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**JUR 267
JUSTCIV 80
CODEC 800**

OPINION OF THE LEGAL SERVICE

Subject : Proposal for a Regulation of the European Parliament and the Council creating a European order for payment procedure¹
 – Legal basis

INTRODUCTION

1. During its meeting of 6 May 2004, the Committee on Civil Law Matters requested an opinion of the Council Legal Service on the legal basis of the above proposal which the Commission has founded on Article 61 (c) of the EC Treaty. The present opinion responds to this request.

THE AIM AND CONTENT OF THE PROPOSAL

2. According to the case-law of the Court of Justice, the choice of the legal basis for a measure must be based on objective factors which are amenable to judicial review; those factors include in particular the aim and the content of the measure.²

¹ Doc. 7615/04 of 26.3.2004, JUSTCIV 48 CODEC 411.

² Cf., most recently, Case C-338/01, Commission v. Council, judgment of 29.4.2004, para. 54 (not yet reported in the ECR).

3. The aim of the proposal is to facilitate the collection of civil law pecuniary claims which are likely to remain uncontested. The recitals of the proposal place this aim in the larger context of the establishment of an area of freedom, security and justice and, in particular, the objective to facilitate the smooth judicial cooperation and an enhanced access to law.³ Furthermore, the recitals refer to the importance for the economic operators to swiftly and efficiently recover outstanding debts over which no legal controversy exists. It is stated that the absence of uniform procedures to this effect could impede access to efficient justice and distort competition within the internal market owing to the disequilibrium with regard to the functioning of the procedural means afforded to creditors in different Member States.⁴
4. As concerns its content, the proposed Regulation would establish a uniform procedure for the collection of uncontested pecuniary claims in civil and commercial matters with the exception of certain matters expressly excluded from its scope (Articles 1 and 2(1) of the proposal). This procedure would not replace or harmonise the existing mechanisms for the recovery of uncontested debts under national law but would constitute an additional option for the creditor (Article 2(2)).
5. Articles 3 to 12 of the proposal set out the main procedural steps relating to the European order for payment as well as its effects. An application for a European order for payment must contain certain information concerning the claim. If the requirements laid down in the proposed Regulation are fulfilled, the court seized shall issue a European payment notification. This notification is served on the defendant. If the defendant lodges a statement of defence within a certain time period, the proceedings shall continue in accordance with the rules of ordinary civil procedure. In the absence of a statement of defence or a statement informing about the payment the court shall deliver a European order for payment. This order is to be served on the defendant. The order is in principle enforceable. If within a certain time period the defendant lodges a statement of opposition to the European order for payment, the proceedings shall continue in accordance with the rules of ordinary civil procedure. For most of the above procedural steps the proposed Regulation provides for standard forms which are set out in the annexes to the Regulation.⁵

³ Cf. recitals 1 to 3.

⁴ Cf. recitals 5 to 7.

⁵ The proposal also contains rules on legal representation, costs, the relationship with national procedural law as well as implementing rules (Articles 13 to 18).

6. It follows from the above that the aim and the content of the proposed Regulation is to establish a uniform procedure for the collection of uncontested pecuniary claims in civil and commercial matters.

ARTICLES 61 (C) AND 67 OF THE EC TREATY

7. Article 61 (c) refers to Article 65 of the EC Treaty according to which recourse to the legal basis of Articles 61 (c) and 67 (1) and (5) of the EC Treaty is possible for :
- measures in the field of judicial cooperation in civil matters having cross-border implications, and
 - insofar as they are necessary for the proper functioning of the internal market.
8. The present opinion examines first the internal market requirement and secondly the cross-border requirement.

The internal market requirement

9. The Council Legal Service has consistently taken the view that the Council has a margin of appreciation in determining whether a measure is necessary for the proper functioning of the internal market within the meaning of Article 65 of the EC Treaty; within this margin, the Council may reasonably conclude that a measure is necessary in the sense of Article 65, if it facilitates the proper functioning of the internal market.⁶
10. The proper functioning of the internal market would be facilitated if the establishment of a European order for payment procedure would help to eliminate obstacles to the free movement of goods, persons, services or capital.

