JURISDICTION IN CIVIL AND COMMERCIAL MATTERS

Revision of Regulation 44/2001 (Brussels I)

Stakeholder questionnaire

BEUC response

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Ref.: X/052/2010 - 12/07/10

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Summary

The European Consumers' Organisation (BEUC) welcomes the opportunity to submit its comments to the questionnaire on the forthcoming revision of the EU Regulation (EC) 44/2001 on the jurisdiction, recognition and enforcement of judgments in civil and commercial matters ('Brussels I').

BEUC acknowledges the importance of the provisions of the current Regulation regulating jurisdiction over consumer contracts. Articles 15-17 of the Regulation have been established with the aim of protecting consumers as the weaker party in a commercial transaction and enhancing consumers' access to justice. **The implementation of these provisions has been satisfactory and therefore no change is to be made.**

As regards online consumer contracts, **BEUC is in favour of a large interpretation of Article 15.1.c.**

The forthcoming revision of the Brussels I Regulation should take into consideration the work of the European Commission in the field of **collective redress**. The current Brussels I Regulation is not well equipped to deal with cross-border collective mass claims. **BEUC supports the introduction of rules that would allow for the consolidation of proceedings before the most competent court.**

As regards the most appropriate court, BEUC is opposed to any proposal that would allow for the competence of the court of the trader. The criteria to define the competent court should include the adequate representation of claimants and consumers' access to justice.

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I. Jurisdiction over consumer contracts (Article 15)

BEUC strongly believes that Article 15 of the Brussels I Regulation is a central piece of the regulation in terms of consumer protection and is **therefore strongly opposed to any changes to Section 4 of the Regulation.**

The issue of jurisdiction is not some abstract legal question; it directly concerns the rights of citizens in each country to go to court in their own country. It has taken a long time to establish that right; we hope that the European Commission will not dilute that right or take it away.

❖ Lack of consultation and evidence

BEUC has serious concerns regarding the lack of any evidence as to the need for such a revision, as well as the lack of any official consultation on the issue. The official consultation on the revision of the Regulation did not include any questions related to Article 15, while the European Parliament has not identified any problem with the specific provisions on consumer contracts. Furthermore**,** the report on the application of the Brussels I Regulation (the so-called Heidelberg Study), has concluded that the application of Section 4 has been satisfactory and therefore, there is no need to amend the relevant provisions.

❖ Access to justice

The rationale for the establishment of special rules on jurisdiction over consumer contracts has been the protection of the consumers as the weaker party in a transaction and the facilitation of access to justice. As a general rule, consumers may bring proceedings against their contracting party 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. Consumers thus 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 cross-border. The presumption that the 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 case of cross-border disputes. If the rules on jurisdiction were to be changed to allow for the forum of the trader's establishment, consumers would face additional obstacles to start proceedings in a country different of their own. Cross-border redress is very difficult for individual consumers and in practice almost non-existent. The main barriers to cross-border actions relate to language problems, costs and non-familiarity with the law and the jurisdictional system of foreign countries.

Consumer organizations also face considerable difficulties in acting cross-border. According to all our members' organisations, launching proceedings in another Member State implies much higher costs, while problems of standing are also relevant. Consumer organisations have very little experience in cross-border enforcement, as an

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illustration it is striking to note that only 7 cross-border injunction actions have been brought since the enactment of the injunctions directive in 1997.

In addition, it is important to stress that the trader takes a "risk" when selling cross-border of being sued in the member States where he sells. The risk of facing a lawsuit abroad is part of the professional activity and can be envisaged and provisioned via insurance policies. In cross-border lawsuits, businesses will be able to hire local lawyers and translators, which regular consumers can hardly do due to the price it incurs. The financial and human resources a business can have also allow it to launch an exequatur procedure in order to enforce the judgement held in another country in its country of establishment. On the contrary this procedure is hardly accessible for individuals (lack of knowledge, additional judicial costs…).

- **Consumer confidence in cross-border trade**

The questionnaire explicitly asks "to what extent is either party's willingness to engage in cross border trade affected by the possibility of having to solve a commercial dispute in a foreign jurisdiction?". The response to that question has to take into consideration the possible impact on consumers' confidence in the Internal Market and on the degree of their involvement in cross-border transactions through online commerce.

On the basis of the experience of consumer associations, in case consumers are deprived of the protective rules of Article 15, they would be more reluctant to shop cross-border due to the difficulties in seeking redress in a foreign country. Inevitably, this would lead to a reduction of consumers' trust and a decrease in online commerce.

