RECENT DEVELOPMENTS IN THE SPHERE OF JURISDICTION IN CIVIL AND COMMERCIAL MATTERS

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Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,[2] commonly referred to as the Brussels I Regulation (hereafter "the Regulation"), lays down uniform rules to settle conflicts of jurisdiction and to facilitate the free circulation of judgments in the European Union. As its title suggests, it applies in a broad range of matters including contractual, delictual and property claims. The Regulation replaced the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by several conventions on the accession of new Member States.[3] It is applicable in all the Member States, including, by way of a separate international agreement, to Denmark[4] which has a special regime for judicial cooperation.[5] The 1988 Lugano Convention, which has now been revised by the new Lugano Convention concluded by the Union, Denmark and the EFTA States on 30 October 2007,[6] governs the same subject matter as the Regulation and binds the Member States (including Denmark) on the one hand and Iceland, Norway, and Switzerland on the other hand.

The Regulation entered into force on 1 March 2002. Overall it is believed to be a successful instrument which has functioned well but after eight years from its date of application, on 14 December 2010, the European

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[2] OJ L12, 16.1.2001/1.

[3] OJ C27, 26.1.1998/1.

[4] Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L299, 16.11.2005/62. The agreement ensures the application of the provisions of the Regulation in Denmark as of 1 July 2007 and contains a mechanism which enables Denmark to apply any instrument modifying the Regulation.

[5] Title V of Part Three of the Treaty on the Functioning of the European Union is not applicable to Denmark by reason of the Protocol on the position of Denmark annexed to the Treaties.

[6] OJ L339, 21.12.2007/1.

Commission published a Proposal for a recast of the Regulation[7] (hereafter "the Proposal") to improve the application of certain of its provisions, further facilitate the free movement of judgments and further enhance access to justice.[8] The Proposal followed a 2009 report from the Commission on the application of the Regulation[9] in accordance with Article 73 of the Regulation and a Green Paper on the review of the Regulation[10] which put forward some suggestions on possible ways forward with respect to certain points raised in the report. The Proposal was also preceded by extensive public consultation and a number of expert studies on the current system, together with the 2010 Report from the European Parliament's Committee of Legal Affairs on the implementation and review of the Regulation.[11]

The Commission's Proposal identifies four main shortcomings in the Regulation's operation, one in connection with the procedure for the recognition and enforcement of judgments in other Member States[12] and three in connection with the rules on jurisdiction. It proposes amendments to address these deficiencies together with other amendments to improve the functioning of the Regulation, with the ultimate objective of facilitating cross-border litigation and removing the remaining obstacles to the free movement of judgments.[13] This paper will not deal with the proposed changes to the

[7] 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), 14.12.2010, COM (2010) 748 final.

[8] Proposed recast Regulation, preamble, para 9.

[9] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 21.04.2009, COM (2009) 174 final.

[10] 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, 21.04.2009, COM (2009) 175 final.

[11] Report on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 29.06.2010, 2009/2140(INI).

[12] The Commission believes that the *exequatur* remains an obstacle to the free circulation of judgments which entails unnecessary costs and delays and deters companies and citizens from making full use of the internal market, and therefore proposes its abolition subject to certain safeguards.

[13] The importance of this aim has been emphasised by the European Council in its 2009 Stockholm Programme.

rules on the recognition and enforcement of foreign judgments, but will solely address the proposed amendments in the jurisdictional sphere.

Jurisdiction over defendants domiciled in third States

Under the present system where the defendant is domiciled in a Member State,[14] the jurisdiction of the courts of the Member States in civil and commercial matters is governed solely by the Regulation and the rules of national law on jurisdiction are not applicable as against such a defendant.[15] The basic system of the Regulation is that a defendant domiciled in a Member State is to be sued in the courts of that Member State,[16] unless a rule of special jurisdiction allows the claimant to bring proceedings in another Member State.[17] In Case 412/98 *Groupe Josi*[18] the European Court of Justice clarified that the domicile of the plaintiff is generally irrelevant and hence the jurisdictional rules of the Regulation are applicable in a dispute between a defendant domiciled in a Member State and a claimant domiciled in a third State. Moreover in Case C-281/02 *Owusu*,[19] the Court held that the jurisdictional rule conferring jurisdiction on the courts of the defendant's domicile is mandatory in nature and its application cannot be set aside on the basis of a rule of national law such as the doctrine of *forum non conveniens* under English law.

