Civil and commercial judicial cooperation, enforcement of judgments: Brussels I, Lugano Conventions

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The Commission presents a report on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Council Regulation (EC) No 44/2001 is the matrix of European judicial cooperation in civil and commercial matters. It replaced the 1968 Brussels Convention and lays down uniform rules to settle conflicts of jurisdiction and facilitate the free circulation of judgments, court settlements and authentic instruments in the European Union.

This report has been prepared in accordance with Article 73 of the Regulation, on the basis of a general study commissioned by the Commission, and aims at presenting to the European Parliament, the Council and the European Economic and Social Committee an assessment on the application of the Regulation. It is accompanied by a Green Paper which makes some suggestions on possible ways forward with respect to the points raised in this report. Both documents serve as the basis for a public consultation on the operation of the Regulation.

General evaluation of the Regulation: in general, the Regulation is considered to be a highly successful instrument, which has facilitated cross-border litigation through an efficient system of judicial cooperation based on comprehensive jurisdiction rules, coordination of parallel proceedings, and circulation of judgments. The system of judicial cooperation laid down in the Regulation has successfully adapted to the changing institutional environment (from intergovernmental cooperation to an instrument of European integration) and to new challenges of modern commercial life. As such, it is highly appreciated among practitioners. However, this general satisfaction with the operation of the Regulation does not exclude that the functioning of the Regulation may be improved.

The report also evaluates the following specific points of the Regulation:

The abolition of exequatur: the main objective of the revision of the Regulation should be the abolition of the exequatur procedure in all matters covered by the Regulation. The general study shows that, when the application is complete, first instance proceedings before the courts in the Member States tend to last, on average, from 7 days to 4 months. When, however, the application is incomplete, proceedings last longer. Applications are often incomplete and judicial authorities ask for additional information, in particular translations. Most applications for a declaration of enforceability are successful (between 90% and 100%). Only between 1 and 5% of the decisions are appealed.

The operation of the Regulation in the international legal order: the absence of harmonised rules on subsidiary jurisdiction causes an unequal access to justice for Community citizens. This is particularly the case in situations where a party would not get a fair hearing or adequate protection before the courts of third States. Moreover, the absence of common rules determining jurisdiction against third State defendants may jeopardise the application of mandatory Community legislation. In addition, the absence of common rules on the effect of third State judgments in the Community may in certain Member States lead to situations where third State judgments are recognised and enforced even where such judgments are

in breach of mandatory Community law. Finally, the absence of harmonised rules determining the cases where the courts of the Member States can decline their jurisdiction on the basis of the Regulation in favour of the courts of third States generates a great deal of confusion and uncertainty.

Choice of court: concerns have been voiced that the Regulation would not sufficiently protect exclusive choice of court agreements. These follow from the possibility that one party to such an agreement seizes the courts of a Member State in violation of the choice of court agreement, thereby obstructing proceedings before the chosen court insofar as the latter are brought subsequently to the first proceedings. The resulting parallel proceedings may lead to delays which are detrimental to the proper functioning of the internal market. Parallel proceedings equally create additional costs and uncertainty. The Commission has proposed to sign the Hague Convention on choice of court agreements. The Convention will apply in all cases where at least one of the parties resides in a Contracting State other than an EU Member State, whereas the Regulation applies where at least one party is domiciled in a Member State. Under the Convention, the court designated by the agreement may proceed notwithstanding parallel proceedings being brought elsewhere. Any other court should suspend or dismiss proceedings except in a number of limited situations defined in the Convention.

Industrial property: the report highlights two main difficulties. The first difficulty concerns the operation of the lis pendens rule. Industrial property litigation is one of the areas where parties have attempted to pre-empt the exercise of jurisdiction by a competent court by starting proceedings before another court which usually, though not always, lacks jurisdiction, preferably in a State where the proceedings to decide on the jurisdiction issue and/or on the merits take a long time. The second difficulty is the impossibility to bring consolidated proceedings against several infringers of a European patent where the infringers belong to a group of companies and act in accordance with a coordinated policy. The obligation to bring proceedings in each of the jurisdictions concerned would entail high costs for the victims and hamper an efficient handling of the claims;

Lis pendens and related actions: with respect to exclusive jurisdiction under the Regulation, it should be reflected whether the need arises to improve the existing lis pendens rule in general in order to prevent abusive procedural tactics and ensure a good administration of justice in the Community. With respect to the rule on related actions, the requirement that both actions must be pending before the courts and the reference to national law for the conditions of consolidation of related actions hampers an effective consolidation of proceedings at Community level. It is currently not possible on the basis of the Regulation to group actions, in particular actions of several plaintiffs against the same defendant, before the courts of one Member State, whereas such consolidation is frequently needed. Lastly, it may be appropriate to clarify the definition of the moment in time when proceedings are considered to be pending for purposes of the lis pendens and related actions rules;

Provisional measures: provisional measures remain an area where the diversity in the national procedural laws of the Member States makes the free circulation of such measures difficult, particularly with respect to: (i) protective measures ordered without the defendant being summoned to appear and which are intended to be enforced without prior service of the defendant; (ii) protective orders aimed at obtaining information and evidence; (iii) the application of the conditions set by the Court of Justice in Cases C-391 /95 (*Van Uden*) and C-99/96 (*Mietz*) for the issuance of provisional measures ordered by a court which does not have jurisdiction on the substance of the matter;

The interface between the Regulation and arbitration: arbitration falls outside the scope of the Regulation given that the recognition and enforcement of arbitral agreements and awards is governed by the 1958 New York Convention, to which all Member States are parties. Despite the broad scope of the exception, the Regulation has in specific instances been interpreted so as to support arbitration and the recognition/enforcement of arbitral awards. Even though the New York Convention is generally perceived to operate satisfactorily, parallel court and arbitration proceedings arise when the validity of the arbitration clause is upheld by the arbitral tribunal but not by the court.

In addition to the issues examined above, the report notes that far as scope is concerned, no substantial practical problems have been reported beside the arbitration point discussed above.

Furthermore, with respect to the notion of "domicile", the report shows that no difficulties arise in practice when the courts apply their national concept of "domicile" on the basis of this Regulation.

In its resolution of 18 December 2008, the European Parliament has called on the Commission to address the question of the free circulation of authentic instruments. The general study also reports difficulties in the free circulation of penalties. Lastly, the study shows some ways to limit the costs of enforcement proceedings.