



## **Discussion Paper**

### **Informal Justice and Home Affairs Ministers' Meeting**

Copenhagen

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Session I (Justice)

#### ***Brussels I-Regulation***

##### ***Access to Union courts in civil cases with third country defendants***

1. Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (known as “the Brussels I Regulation”) which entered into force in March 2002 is the cornerstone in judicial cooperation within the European Union. It applies to a broad range of matters, covering contractual and non-contractual claims. It identifies the most appropriate jurisdiction for solving a cross-border dispute and ensures the smooth recognition and enforcement of judgments issued in another Member State. It therefore provides European citizens and businesses with legal certainty and predictability through uniform European rules.

Eight years after the Brussels I Regulation entered into force, the Commission began a review of the practical operation of the Regulation. While the Regulation is considered overall to be working well, the consultations and studies conducted by the Commission have revealed a need for reform.

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Against this backdrop, the Commission presented a proposal for a revision of the Brussels I Regulation on 14 December 2010.<sup>1</sup>

2. As the jurisdiction rules of the Brussels I Regulation currently stand they do not apply (with a few exceptions) when the defendant is domiciled outside the EU. For such cases the Regulation allows for the application of the rules of jurisdiction set out in national law (the so-called "residual jurisdiction"). This referral to national law entails that it depends on the national rules of the Member State in which the claimant brings his case to court whether or not the court has jurisdiction. It should be noted that the national rules on jurisdiction in cases involving third country defendants vary widely between Member States.

3. In its proposal for a revised Brussels I Regulation, the Commission has suggested extending the jurisdiction rules of the regulation to disputes involving third country defendants (*total harmonisation*).

Since the proposal for total harmonisation has been met with scepticism from a number of Member States alternative options have been considered.

A possible alternative could be to extend the jurisdiction rules of the Brussels I Regulation to disputes involving third country defendants, but at the same time allow the national rules of jurisdiction to apply to the extent that they provide further access to national courts (*minimum harmonisation*).

A second alternative could be to leave the current rules unchanged and thus leave the issue to be regulated by national law (*status quo*).

A third alternative – that has not yet been addressed in the negotiations – could be to extend the jurisdiction rules of the regulation to particular types of disputes involving third country defendants (*partial harmonisation*)

4. In support of the proposed *total harmonisation* the Commission has highlighted a number of arguments 1) the diversity of national laws leads to unequal access to justice for EU companies in transactions with partners from third countries, 2) the enforcement of European legislation protecting weaker parties (e.g. consumers, employees, insured persons etc) is not en-

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<sup>1</sup> Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) (COM (2010) 748 final – doc. 18101/10 JUSTCIV 239 CODEC 1587).

sured with the current rules, 3) the extension of the jurisdiction rules to third country defendants will improve access to justice, legal certainty and the protection of EU citizens and companies in disputes having a connection with third countries, and 4) access to justice will be fully transparent as all rules on international jurisdiction will be consolidated in one single document. Some delegations have supported the Commission's proposal to extend the jurisdiction rules to third country defendants.

During negotiations it has been argued that the question of whether or not the jurisdiction rules should be extended to third country defendants is largely a political question on how the EU would like to position itself in relation to third countries.

A number of Member States have in this respect argued that the EU should generally favour multilateral standard-setting for the judicial assistance framework. According to some delegations an extension of jurisdiction to third country defendants could take place more appropriately within the framework of, for instance, the Hague Conference on Private International Law, in order to ensure reciprocity and international comity. The extension of the jurisdiction rules of the Regulation could in this connection eliminate the incentive of third countries to negotiate with the EU, as the jurisdiction rules play an important role in the bargaining between the states involved. It is, however, unclear at this stage what result might be achieved in the future at the multilateral level.

Against this backdrop and in the light of the fact that the current scope of the regulation is not considered to have created any major problems for EU citizens and businesses since the adoption of the Brussels Convention in 1968, a number of Member States have spoken in favour of leaving the issue regulated by national law and thus obtaining *status quo*.

The introduction of a *minimum harmonisation* – possibly as a compromise between full harmonisation and status quo – would entail that the existing EU rules on jurisdiction would be extended to defendants domiciled outside the EU, but that national jurisdiction grounds would continue to exist in subsidiary order. Member States in favor of such a solution have argued that it would provide claimants domiciled within the EU with adequate grounds of jurisdiction enabling them to bring their proceedings before a court in a Member State. Furthermore, it would ensure that third States would retain a proper incentive to negotiate seriously with the EU for a global agreement.

Arguments against a minimum harmonisation solution have been that it will be difficult for practitioners to use as they would have to interpret both national and EU-legislation. Thus, minimum harmonisation does not provide legal certainty and predictability as it will not provide a transparent legal framework. Furthermore, it could be argued that the introduction of minimum harmonisation will not provide equal access to justice.

The introduction of *partial harmonisation* – as another possible compromise between total harmonisation and status quo – would entail the extension of the jurisdiction rules of the Brussels I Regulation to third country defendants in certain situations. It could for instance be considered to extend the jurisdiction rules in relation to choice of court agreements, weaker parties such as consumers and employees, or to disputes concerning immovable property located in a third country. In other cases the Regulation would still allow for the application of the rules of jurisdiction set out in national law.

**5.** Since the question of a possible extension of the jurisdiction rules is of a primarily political nature the Presidency wishes to facilitate a debate on this issue in order to provide guidelines for the future work of the Working Party on Civil Law Matters.

The Presidency therefore invites Ministers to consider the following questions:

1. Do Ministers find that the current restriction in respect of the scope of the regulation creates practical problems for EU citizens and businesses? Will such problems be solved by extending the rules on jurisdiction in the regulation as suggested by the Commission?
2. Do Ministers find it appropriate to let the rules on jurisdiction in the recast Regulation apply, in an exclusive way, only to defendants domiciled in a Member State and to allow national rules of jurisdiction to apply, in a residual way, to all other defendants?
3. Do Ministers find that a possible compromise could be to introduce either minimum harmonisation or partial harmonisation of the jurisdiction rules? In which areas could partial harmonisation provide a particular added value?