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INFORMATION NOTE

from : General Secretariat of the Council
to: Committee on Civil Law Matters (General Questions)

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SURE 19

Subject : Questions relating to judicial co-operation in civil matters examined in other
Community draft instruments

I. INTRODUCTION

1. At its meeting on 10 March 1999 Coreper entrusted the Committee on Civil Law Matters with the task of ensuring coherence in European Community action in civil law matters, in particular those covered by Articles 65 and 293 of the EC Treaty.¹

¹ 6166/2/99 REV 2 CK4: "This Committee deals with specific topics and also ensures coherence in EU action in civil law matters, in particular those covered by Articles 65 and 293 of the TEC. The Committee may also advise on questions concerning judicial cooperation in civil matters arising in other areas of the EC Treaty, such as provisions specifying the competent court and questions of applicable law where Community instruments are concerned."

2. The Committee can also advise on questions relating to judicial co-operation in civil matters which arise in other areas of the EC Treaty.
3. In the framework of this mandate, the Committee on Civil Law Matters has prepared a number of opinions¹ to other working parties and to Coreper, emphasising the need for Community instruments in other areas to be consistent with the rules in the area of judicial co-operation in civil matters.
4. The purpose of this document is to provide an update on developments as of 6 February 2009 with regard to instruments or draft instruments containing provisions related to certain matters covered by legislative acts in the area of judicial cooperation in civil matters, in particular:
 - (a) the Directive on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts (further referred to as the Timeshare Directive),
 - (b) the draft Directive on the taking-up and pursuit of the business of insurance and reinsurance (further referred to as the draft Solvency II Directive),
 - (c) the draft Directive on consumer rights (further referred to as the draft Consumer Rights Directive),
 - (d) the draft Agreement for a European and Community Patents Court (further referred to as the draft Patent Court Agreement)
 - (e) the draft Anti-Counterfeiting Trade Agreement and
 - (f) the Green Paper on Consumer Collective Redress.
5. At its meeting on 20 February 2009 the Committee on Civil Law Matters (General Questions) is invited to take note of the information in points II to VII and to examine whether follow-up is needed on any of the items.

¹ See for example 7438/08 JUSTCIV 48, CODEC 343, CONSOM 32 (timeshare), 12874/06 JUSTCIV 191 EF 32 ECOFIN 291 CONSOM 78 CRIMORG 137 CODEC 919 (payment services), 8299/06 JUSTCIV 98 CONSOM 21 CODEC 334 (consumer credit), 12655/04 JUSTCIV 127 COMPET 152 SOC 423 CODEC 1032 (services), 5668/04 JUSTCIV 13 CONSOM 5 MI 19 CODEC 106 (unfair commercial practices).

II. DIRECTIVE ON CERTAIN ASPECTS OF TIMESHARE, LONG-TERM HOLIDAY PRODUCTS, RESALE AND EXCHANGE

6. On 8 June 2007 the Commission submitted a proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange.¹
7. The Committee on Civil Law Matters (General Questions) prepared an opinion on the draft Timeshare Directive² that was sent to the Working Party on Consumer Protection and Information. The Working Party took the opinion of the Committee into account in the discussions of Article 12 (former Article 8).
8. At the end of 2008 the Council and the European Parliament reached agreement at first reading and the Directive was published in the Official Journal on 3 February 2009.³
9. The Directive contains recitals (17) and (18) and Article 12 which are of relevance for judicial cooperation in civil law matters. These provisions are reproduced in Annex I.

¹ 10686/07 CONSOM 82 JUSTCIV 168 CODEC 657

² 7438/08 JUSTCIV 48 CODEC 343 CONSOM 32.

³ Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts.

III. THE DRAFT DIRECTIVE ON THE TAKING-UP AND PURSUIT OF THE BUSINESS OF INSURANCE AND REINSURANCE

10. On 21 April 2008 the Commission adopted an amended proposal for a Directive of the European Parliament and of the Council on the taking-up and pursuit of the business of insurance and reinsurance.¹ This proposal aims to recast the existing 13 Directives in the area of life and non-life insurance, reinsurance, insurance groups and winding-up into a single legal instrument.

11. At the end of November 2008 the Council confirmed its general approach on the basis of a compromise text prepared by the Presidency² with a view to a possible first reading agreement with the European Parliament.

