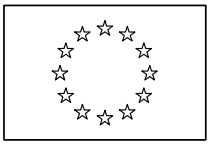

COMMISSION OF THE EUROPEAN COMMUNITIES

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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

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1. INTRODUCTION

1.1. Background

Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I")[1], hereafter "the Regulation", is the matrix of European judicial cooperation in civil and commercial matters. It lays down uniform rules to settle conflicts of jurisdiction and facilitate the free circulation of judgments, court settlements and authentic instruments in the European Union. It replaced the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by several conventions on the accession of new Member States to that Convention (hereinafter the "Brussels Convention")[2].

The European Community and Denmark have concluded an agreement on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters which ensures the application of the provisions of the Regulation in Denmark as of 1 July 2007[3]. The 1988 Lugano Convention governing the same subject matter binds the Member States, including Denmark, on the one hand and Iceland, Norway, and Switzerland on the other hand[4]. This latter convention will be replaced, in the near future, by a convention concluded by the Community, Denmark and the above-mentioned States[5].

1.2. This Report

This report has been prepared in accordance with Article 73 of the Regulation, on the basis of a general study commissioned by the Commission on the practical application of the Regulation[6]. Furthermore, the Commission requested a study aimed at analysing the existing national jurisdiction rules that apply in cases where the defendant is not domiciled in a Member State ("subsidiary jurisdiction")[7]. The Commission further requested a study[8] to evaluate the impact of a possible ratification, by the Community, of the Hague Convention on choice-of-court agreements[9]. This report has also taken into account a study on enforcement

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1 OJ L 12, 16.1.2001, p.1.
2 OJ C 27, 26.1.1998, p. 1.
3 OJ L 299, 16.11.2005, p. 62.
4 OJ L 319, 25.11.1988.
5 OJ L 339, 21.12.2007, p. 1.
6 The study, hereafter referred to as the "general study", was prepared by Prof. Dr. B. Hess, Prof. Dr. T. Pfeiffer, and Prof. Dr. P. Schlosser. It is available at: http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm
7 The study was prepared by Prof. A. Nuyts. It is available at: http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm
8 The study was prepared by GHK Consulting. It is available at http://ec.europa.eu/dgs/justice_home/evaluation/dg_coordination_evaluation_annexe_en.htm
9 See the Commission's proposal to sign the Convention COM(2008) 538 and SEC(2008) 2389, 5.9.2008.

of judicial decisions in the European Union, which the Commission commissioned in 2004[10]. Finally, in the course of 2005, the European Judicial Network in Civil and Commercial Matters provided information on the practical application of the Regulation on the basis of a questionnaire prepared by the Commission.

This report aims at presenting to the European Parliament, the Council and the European Economic and Social Committee an assessment on the application of the Regulation. It is accompanied by a Green Paper which makes some suggestions on possible ways forward with respect to the points raised in this report. Both documents serve as the basis for a public consultation on the operation of the Regulation.

2. THE APPLICATION OF THE REGULATION IN GENERAL

2.1. Statistical data on the application of the Regulation

In most Member States, there is no systematic collection of statistical data on the application of the Regulation. It has been possible, however, to gather some data from central databases of the Ministries of Justice in certain Member States, direct contacts with the courts in the Member States, interviews with other stakeholders, commercial and academic databases, and publications in legal literature.

A distinction must be made between the jurisdiction rules on the one hand and the rules on recognition and enforcement of judgments on the other hand. In general, the Regulation is mostly applied in economic centres and border regions. The jurisdiction rules generally apply in a relatively small number of cases, ranging from less than 1% of all civil cases to 16% in border regions[11]. The rules on recognition and enforcement are more frequently applied but it has not been possible to obtain comprehensive data on the number of declarations of enforceability delivered by the courts. The numbers range from very low (e.g. 10 declarations in 2004 in Portugal) to higher (e.g. 420 declarations in 2004 in Luxembourg) with again a peak in border regions (e.g. 301 declarations in the courts of the Landgericht Traunstein in Germany, located near the Austrian border).

