



Reports of Cases

OPINION OF ADVOCATE GENERAL

RICHARD DE LA TOUR

delivered on 28 April 2022¹

Case C-604/20

ROI Land Investments Ltd

v

FD

(Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany))

(Reference for a preliminary ruling – Judicial cooperation in civil matters – Jurisdiction and the recognition and enforcement of judgments – Regulation (EU) No 1215/2012 – Articles 17 and 21 – Regulation (EC) No 593/2008 – Applicable law – Article 6 – Individual contract of employment between an employer and an employee – Letter of comfort between that employee and a third party company guaranteeing performance of that employer’s obligations towards the employee – Action based on that letter of comfort – Action relating to a contract of employment – Concept of ‘employer’ – Concept of ‘trade or profession’/‘professional activities’ – Concept of ‘consumer’ – Conditions in which national rules of jurisdiction apply)

I. Introduction

1. This request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany) concerns the interpretation of Article 6(1), Article 17(1) and Article 21(1)(b)(i) and (2) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters² and of Article 6(1) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).³

2. The request has been made in proceedings between FD, who is domiciled and works in Germany, and ROI Land Investments Ltd, a company established in Canada, concerning that company’s refusal to pay the salary owed to FD by an insolvent subsidiary, R Swiss AG, under a letter of comfort entered into between FD and ROI Land Investments in connection with the transfer of FD’s contract of employment to R Swiss.

¹ Original language: French.

² OJ 2012 L 351, p. 1.

³ OJ 2008 L 177, p. 6 (‘Rome I Regulation’).

3. The novel circumstances of this case, compared with those on which the Court has based its case-law on jurisdiction in cross-border disputes concerning employment contracts, has led the referring court to entertain doubts, in essence, in the light of the rules of jurisdiction that protect employees and consumers, as to the interpretation of the concept of ‘employer’ in respect of individual contracts of employment and the concept of ‘trade or profession’/‘professional activities’ in relation to a contract concluded by a consumer, where the jurisdiction of a German court may be based on one of those concepts.

4. I will therefore set out below why I am of the view that, fundamentally:

- A company which, because it has a direct interest in the proper performance of an employee’s employment contract with a different company in the same group, has entered into an agreement with that employee which forms an integral part of that contract and under which it guarantees, inter alia, that employee’s remuneration, is also an ‘employer’ within the meaning of Section 5 of Chapter II of Regulation No 1215/2012;
- The rules of jurisdiction under national law do not apply where the conditions under which Article 21(2) of that regulation applies are satisfied; and
- In the event that the dispute does not fall within the scope of that section, an employee in the situation of the employee in the present case is not a consumer within the meaning of the Rome I Regulation and Regulation No 1215/2012.

II. Legal context

A. Regulation No 1215/2012

5. In this Opinion, I will refer to recitals 14, 15 and 18 of Regulation No 1215/2012.

6. Article 6(1) of that regulation provides:

‘If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State.’

7. Article 17(1) of that regulation, which falls within Section 4 of Chapter II, on ‘Jurisdiction over consumer contracts’, provides:

‘In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this section, without prejudice to Article 6 ... if:

...

- (c) ... 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 States including that Member State, and the contract falls within the scope of such activities.’

8. Article 18 of that regulation, which is also found in that section, states in paragraph 1 thereof:

‘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, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.’

9. Section 5 of Chapter II of Regulation No 1215/2012, on ‘Jurisdiction over individual contracts of employment’, includes Articles 20 and 21. Article 20(1) provides:

‘In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 6 ...’.

10. Article 21 of that regulation states:

‘1. An employer domiciled in a Member State may be sued:

...

(b) in another Member State:

(i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or

...

2. An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1.’

B. The Rome I Regulation

11. In this Opinion, I will refer to recital 7 of the Rome I Regulation.

12. Article 6 of the Rome I Regulation, on ‘Consumer contracts’, provides in paragraph 1 thereof:

‘Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or

(b) by any means, directs such activities to that country or to several countries including that country,

and the contract falls within the scope of such activities.’

III. The facts in the main proceedings and the questions referred

13. ROI Land Investments is a real estate company established in Canada. FD, who resides in Germany, worked for ROI Land Investments from September 2015 as ‘deputy vice president investors relations’ on the basis of a ‘service agreement’.

14. Due to uncertainty as to the nature of the contractual links between them, those two parties decided to ‘transfer’ their contractual relationship to a new Swiss company to be created for sales in Europe.⁴ In November 2015, they arranged to terminate the service agreement with retroactive effect. A letter accompanying that arrangement stated that FD had signed it subject to the condition that an equivalent arrangement would be concluded in relation to an executive management contract in respect of the Swiss company that was to be created.

15. On 15 January 2016, the shares in R Swiss, which had been created the previous day in accordance with Swiss law, were transferred to the president of ROI Land Investments and future president of the Board of Directors of R Swiss. In April 2016, R Swiss transferred those shares to R D Canada Inc., a wholly owned subsidiary of ROI Land Investments.

16. On 12 February 2016, FD entered into a written contract of employment with R Swiss relating to his activities as a director and setting the amount of his starting bonus and salary. The same day, FD and ROI Land Investments signed a document entitled ‘patron agreement’, which is, according to the terminology used by the parties, an expression equivalent to ‘letter of comfort’ (‘the letter of comfort’), which reads as follows:

‘Clause 1

R⁵ has established a subsidiary, R Swiss AG, for sales in Europe. The director is responsible for the executive management of that company. In accordance with that assumption, R declares the following:

Clause 2

R has full responsibility for the fulfilment of the obligations relating to the contracts of R Swiss AG based on the cooperation of its director with R Swiss AG.’

17. That letter of comfort does not contain a jurisdiction clause or choice of applicable law clause. FD’s habitual place of work in relation to ROI Land Investments was Stuttgart (Germany).

18. On 11 July 2016, ROI Land Investments dismissed FD. By judgment of 2 November 2016, the Arbeitsgericht Stuttgart (Labour Court, Stuttgart, Germany), hearing proceedings brought by FD, made a definitive finding that the dismissal was ineffective. It also ordered R Swiss to pay FD USD 255 000 (approximately EUR 230 000) as his starting bonus and USD 212 500 (approximately EUR 192 000) as remuneration for April to August 2016, as agreed in the employ-

⁴ The order for reference states that according to the findings of the Landesarbeitsgericht (Higher Labour Court, Germany), which ROI Land Investments has not challenged, the ‘service relationship’ was ‘moved’ to R Swiss purely for ‘tax optimisation’ reasons, and that FD’s activity consisting of acquiring investors for its real estate projects on the European market, including Germany, had not changed.

⁵ According to the findings of the referring court, this is ROI Land Investments.

ment contract. R Swiss has not paid those amounts to FD. At the beginning of March 2017, insolvency proceedings were brought against R Swiss under Swiss law. In May 2017, those proceedings were discontinued on the ground of a lack of assets.⁶

19. FD then brought proceedings against ROI Land Investments under the letter of comfort, seeking payment of all salary owed to him by R Swiss, before the Arbeitsgericht Stuttgart (Labour Court, Stuttgart), which he considers to have jurisdiction by virtue of – at least – the rules of jurisdiction in respect of consumer contracts under Regulation No 1215/2012.

