

**Regulation Brussels Ia: a standard for free circulation of judgments and mutual trust in the European Union  
(JUDGTRUST)**

**REVISED RULE ON TACIT PROROGATION:  
OBLIGATION OF THE COURT SEISED OF A MATTER  
INVOLVING ‘WEAKER PARTIES’ AND THE  
CONSEQUENCES OF A FAILURE TO DO SO**

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# INTRODUCTION

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# INTRODUCTION

Section 7 of Chapter II of Brussels Ibis Regulation deals with prorogation of jurisdiction. Within some limits, the jurisdiction may be chosen by the parties.

This choice can be made:

- by a choice-of-court agreement or by a trust provision, according to Art. 25, or
- by submission, according to Art. 26.

The prorogation by submission displaces the heads of jurisdiction in insurance, consumer contracts and individual contracts of employment matters.

ECJ case *Česká podnikatelská pojišťovna as, Vienna Insurance Group v Michal Bilas* (20/5/2010) regarding Brussels I Regulation.

Paragraph 2 of Art. 26 Brussels Ibis Regulation adds that in matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the defendant, the court shall, before assuming jurisdiction under paragraph 1, ensure that the defendant is informed:

- of his right to contest the jurisdiction of the court and
- of the consequences of entering or not entering an appearance.

The purpose of Art. 26 is in part common to the purpose of Art. 25: to respect freedom of choice.

Where one of the parties is a typically weaker party, can be appropriate to limit freedom of choice or, as it is the case in Art. 26(2), to provide for a duty of information aimed at overcoming the information asymmetry between the parties

# I. THE DUTY OF INFORMATION IN GENERAL

Art. 26(2) prevails over any domestic ordinary provision, but does not state about the obligation of the defendant being assisted by a lawyer or about the language of the information.

The [European Judicial Network in civil and commercial matters](#) established a [non-mandatory standard text](#) containing the information which the court could use to fulfil its obligation to provide to the defendant with the information pursuant to Art. 26(2). This text reads as follows:

“You are being sued before the court of a Member State of the European Union under Regulation 1215/2012.

Under Article 26 of this Regulation the court before which a defendant enters an appearance shall - in principle - have jurisdiction even if jurisdiction cannot be derived from other provisions of the Regulation. This rule, however, does not apply where appearance was entered to contest jurisdiction.

If you are certain that the court has no jurisdiction under the other provisions of the Regulation, you need not respond to the lawsuit in any way. If you have doubts about the issue of jurisdiction, it is advisable that you challenge jurisdiction of the court prior to entering into the subject-matter of the lawsuit”.

This standard text should just be a starting point. The content of the information shall be adjusted to the circumstances of the particular case.

The information shall be provided as early as necessary to allow the defendant to contest the jurisdiction as required to avoid submission under Art. 26(1).

Art. 24(2) of the EU Commission's Proposal provided that the document instituting proceedings or the equivalent document must contain information for the defendant on his right to contest the jurisdiction of the court and the consequences of entering an appearance.

This part of the provision was not adopted in the Regulation. Therefore, there is no duty for the claimant to provide this information for the defendant. The duty of information is incumbent on the court.

## II. SCOPE OF APPLICATION OF THE DUTY OF INFORMATION

The duty of information arises whenever the defendant is a weaker party in matters of insurance, consumer contracts and individual employment contracts or only where all the pre-requisites of application of Sections 3 to 5 are fulfilled?

In case the weaker party assigns its credit and the other party starts negative declaratory proceedings, it is discussed if there is a duty of information regarding the assignee.

A particular situation arises where there is an invalid choice of court agreement in favor of the seised court. The defendant can be misled by this agreement and submit to the jurisdiction of the court in the belief that it has jurisdiction by virtue of the agreement.

In my opinion, if there is the risk of the defendant being misled in accepting the jurisdiction of the seised court by an invalid choice of court agreement within the scope of application of Art. 26(2), there is a reinforced duty of information by the court.



### III. CONSEQUENCES OF NON-COMPLIANCE WITH ART. 26(2)

What are the consequences of court failing to comply with the duty of information under Art. 26(2)?

The consequences are not specified in the Regulation and there are major divergences between the authors.

According to the prevailing view, if the information is not provided there is no prorogation of court by submission. The decision of the court may be appealed if an appeal can be lodged on the ground of lack of jurisdiction.

If the decision can not be appealed or the appeal is rejected is there a ground for refusal of recognition?

The authors also diverge on this issue, which has not yet been ruled by the ECJ.

## IV. FINAL REMARKS

Art. 26(2) prevails over any domestic ordinary provision, but it is not evident that it displaces any ordinary provision providing for an equivalent duty of information regarding defendants outside its scope of application.

It is recommended that in an amendment of the Regulation the consequences of the failure to fulfill the duty of information are specified.

In my opinion, for the time being it is preferable to leave to the courts, and namely to the ECJ, the task of materializing the content of the duty of information according to different types of situations.