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**EU CASE LAW**  
DEVELOPMENTS AND INSIGHT

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February 2018

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## INTRODUCTION

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Welcome to Uría Menéndez's Developments and Insight newsletter on EU case law. In our firm we understand the impact that the decisions of the Court of Justice of the European Union can have on the day-to-day activities of companies, governments, workers and citizens. The broad jurisdiction of the Court of Justice, together with the increasing powers of the EU, requires legal practitioners to pay very close attention to the developments currently taking place in EU courts.

The array of topics on which the Court of Justice renders crucial judgments is broad. In order to facilitate a better overall update and understanding of the latest developments and practical implications of the case-law, a team of Uría Menéndez lawyers will periodically compile and examine the most important decisions, providing you with an immediate insight into their implications and potential effects.

Developments in the Court of Justice do not only concern the judgments rendered in individual cases. Changes in the institutional infrastructure of EU courts are also a key issue. Thus, this newsletter will also focus on recent events that concern the EU court system and have a direct impact on companies, governments or organizations that regularly litigate in these courts.

We hope that this concise newsletter provides you with valuable information when dealing with the many intricacies of EU law. In Uría Menéndez we are aware of the key role of EU law for our clients and we look forward to assisting you with this contribution.



Daniel Sarmiento  
EU Law and Litigation

## SERVICES DIRECTIVE –PURELY INTERNAL SITUATIONS – RESTRICTION ON RETAIL TRADE IN GEOGRAPHICAL ZONES

🔗 Judgment of the Court of 30 January 2018 in joined cases C-360/15 and C-31/16 X BV and Visser Vastgoed Beleggingen

**The rules of freedom of establishment in the Services Directive apply to purely internal situation with no transfrontier link**

**The Services Directive applies to municipal measures for the protection of the urban environment, but they must not interfere disproportionately in the ability of an undertaking to establish itself in the area**

The Supreme Court and the State Council of the Netherlands made two preliminary references to the Court of Justice on the interpretation of the Services Directive (2006/123/EC). The referring courts questioned the applicability of the Directive to municipal regulations in cases with no transfrontier links. Also, the references concerned the interpretation of the Services Directive in the field of urban development. The referring courts questioned whether a zoning plan prohibiting the activity of retail trade in goods, other than bulky goods, in geographical zones situated outside the city centre, breached the Services Directive.

- First, the Court ruled that the activity of retail trade in goods constitutes a 'service' for the purposes of the Services Directive, even if the transaction concerns a good and not a service *stricto sensu*.
- Second, the Court stated that the Services Directive applies to purely internal situations, irrespective of whether a transfrontier link exists or not.
- Third, the Court confirmed that measures of urban development are subject to the Services Directive, but can be justified in the interests of town and country planning.

This is a ground-breaking judgment that will have significant practical implications in a broad array of businesses. The rules on freedom of establishment of the Services Directive are confirmed to be applicable in purely internal situations. Thus, local undertakings can rely directly against public authorities on the grounds of the Directive, irrespective of the existence of a transfrontier link. The judgment will enhance the effectiveness of the Directive, particularly in Member States with internal territorial markets that can restrict the freedom of establishment of foreign but also of local undertakings.

In addition, the judgment confirms the applicability of the Services Directive to planning rules on urban development, particularly at a time of growing concerns of local authorities with the growth of tourism as a result of online platforms and shared economy activities.

## COMPLIANCE – PREVENTION OF MONEY LAUNDERING

🔗 Judgment of the Court of 17 January 2018 in case C-676/16 Corporate Companies

**Directive 2005/60/EC against money laundering and terrorist financing applies to an entity or person whose commercial activity consists in selling companies which it formed without the request on the part of its potential clients, for the purposes to sale to those clients**

Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing applies, *inter alia*, to trust and company service providers that form companies or other legal persons. Following a dispute between a company (Corporate Companies) and the Czech Ministry of Finance over the subjective scope of application of the Directive, a Czech court requested a preliminary ruling to the Court of Justice.