20. The judgment of the Arbeitsgericht Stuttgart (Labour Court, Stuttgart) finding itself not to have international jurisdiction was overturned by the Landesarbeitsgericht (Higher Labour Court, Germany) which based its decision on FD's status as a consumer.

21. In the context of the appeal on a point of law brought by ROI Land Investments to the Bundesarbeitsgericht (Federal Labour Court, Germany), in order to determine whether German substantive law applies to the letter of comfort, that court enquires whether the German courts have international jurisdiction to hear FD's action, under Regulation No 1215/2012, by virtue of the specific rules of jurisdiction either for employment contracts or for consumer contracts and, if those for consumer contracts apply, whether FD must be regarded as a 'consumer' within the meaning of the Rome I Regulation.

22. The referring court states in that respect, first, that, as a unilateral promise, the letter of comfort is comparable in German law to an assurance and that it is not disputed, irrespective of the law applicable, that ROI Land Investments is liable for performance of R Swiss's obligations not only where the latter company is insolvent.

23. The referring court then states that ROI Land Investments is not, by virtue of that letter of comfort, subrogated to R Swiss's legal position as an employer and that the authority to issue instructions to FD was exercised by R Swiss's executive director.

24. Lastly, that court emphasises the peculiarity of the dispute, namely that, had the letter of comfort not existed, FD and R Swiss would not have concluded an employment contract, and that the duties that FD carried out previously at ROI Land Investments, the parent company, did not change after his transfer to its subsidiary, R Swiss, which was created for its sales in Europe.

25. Furthermore, that court seeks clarification of the relationship between the provisions of Regulation No 1215/2012 and national law, in view of the reservation in Article 6(1) of that regulation concerning application of Article 21(2) of the same regulation.

26. The Bundesarbeitsgericht (Federal Labour Court) is also uncertain whether Article 17(1) of Regulation No 1215/2012, which applies to consumer contracts, may be interpreted as meaning that the letter of comfort can be described as a contract that the applicant, as an employee, has concluded for the purpose of his trade or profession. Specifically, the referring court enquires whether the concept of 'professional activities' includes only self-employed activities.

⁶ The order for reference does not state whether FD satisfies the requirements to be eligible for the guarantee scheme established in Germany under Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (OJ 2008 L 283, p. 36).

27. In those circumstances, the Bundesarbeitsgericht (Federal Labour Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) Is Article 6(1) read in conjunction with Article 21(2) and Article 21(1)(b)[(i)] of Regulation [No 1215/2012] to be interpreted as meaning that an employee can sue a legal person – which is not his or her employer and which is not domiciled in a Member State within the meaning of Article 63(1) of [Regulation No 1215/2012] but which, by virtue of a letter of comfort, is directly liable to the employee for claims arising from an individual contract of employment with a third party – in the courts for the place where or from where the employee habitually carries out his or her work in the employment relationship with the third party or in the courts for the last place where he or she did so, if the contract of employment with the third party would not have come into being in the absence of the letter of comfort?
- (2) Is Article 6(1) of [Regulation No 1215/2012] to be interpreted as meaning that the reservation in respect of Article 21(2) of [Regulation No 1215/2012] precludes the application of a rule of jurisdiction existing under the national law of the Member State which allows an employee to sue a legal person, which, in circumstances such as those described in the first question, is directly liable to him or her for claims arising from an individual contract of employment with a third party, as the “successor in title” of the employer in the courts for the place where the employee habitually carries out his or her work, if no such jurisdiction exists under Article 21(2) read in conjunction with Article 21(1)(b)(i) of [Regulation No 1215/2012]?
- (3) If the first question is answered in the negative and the second question in the affirmative:
 - (a) Is Article 17(1) of [Regulation No 1215/2012] to be interpreted as meaning that the concept of “professional activities” includes paid employment in an employment relationship?
 - (b) If so, is Article 17(1) of [Regulation No 1215/2012] to be interpreted as meaning that a letter of comfort on the basis of which a legal person is directly liable for claims of an employee arising from an individual contract of employment with a third party constitutes a contract concluded by the employee for a purpose which can be regarded as being within the scope of his or her professional activities?
- (4) If, in answer to the above questions, the referring court is deemed to have international jurisdiction to rule on the dispute:
 - (a) Is Article 6(1) of [the Rome I Regulation] to be interpreted as meaning that the concept of “professional activities” includes paid employment in an employment relationship?
 - (b) If so, is Article 6(1) of the Rome I Regulation to be interpreted as meaning that a letter of comfort on the basis of which a legal person is directly liable to an employee for claims arising from an individual contract of employment with a third party constitutes a contract concluded by the employee for a purpose which can be regarded as being within the scope of his or her professional activities?’

28. FD and the European Commission submitted written observations to the Court.

IV. Analysis

29. The Bundesarbeitsgericht (Federal Labour Court) has requested a preliminary ruling by the Court in an action brought by FD against ROI Land Investments, a company which is not domiciled in a Member State. The jurisdiction of the German courts is governed by national law only if one of the conditions laid down in Article 6(1) of Regulation No 1215/2012 is satisfied. Since FD's action is based on an agreement guaranteeing the payment of salary owed to him entered into in connection with an employment relationship and since the earlier court hearing the matter found itself to have jurisdiction, holding that FD was a consumer, the referring court's doubts correctly focus on the scope of Article 18(1) and Article 21(2) of that regulation, to which Article 6 of that regulation refers.

30. Accordingly, in this case, the referring court seeks to determine primarily whether the German courts may have jurisdiction under the protective measures in Chapter II, Section 5 of Regulation No 1215/2012, on individual contracts of employment, or Section 4 of that chapter, on consumer contracts. If either provision in that section is applicable, that court enquires as to the scope of the concept of 'consumer' in the context of the Rome I Regulation, in order to determine whether German substantive law applies to the letter of comfort.

31. In view of those doubts, which relate to two regulations, one of which concerns jurisdiction and the other the law applicable to contractual obligations, it is appropriate to set out a number of general rules, some of which are referred to in the Court's case-law.

32. First, since Regulation No 1215/2012 repealed and replaced Regulation (EC) No 44/2001,⁷ the Court's interpretation of the provisions of the latter regulation also applies to Regulation No 1215/2012, where the provisions of those two instruments of EU law may be regarded as equivalent.⁸

33. The same is true of the rules of jurisdiction relating to employment contracts, which do not derive from the provisions of the 1968 Brussels Convention in its original version⁹ but were nevertheless introduced in 1989, and then reproduced¹⁰ and supplemented to form a separate section of the regulations replacing the 1968 Brussels Convention. However, it was Regulation No 1215/2012 that added an international dimension to the rules of jurisdiction for both consumer contracts and employment contracts. The context of this request for a preliminary

⁷ Council Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

⁸ See, inter alia, judgment of 16 November 2016, *Schmidt* (C-417/15, EU:C:2016:881, paragraph 26 and the case-law cited) and, in relation to consumer contracts, judgment of 3 October 2019, *Petruchová* (C-208/18, EU:C:2019:825, paragraph 38). That principle is recalled in recital 34 of Regulation No 1215/2012 in respect of the regulations replacing the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32), as amended by the Convention of 9 October 1978 (OJ 1978 L 304, p. 1), by the Convention of 25 October 1982 (OJ 1982 L 388, p. 1) and by the Convention of 26 May 1989 (OJ 1989 L 285, p. 1) ('the 1968 Brussels Convention').

