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Consultation on the Report and on the Green paper of the European Commission on the review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [COM(2009) 175 final]

* I authorize the Commission to post this document on its website.

I welcome the opportunity to provide, at this early stage, an input to the consultation on the Report and on the Green Paper on the review of Council Regulation (EC) No 44/2001 (hereinafter, the Regulation).

Therefore, further to the invitation of the European Commission, I hereby submit to your kind attention my comments on some procedural issues related to **Question n. 6** on provisional measures. The question reads as follows:

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Question 6 on provisional measures:

Do you think that the free circulation of provisional measures may be improved in the ways suggested in the Report and in this Green Paper? Do you see other possibilities to improve such a circulation?

This submission will focus mainly on Article 47, and concentrate also on the necessity to expressly include the automatic recognition and enforcement of urgent measures in the Regulation, in order to put it in line with Article 18 of Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, and with Articles 5 and 6 of Regulation (EC) No 805/2004 creating a European enforcement order for uncontested claims.

1. THE CURRENT SITUATION

Recognition and enforcement of judgments is regulated by Chapter III of the Regulation; procedural aspects on enforcement are provided by its Section 2.

My interest focuses on the efficiency of the procedure provided by Article 47, and over the further results that can be achieved in case of success of the procedure of declaration of enforceability; my comments are only based on my analysis of the application of the Regulation in Italy.

Article 47 reads as follows:

- 1. When a judgment must be recognised in accordance with this Regulation, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State requested without a declaration of enforceability under Article 41 being required.*
- 2. The declaration of enforceability shall carry with it the power to proceed to any protective measures.*
- 3. During the time specified for an appeal pursuant to Article 43(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.*

The smooth application of said Article in Italy is hampered by the following issues.

Firstly, it is difficult to understand whether the national court that is competent to issue the declaration of enforceability of a foreign decision (see Article 39.1/Annex II of the Regulation) is also competent to issue provisional and protective measures provided by Article 47, or whether said

measures shall be adopted by the court which is competent according to the domestic rules of the Member State where the execution is sought.

Moreover, Article 47.2 does not state clearly whether protective measures against the property of the party against whom enforcement is sought come along with the decision of enforceability/shall be adopted *ex officio* by the requested Authority indicated in Annex II of the Regulation, **or** shall be *expressly requested* by the applicant. Over the point, various linguistic versions of the Regulation appear divergent: IT «*La dichiarazione di esecutività implica l'autorizzazione a procedere a provvedimenti cautelari*»; FR «*la déclaration constatant la force exécutoire emporte l'autorisation de procéder à des mesures conservatoires* »; ES «*El otorgamiento de la ejecución incluira la autorización para adoptar cualesquiera medidas cautelares*»; PT «*A declaração de executoriedade implica a autorização para tomar tais medidas* ».

In other words, pursuant to Article 47.2 is the applicant obliged to request specific protective/provisional measures before the national court which is competent to adopt them under domestic law? In case there is no such obligation, the Court requested under Article 39.1/Annex II can **or** shall adopt *ex officio* said measures?

The questions are relevant in the Member State where the Authority indicated in Article 39.1/Annex II is not competent (or declares itself not to be competent under domestic law) for the adoption of the protective-conservative measures provided by the Regulation. The issue cannot be left in the hands of the domestic systems, because some system could indicate as competent a court other than the one of Article 39.1-Annex II, thus hampering the quick adoption of protective measures after the foreign decision is declared enforceable.

The following cases can explain the uncertainties in which Italian courts incur in the application of Article 47:

1) Court of Appeal of Bologna, decision 24.6.1993: the Court of Appeal stated that (under the Brussels Convention) the declaration of enforceability carried automatically with it the power to proceed to any protective measure and that was not necessary neither a specific request of said measures by the claimant, nor an express authorization by the Court itself to enforce protective measures, even when said authorization was requested by the domestic law. See also Court of Appeal of Brescia, 30.10.1985; Court of Appeal of Torino, 18.4.1980; Court of Appeal of Milano 27.3.1981.

