merger-absorption. By contrast, the Tenth Directive is more precise regarding statutory audits which must be established by the Member States. A national authority competent as regards that part of the procedure relating to each merging company subject to its national law must be designated by each Member State. Before the merger, the authority issues a certificate attesting to the proper completion of the premerger acts and formalities (Article 127). The legality of the cross-border merger as regards that part of the procedure which concerns the completion of the cross-border merger and, where appropriate, the formation of a new company resulting from the cross-border merger where the company created by the cross-border merger is subject to its national law must be scrutinized (Article 128). The authority shall ensure that the merging companies have approved the common draft terms of cross-border merger in the same terms. Once the controls are exercised, the merger is effective and its validity can no longer be challenged (Article 134). The company resulting from the cross-border merger is subject to the rules in force concerning employee participation, if any, in the Member State where it has its registered office (Article 133). Employee participation in the undertakings concerned by the merger must not only be maintained in accordance with Article 133(2)(a) of the directive but must also be extended, in application of Article 133(2)(b), to employees of establishments of the company resulting from the cross-border merger that are situated in other Member States than the one where the company resulting from the cross-border merger has its registered office. Further, Article 133 does not provide for a less onerous employee participation system for small companies under which employees employed in Member States other than the one in which the company resulting from the merger is registered could be deprived on a long-term basis of their participation rights within that company.152

19.10. Divisions

The object of the Sixth Directive No 82/891153, replaced by Directive No 2017/1132,154 which governs divisions by acquisition, by formation of new companies and division under judicial supervision between public limited liabilities companies of a same Member State, is to ensure to members of those companies and to third parties rights equivalent to the rights granted to them by the Third Directive relating to mergers.

152 Case C-635/11 Commission v Netherlands, Judgment of 20 June 2013, LawLex13993.
Division by acquisition consists for a company, after being wound up without going into liquidation, to transfer to several companies all its assets and liabilities in exchange for the allocation to the shareholders of the company being divided of shares in the companies receiving contributions as a result of the division (Directive No 2017/1132 Article 136(1)). Where it takes place by the formation of new companies, all its assets and liabilities are transferred by the wound-up company to newly-formed companies in exchange for the allocation to the shareholders of the company being divided of shares in the recipient companies (Article 155(1)).

Divisions by acquisition and by formation of new companies fulfill forms that are similar to those imposed on mergers: drawing-up of draft terms of division by the administrative or management bodies of the companies involved in the division (Article 137), subject to a duty of publication (Article 138), then to the approval of the general meeting of each of the companies (Article 139)\(^{155}\); drawing-up of reports by the administrative or management bodies of the company being divided (Article 141) and by independent experts (Article 142), intended to inform shareholders, unless they have decided otherwise for the independent experts’ report\(^{156}\); availability to shareholders of all documents useful for their information either at the registered office, or on the website of the companies concerned (Article 143). For claims antedating the division, Article 12 guarantees the creditors’ right by setting-up a joint and several liability of the recipient companies when one of them has not fulfilled an obligation transferred to it due to the division. Moreover, joint and several liability of the recipient companies for the obligations of the company being divided may also be provided for by the Member States. Any formal irregularity of the division is penalized by nullity in accordance with the restrictive model of the Third Directive (Article 153).

Lastly, division under supervision of a judicial authority is a specific transaction subject to supervision by a judicial authority which has the power to call a general meeting of the shareholders of the company being divided, as well as any meeting of creditors of each of the companies involved in order to decide upon the division and to approve the draft terms of division (Article 157). After establishing that the shareholders and creditors suffer no prejudice, the judicial authority may relieve the companies involved in the division from applying certain rules laid down for division by acquisition and by formation of new companies regarding information.

\(^{155}\) Article 150 also requires that the publication of the division be made in the manner prescribed by the rules in the First Directive.

\(^{156}\) Directive No 82/891, Article 10.
20.04. Rules governing transfer of undertaking

Settling the legal effects of the transfer of undertaking, Article 3(1) of Directive No 2001/23 provides that, "the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee". However, "Member States may provide that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer". It cannot be departed from the mandatory provisions of the directive in a way which is not favorable to employees' interests (Article 8). Accordingly, except in the event that the Member States choose to lay down a joint and several liability of the transferor and the transferee, the rights and obligations are automatically transferred to the transferee, who may not obstruct such transfer\textsuperscript{157}.

The transfer extends to all the obligations of the transferor resulting from an employment contract or employment relationship, including those arising prior to the date of the transfer\textsuperscript{158}, such as unlawful terminations of contracts of employment\textsuperscript{159}. Even if, following the transfer, the transferee has the right, like the transferor, to adopt certain decisions with respect to the employee, for example regarding dismissal or the grant of early retirement, he must comply with the rights and obligations arising of the employment contract or employment relationship established with the transferor\textsuperscript{160} but not the transferor's obligations with respect to third parties to the contract or employment relationship\textsuperscript{161}. The continued observance of the rights and obligations of the transferor arising from a contract of employment extends to the clause which the transferor and the worker agreed pursuant to

\textsuperscript{157} Case C-305/94 Rotsart de Hertaing v Benoidt and IGC Housing Service [1996] ECR I-5927, LawLex092148.
\textsuperscript{158} Case 135/83 Abels v Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie [1985] ECR 469, LawLex091540.
\textsuperscript{159} Case C-319/94 Dethier Équipement v Dassy and Sovam [1998] ECR I-1061, LawLex091476: employees unlawfully dismissed by the transferor shortly before the undertaking is transferred and not taken on by the transferee may claim, as against the transferee, that their dismissal was unlawful.
\textsuperscript{160} Case C-4/01 Martin and others [2003] ECR I-12859, LawLex09680.
\textsuperscript{161} Case C-313/07 Kirtruna and Vigano [2008] ECR I-7907, LawLex091131: Article 3(1) of Directive No 2001/23 does not, in the event of a transfer of an undertaking, require the preservation of the lease of commercial premises entered into by the transferor of the undertaking with a third party, even though the termination of that lease is likely to entail the termination of the contracts of employment transferred to the transferee.
the principle of freedom of contract, according to which their employment relationship is governed not only by the collective agreement in force on the date of the transfer, but also by collective agreements subsequent to the transfer supplementing it, modifying it or replacing it, if national law provides for the possibility for the transferee to make adjustments, which are either consensual or unilateral. Likewise, the obligation for the transferee to maintain, after the transfer, the working conditions agreed upon by a collective agreement does not extend to the provisions of a collective agreement which the transferor took on in respect of workers who were not employed by the undertaking at the time of the transfer, or subsequent to those that were in force at the time of the transfer of the business or having expired concomitantly to the transfer. Moreover, the employees' rights to old-age, invalidity or survivors' benefits outside the statutory social security schemes in Member States are not transferred, unless the Member States provide otherwise (Article 3(4)). Early retirement benefits paid in the event of dismissal to employees who have reached a certain age, which do not identify to such benefits, are automatically transferred.

Even though the obligation to maintain the employees' rights in principle prevents the transferee from altering the working conditions solely because of the transfer, national provisions may authorize it to make alterations, even substantial ones, where they are not motivated by the transfer and rely on other objectives. Alterations may, in particular, relate to the date of payment and the composition of wages, or to the calculation of the rights of a financial nature attached to employees' length of service, such as a termination payment or salary increases. This possibility is however restricted. A public entity may thus reduce the amount of the remuneration of the employees transferred for the purpose of complying with the national rules for public employees, provided that it takes the employee's length of service into account. Furthermore, pursuant to Article 4(2) of the directive, where the transfer involves a substantial change in the working conditions to the detriment of the

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162 Case C-680/15 Landsorganisationen I Danmark for Tjenerforbundet I Danmark, Judgment of 27 April 2017, LawLex171308.
168 Case 324/86 Tellrup v Daddy's Dance Hall [1988] ECR 739, LawLex092310: in principle, an employee cannot waive the protection established by the directive, the provisions of which are mandatory even where the new working conditions are globally more favorable, unless the alteration of those conditions is permitted by the national law in cases other than the transfer of an undertaking.
employee, the possible termination of the contract will be regarded as being attributable to the employer.\footnote{172}

To avoid the rules protective of employees from being bypassed, the European court has laid down the principle according to which the transferor and the transferee could not contractually postpone the date of the transfer of the rights and obligations resulting from the employment contract\footnote{173}, where that date is a particular point in time, concomitant to the transfer of undertaking, which cannot be fixed at the parties' will\footnote{174}. Thus, workers dismissed with effect from a date prior to that of the transfer are regarded as still in the employ of the undertaking on the date of the transfer, where it is an established fact that the dismissal is intended to bypass the transfer of obligations to the new employer\footnote{175}.

Unlike the transferee, the employee may always refuse his own transfer\footnote{176}. Unless that refusal is motivated by a substantial change in his working conditions at the transferee's initiative, the termination of the contract will be regarded as being attributable to him\footnote{177} and he may not claim the maintenance of his contractual link with the transferor, who is discharged from its obligations\footnote{178} unless national law has chosen the joint and several liability provided for in Article 3(1) of the directive\footnote{179}.

Furthermore, the transferor and the transferee are required to inform in good time the representatives of the employees of the date or proposed date of the transfer, the reasons for the transfer, the legal, economic and social implications of the transfer, any measures envisaged in relation to employees\footnote{180}. This obligation to inform is not only aimed at obtaining observations on the transfer of the undertaking, but also at seeking an agreement. Therefore, it applies even to employers who object to employee representation in their undertaking and includes highly deterrent sanctions\footnote{181}.

\footnote{173}{Case C-305/94 Rotsort de Hertaing v Benoist and IGC Housing Service [1996] ECR I-5927, LawLex092148.}
\footnote{174}{Case C-478/03 Celtec [2005] ECR I-4389, LawLex09952.}
\footnote{175}{Case 101/87 Bork International v Foreningen af Arbejdslædere i Danmark [1988] ECR 3057, LawLex091438.}
\footnote{176}{Case 144/87 Berg v Besselsen [1988] ECR 2559, LawLex111553; Case C-132/91 Katsikas and others v Konstantinidis and others [1992] ECR I-6577, LawLex09524; C-297/03 Sozialhilfeverband Rohrbach [2005] ECR I-4305, LawLex091429: a State entity which transfers its operations may not rely on Article 3(1) and Article 1(1)(c) of Directive No 2001/23 against an employee in order to force him to continue his employment relationship with a transferee.}
\footnote{177}{Case C-399/96 Europièces v Sanders and Automotive Industries Holding Company [1998] ECR I-6965, LawLex09678; See for an opposite ruling, C-425/02 Delahaye [2004] ECR I-10823, LawLex09786.}
\footnote{179}{Case C-51/00 Temco [2002] ECR I-969, LawLex091013.}
\footnote{180}{Directive No 2001/23/EC, Article 7, 1 to 6.}
\footnote{181}{Case C-382/92 Commission v United Kingdom [1994] ECR I-2435, LawLex09603.}
21.01. Introduction

Article 12 TFEU lays down the principle according to which "consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities". Pursuant to Article 169 TFEU, in order to ensure a high level of consumer protection, the Union is required to contribute, in particular, to protecting the economic interests of consumers and to promoting their right to information. The objective is to ensure that they have real choices and to protect them against malicious professionals by guaranteeing the openness, fairness and transparency of the internal market.

Initially, in matters of consumer protection, the European legislator had chosen the technique of minimum harmonization which made it possible to coordinate the laws of the various Member States while leaving them the power to adopt more protective rules. This possibility has the disadvantage, however, of leading to national laws with significant coexisting divergences which discourage exports by reason of the need to adapt the sale of the products to the statutory specificities of each Member State and reduce consumer confidence in cross-border transactions. Thus, since 2002, a reversal of trend in favor of total harmonization of the laws of the Member States in consumer matters has been observed. Several directives show it, either specific ones like the directive concerning the distance marketing of consumer financial services or the directive on credit agreements for consumers, or general one like the directive on unfair commercial practices. This movement is confirmed with Directive No 2011/83 of 25 October 2011 which recommends maximum harmonization of the
rules it gathers: contracts negotiated away from business premises, abusive clauses, distance contracts and consumer guarantees.

Among the big transversal directives in consumer matters, account is also to be taken of the directive on liability for defective products and the directive on general product safety. At the frontier of consumer protection and public health protection, these two directives may be approximated from a number of sector-specific directives which are aimed at establishing a balance between suppression of obstacles to the free movement of goods, protection of public health and fair information of consumers. This is the case for the directive on medicinal products for human use, like previously for the directive concerning cosmetic products, recast in Regulation No 1223/2009, and the directive on foodstuffs, now replaced by Regulation No 1169/2011, which lay down strict rules regarding labeling and advertising, aimed in particular at avoiding the misleading of consumers.

192 Directive No 2001/83 of 6 November 2001 on the Community code relating to medicinal products for human use, OJ L 311 of 28.11.2001. - See, specifying that the directive has brought about complete harmonization, since the cases in which the Member States are authorized to adopt provisions departing from that Directive are listed expressly, Case C-374/05 Gintec [2007] ECR I-9517, LawLex09589.
Section 1 Commercial advertising

II. Comparative advertising

21.05. Conditions of lawfulness

Pursuant to Article 4 of Directive No 2006/114, in order to be lawful, comparative advertising must meet several cumulative conditions.

Advertising must not be misleading (Directive No 2006/114, Article 3; Directive No 2005/29, Articles 6 and 7). It must neither omit a significant aspect of the purchaser’s choice, nor merely relate to a sample of products while implying that the comparison was made on all the products of the advertiser and its competitors. Thus, information on the basis of which the comparison was made between the prices charged in shops having larger sizes or formats in the advertiser’s retail chain and those displayed in shops having smaller sizes or formats in competitors’ retail chains is information in the absence of which it is likely that the advertising would fail to fulfil the objective comparison requirement and would be misleading. Furthermore such information must not only be provided clearly but be contained in the advertisement itself. However, as the provisions applicable to the misleading character of advertising have a level of integration that differs depending on whether the advertising is intended for traders or not, and as the directive on comparative advertising in the Member States has exhaustively harmonized its conditions of lawfulness, stricter national provisions regarding protection against misleading advertising do not apply to comparative advertising in respect of the form and content of the comparison.

Advertising must compare goods or services meeting the same needs or intended for the same purpose and relate to one or more material, relevant, verifiable and representative features of those goods and services, such as the general level of prices and the amount that can be saved. However,

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200 Case C-44/01 Pippig Augenoptik [2003] ECR I-3095, LawLex09827; Comp. Case C-373/90 X [1992] ECR I-131, LawLex09577: an advertiser is not guilty of misleading advertising by offering cars as less expensive, where, even though it does not specify that the price difference is justified because they are equipped with fewer accessories, insofar as such factors would not have deterred a significant number of consumers from making a purchase, had they known it.


202 Case C-562/15 Carrefour Hypermarchés (SAS), Judgment of 8 February 2017, LawLex17286.


204 Case C-356/04 Lidl Belgium [2006] ECR I-8501, LawLex061866: an advertisement may validly compare a selection of basic consumables sold by two competing chains of stores, but not individual products sold by them, provided that those selections each consist of individual products which, when viewed in pairs, individually meet the same needs or are intended for the same purpose.

205 Case C-356/04 Lidl Belgium [2006] ECR I-8501, LawLex061866: A feature mentioned in comparative advertising satisfies the requirement of verifiability where the details of the comparison which form the basis for the mention of that feature are not set out in the advertising, only if the advertiser indicates where and how they may readily examine those details with a view to verifying, or, if they do not possess the skill required for that purpose, to having verified, the details and the feature in question as to their accuracy.
Article 4 does not require the format or size of the shops selling the goods whose prices are being compared to be similar\(^{206}\). The products must display a sufficient degree of interchangeability to be compared: the fact that foodstuffs vary as to the extent to which consumers like to eat them and the pleasure to be derived from consuming them, their method and place of production, the ingredients used and who produces them, does not exclude any comparison\(^{207}\).

Where the advertising concerns products with a designation of origin, it must relate in each case to products with the same designation (Article 4(e)). However, the advertising may compare a product with a controlled designation of origin and another product\(^ {208}\) where it does not try to take unfair advantage of the reputation of the designation of origin as prohibited by Article 4(f) of the directive\(^ {209}\).

Comparative advertising must be fair. It must not: discredit or disparage trademarks, trade names, other distinguishing marks, goods, services, activities or circumstances of a competitor\(^ {210}\), present a good or service as an imitation or a replica of a good or a service bearing a protected trademark or trade name\(^ {211}\), or give rise to confusion among traders, between the advertiser and a competitor or between the trademarks, trade names, other distinguishing marks, goods or services of the advertiser and those of a competitor\(^ {212}\).

### 21.06. Assessment of advertising

The guarantee of a better provision of information to consumers, which constitutes one of the main objectives of Directive No 2006/14, should guide the court when assessing the conditions of lawfulness for comparative advertising submitted to its review\(^ {213}\). Where it is lawful, comparative advertising contributes to objectively showing the merits of the various comparable products and

\(^{206}\) Case C-562/15 Carrefour Hypermarchés (SAS), Judgment of 8 February 2017, LawLex17286.
\(^{207}\) Case C-159/09 Lidl [2010] not yet published in the ECR, LawLex11644.
\(^{208}\) Case C-381/05 De Landtsheer Emmanuel [2007] ECR I-3115, LawLex09596.
\(^{209}\) Case C-59/05 Siemens [2006] ECR I-2147, LawLex091064: by using in its catalogues of the core elements of a distinguishing mark of a manufacturer, which is known in trade circles, the supplier of compatible products is not taking unfair advantage of the distinctive character or the reputation of the mark when he uses his own acronym and clearly distinguishes between his own and his competitor's identities; Case C-112/99 Toshiba Europe [2001] ECR I-7945, LawLex09387: an advertiser is not taking unfair advantage of the reputation attached to distinguishing marks of his competitor if the aim is solely to distinguish between their respective products and to highlight the differences objectively; Comp. Case C-487/07 L'Oréal and others [2009] ECR I-5185, LawLex11386: an advertiser take unfair advantage of the reputation of another's trademark where he uses comparison lists having as their object or effect to indicate to the public that the perfumes he sells are an imitation of an original perfume.
\(^{210}\) Case C-44/01 Pippig Augenoptik [2003] ECR I-3095, LawLex09827: the assertion according to which a competitor applies greater or excessive prices is not per se discredit or disparagement, even if it does not relate to the average price applied and is systematic.
\(^{212}\) Case C-533/06 O2 Holdings ET O2 (UK) [2008] ECR I-4231, LawLex091037: holding that the use, in a comparative advertisement, of a sign similar to the mark of a competitor of the advertiser cannot be prevented by that competitor on the basis of the directive relating to trademarks, where such use does not give rise to a likelihood of confusion.
stimulates competition between suppliers of goods and services to the consumer’s advantage (Directive No 2006/114, recital 6). Any comparative message must therefore be interpreted in the sense most favorable to the advertising. Thus, whether an advertiser is taking unfair advantage of the reputation of a trademark, trade name or other distinguishing marks of a competitor depends on the benefit of comparative advertising to consumers.

Advertising must also be assessed taking into account the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect and the information contained in the advertisement, in particular the information concerning the shops in the advertiser’s retail chain and those in the retail chains of competitors whose prices have been compared and, more generally, all of its features. The criterion of average consumer is defined in concreto by the national courts which must take into account the perception of consumers to whom the comparative advertising is addressed. Thus, advertising intended for well informed traders is assessed with less severity than advertising for end-users.

It is for the referring court, in order to assess the lawfulness of such advertising, to ascertain whether, in the light of the circumstances of the case, the advertising at issue does not satisfy the objective comparison requirement and/or is misleading by taking into consideration the average consumer of the products in question who is reasonably well informed and reasonably observant and circumspect.

III. Unfair commercial practices

21.07. Scope of application

Directive No 2005/29 on unfair business-to-consumer commercial practices (full harmonization Directive) seeks to guarantee a high level of protection to consumers by approximating the laws of the Member States, whereas Directive No 84/450, of minimum application, had led to a territorial

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214 Case C-44/01 Pippig Augenoptik [2003] ECR I-3095, LawLex09827: insofar as one of the objectives of the directive is that consumers should make the best possible use of the internal market, it would be inappropriate to declare an advertisement illegal on the ground that it compares products obtained through different distribution channels.


216 Case C-381/05 De Landtsheer Emmanuel [2007] ECR I-3115, LawLex09596.

217 Case C-562/15 Carrefour Hypermarchés (SAS), Judgment of 8 February 2017, LawLex17286.


221 The consumer is defined in Article 2 of the directive as any natural person who, in commercial practices covered by the directive, is acting for purposes which are outside his trade, business, craft or profession. Thus a Member State fails to fulfill its obligations under Article 2(b) and (d), 3 and 4 of Directive No 2005/29 by excluding members of a profession and dentists and physiotherapists from the scope of its national legislation transposing the directive: Case C-421/12 Commission v Belgium, Judgment of 10 July 2014, LawLex142220.
division of consumer law and, correlative, to a strong degree of legal uncertainty for consumers and competitive distortions to the detriment of traders.

Under the directive\textsuperscript{222}, "consumer" means any natural person acting for purposes which are outside his trade, business, craft or profession; "trader" on the other hand means any natural or legal person acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader. The scope of application of the directive is particularly broad since it applies "to unfair business-to-consumer commercial practices [...] before, during and after a commercial transaction in relation to a product" (Article 3) and therefore refers to all marketing stages of the product. Although the directive is aimed specifically at undertakings, the Court of Justice extended its scope to cover a body responsible for managing a statutory health insurance fund. The Court held that whether such a body was a public or private body or the fact that it was charged with a task of public interest is irrelevant and found that its members could be deceived by the misleading information circulated by that body and must therefore be regarded as consumers, the economic interest of whom are expressly protected by the directive\textsuperscript{223}. The Court has also stated that the mere fact that the sale is intended to generate profit or that a person publishes, simultaneously, on an online platform a number of advertisements offering new and second-hand goods for sale is not sufficient, by itself, to classify that person as a trader\textsuperscript{224}. Notably, the assessment of the classification as a 'trader' is based on a set of criteria which requires a case-by-case verification of whether the sale on the online platform was carried out in an organized manner, whether it was intended to generate profit, whether the seller had technical information and expertise relating to the products offered for sale which the consumer did not necessarily have, whether the seller had a legal status which enabled her to engage in commercial activities and was subject to VAT, whether the seller, acting on behalf of a particular trader or on her own behalf or through another person acting in her name and on her behalf, received remuneration or an incentive; whether the seller purchased new or second-hand goods in order to resell them, whether the goods for sale were all of the same type or of the same value, and, in particular, whether the offer was concentrated on a small number of goods\textsuperscript{225}.

Article 2(d) defines "business-to-consumer commercial practices" as "any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a

\textsuperscript{222} Directive No 2005/29, Art. 2(a) and(b).
\textsuperscript{223} Case C-59/12 BKK Mobil Oil Köpperschaft des öffenlichen Rechts, Judgment of 3 October 2013, LawLex131442.
\textsuperscript{224} Case C-105/17 Komisia za zashtita na potrebitelite, Judgment of 4 October 2018, LawLex181459.
\textsuperscript{225} Case C-105/17 Komisia za zashtita na potrebitelite, Judgment of 4 October 2018, LawLex181459.
trader, directly connected with the promotion, sale or supply of a product to consumers”. The directive applies to commercial practices taking place before the commercial transaction and also defines, at Article 2(i), the concept of invitation to purchase as "a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase". The Court of Justice has stated that to be capable of being categorized as an invitation to purchase, it is not necessary for it to include an actual opportunity to purchase or for it to appear in proximity to and at the same time as such an opportunity. A practice will fall within the scope of application of the directive where its purpose is to attract consumers to the business premises of a trader and to encourage them to make purchases. Thus information relating to exclusivity on which a travel agency relied constitutes a commercial practice. However, this is not the case of national legislation prohibiting the opening of an establishment seven days a week because its objective is the protection of the right of workers to a private life, not the protection of consumers, or of a provision under which publishers are required to identify specifically, through the use of the term 'advertisement', any publication in their periodicals for which they receive remuneration.

A commercial practice is unfair, according to Article 5, where "it is contrary to the requirements of professional diligence" and "materially distorts or is likely to materially distort the economic behavior with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers". To that general definition, Annex I of the directive adds a list of thirty-one unfair practices that the Member States are required to include in their provision of transposition and which are penalized per se without previous review of the practice. According to the Court, Annex 1 applies to a pyramid promotional scheme in which there is an indirect link between the contributions paid by new members of the scheme and the compensation paid to existing members, in that its aim is

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226 According to the ECJ, the practices covered by it must be commercial in nature, i.e. they must originate from traders, and they must be directly connected with the promotion, sale or supply of their products to consumers: Case C-391/12 RKvS Verlagsgesellschaft mbH, Judgment of 17 October 2013, LawLex131496.
228 This is the case for resale at a loss: Case C-343/12 Order of 7 March 2013, Euronics Belgium.
229 C-435/11 CHS Tour Services GmbH, Judgment of 19 September 2013, LawLex131334.
230 Case C559/11 Pelckmans Turnhout NV, Judgment of 4 October 2012, not available in English.
231 Case C-391/12 RKvS Verlagsgesellschaft mbH, Judgment of 17 October 2013, LawLex131496.
232 For an example of its application see Case C-515/12 "4finance" UAB, Judgment of 3 April 2014, LawLex14569, which classifies a practice as an unfair commercial practice per se only where such a scheme requires the consumer to give financial consideration, regardless of its amount, for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products.
to generate a profit for itself, that is, for the promoters of the scheme, and not only for the players.\(^{233}\)

As the list is exhaustive, practices which do not fall within the Annex, such as bans on tied sales\(^{234}\), commercial lotteries which make the participation of consumers dependent on the purchase of goods\(^{235}\) or clearance sales without prior administrative authorization\(^{236}\), resale at a loss\(^{237}\) or announcements of price reductions\(^{238}\) must be assessed in view of the criteria laid down by Articles 5 et seq.

Despite the European legislator’s wish to give the directive a scope of application as wide as possible, the provision applies without prejudice to the rules of contract law, in particular those on the validity, formation or effects of a contract (Article 3(2)). The rules relating to the health and safety aspects of products, which are the subject-matter of sector-specific Directives, also do not fall within the scope of Directive No 2005/29 (Article 3(3)). The directive does not therefore preclude a provision of national law which protects public health and the dignity and integrity of the professions of plastic surgeon and plastic doctor by prohibiting any natural or legal person from disseminating advertising for procedures relating to plastic surgery or non-surgical plastic medicine\(^{239}\). Although financial services necessitate detailed requirements due to the complexity and inherent serious risks they present, Directive No 2005/29 applies to them and provides that Member States may impose requirements which are more restrictive or prescriptive (Art.3 (9)). Thus the Court finds that Article 3(9) does not preclude a Member State from laying down a general prohibition - save in the cases exhaustively listed by the national legislation - of combined offers to consumers where at least one of the components of those offers is a financial service\(^{240}\).

In addition to the general ban on unfair commercial practices defined in Article 5, the directive refers to two specific types of unfair commercial practices: misleading commercial practices (Articles 6 and 7) and aggressive commercial practices (Articles 8 and 9)\(^{241}\). The EU court has specified that a

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\(^{233}\) Case C-667/15 Loterie Nationale - Nationale Loterij NV van publiek recht, Judgment of 15 December 2016, LawLex162083.


\(^{235}\) Case C-304/08 Plus Warenhandelsgesellschaft, LawLex11479.

\(^{236}\) Case C-206/11 Köck [2013], LawLex1399.

\(^{237}\) Case C-343/12 Order of 7 March 2013, Euronics Belgium; Case C-295/16 Europamur Alimentación SA, Judgment of 19 October 2017, LawLex171687: Directive No 2005/29 precludes a national provision, which contains a general prohibition on offering for sale or selling goods at a loss and which lays down grounds of derogation from that prohibition that are based on criteria not appearing in that directive.

\(^{238}\) Case C-13/15 Cdiscount SA, Judgment of 8 September 2015, LawLex151102.

\(^{239}\) Case C-356/16 Wamo BVBA, Judgment of 26 October 2017, LawLex171766.

\(^{240}\) Case C-265/12 Citroën Belux NV, Judgment of 18 July 2013, LawLex131169.

\(^{241}\) According to the Court, the basic rule according to which unfair commercial practices are prohibited is given effect and concrete expression by more specific provisions with a view to due account’s being taken of the risk posed to consumers by the two cases that arise...
contractual term cannot be declared invalid on the basis of Directive No 2005/29, unlike Directive No 93/13, even if it was agreed on between the parties to the contract on the basis of an unfair commercial practice, insofar as the two directives pursue distinct aims, the prohibition of unfair commercial practices for the former and the restoration of contractual equality for the latter.

21.08. Misleading commercial practices

Within misleading practices, Directive No 2005/29 makes a distinction between misleading actions (Article 6) and misleading omissions (Article 7).

1) Misleading actions

Pursuant to Article 6(1), "a commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct" and "causes or is likely to cause him to take a transactional decision that he would not have taken otherwise". Any decision directly related to the decision whether or not to purchase a product is covered by the concept of "transactional decision". When a practice satisfies those criteria, it constitutes an unfair commercial practice and it is not necessary to determine whether the condition of that practice being contrary to the requirements of professional diligence laid down in Article 5(2)(a) is also met.

The misleading action, which is not limited to false allegations, has a quite subjective character which means that the case law rendered in application of Directive No 84/450 is very important. Thus, a seller stating that the goods for sale come from an insolvent estate is misleading where the information, even if true, that the goods belong to the insolvent estate induces the consumer to think that these goods are sold at a very low price.

A lie or misleading mistake which constitutes a misleading action may relate to various aspects such as the existence or nature of the product, its main characteristics, the extent of the trader's commitments, the motives for the commercial practice and the nature of the sales process, as well as

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243 Case C-281/12 Trento Sviluppo (SRL), Judgment of 19 December 2013, LawLex131863.
244 Case C-435/11 CHS Tour Services GmbH, Judgment of 19 September 2013, LawLex131334.
246 Under the directive, the main characteristics of the product refer to its availability, benefits, risks, execution, composition, accessories, aftersale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product.
any statement or symbol which gives the impression that the trader of the product is sponsored or has
a direct or indirect support, its price or the manner in which the price is calculated, or the existence of
a specific price advantage, the need for a service, part, replacement or repair, the nature, attributes and
rights of the trader or his agent, such as his identity and assets, his qualifications, status, approval,
affiliation or connection and ownership of industrial, commercial or intellectual property rights or his
awards and distinctions, the consumer's rights, including the right to replacement or reimbursement
under Directive No 1999/44 of 25 May 1999 on certain aspects of the sale of consumer goods and
associated guarantees, or the risks it may face. A misleading commercial practice is constituted where
traders give the false impression that the consumer has already won a prize, while the taking of any
action in relation to claiming that prize, be it requesting information concerning the nature of that
prize or taking possession of it, is subject to an obligation on the consumer to pay money or to incur
any cost whatsoever, regardless of whether the cost is insignificant compared with the value of the
prize or that it does not procure the trader any benefit. Where the price of a product is divided into
several components, while the other, which nevertheless constitutes an inevitable and foreseeable
element of the price, is completely omitted or is presented less prominently, that presentation is also
misleading.

Pursuant to Article 6(2), a commercial practice is also regarded as misleading if, in its factual context,
it causes or is likely to cause the average consumer to take a transactional decision that he would not
have taken otherwise, provided that it involves the implementation of techniques which create
confusion with another product, trade mark, trade name or other distinguishing mark of a competitor
or the non-compliance by the advertiser with commitments contained in a code of conduct by which it
is bound. However, although non-compliance by a trader with a code of conduct may constitute an
unfair commercial practice, the directive does not preclude national legislation which does not confer a
legally binding nature on a code of conduct, and hence does not require the Member States to provide
for there to be direct consequences for traders solely on the ground that they have not complied with a
code of conduct after subscribing to it. The Court of Justice has clarified that time constraints that
may apply to certain communication media, such as television commercials, cannot be taken into
account.

248 Case C-611/14 Canal Digital Danmark, Judgment of 26 October 2016, LawLex161753.
250 Case C-611/14 Canal Digital Danmark, cited above.
2) Misleading omissions

Where it causes or is likely to cause a consumer to take a transactional decision that he or she would not have taken otherwise, the omission of "material information that the average consumer needs, according to the context, to take an informed transactional decision" (Article 7(1)) is misleading. The same goes when a trader hires or provides such material information in an unclear, unintelligible, ambiguous or untimely manner, or fails to identify its commercial intent (Article 7(2)). Thus, in the context of a combined offer consisting of the sale of a computer equipped with pre-installed software, the failure to indicate the price of each of those items of software does not constitute a misleading commercial practice insofar as the price of each of those items is not such as to prevent the consumer from taking an informed transactional decision or likely to cause the average consumer to make a transactional decision that he would not have taken otherwise.

Likewise, the act of not providing consumers with information on the testing conditions that resulted in the energy classification indicated on the energy label does not constitute a misleading omission within the meaning of the directive. However, information on the basis of which the comparison was made between the prices charged in shops having larger sizes or formats in the advertiser's retail chain and those displayed in shops having smaller sizes or formats in competitors' retail chains is material information within the meaning of Article 7. Technical limitations imposed on the trader by the medium used to communicate must, in all events, be taken into account in deciding whether information has been omitted, as he may make additional information available to consumers by other means (Article 7(3)).

The directive distinguishes between commercial communications, such as advertising and marketing, and invitations to purchase - "a commercial communication [...] indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase" (Article 2(i)). Information in relation to

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251 See, however, Case C-373/90 X [1992] ECR I-131, LawLex09577: an advertiser is not guilty of misleading advertising by offering cars as less expensive than those sold by official dealers, where it does not mention that the price difference is justified because they are equipped with fever accessories, insofar as such factors would not have deterred a significant number of consumers from making a purchase, had they known it.

252 Case C-310/15 Deroo-Blanquart, Judgment of 7 September 2016, LawLex161382.

253 Case C-632/16 Dyson, Judgment of 25 July 2017, LawLex181257.

254 Case C-562/15 Carrefour Hypermarchés (SAS), Judgment of 8 February 2017, LawLex17286.

255 Case C-611/14 Canal Digital Danmark, cited above: The national court must give consideration to the context in which that practice takes place, in particular the limitations of the communications medium used for the purposes of that commercial practice, the limitations of time and space imposed by that communications medium and any measures taken by the trader to make the information available to consumers by other means, even though that requirement is not expressly referred to in the wording of the national legislation in question.
commercial communication which appear in the European directives whose non-exhaustive list is contained in Annex II are regarded as material (Article 7(5))

Pursuant to Article 7(4), an invitation to purchase must contain the following material information: main characteristics of the product, geographical address and identity of the trader, price inclusive of taxes or manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges, arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence and, for products and transactions involving a right of withdrawal or cancellation, existence of such a right. According to the Court of Justice, a reference only to an entry-level price in an invitation to purchase cannot be regarded, in itself, as a misleading omission\(^\text{256}\). A trader may merely mention certain of a product’s main characteristics in an invitation to purchase where it refers in addition to its website insofar as it fulfills its obligations as to essential information\(^\text{257}\). Therefore, although the information on the geographical address and identity of the trader, referred to in Article 7(4)(b) of Directive No 2005/29, must in principle be included in the invitation to purchase, that need not necessarily be the case where the means of communication used for the purposes of the commercial practice imposes limitations of space, provided however that the consumers who may purchase the products advertised via the website, mentioned in the advertisement, may easily obtain that information on or via that website\(^\text{258}\).

21.09. Aggressive practices

Pursuant to Article 8 of Directive No 2005/29, "a commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise". Article 9(b) specifies the concepts of harassment, coercion and use of undue influence. The use of physical force or abusive language, the exploitation by a trader "of any specific misfortune or circumstance of such gravity as to impair the consumer’s judgment" (Article 9 (c)), the fact of imposing significant non-contractual barriers to consumers (Article 9(d)) and the threat to take

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\(^{256}\) Case C-122/10 Konsumentombudsmannen [2011] ECR I-3903, LawLex111092.

\(^{257}\) Case C-122/10 Konsumentombudsmannen, cited above.

\(^{258}\) Case C-146/16 Verband Sozialer Wettbewerb eV, Judgment of 30 March 2017, LawLex17611, which specifies that it is for the referring court to examine, on a case-by-case basis, whether the limitations of space in the advertisement warrant information on the supplier being provided only upon access to the online sales platform and, whether, so far as the online sales platform is concerned, the information required by Article 7(4)(b) of Directive 2005/29 is communicated simply and quickly.
any action that cannot legally be taken (Article 9(e)) are thus covered by the directive. In determining whether an aggressive commercial practice exists, account must be taken of the location where it is to be implemented, its persistence and nature (Article 9(a)). Thus, in a reference for a preliminary ruling concerning several promotional lotteries where all participants were entitled to a prize, subject to three options of participation (calling a premium rate telephone number, SMS or ordinary post), with consumers encouraged to use the most expensive route (the premium rate telephone number), the EU court held that practices by which the trader gives the false impression that the consumer has already won a prize, while the taking of any action in relation to claiming that prize, be it requesting information concerning the nature of that prize or taking possession of it, is subject to an obligation on the consumer to pay money or to incur any cost whatsoever, constitutes, in itself, an aggressive commercial practice, even if the cost imposed on the consumer, such as the cost of a stamp, is de minimis compared with the value of the prize or that it does not procure the trader any benefit. Conduct whereby a telecommunications operator sells SIM cards on which certain services are pre-loaded and pre-activated without first sufficiently informing the consumer of that pre-loading and pre-activation, nor of the cost of those services, also constitutes an aggressive commercial practice by inertia selling within the meaning of Annex I point 29 of the directive.

