

EN

EN

EN



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 21.4.2009
COM(2009) 175 final

GREEN PAPER

**ON THE REVIEW OF COUNCIL REGULATION (EC) No 44/2001 ON
JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF
JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS**

GREEN PAPER
ON THE REVIEW OF COUNCIL REGULATION (EC) No 44/2001 ON
JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF
JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

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 ("the Regulation")¹. 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.

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, to the following address:

European Commission
Directorate-General Justice, Freedom and Security
Unit E2 – Civil Justice
B – 1049 Brussels Fax: + 32 (0) 2 299 64 57
E-mail: jls-coop-jud-civil@ec.europa.eu

Contributions will be published on the Internet. It is important to read the specific privacy statement attached to this consultation for information on how your personal data and contribution will be dealt with. Professional organisations are invited to register in the Commission's Register for Interest Representatives².

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.

In the area of uncontested claims, intermediate measures have been abolished on the basis of a control, in the Member State of origin, of minimum standards relating to the service of the document instituting proceedings and to the provision of information about the claim and the procedure to the defendant. In addition, an exceptional review should remedy situations where the defendant was not served personally in a way to enable him/her to arrange for his/her

¹ OJ L 12, 16.1.2001, p. 1.

² (<http://ec.europa.eu/transparency/regrin>). This Register was set up in the framework of the European Transparency Initiative with a view to provide the Commission and the public at large with information about the objectives, funding and structures of interest representatives.

defence or where he/she could not object to the claim by reason of force majeure or extraordinary circumstances ("special review"). Under this system, the claimant must still go through a certification procedure, be it that this procedure takes place in the Member State of origin rather than in the Member State of enforcement.

In the area of contested and uncontested claims, on the other hand, Regulation 4/2009 on maintenance obligations³ abolishes *exequatur* on the basis of harmonised rules on applicable law and the protection of the rights of the defence is ensured through the special review procedure which applies once the judgment has been issued. Regulation 4/2009 thus takes the view that, in the light of the low number of "problematic" judgments presented for recognition and enforcement, a free circulation is possible as long as the defendant has an effective redress *a posteriori* (special review). If a similar approach were followed in civil and commercial matters generally, the lack of harmonisation of such a special review procedure might introduce a certain degree of uncertainty in the few situations where the defendant was not able to defend him/herself in the foreign court. It should therefore be reflected whether a more harmonised review procedure might not be desirable.

Question 1:

Do you consider that in the internal market all judgments in civil and commercial matters should circulate freely, without any intermediate proceedings (abolition of exequatur)?

If so, do you consider that some safeguards should 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. The reply to these needs should not vary from one Member State to another, taking into account, in particular, that subsidiary jurisdiction rules do not exist in all the Member States. 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. In this respect, a balance should be found between ensuring access to justice on the one hand and international courtesy on the other hand. Three grounds might be considered in this respect: jurisdiction based on the carrying out of activities, provided that the dispute relates to such

³ OJ L 7, 10.1.2009, p. 1.

activities; the location of assets, provided that the claim relates to such assets; and a *forum necessitatis*, which would allow proceedings to be brought when there would otherwise be no access to justice⁴.

Further, if uniform rules for claims against third State defendants are established, the risk of parallel proceedings before Member State and third State courts will increase. It must therefore be considered in which situations access to the courts of the Member States must be ensured irrespective of proceedings ongoing elsewhere and in which situations and under which conditions it may be appropriate to allow the courts to decline jurisdiction in favour of the courts of third States. This could be the case, for instance, when parties have concluded an exclusive choice of court agreement in favour of the courts of third States, when the dispute otherwise falls under the exclusive jurisdiction of third State courts, or when parallel proceedings have already been brought in a third State⁵.

Finally, 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' courts⁶.

Question 2:

Do you think that the special jurisdiction rules of the Regulation could be applied to third State defendants? What additional grounds of jurisdiction against such defendants do you consider necessary?

How should the Regulation take into account exclusive jurisdiction of third States' courts and proceedings brought before the courts of third States?

Under which conditions should third State judgments be recognised and enforced in the Community, particularly in situations where mandatory Community law is involved or exclusive jurisdiction lays with the courts of the Member States?