⁶ Cf. in particular the opinion of 11.11.1999, doc. 11907/99 JUR 379 JUSTCIV 145, para. 15; and the opinion of 2.3.2004, doc. 7015/04 JUR 109 JUSTCIV 37, para. 16.

11. At present, the procedures for the collection of pecuniary claims in civil matters which are likely not to be contested are substantially different in the Member States with respect to their requirements and effectiveness.⁷ As the Commission pointed out, the access of economic operators to judicial mechanisms of substantially different performance levels may entail a distortion of competition in the internal market regardless of whether the actors are domiciled in different Member States or in the same Member State.⁸ The Commission referred to a study that demonstrates that the proportion of intentional payment delays is substantially below the Union-wide average in Member States where judgments can be obtained and enforced more quickly, more cheaply and more efficiently.⁹ If some operators have access to efficient and effective procedures for the collection of debts while others do not, there is no level playing field for operators competing in the internal market. The existing disparities in the laws of the Member States could therefore, arguably, put obstacles to the proper functioning of the internal market.¹⁰ Consequently, it can be considered reasonable to regard a situation implying a marked disequilibrium with regard to the efficiency of the procedural means afforded to creditors under different national laws as amounting to a distortion of competition within the internal market. A uniform procedure for a payment order could thus facilitate the proper functioning of the internal market.

⁷ Cf. the Commission's Green paper on a European order for payment and on measures to simplify and speed up small claims litigation, doc. 5347/03 JUSTCIV 3 of 13.1.2003, point 3.1.1.

⁸ Cf. paragraph 2.2.2. of the explanatory memorandum to the proposal.

⁹ Cf. footnote 15 in the Green paper mentioned *supra* (note 7).

¹⁰ It would appear to the Legal Service that the assumption that economic operators acting throughout the Community take such differences in debt collection procedures in account in making their business decisions is a realistic one not only in cross-border situations, whereas this is not the case with respect to considerations relating to the different systems of legal aid (cf. on this latter aspect, Legal Service opinion of 17.4.2002, doc. 7862/02 JUR 143 JUSTCIV 48, paras. 15 and 24 to 26).

12. The Legal Service considers that this conclusion can be reconciled with the Court's judgment of 22 June 1999 in Case C-412/97.¹¹ In this judgment, the Court ruled that Article 34 of the EC Treaty (now, after amendment, Article 29 EC) does not preclude national legislation which excludes recourse to the procedure for obtaining summary payment orders where service on the debtor is to be effected in another Member State of the Community. According to the Court, the possibility that nationals would hesitate, because of these procedural limitations, to sell goods to purchasers established in other Member States was too uncertain and indirect for that national provision to be regarded as liable to hinder trade between Member States.
13. However, in view of the increasing economic integration within the internal market and the procedural problems which economic operators face in collecting debts, as shown by studies launched by the Commission, it is not certain that the Court would come to the same conclusions today. Furthermore, the standard of review in cases relating to restrictive measures adopted by Member States is not necessarily the same as in cases relating to the appreciation of the fulfilment of the conditions for the Community legislator to act with a view to eliminating obstacles to the internal market. While it is true that the mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or to distortion of competition liable to result therefrom is not sufficient to justify recourse to Article 95 of the EC Treaty as a legal basis, this legal basis can be used for measures having as their genuine object the improvement of conditions for the establishment and functioning of the internal market.¹² In this context, the Court recently stated that recourse to Article 95 does not presuppose the existence of an actual link with free movement between Member States in every situation referred to by the measure founded on that basis.¹³ The Legal Service submits that the standard for appreciating the scope of the internal market requirement in Article 65 is at least not more stringent than under Article 95, and that this standard is met by the present proposal for the reasons stated in paragraph 11 above.

¹¹ ED Srl v. Fenocchio, [1999] ECR I-3845, paras. 11 and 12.

¹² Cf. Case C-376/98, Germany v. Parliament and Council, [2000] ECR I-8419, para. 84.

