

JURISDICTION IN CIVIL AND COMMERCIAL MATTERS

Commission's proposal for the revision of the Brussels I regulation

BEUC's position

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Summary

- The European Commission has recently published its amending proposal to the Council Regulation (EC) No. 44/2001 of 22 December, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I' regulation).
- BEUC welcomes the fact that section 4 on jurisdiction over consumer contracts is not under revision and that consumers will continue to have at their disposal the forum of their habitual residence if one of the conditions established in the regulation (either the trader pursues or directs activities in the consumer's country) applies.
- BEUC also finds a strong positive in the extension of the scope of application of the Brussels I regulation to defendants domiciled in a third country (new article 4(2)). This would help define a common approach when deciding the competent court in disputes arising between consumers and businesses located in a Member State or outside the European Union.
- The abolition of exequatur is also positive in terms of facilitating the circulation of decisions and therefore the enforcement of consumer rights. However, we are concerned that exequatur is specifically not abolished for decisions issued in collective proceedings. This exemption does not add substantial additional guarantees for losing parties, whereas for winning parties it represents additional burdens (costly and very time-taking) to enforce the decisions in collective redress cases. Consequently, **BEUC calls for the abolition of exequatur also for decisions issued in collective proceedings.**

Council Regulation (EC) No. 44/2001 of 22 December, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereafter, Brussels I regulation) is a very important piece of legislation when it comes to ensuring access to justice for consumers.

I. Jurisdiction over consumer contracts

We welcome the fact that section 4 on jurisdiction over consumer contracts of the Brussels I regulation is not under revision in the Commission's proposal.

As indicated in BEUC's response to the stakeholder questionnaire on the revision of Brussels I¹, the issue of jurisdiction is not some abstract legal question; it directly concerns the right of citizens to go to court in the country where they have their habitual residence.

The rationale for the establishment of special rules on jurisdiction over consumer contracts has been the protection of consumers as the weaker party in a contractual transaction and the facilitation of access to justice. As a general rule, consumers may bring proceedings against the other contracting parties either in the courts of the Member State in which that party is domiciled, or in the courts of the place where the consumer himself is domiciled. Thus consumers have a choice of forum, while proceedings against consumers may only be brought in the courts of the Member State in which the consumer is domiciled.

This rationale becomes more prominent in light of the development of online commerce, especially across borders. The presumption that current protective jurisdictional rules remove all obstacles to justice is erroneous. Even if consumers are granted the right to sue at home, a number of practical and procedural difficulties remain. These difficulties are multiplied in cross-border disputes. If the rules on jurisdiction were to be changed to allow for the forum in which the trader is established, consumers would face additional obstacles to start proceedings in a country different to their own. In practice, this would result in serious limitations on their access to justice.

II. Extension of the scope of the regulation to defendants located outside the EU

The Commission's proposal which aims to promote the interests of the parties and the proper administration of justice (recital 16) extends the scope of the Brussels I regulation to defendants not domiciled in any of the Member States (new article 4(2)).

In consumer contracts, this means that EU rules on jurisdiction would now also apply when determining the competent court in disputes arising between a consumer domiciled in a Member State and a business located outside the EU. **BEUC welcomes this reform.**

¹ BEUC response to the stakeholder questionnaire on the revision of regulation 44/2001 (Brussels I), available at www.beuc.eu (Ref: X/052/2010 – 12/07/10).

Currently, advances in communication technologies allow traders established outside the EU to easily target consumers residing in Member States and to offer their products and services. When problems arise and the competent court has to be determined, national laws come into play, as the dispute is excluded from the scope of Brussels I regulation (article 4(1)).

Due to the existing differences between national regimes of Private International Law, in a similar situation (for example, a dispute between consumer residing in a Member State and the company located in the US) national judges might decide their competence in a different way.

While the current Brussels I regulation is limited to the specific regime for disputes arising between consumers and businesses who are located in Member States, BEUC believes this same system should also apply when the business is domiciled outside the EU.

III. Exequatur for decisions issued in a collective procedure

Exequatur is a procedure for recognition and enforcement of a judgment in another Member State. At the moment, it entails additional costs and time delays for the parties involved and makes the enforcement of judgements within the EU more complicated.

The proposed abolition of exequatur is one of the most significant reforms of the Brussels I regulation. As indicated in the Explanatory Memorandum, its aim is to move towards a simpler, less costly and more automatic system of circulating judgments². Overall, **BEUC supports the abolition since it will facilitate the circulation of decisions and therefore afford consumers easier enforcement of their rights within the European Union.**

Nevertheless, the Commission's proposal has exempted the abolition of exequatur in paragraph 3 of article 37 for:

(...)

- Judgments given in proceedings which concern the compensation of harm caused by unlawful business practices to a multitude of injured parties and which are brought by:
 - state body;
 - a non-profit making organization whose main purpose and activity is to represent and defend the interests of groups of natural or legal persons, other than by, on a commercial basis, providing them with legal advice or representing them in court; or
 - a group of more than fifteen claimants.

² COM(2010) 748/3, 14 December, 2010.

The European Commission explained the exclusion by way of significant differences among the national systems of collective redress. This situation, according to the Commission, represents an obstacle to the required level of trust between Member States as a pre-condition for the abolition of exequatur.

