Opinion of the European Economic and Social Committee on the 'Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters'

COM(2010) 748 final — 2010/0383 (COD)

(2011/C 218/14)

Rapporteur-general: **Mr HERNÁNDEZ BATALLER**

On 15 February 2011, the Council decided to consult the European Economic and Social Committee, under Articles 67(4) and 81(2) of the Treaty on the Functioning of the European Union, on the

Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

COM(2010) 748 final/2 — 2010/0383 (COD).

On 1 February 2011 the Committee Bureau instructed the Section for the Single Market, Production and Consumption to prepare the Committee's work on the subject.

Given the urgent nature of the work, the European Economic and Social Committee appointed Mr Hernández Bataller as rapporteur-general at its 471st plenary session, held on 4 and 5 May 2011 (meeting of 5 May), and adopted the following opinion by 162 votes to 1, with 2 abstentions.

1. **Conclusions and recommendations**

1.1 The Committee supports the Commission's proposal, considering that it should enable the goal of removing legal barriers to be achieved: this will make life easier for people and businesses, improving effective remedies.

1.2 The Committee urges the Commission to pursue its initiative to remove legal barriers in the European Union, to achieve a genuine European judicial area, taking into consideration all the comments the EESC has made on the matter in its various opinions.

2. **Introduction**

2.1 On 1 March 2002, Regulation 44/2001 replaced the Brussels Convention, together with all of the bilateral instruments between the different Member States on this subject. Also known as the Brussels I Regulation, it is the EU's most important piece of legislation so far on judicial cooperation in civil matters.

2.2 Basically, Regulation 44/2001 allows, in particular circumstances, for any natural or legal person involved in cross-border court proceedings and domiciled in a different Member State from that where the case is brought, to bring a case before the courts of a Member State, favouring the closest connecting factor.

2.2.1 Article 5 of the Regulation also establishes that in matters relating to a contract, particularly in the case of the sale of goods, it is possible to sue the company in the Member State where the goods were delivered, or should have been delivered.

2.2.2 The areas in which the new legislation applies are listed in Article 5 (contractual and non-contractual liability, civil claims for damages, operation of a branch or agency, etc.).

2.2.3 A whole section of the Regulation – Section 3 – is devoted to jurisdiction in matters relating to insurance. This section states that the policy holder may use the courts for the place where he/she is domiciled to sue the insurer, even if the insurer is domiciled in a different Member State. However, if the insurer wants to sue the policy holder, the insured or a beneficiary, he/she may bring proceedings only in the courts of the Member State in which the defendant is domiciled.

2.3 Regulation 44/2001 consists of a set of explicit conferrals of jurisdiction, and focuses in places on improving protection for particular groups (consumer contracts, individual contracts of employment). However, the traditional rules on jurisdiction still apply to lawsuits on immovable property, dissolution of legal persons or entries in registers and enforcement of judgments.

2.4 Two lengthy sections of Regulation 44/2001 deal with the enforcement of judgments and the recognition of authentic instruments in another Member State. It ends with a series of final and transitional provisions, which set out how this new instrument for legal cooperation relates to other more specific conventions that Member States have signed.

2.5 On 21 April 2009 the Commission adopted a report on the application of the Regulation and a Green Paper. The EESC issued an opinion [1] on the Green Paper, supporting some of the Commission's proposals for reform.

3. **Proposal for a Regulation**

3.1 The overall objective of the revision is to further develop the European area of justice by removing the remaining obstacles to the free movement of judicial decisions in line with the principle of mutual recognition. The importance of this aim was emphasised by the European Council in its 2009 Stockholm Programme [2]. More specifically, the proposal aims at facilitating cross-border litigation and the free circulation of judgments in the European Union. The revision should also help to create the necessary legal environment for the European economy to recover.

3.2 The proposed elements of the reform are as follows:

— abolition of the intermediate procedure for the recognition and enforcement of judgments (exequatur) with the exception of judgments in defamation cases and judgments given in collective compensatory proceedings; and various options for preventing in exceptional circumstances that a judgment given in one Member State takes effect in another Member State;

— the proposal also contains a series of standard forms which aim at facilitating the recognition or enforcement of foreign judgments in the absence of the exequatur procedure as well as the application for a review under the procedure safeguarding the rights of defence;

— extension of the jurisdiction rules of the Regulation to disputes involving third country defendants, including regulating situations where the same issue is pending before a court inside and outside the EU. The amendments will ensure that the protective jurisdiction rules available for consumers, employees and the insured will also apply if the defendant is domiciled outside the EU;

— enhancement of the effectiveness of choice of court agreements, which includes two modifications:

  — where the parties have designated a particular court or courts to resolve their dispute, the proposal gives priority to the chosen court to decide on its jurisdiction, regardless of whether it is first or second seised;

  — the proposal also introduces a harmonised conflict of law rule on the substantive validity of choice of court agreements, thus ensuring a similar outcome on this matter whatever the court seised;

— improvement of the interface between the Regulation and arbitration;

— improvement of access to justice for certain specific disputes;

— clarification of the conditions under which provisional measures can circulate in the EU.