¹³ Cf. Case 101/01, Bodil Lindqvist, judgment of 6.11.2003, para. 40 (not yet reported in the ECR).

14. The Legal Service is therefore of the opinion that a Community measure establishing an order for payment procedure would facilitate the proper functioning of the internal market and can validly be considered by the Council to be necessary within the meaning of Article 65 of the EC Treaty.

The cross-border requirement

15. In the second place, it is necessary to examine whether the measure deals with cooperation and has cross-border implications within the meaning of Article 65 of the EC Treaty. The terms "cooperation" and "cross-border implications" have been interpreted by the Legal Service in a wide sense.¹⁴ Certain rules aiming at the harmonisation of the Member States' rules on civil procedure, including the rules applicable to internal situations, can be based on Articles 61 (c) and 67 of the EC Treaty if these rules are ancillary in the sense that they are necessary to achieve the principal aim of a measure which consists in regulating a cross-border situation. However, the fact that any internal litigation could, in theory, develop cross-border consequences later on is not sufficient in this respect. The cross-border element must be a real and present one.
16. While the proposed Regulation would apply to cross-border and purely internal situations, it is common ground that the large majority of cases falling under the proposed measure would relate to purely internal situations.
17. Furthermore, it is difficult to argue that the inclusion within the scope of the Regulation of such internal situations would be necessary in order to achieve the objective of enhancing the cross-border application of the measure.
18. Finally, the fact that the measure can be considered to be necessary for the proper functioning of the internal market is not in itself sufficient in this respect. The cross-border requirement is indeed a separate and additional condition for the application of the legal basis of Articles 61 (c) and 67.

¹⁴ Cf. opinion of 17.4.2002 (*supra*, note 10), paras. 8 *et seq.*

19. The Legal Service is therefore of the opinion that the proposal cannot be founded on Articles 61 (c) and 67 of the EC Treaty, to the extent that it is not limited to cases having cross-border implications. By contrast, this legal basis would be appropriate to the extent that a revised text of the proposal would be limited to cases having cross-border implications.

ARTICLE 95 OF THE EC TREATY

20. Article 95 of the EC Treaty empowers the Council, acting in accordance with the co-decision procedure and after consulting the Economic and Social Committee, to adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States, which have as their object the establishment and functioning of the internal market, provided that they do not fall under the exceptions mentioned in Article 95 (2).
21. The first question is whether the proposed Regulation, which would establish a new uniform procedure in civil matters, is a measure for the approximation of provisions laid down by the rules in Member States.
22. The Court of Justice has addressed the concept of approximation in particular with respect to intellectual property rights. According to its case law, the Community can harmonise national law in this area on the basis of Article 95 of the EC Treaty, but this legal basis cannot be used for the creation of new rights superimposed upon national rights.¹⁵

¹⁵ Opinion 1/94, [1994] ECR I-5267, para. 59; Case C-350/92, Spain v. Council, [1995] ECR, I-1985, para. 23; Case C-377/98, Netherlands v. Council, [2001] ECR, I-7079, para. 24. The Court also confirmed that in such cases, the measure may be based on Article 308 EC if the other conditions of this Article are fulfilled.

23. The Legal Service has taken the position that approximation within the meaning of Article 95 EC may take the form either of a Directive providing for complete, maximum, minimum or partial harmonisation of national rules or of a Regulation automatically replacing those rules.¹⁶ By contrast, measures which neither approximate national legal systems nor facilitate approximation of national legal systems but create a body of Community regulations and centralised procedures go beyond the bounds of Article 95 of the EC Treaty.¹⁷
24. The proposed measure does not provide for centralised procedures at Community level, but for a uniform procedure to be applied by the Member States' authorities. However, it shares with the measures creating centralised Community procedures the feature that it does not in any way modify existing national procedures, but creates a new Community-wide procedure which is superimposed on the procedures created by legislation of the Member States.¹⁸
25. In the light of the above, the Legal Service is of the opinion that the proposed measure would not bring about an approximation of the legislation of the Member States and that it therefore cannot be founded on Article 95 of the EC Treaty. That opinion is subject to the outcome of a current case before the Court.¹⁹

¹⁶ Opinion of the Legal Service of 4.7.2002, doc. 10645/02 JUR 249, para. 9.