2.2. General evaluation of the Regulation

In general, the Regulation is considered to be a highly successful instrument, which has facilitated cross-border litigation through an efficient system of judicial cooperation based on comprehensive jurisdiction rules, coordination of parallel proceedings, and circulation of judgments. The system of judicial cooperation laid down in the Regulation has successfully adapted to the changing institutional environment (from intergovernmental cooperation to an instrument of European integration) and to new challenges of modern commercial life. As such, it is highly appreciated among practitioners.

This general satisfaction with the operation of the Regulation does not exclude that the functioning of the Regulation may be improved.

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[10] Study on making more efficient the enforcement of judicial decisions within the European Union: transparency of a debtor's assets, attachment of bank accounts, provisional enforcement and protective measures. The study was prepared by Prof. dr. B. Hess and is available at: http://ec.europa.eu/civiljustice/publications/docs/enforcement_judicial_decisions_180204_en.pdf

[11] Statistics based on data gathered from the years 2003 through 2005 mainly.

3. SPECIFIC EVALUATION OF CERTAIN POINTS OF THE REGULATION

3.1. The abolition of exequatur

Following the political mandate by the European Council in the Tampere (1999) and The Hague (2004) programs[12], the main objective of the revision of the Regulation should be the abolition of the *exequatur* procedure in all matters covered by the Regulation.

As regards the existing *exequatur* procedure, the general study shows that, when the application is complete, first instance proceedings before the courts in the Member States tend to last, on average, from 7 days to 4 months. When, however, the application is incomplete, proceedings last longer. Applications are often incomplete and judicial authorities ask for additional information, in particular translations. Most applications for a declaration of enforceability are successful (between 90% and 100%). Only between 1 and 5% of the decisions are appealed. Appeal proceedings may last between one month and three years, depending on the different procedural cultures in the Member States and the workload of the courts.

In cases where the declaration of enforceability is challenged, the ground of refusal of recognition and enforcement most frequently invoked is the lack of appropriate service pursuant to Article 34(2). However, the general study shows that such challenges are rarely successful today[13]. As to public policy, the study shows that this ground is frequently invoked but rarely accepted. If it is accepted, this mostly occurs in exceptional cases with the aim of safeguarding the procedural rights of the defendant[14]. It seems extremely rare, in civil and commercial matters, that courts would apply the public policy exception with respect to the substantive ruling by the foreign court. The other grounds for refusal are rarely invoked. Irreconcilability between judgments is to a great extent avoided, at least at European level, by the operation of the Regulation's rules on *lis pendens* and related actions. As for the control of certain jurisdiction rules, it should be considered whether this still fits with the prohibition of review of a foreign court's jurisdiction; in addition, the practical importance of the rule is limited in that the court is bound in any event by the findings of fact by the court of origin.

3.2. The operation of the Regulation in the international legal order

As the successor of the Brussels Convention, the Regulation takes the perspective of the defendant in court proceedings. In this perspective, most of the jurisdiction rules of the Regulation apply only when the defendant is domiciled in a Member State. If the defendant is not domiciled in a Member State, the Regulation refers to national law ("subsidiary jurisdiction"), with the exception of situations where the courts of a Member State have exclusive jurisdiction pursuant to Articles 22 or 23 of the Regulation or in certain types of disputes concerning specific subject matters (e.g. Community trademarks)[15].

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12 The Council conclusions have been implemented in the Programme of Mutual Recognition in Civil Matters (OJ C 12, 15.1.2001) and the Action Plan implementing the Hague Programme - COM(2006) 331.

13 This is particularly the result of the deletion in the Regulation of the requirement of regular service which has reduced the possibilities for abuse on the part of defendants.

