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COMMISSION STAFF WORKING PAPER

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)

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DISCLAIMER: This report commits only the Commission's services involved in its preparation and does not prejudge the final form of any decision to be taken by the Commission

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Lead DG – DG JUSTICE Agenda Planning No 2009/JLS/013

1. BACKGROUND AND CONSULTATION OF INTERESTED PARTIES

1.1. Background

Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (known as "Brussels I")[1] is the matrix of civil judicial cooperation in the European Union. It creates a secure legal framework for cross-border legal proceedings in a broad range of civil disputes. The Regulation identifies the most appropriate jurisdiction*[2] for solving a cross-border dispute and ensures the smooth recognition* and enforcement* of judgments issued in another Member State. The Regulation replaced the 1968 Brussels Convention which had been concluded between the then Member States and successively amended to reflect the Union's successive enlargements. It applies in all Member States, including Denmark, which has a special regime for judicial cooperation under the Treaty.

Regulation Brussels I entered into force in March 2002. Eight years afterwards, the Commission has reviewed its operation in practice and considered necessary amendments to the instrument. While the Regulation is overall considered to work successfully, the consultation of stakeholders and different studies conducted by the Commission revealed the need and potential for reform. Cross-border litigation could be made speedier, cheaper and more efficient. Moreover, the possibilities of using abusive litigation tactics could be reduced.

1.2. Political mandate

The European Council in its 2009 Stockholm Programme[3] called for the further development of the European area of justice by removing the remaining restrictions on the exercise of rights of citizens and companies. More specifically, judgments in civil matters should be directly enforceable in another Member State without any intermediate measures being required. Moreover, access to the courts by citizens and businesses should be facilitated in order to enable them to enforce their rights throughout the Union. Improved access to justice should also equip economic operators with tools that enable them to benefit fully from the single market, especially at a time of economic crisis.

1.3. Organisation and timing

The Commission's Work Programme for 2010 includes the adoption of a proposal for revising Regulation 44/2001 as a strategic initiative, for which a road map was prepared .

The Commission commissioned an external study (hereinafter "the external study") to support the preparation of the Impact Assessment[4]. The problems, objectives and policy options assessed in that study are based on the outcome of the consultation and the expertise brought together by the Commission to prepare the present initiative (see point 1.4 below) as well as contributions from the contractor.

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1 OJ L 12, 16.1.2001, p.1.

2 Legal terms marked by an asterix "*" are explained in the glossary contained in Annex I.

3 Adopted at the meeting of the European Council of 10th and 11th December 2009.

4 CSES Centre for Strategy & Evaluation Services, Data Collection and Impact Analysis – Certain Aspects of a Possible Revision of Council Regulation No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments In Civil and Commercial Matters (Brussels I).

This report also incorporates comments submitted during two meetings of the inter-service steering group on 17 May and 3 September 2010 at which representatives of the Directorates-General Communication, Competition, Employment, Economic and Financial Affairs, Enterprise and Industry, Environment, Health and Consumers, Information Society, Internal Market and Services, Trade, Mobility and Transport as well as the Secretariat General and the Legal Service of the Commission participated.

This Impact Assessment was reviewed by the Impact Assessment Board (IAB). The recommendations for improvements have been accommodated in this revised version of the report. In particular, the following changes were made: the assessment of the benefits of the abolition of exequatur was revised; the views of stakeholders and the necessary adjustments in the national legal systems were more fully presented; the justification of EU action on grounds of subsidiarity was expanded and the justification for the proposed degree of harmonisation of the rules on jurisdiction vis-à-vis third country defendants was strengthened.

1.4. Consultation and expertise

On 21 April 2009 the Commission adopted a Green Paper on the review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM(2009) 175). A total of 130 responses have been received and are available on DG Justice's website (for a summary of stakeholders' views see Annex II)[5].

On the same date, the Commission adopted a report on the application of Council Regulation (EC) No 44/200 (COM (2009)174). In preparation of that report, the Commission has taken into account several studies commissioned by it, the respective results of which are summarised in Annex III:

- A 2007 study on the practical application of the Regulation conducted by Prof. Burkhard Hess, Thomas Pfeiffer, and Peter Schlosser (the "Hess report")[6]

- A 2007 study to evaluate the impact of a possible ratification, by the European Community, of the 2005 Hague Convention on Choice-of-Court Agreements conducted by GHK[7]

- A 2006 study on subsidiary jurisdiction conducted by Prof. Arnaud Nuyts of the University of Brussels (the "Nuyts report")[8]

- A 2004 study on enforcement of judicial decisions in the European Union, conducted by Prof. Burkhard Hess from the University of Heidelberg[9]

Empirical data supporting the preparation of this impact assessment was collected by the external study (see point 1.3 above) which was finalised in September 2010. In addition, a survey of European companies on commercial disputes and cross-border debt recovery was launched via the European Business Test Panel[10]. This impact assessment also relies on the

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5 http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_public_en.htm

6 http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm

7 http://ec.europa.eu/dgs/justice_home/evaluation/dg_coordination_evaluation_annexe_en.htm

8 http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm

9 http://ec.europa.eu/civiljustice/publications/docs/enforcement_judicial_decisions_180204_en.pdf

10 422 replies were received in total out of which 281 companies filled in the questionnaire completely. For the others, the topic was not relevant.

results of a study on Civil Justice Systems in Europe conducted in 2008 by the University of Oxford[11].

Two major conferences were organised by the Commission, one together with the Heidelberg University and the Journal of Private International law in December 2009, another one together with the Spanish Presidency in March 2010. These conferences have constituted a large forum of exchange of views with stakeholders on the many different issues raised in the revision.

Finally, a meeting with national experts was held on 20 July 2010. Two meetings with experts on the matter of arbitration were held, one on 1 July 2010 and one on [24] September 2010.

1.5. The revision of the Regulation

The revision of Regulation Brussels I pursues two general objectives. First, it should facilitate cross-border litigation and the free circulation of judgments and cut unnecessary red tape in line with the principle of mutual recognition. This will make it easier and less time-consuming for European citizens and companies to litigate in another Member State if that is required for solving their disputes. Second, the revision should also help to create the necessary legal environment for the European economy to recover. In order to achieve this, the revised Regulation should further reduce the cost of litigation and enhance legal certainty for cross-border transactions.

In order to achieve these objectives, the Commission envisages to make four main amendments to the Regulation:

- the abolition of remaining intermediary procedures for the recognition and enforcement of judgments,
- a general improvement of access to justice for European citizens and companies in international disputes,
- an enhancement of the effectiveness of choice of court agreements, and
- an improvement of the relation between court and arbitral proceedings.

These four amendments have important impacts and have attracted most attention from stakeholders. They will therefore constitute the subject matter of this Impact Assessment.[12]

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[11] Study on Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law, 2008, available at http://www.mla.org.mk/webcontent/file_library/ATT04152.pdf

[12] The external study supporting the preparation of this impact assessment has focussed, among the points which will be dealt with in this impact assessment, on the gathering of further data on the operation of the Regulation's rule on consumer contract disputes. The Hess report revealed a certain degree of legal uncertainty in the application of the existing rule but had not recommended any changes of the rule. The results of the external study equally did not support a legislative intervention in the form of a change to the existing rule , particularly in the light of two cases before the European Court of Justice which will address concerns of legal certainty. Nevertheless, not dealing with the matter at this stage, the Commission believes that concerns on the operation of the rule should be addressed. In this respect, several actions are being undertaken. The Commission's work programme for 2011 foresees a legislative initiative on the development of existing mechanisms for ADR; the Communication concerning a digital agenda for Europe (COM(2005) 245 final of 19.5.2010) provides for the development of an on-line dispute resolution mechanism for e-commerce; the abolition of exequatur

In addition, the revision of Regulation Brussels I will contain a number of other amendments, more of a technical nature, which involve smaller impacts and have not received the same degree of attention from stakeholders. They include, in particular, an improvement of the rule which prevents parallel proceedings in Europe. As set out in this report, this rule has mainly raised attention in connection with choice of court agreements (cf. infra). Some issues have been raised by a few stakeholders beyond choice of court. It stems from the fact that the courts in some Member States may take a long time to decide on their jurisdiction and from the lack of information of the courts on proceedings pending in other Member States. These points do not require a substantial change of the rule itself, like in the case of choice of court agreements. The operation of the rule may be improved by a few small changes of a rather technical nature. In particular, it may be ensured that a decision on jurisdiction is taken swiftly by the courts (by imposing a deadline to decide on the jurisdiction question) and that an appropriate communication between the courts involved takes place.

Another set of amendments will improve access to justice in specific situations. In particular, the revision will create a forum for claims of rights *in rem* at the place where moveable assets are located and allow actions against multiple defendants in the employment area to be brought in a single forum under Article 6 (1).

Finally, the revision will clarify the conditions under which provisional, including protective measures can circulate in the EU and improve the coordination of proceedings, in particular proceedings on the merits on the one hand and proceedings aimed at obtaining provisional or protective relief on the other hand. This may be realised by creating a communication between the courts involved.

1.6. Respect of Fundamental Rights

With the entry into force of the Treaty of Lisbon on 1 December 2009, the Charter of Fundamental Rights of the European Union ('the Charter')[13] has become legally binding[14]. This means that the EU institutions as well as the Member States when implementing Union

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envisaged in this impact assessment will improve cross-border litigation generally; the future revision of Regulation 861/2007 should consider a possible increase of the threshold for the use of the small claims procedure, as foreseen in the Monti Report on a new strategy for the internal market; the development of on-line judicial procedures will be further explored, in particular the electronic processing of the European order for payment and small claims procedures and electronic forms of mediation in the context of the roadmap on e-justice. The upcoming Communication on e-commerce will address the lack of development of e-commerce, evaluate the impact of the E-commerce Directive and encourage the smooth functioning of the internal market for e-commerce, particularly having regard to the efficiency of the above-mentioned measures.

Another matter which has been considered during the public consultation concerns the operation of the Regulation's rules on industrial property disputes. The report and green paper described certain deficiencies of the existing rules (e.g. duplication of litigation in various Member States and risk of contradicting judgments despite the fact that the same underlying European patent is the subject matter of the litigation) and some possible ways to address these (in particular, e.g., the possibility to allow that litigation in different Member States are connected). The results of the public consultation show that most stakeholders prefer to await the outcome of the discussions on the creation of a unified patent litigation system as this is currently undertaken at Union and international level. The unified patent litigation system would permit to address patent litigation as a whole, going beyond the mere jurisdictional questions. The Commission will monitor very closely the developments on this matter and re-consider its approach towards patent litigation under the Brussels Regulation, if the ongoing efforts to create a unified patent litigation system were not to lead to the warranted result.

[13] OJ 2010 C 83/02, 389ss.

[14] Cf Article 6 TEU.

law have to respect the rights, observe the principles and promote the application of the Charter in accordance with their respective powers[15]. For this reason, all legislative proposals put forward by the Commission are subject to a systematic and rigorous monitoring to ensure their compliance with the Charter, which, as set out in the Strategy for the effective implementation of the Charter by the European Union, must serve as compass for the Union's policies[16]. The rights and principles of the Charter which may be affected by the revision of Regulation Brussels I vary depending on the specific amendment considered; the impact of the different aspects of the reform on these rights and principles is assessed in the following chapters. The content of the main provisions concerned is set out below:

1.6.1. Right to an effective remedy, Article 47 subparagraph 1

According to Article 47 subparagraph 1, everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal. This provision is crucial to ensure access to justice in the European law context. The ECJ has emphasised that the exercise of the rights conferred by EU law must not be rendered 'virtually impossible or excessively difficult' by procedural rules.[17] In line with the case law of the European Court of Human Rights, the right to an effective remedy also includes the right of the creditor to recover his claim within a reasonable period of time and on the basis of efficient procedures[18].

1.6.2. Right to a fair trial, Article 47 subparagraph 2

Article 47 subparagraph 2 stipulates that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law and that everyone shall have the possibility of being advised, defended and represented. For disputes relating to civil law rights and obligations, this guarantee corresponds to Article 6(1) of the ECHR. Inherent in this provision is the right to defence which includes – in the area of civil law - the right to be heard and the right to make known its views on the truth and relevance of the facts, objections and circumstances put forward by the other party[19].

1.6.3. Respect for private and family life (Article 7); Protection of personal data (Article 8) Freedom of religion (Article 10)

Article 7 guarantees that everyone has the right to respect for his private and family life, home and communications; article 10 provides that everyone has the right to freedom of thought, conscience and religion. These rights correspond to Articles 8 and 11 of the ECHR. Article 8 grants persons the right to the protection of personal data concerning them[20].

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15 Cf. Article 51 (1) of the Charter.

16 Communication from the Commission "Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union" COM (2010) 573final.

17 See e.g. *ECJ*, Case C-312/93, *Pertbroeck v. Belgian State*, [1995] *ECR* I-4599, para. 23.

18 See e.g. European Court of Human Rights, 19.3 1997, Hornsby v. Greece, ECHR-Reports 1997 II 495.

19 Commentary to the Charter of Fundamental Rights, p. 368.

20 This right is based on Article 286 of the TFEU and Directive 95/46/EC on the protection of individuals with regard to the processing of personal data as well as on Article 8 of the ECHR and on the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data.

1.6.4. Freedom of expression and information (Article 11)

Article 11 guarantees that everyone has the right to freedom of expression and that the freedom and pluralism of the media shall be respected. The exercise of these freedoms may be subject to conditions or restrictions in particular for the protection of the reputation or the rights of others[21].

1.6.5. Freedom to conduct a business, Article 16

Article 16 recognises the freedom to conduct a business in accordance with Union law and national laws and practices. This Article is based on Court of Justice case-law which has recognised freedom to exercise an economic or commercial activity and freedom of contract[22], and on Article 119(1) and (3) of the TFEU, which recognises free competition. Arguably, these rights encompass that the legal system gives effect to the will of the parties.

1.6.6. Consumer Protection, Article 38

Article 38 of the Charter stipulates that Union policies shall ensure a high level of consumer protection. The principle set out in this Article is based on Article 169 of the TFEU. It is also reflected in Article 12 TFEU according to which consumer protection requirements have to be taken into account in defining and implementing other Union policies and in Article 114 (3) TFEU which requires Commission proposals to take as a base a high level of consumer protection.

2. PROBLEM DEFINITION, OBJECTIVES AND ASSESSMENT OF POLICY OPTIONS

In the following section, the problems, objectives, policy options and their impact assessment will be dealt with in separate subsections for each of the four issues set out above. This approach seems appropriate because each of the four issues has a different problem definition, different policy objectives, different policy options and a different group of stakeholders affected. An overview of the stakeholders' views on the four main aspects of the revision outlined above is provided in Annex II. Moreover, the four issues are not interconnected in the sense that the choice of a policy option on one issue would have an impact on the other issues. For each of the four issues, a preferred policy option will be identified. The impact assessment will conclude with an overall assessment of the impact of the preferred policy options.

2.1. THE FREE CIRCULATION OF JUDGMENTS

2.1.1. Problem definition for the free circulation of judgments

2.1.1.1. The current problem

Traditionally, a judgment given in one Member State does not automatically take effect in another Member State. In order to be enforced in another country, a court in that country first has to validate the decision and declare it enforceable. This is done in a special intermediate

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21 Explanatory Memorandum to the Charter of Fundamental Rights, CONVENT 49.

