



**COUNCIL OF
THE EUROPEAN UNION**

**Brussels, 29 June 2011 (05.07)
(OR. en,es)**

**Interinstitutional File:
2010/0383 (COD)**

**9474/11
ADD 16**

LIMITE

**JUSTCIV 106
CODEC 700**

NOTE

from: Spanish delegation

to: Working Party on Civil Law Matters (Brussels I)

No. Cion prop.: 18101/10 JUSTCIV 239 CODEC 1587

Subject: 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)

– Comments from the Spanish delegation

The Spanish delegation welcomes the opportunity to work with the other delegations, the GSC and the Commission to improve and clarify the proposal for recasting Regulation (EC) No 44/2001 which is currently in force.

As we said at the first meeting, the proposal submitted by the Commission enables us to make comments on the wording of some rules, without proposing that any chapter or section be changed or deleted.

Our remarks are based on concrete suggestions from a practical viewpoint, concerning some articles of the text under discussion with the aim of retaining the wording whenever advisable and improving it when necessary. Each suggestion is accompanied by an explanatory note.

Finally, the Spanish delegation points out that the suggestions and remarks made in this document are of a preliminary nature because the internal consultation process has not yet been completed and Spain's final position could therefore change.

N.B.:

- The exact wording of the articles of the proposal is shown in *italics*.
- Spain's suggestions are inserted in **bold** type.
- Deletions suggested by Spain are indicated by ~~strikeout~~.

- **Article 1(2)(d)**: *"arbitration, including judgments concerning the recognition and enforcement of arbitral awards, save as provided for in Articles 29, paragraph 4 and 33, paragraph 3;"*

Reason: It is necessary to draft this article more precisely, mentioning judicial decisions concerning arbitration so that they are excluded. This is in accordance with the ECJ judgment of 25 July 1991 (C-190/89) and that of 17 November 1998 (C-391/95) because the type of law which safeguards judicial proceedings concerning recognition or enforcement is clearly arbitral.

- **Article 2(a)**: *"judgment' means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court."*

Reason: The existing Article 32 is very clear and does not give rise to any doubt about the meaning of "judgment". We would like to have the same clarity in the new "Brussels I" Regulation.

- **Article 2(c)**: *"court' shall include any court or tribunal as well as any public authorities with powers equivalent to judicial powers that are designated by a Member State as having jurisdiction in the matters falling within the scope of this Regulation."*

Reason: It is considered necessary to specify the judicial nature of the court or the public authority in accordance with Article 2(2) of Regulation No 4/2009.

- **Article 4(2)**: It would be more practical to reverse the rule laid down in the proposal:

*"Persons ~~not domiciled in any of the Member States~~ a **third State** 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."*

Reason: In practice, it is easier to prove residence in a third State than non-residence in any of the 27 EU Member States.

- **Article 5**: Remarks refer to paragraphs 1 and 3:

1. *"The following courts **of the Member States** may ~~shall~~ have jurisdiction"*

Reason: As this is a special forum, the imperative "shall" may lead to ambiguities with regard to the exclusive jurisdiction laid down in Article 22. "**May have**" indicates more clearly the provision's optional nature. The indication "**of the Member States**" makes it clear that no rules applicable to third States are being laid down.

3. *"as regards rights in rem or possession in moveable property, the courts for the place where the property is situated, **provided that the claimant has requested provisional measures concerning that property either by means of the claim or previously**"*

Reason: The jurisdiction which has been laid down can be avoided easily by changing the place of the property. It would therefore be more practical to guarantee the effectiveness of this forum by requiring that the claimant request provisional measures concerning the property in question either at the same time or prior to the claim.

- **Article 6(1)**: We would add two exceptions to this rule:

*"where he is domiciled in a Member State and is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings, **unless**:*

- (a) unless he is sued in the court of a Member State which could not reasonably be foreseen, or*
- (b) proceedings were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;"*

Reason: The possibility of fraudulent proceedings could be limited by establishing cases in which consolidation can be contested by the defendant.

Paragraph (a) of our remarks is in accordance with the principles laid down in recitals 12 and 13: "The rules of jurisdiction should be highly predictable" and "the existence of a close link should ensure legal certainty avoiding that the defendant is sued before a court of a Member State which was not reasonably foreseeable for him".

