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Rapporteur: Mr HERNÁNDEZ BATALLER

On 21 April 2009, the European Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the


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 17 November 2009. The rapporteur was Mr Hernández Bataller.

At its 458th plenary session, held on 16 and 17 December 2009 (meeting of 16 December), the European Economic and Social Committee adopted the following opinion by 174 votes in favour with one abstention.

1. Conclusions and recommendations

1.1 The EESC shares the Commission’s position that the exequatur procedure should be abolished, with a view to facilitating the free movement of judgments in the internal market and the enforcement of these judgments on individuals and businesses.

1.2 The Committee considers that the scope of Regulation 44/2001 should be extended to administrative rulings and therefore calls on the Commission to carry out any studies needed to remove existing barriers to this process.

1.3 Similarly, the EESC considers the adoption of measures facilitating the trans-national use of arbitration to be important, and favours introducing a supra-national and uniform conflict rule with regard to the validity of arbitration agreements, which would refer to the law of the Member State in which arbitration takes place. This should be done while leaving the operation of the New York Convention untouched or at least as a basic starting point for further action.

1.4 A common supranational approach that establishes clear and precise rules on international jurisdiction will strengthen the public’s legal protection and will ensure that binding Community legislation is implemented harmoniously. To achieve this, rules on defendants resident in third countries should be included, rules on subsidiary jurisdiction established, and measures adopted to prevent forum shopping and to encourage the use of standard choice of court clauses.

1.5 Rules should also be adopted to increase legal certainty and reduce the high costs caused by the possible duplication of intellectual property disputes before national courts.

1.6 For judicial proceedings in which binding and protective rights are clarified, such as the rights involved in labour contracts or consumer relations, for example, Regulation 44/2001 will have to be amended to allow for more than one case at a time, so that collective actions can be brought before the courts.

2. Introduction

2.1 One of the aims of the Treaty on European Union is that of ‘maintaining and developing an area of freedom, security and justice’ and Article 65 of the Treaty establishing the European Community states that measures in the field of judicial cooperation in civil matters having cross-border implications, in so far as necessary for the proper functioning of the internal market, shall include ‘the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases’.

2.2 The Tampere European Council held in October 1999 made the principle of the mutual recognition (1) of judgments a veritable cornerstone of judicial cooperation in both civil and criminal matters in the European Union.

(1) The principle of ‘mutual recognition’ guarantees the free movement of judgments without Member States’ procedural laws having to be harmonised.
2.3 The entry into force of the Treaty of Nice in February 2003 replaced the decision-making procedure under Article 67 with qualified majority voting and the co-decision procedure in the field of judicial cooperation in civil matters, except in the area of family law.

2.4 The 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters makes an extremely valuable contribution to the Community acquis.

2.4.1 The case-law of the European Court of Justice on the Convention and the entry into force of the Amsterdam Treaty made possible the adoption of Council Regulation (EC) No 44/2001 of 22 December on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2), on the proposal for which the EESC delivered an opinion (3), which welcomed the idea of a Community instrument to replace the Convention.

2.4.2 Regulation (EC) No 44/2001 lays down uniform rules for settling conflicts of jurisdiction and for facilitating the free movement of judgments, court settlements and authentic instruments enforceable in the European Union. This Regulation has proven to be of key importance in cross-border civil and commercial proceedings.

2.4.3 Denmark did not initially participate in judicial cooperation in civil matters. As matters now stand, the Regulation has been in force in Denmark since 1 July 2007, under the provisions of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (4).

2.4.4 The Lisbon Treaty will make action at the European level easier in the field of judicial cooperation in civil matters, by increasing use of the Community method (5), with the Commission’s proposals being adopted by qualified majority, and by boosting an active role of the European Parliament, democratic scrutiny via national parliaments, and the Court of Justice’s role in monitoring legality.

3. The Commission Green Paper

3.1 Article 73 of Regulation 44/2001 states that the Commission is to present a report, no later than five years following its entry into force, on the Regulation’s application, together with any proposals for adaptations to it.

3.2 The Green Paper contains a set of proposals on the aspects that the Commission deems most crucial, reflecting the experience of Regulation No 44/2001’s implementation and the relevant ECJ case-law.

