November 2009

AK Position Paper

Green Paper on the Review of Regulation (EC) No. 44/2001

Brussels I Regulation

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About us

The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.

The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.

Organisation and Tasks of the Austrian Federal Chamber of Labour

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 – amongst others unemployed, persons on maternity (paternity) leave, community- and military service – of the 3.2 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Herbert Tumpel
President

Werner Muhm
Director

Executive Summary

The first years of experience with Brussels I have shown that the **Regulation essentially guarantees a well functioning European system of jurisdiction** in civil and commercial matters.

However, not least cases, which had to be decided by the European Court of Justice (ECJ), have made it obvious that the current **Regulation has some weaknesses and gaps**. The need for reform resulting from this is particularly urgent as above all those sections identify problem areas, in which the "weakest party" [should] be protected by rules of jurisdiction, which are more favourable to them than the general regulation" (as was already pointed out in Recital 13 of the Regulation).

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So far, the "stronger parties" have used the **weaknesses of the current regulation** to the **disadvantage of workers and consumers** and their interest representation.

The fact that the current regulation does **not provide a separate place of jurisdiction for claims under civil law** in connection with **industrial action** enabled in particular transnational companies to use the current regulations to their own advantage. Several cases, which were decided by the European Court of Justice, have shown that the current provisions of the Regulation leave scope for choosing a non-relevant often also deregulation-friendly **place of jurisdiction (so-called "Forum Shopping")**.

As a result, an article of the Regulation enables the complaining party in case of several defendants with different locations to choose before which court of domicile it brings action against both parties. The companies take advantage of this by choosing the **most liberal place of jurisdiction**. This also happened in the **Viking Case** (Rs C-438/05), which in the meantime has achieved general renown as the ECJ ruling was not only met with utmost condemnation by the European trade union movement.

It is against this background that AK demands its own place of jurisdiction for industrial action. Courts at the place of disagreement shall decide about respective legal disputes.

Apart from that it has to be ensured that also those **workers, who normally do not carry out their work in one single Member State, have access to the place of jurisdiction, which is most relevant to their work**. Wage-dependent workers with several employers, who are closely related to each other, shall be able to assert their claims in future in consolidated proceedings before a uniform place of jurisdiction. **Exceptions**, which are adverse to the system (e.g. for contracts of carriage) in the area of the **place of jurisdiction**

in consumer disputes have to be banished and procedural obstacles (e.g. in the area of legal action by interest representation) **must be overcome**.

Provided that **respective accompanying measures are in place, AK supports** the **abolition of the exequatur proceeding**, which has been suggested by the Commission **in order to reduce the costs of law enforcement** in cross-border cases. In order to promote the enforcement of the mandatory community law, we **welcome the extension of the scope of application of the Brussels I Regulation to defendants who are habitually resident in a third country**. In contrast AK **does not see any objective case** for extending the **exclusive jurisdiction in the sector of corporate law**, as this might affect sensible matters, such as co-determination.

The AK position in detail

The revision of the Regulation should therefore be used to close existing loopholes.

I. A developed place of jurisdiction in labour law matters in the sense of a coherent European IPR

Experiences with the existing jurisdiction in labour law cases have shown that the present Brussels I Regulation has certain gaps resp. leaves scope for manipulation. In some cases this has resulted in a disadvantage of the workers and their interest representations. The revision of the Regulation should therefore be used to close existing loopholes and to develop the European International Private Law in a broader sense (IPR and International Civil Procedure) "to a coherent whole, which in the coming years will harmoniously integrate in the remaining policy areas of the Union"[1]. It is therefore necessary to pay particular attention to the future compliance of the Brussels I Regulation with the – only after their adoption enacted – regulations to the law applicable to contractual (Rome I Regulation) and to non-contractual obligations (Rome II Regulation).

1. A separate place of jurisdiction for industrial action

Although the current Regulation regulates the responsibility for individual employment agreements (Art 18ff), it does in a certain system adversity to Rome II (Art 9), however, not provide for a special place of jurisdiction for claims under civil law in connection with industrial action.

So far complaining parties have used this circumstance to the disadvantage of the affected interest representations, by making use of the freedom – resulting from the Regulation – to choose a place of jurisdiction, which they regarded as favourable (so-called Forum Shopping).

In order to put a stop to this Forum Shopping and to ensure the coherence with Rome II, the Brussels I Regulation should be supplemented by a separate place of jurisdiction for industrial action. A place of jurisdiction at the location of the industrial action is also in accordance with the IPR Principles (in a broader sense), as it will regularly demonstrate the closest relation to the facts.