Paragraph (b) enables a court to judge whether the applicant's aim is fraudulent in bringing proceedings before it with the sole purpose of avoiding the court which would normally have been competent in his case.

- **Article 22**: The remarks refer to paragraph 1(a) and (b):

(a): *"in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State, ~~either at the moment of conclusion of the agreement or at the moment of the institution of proceedings~~".*

Reason: There is not necessarily a real link or connection between the domicile of the parties at the time of conclusion of the agreement and the subsequent proceedings. The proceedings may be instituted some time after the conclusion of the agreement and the parties to the agreement may have changed domicile meanwhile.

(b): It is suggested that this be deleted.

Reason: Tenancies of business premises are permanent by definition and there is no valid reason to change the rules governing jurisdiction on this subject, especially when there is an obvious connection between a tenancy of immovable property and the State in which the property is situated. Furthermore, proceedings of this type are usually for the purpose of eviction, which falls under Article 22(5), which is why Article 22(1)(b) of the Commission's proposal may give rise to doubts.

- **Article 23(1)**: *" 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. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:"*

Reason: The deletion is suggested in order to follow the wording of Article 5(1) of the Convention on Choice of Court Agreements concluded on 30 June 2005, which has been signed by the EU.

- **Article 24(2)**: *"In matters referred to in Sections 3, 4, and 5 of this Chapter, the document instituting proceedings or the equivalent document must contain information for the defendant on his right to contest the jurisdiction of the court and the consequences of entering an appearance **or failing to enter an appearance**. Before assuming jurisdiction on the basis of this Article, the court shall ensure that such information was provided to the defendant."*

Reason: Information concerning failing to enter an appearance is even more important than that concerning entering an appearance because its deficiency may deprive the defendant of a proper defence. Defendants are entitled to know the possible consequences of both entering an appearance and failing to enter an appearance.

- **Article 25(b)**: To avoid exorbitant jurisdiction, it should be stated more precisely in a recital that the basis of this "sufficient connection" cannot only be the actor's domicile or nationality.

- **Article 26**: *"Where no court of a Member State has jurisdiction under this Regulation, the courts of a Member State may, on an exceptional basis, hear the case ~~if the right to a fair trial or the right to access to justice so requires, in particular~~*

(a) if proceedings cannot reasonably be brought or conducted"

Reason: The phrase struck out is not excessively respectful of third countries' legal systems and could violate a basic principle of respect in international relations.

The wording of Article 7 of Regulation No 4/2009 seems more respectful towards third States' legal systems and allows application of the rule proposed in the cases mentioned in (a) and (b).

- **Article 27**: "*Where a court of a Member State is seised of a claim which is principally concerned with a matter over which **the courts of another Member State have exclusive jurisdiction by virtue of Article 22**, it shall declare of its own motion that it has no jurisdiction.*"

Reason: It is necessary to oblige a court which hears a case to examine of its own motion its jurisdiction with regard to the exclusive jurisdiction imposed by the Regulation itself.

- **Article 28**: "*Where a defendant **not domiciled in a Member State** is sued in a court of that Member State and does not enter an appearance, the court **shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation.***"

2. *That court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document ..."*

Reason: Although the cross-border nature of the rule is implied by the spirit of the regulation, it is easily highlighted by adding "**not**", which was already included in the previous version.

Moreover, in order to dispel any doubts about the obligation to examine jurisdiction, if this is not included in Article 27 or even repeated, given the importance of exclusive jurisdiction, it would be advisable to retain the previous wording.

- **Article 29**: The amendment of paragraphs 1 and 4 is suggested:

1. "*Without prejudice to Articles 22, 24 and 32(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings*"

Reason: In this rule, it would be useful to utilise a desirable legislative technique to highlight the qualitative primacy (as opposed to the quantitative primacy) of the exclusive competence in Article 22 over jurisdiction by submission in Article 24 and of the latter over choice of court.

4. "In an arbitration agreement, where the 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"

Reason: The Commission proposal seems effective for solving the problem of "torpedo" actions. However, the proposed wording would improve understanding of the rule:

On the one hand, it ensures greater legal certainty because the rule excludes the jurisdiction of all the other courts of the Member States.

