Implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I)

2009/2140(INI) - 21/04/2009 - Document attached to the procedure

This Green Paper accompanies the Report from the Commission on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Its purpose is to launch a broad consultation among interested parties on possible ways to improve the operation of the Regulation with respect to the points raised in the Report.

1) The abolition of all intermediate measures to recognise and enforce foreign judgments ("exequatur"): the existing exequatur procedure in the Regulation simplified the procedure for recognition and enforcement of judgments compared to the previous system under the 1968 Brussels Convention. Nevertheless, it is difficult to justify, in an internal market without frontiers, that citizens and businesses have to undergo the expenses in terms of costs and time to assert their rights abroad.

If applications for declarations of enforceability are almost always successful and recognition and enforcement of foreign judgments is very rarely refused, aiming for the objective of abolishing the exequatur procedure in all civil and commercial matters should be realistic. In practice, this would apply principally to contested claims. The abolition of exequatur should, however, be accompanied by the necessary safeguards.

The Green Paper asks the following questions:

- In the internal market, should all judgments in civil and commercial matters circulate freely, without any intermediate proceedings (abolition of exequatur)?
- If so, should some safeguards be maintained in order to allow for such an abolition of exequatur? And if so, which ones?

2) The operation of the Regulation in the international legal order: the good functioning of an internal market and the Community's commercial policy both on the internal and on the international level require that equal access to justice on the basis of clear and precise rules on international jurisdiction is ensured not only for defendants but also for claimants domiciled in the Community.

The jurisdictional needs of persons in the Community in their relations with third States' parties are similar. A common approach would strengthen the legal protection of Community citizens and economic operators and guarantee the application of mandatory Community legislation.

- In order to extend the personal scope of the jurisdiction rules to defendants domiciled in third States, it should be considered to what extent the special jurisdiction rules of the Regulation, with the current connecting factors, could be applied to third State defendants.
- In addition, it should be reflected to what extent it is necessary and appropriate to create additional jurisdiction grounds for disputes involving third State defendants ("subsidiary jurisdiction").
- The existing rules at national level pursue an important objective of ensuring access to justice; it should be reflected which uniform rules might be appropriate.

- Lastly, it should be considered to what extent an extension of the scope of the jurisdiction rules should be accompanied by common rules on the effect of third State judgments. A harmonisation of the effect of third State judgments would enhance legal certainty, in particular for Community defendants who are involved in proceedings before the courts of third States. A common regime of recognition and enforcement of third State judgments would permit them to foresee under which circumstances a third State judgment could be enforced in any Member State of the Community, in particular when the judgment is in breach of mandatory Community law or Community law provides for exclusive jurisdiction of Member States' courts.

3) Choice of court: agreements on jurisdiction by the parties should be given the fullest effect, not the least because of their practical relevance in international commerce. It should therefore be considered to what extent and in which way the effect of such agreements under the Regulation may be strengthened, in particular in the event of parallel proceedings.

The Green Paper envisages the advantages and inconveniences of several possible solutions to enhance the effectiveness of the choice of court agreements in the Community, such as:

- to release the court designated in an exclusive choice-of-court agreement from its obligation to stay proceedings under the lis pendens rule;
- to reverse the priority rule insofar as exclusive choice of court agreements are concerned;
- to maintain the existing lis pendens rule may, but a direct communication and cooperation between the two courts could be envisaged, combined, for instance, with a deadline for the court first seized to decide on the question of jurisdiction and an obligation to regularly report to the court second seized on the progress of the proceedings;
- to exclude the application of the lis pendens rule in situations where the parallel proceedings are proceedings on the merits on the one hand and proceedings for (negative) declaratory relief on the other hand or at least to ensure a suspension of the running of limitation periods with respect to the claim on the merits in case the declaratory relief fails;
- to address the uncertainty surrounding the validity of the agreement, for instance, by prescribing a standard choice of court clause, which could at the same time expedite the decision on the jurisdiction question by the courts.

4) Industrial property: the possibility to effectively enforce or challenge industrial property rights in the Community is of fundamental importance for the good functioning of the internal market.

The Commission has proposed the creation of an integrated jurisdictional system through the establishment of a unified European patent litigation system which would be entitled to deliver judgments on the validity and the infringement of European and future Community patents for the entire territory of the internal market. In addition, on 20 March 2009, the Commission adopted a Recommendation to the Council concerning the negotiating directives for the conclusion of an international agreement involving the Community, its Member States and other Contracting States of the European Patent Convention.

Pending the creation of the unified patent litigation system, certain shortcomings of the current system may be identified and addressed in the context of Regulation (EC) No 44/2001.

- With respect to the coordination of parallel infringement proceedings, it could be envisaged to strengthen the communication and interaction between the courts seized in parallel proceedings and /or to exclude the application of the rule in the case of negative declaratory relief.
- With respect to the coordination of infringement and invalidity proceedings, several solutions to counter "torpedo" practices have been proposed in the general study. It is hereby referred to the study for those solutions. However, the problems may be dealt with by the creation of the unified patent litigation system, in which case modifications of the Regulation would not be necessary.

