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From:	European Commission
To:	Working Party on Competitiveness and Growth (Internal Market)
Subject:	P2B – private international law - ppt presentation



P2B – private international law

COMPCRO CWP
14 September 2018

What questions shall be addressed today?

- *What law would apply in an EU court?*
- *How would an individual business user go to an EU court?*
- *How does Article 12 strengthen enforcement of the Regulation?*
- *What other enforcement tools does the Regulation contain?*
- *How does Article 12 work in practice?*
- *Is there a risk of fragmentation?*

Why would an individual business user want to go to court?

Currently, lack of platform-specific fairness rules adds to **fundamental redress barriers in practice** (others are fear of retaliation, lack of speed & high cost of proceedings and exclusive jurisdiction of foreign - EU & non-EU - courts)

With the P2B regulation, business users could try to sue if:

- The OIS fails to set up an internal complaints handling system (non-compliance with Article 9).
- The OIS fails to include the objective grounds to suspend or terminate the provision of its services to a business user, in its terms and conditions (non-compliance with Article 3(1)(c).
- The terms and conditions do not contain any information on what access to data a business user has (non-compliance with Article 7).

What law would apply in an EU Court?

If an EU court has jurisdiction, it shall apply the P2B rules, either because these will be an integral part of all Member States legal systems, or – in the case of a choice of law clause applying non-EU law – because it would establish the overriding mandatory nature of the P2B rules

- In the light of recital 6 & 7 and Article 1, the proposed regulation should apply to all EU-based intermediation, regardless of domicile OIS and non-EU choice of law clauses.*
- Follows the approach taken by the ECJ in the Ingmar case.*

How would an individual business user go to an EU Court?

If issues of fear of retaliation, lack of speed & high cost, and cross-border litigation can be overcome:

- Existing rules of private international law will determine law and jurisdiction.
- The proposed regulation does not prescribe a special jurisdictional regime.

Scenario 1:

**EU business user wants to sue an EU OIS.
Choice of forum & law clause in the EU.**

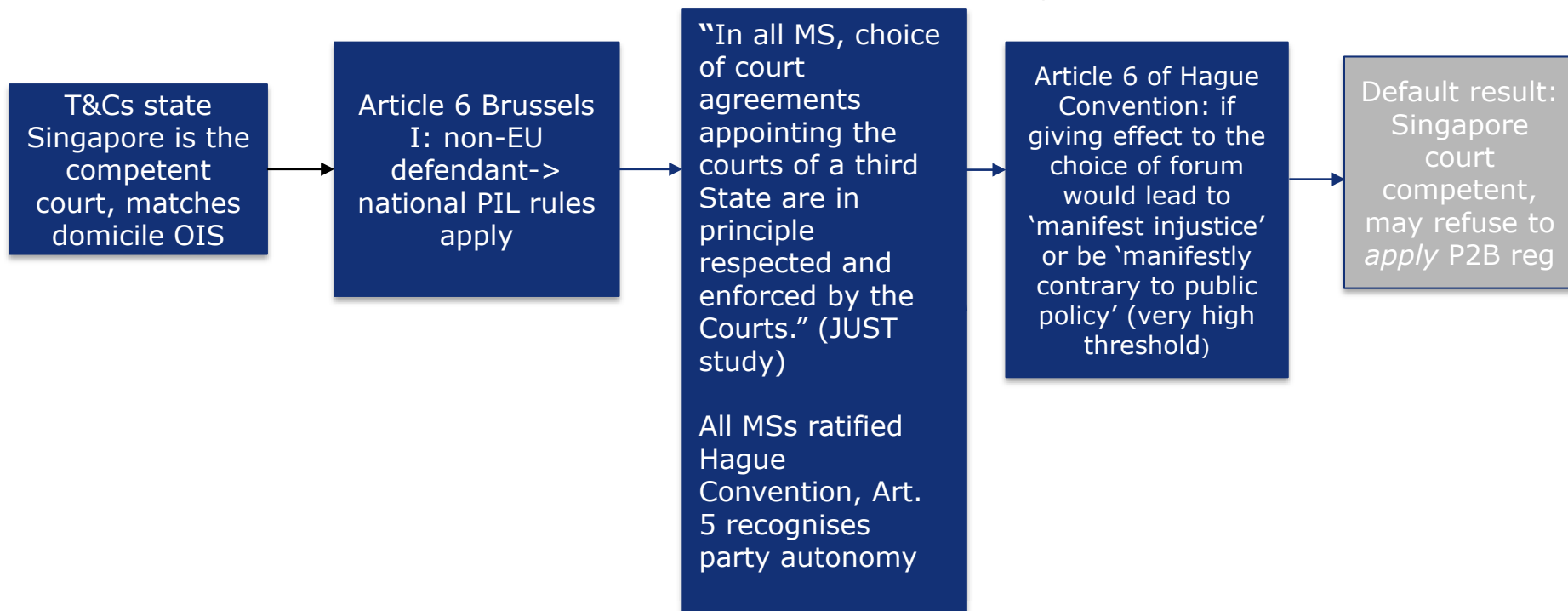
- Jurisdiction: Brussels 1a determines jurisdiction - the exclusively competent court is the one specified in the T&Cs, including for tort actions (Article 25)
- Applicable law: the proposed regulation, as it will form integral part of all Member States' legal orders.