On the other hand, it favours proof of an agreement over an arbitration clause. Otherwise, a verbal arbitration agreement (or generic agreement without a designated seat) could be invoked against the court that really has jurisdiction, obliging it to stay its proceedings or modify jurisdiction.

In connection with this article, **recital 20** should be amended as follows: "*The effectiveness of arbitration agreements should also be improved in order to give full effect to the will of the parties. This should be the case, in particular, where the ~~agreed or~~ designated seat of an arbitration is in a Member State. This Regulation should therefore contain special rules aimed at avoiding parallel proceedings and abusive litigation tactics in those circumstances. The seat of the arbitration should refer to the seat selected by the parties or the seat designated by an arbitral tribunal, by an arbitral institution ~~or by any other authority directly or indirectly~~ chosen by the parties.*"

Reason: "Agreed" is too general whereas "designated" is very clear and implies agreement between the parties.

"Or by any other authority directly or indirectly" is also a very general phrase and it should be specified that the seat may be fixed only by the parties, an arbitral tribunal or an arbitral institution. Moreover, reference to "other authorities" could weaken the autonomy of the arbitral institution in laying down its own rules at the time of fixing the seat of the arbitral tribunal.

- **Article 30(2)**: *"Where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question **and its law permits the consolidation thereof.**"*

Reason: National law must be respected and the original proposal abolishes each State's power to determine its own jurisdiction with regard to proceedings originating in other States. Each State may prevent consolidation in cases in which this could be detrimental to the rights of any of the parties due to the substance or the state of the proceedings.

It also prevents a party from fraudulently ceasing to bring all the proceedings in one State and instituting the rest in another State although he could have brought them all together from the beginning, subsequently requesting consolidation in order to delay the proceedings.

- **Article 32(2)**: *"With the exception of **the exclusive jurisdiction laid down in Article 22 and agreements governed by Sections 3, 4 and 5 of this Chapter, where an agreement referred to in Article 23 confers exclusive jurisdiction to a court or the courts of a Member State, the courts of other Member States shall have no jurisdiction over the dispute until such time as the court or courts designated in the agreement decline their jurisdiction.**"*

Reason: Although the Commission considers that exclusive jurisdiction is safeguarded by Article 23(4), in our opinion a specific reference to Article 22 would clarify the primacy of exclusive competence over choice of court.

- **Article 33**: It is proposed that paragraph 2 be redrafted by adding a new paragraph 3. Paragraph 3 of the original proposal would therefore become paragraph 4:

2. "The courts and authorities responsible for service referred to in paragraph 1 shall note, as applicable, the date ~~and time~~ of lodging of the document instituting proceedings or of receipt of the documents to be served."

3. "In the event of simultaneous dates, the court which effected service on the defendant earlier shall be the court first seised."

4. "For the purposes of this Section, an arbitral tribunal is deemed to be seised"

Reason: The simultaneous lodging of related actions in Member States is absolutely exceptional. It therefore seems costly and unnecessary to oblige all Member States to establish procedural rules and mechanisms to record the time of lodging of documents.

The subsidiary rule in our proposal solves this exceptional problem easily without cost or any reform of procedural laws. It also allows the defendant to request the consolidation of actions when service is effected for the second time.

- **Article 34(3)**: *"The court may discharge the stay at any time upon application by either party if one of the following conditions is met:*

(a) when one of the parties proves that proceedings in the third State have been pending without any procedural step for more than two years, excluding the necessary application by the party requesting continuation of the proceedings."

Subparagraph (b) of Article 34(3) would be deleted and (c) would become (b).

Reason: When the EU court discharges the stay of proceedings, a conflict may arise and contradictory judgments may be given because proceedings would also continue in the third State. It is therefore advisable to lay down objective requirements which enable the courts of the Member States to continue their own proceedings. Two reasonable requirements would be:

- A period of at least two years without court procedures.
- Requiring that one of the parties requested the discharge of the stay of proceedings and continuation of the proceedings before the court of the third State, which complies with the rules of civil procedure and is also reasonable for overcoming the stay of proceedings before the court of the third State.

