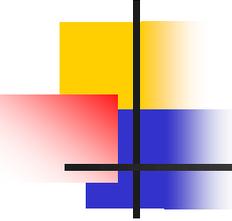


Regulation 1215/2012: Provisional, including protective measures

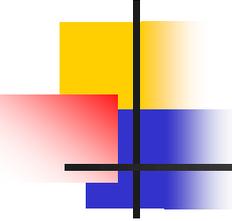
PhD Diana Ungureanu,
NIM trainer





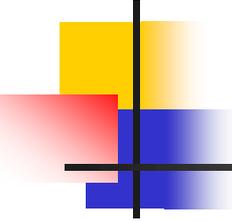
Definition

- include, for example, protective orders aimed at obtaining information or preserving evidence - Articles 6 and 7 of Directive 2004/48/EC on the enforcement of intellectual property rights
- It should not include measures which are not of a protective nature, such as measures ordering the hearing of a witness. (Preamble, par.25)



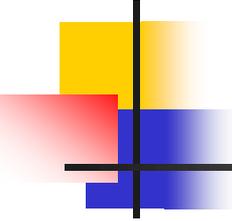
Art.35. Conditions. A real connection

- Article 35: unchanged: *Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter.*
- **C-391/95 Van Uden-** there has to be a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the State of the court before which those measures are sought



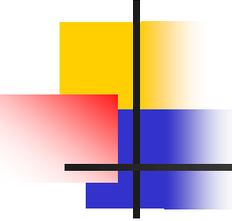
Provisionary

- **Case C-261/90 Reichert** -The measures have to be provisional , not – An action provided for by national law, such as the **action paulienne** in French law, whereby a creditor seeks to obtain the revocation in regard to him of a transfer of rights in rem in immovable property by his debtor in a way which the creditor regards as being in fraud of his rights
- **C-391/95 Van Uden-** Interim payment of a contractual consideration does not constitute a provisional measure unless, first, **repayment** to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure sought **relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made.**



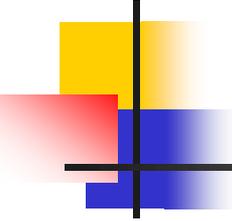
Recognition/enforcement

- **New Regulation:** - R/E of judgments limited to those taken by a court which has substantial jurisdiction under the Regulation: Article 2(a) and recital 33:
- Where provisional, including protective, measures are ordered by a court **having jurisdiction as to the substance of the matter**, their free circulation should be ensured under this Regulation. (....)
- Where provisional, including protective, measures are ordered by a court of a Member State **not having jurisdiction as to the substance of the matter**, the effect of such measures should be confined, under this Regulation, to the territory of that Member State.



Adversary proceedings

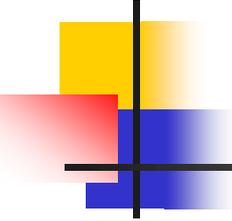
- **Case 125/79 Denilauler:** Judicial decisions authorizing provisional or protective measures, **which are delivered without the party against which they are directed having been summoned to appear** and which are intended to be enforced without prior service do not come within the system of recognition and enforcement; only provisional or protective measures ordered in the State of origin pursuant to adversary proceedings -subject of recognition/enforcement
- Slight amendment of Denilauler criteria: recital 33: Where provisional, including protective, measures are ordered by a court having jurisdiction as to the substance of the matter, their free circulation should be ensured under this Regulation.
- However, provisional, including protective, measures which were ordered by such a court **without the defendant being summoned to appear should not be recognised** and enforced under this Regulation **unless the judgment containing the measure is served on the defendant prior to enforcement.**
- This should not preclude the recognition and enforcement of such measures **under national law.**



The standard

C-394/07, Marco Gambazzi - the court of the State in which enforcement is sought may take into account, with regard to the public policy clause referred to in that article, the fact that the court of the State of origin ruled on the applicant's claims **without hearing the defendant**, who entered appearance before it but **who was excluded from the proceedings** by order on the ground that he had not complied with the obligations imposed by an order made earlier in the same proceedings, if, following a comprehensive assessment of the proceedings and in the light of all the circumstances, it appears to it that that exclusion measure constituted a manifest and disproportionate infringement of the defendant's right to be heard.

C-559/14, Meroni- **Recognition and enforcement of provisional and protective measures** - the recognition and enforcement of an order issued by a court of a Member State, without a prior hearing of a third person whose rights may be affected by that order, cannot be regarded as manifestly contrary to public policy in the Member State in which enforcement is sought or manifestly contrary to the right to a fair trial within the meaning of those provisions, **in so far as that third person is entitled to assert his rights before that court.**



Relation with exclusive jurisdiction

- **C-616/10, Solvay**- Art.24 al.4- compatible with art.35- interim measures
- **Article 22(4) of R. 44/2001** -not precluding, the application of **Article 31**- constitute 'special provisions' as opposed to the 'general provisions' in Section 1 of that chapter
- there is nothing to indicate that either of the provisions at issue can be regarded as general or special in relation to the other
- the court before which the interim proceedings have been brought does not make a final decision on the validity of the patent invoked but makes an assessment as to how the court having jurisdiction under Article 22(4) of the regulation would rule in that regard, and will refuse to adopt the provisional measure sought if it considers that there is a reasonable, non-negligible possibility that the patent invoked would be declared invalid by the competent court.
- no risk of conflicting decisions, since the provisional decision taken by the court before which the interim proceedings have been brought will not in any way prejudice the decision to be taken on the substance by the court having jurisdiction under Article 22(4) of R. 44/2001