- The Court declares that the Directive does not only apply to natural or legal persons that are hired by a third party to form a company in the name and on behalf of such third party. It also applies to persons, such as Corporate Companies, whose commercial activity consists in selling companies which it formed itself without any prior request on the part of its potential clients, for the purposes of sale to those clients, by means of a transfer of its shares in the capital of the company being sold.
- The Court considers that otherwise the aim of preventing the use of the financial system for the purposes of money laundering and terrorist financing would be put at risk. The judgment considers that forming a company is in itself a transaction which, by its very nature, presents a high risk of money laundering and terrorist financing.

The judgment of the Court confirms that the subjective scope of the Directive cannot be artificially limited based on a purely formalistic interpretation of the rule. Indeed, both the wording of the Directive and its aim, i.e. fighting against money laundering and terrorist financing, clearly suggest that the Directive should apply to entities such as Corporate Companies.

## COMPETITION – RESTRICTIONS BY OBJECT – MEDICINAL PRODUCTS

🔗 Judgment of the Court of 23 January 2018 in case C-179/16 *F. Hoffmann-La Roche and others*

**An arrangement concerning the dissemination of misleading information relating to adverse reactions resulting from the use of a medicinal product may constitute a restriction by object. Such arrangement, in principle, cannot be ancillary to another broader and pro-competitive agreement**

The Italian Competition Authority fined Roche and Novartis for entering into a market-sharing agreement. Such agreement consisted in the dissemination of opinions which could give rise to public concern regarding the safety of a product distributed by Roche and originally intended to treat cancer (Avastin), but which was used to treat eye diseases as well. This product, in practice, competed with a product distributed by Novartis and licensed by Roche which was also used to treat eye diseases (Lucentis). The decision of the authority was challenged and the Italian court requested a preliminary ruling.

- The Court considers that Avastin and Lucentis might be part of the same product market. In this regard, it declares that a relevant market may include, in addition to the medicinal products authorised for the treatment of a disease, another medicinal product whose market authorization does not cover the treatment, but which is used for that purpose. Hence, such products can be considered substitutable for the purposes of article 101 of the TFEU.
- The Court indicates that an agreement put in place between two undertakings marketing two competing products, which concerns the dissemination, in a context of scientific uncertainty, to the regulator, healthcare professionals and the general public of misleading information relating to adverse reactions resulting from the use of one of those products might restrict competition by object. In that case, the Court took into account that such information, given the characteristics of the medicinal products sector, would encourage doctors to refrain from prescribing the product.
- The Court declared that such an arrangement could not be considered to be ancillary to a broader, pro-competitive, agreement. Among other things, it indicated that the agreement had not been designed to restrict the commercial autonomy of the parties to the licensing agreement, but rather the conduct of third parties.

This judgment seems to support an expansive view of the “by object” category. It remains to be seen how this doctrine will apply to other sectors. It also raises questions as to in which specific circumstances a medicinal product authorized for the treatment of a disease can compete with one that is used outside the limits of its market authorization

## EQUAL TREATMENT AT WORK – DISMISSAL – WORKERS WITH DISABILITIES

🔗 Judgment of the Court of 18 January 2018 in case C-270/16 *Carlos Enrique Ruiz Conejero v Ferroservicios Auxiliares SA, Ministerio Fiscal*

**Dismissal on the basis of intermittent albeit justified absence may indirectly discriminate against workers with disabilities, unless appropriate and necessary to attain the legitimate aim of combating absenteeism.**

A Spanish labour court questioned whether Article 52(d) of the Spanish Worker’s Statute, which allows for termination of an employment contract on the basis of intermittent albeit justified absences, is contrary to Directive 2000/78/EC, on equal treatment in employment and occupation. The reason is that Article 52(d) applies in the same way to persons with disabilities as to persons without disabilities while the former are more prone to intermittent absences.