⁹ For a detailed summary of the case-law and legislative history of those provisions, see Gaudemet-Tallon, H. and Ancel, M.-É., *Compétence et exécution des jugements en Europe – Règlements 44/2001 et 1215/2012, Conventions de Bruxelles (1968) et de Lugano (1998 et 2007)*, 6th ed., L.G.D.J., Paris, 2018, p. 457 et seq., and Grušić, U., *The European Private International Law of Employment*, Cambridge University Press, Cambridge, 2015, pp. 58 to 62.

¹⁰ See concordance between Article 5(1) of the 1968 Brussels Convention and Article 19 of Regulation No 44/2001 and Article 21 of Regulation No 1215/2012. A table of correspondences for those provisions can be found at: <http://www.lynxlex.com/sites/default/files/files/Tableau%20panoramique%20de%20Bruxelles%20C3%A0%20Lugano.pdf>.

ruling is therefore one in which application of the rules of jurisdiction under Article 18(1) and Article 21(1)(b) of that regulation has been extended to include a defendant domiciled in a third country.¹¹

34. Moreover, the provisions of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Lugano on 30 October 2007¹² that are, in essence, identical to those of Regulation No 1215/2012, Regulation No 44/2001 and the 1968 Brussels Convention, are interpreted consistently with the provisions of those latter instruments.¹³

35. Lastly, as indicated in recital 7 of the Rome I Regulation, the substantive scope and enacting provisions of that regulation should be consistent with respect to Regulation No 44/2001 and, in so far as Regulation No 44/2001 was repealed and replaced by Regulation No 1215/2012, that objective of ensuring consistency also applies to that regulation.¹⁴

36. Secondly, the meaning and scope of terms for which EU law provides no definition must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part.¹⁵ Where there is divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.¹⁶

37. Thirdly, the rules of jurisdiction applicable in the present case, those now set out in Sections 4 and 5 of Chapter II of Regulation No 1215/2012, are derogations from the general rule that jurisdiction lies with the courts of the Member State in which the defendant is domiciled, contained in Article 4(1) of that regulation. Those rules must, therefore, be interpreted strictly in a manner not going beyond the situations expressly envisaged by that regulation,¹⁷ without prejudice to a number of overriding objectives laid down by the legislature.¹⁸

38. The foregoing having been established, I now come to examine in detail the conditions for Article 17(1) and Article 21(1)(b)(i) of Regulation No 1215/2012 to apply, in the order of the questions posed by the referring court in the light of the specific circumstances of the main proceedings.

¹¹ Under Article 21(1)(b) of that regulation, an employee can therefore sue his employer in a Member State before the courts for the place where the employee habitually carries out his work or, in certain circumstances, for the place of the business through which he was engaged.

¹² That convention was approved on behalf of the European Community by Council Decision 2009/430/EC of 27 November 2008 (OJ 2009 L 147, p. 1) ('the Lugano II Convention').

¹³ See, to that effect, judgment of 30 September 2021, *Commerzbank* (C-296/20, EU:C:2021:784, paragraph 33 and the case-law cited).

¹⁴ See judgments of 14 September 2017, *Nogueira and Others* (C-168/16 and C-169/16, EU:C:2017:688, paragraph 55), and of 8 May 2019, *Kerr* (C-25/18, EU:C:2019:376, paragraph 36).

¹⁵ See judgment of 22 April 2021, *Austrian Airlines* (C-826/19, EU:C:2021:318, paragraph 22).

¹⁶ See, among others, judgment of 10 December 2020, *Personal Exchange International* (C-774/19, EU:C:2020:1015, paragraph 27) ('the judgment in *Personal Exchange International*').

¹⁷ See, specifically, in respect of consumer contracts, judgment of 19 January 1993, *Shearson Lehman Hutton* (C-89/91, EU:C:1993:15, paragraph 16 and the case-law cited), and the judgment in *Personal Exchange International* (paragraph 24). For employment contracts, see judgment of 22 May 2008, *Glaxosmithkline and Laboratoires Glaxosmithkline* (C-462/06, EU:C:2008:299, paragraph 28 and the case-law cited).

¹⁸ See, by way of example, judgment of 21 January 2016, *SOVAG* (C-521/14, EU:C:2016:41, paragraph 37).

A. Jurisdiction over individual contracts of employment

39. By its first question, the referring court enquires, in essence, whether Article 21(1)(b)(i) and Article 21(2) of Regulation No 1215/2012 must be interpreted as meaning that an employee may bring proceedings before the courts for the last place from where he or she habitually carried out his or her work, against a person who is not domiciled in a Member State, with whom he or she does not have an employment contract but who is, under a letter of comfort which was a prerequisite for conclusion of that contract, directly liable for performance of the employer's obligations towards that employee.

40. Article 21(1)(b) of Regulation No 1215/2012 is the provision referred to in Article 21(2) of that regulation, which applies, under Article 6(1) of that regulation, where the employer is not domiciled in a Member State. It is therefore a particular provision of Chapter II, Section 5 of that regulation and lays down the rules of jurisdiction for courts hearing disputes 'in matters relating to individual contracts of employment', where *the employer* is sued by the employee.

41. The Court has not yet defined the concept of 'employer' within the meaning of Regulation No 1215/2012.¹⁹ Its case-law has established only the characteristics of the relationship between the employee and the employer.

42. It emerges from that case-law that the concept of 'individual contract of employment' referred to in Article 20 of Regulation No 1215/2012 must be given an autonomous interpretation in order to ensure the uniform application of the rules of jurisdiction established by that regulation in all Member States.²⁰

43. The Court has held that the concept of 'individual contract of employment' presupposes a relationship of subordination of the employee to the employer,²¹ since the essential feature of an employment relationship is that for a certain period of time one person performs services for and under the direction of another in return for which he or she receives remuneration.²²

44. As regards whether such a relationship of subordination exists, the Court has clarified that the issue must be assessed in each particular case on the basis of all the factors and circumstances characterising the relationship between the parties, in order to determine whether, looking behind the formal and contractual relationship, the actual situation is such that the party sued by the employee can be classified as an 'employer'.²³

¹⁹ See also, for a recent summary of the various criteria drawn from the Court's case-law on social security, employment relationships and private international law, Opinion of Advocate General Pikamäe in *AFMB and Others* (C-610/18, EU:C:2019:1010, points 41 to 55).

²⁰ See, in that respect, judgment of 25 February 2021, *Markt24* (C-804/19, EU:C:2021:134, paragraph 24 and the case-law cited).

²¹ If there is no relationship of subordination, the relationship between the parties may be classified as a contract for the provision of services under the second indent of Article 7(1)(b) of Regulation No 1215/2012. See, to that effect, judgment of 10 September 2015, *Holterman Ferho Exploitatie and Others* (C-47/14, EU:C:2015:574, paragraphs 51 and 58) ('the judgment in *Holterman Ferho Exploitatie and Others*'). However, that article only applies to a defendant domiciled in a Member State.