14 See, for instance, Case C-7/98 (*Krombach*).

15 Regulation (EC) No 40/94 on the Community trademark (OJ L 11, 14.1.1994, p. 1).

The operation of the Regulation in the international legal order has been the subject of a number of preliminary questions referred to the European Court of Justice. In Case 412/98 (*Josi*), the Court clarified that the jurisdiction rules of the Regulation (previously the Convention) apply in a dispute between a defendant domiciled in a Member State and a claimant domiciled in a third State. As a result, defendants domiciled in the Member States may rely on the protection offered by the Regulation in disputes involving parties domiciled in third States. In Case C-281/02 (*Owusu*), the Court held that the rules of the Regulation, in particular the basic rule of the jurisdiction of the courts of the defendant's domicile, are mandatory in nature and their application cannot be set aside on the basis of national law. This is the case, not only in relation to other Member States, but also when the dispute is connected to a third State and shows no other connecting factors to other Member States. Finally, the operation of the Regulation with respect to third States has been analysed by the Court in its Opinion 1/03. In that opinion, the Court suggests in particular that the jurisdiction rules of the Regulation apply when the defendant is domiciled in a Member State in cases where the connecting factors for exclusive jurisdiction under Articles 22 and 23 of the Regulation are situated in a third State (no so-called "*effet réflexe*").

The absence of harmonised rules on subsidiary jurisdiction causes an unequal access to justice for Community citizens. The study on residual jurisdiction shows that this is particularly the case in situations where a party would not get a fair hearing or adequate protection before the courts of third States. The study equally shows that the absence of common rules determining jurisdiction against third State defendants may jeopardize the application of mandatory Community legislation, for example on consumer protection (e.g. time share), commercial agents, data protection or product liability. In Member States where no additional jurisdictional protection exists, consumers cannot bring proceedings against third State defendants. The same is true, for instance, for employees, commercial agents, victims of competition law infringements or of product liability torts, and individuals who intend to avail of the rights afforded by EU data protection legislation. In all these areas, where mandatory Community legislation exists, Community claimants may be deprived of the protection offered to them by the Community rules.

In addition, the absence of common rules on the effect of third State judgments in the Community may in certain Member States lead to situations where third State judgments are recognised and enforced even where such judgments are in breach of mandatory Community law or Community law provides for exclusive jurisdiction of Member States' courts.

Finally, the study on residual jurisdiction shows that the absence of harmonised rules determining the cases where the courts of the Member States can decline their jurisdiction on the basis of the Regulation in favour of the courts of third States generates a great deal of confusion and uncertainty.

3.3. Choice of court

The law applicable to choice of court agreements. While Article 23 of the Regulation, as interpreted by the European Court of Justice, extensively lays down the conditions concerning the validity of choice of forum agreements, uncertainties exist as to the exhaustive character of these conditions. The study shows that in some instances, besides the uniform conditions laid down in the Regulation, the consent between the parties is made subject, on a residual basis, to national law, determined either by reference to the *lex fori* or to the *lex causae*. This leads to undesirable consequences, in that a choice of court agreement may be considered valid in one Member State and invalid in another.

Choice of court and *lis pendens*. Concerns have been voiced that the Regulation would not sufficiently protect exclusive choice of court agreements. These concerns follow from the possibility that one party to such an agreement seizes the courts of a Member State in violation of the choice of court agreement, thereby obstructing proceedings before the chosen court insofar as the latter are brought subsequently to the first proceedings. In Case C-116/02 (*Gasser*), the European Court of Justice has confirmed that the *lis pendens* rule of the Regulation requires the court second seized to suspend proceedings until the court first seized has established or declined jurisdiction. In Case C-159/02 (*Turner*), the Court further confirmed that procedural devices which exist under national law and which may strengthen the effect of choice of court agreements (such as anti-suit injunctions) are incompatible with the Regulation if they unduly interfere with the determination by the courts of other Member States of their jurisdiction under the Regulation.

The resulting parallel proceedings may lead to delays which are detrimental to the proper functioning of the internal market. In some cases, a party may make use of such delays to effectively frustrate a valid choice of court agreement, thereby creating an unfair commercial advantage for itself[16]. Parallel proceedings equally create additional costs and uncertainty. Also, a tendency has been reported on the part of lenders in corporate loan transactions to institute proceedings pre-maturely so as to ensure the jurisdiction of the court designated in the agreement, with the negative economic consequences this has in terms of triggering default and cross-default clauses in loan agreements. These situations are particularly resented in specific circumstances, such as when the first proceedings are limited to obtaining negative declaratory relief, which has the effect of completely blocking proceedings on the merits.

