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COVER NOTE

from: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

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to: Mr Pierre de BOISSIEU, Secretary-General of the Council of the
European Union

Subject: Commission Staff Working Paper – Summary of the impact assessment
Accompanying document to the 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)

Delegations will find attached Commission document SEC(2010) 1548 final.

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EUROPEAN COMMISSION

Brussels, 14.12.2010
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COMMISSION STAFF WORKING PAPER

SUMMARY OF THE IMPACT ASSESSMENT

Accompanying document to the

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}

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1. BACKGROUND, CONSULTATION AND EXPERTISE

Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (known as "Brussels I") which entered into force in March 2002 is the matrix of civil judicial cooperation in the European Union. It identifies which court is competent for solving a cross-border dispute and ensures the smooth recognition and enforcement of judgments given in another Member State. While the Regulation is overall considered to be working well, the consultation of stakeholders and several studies conducted by the Commission revealed the need for reform. In the same vein, the Stockholm Programme calls for removing the remaining restrictions on the exercise of rights by citizens and companies.

In preparation of the Regulation's revision, the Commission broadly consulted stakeholders and sought extensive external expertise. It adopted a Green Paper launching a public consultation in April 2009 and commissioned a total of four studies addressing different issues of the reform. Empirical data supporting the preparation of the impact assessment was collected by a further external study and an European Business Test Panel survey. The Commission also organised two major conferences, a meeting with national experts and two meetings with experts on arbitration. Additional comments were provided by an inter-service steering group within the Commission.

2. PROBLEM DEFINITION, OBJECTIVES AND ASSESSMENT OF POLICY OPTIONS

2.1. THE FREE CIRCULATION OF JUDGMENTS

2.1.1. Problem definition and scope

A judgment given in one Member State does not automatically take effect in another Member State but has to be validated and declared enforceable in a special intermediate court procedure known as "exequatur". This procedure is costly and time-consuming. On an EU-average, it costs € 2.200 in a straightforward case. This amount can increase exponentially in a more complex or contested case (to about € 12.700). On the assumption that 25% of all cases are complex, the overall cost of exequatur proceedings in the EU amounts to more than €47 million per year. The time for obtaining exequatur varies from a couple of days up to several months in appeal cases up to two years. In more than 90% of cases, the procedure is a pure formality because there are no grounds for refusing recognition and enforcement; only few decisions are appealed and appeals are rarely successful. The exequatur procedure adds to the complexities of cross-border litigation which deter companies from doing business cross-border trade.

2.1.2. Objectives

- The specific objective of this part of the Proposal is to achieve a genuine free circulation of judgments in all civil and commercial matters.

2.1.3. Retained Policy Options

- Policy Option 1: Status quo

- Policy Option 3: Maintain exequatur but alleviate some of the burden for the claimant
- Policy Option 4A: Abolish the exequatur procedure while introducing the necessary safeguards for the protection of the rights of the defence. However, exequatur will be maintained for judgments in defamation cases and collective redress proceedings.

2.1.4. *Analysis of Impacts of preferred Option 4A: Abolition of the exequatur procedure and introduction of necessary safeguards*

(a) **Effectiveness**: This option would fully realize the objective of creating a genuine free circulation of judgments in the European Union. (b) **Key impacts**: (i) **Economic impact**: The abolition of exequatur would eliminate the costs and delays associated with the current exequatur procedure, thereby allowing EU companies and citizens to save a major part of the current costs of almost € 48 Mio/year. In the vast majority of cases in which the enforceability of the foreign judgment is not contested by the defendant, the claimant would only have to bear minimal translation costs due to the introduction of standard forms which dispense with the requirement of having to translate the full judgment. Only in complex cases, costs for translating the full judgment and legal fees would continue to arise. This option would also encourage more businesses, in particular **SMEs**, to engage in cross-border transactions. At present, only 25% of Europe's 20 Mio SMEs are engaged in cross-border trade; i.e. 15 million SMEs could potentially expand their business to other Member States. 39% of these SMEs would be a lot more inclined to get involved in cross-border transactions if the exequatur procedure were abolished. Even if only a quarter of them actually does, this would bring 1.4 Mio SMEs into the internal market. (ii) **Fundamental rights**: The abolition of exequatur would be accompanied by procedural safeguards which would ensure that a judgment in breach of the right to a fair trial and the right of defence cannot be recognised and enforced. This option would therefore comply with the Charter, in particular its Article 47. Since the grounds which could be invoked against the enforcement of the foreign judgment largely correspond to those which can be invoked today in the context of the exequatur procedure, the level of judicial protection for cross-border proceedings would not be lowered compared to the status quo. (iii) **Financial costs**: Member States would incur costs due to the need to familiarize legal professionals with new procedures. These costs would be minimal if national safeguard procedures were modelled on the procedures adopted under European instruments which have abolished exequatur for certain types of claims. The proposal will also contain a standard form which aims at facilitating direct enforcement.