The Regulation does not contain a comprehensive set of rules for disputes involving defendants from outside the EU. At present, subject to certain exceptions,[20] the jurisdictional rules in the Regulation are only applicable where the defendant is domiciled in a Member State. Article 4(1) of the Regulation expressly provides that 'if the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall,

[14] The notion of domicile is dealt with in Articles 59 and 60 of the Regulation.

[15] Brussels I Regulation, art 3 para 2.

[16] Ibid art 2 para 1.

[17] Ibid art 3 para 1.

[18] [2000] ECR I-5925.

[19] [2005] ECR I-1383.

[20] The application of Article 22 of the Regulation (exclusive jurisdiction) and Article 23 (prorogation of jurisdiction) is not dependent on the defendant being domiciled in a Member State.

subject to Articles 22 and 23, be determined by the law of that Member State.' This means that, subject to the exceptions in Articles 22 and 23, in the case of a defendant not domiciled in a Member State, the question of whether a national court may hear a case against such a defendant is governed by the national law of the court in question (commonly referred to as 'subsidiary jurisdiction'). There is no uniformity in the sphere since each Member State has its own rules to determine jurisdiction over third State defendants.[21] In Malta, for example, the rules are found in Sections 742 to 744 of the Code of Organisation and Civil Procedure[22] and Section 549 of the Commercial Code.[23] Article 74 of the Regulation obliges the Member States to notify the Commission with any changes to these rules (listed in Annex I to the Regulation) and the Commission is obliged to keep the Annex regularly updated. The latest update was published by a Commission Regulation in 2010.[24]

In its Proposal, the Commission points out that one of the major deficiencies of the Regulation is that it does not cater for disputes involving defendants from outside the EU. It notes that the lack of harmonised rules at EU level and the diversity in the national laws of the Member States to determine jurisdiction over third State defendants leads to unequal access to justice for EU citizens and companies in transactions with persons from third countries, since some can easily litigate in the EU while others cannot, depending on how generous the rules of national jurisdiction are. In addition, the Commission points out that where the national law of the Member State in question does not grant access to its courts in disputes with parties outside the EU, the enforcement of mandatory EU laws such as those protecting consumers, employees and data subjects is not guaranteed. For example, in those Member States where no additional jurisdictional protection exists under national law, consumers may not be able to bring proceedings against third State defendants who have no

[21] A study on the existing national jurisdictional rules applicable in cases where the defendant is not domiciled in a Member State was prepared by Prof. A. Nujts and is available at the following link: http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm.

[22] Chapter 12 of the Laws of Malta.

[23] Chapter 13 of the Laws of Malta.

[24] Commission Regulation (EU) No 416/2010 of 12 May 2010 amending Annexes I, II and III to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2010] OJ L119 p7.

presence in the consumer's Member State.[25] The same may also be true, for instance, for Union employees, commercial agents, victims of competition law infringements and individuals who want to enforce the rights conferred to them by EU data protection legislation, where the national law of the Member State concerned does not confer power on the national court to hear the dispute against a third State defendant.