²² See, among others, judgments of 11 April 2019, *Bosworth and Hurley* (C-603/17, EU:C:2019:310, paragraph 25 and the case-law cited), and of 25 February 2021, *Markt24* (C-804/19, EU:C:2021:134, paragraph 25 and the case-law cited).

²³ See judgment of 11 April 2019, *Bosworth and Hurley* (C-603/17, EU:C:2019:310, paragraphs 26 and 27 and the case-law cited). See also, by analogy, judgment of 15 December 2011, *Voogsgeerd* (C-384/10, EU:C:2011:842, paragraph 62) ('the judgment in *Voogsgeerd*').

45. As a general rule, therefore, those requirements serve to distinguish self-employment from employee status.²⁴ The Court has not used them to delimit the concept of ‘employer’.²⁵

46. The Court has also held that contracts of employment have certain particularities: they create a lasting bond which brings the employee to some extent within the organisational framework of the business of the undertaking or employer, and they are linked to the place where the activities are pursued, which determines the application of mandatory rules and collective agreements.²⁶

47. In the case in the main proceedings it is common ground, according to the referring court, that there was no formal individual contract of employment between FD and ROI Land Investments when the proceedings were brought and that there was no relationship of subordination between them, and it was even found that ‘any ability ROI Land Investments may have had to influence management of R Swiss [would] not alter that fact.’

48. Nevertheless, on the basis of that court’s account of FD’s actual situation vis-à-vis ROI Land Investments, it does not seem inconceivable that that parent company may be regarded as an employer within the meaning of Article 21(1) of Regulation No 1215/2012.

49. The specific circumstances of the case in the main proceedings illustrate once again the particular meaning of the concept of ‘employer’ within a group of companies²⁷ and the particular risk involved where it is held, in the light of the usual criteria, that in all circumstances a single relationship must be established between employee and employer, in which it is the employer for whom the employee performs his or her tasks, which exercises management powers and which pays the employee remuneration or any other consideration.

50. To my mind, regard must be had to the fact that within a group of companies, contractual relations may interconnect or the fundamental elements of the employment contract may be shared out, and to the arrangements that such a configuration may favour.²⁸

51. In the present case, FD’s action against ROI Land Investments is based on that company’s undertaking to perform the obligations of his employer, R Swiss, without which FD would not have concluded a contract with R Swiss the same day.²⁹ The undertaking given was not subject to a condition that the employer had become insolvent. Furthermore, under that employment relationship, FD was specifically obliged to do the same work as he did previously for ROI Land Investments. The referring court had also highlighted the economic link between the contractual employer and that third party.³⁰

²⁴ See the judgment in *Holterman Ferho Exploitatie and Others* (paragraph 41). See, further, for an overview of the concept of ‘worker’ within the meaning of Article 45 TFEU, Opinion of Advocate General Trstenjak in *Voogsgeerd* (C-384/10, EU:C:2011:564, point 88) and the judgment in *Holterman Ferho Exploitatie and Others* (paragraph 41).

²⁵ See, by way of comparison, the judgment in *Voogsgeerd* (paragraph 65), in which, in respect of the Rome Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 (OJ 1980 L 266, p. 1), the Court found that ‘the place of business of an undertaking other than that which is formally referred to as the employer, with which that undertaking has connections, may be classified as a “place of business” if objective factors make it possible to establish that there exists a real situation different from that which appears from the terms of the contract, even though the authority of the employer has not been formally transferred to that other undertaking.’

²⁶ See the judgment in *Holterman Ferho Exploitatie and Others* (paragraph 39 and the case-law cited).

²⁷ As regards identification of a lasting bond which brings the employee to some extent within the organisational framework of the business of that company, see the judgment in *Holterman Ferho Exploitatie and Others* (paragraph 45). See also, by way of illustration, Opinion of Advocate General Henrik Saugmandsgaard Øe in *Bosworth and Hurley* (C-603/17, EU:C:2019:65, points 104 and 105).

²⁸ See, in that respect, Opinion of Advocate General Jacobs in *Pugliese* (C-437/00, EU:C:2002:511, point 38). See also Opinion of Advocate General Saugmandsgaard Øe in *Bosworth and Hurley* (C-603/17, EU:C:2019:65, point 109).

²⁹ See points 16 and 24 of and footnote 4 to this Opinion.

³⁰ See points 14 and 15 of this Opinion.

52. To my mind, this means that the rights on which FD is relying in bringing proceedings against ROI Land Investments flow from the individual contract of employment between FD and R Swiss. Since ROI Land Investments' unconditional concomitant commitment concerns an essential element of the employment relationship, that is to say, FD's remuneration, it *is an integral part of the individual contract of employment*.³¹ In that respect, ROI Land Investments is not merely a guarantor but can be classified as the employer, by application of Article 20 in conjunction with Article 21 of Regulation No 1215/2012.

53. It is nevertheless still necessary to examine whether the other essential characteristic of an employment relationship is present in the case in the main proceedings, that is to say, the obligation on the employee to perform services for the employer in return for which he receives remuneration.³²

54. Relying on that strict reciprocity between the obligations arising from the employment relationship, it may be sufficient to take the view that, as a result of the letter of comfort at issue which is an integral part of the contract of employment, the third party concerned is placed in the position of a *de facto* employer. In other words, by guaranteeing the employee's remuneration in that way, that third party acts as if the services were performed on its behalf.

55. Nevertheless, given its implications, I do not believe that such a solution based purely on the formal link between the parties' commitments in the context of the employment relationship is completely satisfactory. I believe it is also necessary to have regard to the context in which those commitments were entered into.

56. I therefore propose that the Court should highlight that the letter of comfort concluded with the third party to the contract of employment, in a context of economic interdependence between the employer and that third party,³³ manifests the latter's interest in performance of that contract. The Court used that criterion in its judgment of 10 April 2003, *Pugliese*.³⁴

57. As in the present case, in the case that gave rise to the judgment in *Pugliese*, the employment relationship had been conducted within a group of companies and there were coexisting obligations. The dispute concerned payment to the employee of travel and accommodation costs which a first employer, after conclusion of the contract of employment, had undertaken to pay,³⁵ where that employee no longer worked for the first employer.³⁶

³¹ That approach thereby ensures consistency with the Rome I Regulation, Article 8 of which indicates the law applicable to the contract of employment. See, by analogy, in respect of the circumstances in which the criteria defined by the legislature can apply, the judgment in *Voogsgeerd* (paragraphs 44 to 51).

³² See point 43 of this Opinion.

³³ See points 50 and 52 of this Opinion.

³⁴ C-437/00, 'the judgment in *Pugliese*', EU:C:2003:219.

³⁵ See the judgment in *Pugliese* (paragraphs 6 and 10).

³⁶ The employee had successively entered into two contracts of employment with two employers. The first employer was fully informed of the conclusion of the second contract and had agreed to suspension of the first contract (paragraph 13 of that judgment), owing to the employee being transferred to a post with a different company in which that employer held some 21% of the shares (paragraph 5 of that judgment).

