EU Green Paper

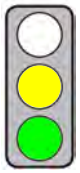
AMENDMENT OF EU JURISDICTION AND ENFORCEMENT REGULATION ("BRUSSELS I")

Status: 25.05.2009

MAIN ISSUES

Objective of the Green Paper: The Commission wishes to instigate a discussion concerning possible ways to further reduce conflicts of jurisdiction and impediments to the enforcement of court decisions in international legal relations.

Parties Affected: Any company or private person.



Pros: Most of the projected measures are to be welcomed under both economic and legal aspects.

Cons: (1) "Collective redress" should not be admitted in the EU.

(2) The possibility to receive legal protection also in Member States not related to the matter in dispute increases the risk of an abusive choice of jurisdiction.

CONTENT

Title

Green Paper COM(2009) 175 of 21. April 2009 on the **Review of Council Regulation (EG) No. 44/2001** on **Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters**

Brief Summary

Legal provisions cited refer to Regulation (EC) No. 44/2001 to be reviewed.

- **Background**
  - The Green Paper and the accompanying Report [COM(2009) 174] launch a consultation on possible amendments to the European Jurisdiction and Enforcement Regulation ["Brussels I" / (EC) No. 44/2001].
  - Brussels I governs the jurisdiction for court proceedings with cross-border relevance and the recognition and enforcement of judgements. Its aim is to reduce the differences among national rules, which impede the "sound operation" of the internal market.
  - Brussels I generally applies to all decisions made by courts of a Member State in civil or commercial matters [Art. 1 (1)), whatever they may be called, e.g. judgement, decree, or writ of execution (Art. 32). Several areas – in particular succession, bankruptcy and the law governing matrimonial property rights as well as arbitration – are expressly excluded (Art. 1 (2)).
- **Abolition of the exequatur procedure for decisions of Member State courts**
  - According to the Brussels I exequatur procedure in the EU, which is already simpler than the one used in legal relations with third States, court decisions made in a Member State are recognised by other Member States without any extra procedure (Art. 33 (1)) and are declared enforceable upon application without being reviewed as to their substance (Art. 38 (1), 36, 45 (2)).
  - Only in exceptional cases are they not recognized and not declared enforceable, e.g. if a document relevant for the proceeding has been incorrectly served to the defendant (Art. 34, Art. 45 (1)).
  - Brussels I exequatur procedures are mostly successful (90 to 100%) but may take up to four months and create considerable costs [Review COM(2009) 174, p. 4].
  - The Commission therefore supports the complete abolition of exequatur procedures provided the protection of the judgment debtor is ensured through subsequent appeals. As a consequence, it would no longer be necessary, within the EU, to have decisions recognized and declared enforceable.
- **Effects of third States' judgements on the EU**
  - Currently, third States' judgements may be recognised and enforced even if they are in conflict with mandatory EU law due to a lack of harmonised rules in the EU. A case that illustrates the problem is the decision of a U.S. court on collective redress against Bertelsmann AG in the "Napster" case (cp. the subsequent decision by the German Federal Constitutional Court of 25. July 2003 – 2 BvR 1198/03)
  - Therefore the Commission calls for harmonised rules throughout the Community as regards the recognition and enforcement of third States' judgements in order to enhance legal certainty.

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- **Extended options for filing suits before EU courts against defendants from third States**
  - Because Member States rules on jurisdiction for lawsuits against defendants domiciled outside EU Member States (Art. 4 (1)) are either inexistent or inconsistent among each other, plaintiffs might be forced to sue in third States. This is problematic
    - where plaintiffs cannot invoke mandatory EU law (e.g. consumer protection);
    - where plaintiffs do not get adequate protection (e.g. a fair hearing) before the courts of third States. [Report COM(2009) 174, p. 5]
  - In order to enable plaintiffs to sue defendants – domiciled outside the Community – in the EU, the Commission is considering:
    - extending the rules on the “special jurisdiction” of courts in the EU (Art. 5–7, e.g. the place of fulfilment of a sales contract) or
    - introducing a “subsidiary jurisdiction” of courts in the EU which applies if, for instance, the filing of a suit in a third State is impossible or cannot reasonably be expected (“forum necessitatis“).

- **Strengthening prorogations of jurisdiction**
  - The question whether the EU rules on agreements conferring jurisdiction upon a court ("prorogation of jurisdiction”, Art 23) cover all relevant cases, is currently in dispute. Such agreements might thus be considered valid in one Member State, but invalid in another. Consequently, there is a risk of parallel proceedings before different courts, which lead to delays, additional costs and legal uncertainty, all of which are “detrimental to the proper functioning of the internal market“. (Report KOM(2009) 174, p. 6)
  - If the same claim is brought before courts of several Member States, the court which is seized later must currently stay its proceedings until the court seized first has decided which court has jurisdiction (“lis pendens” rule; Art. 27 (1)). This also applies if the prorogation of jurisdiction refers to the second court.
  - As prorogation of jurisdiction is of high relevance in international trade, the Commission wishes to strengthen its legal effect. It therefore puts the following options up for discussion:
    - The court chosen by agreement must examine its jurisdiction first, even if it was not seized first; depending on the outcome, the other court may have to stay its proceedings.
    - It should be possible to hold parties violating the prorogation of jurisdiction liable for damages.
    - Both courts must cooperate, e.g. in that the court seized first examines its jurisdiction within a certain deadline and provides the court chosen by agreement with updates on the status of the proceedings.
    - The parties ought to use standardised clauses to prorogate jurisdiction.