⁴ See the *forum necessitatis* rule in Article 7 of Regulation (EC) No 4/2009. The *forum necessitatis* rule ensures that, where no court of a Member State has jurisdiction pursuant to the Regulation, the courts of the Member States may, on exceptional basis, hear the case if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected.

⁵ On these questions, it may be referred to the study on subsidiary jurisdiction mentioned in the Report, as well as to the work accomplished by the European Group for Private International law (GEDIP), in particular at their session in Bergen in September 2008 (see http://www.gedip-egpil.eu/gedip_documents.html).

⁶ This concern has been voiced, for instance, in the context of consumer collective redress, whereby Community companies are involved in collective action in third States (e.g. United States).

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.

One solution might be to release the court designated in an exclusive choice-of-court agreement from its obligation to stay proceedings under the *lis pendens* rule⁷. A drawback of this solution is that parallel proceedings leading to irreconcilable judgments are possible.

Another solution might be to reverse the priority rule insofar as exclusive choice of court agreements are concerned. In this option, the court designated by the agreement would have priority to determine its jurisdiction and any other court seized would stay proceedings until the jurisdiction of the chosen court is established. This solution already applies in the context of the Regulation with respect to parties none of whom is domiciled in a Member State. Such a solution would align to a large extent the internal Community rules with the international rules. A drawback of this solution may be that if the agreement is invalid, a party must seek first to establish the invalidity before the court designated in the agreement before being able to seize the otherwise competent courts.

Alternatively, the existing *lis pendens* rule may be maintained, 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. In this option, it should be ensured that the claimant does not lose a legitimate forum for reasons outside his/her control.

The efficiency of jurisdiction agreements could also be strengthened by the granting of damages for breach of such agreements, arising for instance from the delay or the exercise of default clauses in loan agreements.

Another solution might also be 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.

Finally, the uncertainty surrounding the validity of the agreement could be addressed, 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 courts⁸. This option could be combined with some of the solutions suggested above: the acceptance of parallel proceedings

⁷ *Lis pendens* rule requires that, where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the Court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.

⁸ Concerning the validity of the agreement, it is sometimes suggested that a harmonised conflict rule might be appropriate in order to ensure a uniform application of the rules of the Regulation. It should be noted that the law applicable to choice of court agreements is excluded from the scope of Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I).

or the reversal of the priority rule could be limited to those situations where the choice-of-court agreement takes the standard form prescribed by the Regulation.

Question 3:

Which of the above suggested solutions, or any other possible solutions, do you consider most appropriate in order to enhance the effectiveness of choice of court agreements in the Community?

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. Substantive law on intellectual property is already largely part of the *acquis communautaire*⁹. Directive 2004/48/EC on the enforcement of intellectual property rights¹⁰ aims at approximating certain procedural questions relating to enforcement. . In order to address the lack of legal certainty and the high costs caused by duplication of proceedings before national courts, 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 market¹¹. 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 Convention¹². 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 (cf. supra, point 3).

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

⁹ Intellectual property rights also include copyright which is not addressed in this paper. As a right which is not subject to registration, copyright is not covered by the exclusive jurisdiction rules of the Regulation.

¹⁰ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004, p. 45).

¹¹ COM(2007) 165.

¹² SEC(2009) 330.

domiciled. A drawback of such a rule might be, as the Court of Justice suggested, that the strong factual basis of the rule may lead to a multiplication of the potential heads of jurisdiction, thereby undermining the predictability of the jurisdiction rules of the Regulation and the principle of legal certainty. In addition, such a rule may lead to forum shopping. Alternatively, a re-formulation of the rule on plurality of defendants might be envisaged in order to enhance the role of the courts of the Member State where the primary responsible defendant is domiciled.

Question 4:

What are the shortcomings in the current system of patent litigation you would consider to be the most important to be addressed in the context of Regulation 44/2001 and which of the above solutions do you consider appropriate in order to enhance the enforcement of industrial property rights for rightholders in enforcing and defending rights as well as the position of claimants who seek to challenge those rights in the context of the Regulation?

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 (cfr. *supra*, point 3).