58. The Court held in the judgment in *Pugliese* that ‘the dispute concern[ed] an individual contract of employment’.³⁷ After indicating that it was necessary to determine the extent to which those two contracts of employment at issue were connected,³⁸ it held that an employee who is connected to two different employers may sue the first employer before the courts of the place where the employee carries out his or her work for the second employer when, ‘*at the time of the conclusion of the second contract of employment*, the first employer itself has *an interest in the employee’s performance of the service for the second employer* in a place decided on by the latter’.³⁹

59. The Court identified that test in order to meet the objective of affording proper protection to the employee, which guided it to opt for a close connection between the dispute and the court called upon to hear it.⁴⁰ The Court also found that test to be satisfactory as regards the requirements of legal certainty, predictability and the proper administration of justice.⁴¹

60. It seems to me that the foregoing test, to the effect that the party giving a commitment to the employee must show an interest in performance of the service to be provided by the employee, can be applied broadly⁴² and is not limited to situations where more than one *contract of employment* has been concluded. In my view, its application can be extended to a situation such as that in the present case, where the letter of comfort is an integral part of the contract of employment.⁴³ I believe that interpretation is satisfactory in the light of the principles that were set out in the judgment in *Pugliese* and restated in Regulation No 1215/2012.⁴⁴

61. However, since to a certain extent every undertaking within a group has a general indirect interest in every employee of the group performing his or her services well, I propose to set a limit on that ‘interest in the employee’s performance of the service’ test as a means of defining the concept of ‘employer.’ In my view, the third party’s interest must be direct.

62. In the present case, I note that, according to the order for reference, ROI Land Investments had ‘a direct interest in performance of the applicant’s obligations towards R Swiss’.

63. Accordingly, as in the judgment in *Pugliese*, the Court can identify a number of general criteria for assessing that interest.

64. In that judgment, the Court stated that ‘the existence of [the] interest [in the employee’s performance of the service] does not have to be strictly verified according to formal and exclusive criteria, but must be determined in an overall manner taking into consideration all the facts of the

³⁷ The judgment in *Pugliese* (paragraph 15). In his Opinion in *Pugliese* (C-437/00, EU:C:2002:511), in point 44, Advocate General Jacobs examined the following question: ‘Does the dispute concern “matters relating to an individual contract of employment”?’ In point 45 et seq. he found that the bond between the employee and the defendant should not be distinguished from a contract of employment, within the meaning of Article 5(1) of the 1968 Brussels Convention, even though her obligation to work for the latter had been suspended and even though the dispute concerned performance of an agreement other than the original contract of employment. He found in particular that the arrangements at issue formed ‘a whole which had, and never lost, the nature of a contract of employment’, and noted that the effects of that contract which remained, such as payment of insurance contributions and recognition of seniority, are typical obligations of an employer towards an employee).

³⁸ See the judgment in *Pugliese* (paragraph 21).

³⁹ Paragraph 23 of that judgment. Emphasis added.

⁴⁰ See the judgment in *Pugliese* (paragraphs 17 and 18). See, to the same effect, judgment of 21 June 2018, *Petronas Lubricants Italy* (C-1/17, EU:C:2018:478, paragraphs 23 and 24 and the case-law cited).

⁴¹ See the judgment in *Pugliese* (paragraph 16).

⁴² See, to the same effect, Opinion of Advocate General Saugmandsgaard Øe in *Bosworth and Hurley* (C-603/17, EU:C:2019:65, point 109).

⁴³ See point 52 of this Opinion.

⁴⁴ See recitals 15, 16, 18 and 21 of that regulation. See, by analogy, judgment of 4 October 2018, *Feniks* (C-337/17, EU:C:2018:805, paragraphs 34 and 36).

case.’⁴⁵ The Court listed non-exhaustively various factors relevant to the assessment⁴⁶ which I consider can be transposed to a situation concerning the interest of a third party to the relationship with the contractual employer. Those main factors are:

- the fact that there is an organisational or economic link between the two employers;⁴⁷
- the fact that conclusion of a new contract of employment was envisaged at the time the contract concluded previously with the third party was terminated or expired;⁴⁸
- the fact that an earlier contract was terminated on account of the conclusion of the new contract;⁴⁹
- the fact that there is an agreement between the contractual employer and the third party providing a framework for the coexistence of the contracts concluded with the employee;
- the fact that the third party indirectly retains management powers in respect of the employee;⁵⁰
- the fact that the third party is able to decide the duration of the employee’s work for the contractual employer.

65. Other factors, suggested to me by the findings of the referring court, also seem to be relevant:

- the fact that the third party is contractually liable for performance of the obligations of the contractual employer, in particular at the request of the employee, with no limitation;⁵¹
- the fact that the employee’s tasks, which he had performed under an earlier contract under the direction of the third party, remain unchanged after conclusion of the new contract;⁵²
- the fact that the employee in question, despite termination of the original contract, remains obliged to perform his services for that third party.⁵³

66. I would add that in my view there is no reason to limit any of those criteria to legal persons. Natural persons likewise may be contractual employers or employees with an interest in the context of a group or a network of individual undertakings.

67. It will therefore be for the referring court to determine, in the light of those or other more relevant criteria, whether the circumstances of the case in the main proceedings point to *a direct interest on the part of the third party in the proper performance of the service* by the employee under a contract of employment concluded with a different person in the same group from which it can be inferred that the third party may be classified as an employer within the meaning of Article 21(1) of Regulation No 1215/2012.

⁴⁵ The judgment in *Pugliese* (paragraph 24).

⁴⁶ The judgment in *Pugliese* (paragraph 24).

⁴⁷ In the present case, see points 14 and 15 of this Opinion.

⁴⁸ See, in the present case, point 14 of this Opinion.

⁴⁹ See, in that regard, point 14 of this Opinion.

⁵⁰ Which, according to the findings of the referring court, does not obtain in the present case. See point 47 of this Opinion, in conjunction with point 49.

⁵¹ In the present case, see points 16 and 24 of this Opinion.

⁵² See, in the present case, point 24 of this Opinion.

⁵³ See the facts summarised in footnote 4 to this Opinion.

68. I therefore propose that the Court should answer the referring court's first question to the effect that a legal or natural person, whether or not domiciled in a Member State, with whom an employee has not concluded his or her contract of employment but has concluded an agreement forming an integral part of that contract, under which that person is liable for performance of the employer's obligations towards that employee, may be found to be an 'employer' within the meaning of Article 21(1) and (2) of Regulation No 1215/2012 where that person has a direct interest in proper performance of that contract.

B. Whether certain rules of jurisdiction apply exclusively where the defendant is not domiciled in a Member State

69. By its second question, the referring court enquires whether, in the event that the Court finds that the dispute does not fall within the scope of Chapter II, Section 5 of Regulation No 1215/2012, Article 6(1) of that regulation must be interpreted as meaning that the reservation in respect of Article 21(2) of Regulation No 1215/2012 precludes the application of rules of jurisdiction existing under national law.

70. I note in that respect that the referring court has not expressed the same doubt in respect of application of the rules of jurisdiction set out in Chapter II, Section 4, of the same regulation, which are the subject matter of the third and fourth questions referred, even though the issues raised are identical.

71. Were the Court to answer the first question referred in the negative, finding that a third party to the contract of employment, as exists in the main proceedings, cannot be regarded as an employer, the dispute would therefore not fall within the scope of Chapter II, Section 5 of Regulation No 1215/2012. The national rules of jurisdiction would therefore have to be applied for the reasons set out below.

72. First, national rules of jurisdiction apply as a matter of principle to defendants that are not domiciled in a Member State, in accordance with the wording of Article 6(1) of that regulation, read in the light of recital 14 of the regulation.