Section 2 Unfair terms

21.10. Definitions

Directive No 93/13 fulfills a twofold objective: to protect consumers and prevent any competitive distortion between sellers or providers of services in the context of the sale of their products or services in other Member States. However, it only carries out minimum harmonization since, pursuant to Article 8, the Member States remain free to adopt or maintain more stringent provisions to ensure a higher degree of protection for the consumer. As a harmonization instrument, Directive No 93/13 applies even to situations which do not have a cross-border element, unlike the provisions of the Treaty on the Functioning of the European Union on freedom of movement. In application of

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259 Case C-428/11 Purely Creative Ltd and others, Judgment of 18 October 2012, LawLex122226.
260 Cases C-54/17 and C-55/17 Autorità Garante della Concorrenza e del Mercato, Judgment of 13 September 2018, LawLex181288: such is this case even where the consumer could have opted for deactivation of the services in question on the SIM card through the telecommunication operators concerned or could have configured his device to deactivate those services, insofar as, in the absence of clear and sufficient information on the existence of those pre-loaded and pre-activated services and their costs being communicated by those operators to the consumer, before purchase of the SIM card in question, it is at the very least unlikely that the consumer would genuinely be able to make use of such an option, at least before being billed for the services.
262 Case C-483/16 Sziber, Szeder, Judgment of 31 May 2018, not available in English.
Article 7 of the directive, the Member States must ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts. Thus, in the absence of harmonization of the national mechanisms for enforcement, the rules fixed by the national legal order of each Member State must satisfy the two conditions: that they are no less favourable than those governing similar domestic actions (principle of equivalence) and do not make it in practice impossible or excessively difficult to exercise the rights conferred on consumers by EU law (principle of effectiveness). The national transitional provision which fixes a time-limit of one month from the day of its publication in the official journal aiming to ensure that consumers, the defendants in mortgage enforcement proceedings in progress in which the normal period within which to object to enforcement has already begun to run or has expired, have the possibility, in the same proceeding, to raise a new ground of opposition which was not foreseen when the legal proceedings concerned were brought, based on the unfairness of contractual terms, is contrary to the principle of effectiveness, not with regard to the length of the period which is reasonable and proportionate, but with regard to the mechanism chosen to start the period running, given that, as the consumers concerned were not personally informed of this new possibility, there is a significant risk that the time-limit will expire without them being able effectively and usefully to exercise their rights.  

The directive only protects consumers it defines in Article 2 as "any natural person who, in contracts covered by this directive, is acting for purposes which are outside his trade, business or profession". Thus a lawyer who concludes a credit agreement with a bank, in which the purpose of the credit is not specified, is a "consumer" within the meaning of the directive where that agreement is not linked to that lawyer’s profession regardless of the fact that the debt is secured by a mortgage taken out by that person in his capacity as representative of his law firm and involves goods intended for the exercise of that person’s profession. Legal persons are thus excluded from its scope of application. Thus, a natural person, who, by means of a novation agreement, has contractually undertaken to repay to a commercial operator, which is a professional lending institution, loans originally granted to a company for purposes inherent in that company’s business activity, constitutes a consumer within the meaning of the directive, in the case where that natural person has no evident link with that company but acted in that way on the basis of links, outside his trade, business or profession, with the person who

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264 Case C-110/14 Horatiu Ovidiu Costea, Judgment of 3 September 2015, LawLex151033.
controlled the company which received the original loans and also with the persons who signed contracts ancillary to the original loan contracts\(^{266}\).

The directive applies to unfair terms in contracts concluded between a seller or supplier and a consumer, with the exception of those terms which reflect mandatory statutory or regulatory provisions. It defines those contracts to which it is applicable by reference to the status of the contracting parties\(^{267}\). Subject to contractual terms which reflect a mandatory national provision, Directive No 93/13 therefore applies to a residential tenancy agreement concluded between a landlord acting for purposes relating to his trade, business or profession and a tenant acting for purposes which do not relate to his trade, business or profession\(^{268}\). It also applies to provisions in general terms and conditions, incorporated into contracts concluded between a supplier and a consumer, which reproduce a rule of national law applicable to another category of contract to which they are not subject\(^{269}\). The directive also applies to standard form contracts for legal services concluded by a lawyer with a natural person acting for purposes which are outside his trade, business or profession\(^{270}\). Likewise, a free educational establishment, which, by contract, has agreed with one of its students to provide repayment facilities for sums due by the latter in respect of registration fees and costs connected with a study trip, must be regarded, in the context of that contract, as a "seller or supplier" within the meaning of the directive\(^{271}\). On the other hand, the legal and regulatory provisions on national mechanisms for enforcement, the rules for giving effect to the grounds of objection allowed in mortgage enforcement proceedings and the powers conferred on the national court fall neither within the scope of Directive No 93/13, nor under the principles of EU law on consumer protection and the balance in the parties' contractual rights and obligations, when there is no contractual term altering the effect or ambit of those national provisions\(^{272}\). This is also the case for a contractual term in a contract concluded by a seller or supplier with a consumer if that contractual term reflects the content of a mandatory statutory or regulatory provision, which must be established by the referring court\(^{273}\).

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\(^{266}\) Case C-535/16 Bachman, Order of 27 April 2017, not available in English.

\(^{267}\) Case C-74/15 Tarcau v Banca Comerciala Intesa Sanpaolo România SA, Judgment of 19 November 2015, not available in English: the directive applies to a contract providing immovable property as security or to a guarantee contract concluded between a natural person and a credit institution in order to guarantee the obligations which a commercial company has entered into with that institution in the context of a credit agreement, where that natural person has acted for purposes outside their trade, business or profession and has no connection in terms of function with that company.

\(^{268}\) Case C-488/11 Asbeek Brusse, Judgment of 30 May 2013, LawLex13881.

\(^{269}\) Case C-92/11 RWE Vertrieb AG, Judgment of 21 March 2013, LawLex13471.

\(^{270}\) Case C-537/13 Siba v Devenas, Judgment of 15 January 2015, LawLex1549.

\(^{271}\) Case C-147/16 Karel de Grote - Hogeschool Katholieke Hogeschool Antwerpen VZW, Judgment of 17 May 2018, LawLex18725.

\(^{272}\) Case C-280/13 Barclays Bank (SA), Judgment of 30 April 2014, LawLex14640.

\(^{273}\) Case C-34/13, Monica Kušionova, Judgment of 10 September 2014, LawLex14884.
A contractual term which has not been individually negotiated is unfair where, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligation to the detriment of the consumer (Article 3). A term is regarded as not individually negotiated where it has been drafted in advance without the consumer having been able to influence its substance, particularly in the context of a pre-formulated standard contract. The fact that certain aspects of a term or one specific term have been individually negotiated does not exclude the application of this article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract. The concept of a term which has not been individually negotiated covers, inter alia, a contractual term amended by a mandatory national statutory provision adopted after the conclusion of a contract with a consumer, for the purpose of removing a term which is null and void from that contract. The question whether that significant imbalance exists cannot be limited to a quantitative economic evaluation based on a comparison between the total value of the transaction which is the subject of the contract and the costs charged to the consumer. The existence of a significant imbalance does not necessarily require that the costs charged to the consumer by a contractual term have a significant economic impact having regard to the value of the transaction in question, but can result solely from a sufficiently serious impairment of the legal situation in which that consumer, as a party to the contract, is placed by reason of the relevant national provisions, whether this be in the form of a restriction of the rights which, in accordance with those provisions, he enjoys under that contract, or a constraint on the exercise of those rights, or the imposition on him of an additional obligation not envisaged by the national rules. Thus according to the Court of Justice, in a loan agreement concluded with a consumer, a non-negotiated term fixing the default interest rate applicable is unfair when the consumer who is late performing his payment obligation is required to pay a disproportionately high sum in compensation, as the rate of which exceeds by more than two percentage points the ordinary interest rate provided for in that agreement.

Under Article 4(2), "assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the

274 See Case C-415/11 Mohamed Aziz, LawLex13362: in order to assess whether the imbalance arises "contrary to the requirement of good faith", it must be determined whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to the term concerned in individual contract negotiations.
275 Case C-51/17 OTP Bank Nyrt., Judgment of 20 September 2018, LawLex181347: even if a contractual term relating to the foreign exchange risk is not excluded from the scope of Directive No 93/13, per se, that provision does not cover terms which reflect mandatory provisions of national law, inserted after the conclusion of a loan contract concluded with a consumer and intended to remove a term which is null and void from that contract, by imposing an exchange rate set by the National Bank.
277 Case C-96/16, C-94/17 Banco Santander SA, Escobedo Cortés, Judgment of 7 August 2018, LawLex181207.
one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language”. The Court of Justice\footnote{Case C-26/13 Árpád Kásler, Judgment of 30 April 2014, LawLex14641, which added that the term “subject matter of the contract” of Art. 4(2), only refers to an essential obligation of the agreement which, as such, characterizes it.} held that the requirement that a contractual term must be drafted in plain intelligible language is to be understood as requiring not only that the relevant term should be grammatically intelligible to the consumer, but also that the contract should set out transparently the specific functioning of the mechanism to which the relevant term refers and the relationship between that mechanism and that provided for by other contractual terms, so that that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it. Financial institutions must provide borrowers with adequate information to enable them to take well-informed and prudent decisions, insofar as a term relating to the foreign exchange risk must be understood by the consumer both at the formal and grammatical level and also in terms of its actual effects, so that the average consumer, who is reasonably well informed and reasonably observant and circumspect, would not only be aware of the possibility of a depreciation of the national currency in relation to the foreign currency in which the loan was denominated, but would also be able to assess the potentially significant economic consequences of such a term with regard to his financial obligations\footnote{Case C-51/17 OTP Bank Nyrt., Judgment of 20 September 2018, LawLex181347.}. According to the Court\footnote{Case C-448/17 EOS KSI Slovensko s.r.o. Judgment of 20 September 2018, LawLex181355.}, the terms of a consumer credit agreement are not drafted in plain intelligible language where they neither mention the APR (annual percentage rate of change) - and contain only a mathematical formula for the calculation thereof without the information necessary to make that calculation - nor the rate of interest.

Unfair terms are not binding on the consumer. The conditions by which unfair terms are voided are provided by the national law of each Member State (Art. 6). The contract will continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair provisions. According to the Court of Justice, a Member State may provide that a contract concluded with a consumer by a trader which contains one or more unfair terms is to be void as a whole where that will ensure better protection of the consumer\footnote{Case C-453/10 Jana Perenicová, Judgment of 15 March 2012, LawLex12615.}. Member States are not precluded from adopting annulment procedures producing effects with regard to all consumers having concluded a contract to which the same terms apply, including with regard to those consumers who were not party to the
injunction proceeding brought by a consumer protection body. Further, Union law does not preclude the sanctioning of the unfairness of a non-negotiated term fixing the default interest rate in a loan agreement concluded with a consumer by the complete elimination of that interest, while the ordinary interest provided for in that agreement continues to run.

An annex to Directive No 93/13 draws up a list of grey terms, regarded as unfair. This annex, which contains only an indicative list, does not limit the discretion of the national court that is under no obligation to find a term appearing in the list unfair and, conversely, may find unfair a term that does not appear in the list. However, terms which reflect mandatory statutory or regulatory provisions or provisions of international conventions to which the Member States or the Union are party, do not fall within the scope of application of the directive (Article 1(2)).

21.11. Action by associations

Pursuant to Article 7(2) of Directive No 93/13, organizations which have a legitimate interest under national law in protecting consumers are empowered to take action before the competent courts to seek the termination of the use of unfair terms by traders. Paragraph 3 adds that these legal remedies may be directed against traders or their associations which use or recommend the use of those terms. The directive intends to offset the situation of inequality existing between the consumer and the professional by a positive intervention, outside the mere parties to the contract. Thus, the action opened to consumer protection associations by the domestic law of each Member State must not only be repressive but must also be preventive and cover the mere recommendation of the use of such clauses in the same way as the actual use thereof. With no direct contractual link, the action of consumer associations is a matter relating to delict or quasi-delict.

The collective action of associations is by nature different from the individual action of consumers. In the latter, the courts assess in concreto the unfair character of a term contained in a contract already entered into while in the former their assessment is made in abstracto on the unfair character of a term.

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282 Case C-472/10 Nemzeti Fogyasztóvédelmi Hatóság v Invitel, Judgment of 26 April 2012, LawLex121761.
283 Case C-96/16, C-94/17 Banco Santander SA, Escobedo Cortés, Judgment of 7 August 2018, LawLex181207.
285 Case C-372/99 Commission v Italy [2002] ECR I-819, LawLex09575: “the deterrent nature and dissuasive purpose of the measures to be adopted, together with their independence from any particular dispute mean, as the Court held, that such actions may be brought even though the terms which it is sought to have prohibited have not been used in specific contracts, but have only been recommended by suppliers and sellers or their associations”.
287 An action for an injunction pitting an association against a seller or supplier is not characterized by the same imbalance as is present in an individual action brought by a consumer against a seller or supplier: Case C-413/12 Asociación de Consumidores Independientes de Castilla y León, Judgment of 5 December 2013, LawLex131744.
that might be included in contracts which have not been entered into yet. Thus, Article 5 of the directive, according to which, where there is doubt about the meaning of a term, the interpretation most favorable to the consumer prevails, does not apply to collective action. In effect, in order to obtain, by way of prevention, the most favorable result for consumers as a whole, it is not necessary, where there is doubt, to interpret the term in a manner favorable to them. National legislation may, without contravening either Directive No 93/13 or the principles of equivalence and effectiveness, provide that actions are to be brought before the courts where the defendant is established and that no appeal lies against a decision declining territorial jurisdiction handed down by a court of first instance. Further, a consumer must be permitted to bring an individual action seeking a declaration that a contractual term binding him to a seller or supplier is unfair without that action being suspended pending a final judgment concerning an ongoing collective action brought by a consumer association to prevent the use of terms similar to those at issue in that individual action. At the same time, a consumer protection organization may intervene, in the interests of the consumer, in proceedings seeking an order for payment concerning an individual consumer and lodge an objection against that order in the absence of a challenge to it by the consumer.

EU legislation does not provide for a right for consumer protection associations to intervene in individual disputes involving consumers. In accordance with the principle of procedural autonomy, it is therefore for the national legal order of each Member State to establish such rules, provided that they are not less favorable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by European Union law (principle of effectiveness). National legislation which does not allow a consumer protection association to intervene in support of a consumer in proceedings for enforcement, against the latter, of a final arbitration award is not precluded by Directive No 93/13.

21.13. Assessment of the unfair character by the national court

Pursuant to Article 4(1) of the directive, "the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the..."
contract and to all the other terms of the contract or of another contract on which it is dependent. All the circumstances which could have been known to the seller or supplier at the time of the conclusion of the contract and which were of such a nature that they could affect the future performance of the contract, must therefore be taken into account by the court in its assessment of the existence of any imbalance, as must the expertise and knowledge of the seller or supplier. The supervision by the court not only relates to the substance but also to the form. In effect, according to Article 4(2), "assessment of the unfair nature of the terms shall relate neither to the definition of the main subject-matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language." The national court must, in order to determine whether the contractual term on which the claim brought before it is based may be unfair, take account of all of the other terms of the contract; it is for the national court to carry out that assessment with regard to all the circumstances of the particular case, including all the general terms and conditions of the consumer contracts i.e. whether the contract sets out in transparent fashion the reason for and method of the variation of those charges, so that the consumer can foresee, on the basis of clear, intelligible criteria, the alterations that may be made to those charges as the lack of information on the point before the contract is concluded cannot, in principle, be compensated for by the mere fact that consumers will, during the performance of the contract, be informed in good time of a variation of the charges and of their right to terminate the contract if they do not wish to accept the variation.

It is for the national court to assess the unfairness of the terms submitted to its review. But can it raise of its own motion the unfairness of a term while the consumer himself has not claimed that it was contrary to European law? The Court of Justice has answered yes to that question. The system of protection implemented by the directive relies on the imbalance of powers of the consumer and the seller or supplier. Article 6(1) of the directive thus specifies that the consumer must not be bound by unfair terms. To ensure the fulfillment of that objective, the inequality of the parties to the contract must be offset by a positive action, outside the parties, which may be due to consumer associations (Article 7), but also to the national court. In effect, recognizing that it has the power to find of its own motion the unfairness of a term may have a deterrent effect likely to result in putting an end to the use of the unfair terms in contracts offered by traders. Thus, national legislation can provide for a simplified notarial enforcement procedure without the notary verifying the unfairness of contractual terms, where the national court can carry out that verification in the context of an action challenging the validity of the contract or by the suspension of the enforcement of the contract.

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293 Case C-186/16 Andriciuc and others, Judgment of 20 September 2017, LawLex171472.
294 Case C-472/11, Banif Plus Bank Zrt, Judgment of 21 February 2013, LawLex13192: the national court must, in order to determine whether the contractual term on which the claim brought before it is based may be unfair, take account of all of the other terms of the contract; Case C-92/11 RWE Vertrieb AG, Judgment of 21 May 2013, LawLex13471: it is for the national court to carry out that assessment with regard to all the circumstances of the particular case, including all the general terms and conditions of the consumer contracts i.e. whether the contract sets out in transparent fashion the reason for and method of the variation of those charges, so that the consumer can foresee, on the basis of clear, intelligible criteria, the alterations that may be made to those charges as the lack of information on the point before the contract is concluded cannot, in principle, be compensated for by the mere fact that consumers will, during the performance of the contract, be informed in good time of a variation of the charges and of their right to terminate the contract if they do not wish to accept the variation.
296 According to the Court, Article 6(1) is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them: Case C-397/11 Erika Jorós, Judgment of 30 May 2013, LawLex13880.
297 Case C-32/14 Bank Hungary Zrt. v Sugár, Judgment of 1 October 2015, LawLex151180.
national procedural system which does not allow the court, during the order for payment proceedings or the enforcement proceedings concerning an order for payment, to assess of its own motion the potentially unfair nature of the terms of a contract between a seller or supplier and a consumer, undermines the effective protection of the rights provided under the directive\textsuperscript{298}.

Specifying the scope of the power thus recognized to the national court, the Court of Justice has underlined that its exercise cannot be hindered by the establishment of a limitation period since the trader would merely have to wait for the expiry of that period to bring an action, thus depriving the consumer or the court of any possibility to claim the unfair character of the term\textsuperscript{299}. A national court hearing an action for annulment of an arbitration award may also determine whether the arbitration clause is unfair even when the consumer raised its nullity merely as part of the action for annulment against the award\textsuperscript{300}. The Court of Justice goes even further when it asserts that the national court is "required to assess of its own motion whether a contractual term is unfair" where it has available to it the legal and factual elements necessary for that task, including when it is assessing whether it has territorial jurisdiction\textsuperscript{301} or where, under its national rules of procedure, it must carry out such an assessment in similar actions of a domestic nature\textsuperscript{302}. Where the unfair nature of a term has been acknowledged, the national court is required, of its own motion, and also as regards the future, to draw all the consequences provided for by national law in order to ensure that consumers who have concluded a contract to which the same term applies will not be bound by that term\textsuperscript{303}. Therefore it can, where it has the power under internal procedural rules, annul of its own motion a contractual term which it has found to be unfair\textsuperscript{304} and is not obliged, in order to be able to draw the consequences arising from that finding, to wait for the consumer, who has been informed of his rights, to submit a statement requesting that that term be declared invalid, even though the principle of audi alteram partem requires the national court to inform the parties and to give them the opportunity to challenge the views of the other party, in accordance with the formal requirements laid down in that regard by the national rules of procedure\textsuperscript{305}. On the other hand, the national court is not authorized to revise the content of unfair contractual terms insofar as that contract must continue in existence, in principle,

\textsuperscript{298} Case C-49/14 Finanmadrid EFC (SA) v Albán Zambrano, Judgment of 18 February 2016, LawLex16351.
\textsuperscript{299} Case C-473/00 Cofidis [2002] ECR I-10875, LawLex09951.
\textsuperscript{300} Case C-168/05 Mostaza Claro [2006] ECR I-10421, LawLex09684.
\textsuperscript{302} Case C-40/08 Asturcom Telecomunicaciones [2009] ECR I-9579, LawLex11321; Case C-397/11 Erika Jorós, Judgment of 30 May 2013, LawLex13880.
\textsuperscript{303} Case C-472/10 Nemzeti Fogyasztóvédelmi Hatóság, Judgment of 26 April 2012, LawLex121761.
\textsuperscript{304} Case C-488/11 Asbeek Brusse, Judgment of 30 May 2013, LawLex13881.
\textsuperscript{305} Case C-472/11 Banif Plus Bank, Judgment of 21 February 2013, LawLex13192.
without any amendment other than that resulting from the deletion of the unfair term. Where a contract cannot continue in existence after an unfair term has been deleted, that provision does not preclude a rule of national law enabling the national court to cure the invalidity of that term by substituting for it a supplementary provision of national law.

**Section 5 Liability for defective products**

**21.16. Principle of liability of the producer**

Council Directive No 85/374 of 25 July 1985 is aimed at remedying the damageable effects, both for consumers and producers, of the divergences of the laws of the Member States regarding liability for defective products. The search for balance between the interests of the various parties has led to establishing a system of liability without fault on the part of the producer with respect to any victim of a bodily injury or a loss caused to a product other than the defective product itself (Article 1), mitigated by certain causes of exemption (Article 7) and a system of short limitation period (Articles 10 and 11). However, where the producer is liable for the loss caused by a defect of his product, meaning all movables, including electricity, even though incorporated into another movable or into an immovable (Article 2), the victim is not exempted from establishing, by virtue of Article 4, the defect of the product, which means the lack of safety which may legitimately be expected, taking all circumstances into account (Article 6), its damage, as well as the existence of a causal relationship between defect of the product and damage. The EU court accepts, only in matters relating to medicine, evidentiary rules, where medical research neither establishes nor rules out the existence of a link between the administering of a vaccine and the occurrence of a disease, which do not require the victim to produce certain and irrefutable evidence of a defect in the product and of a causal link between the defect and the damage suffered, but authorizes the court, where applicable, to conclude that such a defect has been proven to exist, on the basis of the serious, specific and consistent indicia brought by the applicant, such as the temporal proximity between the administration of the vaccine and the occurrence of the disease and the lack of personal and family history of that disease, together with the existence of a significant number of reported cases of the disease occurring following such

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306 Case C-618/10 Banco Español de Crédito SA v Camino, Judgment of 14 June 2012, LawLex121486.
307 Case C-26/13 Árpád Kásler, Judgment of 30 April 2014, LawLex14641.
vaccines being administered. Carrying out maximum harmonization, the margin of discretion available to Member States in order to make provision for product liability is entirely determined by the directive itself and must be inferred from its wording, purpose and structure.

Article 1 lays down the principle of liability of the producer, defined in Article 3 as designating "the producer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer" (Article 3(1)) or "without prejudice to the liability of the producer, any person who imports into the Community a product" (Article 3(2)). Where the producer or the importer of the product cannot be identified, each supplier is treated as its producer unless he informs the victim, within a reasonable time, of the identity of the producer or of the person who supplied him with the product (Article 3(3)). The supplier cannot be regarded as liable on the same basis as the producer even though the latter cannot be identified, where he has informed the injured person within a reasonable time of the identity of the person who supplied him with the product. In such case, the supplier should inform the injured person of the identity of the producer or his own supplier on his own initiative and promptly.

Harmonization being maximum, no national rule may provide that the supplier is answerable without restriction for the producer’s liability when Article 3 envisages that liability only in a very specific case. An intermediary supplier cannot be assimilated to the producer and directly answer for the product's defects with respect to the injured persons and upstream suppliers in the distribution chain.

Having entrusted national law with the determination of the conditions in accordance with which one party may be substituted for another in case of proceedings brought against a company mistakenly considered to be the producer of a product whereas, in reality, that product was manufactured by

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309 Case C-621/15 Sanofi Pasteur MSD, Judgment of 21 June 2017, LawLex171080: on the other hand, EU law precludes evidentiary rules based on presumptions according to which, where medical research neither establishes nor rules out the existence of a link between the administering of the vaccine and the occurrence of the victim's disease, the existence of a causal link between the defect attributed to the vaccine and the damage suffered by the victim will always be considered to be established when certain predetermined causation-related factual evidence is presented.


311 Case C-52/00 Commission v France [2002] ECR I-3827, LawLex091029: the supplier is rendered liable only on an ancillary basis where the producer is unknown, and not in every case.

312 Case C-358/08 Aventis Pasteur [2009] ECR I-11305, LawLex11401: in this case, the supplier, a wholly-owned subsidiary of the producer, had indicated the identity of the latter only very late in the procedure, and under its former name, accordingly delaying its identification by the injured person.

313 Case C-402/03 Skov and Bilka [2006] ECR I-199, LawLex09690.

314 Case C-327/05 Commission v Denmark [2007] ECR I-93, Summ.pub.
another company\textsuperscript{316}, the Court of Justice has strictly limited the power recognized to the Member States by specifying that the substitution of one defendant for another during judicial proceedings cannot, without breaching Directive No 85/374, be applied in a way which permits a producer to be sued, after the expiry of the ten-year period, as defendant in proceedings brought within that period against another person\textsuperscript{317}.

\textsuperscript{316} Case C-127/04 O’Byrne [2006] ECR I-1313, LawLex09473.
\textsuperscript{317} Case C-358/08 Aventis Pasteur [2009] ECR I-11305, LawLex11401.
Chapter 22

Intellectual property

22.01. Context

In order to be effective, the free movement of goods and services implies unification of the material rules of intellectual property at the European level. Thus, a uniform system of protection of intellectual property rights which encompasses industrial properties and copyrights and related rights has been progressively set up in order to remedy the disparities between national laws. The European Union has therefore established the "Community trade mark" or the "Community designs", or proposed the creation of a "Community patent". Initially based on Article 95 EC, the action of the Union now relies on Article 118(1) TFEU, a specific legal basis\[318\], which empowers the European Parliament and the Council with the mission to establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralized European-wide authorization, coordination and supervision arrangements.

The trade mark may now be protected by an European\[319\] and/or national right: undertakings are free to choose either or both. European trade mark law has been revised following the adoption of Directive No 2015/2436 of 16 December 2015 to approximate the laws of the Member States relating to trade marks\[320\] which recasts Directive No 2008/95 of 22 October 2008\[321\], and of Regulation No 2015/2424 of 16 December 2015\[322\] which amends Regulation No 207/2009 of 26 February 2009 on the Community trade mark. Lastly, Regulation No 2017/1001 of 17 June, 2017\[323\] has replaced Regulation No 207/2009 as amended.


319 See Case C-9/93 IHT Internationale Heiztechnik v Ideal-Standard [1994] ECR I-2789, LawLex055054, pt 56, specifying that EU law relating to trade marks does not replace the laws of the Member States on trade marks and the Community trade mark is merely superimposed on the nationals rights since undertakings are in no way obliged to take out Community trade marks.

320 OJ L 336 of 23 December 2015, 1.


322 OJEU L 341 of 24 December 2015, 21. The amended regulation together with the new directive No 2015/2436 constitute the new "trade mark package".

The reform is pursuing a dual aim: modernizing the trade mark system in the Union and adapting it to the internet era by making it more effective, efficient and consistent as a whole; national trade mark laws and practices should be further harmonized and brought into line with the EU trade mark system to the extent appropriate in order to create as far as possible equal conditions for the registration and protection of trade marks throughout the Union. In effect, under amended Regulation No 207/2009, an EU trade mark may consist of any signs, in particular words, including personal names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings and are represented on the Register of European Union trade marks in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor. The registration may take place at the Office for Harmonization in the Internal Market (OHIM), at the central industrial property office of a Member State or at the Benelux Office for Intellectual property. The Union trade mark has a unitary character since it produces the same effects in all the countries of the Union. Its proprietor has an exclusive right which allows him to oppose any use by third parties of the protected sign without his authorization for an identical sign for identical goods or services, for a misleading sign or for an identical or similar sign for different goods or services. Under penalty of revocation, the proprietor must make genuine use of it within five years following registration. Revocation is also incurred where the trade mark has become the common name for a good or service or where it is liable to mislead the public as to the nature, quality or geographic origin of the good or service. The proprietor may obtain the conversion of his Community trade mark into a national trade mark. He may also choose international registration in a single application at the Office of his Member State.

Directive No 2015/2436 of 16 December 2015 which approximates the laws of the Member States on national trade marks, only covers rights acquired on the trade mark by registration and not through

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324 Cf. Art. 3, Directive No 2015/2436 and Art. 4, Regulation No 207/2009 amended. The two texts remove the graphic representation criterion from the definition of the EU trade mark. In effect, previously, only signs capable of being represented graphically could be registered as a Community trade mark, provided that such signs were capable of distinguishing the goods or services of one undertaking from those of another (see Article 2, Directive No 2008-95). Under French law see Article L. 711-1 et seq Intellectual Property Code.

325 Article 58, Regulation No 2017/101.

326 Cf. Article 139 et seq. of Regulation No 2017/1001.

327 Directive No 2008/95/EC, Article 1: “This Directive shall apply to every trade mark in respect of goods or services which is the subject of registration or of an application in a Member State for registration as an individual trade mark, a collective mark or a guarantee or certification mark, or which is the subject of a registration or an application for registration in the Benelux Office for Intellectual Property or of an international registration having effect in a Member State”; See, also, Case C-23/01 Robelco [2002] ECR I-10913, LawLex091303, which considers that the reinforced protection of a trade mark’s distinctiveness or reputation against certain uses of a sign other than for the purposes of distinguishing goods or services, within the meaning of Article 5(5) of Directive No 2008/95, is not covered by EU harmonization.
use. Its objective is to make the fact of obtaining and continuing to hold a registered trade mark subject to the same conditions in all Member States. It imposes duties on Member States with respect to the nature of the protected sign, its terms and conditions of registration or the conditions of revocation or invalidity which are greatly identical to those laid down for the Community trade mark.

Designs were first covered by a directive harmonizing the national laws - Directive No 98/71 of 13 October 1998 - before Regulation No 6/2002 of 12 December 2001 established a unitary right and set up a unified system for obtaining a Community design and uniform protection throughout the entire territory of the EU. It created a single registration procedure for design before the OHIM. The two systems - national and European - coexist. Thus, at least for their identical provisions, the interpretation of the regulation by the European court is a useful guideline to interpreting the directive which has, as yet, not been the subject of any request for a preliminary ruling. Since the accession of the European Community to the Geneva Act of the Hague Agreement of 22 July 1999 concerning the international registration of industrial designs, any national who has a domicile, a habitual residence or a real and effective industrial or commercial establishment in the territory of the Union may further file an international application designating the Union, since the international registration of the design has, in this case, the same effects than a Community design.

By contrast, patents have not been neither the subject-matter of any single European law nor of provisions for the approximation of the national laws of the Member States. As only the terms and conditions for filing patents having been unified at European level, filing may now take place in three different ways: national - consisting in filing an application with each of the national patent office, European - consisting in filing only one application with the European Patent Office (EPO) and international - referred to as PCT which requires an application with the national office of a Member State of the World Intellectual Property Organization (WIPO). The PCT system provides

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330 Office for Harmonization in the Internal Market.
for a simplified filing procedure which refers to the competence of the national or regional offices for the delivery of patents. The EPO is the only regional office for Europe. The European patent, which does not constitute a single right but a bundle of national patents, falls within a legal system which is totally distinct from that of the European Union. It was set up by the Munich Convention on the delivery of European patents (the European Patent Convention - EPC) of 5 October 1973 to which 31 European States have now acceded, including Germany, the United Kingdom, Italy, Spain, France, the Netherlands and Switzerland. Its success comes from the economic, administrative and efficiency gains that a centralized system of delivery of patents brings in relation to the traditional filing procedure in each of the national offices. The creation of an "EU patent" which has been planned for many years is expected by reason of the limited scope of the European patent which only harmonizes the filing conditions. After its delivery, the European patent produces effects which vary depending on the law of each State having acceded to the Munich Convention. On 4 December 2009, a proposed regulation on the European Union patent was submitted to the "Competitiveness" Council.

Artistic and literary works have been subject to a wide horizontal harmonization of national laws regarding copyright and related rights with the "Information Society" Directive and the "Protection Term" Directive. However, harmonization still remains partial and not yet completed. They are also

334 European Patent Convention (EPC) of 5 October 1973, set up by the Munich Convention of 5 October 1973 and entered into force on 7 October 1977; superseded by the EPC of 29 November 2000, OJ of the EPO 2001, special edition No 4, entered into force on 13 December 2007; See also Communication from the Commission EC of 3 April 2007, "Enhancing the patent system in Europe".

335 Within the European patent organization, the EPO is the executive body of the Convention whose function is particularly to deliver these patents. The official languages are German, English and French. The Convention goes along implementing regulations and a set of particularly detailed guidelines for formalities examination (Part A), for search (Part B), for substantive examination (Part C), for opposition procedure (Part D) and on general procedural matters (Part E).


337 EPC, Article 64(1): "A European patent shall (…) confer on its proprietor from the date on which the mention of its grant is published in the European Patent Bulletin, in each Contracting State in respect of which it is granted, the same rights as would be conferred by a national patent granted in that State".

338 EU Council of 27 November 2009, No 16114-09.
governed by earlier specific directives devoted to rental right and lending right\(^{341}\) or to the protection of certain types of object (databases\(^{342}\), computer programs\(^{343}\), works of art\(^{344}\), topographies of semiconductor products\(^{345}\)) or operating methods (satellite broadcasting or cable retransmission\(^{346}\)), including some which have been subject to recent codification.

For enforcing intellectual property rights and calculating damages which the infringer must pay, Directive No 2004/48 of 29 April 2004\(^{347}\) has harmonized national procedures. Giving rise to much criticism for its lack of severity and its rather non-binding character for the Member States, its scope is limited as it only addresses civil and administrative sanctions and not criminal sanctions for infringement. On this issue, a minimum European harmonization is at the planning stage. A proposed Directive of 12 July 2005 on criminal measures aimed at ensuring the enforcement of intellectual property rights was approved by the European Parliament at first reading on 25 April 2007\(^{348}\). If adopted, all intentional infringements of an intellectual property right on a commercial scale would constitute a criminal offence, and the most serious offences would incur a maximum term of at least four years’ imprisonment and a fine to a maximum of EUR 300,000 while the penalty of non-intentional conduct would be left to the discretion of Member States. In order to protect the proprietors of intellectual property rights against counterfeit\(^{349}\) and pirated\(^{350}\) goods, the European authorities have also adopted a regulation allowing counterfeit goods to be detained by the customs


\(^{349}\) Counterfeit goods are defined as "(i) goods, including packaging, bearing without authorization a trademark identical to the trademark validly registered in respect of the same type of goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the trademark-holder's rights under Community law (…) or the law of the Member State in which the application for action by the customs authorities is made; (ii) any trademark symbol (including a logo, label, sticker, brochure, instructions for use or guarantee document bearing such a symbol), even if presented separately, on the same conditions as the goods referred to in point (i); (iii) packaging materials bearing the trademarks of counterfeit goods, presented separately, on the same conditions as the goods referred to in point (i);" (Regulation (EC) No 1383/2003, Article 2(1)(a).

\(^{350}\) Pirated goods are defined as "goods which are or contain copies made without the consent of the holder of a copyright or related right or design right, regardless of whether it is registered in national law, or of a person authorized by the right-holder in the country of production in cases where the making of those copies would constitute an infringement of that right under Council Regulation (…) on Community designs or the law of the Member State in which the application for customs action is made" (Regulation (EC) No 1383/2003, Article 2(1)(b)).
authorities, thus preventing them from circulating within the European territory\footnote{351}{Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights, OJ, L 196 of 2 August 2003, 7, which replaces Regulation (EC) No 3295/94 of 22 December 1994, OJ, L 341 of 30 December 1994. See Regulation (EC) No 1383/2003 Article 2(1)(a) and (b) to find, respectively, the definition of "counterfeit goods" and of "pirated goods".}. The national customs authorities act at the request of the right-holders or on their own motion, a soon as goods are suspected of being counterfeit\footnote{352}{Regulation (EC) No 1383/2003, Article 4.}. Within ten working days - three days for perishable goods - of the notification of detention, the right-holders must take interim measures or initiate the appropriate court proceedings on the merits, under penalty of end of the detention or release of the goods\footnote{353}{Regulation (EC) No 1383/2003, Article 13.}. However, the directive does not apply to goods manufactured or released for free circulation within the Union\footnote{354}{Regulation (EC) No 1383/2003, Article 1.}. In a communication of 11 September 2009, the Commission introduced its new strategy which relies on a strengthening of administrative cooperation between Member States, a better exchange of information and good practices. For that purpose, it has launched a European observatory intended to gather, control and disseminate information and data relating to intellectual property rights\footnote{355}{COM(2009) 467 final.}. The Commission also published a report on 22 December 2010 on the application of Directive No 2004/48 which highlights the need to address the challenges posed by the digital environment in order to combat the spread of counterfeiting and piracy on the internet, for public consultation\footnote{356}{After the publication of a synthesis of this public consultation in July 2013, two new communications were adopted, one entitled “Towards a renewed consensus on the enforcement of Intellectual Property Rights: An EU Action Plan” [(COM 2009) 467 final], based on preventive measures and enforcement policy tools seeking to deprive commercial scale infringers of the revenue flows and make it more difficult to place illicit goods on the market, and the other, “Trade, growth and intellectual property - Strategy for the protection and enforcement of intellectual property rights in third countries”[(IDM (2014) 389).].}

**Section 1 Trade mark**

**I. Registration of the trade mark**

**B. Grounds for refusal or invalidity**

**22.05. Exhaustive list**

Articles 4 and 5 of Directive 2015/2436 incorporate in substance the list of grounds for refusal or invalidity of registration of Articles 3 and 4 of Directive No 2008/95, and add to them. Some of the grounds are mandatory and are binding on Member States, while others are only facultative for Member States who further retain the power to maintain or introduce into their legislation grounds...
for refusal or invalidity linked to questions which do not fall within the scope of application of the directive, such as eligibility for the grant or conservation of the right on a trade mark relating to the capacity of the trade holder, the renewal of the trade mark, the system of taxes or non-compliance with procedural rules. The new directive qualifies the grounds for invalidity or refusal set out in Article 4 - which may be relied on by any person and at any time - as absolute, in opposition to the grounds in Article 5, which are described as relative. The scope of application of the absolute grounds is extended to cover protected designations of origin, protected geographical indications, protected traditional terms for wine and traditional specialties and plant varieties. Among the absolute grounds, bad faith on the part of the applicant for registration (formerly an optional ground for refusal under Article 3(2) of Directive No 2008/95) also becomes a mandatory ground for invalidity but remains an optional ground for refusal of registration.

Thus, the following cannot be registered or, if registered, are liable to be declared invalid:

- signs which cannot constitute a trade mark per se,
- non-distinctive trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, or the time of production of the goods or of rendering of the service, or other characteristics of the goods or services, or of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade, as well as signs which consist exclusively of the shape which results from the nature of the goods themselves, the shape of goods which is necessary to obtain a technical result or the shape which gives substantial value to the goods,
- trade marks which are contrary to public policy or to accepted principles of morality, such as to deceive the public, for instance as to the nature, quality or geographical origin of the goods or services or which have not been authorized by the competent authorities and are to be refused or invalidated pursuant to Article 6ter of the Paris Convention for the Protection of Industrial Property,
- trade marks which, pursuant to Union legislation or the national law of the Member State concerned, or to international agreements to which the Union or the Member State concerned is

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359 Directive No 2015/2436, Art. 4(2): “A trade mark shall be liable to be declared invalid where the application for registration of the trade mark was made in bad faith by the applicant. Any Member State may also provide that such a trade mark is not to be registered”.
360 Which prohibits “armorial bearings, flags, and other State emblems, of the countries of the Union, official signs and hallmarks indicating control and warranty adopted by them, and any imitation from a heraldic point of view”.
party, provide for protection of designations of origin and geographical indications; trade marks providing for protection of traditional terms for wine, or for protection of traditional specialities guaranteed\(^\text{361}\);

- trade marks which consist of, or reproduce in their essential elements, an earlier plant variety denomination in accordance with Union legislation or the national law of the Member State concerned or international agreements providing protection for plant variety rights, and which are in respect of plant varieties of the same or closely related species\(^\text{362}\);

- trade marks which are unavailable because they are identical with, or similar to, an earlier trade mark.