Concerning the rule on related actions, it should be reflected to what extent it may be appropriate to permit a grouping of actions by and/or against several parties on the basis of uniform rules. The risk of negative conflicts of jurisdiction could be addressed by a cooperation and communication mechanism between the courts involved and by an obligation on the part of the court which declined jurisdiction to re-open the case if the court first seized declines jurisdiction. In Article 30(2), it should be clarified that the authority responsible for service is the first authority receiving the documents to be served. Also, in the light of the importance of the date and time of receipt, the authorities responsible for service and the courts, as appropriate, should note when exactly they receive the documents for purposes of service or when exactly the document instituting proceedings is lodged with the court.

One other possibility could be to provide for a limited extension of the rule in Article 6(1), allowing for a consolidation if the court has jurisdiction over a certain quorum of defendants.

Question 5:

*How do you think that the coordination of parallel proceedings (*lis pendens*) before the courts of different Member States may be improved?*

Do you think that 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*¹³, 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.

Further, 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 particular, 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. The role of the court seized of the request would be to assist the proceedings on the merits by "lending remedies", particularly when effective protection is not available in all the Member States, without interfering with the jurisdiction of the court having jurisdiction on the substance. When such assistance is no longer needed, the court having jurisdiction on the substance may set aside the foreign measure. Again, a communication between the courts involved may be helpful. This would allow applicants to seek efficient provisional protection where this is available in Europe.

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. Alternatively, it might be considered that this difficulty will be adequately resolved through case law in the future.

Finally, if *exequatur* is abolished, Article 47 of the Regulation should be adapted. In this respect, inspiration may be drawn from Article 18 of Regulation (EC) No 4/2009.

Question 6:

Do you think that the free circulation of provisional measures may be improved in the ways suggested in the Report and in this Green Paper? Do you see other possibilities to improve such a circulation?

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.

¹³ *Ex parte measures* mean, in the context of provisional measures, temporary orders issued by the court based on one party's request without hearing from the other side.

In particular, a (partial) deletion of the exclusion of arbitration from the scope of the Regulation might improve the interface of the latter with court proceedings. As a result of such a deletion, court proceedings in support of arbitration might come within the scope of the Regulation. A special rule allocating jurisdiction in such proceedings would enhance legal certainty. For instance, it has been proposed to grant exclusive jurisdiction for such proceedings to the courts of the Member State of the place of arbitration, possibly subject to an agreement between the parties¹⁴.

Also, the deletion of the arbitration exception might ensure that all the Regulation's jurisdiction rules apply for the issuance of provisional measures in support of arbitration (not only Article 31). Provisional measures ordered by the courts are important to ensure the effectiveness of arbitration, particularly until the arbitral tribunal is set up.

Next, a deletion of the exception might allow the recognition of judgments deciding on the validity of an arbitration agreement and clarify the recognition and enforcement of judgments merging an arbitration award. It might also ensure the recognition of a judgment setting aside an arbitral award¹⁵. This may prevent parallel proceedings between courts and arbitral tribunals where the agreement is held invalid in one Member State and valid in another.

More generally, the coordination between proceedings concerning the validity of an arbitration agreement before a court and an arbitral tribunal might be addressed. One could, for instance, give priority to the courts of the Member State where the arbitration takes place to decide on the existence, validity, and scope of an arbitration agreement. This might again be combined with a strengthened cooperation between the courts seized, including time limits for the party which contests the validity of the agreement. A uniform conflict rule concerning the validity of arbitration agreements, connecting, for instance, to the law of the State of the place of arbitration, might reduce the risk that the agreement is considered valid in one Member State and invalid in another. This may enhance, at Community level, the effectiveness of arbitration agreements compared to Article II(3) New York Convention.

Further, as far as recognition and enforcement is concerned, arbitral awards which are enforceable under the New York Convention might benefit from a rule which would allow the refusal of enforcement of a judgment which is irreconcilable with that arbitral award. An alternative or additional way forward might be to grant the Member State where an arbitral award was given exclusive competence to certify the enforceability of the award as well as its procedural fairness, after which the award would freely circulate in the Community. Still another solution suggested consists of taking advantage of Article VII New York Convention to further facilitate at EU level the recognition of arbitral awards (a question which might also be addressed in a separate Community instrument).