73. Secondly, it is in my view inconceivable that EU rules of jurisdiction, outside their scope, could have a prohibitive effect on national provisions. To conclude otherwise would moreover mean that national rules of jurisdiction would be inapplicable in all situations.

74. The referring court's second question could therefore be answered to the effect that, in the event that Article 21(2) of Regulation No 1215/2012 does not apply, Article 6(1) of that regulation must be interpreted as meaning that the rules of jurisdiction existing under the national law do apply.

75. Nevertheless, I propose that the Court should consider the interpretation *a contrario* that can be inferred from that answer worded in general terms. I believe that attention to be warranted given the referring court's reference to commentaries in German academic writings that reveal uncertainty as to how the provisions of Article 6(1) of Regulation No 1215/2012 interrelate with those in the sections concerning disputes relating to consumer contracts and contracts of employment.⁵⁴

⁵⁴ See, to the same effect, Gaudemet-Tallon, H. and Ancel, M.-É., *Compétence et exécution des jugements en Europe – Règlements 44/2001 et 1215/2012, Conventions de Bruxelles (1968) et de Lugano (1998 et 2007)*, 6th ed., L.G.D.J., Paris, 2018, p. 464, and footnote 167.

76. Article 6(1) of that regulation provides that, where the defendant is not domiciled in a Member State, national law governs the jurisdiction of the court hearing the matter ‘subject to’⁵⁵ Article 18(1) and Article 21(2) of that regulation. Those articles are contained in each of the sections concerned, following Article 17(1) and Article 20(1) respectively of that regulation, both of which state that ‘jurisdiction shall be determined by this Section, *without prejudice* to Article 6[...]’ of Regulation No 1215/2012.⁵⁶

77. The same expressions were used in both the 1968 Brussels Convention and Regulation No 44/2001: ‘subject to’ in Article 4 of both instruments and ‘without prejudice to’ in Article 13 of the convention and Articles 15 and 18 of the regulation respectively. The rules governing *exclusive* jurisdiction, and then, in that regulation, those relating to the prorogation of jurisdiction, necessarily had the effect of precluding the application of national law.⁵⁷

78. It is therefore necessary to determine whether, in Regulation No 1215/2012, the addition of rules of jurisdiction *to protect a weaker party* must have the same scope. There are several possible approaches.

79. I believe it can be inferred from the wording of Article 5 of that regulation – according to which defendants domiciled in a Member State *may be sued* in the courts of another Member State *only by virtue* of the rules set out in Sections 2 to 7 of Chapter II of that regulation, which is different from the wording of Article 6(1) of that regulation, applicable in respect of defendants domiciled in third countries – that the national rules of jurisdiction may continue to apply *in addition* to those laid down by Regulation No 1215/2012.⁵⁸

80. The same can be inferred from the fact that Article 21(2) of that regulation provides that the employer ‘*may* be sued in a court of a Member State in accordance with point (b) of paragraph 1’.⁵⁹ An employee can therefore choose between jurisdiction based on the regulation and jurisdiction under national law.⁶⁰

81. However, it can also be argued, in the light of the second sentence of recital 14 of Regulation No 1215/2012, on the rules of jurisdiction that must prevail in the light of the objectives pursued by that regulation,⁶¹ that the rules set out in Sections 4 and 5 of Chapter II of that regulation preclude the application of national laws, indistinguishably, even where those laws may be more favourable to the applicant.⁶²

⁵⁵ This is the same expression as that used in Article 4 of Regulation No 1215/2012.

⁵⁶ Emphasis added. The same difference in wording can also be seen in the German-, English- and Polish-language versions.

⁵⁷ I note, nevertheless, that in both Regulation No 44/2001 and Regulation No 1215/2012 the same terms are used in those articles in their versions in Spanish (‘sin perjuicio’), Danish (‘jf. dog’), Italian (‘salva/fatto salvo’), Dutch (‘onverminderd’), Portuguese (‘sem prejuízo’) and Swedish (‘om inte annat’).

⁵⁸ See, to that effect, Garcimartín Álferez, F.J. and Sánchez Fernández, S., ‘El nuevo Reglamento Bruselas I: qué ha cambiado en el ámbito de la competencia judicial’, *Revista española de derecho europeo*, No 48, Marcial Pons Ediciones Jurídicas y Sociales, Madrid, 2013, pp. 3 to 6, and Pohl, M., ‘Die Neufassung der EuGVVO – im Spannungsfeld zwischen Vertrauen und Kontrolle’, *Praxis des Internationalen Privat- und Verfahrensrechts* (IPRax), Vol. 2, Verlag Ernst und Werner Gieseking GmbH, Köln, 2013, pp. 109 to 111.

⁵⁹ Emphasis added.

⁶⁰ See Nord, N., ‘Refonte du règlement “Bruxelles I” et protection du travailleur’, *La Semaine Juridique Sociale*, No 52, LexisNexis, Paris, 2014, p. 3, paragraph 19.

⁶¹ ‘... in order to ensure the protection of consumers and employees, to safeguard the jurisdiction of the courts of the Member States in situations where they have exclusive jurisdiction and to respect the autonomy of the parties, certain rules of jurisdiction in this Regulation should apply regardless of the defendant’s domicile.’

⁶² See, in that respect, Nord, N., ‘Refonte du règlement “Bruxelles I” et protection du travailleur’, *La Semaine Juridique Sociale*, No 52, LexisNexis, Paris, 2014, p. 3 and p. 4, paragraph 20. On the rules relating to contracts of employment, see Cuniberti, G., ‘La réforme du Règlement Bruxelles I’, *Droit et procédure – EJT*, No 2, Dalloz, Paris, 2013, paragraph 37.

82. I am inclined to concur with that view which is based on the fact that Regulation No 1215/2012 is coherent and accords with earlier provisions and with the purposes of those provisions, and therefore dispels the doubts arising from differences in the language versions.

83. I note, first, that in Article 6 of Regulation No 1215/2012, by way of general provisions for situations in which the defendant is not domiciled in a Member State, the exclusion of national law, which was previously envisaged for rules governing exclusive jurisdiction,⁶³ was extended specifically for consumers and employees, while the principle that the national rules of jurisdiction applied was retained.⁶⁴ This is therefore, in my view, a matter of exceptions to that principle.

84. Secondly, in the sections of Regulation No 1215/2012 that relate to consumers and employees, both described as ‘the weaker party’,⁶⁵ the reservation⁶⁶ relating to the application of certain general provisions has been retained, including in Article 6 of that regulation. I infer from those provisions read together that Article 6 of that regulation addresses the situation of any defendant domiciled in a third country in general and that the reference in that article to Article 21(2) of the same regulation defines the rules applicable for the specific situation where an employer is sued by an employee. The legislature therefore decided that the national rules do apply where the defendant is an employee.