This result would contradict with the objectives of the European Union to boost the development of online commerce, given the very low take-up by consumers across the EU. As demonstrated by the European Commission's report on e-commerce cross border, only 7% of European engage in such transactions. Indeed, if consumers would have to take legal action cross-border or would face legal action in a different Member State, this would **de facto amount to a denial of justice**.

- **E-commerce consumers' contracts**

Consumers' right to take action in their own national courts in legal disputes arising from cross-border e-commerce transactions is crucial. The development of e-commerce is no reason to take away this right, which is a pre-condition to give consumers confidence in cross-border e-commerce. Although consumers on the Internet today still mainly engage in low-value transactions, they will increasingly buy their cars or financial services on-line from suppliers established in another Member State. If something goes wrong consumers must have meaningful access to remedies, which includes the possibility of going to court in their own country as a last resort.

BEUC is aware that a certain degree of legal uncertainty exists in relation with on-line consumers contracts and the absence of a clear definition of the notion of an activity directed to the Members States of the residence of the consumers (Article 15.1.c). The development of e-commerce has raised uncertainties about the scope to give to this provision. The question is whether the fact that a trader's website is accessible in several Member State means that this trader directed his activities to all these countries and subsequently accepted the possibility of being sued in all of them.

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Under Article 15 para.1 c) the consumer protection rule only applies when "the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities."

The European Court of Justice has been asked to provide an interpretation of the notion of "activities directed to" in two preliminary rulings cases C-585/08[1] and C-144/09. In her Opinion, the Advocate General has established a list of criteria to identify whether or not a trader directs its activities to a certain Member State. According to these, the mere fact that a website is accessible in a Member State can not be a sufficient reason to consider that a trader is directing his activities to this country. The national judge has to decide whether the trader directs his activities to a certain Member State taking into consideration all the circumstances of the case. Complementary factual elements have to be taken into consideration such as the content of the website, past activities of the trader, the type of top-level domain used, the recourse to advertising in this Member State or on internet… etc. It can be expected that this ECJ judgment will provide for guidance to business and to consumers and will deal with a number of questions that have arisen in the past in this context.

BEUC supports a large interpretation of Article 15.1.c in line with the general approach of the Brussels I Regulation. Requiring the establishment of a close casual link with the country of residence of the consumer would go against the principle of consumer protection. In case a trader does not wish to do business with consumers in a specific Member State, he should bear the responsibility of ensuring that contracts are not entered with consumers from that country. The simple requirement of targeted advertising to consumers would not suffice to sufficiently protect consumers, given that the techniques for such advertising offered by the digital technologies keep evolving and cannot always be perceived by consumers as targeted to them.

BEUC considers the arguments put forward by businesses that a broad interpretation would hinder the further development of e-commerce as unfounded. The risk of businesses being sued abroad is overstated and not substantiated by evidence. In practice, it is very rare for consumers to engage in litigation against a trader, let alone in another country, but rather try to solve the dispute through direct contact with the trader or through Alternative Dispute Resolution mechanisms, the efficiency of which remains ambiguous and is certainty not the most efficient redress mechanism for all cases. On the contrary, consumers will be willing to shop more cross-border when they will have procedural protection.

Furthermore, the distinction between active and passive websites should not be the relevant criterion. Such a distinction has become irrelevant by the Regulation on applicable law (Rome I), which also calls for a coherent interpretation of the rules on applicable law and jurisdiction (Brussels I)[2]. In addition, despite the widespread distinction between active and passive websites, the Common Declaration of the Council and the Commission[3] does not make a similar distinction; it simply specifies

1 C-585/08 Peter Pammer v Reederai Karl Schlüter GmbH &Co KG - C-144/09 Hotel Alpenhof GesmbH v Oliver Heller.

2 Recital 24 of Regulation 593/2008 on the law applicable on contractual obligations.

3 Joint Statement of the Council and the Commission on Articles 15 and 73 of the Brussels I Regulation.

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that the important elements for the interpretation of Article 15.1.c is that the site solicits the conclusion of distance contracts and that such a contract has actually been concluded.

Nevertheless, the Declaration fails to clarify the meaning of Article 15.1.c; it only says which commercial activities are not directed to the domicile of a consumer, but does not clarify what activities have targeted that country. Despite the divergence in interpretation by national courts[4], BEUC supports a broad scope, also taking into consideration that businesses can always ring-fence their target market.