2.1.5. *Comparing the retained Options and the preferred Policy Option 4A.*

| Objectives/impact | Option 1 – Status quo | Option 3 – alleviating burden for applicant | Option 4A – abolition of exequatur |
|--|-----------------------|---|------------------------------------|
| Removal of remaining barriers to the free circulation of judgments | 0 | + | ++ |
| Economic impact | 0 | + | + |
| Financial costs | 0 | - | - |

| | | | |
|--------------------|---|---|---|
| Fundamental rights | 0 | 0 | 0 |
|--------------------|---|---|---|

2.2. THE OPERATION OF THE REGULATION IN THE INTERNATIONAL LEGAL ORDER

2.2.1. Problem definition

- The jurisdiction rules of the Regulation currently (with some exceptions) do not apply when the defendant is domiciled outside the EU, so that in these cases the Regulation refers to national law (so-called "residual jurisdiction"). Within the EU, national rules on jurisdiction for third country defendants vary widely between Member States. In cases where the defendant is domiciled outside the European Union,
- European citizens and companies have unequal access to justice,
- unequal conditions for companies doing business in the internal market are created which can lead to a distortion of competition,
- the enforcement of European legislation protecting weaker parties (e.g. consumers, employees, insured etc) is not ensured.

2.2.2. Objectives

- The specific objective is to improve access to justice, legal certainty, and protection of EU citizens and companies in disputes connected with third States.

2.2.3. Analysis of retained Policy Options

- Policy Option 1: Status quo
- Policy Option 3A: Minimum harmonisation of the rules on jurisdiction (Option 3A)
- Policy Option 4A: Full harmonisation of the rules on jurisdiction

2.2.4. Analysis of impact of preferred policy option 4A: Full harmonisation of the rules on jurisdiction

(a) Effectiveness: The full harmonisation of jurisdiction rules would ensure both full and equal access to justice in the European courts. Access to justice would also be fully transparent because all rules on international jurisdiction would be consolidated in one single document, the revised Regulation. This option would also do away with the artificial distinction between defendants domiciled within the EU and outside the EU. This distinction is no longer drawn by recent EU legislation, notably Regulation 4/2009 on maintenance obligations, and the Commission proposal for a regulation on succession and wills. **b) Key impact: (i) Economic impact:** This option will increase the possibilities for EU companies to litigate in the EU rather than abroad. This will bring about a reduction in the average litigation costs and delays for EU companies because litigation within the European area of justice is generally cheaper and simpler than litigation in a country outside the EU. Measures of judicial cooperation are largely absent in relations with third countries and the geographical distance

of the competent court will most likely increase costs for witnesses and parties to appear in person. Moreover, a harmonisation of the rules relating to third country defendants will increase legal certainty and predictability which, in turn, is likely to produce cost savings for the companies involved. The improved legal framework might also encourage more companies to engage in cross-border transactions. In addition, possible distortions of competition which result from the divergence of national rules on jurisdiction would be eliminated. **SMEs:** Any cost savings will be particularly beneficial for SMEs which do not have the resources to handle complex international litigation in the same way as large companies **(ii) Financial costs** Option 4A would trigger minimal to no financial costs for the Member States. **(iii) Fundamental rights** The full harmonisation would improve access to justice for weaker parties (consumers, employees etc) in line with Articles 38 and 47 of the Charter because it would guarantee their access to an EU court in disputes involving defendants from outside the EU. In addition, this option would ensure full access to justice to European companies in litigation involving third country defendants. The creation of a forum of necessity would ensure that European companies would have access to an EU court in case no other court guaranteeing a fair trial has jurisdiction. Finally, the introduction of a forum geared specifically at non-EU defendants would improve access to justice for companies from those Member States which currently do not have comparable provisions in their national law. **(iii) Social impact** This option would ensure that weaker parties retain the protection granted to them by mandatory EU law. **(iv) Third countries** The impact of Option 4A on non-EU countries would depend on the substance of the harmonised jurisdiction rules. The envisaged creation of a forum of necessity and a "mildly exorbitant" rule of jurisdiction, e.g. based on the location of assets having a link with the dispute in the territory, is hardly objectionable on a diplomatic level. On the contrary, impact on third countries would be positive as Member States would not be entitled to maintain more generous conditions for access to justice in their national law. Should international negotiations on a worldwide judgments convention resume, the impact of the revision on the EU's negotiating position would equally depend on the substance of the harmonised rules. While the alignment of national rules as such would be neutral in this respect, the precise contents of the rules could affect the EU's position in the negotiations.