22 Explanatory memorandum to the Charter of Fundamental Rights, CONVENT 49 of 11 October 2000., see also judgment in case 151/78 Sukkerfabriken Nykobing (1979), para. 19, and case C-240/97 Spain v. Commission (1999), para 99.

court procedure, known as "exequatur"*, which takes place after the judgment has been obtained and before concrete measures of enforcement can be taken.

Over the past forty years, obtaining "exequatur" within the European Union has successively been facilitated. The 1968 Brussels Convention harmonised the exequatur procedure in the then Member States; the 2001 Brussels I Regulation significantly accelerated the process of exequatur.

Despite these efforts, the intermediate exequatur procedure still makes cross-border litigation more cumbersome, time-consuming and costly than national litigation. Parties have to bear court fees for processing the application. Often a lawyer is hired to prepare the documentation and handle the procedure abroad. Finally, costs of translation[23] and service of documents add to the bill. The delay and costs involved in obtaining the recognition and enforcement of cross border judgments discourage people from making full use of the possibilities offered to them in the internal market by doing business and shopping in other EU countries.

2.1.1.2. Who is affected?

The need to go through exequatur proceedings affects all citizens and companies (whether EU or foreign) which need to have a judgment given by the courts of one Member State recognized and enforced in another Member State.

2.1.1.3. Scope of the problem

The problem concerns in principle every judgment in civil and commercial matters which is given by the courts of one Member State and which needs to be enforced in another Member State. Exceptions apply to certain types of judgments (on claims up to € 2,000, uncontested claims and claims for family maintenance) for which exequatur has already been abolished by recent EU legislation (see Section 2.1.2 below). The number of applications for recognition and enforcement under Regulation Brussels I has been estimated at roughly 10,000[24] per year in the entire European Union.

On an EU average, in 93% of the cases, the intermediate step is a pure formality as there are no reasons to refuse recognition and enforcement of the foreign judgment[25]. Between 1 and 5% of the decisions to grant exequatur are appealed[26] but these appeals are rarely successful. Only in a handful of cases does the procedure actually lead to a refusal of recognition and enforcement.

The time for obtaining exequatur varies between the Member States; it can take from a couple of days up to several months, depending on the jurisdiction and the complexity of the case. This does not take into account the time required for collecting the documents necessary for

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23 Costs of translations have been calculated on a basis of a 10 page document x €30 per page = €300. The proposal aims at reducing these costs by introducing a standard form which will contain only an extract of the judgment for purposes of enforcement; only this form will need to be translated.

24 CSES report, p. 35.

25 CSES report, p. 35

26 Cf Hess report p. 21. The difference between 93% and this figure can be explained by the fact that a number of applications is refused at first instance because they do not comply with formal requirements or fall outside the scope of the Regulation.

the application and translations. If an appeal is made, this delay considerably increases: appeal proceedings can take up to two years in some Member States[27].

The costs for obtaining exequatur equally vary throughout the EU. For a straightforward case of exequatur, identifiable costs (which include court and lawyers' fees, costs for service of documents and translations) range from € 1,100 in Bulgaria to almost €4,000 in the United Kingdom. On an EU-27 average, € 2,200 has to be paid for processing the application. This amount can increase exponentially in a more complex or contested case where legal costs amount in the EU-27 average to about € 12,700[28]. On the assumption that 25% of all cases are complex, the overall cost of exequatur proceedings in the EU amounts to almost€48 million per year (for details on the number, costs and delays of exequatur proceedings see Annexes IV and V).

The complexities of cross-border litigation can deter companies from doing business cross-border. Currently, only 25% of European SMEs are engaged in cross-border trade. The possibility of having to pursue litigation abroad is a major concern to business and one of the main reasons for not getting involved in cross-border trade[29].

2.1.1.4. Need for EU action (Subsidiarity)

The current procedure for the recognition and enforcement of judgments in civil and commercial matters has been established by Regulation Brussels I, hence by EU law. Any reform of this procedure requires inevitably the intervention of the European legislator and therefore, by definition cannot be achieved by the Member States alone.

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. The operational objective is to remove the remaining barriers for such a free circulation of judgments. It should be noted in this context that over the past six years the European legislator has already abolished the exequatur procedure for certain types of claims, namely those on small (up to € 2,000) claims[30], uncontested claims[31] and – most recently - on claims for family maintenance[32]. The European Council in its Stockholm Programme emphasised that the process of eliminating intermediate procedures (exequatur) in the area of civil law has to continue and that the abolition of exequatur has to be accompanied by appropriate safeguards.

2.1.3. Description of Policy Options

Policy Option 1: Status quo

Under this policy option, the existing procedure for recognition and enforcement of judgments in civil and commercial matters would continue to exist for judgments concerning an amount

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27 For details see Annex V.

28 For a detailed account of the costs of exequatur in the Member States see Annex IV A.

29 CSES study, p. 58.

30 Regulation 861/2007 creating a European Small Claims Procedure.

31 Regulation 805/2004 establishing a European enforcement order for uncontested claims and Regulation 1896/2006 creating a European Order for Payment Procedure.

32 Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

exceeding 2,000 €. The defendant* has the possibility to contest the decision granting recognition and enforcement in the Member State of enforcement in a special procedure established by the Regulation and on the grounds enumerated therein[33].

Policy Option 2: Maintain exequatur and reduce the grounds for refusing recognition and enforcement

Under this policy option, the free circulation of judgments would not be realised entirely but would be facilitated. The existing exequatur procedure would be maintained, but the number of grounds which today entitle a Member State to refuse the recognition and enforcement of a foreign judgment would be reduced. Currently, the defendant can raise a number of objections against the recognition of a foreign judgment. If Option 2 were implemented, some of these objections would no longer be available. In particular, the defendant would no longer be able to contest that the court in the Member State of origin did not have jurisdiction to hear the case.

Policy Option 3: Maintain exequatur but alleviate some of the burden for the applicant

Under this policy option, which could be combined with Option 2, the existing exequatur procedure would be maintained but some of the problems which the current procedure poses for citizens and companies would be addressed. Two such problems are the costs of the exequatur procedure and the need for claimants to go before the courts of the Member State of enforcement in order to obtain the declaration of enforceability. The burden of the exequatur procedure on the claimant could be alleviated by requiring the Member States to bear he costs of the procedure. Member States would have to provide legal aid to a claimant seeking to enforce his judgment abroad and/or establish a system of administrative assistance by which state authorities would help the claimant in preparing the application which would enable him to present it without the need of a lawyer. Moreover, a system of co-operation between courts would be established which would allow EU claimants to introduce the application in their own Member State, after which the courts of the Member State of origin would transmit it to the Member State where enforcement is sought.

Policy Option 4: Abolish the exequatur procedure, either while introducing the necessary safeguards for the protection of the right to a fair trial (Option 4A) or without establishing any safeguards (Option 4B).

Under this policy option, the free circulation of judgments would be realised by removing entirely the existing procedure for recognition and enforcement of judgments. This option could be realised without any safeguards (Option 4B). Under this sub-option, full mutual trust is given to judgments in other Member States; no distinction at all is made between foreign and national judgments. Alternatively, it could be analysed which existing grounds for the refusal of foreign judgments may justifiably lead to a refusal of recognition and enforcement of a foreign judgment; any such grounds could be replaced by alternative safeguards (Option 4A). Three main safeguards could be considered when abolishing the exequatur procedure. A

[33] According to Articles 34 and 35 of the Regulation, there are essentially five grounds for refusing recognition of a foreign judgment: (a) if recognition were manifestly contrary to the public policy of the state of enforcement, (b) if the defendant did not have proper notice of the proceedings, (c) if the judgment is irreconcilable with another judgment between the same parties; (d) if it does not respect certain of the Regulation's jurisdiction rules (for consumer and insurance contracts and exclusive jurisdiction).

first safeguard, which already figures in existing Union instruments which have abolished exequatur[34], is the creation of an extraordinary remedy in the Member State of origin for the defendant who was not informed about the proceedings against him/her in that State. A second safeguard, which does not yet exist in any Union instrument, could consist in the creation of a second type of extraordinary remedy in the Member State of enforcement which would permit to remedy any other procedural defects which may have arisen during the proceedings before the court of origin and which may have infringed the defendant's rights of defence as guaranteed in Article 47 of the EU Charter[35]. A third safeguard would enable the defendant to stop the enforcement of the judgment in case it is irreconcilable with another judgment which has been issued in the Member State of enforcement or – provided that certain conditions are fulfilled - in another country. These safeguards largely reflect the current grounds under which the recognition and enforcement of a foreign judgment can be refused today in the context of the exequatur procedure. The only exceptions relate to substantive public policy*[36] and to the respect, by the court of origin, of certain jurisdiction rules. The former ground of refusal no longer seems necessary because to the knowledge of the Commission there has not been a single case since the entry into force of the Brussels Convention where recognition and enforcement of a judgment has been refused for this reason. The latter ground of refusal does no longer seem adequate in light of the principle of mutual trust between Member States.

During the public consultation, representatives of the media have expressed concerns that the abolition of exequatur in defamation cases could have a negative impact on the freedom of expression. Defamation cases are cases in which an individual claims that rights relating to his personality or privacy have been violated by the media. Problems arise from the fact that in some Member States, notably in the United Kingdom, victims of defamation may obtain particularly high damages which can have serious impact for publishers and journalists. In certain Member States, e.g. France, defamation is even a criminal offence. Defamation cases are different from other civil and commercial cases because any court ruling allowing or prohibiting a certain publication has impact on fundamental rights, such as human dignity, respect for private and family life, protection of personal data, freedom of expression and information. These impacts render defamation cases particularly sensitive. The law in this area is not harmonised on the European level. Member States' approaches to ensure compliance with all the fundamental rights outlined above diverge very widely.[37] These differences were recently illustrated by the controversy surrounding the publication of Prophet Mohammed cartoons. After a Danish court rejected a defamation case brought against the Danish newspaper, claimants who felt harmed by the publication contemplated bringing libel proceedings in Britain. In the light of the divergences outlined above, it seems preferable to retain the exequatur procedure for decisions in these types of cases in order to allow Member States to maintain all existing controls on foreign defamation judgments.

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34 Regulation 805/2004 establishing a European enforcement order for uncontested claims, Regulation 1896/2006 creating a European Order for Payment Procedure, Regulation 861/2007 creating a European Small Claims Procedure, and Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

35 see, in particular, Case C-7/98 (*Krombach*) and Case C-394/07 (*Gambazzi).*

36 Where there the substance of the foreign judgment is at variance to an unacceptable degree with the legal order of the Member State of enforcement because it infringes a fundamental principle of that state.

37 Cf Final report of the comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising oout of violations of privacy and rights relating to personality, carried out by Mainstrat for the Commission, JLS/2007/C4/028, available at http://ec.europa.eu/justice/doc_centre/civil/studies/doc_civil_studies_en.htm.

Concerns relating to the abolition of exequatur have also been raised with respect to collective redress, i.e. proceedings brought by a group of claimants, a representative entity or a body acting in the public interest and which concern the compensation of harm caused by unlawful business practices to a multitude of claimants. In this area, the procedural law of Member States diverges widely; in some countries, legislation on collective redress has only been introduced very recently, thereby not allowing to fully assess the practical application of these rules and their economic effect on foreign companies. It seems therefore preferable to retain the exequatur procedure for judgments in collective redress proceedings for the time being to maintain all existing controls on foreign judgments in such proceedings.

2.1.4. Discarded Policy Options

Two policy options, option 2 and option 4B can be discarded because they do not constitute realistic policy alternatives.

Option 2 would not bring about a palpable improvement of the current situation: as set out above, an appeal against the decision granting exequatur is only brought in 1% – 5% of the cases. A reduction of the grounds of refusal would therefore only improve the situation for a very limited part of the applications while leaving the vast majority of cases completely unaffected. Therefore, it will not be considered separately but jointly with policy option 3.

Option 4B, the abolition of exequatur without establishing adequate safeguards, has equally been discarded because it would have fundamental rights implication in the exceptional case where a judgment to be recognised in another Member State does not comply with fundamental rights, such as the right to a fair trial. This option would entirely rely on national law to ensure compliance with the right to a fair trial or the rights of defence without any safeguards for situations where this protection at national level failed. Even if such situations are exceptional, the serious adverse impact on fundamental rights in such a case justifies discarding this option. In addition, the majority of stakeholders which replied to the public consultation on the Green Paper requested that the abolition be accompanied by adequate safeguards. Option 4B would also go plainly against the conclusions of the European Council in December 2009 which emphasised the need of appropriate safeguards for the abolition of exequatur. Furthermore, this option would entirely rely on national law to ensure compliance with Article 47 of the EU Charter.

2.1.5. Analysis of Impacts of Retained Policy Options

2.1.5.1. Policy Option 1: Status Quo

(a) **Effectiveness to achieve objectives**: Maintaining the status quo would have no effect on the problem identified and would not contribute to achieving the objectives outlined above. (b) **Key impacts** (i) **Fundamental rights**: The current exequatur procedure adequately safeguards fundamental rights as defined in the EU Charter. In particular, the right to a fair trial is guaranteed by the possibility to refuse recognition and enforcement of a judgment in the event of a violation of public policy or a lack of proper notice of the proceedings . (ii) **Economic impact**[38]: As to the effect of the status quo on the European economy, while the total number of businesses and consumers involved in cross-border litigation and affected by the procedure is still relatively small (only about 10,000 cases per year for the entire EU), the

[38] The term "economic impact" refers to the costs or savings for companies and citizens which the respective policy option will bring about.

number of exequatur cases is generally increasing[39]. Moreover, for those who are faced with cross-border litigation, the costs and delays in having their judgments enforced across EU borders constitute a significant inconvenience; the overall cost of exequatur proceedings in the EU amounts to almost €48 Mio a year (see section 2.1.1.3). More importantly, the costs and complications of cross-border litigation under the current legal framework are putting-off businesses and consumers from getting involved in cross-border transactions, thereby preventing them from benefitting from the EU's internal market. The EBTP survey has shown that roughly one third of the companies that currently do not sell goods or provide services in other Member States have not developed or stopped cross-border business because of potential or actual cross-border disputes and problems with cross-border debt-recovery[40]. Since SMEs have less resources and infrastructure to deal with cross-border legal proceedings than larger companies, they are likely to be particularly affected by the shortcomings of the current situation. **(iv) Social impact:** The status quo also creates problems for employees carrying out work in a Member State other than the one where their employer is domiciled if they have to enforce a judgment against their employer, e.g. for outstanding wages, abroad.