That is why AK requests that the courts of the state, where industrial action took place or will take place should have jurisdiction.

A respective Article of the Brussels I Regulation in agreement with Article 9 of the Rome II Regulation could therefore be as follows:

"Legal proceedings in connection with upcoming or carried out industrial action should therefore be instituted

1 The Communication of the Commission "An area of freedom, security and justice serving the citizen ", COM(2009) 262 is final.

before the Courts of the Member State where the industrial action is planned or has been carried out."

Not least several cases decided by the European Court of Justice ECJ have shown that the current provisions of the Regulation provide significant scope for "Forum Shopping":

Due to the lack of a place of jurisdiction for industrial action, a court of the United Kingdom for example was appointed to decide about industrial action in Finland in the Viking Case[2]. The reason being that Art 6 Z 1 of the Brussels I Regulation permits the complaining party in case of several defendants with various places of residence/branches to choose freely before which court of domicile/establishment it wants to institute legal proceedings against both parties. The complaining company in the Viking Case used this circumstance to its own advantage: as the Finnish Shipping Line Viking had planned to have one of its ship sail under the Estonian flag to benefit from Estonia's low wage level, the Finnish Seamen's Union (FSU) threatened industrial action. At the same time it asked its international umbrella organisation, the International Transport Workers' Federation (ITF) to take solidarity action. As the head office of ITF is in London, Viking now sued both ITF and FSU for neglect and compensation before a Court of the United Kingdom. Based on Art 6 Z 1 the Court declared itself to be competent and therefore had to decide on industrial action, which had been carried out in Finland.

Another element of the present Brussels I Regulation results in the fact that – due to the lack of a place of jurisdiction at the place of the industrial action – courts without any relation to the industrial action have to make a decision from the viewpoint of civil law. As a result Art 5 Section 3 Brussels I Regulation in accordance with the consistent practice of the ECJ[3] leads to the fact that the seat of the complaining party is at the same time also decisive for the place of jurisdiction: in the Tor Line case[4] a Swedish trade union - after rejecting the conclusion of a wage agreement - took strike action against a Danish shipping company, which operated ferries between Sweden and the United Kingdom, by preventing loading and unloading Swedish ports. Even though the industrial action was carried out in Sweden by Swedish trade union members, the ECJ decided that based on Art 5 Section 3 Brussels I Regulation a Danish court would have jurisdiction over the action for damages as the damage had occurred at the seat of the company.

The facts of the two ECJ cases represent a small section of those cases, in which the complaining party - due to the lack of its own place of jurisdiction at the place where the industrial action took place - has been provided with plenty of scope for "Forum Shopping".

2 ECJ11.12.2007, Rs C-438/05, Viking Line, Slg 2007, I-10779.

3 ECJ 30.11.1976, Rs 21-76, Mines de potasse d'Alsace, Slg 1976, 1735; ECJ 7.3.1995, Rs C-68/93, Shevill, Slg 1995, I-415; ECJ 5. 2. 2004, Case C-18/02, Tor Line, Slg 2004, I-01417

4 V 5.2.2004, Case C-18/02, Tor Line, Slg 2004, I-01417

The courts of those countries should therefore decide on industrial action where the action had been taken place or where it is planned.

The revision of the Brussels I Regulation provides the opportunity to close these loopholes, which are detrimental to workers and their interest representations, to achieve consistency with Rome II and thereby to realize a coherent European IPR. The courts of those countries should therefore decide on industrial action where the action had been taken place or where it is planned.

2. Jurisdiction of the court for individual employment agreements

The present regulation (Art 19 Brussels I Regulation) provides that the employee can basically not only sue in the Member State resp. at the seat of the employer but also before a court of the location where the employee normally carries out his/her work. Naturally this option is not available to employees, who normally do not carry out their work in a single Member State. In this case it is provided (Art 19 Z 2 lit b) that legal action can be taken at the place where the branch establishment is or was, that recruited the employee. This regulation, however, is not without problems. On the one hand it is not sufficiently clear how to interpret "branch establishment" and "recruitment" (for similar question in connection with the International Labour Law see Hoppe, Die Entsendung von Arbeitnehmern ins Ausland [1999] Sending Workers Abroad, 185 ff and Ganglberger, Der Übergang vom IPRG zum EVÜ bei Arbeitsverhältnissen mit Auslandsberührung [2001] [The transition from Federal Private International Law to European Conflict of Law Rules Governing Contract Law in case of employment with foreign element] 150 ff); on the other hand decides on a formal point of view (place of recruitment), which possibly has little in common with the actual employment (see for example Rief, Ausländische Personalleasingunternehmen auf dem Austrian Arbeitsmarkt [Foreign personnel leasing companies on the Austrian labour market}, DRdA 2006, 255 ff).