2) Court of Appeal of Torino, decision 20-23.2.2009: the Court of Appeal delivered a declaration of enforceability of a German urgent decision (immediate delivery of goods), but refused to adopt protective measures against the property of the party against whom enforcement was sought; in fact, the Court stated that it was only competent for the delivery of the declaration of enforceability, and stated that the applicant had to respect domestic procedure and rules on competence, and therefore had to request all other measures, including protective measures, to the Court of first instance.

3) Court of Appeal of Palermo, decision 22.6.2001: the Court of Appeal decided that, despite Article 39 of the Brussels Convention [article 47 of the Regulation] implied an automatic authorization to proceed to protective measures, the domestic court was allowed to revoke or modify protective measures in case of modification of the factual situation, even if said power was not foreseen by the Convention [Regulation].

4) Court of First Instance of Udine, decree 28.2.1997: the Court of first instance stated its own competence (and not of the Court of Appeal, which was the domestic court

allowed to declare the enforceability of a foreign decision under Article 32 of the Convention [Article 39.1/Annex II of the Regulation]) to issue provisional/protective measures before the declaration of enforceability of a foreign judicial decision.

Because of the uncertainty on the interpretation on the scope of some of its provisions, Article 47 could discourage the free movement of judicial urgent decisions. In fact, an applicant would prefer to start a proceeding in the Member State where he can execute the decision of the merits, thus skipping several procedural steps. In fact, according to Article 47.3, the applicant shall:

- 1) file a claim in a Member State (according to the rules on jurisdiction provided by the Regulation), then,
- 2) request the declaration of enforceability in the Member State of domicile of the defendant or the one where the decision shall be executed (Article 39.2), then
- 3) wait for the one month delay pursuant to Article 43 and Article 47.3; in said period, the applicant can only request protective measures but cannot execute the foreign decision, not even if it is urgent (for example: order of immediate delivery of goods).

The mentioned procedure could result in a waste of time, particularly when foreign urgent measures are to be enforced, and when time is of fundamental importance. For this reason, in many cases it would be more attractive to ask directly urgent measures in the Member State where execution is sought.

The immediate execution of foreign urgent measures is crucial also in the light of the fact that, in case of opposition pursuant to Article 43.5, the opposition procedure can last a long time (about 2 years, according to the Study, JLS/C4/2005/03, National report on Italy, p. 24, point 4.1.13), thus frustrating the enforceability of foreign urgent decisions, that cannot be fully executed “*until any such appeal has been determined*” (Article 47.3): in fact, the debtor could easily decide to start an opposition procedure only with the purpose of delaying the full execution of the foreign measure.

Another point that has to be taken into account, is that the protective measures provided by Article 47.3 can only be taken “*against the property of the party against whom enforcement is sought*”, while in some cases the claimant would seek measures on his own property, that is (unlawfully) held by the defendant.

2. PROPOSALS

I propose:

- To state clearly if the domestic Authority indicated in Article 39.1/Annex II is also competent to deliver (ex officio and/or upon request) provisional / protective measures pursuant to Article 47, and also can adopt urgent measures against the assets of the debtor;
- In case of enforcement of foreign urgent measures, to abolish the “one-month standby” provision, and allow the claimant to start immediately the execution of the foreign decision, after it is recognized by the domestic court;
- Consequently, to abolish in said cases the necessity to request provisional/protective measures, which would be redundant in case urgent measures can be immediately enforceable;

- To fix a time limit for the procedure indicated in Article 41, at least for urgent measures;
- In case the national Authority has not issued the declaration of enforceability of the foreign decision within said time limit, the foreign decision should be considered *per se* enforceable, and the Registry of the domestic Authority should be allowed to issue an *ex officio* declaration of enforceability.
- Under Article 47, to allow the claimant to seek provisional/protective/urgent measures also on his own property, which is (unlawfully) held by the defendant.

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I believe that the proposed amendments will help to improve the Regulation, that has proved to be a useful tool for the increased integration and interconnection of judicial domestic systems; I would be happy if my comments could be taken into consideration when the Commission will review the Regulation.

I thank you in advance for your kind attention.

With kind regards,



Ferdinando Lajolo