2.1.5.2. Policy Option 3: Maintain exequatur but alleviate some of the burden for the applicant

(a) **Effectiveness to achieve objectives**: Option 3 would go some way towards addressing the shortcomings associated with the exequatur procedure while falling short of a total removal of the existing barriers to the free circulation of judgments. It would not reduce the costs of the existing exequatur procedure but shift them from the parties to the Member States. Delays inherent in the current system would remain. (b) **Key impacts (i) Financial costs[41]**: Option 3 would leave the established procedures at national level largely intact, thereby not requiring Member States to introduce new judicial procedures. However, Member States would incur significant financial costs because they would have to assume the costs currently associated with the exequatur procedure: they would have to renounce to current sources of income (e.g. by abolishing court fees), to compensate the applicant for costs incurred (e.g. by granting legal aid) and/or to provide certain services to the applicant (e.g. by assisting the applicant with the introduction of his request which would enable him to go through the procedure without having to hire a lawyer). It is highly doubtful that Member States would be prepared to assume this financial burden in times of economic crisis and tight budgetary control. (ii) **Fundamental Rights**: The protection of the rights of defence under the current system (outlined above, section 2.1.4.1) would essentially remain untouched. **(iii) Economic impact**: Under Option 3, the current costs of the exequatur procedure would not be diminished; the financial burden would merely be shifted from companies or citizens to the state budgets of the Member States. The envisaged reduction of the grounds of refusal and the use of standard forms are not likely to significantly reduce the legal costs associated with the exequatur procedure. The elimination of the main obstacles for the applicant would come at a cost for Member States (see above, point (i)). Although the financial burden would no longer be on

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39 CSES study, p. 40. While there are no reliable figures to evidence this trend due to poor statistics in Member States, discussions with various ministries as part of our research generally point to an upward trend in the number of applications and this is probably the most reliable guide to the situation across the EU as a whole.

40 2010 EBTP survey on commercial disputes and cross-border debt recovery: Out of 44.5% of companies not involved in cross-border commercial activities; 13.1% replied that this was due to potential or actual cross-border disputes or problems with cross-border debt recovery.

41 The term "financial costs" refers to the costs of implementing the respective policy option in the Member States.

the parties but on the general taxpayer, the overall economic impact would remain the same. Moreover, it is far from certain that Member States would be prepared to assume these costs at a time of economic crisis. Finally, while the companies already engaged in cross-border transactions would benefit from the reduction in costs and complications, it is doubtful whether Option 3 would have sufficient symbolic effect to encourage those businesses, including **SMEs**, which currently do not trade across borders, to do so. **(iv) Social impact:** Option 3 would improve the situation for employees who are carrying out work in a Member State other than the one where their employer is domiciled and who would have to enforce a judgment against their employer, e.g. for outstanding wages, abroad.

2.1.5.3. Policy Option 4A: Abolition of exequatur with appropriate safeguards

(a) **Effectiveness**: This option would have maximum effectiveness: it would fully realize the objective of creating a genuine free circulation of judgments in the European Union. (b) **Key impacts**: (i) **Economic impact**: The main advantage of Option 4A is that it would fully eliminate the costs and delays associated with the current exequatur procedure for the vast majority (over 90% of cases) in which the enforceability of the foreign judgment is not contested by the defendant. Currently, the costs of exequatur proceedings amount to almost €48 million per year (see section 2.1.1.3). If exequatur were abolished, claimants would be able to save a significant part of this amount. In straightforward cases, the envisaged reform would almost completely do away with the costs of the current intermediate proceedings. Lawyer and court fees would no longer be incurred. Translation costs would be minimised through the use of a standard form; the competent authority in the Member State of enforcement would only be entitled to request a translation of an extract of the judgment (max one page). In complex cases, claimants would continue to incur legal and translation costs if the enforcement is contested by the defendant in a special review procedure. However, the introduction of standard forms should reduce translation costs and lawyers' fees also in these circumstances. More importantly, the effect of abolishing exequatur is likely to persuade more businesses and consumers to engage in cross-border trade than under either Options 1 or 3. The increase in businesses' and consumers' confidence in cross-border dealings is likely to be particularly beneficial for European **SMEs.** At present, only 25% of Europe's 20 million SMEs are engaged in cross-border trade or some other form of cross-border collaboration. This means that 15 million SMEs could potentially expand their business to other Member States[42]. A survey has shown that 39% of these SMEs would be a lot more inclined to get involved in cross-border transactions if the exequatur procedure were abolished[43]. Even if only a quarter of the SMEs inclined to expand their business across borders under these conditions actually does, this would bring another 1,4 Million SMEs into the internal market, thereby increasing economic growth. (for details see Annex VI). The retention of exequatur for defamation cases is unlikely to reduce the positive economic impact of Option 4A because the number of these cases is quite limited and the sector affected is quite distinct from "ordinary" cross-border business activities. (ii) **Fundamental rights**: As outlined in Section 2.1.3 above, 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. The defendant would have three main remedies at his disposal by which he could prevent – in certain circumstances – that a foreign judgment takes

[42] CSES study p. 60; EIM (Panteia), Internationalisation of European SMEs, Final Report, p. 5, study for DG enterprise and Industry, 2010.

[43] CSES study, p. 59 based on a survey of key stakeholders.

effect in a Member State. 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. In addition, exequatur procedure for decision on defamation would be maintained in order to allow Member States to exercise all existing controls on foreign defamation judgments and to avoid impacts as regards respect for private and family life (Article 7); Protection of personal data (Article 8) and Freedom of expression and information (Article 11). (iii) **Financial costs**: The introduction of new procedures in Member States' national legal systems with which legal professionals, notably enforcement agents, would need to be familiarized would trigger certain financial costs for Member States. However, if national safeguard procedures were modelled on the procedures adopted for the European Enforcement Order and other European instruments which have abolished exequatur for certain types of claims, the costs of implementing Option 4A would be limited. Moreover, the proposal will contain a standard form which aims at facilitating direct enforcement. It should also be noted that costs for implementing the reform are limited in time whereas the economic benefit outlined above would be sustained on a permanent basis. **(iv) Social impact:** Option 4A would be particularly beneficial for weaker parties. For example, it would improve the situation for employees having to enforce a judgment against their employer in another Member State.

2.1.6. Comparing the Options and preferred Policy Option

A comparison of the ratings of the three policy options retained to address the problem of the free circulation of judgments shows that the preferred option is Option 4A.

Objectives/impact	Policy Option 1 – Status quo	Policy Option 3 – alleviating burdens for applicant	Policy 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 for the operation of the Regulation in the international legal order

2.2.1.1. The current problems

Problem 1: With some exceptions, the jurisdiction rules of Regulation Brussels I only apply when the defendant is domiciled in the EU. If the defendant is domiciled in a third State, the

Regulation refers to national law (the so-called "residual jurisdiction"*). In other words, Union law regulates only part of the international jurisdiction* of the Member States' courts, leaving the remaining part to national law.

This limitation in the scope of the Regulation can be explained by its historic origins as an international convention. When concluding the Brussels Convention in 1968, Member States primarily aimed at protecting defendants domiciled in their respective territories from being sued in the courts of other Member State on the basis of grounds of jurisdiction which do not guarantee a sufficient connection with the dispute and the application of which is usually limited in bilateral or multilateral conventions on judicial cooperation (so-called "*exorbitant* grounds of jurisdiction"*)[44]. Under this approach, there was no reason to take into account non-EU defendants; their treatment was therefore left to national law.

For the EU, the Convention and its successor, the Regulation, define certain grounds of jurisdiction as exorbitant[45], by excluding their application between Member States. For instance, the provision in the French code of civil procedure according to which French courts always have jurisdiction for an action brought by or against a French citizen has been defined as exorbitant by the Regulation. However when a defendant is domiciled in a third State, those exorbitant grounds of jurisdiction are today applicable.

National rules on jurisdiction for third country defendants vary widely between Member States (for an overview of national legislation on jurisdiction concerning weaker party disputes see Annex VIII, for national exorbitant grounds of jurisdiction see Annex IX). This divergence leads to the situation where European citizens and companies have unequal access to justice in cases where the defendant is domiciled outside the European Union. Moreover, the fact that rules on international jurisdiction are at present laid down in two separate bodies of law, one which applies where the defendant is located in the European Union, the other where the defendant is located outside the EU, adds to the complexity of cross-border procedures.

Problem 1A: This situation creates unequal conditions for companies doing business in the internal market and prevents the creation of the necessary level playing field. Companies from Member States which handle access to courts restrictively in disputes with third country defendants will usually incur higher business risk and higher legal costs than companies based in Member States which grant generous access to their courts in these circumstances. Not being able to litigate in a close jurisdiction has a negative economic impact on companies, albeit one that is difficult to quantify: claimants are not familiar with the foreign legal system, lack access to their known and trusted lawyers and have the inconvenience of travelling and wasted management time.

Moreover, companies might not always get a fair trial and an adequate protection of their rights before the courts of a third State. Such problems can notably arise in countries where the judiciary cannot be considered to be independent or is riven by corruption.

Example[46]: An Italian company has engaged in a joint venture agreement in Saudi Arabia. A dispute arises which cannot be settled amicably. The Italian company wants to introduce court proceedings against the Saudi Arabian joint venture partner. Since its opponent has assets in

44 Cf Nuyts report, p. 59 with further references.
45 Cf Annex I of Regulation Brussels I.
46 This is a real life example reported by an Italian academic.

the EU, the company tries to go to court in Europe. However, the rules of the Regulation do not apply and under Italian law, no Italian court is competent to hear the case. The company is therefore forced to litigate in Saudi Arabia where – due to the lack of independence of the Saudi Arabian courts – it does not get a fair trial.

A French company in the same situation would have been able to bring the lawsuit in France and – assuming the court would uphold the claim – be able to enforce the French judgment against the assets of the joint venture partner located within the EU.

Problem 1B: The current situation is also problematic when weaker parties (e.g. consumers, employees or insured) are involved in a dispute with defendants outside the European Union. Some Member States' jurisdictions (e.g. Austria, Czech Republic, England) do not give a weaker party the possibility to litigate at home in these circumstances[47]. The obligation to sue a third country defendant abroad creates an additional burden for the weaker party and is likely to deprive him of the protection granted by mandatory European legislation. Such legislation protects, in particular, the rights of consumers, commercial agents and victims of defective products. If national law does not grant the weaker party access to the courts in Europe, he may have no possibility to avail himself of the protection granted to him by Union law. This problem is illustrated in the following example:

Example[48]: While on holiday in Antalya (Turkey), an English consumer enters into a time share agreement with a Turkish company. Under the terms of the contract, the Englishman acquires the right to use an apartment situated on the Turkish Riviera for a specific calendar week of each year. As required by the terms, he pays the first instalment and a deposit when signing the contract. A week later, when reconsidering his financial situation after returning home, he realizes that he cannot really afford the deal. He decides to withdraw from the contract and demands reimbursement of the money paid. Under the Time Share Directive[49], a consumer is entitled to withdraw from a timeshare contract within the period of 14 days. The Turkish seller refuses to reimburse the price. The English consumer wants to assert his rights under the Time Share Directive in court. However, under English law, no court in England has jurisdiction to hear the case. Since a Turkish court would not be bound by the Time Share Directive, the lack of jurisdiction of the English courts effectively deprives the consumer of the protection which EU law grants to him.

Again, a French consumer would have been able to sue "at home" and the French court would have applied the Time Share Directive. Even if he was not able to enforce the French judgment in Turkey, the consumer would be able to obtain the cancellation of the contract; moreover, where assets of the defendant are located in the EU, the judgment can be enforced against those assets.

Problem 2: At present, Regulation Brussels I only governs the recognition and enforcement of judgments given by courts of the *Member States*. The recognition and enforcement of

47 For details see Annex VIII.

48 Scenario inspired by ECJ case C 73/04 *Brigitte and Markus Klein v. Rhodos Management Ltd* . A summary of relevant judgments of the ECJ may be found in Annex VII.

49 Directive 2008/122/EC of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts.

judgments rendered by courts outside the European Union is governed by national law. The absence of common rules in the EU on the effect of third State judgments leads to a situation where such judgments may enter the EU in some Member States and not in others. Some Member States are very open to recognise and enforce third State judgments, others are very strict, yet others do not recognise and enforce third State judgments at all except in the event of a bilateral convention with the third State concerned. This creates unequal protection of EU citizens and companies against third State judgments, in particular when the third State court has taken jurisdiction on the basis of exorbitant grounds of jurisdiction (see above, Problem 1) or on the basis of grounds which violate the exclusive jurisdiction of Member States' courts. It may also lead to market distortions.

2.2.1.2. Who is affected?

Those affected are European citizens and companies involved in disputes with parties domiciled in third States.

2.2.1.3. Scope of the problem

The extent of the problem resulting from the existence of residual rules on jurisdiction is difficult to quantify. With the exception of Austria, Member States do not maintain statistics on the number of disputes with the parties domiciled in third States. Figures are, however, available on the extent of the divergences in the access to EU courts for citizens and companies. For example, six Member States can take jurisdiction to hear a case involving a defendant from outside the EU if he was present on their territory at the time of service of the claim; 14 (partially identical) Member States consider the presence of the defendant's assets to suffice; three consider a cause of action or activities on their territory to suffice. On the other hand, nine Member States do not have such "exorbitant" rules on jurisdiction in their national law. The situation is similar when it comes to the protection of weaker parties. While in the area of employment law, a majority of 18 Member States allow an employee to bring proceedings against a non-EU defendant at home, this number is reduced to only 12 Member States in the area of consumer law, four Member States in the area of insurance law and only three Member States in the area of commercial agency agreements[50] (for details see Annex VIII). In those Member States which do not afford in their national law a jurisdictional protection to weaker parties engaged in cross-border transactions with parties outside the EU, there is clearly a risk that these weaker parties be deprived of the substantive protection provided by EU legislation[51]. 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. The operational objective is to ensure equal access to justice in the EU and make sure that weaker parties are not deprived of the protection granted to them by EU law.

2.2.2. Need for EU action (Subsidiarity)

Under the principle of subsidiarity laid down in Article 5 TFEU, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States but can be better achieved at Union level. The existence of unequal conditions for companies doing business in

50 Nuyts Study on residual jurisdiction, p. 43, 46, 48 and 49 respectively.

51 Cf Nuyts Study on residual jurisdiction, p. 86 es.

the internal market cannot be adequately addressed by action at Member State level because the present problem is caused by the diversity of national legislation and reform by individual Member States will not remedy the situation. The possibility to take a coordinated approach and resolve the problem by way of multilateral or bilateral conventions is no longer available to the Member States because external competence in matters of international jurisdiction lies exclusively with the European Union, as the Court of Justice has clarified in its Lugano Opinion 1/03[52]. The protection of weaker parties could theoretically be achieved at national level but Member States have not addressed the issue so far and there is no indication that they would if the Union refrained from legislating. In addition, since mandatory Union law is at stake, the Union should take appropriate action to ensure enforcement of Union law. For these reasons, the objectives set out above could be better achieved at EU level. Moreover, action at EU level would have the benefit of simplifying the current legal framework by consolidating all rules on international jurisdiction into a single legal document.

2.2.3. Description of Policy Options

Five policy options have been identified to address the problems outlined above.

Policy Option 1: Status quo

If the status quo were maintained, unequal access to justice resulting also in some unequal costs to bear would continue to exist as a result of diverging national laws governing jurisdiction *vis-à-vis* third State defendants as well as recognition and enforcement of third State judgments.

