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Public Hearing on the Review of Council Regulation (EC) No 44/2001
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My comments will be of a general nature and mainly deal with the advisability of reviewing Regulation No. 44/2001, as well as with the criteria to be applied during such a process. Since I consider these aspects to be the most important ones, I will mainly focus on them. Instead, I will put minor emphasis on the details of any changes to the present legislation, also because time limits do not allow technical aspects to be adequately developed.

The first question is whether it would be advisable to proceed with the review of the Regulation. I would say 'yes': some amendments seem in fact to be useful. I do believe, however, that it is important to proceed with great caution. The Regulation is essential for the proper functioning of the internal market. Its importance has been demonstrated and should the Regulation be modified in an inadequate way, it would be highly unfortunate.

Concerning such a risk, I think that we can learn a few lessons from the transformation of the 1968 Convention into Regulation 44/2001. On that occasion, two changes of considerable practical importance were introduced by the Regulation . The *exequatur* procedure was simplified and made more efficient, and Art. 5 (1) was radically changed. While changes in the *exequatur* procedure were a simple and clear solution that turned out to be very sound from a practical point of view, the change in Art. 5 (1) has, instead, turned out – in the unanimous opinion of those practicing law, as well as legal scholars – to be an error.

The latter outcome is extremely serious. It should be kept in mind that Art. 5 (1) is of fundamental importance in the regulatory system, as it is applied whenever contracts are concerned. Among all the articles concerning jurisdiction, it is surely the most used in litigations between firms. Precisely for this reason, today all sides are calling for the modification of the modification to Art. 5, proposing a wide range of corrections. Moreover, the silence of the Commission's Green Paper on this point is perplexing.

On the contrary, it is my opinion that it would not be advisable to reform that provision again, unless the intent were that of returning to the original text of the 1968 Convention. I think so because I foresee the risk of adding further complications on existing ones, and I believe that it would be advisable to look for more satisfactory interpretative solutions. Judges - when necessary referring to scholars' opinions - usually find a way to remedy legislative approximation and inattention. It is enough to recall the infinite series of interpretative problems that all articles of any civil code have raised and will continue to raise. How many thousands of amendments would one of our codes present today, if legislators had intervened, or if they would have done so in reaction to every interpretative problem?

I referred to the *exequatur* and to Art. 5 (1) examples of the 1968 Convention because it seems to me that they suggest a general criterion to be used in the review of the Regulation: according to it, the intervention of the legislator should be limited to the organisation of the system itself, rather than concern the interpretative problems of each article. That type of problem should be left in the hands of those responsible for interpreting legislation, unless the fundamental principles of justice or the essential aims that the legislator seeks to attain have been clearly compromised.

Another general observation that suggests the use of great caution in the review process, concerns the tendency of the European legislator to increase the complexity of private international law, often without any real reason.

I believe it is important to remember some data which cannot easily be contested. I refer to the extraordinary proliferation of rules and their complexity, in a word to the great sophistication that european private international law has reached, while it still is and remains marginal, though essential to all legal systems. In the light of the above, I foresee the danger that the review of Regulation 44/2001 follow the same pattern of complexity: such an outcome does not appear to me to be necessary.

I will not discuss the point concerning the necessity and utility of european private international law. I do, however, feel obliged to note that it constitutes a body of regulations having a degree of technical complexity such that - in many countries, including my own - only sector specialists are familiar with them.

These rules are not part of the knowledge of mean legal practitioners and cannot be understood by them simply by referring to general concepts. The result of this situation is that the European rules are largely ignored, and when one requires a relative amount of security concerning this subject, the assistance of particularly expert counsels is necessary.

I would also like to point out that private international law questions regarding the procedure and the applicable law are only preliminary questions which should be examined before dealing with the merits of the case. It is therefore necessary that these questions be decided upon rapidly, and for this reason it is indispensable that the rules be simple.

Going on to an overall evaluation of the various questions raised in the Green Paper, my impression is that convincing and urgent reasons have not yet emerged that justify modifying the basic principles of the Regulation .

The highly valuable research contained in the preparatory studies of the Green Paper, and the numerous, well-thought-out answers gathered from impacted parties, scholars and professionals, lead me to make the following remarks:

Firstly, the present system functions well, since it is generally applied in a proper way;

Secondly, a large number of the problems that have been pointed out in the studies and comments on the Green Paper belong to the normal interpretative discourse that rises from any legislative text;

Thirdly, none of the problems pointed out has caused a crisis in the functioning of the system to the extent of compromising the basic aims of the Regulation;

Fourthly, both the basic aims of the Regulation as well as the related rules are still valid and in line with the present characteristics and needs of the internal market, even keeping in mind the significant degree of social and economic integration reached by the european people;

Fifthly, perfecting certain aspects of the present legislation is certainly possible, but does not require modification of the principles upon which the system of Regulation 44/2001 is based, as they have been expressed by the European Court of Justice.

As a final comment, I would add a strong call for action: that the European legislator might place the review process in the framework of an overall legislative policy aimed at harmonising the functioning of the national procedural rules, keeping in mind the requirements of the principle of the right to a fair trial. I believe that much remains to be done in this field.

I will now deal with some points proposed in the Green Paper as objects of review.

The first question concerns the abolition of the *exequatur* process.

