Opinion of the Economic and Social Committee on the 'Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters'

(2000/C 117/02)

On 28 September 1999 the Council decided to consult the Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the above-mentioned proposal.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 15 February 2000. The rapporteur was Mr Malosse.

At its 370th plenary session of 1 and 2 March 2000 (meeting of 1 March) the Economic and Social Committee adopted the following opinion unanimously.

1. Introduction

1.1. One of the key innovations of the Amsterdam Treaty is to bring a substantial part of what is known as the third pillar of the Union, i.e. justice and home affairs, within the Community's sphere of responsibility.

1.1.1. In accordance with Article 2 of the revised Treaty, the European Union has set itself the objective of maintaining and developing the Union as an area of freedom, security and justice, in which the free movement of persons is assured and where litigants can assert their rights, enjoying facilities equivalent to those which they enjoy in the courts of their own country.

1.2. As part of the Council's and Commission's Action Plan on how best to implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom, security and justice, the Community has been asked to adopt the measures pertaining to judicial cooperation in civil and commercial matters needed for the smooth operation of the single market.

1.3. The proposed regulation submitted to the Economic and Social Committee for its opinion was drafted with the above in mind. Indeed, for the single market to operate smoothly, clear rules have to be defined setting out jurisdiction in cases of litigation between companies and citizens of different Member States, in particular to specify which court has jurisdiction. Similarly, it is necessary to set up mechanisms to ensure the recognition and enforcement of court judgements.

1.4. In matters pertaining to jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, the European Commission's initiative does already have a basis on which to build. In fact the Member States, aware of the need to provide some legal certainty in cases of litigation within the single market, had, as part of intergovernmental and bilateral cooperation, drafted a number of conventions to this end. The most important of these was the so-called 'Brussels' Convention concluded on 27 September 1968 between the then six members of the European Community; this Convention covered jurisdiction, recognition and enforcement of judgements in civil and commercial matters.

1.4.1. A Protocol on the interpretation of this Convention by the Court of Justice of the European Communities was signed in 1971. The Convention and the Protocol, which are part of the 'acquis' since they were concluded on the basis of Article 293 of the EEC Treaty, have been successively extended to cover the new Member States. It should, however, be pointed out that the current Brussels Convention, as amended following the accession negotiations for Austria, Finland and Sweden, has not yet entered into force in all the Member States, as only a minority of them have ratified it.

1.5. In parallel to the Brussels Convention, the Lugano Convention, signed on 16 September 1988, takes up the principles of the Brussels Convention between the Member States of the EU and those of the European Free Trade Association (EFTA).

2. The proposed regulation submitted by the European Commission

2.1. *The main provisions of the proposal*

2.1.1. Like the Brussels Convention and the numerous bilateral conventions it is to replace, the regulation aims to:

— introduce uniform modern standards for jurisdiction in civil and commercial matters;

— simplify the formalities governing the rapid and automatic recognition and enforcement of the relevant judgements by a simple and uniform procedure.

2.1.2. On jurisdiction the proposal establishes the principle of 'the defendant's domicile as the general ground for jurisdiction', i.e. the country in which the citizens or companies in question have their legal domicile. The regulation does, nevertheless, stipulate special provisions for some categories of litigation.

2.1.2.1. Contractual litigation

Litigation is normally lodged with the court for the place of performance of the obligation in question:

— for the delivery of goods, it (the place of enforcement) will be the place where, under the contract, the goods were, or should have been, delivered;

— for the provision of services, it will be the place where the services were, or should have been, provided;

— in matters relating to maintenance, in the courts for the place where the creditor is domiciled;

— for litigation concerning relations between insurers and insured persons, the insurer may be sued in the courts of the place where the plaintiff (insurance policyholder, insured person or beneficiary) has his or her domicile;

— for contracts concluded by consumers — likewise to protect the weaker party to the contract — the jurisdiction of the country of domicile of the consumer will be recognised, including cases where goods and services have been purchased via electronic commerce;

— for employment contracts, the regulation recognises to the place of domicile of the employee.

2.1.2.2. For litigations relating to tort, delict or quasi-delict

— The defendant may be sued in the court of the place where the harmful event has occurred or there is a risk of it occurring.

2.1.2.3. The regulation also establishes exclusive jurisdiction for some litigation, inter alia by specifying, in cases concerning intellectual property rights, the court of the Member State of deposit or registration.

2.1.3. With regard to recognition, the draft regulation establishes the principle of automatic compliance with decisions within the European Community. This arrangement means that the same proceedings cannot be recommenced in another Member State. If dispute proceedings are initiated, the procedure used will be that provided for under the section on enforcement. This same section sets out the grounds for non-recognition or non-enforcement (Articles 41 and 42); these grounds have been narrowed down quite considerably in comparison to those set out in the Brussels Convention.