85. There can therefore be no derogation from the principle upheld by the Court according to which, where the rules of jurisdiction in Chapter II, Section 5 of Regulation No 1215/2012 apply, they must take precedence over the national rules of jurisdiction, even where the national rules would be more favourable to the employee, because they are not only specific but also exhaustive.⁶⁷

86. Under those circumstances, my view is that the existing situation does meet both the objective of the regulations applicable to cooperation in civil matters of harmonising the rules on conflicts of jurisdiction and the requirements that rules of jurisdiction must be predictable and that the courts with jurisdiction must be limited in a manner that protects the weaker parties concerned, given that, by definition, those rules of jurisdiction apply to those parties.⁶⁸

87. By reason of all of the foregoing, I propose that the Court should answer the second question referred to the effect that Article 6(1) of Regulation No 1215/2012 must be interpreted as meaning that application of the rules of jurisdiction existing under the national law is precluded where the requirements are satisfied for Article 21(2) of that regulation to apply.

⁶³ See, to that effect, the Report by Mr P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1979 C 59, p. 1), especially p. 21.

⁶⁴ For the background to that provision, see in particular Gaudemet-Tallon, H., and Ancel, M.-É., *Compétence et exécution des jugements en Europe – Règlements 44/2001 et 1215/2012, Conventions de Bruxelles (1968) et de Lugano (1998 et 2007)*, 6th ed., L.G.D.J., Paris, 2018, p. 137.

⁶⁵ Recital 18 of that regulation.

⁶⁶ That term is taken from the Report by Mr P. Jenard, op. cit., p. 33.

⁶⁷ See, to that effect, judgments of 22 May 2008, *Glaxosmithkline and Laboratoires Glaxosmithkline* (C-462/06, EU:C:2008:299, paragraph 18), and of 25 February 2021, *Markt24* (C-804/19, EU:C:2021:134, paragraphs 33 and 34 and the case-law cited).

⁶⁸ See, in that vein, Nord, N., ‘Refonte du règlement “Bruxelles I” et protection du travailleur’, *La Semaine Juridique Sociale*, No, 52, LexisNexis, Paris, 2014, pp. 3 and 4, paragraph 20, and Cuniberti, G., ‘La réforme du Règlement Bruxelles I’, *Droit et procédures – EJT*, No 2, Dalloz, Paris, 2013, paragraph 37. See, also, Temming, F. and Glatz, P., ‘Vorlagen an den EuGH, Arbeitsrecht, Haftung aus Arbeitsvertrag/Rechtsnachfolger’, *Zeitschrift für europäisches Sozial- und Arbeitsrecht* (ZESAR), No 5/6, Erich Schmidt Verlag, Berlin, 2021, p. 230, especially p. 232.

C. Jurisdiction over consumer contracts

88. By its third and fourth questions, the referring court enquires whether an employee in a situation such as that in the present case may avail himself or herself of the consumer protection provisions as a basis for jurisdiction.

89. The third question concerns the provisions of Article 17(1) of Regulation No 1215/2012. The fourth question concerns those of Article 6(1) of the Rome I Regulation. Both questions relate to contracts concluded by a natural person ‘for a purpose which can be regarded as being outside his or her trade or profession’.

90. According to the referring court,⁶⁹ this concerns determining whether a ‘trade or profession’ within the meaning of those provisions includes paid employment as well as self-employed activities.

91. Since the material scope and provisions of the Rome I Regulation must be consistent with, inter alia, the regulations on jurisdiction,⁷⁰ I will examine the third and fourth questions referred together, looking at the first part of both questions and then the second part. In relation to Regulation No 1215/2012, the referring court asked its third question only in the event of a negative answer to the first question referred. Since I propose that the Court should reply to that question in the affirmative, the following analysis is provided in the alternative.

1. The concept of ‘trade or profession’/‘commercial or professional activities’ within the meaning of Regulation No 1215/2012 and the Rome I Regulation

92. By the first part of its third and fourth questions, the referring court asks the Court, in essence, whether Article 17(1) of Regulation No 1215/2012 and Article 6(1) of the Rome I Regulation are to be interpreted as meaning that the concept of ‘trade or profession’/‘commercial or professional activities’ includes paid employment in an employment relationship.

93. I would call to mind that this is one of the conditions for the consumer protection rules to apply.⁷¹ Interpreting the concept ‘trade or profession’/‘commercial or professional activities’ is far from straightforward because the various language versions of Article 17 of Regulation No 1215/2012⁷² are not consistent either within that regulation or with those of Article 6 of the Rome I Regulation.

94. In the French and other language versions, a consumer is defined in the first sentence of Article 17(1) of Regulation No 1215/2012 as a person who concludes a contract ‘pour un usage pouvant être considéré comme étranger à son *activité professionnelle*’ (‘for a purpose which can be regarded as being outside his *trade or profession*’), whereas in the same paragraph, subparagraph (c), the other contracting party is a person ‘qui exerce des *activités commerciales ou*

⁶⁹ See point 26 of and footnote 74 to this Opinion.

⁷⁰ See point 35 of this Opinion.

⁷¹ See judgment of 26 March 2020, *Primera Air Scandinavia* (C-215/18, EU:C:2020:235, paragraph 56 and the case-law cited), and the judgment in *Personal Exchange International*, paragraph 27.

⁷² Article 15 of the earlier Regulation No 44/2001 was worded identically. See, in that respect, in the case that gave rise to the judgment in *Personal Exchange International*, the doubts entertained by the referring court on the basis of the Slovenian-language version (paragraph 21 of that judgment).

professionnelles’ (‘who pursues *commercial or professional activities*’).⁷³ In the German⁷⁴ and other language versions,⁷⁵ in contrast, the same terms are used for the activities of the consumer and of the other party to the contract. Other language versions use different expressions, with no common terms to define a consumer and the activity of the defendant.⁷⁶

95. Furthermore, the terms used in Article 6(1) of the Rome I Regulation to define a consumer and a professional do not always correspond to those used in Article 17 of Regulation No 1215/2012. For example, in the French-language version a professional is defined by reference to an ‘*activité professionnelle*’ (trade or professional activity) rather than to an ‘*activité commerciale et professionnelle*’ (commercial or professional activity), as in Article 17(1)(c) of that regulation.

96. Under those circumstances, it seems to me that the provisions at issue should not be interpreted on the basis of how the concept of ‘consumer’ is defined.⁷⁷ The Court recently recalled, in relation to Regulation No 1215/2012, that ‘only contracts concluded *outside and independently of any trade or professional activity or purpose, solely for the purpose of satisfying an individual’s own needs in terms of private consumption*,⁷⁸ are covered by the special rules laid down by the regulation to protect the consumer as the party deemed to be the weaker party’.⁷⁹

97. The Court therefore has clearly not drawn a distinction according to whether the professional activities are self-employed or otherwise in its consistent case-law based on the evolution over time of the consumer protection provisions originally contained in the 1968 Brussels Convention.⁸⁰

98. FD submits that the German court has jurisdiction on the grounds that the letter of comfort, on which his action is based, was concluded for a purpose which can be regarded as being outside his trade or profession. As grounds for considering paid employment to be included in the concept of ‘consumer’, he submits that employees use their remuneration to ‘meet their own needs’.

99. However, according to that reasoning, the term would have to include other, self-employed, professionals, such as craftworkers, manufacturers, farmers and independent traders, who make use of their profits for day-to-day life no less than employees use their salaries. Furthermore,

⁷³ Emphasis added. The same dichotomy exists in the Spanish- and Italian-language versions.