BEUC therefore regrets the argument often brought forward that the consumer protective rule of Article 15.1.c might discourage businesses seeking to engage in e-commerce activities. As outlined by the European Commission's report on e-commerce[5], a wide range of various obstacles have been identified as reasons why traders do not engage more in cross-border transactions, some of them are due to business practices, which tend to delineate their markets. In addition, such an argument is often used in an erroneous way, because it confuses the court's jurisdictional powers, governed by Brussels I Regulation, with the substantive law applicable to the electronic contract, which is governed by the Rome I Regulation. Ideas to change the current system of Art 15 by allowing business to use choice of jurisdiction clauses in consumer contracts must be strongly rejected. This would mean in practice that suppliers impose their own choice of court by using standard contract clauses, which consumers have to accept. Consumers would not have a real "choice" to accept or reject these jurisdiction clauses, because most businesses would use them. Consequently the proposed amendment would systematically undermine the aim of the regulation, which is to provide a special regime of protection for consumer contracts.

- **Travel contracts**

BEUC calls on the European Commission to extend the consumer protective rules of Articles 15-17 to consumer transport contracts. Passengers currently face considerable difficulties in asserting their rights against transport companies, in particular air carriers, which are mainly due to jurisdiction clauses that consumers sign in when concluding a transport contract and which establish the jurisdiction of the place of establishment of the company. As indicated above, consumers are not willing to refer to the court of another Member State to enforce their rights as this implies inter alia facing higher costs, language barriers and unfamiliarity with court procedural rules. As a result, despite the fact that passengers will very often face problems with the transport company, they will only rarely engage in legal proceedings if they have to do so in another Member State.

The forthcoming revision of the Brussels I Regulation must be used as an opportunity to update rules on international private law and put in place a coherent framework for transport contracts that will enable consumers to take legal actions in the court of their place of residence.

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4 Review article Private International law in consumer contracts: a European perspective, Journal of Private International Law, Vol.6 No.1 by Zheng Sophia Tang.

5 Report on cross-border e-commerce in the EU SEC(2009) 283 final; http://ec.europa.eu/enterprise/newsroom/cf/document.cfm?action=display&doc_id=2277&userservice_id=1&request.id=0

II. Consumer collective redress

BEUC has long been supporting the introduction of a pan-European mechanism for judicial collective action as a means to enhance consumers' access to justice. In this context, private international rules also need to be updated to reflect the specificities of cross-border collective litigation, namely the questions related to jurisdiction and recognition and enforcement that have not been properly addressed in the existing European private international law.

BEUC notes that the current Brussels I Regulation is not well equipped to deal with cross-border collective mass claims. BEUC would like to set out its concerns and proposals as to how to accommodate the Brussels I regulation to the needs of consumer collective litigation and especially cross-border litigation.

- The need for rules on competent forum in collective redress cases

The problem of defining the competent forum is of crucial importance in the case of cross-border collective litigation, where multiple fora could potentially have the competence to examine the case.

BEUC would like to note that the current Brussels I Regulation is not well equipped to deal with cross-border collective mass claims. First of all, multiple Member States may potentially have jurisdiction over a consumer claim and secondly, the court first seized will have conduct of the claim to trial[6], with no scope to decline jurisdiction in favour of a more convenient forum[7]. As a result, this could result in claims being heard in fora that are not convenient for the majority of the class, in terms of distance, representation, and language. In case of cross-border damage, multiple claims may be filed in several Member States concurrently, thus relying on the courts of each Member State to consider their jurisdiction and to decline to hear the case in favour of the court first seized. Such a procedure will in most cases be lengthy in time, thus failing to ensure effective redress to the consumers-claimants.

The rules on related actions[8] of the Brussels I Regulation seem to be crucial in the context of collective litigation. According to Article 28, a court seized subsequently may decide to stay its proceedings until the court seized initially has decided its own jurisdiction. Collective litigation is characterised by a multitude of plaintiffs who may initiate litigation in different Member States against the same trader. In order to avoid cases of lengthy lis pendens, a consolidation of proceedings before a single forum is desirable. Such a consolidation is possible under European procedural law, which permits a closer cooperation among civil courts handling parallel proceedings, including a transfer of litigation[9]. From this perspective, it seems possible to provide for a transfer of parallel actions through consolidation to the most appropriate court.

As regards the most appropriate court, BEUC has serious concerns as regards the options put forward by the European Commission, DG SANCO in the Green Paper on

6 Article 27 of the Brussels Regulation.
7 The doctrine of forum non convenient is available in common law jurisdictions.
8 Articles 27 and 28.
9 Article 15 of Regulation Brussels II bis, and see also Hess, Europaisches Zivilprozessrecht, § 9II, paras 58 et seq.

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consumer collective redress, which suggested representative actions to be brought to the trader's court or the court of the place of the performance of the contract. Such a rule fails to pass the test of consumers' access to justice and does not resolve the difficulties that consumers and consumer organisations face when seeking to bring collective actions in another Member State.