2.1.4. With regard to enforcement, the regulation is founded on mutual trust between judicial authorities which must allow implementation of judgements (order, decision or writ of execution) in a Member State other than the state of origin of the court judgement.

2.1.4.1. The enforcement procedure existing in the Brussels Convention, because of the length of time and cost involved, considerably slowed down application of court decisions within the Union. This procedure has therefore been simplified in the Community's draft regulation. Thus the court enjoying jurisdiction, responsible for declaring the enforceability of a decision in the state addressed, must limit its intervention to straightforward formal checks on the documents presented in support of the application in *exequatur*. The grounds for non-execution cannot at this stage of the proceedings be raised automatically by the judge, but may be reviewed on appeal by the party against whom the enforcement is implemented.

2.1.4.2. For provisional and protective measures, the regulation stipulates that a foreign decision which has not yet been declared enforceable in the state addressed, nevertheless does establish the existence of a credit claim warranting provisional and protective measures (according to the legislation of the state addressed). Such a measure will protect the interests of the creditor pending the enforcement decision.

2.1.5. The draft regulation only applies to those Member States having subscribed to the Treaty provisions on judicial cooperation in civil matters; this excludes the United Kingdom, Ireland and Denmark from its field of application. Thus this draft regulation apparently constitutes a first in the Community's legal system, even if these countries have the option of aligning their approach on that of the twelve other Member States. It now seems that the United Kingdom and Ireland will opt to apply the regulation, while Denmark has yet to decide. As regards litigation with nationals or companies established in third countries, the national laws of these countries will apply, except in cases where there is a clause allocating exclusive jurisdiction to one Member State.

2.2. *Innovations vis-à-vis the Brussels Convention*

2.2.1. The Brussels and Lugano Conventions provided the model for the draft regulation. These Conventions have been undergoing revision since December 1997 and, before ratification of the Amsterdam Treaty, the European Commission had proposed a new Convention which was intended to be an improvement on the current Convention. These proposed improvements have naturally found their way into the new proposal.

2.2.2. The main innovation lies in the fact that this is a uniform draft regulation (and not a directive which could have given rise to diverging national provisions).

2.2.3. The draft regulation provides an autonomous definition of the legislation applying to commercial activities relating to trade within the single European market: the sale of goods and provision of services. These provisions obviate the need for reference to the rules of international law and are therefore intended to improve the legal certainty of trade.

2.2.4. The draft regulation extends the possibility, for all direct contracts with consumers, of applying the jurisdiction of the consumer's country of domicile, including for sales via electronic commerce.

2.2.5. The proposal simplifies the enforcement procedure to a considerable extent by limiting the power of the judge, thus promoting the free movement of judgements within the Community.

2.2.6. The proposal restricts to some extent the scope of derogations which may allow appeals against the recognition and enforcement of sentences issued in another Member State. Thus, for example, one case where a derogation is allowed is where 'the declaration of enforceability is manifestly contrary to public policy'. By adding the term 'manifestly', which was not in the wording of the Brussels Convention, the scope of the derogation has been restricted.

3. **General comments**

3.1. *The scope of the opinion of the Economic and Social Committee*

3.1.1. The entry into force of the Amsterdam Treaty has meant that the Committee can carry out its advisory role in achieving the area of freedom, security and justice provided for by the Treaty. This is a key area for civil society organisations in Europe. In its capacity as sole institutional body where civil society organisations are represented, the Committee sees here an excellent opportunity for acting in the interests of the people of the Union.

3.1.2. At its plenary session of 20 and 21 October 1999, the Committee adopted its Opinion on the Proposal for a Council Directive on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (Rapporteur: Mr Hernández Bataller) [1]. In this opinion the Committee supported the Commission's proposal, but regretted that it was in the form of a directive and not a regulation (such as the present proposal) and asked inter alia for mechanisms to be set up for providing information to the general public. The Committee welcomes the Commission's decision to convert this draft directive into a draft regulation.

3.1.3. The Committee stresses the need for consistency between the two draft regulations since the 'service' of documents is a pre-requisite to the 'recognition and enforcement' of judgements. It therefore considers that information and training measures for practitioners and citizens should be designed using a consistent and broad-based approach to the two texts.

3.2. *The appropriateness of a Community instrument*

3.2.1. Replacement of the Brussels Convention in the twelve Member States participating without restriction in the justice/security part of the Treaty, by a regulation with direct application, does seem to represent significant progress, in particular insofar as it will create greater legal certainty (one single text instead of numerous conventions in a variety of forms). Moreover, the Court of Justice will be able to ensure uniform application of the provisions set out in the regulation in all Member States.