Policy Option 2: International negotiations

Under this policy option, the Commission would seek to negotiate an international agreement which would establish common rules on jurisdiction and the recognition and enforcement of judgments on an international level. Such an agreement would notably ensure that countries only take jurisdiction on the basis of internationally accepted criteria. Negotiations could take place in the framework of an international organisation such as the Hague Conference on Private International Law*. This option could be pursued on a self-standing basis or in combination with Options 3, 4 or 5.

Policy Option 3: Minimum harmonisation

Under this option, only a few rules relating to disputes involving third country defendants would be harmonised while the remainder would continue to be governed by national law. This option could cover only the rules on jurisdiction (Option 3A) or both, the rules on jurisdiction and those on recognition and enforcement (Option 3B). A minimum harmonisation of the rules on jurisdiction would focus on disputes involving "weaker parties" (consumers, insured, employees). It would extend the current rules of the Regulation, which allow these parties to sue "at home" in intra-EU disputes, to defendants domiciled outside the EU. Member States would be allowed to maintain national rules on jurisdiction in all other cases involving third country defendants. A minimum harmonisation of rules on the recognition and enforcement of third country judgments would provide a minimum protection

[52] Opinion 1/03 of 7 February 2006 on the competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognitin and enforcement of judgments in civil and commercial matters.

from third country judgments which do not comply with EU standards. Member States would, however, be permitted to maintain national rules which establish more restrictive conditions for the recognition and enforcement of non-EU judgments than the minimum rules.

Policy Option 4: Full harmonisation of both the rules on jurisdiction and recognition and enforcement

This policy option would fully harmonise the rules relating to disputes with third State defendants at EU level. As with Option 3, this option can be divided into two suboptions: a full harmonisation of the rules on jurisdiction only (Option 4A) or a full harmonisation of both the rules on jurisdiction and on the recognition and enforcement of third country judgments (Option 4B). The full harmonisation of jurisdiction rules would require the extension of all existing grounds of jurisdiction in Regulation Brussels I to defendants domiciled outside the EU. This means that not only the protective fora discussed in Option 3 but also the grounds on jurisdiction applying for disputes in matters of contract or tort would be extended to apply to third country defendants. Moreover, an additional ground of jurisdiction would be created which would grant EU parties, both weaker parties and companies, access to EU courts in case no other court would have jurisdiction to hear the case or the EU party would not get a fair trial in the third country court (so-called "*forum necessitatis*"*). In addition, national "residual" grounds of jurisdiction, i.e. would be abolished, thereby creating a level playing field in the EU when it comes to access to justice. In order to compensate for the abolition of national grounds of jurisdiction, an additional, "mildly exorbitant" forum would be established which grants jurisdiction to the court of the Member State where assets of the defendant are situated. This forum would have the advantage of granting jurisdiction at the place where usually the judgment can be enforced.

Under Option 4B, the grounds for refusing the recognition and enforcement of a judgment issued in a non-EU country would be fully harmonised by the Regulation.

2.2.4. Discarded policy options

Policy options 2, 3B and 4B can be discarded from the further analysis for the following reasons:

The harmonisation of the rules on recognition and enforcement, whether minimal or full (Options 3B and 4B) has not received sufficient support from stakeholders in the public consultation. Few stakeholders were in favour of the idea to establish EU rules on recognition and enforcement; all others expressing a view on the issue preferred the issue to remain governed by national law or international conventions. Overall, stakeholders seem to be more concerned that the issue in question risks overburdening the revision of the Regulation than with the protection of EU citizens and companies from third country judgments. As to the Member States, while many agree that an extension of the jurisdiction rules to cover third State defendants would be an improvement of the current situation, most are very reluctant as to a harmonisation of the regime of recognition and enforcement. It would therefore not make political sense to pursue these options further at this stage.

By contrast, Option 2, i.e. the approach to address the current problems through the negotiation of an international instrument, has received significant support from stakeholders in the public consultation. The option has nevertheless been discarded in its pure form, i.e. without being combined with either Option 3A or 4A, because it does not seem to be realistic that agreement on a multilateral convention on this issue could be reached in the short or

medium term. Efforts of negotiating a worldwide convention on jurisdiction and the recognition and enforcement of judgments in civil matters (the "judgment convention") have been undertaken by the Hague Conference on Private International Law for almost twenty years without producing viable results. In 1999, the project of a judgments convention dramatically failed after years of intense negotiations. Over the past ten years, the Hague Conference has repeatedly tried to re-launch the project, most recently at its general meeting in April 2010, but without avail. Although the EU supported the idea, the majority of delegations, including the USA, Canada, Japan and Australia, were opposed to resume even exploratory work on this matter for the time being. Hence, while the EU should continue its efforts to re-launch negotiations on this issue, it is highly unlikely that a convention could be agreed in a foreseeable future and the ratification process could easily take another decade.

2.2.5. Analysis of impact of retained policy options

2.2.5.1. Policy Option 1: Status quo

(a) Effectiveness to achieve objectives: This option would not meet the objectives set out above of ensuring access to justice and guaranteeing protection from third state judgments. **(b) Key impacts. (i) Economic impact**. The key argument for retaining the status quo is that there is little quantitative evidence that the existing divergences between the national laws of Member States lead to distortions of competition and that the absence of access to EU courts entails significant losses for consumers and other weaker parties. However, the mere fact that the problem is difficult to quantify does not mean that it does not exist. **(ii) Financial costs: Fundamental rights.** The status quo can lead to situations where EU citizens and companies do not have adequate access to justice or would not benefit from a fair trial in the competent court. While the mere fact that an EU claimant has to litigate outside the EU does not as such constitute a denial of justice, situations can arise where the competent foreign court does not guarantee certain procedural standards, is not independent, is corrupt or for other reasons does not respect the parties' right to a fair trial. Moreover, the status quo does not guarantee an effective remedy before a tribunal in cases where rights of weaker parties granted by EU law are infringed. **(iii) Social impact.** Under the status quo, consumers, employees and other weaker parties would not always be able to avail themselves of the rights granted to them in mandatory EU legislation. This lack of adequate protection will make weaker parties reluctant to engage in transactions with parties in non-EU countries. **(iv) Third countries.** The existence of exorbitant grounds of jurisdiction in a number of Member States could be a problem for non-EU countries which might be drawn before EU courts even if the case in question does not have a sufficient link with the EU territory. Exorbitant grounds of jurisdiction are generally critised at international level. The most recent attempt to reach international agreement on reducing such exorbitant fora in the context of the Hague judgments Convention has however failed.

2.2.5.2. Policy Option 3A: Minimum harmonisation of the rules on jurisdiction

(a) Effectiveness to achieve objectives: Option 3 would achieve part of the objectives indicated above. It would ensure adequate access to EU courts for weaker parties involved in disputes with defendants domiciled outside the EU. However, inequalities in the access to justice within the EU would remain. **(b) Key impact (i) Economic impact** Option 3 would remove the burden for weaker parties resulting from litigation before the courts of a non-EU State, in particular in those Member States where no access to the courts is currently foreseen under national law. On the other hand, Option 3 would not remedy the absence of a level playing field caused by the current divergence of national rules because the divergence of

national rules on jurisdiction would remain. This means that companies in some Member States will continue to incur higher business risk and litigation costs than companies in other Member States. **(ii) Financial costs:** Option 3A would trigger minimal to no financial costs for the Member States. **(iii) Fundamental rights and social impact:** Option 3A would improve the current situation in terms of fundamental rights for weaker parties, both as regards Article 47 and Article 38 of the EU Charter. It would clearly strengthen access to justice in the EU for consumers, employees, insured and other weaker parties involved in litigation with third country defendants by ensuring the enforcement of the rights granted to them by EU legislation. The situation that a weaker party would effectively be deprived from the protection afforded to him by EU legislation because no court in the EU would be competent to hear the case would no longer arise. However, Option 3 would not remedy the risk of a denial of justice which European companies might encounter under the present system, i.e. the situation that no court or only a court where the company cannot expect a fair trial would be competent to hear the case. **(iv) Third countries:** Option 3 would not have significant impact on third countries because the extension of the Regulation's protective rules of jurisdiction to situations where the weaker party is litigating against a defendant outside the EU would presumably not be perceived as unduly extending jurisdiction

2.2.5.3. Policy Option 4A: Full harmonisation of the rules on jurisdiction

(a) Effectiveness to achieve objectives: The full harmonisation of jurisdiction rules would achieve the desired objective of ensuring both full and equal access to justice to 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 do away with the artificial distinction between defendants domiciled within the EU and outside the EU. Such a distinction is no longer made in recent EU legislation, notably the Regulation 4/2009 on maintenance obligations[53] and the Commission proposal for a regulation on succession and wills.[54] **(b) Key impact: (i) Economic impact:** The full extension of the Regulation's rules on jurisdiction to third country defendants would increase the possibilities for EU companies to litigate in the EU rather than abroad. This would 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[55]. 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, the absence of a level playing field which results from the divergence of national rules on jurisdiction would be remedied. **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 3A would trigger minimal to no financial costs for the Member States. **(iii) Fundamental rights and social impact:** As for Option 3A, 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

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53 Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. OJ L 7, 10.1.2009.

54 COM (2009) 154 final of 14 October 2009.

55 See CSES study, p. XXX (figures to follow).

EU. In addition, Option 4A 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** As Option 3A, Option 4A would ensure that weaker parties (consumers, employees etc.) 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. If the EU were to include several strongly exorbitant fora in the revised Regulation, the reform may be badly perceived on a diplomatic level. However, the envisaged creation of a forum of necessity and a "mildly exorbitant" rule of jurisdiction, e.g. based on the location of assets provided that the case has a sufficient link with the forum, is hardly objectionable on a diplomatic level given that the procedural rules of most of the EU's trading partners contain themselves exorbitant rules of jurisdiction. 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. The alignment of national rules as such would be neutral in this respect and the introduction of a "mildly exorbitant" forum in the Regulation could improve the EU's bargaining position in the negotiations.

2.2.6. Comparing the options and preferred policy option

Based on the above analysis, the key elements of which are summarized in Table 2, the preferred Policy Option is Option 4A.

Objectives/impact	Policy Option 1	Policy Option 3A	Policy Option 4A
Improve protection of EU parties in extra-EU disputes	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 for the Choice of Court Agreements

2.3.1.1. The current problem

Choice of court agreements (also known as "forum-selection-clauses") are one of the most important jurisdictional devices of modern times. They are contractual clauses by which the parties determine which court should decide any dispute which might arise between them.

Choice of court agreements enable businesses (and others) to plan where potential litigation will take place; the effectiveness of choice of court agreements increases legal certainty for companies.

Regulation Brussels I gives effect to choice of court agreements, provided they comply with certain formal requirements. The possibility of the parties to choose the competent court is only excluded in specified cases where there is likely to be an inequality of bargaining power[56] or where there are strong policy reasons why particular courts should have exclusive jurisdiction[57].

Problem 1: Concerns have been raised that the effectiveness of choice of court agreements may in practice suffer from abusive litigation tactics. This is possible due to an interplay with another provision in the Regulation, the so-called *lis pendens** rule[58]. This rule aims to avoid the situation that two courts in the EU deal with the same case at the same time with potentially conflicting outcomes. It stipulates that the court second seized of a dispute must stay proceedings until the court first seized has ruled on its jurisdiction. Where the court first seised is not the chosen court, it should decline jurisdiction unless the agreement is invalid.

While the *lis pendens* rule is sound in theory, it may encourage abusive litigation tactics in practice. This is because a party can gain important advantages if it violates the choice of court agreement and sues in another jurisdiction than the chosen one. First, the court actually seized might consider the agreement invalid while the chosen court would have upheld it. The court seised might also consider that the question in dispute is not covered by the choice of court agreement whereas the court chosen is known to give a broader interpretation to the scope of jurisdiction clauses. Thirdly, the party wishing to escape the choice of court agreement can considerably delay proceedings in the chosen court if the court first seised is situated in a country whose judicial system is notoriously slow. In legal literature, this technique has come to be known as the "Italian torpedo"[59]. Depending on the jurisdiction and the complexity of the case, it will take the non-competent court from several months to several years to decline jurisdiction. This delay, which adds to the time for obtaining a judgment on the merits can be extremely vexing for companies seeking to swiftly recover their debts. Moreover, torpedo actions increase the costs of litigation by adding court and lawyers' fees in the non-competent jurisdiction to the overall bill.

The problem described above can be illustrated by the *Gasser*[60] case which was decided by the Court of Justice in 2003[61] and has sparked the call for reforming the Regulation's rules on choice of court agreements:

Example: Company X, established in Austria, concludes a sales contract with

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56 E.g. in relation to consumers, employees and insured.

57 E.g. concerning rights in rem in immovable property, cf. Article 22 of the Regulation.

58 Article 27.

59 This expression was actually coined by an Italian lawyer specialised in intellectual property law who advised companies wishing to infringe a patent to bring a declaratory action for non-liability in Italy. Their action may fail in the end but it is likely to take years to decide during which they could make use of the patent without interference; cf. Franzosi, "Worldwide Patent Litigation and the Italian Torpedo" (2977) 7 EIPRev, p. 382. In one such case, it took eight years for a non-competent court to decline jurisdiction, cf the judgment of the ECJ in case C- 159/97 *Trasporti Castelletti v. Trumpy.*

60 A summary of relevant judgments of the ECJ may be found in Annex VII.

61 Judgment of the ECJ of 9th December 2003 in case C-116/02 *Gasser GmbH v. MISRAT Srl.* The facts of the case have been simplified to illustrate the point discussed.

company Y, established in Italy. The contract contains a clause whereby the parties agree to bring any disputes under the contract before the courts in Vienna, Austria. Company Y defaults on its performance under the contract. Before company X can bring an action for damages, company Y launches court proceedings in Rome, Italy, requesting that the contract be declared null and void. When company X brings an action for damages in Vienna on the basis of the choice of court agreement, arguing that the agreement is valid, the Viennese court is unable to proceed due to the lis pendens rule and has to wait until the court in Rome has declined jurisdiction.

Problem 2: The effectiveness of choice of court agreements needs to be ensured not only within the European Union but also beyond the EU's borders. European companies doing business worldwide will not always be able to impose the choice of their home jurisdiction on their trading partner; they will often have to agree to litigate in a court situated outside the EU. In these circumstances, it is equally important for the companies that the choice made by the parties will be upheld in case a dispute arises. However, the current divergence of national laws on the question of choice of court agreement makes it difficult for businesses to foresee if and under which conditions their jurisdiction clause will be respected. In order to remedy this situation, the European Union negotiated an international agreement, the Hague Convention on Choice of Court Agreements[*], which improves legal certainty for forum-selection-clauses in B2B relationships. The convention was adopted in 2005 and signed by the EU in 2009. The ratification process is ongoing and closely followed by the EU's main trading partners such as the US. The ratification of the Convention would have an impact on the Regulation because choice of court agreements between an EU party and a non-EU party would no longer be governed by the Regulation but by the Convention. The revision of the Brussels I Regulation does not seek to implement the Convention's rules; this is not necessary given that the Convention once ratified will be directly applicable in all Member States. However, the revision 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[62].

2.3.1.2. Who is affected?

Although choice of court agreements can be concluded by anyone entering into a contract, they are primarily relevant for companies involved in cross-border trade, whether with partners domiciled within or outside the European Union.