This jurisdiction regulation should therefore – as in International Labour Law, see Art 8 Section 4 of the Rome I Regulation – be supplemented by a kind of escape clause, which in problematic cases would provide some form of compensation, or it should be adjusted to corporate integration.

Long distance lorry drivers or other international transport workers need a certain corporate connection, which is based on the following aspects:

- where do the various deployments start resp. where do they end ("base");
- from where does the worker receive his instructions;
- who does he contact if he encounters problem with his vehicle;
- who does he contact if he needs to inform his company about employment matters (e.g. sickness notification) or to clarify certain issues (e.g. negotiated leave, pay negotiations).

If the regulation would be adjusted to corporate connection resp. integration, its aim and purpose would be far

better achieved and the scope for manipulation significantly restricted.

3. Consolidation of proceedings by suing workers

See the statements in Section III (Item 4. Lis pendens and related proceedings).

II. Perspectives for an improved place of jurisdiction in consumer disputes

The first years of experience with the Regulation in the area of places of jurisdiction for consumers have also shown that in some cases the ratio of Recital 13 does not comply with the existing system of jurisdiction of the Brussels I Regulation. In order to complete the protection of the "weaker party by jurisdiction regulations [...], which are more favourable to them than the general regulation", AK would like to make the following proposals:

It would be important to enable consumer protection organisations to use the relevant special of jurisdiction.

1. Test cases

Based on the idea of substantive law of consumer protection the jurisdiction regulations of some Member States provide for the option that consumers may assign their claims to interest representations in order to enable an efficient collection resp. appropriate legal action. Pursuant to § 502 Section 5 Z 3 Code of Civil Procedure (ZPO) consumers in Austria for example are able to assign their claims to AK among others. It is the aim of this Regulation to enable test cases of the interest representations named in § 29 Consumer Protection Act (KSchG) to clarify the legal position in favour of the consumers. If such complaints contain cross-border issues it is currently not yet possible to draw on the favourable place of jurisdiction in consumer disputes of the Brussels I Regulation, but the place of jurisdiction has to be determined via the general linkage regulations depending on the case in question. Because in accordance with the current version of the Regulation the complainant must also be the consumer. This may result in the fact that the consumer protection organisation has to bring proceedings in another Member State.

As a contribution for a better awareness and promotion of consumer interests in the Internal Market it would be therefore important, to also enable consumer protection organisations – which are acting on behalf of the consumer after all – to use the relevant special of jurisdiction.

2. Transport contracts

In a certain system adversity – in particular also in view of other community law acts – the current version of the Brussels I Regulation excludes the transport contracts concluded by consumers from the special protection of Section 4 (Competence in consumer affairs). As a result of this, these contracts are governed by the general provisions resp. the special provisions of a variety of international contracts. This is not only confusing but may also lead to extremely different places of jurisdiction and in some cases to

linkages, which put substantial obstacles in the way of law enforcement for consumers. As a result affected consumers time and again refrain from taking legal action. Bookings of cross-border flights by consumers are meanwhile not only common practice but are caused resp. promoted by the internal and trade policy of the Union. At the same time, airlines have always been acting internationally and therefore adjusted their offers to different markets.

Transport contracts should be integrated in the special regulations for places of jurisdiction in consumer disputes.

By abolishing the current Article 15 Section 3, transport contracts should therefore be integrated in the special regulations for places of jurisdiction in consumer disputes.

3. Short-term rental agreements

Improvements of the Brussels I Regulation for short-term rental agreements in favour of consumers, in particular with just holiday home or holiday flat rental agreements as well as just hotel contracts should also be examined. The place of jurisdiction with regard to a rental property often creates serious problems for the consumer and often results in defects of the accommodation not being brought before the court. The alternative place of jurisdiction of the joint state of residence of lessor and lessee – provided that such a state does exist and provided that the lessee is a natural person and that the accommodation is only for private use – does only make it easier for consumers in certain aspects. In practice, this constellation is only one of many alternatives and by far not the most frequent one.