3.2.2. The Committee is pleased that the United Kingdom and Ireland intend to apply the regulation and hopes that Denmark will follow suit, in accordance with the appropriate procedure, so that this regulation may be uniformly implemented throughout the Community.

4. **Specific comments**

4.1. *Improving enforcement procedures for court judgements*

4.1.1. It is clear from the conclusions of the European Council in Tampere on 15 and 16 October 1999 that this proposed regulation can only be considered as a step towards the establishment of a genuine common judicial area, in which citizens and businesses can assert and exercise their rights and carry out their obligations in full legal certainty. Thus the European Council in Tampere called on the Commission to establish 'minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the Union as well as special common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims, as well as maintenance claims and on uncontested claims'.

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[1] OJ C 368, 20.12.1999, p. 47.

4.1.2. European instrument of enforcement

4.1.2.1. The proposed regulation is to be endorsed in that it simplifies the exequatur procedure; however, it falls short of establishing an efficient judicial area. Once the exequatur has been obtained, instruments of enforcement still have to be applied and these take many different forms across the Member States. Although it would appear to be very difficult to standardise enforcement procedures at the moment, the Committee proposes certain amendments relating, among other things, to protective measures.

4.1.2.2. Article 44 of the proposed regulation stipulates that the applicant may avail himself of protective measures in accordance with the law of the Member State addressed, without a declaration of enforceability under Article 37 being required. For creditors, therefore, this arrangement to some extent opens the way for a 'European instrument of enforcement'. The provision remains inadequate, however, since, even in this case, a court order is still required in some countries. Thus, it would be useful to stipulate that a court judgement made in another Member State without exequatur would be a sufficient basis for applying certain enforcement procedures, such as asset-freezing orders which exist in most EU countries.

4.1.3. The need for simple and rapid redress procedures

4.1.3.1. The Committee had already stressed 'the importance of redress procedures that are rapid and easily accessible' in its Opinion on the Proposal for a European Parliament and Council Directive combating late payment in commercial transactions [1]. Proposals made in this connection were unfortunately withdrawn by the Council from the proposed directive.

4.1.3.2. The Committee thus proposes that studies be carried out into comprehensive proposals, including the simplification and acceleration of procedures and minimum standards for legal aid.

4.1.3.3. Regarding enforcement, the objective should be to establish a European instrument of enforcement, which would take effect throughout the Community as soon as a judgement is passed. This idea was examined at the Tampere European Council in October 1999 and is fully supported by the Committee.

4.1.4. Towards a European instrument of enforcement

4.1.4.1. The Committee therefore calls for the European instrument of enforcement to be set in train without delay, particularly in those areas where there is some urgency: maintenance claims, late payments, late wage payments, non-payment of wages as a result of company bankruptcy, etc. Initially, the Committee proposes that the Commission recognise the validity of this European instrument of enforcement (automatic enforcement without making it subject to an exequatur procedure) for indisputable claims. To establish the concept of a European instrument of enforcement, the Commission could propose the adoption of a 'European' recovery procedure for 'European' claims, with identical arrangements in all Member States. Such a procedure could operate and develop along lines similar to the payment injunctions currently used in Germany and France. In the long run, the general adoption of an arrangement such as this would render the exequatur procedure meaningless since any given judgement would comply with the same implementation conditions in each Member State.

4.1.5. Towards a convergence of rights

4.1.5.1. In parallel, it would also be important to secure convergence of civil and commercial rights within the European Union; in the longer term this is a condition for the creation of a genuine area of freedom, justice and security.

4.2. *Adapting the draft regulation to electronic commerce*

4.2.1. Article 15 of the proposal has provoked strong concern within the business community and provides the makings of a controversy. This article repeats the principle laid down in Article 13 of the current Brussels Convention whereby jurisdiction is held in the state of the consumer's domicile. According to Article 13 of the Brussels Convention, this jurisdiction applies as long as the consumer has been subject to a specific invitation or advertising in his state of domicile. In Article 15 of the draft regulation, the European Commission's amendment is designed to take into account the development of electronic commerce. The draft equates the offer of goods and services via the Internet with an invitation or advertising by businesses which 'by any means, ... direct their activities towards that Member State or to several countries including that Member State'.

4.2.2. The question is whether promoting its services on the Internet means that a company is deliberately seeking to expand beyond its traditional marketing area. Unlimited access to the entire planet is peculiar to the Internet. It is perfectly understandable, however, that the prospect of being brought before foreign courts could deter small and medium-sized enterprises from using the Internet to promote their services. The European Union is, therefore, facing a two-fold challenge: guaranteeing the best possible legal protection for its citizens in relation to the development of electronic commerce and its risks (particularly since it generally requires an advance

(1) OJ C 407, 28.12.1998.

payment by the consumer), while at the same time not deterring European businesses, particularly SMEs, from using this channel to promote their services. This challenge relates primarily to the European judicial area, but also involves an international dimension, particularly in terms of consumer protection, as the majority of proposals on the 'web' originate from businesses established in third countries.