The Commission therefore proposes an extension of the jurisdictional rules of the Regulation to disputes involving third State defendants. As noted in the preamble to the proposed recast regulation, 'the circumstance that the defendant is domiciled in a third State should no longer entail the non-application of certain Union rules on jurisdiction, and there should therefore no longer be any referral to national law. This Regulation should therefore establish a complete set of rules on international jurisdiction of the courts in the Member States.'[26] The Proposal ensures uniformity by providing that 'persons not domiciled in any of the Member States may be sued in the courts of a Member State only by virtue of the rules set out in Sections 2 to 8 of this Chapter.'[27]

The Proposal extends the Regulation's rules of special jurisdiction under Section 2 of Chapter II of the Regulation to defendants domiciled in third States. Under the current system, the exceptions to the general rule of jurisdiction are based on the close link between the designated court and the action.[28] In the Commission's view, this close link between the proceedings and the territory of a Member State justifies the extension of the national court's jurisdiction to defendants not domiciled in the EU.[29] Thus, whereas at present, under Article 5(1) of the Regulation dealing with matters relating to a contract, the national court of the place of performance of the obligation in question[30] only has jurisdiction against persons domiciled

[25] This seems to be the position in Malta in the case of suppliers not domiciled, resident or present in Malta since Article 742(1) of Chapter 12 of the Laws of Malta requires at least presence in Malta or that the judgment is capable of being enforced in Malta.

[26] Proposed recast Regulation, preamble, paras 16, 17.

[27] Ibid art. 4 para 2.

[28] Brussels I Regulation, preamble, para 12.

[29] Proposed recast Regulation, preamble, para 17.

[30] Art. 5(1)(b) of the Regulation provides that unless otherwise agreed, the place of performance of the obligation in question shall be: in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been

in a Member State, the Proposal extends the jurisdiction of the court of the place of contractual performance to defendants not domiciled in a Member State. At present, the court of the place of contractual performance can only assume jurisdiction over third State defendants if such jurisdictional power is conferred by its national law.

Similarly, under the new proposed Article 5(2), in matters relating to tort, delict or quasi-delict, the courts for the place where the harmful event occurred or may occur have jurisdiction even if the defendant is not domiciled in a Member State, unlike the position under the current Article 5(3) of the Regulation. Thus, where the damage occurs in a Member State, or where the event giving rise to it took place in a Member State,[31] an action in tort or quasi-tort may be brought by a claimant in that Member State irrespective of the State of domicile of the defendant.

The proposed amendments also attempt to ensure that the protective jurisdictional rules currently available to consumers, employees and insured persons will apply where the defendant is domiciled outside the EU. In Case 318/93 *Brenner*[32] the Court confirmed that the special rules designed to protect consumers do not apply if the supplier is not domiciled in a Member State since in such case Article 4 is applicable. Indeed, at present, the jurisdictional rules designed to protect the so-called weaker parties only apply if the defendant is domiciled[33] or deemed to be domiciled in a Member State.[34] Thus, while at present the insured and the employee may bring proceedings at home only if the insurer or employer is domiciled or deemed to be domiciled in a Member State, with the proposed amendment, they may have recourse to the courts of their home Member State even if the insurer or employer is domiciled outside the EU. Similarly, the consumer would be able to sue at home if he has concluded a contract with a supplier established in a non-Member State that had directed its activities towards the consumer's Member State, for example by means of a website.[35]

delivered; in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided.

[31] See Case 21/76 *Bier* [1976] ECR 1735.

[32] [1994] ECR I-4275.

[33] Brussels I Regulation, art. 9 para 1, art 16 para 1, art 19 para 1.

[34] Ibid art. 9 para 2, art 15 para 2, art 18 para 12.

[35] Guidance on the notion of direction of activities by means of a website has been recently provided by the ECJ in Joined Cases C-585/08 and C-144/09 *Peter Pammer and Hotel Alpenhof* 07/12/10.

The Proposal also creates two additional fora for disputes involving defendants domiciled outside the EU. First, where no court of a Member State has jurisdiction under some other provision of the Regulation, the Proposal provides that a non-EU defendant may be sued in the courts of the Member State where property belonging to the defendant is located, provided that the value of the property is not disproportionate to the value of the claim and the dispute has a sufficient connection with the Member State of the court seised.[36] In its Proposal, the Commission notes that

> the forum of the location of assets balances the absence of the defendant in the Union. Such a rule currently exists in a sizeable group of Member States and has the advantage of ensuring that a judgment can be enforced in the State where it was issued.[37]