Scenario 2:

EU business user want to sue a non-EU OIS.

Choice of forum & law clause outside of the EU.

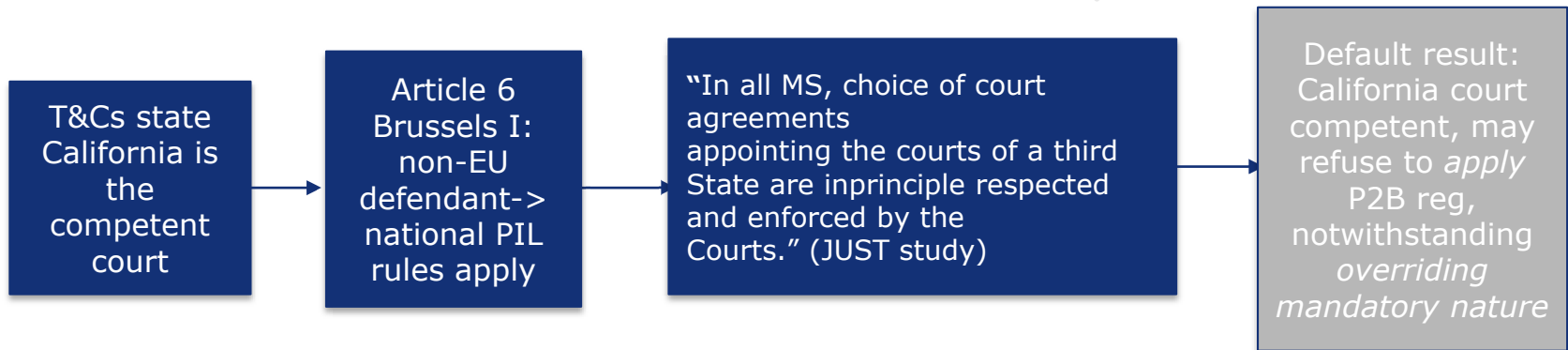
OIS from a contracting state to the Hague Convention.



Any national case law on interpreting Art. 6 Hague Convention?

Scenario 3:

**EU business user want to sue a non-EU OIS.
Choice of forum & law clause outside of the EU.
OIS from a country which has not ratified the Hague Convention**



HOWEVER: national courts in the EU could decide, on a case-by-case basis and based on exceptions in their national law, to set aside the contractual choice of forum clause in order to declare themselves competent for cases brought by individual business users