3.3 The issues on which the Green Paper seeks to stimulate public debate include abolishing the exequatur procedure (6), the Regulation’s operation in the international legal order, the choice of court, industrial property, lis pendens [parallel proceedings] and related actions, provisional measures, the interface between the Regulation and arbitration and the Regulation’s scope and jurisdiction.

3.4 The Green Paper also addresses recognition and enforcement, in particular the free movement of authentic instruments, as called for in the European Parliament resolution of 18 December 2008; or the possibility of using a common standard form for enforcement.

4. General comments

4.1 Regulation (EC) No 44/2001 has proven to be an instrument of key importance in procedural and commercial practice. The EESC shares the Council and the Commission’s view that measures in the field of judicial cooperation in civil matters are necessary for the proper functioning of the internal market.

4.2 The debate proposed by the Commission is relevant, given the experience of implementing the Regulation in recent years. The aim is to strengthen the fundamental right to obtain effective access to justice, which is a fundamental right enshrined in the European Charter of Fundamental Rights and under Article 65 of the EC Treaty, and is at the same time a general principle of law recognised by ECJ case-law.

4.3 Abolishing the exequatur procedure in all judgments handed down by Member State courts in civil and commercial matters is entirely consistent with the aims of ensuring their effectiveness and of upholding legal certainty in the internal market and the fundamental right to a fair trial (7) and effective remedy, as recognised in Article 6(1) of the European Convention on Human Rights and Article 47(1) of the European Charter of Fundamental Rights (8).

(5) The Community method is based on the idea that the public’s general interest is better protected when the Community institutions play their full role in the decision-making process, whilst respecting the principle of subsidiarity.
(6) Exequatur is a procedure intended to determine whether it is possible to recognise a judgment handed down by a court outside the jurisdiction of the State in which enforcement is sought, and to enable the judgment to be enforced in a State other than that in which it was handed down.
(7) Access to a fair trial forms part of right set out in Article 6-1, in accordance with the case-law of the European Court of Human Rights (See the Golder (21.2.1975, points 28 to 31) and Dewer judgments, amongst others.
4.3.1 This approach thus complies with the subsidiarity clause implicitly contained in the first paragraph of the EC Treaty Article 65(1), which states that measures adopted in the field of civil judicial cooperation with cross-border implications can only be adopted in so far as they are necessary for the proper functioning of the internal market.

4.3.2 On the one hand, and as regards the requirements to be met for a judgment to be enforceable at the supranational level, the guarantees set out in Council Regulation (EC) No 2201/2003 of 27 November 2003 (Brussels II-a) might prove adequate (Articles 41 and 42 of that Regulation make judgments in the fields of access rights and the return of minors directly enforceable), provided that two guarantees are in place in both cases: that the judgments are enforceable in the Member State of origin and that they have been duly certified in the Member State of origin (\(^9\)).

4.3.3 Consequently, the only potential obstacle would be another enforceable judgment being given subsequently by a different court, but this would be an exceptional occurrence in the field covered by the Commission's proposed amendment to Regulation (EC) No 44/2001.

4.3.4 On the other hand, and as regards safeguarding the defendant's rights, an interpretation in line with the principle of mutual recognition enables the court before which the claim has been brought to apply the same rules that apply under national legislation to cases of notification of foreign citizens or non-resident nationals of the commencement of proceedings.

4.3.5 In the absence of such provisions, or should existing legislation be clearly inadequate to safeguard the right to fair proceedings (for example comprehension of the language, the reliability of the means of serving and receiving claims, etc.) it would be useful to establish subsidiary rules on guarantees in supranational law.

4.3.6 The EESC would, however, be in favour of a supranational review procedure that is generally more harmonised in civil and commercial proceedings, provided that the defendant has the safeguard of an a posteriori means of redress (special review).

4.4 In line with ECJ case-law (\(^10\)), Chapter II of Regulation (EC) No. 44/2001 unifies the rules on jurisdiction not only for intra-Community disputes but also for those containing some extra-Community aspect, including situations in which the defendant is not domiciled in an EU Member State.

4.4.1 It should thus be possible to establish special rules on jurisdiction providing a supranational framework for such cases, in contrast with the current situation, as set out in Article 4 of Regulation (EC) No. 44/2001, which refers the decision to the national courts, although these rules would still be subject to the exceptions laid down in Articles 22 and 23 of the same Regulation.