⁷⁴ The expression ‘berufliche oder gewerbliche Tätigkeit’ appears in both those provisions. According to the clarifications provided by the referring court, the difficulty in interpreting that expression arises because the term ‘gewerblich’ is used in conjunction with the term ‘beruflich’ which has a very broad meaning. It could be inferred from the expression that only self-employed activities or liberal professions are included.

⁷⁵ See, for example, in the Polish- and Portuguese-language versions (‘zawodową lub gospodarczą’ and ‘atividade comercial ou profissional’ respectively). The Danish-language version uses a single expression (‘erhvervsmæssige virksomhed’), likewise twice in the same way.

⁷⁶ See, for example, in English (‘trade or profession’/‘commercial or professional activities’), Dutch (‘bedrijfs of beroepsmatig’/‘commerciële of beroepsactiviteiten’), and Swedish (‘affärsverksamhet eller yrkesverksamhet’/‘kommersiell verksamhet eller yrkesverksamhet’).

⁷⁷ In the language versions that I have examined, I note that the term ‘consumer’ refers to a person who merely uses goods or a service. The position of a consumer is therefore the opposite of that of an employee, who produces goods or offers services on behalf of the employer. See, to that effect, the judgment in *Personal Exchange International* (paragraph 38).

⁷⁸ Emphasis added.

⁷⁹ Judgment of 3 October 2019, *Petruchová* (C-208/18, EU:C:2019:825, paragraph 42 and the case-law cited). See, also, for a summary of the same criteria, some in general terms, in respect of Articles 15 to 17 of Regulation No 44/2001, the judgment in *Personal Exchange International* (paragraphs 29 to 31 and the case-law cited).

⁸⁰ See Report by Professor Dr Peter Schlosser on the Convention of 9 October 1978 on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (OJ 1979 C 59, p. 71) (especially p. 118, paragraph 153), and judgment of 14 March 2013, *Česká spořitelna* (C-419/11, EU:C:2013:165, paragraph 32 and the case-law cited).

although consumers use, or indeed consume, goods and services, and use their wages for that purpose, those wages cannot be regarded as being consumed for the purposes of Chapter II, Section 4 of Regulation No 1215/2012.

100. An argument based on the structure of the legislation is in my view also tenable. The EU legislature provided for different fora for consumers and employees. An extensive interpretation of the scope of the rules of jurisdiction for consumers in such a situation⁸¹ would constrain the legislature's ability to define specific rules for employees under which employees could not bring proceedings before the court where they are domiciled, as consumers can, in order to give priority to seising the court close to their place of work.

101. I would add, lastly, as the Commission has argued, that an extensive interpretation cannot be justified on the grounds that there is a situation not envisaged in Regulation No 1215/2012 for which there is no applicable provision.⁸²

102. Accordingly, I propose that the Court should answer the first part of the referring court's third and fourth questions to the effect that the concept of 'trade or profession'/'commercial or professional activities' within the meaning of Article 17(1) of Regulation No 1215/2012 and Article 6(1) of the Rome I Regulation, includes paid employment in an employment relationship.

2. Classification of an agreement guaranteeing performance of the employer's obligations to the employee

103. By the second part of the third and fourth questions, the referring court asks the Court, in essence, whether Article 17(1) of Regulation No 1215/2012 and Article 6(1) of the Rome I Regulation must be interpreted as meaning that the concept of 'trade or profession'/'commercial or professional activities' includes a letter of comfort under which a third party is directly liable to an employee for performance of obligations arising from an individual contract of employment concluded with his or her employer.

104. The question is asked only in the event that the concept of 'trade or profession'/'commercial or professional activities' does not include the activities of an employee and that the referring court could therefore have international jurisdiction.

105. Since I have already rejected that outcome, I therefore propose that the Court should, in the alternative, reply to the referring court that an agreement, albeit unilateral,⁸³ entered into with an employee, intended to ensure compliance with the obligations of his or her employer, rather than to meet personal needs, is directly linked to the contract of employment. It is therefore not concluded 'outside and independently of any trade or professional activity or purpose'.⁸⁴

⁸¹ See, by way of comparison, the judgment in *Personal Exchange International*, concerning a poker-playing contract concluded online by a person who regularly received substantial winnings.

⁸² The referring court noted in that respect that, as positive law currently stands, the objective of protecting the weaker party, set out in recitals 14 and 18 of Regulation No 1215/2012, would not be met if the employment relationship of an employee within a group of companies could be relied upon against him or her to prevent him or her from benefiting from rules of jurisdiction applicable to consumers, or, conversely, if the absence of an employment relationship could be relied upon as grounds for not applying the rules that the regulation likewise sets out in the interests of employees.

⁸³ See, by analogy, judgment of 14 May 2009, *Ilseinger* (C-180/06, EU:C:2009:303, paragraph 51).

⁸⁴ See point 96 of this Opinion.

106. In the present case, since the terms of the letter of comfort and the circumstances in which it was concluded must lead to a finding that it is an integral part of the contract of employment,⁸⁵ it must be inferred that it is not independent of FD's professional activities. The Court's ruling on the exclusion of employment contracts from the scope of Directive 93/13/EEC⁸⁶ can in my view be transposed in that respect.⁸⁷

107. Accordingly, I propose, in the alternative, that the Court should answer the second part of the referring court's third and fourth questions to the effect that a letter of comfort forming an integral part of a contract of employment, under which a person is liable for performance of the obligations of the employer towards the employee, falls within the concept of 'trade or profession'/'commercial or professional activities' within the meaning of Article 17(1) of Regulation No 1215/2012 and Article 6(1) of the Rome I Regulation.

V. Conclusion

108. In the light of all of the foregoing, I propose that the Court should answer the questions referred by the Bundesarbeitsgericht (Federal Labour Court, Germany) as follows:

- (1) Article 21(1) and (2) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that a legal or natural person, whether or not domiciled in a Member State, with whom an employee has not concluded his or her contract of employment but has concluded an agreement forming an integral part of that contract, under which that person is liable for performance of the employer's obligations towards that employee, may be found to be an 'employer' where that person has a direct interest in the proper performance of that contract. The existence of any direct interest of that nature must be determined by the referring court on a comprehensive basis, taking into consideration all the circumstances of the case.
- (2) Article 6(1) of Regulation No 1215/2012 must be interpreted as meaning that application of the rules of jurisdiction existing under national law is precluded where the requirements are satisfied for Article 21(2) of that regulation to reply.

In the alternative, in the event that the Court were to find that the dispute does not fall within the scope of Article 21(2) of Regulation No 1215/2012:

- (3) Article 17(1) of Regulation No 1215/2012 and Article 6(1) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ('Rome I') must be interpreted as meaning that the concept of 'trade or profession'/'commercial or professional activities' includes paid employment in an employment relationship.

⁸⁵ See point 52 of this Opinion.

⁸⁶ Council Directive of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

⁸⁷ See judgment of 21 March 2019, *Pouvin and Dijoux* (C-590/17, EU:C:2019:232, paragraph 32).

- (4) Article 17(1) of Regulation No 1215/2012 and Article 6(1) of Regulation No 593/2008 must be interpreted to the effect that a letter of comfort forming an integral part of a contract of employment, under which a person is liable for performance of the obligations of the employer towards the employee, falls within the concept of ‘trade or profession’/‘commercial or professional activities’.