- The Court considered that Article 52(d) is liable to place disabled workers at a disadvantage and so to bring about a difference of treatment indirectly based on disability within the meaning of Directive 2000/78 because a worker with a disability is more exposed to the risk of being absent by reason of an illness.
- However, the Court held that it is for the referring court to decide whether the difference introduced by Article 52(d) is objectively justified as appropriate and necessary to achieve the legitimate aim of combating absenteeism at work, by pondering over the adverse effects on workers with disabilities and companies and ensuring that such provision does not extend to merely sporadic absences.

The referring Spanish labour court is granted much leeway for its decision on the merits, but the Court already hints at the important role to be played by national law on the rights of persons with disabilities and their social inclusion, which nuance the obligation on employers to take appropriate measures vis-à-vis workers with disabilities by excepting the scenario in which an excessive burden would be placed on the former. For more information, see our [labour law newsletter](#).

## TERRITORIAL SCOPE OF EU LAW – FREE MOVEMENT OF GOODS – GIBRALTAR

🔗 Judgment of the Court of 23 January 2018 in case C-267/16 *Albert Buhagiar and Others v Minister for Justice*

**The exceptions to the applicability of EU law in Gibraltar under the UK's Accession Treaty cannot be interpreted so restrictively that certain provisions of Directive 91/477/EC, on hunting and sport target-shooting, would extend to such territory**

The Supreme Court of Gibraltar referred several preliminary references of interpretation of the UK's Accession Treaty. The references dealt with the scope of application of freedom of goods to Gibraltar, and whether a Directive that concerns both goods and services can be subject to the exclusion of free movement of goods that applies to Gibraltar as a result of the UK's Accession Treaty.

- Firstly, the Court ruled that the UK's Accession Treaty excludes the applicability in Gibraltar of Directive 91/477/EC, which introduces an authorization system to allow hunters and sport target shooters to move between Member States. According to the Court, the main objective of Directive 91/477/EC is not to facilitate the freedom to provide services and the free movement of persons as regards hunting and target shooting, but to set up a framework for the free movement of certain goods (i.e. firearms for civilian use) within the EU.
- Secondly, the Court rejected a strict interpretation of the rule that excludes the application of free movement of goods in Gibraltar, on the grounds that such interpretation would entail a more limited scope of the free movement of goods in the relations with Gibraltar than that resulting from the Treaty on the Functioning of the European Union ("TFEU").
- Thirdly, the Court underlined that Directive 91/477/EC has its legal base on Article 114 TFEU, a legal basis for harmonisation in the internal market, given that it is intended to ensure approximation of laws, regulations and administrative provisions of the Member States as regards free movement of goods (i.e. firearms for civilian use).

This judgment provides useful criteria for the interpretation of accession treaties, by ruling that provisions on fundamental freedoms in the TFEU cannot be construed more restrictively in light of an Accession Treaty. Thus, the judgment confirms the existence of a certain hierarchy between two sources of EU primacy law: founding Treaties and accession treaties, in a way that allows the latter to depart from founding Treaties.

## JURISDICTION IN RESPECT OF CONTRACTS – DEFINITION OF CONSUMER

🔗 Judgment of the Court of 25 January 2018 in case C-498/16 *Schrems*

**A user shall be considered a consumer if she predominately makes a non-professional use of a service**

**In that case, the user can benefit from the consumer forum and bring proceedings in the Member State in which she is domiciled**

Mr Schrems, a resident in Austria, brought legal proceedings against an online social network before the Austrian courts. He claimed that the defendant had infringed data-protection provisions in relation to his private account and to the accounts of seven other users who had assigned to him their claims. The defendant argued that the Austrian courts did not have international jurisdiction, since - in its view - the claimant could not rely on the rule of EU law (at that time, Regulation 44/2001) that allows consumers to bring an action against a foreign contracting partner in their own place of domicile. Indeed, Mr Schrems used the network also for professional purposes. In this context, the Austrian Court requested a preliminary ruling.