On the other hand, each Member State has the possibility, and not the obligation, of refusing the registration of a trade mark or, if registered, of declaring it invalid:

- where the use of that trade mark is prohibited pursuant to its law or to the law of the Union, other than trade mark law,

- where it covers a sign of high symbolic value, in particular a religious symbol,

- where it includes badges, emblems and escutcheons other than those covered by Article 6ter of the Paris Convention and which are of public interest, unless the consent of the competent authority to their registration has been given in conformity with the legislation of the Member State,

- or for which the application for registration was made in bad faith (Article 3(2)(d)).

The authority which is competent to grant registration is normally required to state reasons for refusing registration of a trade mark in respect of all the goods or services for which the registration is sought. It may use general reasoning for all the goods or services in question if the same reasoning is valid for a same category or group of goods or services\(^\text{363}\). It takes account only of the facts and circumstances existing at the time it rules\(^\text{364}\).

\(^{361}\) Directive No 2015/2436, Art. 1(i) to (k).


\(^{363}\) Case C-239/05 BVBA Management, Training en Consultancy [2007] ECR I-1455, LawLex09843.

\(^{364}\) Case C-239/05 BVBA Management, Training en Consultancy [2007] ECR I-1455, LawLex09843.
1° No distinctiveness

22.09. Signs consisting exclusively of the shape of the good

In principle, a sign which consists of the shape of a good may constitute a trade mark. A public interest requirement however sets forth that purely functional shapes should be made freely available to all economic traders. Article 4(1)(e) of Directive No 2015/2436 thus provides for three exhaustive grounds for refusal of registration of a sign which consists exclusively of the shape of a good: (i) the shape or another characteristic, which results from the nature of the good itself, (ii) the shape or another characteristic of the product which is necessary to obtain a technical result and, (iii) the shape which gives substantial value to the good. The grounds are autonomous: it only requires one of them to be met for registration to be refused.

1) The shape or another characteristic which results from the nature of the good itself

The application for registration may relate to the shape of the packaging of the good rather than the good itself. Two types of goods are thus distinguished: goods which possess an intrinsic shape and it is unnecessary to give them a particular shape to enable them to be marketed (e.g. nails) and goods which do not possess an intrinsic shape and must be packaged in order to be marketed (e.g. goods manufactured in the form of granules, powder or liquid). In that case, the packaging chosen gave the good a shape that could be protected.

2) The shape or another characteristic of the product necessary to obtain a technical result

The shape of the product is deemed necessary to obtain a technical result where the essential characteristics of that shape fulfill a technical function. In that case, the manner in which the goods function is important, not their method of manufacture. For a sign made up of both functional and capricious components, the supervisory authorities thus check that the capricious components are not dominating in the general impression produced by the trade mark before refusing the registration.

366 Case C-205/13 Hauck &amp; Co., Judgment of 18 September 2014, LawLex14939.
367 See Case C-218/01 Henkel [2004] ECR I-1725, LawLex091242, in respect of a manufacturer of liquid detergents who had applied for registration as a color three-dimensional trade mark of a shape consisting of a tall bottle, which narrows towards the top, with an integral handle, a rather small pouring aperture and an a two-level stopper, which can also be used a measuring cup. In such a case, the shape of the product and that of the packaging have been assimilated for purposes of assessment of the grounds for refusal to register.
368 Case C-215/14 Nestlé, Judgment of 16 September 2015, LawLex151091.
The existence of other forms that make it possible to obtain the same technical result is not such as setting aside the ground for refusal or invalidity of the registration.

3) The shape or another characteristic which gives substantial value to the good

The shape may give added value to the good (e.g., a specific garment cut). That value cannot be limited purely to the shape of products having only artistic or ornamental value but concerns all the essential functional characteristics, as the target public's perception of the shape of that product is only one of the assessment criteria which may be used to determine whether that ground for refusal is applicable. The Court has recently held that a sign consisting of a color applied to the sole of a high-heeled shoe cannot be regarded as consisting "exclusively" of a shape where the main element of that sign is a specific color -red- designated by an internationally recognized identification code: the mark therefore does not fall within the scope of the prohibition of the registration of shapes. However, a sign consisting of the shape of a product may never acquire a distinctive character through use, unlike the other grounds for refusal to register. Therefore, a sign which initially consisted exclusively of a shape giving substantial value to the good which subsequently and prior to the application for registration acquired recognition following advertising campaigns, cannot constitute a trade mark on account of the use made of it. As each of the grounds for refusal to register is independent of the others, there is nothing to prevent the provisions relating to the refusal of registration of descriptive marks from applying to an application for a three-dimensional mark consisting of the form of a product which is not refused under Article 4(1)(e).

Section 2 Copyright and related rights

22.29. International context

According to Article 118 TFEU one of the objectives of the EU is the adoption of measures to provide uniform protection of intellectual property rights. As the second branch of intellectual property, literary and artistic works include copyright, the creator's exclusive right on its work and related rights of the copyright, such as those of artists or performers, phonogram and film producers or

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370 Case C-205/13 Hauck GmbH & Co. KG, Judgment of 18 September 2014, LawLex14939.
372 Directive No 2008/95/EC, Article 3(3).
373 Case C-371/06 Benetton Group [2007] ECR I-7709, LawLex09569, for G-Star trousers with, inter alia, an oval kneepad and two lines of sloping stitching from hip height to crotch level.
broadcasting organizations, which constitute essential rights to intellectual creation. The author must be able to have control over the intellectual and economic exploitation of his work. Copyright was protected very early on at the international level, as the date of the first provision guaranteeing the protection of the rights of authors to exercise control over the use of their works and to receive remuneration was 9 September 1886 - the Berne Convention. The evolution of the methods of determination and transmission of intellectual works has since then made a difference.

Unlike trade marks and patents, copyright exists independently of any legal formality of registration. It may apply only to an original object which expresses the author's own intellectual creation. The arrival of new technologies, in particular information technology and the internet networks, has made the use of original works difficult to control. In order to adapt international law on literary and artistic works to digital environment, two "internet" treaties of the World Intellectual Property Organization (WIPO) signed on 20 December 1996, were ratified on 14 December 2009 by the European Union and its Member States and came into force on 14 March 2010, as far as the European Union is concerned. The TRIPS Agreement, to which the Union is a party, also contains substantial provisions relating to copyright and related rights.

The EU authorities interpret copyright in the light of those provisions. The European provisions are mainly organized around two poles: protection and management of copyright. No provision as yet concerns copyright in general. Copyright is multifaceted with a great variety of provisions from protection of databases, computer programs, through the audiovisual sector, to works of art. Only Directive No 2001/29 of 22 May 2001 tends to horizontally harmonize copyright in the "information society" irrelevant of the type of protected object, the category of assignees or the method of exploitation. Following the adoption of a Green Paper in 2008, the Commission issued a communication of 19 October 2009 setting itself several targets in order to adjust copyright to new technologies, particularly regarding the digitalization of works, orphan works or the protection of...

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375 According to Article 5(2) of the Bern Convention, "the enjoyment and the exercise of these rights shall not be subject to any formality".
376 Case C-5/08 Infopaq International [2009] ECR I-6569, LawLex11245: "under Articles 1(3) of Directive No 91-250, 3(1) of Directive No 96-9 and 6 of Directive No 2006-116, works such as computer programs, databases or photographs are protected by copyright only if they are original in the sense that they are their author's own intellectual creation".
377 A specialized agency of the United Nations created in 1967, with headquarters in Geneva, which now manages the Berne Convention.
378 WIPO Copyright Treaty (88 members with accession of the EU) and WIPO Performances and Phonograms Treaty (86 members with accession of the EU).
380 Agreement on the Trade-Related Aspects of Intellectual Property Rights, attached to the Marrakech Convention establishing the WTO concluded on 15 April 1994, Annex 1 C.
creator of internet content. According to the Commission, any harmonization of copyright and related rights must be based on a high level of protection since these rights are essential to intellectual creation. In December 2015, the Commission published a communication entitled "Towards a modern, more European copyright framework", preamble to a proposal for a directive on copyright in the digital single market, the so-called "Copyright" Directive, which has not yet been adopted.

I. General protection rules

22.32. Reproduction right

Pursuant to Article 2 of Directive No 2001/29, an exclusive right "to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or part" must be laid down in favor of authors for their works (a), of performers for fixations of their performances (b), of phonogram producers for their phonograms (c), of the producers of the first fixations of films, in respect of the original and copies of their films (d) and of broadcasting organizations for fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite (e).

The reproduction right is defined rather widely in order to guarantee a maximum level of protection for authors and holders of related rights. Traditionally, reproduction consists in materially fixing the work through any process that allows its communication to the public. This is the case for the storing of a protected work in digital form in an electronic medium or, for online music, of all the intangible copies made in the process of online distribution of musical works.

The reproduction right is not unlimited however. Article 5 of the directive contains an exhaustive list of exceptions. Paragraph 1 provides for a mandatory exception subject to the fulfillment of five cumulative conditions: the act of reproduction must be an integral and essential part of a

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382 An intellectual creation of the author reflecting his personality and expressing his free and creative choices in its production constitutes a protected work: Case C-145/10 Painer, Judgment of 1 December 2011, LawLex12614, for a portrait photograph.


385 Case C-527/15 Stichting Brein, Judgment of 26 April 2017, LawLex17752: acts of reproduction, on a multimedia player, of copyright-protected works obtained from streaming websites belonging to third parties offering those works without the consent of the copyright holders do not satisfy the cumulative conditions for exemption from the reproduction right insofar as those acts do not have as their sole purpose to enable the transmission in a network between third parties by an intermediary or a lawful use of a work or protected subject matter and cause unreasonable prejudice to the legitimate interests of the right holders resulting in a diminution of lawful transactions relating to the protected works.
technological process\textsuperscript{386}, be temporary, transient or incidental, have as sole purpose to enable a transmission in a network between third parties by an intermediary or a lawful use of a work or other protected subject-matter, with no independent economic significance\textsuperscript{387}. The exception must be strictly interpreted\textsuperscript{388}, and the storage and deletion of the temporary reproduction must not be dependent on discretionary human intervention, particularly by the user of protected works. In effect, an act can be held "transient" only if its duration is limited to what is necessary for the proper completion of the technological process in question which must be automated and must not require human intervention once its completion has come to an end\textsuperscript{389}. According to the Court of Justice, if they satisfy the conditions of Article 5 of the directive, copies on a user's computer screen and the copies in the internet 'cache' of that computer's hard disk, made by an end-user in the course of viewing a website may be made without the authorization of the copyright holder\textsuperscript{390}. However, national legislation cannot give an approved collecting society the right to authorize the reproduction and communication to the public in digital form of "out-of-print" books, which are no longer commercially distributed by a publisher and are not currently published in print or in digital form, while allowing the authors of those books, or their successors in title, to oppose or put an end to that practice, on the conditions that that legislation lays down\textsuperscript{391}.

The following paragraphs of the directive list a series of exceptions to the right of reproduction that the Member States have the possibility to include in their domestic law, such as reproduction for private use by an individual\textsuperscript{392}, reproduction for the non-commercial purpose of scientific research or

\textsuperscript{386} This exception covers acts that allow acts of browsing and catching: recital 33. For an example see Case C-302/10 Infopaq International A/S Judgment of 17 January 2012, LawLex12694.
\textsuperscript{387} Case C-5/08 Infopaq International [2009] ECR I-6569, LawLex11245; Case C-403/08 Football Association Premier League LTD, Judgment of 4 October 2011, LawLex111693, on the temporary nature of acts of reproduction carried out within the memory of a satellite decoder and on a television screen.
\textsuperscript{388} Article 5 thus indicates that these exceptions "shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder".
\textsuperscript{389} Case C-5/08 Infopaq International [2009] ECR I-6569, LawLex11245, pt 64, where the condition is not met because the deletion of the reproduction is dependent on the user's will only.
\textsuperscript{390} Case C-360/13 Public Relations Consultants Association Ltd, Judgment of 5 June 2014, LawLex142047.
\textsuperscript{391} Case C-301/13 Soulier and Doke, Judgment of 16 November 2016, LawLex162065.
\textsuperscript{392} Although it is open to the Member States to introduce a private copying exception to the author's exclusive reproduction right, the fair compensation paid to affected authors cannot be freely defined by each State but constitutes an autonomous concept which must be uniformly interpreted on the territory of the EU: Case C-467/08 Padawan, LawLex11361. Thus a fair compensation vests by operation of law, directly and originally, in the principal director, in his capacity as author or co-author of the cinematographic work, and national legislation cannot deprive him/her of this right by laying down a non-rebuttable presumption of transfer in favor of the producer of a work: Case C-277/10 Luksan, Judgment of 9 February 2012, LawLex12697. A national rule may indiscriminately apply a private copying levy on the first placing on the market in the national territory, for commercial purposes and for consideration, of recording media suitable for reproduction, while at the same time providing for a right to reimbursement of the levies paid in the event that the final use of those media does not meet the criteria set out in Article 5(2)(b) of Directive No 2001/29: Case C-521/11 Amazon.com International Sales Inc., Judgment of 11 July 2013, LawLex131121.
teaching by libraries or educational establishments, quotations for purposes such as criticism or review of a work which has been lawfully made available to the public, the preservation of ephemeral recordings of works made by broadcasting organizations by means of their own facilities and for their own broadcasts etc. (Article 5(2) and (3)). These exceptions apply only in certain special cases where they do not adversely affect the normal exploitation of the work or protected subject-matter and cause no unjustified damage to the legitimate interest of the rightholder. Facultative exceptions to the reproduction right may besides be subject to the requirement of fair compensation to the rightholder. Fair compensation may even be provided for by the Member States for exceptions or limitations which do not require such compensation (recital 36). The form, detailed arrangements and possible level of such compensation are fixed by taking account of the particular circumstances of each case and the possible harm to the rightholders may constitute a valuable criterion. Thus, no payment would be owed in case of minimal prejudice or where the rightholders would have already received payment in some other form, for instance as part of a license fee (recital 35). In all cases, Member States are precluded from allocating a part of the fair compensation payable to rightholders to the publishers of works created by authors, those publishers being under no obligation to ensure that the authors benefit, even indirectly, from some of the compensation of which they have been deprived. Furthermore, a scheme for fair compensation for private copying cannot be financed from the General State Budget insofar as it is not possible to ensure that the cost of that compensation is borne by the users of private copies.

The author’s exclusive right concerns all or part of his work. Parts of a work are governed by the same system as the work as a whole where they share its originality. In order to be protected, the component of a work must therefore be the reflection of its author’s own intellectual creation. Thus, in newspaper articles, even though the words cannot be protected in themselves, their choice, combination and

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393 Case C-117/13 Technische Universität Darmstadt, Judgment of 11 September 2014, LawLex14885, requiring that the holder of copyright and related rights and a publicly accessible library must have concluded a licensing agreement in respect of the work in question that sets out the conditions in which that establishment may use that work.
394 Case C-510/10 DR; TV2 Danmark A/S v NCB, Judgment of 26 April 2012, LawLex12962, extending the exception to recordings made by any third party acting on behalf of or under the responsibility of that organization.
395 The private copying exception does not cover reproduction for private use made from a source which is unlawful: Case C-435/12 ACI Adam BV nd others, Judgment of 10 April 2014, LawLex141839.
396 Particularly in case of reproductions on paper or any similar medium by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, reproduction of broadcast by social institutions pursuing non-commercial purpose, such as hospitals or prisons.
397 On the private copying levy imposed as fair compensation, see Case C-457/11 Verwertungsgesellschaft Wort, Judgment of 27 June 2013, LawLex131028 validating the levy required for private copying imposed by means of photocopying.
398 Case C-572/13 Hewlett-Packard Belgium SPRL v Reprobel SCRL Epson Europe BV, Judgment of 12 November 2015, LawLex151434.
399 Case C-470/14 Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA), Judgment of 9 June 2016, LawLex161353.
sequence give them an original character. Thus sentences or parts of sentences are liable to be original and to justify a prohibition from reproduction\textsuperscript{400}.

22.33. Rights of communication and rights to make available

An exclusive right to authorize or prohibit any availability to the public, by wire or wireless means, in such a way that each person may access them from a place and at a time individually chosen by that person\textsuperscript{401}, is recognized to authors on their works, to performers on the fixations of their performances, to phonograph producers on their phonograms, to producers on the first fixations of films, on the original and copies of such films, to broadcasting organizations on fixations of their broadcasts (Article 3). The availability right is coupled for authors with an exclusive right of communication of the work to the public\textsuperscript{402}. This right is understood in the broad sense and covers all communication to the public not present at the place where the communication originates, as well as any transmission or retransmission of that nature, by wire or wireless means, but does "not cover any other acts" (recital 23)\textsuperscript{403}. Therefore, direct performances, including online\textsuperscript{404}, do not fall within the scope of application of the directive. In other words, to be categorized as a "communication to the public", a protected work must be communicated using specific technical means, different from those previously used or, failing that, to a "new public" i.e. a public that was not already taken into account by the copyright holders when they authorized the initial communication to the public of their work\textsuperscript{405}. In the absence of the consent of the author concerned, such a retransmission of a work by means of an internet stream is not permitted unless it falls within the scope of Article 5 of Directive No 2001/29, which sets out an exhaustive list of exceptions and limitations to the right of

\textsuperscript{400} Case C-5/08 Infopaq International [2009] ECR I-6569, LawLex\textsuperscript{11245}.
\textsuperscript{401} Case C-279/13 C More Entertainment AB v Linus Sandberg, Judgment of 26 March 2015, LawLex\textsuperscript{15430}.
\textsuperscript{402} Directive No 2006/115/EC of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, establishes in Article 8 a right of communication for performers, as regards the broadcasting by wireless means, unless the performance is itself already a broadcast performance or is made from a fixation. Broadcasting organizations have the exclusive right to authorize or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the exclusive right regarding the communication to the public of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite, for broadcasting organizations is also laid down in the directive (Article 7).
\textsuperscript{403} Case C-283/10 Circul Globus Bucuresti [2011] ECR I-12031, LawLex\textsuperscript{12222}, the right of the author of a work to prohibit any communication to the public of that work only refers to the cases where the public is not present at the place where the communication originates, and not where the communication is carried out directly in a place open to the public using any means of public performance or direct presentation of the work.
\textsuperscript{404} Case C-279/13 C More Entertainment AB v Linus Sandberg, Judgment of 26 March 2015, LawLex\textsuperscript{15430}; national legislation may extend to a pay TV channel the exclusive right to broadcast sporting fixtures live on internet provided that such an extension does not undermine the protection of copyright guaranteed under EU law.
\textsuperscript{405} Case C-527/15 Stichting Brein, Judgment of 26 April 2017, LawLex\textsuperscript{17752}: the provision of a multimedia player which enables, in view of the add-ons pre-installed on it, access via structured menus to links which, when activated by the remote control of that multimedia player, offer its users direct access to protected works without the consent of the copyright holders, is an act of communication to the public.
communication to the public or of Article 9, which is intended to maintain the provisions applicable in areas other than that harmonized by the directive\textsuperscript{406}.

The concepts of "communication" and "public" are interpreted widely as the principal objective of Directive No 2001/29 is to establish a high level of protection of authors, allowing them to obtain an appropriate reward for the use of their works, including on the occasion of a "communication to the public"\textsuperscript{407}. Thus, the distribution of a signal through television sets to customers in hotel rooms\textsuperscript{408} or in a bar–restaurant\textsuperscript{409} constitute communication to the public. The word "public" refers to an undetermined number of potential listeners\textsuperscript{410}. This is the case for hotel customers who have a television set in their room, who, even if they quickly succeed each other, ultimately represent a fairly large number of persons. Given the cumulative effects resulting from the repeated availability of works, the mere availability of access means to the works is sufficient, in such a case, to identify communication to the public, irrespective of their actual use. In accordance with Article 11bis, paragraph 1(ii) of the Berne Convention, such a broadcast constitutes a communication made by a broadcasting organization other than the original one to a public different from the public at which the original act of communication of the work is directed\textsuperscript{411}. However, when the author authorizes the broadcast of his work, he considers only direct users, i.e. the owners of reception equipment who, either personally or within their own private or family circles, receive the programs. Hotel guests therefore constitute a new audience for which the author, whose right is not exhausted by an act of communication to the public, or availability to the public, has not authorized communication of his work (Directive No 2001/29, Article 3(2))\textsuperscript{412}. Likewise, the transmission of works included in a terrestrial broadcast and the making available of those works over the internet must be authorized individually and separately by the authors concerned given that each is made under specific technical conditions, using a different means of transmission for the protected works and each is intended for a

\textsuperscript{406} Case C-275/15 ITV Broadcasting Limited and others, Judgment of 1 March 2017, LawLex17401.

\textsuperscript{407} Case C-275/15 ITV Broadcasting Limited and others, cited above.

\textsuperscript{408} Case C-306/05 SGAЕ [2006] ECR I-11519, LawLex092221.

\textsuperscript{409} Case C-403/08 Football Association Premier League LTD [2011]ECR I-9083, LawLex111693.


\textsuperscript{411} The Court of Justice thus clarified that the concept of communication to the public covers a retransmission of the works included in a terrestrial television broadcast made by an organization other than the original broadcaster, by means of an internet stream made available to the subscribers of that other organization who may receive that retransmission by logging on to its server, even though those subscribers are within the area of reception of that terrestrial television broadcast and may lawfully receive the broadcast on a television receiver: Case C-607/11 ITV Broadcasting Ltd, Judgment of 7 March 2013, LawLex13353.

\textsuperscript{412} See also for a spa establishment Case C-351/12 OSA, Judgment of 27 February 2014, LawLex141596, which qualifies as an act of communication to a new public the making available of radio broadcasts works to patients in a spa establishment.
public\textsuperscript{413}. Knowingly posting, on a website, hyperlinks to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a 'communication to the public' within the meaning of Article 3(1) of Directive No 2001/29\textsuperscript{414}, as does the making available and management, on the internet, of a sharing platform which, by means of indexation of metadata referring to protected works and the provision of a search engine, allows users of that platform to locate those works and to share them in the context of a peer-to-peer network\textsuperscript{415}. On the other hand this is not the case for the inclusion of hyperlinks redirecting users to works freely communicated to the public on other websites does not\textsuperscript{416} or where a broadcasting organization transmits its programme-carrying signals exclusively to signal distributors without those signals being accessible to the public during and as a result of that transmission, with those distributors then sending those signals to their respective subscribers so that they may watch those programmes, unless the intervention of the distributors in question is just a technical means\textsuperscript{417}. Furthermore, it is irrelevant that the acts of communication by which the work is made available to the public have a public or private nature, this condition being required neither by Directive No 2001/29, nor by Article 8 of the WIPO Copyright Treaty of 20 December 1996\textsuperscript{418}.

Moreover, in the Recommendation of 18 May 2005, the Commission specified the concept of right of communication to the public of musical works. It includes webcasting, internet radio, simulcasting, and near-on-demand services received either on a personal computer or a mobile telephone. The exclusive right of making available a musical work includes on-demand and other interactive services\textsuperscript{419}.

As Directive No 2001/29 applies without prejudice to any other applicable law in the field, unless it states otherwise, the right of communication to the public recognized as a right related to copyright falls within the scope of Directive No 2006/115, Article 8 of which provides that "Member States shall provide for performers the exclusive right to authorize or prohibit the broadcasting by wireless means

\textsuperscript{413} Case C-607/11 ITV Broadcasting Ltd, Judgment of 7 March 2013, LawLex13353.
\textsuperscript{414} Case C-160-15 GS Media BV, Judgment of 8 September 2016, LawLex161389.
\textsuperscript{415} Case C-610/15 Stichting Brein, Judgment of 14 June 2017, LawLex171046.
\textsuperscript{416} Case C-466/12 Svensson and others, Judgment of 13 February 2014, LawLex14257, which states that Article 3 of Directive No 2001/29 does not permit Member States to give wider protection to copyright holders by laying down that the concept of communication to the public includes a wider range of activities than those referred to in that provision.
\textsuperscript{417} Case C-325/14 SBS Belgium NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM), Judgment of 19 November 2015, LawLex151477.
\textsuperscript{418} Case C-306/05 SGAE [2006] ECR I-11519, LawLex092221, point 44.
\textsuperscript{419} Commission Recommendation No 2005/737 of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services, OJ L 276, 21 October 2005, 54-57, point 1), f), ii) et iii).
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and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation". According to the Court of Justice, the broadcasting, free of charge, of phonograms within private dental practices engaged in professional economic activity, for the benefit of patients of those practices and enjoyed by them without any active choice on their part, does not constitute a "communication to the public" and does not entitle the phonogram producers to the payment of remuneration. On the other hand, there is a communication to the public where a hotel operator provides in guest bedrooms television and/or radios to which it distributes a broadcast signal or other apparatus, as well as phonograms in physical or digital format capable of being broadcast or heard by means of that apparatus.

Exceptions or limitations may be provided for by Member States to the right of communication, in particular for use for the sole purpose of illustration for teaching or scientific research or for the benefit of people with a disability, where the use has a non-commercial nature (Article 5(3)), or use for the purpose of public security, information (for political speeches), for religious or official celebrations, for permanent exhibition in public places (for works of architecture or sculpture). Communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other protected subject-matter of the same character, is also possible where the use is not expressly reserved and the source, including the author's name, is indicated. A Member State cannot allocate exploitation rights of a cinematographic work by operation of law exclusively to the producer of the work in question, where they are vested directly, originally and exclusively in the principal director.

II. Specific protection rules

A. Rental right and lending right

22.39. Equitable remuneration

Authors and performers must benefit from a system which guarantees a true right to equitable remuneration. In all events, they retain a right to obtain an equitable remuneration, even if the rental right has been transferred or assigned (Article 5(1) of Directive No 2006/115). They cannot waive that right (Article 5(2)) and they may entrust the administration of their right to remuneration to collecting societies representing them (Article 5(3)).

420 Case C-135/10 Società Consortile Fonografi (SCF), Judgment of 15 March 2012, LawLex12629.
422 Case C-277/10 Laksan, Judgment of 9 February 2012, LawLex12697.
Likewise, a single equitable remuneration is to be paid by the phonogram user if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public. The remuneration is shared between the relevant performers and phonogram producers. In the absence of agreement between them, Member States may lay down the conditions as to such sharing (Article 8). In the absence of any European definition of equitable remuneration paid by the phonogram user, it is for each Member State to determine in its own territory the most appropriate criteria for enabling a proper balance to be achieved between the interests of performing artists and phonogram producers in obtaining that remuneration, and the interests of third parties in being able to broadcast the phonogram on terms that are reasonable. The calculating method, which gives preference to a contractual agreement based on objective criteria and, in the event that negotiations fail, agrees to appeal to the national court assisted by an expert, has been held to comply with the requirement of equitable remuneration.

Like performers (Article 8(1)), broadcasting organizations have the exclusive right to authorize or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee (Article 8(3)). According to the Court, the communication to the public of television and radio broadcasts by means of TV sets installed in hotel rooms does not fall within the scope of the exclusive right of broadcasting organizations provided for in Article 8(3).

Lastly, Member States may derogate from the exclusive right in respect of public lending, provided that authors obtain a remuneration for such lending (Article 6(1)). The public lending exception applies to the making available by a public library of a digital copy of a book provided that that copy was not obtained from an illegal source. The rule is also valid for phonograms, films and computer programs (Article 6(2)). However, "certain categories of establishments" may be exempted from the remuneration obligation (Article 6(3)). The Court of Justice strictly interprets that derogation to the exclusive right. The main purpose of the directive being to guarantee adequate income to authors or performers and to recoup investments required particularly for the production of phonograms and

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423 Case C-245/00 SENA [2003] ECR I-1251, LawLex09917.
424 Case C-245/00 SENA [2003] ECR I-1251, LawLex09917.
426 Case C-174/15 Vereniging Openbare Bibliotheken, Judgment of 10 November 2016, LawLex162117, stating that EU law does not preclude a Member State from providing that the system of remuneration of authors in the event of public lending of their works only applies to the making available by a public library of a digital copy of their works on condition that the digital copy must have been put into circulation by a first sale or other transfer of ownership of that copy in the European Union by the holder of the right of distribution to the public or with his consent.
films (recital 5), a national law cannot lead to total exemption\textsuperscript{427}. A Member State which is not capable of determining the relevant criteria for drawing a valid distinction between categories of establishments, has no other choice but imposing on all the obligation to pay the remuneration\textsuperscript{428}.

C. Satellite broadcasting and cable retransmission

22.44. Cable retransmission

Copyright owners or holders of related rights have an exclusive right of cable retransmission of programs from other Member States. The cable distributor must obtain a contractual authorization of all the rightholders for each part of a transmitted program. Directive No 93/83 obliges the rightholders to use a collecting society in order to grant or refuse authorization for retransmission (Article 9). The right to cable retransmission may only be exercised collectively in order to prevent outsiders holding rights in individual parts of the program from impeding the smooth operation of contractual arrangements (recital 28)\textsuperscript{429}. Thus, where the rightholder has not entrusted the management of his rights to a collecting society, the collecting society which manages rights of the same category is deemed to be mandated to manage these rights (Article 9). The power of the collecting society which is deemed to be mandated to manage the copyright owner or the holder of related rights is not limited to the financial aspects of those rights\textsuperscript{430}.

As an exception, broadcasters are not required to use a collecting society for their own programs, irrespective of whether the rights are their own or have been transferred to them by other copyright owners and/or holders of related rights (Article 10). So-called “free” packages, i.e. without payment to collecting societies, are thus offered to cable distributors.

Where the retransmission is necessarily made by cable, the initial transmission, which must be intended for reception by the public, may be carried out by satellite, by cable or by any other wire or over-the-air system (Article 1(3)). Furthermore, the retransmission must be simultaneous, unaltered and unabridged, which excludes deferred or incomplete retransmissions from the scope of application.

\textsuperscript{427} Case C-175/05 Commission v Ireland [2007] ECR I-3*, Summ.pub., LawLex092222.
\textsuperscript{428} Case C-175/05 Commission v Ireland [2007] ECR I-3*, Summ.pub., LawLex092222. See, along the same lines, for a Member State having encountered difficulties in drawing a distinction based on cultural or educational grounds within the group of establishments accessible to the public represented by public libraries and media libraries, school and university libraries and public documentation centers: Case C-433/02 Commission v Belgium [2003] ECR I-12191, LawLex092200.
\textsuperscript{429} For legal online music services, the Commission decided in favor of a system of multi-territorial licensing in order to enhance greater legal certainty to users. Holders of online rights must be able to freely choose the collective rights manager, and swap if necessary, to operate those services across the Union: Commission recommendation No 2005/737 of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services, OJ L 276, 21 October 2005, 54-57.
\textsuperscript{430} Case C-169/05 Uradex [2006] ECR I-4973, LawLex092217.
of the directive. Furthermore, a retransmission within one Member State falls outside the scope of Directive No 93/83\textsuperscript{431}.

**Section 4 Procedural rules and sanctions**

**22.55. Means to enforce intellectual property rights**

Directive No 2004/48 of 29 April 2004\textsuperscript{432}, which is aimed at ensuring a high, equivalent and homogeneous level of protection of intellectual property within the internal market, has only partly reached that objective by reason of its lack of severity with respect to counterfeiters and pirates whose activities have increased\textsuperscript{433} and the existence in certain Member States of less protective provisions. The frequently non-binding nature of the provision is an advantage for the Member States who can then apply their more liberal national provisions. The directive relates to all intellectual property rights, including patents, initially excluded from the proposal for a directive. It affects neither the substantive law on intellectual property nor the specific provisions on the enforcement of rights and on exceptions concerning copyright and related rights, or the national and international obligations on Member States and relating to criminal procedures and penalties applicable in respect of infringement of intellectual property rights (Article 2).

Directive No 2004/48 concerns the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights (Article 1) and applies to any infringement of intellectual property rights as provided for by European law and/or by the national law of the Member State concerned (Article 2). Only holders of intellectual property rights and other persons authorized to use them (licensees), intellectual property collective rights-management bodies and professional defense bodies are entitled to seek application (Article 4). The capacity as author is presumed to belong, in accordance with the Berne Convention\textsuperscript{434}, to the person whose name appears on the work. The same presumption applies to the holders of rights related to copyright (Article 5).

\textsuperscript{431} Case C-275/15, ITV Broadcasting Limited and others, Judgment of 1 March 2017, LawLex17401.

\textsuperscript{432} OJ L 157 of 30 April 2004.

\textsuperscript{433} See Communication from the Commission No 2009/67 of 11 September 2009 entitled "Enhancing the enforcement of intellectual property rights in the internal market", which notices the increase in the piracy and counterfeiting phenomena, particularly favored by the Internet.

\textsuperscript{434} Berne Convention of 9 September 1886, Article 15: "1) In order that the author of a literary or artistic work protected by this Convention shall, in the absence of proof to the contrary, be regarded as such, and consequently be entitled to institute infringement proceedings in the countries of the Union, it shall be sufficient for his name to appear on the work in the usual manner. This paragraph shall be applicable even if this name is a pseudonym, where the pseudonym adopted by the author leaves no doubt as to his identity".
Regarding evidence, the judicial authorities are given the power to order the disclosure of banking, financial or commercial documents under the control of the opposing party, in the case of infringement committed on a 'commercial scale', subject to the protection of confidential documents (Article 6). The judicial authorities have also the power to order provisional measures to preserve evidence (the taking of samples, of the infringing goods, materials and implements used in the production and/or distribution of these goods and the documents relating thereto). In order to ensure compensation for any prejudice suffered by the defendant, provisional measures may be subject to the lodging of security or an equivalent assurance (Article 7). These measures must further be followed by civil or criminal proceedings on the merits within a reasonable period.\footnote{435 If the judicial authority fails to determine that period, such period cannot exceed 20 working days or 31 calendar days, whichever is the longer (Directive No 2004/48, Article 7(3)).}

A special interlocutory procedure is created in case of ascertained or imminent infringement of an intellectual property right. In such a case, the judicial authorities may, at the request of the applicant, issue provisional and protective measures (prohibition subject to penalty payment, lodging of guarantees, seizure or delivery up of goods, seizure of movable and immovable property, blocking of bank accounts other assets, communication of bank, financial or commercial documents, etc.) (Article 9). Protection of the right holder is however limited since he can launch that procedure only if he has previously presented "reasonably available evidence sufficient to support its claims". The national law of certain Member States, more protective, does not subject the implementation of a procedure to that condition but leaves it to the court's discretion. Resorting to that procedure thus enables the right holder to gather necessary evidence, since an abusive seizure is penalized by the possibility offered to the seized party to claim damages.

Since surprise is indispensable to the success of seizure, Article 9(4) lays down the possibility to take provisional measures without the defendant having been heard. This violation of the defense rights is however accepted only in limited cases - in case any delay would cause irreparable harm to the right holder or in case of demonstrable risk of evidence being destroyed - which limit the rights of the holder, where the seized party has, in return, a right to be promptly informed as well as a right of review.

Directive No 2004/48 establishes a right of information intended to fight infringing networks by allowing victims to ask the competent judicial authorities to give precise information on the origin of infringed goods or services, the distribution networks and the identity of third parties involved in the
infringement (Article 8). The exercise of that right may be used to supplement the pieces of information obtained as part of the seizure of infringing material. The right of information laid down in Article 8, which guarantees the right to an effective remedy, is applicable not only in proceedings seeking a finding of an infringement of an intellectual property right, but also in the context of separate proceedings brought after the termination of such an action.\(^436\)

At the civil level, the victim of an infringement found by a judicial decision has the right to ask the court to cause that infringement to cease, if necessary subject to penalty payment (Article 11)\(^437\), as well as the taking of corrective measures, such as recall or definitive removal from the channels of commerce or destruction (Article 10). The violation of an intellectual property right is traditionally an infringement that incurs the civil liability of its author. The directive further lays down the possibility for the holder of the right harmed by an infringing activity to obtain compensation that is distinct from the civil liability under general law (Article 13). Two alternative calculations of the damages are set. The first one takes account of the lost profits for the right holder, his moral prejudice and unfair profits made by the infringer. The second provides for setting the damages as a lump sum on the basis of elements such as "at least" the amount of royalties or fees which would have been due if the infringer had requested authorization to use the intellectual property right in question. Regardless of the calculation method adopted, it seems rather not dissuasive insofar as it would have been better, in the first case, to take account of all the profits made by the infringer and in the second, to provide for the doubling of the contractual fee, as suggested in the proposal for a directive.\(^438\) The optional character of the right to compensation when the infringing action is involuntary does not go towards greater protection of the holder. In effect, the Member States are not required to order payment of profits or collection of damages when the infringer engaged in an infringing activity without knowing it or without having reasonable cause to have known.

\(^{436}\) Case C-427/15 New Wave CZ, a.s., Judgment of 18 January 2017, LawLex17119.

\(^{437}\) Apart from the infringer, an application for an injunction can be brought against intermediaries whose services are used by a third party to infringe an intellectual property right: Case C-494/15 Tommy Hilfiger Licensing LLC, Judgment of 7 July 2016, LawLex161279.

\(^{438}\) For an application in line with the proposal for a directive, see Case C-367/15 Stowarzyszenie "Olawskaja Telewizja Kablowa", Judgment of 25 January 2017, LawLex17199.
Chapter 23

Public procurement contracts

Section 1 Directive on public works, public supply and public service contracts

I. Scope of application

23.04. Contracting authority

To constitute a public contract, the contract in question must be entered into by "one or more contracting authorities". Pursuant to paragraph 1 of Article 2(1) of Directive No 2014/24, the State, regional or local authorities, bodies governed by public law and associations formed by one or several of such authorities or one or several of such bodies governed by public law are deemed to be contracting authorities.

The concept of State or local or regional authority has a functional non-organic definition. Thus, in addition to the State and its authorities under the traditional meaning, all bodies having legislative, executive and judicial powers, including bodies which, in a federal State, exercise those powers at federal level are described as State authorities. A local land consolidation committee also falls within that category where its composition and functions are laid down by law, its members are appointed by the public authorities and the observance with its obligations are ensured by those authorities. The functional definition of the State body makes any objection derived from the absence of legal personality of the entity in question inoperative.

A body governed by public law is defined as any body: a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; (b) having

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439 The expression "regional authorities" includes authorities listed non-exhaustively in NUTS 1 and 2, as referred to in Regulation (EC) No 1059/2003 of the European Parliament and of the Council of 26 May 2003, while "local authorities" includes all authorities of the administrative units falling under NUTS 3 and smaller administrative units, as referred to in that regulation (Dir. No 2014/24, Art. 2(2)).