Secondly, the courts of a Member State will also be able to exercise jurisdiction, on an exceptional basis, if no other forum guaranteeing the right to a fair trial or the right to access to justice is available and the dispute has a sufficient connection with the Member State concerned.[38] The Proposal states that 'the forum of necessity guarantees the right to a fair trial of EU claimants, which is of particular relevance for EU companies investing in countries with immature legal systems.'[39]

The Commission also intends to regulate the situation where the same issue is pending before a court inside and outside the EU. It introduces a discretionary *lis pendens* rule for disputes on the same subject-matter and between the same parties which are pending before the courts in the EU and in a third country. A court of a Member State can exceptionally stay proceedings if a non-EU court was seised first and it is expected to decide within a reasonable time; and its decision is capable of recognition and enforcement in that Member State and the court is satisfied that a stay is necessary for the proper administration of justice.[40] The court may discharge the stay and continue hearing the case

[36] Proposed recast Regulation, art. 25.

[37] Ibid, Explanatory Memorandum, para 3.1.2.

[38] Ibid art. 26.

[39] Ibid Explanatory Memorandum, para 3.1.2.

[40] Ibid art 34 para 1.

if the proceedings in the third State are themselves stayed or are discontinued, if it appears that the case is unlikely to be concluded within a reasonable time or if lifting the stay is required for the proper administration of justice.[41] This amendment aims to avoid parallel proceedings in and outside the EU, though there seems to be no power to stay proceedings on the sole ground that the parties have concluded an exclusive choice of court agreement in favour of the courts of a third State if the non-EU court is not seised first. The new *lis pendens* rule proposed in Article 34 of the recast Regulation is different from the current rule designed to prevent parallel proceedings in the courts of two Member State, because in such case, Article 27(1) of the Regulation provides that the stay is mandatory.

It is worth noting that in its 2010 Report, the Legal Affairs Committee of the Parliament, probably influenced by the traditional position under English common law which came to the fore in Case C-281/02 *Owusu*,[42] had recommended that a *forum non conveniens* rule should be introduced to allow a court having jurisdiction under the Regulation to stay proceedings if it considers that a court of another Member State or of a third country is better placed to hear the dispute.[43] While the discretionary *lis pendens* rule applicable where a non-EU court is first seised of the dispute, though not identical, is along the lines of this suggestion, the Proposal contains no provision allowing a court of a Member State to stay proceedings on the sole ground that another court in a Member State is a more suitable forum for the trial of the action. The current position, which is more in line with the civil law approach on jurisdiction, is therefore maintained.

If adopted, the above-described rules will supersede the existing national rules in the same way as the current rules in the Regulation have superseded the national jurisdictional rules of the Member States in the case of defendants domiciled in the EU. The extent to which it would be possible to enforce a European judgment obtained against a non-EU defendant in a third State would depend on the law of the third State concerned, so where the non-EU defendant has no assets in the Union and enforcement of the judgment in the Union is likely to

[41] Ibid art. 34 para 3.

[42] [2005] ECR I-1383.

[43] Report on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 29.06.2010, 2009/2140(INI).

be impossible, suing in the Union may not always be a sensible option.

Enhancing the effectiveness of choice of court agreements

The second identified shortcoming of the Regulation relates to the efficiency of choice of court agreements. As things stand at the moment, the Regulation obliges the court designated by the parties in a choice of court agreement to stay proceedings if another court has been seised first.[44] In Case C-116/02 *Gasser*,[45] the European Court of Justice confirmed that the *lis pendens* rule requires the court second seised to suspend proceedings until the court first seised has established or declined jurisdiction, even if the court seized second was nominated by an agreement which is valid under Article 23; moreover, in Case C-159/02 *Turner*,[46] the Court ruled that the issue of an anti-suit injunction to strengthen the effect of choice of court agreements is incompatible with the Regulation, since it unduly interferes with the determination by the courts of other Member States of their jurisdiction under the Regulation.