- **Consolidation of connected claims – “collective redress“**
  - Currently, claims requiring a joint hearing and decision may be consolidated only if several defendants are being sued (Art. 6 (1)).
  - The Commission is considering admitting proceedings of several plaintiffs against one defendant (“collective redress“) [Report COM(2009) 174, p. 8], in particular for
    - consumer protection suits [COM(2008) 794, cp. CEP Policy Brief] and
    - damages actions for breach of the EC antitrust rules [COM (2008) 165, cp. CEP Policy Brief, in German only].
  - The Commission is somewhat sceptical about the consideration to consolidate patent infringement proceedings against several defendant companies of one group and to conduct them in the Member State where the company “coordinating“ the activities or “having the closest connection“ with the infringement is domiciled (Green Paper COM(2009) 174, p. 6). These rather unclear conditions increase the risk that plaintiffs choose the court to have jurisdiction for tactical reasons (“forum shopping“).

- **Extension of provisional protective measures**

  The Commission wishes to extend the possibility of receiving provisional legal protection in a Member State even if the court of another Member State has jurisdiction as to the substance of the matter (Art. 31).
  - Provisional legal protection should also be granted if there is no “real connecting link” between the subject matter and the court seized – e.g. assets within the territorial boundaries of the court’ jurisdiction.
  - The court of the main action is to be entitled to abolish, amend or adjust provisional measures.
  - The court seized to grant provisional legal protection must cooperate with the court of the main action.

- **Coordination between public courts and arbitration boards**

  To strengthen the effectiveness of arbitration proceedings and to avoid parallel proceedings between arbitration boards and Member State courts, the Commission proposes to regulate at least some matters of the relationship between the two jurisdictions in the Brussels I Regulation [Report COM(2009) 174, p. 10-11].
  - Where public courts are appointed to decide on preliminary or secondary matters of an arbitration proceeding (e.g. the appointment of arbitrators), the courts located at the place of arbitration are to be competent unless the parties have agreed otherwise.
  - In order to clarify the jurisdiction of public courts for provisional measures before an arbitration court is established, all rules of Brussels I on jurisdiction are to apply.
  - A “general coordination“ of parallel proceedings before public courts and the arbitration court in different Member States, where it concerns the validity of the same arbitration agreement, could be effected by
    - giving “priority” jurisdiction for only this legal question to the public court at the place of arbitration
    - a “strengthened cooperation“ between the courts and arbitration boards concerned.

Statement on Subsidiarity

The Commission does not address the question of subsidiarity expressly. However, it stresses several times that its proposals are to improve the “good functioning of the internal market“ (p. 4 and 7).

Political Context

Brussels I is a central instrument of the EU for the establishment of an “area of freedom, security and justice” (Art. 2 TEU, Art. 65 TEC), in which persons and companies may move freely, engage in business, and exercise their rights.
Further EU instruments to reduce judicial impediments to the internal market are the Regulations on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [(EC) No. 1206/2001], on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and on matters of parental responsibility [“Brussels II”-Regulation, (EC) No. 2201/2003], on creating a European Enforcement Order for uncontested claims [(EC) No. 805/2004] as well as on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [(EC) No. 4/2009].
With the Green Paper, the Commission complies with its obligation to examine the application of Brussels I and to submit proposals for improvement (Art. 73). With regard to a revision of Brussels I, the European Council has already argued in favour of abolishing the exequatur procedure at its meetings in Tampere (1999) and Brussels (2004).

Options for Influencing the Political Process

Leading Directorate General:	DG Justice Freedom and Security
Consultation procedure:	All interested parties may comment by 30. June 2009: http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0002_en.htm

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

To ensure the legal certainty and thus the functionality of the market economy system, a legal system that ensures the effective, fast and economical enforcement of legal claims is of utmost importance. Therefore, in principle there are no ordoliberal concerns against a strengthening of the cross-border effect of court judgements through the abolition of the exequatur procedure, extended competences of courts in the EU, nor against the strengthening of the prorogation of jurisdiction and arbitral jurisdiction.
However, if actions for consumer protection or actions for damages due to infringements against antitrust law were to be excessively facilitated by means of collective redress, there is a risk that entrepreneurial action be harmed by excessive deterrence [cp. CEP Policy Brief on the Green Paper on consumer collective redress COM(2008) 794; CEP Policy Brief (in German only) on the White Paper on damages actions for breach of EC antitrust rules COM(2008) 165]. Moreover, allowing collective redress in the EU would make it more difficult for EU courts to reject collective redress from third States by referring to a different legal tradition in the EU. This would increase the exposition of EU companies to foreign collective redress. **EU-wide collective redress is** therefore **to be rejected**.