443 Case C-272/91 Commission v Italy [1994] ECR I-1409, LawLex092115: the absence of legal personality of a department of the Finance Ministry of a Member State far from enabling it to escape the obligations laid down by the directive, gives the Ministry itself the capacity of contracting authority.
legal personality; and (c) financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law (Article 2(4)). Lists of those bodies notified by the Member States are set out in the Annex to the directive and are periodically supplemented.

However, the lists of entities are not exhaustive and qualification problems have inevitably arisen for those not included in them. Even if the fact of appearing on those lists suggests what capacity the body concerned has, the bodies mentioned must, in all events, according to the European court, fulfill three cumulative criteria set by Article 1(9), which are alternative. The issue of the legal personality is governed by the statutes of the body concerned. By contrast, the concept of establishment for the specific purpose of meeting needs in the general interest, not having an industrial and commercial character and the condition of control or financing, for the most part, by the State or regional or local authorities have been specified by the Court of Justice. Directive No 2014/24 clarifies in recital 10 that "a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity should not be considered as being a 'body governed by public law' since the needs in the general interest, that it has been set up to meet or been given the task of meeting, can be deemed to have an industrial or commercial character" adding that there is no longer any doubt that "being financed for the most part", as the Court of Justice has clearly laid down, means "for more than half, and that such financing may include payments from users which are imposed, calculated and collected in accordance with rules of public law".

1) Body established for specific purposes

It is not necessary to have the body created by a law or a regulation or established from the origin to meet needs in the general interest, not having an industrial or commercial character, provided that it has subsequently taken responsibility for such needs. The activity of the body may be divided and the fulfillment of needs in the general interest may only be incidental. As the concept of contracting

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authorities is functional, the mission may even be entrusted to a commercial company under public supervision where the cumulative conditions in Article 1(9) are fulfilled. Needs in general interest, not having an industrial and commercial character, may be defined as needs which are satisfied otherwise than by the supply of goods or services in the marketplace and which, for reasons associated with the general interest, the State chooses to provide itself or over which it wishes to retain a decisive influence. The general interest is assessed depending on the circumstances prevailing when the body was created and the conditions under which it exercises its activity. In this respect, the absence of competition on the market in question, of profit-making as a principal matter and of assumption of risks associated with the activity are decisive criteria. Activities falling within the category of needs in the general interest have included: production of documents which are closely linked to public order or the institutional operation of the State, removal and treatment of household refuse, organization of fairs and exhibitions, terrassing, large-scale and specialist works for the construction of the second biological treatment phase of a sewage treatment plant, contribution to the prison policy of a Member State, activity of funeral undertaker, or heating for an urban area by means of an environmentally-friendly process.

2) Financed for the most part or supervised by the State, regional or local authorities

The body must be supervised or financed for the most part by the State. Financing for the most part by the State shall mean in excess of 50% of all the body’s resources. The condition of public financing only covers payments without consideration. It may be direct in case of university awards and grants or indirect, such as a fee or contribution paid by users since it is charged, assessed and collected under public law rules. In any event, where the methods of financing of the body are

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451 Compare Case C-373/00 Adolf Truley [2003] ECR I-1931, LawLex11404, retaining that the existence of significant competition in the sector does not necessarily exclude the concept of needs in the general interest.
452 Case C-223/99 Agorá and Excelsior [2001] ECR I-3605, LawLex091007: excluding the description of contracting authority for a body the management of which is based on performance, efficiency and cost-effectiveness and which operates in a competitive environment.
highly changeable, this body must be regarded as a contracting authority until the procurement procedure has been completed, where it could be described as such at the date of commencement of the invitation to tender\(^{463}\). Supervision by the State is established where the tasks of the body are determined and its agents are appointed by the State which gives it instructions\(^{464}\). Thus, the supervision exercised by a minister on the compliance, by certain bodies, of very detailed management rules imposed on them by national law is sufficient to characterize the fact that the public body is supervised by the State\(^{465}\). The situation in which, on the one hand, the public authorities supervise not only the annual accounts of the body concerned but also its conduct and, on the other hand, where they are authorized to inspect the business premises and facilities of that body and to report the results of those inspections to a regional authority which holds all the shares through another company, characterizes the supervision as required by the directive, unlike a mere ex-post review\(^{466}\). Further, a company which, on the one hand, is wholly owned by a contracting authority whose activity consists of meeting needs in the general interest and which, on the other, carries out both transactions for that contracting authority and transactions on the competitive market is a body governed by public law within the meaning of Article 2(1), provided that the activities of that company are necessary for the contracting authority to exercise its own activity and, in order to meet needs in the general interest, that company is able to be guided by non-economic considerations\(^{467}\).

23.06. Procurement contract

Public contracts suggest the existence of contracts for a pecuniary interest concluded in writing (Article 2(1)(5)). The directive requires the contract to be written, which it defines as "any expression consisting of words or figures which can be read, reproduced and subsequently communicated" and this may "include information which is transmitted and stored by electronic means", but does not require any specific contractual form. Thus, master agreements, which give unity to the various specific contracts they govern\(^{468}\), or cooperation agreements concluded between non-commercial bodies governed by public law\(^{469}\) may fall within Directive No 2014/24. The application of that directive is

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\(^{465}\) Case C-237/99 Commission v France [2001] ECR I-939, LawLex09840: particularly where the minister has the possibility to order the winding-up of one of the bodies and to appoint a liquidator or to suspend the managerial organs and to appoint a provisional administrator.

\(^{466}\) Case C-373/00 Adolf Truey [2003] ECR I-1931, LawLex11404.

\(^{467}\) Case C-567/15 LitSpecMet UAB, Judgment of 5 October 2017, LawLex171592.

\(^{468}\) Case C-119/06 Commission v Italy [2007] ECR I-168*, Summ.pub.

\(^{469}\) Case C-84/03 Commission v Spain [2005] ECR I-139, LawLex091196.
excluded only where the contract in question is a unilateral administrative measure solely creating obligations for the alleged successful tenderer and departing significantly from the normal conditions of a commercial offer made by that tenderer.\textsuperscript{470}

The pecuniary character of the contract implies the existence of a consideration for the service, which may be constituted by a price\textsuperscript{471}, or of costs replacing it as a whole or in part\textsuperscript{472}. The fact that the providers act on a volunteer basis does not in itself remove any pecuniary character to the contract where the remuneration of the provided services, determined in advance and as a fixed sum, exceeds the mere repayment of the costs incurred.\textsuperscript{473}

However, all public contracts for a pecuniary interest do not fall within the scope of application of Directive No 2014/24: only those which have a value that exceeds a certain threshold trigger the formal procedures provided for at the European level. Article 4 of the directive determines the following thresholds for contracts that fall within its scope of application:\textsuperscript{474}

- EUR 144,000 for public supply and service contracts awarded by contracting authorities which are listed as central government authorities;
- EUR 221,000 for public supply and service contracts awarded by contracting authorities other than central government authorities;
- EUR 750,000 for public service contracts for social and other specific services;
- EUR 5,548,000 for public works contracts.

Pursuant to Article 5 of the directive, the threshold is calculated based on the total amount payable to the economic operator, excluding VAT, as estimated by the contracting authority. It takes account of any form of option and any renewals of the contract. The estimate must be made at the moment the contract notice is sent or, if there is no such notice, at the moment the procedure commences. Case law has refined the calculation and specified that the total value of works contracts from the point of

\textsuperscript{471} See, however, Case C-532/03 Commission v Ireland [2007] ECR I-11353, LawLex091034: the mere fact that, as between two public bodies, funding arrangements exist in respect of emergency ambulance services does not imply that the provision of the services concerned constitutes an award of a public contract.
\textsuperscript{472} Case C-399/98 Ordine degli Architetti and others [2001] ECR I-5409, LawLex09679: the commitment by the holder of a building permit or development plan to execute infrastructure works for which a municipal authority is normally responsible is a contract for pecuniary interest, insofar as the holder is settling an infrastructure contribution debt.
\textsuperscript{473} Case C-119/06 Commission v Italy [2007] ECR I-168*, Summ.pub.
\textsuperscript{474} For markets more than 50% subsidized by the contracting authority, the directive applies to contract of on amount equal to or exceeding EUR 5,548,000 (Article 13).
view of a potential bidder must be taken into account, i.e. not only amounts to be paid by the contracting authority but also all the revenue received from third parties\textsuperscript{475}. Directive 2014/24 now states that the estimated value must include any prizes or payments to candidates or tenderers that the contracting authority provides (Article 5(1), second indent).

No works project or proposed purchase may be subdivided arbitrarily in order to reduce the thresholds. The assessment must be given on an overall project. Thus, to determine whether thresholds which trigger the applicability of the directive are reached, the value of a framework agreement must be estimated depending on the total value of specific contracts concluded pursuant to that agreement\textsuperscript{476}. Similarly, services which have internal consistency from a technical and economic point of view and functional continuity with regard to which the division into several different construction phases according to the pace of performance does not have the effect of stopping the works, constitute a single contract\textsuperscript{477}. Accordingly, national legislation which takes into consideration only the individual value of lots to be built, not their total value, is contrary to the prescriptions of the directive\textsuperscript{478}.

**II. Legal rules**

B. Public procurement procedure

**23.11. Participation in a public contract**

The participation of economic operators in a call for tender depends, first of all, on the procedure chosen by the contracting authority. Article 26 of Directive No 2014/24, like Directive No 2004/18, provides for various possibilities: open procedures (whereby any interested economic operator may submit a tender)\textsuperscript{479}, restricted procedures (in which any economic operator may ask to participate but only those economic operators invited by the contracting authority may submit a tender)\textsuperscript{480}, negotiated procedures without prior publication (limited to cases where publication is either not possible, for reasons of extreme urgency brought about by events unforeseeable for and not attributable to the contracting authority, or where it is clear from the outset that publication would not trigger more competition or better procurement outcomes)\textsuperscript{481}, competitive dialogues (in which any economic

\textsuperscript{475} Case C-220/05 Auroux and others [2007] ECR I-385, LawLex091244.
\textsuperscript{477} Case C-574/10 Commission v Germany, Judgment of 15 March 2012, not available in English.
\textsuperscript{478} Case C-412/04 Commission v Italy [2008] ECR I-619, LawLex09744.
\textsuperscript{479} Directive No 2014/24, Art. 27.
\textsuperscript{480} Directive No 2014/24, Art. 28.
\textsuperscript{481} Directive No 2014/24, Art. 32.
operator may request to participate and whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements and on the basis of which the candidates chosen are invited to tender. The directive provides for additional procedures: the competitive procedure with negotiation (for situations where open or restricted procedures without negotiations are not likely to lead to satisfactory procurement outcomes or where an open or restricted procedure resulted only in irregular or unacceptable tenders in particular in the case of complex purchases such as sophisticated products, intellectual services, for example some consultancy services, architectural services or engineering services, or major information and communications technology projects) and innovation partnerships (allowing contracting authorities to establish a long-term innovation partnership for the development and subsequent purchase of new, innovative products, services or works provided that such innovative products, services or works can be delivered to agreed performance levels and costs, without the need for a separate procurement procedure for the purchase).

Even if Directive No 2014/24 does not pursue an objective of full harmonization of the system of public contracts in the Member States, the latter are authorized to use only the procedures exhaustively listed in Article 26.

Submitted offers must fulfill the conditions that the contracting authority has set in the contract notice or in the specifications, in accordance with the qualitative criteria defined by Article 58 and the causes of exclusion provided for by Article 57. Member States cannot require references other than those expressly defined in the directive. In the tender specifications relating to the award of a public contract, the contracting authority may not impose on a tenderer which relies on the capacities of other entities the obligation, before the contract is awarded, to conclude a cooperation agreement with those entities or to form a partnership with them, insofar as the tenderer is free to choose the legal nature of the links it intends to establish with those other entities. The review of applications must

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486 It should be noted that Article 45 does not provide for uniform application of the grounds of exclusion it sets at EU level, Case C-226/04 La Cascina and others [2006] ECR I-1347, LawLex091293.
488 Case C-234/14 Ostas celtnieks Sia, Judgment of 14 January 2016, LawLex1660.
not give the contracting authority the opportunity to introduce discrimination. Thus, the tenderer cannot be required to be registered with the ‘Ordre des architectes’ in order to favor national architects\(^\text{489}\). But a bid that does not meet the mandatory conditions laid down in the specifications may be set aside without taking into account the circumstances having surrounded the awarding procedure\(^\text{490}\). However, a tenderer who does not fulfill the technical requirements may have an interest in asking for the annulment of the awarding decision where there is a suspicion that the successful tenderer itself could be incapable of fulfilling the contract conditions\(^\text{491}\).

Article 57 of the directive sets forth the list of the grounds for exclusion from participation in a call for tender relating to the personal situation of the candidate or tenderer (violation of probity, bankruptcy etc.), as well as admissible evidence. Although the grounds for exclusion of a contractor from participation in a public contract set forth in the directive on the works contracts are exhaustively set\(^\text{492}\), Member States are authorized to lay down other measures which are intended to guarantee compliance with the principles of equal treatment of tenderers and transparency, provided that they do not go beyond what is necessary to reach that objective\(^\text{493}\). National legislation may therefore allow the contracting authority to take into consideration, in accordance with the conditions it has laid down, a criminal conviction of the director of a tendering company, even if the conviction is not yet final, for an offense concerning the professional conduct of that company and to exclude that company from taking part in the tendering procedure at issue, on the ground that, by failing to declare the conviction

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490 Case T-40/01 Scan Office Design v Commission [2002] ECR II-5043, LawLex091354: where it is established that the tenderer cannot meet the technical requirements of the contracting authority, the various irregularities committed by that authority in the tender procedure are irrelevant.
492 Case C-199/15 Ciclat Soc. coop., Judgment of 10 November 2016, LawLex162122: EU law does not preclude nationla legislation which obliges a contracting authority to consider an infringement relating to the payment of social security contributions, recorded in a certificate requested by a contracting authority on its own initiative and issued by the social security institutions, to be a ground for exclusion, where that infringement existed on the date of the participation in a tender procedure, even if it no longer existed at the time of the award or of the verification carried out on the contracting authority’s own initiative.
493 Case C-21/03 Fabricicom [2005] ECR I-1559, LawLex09354, holding that although an entity having carried out certain preparatory works in connection with a call for tender is not in the same situation as the other tenderers, the rule which prevents it from submitting a tender and which does not allow it to establish that it has not obtained a competitive advantage, is disproportionate. C-226/04 La Cascina and others [2006] ECR I-1347, LawLex091293; C-213/07 Michaniki [2008] ECR I-9999, LawLex092282, holding incompatible a law which established an irrebuttable presumption that the status of owner, partner, main shareholder or management executive of an undertaking active in the media sector was incompatible with that of owner, partner, main shareholder or management executive of an undertaking to which the State entrusted the performance of public contracts; C-538/07 Assitur [2009] ECR I-4219, LawLex11272, regarding a national rule which laid down an absolute prohibition on participation in a same tendering procedure by a parent company and its subsidiary, without allowing them an opportunity to demonstrate that no influence was exercised on each other; Case C-465/11 Forposta SA, Judgment of 13 December 2012, LawLex122451: a regulation providing that grave professional conduct leads to the automatic exclusion of the economic operator from a procedure for the award of a public contract; Case C-425/14 Impresa Edilux (ès qual.), Società Italiana Costruzioni e Forniture Srl (SICEF), Judgment of 22 October 2015, LawLex151330, compatibility with EU law of a national rule under which a contracting authority may provide that a candidate or tenderer be automatically excluded from a tendering procedure relating to a public contract for not having lodged, with its tender, a written acceptance of the commitments and declarations contained in a legality protocol, such as that at issue in the main proceedings, the purpose of which is to prevent organized crime from infiltrating the public procurement sector, insofar as that protocol contains declarations that the candidate or tenderer is not in a relationship of control or of association with other candidates or tenderers.
which was not yet final, it had not fully and effectively dissociated itself from that director’s activities\textsuperscript{494}.

Pursuant to Article 58 of the directive, the contracting authority can require that candidates or tenderers possess the economic and financial capacities to perform the contract. For that purpose, contracting authorities may require, in particular, that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract, that they provide information on their annual accounts showing the ratios, for instance, between assets and liabilities and that they be covered by an appropriate level of professional risk indemnity insurance. The minimum yearly turnover that economic operators are required to have shall not exceed two times the estimated contract value, except in duly justified cases\textsuperscript{495}. Proof of economic and financial standing may be furnished by appropriate statements from banks or, where necessary, evidence of relevant professional risk indemnity insurance; the presentation of balance-sheets or extracts from the balance-sheets; a statement of overall turnover and, where appropriate, of turnover in the area covered by the contract for a maximum of the last three financial years available, depending on the date on which the undertaking was set up or the operator started trading, as far as the information on these turnovers is available. Under Article 63 the economic operator may also rely on the capacities of other entities, regardless of the legal nature of the links which it has with them, if it is proven that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities\textsuperscript{496}. Where the economic operator is unable to provide the references requested by the contracting authority, it is also allowed to prove his economic or financing standing by any other document which the contracting authority considers appropriate\textsuperscript{497}. However, a Member State can fix a maximum value for works which may be carried out at one time by tenderers to a call for tender in order to guarantee their financial and economic standing\textsuperscript{498}. It can also require a minimum level of economic and financial standing with reference to one or more items on the balance sheet provided that they are objectively such as to provide information on such standing and that the threshold thus fixed actually constitutes a

\textsuperscript{494} Case C-178/16 Impresa di Costruzioni Ing. E. Mantovani SpA, Judgment of 20 December 2017, LawLex18478.
\textsuperscript{495} E.g. relating to the special risks attached to the nature of the works, services or supplies. The contracting authority shall indicate the main reasons for such a requirement in the procurement documents or the individual report.
\textsuperscript{496} This option is not open to tenderers in the context of a service contract to which Annex B of Directive No 2004/18 applies, see Case C-95/10 Strong Segurança SA [2011] ECR I-1865, LawLex111072.
\textsuperscript{497} For an application, Case T-169/00 Esedra v Commission [2002] ECR II-609, LawLex091279.
\textsuperscript{498} Case 27/86 CEI v Association intercommunale pour les autoroutes des Ardennes [1987] ECR 3347, LawLex091800.
positive indication of the existence of a sufficient economic and financial basis for the performance of that contract.\textsuperscript{499}

In addition to his economic and financial standing, the tenderer must, according to Article 58, show his technical and/or professional abilities which are assessed and examined in accordance with the list set forth in Annex XII, Part II of the directive.\textsuperscript{500} Although the required references must appear in the contract notice, a general reference, such as the operator’s specific background, a criterion which is inseparable from the very notion of suitability, must not necessarily appear in the notice.\textsuperscript{501} Article 63 also allows an economic operator, for a particular contract, to rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking from those entities to place the necessary resources at the disposal of the economic operator.\textsuperscript{502} Even in the context of a negotiated procedure, the contracting authority is not authorized to conduct negotiations with tenderers in respect of tenders which do not comply with the mandatory requirements laid down in the technical specifications relating to the contract.\textsuperscript{503}

In the context of a restricted procedure, the number of undertakings which a contracting authority intends to invite to tender cannot be lower than five in order to ensure genuine competition.\textsuperscript{504}

\textsuperscript{499} Case C-218/11 Judgment of 18 October 2012, Édukövízig and Hochtief Construction, LawLex122241.

\textsuperscript{500} A list of the works carried out over the past five years; a list of the principal deliveries effected or the main services provided in the past three years, with the sums, dates and recipients, whether public or private, involved; an indication of the technicians or technical bodies involved, especially those responsible for quality control; a description of the technical facilities and measures used by the supplier or service provider for ensuring quality and the undertaking’s study and research facilities; where the products or services to be supplied are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authorities or on their behalf by a competent official body of the country in the which the supplier or service provider is established, subject to that body's agreement; an indication of the educational and professional qualifications of the service provider or contractor and/or those of the undertaking's managerial staff and, in particular, those of the person or persons responsible for providing the services or managing the works; for public works contracts and public services contracts, and only in appropriate cases, an indication of the environmental management measures that the economic operator will be able to apply when performing the contract; a statement of the average annual manpower of the service provider or contractor and the number of managerial staff for the last three years; a statement of the tools, plant or technical equipment available to the service provider or contractor for carrying out the contract; an indication of the proportion of the contract which the service provider intends possibly to subcontract; and, with regards to the products to be supplied: samples, descriptions and/or photographs, the authenticity of which must be certified if the contracting authority so requests, certificates drawn up by official quality control institutes or agencies of recognized competence attesting the conformity of products clearly identified by references to specifications or standards.


\textsuperscript{503} Case C-561/12 Nordecon, Judgment of 5 December 2013, LawLex131741.

\textsuperscript{504} Case C-225/98 Commission v France [2000] ECR I-7445, LawLex071613; see, also, C-138/08, LawLex11497, extending that principle to the negotiated procedure.
In the competitive procedures with negotiation any economic operator may submit a request to participate in response to a call for competition. Only those economic operators invited by the contracting authority following its assessment of the information provided may submit an initial tender however (Art. 29). The contracting authorities should indicate beforehand the minimum requirements which characterize the nature of the procurement and which should not be changed in the negotiations. Negotiations are aimed at improving the tenders so as to allow contracting authorities to buy works, supplies and services perfectly adapted to their specific needs and may therefore concern all characteristics of the purchased works, supplies and services including, for instance, quality, quantities, commercial clauses as well as social, environmental and innovative aspects, insofar as they do not constitute minimum requirements.

Innovation partnerships are based on the same terms as competitive procedures with negotiation. The contracting authority publishes a contract notice which sets out the qualitative selection criteria and defines the minimum requirements to be met by all tenders. Any economic operator may submit a request to participate in response to a contract notice. The contracting authorities negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tenders to improve the content thereof. The minimum requirements and the award criteria are not subject to negotiations.

Pursuant to Article 59 of Directive No 2014/24, the submission of a request to participate in a public contract is done through use of a European Single Procurement Document (ESPD) consisting of an updated self-declaration as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfils the relevant conditions. The ESPD identifies "the public authority or third party responsible for establishing the supporting documents and contains a formal statement to the effect that the economic operator will be able, upon request and without delay, to provide those supporting documents". The ESPD is drawn up on the basis of a standard form and is provided exclusively in electronic form. This information is stored by the Member States in a database accessible to the contracting authorities of other Member States.

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[^505]: it is not in one of the situations referred to in Article 57 in which economic operators shall or may be excluded; it meets the relevant selection criteria that have been set out pursuant to Article 58; where applicable, it fulfils the objective rules and criteria that have been set out pursuant to Article 65 relative to the reduction of the number of otherwise qualified candidates to be invited to participate.

[^506]: A complete and up-to-date list of databases containing relevant information on economic operators is made available by each Member State in the European repository of certificates database, e-Certis.
23.12. Criteria for award of the contract

The notion of award criteria is central to Directive No 2014/24 (recital 89). Criteria that are not aimed at identifying the tender which is economically the most advantageous, but are instead essentially linked to the evaluation of the tenderers' suitability to perform the contract in question, cannot be regarded as award criteria\(^{507}\). The directive establishes the principle of the most economically advantageous tender: "all winning tenders should finally be chosen in accordance with what the individual contracting authority considers to be the economically best solution among those offered". Directive No 2014/24 replaces the terminology used in Directives 2004/17 and 2004/18 with the concepts of "cost-effectiveness" and "best price-quality ratio". To assess the best price-quality ratio, the contracting authorities must define the economic and qualitative criteria\(^ {508}\) they will apply taking into account environmental and/or social aspects linked to the subject-matter of the public contract\(^ {509}\). For that purpose, the directive establishes a non-exhaustive list of the criteria that may be used. The Court of Justice had indeed prior to Directive No 2014/24 confirmed that the contracting authorities could use criteria that were not solely economic. Social criteria, such as a campaign against unemployment\(^ {510}\), or ecological criteria\(^ {511}\) may be retained, provided that they are related to the object of the contract\(^ {512}\). On the other hand, the contracting authority cannot base its assessment on the criteria listed in Article 58, which are qualitative selection criteria of the candidate rather than award criteria\(^ {513}\).

The most economically advantageous tender under Article 67 is determined "on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68,

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507 Case C-9/17 Maria Tirkkonen, Judgment of 1 March 2018, LawLex18351: a farm advisory scheme through which a public entity admits all the economic operators who meet the suitability requirements set out in the invitation to tender and who pass the examination referred to in that invitation to tender, even if no new operator can be admitted during the limited validity period of that scheme, does not constitute a public contract within the meaning of that directive, where the contracting authority has not referred to any award criteria for the purpose of comparing and classifying admissible tenders.

508 Award criteria shall be considered to be linked to the subject-matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle (Art. 67(3)).

509 To better integrate social and environmental considerations in the procurement procedures, contracting authorities can use award criteria or contract performance conditions "relating to the works, supplies or services to be provided under the public contract in any respect and at any stage of their life cycles from extraction of raw materials for the product to the stage of disposal of the product, including factors involved in the specific process of production, provision or trading and its conditions of those works, supplies or services or a specific process during a later stage of their life cycle, even where such factors do not form part of their material substance" (recital 97).


512 When this is not the case, the award decision may be challenged by review under Directive No 89/665, Case C-448/01 EVN and Wienstrom [2003] ECR I-14527, LawLex09865; Case C-601/13 Ambisig, Judgment of 26 March 2015, LawLex15406.

and may include the best price-quality ratio\cite{514}. Article 67(2) defines those criteria: quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions, organisation, qualification and experience of staff assigned to performing the contract, after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion. The cost element may also take the form of a fixed price or cost. The contracting authority sets out in the procurement document the weighting fixed for each criterion in order to determine the most economically advantageous offer\cite{515}. Those weightings may be expressed by providing for a range with an appropriate maximum spread. A general reference to a provision of national law setting forth those criteria\cite{516}, or the fact that they have been lodged with a notary\cite{517} do not fulfill the obligation to specify the weighting in the procurement documents. The contracting authority identifies the most advantageous tender according to the criteria and priority order it has set in the notice of opening\cite{518}. Where weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance.

The award criteria must be accompanied by requirements which permit the accuracy of the information provided by tenderers to be effectively verified\cite{519}. On the other hand, the fact that an award criterion relates to an element which will be accurately known only after the contract has been awarded is not contrary to Directive No 2004/18 if that criterion does not confer unrestricted freedom on the contracting authority, if it is mentioned in the contract documents or contract notice and the principle of non-discrimination of tenderers is observed\cite{520}.

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\item As part of the EU strategy to achieve smart, sustainable and inclusive growth. Cost effectiveness is assessed on the basis of life-cycle costing which covers, pursuant to Article 68, “to the extent relevant […] parts or all of the following costs over the life cycle of a product, service or works”. Those costs include costs relating to acquisition, costs of use, such as consumption of energy and other resources, maintenance costs, end of life costs, such as collection and recycling costs, costs imputed to environmental externalities. Whenever a common method for the calculation of life-cycle costs has been made mandatory by a legislative act of the Union, that common method must be applied for the assessment of life-cycle costs.
\item For an application, Case C-532/06 Lianakis and others [2008] ECR I-251, LawLex091036; Nothing precludes a criterion that cannot be assigned an economic value from being affected of a high weighting coefficient, Case C-448/01 EVN and Wienstrom [2003] ECR I-14527, LawLex09865.
\item Case 31/87 Beenjes v Netherlands [1988] ECR 4635, LawLex092329: thus, the national criterion of ‘the most acceptable tender’ is compatible with Directive No 2004/18 if it reflects the discretion which the contracting authority has in order to identify the most economically advantageous tender; in all events, the possible discrimination benefitting to the successful tenderer of a contract pursuant to his national law does not challenge the award decision, where the contracting authority is required to select the most economically advantageous tender, Case T-139/99 AICS v Parliament [2000] ECR II-2849, LawLex091259.
\item Case C-448/01 EVN and Wienstrom [2003] ECR I-14527, LawLex09865; Case C-368/10 Commission v Netherlands, Judgment of 10 May 2012, LawLex121494, according to which the criteria for the award of a public contract can refer to the fact that the product concerned is of fair trade origin.
\item Case C-19/00 SIAC Construction [2001] ECR I-7725, LawLex09766: criterion of the tender the ultimate cost of which is likely to be the lowest according to the professional opinion of an expert.
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Section 2 Special sectors Directive

23.15. Scope of application

Directive No 2014/25 which repeals and replaces Directive No 2004/17 of 31 March 2004 coordinates the procurement procedures in the water, energy, transport and postal services sectors. The existence of a specific directive, which supplements the general Directive No 2014/24, is justified by the influence that national authorities may exercise on the conduct of the contracting entities and by the fact that the markets it covers are closed markets by reason of the existence of special or exclusive rights awarded by the Member States. The opening to competition of public contracts concluded by entities operating in the water, energy, transport and postal service sectors appear sometimes necessary, and the directive aims to reconcile the specificities of those sectors with the European principles of equal treatment, non-discrimination and transparency. To that is added the objective set out in Commission Communication of 3 March 2010 entitled "Europe 2020, a strategy for smart, sustainable and inclusive growth" aimed at facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement and to enable procurers to make better use of public procurement in support of common societal goals.

Following the example of Directive No 2014/24, supply, works and service contracts are defined as contracts for pecuniary interest concluded in writing between one or more of the contracting entities and one or more contractors, suppliers, or service providers (Art. 2(1)). Article 3 classifies as "contracting authorities" the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law. Contracting entities are defined in Article 4 as entities which are either contracting authorities or public undertakings.

The directive also enshrines the case law applying former Directive No 2004/17 to contracting entities which, when they are not contracting authorities or public undertakings, exercise any of the activities

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522 On the other hand, the telecommunications sector, also covered in the past by Directive No 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sector, is not covered anymore by reason of its completed liberalization (See Directive No 2004/17, recital 5).

523 Regional authorities include all authorities of the administrative units, listed non-exhaustively in NUTS 1 and 2, as referred to in Regulation (EC) No 1059/2003 and local authorities include all authorities of the administrative units falling under NUTS 3 and smaller administrative units.

524 A public undertaking is any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.
referred to in the directive and enjoy special or exclusive rights granted by a competent authority of a Member State by way of any legislative, regulatory or administrative provision (Art. 4(1)(b)).

According to the Court of Justice, a contractual partner of the contracting authority that the directive refers to for purposes of simplification as 'economic operator' is a 'contractor', a 'supplier' or a 'service provider', either a natural or a legal person, or a contracting entity, or a group of such persons and/or entities which offers on the market, respectively, the execution of works and/or a work, products or services. Directive No 2014/25 ratifies this approach specifying in recital 17 that the notion of "economic operators" should be interpreted in a broad manner so as to include any persons and/or entities which offer the execution of works, the supply of products or the provision of services on the market, irrespective of the legal form under which they have chosen to operate.

Sectors covered by the directive are gas, heat (Art. 8) and electricity (Art. 9), water (Art. 10), transport services (Art. 11), ports and airports (Art. 12), postal services (Art. 13) and extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels (Art. 14). In the case of mixed contracts, the applicable rules are determined with respect to the main subject of the contract where the different parts which constitute the contract are objectively not separable. The contracting entities must determine whether the different parts are separable or not based on the relevant case-law of the Court of Justice (recital 13).

The directive only applies to contracts which have a value exclusive of VAT estimated to be no less than EUR 443,000 in the case of supply and services contracts and EUR 5,548,000 in the case of works contracts (Art. 16). The amount of the contract is assessed overall by taking account of the whole work, regardless of its formal presentation (Art. 17). Thus, the existence of a single work, for purposes of determining whether a Member State has artificially split a public contract to avoid reaching the thresholds triggering the applicability of the directive, must be assessed in the light of the

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525 Case C-393/06 Ing. Aigner [2008] ECR I-2339, LawLex09660: such as an entity having legal personality whose capital is owned by a town which monitors its economic and financial management, created to provide heating for an urban area by means of an environmental-friendly process.

526 Case C-87/94 Commission v Belgium [1996] ECR I-2043, LawLex091203: the directive covers a contract even if all the candidates have the same nationality as the contracting authority since its applicability is not subject to any condition concerning the nationality or seat of the tenderers.

527 Case C-396/14 MT Højgaard A/S, Judgment of 24 May 2016, LawLex16979: a contracting entity is not in breach of the principle of equal treatment where it permits one of two economic operators who formed part of a group of undertakings that had, as such, been invited to submit tenders by that contracting entity, to take the place of that group following the group's dissolution and to take part, in its own name, in a negotiated procedure for the award of a public contract, provided that it is established that that economic operator by itself meets the requirements laid down by the contracting entity and, second, that the continuation of its participation in that procedure does not mean that other tenderers are placed at a competitive disadvantage.

528 For an example prior to Directive No 2014/25, see Case C-393/06 Ing. Aigner [2008] ECR I-2339, LawLex09660.
single economic and technical function fulfilled by the various works and not in the light of the existence of a single contracting entity or the possibility of a single undertaking carrying out the whole of the work\textsuperscript{529}.

Where the contract in question does not reach the thresholds set or is covered by an express provision which excludes the application of the directive (Art. 18 to 28), the Court of Justice imposes on the parties compliance with the underlying principles of equal treatment and transparency. Thus, the first of those principles precludes a contracting authority from accepting the amendment to a tender after the opening of envelopes, granting the contract to an operator which does not meet the criteria set in the contract documents or taking into account, to retain its tender and set aside that of other tenderers, criteria that do not appear in the contract documents\textsuperscript{530}. Likewise, although public service concession contracts fall outside the requirements of the directive, they remain subject to the fundamental principles of EU law and, in particular, the principle of transparency\textsuperscript{531}.

23.16. Legal rules

The main obligation of the contracting entities is to launch a call for competition before awarding contracts in the sectors referred to in the directive. The publicity of the contract is ensured either by a periodic indicative notice subject to mandatory requirements when made as a means of calling for competition for restricted procedures or negotiated procedures with prior call for competition\textsuperscript{532}, by a notice on the existence of a qualification system\textsuperscript{533} or by a contract notice which may be used as a means of calling for competition in respect of all procedures\textsuperscript{534}.

Article 50 provides for the possibility for contracting entities to use the negotiated procedure without prior call for competition in a number of cases, including inter alia:

- when no tenders or no suitable tenders or no applications have been submitted in response to a procedure with a prior call for competition, provided that the initial conditions of contract are not substantially altered\textsuperscript{535};

\textsuperscript{529} Case C-16/98 Commission v France [2000] ECR I-8315, LawLex071586.
\textsuperscript{530} Case C-87/94 Commission v Belgium [1996] ECR I-2043, LawLex091203.
\textsuperscript{531} Case C-324/98 Telaustria and Telefonadress [2000] ECR I-10745, LawLex071626.
\textsuperscript{532} Directive No 2014/25, Art. 67.
\textsuperscript{533} Directive No 2014/25, Art. 68.
\textsuperscript{534} Directive No 2014/25, Art. 69.
\textsuperscript{535} Case C-199/07 Commission v Greece [2009] ECR I-10669, LawLex11487: the obligation of call for competition is not required for a contract awarded in the electricity sector where tenders submitted as part of two prior calls for tenders do not enable the entity to achieve the project for which the procedure was launched, give the regulatory constraints to which it is subject.
- where a contract is purely for the purpose of research, experiment, study or development, and not for the purpose of securing a profit or of recovering research and development costs;

- when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be executed only by a particular economic operator\textsuperscript{536};

- insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting entities, the time-limits laid down for open, restricted and negotiated procedures with a prior call for competition cannot be adhered to\textsuperscript{537}.

The publicity obligation is required not only for the launching of the initial tender offer, but also where the essential characteristics of the contract are amended following negotiations initiated between the contracting entity and the participants. The renegotiation of the terms of a public contract may be assimilated to a new contract only if the discussions initiated relate to characteristics that are substantially different from those having as their purpose the initial agreement and result in the amendment of the essential terms of the contract\textsuperscript{538}.

Participants in the award procedure are selected pursuant to the qualitative criteria listed in Article 78 of the directive. The contract notice, which sets out the criteria, must not be worded so as to give rise to a difference in treatment because of the Member State of establishment of the party concerned, to the detriment of foreign candidates\textsuperscript{539}. Where those criteria relate to the economic or financial standing of the operator, or its technical and/or professional capability, it should be authorized to rely on the capability of other entities, regardless of the legal nature of the links existing between itself and those entities, provided that it brings evidence that it has the means necessary to perform the contract. Furthermore, a group of economic operators cannot rely on the capability of the participants to the group or other entities\textsuperscript{540}.

\textsuperscript{536} Case C-394/02 Commission v Greece [2005] ECR I-4713, LawLex09665: the fact that there are technical reasons which make it absolutely necessary to award a contract to a particular undertaking is not established where, in the past, the same works were subject to a call for tenders and, in this case, the contracting authority canvassed two undertakings.

\textsuperscript{537} Case C-394/02 Commission v Greece [2005] ECR I-4713, LawLex09665: the existence of extreme urgency brought about by unforeseeable events is not established where the facts of the case show that the contract could have been awarded three years before.

\textsuperscript{538} Case C-16/98 Commission v France [2000] ECR I-8315, LawLex071586: the renegotiation of the terms of a public contract may be assimilated to a new contract only if the discussions initiated relate to characteristics that are substantially different from those having as their purpose the initial agreement and result in the amendment of the essential terms of the contract.

\textsuperscript{539} Case C-199/07 Commission v Greece [2009] ECR I-10669, LawLex11487.

\textsuperscript{540} Case C-399/05 Commission v Greece [2007] ECR I-1011*, Summ.pub.: it is not necessary that a selection criterion - such as that relating to background, be met by each of the members of the consortium submitting a tender, where one of them meets it.
As in Directive No 2014/24, the award of a contract can take place only on the basis of the most economically advantageous tender\(^\text{541}\). The most economically advantageous tender is assessed on the basis of the price or the cost according to a cost-effectiveness approach such as life-cycle costing, and may include the best price-quality ratio, which is assessed on the basis of criteria including qualitative, environmental and/or social aspects, linked to the subject-matter of the contract in question. The directive ratifies the previous case law which held that the contracting authorities could take into consideration ecological criteria, provided that the criteria retained are linked to the subject-matter of the contract and referred to in the contract documents or the tender notice, do not confer an unrestricted freedom of choice on the contracting authority and comply with the principle of non-discrimination\(^\text{542}\). On the other hand, such criteria must remain distinct from qualitative selection criteria\(^\text{543}\).