I believe the answer to that suggestion should be 'no' for at least two reasons.

Firstly, as it has been demonstrated by the experience of the United States, the *exequatur* procedure (or in any case a simplified review procedure of the judgment given in another State) is not itself a significant obstacle to the development of transnational relations. Significant practical reasons do not therefore exist to suppress an institution that has not kept the American States from reaching a level of economic integration superior to ours.

Secondly, the abolition of the *exequatur* procedure would be acceptable if the exercise of jurisdiction were founded, in each and all countries, on uniform rules of substantive and procedural law, and furthermore if it were *de facto* referable to a unitary and sovereign power. Moreover – it should be stressed – said exercise would have to fully comply with the requirements of the right to a fair trial.

This is not presently the situation, and each Member State must assume its individual responsibility in exercising jurisdiction. The principle of individual responsibility of each State in the realisation of jurisdictional power is at the basis of the *Pellegrini* (2001) case tried before the European Court of Human Rights. This judgment, which found Italy responsible for violating the principle of the right to a fair trial (Art. 6 of the European

Convention on Human Rights), represented the unequivocal confirmation of the fact that, in the event that a State grants the enforcement of a judgment delivered by another State, the former is also responsible in the event of any violations of the principle committed by the latter.

According to the Strasbourg Court, the State in which the enforcement of the foreign judgement is sought is obliged to check the contents of the judgment and to refuse to enforce it if the judgment itself, or the procedure according to which it was delivered, does not respect the requirements of the right to a fair trial.

The conclusion that emerges is therefore clear: the conformity of the foreign decision with the right to a fair trial must be checked by the State of enforcement. Therefore, the suppression of the *exequatur* procedure, or of an analogous form of control of the foreign judgment, would expose every Member State of the Union to the risk of possibly being responsible for violations of the right to a fair trial carried out by another member State. Unfortunately, as it has been shown by the Strasbourg Court's decisions, similar violations by member States are not at all infrequent.

Regarding this, the *Kombrach* case demonstrates that the principle of mutual trust between member States cannot be a general rule to be directly applied in concrete cases. I therefore think that the principle according to which the judgment of a Member State must be subjected to check, when enforcement in another member State is sought, should be unerringly observed.

If this is so, then the only remaining question is how the checking procedure should be structured.

The mechanisms set out in Regulation 805/2004, Regulation 2201/2003 (Art. 41-42) and by the recent Regulation 4/2009, are not compatible with the *Pellegrini* judgement, since the duty of checking the foreign judgement falls on the State of enforcement. Consequently, the alternative is whether to maintain an autonomous *ad hoc* proceeding of reviewing foreign judgments, as it is now, or to transfer the control phase directly to the execution proceeding subject to national law.

The latter solution would certainly answers best the need for speed of the procedure, but would require the harmonisation of the internal laws of the Member States in order to permit – in the execution proceeding – checking for non-enforcement grounds deriving from the violation of the right to a fair trial in the State of origin.

Taking into account the complex problems that would rise from the abolition of the present *exequatur* procedure, and in the event of its substitution with a checking procedure in the execution phase, my impression is that such an innovation would result in increased complexity without bringing any real benefit to the system in terms of simplifying the process.

Instead, one could consider improving the efficiency of the current procedure by means of several specific amendments: providing for example the possibility, in derogation to Art. 47 (3), to allow execution provisionally, against the presentation of security. Other improvements of this type are possible (e.g. standard forms for applications for a declaration of enforceability).

The other question on which I would like to briefly comment concerns the difficult relationship of the *lis pendens* rule (Art. 27) with the jurisdiction agreements (Art. 23). The question is whether the *lis pendens* rule should be modified to allow the judge designated by the agreement to decide on the jurisdiction, despite the case having been previously brought before another judge in violation of the agreement.

I will not comment on the examination of the various solutions proposed, each of which has its own drawbacks, and instead will only make some general remarks.

The premise of the hypotheses in favour of the supremacy of the agreement is that it creates a sacred bond to be respected at any cost. It is a super-agreement that nothing can and should question the validity of, unless the designated judge deems it to be invalid.

I would like to point out that this dogma does not hold up when we are talking about a negotiation process between companies in a context of differentiated contractual power. Between a large corporation and a small firm, the imbalance when contracting the

prorogation of jurisdiction does not even require demonstrating. It is a question upon which it would be wise to reflect.

This is not – though – the essential point. In reality, the superiority that many attribute to the prorogation agreement concerns judicial power, not only the parties involved. The legal effect of the pact falls upon the judges. Now, should the pact be invalid, as it happens, why can only the designated judge declare it to be so? Why should an ineffective pact bind all judges to silence, save one? No doubt that unfair trial tactics, better known as *torpedo actions*, should be fought effectively.

I do not believe, however, that for this reason we should alter the equilibrium of the legal system, which is founded on the priority of action, whatever the action may be. Unfair practices should be sanctioned and it is necessary that the judges investigate appropriate instruments to do so. I think that this is possible. It could be said that the judge who decides on clearly abusive cases, initiated only to block the other party, should be responsible for violation of the principle of loyal cooperation laid down in Art. 10 of the EC treaty. The pact concerns judges and it is up to them to guarantee the efficacy of the agreement. I believe that priority should be assigned to jurisprudence, and to its capacity to evolve, and not to the prorogation agreement.