In particular the fact that lessors and vendors of relevant real estate direct their business activities more and more on the Member State of the consumer (e.g. by a relevant website) emphasises the need for action. This problem, which has also been addressed by the Commission in the Green Paper, should therefore be solved by the integration into the special regulations for places of jurisdiction in consumer disputes.

4. Consumer loan agreements

AK supports the proposal of the Commission to adapt the wording of Art 15 Section 1 Letters a and b of the Brussels I Regulation to the definition of the consumer loan agreement in Directive 2008/48/EC.

III. Answering the remaining questions of the Green Paper

1. Exequatur procedure

AK welcomes the initiative of the Commission to abolish the exequatur procedure, as it does not only extend the execution abroad, but also causes additional costs for the instigating party (translation and legal costs in the executive state). These costs are a heavier burden for workers and consumers than for other complaining parties.

To keep the costs for the instigating party at a low level, the form proposed under Item 8.3 of the Green Paper, which should be uniformly available in all official languages is definitely a

sensible addition. Apart from that it should be sufficient to have the verdict translated, as the highest costs are incurred for translating the statement of reasons and the decision. Finally one could also consider not to request that the instigating party provides the translation but to instruct the court of justice to have the documents translated and to collect all costs incurred by way of enforcement directly from the indemnifying party.

The abolition of the exequatur procedure must, however, be accompanied by appropriate guarantees. In this context it is particular important to ensure (for example by a greater harmonisation of the review procedures as proposed by the Commission) that the defendant will have access to effective legal remedies in the original Member State of the judgment. Only on this basis, participants in legal relations will develop the trust needed to be able to forego central conditions of the current enforcement proceedings (e.g. Art 34 Section 1).

AK rejects an asymmetric standardisation.

(Answer to question 1)

2. Functionality of international legal system regulations

AK welcomes the extension of the scope of application of the Brussels I Regulation to third State defendants. In order to prevent that mandatory provisions of the Community law will not be applied by a place of jurisdiction outside the Union, an appropriate regulation should aim at creating a starting point in case of disputes with third State defendants for the jurisdiction within the European Union. It would for example be useful to provide the starting points proposed by the Commission (carrying out a profession, situs of an asset, auxiliary jurisdiction) in subsidiary order. Thereby, however, attention has to be paid to the compatibility of the Hague Convention of Jurisdiction and to ensure that the special jurisdiction regulations (for individual employment agreements, for consumer affairs and the place of jurisdiction for industrial action to be created) will also apply to persons having their residence/branch in a third State.

As long as it is not guaranteed that respective regulations also exist in relevant third States, we regard common regulations for the recognition and execution of court decisions taken in third States as problematic. As long as this has not been guaranteed the main beneficiaries of a standardisation of regulations will be instigating parties from third States. Therefore AK rejects such an asymmetric standardisation.

(Answer to question 2)

3. Choice-of-forum clauses

With regard to the Choice-of-forum clause, the first proposed solution (the court which is exclusively named as competent in the Choice-of-forum clause shall in case of already pending proceedings before another court no longer be suspended due to pendency) is rejected as possible parallel proceedings might cause quite considerable legal uncertainty. The third solution (cooperation of the courts)

appears not to be very practical and might extend the duration of proceedings. In case of the third solution (reversal of pendency regulation) it would have to be ensured that this does not apply in areas in which for the protection of typically worse-off parties mandatory places of jurisdiction as for example in Art 21 for complaints from individual employment agreements have been provided for in the current Regulation. AK therefore requests that an exception from the reversal of the pendency regulation will be provided for with regard to labour and consumer issues.

(Answer to question 3)

4. Pendency and associated proceedings

With regard to the question whether the opportunity should be granted to consolidate proceedings which are initiated by and/or against several parties one has to differentiate between proceedings in consumer affairs and those in connection with individual employment agreements.

AK proposes an additional extension to that effect that proceedings can be consolidated on request even if the court has jurisdiction for a certain number of complainants.

The admission of class action in consumer affairs by and/or against several parties on the basis of uniform regulations is expressly welcomed. It seems to be questionable, however, whether the currently provided for regulation in Art 29 and 30, according to which the mandatory jurisdiction of several courts at the time of the occurrence of the legal pendency is decisive for the competence of the court, should be taken into account for the instrument of class action.

AK proposes to set up a separate jurisdiction system for class action according to which not only the time of the legal pendency alone should decide on the jurisdiction. Any other criteria, which should be taken into account, would be the number of aggrieved parties in the Member States as well as the factual connection to the individual Member States. What appears to be important is to set up special places of jurisdiction for the instrument of collective law enforcement in the Member States, which guarantee that even major class action can be dealt with within a period, which is reasonable for the persons affected. The participation in class action proceedings should be open to all cross-border complainants; however, everybody should also have the right to pursue his/her claim in individual proceedings, even if class action proceedings in the same case have been brought before the court in a Member State.