A candidate or tenderer who has been rejected must be 'promptly' informed of the reason of the rejection. The contracting authority, bound by an obligation of diligence in respect of the communication, to those tenderers requesting it, of the reason for the rejection of their bid, must bring evidence of objective factors capable of justifying the two-month delay in communicating the information\(^\text{544}\). Where a public procurement procedure in which two tenders have been submitted and the contracting authority has adopted two simultaneous decisions rejecting the tender of one of the tenderers and awarding the contract to the other, the unsuccessful tenderer who brings an action against those two decisions must be able to request the exclusion of the tender of the successful tenderer\(^\text{545}\).

In addition to the remedies offered to economic operators by Directive No 92/13 of 25 February 1992\(^\text{546}\), the Commission may bring an action for failure to fulfill obligations where it finds a violation of the provisions of Directive No 2014/25. This action is admissible provided that on the date of

\(^{541}\) Directive No 2014/25, Article 82.


\(^{545}\) Case C-131/16 Archus sp. z o.o, Judgment of 11 May 2017, LawLex17863: specifying that in an action available under Article 1(3) of Directive No 93/13 to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement - in this case an unsuccessful tenderer seeking the exclusion of the successful tenderers' bid on the ground that it does not comply with the tender specifications - the concept of "a particular contract", within the meaning of that article, may apply to the possible initiation of a new public procurement procedure.

expiration of the period set in the reasoned opinion sent to the Member State by the Commission, the contract has not been fully performed yet\(^{547}\).

### Section 4 Remedies Directive

#### I. General rules

**23.19. Conditions for bringing proceedings**


Pursuant to Article 1 of Directive No 89/665, the Member States shall take all the measures necessary to ensure that decisions taken by the contracting authorities may be reviewed effectively and as rapidly as possible, where such decisions have infringed European law in the field of public procurement or national rules implementing that law\(^{551}\). The remedy must be available to any person having or having had an interest in obtaining a particular contract or who has been or risks being harmed by an alleged infringement.

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\(^{547}\) This is the case where the works which are the subject-matter of the contract have been completed only up to 85%, Case C-394/02 Commission v Greece [2003] ECR I-4713, LawLex09665; See also Case C-536/07 Commission v Germany [2009] ECR I-10355, LawLex11271.


\(^{549}\) This remedy, offered particularly to evicted tenderers, is to be distinguished from the remedy for failure to fulfill obligations that the Commission may exercise on the basis of Article 258 TFEU and which is aimed at protected the general interest: Case C-17/09 Commission v Germany, [2010] ECR I-4, Summ. pub.; Case C-275/08 Commission v Germany [2009] ECR I-168, Summ. pub. This objective difference justifies the fact that the Commission acts even after expiration of the period prescribed for internal remedies. However, the Commission's action is admissible only if the contract has not been completed yet on the date of the reasoned opinion: C-125/03 Commission v Germany [unpublished]; C-217/06 Commission v Italy [2007] ECR I-132, Summ. pub.; C-237/05 Commission v Greece [2007] ECR I-8203, LawLex09837; C-536/07 Commission v Germany [2009] ECR I-10355, LawLex11271; C-199/07 Commission v Greece [2009] ECR I-10669, LawLex11487.


\(^{551}\) Case C-166/14 MedEval Qualitäts, Judgment of 26 November 2015, LawLex151543, holding that the principle of effectiveness, precludes national legislation which makes bringing an action for damages in respect of the infringement of a rule of public procurement law subject to a prior finding that the public procurement procedure for the contract in question was unlawful because of the lack of prior publication of a contract notice, where the action for a declaration of unlawfulness is subject to a six-month limitation period which starts to run on the day after the date of the award of the public contract in question, irrespective of whether or not the applicant in that action was in a position to know of the unlawfulness affecting the decision of the awarding authority.
Pursuant to that provision, the decision not to initiate a formal procedure of invitation to tenders\textsuperscript{552} or the withdrawal of an invitation to tender\textsuperscript{553} are reviewable acts insofar as they produce legal effects. On the other hand, mere procedural acts may be excluded from the remedy right guaranteed by Directive No 89/665, unless they decide, directly or indirectly, the substantive issues of the case, render it impossible to continue the procedure or to conduct a defense, or cause irreparable harm to legitimate rights or interests\textsuperscript{554}. The first expression of intent of the contracting authority in connection with a contract, such as entering into specific contractual negotiations with an operator, does not constitute a mere preparatory work or preliminary study but a decision against which there is a right of appeal\textsuperscript{555}.

Irrespective of the formal capacity of the tenderer or candidate, the action is available to any person having or having had an interest in obtaining the contract or who has been or is at risk of being harmed by an infringement of the rules on call for tenders\textsuperscript{556}. It results that although an action against the decision awarding a contract is available even to an operator who has not submitted any offer, in particular in the case of a contract awarded without competitive call to tender, it cannot be exercised by an operator who has submitted no offer because he considered that he did not fulfill the discriminatory conditions laid down in the contract notice and did not seek review of the specifications which he alleges are unlawful\textsuperscript{557}. Moreover, national legislation cannot prevent a tenderer from contesting the lawfulness of the decision of the contracting authority not to consider his bid as the best bid on the ground that his bid should have been eliminated at the outset for other reasons, where it would deny him the possibility of contesting the admissibility decision\textsuperscript{558}. Where a consortium without legal personality grouping together several economic operators has tendered without being awarded the contract, the directive precludes neither national law from providing that all the members must act together\textsuperscript{559}, nor, on the other hand, national law which allows an individual member of the consortium to bring an action against the decision awarding the contract\textsuperscript{560}. Lastly, an operator who has participated in a contract award procedure cannot be regarded as having lost his interest in obtaining the contract and therefore in bringing proceedings, on the ground that he failed to refer the case to a conciliation committee before seeking a review against the decision awarding the contract to

\textsuperscript{552} Case C-26/03 Stadt Halle and RPL Lochau [2005] ECR I-1, LawLex091005.

\textsuperscript{553} Case C-92/00 HI [2002] ECR I-5553, LawLex091209.

\textsuperscript{554} Case C-214/00 Commission v Spain [2003] ECR I-4667, LawLex091233.

\textsuperscript{555} Case C-26/03 Stadt Halle and RPL Lochau [2005] ECR I-1, LawLex091005.

\textsuperscript{556} Case C-26/03 Stadt Halle and RPL Lochau [2005] ECR I-1, LawLex091005.

\textsuperscript{557} Case C-230/02 Grossmann Air Service [2004] ECR I-1829, LawLex091304.

\textsuperscript{558} Case C-249/01 Hackermüller [2003] ECR I-6319, LawLex09928.

\textsuperscript{559} Case C-129/04 Espace Trianon and Sofibail [2005] ECR I-7805, LawLex09490.

\textsuperscript{560} Case C-492/06 Consorzio Elisoccorso San Raffaele [2007] ECR I-8189, LawLex09986.
another tenderer, whilst such a formality is not in keeping with the objectives of speed and effectiveness of the directive⁵⁶¹.

Section 1 Scope of application

II. Material scope of application

24.08. Exclusion of fiscal, customs and administrative matters

Regulation No 1215/2012 does not cover revenue, customs or administrative matters (Article 1). However, the public authority's action is not sufficient for the proceedings to fall outside the scope of application of the regulation.

In the Eurocontrol judgment\(^{562}\), the Court of Justice considered that a judgment given in an action between a public authority and a person governed by private law does not fall within the regulation where the right on which the action relies arises from an act of the public authority in the exercise of its powers, even if the action brought has a civil nature\(^{563}\). This is the case for the removal of a wreck\(^{564}\), acts perpetrated by armed forces\(^{565}\) or for an action for recovery of sums not due on the

\(^{565}\) Case C-292/05 Lechouritou and others [2007] ECR I-1519, LawLex091416: the action for recovery brought in a Member State by the successors of the victims of war massacres against another Member State by reason of acts perpetrated by its armed forces does not fall
ground of unjust enrichment having its origin in the repayment of a fine imposed in competition law proceedings\textsuperscript{566}. However, enforcement proceedings brought by a company owned by a local authority against a natural person domiciled in another Member State, for the purposes of recovering an unpaid debt for parking in a public car park fall within the scope of Regulation No 1215/2012 insofar as they are not of a punitive nature but merely constitute consideration for a service provided\textsuperscript{567}. The civil servant status of the person against whom the action is brought is not sufficient to set aside application of the regulation, since a civil servant does not necessarily exercise public powers, even if he acts on behalf of the State. Thus, an action for recovery against a State school teacher having caused injury to a pupil during a school trip by reason of a breach of his official duties does not fall within administrative matters insofar as the conduct of the teacher in his function as a person in charge of pupils does not constitute an exercise of public powers going beyond those existing under the rules applicable to relations between private individuals and where a teacher in a State school assumes the same functions vis-à-vis pupils as those assumed by a teacher in a private school\textsuperscript{568}.

The ‘public authority acting in the exercise of public powers’ criterion also applies to distinguish proceedings falling under civil matters and those falling under customs matters. A claim by which a Member State seeks to enforce a guarantee contract governed by private law intended to guarantee the payment of a customs debt does not fall within the concept of ‘customs matters’ expressly excluded from the regulation, where the legal relationship between the creditor and the guarantor, as resulting from the guarantee contract, does not entail the exercise by the State of powers going beyond those existing under the rules applicable to relations between private individuals\textsuperscript{569}.

24.11. Exclusion of bankruptcy

Issues relating to bankruptcy, judicial arrangements, compositions and analogous proceedings, governed by Regulation No 2015/548\textsuperscript{570}, do not fall within the scope of application of Regulation No 1215/2012 (Article 1(2)(b))\textsuperscript{571}. The exclusion covers decisions which must "derive directly from the bankruptcy or winding-up and be closely connected with the proceedings for 'liquidation des biens' or

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\textsuperscript{566} Case C-102/05 Gazdasági Versenyhivatal, Judgment of 28 July 2016, LawLex1711.
\textsuperscript{567} Case C-551/15 Pula Parking d.o.o, Judgment of 9 March 2017, LawLex17463.
\textsuperscript{568} Case C-172/91 Sonntag v Waidmann [1993] ECR I-1963, LawLex09718.
\textsuperscript{569} Case C-266/01 Préservatrice Foncière TIARD [2003] ECR I-4867, LawLex091337.
\textsuperscript{571} Brussels I bis Regulation is, on the other hand, applicable to liquidation or dissolution of legal entities which are solvent: Article 24(2).
the 'règlement judiciaire'\textsuperscript{572}, such as proceedings which lead to the de facto manager of a legal person to be ordered to pay a sum to the general body of creditors\textsuperscript{572} or an action for liability brought against the members of a committee of creditors on the basis of their conduct when voting on a restructuring plan in insolvency proceedings\textsuperscript{573}. According to the Court of Justice\textsuperscript{574}, applying the exclusion in Article 1(2)(b) depends on the closeness of the link between the insolvency proceedings and the court action at issue. Thus, an action for damages for unfair competition by which the assignee of part of the business acquired in the course of insolvency proceedings is accused of misrepresenting itself as being the exclusive distributor of articles manufactured by the debtor does not fall within the scope of the regulation on insolvency insofar as, even if there is a link between the action in the main proceedings and the insolvency proceedings, that link is neither sufficiently direct or sufficiently close so as to exclude Regulation No 44/2001 and therefore, so as to make Regulation No 2015/848 applicable\textsuperscript{575}.

An action brought by a seller based on a reservation of title against a purchaser who is insolvent falls within Regulation No 1215/2012, where such an action is not based on the law of the insolvency proceedings and requires neither the opening of such proceedings nor the involvement of a liquidator\textsuperscript{576}, whilst the decision relating to the extent of the powers of the liquidator as part of insolvency proceedings (opened before the coming into force of Regulation No 1346/2000) is excluded\textsuperscript{577}.

\textsuperscript{572} Case 133/78 Gourdain v Nadler [1979] ECR 733, LawLex091538: proceedings which lead to the de facto manager of a legal entity to be ordered to pay a sum to the general body of creditors do not fall within the scope of application of the regulation where special provision is made in a law on bankruptcy, where they are made only to the court which made the order for the 'règlement judiciaire' or the 'liquidation des biens', where, if they succeed, it is the general body of creditors which benefits from them and, lastly, where, in the event of the winding-up of a commercial company, their object is to go beyond the legal person and proceed against its managers and their property.

\textsuperscript{573} Case C-649/16 Valach and others, Judgment of 20 December 2017, LawLex1838.

\textsuperscript{574} Case C-111/08 SCT Industri [2009] ECR I-5655, LawLex11633.

\textsuperscript{575} Case C-641/16 Tünkers France, Judgment of 9 September 2017, LawLex171811.


\textsuperscript{577} Case C-111/08 SCT Industri [2009] ECR I-5655, LawLex11633.
Section 2 Content

II. Special jurisdiction
A. Options
1° Matters relating to a contract

24.20. Concept of 'matters relating to a contract'
The concept of matters relating to a contract is an independent concept which must be interpreted chiefly according to the system and objectives of Regulation No 1215/2012 and should not be taken as referring to how the legal relationship in question before the national court is classified by the relevant national law. The special jurisdictional rule in Article 7(1) of Council Regulation No 1215/2012 does not require a contract to have been concluded, but assumes that an obligation is identified. Thus the plaintiff may benefit from the choice of jurisdiction, even though the defendant claims by way of plea that the contract has not been concluded. The concept of matters relating to a contract covers in practice all situations in which there is an obligation freely assumed by one party towards another. The Paulian action, once it is brought on the basis of the creditor’s rights created upon the conclusion of a contract, falls within matters relating to a contract, as, by this action the creditor seeks a declaration that the transfer of assets by the debtor to a third party has caused detriment to the creditor’s rights deriving from the binding nature of the contract and which correspond with the obligations freely consented to by the debtor. The cause of this action therefore lies essentially in the breach of these obligations towards the creditor to which the debtor agreed. Actions seeking the annulment of a contract and the restitution of the amounts paid on the basis of a document the nullity of which is established are thus regarded as matters relating to a contract. This is also the case of a recourse claim between jointly and severally liable debtors under a credit agreement or a claim

581 Case C-26/91 Handte v TMCS [1992] ECR I-3967, LawLex092082: the action of a sub-buyer against the manufacturer does not fall within matters relating to a contract insofar as "there is no contractual relationship between the sub-buyer and the manufacturer because the latter has not undertaken any contractual obligation towards the former" and “particularly where there is a chain of international contracts, the parties’ contractual obligations may vary from contract to contract, so that the contractual rights which the sub-buyer can enforce against his immediate seller will not necessarily be the same as those which the manufacturer will have accepted in his relationship with the first buyer”.
582 Case C-337/17 Feniks sp. z o.o., Judgment of 4 October 2018, LawLex181765.
584 Case C-249/16 Saale Kareda, Judgment of 15 June 2017, LawLex171073.
brought by air passengers for compensation for the long delay of a connecting flight, against the operating air carrier with which the passenger concerned does not have contractual relations 585. The repudiation of a commercial agency agreement and all relating claims such as compensation in lieu of notice and compensation for the wrongful repudiation of that agreement, or the claims for payment of commissions due under the contract 586, membership of an association which creates close links between the members of the same kind as those which are created between parties to a contract 587, or the fact that a vendor sends a letter of its own initiative to the consumer’s home, without any request by that consumer, giving that consumer the impression that a prize would be awarded to him if he returned the payment notice attached to the letter, if he had accepted the conditions laid down by the vendor and did in fact claim payment of the prize announced 588, constitute obligations freely assumed falling within Article 7(1).

The criterion of ‘freely assumed commitments between the parties’ also enables matters relating to a contract to be distinguished from matters relating to tort, delict and quasi-delict, which are defined negatively in relation to matters relating to tort 589. The action brought by a sub-buyer against the manufacturer for damages on the ground that the goods are not in conformity 590, an action for liability brought by an insurer on the basis of a bill of lading which discloses no contractual relationship freely entered into between the consignee of the damaged goods and the actual maritime carriers 591, or the obligation of which the guarantor claims the performance on the basis of a guarantee agreement concluded without the debtor knowing 592 do not fall within matters relating to a contract but with matters relating to tort, delict or quasi-delict. Likewise, the dispute in which national legislation renders a legal person liable for the debts of a company which he controls, where that person did not comply with the reporting obligations following the acquisition of that company, cannot be regarded as concerning matters relating to a contract due to lack of consent 593. Further, proceedings concerning the avoidance of a contract of gift of immovable property on the ground of the donor’s incapacity to contract do not fall within the exclusive jurisdiction of the courts of the Member State in which the...

585 Joined Cases C-274/16, C-447/16, C-448/16 Flightright GmbH, Judgments of 7 March 2018, LawLex18427.
589 Case 189/87 Kalfelis v Schröder and others [1988] ECR 5565, LawLex091633: “The concept of ‘matters relating to tort, delict or quasi delict’ must be regarded as an autonomous concept including all actions which seek to establish the liability of a defendant and which are not related to a contract”.
592 Case C-265/02 Frahuiil [2004] ECR I-1543, LawLex091046.
593 Case C-519/12 OTP Bank, Judgment of 17 October 2013, not available in English.
property is situated, but within the special jurisdiction of the courts of the place of performance of the obligation in question, given that, as regards mixed actions based on a right in personam and seeking to obtain a right in rem, there are numerous factors which support the view that such actions are predominantly actions in personam. On the other hand, civil liability claims which are classified as matters relating to tort under national law must be regarded as concerning matters relating to a contract where the conduct complained of may be considered a breach of the terms of the contract, which is established by taking into account the purpose of the contract. This is also the case for an action for damages founded on the sudden termination of a long-standing business relationship, where there existed between the parties a tacit contractual relationship based on a body of consistent evidence: good faith, the regularity of the transactions and their development over time expressed in terms of quantity and value, any agreements as to prices charged and/or discounts granted, and the correspondence exchanged.

Lastly, matters relating to a contract expressly cover the sale of goods and the provisions of services referred to in Article 7(1)(b). These concepts have been specified by the Court of Justice. Thus, a contract under which the owner of an intellectual property right grants its contractual partner the right to use it in return for remuneration, is not a contract for the provision of services. On the other hand, a contract for the supply of goods containing specific terms concerning the distribution by the distributor of the goods sold by the grantor constitutes a contract for the sale of goods within the meaning of the second indent of Article 7(1)(b) of the regulation. Contracts of which the object is the supply of goods to be manufactured or produced even though the purchaser has specified certain requirements with regard to the supply, fabrication and delivery of the goods, the purchaser has not supplied the materials, and the supplier is responsible for the quality of the goods and their compliance with the contract, must be classified as contracts for the sale of goods within the meaning of the regulation.

24.22. Determining the place of performance of the obligation

The concept of place of performance of the obligation forming the basis of the action has raised many concerns as to interpretation which Regulation No 44/2001 had tried to address by objectively
defining that place for contracts for the sale of goods and provisions of services, which, from a
statistical point of view, constitute the essential part of the contracts. However, the issue of
determination of the place of performance of the obligation at issue remains where it arises of another
type of contract and the parties have not agreed thereto in advance.

The Court of Justice, in the Tessili judgment, laid down the rule according to which the place in
which the obligation was or should have be performed must be determined in accordance with the law
that governs the obligation at issue, according to the rules of conflict of the court seized. Coming at a
time when there were many divergences between the national laws in matters relating to a contract due
to lack of unification of the applicable substantive law, the principle of referral to the rules of conflict
of the court seized has been set out by the Court of Justice: the place of performance is determined
pursuant to the rules of private international law of the Member State of the court seized, as well as to
the substantive law, even where those rules refer to the application to the contract of provisions such
as those of the Uniform Law on the International Sale of Goods, annexed to the Hague Convention
of 1 July 1964. The Court of Justice, which has consistently restated the principle of determination
of the place of performance of the basic obligation in accordance with the law governing the obligation
at issue, according to the rules of conflict of the court seized, justifies this solution by the need that
"the competent court [be] the court of the place where the obligation in question is to be performed in
accordance with the law applicable to it" and adds that by reason of the harmonization carried out

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600 Case 56/79 Zelger v Salinitri [1980] ECR 89, LawLex092029: the parties are free to agree on a place of performance for contractual
obligations - forming the basis of jurisdiction of the court under Article 7(1) - which differs from that which would be determined under the
law applicable to the obligation at issue, without having to comply with specific formal conditions regarding jurisdiction clauses, provided
that the localization clause is valid under the law applicable to the contract; Case C-106/95 MSG v Les Gravières Rhénanes [1997] ECR I-
911, LawLex09336; however, the parties cannot choose a fictitious place of performance which has no real connection with the reality of the
contract and the obligations arising out thereof, as this would amount to agree on the jurisdiction of a court without complying with the
formal conditions under the regulation relating to forum election clauses.

601 Case 12/76 Industrie Tessili italiana v Dunlop AG [1976] ECR 1473, LawLex091509: in this case, the obligation forming the basis of the
claim in question consisted in a payment obligation which, according to the laws of the Member States, was payable at the debtor's domicile
or at the creditor's domicile. From that finding, the Court favored the method of conflict of law and the 'lege causae' qualification which, if
applicable, may lead to the application of a foreign substantive law, rather than the 'lege fori' qualification which, in Member States where
the payment is due at the debtor's domicile, would have resulted in removing all substance from the option recognized to the plaintiff-creditor
in Article 7(1) (since the place of performance is, in such a case, necessarily superposed to the domicile of the defendant-debtor), whereas in
the Member States where the payment is due at the creditor's domicile, the plaintiff (creditor) would have benefited from the possibility to
sue the debtor in the court of his domicile [which the regulation intends precisely to avoid since it is not normally based on the criterion of
the plaintiff's domicile].

602 Vienna Convention of 11 April 1980 on the Contracts for the International Sale of Goods or the Hague Convention of 1 July 1964
relating to a Uniform Law on the International sale of Goods.

within the Union\(^{604}\), the law applicable to the determination of the place of performance is no longer likely to vary depending on the court seized\(^{605}\).

However the Tessili case law has the major disadvantage of leading to a fragmentation of the case and a dispersion of jurisdiction where there is more than one claim based on distinct contractual obligations\(^{606}\). Therefore, where an action is founded on two obligations of equal ranking arising from the same contract, the court does not have jurisdiction to hear the whole of the action, where under the conflict rules of the State in which that court is situated the obligations are to be performed in another Member State\(^{607}\). Thus, where the contractual obligation forming the basis of the claim consists in an obligation not to do something, applicable without any geographic limit, is not capable of fixing a single place of performance and where the multiplicity of courts having jurisdiction might encourage forum shopping on the part of the plaintiff, the Court prefers not to apply the Tessili case law and will designate the court having jurisdiction depending on the defendant's domicile\(^{608}\).

In the case of the sale of goods, Regulation No 1215/2012, under the first indent of Article 7(1)(b), grants jurisdiction to the court of the place of performance where the goods were delivered or should have been delivered. The place of delivery of the goods, as autonomous linking factor, applies "to all claims founded on one and the same contract for the sale of goods rather than merely to the claims founded on the obligation of delivery itself"\(^{609}\). Establishing the place of performance of 'the tasks which characterize the contract' as the autonomous linking factor, the regulation excludes resorting to the rules of private international law of the Member States of the court seized, and to the substantive law which, under that law, would be applicable to determine the place of performance of the basic

\(^{604}\) Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations, replaced by Rome (I) Regulation, applicable to all contracts concluded from 17 December 2009.

\(^{605}\) Case C-440/97 GIE Groupe Concorde and others [1999] ECR I-6307, LawLex09831: to the Court of Cassation which was wondering whether the national courts might determine the place of performance of the obligation by seeking to establish, having regard to the nature of the relationship creating the obligation and the circumstances of the case, the place where the performance actually took place or should have taken place, without having to refer to the law which, under the rules on conflict of law, governs the obligation at issue, the ECJ answered that the reference, in Article 7(1) of the regulation, to the place of performance of the contractual obligations can only be understood as a referral to the applicable substantive law, pursuant to the conflict rules of the court seized, and such referral is even more justified because there is no risk that the law applicable to the determination of the place of performance will vary depending on the court seized, since the conflict rules enabling the law applicable to the contract to be determined have been standardized in the Member States.

\(^{606}\) Although most of the time the law governing the obligation that forms the basis of the claim is in fact the law of the contract, some obligations at issue may fall within a specific law - See on that issue, Case 14/76 De Bloos v Bouyer [1976] ECR 1497, LawLex091547, having retained that it is for the national court to ascertain whether, under the law applicable to the contract, the compensation sought penalizes the non-performance of an obligation arising out of the contract, or whether it is based on an independent obligation, even a public-order provision, with the consequence that, depending on whether the law applicable to the obligations at issue is that of the contract or another law, their place of performance may be localized in distinct States and therefore lead to grant jurisdiction to the courts of a Member State for certain claims, while another court will have international jurisdiction to hear other claims.


\(^{608}\) Case C-256/00 Besix [2002] ECR I-1699, LawLex091000.

\(^{609}\) Case C-386/05 Color Drack [2007] ECR I-3699, LawLex09623.
obligation in accordance with the De Bloos and Tessili case law. The place in which the goods were or should have been delivered under the contract must therefore be determined on the basis of the contractual provisions. The national court must take into account all the relevant contractual terms and clauses enabling the place of delivery to be clearly identified, including the terms and clauses generally recognized and applied in international commercial usage, such as Incoterms. Where it is impossible to determine the place of delivery of the goods on that basis, without reference to the substantive law applicable to the contract, that place is the place where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sales transaction. In case of sale of goods involving several places of delivery within a single Member State, the plaintiff may sue the defendant in the court for the principal place of delivery, which must be understood as the place with the closest linking factor between the sales contract and the court having jurisdiction. Where the principal place of delivery cannot be determined, the plaintiff is free to choose the court for the place of delivery it wishes.

In the case of the provision of services, the second indent of Article 7(1)(b) designates as the court having jurisdiction that of the place where the services were provided or should have been provided. According to the Court of Justice, the rules of special jurisdiction for the provision of services, where the services are provided at several places, cannot be applied a differentiated approach from that adopted in case of plurality of places of delivery of the goods, insofar as they have the same origin, pursue the same objectives and occupy the same place in the scheme established by the regulation. As a result, in case of air transport of persons from one Member State to another, the places of departure and arrival of the aircraft must be regarded as the principal place of the provision of services insofar as the air transport services consist, by their very nature, of services provided in an indivisible and identical manner. The court having jurisdiction to deal with a claim for compensation founded on an air transport contract will therefore be that, at the applicant’s choice and in addition to that of the defendant’s domicile, which has territorial jurisdiction over the place of departure or place of arrival of

611 Case C-87/10 Electrosteel Europe SA, Judgment of 9 June 2011, LawLex111090.
613 Case C-386/05 Color Drack [2007] ECR I-3699, LawLex09623: the first indent of Article 7(1)(b) applies whether there is one place of delivery or several, in a same Member State, which "is without prejudice to the answer to be given where there are several places of delivery in a number of Member States".
614 Case C-386/05 Color Drack [2007] ECR I-3699, LawLex09623.
the aircraft. Where the claim for compensation for the long delay of a connecting flight is based on an irregularity which took place on the first leg of the flight operated by an air carrier which is not the contracting party of the passengers in question, the place of arrival of the second flight must be regarded as the place of performance of the flight in its entirety, where the carriage on both flights was operated by two different air carriers. Lastly, the Court has specified that the second indent of Article 7(1)(b) is applicable in the case of the provision of services in more than one Member States. Thus, for a commercial agency contract implying the provision of the services in several Member States, the court having jurisdiction to hear and determine all the claims is the court within whose jurisdiction the place of the main provision of services is situated, determined on the basis of the provisions of the contract or, in the absence of such provisions, the actual performance of the contract or, where it cannot be determined on that basis, the place where the agent is domiciled.

3° Delict or quasi-delict

24.25. Harmful event

The concept of 'harmful event' is broad in scope and includes physical, pecuniary, non-pecuniary loss or damage. Injury to the reputation and good name of a natural or legal person due to defamatory publication may thus fall within Article 7(2). With regard to consumer protection, it covers not only situations where an individual has personally sustained damage but also the undermining of legal stability by the use of unfair terms.

The concept of harmful event also encompasses the 'knock-on' damage, i.e. the damage suffered by a victim who is not the principal victim and the indirect damage, i.e. that follows the initial damage. According to the Court of Justice, a loss of income may be regarded as initial damage. Moreover, application of Article 7(2) is not subject to the fact that any actual concrete damage has

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616 Joined Cases C-274/16, C-447/16, C-448/16 Flightright GmbH, Judgment of 7 March 2018, LawLex18427.
occurred\(^{623}\): a merely preventive action seeking to prevent the occurrence of a future harmful event also falls within matters relating to tort and delict\(^{624}\).

**24.26. Place where harmful event occurred**

Article 7(2) of Regulation No 1215/2012 makes it possible to sue the defendant in the courts for the place where the harmful event occurred or might occur. According to the Court of Justice, the courts for the place where the harmful event occurred are in principle "the most appropriate for deciding the case, in particular on the grounds of proximity and ease of taking evidence [...]"\(^{625}\).

As determining the place where the harmful event occurred is often difficult, in particular in case of plurality of damages in time or in space, the Court of Justice has laid down a rule according to which if the place where the event took place may give rise to liability in tort, delict or quasi-delict and the place where that event results in damage are not identical, the expression 'place where the harmful event occurred' must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the plaintiff, in the courts of either of the places\(^{626}\). Where a manufacturer faces a claim of liability for a defective product, the place of the event giving rise to the damage is the place where the product in question was manufactured\(^{627}\) whereas the place where the harmful event occurred refers to the place where the initial damage occurred as a result of the normal use of the product for the purpose for which it was intended\(^{628}\). Thus, under competition law, in the event of a single and continuous infringement, the victim may bring a damages action against the participants either before the courts of the place in which the cartel was concluded or the place in which one agreement in particular was concluded which is identifiable as the sole causal event giving rise to the loss suffered, or before the courts of the place where its own registered office is located by virtue of the place where the loss

\(^{623}\) Case C-167/00 Henkel [2002] ECR I-8111, LawLex09666.

\(^{624}\) Case C-18/02 DFDS Torline [2004] ECR I-1417, LawLex09748: "the finding that the courts for the place where the harmful event occurred are usually the most appropriate for deciding the case, in particular on the grounds of proximity and ease of taking evidence, is equally relevant whether the dispute concerns compensation for damage which has already occurred or relates to an action seeking to prevent the occurrence of damage".

\(^{625}\) Case C-18/02 DFDS Torline [2004] ECR I-1417, LawLex09748.

\(^{626}\) Case 21/76 Handelskwekerij Bier v Mines de Potasse d'Alsace [1976] ECR 1735, LawLex091660.

\(^{627}\) Case C-45/13 Andreas Kainz, Judgment of 16 January 2014, LawLex1432, specifying that the interpretation of the place of the event giving rise does not take into account the interests of the victim thus enabling him to bring his action before a court of the Member State in which he is domiciled insofar as Article 5(3) [7(2) Regulation No 1215/2012] is specifically not designed to offer the weaker party stronger protection.

\(^{628}\) Case C-189/08 Zuid-Chemie v Philippo's, Judgment of 16 July 2009, LawLex11485.
occurred\textsuperscript{629}. The jurisdiction option must however be exercised in compliance with the requirements laid down by the regulation regarding foreseeability and close connecting factor with the dispute\textsuperscript{628}.

Article 7(2) only covers the place where the harmful event directly produced effects on the person who is the immediate victim. In the context of an action seeking compensation for damage caused by anticompetitive conduct, the term 'place where the harmful event occurred' may be understood to mean either the place of conclusion of an anticompetitive agreement contrary to Article 101 TFEU, or the place of commission of acts exploiting the financial benefit resulting from that agreement, consisting, inter alia, in the application of predatory prices amounting to abuse of a dominant position under Article 102 TFEU; the "place where the harmful event occurred" may cover the place of the market which is affected by that conduct and on which the victim claims to have suffered those losses\textsuperscript{631}. In case of succession of damages in time, the place where the harmful event occurred cannot be construed so extensively as to encompass the place where the claimant is domiciled by reason only of the fact that he has suffered financial damage there resulting from the initial damage which arose and was incurred in another Member State\textsuperscript{632}, any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere\textsuperscript{633}, or the place where the indirect victim ascertained a damage resulting from the initial damage on its own assets\textsuperscript{634}. Where the damage consists in a purely financial loss occuring directly in the applicant's bank account and is the direct result of an unlawful act committed in another Member State, the place where the damage occurred may not be construed as being, failing any other connecting factors, the place in a Member State where the harmful event occurred\textsuperscript{635}. On the other hand, in a situation where an investor brings, on the basis of the prospectus relating to a certificate in which he or she invested, a tort action against the bank which issued that certificate, the courts of that investor's domicile, as the courts for the place where the harmful event occurred have jurisdiction to hear and determine that action, where the damage the investor claims to have suffered consists in financial loss which occurred directly in that investor's bank account with a bank established within the jurisdiction of those courts and the other

\textsuperscript{629} Case C-352/13 Cartel Damage Claims, Judgment of 21 May 2015, LawLex15644.
\textsuperscript{630} Case C-51/97 Réunion européenne and others [1998] ECR I-6511, LawLex091016.
\textsuperscript{632} Case C-168/02 Kronhofer [2004] ECR I-6009, LawLex09674: the jurisdiction option cannot cover the place where the claimant is domiciled and where 'his assets are concentrated' by reason only of the fact that the claimant has suffered financial damage there resulting in the loss of part of his assets which arose and was incurred in another Contracting State.
\textsuperscript{634} Case C-220/88 Dumez France and others v Hessische Landesbank and others [1990] ECR I-49, LawLex092346: the indirect victim - to whom the European court tacitly recognizes a right to compensation - does not have other jurisdiction options than those of the immediate victim, i.e. the court where the defendant is domiciled, that of the generating fact took place, or that of the place where the damage occurred.
\textsuperscript{635} Case C-12/15 Universal Music International Holding BV, Judgment of 16 June 2016, LawLex161117.
specific circumstances of that situation also contribute to attributing jurisdiction to those courts. Where there are a number of perpetrators, Article 7(2) of Regulation No 1215/2012 does not allow jurisdiction to be established on the ground of a harmful event imputed to one of the presumed perpetrators of damage, who is not a party to the dispute, over another presumed perpetrator of that damage who has not acted within the jurisdiction of the court seized.

The generating fact or the damage may also take place in several places. Thus, regarding libel by a newspaper article distributed in several Member States, which implies a plurality of damages located in different places, the place of the event giving rise to the damage is the place where the publisher of the newspaper in question is established, whilst the place where the damage occurred corresponds to all the places where the publication was distributed, provided that the victim is known there. The victim may then sue the defendant either before the courts of the Member State of the place where the publisher is established for all the harm caused by defamation, or before the courts of each Member State in which the article was published, which have jurisdiction to rule solely in respect of the harm caused in their territory. Likewise, in the event of infringement of personality rights by means of content placed online on an internet website, the victim has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the center of his activities is based. Although the center of interests of a legal person and holder of personality rights which have been infringed by the publication of incorrect information concerning it on the internet and by a failure to remove comments relating to that person may coincide with the place of its registered office, when all or the main part of its activities are carried out in a different Member State from the one in which its registered office is located, and the commercial reputation of that legal person is greater in that Member State than in any other, it is presumed that the courts of that Member State are best placed to assess the existence and the potential scope of that alleged injury. That legal person cannot, however, bring an action for rectification of that information and removal of those comments before the courts of each Member State in which the information published on the internet is or was accessible.

636 Case C-304/17 Helga Löber v Barclays Bank, Judgment of 12 September 2017, LawLex181272.
637 Case C-228/11 Melzer v MF Global UK Ltd, Judgment of 16 May 2013, LawLex13846.
639 Case C-509/09 eDate Advertising and others [2011], LawLex12126.
640 Case C 194/16 Bolagsupplysningen OU, Ingrid Ilsjan, Judgment of 17 October 2017, LawLex171692.
As regards infringements of intellectual property rights the center of interest of the victim criterion cannot be implemented for determining the court having jurisdiction. The occurrence of the harmful event giving rise to an infringement of copyright does not depend on whether the website concerned is directed to the Member State in which the court seized is situated but whether the photographs covered by that copyright are accessible in that State. In the case of an infringement of a trade mark registered in a Member State through the use, by an advertiser, of a keyword identical to that trade mark on the website of an internet search engine operating under a top-level domain different from that of the Member State where the trade mark is registered, in this case "google.de", an action may be brought in the courts of the Member State in which the trade mark is registered, or in the courts of the place of establishment of the advertiser. Where the harmful event consists of an infringement of copyrights protected by the Member State of the court seized, the latter has jurisdiction to hear an action to establish liability brought by the author of a work against a company established in another Member State and which has, in the latter State, reproduced that work on a material support which is subsequently sold by companies established in a third Member State through an internet site also accessible with the jurisdiction of the court seized. For an infringement of the prohibition on resale outside a selective distribution network and via a marketplace by means of online offers for sale on a number of websites operated in various Member States, the authorized distributor has the right to bring an action seeking an injunction prohibiting the resulting unlawful interference in the courts of the place where the damage occurred, i.e. the territory of the Member State which protects the prohibition on resale and on which the appellant alleges to have suffered a reduction in its sales. On the other hand, in the event of unlawful comparative advertising or unfair imitation of a sign protected by a Community trade mark, Article 7(2) of Regulation No1215/2012 does not allow jurisdiction to be established, on the basis of the place where the event giving rise to the damage resulting from the infringement occurred.

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641 Case C-523/10 Wintersteiger [2012], LawLex12635: in the case of infringement of a trade mark registered in a Member State by the publication on the internet site of a search engine of a keyword identical to that trade mark, the criterion of center of interests of the person whose rights have been infringed does not apply also to the determination of jurisdiction in respect of infringements of intellectual property rights, insofar as the protection afforded by the registration of a national mark is, in principle, limited to the territory of the Member State in which it is registered, so that, in general, its proprietor cannot rely on that protection outside the territory.

642 Case C-170/12 Peter Pinckney, Judgment of 3 October 2013, LawLex131433.

643 Case C-523/10 Wintersteiger [2012], LawLex12635: in this case, the event giving rise to the harm is the activation by the advertiser of the technical process displaying, according to pre-defined parameters, the advertisement which it created for its own commercial communications which should be considered to be the event giving rise to an alleged infringement, and not the display of the advertisement itself, and the place of said event is the place of establishment of the advertiser.

644 Case C-170/12 Peter Pinckney, Judgment of 3 October 2013, LawLex131433.

645 Case C-618/15 Concurrence SARL, Judgment of 21 December 2016, LawLex162144.
infringement occurred, for the court in that Member State whose unfair competition law has been infringed, where the presumed perpetrator who is sued there did not himself act there.  

Lastly, the place where the event giving rise to the damage occurred or the place where the damage occurred may be impossible to find. The Court of Justice then chooses that of the places which does not raise any difficult localization. Where it is impossible to determine the place where the event giving rise to the damage occurred, the addressee of the goods damaged during the international maritime transport may bring proceedings before the courts in the place where the damage occurred, i.e. the court in the place where the actual carrier was to deliver the damaged goods. Likewise, in the event of damages resulting from industrial action and consisting in financial loss as a result of immobilizing a ship and leasing a replacement ship, the place of the event giving rise to the damage is the place where the notice of industrial action was served.