With Article 34(3)(c) (which would become (b)), the court would have a sufficient margin of discretion with regard to the special circumstances of the case, including (a) and (b) of the proposal.

- **Article 36**: The addition of a new paragraph is proposed:

"Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if the courts of another State or an arbitral tribunal have jurisdiction as to the substance of the matter.

The court shall reject the application if the circumstances of the case or the lack of urgency do not justify its competence and shall refer the applicant to the competent court under this Regulation."

Reason: This second paragraph would enable the courts of the Member States to reject both fraudulent and non-urgent applications. In that case, it is desirable that provisional measures be adopted by the court which has jurisdiction as to the substance of the matter.

- **Article 37**: Our remarks refer to paragraphs 3(b)(ii) and 4:

3(b)(ii): "*a non-profit making organisation whose main purpose and activity is to represent and defend the interests of groups of natural or legal persons, ~~other than by, on a commercial basis, providing them with legal advice or representing them in court, or~~*"

Reason: "Non-profit making" obviously cannot be "on a commercial basis". Good legislative drafting avoids unnecessary repetitions.

4. Also for legislative drafting reasons, this paragraph should be included among the final provisions as it lays down a temporary rule for the Commission.

- **Article 38**: Our proposal refers to paragraphs 1 and 2:

1. "*Subject to the ~~provisions of exceptions provided for in this Chapter, a judgment given in a Member State shall be recognised in the other Member States without any special procedure being required and without any possibility of opposing its recognition.~~*"

Reason: When a rule establishes a general principle, reference should be made to the exceptions to it in order to avoid misunderstandings.

2. "Without prejudice to Articles 40 to 46, a judgment given in one Member State which is enforceable in that State shall be enforceable in another Member State without the need for a declaration of enforceability."

Reason: As stated above, if the general principle of enforceability is affirmed, mention should be made of the possibility of a dispute, for which rules are also laid down in this proposal.

- **Article 39(1):** *"A party who wishes to invoke in another Member State a judgment recognised pursuant to Article 38(1) shall produce a copy of the judgment which satisfies the conditions necessary to establish its authenticity, **together with an authentic translation of the judgment.**"*

Reason: There is a conflict between Article 31 and Article 39, which is connected with Article 42(4). Although Article 31 imposes coordination, Articles 39 and 42 do not allow the court responsible for enforcement to take cognisance of the translation of the entire judgment.

In accordance with the principle of legal certainty, the court responsible for enforcement must be provided with a translation that contains the pleas of fact and law that are required for understanding and enforcing the judgment.

Moreover, the cost saving mentioned by the Commission is small in comparison with the saving that could be made at the level of the court responsible for enforcement and with regard to safeguarding legal certainty.

- **Article 42**: Our remarks refer to paragraphs 1(a) and 2(a):

1(a) and 2(a): *"a copy of the judgment which satisfies the conditions necessary to establish its authenticity, **duly translated**; and"*

This would entail deletion of Article 42(4) which sets out cases in which the court may request translation of the judgment.

Reason: A summary of the judgment may create problems for the court responsible for enforcement. As stated above, legal certainty prevails over small savings. The proposal does not even allow translation of the entire judgment to be requested, which is at variance with the rule of cooperation between courts that is laid down in the second paragraph of Article 31.

- **Article 43**: It would be useful to transfer to Article 46(1) the reasons for refusing recognition or enforcement of a judgment. In that case, Article 43 of the proposal would logically have to be deleted.

Therefore, and in connection with the judgment in Case C-167/08, our proposal aims at including in Article 43 broader legal capacity for disputing enforcement or recognition which is necessary, given the abolition of exequatur, to protect the right of third parties to have access to justice.

"Any interested party shall be entitled to request the refusal for which rules are laid down in Article 46, including parties which intervened in proceedings before the court of origin, as well as third parties interested or affected by recognition or enforcement, such as creditors, guarantors or debtors."

Reason: The recent judgment in Case C-167/08 (Draka NK Cables) states that any person affected by the enforcement of a transnational judgment cannot appeal against the decision on a request for a declaration of enforceability if he has not previously appeared as a party in the proceedings before the court of origin.

As a result of the proposed abolition of exequatur and with this case law, third parties interested in enforcement would not be able to appeal against or contest enforcement under the procedures established by the law of the State of enforcement.