2.3.1.3. Scope of the problem

Almost 70% of European companies engaged which sell products or provide services in another Member State have choice of court agreements in their international contracts[63]. The larger the company, the more likely that it makes use of this jurisdictional device: 90% of companies having more than 250 employees use choice of court agreements regularly or occasionally[64]. These figures show that the overwhelming majority of EU business makes use of choice of court agreements in their B2B relations and is interested to minimise the possibilities of abusive litigation tactics which could thwart their effectiveness and force

62 Cf Article 6 of the Convention.

63 EBTP survey, question 3.

64 Oxford study on civil judicial systems in Europe, question 48, 49.

companies to litigate in a court other than the one contemplated or to engage in costly and time-consuming parallel litigation. Choice of court agreements also figure increasingly in transnational company agreements concluded between employees' representatives and the management[65].

It is difficult to obtain reliable figures which would quantify the risk of abuse of the existing rules. According to one survey, 7.7% of companies reported that in the past five years their contractual counterpart did not comply with the clause designating the competent court and took the dispute before a different court[66]; almost half of these companies faced this problem more than once. 5.7% of companies stated that their choice of court agreement was held invalid over the same period[67]. It is not clear which percentage of these companies was affected by abusive litigation tactics but it can be inferred from the figures that this concerns between 2 and 7.7% of all companies.

2.3.2. Objectives

The specific objective is to enhance the effectiveness of choice of court agreements and facilitate the ratification by the European Union of the Hague Convention on Choice of Court Agreements. The operational objectives are to eliminate possibilities for abusive procedural tactics in a way which makes the rules of the Regulation compatible with the Hague Convention.

2.3.3. Need for EU action (Subsidiarity)

The rules governing *lis pendens* between two or more courts seised with a dispute in the Member States are laid down in Regulation Brussels I, an instrument of EU law. Any modification of these rules for disputes involving choice of court agreements requires inevitably the intervention of the European legislator and therefore, by definition cannot be achieved by the Member States alone.

2.3.4. Description of policy options

Policy Option 1: Status quo

Under this option, the effectiveness of choice of court agreements would continue to suffer from abusive litigation tactics and the solution adopted by the Regulation would not be in line with the one promoted by the Hague Convention.

Policy Option 2: Exempt the chosen court from obligation to stay proceedings

Under this option, the court designated in a choice of court agreement would be released from its obligation to stay proceedings pending the decision of the court first seised. As a consequence, both the chosen court and the court first seised would be allowed to continue their proceedings in parallel.

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65 See on this issue the 2009 study by van Hoek/Hendricks, International private law aspects and dispute settlement related to transnational company agreements, available at the very bottom of http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=214

66 EBTP survey, question 7.

67 EBTP survey, question 4; given that the number of companies answering questions 7 and 4 is identical, it can be presumed that the companies refer to the same cases.

Policy Option 3: Give the chosen court priority to decide on its jurisdiction

Under this option, the court chosen in a choice of court agreement would be given priority to proceed and decide on its jurisdiction, regardless of whether it is first or second seised. Any other court would have to stay proceedings until the chosen court has established or – in case the choice of court agreement is invalid – declined its jurisdiction.

Policy Option 4: Impose a deadline on the court first seised to decide on its jurisdiction

Under this option, the chosen court would continue having to stay proceedings until the court first seised has declined its jurisdiction but the Regulation would oblige the court first seised to take its decision within a certain deadline. In addition, the two courts would communicate in the course of the proceedings with a view to facilitating the resolution of the jurisdiction question.

Policy Option 5: Exclude actions for negative declaratory relief from the lis pendens rule

Under this option, the general rule that the court second seised has to stay proceedings pending the decision of the court first seised would remain. However, an exception would be made for cases where the first court has only been seised with an action for declaratory relief. These are actions where the claimant does not request the payment of a sum of money or the performance of the contract but seeks a ruling on the validity of a contractual clause or the existence of a specific obligation. Thus, a claimant trying to evade a claim for damages in the chosen court could seek a declaration from another court that he is not liable to pay damages (so-called "negative declaratory relief"). Under Option 5, the chosen court which is seised second could continue with its proceedings in situations where the action in the court first seised was limited to declaratory relief.

2.3.5. Discarded policy options

Two policy options, option 4 and option 5 have been discarded following the public consultation because they did not receive sufficient support by stakeholders.

As to Option 4 (Imposing a deadline on the court first seised and establishing a mechanism of direct communication between the courts) many stakeholders considered that this option could be a useful additional measure to improve the functioning of the lis pendens rule generally but that it would not by itself achieve the desired objective of discouraging the circumvention of choice of court agreements. Setting a deadline would be helpful to speed up proceedings in some countries where the judicial system is very slow but would not as such discourage abusive litigation in a non-competent court. Costs and delays would still be incurred, even if the time frame became more predictable. This option will therefore not be considered separately in this context. It will be considered as an amendment to the general functioning of the lis pendens rule which, however, goes beyond the scope of this analysis (see point 1.5 above).

Option 5 (the exclusion of negative declaratory relief from the *lis pendens* rule) did not receive substantial support by stakeholders. First, it tackles only part of the problem outlined above. While actions seeking a declaration of non-liability might be one way to frustrate a choice of court agreement, they are certainly not the only way. In many circumstances, a party wishing to torpedo a choice of court agreement could also bring an action seeking performance and/or requesting the payment of damages. This option would therefore not entirely remove the threat to choice of court agreements resulting from pre-emptive

proceedings. Stakeholders also pointed out that this option would not be in line with the solution adopted by the Hague Choice of Court Convention. It was therefore decided not to pursue it further.

2.3.6. Analysis of impacts of retained options

2.3.6.1. Policy Option 1: Status quo

(a) Effectiveness to achieve objectives: This option would not meet the objectives outlined above. The status quo would continue jeopardising the effectiveness of choice of court agreements and would not bring about the legal certainty necessary to encourage businesses to engage in cross-border transactions. **(b) Key impacts: (i) Economic impact:** Choice of court agreements are widely used by European businesses; more than 70% of EU companies uses this judicial device in their international contracts (see Section 2.3.1.3 above). The current situation is heavily criticised by stakeholders which emphasise the imminent need to strengthen the effectiveness of choice of court agreements. The actual damage caused by abusive litigation tactics today is difficult to quantify; the proportion of companies affected by the shortcomings of the current situation in the past five years is between 2 and 7.7%. Where a company becomes a victim of abusive litigation tactics, it incurs costs and delays to defend its case in a jurisdiction other than the one chosen before being able to litigate in the chosen court. The costs incurred consist notably of lawyers' fees and travel expenses, possibly also costs of the translation of documents or of expert witnesses[68]. More importantly, the risk of having the resolution of their disputes complicated in the way outlined above is putting off European companies from getting involved in cross-border transactions, thereby preventing them to make full use of the advantages offered to them by the internal market. As set out in Section 2.1.5.1 above, about 30% of the companies that currently do not sell goods or provide services in other Member States are not doing so because of potential or actual problems in cross-border litigation or debt-recovery[69]. Since **SMEs** have fewer resources and infrastructure to deal with cross-border legal proceedings, the deterring effect of the status quo is likely to be larger on them than on big multinationals. **(ii) Fundamental rights:** The fact that the status quo does not fully ensure the effectiveness of choice of court agreements could have a negative impact on the freedom to conduct a business referred to in Article 16 of the Charter, which encompasses the freedom of contract. Arguably, these rights encompass that the legal system gives effect to the will of the parties. Where a choice of court agreement is validly concluded, parties should not be able to escape from it by bringing an action in a different court. The current situation which encourages abusive litigation tactis of that kind is problematic in that respect. **(iii) International aspects:** Maintaining the status quo would mean that the regime applied under the Regulation to internal situations would differ from the regime applied to external situations under the Hague Convention on Choice of Court agreements.

2.3.6.2. Policy Option 2: Exempt the chosen court from the obligation to stay proceedings

(a) Effectiveness to achieve objectives: This option would achieve the desired objective of discouraging abusive litigation tactics because pre-emptive actions in another court would no longer delay proceedings in the chosen forum. However, a bad faith claimant could still

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[68] It will depend on the procedural rules of the forum to what extent these costs can be recovered from the losing party in case the court not chosen upholds the choice of court agreement. These rules vary significantly between Member States.

[69] EBTP survey, question 1.

complicate the life of his (business) partner by first seising a court not chosen by the parties and forcing the other party to engage in parallel litigation. In the cases where the court not chosen decided that the jurisdiction clause was invalid, option 2 would entail the risk of conflicting judgments which the rules of the Regulation generally seek to avoid. **(b) Key impacts: (i) Economic impact:** Option 2 would have some economic benefits because it would limit the risk of abusive litigation and thereby limit the damage caused at present by the abuse. However, option 2 would create the risk of cost and time-consuming parallel litigation and conflicting judgments which today does not exist. It would therefore not go far enough to encourage those businesses which currently are not engaged in cross-border trade to do so . On the basis that over the past five years, 7.7% of companies have faced a situation where their contractual counterpart did not respect the choice of court agreement and brought proceedings in a different court, the risk of parallel proceedings and conflicting outcomes would affect 1.5% of companies per year[70]. **(ii) Financial costs:** Financial costs incurred for implementing the change would be minimal given that no new procedures would be introduced. **(iii) Fundamental rights:** By allowing the chosen court to proceed, option 2 would give better effect to the will of the parties having concluded a choice of court agreement than option 1. However, the risk of costly and time-consuming parallel litigation would remain. Option 2 would therefore only slightly improve the situation in terms of the freedom to conduct a business referred to in Article 16 of the Charter. **(iv) International aspects:** This option mirrors to a certain extent the approach adopted by the Hague Convention. The rule that chosen court would be able to proceed even if it is seised second corresponds to the situation which would apply to choice of court agreements in favour of courts outside the EU once the Hague Convention is ratified by the EU.

2.3.6.3. Policy Option 3: Give the chosen court priority to decide on its jurisdiction

(a) Effectiveness to achieve objectives: Giving jurisdictional priority to the chosen court would discourage the use of tactical pre-emptive claims which seek to undermine a valid choice of court agreement. Option 3 would thus fully achieve the objectives set out above without entailing the risk of parallel proceedings as does option 2. **(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 and the parties end up litigating in another court. However, the percentage of choice of court agreements which is declared invalid is relatively small: it concerns only about 1.1% of companies per year[71]. Arguably, fewer companies would be affected by the disadvantages of option 3 than those affected by the drawbacks of option 2. **(ii) Financial costs:** As option 2, option 3 would be a clear and straightforward solution to address the identified problem which would only entail minimal implementation costs. **(iii) Fundamental rights:** By minimizing the room for abusive litigation tactics, option 3 would fully give effect to the will of the parties to a choice of court agreement. This would improve the situation of the parties in terms of the freedom to conduct a business as referred

[70] Cf EBTP survey, question 4 and 6, according to which over a five year period, 7.7% of companies faced a situation where their choice of court clause was not respected by the other party and proceedings were brought in a different court.

[71] Cf EBTP survey, question 4.

to in Article 16 of the Charter. **(iv) International aspects**: Option 3 mirrors the solution adopted by the Hague Convention. As in the Convention, priority is given to the chosen court which is able to proceed even if seised second. In the public consultations, this option was therefore supported by many stakeholders.

2.3.7. Comparing the options and preferred Policy Option

On the basis of the analysis set out above, which is summarized in the table below, Option 3 is the preferred policy option.

Objectives/impact	Policy Option 1 Status quo	Policy Option 2 Exemption from obligation to stay proceedings	Policy 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 for the interface between the Regulation and Arbitration

2.4.1.1. The current problems

Arbitration is a matter of great importance in international commerce. It is a way for companies to resolve their disputes out-of-court which has certain advantages over court litigation, notably in terms of confidentiality, speed and informality of proceedings[72].

Arbitration is currently not covered by the scope of Regulation Brussels I. The exclusion of arbitration can be explained by the existence of the 1958 *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards** which requires the courts of the Contracting States to give effect to a private agreement to arbitrate and to recognize and enforce an arbitral award made in another Contracting State. All Member States are party to this Convention and it is also widely ratified throughout the rest of the world.

While in general the arbitration exclusion of the Regulation has allowed arbitration in the Member States to develop on the basis of the New York Convention and national law, difficulties have been reported concerning the relation of arbitration and court proceedings. In fact, there are situations in which state courts may be requested to intervene in disputes which have been submitted to arbitration. For instance, courts may be seized to grant interim relief*, to assist in setting the arbitration in motion or to evaluate the validity of an arbitration

[72] Cf. Oxford Study on Civil Justice Systems in Europe, Fn. XX above, question 49.

agreement. In the latter case, the party challenging the validity of the arbitration agreement will usually request the court to decide also on the merits of the case. This can lead to parallel proceedings and irreconcilable decisions between courts and arbitral tribunals where the agreement is held invalid in one Member State and valid in another.

This problem was recently illustrated in the *West Tankers*[73] case. The parties to a commercial contract had agreed to arbitration in London; nevertheless an action for damages was introduced in the Italian courts (where the damage had occurred), based on the argument that the arbitration agreement was invalid. The question arose whether the Italian proceedings were covered by the scope of Regulation Brussels I. The Court of Justice held that if a party to an arbitration agreement introduced court proceedings on the merits in which the invalidity of the arbitration clause was raised as an preliminary question, such proceedings fall within the scope of Regulation Brussels I. This means that the subsequent judgment circulates freely within the EU under the Regulation and can prevent the continuation of arbitral proceedings on the same issue or the later recognition and enforcement of the arbitral award. This situation creates an incentive for a party wishing to escape from an arbitration agreement to claim (possibly in bad faith) that the agreement is invalid and to bring proceedings on the merits in a Member State where it is likely to obtain a favourable decision.

The *West Tankers* decision thus revealed a real risk for abusive litigation tactics under the Regulation. The fact that a bad faith claimant can escape from an arbitration agreement by bringing an action on the merits in a "friendly" jurisdiction jeopardizes the effectiveness of arbitration in the European Union. The current situation may encourage parties to arbitrate in countries outside the EU which provide more legal certainty for arbitral proceedings, thereby undermining the attractiveness of arbitration within the European Union.

2.4.1.2. Who is affected?

The main stakeholders concerned are large European companies which opt for arbitration to resolve disputes with their commercial counterparts and European arbitration centres.

2.4.1.3. Scope of the problem

The current legal framework does not sufficiently protect the effectiveness of arbitration agreements in the EU. It entails a risk of parallel court and arbitration proceedings which are not only costly and time-consuming for the companies concerned but also create the risk of conflicting outcomes. The reactions received in the public consultation and examples of cases discussed in legal literature clearly show that the problem exists, although its exact extent is difficult to quantify notably due to the confidentiality of arbitral proceedings.

The effectiveness of arbitration is of key importance for a significant number of notably larger companies and multinationals which use this method of dispute resolution on a regular basis. Surveys show that about 63% of large European companies prefer arbitration over litigation to resolve their business disputes; this is mainly due to the confidentiality and speed of arbitration proceedings[74]. Where they have a choice, European companies prefer to arbitrate within the EU: their most popular seats of arbitration are London and Paris, followed by

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[73] Case C-185/07. A summary of relevant judgments of the ECJ may be found in Annex VII.