BEUC does not agree with this approach. **The Commission's proposal already introduces safeguards for the enforcement of decisions exempted from an exequatur which could also be perfectly applicable to judgments issued in collective redress proceedings.**

In this sense, a national judge, upon request by the defendant, can refuse the enforcement of a judgment if:

- it is irreconcilable with: (1) a judgment given in a dispute between the same parties in the Member State of enforcement or (2) an earlier judgment in another Member State or third country involving the same cause of action and between the same parties provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State of enforcement (article 43);
- it violates the defendant's right to a defence (article 45) or fundamental principles underpinning the right to a fair trial (article 46).

These safeguards are the same for the proceedings regulated in Chapter III, Section 2 (Judgments for which a declaration of enforceability is required on a transitional basis) under article 48, with the exception of public policy (article 48, paragraph 1), which is the only additional safeguard for cases where an exequatur is required.

However, from the case law described below, it stems that the public policy safeguard does not add substantial additional guarantees to the losing parties. As illustrated in the following examples, the recognition or enforceability of a decision was denied for the same grounds as those already included in articles 43, 45 and 46 of the Commission's proposal.

The Court of Justice of the European Union (CJEU) established that the public policy exemption must be interpreted narrowly³. In the leasing case *Hoffmann v Adelheid* the court indicated that public policy "ought to operate only in exceptional cases". This is supported by the wording of article 34(1) of the Brussels I regulation with the inclusion of the adverb "manifestly".

It has been also stated that this exemption should operate to adequately protect the rights of the defendant. In this sense, the CJEU in the case *Krombach v Bamberski*⁴ indicated that "it follows from the foregoing developments in the case-law that recourse to the public policy clause must be regarded as being possible in exceptional cases where the guarantees laid down in the legislation of the State of origin and in the Convention itself have been insufficient to protect the defendant from a manifest breach of his right to defend himself before the court of origin, as recognised by the ECHR."

³ Judgment of the Court of 4 February, 1988, *Horst Ludwig Martin Hoffmann v Adelheid Krieg*, Case 145/86, and Judgment of the Court (Fifth Chamber) of 10 October 1996, *Bernardus Hendrikman and Maria Feyen v Magenta Druck & Verlag GmbH*, Case C-78/95.

⁴ Judgement of the Court of 28 March, 2000, *Dieter Krombach v André Bamberski*, Case 7/98.

National courts have adopted a similar approach, as indicated in the Heidelberg Study⁵. For example, in Germany the few identified cases where exequatur was denied were all related to procedural infringements prejudicing the defendants' rights: in two cases a violation of procedural guarantees (right to be heard) of article 103 (1) of the German Constitution and article 6 of the ECHR were at issue. In France, the granting of exequatur was refused due to an infringement of public policy in a case wherein the debtor was charged with payment without the English court of origin giving any reasoning as to the facts or law⁶. A Greek court also denied the recognition of a foreign judgment where the defendant was considered to be of unknown residence, although the claimant was aware of his whereabouts⁷.

English law states that public policy is infringed when there is substantial evidence that the judgment has been obtained by fraud on the foreign court. In the case *Maronier v Larmer*⁸ the Queen's Bench Division ruled that enforcement of the judgment would contravene English public policy because the defendant was prevented from the right to an effective opportunity to defend himself in civil proceedings.

These are just some examples illustrating how the exemption of public policy is invoked in cases of procedural fraud and/or when the defendant was not able to exercise their rights properly. Articles 45 and 46 of the Commission proposal have exactly the same purpose: to prevent the enforcement of decisions issued by a court of a Member State in a procedure where the defendant's rights were not respected. **Therefore, even without exequatur the defendant would count on appropriate means to stop the enforcement of a decision, both in individual and in collective proceedings.**

Some concerns exist in relation to the substantive or so-called 'material' public policy. Under the Commission's proposal a judge will no longer be able to deny the recognition or enforcement of a decision if it transpires to be contrary to fundamental principles and values of the requested forum.

However, this is a very rare situation - Heidelberg study states that 'in civil and commercial matters there are no such fundamental differences between the legal systems of the Member States which could trigger the application of substantive public policy'⁹. Therefore most cases of the application of public policy will be generally related to "procedural" breaches linked to the defendant's right to fair trial and consequently fall under the situations where the Commission proposal foresees appropriate safeguards for the party against whom the enforcement is sought.

Currently existing national systems of collective redress are different across the EU and hence there are concerns that exequatur should still be applied to the judgements issued in collective proceedings. It has to be underlined that this debate once more highlights **the need for the EU wide system of collective redress**. However, in the case of the enforcement of judgements, under the Commission's proposal even without the exequatur the party concerned would be able to invoke adequate safeguards to stop the recognition or enforcement of a decision issued in breach of that party's rights.

⁵ Ruprecht-Karls-Universität Heidelberg, *Report on the Application of Regulation Brussels I in the Member States*, final version September 2007, pages 243/252.

⁶ C. Versailles (1^{er} ch. 1^{er} sect.), 18/05/2000, no. 4364-97.

⁷ Drama 251/2000, Harmenopoulos 2001, 9 535.

⁸ *Maronier v Larmer*, 2003, Queen's Bench Division, Law Reports, issue 4, p. 620-632.

⁹ Ruprecht-Karls-Universität Heidelberg, *Report on the Application of Regulation Brussels I in the Member States*, final version September 2007, page 289.

Taking into account the arguments outlined above, BEUC considers that the exemption of exequatur for judgements rendered in collective proceedings does not add substantial additional guarantees for the party against whom enforcement is sought, whereas for the winning party it represents an additional burden (costly and time consuming) in enforcing the decisions in collective redress cases. Consequently, we call for **the abolition of exequatur also in decisions issued on collective proceedings.**

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