12. Since this proposal could have implications for instruments in the area of judicial cooperation in civil matters (in particular the Rome I Regulation), the Committee should follow developments on this file. Some of the provisions dealing with applicable law issues are reproduced in Annex II.

¹ 6996/1/08 REV 1 SURE 8 ECOFIN 92 CODEC 272

² 16237/08 SURE 33 ECOFIN 560 CODEC 1645 + COR 1

IV. THE DRAFT DIRECTIVE ON CONSUMER RIGHTS¹

13. The Commission submitted on 8 October 2008 a proposal for a Directive of the European Parliament and of the Council on consumer rights.²
14. The proposal is a result of the review of the consumer acquis which covers a number of Directives on consumer protection. The proposal aims at revising Directive 85/577/EEC on contracts negotiated away from business premises, Directive 93/13/EEC on unfair terms in consumer contracts, Directive 97/7/EC on distance contracts and Directive 1999/44/EC on consumer sales and guarantees. The proposal merges these four Directives into a single horizontal instrument regulating the common aspects in a systematic fashion, simplifying and updating the existing rules, removing inconsistencies and closing gaps.
15. The objective of the proposal is to contribute to the better functioning of the business-to-consumer internal market by enhancing consumer confidence in the internal market and reducing business reluctance to trade cross-border. This overall objective should be attained by decreasing the fragmentation, tightening up the regulatory framework and providing consumers with a high common level of consumer protection and adequate information about their rights and how to exercise them.
16. The proposal moves away from the minimum harmonisation approach followed in the four existing Directives (i.e. Member States may maintain or adopt stricter national rules than those laid down in the Directive) to embrace a full harmonisation approach (i.e. Member States cannot maintain or adopt provisions diverging from those laid down in the Directive).

¹ As agreed in 13467/07 JUSTCIV 251 COMPET 271 CONSOM 114 EF 60 ECOFIN 376 SOC 352 MI 231 ETS 18 the Committee on Civil Law Matters will follow the development of aspects relating to contractual law in the area of civil and commercial matters examined in other Community draft instruments.

² 14183/08 CONSOM 140 JUSTCIV 220 CODEC 1315

17. Recital 10 provides that “[t]he provisions of this Directive should be without prejudice to Regulation (EC) No 593/2008 of the European Parliament and of the Council applicable to contractual obligations (Rome I)¹”.

18. Work on this draft Directive will be followed in the context of the discussions on the Common Frame of Reference ("CFR") since the Council has agreed that the CFR should include consumer contracts and that particular attention should be paid to the consistency between the CFR and the Directive on consumer rights² taking into account that the Consumer Rights Directive is a legal act addressed to the Member States whereas the CFR should be a set of non-binding guidelines to be used by the law-makers at Community level.³

V. THE DRAFT PATENT COURT AGREEMENT⁴

19. On 4 April 2007 the Commission presented a communication on enhancing the patent system in Europe.⁵ Following this communication, the Working Party on Intellectual Property (Patents) has been discussing the possibilities of establishing a new, unified patent litigation system in the European Union applicable to both the European patents and future Community patents.

20. At the end of 2008 the Competitiveness Council took note of a progress report on the proposal for a Regulation on the Community Patent and the Draft Patent Court Agreement and instructed its preparatory bodies to continue work on the patent litigation system and the Community patent with a view to finding solutions and reaching agreement in both areas as soon as possible.

¹ OJ L 177, 4.7.2008, p. 6.

² 15306/08 JUSTCIV 236 CONSOM 167

³ 8286/08 JUSTCIV 68 CONSOM 39

⁴ See also 13271/06 ADD 1 JUSTCIV 207 COMPET 250 CONSOM 86 CRIMORG 145 EF 37 ECOFIN 308 SOC 429 MI 168 ETS 22 PI 76 COUR 63 JUR 468

⁵ 8302/07 PI 11

21. The Draft Patent Court Agreement establishes a system for the settlement of disputes related *inter alia* to the infringement and validity of European and future Community patents.
22. Since this proposal could have implications for instruments in the area of judicial cooperation in civil matters (in particular the Brussels I Regulation), the Committee should follow developments on this file.