The right of these interested third parties to have access to justice therefore makes it necessary to extend legal capacity to appeal against enforcement of a judgment to "any interested party" whose interests may be affected by enforcement.

- **Article 45**: Our proposals refer to paragraphs 1, 4 and 5.

1. *"A defendant who did not enter an appearance in the Member State of origin shall have the right to apply for a review of the **transnational** judgment before the competent court of that Member State where:"*

Reason: The adjective "transnational" rules out the possibility of considering that a new internal appeal procedure has been created. The original proposal allowed appeals before the court of origin, including in another Member State, before recognition or enforcement.

4. *"The application for a review shall be made promptly, in any event within **two months** from the day the defendant was effectively acquainted with the contents of the judgment and was able to react. Where"*

Reason: Calculating time limits in months from one date to another instead of in days (45 days in this case) is certainly easier; there is no justification for calculating in days, for example up to 90, in Article 58(2) of the Commission proposal.

5. *"If the application for a review is manifestly unfounded, the court shall dismiss the application immediately ~~and in any event within 30 days from the receipt of the application~~. In such case, the judgment shall remain in force."*

Reason: With a view to desirable legislative drafting, it is unreasonable to set time limits where failure to comply with them has no legal consequence. Furthermore, "immediately" already sufficiently expresses the speed which the Regulation imposes on the court.

- **Article 46**: Our proposals refer to paragraphs 1, 2, 4 and 8:

1. *"In cases other than those covered by Article 45, **the competent authority of the Member State of enforcement, at the request of any interested party, shall totally or partially refuse a party shall have the right to apply for a refusal of recognition or enforcement of a judgment where such recognition or enforcement would not be permitted by the fundamental principles underlying the right to a fair trial:***

- (a) if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;*
- (b) if it conflicts with Sections 3, 4 or 6 of Chapter II or Article 29(4);*
- (c) if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State of enforcement;*
- (d) if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State of enforcement."*

Reason: It would be useful to insert into this paragraph the reasons for refusing recognition or enforcement of the judgment of a court in another Member State. In this case, logically, the reasons for refusal would not be included in Article 43.

Comments have already been made on "*any interested party*" with regard to Article 43.

Substantive public policy is included in (a) as a ground for opposition. Spain supports the majority of Member States who want to retain this ground, keeping the current wording of the Regulation in this connection.

Paragraph (b) also includes failure by protective and exclusive fora to fulfil their obligations. The proposal must include the consequences of infringement of the rules of jurisdiction laid down by the Regulation itself, as in the case of the existing Article 35(1) of Regulation No 44/2001 and Article 6(1)(b) of Regulation No 805/2004.

Paragraphs (c) and (d) include the grounds of procedural public policy which appear in the proposed text of Article 43(a) and (b).

2. *"The application shall be brought before the court of the Member State of enforcement, listed in Annex III, within one month of service thereof. The local jurisdiction shall be determined by reference to the place of domicile of the party against whom recognition or enforcement is sought or to the place of enforcement. If the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for bringing the application shall be two months and shall run from the date of service. No extension of time may be granted on account of distance."*

Reason: It seems necessary to limit the period for lodging an appeal, as the rules laid down in the existing Article 43(5) of Brussels I have been incorporated.

With regard to deletion of the rule concerning territorial jurisdiction, such a rule must be established by each Member State's procedural law, in accordance with the principle of subsidiarity of Community legislation.

4. "If the application is manifestly unfounded, the court shall dismiss the application immediately and in any event within 30 days from the receipt of the application."

Reason: As was pointed out with regard to Article 45(5) of the proposal, there is no point in setting procedural time limits without legal consequences. Moreover, "immediately" already sufficiently expresses the speed required by the Regulation.

8. ~~"The unsuccessful party shall bear the costs of the proceedings under this Article, including the legal costs of the other party."~~

Reason: The payment of costs must be governed by each Member State's procedural law, in accordance with the principle of subsidiarity of Community legislation.

- **Article 48**: We propose adding a new paragraph 2, so that the existing text would become paragraph 1 of this article.

2. "Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in the case provided for in Article 29(4)."

In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the Member State of origin based its jurisdiction.