[74] Oxford Study on Civil Justice Systems in Europe, question 48, 49; 95% of the companies questioned have more than 250 employees.

Geneva, Stockholm and New York[75]. The attractiveness of arbitration in Europe is also important for European arbitration centres which assist the parties with the arbitration process, e.g. choosing the arbitrators, organising the hearings and finalising the award and which charge fees for these services. In 2009, European arbitration centres administered 4,453 international arbitration cases with a total value of over € 50 billion; the tendency is growing[76]. Judging by the value of the claim (and leaving apart sector-specific centres such as the London Maritime Lawyers' Association), the most important arbitration centre in the EU is the International Chamber of Commerce in Paris, followed by the London Court of International Arbitration[77]. But also smaller centres such as the Vienna International Arbitration Centre, the Netherlands Arbitration Institute, the German DIS and the Stockholm Chamber of Commerce make important contributions to the European arbitration industry[78]. The total value of the arbitration industry in the European Union can be estimated at €4 billion[79]. The European arbitration industry faces increasing competition from emerging arbitration centres in Asia. Notably, the Singapore International Arbitration Centre is one of the fastest growing arbitral institutions, having increased its case-load by over 300% over the past 9 years and currently handling the fifth largest number of cases worldwide[80]. Objectives

The specific objective is to ensure a transparent and predictable coordination of court and arbitral proceedings which preserves and improves the attractiveness of the European Union as place of arbitration. The operational objective is to avoid parallel court and arbitration proceedings and to reduce the possibilities of undermining arbitration proceedings through abusive litigation tactics.

2.4.2. Need for EU action (Subsidiarity)

The problems described above are caused by the delimitation of the scope of Regulation Brussels I, as interpreted by the case-law of the Court of Justice. Any modification to the scope of the Regulation, whether extending or limiting it, therefore requires the intervention of the European legislator and, by definition cannot be achieved by the Member States alone.

2.4.3. Description of policy options

Policy Option 1: Status quo

If the status quo were maintained, arbitration would generally remain excluded from the scope of the Regulation. However, in light of the case law of the European Court of Justice, court proceedings on the merits of the case and in which the validity of the arbitration agreement is raised as a preliminary question would be covered by the Regulation, thus allowing parallel proceedings, possibly conflicting outcomes of the dispute and enabling a party seeking to escape from an arbitral agreement to "sabotage" the arbitral proceedings.

Policy Option 2: Extend the exclusion of arbitration from the scope

Under this policy option, the exclusion of arbitration from the scope of Regulation Brussels I would be extended to cover not only arbitration proceedings but also any court proceedings

75 CSES study, p. 90, 91.
76 CSES study, p. 86.
77 CSES study, p 88.
78 CSES study, p. 90, 91.
79 CSES study, p. 88.
80 CSES study, p. 89.

related to arbitration proceedings, notably proceedings in which the validity of an arbitration agreement is contested. The recognition and enforcement of a subsequent judgment would not be governed by the Regulation but by national law.

Policy Option 3: Enhance the effectiveness of arbitration agreements

This option would enhance the effectiveness of arbitration agreements by including common rules for certain aspects of arbitration in Regulation Brussels I. Essentially, a rule on lis pendens would be inserted into the Regulation which provides that a court seised with a dispute involving an arbitration agreement would have to stay proceedings if a court at the seat of the arbitration or an arbitral tribunal is seised with the question of the existence, validity or effects of the arbitration agreement. As a result, it would always be possible for the parties to an arbitration agreement to ensure that only the arbitral tribunal or the court at the seat of the arbitration is hearing the case. This would prevent parallel proceedings and the use of tactical litigation manoeuvres to "sabotage" arbitration proceedings as outlined above. This element could be implemented on its own (Option 3A) or in combination with an improved system for the recognition and enforcement of arbitral awards which would go beyond the 1958 New York Convention (Option 3B). Such a system could be limited to establishing a uniform procedure for recognition and enforcement, similar to the existing exequatur system for court judgments, while retaining the grounds of refusal of the 1958 New York Convention, or it could restrict the grounds for refusal beyond those in the New York Convention and also deal with situations of irreconcilable court judgments and arbitral awards.

2.4.4. Discarded Policy Options

Following the public consultation, Option 3B was discarded because there was little support for it. Stakeholders generally feel that the 1958 New York Convention works satisfactorily for the recognition and enforcement of foreign arbitral awards and that there is no need to regulate this issue on the European level. It would therefore not make sense to pursue this option further.

2.4.5. Analysis of impacts of retained Policy Options

2.4.5.1. Policy Option 1: Status quo

(a) Effectiveness to achieve objectives: Maintaining the status quo would not contribute to the objectives outlined above. Businesses which have opted for arbitration in one country would continue to run the risk that the arbitration agreement is set aside by a court of another, possibly less "arbitration-friendly" country. **(b) Key impact: (i) Economic impact:** Although the total number of arbitration cases in the EU is relatively modest, the average value of these cases is very high (more than € 1 mio per case). Where such significant amounts of money are at stake, businesses need to be sure that their choice of the dispute resolution method cannot be jeopardized by their opponent's abusive litigation tactics. In particular, the potential consequences of the *West Tankers* decision are perceived as very negative by the arbitration community; stakeholders emphasize the need for reform[81]. Given that the West Tankers decision is a fairly recent one, there is not yet hard evidence pointing to EU arbitration centres losing out to non-EU ones but there is a concern that this is beginning to happen[82]. If business

[81] CSES study, p. 105.
[82] CSES study, p. 105.

moves away from arbitration in Europe, the European arbitration industry risks losing a significant part of its current €4 bio value. Moreover, those European companies which currently go for arbitration in the EU would need to incur lawyers' costs for adapting their dispute resolution strategies. **(ii) Fundamental Rights:** The risk of parallel proceedings between courts and arbitral tribunals and of "sabotage" of the arbitral proceedings would subsist. This situation could have negative impact for the efficiency of justice and for the freedom to conduct a business because it does not ensure that appropriate effect is given to the will of the parties. **(iii) Third countries**: Today, European arbitration centres attract not only European companies but also companies from outside the EU. If the legal framework for arbitration becomes less attractive following the *West Tankers* decision, non-EU companies would re-orientate their dispute resolution to arbitration centres outside the EU.

2.4.5.2. Policy Option 2: Extend the exclusion of arbitration from the scope

(a) Effectiveness to achieve objectives: This option would partially achieve the objectives outlined above. Doubts over the effectiveness of agreements to arbitrate in the EU would be removed and businesses within the EU would be able to arbitrate without the threat of costly delaying tactics against them. However, the general problem of parallel court and arbitration proceedings and risk of conflicting decisions would remain. Moreover, the total exclusion of all judgments in cases involving an arbitration agreement from the scope of the Regulation would enable cynical litigants to "torpedo" the recognition and enforcement of a judgment simply by claiming that the parties have concluded an arbitration agreement. Furthermore, option 2 would go against the overall objective of creating a genuine area of justice in the European Union because it would re-nationalise part of the rules which are today harmonised on the European level. Judgments which currently circulate under Regulation Brussels I would cease to do so; their recognition and enforcement in another Member State would again be governed by the national laws of the 27 Member States. This would constitute a step backwards in the creation of a European area of civil justice which should be avoided. **(b) Key impact: (i) Economic impact**: Essentially, the risks linked to the possibilities for abusive litigation tactics which have been illustrated by the *West Tankers* decision will be eliminated. However, the risk of parallel court and arbitration proceedings would continue to exist. Arbitration in the EU would be more attractive for European companies than under Option 1. Equally, the attractiveness of arbitration centres in Europe would be better ensured than under Option 1, although the deficiencies in the current legal framework may still make them less attractive than certain competitors outside the EU **(ii) Financial costs**: Costs for implementing the modification would be minimal. **(iii) Fundamental Rights:** Under this Option, the question whether a court can hear a case in which an arbitration agreement has been concluded would depend entirely on national law. The risk of parallel proceedings would therefore subsist with the negative impact for the efficiency of justice and for the freedom to conduct a business outlined above. The attractiveness of arbitration in the European Union would be consolidated.

2.4.5.3. 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**: As in Option 2, 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 centres. The European arbitration industry would be able to maintain their current business or expand it. **(ii) Financial costs**: As for Option 2, the modification of the Regulation would entail only minimal implementation costs for Member States. **(iii) Fundamental Rights:** This option would improve the effectiveness of the remedy before a tribunal (article 47 of the Charter) 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. It would also contribute to ensure 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 referred to in Article 16 of the Charter. **(iv) Third countries**: It may be expected that the attractiveness of arbitration in the European Union would be increased.

2.4.6. Comparing options and preferred Policy Option

Based on the above analysis, which is summarized in the table below, the preferred policy option is option 3A.

Objective/impact	Option 1 Status quo	Option 2 Extending the exclusion	Option 3 Enhancing the effectiveness
Avoid parallel proceedings and conflicting decisions	0	–	+
Ensuring effectiveness of arbitration in EU	0	+	++
Economic impact	0	+	+
Fundamental rights	0	+	++

3. OVERALL EVALUATION OF IMPACT OF PREFERRED POLICY OPTIONS

3.1. Summary of the preferred policy options

The preferred policy options for the revision of Regulation Brussels I can be summarized as follows:

(1) The existing exequatur procedure would be abolished, thereby permitting judgments to freely circulate within the European Union. The rights of the defendant would be safeguarded by introducing review procedures necessary to ensure the right to a fair trial.

(2) The existing rules on jurisdiction of the Regulation would be extended to apply to defendants domiciled outside the EU; moreover, some additional fora would be added which would only apply to third country defendants. Jurisdiction for third country defendants would be fully governed by the

regulation but the recognition and enforcement of third country judgments would continue to be governed by national law.

(3) The effectiveness of choice of court agreements in favour of EU courts would be increased by reducing the possibilities of abusive litigation. The chosen court would get priority to decide the case even if another court is seised first of the dispute.

(4) Arbitration agreements would also be made more effective. Any other court whose jurisdiction is contested on the basis of the existence of an arbitration agreement would have to suspend proceedings on the matter insofar as the question of the existence, validity, or effects of the agreement is brought before the courts of the seat of the arbitration in the Union or before an arbitral tribunal. This will reduce the risk of parallel proceedings and abusive litigation tactics by parties seeking to evade an arbitration clause.

3.2. The preferred options' effectiveness to achieve the policy objectives

As indicated in the assessment of the individual policy options, the preferred options address the problems identified better than any of the other options. Taken as a whole, they facilitate cross-border litigation and ensure a genuinely free circulation of judgments based on the principle of mutual recognition and improve respect of fundamental rights. They also help create the necessary legal environment for the European economy to recover by reducing the cost of litigation and enhancing legal certainty for cross-border transactions.

More specifically, the package of preferred policy options will

- remove the remaining barriers for the free circulation of judgments while maintaining a high standard of protection of the rights of defence;
- ensure equal access to justice as well as the conditions for a fair trial for citizens and companies in the European Union and make sure that weaker parties are not deprived of the protection granted to them by European law;
- enhance the effectiveness of choice of court agreements concluded in favour of European courts by reducing to a maximum the possibilities for abusive litigation tactics.
- Avoid parallel court and arbitration proceedings and reduce the possibilities of circumventing arbitration agreements by abusive litigation tactics.

3.3. Economic impact

The package of policy options would lead to significant savings for European companies currently engaged in cross-border business. The abolition of exequatur would allow these companies to save the major part of the current costs of the intermediate procedure of almost €48 Mio per year. . Also the new rules on jurisdiction 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. In addition, the preferred policy options would contribute to preserving the current value of the European arbitration industry of € 4 billion per year and possibly increase it. Moreover, the reform would encourage an estimated 39 % (5,8 million) SMEs which are currently not involved in cross-border transactions to make full use of the benefits offered to them by the

internal market and give more confidence to more than 50% of the consumers which are currently discouraged or entirely discouraged from engaging in cross-border commerce because of the costs and delays associated with enforcing their rights in another country.

3.4. Impact on financial costs

Taken as a whole, the reform package would trigger relatively modest financial costs. Only the abolition of exequatur would require Member States to incur costs for training to familiarize the legal profession with the new procedures envisaged to safeguard the defendant's rights. However, if national safeguard procedures are modelled on the procedures adopted for the existing European instruments which already have abolished exequatur for the judgments falling within their scope, the costs for implementing the reform should be minimal. In addition, judicial intermediaries, notably those in charge of the actual enforcement, would need procedural guidance and training to be able to handle the enforcement of judgments from another Member State in the absence of a validation by a national court. The other changes envisaged constitute relatively straightforward changes to existing rules which would not require the creation of new procedures and should be able to be applied by judicial intermediaries without the need of special training.

3.5. Impact on fundamental rights

All elements of the reform package respect to the rights set out in the Charter of Fundamental rights, and in particular the right to an effective remedy and the right to a fair trial guaranteed in its Article 47. They also improve the level of consumer protection referred to in Article 38. The abolition of exequatur will be accompanied by the creation of special review procedures which ensure that the defendant has an effective remedy and that a judgment which does not respect his right to a fair trial or rights of defence will not take effect. The changes envisaged for the international legal order will improve access to justice in the European Union for citizens, in particular weaker parties, and companies. The elimination of the possibilities of circumventing a choice of court or arbitration agreements strengthens access to justice by improving access to the court chosen by the parties while avoiding dilatory tactics which could undermine the right to a fair trial. The strengthening of the effectiveness of arbitration agreements reduces the risk of parallel proceedings, thereby improving the general efficiency of justice and the freedom to conduct a business as referred to in Article 16.

3.6. Social impact

In sum, the revision of Regulation Brussels I will improve the situation of weaker parties, notably consumers, employees and insured in cross-border legal disputes. This is first of all due to the abolition of exequatur which will allow citizens involved in cross-border litigation to save substantial costs and be able to enforce a foreign judgment without the delay caused by the existence of the intermediate procedure. Moreover, the increased access to European courts in transactions involving defendants from third countries will ensure that weaker parties will be able to avail themselves of the protection awarded to them by European legislation.

3.7. Impact on third countries

The changes envisaged in the reform package will not have an adverse effect on the relations of the European Union with third countries. The contemplated harmonisation of the rules of jurisdiction to cover defendants domiciled in third countries is fully in line with internationally accepted standards. A defendant domiciled in a third country would in

principle only have to appear before an EU court if the case has a substantial link with the EU territory; the only exception would apply in cases where the party's right to access to court or to a fair trial would not be guaranteed in that third country. Moreover, the removal of the existing exorbitant grounds of jurisdiction in Member States' national law will be to the benefit of third country defendants who no longer risk to be sued in a European court which has no or only very little connection with the case. The other elements of the reform package will equally contribute to improving the EU's relations with its international partners: the modifications contemplated in the area of choice of court agreements will facilitate the ratification of the Hague Convention on Choice of Court agreements by the European Union which will give a positive signal to the international community. Moreover, the improved interface between the Regulation and arbitration will make European arbitration centres more attractive to companies from outside the EU. Finally, third country claimants which have obtained a judgment in one Member State but need to enforce it in another Member State will benefit from the reduction of costs and delays brought about by the abolition of exequatur procedures.