2.2.5. Comparing the options and the preferred Policy Option

| Objectives/impact | Option 1 | Option 3A | Option 4A |
|---|----------|-----------|-----------|
| Improve protection of EU parties in disputes with non-EU defendants | 0 | + | ++ |
| Economic impact | 0 | 0 | + |
| Fundamental rights | 0 | + | + |
| Impact on third countries | 0 | 0 | 0 or + |

2.3. CHOICE OF COURT AGREEMENTS

2.3.1. *Problem definition and scope*

The overwhelming majority of EU business involved in cross-border trade makes use of choice of court agreements (almost 70 % of all companies and 90% of large companies).

- The Regulation gives in principle effect to choice of court agreements but concerns have been raised that the effectiveness of such agreements may in practice suffer from abusive litigation tactics. This is due to the interplay with another provision in the Regulation, the so-called *lis pendens* rule which aims to avoid the situation that two courts in the EU deal with the same case at the same time. It stipulates that the court second seized of a dispute must stay proceedings until the court first seized has ruled on its jurisdiction. A party wishing to escape the choice of court agreement can considerably delay proceedings in the chosen court if it first seises a (non-competent) court in a country where the judicial system is comparatively slow. Over the past five years, 7,7% of companies reported that their contractual counterpart did not comply with the clause designating the competent court.
- The effectiveness of choice of court agreements needs to be ensured also beyond the EU's borders. The EU negotiated an international agreement, the Hague Convention on Choice of Court Agreements, which improves legal certainty for forum-selection-clauses in B2B relationships; the ratification process is ongoing. The revision of the Regulation should ensure that the approach to choice of court agreements for intra-EU situations is coherent with the one which will potentially be adopted for extra-EU situations. Under the Hague Convention, the court seised but not chosen must dismiss the case unless one of the exceptions established by the Convention applies.

2.3.2. *Objectives*

The specific objective is to enhance the effectiveness of choice of court agreements. The reform should also facilitate the ratification by the EU of the Hague Convention on Choice of Court Agreements.

2.3.3. *Description of retained policy options*

- Policy Option 1: Status quo.
- Policy Option 2: Exempt the chosen court from obligation to stay proceedings
- Policy Option 3: Give the chosen court priority to decide on its jurisdiction

2.3.4. *Analysis of impacts of preferred Policy Option 3: Give the chosen court priority to decide on its jurisdiction*

(a) Effectiveness to achieve objectives: Option 3 would discourage the use of tactical pre-emptive claims which seek to undermine a valid choice of court agreement and thus fully achieve the objectives set out above **(b) Key impacts (i) Economic impact:** Option 3 would eliminate the costs and delays which businesses incur today due to their partners' bad faith attempts to circumvent choice of court agreements. It is also likely to encourage at least part of the 30% of businesses which currently are not involved in cross-border trade because of problems inherent in cross-border litigation or debt-recovery to do so. It would increase legal

certainty for businesses and boost their confidence in the effectiveness of their contractual arrangements for dispute resolution. The drawback of this solution is that it may lead to delays in judicial proceedings where the designated court eventually holds the agreement invalid (concerns only 1.1% of companies per year) and the parties end up litigating in another court. **(ii) Financial costs** Option 3 would only entail minimal implementation costs. **(iii) Fundamental rights** Option 3 would fully give effect to the will of the parties to a choice of court agreement. This would significantly improve the situation of the parties in terms of the freedom to conduct a business as guaranteed in Article 16 of the Charter. **(iv) International aspects:** Option 3 mirrors the solution adopted by the Hague Convention. Importantly, as in the Convention, priority is given to the chosen court which is able to proceed even if seised second.

2.3.5. Comparing the options and preferred Policy Option

| Objectives/impact | Option 1 Status quo | Option 2 Exemption from obligation to stay proceedings | Option 3 Giving priority to the chosen court |
|---------------------------------------|------------------------|---|--|
| Eliminate the possibilities for abuse | 0 | + | ++ |
| Economic impact | 0 | + | ++ |
| Fundamental rights | 0 | + | ++ |
| International aspects | 0 | + | ++ |

2.4. INTERFACE BETWEEN THE REGULATION AND ARBITRATION

2.4.1. Problem definition

Arbitration is a matter of great importance in international commerce, as it used by larger companies and multinationals on a regular basis (about 63% of large European companies prefer arbitration over litigation). Arbitration is currently not covered by the scope of Regulation Brussels I. Difficulties have been reported concerning the relation of arbitration and court proceedings. Notably, a party challenging the validity of an agreement to arbitrate can request the court to rule also on the merits. This can lead to parallel court and arbitral proceedings with the risk of conflicting outcomes where the agreement is held invalid in one Member State and valid in another. This situation can be abused by litigants wishing to escape an arbitration agreement. The problem which has been highlighted by a recent decision of the Court of Justice in the *West Tankers* case reduces the effectiveness of .