¹⁷ Cf. opinion of 4.7.2002, doc. 10673/02 JUR 252, para. 16, and the references in this opinion to earlier opinions.

¹⁸ In its opinion of 30.11.1998 (doc. 13533/98 JUR 430, para. 8) on the draft Directive combating late payment in commercial transactions, the Legal Service stated that Article 100a of the EC Treaty (now Article 95) cannot be used for the creation of new uniform legal procedures according to which the Member States would be required to introduce accelerated legal recovery procedures for undisputed debts and ensure that simplified legal procedures are in place for the discharge of small debts. But see also *infra*, points 30 et seq. on another aspect of this opinion.

¹⁹ The legislative practice of the EC was arguably not always consistent with this approach and an issue of this type is at present pending before the Court of Justice in Case C-66/04, UK v European Parliament and Council, relating to Regulation No 2065/2003 of 10.11.2003 on smoke flavourings used or intended for use in or on foods.

ARTICLE 308 OF THE EC TREATY

26. Article 308 of the EC Treaty is designed to fill the gap where no specific Treaty provisions confer on the Community institutions powers to act if such powers appear none the less necessary to enable the Community to carry out its functions with a view to obtaining one of the objectives laid down by the Treaty. That provision cannot serve for widening the scope of Community powers beyond the general framework of the Treaty and, in particular, the provisions defining the tasks and activities of the Community.²⁰

27. Invoking Article 308 thus depends on three conditions being fulfilled:

- no other provision of the Treaty provides the necessary powers to adopt the measure;
- the aim of the measure must be to attain, in the course of the operation of the common market, one of the objectives of the Community; and
- the measure is necessary to attain this objective.

Absence of specific powers in the Treaty

28. It has been demonstrated above²¹ that Articles 61 (c) and 67 of the EC Treaty would provide a legal basis for the adoption of the proposed measure if and to the extent that the measure was limited to cases having cross-border limitations. To the extent that this was not the case, neither Articles 61 (c) and 67, nor Article 95 nor, indeed, any other specific provision of the EC Treaty would provide an appropriate legal basis for the proposed measure. To this extent, the first condition for recourse to Article 308 of the the EC Treaty is therefore fulfilled.

²⁰ Cf. Opinion 2/94 of the Court of Justice, [1996] ECR I-1759 at para. 30.

²¹ Paragraph 19, *supra*.

The objective of the Treaty

29. It has also been demonstrated above²² that the proposed measure can be considered to pursue the objective of eliminating obstacles to the functioning of the internal market, which is among the objectives of the Community set out in Article 3 (1) of the EC Treaty.
30. It is true that the Legal Service stated in its opinion of 30 November 1998²³ that the creation of uniform legal procedures in civil matters which would require Member States to introduce accelerated legal recovery procedures for undisputed debts and ensure that simplified legal procedures are in place for the discharge of small debts does not pursue any objective of the Treaty.
31. However, the Legal Service would no longer adhere to the conclusion on this aspect of its opinion of 30 November 1998. The Legal Service has more recently reaffirmed that the mere fact that a measure is concerned with the approximation of laws relating to the laws on civil procedure in the Member States is, in principle, not an obstacle to founding such a measure on a legal basis pursuing the internal market objective.²⁴ Furthermore, the Community's legislative practice shows that the Community legislator has had recourse to Article 95 for measures relating to the approximation of the laws on civil procedures.²⁵ As these measures complied with the approximation requirement and pursued the internal market objective under Article 95 of the EC Treaty, they were appropriately founded on this legal basis.

²² Paragraph 14, *supra*.

²³ Doc. 13533/98 JUR 430, at point 8.

²⁴ Opinion of 17.4.2002, *supra* note 10, para. 21.