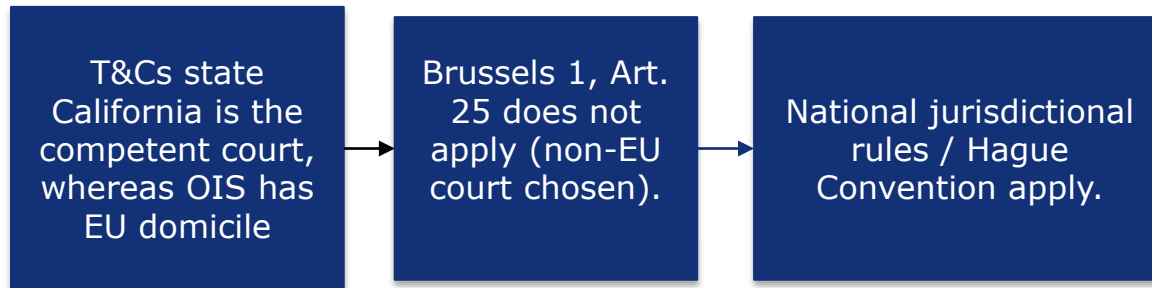
What exceptions to party autonomy are foreseen in the PIL rules of your Member State? Are these exemptions more likely to apply if OIS domicile did not ratify Hague Convention?

Example: Mon Orchata v Facebook (ES)

Scenario 4:

EU business user want to sue an EU OIS.

Choice of forum & law clause outside of the EU.



HOWEVER: national courts in the EU could decide, on a case-by-case basis and based on exceptions in their national law, to set aside the contractual choice of forum clause in order to declare themselves competent for cases brought by individual business users

What exceptions to party autonomy for such scenario are foreseen in the PIL rules / case law of your Member State? Note the absence of any link between the parties to the contract and the forum.

How does Article 12 strengthen enforcement of the Regulation? (1)

- *Proposal strengthened by possibility for private litigation by representative bodies (Article 12).*
- *Ensures P2B rules are not circumvented by OIS selecting non-EU choice of law & forum clauses: Recitals 6, 7 & Article 1 clarify geographic application and codify existing PIL notion of overriding mandatory rules.*

How does Article 12 strengthen enforcement of the Regulation? (2)

- *This was identified as the most efficient and proportionate enforcement tool.*
 - Business users face large number of problems.
 - These are frequently left unresolved, mainly for fear of retaliation.
 - Lack of quick, bilateral solutions risks damage even in non-controversial cases, in turn affecting trust.
 - Court litigation by business users not a viable solution – barriers include high cost, lack of speed (incl. jurisdictional issues) and fear of retaliation.

What other enforcement tools does the Regulation contain?

- *Transparency on "rules of the game" as a preventive tool with disciplining effect.*
- *Fairness standards to mitigate impact of profound changes (T&Cs, delisting).*
- *Internal complaint-handling & mediation to provide quick & mutually beneficial solutions.*