Concerns were voiced that under the current rules as interpreted by the European Court of Justice, litigants acting in bad faith could delay the resolution of the dispute in the forum chosen by the parties and frustrate the course of justice by first seising a non-competent court.[47] Such a tactic, commonly referred to as a *torpedo* action, is believed to undermine the legal certainty and efficiency which choice of court agreements are intended to bring about, though in all fairness to the Court, the torpedo effect is not really the result of the ruling in *Gasser,* but rather the consequence of the fact that certain national courts are unable to decide the question of jurisdiction without undue delay. It is this delay that confers the destructive power of the torpedo action. Indeed, if judgment on the jurisdictional issue is given forthwith by the court first seised, the *lis alibi pendens* rule which is essential to prevent irreconcilable judgments and ensure the free

[44] Brussels I Regulation, art 27 para 1.

[45] [2003] ECR I-14693.

[46] [2004] ECR I - 3565.

[47] See Hess B., Pfeiffer T. and Schlosser P., *Report on the Application of Regulation Brussels I in the Member States,* September 2007, Study JLS/C4/2005/03 <http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf> accessed 12 July 2011.

movement of judgments will not cause as much alarm as it did in *Gasser*.

Among the various ways to improve the effectiveness of choice of court agreements, the 2009 Green Paper floated the following options: (i) releasing the court designated in an exclusive choice-of-court agreement from its obligation to stay proceedings under the *lis pendens* rule;[48] (ii) reversing the priority rule by giving priority to the court chosen in the agreement to determine its jurisdiction; (iii) maintaining the existing *lis pendens* rule but establishing a direct communication and cooperation between the two courts, together with a deadline for the court first seised to decide the question of jurisdiction; or (iv) excluding the *lis pendens* rule in situations where the parallel proceedings are proceedings on the merits on the one hand and proceedings for negative declaratory relief on the other.[49]

During the consultation with stakeholders, preference was expressed for granting priority to the chosen court to decide on its jurisdiction. Such a mechanism largely accords with the system established in the 2005 Hague Choice of Court Agreements Convention concluded under the auspices of the Hague Conference on Private International Law.[50] It therefore ensures a coherent approach with that at international level and facilitates possible accession to the Convention by the Union. The Commission has in fact already made a Proposal for the EU to sign the Convention.[51]

In its Proposal, the Commission therefore proposes that where the parties have designated a particular court to resolve their dispute, priority is to be given to the chosen court to decide on its jurisdiction, regardless of whether it is first or second seised.[52] Any other court has to stay proceedings until the chosen court has established, or in case the agreement is invalid, declined jurisdiction. Moreover, the Proposal introduces a harmonised conflict of

[48] This has the disadvantage of permitting parallel proceeedings leading to irreconcilable judgments.

[49] See 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, 21.04.2009, COM (2009) 175 final.

[50] The Union acceded to the Hague Conference on Private International Law on 3 April 2007.

[51] Proposal for a Council Decision on the signing by the European Community of the Convention on Choice-of-Court Agreements, 05.09.2008, COM (2008) 538 final.

[52] Proposed recast Regulation, art 32 para 2.

law rule on the substantive validity of jurisdiction agreements intended to ensure a similar outcome, whichever court is seised. The proposed new Article 23(1) provides that if the parties have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, 'unless the agreement is null and void as to its substance under the law of that Member State.'

It is also worth noting that the application of the proposed new Article 23 will no longer be dependent on one or more of the parties being domiciled in a Member State. Thus, even if two parties not domiciled in a Member State have agreed that the courts of a Member State are to have jurisdiction to settle disputes, that court will have jurisdiction to hear the dispute by virtue of Article 23.

Improving the relationship between the Regulation and arbitration

A further amendment designed to address the third perceived shortcoming of the Regulation in the jurisdictional sphere relates to the interface between arbitration and litigation. Arbitration is currently excluded from the scope of the Regulation.[53] In its 2009 Report, the Commission notes that even though the 1958 New York Convention is generally perceived to operate satisfactorily, problems arise in the event of parallel court and arbitration proceedings concerning the validity of an arbitration clause, particularly where the validity of the clause is upheld by the arbitral tribunal but not by the court.[54] Indeed, by challenging an arbitration agreement before a court, a party may undermine the arbitration agreement and create a situation of parallel proceedings which may lead to irreconcilable resolutions of the dispute. The Commission notes that this leads to additional costs and delays and creates incentives for abusive litigation tactics.[55]

[53] Brussels I Regulation, art 1 para 2(d). The rationale behind the exclusion is that the recognition and enforcement of arbitral agreements and awards is governed by the 1958 New York Convention to which all Member States are parties.