4.5 With regard to the introduction of 'subsidiary jurisdiction rules', the three rules currently under consideration appear to be adequate:

— jurisdiction based on the carrying out of activities, provided that the dispute relates to such activities (a similar clause already exists, in Article 3 of Regulation (EC) No 1346/2000 on insolvency proceedings, conferring jurisdiction on the State in which the centre of the debtor's main assets is located);

— jurisdiction based on the location of assets claimed to pay off a debt; and

— lastly, jurisdiction based on the concept of forum necessitatis (\(^11\)), although this option would have to comply strictly with the terms under which international law recognises the principle of objective territoriality (\(^12\), which underline the obligation to prove that referring a case to a given court is appropriate.

4.5.1 The exceptional nature of the use of the forum necessitatis rules is reflected in, amongst other provisions, Article 7 of Regulation (EC) No 4/2009 (\(^13\), which allows the court of a Member State to settle a dispute provided that no other Member State has jurisdiction within the meaning of the Regulation and proceedings cannot be instituted in a third State with which the dispute is closely connected.

4.5.2 Nevertheless, as regards extending the use of such procedures, given the risk of parallel proceedings as a result of establishing uniform rules for claims brought against defendants from third countries, these supranational uniform rules should be restricted to the following procedural situations:

— when the parties have concluded an exclusive choice of court agreement in favour of third-country courts;

— when the dispute falls, for other reasons, within the sole jurisdiction of third-country courts; or

— when parallel proceedings have already been opened in a third country.


(\(^10\)) Judgment of 1 March 2005, Case C-281/02 Owusu, and Opinion 1/03 of 7 February 2006, paras 143-145.

(\(^11\)) This means that a court will recognise the jurisdiction assumed by a third-country court if, in its opinion, that court had assumed jurisdiction in order to prevent a denial of justice caused by the lack of a competent court. This is more an aspect of access to the courts than a recognition of judgments.

(\(^12\)) For example in the judgments of the ICJ of 7 September 1927 in the Lotus case and of 5 February 1970, in the Barcelona Traction case.

4.6 As regards the recognition and enforcement of judgments given by third-country courts holding sole jurisdiction in a dispute, a uniform supranational procedure must be established to avoid the damage and delays resulting from current differences in national legal systems. This means introducing a common set of conditions for accepting the decisions of third-country courts, which the EESC considers to be important.

4.6.1 The European Union has, therefore, on the basis of ECJ Opinion 1/2003, been given sole competence to sign the relevant international conventions at both the bilateral and unilateral levels and consequently, establishing a uniform supranational procedure is deemed appropriate.

4.7 Lis pendens

4.7.1 As is widely known, the rule of lis pendens states that where two claims exist involving the same cause of action, with identical facts being considered by two different courts, the court before which the claim was brought last must automatically stay proceedings in favour of the other court.

4.7.2 With regard to setting supranational rules to ensure the effectiveness of choice of court agreements signed by the parties concerned in the event of parallel proceedings taking place, reasons of efficiency, speed and legal certainty would appear to recommend amending the lis pendens rule in the Regulation, with safeguards for the obligation on the two relevant courts to communicate and cooperate directly with one another.

4.7.3 It would be useful to establish a mechanism for cooperation and communication between the courts involved, oblige the court that stayed proceedings to re-open the case if the court where proceedings were first brought also stays proceedings, which would avoid negative conflicts of jurisdiction such as the one contained in Regulation 2201/2003 (14).

4.7.4 In this regard, ‘lis pendens with safeguards’ would enable a deadline to be set, within which the court that has jurisdiction on the grounds that it heard the claim first – applying the priority in time rule – should make a firm decision on its competence and, if it retains this competence, would be obliged to regularly inform the other court of progress on the case, in keeping with other binding deadlines.

4.8 Establishing a ‘rule of due care’ obliging courts to promptly communicate the relevant developments to two or more courts in a situation of parallel jurisdiction relating to the same case in which they have declared themselves to have sole jurisdiction would undoubtedly strengthen legal certainty.