¹⁴ If this approach is followed, uniform criteria should permit to determine the place of arbitration. The general study suggests to refer to the agreement of the parties or the decision of the arbitral tribunal. If the place cannot be defined on that basis, it is suggested to connect to the courts of the Member State which would have jurisdiction over the dispute under the Regulation in the absence of an arbitration agreement.

¹⁵ This is particularly important, for instance, if the award is set aside for violation of mandatory rules of Community law (e.g. competition law).

Question 7:

Which action do you consider 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?*

8. Other issues**8.1. Scope**

As far as scope is concerned, maintenance matters should be added to the list of exclusions, following the adoption of Regulation (EC) No 4/2009 on maintenance. With respect to the operation of Article 71 on the relation between the Regulation and conventions on particular matters, it has been proposed to reduce its scope as far as possible.

8.2. Jurisdiction

In the light of the importance 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. With respect to employment contracts, it should be reflected to what extent it might be appropriate to allow for a consolidation of actions pursuant to Article 6(1). As to exclusive jurisdiction, it should be reflected whether choice of court in agreements concerning the rent of office space should be allowed; concerning rent of holiday homes, some flexibility might be appropriate in order to avoid litigation in a forum which is remote for all parties. It should also be considered whether it might be appropriate to extend the scope of exclusive jurisdiction in company law (Article 22(2)) to additional matters related to the internal organisation and decision-making in a company. Also, it should be considered whether a uniform definition of the "seat" could not be envisaged. With respect to the operation of Article 65, it should be reflected to what extent a uniform rule on third party proceedings might be envisaged, possibly limited to claims against foreign third parties. Alternatively, the divergence in national procedural law might be maintained, but Article 65 could be redrafted so as to allow national law to evolve towards a uniform solution. In addition, an obligation on the part of the court hearing the claim against a third party in third party notice proceedings to verify the admissibility of the notice might reduce the uncertainty as to the effect of the court's decision abroad.

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 the binding force of a jurisdiction agreement in a bill of lading for the third party holder of the bill of lading, stakeholders have suggested that a carrier under a bill of lading should be bound by and at the same token allowed to invoke a jurisdiction clause against the regular third-party holder, unless the bill is not sufficiently clear in determining jurisdiction.

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/EC¹⁶.

With respect to the ongoing work in the Commission on collective redress¹⁷, it should be reflected whether specific jurisdiction rules are necessary for collective actions.

8.3. Recognition and enforcement

As far as recognition and enforcement is concerned, it should be reflected to what extent it might be appropriate to address the question of the free circulation of authentic instruments.¹⁸ In family matters (Regulations (EC) No 2201/2003 and (EC) No 4/2009), the settlement of a dispute in an authentic instrument is automatically recognised in the other Member States. The question arises to what extent a "recognition" might be appropriate in all or some civil or commercial matters, taking into account the specific legal effects 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.

Finally, 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 judgment¹⁹. Such a form would obviate the need for translation of the entire judgment and ensure that all relevant information (e.g. on interest) is available to the enforcement authorities. Costs in the enforcement may be reduced by removing the requirement to designate an address for service of process or to appoint a representative *ad litem*²⁰. In light of the current harmonisation at Community law, in particular Regulation (EC) No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters²¹, such a requirement does indeed seem obsolete today.

Question 8:

Do you believe that the operation of the Regulation could be improved in the ways suggested above?

¹⁶ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133, 22.5.2008, p. 66).

¹⁷ See the Green Paper on consumer collective redress - COM(2008) 794, 27.11.2008 - and the White Paper on damages actions for breach of the EC antitrust rules - COM(2008) 165, 2.4.2008.

¹⁸ The European Parliament has in its Resolution of 18 December 2008 referred also to a European Authentic Act.

¹⁹ See, for instance, Regulation (EC) No 4/2009.

²⁰ A representative *ad litem* means a person appointed to act for a party during the course of legal proceedings.

²¹ OJ L 324, 10.12.2007, p. 79.