- Firstly, the Court of Justice ruled that a user of services may, in bringing an action, rely on her status as a consumer (and, therefore, benefit from the consumer forum) if she predominately uses such services for non-professional purposes. Neither the expertise which that user may acquire in the field covered by those services nor her assurance given for the purposes of representing the rights and interests of users of those services can deprive her of the status of "consumer".
- Secondly, the Court of Justice considered that the consumer forum cannot be invoked in proceedings brought by a consumer with a view to asserting, in the courts of the place where she is domiciled, not only her own claims but also claims assigned by other consumers. Indeed, the Court indicates that the consumer forum was established in order to protect the consumer as a party to the contract in question. Therefore, the consumer is protected only in so far as she is the applicant or defendant in proceedings.

This judgment confirms that using services partly for professional activities does not automatically preclude the use of the consumer forum. However, assessing whether a user makes a predominately non-professional use of a service or not is a case-specific analysis. This results in considerable legal uncertainty for both companies and users.

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## BREXIT AND THE COURT OF JUSTICE

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According to the European Commission's First Draft of the Transitional Arrangements in the Withdrawal Agreement of the UK, the Court of Justice "shall have jurisdiction as provided for in the Treaties" during the transitory period until 31 December 2020. Therefore, the UK would be bound by the Court of Justice's rulings until the said date, and its courts will have the power to make preliminary references to the Court of Justice.

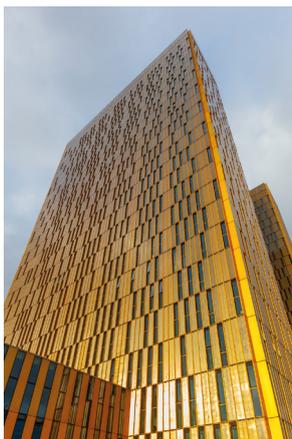
In addition, the Commission has proposed the introduction of a new remedy, a "mechanism" allowing the Union to suspend "certain benefits deriving for the United Kingdom from participation in the internal market" during the transitory period. This mechanism would be construed as a remedy allowing the matter to be referred to the Court of Justice, similar to an infringement procedure, but with the consequence of suspending the benefits deriving from having access to the internal market during the transitory period.

For further information, see the official documents [here](#).

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## REFORM OF THE COURT OF JUSTICE AND OF THE GENERAL COURT

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The Court of Justice of the EU has submitted to the Council its first Report on the reform introduced by Regulation 2015/2422, which doubled the size of the General Court and abolished the Civil Service Tribunal. In this Report, the Court of Justice is confronted with the issue of a partial transfer of its preliminary reference jurisdiction to the General Court. The Report states the following points:

- Due to additional upcoming reforms, and to the intense dialogue with national courts through the preliminary reference procedure, it is suggested that any discussion on transfers of preliminary reference jurisdiction to the General Court should be postponed.
- In addition, the Court of Justice announces that before the end of 2018 a reform of its Statute and of the Rules of Procedures of both the Court of Justice and the General Court will be submitted to the Council and the European Parliament. These reforms will mostly concern the handling of direct actions at the General Court and appeals at the Court of Justice, but no details as to the content of such reforms were anticipated.

For further information, see the official documents [here](#).

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CONTACT LAWYERS

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**Jaime Folguera**  
EU and Competition Law  
+34915860657  
jaime.folguera@uria.com



**Raúl Boo**  
Employment Law  
+34963531779  
raul.boo@uria.com



**Daniel Sarmiento**  
EU Law and Litigation  
+34915860657  
daniel.sarmiento@uria.com



**Edurne Navarro**  
EU and Competition Law  
+3226396464  
edurne.navarro@uria.com



**Gillian Cahill**  
EU Law and International Arbitration  
+34915870990  
gillian.cahill@uria.com



**Manuel Vélez**  
Compliance and Public Law  
+34915860531  
manuel.velez@uria.com

**BARCELONA**  
**BILBAO**  
**LISBOA**  
**MADRID**  
**PORTO**  
**VALENCIA**  
**BRUXELLES**  
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