The Hague Convention on choice of court agreements. The Commission has proposed to sign the Convention on choice of court agreements that was concluded on 30 June 2005 under the auspices of the Hague Conference on Private International Law[17]. The Convention will apply in all cases where at least one of the parties resides in a Contracting State other than an EU Member State, whereas the Regulation applies where at least one party is domiciled in a Member State. As a result, a coherent application of the rules of the Convention and those of the Regulation should be ensured. The main question is whether it is appropriate to maintain two different legal regimes, even in coordinating jurisdiction between the courts of Member States, depending on whether or not one of the parties is domiciled in a third State[18]. With respect to the question of parallel proceedings, the Convention does not contain a direct rule on *lis pendens*; the court designated by the agreement may proceed notwithstanding parallel proceedings being brought elsewhere. Any other court should suspend or dismiss proceedings except in a number of limited situations defined in the Convention.

3.4. Industrial property

The operation of the rules of the Regulation in industrial property matters raises difficulties both for the holder of such rights and those who wish to challenge them. A first difficulty concerns the operation of the *lis pendens* rule. Industrial property litigation is one of the areas where parties have attempted to pre-empt the exercise of jurisdiction by a competent court by starting proceedings before another court which usually, though not always, lacks jurisdiction,

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16 It must be noted, however, that no statistics are available to show whether such behaviour is frequent.

17 COM(2008) 538, 5.9.2008.

18 An extensive analysis of the different situations arising under The Hague Convention and the Regulation can be found in the above-mentioned impact study, in particular Annex IV thereof (cf. footnote 8).

preferably in a State where the proceedings to decide on the jurisdiction issue and/or on the merits take a long time. Such tactics ("torpedoes") may be particularly abusive if the first proceedings are aimed at a declaration of non-liability, thereby effectively preventing proceedings on the merits by the other party before a competent court. They may even lead to a situation that no claim for damages may be brought at all: for instance, when a court seized of a patent infringement action has declined jurisdiction because of the prior introduction of an action for declaratory relief in another Member State, it may be that the infringement proceedings cannot be resumed subsequently and that the courts seized of the declaratory relief do not have jurisdiction with respect to the infringement claim.

Torpedoes are not only used with respect to declaratory relief, but also with respect to counterclaims based on the invalidity of an industrial property right such as a patent raised in infringement actions. Defendants in infringement proceedings may effectively block these proceedings by raising, as a defence, the alleged invalidity of the patent[19]. Since proceedings concerning the validity of patents must be brought before the courts of the Member State in which the patent has been registered, the infringement court is obliged to stay proceedings pending the outcome of the proceedings concerning the validity. This may cause serious delay, in particular when the defendant does not (swiftly) bring the proceedings concerning the validity issue. In addition, positive declaratory relief concerning the validity on the part of the victim of the industrial property right infringement is not available in all Member States.

A next difficulty which is reported in the context of patent litigation is the impossibility to bring consolidated proceedings against several infringers of a European patent where the infringers belong to a group of companies and act in accordance with a coordinated policy[20]. The obligation to bring proceedings in each of the jurisdictions concerned would entail high costs for the victims and hamper an efficient handling of the claims.

3.5. Lis pendens and related actions

The application of the *lis pendens* and related actions rules of the Regulation has also raised concerns in some other cases.

With respect to exclusive jurisdiction under Article 22 of the Regulation, the study does not show an immediate practical need for exceptions to the priority rule. Nevertheless, the use of torpedoes has been reported in other specific areas such as corporate loan and competition cases. As a result, it should be reflected whether the need arises to improve the existing *lis pendens* rule in general in order to prevent abusive procedural tactics and ensure a good administration of justice in the Community.

With respect to the rule on related actions, the requirement that both actions must be pending before the courts and the reference to national law for the conditions of consolidation of related actions hampers an effective consolidation of proceedings at Community level. It is currently not possible on the basis of the Regulation to group actions, in particular actions of several plaintiffs against the same defendant, before the courts of one Member State[21]. Such consolidation is frequently needed, for instance for purposes of consumer collective redress

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19 Case C-315/01 (*GAT*).