5° Operation of a secondary establishment

24.28. Concept of secondary establishment

In case of dispute arising out of the operations of a branch, an agency or other establishment, Article 7(5) of Regulation No 1215/2012 makes it possible to sue the defendant in the courts of the place in which the branch, agency or other establishment is situated.

The concept of agency or branch was first used by the Court of Justice in the event of entities being subject to the direction and control of a parent company. Thus, the grantee of an exclusive sales concession cannot be regarded as being at the head of a branch, an agency or an establishment of the grantor where it is not subject either to the control or to the direction of that grantor. The Court of Justice has then ruled that it was necessary to adopt an independent definition, common to all Member States and which shows, without difficulty, the link.

The concept of 'branch, agency or other establishment' implies an effective place of business which has the appearance of permanency, such as the extension of a parent body but which has a management and is materially equipped to negotiate business with third parties, without those third parties having

646 Case C-360/12 Colty Germany GmbH, Judgment of 5 June 2014, LawLex142050.
647 Case C-51/97 Réunion européenne and others [1998] ECR I-6511, LawLex091016; the place where the damage occurred cannot be either the place of final delivery, which can be changed in mid-voyage, or the place where the damage was ascertained, which would lead to attribute jurisdiction to the courts for the place of the plaintiff's domicile, which the regulation precisely intends to avoid.
to deal with that parent body. This is not the case for a commercial agent who is an independent intermediary and cannot be regarded as the extension of a parent body insofar as he is free to organize his work, to determine his hours of work, to represent several rival firms and is restricted to transmitting orders to the head office without effectively participating in the completion and execution of those orders. When negotiating contracts, a branch or an agency must be an entity capable of being the principal, or even exclusive, interlocutor of third parties, which should be able to rely on the appearance thus created, even if, from a legal standpoint, the two companies in question are independent from one another. The place of establishment of the branch and the place where the commitments at issue taken by the branch in the parent body's name should be performed do not however have to be the same.

The concept of 'operations' of a branch, an agency or other establishment includes "actions relating to rights and contractual or non-contractual obligations concerning the management properly so-called of the agency, branch of other establishment itself such as those concerning the situation of the building where such entity is established or the local engagement of staff to work there" and "those relating to undertakings which have been entered into […] in the name of the parent body and which must be performed in the [Member] State where the place of business is established and also actions concerning non-contractual obligations arising from the activities in which the branch, agency or other establishment […] has engaged at the place in which it is established on behalf of the parent body".

Disputes specific to the internal organization of the other establishment and disputes relating to undertakings entered into by the other establishment in the name of its parent body and with respect to third parties therefore fall within Article 7(5), as does an action seeking compensation for damage allegedly caused by abuse of a dominant position consisting of the application of predatory pricing, where a branch of the undertaking which holds the dominant position actually and significantly participated in that abusive practice.
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III. Exclusive jurisdiction

A. Immovable property

24.34. Rights in rem in immovable property

Article 24(1) of Regulation No 1215/2012 gives exclusive jurisdiction regarding "rights in rem in immovable property or tenancies of immovable property" to the courts of the Member State where the property is situated.

The assignment of exclusive jurisdiction to the courts of the Member State in which the property is situated satisfies the need for the proper administration of justice, insofar as, in this type of proceedings, disputes result frequently in checks, inquiries and expert assessments which must be carried out on the spot and as tenancies of immovable property are generally governed by special rules, it is preferable that these often complex rules be applied by the courts of the States in which they are in force.\(^{659}\)

The concept of 'rights in rem in immovable property' does not encompass all actions concerning rights in rem in immovable property but only those which come within the scope of the regulation and are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights in rem therein and to provide the holders of those rights with the protection of the powers which attach to their interest.\(^{660}\) It is not sufficient that a right in rem immovable property be involved in the action or that the action have a link with immovable property: the action must be based on a right in rem and not a right in personam.\(^{661}\) Actions in personam - except for matters relating to tenancies of immovable property - but also mixed actions based on a right in personam and seeking to obtain a right in rem, are in effect excluded form the scope of application of Article 24(1). Thus, the 'action paulienne' which seeks to render a donation of immovable property effected by a debtor in fraud of the creditor's rights ineffective as against the creditor, an action for a declaration that a person holds immovable property as trustee, an action for rescission of a contract...\(^{662}\)

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\(^{659}\) Case 73/77 Sanders v Van der Putte [1977] ECR 2383, LawLex092011.


\(^{661}\) Case C-294/92 Webb [1994] ECR I-1717, LawLex092116. The difference between a right in rem and a right in personam is that the former, existing in an item of property, has effect against the whole world, whereas the latter can only be claimed against the debtor, See Case C-292/93 Lieber v Göbel [1994] ECR I-2535, LawLex092118.

\(^{662}\) Case C-417/15 Schmidt, Judgment of 16 November 2016, LawLex162121: an action for the avoidance of a contract of gift on the ground of the donor's incapacity to contract, does not fall within the exclusive jurisdiction of the courts of the Member State in which the property is situated but within the special jurisdiction of the courts of the place of performance of the obligation in question - i.e. in this case consisting of the obligation to convey ownership of the immovable property, which was initially performed in Austria.


for the sale of immovable property and consequential claim for damages to compensate for the alleged harm, an action seeking to prevent nuisances affecting land emanating from a nuclear power station, do not fall within Article 24(1). On the other hand, an action intended to terminate the co-ownership of immovable property or an action seeking the removal from the land register of notices evidencing the donee's right of ownership falls within the jurisdiction of the courts of the Member State in which the property is situated.

B. Companies and legal persons

24.36. Scope of application

Under Article 24(2) of Regulation No 1215/2012, the courts of the Member States in which the companies or other legal persons have their seat have exclusive jurisdiction regarding the "validity of the constitution, the nullity or the dissolution of companies [...]

Since the objective of that provision is to centralize jurisdiction in order to avoid conflicting decisions being given as regards the existence of companies and the validity of the decisions of their organs, the courts of the Member State in which the company has its seat are those best placed to deal with such disputes because it is in that State that information about the company has been notified and made public.

It is not sufficient for the proceedings to have any link with a decision of an organ of the company; the dispute must relate to the validity of an organ of the company under the company law applicable or under provisions governing the functioning of its organs. This is not the case for the proceedings brought by a party who alleges that his rights in a company have been infringed by a decision of this company’s organs, or seeking legal redress for damage resulting from infringements of EU
competition law, or concerning questions related to the validity of a decision to enter into a contract which are considered ancillary in the context of a contractual dispute. On the other hand, an action for review of the reasonableness of the consideration that the principal shareholder of a company is required to pay to the minority shareholders of that company in the event of the compulsory transfer of their shares to that principal shareholder comes within the exclusive jurisdiction of the courts of the Member State in which that company is established.

D. Intellectual property rights

24.38. Industrial property

Under Article 24(4), the registration or validity of patents, trade marks, designs, or other similar rights falls within the exclusive jurisdiction of the courts of the Member State in which the deposit or registration has been applied for, has taken place or is deemed to have taken place.

Up to now, the Court of Justice has only ruled on proceedings concerned with the registration or validity of patents and defines the concept of proceedings 'concerned with the registration or validity of patents' as an independent concept which covers all proceedings relating to the validity, existence or lapse of a patent, as well as those relating to an alleged right of priority by reason of an early deposit. Proceedings for infringement of a patent does not fall within the scope of application of Article 24(4) insofar as it is not concerned with the validity of a patent but on the respective rights in that allegedly infringed patent. Such is not the case according to the Court of Justice for proceedings to determine whether a person was correctly registered as the proprietor of a trade mark.

In the field of patents, a number of Member States have set up a system of specific judicial protection which reserves these types of cases to specialized courts and the delivery of patents involves the national authorities' action. Thus, the exclusive jurisdiction conferred by Article 24(4), which is justified by the sound administration of justice, is applicable whatever the form of proceedings in

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Association. The doctors did not challenge the fact that the association's board of management was actually empowered to adopt such a decision rejecting their claim, but challenged the manner in which that power was exercised as they considered that their claim had been rejected without the Board examining it in detail, thereby infringing the rights as members that they alleged to derive from the Articles of Association. Their dispute did not relate to the validity of the decisions of the association's organs, and therefore Article 24(2) did not apply to the dispute.

672 Case C-302/13 flyLAL-Lithuanian Airlines, Judgment of 23 October 2014, LawLex141129.
673 Case C-144/10 Berliner Verkehrsbetriebe (BVG), Judgment of 12 May 2011, LawLex111091.
674 Case C-560/16 E.ON Czech Holding AG, Judgment of 7 March 2018, LawLex18428.
676 Case C-341/16 Hanssen Beleggingen BV, Judgment of 5 October 2017, LawLex171593; a dispute on the question of the individual estate to which an intellectual property right belongs which is not, generally, closely linked in fact and law to the place where that right has been registered, is not subject to Article 24(4) of Regulation No 1215/2012 insofar as there is no dispute regarding the registration of the trade mark as such or its validity.
which the issue of a patent's validity is raised, be it by way of an action or a plea in objection, at the
time the case is brought or at a later stage 677.

IV. Rules on jurisdiction intended to protect the weaker party

24.41. Insurance

The provisions of Section 3 of Chapter II of Regulation No 1215/2012, which afford the insured a
wider range of jurisdiction than that available to the insurer, have had as their purpose to "protect the
insured who is most frequently faced with a predetermined contract the clauses of which are no longer
negotiable" 678. Where the defendant is the insured, Article 14 of the regulation gives jurisdiction to
the courts of the Member State in which the insured is domiciled. By contrast, where the defendant is
the insurer, the 'actor sequitur forum rei' rule still applies, but the plaintiff is recognized jurisdiction
options.

Article 11(1) makes it possible, in particular, to sue the insurer in the courts of the Member State
where he is domiciled 679 or in the courts for the place where the plaintiff is domiciled 680. In respect of
liability insurance, insurance of immovable property or insurance of movable and immovable property
covered by a same insurance and affected by the same contingency, the insured may, under Article 12,
sue the insurer in the courts for the place where the harmful event occurred. The insured also enjoys
facultative jurisdiction rules, copied on the derived jurisdiction in Article 8, in case there are several
defendants 681, in case of counter-claim 682, or in case of junction in proceedings 683. By referring to
Articles 10, 11 and 12, Article 13 affords the victim the jurisdiction options allowed by these
provisions, in case of direct action against the insurer, provided that the law of the court seized permits

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677 Case C-4/03 GAT [2006] ECR I-6509, LawLex09681: a court seized of an action for infringement or for a declaration that there has been
infringement, which, as an assumption, is not the court of the Member State in which the place of delivery of the patent is situated, cannot,
even indirectly, establish the invalidity of a patent without undermining the binding nature of the rule of exclusive jurisdiction laid down in
Article 24(4). Furthermore, it must declare of its own motion that it has no jurisdiction in favor of the court which has exclusive jurisdiction
(See Regulation No 1215/2012, Article 27).

678 Case 201/82 Gerling Konzern Speziale Kreditversicherung AG and others v Amministrazione del Tesoro dello Stato [1983] ECR 2503,
LawLex091653.

679 Article 10 pursuant to which "[In]matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to [...] 
point 5 of Article 7", makes it possible by reference to that provision to sue the insurer who is domiciled in a Member State, but has another
establishment in another Member State, in the latter before the court where that establishment has its seat.

680 Article 11(2) however sets forth that where the insurer has not his domicile in the European Union, but has another establishment in a
Member State, his domicile is deemed to be in that Member State.

681 Article 11(1)(c) provides that the insurer who is domiciled in a Member State may be sued in another Member State, if he is a co-insurer,
in the courts of the Member State in which proceedings are brought against the leading insurer.

682 Article 14(2) provides for the possibility for the plaintiff to bring a counter-claim in the court in which the original claim is pending
pursuant to the jurisdiction rule of that section.

683 Pursuant to Article 13(1), in respect of liability insurance, the insurer may be joined in proceedings which the insured has brought against
the insurer, if the law of the courts so permits.
such an action\textsuperscript{684}. Thus, the employer to which the rights of its employee have passed in order to be reimbursed for the salary paid to the latter during a period of incapacity to work, which, solely in that capacity, has brought an action for damages may be regarded as weaker than the insurer that it sues and, therefore, is able to benefit from the possibility to bring that action before the courts of the Member State in which it is established\textsuperscript{685}.

The jurisdiction rules set forth in matters of insurance are strictly interpreted and are not applicable to proceedings between well-informed professionals\textsuperscript{686}, such as an insurer suing another insurer in the context of third-party proceedings\textsuperscript{687}, or a reinsurer bringing proceedings against the reinsured person in connection with a reinsurance contract\textsuperscript{688} or a natural person, whose professional activity consists in recovering claims for damages from insurers and who relies on a contract for the assignment of a claim concluded with the victim of a road accident\textsuperscript{689}, as well as to disputes relating to insurance contracts in which the insured enjoys considerable economic power\textsuperscript{690}. On the other hand, the \textit{lex specialis} system applies to the relationship between insured-reinsurer where, under the law of a Member State, the policy-holder, the insured person or the beneficiary of an insurance contract has the option to approach directly any reinsurer of the insurer to assert his rights under the contract\textsuperscript{691}.

In principle, one cannot depart from the jurisdiction rules in matters relating to insurance by jurisdiction clauses included in the contract\textsuperscript{692}. However, the principle has five exceptions listed in

\begin{itemize}
\item \textsuperscript{684} Case C-463/06 FBTO Schadeverzekeringen [2007] ECR I-11321, LawLex08717: reference in Article [13(2)] to Article [11(1)(b)] allows the injured person to bring an action directly against the insurer domiciled in another Member State, before the court of the place where the injured party is domiciled, where a direct action is possible. By contrast, reference in Article [13(2)] to Article [11(1)(b)] cannot be afforded to a social security institution, to which the claims of the directly injured party have passed by operation of law, since it cannot be deemed to be an economically weaker party and less experienced legally than a civil liability insurer, see Case C-347/08 Vorarlberger Gebietskrankenkasse [2009] ECR I-8661, LawLex11397. In this case, the Court has however considered that the statutory assignee of the rights of a directly injured party - such as his heir -, should be able to benefit from the jurisdiction rules defined in said provisions, provided that he might be considered as a weaker party.
\item \textsuperscript{685} Case C-340/16 Landeskrankenanstalten-Betriebsgesellschaft - KABEG Judgment of 20 July 2017, LawLex171381: the notion of the "weaker party" has a wider acceptance in matters relating to insurance than those relating to consumer contracts or individual employment contracts and therefore pursuant to Article 13(2) of Regulation No1215/2012, employers to which the rights of their employees to compensation have passed may, as persons which have suffered damage and whatever their size and legal form, rely on the rules of special jurisdiction laid down in Articles 10 to 12 of that regulation.
\item \textsuperscript{686} Case C-106/17 Pawel Hofsoe, Judgment of 31 January 2018, LawLex18204: No special protection is justified where the parties concerned are professionals in the insurance sector, neither of whom may be presumed to be in a weaker position than the other, as the fact that a professional carries out his business on a small scale cannot lead to the conclusion that he is deemed to be a weaker party than the insurer.
\item \textsuperscript{687} Case C-77/04 GIE Réunion européenne and others [2005] ECR I-4509, LawLex091175.
\item \textsuperscript{688} Case C-412/98 Group Josi [2000] ECR I-5925, LawLex071646.
\item \textsuperscript{689} Case C-106/17 Pawel Hofsoe, Judgment of 31 January 2018, LawLex18204.
\item \textsuperscript{690} Case C-77/04 GIE Réunion européenne and others [2005] ECR I-4509, LawLex091175. Concretely, are excluded from the protective system of the rules in Section 3 of the regulation, insurance taken out by large maritime and air companies covering large exposures, within the meaning of the directive on direct insurance other than life insurance.
\item \textsuperscript{691} Case C-412/98 Group Josi [2000] ECR I-5925, LawLex071646: in this case, the plaintiff is in a weaker position than the professional reinsurer.
\item \textsuperscript{692} Article 25 on prorogation by contract in general deems as having 'no legal effect' clauses which are contrary to Article 15.
\end{itemize}
Article 15 of the regulation. The prorogation of jurisdiction by contract is authorized where it follows a dispute between the insurer and the weakest party, which should be more careful in such a context, or if it is in favor of the insured in the broader sense, i.e. included the policy-holder or the beneficiary of the insurance, by making other jurisdiction options available to them. The clause conferring jurisdiction which provides, in the event that the harmful event were to occur abroad, that the insurer's action is brought before the courts of the Member State in which the insurer and the weakest party are domiciled, shall also be lawful if the law of that State so allows (Article 15(3)). In this respect, a clause which complies with Article 15(3) is not enforceable against an assured beneficiary domiciled in a Member State other than the State where the insurance holder and the insurer are domiciled. The regulation also authorizes the insertion of clauses conferring jurisdiction in insurance contracts relating to large industrial and commercial exposures in which the insured benefits from such an economic power than he cannot be considered to be in a weaker position than the insurer (Article 15(5)). Clauses conferring jurisdiction authorized by derogation must comply with the conditions as to form laid down in Article 25 of the regulation on the prorogation by contract in general.

24.42. Consumer contracts

Regulation No 1215/2012 provides for an independent system of jurisdiction rules regarding 'consumer contracts', initially inspired by the will to protect purchasers in an economically weaker person. The prohibition in principle of jurisdiction clauses (to the detriment of the insurer), laid down in Article 15, and the framing of prorogation by contract in matters relating to insurance (but also contract of employment or consumer contract), laid down in Recital 19 of the regulation, are justified by the will to protect the economically weaker person.

Case C-112/03 Société financière et industriele du Peloux [2005] ECR I-3707, LawLex09382: a jurisdiction clause conforming with Article [15(3)] cannot be accepted against a third party beneficiary domiciled in a Member State other than the State of the policy-holder and the insurer, insofar as it would amount to the acceptance of a conferral of jurisdiction for the benefit of the insurer, prohibited as a principle, and to disregarding the aim of protecting the economically weakest party, which the regulation seeks to ensure, by depriving the beneficiary of the opportunity to bring proceedings before the court of the place where the harmful event occurred and to bring proceedings before the court of his own domicile. However, enforcing a jurisdiction clause conforming with Article [15(3)] against a third party beneficiary is not contrary to the regulation where it does not undermine the aim of protecting the economically weakest party. See Comp., Case 201/82 Gerling Konzern Speziale Kreditversicherung AG and others v Amministrazione del Tesoro dello Stato [1983] ECR 2503, LawLex091653, in which the possibility for a third party to the insurance contract to rely on such a clause against the insurer was recognized instead of the possibility for the insurer to rely on a prorogation by contract against that third party beneficiary.

Concretely, this is the case of insurance taken out by large maritime or air companies and contracts covering large exposures, within the meaning of Directive No 73/239 on direct insurance other than life insurance, as amended by Directives No 88/537 and 90/618. Case 201/82 Gerling Konzern Speziale Kreditversicherung AG and others v Amministrazione del Tesoro dello Stato [1983] ECR 2503, LawLex091653: a clause conferring jurisdiction inserted for the benefit of the insured who is not party to the insurance contract and is separate from the policy-holder, is enforceable as against the insurer, provided that the condition as to writing laid down in Article [25] of the regulation has been satisfied as between the insurer and the policy-holder and provided that the consent of the insurer in that respect has been clearly and precisely manifested.

Regulation No 44/2001 of 22 December 2000, replaced by the Regulation No 1215/2012, includes in Section 4 of Title II of the Brussels Convention - created following the adoption of the accession convention of 9 October 1978 in order to take into account the progress of consumer law within the various laws of the Member States - but extends its scope of application by referring to contracts other than contracts "for the supply of goods or a contract for the supply of services", only quoted by the Brussels Convention, alongside sale of goods on instalment credit terms, loan repayable by instalments, or for any other form of credit, made to finance the sale of goods.
position than sellers. The consumer thus has the possibility to bring proceedings either in the courts of the Member State in which the other party to the contract is domiciled, or in the courts of his own domicile, where the seller may only bring proceedings in the courts of the Member State in which the consumer is domiciled (Article 18(1) and(2)). Like for insurance, the voluntary prorogation of jurisdiction is, in principle, prohibited by Article 19, which provides for three similar derogations. It is allowed to include a clause conferring jurisdiction in a consumer contract a) if it is entered into after the dispute has arisen between the consumer and his contracting party, b) if it provides for other jurisdiction options in favor of the consumer/plaintiff or c) if it confers jurisdiction on the courts of the Member State in the territory of which the consumer and the other party to the contract are domiciled at the time of conclusion of the contract, where the law of that State so permits.

1) Types of contract.

Article 17(1) extends the scope of application of the system of consumer protection to any contract concluded by consumers, in particular where: a) the contract is for the sale of goods on installment credit terms, or b) the contract is for a loan repayable by installments, or for any other form of credit, made to finance the sale of goods, or c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer’s domicile or, by any means, directs such activities to that Member State or to several Member States including that Member State, and the contract falls within the scope of such activities.

The concept of ‘sale of goods on installment credit terms’ is to be understood as a transaction in which the price is discharged by way of several payments or which is linked to a financing contract. Article 17(1)(a) tends to protect the purchaser to whom the seller has granted a credit, i.e. where it has

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698 Case 150/77 Ott [1978] ECR 1431, LawLex091568: the jurisdictional advantages laid down in Section 4 of the regulation are reserved only for "buyers who are in need of protection, their economic position being one of weakness in comparison with sellers by reason of the fact that they are private final consumers and are not engaged, when buying the product acquired on instalment credit terms, in trade or professional activities". Accordingly, they cannot apply to the sale of a machine granted by a company to another company; Case C-89/91 Shearson Lehman Hutton v TVB [1993] ECR I-139, LawLex091205: the possibility for a consumer to sue the defendant in the courts of the State in which the plaintiff is domiciled, which is justified by the concern to protect the party to the contract deemed to be economically weaker, as a derogation to the principle of jurisdiction of the court of the defendant’s domiciled, applies only to cases strictly provided for by regulation by nature clearly hostile towards the attribution of jurisdiction to the courts of the plaintiff's domicile.

699 By referring to Article 7(5), Article 17 also allows the plaintiff to sue the contracting party who is domiciled in a Member State but has another establishment in another Member State, in the latter, before the court of the seat of that establishment. The same possibility is given by Article 17(2) to the consumer where his contracting party is domiciled outside the European Union. Where the defendant is not domiciled in the territory of a Member State, the jurisdiction cannot be settled by the regulation, but must be determined by the law of the Member State in the territory of which the referred court is located. Case C-318/93 Brenner and Noller v Dean Witter Reynolds [1994] ECR I-4275, LawLex092122.

700 Concretely, Article 17(1)(c) refers to all contracts entered into (with a consumer) by a professional for the purposes of his commercial business, including where it is exercised on the internet.

transferred to the purchaser possession of the good concerned before that purchaser has paid the whole price. Thus, a transaction in which the agreed price is discharged by way of several payments with transfer of possession and property only taking place after the agreed price has been paid in full, does not constitute a sale of goods on installment credit terms.

Outside sale by installments, the Brussels Convention only referred to a contract for 'the supply of goods or a contract for the supply of services' (Article 15(3)). Now, Article 17 of the regulation applies to all types of contracts. The contract under which an individual places an order for his personal use on the basis of an offer and in return for a price fixed by a mail-order company, is a contract for the supply of goods, having given rise to reciprocal and interdependent obligations between the parties to the contract. This is also the case in a contract of transport which, for an inclusive price, provides for a combination of travel and accommodation. Applying the consumer rules requires at least a contract: proceedings by which an individual seeks an order, under the law of the Member State in which he is domiciled, that a mail order company award a prize, does not fall within the consumer protection rules where the vendor's initiative was not followed by the conclusion of a contract relating to the supply of a good, even if the mail gave the impression that the award of the prize was only subject to the fact that he returned the 'payment notice', without being subject to order goods, and that the letter also contained a request for a 'trial without obligation'. Under the terms of Article 17, the commercial or professional activity must be directed to other Member States, i.e. the trader must have manifested its intention to establish commercial relations with consumers from one or more other Member States, including that of the consumer's domicile. That condition is not met by the mere use of a website by the trader. However, the regulation applies to a contract concluded between a

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703 However, Article 17(3) provides that Section 4 does not apply to contracts of transport other than those which, for an inclusive price, provide for a combination of travel and accommodation.
704 Case C-96/00 Gabriel [2002] ECR I-6367, LawLex091213: as a result, judicial proceedings by which a consumer seeks an order, pursuant to the legislation of the Member State in which he is domiciled, requiring a mail-order company to award a prize ostensibly won, falls within the consumer protection rules.
705 Case C-585/08 Pammer [2010] cited above: specifying the evidence on a trader's website establishing whether an activity is 'directed to' the Member State of the consumer's domiciled: the international nature of the activity in question, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States.
consumer and a professional, which on its own does not come within the scope of the commercial or professional activity 'directed' by that professional 'to' the Member State of the consumer's domicile, but which is closely linked to a contract concluded beforehand by those same parties in the context of such an activity\textsuperscript{708}. The essential condition that the consumer contract is connected with the trader's professional activity directed to the Member State of the consumer's domicile does not presuppose that it is indispensable that the contract has been concluded at a distance\textsuperscript{709}.

2) Concept of consumer.

Article 17 applies to "a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession". Insofar as it may have different content depending on the national law of the Member States, the concept of 'consumer' must be interpreted independently, by reference principally to the system and objectives of the regulation\textsuperscript{710}. From the origin, the Court of Justice has specified that the jurisdictional advantage applies only to buyers who are in need of protection, their economic position being one of weakness in comparison with sellers by reason of the fact that they are private final consumers and are not engaged in trade or professional activities\textsuperscript{711}. The capacity of a consumer is concretely assessed, by reference to the position of the person in a particular contract, having regard to the nature and aim of that contract, and not to the subjective situation, since the self-same person may be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others. Only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the court protection. The plaintiff who is acting in pursuance of his trade or professional activity may not enjoy the benefit of the rules of jurisdiction reserved for consumers\textsuperscript{712}, even if that activity insofar as this is a future activity does not divest it in any way of its trade or professional character\textsuperscript{713}. The user of a private Facebook account does not lose his status as a consumer by publishing books, lecturing, operating websites, fundraising and being assigned the legal claims of numerous consumers for the purpose of their enforcement\textsuperscript{714}. Furthermore, the regulation only protects a consumer who personally is the plaintiff or defendant in an action: this is not the case for a company acting as assignee of the

\textsuperscript{708} Case C-297/14 Rüdiger Hobohm, Judgment of 23 December 2015, LawLex151844.
\textsuperscript{709} Case C-190/11 Mühlleitner, LawLex122016.
\textsuperscript{710} Case C-269/95 Benincasa v Dentalkit [1997] ECR I-3767, LawLex091340.
\textsuperscript{711} Case 150/77 Ott [1978] ECR 1431, LawLex091568.
\textsuperscript{712} Case C-89/91 Shearson Lehman Hutton v TVB [1993] ECR I-139, LawLex091205.
\textsuperscript{713} Case C-269/95 Benincasa v Dentalkit [1997] ECR I-3767, LawLex091340.
\textsuperscript{714} Case C-498/16 Schrems v Facebook Ireland Limited, Judgment of 25 January 2018, LawLex18205.
rights of an individual\textsuperscript{15}, a consumer protection organization which brings an action as an association on behalf of consumers\textsuperscript{16} or the assignee of the rights of other consumers who brings a joint action\textsuperscript{17}.

In a contract with a dual purpose - professional and private-, the contracting party may not rely on the provisions for the protection of consumers, unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply, with the fact that the private element is predominant being irrelevant\textsuperscript{18}. The person who claims standing as a consumer where he behaved in such a way as to give the other party to the contract the legitimate impression that he was acting for the purposes of his business, renounces the consumer protection rules\textsuperscript{19}.

In principle the court of the domicile of the defendant has jurisdiction, but proceedings brought against a consumer who is a party to a long-term mortgage loan contract which includes an obligation to inform the other party to the contract of any change of address, for breach of his contractual obligations, will be brought in the courts of the Member State in which the consumer had his last known domicile, where they have been unable to determine, in accordance with Article 62 of the regulation, the defendant's current domicile and also do not have any firm evidence allowing them to conclude that the defendant is in fact domiciled outside the European Union\textsuperscript{20}.

\textsuperscript{15} Case C-89/91 Shearson Lehman Hutton v TVB [1993] ECR I-139, LawLex091205.
\textsuperscript{16} Case C-167/00 Henkel [2002] ECR I-8111, LawLex09666.
\textsuperscript{17} Case C-498/16 Schrems, Judgment of 25 January 2018, cited above: the rules on jurisdiction laid down as regards consumer contracts apply only to an action brought by a consumer against the other party to the contract, and therefore does not apply to the proceedings brought by a consumer for the purpose of asserting, in the courts of the place where he is domiciled, not only his own claims, but also claims assigned by other consumers domiciled in the same Member State.
\textsuperscript{18} Case C-464/01 Gruber [2005] ECR I-439, LawLex09942: it is for the person wishing to rely on the provisions for the protection of consumers to show that in a contract with a dual purpose - professional and private - the business use is only negligible.
\textsuperscript{19} Case C-464/01 Gruber [2005] ECR I-439, LawLex09942: in the context of a contract with a dual purpose where an individual, without giving further information, orders items which could in fact be used for his business, or uses business stationery to do so, or has goods delivered to his business address, or mentions the possibility of recovering value added tax, must, in view of the impression he has given to the other party acting in good faith, be regarded as having renounced the rules for the protection of consumers, even if the business use in the contract in question is negligible.
\textsuperscript{20} Case C-327/10 Hypotecni banka (AS) [2011] ECR I-11543, LawLex131513.
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3) Concept of other party to a contract

Under Article 18(1) of Regulation No 1215/2012, "A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled". The regulation also applies to the contracting partner of the operator with which the consumer concluded that contract, which has its registered office in the Member State in which the consumer is domiciled.

Section 3 Jurisdictional rules

I. Prorogation of jurisdiction

A. Jurisdiction clause

24.49. Formal requirements

In order to be valid, the clause conferring jurisdiction must be the result of a clear and precise consensus between the parties, in compliance with the forms described in Article 25 of the regulation. According to that article, a clause conferring jurisdiction may be: a) in writing or evidenced in writing; or b) in a form which accords with practices which the parties have established between themselves; or c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned. Article 25 assimilates writing to "any communication by electronic means which provides a durable record of the agreement". The Court of Justice has thus held that the validity of a jurisdiction clause in general terms and conditions of a contract for sale concluded electronically is not affected by the "click-wrap" method of acceptance of those terms insofar as that method makes it possible to print and save the text of those terms and conditions before the conclusion of the contract, even if the webpage containing that information does not open automatically on registration on the website and during each purchase.

721 Case C-478/12 Maletic, Judgment of 14 November 2013, LawLex131586.
1) Justification and scope

The formal requirements laid down in Article 25 are intended to ensure legal certainty and that the parties have given their consent. They "were inserted out of the concern not to impede commercial practice, yet at the same time to cancel out the effects of clauses in contracts which might go unread, such as clauses in printed forms for business correspondence or in invoices, if they were not agreed to by the party against whom they operate." They are strictly interpreted and are only imposed on the parties to the contract: a third party who benefits from a clause conferring jurisdiction made for his benefit cannot be required to expressly sign the clause so as to rely upon it. The conditions of application of that provision are to be interpreted "in the light of the effect of the conferment of jurisdiction by consent." The Member States are not authorized to lay down formal requirements other than those contained in Article 25 of the regulation which is intended to lay down itself the formal requirements which clauses conferring jurisdiction must meet. Accordingly, national law cannot object to the validity of an agreement solely on the ground that the language used is not that prescribed by that law. Article 25(5) provides that "an agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract".

2) Types

Under Article 25(1), the clause conferring jurisdiction may be in writing or evidenced in writing. The written requirement may be materialized by an agreement which is specially drawn up and signed by the parties for that purpose only, or by a clause included in a contract which has another main subject-matter. In any events, it must be established with certainty that the parties have actually consented to a clause which derogates from the ordinary jurisdiction rules laid down in the

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731 Cass. com., 27 February 1996, Pavan (SA) v Richard (SA); A clause mentioned in illegible characters does not meet the requirements of Article 25 of the regulation.
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regulation. Difficulties may arise when the clause is included in a document which is distinct from the contract signed by the parties. The written requirement is met where the clause conferring jurisdiction is contained in the by-laws of a company which are lodged in a place to which the shareholder may have access or are contained in a public register, and any shareholder is deemed to be aware of that clause. Where the clause is included among the general conditions of sale of one of the parties, printed on the back of a contract, the requirement of a writing is fulfilled only if the contract signed by both parties contains an express reference to those general conditions. This is not the case for the mere printing of a jurisdiction clause on the reverse of a bill of lading. Where a jurisdiction clause is included in a prospectus concerning the issue of bonds, the "in writing" requirement is met only if the contract signed by the parties upon the issue of the bonds on the primary market expressly mentions the acceptance of that clause or contains an express reference to that prospectus.

A clause conferring jurisdiction included in an oral agreement must specifically relate to the conferment of jurisdiction and be confirmed in writing. Without a written agreement, a jurisdiction clause does not satisfy the formal requirements of Article 25 ensuring that consensus between the parties has been reached, especially where the general terms containing the clause concerned were mentioned only in the invoices issued by one of the parties. After having required a written

733 Case C-214/89 Powell Duffryn v Petereit [1992] ECR I-1745, LawLex092079: a company's by-laws being regarded as a contract covering both the relations between the shareholders and also the relations between them and the company they set up, the clause conferring jurisdiction provided for therein, is therefore an agreement, within the meaning of Article 25, which is binding on all the shareholders.
734 Case 24/76 Estasis Salotti v Ruewa [1976] ECR 1831, LawLex091700. In this case, the Court of Justice has also considered that the same applies where, in the text of the contract, the parties expressly referred to a prior offer which, in turn, expressly referred to general conditions including a clause conferring jurisdiction, provided that the referral is express and can be checked by a party reasonably careful, and where it is established that the general conditions including the clause conferring jurisdiction have in fact been communicated to the other party with the offer to which reference is made.
735 Case 71/83 Tilly Russ v Nova [1984] ECR 2417, LawLex09207: where a jurisdiction clause appears in the conditions printed on a bill of lading signed by the carrier, the requirement of an agreement in writing within the meaning of Article 25 of the regulation is satisfied only if the shipper has expressed in writing his consent to the conditions contained in that clause, either in the document itself or in a separate written document. Along the same lines, Case 24/76 Estasis Salotti v Ruewa [1976] ECR 1831, LawLex091700: the mere fact that a clause conferring jurisdiction is printed among the general conditions of one of the parties on the reverse of a contract drawn up on the commercial paper of that party does not satisfy the requirement of a writing laid down in Article 25.
737 See as example Case C-106/95 MSG v Les Gravières Rhénanes [1997] ECR I-911, LawLex09336: an oral agreement on the place of performance of contractual obligations which is designed solely to establish that the courts for a particular place have jurisdiction, with no real connection with the contractual obligation, is not governed by Article 7(1), but by Article 25, and must therefore comply with the formal requirements prescribed by the latter as regards jurisdiction clauses.
738 Case 25/76 Segoura v Bonukdarian [1976] ECR 1851, LawLex091735: The purchaser who agrees to orally abide by the vendor's general conditions, is not to be deemed to have agreed to any clause conferring jurisdiction which might appear in those general conditions, insofar as the fact that one of the parties waives the advantage of the provisions conferring jurisdiction provided for by the regulation cannot be presumed.
739 Case C-64/17 Saey Home & Garden NV/SA, Judgment of 8 March 2018, LawLex18386.
confirmation by both parties\textsuperscript{40}, which virtually amounted to require a written form, the Court of Justice has reverted to a more liberal interpretation of the provision\textsuperscript{42}. Now, the written confirmation may come from either of the parties\textsuperscript{42}, provided that it is received by the other party and that the latter raised no objection\textsuperscript{43}.

The San Sebastian Convention has given the parties the possibility to provide for a clause conferring jurisdiction "in a form which accords with practices which the parties have established between themselves". This provision originates in the Segoura judgment\textsuperscript{744} according to which a confirmation in writing issued unilaterally by the vendor in the case of an orally concluded sale contract, is not sufficient to constitute an agreement on the effect of a jurisdiction clause appearing in its general conditions, unless the oral agreement comes within the framework of a continuing trading relationship between the parties which is based on the general conditions of the party having given confirmation.

Lastly, Article 25 gives the possibility to the parties to carry out a prorogation by contract in a form which accords with a usage in international trade or commerce. Consensus on the part of the parties as to a jurisdiction clause is presumed to exist where their conduct is consistent with commercial practices in the relevant branch of international trade or commerce in which they operate and of which the parties are or ought to have been aware\textsuperscript{45}. According to the European Court of Justice, "[t]here is a practice in the branch of trade or commerce in question in particular where a particular course of conduct is generally and regularly followed by operators in that branch when concluding contracts of a

\textsuperscript{40} Case 25/76 Segoura v Bonakdarian [1976] ECR 1851, LawLex091735: a confirmation in writing of the contract by the vendor, accompanied by the text of his general conditions, is without effect, as regards the clause conferring jurisdiction, unless the purchaser agrees to it in writing, which amounted to require a written document signed by both parties.
\textsuperscript{41} Case 71/83 Tilly Russ v Nova [1984] ECR 2417, LawLex092207: a jurisdiction clause not signed by the carrier and contained in the conditions printed on a bill of lading, satisfies the formal requirements laid down in Article 25 of the regulation where an oral agreement expressly relating to that the clause was expressed by the parties, then confirmed by the carrier who signed the bill of lading.
\textsuperscript{42} Case 221/84 Berghoefer ASA [1985] ECR 2699, LawLex091680: the wording of Article 25 does not require that the written confirmation of an oral agreement should be given by the party who is to be affected by the agreement.
\textsuperscript{43} Case 221/84 Berghoefer ASA [1985] ECR 2699, LawLex091680. Along the same lines, Case 313/85 Iveci Fiat v Van Hool [1986] ECR 3337, LawLex092269: where a written agreement containing a jurisdiction clause and stipulating that an agreement can be renewed only in writing has expired but has continued to serve as the legal basis for the contractual relations between the parties, the jurisdiction clause satisfies the formal requirements in Article 25 if, under the law applicable, the parties could validly renew the original agreement otherwise than in writing, or if, conversely, one of the parties has confirmed in writing either the jurisdiction clause or the set of terms which has been tacitly renewed and of which the jurisdiction clause forms part, without any objection from the other party to whom such confirmation has been notified.
\textsuperscript{44} Case 25/76 Segoura v Bonakdarian [1976] ECR 1851, LawLex091735. See also Case 71/83 Tilly Russ v Nova [1984] ECR 2417, LawLex092207: a jurisdiction clause not signed by the carrier, may satisfy the requirements laid down in Article 25, even in the absence of a prior oral agreement relating to that clause, provided, however, that the bill of lading comes within the framework of a continuing business relationship between the shipper and the carrier, insofar as it is thereby established that that relationship is governed as a whole by general conditions containing the jurisdiction clause and the bills of lading are all issued on pre-printed forms systematically containing such a jurisdiction clause.
It is for the national court to determine whether the contract in question comes under the head of international trade or commerce and to find whether there was a practice in the branch of international trade or commerce in which the parties are operating and whether they were aware or are presumed to have been aware of that practice. Awareness of a usage, which is assessed with respect to the parties regardless of their nationality, is established when "in the branch of trade or commerce in which the parties operate a particular course of conduct is generally and regularly followed in the conclusion of a particular type of contracts, so that it may be regarded as an established usage". As part of an orally concluded contract, the fact that one of the parties did not react or remained silent in the face of a commercial letter of confirmation from the other party containing a pre-printed reference to the courts having jurisdiction and that one of the parties repeatedly paid without objection invoices issued by the other party containing a similar reference suggest that a clause conferring jurisdiction has been validly concluded by the parties, if such conduct is consistent with a practice in force in the area of international trade or commerce in which the parties are operating and the parties are or ought to have been aware of that practice.