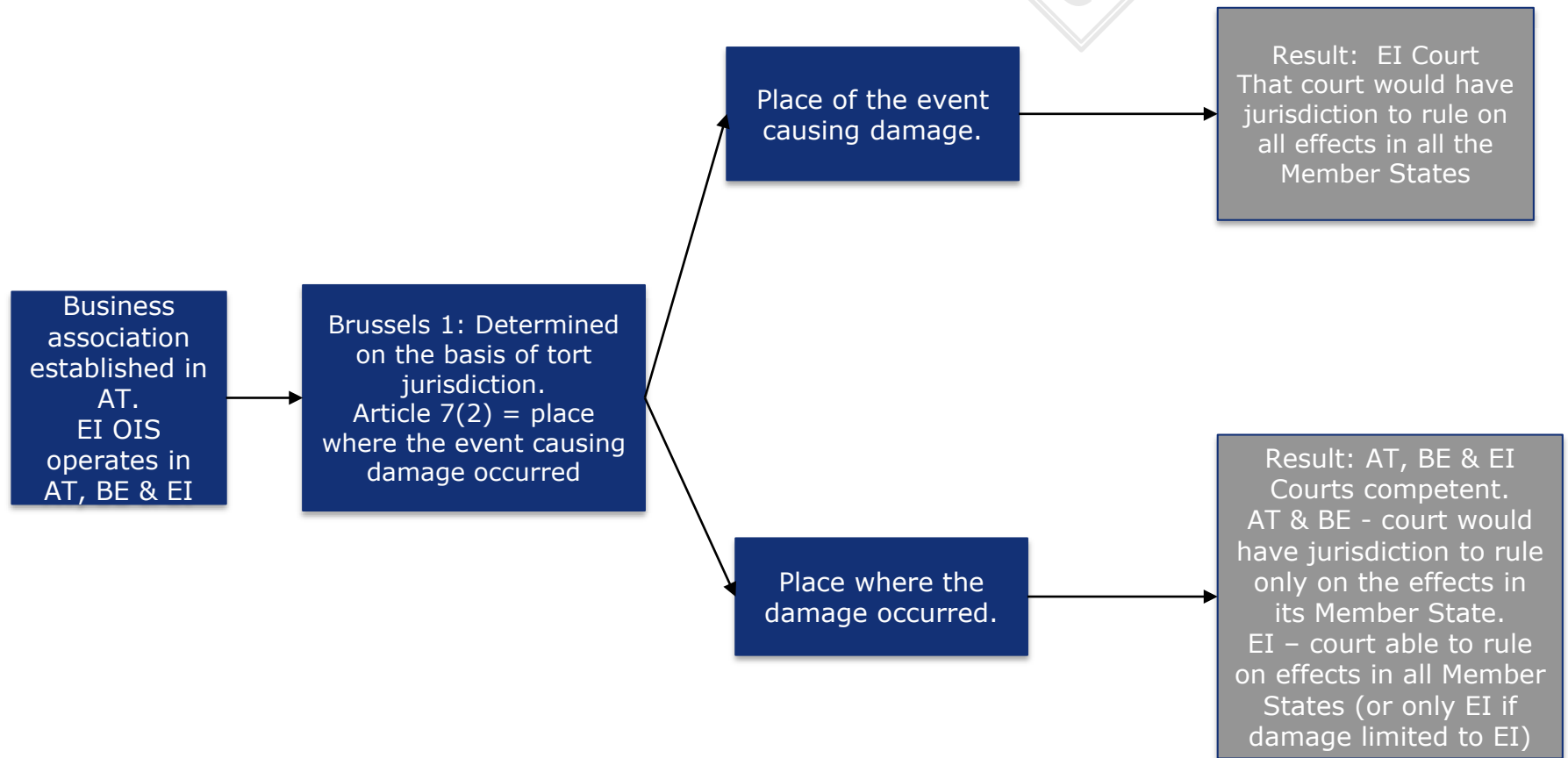
How does Article 12 work in practice?

- *Article 12 does not introduce special jurisdictional regime*
- *It merely recognises representative bodies as having legal standing. No damage necessary.*
 - *Example of cases: as above – e.g. OIS fails to set up an internal complaints handling system (non-compliance with Article 9).*
- *Brings enforcement actions outside the contractual realm of private international law. These actions do need to be proven to be in the collective interest, not relating to an individual contract (cf. Article 12(2)(b))*
- *Article 1 ensures application of P2B rules also to non-EU OIS.*