4. PROPORTIONALITY OF EU ACTION

Measures taken have to be proportionate to the size and extent of the problems addressed. 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 crisis.

5. LEGAL BASIS

Regulation Brussels I was 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 the adoption of legislative instruments aimed at ensuring the compatibility of the rules applicable in the Member States concerning jurisdiction are Article 67 (4) and 81 (2) (a), (c) and (e) of the Treaty on the Functioning of the European Union.

6. MONITORING AND EVALUATION

In order to monitor the effective application of the amended Regulation, regular evaluation and reporting by the Commission will take place. To fulfil these tasks, the Commission will prepare regular evaluation reports on the application of the Regulation, based on consultations of Member States, stakeholders and external experts. Regular expert meetings will also take place to discuss application problems and exchange best practices between Member States in the framework of the European Judicial Network.

In most Member States, there is no systematic collection of statistical data on the application of the Regulation making it very difficult to measure how the Regulation affects cross-border

litigation. The Commission will therefore include in the proposed Regulation a requirement on Member States to provide information on the application of the Regulation in practice, 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.

ANNEX I –GLOSSARY OF LEGAL TERMS

Annex I - Glossary

Term	Definition
Preliminary question	Question which a judge has to examine in order to determine whether certain conditions required for the existence of the principal question are fulfilled.
Anti-suit injunction	A court order which seeks to prevent an opposing party from commencing or continuing proceedings in another jurisdiction or forum by imposing damages in case of non-compliance.
Arbitration	A mechanism for the resolution of disputes outside the courts, wherein the parties refer their dispute to one or more persons (the "arbitrators", "arbiters" or "arbitral tribunal"), by whose decision (the "award") they agree to be bound.
Choice of court agreement	An agreement, usually forming part of a contract, by which parties agree that any future dispute arising out of their relationship should be resolved by a particular court or courts (e.g. "the courts of England", "the upper regional court of Duesseldorf").
Civil and commercial matters	Relates to legal relationships between private individuals, as opposed to the relationship between the State and an individual
Civil justice / civil law	Law that governs the relationships between private individuals (and between private individuals and the State where the latter has acted in a private law capacity), as opposed to public law which governs the relationship between the individual and the State.
Claimant	Any either natural or legal person who brings an action against

	somebody (the defendant) in court.
Declaratory relief	A legally binding judgment of a court which determines the rights of one or more parties without ordering performance or awarding damages.
Defendant	Any natural or legal person against whom an action is brought in court.
Enforcement	The act of a public authority by which a judgment or administrative order is put into practice (e.g. a judgment ordering a debtor to pay 100 euros may be enforced by attaching the requisite sum in a bank account of the debtor's and then disbursing it to the creditor).
Exequatur procedure	Formal court procedure by which a foreign judgment is declared enforceable (i.e. "validated" for enforcement) in the state where enforcement is sought.
Exorbitant rules of jurisdiction	Rules of jurisdiction in which the court seized does not possess – by internationally agreed standards - a sufficient connection with the parties to the case, the circumstances of the case, the cause or subject of the action.
Forum	A judicial body, e.g. a court or tribunal, having jurisdiction.
Forum necessitatis	[Latin, 'forum of necessity'] Forum which may exercise jurisdiction when no other forum is reasonably available
Hague Conference on Private International Law	An intergovernmental organisation with its seat in The Hague, NL, which is working for the progressive unification, by means of international conventions, of the rules of private international law.
Interim relief	Measures ordered by a court which are intended to preserve a factual or legal situation so as to safeguard

	rights the recognition of which is otherwise sought from the courts on the merits, e.g. the freezing of assets.
Jurisdiction/International jurisdiction	Jurisdiction is the power conferred upon a court or tribunal to hear a specific case; international jurisdiction is the competence of the courts of a particular country to hear a case.
Lis pendens or litispendence	[Latin, 'pending suit'] Situation in which at the moment when one court or authority is seized, another court or authority is already in the process of examining the same dispute.
Public policy - procedural public policy - substantive public policy	Generally understood as the ultimate principles which underpin the legal system of a State. In Private International Law the irreconcilability of a judgment with the principle of public policy of a State can lead to the non-recognition of a foreign judgment in that State. *Procedural* public policy refers to the situation where the foreign procedure runs against the basic legal principles of a State. *Substantive* public policy relates to a irreconcilability of the substance of the foreign judgment with the basic principles of the State.
Recognition	The act of accepting a judgment or other act of sovereignty of another state as if it had been issued by an authority of one's own state.
Residual jurisdiction	Refers to the jurisdiction that is left to be determined by national law where the European law currently does not provide uniform grounds of jurisdiction (e.g. jurisdiction in situations where the defendant is domiciled outside the EU).
The 2005 Hague Convention on choice of court agreements	International Convention adopted in the framework of the Hague Conference on Private International law which governs exclusive choice

	of court agreements in cross-border business-to-business relationships.
The 1958 New York Convention on the recognition and enforcement of foreign arbitral awards	International Convention adopted in the framework of the United Nations which requires courts of contracting states to give effect to agreements to arbitrate and to recognize and enforce arbitration awards made in other contracting states.

ANNEX II – SUMMARY OF VIEWS OF STAKEHOLDERS ON THE MAIN ASPECTS OF THE REVISIN OF REGULATION BRUSSELS I

Views of stakeholders on the main elements of the reform as they result from the consultation process are as follows.

1. ABOLITION OF EXEQUATUR

With respect to the abolition of *exequatur*, a large majority of stakeholders and all Member States supported the objective of a free movement of judgments within the European Union. There is general support for the abolition of the exequatur procedure as a means to achieve this objective. A very large majority of stakeholders opined that the abolition of exequatur should be accompanied by safeguards, in particular to protect the rights of defence of the party against whom the enforcement is sought. Views differed on the extent of such safeguards and on the place where such safeguards should be available (Member State of enforcement or Member State of origin). Specific concerns were expressed with respect to the abolition of the exequatur in defamation cases.

2. OPERATION OF THE REGULATION IN THE INTERNATIONAL LEGAL ORDER

With respect to the operation of the Regulation in the international legal order, there was a general opinion that multilateral negotiations at international level would constitute the most appropriate framework for regulation. Failing such framework, views diverged on the best way forward. While a number of stakeholders and Member States supported the extension of the jurisdiction rules to third State defendants, particularly with the aim of ensuring access to justice before the courts in Europe, most stakeholders thought that the recognition and enforcement of third State judgments should be left to a multilateral framework which would ensure reciprocity at international level.

3. CHOICE OF COURT AGREEMENTS

With respect to choice of court agreements, there was a large support from stakeholders and Member States to improve the effectiveness of such agreements. Among the various ways to achieve that objective, preference was expressed for granting priority to the chosen court to decide on its jurisdiction. Such a mechanism would largely accord with the system established in the 2005 Hague Choice of Court Agreements, thus ensuring a coherent approach within the Union and at international level were the European Union to decide to conclude the 2005 Convention in the future.

4. THE INTERFACE BETWEEN THE REGULATION AND ARBITRATION

With respect to the interface between the Regulation and arbitration, while many stakeholders recognised the problem and supported future action, several arbitrators' associations expressed concern on the impact of any regulation on the leading role of European arbitration centres at world-wide level. Views diverged on whether the best way forward, i.e. either to actively promote arbitration agreements by avoiding parallel proceedings and abusive litigation tactics or to exclude arbitration more broadly from the scope of the Regulation. In any event, most

stakeholders expressed general satisfaction with the operation of the 1958 New York Convention which should not be undermined by any Union action on the matter.

ANNEX III - SUMMARY OF LEGAL STUDIES CONDUCTED BY THE COMMISSION

1. Study No. JAI/A3/2002/02 on making more efficient the enforcement of judicial decisions within the European Union

Following a tender issued by the European Commission in 2002, this final report[83] presented by Prof. Dr. B. Hess (University of Heidelberg) in 2004 is based on comparative research conducted by national reports by then 15 Member States which answered to four questionnaires. On the basis of the so obtained detailed information on the practice of enforcement in the single Member States, the study analyses in an elaborate way the transparency of assets, garnishment, and provisional and protective measures in the Member States. It confirms enforcement being the "Achilles heel" of the European Civil Judicial Area, since the non-harmonised national enforcement systems, which also differ significantly in the efficiency of judicial enforcement, create an obstacle to the equality of EU debtors, the functioning of the Internal Market and generally to the right of a creditor to enforce a claim efficiently within the European Judicial Area. In conclusion the study stresses the need for Union action and proposes several measures to improve the enforcement of judicial decisions in the European Union, notably the creation of a European order for the attachment of bank accounts, a European protective order to the same effect and a number of measures enhancing the transparency of the debtor's assets.

2. Study JLS/C4/2005/03 Report on the Application of Regulation Brussels I in the Member States

In September 2007 Prof. Dr. B. Hess, Prof. Dr. Pfeiffer (University of Heidelberg) and Prof. Dr. Schlosser (University of Munich) presented this final report[84] which was asked by the Commission in order to prepare a report for the Commission on the application and on the future revision and improvement of the Brussels I Regulation (see Article 73 of the Brussels I Regulation). The study provides a comprehensive analysis on the application of the Brussels I Regulation in 24 Member States on the basis of interviews, statistics and practical research in the files of the national courts by means of three questionnaires which were distributed among national reporters. The report proposes several improvements concerning Articles 1, 2, 5, 15, 22 (4), 23 of the Brussels I Regulation and the proceedings for recognition and enforcement of foreign judgments as well as Article 49 of the Brussels I Regulation.

3. Study JLS/C4/2005/07 on Residual Jurisdiction

As commissioned by the European Commission, this study[85] presented by Prof. Arnaud Nuyts in July 2007 provides a comparative analysis of the issue of "residual

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83 The final report is available in English only at http://ec.europa.eu/civiljustice/publications/docs/enforcement_judicial_decisions_180204_en.pdf.

84 The final report is available in English only at http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf.

85 The final report is available in English only at http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf.

jurisdiction" as it appears firstly in the application of the Brussels I Regulation in Article 4 when a defendant is domiciled outside of the European Union, secondly in matrimonial proceedings with respect to married couples of Community citizens of different nationalities living in a third State in Article 7 of the Brussels II Regulation and thirdly, in matters of parental responsibility, with respect to children of EU citizenship who are habitually resident outside the EU (Article 14 of the Brussels II Regulation). Based on national reports from 27 Member States the study reflects the great diversity of the national rules of jurisdiction in force in the 27 Member States and proposes a harmonisation of the residual jurisdiction presenting several options for Union action in this field.

4. Study to inform an Impact Assessment on the Ratification of the Hague Convention on Choice of Court Agreements by the European Community

This preparatory study[86] presented by GHK (an independent multi-discipline consultancy based in London) in December 2007 was undertaken with view of carrying out an Impact Assessment on the ratification of the Hague Convention on Choice of Court Agreements by the EU. The Hague Conference on Private International Law adopted on June 30th, 2005 the Hague Convention on Choice of Court Agreements. A number of EU and international instruments already existed in this field, however, as pointed out by the study, not with the breadth of signatures and same scope as The Hague Convention could have. The objectives of this assignment were to carry out an assessment of the direct and indirect impacts of the possible ratification by the European Union of the Hague Convention on the choice of court agreements and other policy options that could address the underlying problems. The study provides necessary information and assessments, notably the identification and elaboration of problems to be addressed, policy objectives, added value of the Union level action and risks. The study concludes by presenting different policy options of which the ratification by the Union of the Hague Convention on choice of court with exclusions under Article 21 with respect to copyright and related rights and insurance is recommended.

[86] The final study is available in English only at http://ec.europa.eu/dgs/justice_home/evaluation/docs/final_report_071207.pdf.

ANNEX IV A - NUMBER AND COST OF EXEQUATUR PROCEEDINGS

Table 1: Number of exequatur applications and success rate (2009)

Country	No. Applications	Success rate %		Country	No. Applications	Success rate %
Austria	*244*	*93*		Latvia	55	76
Belgium*†	307	95		Lithuania	183	83
Bulgaria	54	56		Luxemburg	244	95
Cyprus	14	75		Malta	*7*	*93*
Czech Rep	*42*	*93*		Netherlands*	378	95
Denmark*	163	95		Poland	444	88
Estonia	8	78		Portugal	*205*	*93*
Finland	46	100		Romania	*153*	*93*
France	1,176	99		Slovakia	18	83
Germany*	*1,638*	*88*		Slovenia	238	93
Greece*	500	95		Spain	*887*	*93*
Hungary*	53	88		Sweden	380	90
Ireland	*127*	*93*		UK*	*1,202*	*93*
Italy	*1,156*	*93*		EU27	9,922	93

*Source: CSES study, Table 3.2 page 36. Notes: *= estimates based on sample of courts; † = 2008. Figures in italics are based on an extrapolation of the data for other countries. A detailed explanation of the methodology for scaling up the estimates to an EU27 level is provided in the appendices.*

Table 2: Estimated Cost of Exequatur Proceedings – 2009 (Euro)

Country	Court Fees	Legal fees (5h)	Other fees	Total fees		
Austria	200	1,736	850	2,786		
Belgium	30	1,013	850	1,893		

Bulgaria	20	232	850	1,102		
Cyprus	395	579	850	1,824		
Czech Rep	50	434	850	1,334		
Denmark	80	1,736	850	2,666		
Estonia	20	1,013	850	1,883		
Finland	179	1,736	850	2,765		
France	500	1,736	850	3,086		
Germany	400	1,736	850	2,986		
Greece	10	1,013	850	1,873		
Hungary	15	1,013	850	1,878		
Ireland	110	2,605	850	3,565		
Italy	300-500	2,605	850	3,855		

Source: CSES study, p. 42.

Scenarios

For the purposes of this study, estimates are based on two scenarios: firstly, a straightforward case in which exequatur is granted without any appeal or complication concerning the good order of the paperwork of the application, and enforcement is not contested; and, secondly, a more complex, appealed case with the need for documentation to be translated, legal representation, etc.

Scenario 1 - a 'straightforward' case where a 25-page document is translated, court fees are paid in addition to lawyers' charges for five hours. The average cost of exequatur proceedings is €2,208 (see Table above). On this basis, if all exequatur cases were 'simple', the total cost of exequatur cases in 2009 would have been around €22 million (9,922 cases x €2,208).

Scenario 2 - a more complex or contested case, the total cost of exequatur can increase exponentially, especially because of the extra costs of translation and above all, further lawyer's fees. In order to develop this scenario, the costs have been based on new research and on the report on the cost of civil judicial proceedings in the EU. This scenario is based on an estimated 100 pages to be translated (at an estimated cost of €30) and five days of lawyers' fees (lawyers' fees in different Member States

vary from €40 to over € 500 per hour[87]) giving an average cost for the more complex case of €12,791. If all exequatur cases were 'complex', the total cost of exequatur in 2009 would have been around €126 million (9,922 cases x €12,791).

Table 3 summarises the total cost of exequatur proceedings based on different assumptions for 'simple' and 'complex' cases and a total of 9,922 cases in 2009.