[54] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 21.04.2009, COM (2009) 174 final.

[55] Proposed recast Regulation, Explanatory Memorandum, para 1.2.

Throughout the consultation preceding the Proposal, views diverged on the best way forward insofar as arbitration is concerned. Most stakeholders expressed general satisfaction with the operation of the 1958 New York Convention and felt that its operation should not be undermined by Union action, though it was also suggested that arbitration agreements should be actively promoted by avoiding parallel proceedings and abusive litigation tactics.

The Proposal addresses the issue by obliging a court seised of a dispute to stay proceedings if its jurisdiction is contested on the basis of an arbitration agreement and an arbitral tribunal is already seised of the case, or court proceedings relating to the arbitration agreement have been commenced in the Member State of the seat of the arbitration. The first paragraph of proposed Article 29(4) states that

> Where the agreed or designated seat of an arbitration is in a Member State, the courts of another Member State whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the courts of the Member State where the seat of the arbitration is located or the arbitral tribunal have been seised of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement.

The arbitral tribunal and the courts of the Member State where the seat of the arbitration is located are considered to be most suited to determine the question of the existence, validity or effects of an arbitration agreement. Thus where proceedings on such a question are brought before such fora, any other court must stay proceedings, and it may also decline jurisdiction if its national law so prescribes in such a situation.[56] Where the existence, validity or effects of the arbitration agreement is or are established, the court seised is to decline jurisdiction.[57]

Provisional and protective measures

Provisional, including protective measures, are currently dealt with under Article 31 of the Regulation and the other rules supplied by the European Court of Justice in its case law. In Cases C-391/95 *Van Uden*[58] and C-99/96 *Mietz*,[59]

[56] Ibid art. 29 para 4 point 2.

[57] Ibid art. 29 para 4 point 3.

[58] [1998] ECR I-7091.

for example, the Court set out the conditions for the issuance of provisional measures ordered by a court which does not have jurisdiction on the substance of the matter.

The Proposal attempts to clarify the notion of provisional, including protective measures. Such measures include protective orders aimed at obtaining information or preserving evidence,[60] thus covering search and seizure orders as referred to in Articles 6 and 7 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.[61] However, they do not include measures which are not of a protective nature, such as measures ordering the hearing of a witness for the purpose of enabling the applicant to decide whether to file a case or not.[62]

The Proposal provides for the free circulation of provisional and protective measures which have been granted by a court having jurisdiction on the substance of the case,[63] including, subject to certain conditions, measures which have been granted *ex parte*.[64] By contrast, the Proposal prevents the circulation of provisional measures ordered by a court other than the one having jurisdiction on the substance.[65] Given the wide divergence of national law on this issue, the effect of these measures is to be limited to the territory of the Member State where they were granted, thereby preventing the risk of abusive forum shopping. Finally, if proceedings on the substance are pending in one court and another court is asked to issue a provisional measure, the Proposal requires the two courts to cooperate in order to ensure that all circumstances of the case are taken into account when a provisional measure is granted.[66]

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[59] [1999] ECR I-2277.

[60] Proposed recast Regulation, art 2(b).

[61] OJ L157, 30.04.2004/45.

[62] Proposed recast Regulation, preamble, para 22.

[63] Article 35 of the proposed recast Regulation confers jurisdiction on the court having jurisdiction on the substance of the case to issue such measures.

[64] Proposed recast Regulation, art 2(a).

[65] Article 36 of the proposed recast Regulation confers jurisdiction to issue such measures.

[66] Proposed recast Regulation, art 31.