20 Case C-539/03 (*Roche Nederland*).

21 Article 6(1) currently allows to group actions against several defendants only.

and damages actions for breach of the EC antitrust rules.[22] Also, the decline of jurisdiction by the court second seized pursuant to Article 28(2) may lead to a (temporary) negative conflict of jurisdiction if the first court does not take jurisdiction with respect to the action concerned.

One of the major novelties in the Regulation was the introduction of a definition of the moment in time when proceedings are considered to be pending for purposes of the *lis pendens* and related actions rules. This definition generally seems to have operated satisfactorily. Nevertheless, some uncertainties about its interpretation have arisen which it may be appropriate to clarify, for instance, concerning the authority responsible for service and the date and time of lodging with the court or receipt by the authority responsible for service.

3.6. Provisional measures

Provisional measures remain an area where the diversity in the national procedural laws of the Member States makes the free circulation of such measures difficult.

A first difficulty arises with respect to protective measures ordered without the defendant being summoned to appear and which are intended to be enforced without prior service of the defendant. In Case C-125/79 (*Denilauler*), the Court of Justice held that such *ex parte* measures fall outside the scope of the recognition and enforcement system of the Regulation. It is not entirely clear, however, whether such measures can be recognised and enforced on the basis of the Regulation if the defendant has the opportunity to contest the measure subsequently.

A second difficulty arises with respect to protective orders aimed at obtaining information and evidence. In Case C-104/03 (*St. Paul Dairy*), the Court of Justice held that a measure ordering the hearing of a witness for the purpose of enabling the applicant to decide whether to bring a case is not covered by the notion of provisional including protective measures. It is not entirely clear to what extent such orders are, as a general matter, excluded from the scope of Article 31 of the Regulation. It has been suggested that better access to justice would be ensured if the Regulation established jurisdiction for such measures at the courts of the Member State where the information or evidence sought is located, besides the jurisdiction of the courts having jurisdiction with respect to the substance of the matter. This is particularly important in intellectual property matters, where evidence of the alleged infringement must be secured by search orders, "*saisies contrefaçon*" or "*saisies description*"[23], and in maritime matters.

Further difficulties have been reported with respect to the application of the conditions set by the Court of Justice in Cases C-391/95 (*Van Uden*) and C-99/96 (*Mietz*) for the issuance of provisional measures ordered by a court which does not have jurisdiction on the substance of the matter. In particular, it is unclear how the "real connecting link between the subject matter of the measure sought and the territorial jurisdiction" should be interpreted. This is the case, in particular, when the measure aims at obtaining an interim payment or more generally does not concern the seizing of property.

Finally, the requirement that repayment must be guaranteed in the case of interim payments has given rise to difficulties of interpretation and may lead to high costs if it is considered that

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[22] See the Green Paper on consumer collective redress - COM(2008) 794, 27.11.2008 - and the White Paper on damages actions for breach of the EC antitrust rules - COM(2008) 165, 2.4.2008.

[23] See, in this respect, Articles 7 and 9 of Directive 2004/48/EC.

such repayment may only be secured by the provision of bank guarantees on the part of applicants.

3.7. The interface between the Regulation and arbitration

Arbitration falls outside the scope of the Regulation. The *rationale* behind the exclusion is that the recognition and enforcement of arbitral agreements and awards is governed by the 1958 New York Convention, to which all Member States are parties. Despite the broad scope of the exception, the Regulation has in specific instances been interpreted so as to support arbitration and the recognition/enforcement of arbitral awards. Judgments merging an arbitral award are frequently (though not always) recognised and enforced in accordance with the Regulation. Provisional measures relating to the merits of arbitration proceedings may be granted on the basis of Article 31 provided that the subject-matter of the dispute falls within the scope of the Regulation[24].