4. **General comments**

4.1 The Committee warmly welcomes the Commission's proposal and supports the adoption of a recast version of Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I).

4.2 The Commission proposal is clearly necessary to improve the operation of the area of freedom, security and justice and the internal market, which can only be promoted from supranational level. The initiative will also be a valuable legal tool in a globalised world: it will facilitate international commercial transactions and solve conflicts that arise in relations involving countries outside the EU.

4.2.1 It should be noted that all of the innovations contained in the legal mechanisms proposed, together with the clarification of some rules and principles in this area that already apply in the EU, stem from the experiences that cross-border lawyers, experts and competent bodies of the Member States have passed on publicly to the European Commission.

4.2.2 The principle of subsidiarity is taken into overall account: supranational action is justified given the fact that it is not in the power of Member States to modify unilaterally certain aspects of the existing Regulation Brussels I, such as the exequatur, and provisions on jurisdiction and coordination of legal proceedings between Member States, or between Member States and arbitration proceedings. Functional subsidiarity is also highlighted as an integral part of the principle of participative democracy which is set out in the TEU following the Lisbon Treaty. The Committee has already in the past supported many of the proposals now being made by the Commission [3].

[1] OJ C 255, 22.9.2010, p.48.

[2] Adopted at the meeting of the European Council on 10 and 11 December 2009.

[3] OJ C 117, 26.4.2000, p. 6.

4.3 The proposal is realistic, well thought-through and flexible in the way in which it recommends technical solutions to problems encountered while the Brussels I Regulation has been in force. To summarise, these solutions are: abolition of the exequatur with the exception of judgments in defamation cases and judgments given in collective compensatory proceedings; extension of the regulation to disputes involving third country defendants; enhancement of the effectiveness of choice of court agreements; improvement of the interface between the Regulation and arbitration; classification of the conditions under which provisional and protective measures issued by a court in a Member State can apply in other Member States; and in brief, improvement of access to justice and the functioning of certain pending procedures in national courts.

4.3.1 There is no substantial reason for the proposal to exclude collective proceedings when abolishing the exequatur, and so the wording of Article 37 is unsatisfactory. The Committee has already, on a number of occasions, supported supranational regulation of collective proceedings. The Commission should consider amending Article 6 of Regulation 44/2001 in order to allow actions brought by different claimants to be dealt with collectively, providing that the grounds for their cases are so closely linked that it is appropriate to process and pronounce judgment on them at the same time, so as to avoid decisions which could be incompatible if cases were dealt with separately.

4.3.2 As regards exclusion of defamation, in actual fact the scope of Article 37(3)(a) is broader, encompassing judgments given in another Member State concerning non-contractual obligations arising out of violations of privacy and rights relating to personality. The Commission should give thought to the extent of this exception and the possibility of curtailing it, so that common aspects of people's daily lives are not excluded.

4.3.3 To flesh out the debate on the changes which need to be made on the legal procedures and mechanisms dealt with in the proposal, the Committee would like to make the following points for the Commission to consider.

4.3.4 Article 58(3) of the recast version of the Regulation establishes that the competent court shall give its decision 'without delay' on appeals against a decision on objections to an application for a declaration of enforceability of a judgment. The maximum duration should be more precise, in order to avoid unjustified delays or delays which would be damaging for parties involved.

4.3.5 A deadline could therefore be set: either the 90-day deadline established in Article 58(2) for decisions on appeals contesting a declaration of enforceability, or a deadline between the six weeks provided for in Article 11(3) of Regulation 2201/2003 (on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility) and the 90 day deadline.

4.3.6 Similarly, the new mechanism for legal cooperation (established in Article 31 of the recast version of the Regulation) could be redrafted to strengthen the role of the court with jurisdiction on the substance and guard against potential actions in bad faith that could delay the resolution of the dispute.