Impact on Efficiency and Individual Freedom of Choice

Delays and additional costs for the cross-border enforcement of court judgements in another Member State represent trade barriers to potential business partners. Therefore, particularly the abolition of the exequatur procedure within the EU would help to improve the way the internal market works.

Impact on Growth and Employment

Functioning legal systems are essential for the productivity of an economic system. Effective cross-border enforcement of court decision promotes the division of work in the internal market and thus has a positive impact on growth and employment. Yet EU-wide harmonised collective redress might trigger losses of growth insofar as they convey excessive deterrent effects to the market behaviour of companies.

Impact for Europe as a Business Location

The quality of Europe as a business location is improved if court judgements can be enforced faster and more economically in cross-border cases.

Legal Assessment

Legal Competence

In the field of “judicial cooperation in civil matters” (Art. 61 lit. c TEC), the EU may adopt measures to improve and simplify the recognition and enforcement of court decisions (Art. 65 lit. a TEC), to reduce conflicts of jurisdiction (Art. 65 lit. b TEC) and to promote the compatibility of the rules on civil procedure applicable in the Member States (Art. 65 lit. c TEC). The overall precondition for the above is that the civil matters concerned have cross-border implications and that the measures chosen are “necessary for the proper functioning of the internal market”.

The EU has no competence for the adoption of material rules concerning damages in the field of private law. Therefore, an EU-wide harmonised liability for damages incurred due to infringements of a prorogation of jurisdiction could be introduced through the informally agreed adjustment of national rules.

Subsidiarity

The considered measures affect cases with cross-border implications which can be regulated only at EU level. An infringement of the principle of subsidiarity pursuant to Art. 5 TEC is not apparent.

Proportionality

A final assessment of proportionality is not yet possible, since the concrete extent of the intervention represented by the options outlined briefly by the Commission cannot be estimated.

Compatibility with EU Law

In general, it is to be welcomed that the presented options aim to reduce judicial impediments in EU civil matters in a practice-oriented way. Clear rules for jurisdiction and procedures with regard to cross-border cases increase legal certainty. In this regard, the Commission’s considerations for a strengthened cooperation of courts in different Member States can be helpful.

According to the rule-of-law principle (Art. 6 TEC), **the complete abolition of exequatur procedures** in favour of a judgement creditor **requires that the interests of the judgement creditor are sufficiently protected.** This could, as considered by the Commission, be ensured by allowing for subsequent appeals. Whether these are sufficient, however, depends on their concrete design.

The Commission’s intention to strengthen the prorogation of jurisdiction is to be welcomed as it enhances of private autonomy. For this purpose – as an exception to the priority rule – the court chosen by agreement should be competent even if it is not seized first. In this manner, the risk that parallel proceedings be opened to delay the process of finding end enforcing justice, could be contained.

The considered **introduction of EU-wide collective redress for consumers leads to problems, since to each consumer the material law of his or her home country applies** [Art. 6 of the Regulation (EC) No. 593/2008 (“Rom I“) and Art. 5 of the Regulation (EC) No. 864/2007 (“Rom II“)]. Thus a collective lawsuit filed by consumers from different Member States is hardly possible. Almost unavoidably, the result would thus be forced harmonisation even of the material consumer protection law.

The possibility to receive provisional legal protection also in Member States without a real connecting link to the matter in dispute is not only contradictory to the case law of the ECJ (C-391/95 – *Van Uden*), but also questionable in terms of international law. According to international law, the jurisdiction of a state (*facultas iurisdictionis*) is limited by the requirement of an at least minimal link of the case to the state of the court seized. To waive this requirement of a “genuine link” **increases the risk of a** tactical and possibly even **abusive choice of court** (“forum shopping“).

Compatibility with German Law

As the Brussels I Regulation applies directly in Germany, it prevails over provisions of the German Code of Civil Procedure where applicable.

Alternative Policy Options

The Commission should abandon three of its projects: “collective redress“, claims for damages upon violation of a prorogation of jurisdiction, and the option to receive provisional legal protection in Member States without any link to the matter in dispute.

Possible Future EU Action

Not apparent at this moment.

Conclusion

From an economic and a legal point of view, most of the Commission’s considerations to abolish judicial impediments to the fast, economical and effective enforcement of claims in the EU are to be welcomed. With regard to the concrete design of rules, it is important to protect the interests of the parties involved in the proceedings in a balanced manner.

The Commission’s plans for “collective redress” and the possibility to receive provisional legal protection in Member States without any link to the matter in dispute should be rejected.