2.4.2. Objectives

The specific objective of this part of the Proposal is to ensure a transparent and predictable coordination of court and arbitral proceedings which preserves or improves the attractiveness of the European Union as place of arbitration.

2.4.3. Description of retained policy options

- Policy Option 1: Status quo
- Policy Option 2: Extend the exclusion of arbitration from the scope
- Policy Option 3A: Enhance the effectiveness of arbitration agreements. This option would provide that a court seised with a dispute involving an arbitration agreement would have to stay proceedings if an arbitral tribunal or a court at the seat of the arbitration was seised.

2.4.4. Analysis of impacts of preferred Policy Option 3A: Enhance the effectiveness of arbitration agreements

(a) Effectiveness to achieve objectives This policy option would fully achieve the objectives outlined above. It would ensure the effectiveness of arbitration agreements by eliminating the risk of parallel proceedings and by reducing the possibilities of abusive litigation tactics. It would also ensure that all judgments that currently circulate within the EU continue to do so.

(b) Key impact (i) Economic impact Option 3A would eliminate the risk of abusive litigation tactics, with the economic benefits outlined above. In addition, Option 3A would eliminate the risk of parallel court and arbitration proceedings, thereby significantly improving the attractiveness of arbitration in the EU and of European arbitration centers. **(ii) Financial costs** As for Option 2, the modification of the Regulation would entail only minimal implementation costs for Member States. **(iii) Fundamental Rights** Arbitration would become more effective and efficient than under both Options 1 and 2, thereby improving the parties' access to alternative means of dispute resolution. In addition, the option would improve access to justice for companies wishing to challenge (in good faith) an arbitration agreement because it would establish a clear and transparent legal framework for such challenges while defining clear rules to improve legal certainty and avoiding dilatory tactics. The standards set in Article 47 of the EU Charter will be further strengthened under this option. Finally, it would be ensured that throughout the Union, maximum effect is given to the will of the parties which enhances their freedom to contract and freedom to conduct a business as guaranteed in Article 16 of the Charter. **(iv) Third countries** The attractiveness of arbitration in the European Union would be increased.

2.4.5. Comparing options and preferred Policy Option

| Objective/impact | Option 1 Status quo | Option 2 Extending the exclusion | Option 3 Enhancing the effectiveness |
|---|------------------------|--|--|
| Free circulation of judgments | 0 | – | + |
| Ensuring effectiveness of arbitration in EU | 0 | + | ++ |
| Economic impact | 0 | + | + |
| Fundamental rights | 0 | + | ++ |

3. NECESSITY OF EU ACTION (SUBSIDIARITY)

The problems outlined above relating to the existence of the exequatur procedure, lack of effectiveness of choice of court agreements and the interface between arbitration and the Regulation are caused by the rules of existing EU law and can only be remedied by the intervention of the European legislator. The harmonisation of jurisdiction rules concerning non-EU defendants is necessary to create a level playing field for companies engaged in the internal market and guarantee that the rights of "weaker parties" guaranteed by EU law can be enforced. These goals cannot be achieved by the Member States acting alone.

4. LEGAL BASIS

The Regulation has been adopted on the basis of Articles 61 (c) and 67 (1) of the Treaty establishing the European Community. After the entry into force of the Treaty of Lisbon, the Treaty basis for adopting the revised Regulation consists of Articles 67 (4) and 81 (2) (a), (c) and (e) of the Treaty on the Functioning of the European Union.

5. PROPORTIONALITY OF EU ACTION

The package of preferred options outlined above respects the proportionality principle. The changes contemplated in the package of preferred policy options do not go beyond what is necessary to address the problems identified. As outlined above, the benefits and savings of the preferred policy options largely outweigh its costs and disadvantages. The potential for economic savings is substantial while the financial costs for implementing the reform in the Member States are overall small. The reform package has the potential to promote trust in the internal market and encourage more companies and citizens to engage in cross-border transactions, thereby reaping the benefits of the internal market. Such increased economic activity, taken together with the savings the reform entails, would contribute to help citizens and companies overcome the current financial

6. MONITORING AND EVALUATION

The Commission will prepare every five years evaluation reports on the application of the Regulation. Since most Member States currently do not systematically collection of statistical data on the application of the Regulation, the revised Regulation will contain a requirement to provide relevant information, notably on the number of recourses to the special review procedures created to safeguard the defendant's fundamental rights and on the outcome of these procedures.