4.8.1 Lastly, the EESC considers that including a supranational standard choice of court clause in Regulation 44/2001 would facilitate access for individuals and businesses to effective legal remedy, because it would avoid uncertainty concerning the validity of the choice-of-court agreement, with the aim of avoiding forum shopping by whatever measures are required.

4.9 Safeguard measures

4.9.1 As regards safeguard measures, a review of certain aspects of Articles 31 and 47 of the above-mentioned Regulation 44/2001 would also be useful. This holds especially true where the judicial authorities of a given Member State are asked to enforce such measures when it is another Member State’s court that has jurisdiction to hear the substance of the case.

4.9.2 Given that safeguard measures must be adopted in a court case to protect the procedural situation of the person requesting them if two requirements – fumus boni iuris and periculum in mora (15) – are generally met in the majority of Member States, and in order to prevent the law being abused, some restrictions should be placed on this option.

4.9.3 Firstly, the obligation on the court before which the case is brought to communicate with the court that has jurisdiction on the substance of the dispute and, once this information is assessed, to decide whether it would be appropriate to hear the case, taking as the main criterion the proper conclusion of the proceedings.

4.9.4 Secondly, the obligation on the person requesting safeguard or provisional measures to deposit a bank guarantee, to be set at a reasonable level by the competent court in line with the scale of the case and with the deterrent effect that it must have to prevent the law being abused.

4.9.5 In cases where the plaintiff seeks to obtain an affirmative obligation and other similar cases that do not involve the payment of an amount that is cleared, due and payable on demand, the exemption from having to provide a guarantee could be regulated in line with the factual assessment of all relevant circumstances by the judge, to prevent obstacles to obtaining legal protection.

(15) Safeguard measures require, first of all, prior, and in some cases partial, authorisation for a claim before the judgment is handed down. According to traditional procedural practice for all examples, see Calamandrei, ‘Introducción al Estudio sistemático de las Providencias cautelares’, [Introduction to the systematic study of safeguard provisions] for such measures to be adopted, both of the following requirements must be met: it must be possible to make a prima facie case (fumus boni iuris) and there is a real risk of enforced being frustrated (periculum in mora). The ECJ has also adopted this approach in the order of the President of the Court of 19.7.1995, Commission of the European Communities v Atlantic Container Line AB and others. (Case C-149/95), in the order of the President of the Court of First Instance of 30.6.1999, Pfizer Animal Health SA v Council of the European Union (Case T-13/99), the Factortame case of 19.6.1990 and the order of the President of the Court of Justice of 28.6.1990.

4.10 Abolition of the exequatur procedure

4.10.1 The option of non-recognition also remains in place, on specific grounds set out in Article 34 of the Regulation, referring to public policy, the inability of the parties concerned to arrange for their defence and the judgment’s incompatibility with other judgments.

4.10.2 These factors give the courts with jurisdiction a degree of discretion that is hard to monitor and which clearly adds to legal uncertainty and the risk of undue delays in proceedings.

4.10.3 It would also appear reasonable that, in order to abolish the exequatur procedure when authorising the enforcement of provisional measures, the amendment to Article 47 of the Regulation in question should be based on the formula provided for in the current Article 20 of Regulation (EC) No 4/2009 (16), in other words, a copy of the decision and an extract from the decision, translated using the correct form.

4.10.4 Since the amendments set out in the Regulation are intended to help ensure the widespread application of the principle of ‘mutual recognition’ in cases falling within its scope, it does not appear consistent to continue to make a distinction between ‘recognition’ and ‘enforcement’.

4.10.5 It would, therefore, be desirable to abolish this option or to carefully review the conditions under which it applies.

4.10.6 Furthermore, if the aim is for the ‘recognition’ of judgments to cover the entire civil and commercial sphere, the content of the current Article 1 should be amended to extend its scope to administrative judgments, as this would enable individuals and businesses to draw greater benefit from the operation of the internal market.

4.10.7 This comment also applies to the proposal for the Regulation to include standard financial penalties for debtors and those imposed by Member State courts or tax authorities.

4.10.8 To simplify processes and streamline enforcement, access to justice could be improved by introducing a common standard form, available in all official Community languages and containing an extract of the judgment.

4.10.9 This could help reduce enforcement costs, by removing the requirement to designate an address for service of process or to appoint a representative ad litem: these requirements are now obsolete following the introduction of Regulation (EC) No 1393/2007 (17).