24.50. Effects of the clause

Although Article 25 of the regulation requires compliance with certain forms in order to establish the parties' consent and guarantee legal certainty, this provision also emphasizes on the independent will of the parties and contractual freedom. The prorogation of jurisdiction in a contract enables the parties to confer jurisdiction on courts which would not have jurisdiction under the general or special provisions of Regulation No 1215/2012 or exclude the jurisdiction of courts which would normally have jurisdiction under those rules. It may thus be made in favor of the plaintiff's court although the two parties to the contract are domiciled in two distinct States.

746 Case C-106/95 MSG v Les Gravières Rhénanes [1997] ECR I-911, LawLex09336. The existence of a usage in relation to a branch of international trade or commerce, is sufficiently established where a particular course of conduct is generally and regularly followed by operators in the countries which play a prominent role in that branch without it being necessary for such a course of conduct to be established in all the Member States. Moreover, a course of conduct satisfying the conditions indicative of a usage does not cease to be a usage because it is challenged before the courts, provided that it still continues to be generally and regularly followed in the trade with which the type of contract in question is concerned, see Case C-159/97 Castelletti [1999] ECR I-1597, LawLex091569.


748 Case C-159/97 Castelletti [1999] ECR I-1597, LawLex091569. Along the same lines, See Case C-106/95 MSG v Les Gravières Rhénanes [1997] ECR I-911, LawLex09336: "actual or presumptive awareness of such practice on the part of the parties to a contract is made out where, in particular, they had previously had commercial or trade relations between themselves or with other parties operating in the sector in question or where, in that sector, a particular course of conduct is sufficiently well known because it is generally and regularly followed when a particular type of contract is concluded, with the result that it may be regarded as being a consolidated practice".


750 In effect, Article 25 is based on a recognition of the independent will of the parties to a contract in deciding which courts are to have jurisdiction to settle disputes falling within the scope of the regulation: Case 23/78 Meeth v Glacetal [1978] ECR 2133, LawLex091695.

The prorogation by contract does not only confer jurisdiction but also results in a foreclosure effect, which may have significant consequences for the position of the parties in the court proceedings, insofar as such a provision results in excluding both the general jurisdiction principle laid down in Article 2 of the regulation and the special jurisdiction rules set forth in Articles 7 and 8.

A court designated under Article 25 of Regulation No 1215/2012 has exclusive jurisdiction, unless otherwise agreed upon by the parties. Thus, a clause conferring jurisdiction concluded under Article 25 and referring to all disputes relating to the contract, gives jurisdiction to the court designated by the parties, even for actions which seek to challenge the validity of the contract providing for it. The jurisdiction of the designated court may also be extended to a claim for a set-off connected with the legal relationship in dispute if the court considers that course to be compatible with the letter and spirit of the clause conferring jurisdiction. The jurisdiction of the designated court is however set aside by the exclusive jurisdiction rules laid down in Article 24, which prevail in case of conflict of jurisdiction. Likewise, the fact that an agreement conferring jurisdiction exists does not preclude the application of Article 26, which entails prorogation of jurisdiction in favor of the court of the Member State before which the defendant is voluntarily appearing. On the other hand, in matters of lis pendens, Regulation No 1215/2012 now provides that where actions come within the exclusive jurisdiction of several courts (without specifying whether under the terms of Article 24 or 25), any court other than the court first seized shall decline jurisdiction in favor of that court (Article 31(1)). Further, the jurisdiction of the court elected by the parties, even if second seized, now has priority over another EU court (Art. 31(2)).

The designated court must verify whether the clause which gives it jurisdiction has actually been the subject of a consensus between the parties, without being forced to review the case as to the substance, since the legal certainty which the regulation seeks to secure could be jeopardized if one

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755 Article 27 of Regulation No 1215/2012: “Where a court of a Member State is seized of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 24, it shall declare of its own motion that it has no jurisdiction”.

756 Case 48/84 Spitzley v Sommer Exploitation [1985] ECR 787, LawLex092211: questioned on any implied prorogation of jurisdiction of the court seized to hear a claim for a set-off which only the court designated by the parties should ‘normally’ hear, the Court answered that the existence of such a clause conferring jurisdiction does not preclude the court of the place where the defendant appear from having its jurisdiction extended to a claim based on a contract or a factual situation other than that on which the action is based and for which exclusive jurisdiction in favor of another court has been validly agreed upon under Article 25.

757 These provisions annul the Gasser case law (Case C-116/02 Erich Gasser GmbH).

party to the contract could frustrate the application of Article 25 simply by claiming that the whole of the contract was void on grounds derived from the applicable substantive law. The final paragraph of Article 25 moreover expressly stipulates that "The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid". Generally, only the national court before which such a jurisdiction clause is invoked has jurisdiction to interpret it and determine the disputes falling within its scope of application, but does not have to review the validity of the clause conferring jurisdiction or the intention of the party which inserted it.

Lastly, in principle, a clause conferring jurisdiction is binding only on the parties to the contract. Thus, a jurisdiction clause in a contract between two companies cannot be relied upon by the representatives of one of them to dispute the jurisdiction of a court over an action for damages which aims to render them jointly and severally liable for supposedly tortious acts carried out in the performance of their duties insofar as such clauses in a contract may, in principle, produce effects only in the relations between the parties to the contract. However, in certain cases, the clause may have effects with respect to third parties. Thus, a jurisdiction clause in the contract concluded between the manufacturer of goods and the buyer thereof cannot be relied on against a sub-buyer who, in the course of a succession of contracts transferring ownership concluded between parties established in different Member States, purchased the goods and wishes to bring an action for damages against the manufacturer, unless it is established that that third party has actually consented to that clause. This is the case for the insured third party to whom the European Court has given the possibility to rely on the benefit of the clause conferring jurisdiction provided in favor of the insured as against the insurer, whereas the insurer cannot rely on such a clause as against the third party who is the

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759 Case C-269/95 Benincasa v Dentalkit [1997] ECR I-3767, LawLex091340. Likewise, the designated court does not have to take the provisions of its national law on liability into account to assess the validity of the clause conferring jurisdiction: Case C-159/97 Castelletti [1999] ECR I-1597, LawLex091569.
760 Case C-214/89 Powell Duffryn v Peteriet [1992] ECR I-1745, LawLex092079. Along the same lines, Case C-269/95 Benincasa v Dentalkit [1997] ECR I-3767, LawLex091340: the national court designated by a clause conferring jurisdiction which is validly concluded under Article 25, has exclusive jurisdiction to decide whether that clause, which relates on any dispute relating to the interpretation, performance or other aspects of the contract, also refers to a dispute relating to the validity of the contract.
763 Case C-366/13 Profit Investment SIM SpA Judgment of 20 April 2016, LawLex16854: enforceability of a jurisdiction clause contained in a prospectus produced by the bond issuer concerning the issue of bonds against a third party who acquired those bonds from a financial intermediary if it is established that (i) that clause is valid in the relationship between the issuer and the financial intermediary, (ii) the third party, by acquiring those bonds on the secondary market, succeeded to the financial intermediary's rights and obligations attached to those bonds under the applicable national law, and (iii) the third party had the opportunity to acquaint himself with the prospectus containing that clause.
764 Case C-543/10 Refcomp, Judgment of 7 February 2013, LawLex13137.
beneficiary of insurance. Likewise, the Court of Justice accepts, under certain conditions, the possibility to rely on a clause conferring jurisdiction with respect to a third party where that clause is contained in a bill of lading having been assigned. Lastly, a clause conferring jurisdiction in the by-laws of a company is enforceable as against all the shareholders, even if the shareholder against whom the clause in dispute is invoked opposed to its adoption or became a shareholder after the clause was adopted, insofar as by becoming and by remaining a shareholder, he agrees to be subject to the provisions appearing in the by-laws of the company and to the decisions adopted by the organs of the company, even if he does not agree with some of those provisions or decisions.

II. Incidents relating to jurisdiction

B. Exception of *lis pendens*

24.54. Conditions of implementation

Claims having the same subject-matter, involving the same cause of action, and taking place between the same parties before distinct courts are *lis pendens* cases. Article 29 of Regulation No 1215/2012 does not expressly use the concept of *lis pendens* and rather sets forth the material conditions of its implementation. These conditions are regarded as independent concepts subject to the interpretation of the European Court where there is no common concept of *lis pendens* between the Member States. Article 29 of the regulation covers all situations of *lis pendens* before courts in Member States, irrespective of the domicile of the parties to the two proceedings. However, the European *lis pendens* rules only apply to proceedings directly before the courts of distinct Member States. They do not cover proceedings for enforcement of a same judgment given in a non-Member State.

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766 Case C-112/03 Société financière et industrielle du Peloux [2005] ECR I-3707, LawLex09382: the fact of accepting that a clause conferring jurisdiction which conforms with Article 15(3) is enforceable with respect to the third party beneficiary of the insurance domiciled in a Member State other than the State of the policy-holder and the insurer, is contrary to the objectives sought by the regulation insofar as that measure would amount to the acceptance of a conferral of jurisdiction for the benefit of the insurer and to disregard the aim of protecting the economically weakest party, by depriving the beneficiary of the opportunity to bring proceedings before the court of the place where the harmful event occurred and to bring proceedings before the court of his own domicile.

767 Case 71/83 Tilly Russ v Nova [1984] ECR 2417, LawLex092207: a clause conferring jurisdiction incorporated in a bill of lading is effective with respect to the third party holding the bill of lading where that clause is valid, under Article 25, as between the shipper and the carrier and, under the relevant national law, the holder of the bill of lading has succeeded to the shipper's rights and obligations. However, if, under the national law applicable to the bill of lading, the third party holding it did not succeed to the rights and obligations of one of the original parties, it is for the court to ascertain, having regard to the requirements laid down in Article 25, whether he actually accepted the jurisdiction clause relied on against him, see Case C-387/98 Coreck Maritime [2000] ECR I-9337, LawLex062027.


770 Case C-351/89 Overseas Union Insurance Ltd and others v New Hampshire Insurance Company [1991] ECR I-3317, LawLex09446: Article 27 applies regardless of whether the jurisdiction of the court seized is based on the regulation or results from the law of a Member State in the event that the defendant is domiciled in a non-Member State.

771 Case C-129/92 Owens Bank v Bracco [1994] ECR I-117, LawLex09492: this decision is also an illustration of the prohibition of double exequatur.
Regulation No 1215/2012, since 10 January 2015, changes matters in that it provides for a rule of *lis pendens* which allows the courts of the Member States to take account, in certain circumstances, of proceedings pending before the courts of third States. Thus Article 33 of Regulation No 1215/2012 allows the court of a Member State to stay the proceedings if it expects that the court of a third State first seized, according to the rules of jurisdiction provided for in Articles 4, 7, 8 or 9, of an action involving the same cause of action and between the same parties will give a judgment capable of recognition and, where applicable, of enforcement in that Member State and if a stay is necessary for the proper administration of justice. However, the court of the Member State may continue the proceedings at any time if the proceedings in the court of the third State are themselves stayed or discontinued, if it considers that proceedings in the court of the third State are unlikely to be concluded within a reasonable time or the continuation of the proceedings is required for the proper administration of justice.

1) Same subject-matter, cause of action and parties.

*Lis pendens* suggests that dispute submitted to distinct courts covers the same subject-matter, the same cause of action and the same parties. The requirement of the parties being the same is fulfilled where there may be such a degree of identity between the interests of an insurer and those of its insured person that a judgment delivered against one of them would have the force of *res judicata* as against the other. However, the fact that they are partly the same does not undermine the application of Article 29 and the procedural position of the parties is, in this respect, irrelevant.

The requirement of the cause of action being the same suggests that the pending disputes are based on the same contractual relationship. This is the case where one of the plaintiffs brings an action to enforce an international sales contract whilst the other party brings an action for the rescission or discharge of the same contract. The facts and the legal rule relied upon as basis for the claim must be the same in both disputes. This is the case where a first application is seeking to have the defendant

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772 Case C-351/96 Drouot assurances v Consolidated metallurgical industries and others [1998] ECR I-3075, LawLex09448.
774 Case 144/86 Gubisch Maschinenfabrik v Palumbo [1987] ECR 4861, LawLex091552. The concept of *lis pendens* covers the case where a party brings an action before a court of a Member State for termination of an international sales contracts whilst the other party's action is intended to enforce that contract, and both are pending before the court of a same Member State, regardless of whether the plaintiff in the enforcement proceedings is the defendant in the proceedings for termination, and vice versa; Case C-523/14 Aannemingsbedrijf Aertssen NV, Aertssen Terrassements (SA), Judgment of 22 October 2015, LawLex151328: a complaint lodged seeking to join a civil action to proceedings with an investigating magistrate constitutes pending proceedings even though the judicial investigation of the case at issue has not yet been closed, insofar as the conditions for a situation of *lis pendens* are met, and the fact that the right to obtain compensation for harm suffered as a result of conduct is subject to criminal prosecution does not affect the question of whether the parties are the same, which is assessed independently of their position in the proceedings.
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held liable for causing loss and the other application seeks a declaration that he is not. Accordingly, an action for damages based on the law governing non-contractual liability and an application for the establishment of a liability limitation fund based on the application of an international convention have not the same cause of action and cannot fall within Article 29.

The requirement of the subject-matter being the same is assessed in view of the applicants' respective claims without taking the defense raised into account, insofar as "lis pendens exists from the moment when two courts of different [Member] States are definitively seized of an action, that is to say, before the defendants have been able to put forward their arguments." The requirement of the subject-matter being the same is fulfilled where a party brings an action to enforce a contract, which is aimed at giving effect to it, whilst the other party brings an action for the rescission or discharge of the same, which is aimed precisely at depriving it of any effect, since the binding force of the contract lies at the heart of the two actions, or where an application is seeking to have the defendant held liable for causing a loss and the other application seeks a declaration that he is not. By contrast, the condition of a same subject-matter is not fulfilled where an action seeks to have the defendant declared liable and another application is designed to ensure, in the event that the person is declared liable, that such liability will be limited to a certain amount.

2) Definitive referral of each jurisdiction.

Lisa pendens, which suggest that two distinct courts are finally seized, can be implemented only before the court second seized. To apply Article 29, an order of referrals must be determined. The court first seized is the one before which the requirements for proceedings to become definitively pending are first fulfilled. This is the case where the court first seized has not declined jurisdiction of its own motion and none of the parties has contested its jurisdiction prior to or up to the time when a position

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777 Case C-39/02 Maersk Olie & Gas [2004] ECR I-9657, LawLex09639. The purpose of Article 27, which organizes a system that is simple, objective and automatic to determine, at the outset of proceedings, which of the courts seized will ultimately hear and determine the dispute, would be frustrated if the content and nature of the claims could be modified by arguments necessarily submitted at a later stage by the defendant: "Apart from delays and expense, such a solution could have the result that a court initially designated as having jurisdiction under that article would subsequently have to decline to hear the case" [Case C-111/01 Gantner Electronic [2003] ECR I-4207, LawLex09370].
782 See Case 129/83 Zelger v Salinitri [1984] ECR 2397, LawLex091521. Under the Brussels Convention, the Court of Justice referred it to the national law to determined the order of referrals: "the question as to the moment at which the conditions for definitive seisin […] are met must be appraised and resolved, in the case of each court, according to the rules of its own national law".
is adopted which is regarded under national procedural law as the first defense. However, a document instituting proceedings for the taking of evidence cannot be regarded, for the purposes of assessing a situation of lis pendens and of determining which court is the court first seized as also being the document instituting the substantive proceedings. Article 32 lays down a presumption of referral either at the time when the document instituting the proceedings is lodged with the court, provided that the plaintiff has subsequently had service effected on the defendant or, if the document has to be served before being lodged, at the time when it is received by the authority responsible for service, provided that the plaintiff has subsequently had the document lodged with the court.

According to the Court of Justice, the date on which a procedure for a measure of inquiry prior to any legal proceedings was commenced cannot constitute the date on which a court called upon to rule on a substantive application which was brought in the same Member State following the result of that measure is "deemed to be seized". The authority responsible for service is the first authority receiving the documents to be served.

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783 Case C-1/13 Cartier parfums - lunettes (SAS), Judgment of 27 February 2014, LawLex14374.
784 Case C-29/16 HanseYachts AG, Judgment of 4 May 2017, LawLex171301.
785 Referral to national law in order to determine the moment of referral is no longer applicable under Section 9, but should remain valid in order to determine the temporal scope of application of the regulation.
786 Case C-29/16 HanseYachts AG, Judgment of 4 May 2017, LawLex171301.
787 Regulation No 1215/2012, Article 32(1).
Chapter 25
Recognition and enforcement

Section 1 Recognition and enforcement of decisions

IV. Implementation of an exequatur or recognition procedure

25.14. Arrangements for implementation

Under Regulation No 44/2001, at the end of the recognition or enforcement procedure and, as the case may be, once the remedies were exhausted, the foreign judgment was either recognized (or not), or declared to be enforceable (or not), in the State in which enforcement was sought. If the judgment was declared enforceable, it had to be enforced in application of the domestic law of the court in which execution was sought, as is now laid down in Regulation No 1215/2012.

It remains for the court of the State in which enforcement is sought, in appeal proceedings brought against the enforcement judgment, to determine, in accordance with its domestic law, the legal effects on enforcement itself. Although recognition must have the effect, in principle, of conferring on judgments the authority and effectiveness accorded to them in the Member State in which they were delivered, there is, however, no reason for granting to a decision, when it is enforced, effects that a similar decision given directly in the Member State in which enforcement is sought would not have. Furthermore, the courts of that Member State are not required to apply any provisions of the national legislation of the Member State of origin which, in respect of the enforcement of decisions given by the courts of the Member State of origin, lay down time-limits which differ from those laid down by the law of the Member State in which enforcement is sought.

According to the Court it is also important for the court of the State in which enforcement is sought to see that the enforcement, in that State, of provisional or protective measures allegedly based on the jurisdiction laid down in Article [35] of the regulation, but going beyond that jurisdiction, does not

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790 Case C-379/17 Società Immobiliare Al Bosco Srl, Judgment of 4 October 2018, LawLex181465.
Chapter 26
Insolvency proceedings

26.01. Context
Like Regulation No 1215/2012, which repeals and replaces Regulation No 44/2001 of 22 December 2001, Regulation No 2015/848 of 20 May 2015, which replaces Regulation No 1346/2000 of 29 May 2000, belongs to a movement to integrate international conventions into EU law - except that the latter regulation replaced a convention signed in Brussels on 23 November 1995, which never came into force. Regulation No 2015/848 on insolvency proceedings is perfectly in line with the provisions of Regulation No 1215/2012 the scope of application of which does not extend to covering "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings". Regulation No 2015/848 pursues the same objective of settlement of conflicts of jurisdiction: it sets jurisdiction for the opening of insolvency proceedings and resulting judgments and organizes the recognition of those judgments. However, unlike Regulation No 1215/2012, it also governs conflicts of laws in international bankruptcy matters. Regulation No 2015/848 is accompanied by an implementing regulation, Regulation No 2017/1105, which provides that four standard notice forms must be used - in force as of 27 June 2017 - i) to inform creditors, ii) for the lodgement of claims, iii) for the lodgement of objections in group coordination proceedings and, iv) for access to information via the European e-Justice Portal.

Regulation No 2015/848 is the result of the proposals for modernization put forward by the Commission on 12 December 2012 and in the Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency. The proposals for the 2012 revision of the insolvency regulation aimed to extend the scope of application of the regulation by amending the current definition of the term "insolvency proceedings" and by including "pre-insolvency proceedings" - procedures which provide for the restructuring of a company at a pre-insolvency stage - and "hybrid

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792 OJ L 141 of 5 June 2015.
proceedings7 which leave the existing management in place. The Commission also proposed that
certain minimum information relating to the insolvency proceedings should be published in an
electronic register available to the public free of charge via the internet and that the standard form and
the lodging of claims for foreign creditors should be facilitated, particularly small creditors and SMEs.
The proposal created a specific legal framework to deal with the insolvency of members of a group of
companies while maintaining the "entity-by-entity" approach. The 2014 recommendation essentially
courage the development of preventive rescue procedures and the setting up of an effective
framework for the restructuring of companies within the EU.

Ultimately, the scope of the new regulation was considerably extended. Applicable not only to
relations between Member States but also to any cross-border situation797, the regulation, which
attributes jurisdiction for the opening of insolvency proceedings to the courts of the Member State
within the territory of which "the centre of the debtor's (natural person, legal person, trader or
individual) main interests" is situated, now defines that concept as "the place where the debtor
conducts the administration of its interests on a regular basis and which is ascertainable by third
parties" (Art. 3(1) paragraph 1). Although the regulation maintains the rebuttable presumption for
companies and legal persons that the center of their main interests is their registered office, it also lays
down a presumption in respect of natural persons in favor of their principal place of business or place
of habitual residence. In order to prevent abusive forum shopping allowing parties to transfer assets or
judicial proceedings from one Member State to another with a view to obtaining a more favorable
legal position, those presumptions do not apply under the new regulation where the registered office or
the principal place of business has been moved to another Member State within the 3-month period
or, with regard to the place of habitual residence, within the 6-month period, prior to the request for
the opening of insolvency proceedings (Art. 3(1), paragraphs 2, 3 and 4).

The law applicable to insolvency proceedings, whether main proceedings (in the Member State where
the debtor has the center of its main interests - Art. 3(1)) or secondary (where the proceedings are
opened in the Member State where the debtor has an establishment - Art. 34 and 3(2)), remains that
of the State of the opening of proceedings or "lex fori concursus" (Art. 7 or Art. 35). However,
secondary insolvency proceedings now no longer necessarily lead to liquidation of assets: by virtue of
Article 38 (4), the court seized of a request to open secondary proceedings may open any type of
insolvency proceedings as listed in Annex A (including preventive). The new text establishes the

autonomy of secondary proceedings with respect to the main proceedings and aims to more effectively articulate these parallel proceedings.

To ensure a better treatment of the insolvent members of groups of companies, the regulation has introduced group coordination proceedings which may be requested by any insolvency practitioner appointed in insolvency proceedings opened in relation to a member of the group (Art. 61). A coordinator is appointed to identify and outline recommendations appropriate to an integrated approach to the resolution of the group members' insolvencies (Art. 72). It also provides for a standard form for the lodging of claims (Art. 54) and creates insolvency registers in order to reinforce the rights of creditors (Art. 24).

Section 1 Scope of application

26.02. Scope ratione materiae and ratione temporis

In line with the Recommendation on a new approach to business failure and insolvency, the Commission has given Regulation No 2015/848 an extended scope of application. It is thus extended to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs, in particular to proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of insolvency, and to proceedings which leave the debtor fully or partially in control of its assets and affairs, and to proceedings providing for a debt discharge or a debt adjustment in relation to consumers and self-employed persons (recital 10). Like Regulation No 1346/2000, it applies to collective insolvency proceedings based on the debtor's insolvency which entails the partial or total divestment of a debtor and the appointment of a liquidator (Article 1(1)(a)), proceedings in which the assets and affairs of a debtor are subject to control or supervision by a court known as "debtor in possession" proceedings (Art. 1(1)(b) and proceedings granting a temporary stay of individual enforcement, on condition that they provide for

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798 See Article 50, which provides that where main insolvency proceedings are opened following the opening of secondary proceedings, Articles 41 (Cooperation and communication between insolvency practitioners), 45 (Exercise of creditors' rights), 46 (Stay of the process of realization of assets), 47 (Power of the insolvency practitioner to propose restructuring plans) and 49 (Assets remaining in the secondary insolvency proceedings) apply to the secondary proceedings opened first.

799 See notably Article 41 on cooperation and communication between insolvency practitioners; Article 42 on cooperation and communication between courts; Article 43 on cooperation and communication between insolvency practitioners and courts; Article 46 on the stay of the process of realization of assets; Article 51 on the conversion of secondary insolvency proceedings.

800 A decision to open insolvency proceedings based on the debtor's insolvency following an application seeking the opening of proceedings referred to in Annex A of Regulation 2015/848 constitutes a decision to open insolvency proceedings, where that decision involves the divestment of the debtor and the appointment of a liquidator, even a provisional liquidator: Case C-341/04 Eurofood IFSC [2006] ECR I-3813, LawLex09401.
suitable measures to protect the general body of creditors and, where no agreement is reached, are preliminary to one of the two other proceedings (Art. 1(1)(c)). Annex A, which sets out a list of national insolvency proceedings to which the regulation applies, includes around twenty additional proceedings. Annex B which previously set out the liquidation proceedings covered by the regulation, now lists the insolvency practitioners for each Member State. By defining collective proceedings in Article 2(1) as "proceedings which include all or a significant part of a debtor’s creditors, provided that, in the latter case, the proceedings do not affect the claims of creditors which are not involved in them"\(^{801}\), the regulation now takes into consideration partial collective proceedings.

Regulation 2015/848 contains the same exclusions as its predecessor. Article 1(2) excludes from its scope of application insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, and collective investment undertakings.

In order to settle the recognition and enforcement of decisions other than those directly relating to the opening of insolvency proceedings, Article 32 lists judgments which fall within the scope of application of Regulation No 2015/848 - i.e. judgments which concern the course and closure of insolvency proceedings given by the court which opened the proceedings, and compositions approved by that court, judgment deriving directly from the insolvency proceedings and which are closely linked with them\(^{802}\), even if they were handed down by another court, and all judgments relating to preservation measures taken after the request for the opening of insolvency proceedings -, as well as those which are excluded - i.e. judgments not referred to in paragraph 1 -, by specifying that these exclusions fall within Regulation No 1215/2012, where it is applicable.

The material scope of application of Regulation No 2015/848 is strictly interpreted and is limited to provisions governing the jurisdiction for the opening of insolvency proceedings and the giving of judgments which derive directly from the insolvency proceedings and which are closely linked with them, while the material scope of application of Regulation No 1215/2012 is subject to more liberal

\(^{801}\) Regulation No 2015/848, recital 14: "The collective proceedings which are covered by this Regulation should include all or a significant part of the creditors to whom a debtor owes all or a substantial proportion of the debtor's outstanding debts provided that the claims of those creditors who are not involved in such proceedings remain unaffected. Proceedings which involve only the financial creditors of a debtor should also be covered. Proceedings that lead to a definitive cessation of the debtor's activities or the liquidation of the debtor's assets should include all the creditor's creditors. Moreover, the fact that some insolvency proceedings for natural persons exclude specific categories of claims, such as maintenance claims, from the possibility of a debt-discharge should not mean that such proceedings are not collective".

\(^{802}\) Case C-339/07 Seagon [2009] ECR I-767, LawLex092317: The action to set a transaction aside intended to increase the assets of the undertaking which is the subject of insolvency proceedings and which may be brought by the liquidator only, falls within the material scope of application of Regulation No 1346/2000.
interpretation in accordance with the will of the European legislator to retain a broad conception of the concept of 'civil and commercial matters'. An action is related to bankruptcy or winding-up if it derives directly from the bankruptcy or winding-up and is closely connected with the proceedings. This is also the case for an action brought by the liquidator in the insolvency proceedings against the managing director of the debtor for reimbursement of payments which were made after the company became insolvent or after it had been established that the company's liabilities exceeded its assets, where the right or the obligation which forms the basis of the action finds its source in the common rules of civil and commercial law or in the derogating rules specific to insolvency proceedings. This is not the case for an action brought by a seller based on a reservation of title against a purchaser who is insolvent, where the asset covered by the reservation of title is situated in the Member State of the opening of the insolvency proceedings, where it is not based on the law of insolvency proceedings and requires neither the opening of proceedings of that kind, nor the action of a liquidator, or for an action for damages for unfair competition by which the assignee of part of the business acquired in the course of insolvency proceedings is accused of misrepresenting itself as being the exclusive distributor of articles manufactured by the debtor, as, even if there is a link between the action in the main proceedings and the insolvency proceedings, that link is neither sufficiently direct nor sufficiently close so as to rule out Regulation No 1215/2012 and consequently to make Regulation No 2015/848 applicable.

Lastly, the temporal scope of application of Regulation No 2015/848 is governed by Article 84 which sets forth that the regulation applies only to proceedings opened after 26 June 2017, and acts done by a debtor before the entry into force continue to be governed by the law which was applicable to them at the time they were done. For proceedings opened prior to that date, Regulation No 1346/2000 continues to apply. According to the Court of Justice, the regulation must apply where no judgment opening insolvency proceedings was delivered prior to its entry into force, even if the request for opening judgment was filed before that date. The regulation applies to proceedings opened in respect of real property situated in the territory of a Member State before its accession to the European Union.

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\(^{803}\) Case C-295/13 H v HK, Judgment of 4 December 2014, LawLex141396.


\(^{805}\) Case C-641/16 Tükers France, Judgment of 9 November 2017, LawLex171811.

\(^{806}\) Case C-1/04 Staubitz-Schreiber [2006] ECR I-701, LawLex09269.

\(^{807}\) Case C-527/10 ERSTE Bank Hungary Nyrt, Judgment of 5 July 2012, LawLex14210.
Section 4 Applicable law

26.06. Principle of application of the law of the State opening insolvency proceedings

The concept of 'center of the debtor's main interests' determines not only the court which has jurisdiction to open proceedings but, as an extension, the law governing the proceedings. In effect, according to Article 7 of Regulation No 2015/848, the law applicable to insolvency proceedings and their effects is that of the Member State within the territory of which such proceedings are opened. Article 7(2) includes a non-exhaustive list of the various factors which fall within the law of the opening State: a) the debtors against which insolvency proceedings may be brought on account of their capacity; b) the assets which form part of the insolvency estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings; c) the respective powers of the debtor and the insolvency practitioner; d) the conditions under which set-offs may be invoked; e) the effects of insolvency proceedings on current contracts to which the debtor is party; f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of pending lawsuits; g) the claims which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings; h) the rules governing the lodging, verification and admission of claims; i) the rules governing the distribution of proceeds from the realization of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off; j) the conditions for and the effects of closure of insolvency proceedings,808 k) creditors' rights after the closure of the insolvency proceedings; who is to bear the costs and expenses incurred in the insolvency proceedings; the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors”809.

Articles 8 to 18 lay down exceptions to the principle of application of the law of the opening Member State which are strictly interpreted810. The rules of conflict of law set forth in Articles 8 to 10 concern creditors or third parties to the proceedings who hold rights on the debtor's assets located in a State

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808 Case C-116/11 Bank Handlowy w Warszawie S.A, Judgment of 22 November 2012, LawLex14206, ruling that it is for the national law of the Member State in which insolvency proceedings have been opened to determine at which moment closure of those proceedings occurs, insofar as questions related to the conditions for and effects of the closure cannot be given an autonomous interpretation, but must be decided under the lex concursus designated as applicable.

809 Case C-594/14 Simona Kornhaas, Judgment of 10 December 2015, LawLex151699: holding that national provisions which have the effect of penalizing a failure to fulfill the obligation to apply for the opening of insolvency proceedings fall within the scope of Article 7(2)(m).

810 Case C-557/13 Hermann Lutz, Judgment of 16 April 2015, LawLex15502, on the application of Article 16, which is interpreted strictly.
other than the opening State, and give them the possibility to assert their rights on those assets according to the law of the State concerned. These are, inter alia, the rights of creditors based on rights in rem (Article 8) or a reservation of title (Article 10). According to the Court of Justice, the scope of application of Article 8 which allows the law of the Member State on whose territory the asset concerned is situated to be applied to the right in rem of a creditor or a third party in respect of assets belonging to the debtor, does not depend on the origin of the right in rem concerned or the nature, whether governed by public or private law, of the debt guaranteed by that right in rem. The other derogatory rules of conflict govern the effects of the insolvency proceedings on, inter alia: - contracts relating to immoveable property (Article 11); - payment systems and financial markets (Article 12); - contracts of employment (Article 13); - rights subject to registration (Article 14); - European patents and trade marks (Article 15); - lawsuits pending concerning not only a specific right or asset, but, more broadly, an asset or right that is part of the insolvency estate (Article 18).

With regard to the derogations to the general "lex fori concursus" conflict rule, Article 16, on detrimental acts lays down that Article 7(2)(m)), which makes subject to the law of the State of the opening of proceedings the determination of the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors, does not apply: "where the person who benefited from an act detrimental to all the creditors provides proof that: a) the act is subject to the law of a Member State other than that of the State of the opening of proceedings; and b) the law of that Member State does not allow any means of challenging that act". The system of exceptions under Article 16 also applies to limitation periods or other time-bars relating to actions to set aside transactions under the lex causae. Procedural requirements for the exercise of an action to set a transaction aside are also determined according to the lex causae.

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811 Case C-557/13 Hermann Lutz, cited above: the right resulting from the attachment of the bank accounts is in fact capable of constituting a 'right in rem' within the meaning of Article 8(1) of Regulation No 2015/848, provided that, under the national law concerned, that right was exclusive in relation to the other creditors of the debtor company. For the question as to whether such a right automatically became legally invalid as a result of the opening of insolvency proceedings against the debtor company, reference should be made to the competent lex fori concursus for determining, in application of Article 4(2)(m) of that regulation the rules relative to voidness, voidability or unenforceability, even if the provisions of Article 8(4) refer only to the "actions" (not the "rules") for voidness, voidability or unenforceability.

812 Case C-195-15 SCI Senior Home, Judgment of 26 October 2016, LawLex161739.

813 Case C-250/17 Tarrago da Siveira, Judgment of 6 June 2018, LawLex18871, specifying that although Article 18 of Regulation No 2015/848 which, as an exception, provides that the effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested are governed solely by the law of the Member State in which that lawsuit is pending, does not apply to enforcement proceedings, finding that actions for a declaration of monetary obligations which merely determine the rights and obligations of the debtor, without involving their realization, and therefore, unlike individual enforcement proceedings, do not risk undermining the principle of equal treatment of creditors.

814 Case C-310/14 Nike European Operations Netherlands BV, Judgment of 15 October 2015, LawLex151274.

815 Case C-557/13 Hermann Lutz, cited above.
European Business Law Update

SUB-TITLE 2
ANTI-DUMPUNG/ANTI-SUBSIDIES

Chapter 27
Anti-dumping

Section 1 Elements constituting dumping

I. Criteria to determine product concerned and like product

27.04. Multi-criteria analysis

As for competition, but according to a different method as this is not a matter of analyzing a conduct on the market or structural changes in the supply of goods or services, the Commission carries out a multi-criteria analysis to define the product concerned or like product. Three series of criteria are generally used to identify a product: its nature, its conditions of use and how it is marketed.

The adoption of anti-dumping measures at the end of the procedure depends, to a large extent, on the definition of the product concerned\textsuperscript{816}. The definition of "the product under consideration" at the time the investigation is initiated, does not prevent the EU institutions from subdividing the product into individual product types or models or from relying on model-by-model or type-by-type comparisons between the normal value and the export price, provided that an overall dumping margin for the product under consideration as a whole is established\textsuperscript{817}.

\textsuperscript{816} Case C-232/14 Portmeirion Group UK Ltd, Judgment of 17 March 2016, LawLex16606, holding that the constituent elements of the concept of "product under consideration", and especially the assessment of its homogeneous nature, necessarily determine those to be attributed to the "product concerned".

\textsuperscript{817} Cases C-376/15 P and C-377/15 P Changshu City Standard Parts Factory, Judgment of 5 April 2017, LawLex17711: the EU institutions were entitled to exclude from the calculation of the dumping margin export transactions relating to certain types of the product under consideration because there were no "comparable prices" for those product types, price comparability not being taken into account in the context of the application of Article 2(10) of the basic regulation but only in that of the application of Article 2(11) thereof.
Anti-dumping duties may be extended to types of products which are not dumped where they are perfectly interchangeable with the product in question. According to the Court of Justice, the concept of "product concerned" within the meaning of Article 1 of the Basic Regulation read in the light of the 1994 Anti-dumping Agreement, does not necessarily refer to a product envisaged as a homogeneous whole.

II. Dumping

A. Normal value

1° Market economy countries

a) Calculation methods

27.13. Order of application

The three methods of calculation of the normal value set out in Article 2 of the regulation apply in the order they are mentioned. It is only when none of those methods may be applied that use is made of the general provision set forth in Article 2(6)(c), according to which costs and profits are to be determined on ‘any other reasonable method’. The two methods which depart from the method based on actual prices, are exhaustive and both relate to the characteristics of the sales effected rather than to the price of the product.

The normal value must be determined having regard primarily on the price actually paid or payable in the ordinary course of trade, the Commission enjoying a margin of discretion regarding the order of application of the two other subsidiary methods of calculation. The first method is used where the domestic prices are regarded as representative, which is in principle the case where the volume of sales in the ordinary course of trade on the domestic market is at least 5% of the volume of sales of the product concerned in the Union. Where the domestic prices are not representative, the Commission is free to determine the normal value based on the price of product when exported to a third country or

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818 See, for example, regarding persulphate having a content of persulphate of more than 99%: Commission Regulation No 1748/95 of 17 July 1995, LawLex092750.
820 Case 277/85 Canon v Council [1988] ECR 5731, LawLex092332, considering that the Commission enjoys a margin of discretion regarding the order of application of the two other subsidiary methods of calculation; C-76/98 P Hamptaux v Commission [1999] ECR-SC I-A-59, II-303, LawLex091174, stating that the normal value must be established having regard primarily to the price actually paid or payable in the ordinary course of trade.
using the method of constructed value\textsuperscript{825}. The criterion relating to market size is not in principle a factor capable of being taken into consideration in the choice of a reference country, provided that that market is representative in relation to exports\textsuperscript{826}.