BEUC believes that the criterion of the most affected market could be used to define the most appropriate court. With regard to the criteria for the definition of this forum, BEUC believes that the "Guidelines for the recognition and enforcement of foreign judgements for collective redress" that have been developed by the International Bar Association Task Force on International procedures and Protocols for Collective Redress[10] could be used as a basis for future reflection. According to these guidelines, when there are multiple fora for a collective redress action, the forum in the best position to facilitate adequate representation of the claimants and other parties, to process the claims from an administrative standpoint, to have access to evidence and witnesses, should assume jurisdiction. To these criteria, one would also add the need to guarantee consumers' access to justice by taking into consideration the number of consumers domiciled within the country and/or the number of contracts related to the country.

As regards the possibility of consolidation in front of the court of the most affected market, it would be adapted to the needs of cross-border collective litigation, under the condition that the representation of consumers is taken into consideration, as well as the availability of judicial collective actions in the country concerned. Otherwise, there is the risk of consolidation before a court in a Member State which has not a system for such actions in place.

Such criteria would eliminate the risk of forum shopping in case of collective actions where multiple jurisdictions can be competent. However, this risk is overstated by businesses that fear a race to the most consumer friendly jurisdiction. BEUC would like to stress that the objective of Brussels I is to determine which national court has jurisdiction to hear a case submitted as a collective action. It does not however, specify the circumstances under which the event giving rise to the harm may be considered to be harmful or the evidence which the plaintiffs must adduce. Those questions, including the nature and the evaluation of the damage and the resulting damage awards must be settled by the seized applying the law determined by Rome I and Rome II on applicable law.

As a complementary mechanism, BEUC would support the creation of a web registry for collective claims that would assists in alerting potential collective redress representatives about pending related actions in other jurisdictions. Furthermore, better communication and cooperation between national courts is needed, as well the organisation of professional training for the judiciary, as outlined in the Stockholm programme 2010-2014.

Nevertheless, given that the work of the European Commission in the field of collective redress is ongoing and there is still no clear indication as to the features of a future Community instrument for collective redress, it is difficult to identify the rules on jurisdiction. BEUC therefore would propose that the issue of jurisdiction should be

[10] The International Bar Association Task Force on International procedures and Protocols for Collective Redress.

included in the forthcoming consultation on common principles for collective redress to be launched by the end of 2010.

- Standing of consumer organisations to represent foreign consumers

Another important issue relates to the current lack of standing for EU consumer organisations or regulatory bodies, such as the Consumer Ombudsman in the Nordic countries to represent foreign consumers. Consumer organisations have often been confronted with situations where they could not represent consumers from another Member State which has led to inequalities amongst EU consumers[11].

The question as to whether a consumer organization or a body like the Ombudsman should be entitled to lodge a collective action not only for national but also for foreign consumers is crucial. In Denmark, the Consumer Ombudsman can bring a collective action under opt-out only for Danish consumers, whereas foreign consumers who may have suffered damages from the same Danish trader have to opt-in. The Belgian draft law is based on the same principle, establishing an opt-out procedure for actions brought by Belgian consumer organizations for Belgian consumers and opt-in for consumers from other Member States. The new Italian law, in force since 1 January 2010, seems to provide for this possibility, although it is too early to assess its implementation in practice. On the contrary, the group action system in Portugal is only open to national claimants.

Consumer organisations have proved in many cases that they are reliable bodies and competent to bring collective claims. Granting them with the adequate standing to represent EU consumers would therefore improve the latter's access to justice and would contribute to the achievement of the common area of justice.

- Recognition and enforcement of third country decisions

Due to the lack of effective collective redress mechanisms in Europe, the solutions for European victims (individual consumers and/or consumer organisations) is sometimes to join class actions in front of US courts (e.g. Altroconsumo participation in the class action against Parmalat, UFC Que Choisir join class action against Intel). It is crucial to reflect on this trend and on the effect that third country judgments should have on Member States.

[11] In the Nazer case, a case of food-poisoning in a holiday club in Turkey, our Austrian member VKI was able to bring a group action for compensation only on behalf of Austrian consumers who had booked their travel through an Austrian company. The court rejected the claims brought on behalf of consumers who had booked via the Swiss branch of the same company.

III. Other questions

- Online dispute resolution

The development of cross-border e-commerce shall entail a deeper reflection on online dispute resolution mechanisms as a means to resolve cross-border disputes bearing in mind that access to courts shall always be possible as a last resort. In any case however, consumers' legal rights, and the exercise of those rights, should not be restricted by a non-judicial body. While we are against the principle of linking ADR systems to legal remedies, we would also point out that there are very – for the time being - few existing ADR systems that would meet acceptable standards.

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