4.11 The European Authentic Act

4.11.1 Originally, Article 50 of the Brussels Convention referred to ‘authentic instrument[s]’ that are ‘enforceable’. This provision has been interpreted by the ECJ (18) to mean that these were documents enforceable under the law of the State of origin, the authenticity of which has been established by a public authority or by any other authority empowered to do so by that State.

4.11.2 In Regulation 44/2001, this concept is incorporated into Article 57. The European Parliament has, however, asked the Commission to start work on a European Authentic Act.

4.11.3 The EESC would like the Commission to carry out the necessary work on the free movement of authentic instruments, which could ultimately lead to the creation of a European authentic instrument.

4.12 Consumer protection

4.12.1 According to recital 13 of Regulation 44/2001, in consumer contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for. This principle has been confirmed by ECJ case-law (19).

4.12.2 The Committee shares the concerns expressed by the Commission in the Regulation’s recitals and in ECJ case-law, since it has always been in favour of upholding a high level of protection for consumers, who need to be covered by protective and mandatory regulations.

4.12.3 To ensure the consistency of the Community legal order, it would be appropriate to bring the wording of Article 15(1)(a) and (b) of the Regulation into line with the definition of consumer credit agreements and linked credit agreements set out in Article 3(c) and (n) of Directive 2008/48/EC (20).

4.12.4 Lastly, and with regard to the issue of collective actions, this type of safeguard seeks to limit the procedural costs that usually deter consumers from claiming against a trader registered in another Member State; this applies in particular to the costs entailed when the plaintiff lodges a claim away from his or her usual place of residence and when the plaintiff has to lodge a claim with his or her own judge, and to the costs arising from having ‘a fortiori’ to enforce the judgment in another Member State.

4.12.5 Since the current Regulation (Article 6(1)) does not allow for the possibility of bringing joint actions, especially actions brought by a number of plaintiffs against the same defendant in the courts of a Member State, this provision of the Regulation should be amended, to make it easier for consumers to bring collective actions and for actions to be brought for damages for breaches of Community antitrust regulations, for which the EESC has previously stated its support.

(18) ECJ judgment of 17.6.1999, Case C-260/97, Unibank.
(19) ECJ judgment of 17.9.2009, Case C-347708, Vorarlberger Gebietskrankenkasse.
(20) OJ L 133, 22.5.2008, p. 66.
4.13 Intellectual property

4.13.1 While Directive 2004/48/EC (21) on the enforcement of intellectual property rights is intended to approximate certain procedural questions, supranational regulations are needed to correct the lack of legal certainty and reduce the high costs incurred by the possibility of proceedings before national courts being duplicated.

4.13.2 The EESC considers, therefore, that measures should be adopted to prevent trademark counterfeiting and urges the Commission and the Member States to conclude the European Convention on Patents, whilst ensuring full respect for linguistic pluralism.

4.14 Arbitration

4.14.1 The EESC considers that when reforming Regulation 44/2001, the appropriate measures should be adopted to ensure that judgments can move freely within Europe and to prevent parallel proceedings.

4.14.2 In practical terms, the (partial) lifting of exclusion of arbitration from the Regulation's scope would:

— safeguard measures to support arbitration, — allow for the recognition of judgments on the validity of an arbitration agreement and,
— facilitate the recognition and enforcement of judgments involving an arbitration award.

4.14.3 The EESC is in favour of measures being adopted to make transnational arbitration easier to use and thus favours introducing a supranational and uniform conflict rule concerning the validity of arbitration agreements which would refer to the law of the State in which arbitration takes place.

4.14.4 In any case, the EESC considers that it would seem most appropriate to leave the operation of the 1958 New York Convention on the enforcement of arbitral awards untouched or at least as a basic starting point for further action.

4.15 Extending the scope to administrative rulings

4.15.1 The EESC is aware that Regulation 44/2001 applies only to decisions in civil and commercial matters, but considers that, with a view to the proper functioning of the internal market, the Commission and the Member States should examine the possibility of extending the Regulation's material scope to final administrative rulings by whatever means they may consider appropriate, including that provided by Article 309 of the EC Treaty.

Brussels, 16 December 2009.

The President
of the European Economic and Social Committee
Mario SEPI