Thus, the basic method consists in calculating the normal value based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country (Art. 2(1)) or on the basis of prices of other sellers or producers, where the exporter does not produce or does not sell the like product in the exporting country.

A second method (the so-called constructed value) consists in calculating the normal value on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits. It constitutes the most used alternative method.

A third method takes account of the export prices, in the ordinary course of trade, to an appropriate third country, provided that those prices are representative. This method is rarely used by the Commission since it is particularly difficult to define the concept of appropriate third country. To base itself on export prices on markets other than European markets, it must be able to demonstrate that these prices are not dumped and some international currency fluctuations would make it even more difficult to choose an export market in an appropriate third country\textsuperscript{827}. The condition of representative prices further implies that the sales on export markets are sufficient in volume and that the products concerned are fully and directly comparable to the products exported to the Union\textsuperscript{828}.

Lastly, where there is no representative sales volume on the domestic market, the normal value may also be determined on the basis of a combined use of the domestic prices of the country of origin and the export prices to a third country, both countries constituting one large competitive market having the characteristics of a single market\textsuperscript{829}.

\textsuperscript{826} Case T-675/15 Shanxi Taigang Stainless Steel Co. Ltd., Judgment of 23 April 2018, LawLex18627: the Commission had not erred in choosing the United States as a more appropriate analogue country than Taïwan due to the level of competition and the size of the market since there were at least four large producers of a like product in the United States whereas in Taïwan, the market and prices of the products concerned are driven, to a large extent, by one group of companies and are not due to a normal competitive interaction.
\textsuperscript{828} Commission Regulation (EC) No 2376/94 of 27 September 1994, imports of color television receivers (Malaysia, China, Korea, Singapore and Thailand), LawLex092743.
2° Non-market economy countries

27.23. Market economy producer

The producer or producers which are subject to investigation and are established in a non-market economy country may claim, under the conditions of Article 2(7)(b) of the anti-dumping regulation, for the system applicable to producers active in a market economy country. The claim must be made in writing and contain sufficient evidence that the producer operates under market economy conditions. Article 2(7)(c) sets forth the cumulative conditions that the producer in question must meet:

- decisions of firms regarding prices, costs and inputs – raw materials, technology, labor, output, sales and investments – are taken in accordance with supply and demand, without significant State interference; costs of major inputs must substantially reflect market values. Domestic sales restrictions, sales at a loss on the domestic market or centrally imposed price controls are regarded as excluding the free market rules from applying;

- firms have only one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes;

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830 The claim must be submitted by the whole group involved in the production and sale of the product rather than only by one company within the group: Commission Regulation (EC) No 1043/2000 of 18 May 2000, imports of glycine (China), LawLex092872.

831 The claim is dismissed if the answer to the questionnaire is sent after the deadline and is clearly insufficient because there is no list of export sales to the Union of the domestic sales, as well as the required information on the cost of production: Commission Regulation (EU) No 230/2001 of 2 February 2001, imports of certain iron or steel ropes and cables (the Czech Republic, Russia, Thailand, Turkey), LawLex092845.

832 These conditions must be met by all the companies belonging the a same group to be given the status as market economy producer to one of them: Case T-1/07 Apache Footwear and Apache II Footwear v Council [2009] ECR II-232*, Summ.pub., LawLex11231.


834 Council Regulation (EU) No 1612/2001 of 3 August 2001, imports of ferro molybdenum originating in the People's Republic of China, LawLex092832, which defines significant State interference as the exercise of a direct influence in the management of companies to the imposition of limitations in the freedom to run the business and the creation of distortions in the costs of major inputs; Case T-498/04 Zhejiang Xinan Chemical Group Industrial v Council [2009] ECR II-1969, LawLex11241, which excludes that State 'control' or 'influence' might be a criterion expressly laid down in Article 2(7)(c) where such a control is not, as such, incompatible with the taking of commercial decisions in keeping with market economy conditions.


- the production costs and financial situation of firms are not subject to significant distortion carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade or payment via compensation of debts; the Court of Justice has specified that the words "former non-market economy system" do not refer necessarily and specifically to the historic economic system of a state-trading country, but, more generally, to a non-market economy system; in addition, even if the connection of a measure to various five-year plans implemented in China is sufficient for the assumption that that measure constitutes a distortion carried over from the former non-market economy system, the producer concerned may rebut that presumption if it demonstrates, to the requisite legal standard, that the measure in question is not inherently contrary to a market economy;

- the firms concerned are subject to bankruptcy and property laws;

- exchange rate conversions are carried out at the market rate.

The Commission has a maximum of between seven and eight months after the initiation of the proceedings to decide whether the producer meets these criteria, after the Union industry has submitted comments. The solution retained remains in force throughout the proceedings. Non-compliance with the three-month period does not entail the annulment of the regulation relating to the review which is adopted subsequently. The Commission must respond individually to each MET (market economy treatment) claim submitted. Using the sampling technique does not authorize the Commission to depart from its obligation to rule individually on a producer's application for MET status pursuant to a properly substantiated claim, since such an obligation concerning the recognition of the economic conditions under which each producer operates in respect of the manufacture and sale of the like product concerned, is not affected by the manner in which the dumping margin is to be calculated. Even if tax breaks such as reduced tax rates, which presuppose State intervention, may orientate the conduct of undertakings in a different direction to that caused by the forces present in a market economy, the measures have not been "carried over from the former non-market economy system" and therefore did not commit a manifest error of assessment by refusing to grant the Chinese producer market economy treatment (MET) status.

839 Case T-1/07 Apache Footwear and Apache II Footwear v Council [2009] ECR II-232, Summ.pub., LawLex11231, for a Chinese producer which had a rent for immovable properties that was significant lower than the market price from the former non-market economy system.

840 Case C-301/16 P Commission v GMB Glasmanufaktur Brandenburg GmbH, Xinyi PV Products (Anhui) Holdings Ltd, Judgment of 28 February 2018 LawLex18339, holding that insofar as the tax incentives concerned implement a five-year plan, a characteristic feature of non-market economies which is fundamental to the organization of the Chinese economy, the Commission was entitled to presume that those measures had been "carried over from the former non-market economy system" and therefore did not commit a manifest error of assessment by refusing to grant the Chinese producer market economy treatment (MET) status.

841 Case C-301/16 P Commission v GMB Glasmanufaktur Brandenburg GmbH, cited above.

842 Case T-299/05 Shanghai Excell M&amp;E Enterprise and Shanghai Adeptech Precision v Council [2009] ECR II-573, LawLex091938.

market economy, the mere existence of such measures does not suffice for a refusal to grant the applicant MET\textsuperscript{844}.

Where evidence is not brought that the producer is active in a market economy, the provisions of Article 2(7)(a) apply\textsuperscript{845}. This is also the case where, within the three months following the initiation of the anti-dumping proceedings, the producer in question is found not to fulfill the criteria which an undertaking operating under market economy conditions must satisfy, following changes in the factual situation or the discovery of new evidence of which the Commission could not reasonably have been aware at the time of the determination of the status of the firm active in a market economy\textsuperscript{846}.

B. Export price

27.27. Constructed price

Where there is no actual export price or the export price is unreliable because of an association or a compensatory arrangement between the exporter and the importer or a third party\textsuperscript{847}, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer\textsuperscript{848}, or, if the products are not resold to an independent buyer, or are not resold in the State to which they have been imported, on any other reasonable basis (Art. 2(9)(1), Regulation No 2016/1036). A transaction-by-transaction method may be preferred to a weighted average of the prices charged where it is used to preclude certain maneuvers in which dumping is disguised by charging different prices, some above the normal value and some below it\textsuperscript{849}.

\textsuperscript{844} Case T-586/14 Xinyi PV Products Holdings Ltd, Judgment of 16 March 2016, LawLex16605.


\textsuperscript{846} Case T-138/02 Nanjing Metalink v Council [2006] ECR II-4347, LawLex091229.

\textsuperscript{847} Regulation No 2016/1036, Article 2(9)(1), Case T-51/96 Miwon v Council [2000] ECR II-1841, LawLex0899, stating that the constructed export price may be used not only where the institutions obtain actual evidence of the existence of a compensatory arrangement but also where such an arrangement appears to exist or the export price reported appears to be unreliable; T-88/98 Kundan and Tata v Council [2002] ECR II-4897, LawLex091390, stating that the finding of a compensatory arrangement which may be deduced from the fact that resale price charged by the exported on the European market are lower than the purchase prices charged by the manufacturer with whom it is linked by an exclusive distribution agreement, leads to fix the export price according to the price charged by that exported within the Union.

\textsuperscript{848} Case C-172/87 Mita Industrial v Council [1992] ECR I-1301, LawLex09738; Council Regulation (EU) No 3651/88 of 23 November 1988, imports of serial-impact dot-matrix printers (Japan), LawLex092383; No 1074/96 of 10 June 1996, imports of polyester yarn (Taiwan, Turkey), LawLex092411; No 950/2001 of 14 May 2001, imports of certain aluminum foil (China, Russia), LawLex092608; Commission Regulation (EC) No 981/97 of 29 May 1997, imports of certain seamless pipes and tubes of iron or non-alloy steel (Russia, the Czech Republic, Romania, the Slovak Republic), LawLex092794.

\textsuperscript{849} Case 255/84 Nachi Fujikoshi v Council [1987] ECR 1861, LawLex091771 and 260/84 Minebea v Council [1987] ECR 1975, LawLex091786. See also Council Regulation (EU) No 1074/96 of 10 June 1996, imports of polyester yarn (Taiwan, Turkey), LawLex092411, which, according to the transaction-by-transaction method, only retains transactions which concern quantities directly sold by the exporter to independent importers in order to determine the export price.
In order to establish a reliable export price at the European frontier level, adjustments must be made to take account of all costs, including duties and taxes, incurred between importation and first resale to an independent buyer, and a profit margin (Art. 2(9)(2), Regulation No 2016/1036). In particular, costs and profits inherent in the activity pursued by the exporter’s subsidiary which is established in the Union, and through which export sales are made, shall be deduced. The costs justifying adjustment include those normally borne by an importer but paid by any party, either inside or outside the Union, which appears to be associated or to have a compensatory arrangement with the importer or exporter: usual transport, insurance, handling, loading and ancillary costs, customs duties, any anti-dumping duties, and other taxes payable in the importing country by reason of the importation or sale of the goods, and a reasonable margin for selling, general and administrative costs and profit. An adjustment of the export price can be made not only for differences in commissions paid in respect of the sales under consideration but also for the mark-up received by traders of the products if their functions are similar to those of agents working on a commission basis.

The adjustments made to the export price intended to determine the export price corresponding to normal trading conditions are different, as regards both their purpose and the conditions under which they are applied, from adjustments made in the construction of the export price intended to rectify the export price or the normal value already calculated pursuant to the rules laid down in Article 2(3) to (9) of the Basic Regulation by reference to objective factors corresponding to the particular features of each market (domestic or export), and have a varying impact on conditions and terms of sale, thus affecting price comparability.

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850 Case 277/85 Canon v Council [1988] ECR 5731, LawLex092332, which, with respect to adjustment factors, retains a 3% profit margin to be deducted from that margin of independent importers; See also C-156/87 Gestetner Holdings v Council and Commission [1990] ECR I-781, LawLex09561, which retains the price invoiced by the subsidiary after deducting from that price a reasonable margin for overheads and profit, estimated at 5%; C-188/88 NMB v Commission [1992] ECR I-1689, LawLex09761, for the deduction of anti-dumping duties; Council Regulation (EU) No 2380/95 of 2 October 1995, imports of plain paper photocopiers (Japan), LawLex092395, regarding deduction of costs incurred by the exported, or its subsidiary, and which would normally have been undertaken by the importer, such as the provision of advertising support or costs relating to the performance of the role of re-invoicing agent.


852 Regulation No 2016/1036, Article 2(9)(3).


Section 2 Anti-dumping procedure

III. Commission decision

C. Commitments

27.67. Elimination of the injurious effect

The Commission accepts the undertakings only where it is convinced that they eliminate the injurious effect of the dumping (Regulation No 2016/1036, Article 8(1)). However, according to the General Court, Article 8 does not require the Commission to conduct systematic monitoring of the injurious effects of the dumping, where the Commission accepts satisfactory voluntary undertaking offers submitted by exporters to revise their prices or to cease exports at dumped prices.\(^{855}\) Undertakings mainly relate to prices of which the increase cannot be higher than necessary to eliminate the margin of dumping or less than such margin if such increase is adequate to remove the injury to the Union industry.\(^{856}\) Undertakings may take the form of a minimum price covering imports up to an agreed volume threshold, with imports over and above that threshold being subject to an ad valorem duty, provided that the market structure or the characteristics of the product do not make them inappropriate.\(^{858}\)

By contrast, by giving the companies a choice in deciding whether to export or not, undertakings cannot thus give them the option of exporting higher-priced products under the undertakings while lower-priced products bear the duty.\(^{859}\) The proposed minimum price cannot be 30% below the target price necessary for the Union producer to achieve a reasonable profit.\(^{860}\) Purely quantitative undertakings which, without any price reference, limit the volume of products concerned exported to

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\(^{855}\) Case T-783/14 SolarWorld AG, Judgment of 16 February, LawLex17338.

\(^{856}\) See Case 294/86 Technointorg v Commission and Council [1988] ECR 6077, LawLex092333, which refuses an undertaking where the price increases offered are far less than those needed to eliminate injury and are to take effect over several years; Council Regulation EU No 733/1999 of 30 March 1999, imports of calcium metal (Russia, China), LawLex092502, which considers that the undertaking offered is not acceptable where the proposed minimum price is 30% below the target price necessary for the Union producer to achieve a reasonable profit.

\(^{857}\) See, inter alia, Council Regulation (EU) No 1531/2002 of 14 August 2002, imports of color television receivers (China, Korea, Malaysia, Thailand, Singapore), LawLex092563; No 190/2000 of 24 January 2000, imports of certain seamless pipes and tubes of iron or non-alloy steel (Hungary, Poland, Russia, the Czech Republic, Rumania and the Slovak Republic), LawLex092457; Commission Decision No 2000/137 of 17 February 2000, imports of certain seamless pipes and tubes of iron or non-alloy steel (Croatia, Ukraine), LawLex11522.


\(^{859}\) Council Regulation (EU) No 603/1999 of 15 March 1999, imports of polypropylene binder or baler twine (Poland, the Czech Republic, Hungary), LawLex092501.

\(^{860}\) Council Regulation EU No 733/1999 of 30 March 1999, imports of calcium metal (Russia, China), LawLex092502.
the Union, are also refused in practice\textsuperscript{861}. An undertaking relating to a fixed price is not suitable where the product concerned is a commodity product with a considerable volatility in prices even in the very short term, which is due to the variation in prices of raw materials and linked to currency exchange rates, which would require a monthly revision of prices\textsuperscript{862}.

The acceptable character of the undertakings is defined by the Commission as part of its discretionary power. Thus, to reject an undertaking, they may base themselves on past experience acquired in the sector concerned if that experience has shown that undertakings do not constitute a satisfactory solution to the problems caused by dumping practices\textsuperscript{863}.

In order to safeguard the effectiveness of the undertakings and to avoid circumvention of the anti-dumping measures, a duty may be imposed on other imports of the products concerned even if the export prices of producers are, according to their undertakings, at a level where dumping is eliminated and sales at prices below their costs of production are prevented\textsuperscript{864}.

Lastly, when examining the undertakings, the Commission must not only make sure that it can remove the injury suffered by the Union industry, but must also make sure that exporter may comply with them. The breach of a prior undertaking is a non-negligible indication in this respect. In principle, the Commission does not accept a second undertaking offered by a company which has violated a previous undertaking\textsuperscript{865}. At its discretion, the Commission may however accept the new undertaking where the possibilities of supervision existing in the State concerned are clearly reinforced\textsuperscript{866} or where changes have occurred in the management of the company. In effect, the breach

\textsuperscript{861} Case T-97/95 Sinochem v Council [1998] ECR II-85, LawLex091353, as regards an undertaking the acceptance of which would result in a high anti-dumping duty being applied to all other imports from the same country and the applicant regaining the monopoly in exports to the Union; Commission Regulation (EC) No 1629/2000 of 25 July 2000, imports of ammonium nitrate (Poland, Ukraine), LawLex092856, as regards an undertaking which would result in exempting a substantial volume of imports from the provisional measures; Council Regulation (EU) No 1786/97 of 15 September 1997, imports of silicon carbide (Ukraine), LawLex092441, as regards a quantitative undertaking which consists of a duty-free quota set at a level equivalent to a market share significantly higher than that held by the exporter concerned in the years prior to the investigation; Compare, as regards a non-purely quantitative undertaking: Commission Decision No 2002/683 of 29 July 2002, imports of color television receivers (Malaysia, China, Korea, Singapore, Thailand), LawLex11543, which considers that a minimum price undertaking which provides for quantitative ceilings in defined periods for sales to the Union of the product concerned and the levy of the anti-dumping duty in force once these ceilings are reached, is acceptable.

\textsuperscript{862} Council Regulation (EU) No 1697/2002 of 23 September 2002, imports into the Community of certain electronic microcircuits known as DRAMs (Korea), LawLex092446; No 584/96 of 11 March 1996, imports of certain tube or pipe fittings, of iron or steel (China, Croatia, Thailand), LawLex092406.


\textsuperscript{864} Commission Decision No 83/649 of 19 December 1983, imports of hardboard (Sweden), LawLex11559.
of a first undertaking may result from a lack of internal coordination and the absence of staff capable of managing the obligations taken out. A structural change in the company, with a more competent accounting staff and an efficient IT system capable of implementing the software required for the production of quarterly sales reports to the Commission, may, in such a case, reassure it on the compliance with the undertakings.

VII. Circumvention

27.93. Circumvention by assembly operation

In order to put an end to the 'screwdriver plants' practices, Article 13(2) of the anti-dumping regulation settles circumvention by assembly operations in the Union or a third country. In order to circumvent the anti-dumping measures, the product concerned is sometimes exported in the form of spare parts for assembly, in the Union or a third country, for purposes of resale of the product concerned in the Union. Several cumulative conditions must be met for the assembly operation being described as an unfair circumvention:

- The operation started or substantially increased since, or just prior to, the initiation of the investigation (Art. 13(2)(a)). The Commission retained circumvention whereas the operation started more than three years before the initiation of the investigation.

- The parts must be from the country subject to measures (Art. 13(2)(a)). Depending on the different language versions of the anti-dumping regulation, the definition of circumvention implies either that the parts concerned originate in the countries subject to measures, or that they come from that country. According to the General Court, although it is sufficient to simply refer to where the parts used for assembling the final product are "from", it may be necessary in case of doubt, to verify whether the parts "from" a third country in actual fact originate in another country; thus the trader contesting the unfair character of the circumvention must provide the Union institutions with proof that those parts originated in another country.

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867 Commission Decision No 2002/157 of 5 February 2002, imports of farmed Atlantic salmon importations (Norway), LawLex11541, as regards a partial interim review.
870 Case T-435/15 Kolachi Raj Industrial (Private) Ltd, Judgment of 10 October 2017, : Although the "Form A" certificates of origin have evidentiary value in relation to the origin of the goods to which they relate, that is not absolute, such a certificate, completed by a third country, cannot bind the Union authorities with regard to the origin of those goods by preventing them from verifying the origin by other means where there is objective, sound and consistent evidence creating a doubt as to the true origin of the goods covered by those certificates.
- Parts which are from the country subject to anti-dumping duties must constitute 60% or more of the total value of the parts of the assembled product and the value added to the parts brought in, during the assembly or completion operation, must be equal to or less than 25% of the manufacturing cost (Art. 13(2)(b)). When calculating the value of the imported parts taken into consideration for the '60% of the value of the parts' test, all elements manufactured, assembled or developed by the exporting producer in order to be incorporated into the finished product are considered as an individual part where its manufacture, assembly or development cannot be reversed to any extent without significantly diminishing the value of that element. The value added to the parts brought in, during the assembly or completion operation, corresponds to the sum of labor and depreciation costs and other manufacturing overheads incurred by the assembler in respect of those parts, to the exclusion of selling, general and administrative expenses, as well as the amounts of State grants related to the manufacturing costs of the assembled product. Labor costs and factory overheads relating to packing are particularly excluded from the calculation of that value added.

- The practice in dispute undermines the remedial effects of the duty in terms of the prices and/or quantities and evidence of dumping in relation to the normal values previously established for the like or similar products must be brought (Art. 13(2)(c)).

27.94. Anti-circumvention procedure

Where the conditions of circumvention seem to be met, an anti-circumvention investigation may be initiated by the Commission, on its initiative or at the request of any interested party or a Member State, through a regulation after consultation of the Advisory Committee (Regulation No 2016/1036, Article 13(3)). The investigation, initiated by Commission regulation, which may be conducted with the assistance of the customs authorities, must be concluded within nine months. In the initiating

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874 See for a textbook case regarding circumvention by way of assembly: Council Regulation (EU) No 71/97 of 10 January 1997, imports of bicycles and certain bicycle parts (China), LawLex092414: in order to avoid that imported parts be subject to the anti-dumping duty, suppliers applied a rather costly and complex practice consisting in spreading parts destined for the same assembler across different containers, sent on different dates and sometimes unloaded at different ports. This practice enabled classification of the imported parts in the common customs tariff, which is different from the finished product, and therefore outside the scope of application of the anti-dumping regulation. But, one of the companies liable to circumvention changed its sourcing pattern towards the end of the investigation period, and started to assemble the bicycles by using more than 40% of non-Chinese parts, which it purchased either directly from manufacturers located in these countries of origin or from subsidiaries of these manufacturers located in the Union. The Council took an extension regulation in order to extend the anti-dumping duty in force to certain bicycles parts originating in or consigned from China with the exception of those parts of proven non-Chinese origin.
875 The regulation specifies in fine that the provisions of the anti-dumping regulation relating to the initiation and conduct of the investigation apply.
regulation, the Commission may instruct the customs authorities to make imports subject to registration or to request guarantees\^876. When the facts justify the extension of measures, this is decided by the Commission according to the examination procedure of Article 15(3). The extension of anti-dumping duties to imports at issue takes effect from the date on which registration was imposed or on which guarantees were requested\^877.

Imports may be exempted from extension where the parts are not imported for purposes of circumvention (exempted assembler)\^878 or they are imported in too small quantities by small operators - for example as substitution - to truly undermine the anti-dumping duty in force (de minimis clause). A conditional exemption may be granted where parts are declared for free circulation by, or on behalf of, an assembler which is subject to examination by the Commission\^879. Where the exemption is granted, imports will not be submitted to registration or to other measures (Art. 13(4))\^880. It is the task of the EU institutions to establish that anti-dumping measures are being circumvented in respect of the third country in question as a whole, whereas it is for each individual producer-exporter to show that its particular situation justifies an exemption pursuant to Article 13(4) of the regulation\^881.

Exemption may be granted during the circumvention investigation or after the investigation having resulted in the extension of the duty\^882. The general rules applying to anti-dumping investigations,

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\^876 Council Regulation (EU) No 1905/2003 of 27 October 2003, imports of furfuryl alcohol originating in the People’s Republic of China, LawLex092535, which considers that in order to minimize the risk of circumvention due to the substantial level of non-cooperation (40%) and the high difference in the amounts of definitive duties instituted, special provisions may be taken such as the presentation to the customs authorities of the Member States of a valid commercial invoice, which is to conform to the requirements set out in the annex to the definitive regulation, under penalty of application of the residual anti-dumping duty.

\^877 Council Regulation (EU) No 1023/2003 of 13 June 2003, imports of certain malleable cast iron tube or pipe fittings (Brazil, Argentina), LawLex092546: where circumvention is established, the existing anti-dumping measures are extended to the same products consigned from the not concerned third country, whether declared as originating in that country or not, and apply from the date of registration of their import established, in this case, by the regulation initiating the anti-circumvention investigation.

\^878 See Council Regulation (EU) No 1623/2003 of 11 September 2003, imports of certain zinc oxides (China), LawLex092539, which considers that where the circumvention takes place outside the Union, the exemption of exporters which have not exported the product concerned during the investigation period and are not related to any exporters or producers subject to the extended anti-dumping duty, may be granted after the assessment of the market situation of the product concerned, production capacity and capacity utilization, procurement and sales, and taking into account the likelihood of practices for which there is insufficient due cause or economic justification and the evidence of dumping.


\^880 See, for an example of interruption from import registration after the exporting producer succeeded in showing that there was no circumvention: Commission Regulation (EC) No 2593/2001 of 28 December 2001, imports of glyphosate (Taiwan, Malaysia), LawLex092816.


\^882 The entry into force of the exemption therefore depends on when it was requested: where it was requested during the investigation, the exemption comes into force from the date of initiation of the circumvention investigation; where the request is submitted after extension of the duty, the exemption comes into force from the date of the request.
regarding in particular the conduct of investigations, verification visits, non-cooperation, confidentiality, and the procedural rights of the parties concerned, apply to the procedures of request for exemption.

VIII. Remedies

27.96. Action for annulment

Any natural or legal person may, under Article 263 TFEU, institute action for annulment against decisions addressed to that person and against decisions which are of direct and individual concern to that person, although they are in the form of a regulation or a decision addressed to another person. The action must be brought within two months of the publication of the act, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter.

1) Reviewable acts

Only the final act setting forth a definitive decision, even implied, may be appealed. Commission decisions, in particular imposing interim duties or accepting or refusing undertakings are merely proposals and do not have binding effects, except where they directly, immediately and definitively affect the interests of the applicant. Likewise, neither preparatory acts, such as the initiation of the

883 Case C-21/13 Simon, Evers & Co, Judgment of 4 September 2014, LawLex14843: where there is a complete refusal to cooperate with the circumvention investigation, the Commission is entitled to act on the basis of the evidence available in order to find the existence of a practice, process or work in a third country aiming solely at the circumvention of the antidumping duty affecting imports originating in another third country. It is for the parties concerned to prove that there are reasonable grounds justifying those activities, other than avoiding the anti-dumping duty. See also Cases C-247/15 P, C-253/15 P, C-259-15 P Maxcom Ltd v City Cycle Industries, Judgment of 26 January 2017, LawLex17228, finding that, with regard to the standard of proof required to demonstrate circumvention where there is insufficient or indeed no cooperation on the part of producer-exporters, that there is no provision in the basic regulation which confers on the Commission, in an investigation to establish whether there has been circumvention, the power to compel producers or exporters which are the subject of a complaint to participate in the investigation or to provide information and therefore the Commission is reliant on the voluntary cooperation of the interested parties to provide it with the necessary information.


887 Case C-170/89 BEUC v Commission [1991] ECR I-5709, LawLex09709, as regards a letter by which the Commission refuses to consider a consumer association as an interested party and therefore refuses it access to a non-confidential document. In this case, the plea in law based on infringement of the principle of the right to a fair hearing is however rejected as to the substance since the refusal of access could not result in a measure adversely affecting the consumers, insofar as no allegation was made against them. Case T-369/08 European Wire Rope Importers Association, Judgment of 17 December 2010, LawLex11457, concerning a letter sent by the Commission refusing to initiate a partial interim review due to insufficient evidence.
proceedings\textsuperscript{888}, nor purely confirmative decisions\textsuperscript{889} may be appealed. As an exception, some acts by the Commission which directly, immediately and definitely affect the applicant's interests may be subject to an action for annulment.

2) Standing/legitimate interest

The action for annulment may be brought by the person to whom the decision is addressed or by any person who is directly and individually concerned by it. Since the anti-dumping regulation does not lay down general rules which apply to a whole group of traders without distinguishing between them but imposes different duties on a series of manufacturers or exporters established in certain countries and who are expressly named and also, on other companies which are not named but which pursue the same activities in those same countries, a trader may be individually concerned only by those provisions of the contested regulation which impose on it a specific anti-dumping duty and determine the amount thereof\textsuperscript{890}.

The applicant must have an actual and existing interest in the annulment of the challenged measure. The anti-dumping regulations may thus be subject to application for annulment only if they affect the applicant by reason of certain attributes which are peculiar to it or by reason of circumstances in which it is differentiated from all other persons and therefore distinguishes it individually just as in the case of the person addressed\textsuperscript{891}. The concept of individual interest therefore varies depending on the status of the trader.

The exporting producers must be identified in the acts of the Commission or concerned by the preparatory investigation to be able to bring an action for annulment. This is the case where they are

\textsuperscript{888} Case T-134/95 Dysan Magnetics and Review Magnetics v Commission [1996] ECR II-181, LawLex091228, which considers that the decision to initiate anti-dumping proceedings is not capable of immediately and irreversibly affecting the legal position of the undertakings concerned; T-75/96 R National Farmers' Union and others v Commission [1996] ECR II-815, LawLex091393, stating that the initiation of the proceedings does not even create any requirement to cooperate; T-75/96 Sőktas v Commission [1996] ECR II-1689, LawLex12260, which refuses to consider as challengeable the decision that initiates the proceedings, including in the event that the decision results in setting aside proceedings for amicable settlement of disputes defined by an agreement that creates an association between the European Union and a third country.

\textsuperscript{889} Case T-84/97 BEUC v Commission [1998] ECR II-795, LawLex11242, as regards an application for annulment which is inadmissible because against a decision which merely confirms an earlier decision which was not challenged in due time.

\textsuperscript{890} Case 258/84 Nippon Seiko v Council [1987] ECR 1923, LawLex091784; Case T-431/12 Distillerie Bonollo SpA, Judgment of 3 May 2018 LawLex18656, specifying that the concept of direct concern to the legal situation of the applicants cannot be interpreted restrictively in determining the admissibility of their action, as any action brought by an EU producer against a regulation imposing anti-dumping duties would have to be declared automatically inadmissible, as would any action brought by a competitor of the beneficiary of aid declared compatible with the internal market by the Commission at the end of the formal investigation procedure, as well as any action brought by a competitor against a decision declaring a concentration compatible with the internal market.

named; if only exporters have replied to the questionnaire, they are referred to as exporters of the products concerned or having cooperated in the investigation, where they are included amongst the undertakings referred to in the provisional duty regulation under the heading 'Exporters/producers' in the country concerned and have been subject to an on-the-spot verification, or participated in the investigation whereas the Commission has ultimately decided not to accept the information provided; they triggered the partial interim review procedure, and as the measures adopted at the end of that procedure were intended to offset the dumping that caused the injury, they have suffered as competing producers operating on the same market. The action brought by a producer and its importing subsidiaries established in the Union against a regulation imposing an anti-dumping duty is admissible without it being required, to answer to the question whether the contested measure is of concern to the applicants, to make a distinction between producers and importers, where the existence of dumping is established depending on the resale price applied by importers. The leading manufacturer of the products concerned in the Union and the only remaining manufacturer of those products, which made observations that have largely determined the conduct of the investigation procedure and which suffered a significant injury due to dumped imports which was used to fix the definitive anti-dumping duty, may be regarded as concerned by the regulation imposing that duty. On the other hand, the mere fact that an applicant's name appears in the anti-dumping regulation is not sufficient to confer on him a right to bring proceedings.

Insofar as the importer is compelled to pay anti-dumping duties, it is open to it to bring an action in the competent national court in the context of which it can put forward its arguments against the validity of the regulations at issue. The regulation imposing anti-dumping duties may be of

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903 Case T-147/97 Champion Stationery Mfg and others v Council [1998] ECR II-4137, LawLex091260; Compare Case C-75/92 Gao Yao v Council [1994] ECR I-3141, LawLex091166, as regards a company regarded as not concerned by the preliminary measures, since it is established in a not-concerned third country, has not been the target of the investigation and intervened in the proceedings merely as a channel of transmission of documents between the Commission and the exporting producer concerned.

904 Case T-147/97 Champion Stationery Mfg and others v Council [1998] ECR II-4137, LawLex091260; Compare Case C-75/92 Gao Yao v Council [1994] ECR I-3141, LawLex091166, as regards a company regarded as not concerned by the preliminary measures, since it is established in a not-concerned third country, has not been the target of the investigation and intervened in the proceedings merely as a channel of transmission of documents between the Commission and the exporting producer concerned.


909 Case T-162/09 Adolf Würth GmbH &amp; Co. KG, Judgment of 19 April 2012, not available in English.

individual concern to the importer. This is the case where it is the largest importer of the product subject to the anti-dumping measure and, at the same time, the end user of that product, and where the economic activity of the undertaking concerned is dependent on these imports and is seriously affected by the regulation, taking into account the limited number of producers of the products concerned and the fact that it encountered difficulties in obtaining supplies from the sole producer in the Union, which is its main competitor for the processed product.

The admissibility of the action for annulment also implies that the applicant is directly affected by the measure. An anti-dumping regulation applicable to all imports in the Union of the products concerned originating in a specific country, directly affects each exporter insofar as implementation by the national authorities, by virtue of the European legislation only, of the anti-dumping duty fixed is purely automatic. The customs authorities of the Member States are particularly obliged to collect that duty without having discretion in that regard. Likewise, an assembler is directly concerned by the regulation extending the anti-dumping measure where the extended duty remains collected on imports of its products. An OEM (Original Equipment Manufacturer) supplier also has an interest in bringing proceedings, irrespective of whether it is an exporter or an importer, given its business dealings with the manufacturer concerned by the measures, from which it obtains supplies, which have certain features taken into consideration when constructing the export prices, the normal value and the calculation of the weighted dumping margin on the basis of which the anti-dumping duty has been fixed.

The object of the action must reflect the individual and direct interest of the applicant to bring proceedings. Accordingly, the action for annulment of a regulation instituting definitive duty which is confined to the annulment of the regulation only to the extent that it affects the applicant, is admissible. The admissibility of the action for annulment is also beyond doubt, even if the regulation has reduced the rate of duty imposed on the applicant’s imports to 0%, where the latter

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901 Case C-358/89 Extramet Industrie v Council [1991] ECR I-2501, LawLex09486; See, also, Case C-458/98 P Industrie des poudres sphériques v Council [2000] ECR I-8147, LawLex071661, which considers that the action which is not exclusively based on the difficulties encountered by the applicant in obtaining supplies from the sole Union producer, but on various factors constituting a situation peculiar to the applicant which differentiated it from all other traders with respect to the measure in question, is admissible.
retains an interest in bringing proceedings for nullity of the implied dismissal by the regulation of his request for the rates of duty laid down in the course of the review procedure to be applied retroactively, since the amendment only applies for the future or where the action is brought by the exporter concerned by the preparatory investigations, even if it has not been expressly confined to the part of the regulation concerning imports originating in his country. On the other hand, an action which seeks the annulment of a regulation instituting an anti-dumping duty in its entirety, where only the provisions of the regulation which impose specific anti-dumping duties on imports of his products concern the applicant, is inadmissible.

3) Formal requirements

Initiating an application for annulment is governed by the rules of general law as regards the form and time-limit (two months). It is obviously impossible to challenge the validity of a regulation against which the period to bring an action has expired, whether before the European court or the national court. Where the applicant is a legal person governed by private law, in order to be able to bring an application for annulment, it must have acquired capacity as an independent legal entity at the latest by the expiry of the period prescribed for proceedings to be instituted.

4) Powers of the European court

The complex economic character of the appraisals made by the Commission regarding dumping, and more generally in the field of trade defense measures, results in a court review limited to verifying whether the relevant procedural rules have been complied with, whether the facts on which the choice is based have been accurately stated and whether there has been a manifest error of appraisal and a misuse of powers. The European court, which verifies that the procedural rules have been complied

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910 Case T-37/98 FTA and others v Council [2000] ECR II-373, LawLex14200, which states that the application must be signed by an attorney empowered to carry out procedural acts before the European court.
911 Case T-104/99 AS Bolderaja and others v Council [2000] ECR II-451, LawLex14202, which considers that the action initiated one day after the expiry of the two-month period which starts at the end of the fourteenth day following the date of publication of the regulation, extended on account of distance of two weeks because of the geographical situation of the applicants, is inadmissible due to the fact that it is late; See, also, Case T-84/97 BEUC v Commission [1998] ECR II-795, LawLex11242, as regards an application for annulment held inadmissible because it was brought against a decision which merely confirmed an earlier decision not challenged in due time.
913 Case T-161/94 Sinochem Heilongjiang v Council [1996] ECR II-695, LawLex091272, which states that the condition is met, for an undertaking having submitted on the basis of a repealed national law a license attesting to its registration as an undertaking with its own capital and an independent accounting system, from the time it has been treated as an independent legal entity by the European institutions.
with, may annul a regulation imposing definitive duties following a review procedure where the
investigation has been initiated although there was no evidence of the existence of dumping915.

As in competition procedure, the Commission’s wide power of appraisal requires it to supervise the
compliance with the rights guaranteed by the European legal order in administrative proceedings. In
particular, it must examine carefully and impartially all the relevant aspects of the individual case and
the compliance with the right of the person concerned to make his views known and to have an
adequately reasoned decision916. In the specific case of the anti-dumping procedure where measures
are taken in several phases, the requirements stemming from the right to a fair hearing are taken into
consideration not only in the course of proceedings which may result in the imposition of penalties,
but also in investigative proceedings prior to the adoption of anti-dumping Regulations917.

5) Effects of annulment

The annulment of an anti-dumping regulation which imposes an anti-dumping duty to the applicant
has effects limited to those aspects which concern that applicant. The annulment does not affect the
validity of the anti-dumping duty applicable to products manufactured by another operator, where
they do not form part of the matter to be tried by the European court, even if the act not challenged
before that court would be vitiated by the same illegality918. Where the annulment of the regulation is
based on factors which arose in the course of the anti-dumping proceedings, but without affecting the
initiation of the proceedings, the Commission may, without infringing either the operative part or the
grounds of the judgment of annulment, look in more detail at the issue of determining injury in the
course of the anti-dumping proceedings which are still open and, under its wide discretion, carry out
the investigation on the basis of a different reference period919.

916 Case T-413/03 Shandong Reipu Biochemicals v Council [2006] ECR II-2243, LawLex091355, which considers that it is for the European
courts to satisfy themselves that the institutions took account of all the relevant circumstances and appraised the facts of the matter with all
due care, so that normal value may be regarded as having been determined in a reasonable manner, Case C-76/00 P Petrotub and Republica v
Council [2003] ECR I-79, LawLex091167, which annuls a regulation imposing definitive duties by resorting to the asymmetrical method in
order to calculate the dumping margin because it does not comply with the duty to state reasons provided for in Article 2.4.2 of the 1994
Anti-dumping Code.
917 Insofar as they directly and individually affect the undertakings concerned and entail adverse consequences for them, See Case C-49/88
919 Case C-458/98 P Industrie des poudres sphériques v Council [2000] ECR I-8147, LawLex071661, as regards annulment based on factors
which arose in the course of the investigation concerning the determination of injury, Case C-283/14 CM Eurologistik GmbH, Grünwald