Subject to this paragraph, the jurisdiction of the court of the Member State of origin may not be reviewed."

Reason: As the proposal respects the substantive public policy and procedural public policy in this section, the grounds of jurisdiction for contesting the recognition or enforcement of this type of judgment must be respected in order to ensure consistency.

- **Article 52**: The incorporation of a new paragraph 3 is proposed:

3. "The representation and defence of the applicant before the court shall be determined in accordance with the law of the Member State of enforcement."

Reason: Representation and defence in legal proceedings must be governed by the procedural law of each Member State, in accordance with the principle of subsidiarity of Community law.

- **Article 56(5)**: "*An appeal against the declaration of enforceability is to be lodged within **one month** of service thereof. If the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be **two months** and shall run from the date of service, either on him in person or at his residence. No extension of time may be granted on account of distance.*"

Reason: As pointed out in connection with Article 45(4), calculation of time limits is easier if they are set in months rather than days (45 in this case). There is no justification for calculating in days.

- **Article 58(2)**: "*Subject to Article 56(4), the court seised of an appeal under Article 56 shall give its decision within **three months** from the date it was seised, except where exceptional circumstances make this impossible.*"

Reason: The same remark made concerning the calculation of time limits (actually 90 days in this case).

- **Article 65:** *"The representation and defence of the party seeking the recognition, enforceability or enforcement of a judgment given in another Member State shall be governed by the law of the Member State in which enforcement is sought."*

Reason: Rules concerning representation and defence in legal proceedings must be laid down generally by national procedural law, as was pointed out in connection with Article 52, in accordance with the principle of subsidiarity under Community law.

- **Article 66:** The addition of a second paragraph is proposed:

2. *"In this case, the competent authority of the Member State of enforcement shall seek information from the other court by any appropriate means such as via the European Judicial Network on all relevant circumstances of the case, such as the aim, purpose or limits of the measure, in order to ensure equivalence between the measure or order and the enforcement order sought."*

Reason: Coordination similar to that established in Article 31 should be applied in this case to ensure equivalence between the measure or order and the enforcement order sought.

The necessary cooperation should be guaranteed by means of direct contacts or the European Judicial Network, for example, to find solutions and ensure the greatest possible uniformity with similar cases which have arisen between the courts of the Member States involved.

- **Article 67**: The addition of a new paragraph is proposed:

"A judgment given in a Member State which orders a payment by way of a penalty shall be enforceable in the Member State of enforcement in accordance with Sections 1 or 2, as the case may be. The competent court or authority in the Member State of enforcement shall determine the amount of the payment if that amount has not been finally determined by the courts of the Member State of origin.

Where the amount cannot be determined by the judgment or certificate issued by the court of origin, the court of enforcement shall seek from the latter the information required for determining it."

Reason: To extend the scope of cooperation between courts of origin and enforcement with a view to determining the amount.

- **Article 70**: The addition of a new paragraph is proposed, which would be paragraph 3:

3. "The court with which an appeal against enforceability is lodged shall refuse or revoke a declaration of enforceability only if enforcement of the instrument is manifestly contrary to public policy in the Member State addressed. This ground shall not apply to uncontested claims governed by the Regulation creating a European Enforcement Order."

Reason: In complete consistency with our proposal concerning Article 46(1) aimed at retaining public policy as a ground for contesting judgments, and for the same reason, it is proposed that it should also be retained for authentic instruments and court settlements.

This provision does not include uncontested claims in order to avoid doubts about derogations from this rule, in the light of the Latin principle *lex posterior derogat anterior*, as the present proposal generally regulates the subject matter of Regulation No 805/2004 of 21 April 2004.

- **Article 92**: The deletion of paragraph 2 is proposed:

~~"4. This Regulation shall repeal Regulation (EC) No 44/2001. References to the repealed Regulation shall be construed as references to this Regulation and shall be read in accordance with the correlation table in Annex X.~~

~~2. Except with respect to judgments referred to in Article 37(3), this Regulation shall replace Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims."~~

Reason: Owing to the specific nature of contested claims with regard to which opposition on public policy grounds has been abolished, it is advisable to keep rules concerning contested claims separate from this Regulation, as has been the case up to now.