VI. THE DRAFT ANTI-COUNTERFEITING TRADE AGREEMENT

23. Since 2007, four negotiation rounds have taken place on an Anti-Counterfeiting Trade Agreement. The last one was held in Paris in December 2008 and should be followed by a round scheduled in March 2009 in Morocco.
24. This agreement should cover mainly the following aspects:
- (a) general provisions and definitions,
 - (b) institutional issues,
 - (c) border measures,
 - (d) international cooperation,
 - (e) Internet,
 - (f) criminal enforcement, and
 - (g) civil enforcement.
25. As regards civil enforcement issues, the Community endeavours to reach an agreement which would provide added value to the Agreement on Trade-Related Aspects of Intellectual Property Rights and which would follow the logics of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

26. In particular the Community's objectives are:

- to ensure that the text applies to every type of intellectual property rights;
- to impose compensatory damages rather than punitive damages; and
- to ensure that right holders may apply for an injunction against intermediaries.

27. The Committee on Civil Law Matters should keep the negotiations on this Agreement under consideration, in particular as regards its aspects relating to civil enforcement.

VII. THE GREEN PAPER ON CONSUMER COLLECTIVE REDRESS

28. The Commission submitted on 1 December 2008 a Green Paper on Consumer Collective Redress.¹ This paper discusses the different options for consumer collective redress at EU level and launches a discussion on the way forward.

29. The Committee on Civil Law Matters should keep the matter under consideration.

¹ COM (2008) 794 final, 16658/08 CONSOM 205 JUSTCIV 258 MI 512

Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts

Recitals

- (17) Consumers should not be deprived of the protection granted by this Directive where the law applicable to the contract is that of a Member State. The law applicable to a contract should be determined in accordance with the Community rules on private international law, in particular Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)¹⁶. Under that Regulation, the law of a third country may be applicable, in particular where consumers are targeted by traders whilst on holiday in a country other than their country of residence. Given that such commercial practices are common in the area covered by this Directive and that the contracts involve considerable amounts of money, an additional safeguard should be provided in certain specific situations, in particular where the courts of any Member State have jurisdiction over the contract, to ensure that the consumer is not deprived of the protection granted by this Directive. This concept reflects the particular needs of consumer protection arising from the typical complexity, long-term nature and financial relevance of the contracts falling within the scope of this Directive.
- (18) It should be determined in accordance with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters¹⁷ which courts have jurisdiction in proceedings which have as their object matters covered by this Directive.

¹⁶ OJ L 177, 4.7.2008, p. 6.

¹⁷ OJ L 12, 16.1.2001, p. 1.

Article 12

Imperative nature of the Directive and application in international cases

1. Member States shall ensure that, where the law applicable to the contract is the law of a Member State, consumers may not waive the rights conferred on them by this Directive.
2. Where the applicable law is that of a third country, consumers shall not be deprived of the protection granted by this Directive, as implemented in the Member State of the forum if:
 - any of the immovable properties concerned is situated within the territory of a Member State; or
 - in the case of a contract not directly related to immovable property, the trader pursues commercial or professional activities in a Member State or, by any means, directs such activities to a Member State and the contract falls within the scope of such activities.

Proposal for a Directive of the European Parliament and of the Council on the taking-up and pursuit of the business of insurance and reinsurance

Recitals:

- (60) Whereas those Member States not subject to the application of Regulation No 593/2008/EC should apply the provisions of that Regulation in order to determine the law applicable to contracts of insurance falling within the scope of Article 7 of the Regulation.

CHAPTER I - APPLICABLE LAW AND CONDITIONS OF DIRECT INSURANCE CONTRACTS

SECTION 1 - APPLICABLE LAW

Article 176
Applicable Law

Any Member State not subject to the application of Regulation No 593/2008/EC shall apply the provisions of that Regulation in order to determine the law applicable to insurance contracts falling within the scope of Article 7 of that Regulation.

Article 293
Protection of third-party purchasers

The following law shall be applicable where, by an act concluded after the adoption of a reorganisation measure or the opening of winding-up proceedings, an insurance undertaking disposes, for consideration, of any of the following:

- (1) in the case of an immovable asset, the law of the Member State in whose territory the immovable asset is localised;
- (2) in the case of a ship or an aircraft subject to registration in a public register, the law of the Member State under whose authority the register is kept;
- (3) in the case of transferable or other securities whose existence or transfer presupposes entry in a register or account laid down by law or which are placed in a central deposit system governed by the law of a Member State, the law of the Member State under whose authority the register, account or system is kept.