4.2.3. The Committee would like to improve business/consumer relations in this new form of distribution. It is therefore a priority that the parties concerned develop confidence-building mechanisms with support from the European authorities: codes of good conduct, 'cybertribunal', recourse to mediation. etc. Such measures will provide the best guarantees for the effective development of electronic commerce and its use by businesses and consumers and should also be considered at international level. The Committee calls on the Commission to take stock of existing good practices in this field world-wide, and to support their application in Europe.

4.2.4. Pending results from these confidence-building measures, the Committee recommends preserving Article 13 of the current Brussels Convention which grants jurisdiction to the customer's state of domicile. In order to further reinforce consumer protection, the Committee feels that this principle should be extended to cases where the consumer has been induced, at the co-contractor's instigation, to leave his home country to conclude the contract. For electronic commerce, however, the arrangement proposed in the new regulation ('....by any means, directs such activities to that Member State') is not clear enough to foster a climate of trust between the parties. By retaining the definition of the current Article 13 of the Convention (invitation or advertising in the Member State), it is up to the judge to determine whether the consumer took an active or passive role in receiving the information. There needs to be a greater shift towards effective methods of dispute settlement tailored to electronic commerce and respectful of consumer protection.

4.2.5. For the electronic commerce sector, the Committee suggests a system of self-regulation which, without jeopardising access to the legal system, would encourage the introduction of automatic provisions for recourse to mediation, particularly for small transactions below a certain amount, for example EUR 2 500. Businesses should also be able to restrict their marketing activities to certain countries by actively informing consumers. If necessary, a regulation specifically for the sector could be considered, keenly encouraging mediation and leaving the courts as a last resort.

4.3. *Other recommended improvements to the current regulation*

4.3.1. In order to make the new regulation easier to interpret, the Committee would propose defining certain concepts in line with the case law of the European Court of Justice (ECJ). In relation to Article 5(3), for example, the ECJ has defined the concept of matters relating to delict or quasi-delict. Similarly, and again with an eye to clearer interpretation, some articles of the proposal could be expanded to bring them into line with ECJ case law. Examples include matters relating to a contract or, in respect of third countries, the principle of the place in which the obligation in question was or is to be performed.

4.4. *Encouraging out-of-court dispute settlement*

4.4.1. The Committee places particular emphasis on the out-of-court settlement of disputes in civil and commercial matters. This may take the form of arbitration, where the parties agree to call upon an independent referee who renders an award which is binding on the parties. It may take the form of mediation and conciliation, where the two sides call upon a third party to help them resolve their litigation; the parties alone determine the outcome of the case; they are not bound by any decision. The protracted and costly nature of judicial proceedings is such that individuals and businesses, particularly small and medium-sized enterprises, are soon discouraged from starting proceedings. The Committee would also like to see the development of procedures designed to bring about agreement between the parties, particularly mediation in disputes involving individuals, provided these are straightforward, quick and inexpensive.

4.4.2. With regard to mediation, it is crucial to guarantee the quality of the service provided and the competence and independence of the mediators, as described in the European Commission Recommendation 98/257/EC concerning the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes. With this in mind, it would be useful to step up European cooperation with an eye to aligning provisions and training mediators in the settlement of cross-border disputes.

4.4.3. The Committee welcomes the plans announced at the Tampere Council to examine the measures promoting these procedures in the Community. The Committee would provide its contribution by issuing an own-initiative opinion on the subject. This contribution would be all the more significant as it would be the product of in-depth consultation with the European civil society organisations responsible for implementing these self-regulatory procedures.

4.5. *Information for litigants (point 29 of the Tampere conclusions)*

4.5.1. As in its Opinion on the Service in the Member States of judicial and extrajudicial documents in civil or commercial matters (rapporteur: Mr Hernández Bataller), the Committee underlines the importance of arrangements for providing information to litigants, particularly to citizens, their interest groups, trade unions, small businesses and craft workers, the professions, and their associations. Such moves to provide information should also include the compilation of a 'guide for cross-border users' and the establishment of local information relays (Eures network for cross-border workers, Euro Info Centres for SMEs), so that information is widely circulated about the new rights and duties within the new common area of freedom, security and justice.

4.5.2. As for the proposed regulation itself, the Committee would propose drafting an information booklet, for users (lawyers, associations, consumers etc.) and including a table such as the one set out in the explanatory memorandum to the draft, giving an article-by-article comparison with the Brussels Convention. This information booklet would also deal with the regulation on the Service of judicial and extrajudicial documents in civil and commercial matters.

Brussels, 1 March 2000.

The President

of the Economic and Social Committee

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