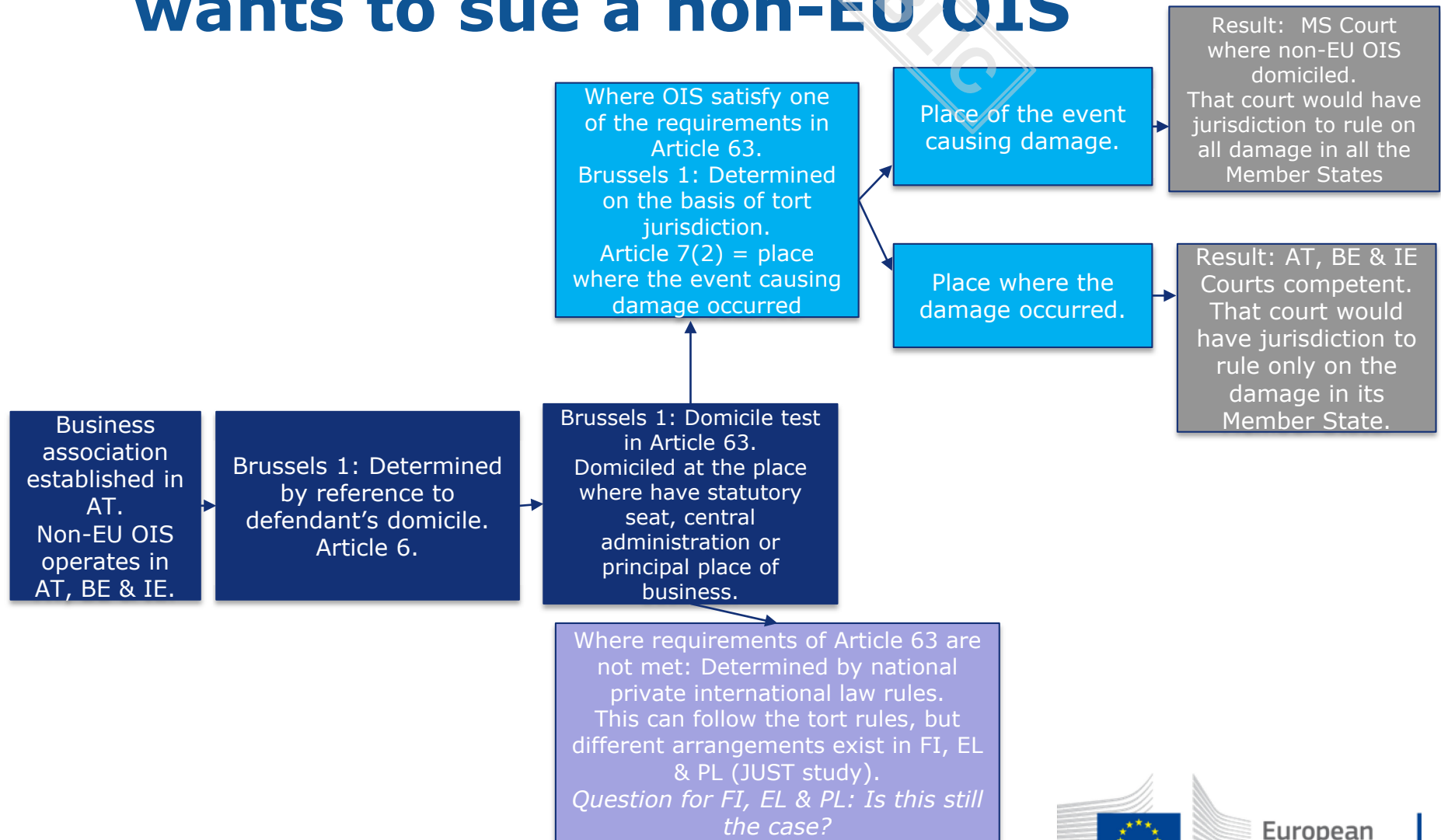
How does Article 12 work in practice?

- *If the representative association genuine/proven objective to act in the collective interest of business users:*
 - Choice of forum clause does not apply as the representative association is not a party to the contract, and action does not target individual contractual term.
 - Outside the contractual realm of private international law.
- *Result: apply tort rules of private international law.*

Scenario 1: AT Business association wants to sue an OIS established in EI



Scenario 2: AT business association wants to sue a non-EU OIS



Is there a risk of fragmentation?

- *A single association representing Austrian businesses could sue in domicile platform (EI) and where damage occurred (A) – risk of conflicting judgments*
- *Different associations could sue in different Member States on same alleged infringement of proposed regulation, or platform could anticipate actions by seizing EI court – risk of inconsistent judgments*
- *This **standard risk of fragmentation** is minimised by:*
 - Use of Regulation – which means harmonised EU rules
 - Article 29 Reg 1215/2012 – same parties, courts other than first seized have to stay proceedings
 - Article 30 Reg 1215/2012 – courts other than first seised may stay proceedings.
 - Article 267 TFEU – preliminary reference possibilities
- *Note: although business users generally do not go to court, validity of intra-EU choice of court clauses under Article 25 Reg 1215/2012 further limits possible fragmentation (use of such clauses is industry standard)*

Conclusion: proposal is proportionate, efficient & promotes EU values

- *Respects and is without prejudice to private international law. No need for special jurisdictional regime, as well as for administrative enforcement & related cooperation.*
- *Respects party autonomy (actively promoted by Union & MSs).*
- *Improves the chances of actions being capable of being brought before an EU Court.*
- *Provides alternatives for business users who are unlikely to go to Court, mainly for fear of retaliation.*



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