Table 3: Total Cost of Exequatur Proceedings based on different scenarios – 2009

Scenario	Total EU cost of exequatur
100% of cases are 'simple'	EUR 21,906,976
25% of cases are 'complex' *(Base Scenario)*	EUR 47,893,943
50% of cases are 'complex'	EUR 73,880,909
75% of cases are 'complex'	EUR 99,867,876
100% of cases are 'complex'	EUR 125,854,842

The study has found that an estimated 93% of applications are successful. On the basis that, at most, around 25% of cases are 'complex' and belong to the second scenario, the base scenario is that **the total cost of exequatur proceedings in 2009 would have been around €48 million**.

Source: CSES study, Table 3.4 p. 44ss.

87 Lawyers' fees were calculated on the basis of the country report (annexes) of the *Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union.*

ANNEX IV B – EXAMPLE OF ITEMISED COSTS OF EXEQUATUR

Example of a "straightforward" case of obtaining exequatur for a French judgment over € 14,000 from the Appellate Court of Douai in Antwerp, Belgium

frais de mise au rôle : € 52

traduction de l'arrêt du français au néerlandais : +/- € 500 (dans la requête en exequatur, il sera demandé que ces frais soient mis à charge de XXX)

signification de la décision accordant l'exequatur (art. 42(2) Règlement) à XXX : +/- € 250

droits d'enregistrement : nihil

élection de domicile dans le ressort d'Anvers : nihil

honoraires : € 875 (si le tribunal convoque la requérante, ce montant devrait être révisé)[88]

Total : **€ 2,145**

Documents à produire :

expédition de l'arrêt ;

certificat délivré par la Cour d'Appel de Douai (sur base de l'article 54 du Règlement 44/2001 ; ce certificat atteste entre autre que la décision française est exécutoire en France ; si la Cour d'Appel n'a pas délivré le certificat, deux solutions sont possibles : soit solliciter à nouveau la Cour d'Appel pour qu'elle délivre le certificat, soit demander l'exequatur en produisant une attestation démontrant que l'arrêt de la Cour d'Appel a été signifié) ;

un mandat au nom de l'ensemble des requérants, qui couvre l'exécution de l'arrêt ;

mise en demeure de XXX

[88] In Belgium, lawyers' fees for an exequatur seem to vary between € 800 and € 2,000.

ANNEX V - LENGTH OF EXEQUATUR PROCEEDINGS

1. First instance

Member State	Average duration
Austria	1 week
Belgium	1-4 months
Cyprus	1-3 months
Czech Republic	n.a.
England&Wales	1-3 weeks
Estonia	3-6 months
Finland	2-3 months
France	10-15 days
Germany	3 weeks
Greece	10 days-7 months
Hungary	1-2 hours
Ireland	1 week or more
Italy	Milan: 20-30 days; Bolzano: 7-20 days
Latvia	10 days
Lithuania	up to 5 months
Luxembourg	1-7 days
Malta	Exemplary single cases with procedures concluded within days up to three months
Netherlands	n.a.
Poland	1-4 months
Portugal	n.a.
Scotland	n.a.

Slovakia	n.a.
Slovenia	n.a.
Spain	n.a.
Sweden	2-3weeks

2. Appeal proceedings

Member State	Average duration
Austria	n.a.
Belgium	Liège: 1 year; Antwerp: 1 year; Brussels: up to 2 years
Cyprus	no information available
Czech Republic	n.a.
England&Wales	1-2 months
Estonia	6 months to 1-2 years
Finland	6 months
France	no information available
Germany	1-6 months; applications which obviously have no chance of success are immediately closed within a period of 1-2 weeks
Greece	6-10 months
Hungary	3 months (in more than 50 % of the cases)
Ireland	n.a.
Italy	about 2 years
Latvia	2-6 months.
Lithuania	up to 2 months;
Luxembourg	10-12 months
Malta	first hearing after 2 years; decision

	3-12 months later
Netherlands	n.a.
Poland	1-3 months
Portugal	4-5 months
Scotland	n.a.
Slovakia	n.a.
Slovenia	2-12 months
Spain	2-4 months
Sweden	n.a.

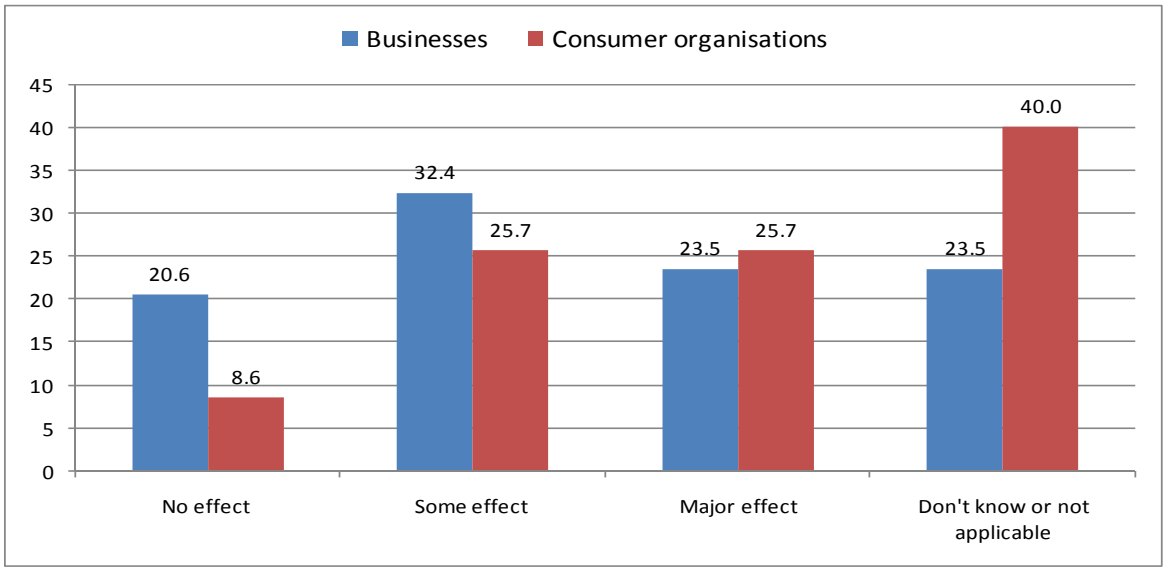
ANNEX VI – EFFECT OF THE RISK OF LITIGATION ABROAD ON CROSS BORDER TRADE AND POSSIBLE IMPACT OF ABOLITION OF EXEQUATUR

Survey Evidence - Effect of the Risk of Litigation Abroad on Cross Border Trade and Possible Impact of Abolition of Exequatur

- 51.4% of the mainly smaller businesses participating in the EBTP survey stated that the risk of a potential dispute was either 'very important' or 'important' in deciding whether or not to expand activities in other European countries (see Table 2.3)

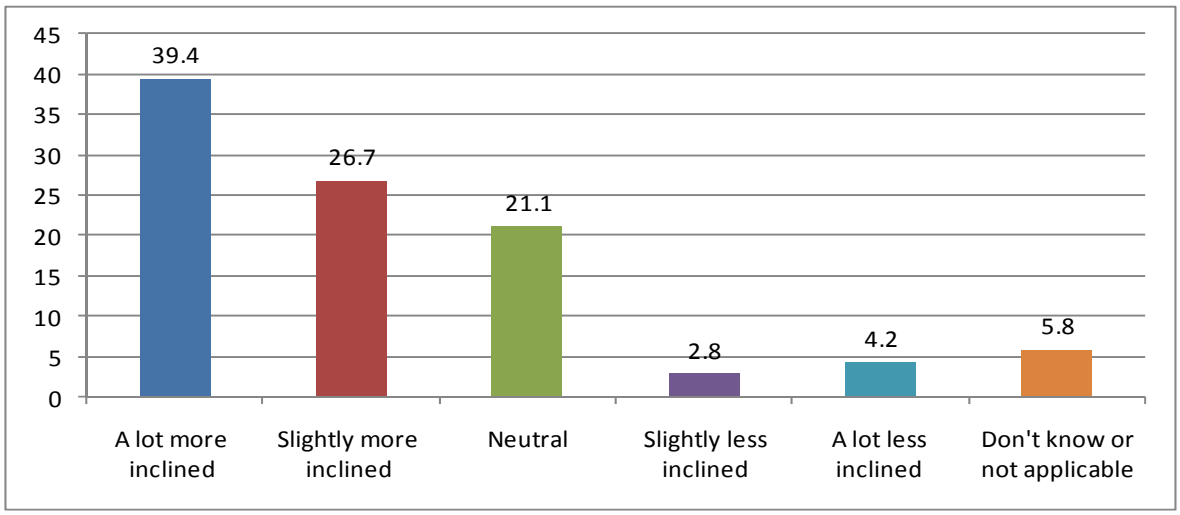
- 55.9% mainly larger companies that completed the key stakeholder questionnaires indicated that the risk of litigation in another country had either 'some effect' (32.4%) or a 'major effect' (23.5%) on their attitude to cross-border trade. A similar proportion of consumer organisations (51.4%) indicated that the risk of litigation had a discouraging effect on consumers' willingness to engage in cross-border transactions (25.7% discouraged a bit' and 25.7% 'entirely discouraged').

Figure 1: What effect (if any) does the risk of litigation in another Member State in a cross-border dispute have on your attitude to cross-border trade?



- 39.4% of businesses and consumer organisations responding to the key stakeholder survey went on to say that they would be 'a lot more inclined' to engage in (more) cross-border commercial activities if a judgment obtained in one Member State was enforceable in another Member State without additional procedures.

Figure 2: To what extent would you be inclined to engage in (more) cross-border commercial activity if, in the event of a dispute, a judgment obtained in one Member State would be enforceable in another without additional procedures?



Source: CSES study, Text box 3.3, p. 61

ANNEX VII – SUMMARY OF RELEVANT CASES OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

1. *Erich Gasser GmbH v MISAT Srl;* Case C-116/02, 9 December 2003

In its decision the ECJ had to answer several questions submitted by an Austrian court which had been appealed by *Gasser*, after an Austrian Regional Court had stayed its proceedings according to Article 21 of the Brussels Convention (Article 27 of the Brussels I Regulation), since it found that the decision of an Italian Court before which *MISAT* had brought action against in an earlier point of time. *Gasser* held, that that the parties had concluded a choice of court agreement conferring jurisdiction on the Austrian court. The ECJ decided that a national court whose jurisdiction has been claimed under a choice of court agreement has to stay its proceedings according to Article 21 of the Brussels Convention (Article 27 of the Brussels I Convention) until the court previously seised has declared that it has no jurisdiction, even if this takes an excessively long time.

2. Brigitte and Marcus Klein v Rhodos Management, Ltd.; C-73/04, 13 October 2005

The ECJ addressed the characterisation of a complex contract under which the German married couple Klein became member of a club which gives access to several services in return for annual fees as a requirement for the purchase of a right to use a holiday property on time share bases under the same contract (against separate payment) for nearly 40 years. The Court decided that such a contract, where the costs for the membership represent the major part of the total price cannot be considered a contract which has as its object "…tenancies of immovable property" in the sense of Article 16(1)(a) of the Brussels Convention (Article 22(1) of the Brussels I Regulation) so that courts in the Member State where the respective property is situated do not have jurisdiction according to this Article.

3. Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.; Case C-185/07, 10 February 2009

The ECJ had to determine whether an anti-suit injunction granted in face of the existence of an arbitration agreement, restraining from pursuing any other proceedings than arbitration and therefore preventing a previously seised national court from examining itself if it has jurisdiction is reconcilable with the Brussels I Regulation. *Allianz* had brought proceedings against *West Tankers* to an Italian national court in order to recover a compensation paid to a contracting partner of *West Tankers*, whereupon the latter started proceedings before a national court in London (which was also the chosen place for arbitration proceedings) seeking an anti-suit injunction. In response to the submissions made by the English national court, the ECJ stated that despite the arbitration exception in Article 1(2)(d) the Brussels I Regulation applies to issues concerning the applicability of an arbitration agreement, including in particular its validity, when the subject matter of a dispute comes within the scope of the Brussels I Regulation. An anti-suit injunction preventing a court of a Member State from determining itself whether it has jurisdiction is irreconcilable with the Brussels I Regulation.

ANNEX VIII – NATIONAL PROTECTIVE JURISDICTIONAL GROUNDS IN CONSUMER, EMPLOYMENT AND INSURANCE CONTRACTS

Member State	Rights for a CONSUMER to bring proceedings at home	Right of EMPLOYEES to bring proceedings at certain defined places	Right of INSURED to bring proceedings at home
Austria	-	+ [91] [92]	-
Belgium	+ [89]	+ [91]	-
Bulgaria	+ [90]	+ [91]	-
Cyprus	-	-	-
Czech Republic	-	-	-
Denmark	+ [89]	-	-
England	-	-	-
Estonia	+ [90]	+ [91] [92]	-
Finland	+ [90]	+ [91] [93]	-
France	-	+ [93]	+
Germany	-	-	-
Greece	-	+ [91] [93]	-
Hungary	+ [89]	+ [91]	-
Ireland	-	-	-
Italy	+ [89]	+ [91]	+

[89] Jurisdiction subject to a territorial connection with that State.

[90] Without restriction.

[91] At the place where the employee carries out his work.

Latvia	-	+ [91] [92]	-
Lithuania	+ [90]	+ [91]	-
Luxembourg	+ [89]	+ [91]	+
Malta	-	-	-
Netherlands	+ [89]	+ [91] [92]	-
Poland	-	-	-
Portugal	-	+ [91]	-
Romania	-	+ [92]	-
Scotland	+ [89]	+ [92]	-
Slovakia	-	+ [92]	+
Slovenia	-	+ [91]	-
Spain	+ [89]	+ [91] [93]	-
Sweden	-	+ [92]	-

[92] At the domicile/residence of the employee.
[93] At the place the contract was concluded.

ANNEX IX - MAIN CATEGORIES OF SPECIFIC NATIONAL RULES ON JURISDICTION EXCLUDED BETWEEN MEMBER STATES (LISTED IN ANNEX I OF THE BRUSSELS I REGULATION

Member State	Citizenship of the parties	Presence of the defendant on territory at the time of service of claim	Location of assets of defendant on the territory	Cause of action or activities in the territory	Domicile of the plaintiff plaintiff
Austria			+ [96]		
Belgium					+ [99]
Bulgaria	+ [94]				
Cyprus				+	
Czech Republic	+ [95]		+ [96]		
Denmark			+ [96]		
England		+	+ [96]		

[94] Without further conditions.
[95] With restrictions.

		[94]			
Estonia			+ [96]		
Finland	+ [95]	+ [94]	+ [96]		
France	+ [94]				
Germany			+ [96]		
Greece					
Hungary					
Ireland		+ [94]			
Italy					
Latvia			+ [97]		+ [98]
Lithuania			+ [96]		
Luxembourg	+ [94]				
Malta	+ [95]	+ [94]			
Netherlands					+ [99]
Poland		+ [94]	+ [96]	+	
Portugal				+	
Romania					

[96] Even if not related to the claim.
[97] Only if related to the claim.
[98] Only for claims relating to the return of a personal property or the reimbursement of its value.
[99] Repelled.

Scotland		+ [95]	+ [96]		
Slovakia			+ [97]		
Slovenia	+ [95]	+ [95]	+ [97]		
Spain					
Sweden			+ [96]		