Taking the above-mentioned criteria into account, we also welcome the proposed expansion of the consolidation options in consumer affairs. AK, however, would propose an additional extension to that effect that proceedings can be consolidated on request even if the court has jurisdiction for a certain number of complainants.

The current experience with the regulation has shown a weak point in connection with the consolidation of proceedings by suing workers. For example, the European Court of Justice determined GlaxoSmithKline Case[5]

5 ECJ 22.5.2008, Rs C-462/06, GlaxoSmithKline, Slg 2008, I-3965.

AK does not see any reason not to support the proposals of the Green Paper in the area of responsibility for interim measures.

that Art 6 Z 1 in case of an employee who wanted to sue two of his employers in consolidated proceedings before a court would not be applied as such proceedings had to be evaluated exclusively in accordance with the special provisions of Art 18-21. The Court acknowledged the idea to grant the employee in labour law cases for teleological reasons (aim of Art 18-21 is the protection of workers) the option to sue pursuant to Art 6 Abs 1.[6] In the end, however, it reached the conclusion that "in view of the current community provisions" such an interpretation would not be admissible as the jurisdiction regulations within the meaning of Recital 11 of the Regulation has to be interpreted in such a way that they are to a high degree predictable. The revision process of the Brussels I Regulation now provides the European standard setter with the opportunity to combine the objectives of predictability with the protection of the weaker party (Recital 13.) and to give the employee the opportunity to take legal action against several parties within the meaning of Art 6 Z 1. AK therefore proposes the inclusion of an appropriate provision into the revised Regulation. Such an article, which would have to be inserted after the current Art 19, could be worded as follows:

In the case of several defendants, the employee would be able to bring action against several employees pursuant to Art 6 Z 1.

As apart from this the Labour Law has so far not shown any practical problems in connection with international jurisdiction and the consolidation of proceedings resp. the lack of opportunity to consolidate proceedings and theoretical arguments speak both in favour and against it, AK does currently not see any need for action.

(Answer to question 5 and in parts to question 8.2)

5. Interim measures

Provided the closing of the existing gaps of the Brussels I Regulation in the area of main jurisdiction (see in particular the 1st section of this statement) within the scope of this revision process is successful, AK does not see any reason not to support the proposals of the Green Paper in the area of responsibility for interim measures. The proposals of the Commission could initiate the transnational cooperation of the courts and enable effective interim legal protection. Thereby it has to be ensured – as suggested in the Green Paper – that the Court competent for the proceedings in the main action will be enabled to immediately cancel any aid measure as soon as it is no longer required.

(Answer to question 6)

6. Relation between regulation and arbitration

A better coordination of proceedings before courts of law and arbitral tribunals is certainly practical, it may, however, not lead to a situation where the enforcement of a court decision can be denied because it is not compatible with the arbitral award.

(Answer to question 7)

6 Rs C-462/06, Rn 25-33.

7. Company law

The question is raised under Item 8.2 of the Green Paper whether the exclusive jurisdiction in Company law (the Commission writes Art 22 Section 1 Brussels I Regulation, what is meant, however, is probably Art 22 Z 2) should be extended to other areas of the corporate internal organisation and to decision-making processes in a corporation and whether a legal definition of the term "Seat" should be contemplated within the scope of the revision.

AK is of the opinion that the current extent of the exclusive responsibility within the area of Company law fulfils its purpose and rejects an extension to other areas. The rights to obtain information and the rights of codetermination of the respective workforces have an effect on the decision-making processes in a company, they must, however, not necessarily converge with the place of the seat of the community. The proposed extension of Art 22 Z 2 would therefore regularly entail a factually not justifiable jurisdiction, which only has marginal reference to the fact and the applicable law.

AK is also opposed to a uniform definition of the term "Seat" by the Brussels I Regulation. A definition with such far reaching consequences should be discussed and decided within the scope of developing the European Company law. In this context, AK will of course support a definition of the term "Seat", which renders the improper foundation of letterbox companies[7] with the main purpose of avoiding protective measures under labour and company law impossible.

7 In this sense also the criticism of the European Parliaments (Resolution of the European Parliament of 22nd October 2008 challenges to collective agreements in the EU, 2008/2085, Item 34.)

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