- If it is considered opportune to provide for a consolidation of proceedings against several infringers of the European patent where the infringers belong to a group of companies acting in accordance with a coordinated policy, a solution might be to establish a specific rule allowing infringement proceedings concerning certain industrial property rights against several defendants to be brought before the courts of the Member State where the defendant coordinating the activities or otherwise having the closest connection with the infringement is domiciled.

The Green Paper asks the question about the shortcomings in the current system of patent litigation which should be considered to be the most important to be addressed in the context of Regulation 44/2001 and which of the above solutions should be considered appropriate in order to enhance the enforcement of industrial property rights.

5) Lis pendens and related actions: with respect to the general operation of the lis pendens rule, it should be reflected whether the current problems might not be addressed by strengthening the communication and interaction between the courts seized in parallel proceedings and/or the exclusion of the application of the rule in the case of negative declaratory relief.

The Green Paper asks: (i) how the coordination of parallel proceedings (lis pendens) before the courts of different Member States may be improved? (ii) Whether a consolidation of proceedings by and/or against several parties should be provided for at Community level on the basis of uniform rules?

6) Provisional measures: the report describes several difficulties with respect to the free circulation of provisional measures.

- With respect to ex parte measures, it might be appropriate to clarify that such measures can be recognised and enforced on the basis of the Regulation if the defendant has the opportunity to contest the measure subsequently, particularly in the light of Article 9(4) of Directive 2004/48/EC.
- As regards the allocation of jurisdiction for provisional measures ordered by a court which does not have jurisdiction on the substance of the matter may be approached differently than it is today under the existing case law of the Court of Justice.
- In addition, if the Member State whose courts have jurisdiction as to the substance of the matter were empowered to discharge, modify or adapt a provisional measure granted by the courts of a Member State having jurisdiction on the basis of Article 31, the "real connecting link" requirement could be abandoned.
- With respect to the required guarantee of repayment of an interim payment, it might be desirable to specify that the guarantee should not necessarily consist of a provisional payment or bank guarantee.

Lastly, if exequatur is abolished, Article 47 of the Regulation should be adapted.

The Green Paper asks whether the free circulation of provisional measures may be improved.

7) The interface between the Regulation and arbitration: arbitration is a matter of great importance to international commerce. Arbitration agreements should be given the fullest possible effect and the recognition and enforcement of arbitral awards should be encouraged. The 1958 New York Convention is generally perceived to operate satisfactorily and is appreciated among practitioners. It would therefore seem appropriate to leave the operation of the Convention untouched or at least as a basic starting point for further action. This should not prevent, however, addressing certain specific points relating to arbitration in the Regulation, not for the sake of regulating arbitration, but in the first place to ensure the smooth circulation of judgments in Europe and prevent parallel proceedings.

In this context, the Green Paper asks which actions should be considered appropriate at Community level:

- to strengthen the effectiveness of arbitration agreements;
- to ensure a good coordination between judicial and arbitration proceedings;
- to enhance the effectiveness of arbitration awards?

The Green Paper deals with **other issues** such as:

Scope (maintenance matters should be added to the list of exclusions, following the adoption of Regulation (EC) No 4/2009 on maintenance).

Jurisdiction: in light of theimportance of domicile as the main connecting factor to define jurisdiction, it should be considered whether an autonomous concept could be developed.

Further, it should be considered to what extent it may be appropriate to create a non-exclusive jurisdiction based on the situs of moveable assets as far as rights *in rem* or possession with respect to such assets are concerned.

In maritime matters, it should be reflected to what extent a consolidation of proceedings aimed at setting up a liability fund and individual liability proceedings on the basis of the Regulation might be appropriate.

With respect to consumer credit, it should be reflected whether it might be appropriate to align the wording of Articles 15(1)(a) and (b) of the Regulation to the definition of consumer credit of Directive 2008/48/EC.

With respect to the ongoing work in the Commission on collective redress, it should be reflected whether specific jurisdiction rules are necessary for collective actions.

Recognition and enforcement: it should be reflected to what extent it might be appropriate to address the question of the free circulation of authentic instruments. Further, the free circulation of judgments ordering payments by way of penalties might be improved by ensuring that the amount fixing the penalty is set, either by the court of origin or by an authority in the Member State of enforcement. It should also be considered to what extent the Regulation should not only permit the recovery of penalties by the creditor, but also those which are collected by the court or fiscal authorities.

Lastly, access to justice in the enforcement stage could be improved by establishing a uniform standard form, available in all official Community languages, which contains an extract of the judgment.

The Commission calls on all interested persons to send their comments on the points addressed below and any other useful contributions, **no later than 30 June 2009**.