4.3.7 There is a rather vague requirement that 'coordination' should be ensured between the court with jurisdiction on the substance and the court in another Member State which is seised with an application for provisional, including protective measures. The latter court is responsible for seeking information from the other court on all relevant circumstances of the case (such as the urgency of the measure sought or any refusal of a similar measure by the court seised as to the substance). This obligation could be complemented with another provision establishing the exceptional nature of the admissibility of these measures, or even, in general terms, discontinuance in favour of the judge making a decision on the substance.

4.3.8 This would also be fully in line with the central role that (for speed and to guarantee the principle of mutual recognition) the Court of Justice gives to the court with jurisdiction to resolve disputes on substance in the interpretation of associated regulations, such as Regulation 2201/2003 mentioned above.

4.4 The fact that the clause on public policy is maintained, only in cases where the exequatur is abolished, should be highlighted (Article 34(1) of the existing Brussels I Regulation, and Article 48(1) of the proposal of the recast version). This clause enables the courts of a Member State in which recognition is sought not to recognise judgments that are manifestly contrary to its public policy.

4.4.1 Of course, this is an option which could give rise to interpretations and give judges a margin of discretion. This provision has been used while the Brussels I Regulation has been in force however, and it is clear that this risk is currently kept in check by at least three legal limits: the criteria established on the matter by the Court of Justice [4], the fact that the Charter of Fundamental Rights of the EU is now in force and binding, and the consolidation of the Court of Justice's case-law that restricts the notion of public policy in favour of the effectiveness of EU law.

[4] ECJ Judgment of 28 March 2000, case C-7/98, Krombach, European Court Reports 2000 p. I-01935.

4.4.2 However, the EESC calls on the European Commission to keep a particularly close eye on the conduct of courts in the Member States, to ensure that the principle of mutual recognition of judgments is implemented correctly whenever decisions are made on jurisdiction for reasons of public policy.

4.5 The proposed recast version of the regulation establishes a new rule on the recognition of arbitration agreements which designate a forum in an EU Member State to reduce the risk of forum-shopping. The issue is only touched upon however, and does not seem to be dealt with sufficiently.

4.5.1 This approach to dispute resolution is becoming increasingly popular – particularly in commercial matters – and it would make sense to extend this approach to other key areas of interest for European citizens (e.g. consumer law and labour law). The Committee therefore calls on the Commission to consider creating, as soon as possible, a supranational legal instrument for the recognition and enforcement of arbitration decisions. In fact, although the proposal favours legal monitoring, arbitration is expressly excluded from the scope of the regulation (Article 1(2) point d).

4.6 The Commission could also promote the development of a communication or guide on how to interpret Article 5 of the proposal (which is pretty much identical to the terms of the existing article in the Brussels I Regulation). This would clarify Article 5 and speed up the process of adopting judgments.

4.6.1 According to both provisions, in matters relating to a contract the courts for the place of performance of the obligation in question shall have jurisdiction. The exception is for the sale of goods, where it shall be the place in a Member State where the goods were delivered or should have been delivered, and in the case of the provision of services, the place in a Member State where the services were provided or should have been provided.

4.6.2 The case-law of the Court of Justice – which interprets the concepts of 'service' and 'goods' in relation to the freedoms of the internal market – does not apply to the Brussels I Regulation. Up until now, the Court of Justice has resolved issues on interpreting the scope of Article 5 by referring to certain international regulations. Yet as these regulations are not binding to the EU or to any of the Member States, they do not amount to common rules for intra-Community contracts.

4.7 Paradoxically, an attempt to speed up legal proceedings seems to be behind the new wording at Article 24(2) of the proposal: Article 24(2) only affects the application of Article 24(1) (which states that a court of a Member State before which a defendant enters an appearance shall have jurisdiction) by establishing that the document instituting proceedings must contain information for the defendant on his right to contest the jurisdiction of the court and the consequences of entering an appearance. This provision could easily be implemented by inserting standard formulas, but could undermine the rights of the weaker parties in a contract, especially given that Article 24(2) limits its scope to insurance contracts, consumer contracts, and individual contracts of employment.

4.7.1 Given that it is the court where the claim is brought that will have to check whether the defendant was given the information, yet no specific requirements are established on the matter, the Committee would like to stress that implementing this provision could lead to uncertainty and considerable room for discretion across the 27 different national jurisdictions in the EU. The EESC therefore calls on the European Commission to review the wording of this provision in order to strengthen the legal position of consumers and employees and ensure that the same procedure is followed, regardless of which court has jurisdiction.

Brussels, 5 May 2011.

The President
of the European Economic and Social Committee
Staffan NILSSON