The study shows that the interface between the Regulation and arbitration raises difficulties. In particular, even though the 1958 New York Convention is generally perceived to operate satisfactorily, parallel court and arbitration proceedings arise when the validity of the arbitration clause is upheld by the arbitral tribunal but not by the court; procedural devices under national law aimed at strengthening the effectiveness of arbitration agreements (such as anti-suit injunctions) are incompatible with the Regulation if they unduly interfere with the determination by the courts of other Member States of their jurisdiction under the Regulation[25]; there is no uniform allocation of jurisdiction in proceedings ancillary to or supportive of arbitration proceedings[26]; the recognition and enforcement of judgments given by the courts in disregard of an arbitration clause is uncertain; the recognition and enforcement of judgments on the validity of an arbitration clause or setting aside an arbitral award is uncertain; the recognition and enforcement of judgments merging an arbitration award is uncertain; and finally, the recognition and enforcement of arbitral awards, governed by the NY Convention, is considered less swift and efficient than the recognition and enforcement of judgments.

3.8. Other issues

In addition to the main points addressed above, the following issues have been raised.

3.8.1. Scope

As far as scope is concerned, no substantial practical problems have been reported beside the arbitration point discussed above. The interpretative rulings by the Court of Justice give appropriate guidance for the interpretation of the terms "civil and commercial matters" and the exclusions from the Regulation's scope. The general study nevertheless shows difficulties in the practical application of Article 71 concerning the relation between the Regulation and conventions on particular matters.

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[24] Case C-391/95 (*Van Uden*).

[25] See Case C-185/07 (*West Tankers*).

[26] See Case C-190/89 (*Marc Rich*). Examples of such ancillary proceedings are proceedings aimed at appointing or removing an arbitrator, fixing the seat of arbitration, extending time limits, or appointing a court expert for the preservation of evidence.

3.8.2. Other issues on jurisdiction

With respect to the notion of "domicile", the report shows that no difficulties arise in practice when the courts apply their national concept of "domicile" on the basis of Article 59(1) Regulation. However, the determination that a party is domiciled in another member State in accordance with foreign law (Article 59(2)) is perceived as difficult.

The operation of certain jurisdiction rules could be improved. For instance, in Case C-462/06 (*Glaxosmithkline*), the Court of Justice confirmed that Article 6(1) does not apply in the context of employment matters. In addition, the study shows that there may be a need for a non-exclusive jurisdiction ground based on the situs of moveable assets. With respect to exclusive jurisdiction concerning rights *in rem*, the study reports a need for choice of court in agreements concerning the rent of office space and a need for some flexibility concerning rent of holiday homes in order to avoid litigation in a forum which is remote for all parties. With respect to the exclusive jurisdiction in the area of company law, questions arise on the scope of the exclusive jurisdiction rule and the lack of uniform definition of the notion of "seat" of a company, leading to possible positive and negative conflicts of jurisdiction.

The non-uniform application of Article 6(2) and 11 on third party proceedings pursuant to Article 65 also raises difficulties. In particular, third parties as well as parties claiming against the third party are treated differently depending on the national procedural laws of the Member States. In addition, courts have difficulties to appreciate the effect of judgments issued by the courts of other Member States following a third party notice.

In maritime matters, difficulties are reported in the coordination of proceedings aimed at setting up a liability fund and individual liability proceedings. Also, the reference to the law applicable to the transportation contract in order to determine the binding force of a jurisdiction agreement in a bill of lading for the third party holder of the bill of lading[27] is reported to be artificial.

In consumer matters, the types of consumer credit agreements covered by Articles 15(1)(a) and (b) of the Regulation do no longer correspond to the evolving consumer credit market where various other types of credit products have developed, as this is reflected in Directive 2008/48/EC on credit agreements for consumers[28].

Finally, in the light of the ongoing work on collective redress at Community level, the question arises whether specific jurisdiction rules should be developed for these specific actions.

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[27] See Case C-387/98 (*Coreck Maritime*).

[28] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133, 22.5.2008, p. 66).

3.8.3. Other issues on recognition and enforcement

In its resolution of 18 December 2008, the European Parliament has called on the Commission to address the question of the free circulation of authentic instruments.[29] The general study also reports difficulties in the free circulation of penalties. Finally, the study shows some ways to limit the costs of enforcement proceedings.

[29] See the Resolution of the European Parliament of 18 December 2008 with recommendations to the Commission on the European Authentic Act, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0636+0+DOC+XML+V0//EN.