New jurisdictional bases and improving the functioning of existing rules

A further set of amendments is designed to create some new jurisdictional bases and improve the practical functioning of some of the existing jurisdictional rules. The proposed new Article 5(3) creates a forum for claims relating to rights *in rem* or possession in moveable property at the courts for the place where the moveable assets are located. The amendment to Article 18, on the other hand, is intended to give employees the possibility to bring actions against multiple defendants in the employment area under Article 6(1). This is beneficial to employees who wish to bring proceedings against joint employers established in different Member States. Another amendment is the proposed addition of paragraph (b) to Article 22(1) on exclusive jurisdiction which is intended to permit choice of court agreements for disputes concerning the tenancies of premises for professional use. The amendment would allow jurisdiction clauses in agreements for the rent of office space, thus providing some flexibility from the rigid rule concerning tenancies of immovable property under the current Article 22(1) of the Regulation.

The jurisdictional rule under current Article 5(2) for maintenance obligations is deleted by the Proposal, since jurisdiction on maintenance disputes is now regulated by Council Regulation 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.[67] Matters falling with the scope of this Regulation will also be expressly excluded from the scope of the new recast Regulation.[68]

The Proposal also aims at improving the current *lis pendens* rule in Article 27 by prescribing a six month time limit for the court first seised to decide on its jurisdiction. This will strongly dilute the power of any torpedo action intended to delay the course of justice since, as noted above, the power of the torpedo is achieved from the length of time which judicial proceedings in some Member States are prone to take, even on the issue of jurisdiction alone. Provision is also made for an exchange of information between the courts seised of the same subject-matter.[69] Moreover, the Proposal facilitates the consolidation of

[67] OJ L7, 10.01.2009/1.

[68] Proposed recast Regulation, art 1 para 2(e).

[69] Ibid art. 29 para 2.

related actions, currently regulated by Article 28, by doing away with the requirement that consolidation has to be possible under national law. Finally, it also provides for certain mandatory information to be given to the defendant. In the matters referred to in Sections 3, 4, and 5 of Chapter II, the document instituting the proceedings must contain information for the defendant on his right to contest the jurisdiction of the court and the consequences of entering an appearance. Before assuming jurisdiction, the national court is to ensure that information was provided to the defendant entering an appearance about the legal consequences of not contesting the court's jurisdiction.[70]

Concluding comments

Some of the Commission's proposed amendments in the jurisdictional sphere, such as those intended to enhance the effectiveness of choice of court agreements, the new jurisdictional basis relating to rights *in rem* or possession in moveable property, and the possibility for the parties to agree on a forum for disputes concerning tenancies for professional use, are expected to be welcomed. Others are more controversial, particularly the extension of the scope of the Regulation to disputes against third State defendants, which the Commission considers necessary to ensure that EU citizens and companies have equal access to a court in the Union and hence create a level playing field. Rather surprisingly, other amendments which had been floated at an earlier stage, such as an autonomous definition of domicile for natural persons which had been welcomed by Parliament,[71] did not feature in the Commission's Proposal.

Whether the proposed changes will become law will obviously depend on whether the Commission's Proposal will receive the necessary support from the Union's co-legislators. The Council is likely to be most concerned with the complete erasure of the Member States' national rules of international jurisdiction in disputes falling within the domain of the Regulation. As we have seen, this is the consequence of the Commission's proposed extension of the Regulation to disputes involving defendants domiciled in third States which, if adopted, will lead to a more complete European codification of the rules on international jurisdiction in civil and commercial matters.

[70] Ibid art. 24 para 2.
[71] See Report on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 29.06.2010, 2009/2140(INI).

The European Parliament now has a much stronger role to play than was the case when the Regulation was adopted on 22 December 2000. Back then, Parliament was only consulted, but following the increase in its powers under successive Treaty revision, the adoption of the new Regulation is now subject to the ordinary legislative procedure. The Parliament is likely to insist that some of the recommendations should not have been ignored by the Commission, though the final result will, as is usually the case, be the result of a political compromise.