²⁵ Cf., e.g., Directive 98/27/EC on injunctions for the protection of consumers' interests (OJ L 166 of 11.6.1998, p. 51); Art. 5 of Directive 2000/35/EC combating late payment in commercial transactions (OJ L 200 of 8.8.2000, p. 35).

32. While the measure under examination does not fulfil the approximation requirement and therefore cannot be founded on Article 95 of the EC Treaty, it can be considered to pursue the internal market objective. If the recitals to the measure were modified accordingly, the measure could therefore be considered to aim at attaining one of the objectives of the Community, as required by Article 308 of the EC Treaty.

Necessity

33. The Legal Service has always taken the view that assessing the necessity of Community action founded on Article 308 of the EC Treaty, which involves political, economic and technical criteria rather than legal criteria, falls within the discretionary powers of the Community institutions.²⁶

34. It is therefore for the Community legislator to assess the necessity of the measure. If the legislator considers this measure to be necessary within the meaning of Article 308 of the EC Treaty, this Article would provide the appropriate legal basis for the adoption of the proposed Regulation creating a European order for payment procedures, to the extent that it concerns situations which do not have cross-border implications.

RELATIONSHIP BETWEEN THE LEGAL BASES OF ARTICLE 61 (C) AND ARTICLE 308 OF THE EC TREATY

35. It follows from the above that the proposed measure falls within the legal basis of Articles 61 (c) and 67 EC to the extent that it concerns situations having cross-border implications and the legal basis of Article 308 to the extent that it concerns situations which do not have such implications.

²⁶ Cf. Legal Service opinion of 15.7.2002, doc. 11010/01 JUR 281 SOC 354, para. 9; opinion of 31.1.2003 doc. 5599/03 JUR 25 JUSTCIV 8, para. 30.

36. The Court of Justice has ruled, most recently in its judgment of 29 April 2004 in Case C-338/01,²⁷ that, if a measure pursues a twofold purpose or if it has a twofold component, and if one of these is identifiable as the main or predominant purpose or component whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component. By way of exception, if it is established that the measure simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure must be founded on the corresponding legal bases. However, no dual legal basis is possible where the procedures laid down for each legal basis are incompatible with each other.
37. In the present case recourse to the dual legal basis of Articles 61 (c) and 308 is excluded because these two legal bases are incompatible. In particular, the Community legislator could not adopt a legislative act based both on a provision under Title IV Part Three of the EC Treaty (such as Article 61 (c)) and on an article figuring in another title of the Treaty (such as Article 308), because of the specific procedural and institutional rules applying to Title IV, in particular the Protocol on the position of Denmark.²⁸
38. It could be argued that the measure has a twofold component and that the component relating to internal situations is the main or predominant component whereas the component relating to cross-border situations is merely incidental. In such circumstances, the measure could in principle, according to the case law cited above (paragraph 36), be based on a single legal basis, namely Article 308 of the EC Treaty which is required by the main or predominant component.
39. The Legal Service doubts, however, that this case law can be applied in a situation, such as the present one, where the main component of a measure requires recourse to Article 308. In view of the subsidiary character of this legal basis, it would not be possible to extend its scope of application to include components of a measure for which a specific legal basis, such as Articles 61 (c) and 67, exists in the Treaty.

²⁷ *Supra*, note 2, para. 55 to 57.

²⁸ Cf. Opinion of the Council Legal Service of 8.2.2002, doc. 6072/02 JUR 61 ASILE 7, at point 11.

40. For these reasons, the Community legislator could consider splitting the proposal into one measure which would create a European order for payment procedure for cross-border situations and another measure which would create a European order for payment procedure for internal situations. In this case, the first measure should be founded on Articles 61 (c) and 67 of the EC Treaty, the second measure on Article 308 of the EC Treaty.

CONCLUSIONS

41. In conclusion, the Legal Service is of the opinion that the proposed measure could be split into two: one measure which would create a European order for payment procedure applying to cross-border situations and another measure which would create such a procedure applying to internal situations. In this case, the first measure should be founded on Articles 61 (c) and 67 of the EC Treaty, the second measure on Article 308 of the EC Treaty.
