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

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PI 10

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

I. INTRODUCTION

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

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

2. The Committee can also advise on questions relating to judicial co-operation in civil matters which arise in other areas of the EC Treaty.
3. In the framework of this mandate, the Committee on Civil Law Matters has prepared a number of opinions¹ to other working parties and to Coreper, emphasising the need for Community instruments in other areas to be consistent with the rules in the area of judicial co-operation in civil matters.
4. The purpose of this document is to provide an update on developments as of 11 January 2010 with regard to instruments or draft instruments containing provisions related to certain matters covered by legislative acts in the area of judicial cooperation in civil matters, in particular:^{2 3}
 - (a) the draft Directive on the taking-up and pursuit of the business of insurance and reinsurance (further referred to as the draft Solvency II Directive),
 - (b) the draft Directive on consumer rights (further referred to as the draft Consumer Rights Directive),

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

² **DELETED** has prepared a working document relating to Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009 amending Regulation (EC) No 883/2004 on the coordination of social security systems, and determining the content of its Annexes, OJ L 284, 30.10.2009.

³ **DELETED** also asked for the inclusion of the initiative for a Directive on the European Protection Order (see 17513/09 COPEN 247 + ADD) in this document due to its possible implications for civil justice. In accordance with the explanatory report the initiative could also relate to "the measures adopted by civil judicial bodies when the breach of the measure involves criminal liability or means that the offender may be deprived of liberty in some other way." The Committee is invited to take a view on this.

- (c) the draft Directive on combating late payment in commercial transactions (Recast) (further referred to as the draft Late Payment Directive)
- (d) enhanced patent system in Europe,
- (e) the draft Anti-Counterfeiting Trade Agreement,
- (f) Communication from the Commission on Cross-Border Business to Consumer e-Commerce in the EU,
- (g) the White Paper on damages action for breach of EC antitrust rules, and
- (h) the Green Paper on Consumer Collective Redress.

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

5. On 21 April 2008 the Commission adopted an amended proposal for a Directive of the European Parliament and of the Council on the taking-up and pursuit of the business of insurance and reinsurance.¹ This proposal aimed to recast the existing 13 Directives in the area of life and non-life insurance, reinsurance, insurance groups and winding-up into a single legal instrument.
6. On 25 November 2009 the Council and European Parliament reached first reading agreement on the Directive. The Directive was published in the Official Journal on 17 December 2009.²

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

² Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ L 335, 17.12.2009.

7. Recital 88 and Article 178 state that those Member States not subject to the application of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)¹ should, in accordance with this Directive, apply the provisions of that Regulation in order to determine the law applicable to contracts of insurance falling within the scope of Article 7 of that Regulation.

III. THE DRAFT DIRECTIVE ON CONSUMER RIGHTS²

8. On 8 October 2008 the Commission submitted a proposal for a Directive of the European Parliament and of the Council on consumer rights.³
9. The proposal is a result of the review of the consumer *acquis* which covers a number of Directives on consumer protection. The proposal aims at revising Directive 85/577/EEC on contracts negotiated away from business premises, Directive 93/13/EEC on unfair terms in consumer contracts, Directive 97/7/EC on distance contracts and Directive 1999/44/EC on consumer sales and guarantees. The proposal merges these four Directives into a single horizontal instrument regulating the common aspects in a systematic fashion, simplifying and updating the existing rules, removing inconsistencies and closing gaps.

¹ OJ L 177, 4.7.2008, p. 6.

² As agreed in 13467/07 JUSTCIV 251 COMPET 271 CONSOM 114 EF 60 ECOFIN 376 SOC 352 MI 231 ETS 18 the Committee on Civil Law Matters will follow the development of aspects relating to contractual law in the area of civil and commercial matters examined in other Community draft instruments.

³ 14183/08 CONSOM 140 JUSTCIV 220 CODEC 1315

10. On 3 and 4 December 2009 the Competitiveness Council held a policy debate on the proposal.¹ Coherence with other Community legislation and the interaction with the general contract law of the Member States were mentioned as essential elements requiring further clarification. The outcome of the debate will provide guidance for continuing work in 2010 and a new version of the text of the draft Directive will be prepared on that basis.
11. In terms of the Working Party on Civil Law Matters, regard should be had to the relationship between the draft and the discussions on the Common Frame of Reference ("CFR"). The Council² has agreed that the CFR should include consumer contracts because of their specific nature. In that connection, particular attention should be paid to the consistency of the CFR and the Directive. In order to achieve the appropriate consistency between the two projects it would be desirable during the setting up of the CFR to follow and to take into account the development in the negotiation of the proposed Directive, acknowledging, however, that the two projects are separate and are intended to pursue objectives which may not always coincide.

IV. THE DRAFT DIRECTIVE ON COMBATING LATE PAYMENT IN COMMERCIAL TRANSACTIONS

12. On 22 April 2009 the Commission presented a proposal for a draft Directive on combating late payment in commercial transactions (Recast) implementing the Small Business Act. This proposal aims to recast Directive 2000/35/EC in order to improve the effectiveness and the efficiency of remedies for late payment.
13. The proposal has been examined in the Working Party on Competitiveness and Growth and the last version is set out in 11575/3/09. Certain provisions that could be of interest to the Working Party on Civil Law Matters are reproduced in Annex I.

¹ See 17076/09 Presse 365

² See 14745/09 JUSTCIV 211 CONSOM 193 for a consolidated version of the conclusions of the Council on CFR.

V. ENHANCED PATENT SYSTEM IN EUROPE¹

14. On 4 April 2007 the Commission presented a communication on enhancing the patent system in Europe.² The communication suggested that consensus could be developed around an integrated jurisdictional system which would combine features of the draft European Patent Litigation Agreement (EPLA) and a Community jurisdiction.
15. Following this communication, the Working Party on Intellectual Property (Patents) has been discussing the possibilities of establishing a new, unified patent litigation system in the European Union applicable to the European patents and future EU patents, the latest version being document 7928/09.
16. These discussions could have implications for civil justice instruments in the field of applicable law and jurisdiction (in particular Brussels I Regulation).
17. On 3 and 4 December 2009 the Competitiveness Council held a debate on an enhanced patent system in Europe and adopted conclusions³ on the main features of the future patent system based on two main pillars and comprising
 - the creation of a unified patent litigation system that would have exclusive jurisdiction in respect of civil litigation related to the infringements and validity of EU and European patents, and would consist of a court of first instance and a court of appeal;
 - the creation of an EU patent as a unitary legal instrument for granting patents valid in the EU as a whole.

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

² 8302/07 PI 11

³ See 17229/09 PI 141 COUR 87

18. In the meantime an opinion from the European Court of Justice is pending on the question whether the envisaged Agreement creating a Unified Patent Litigation System is compatible with the provisions of the Treaty establishing the European Community. The request was submitted in June 2009.¹ The Council conclusions of December 2009 are without prejudice to the request for an opinion from the European Court of Justice.

VI. THE DRAFT ANTI-COUNTERFEITING TRADE AGREEMENT

19. Since 2007, six negotiation rounds have taken place on an Anti-Counterfeiting Trade Agreement. The last one was held on 4-6 November 2009 in Seoul, Republic of Korea, where a US proposal on the enforcement of intellectual property rights in the digital environment was discussed for the first time; the next round will be held on 26-29 January 2010 in Mexico.
20. This agreement should cover mainly the following aspects:
- (a) initial provisions and definitions,
 - (b) civil enforcement,
 - (c) border measures,
 - (d) criminal enforcement ,
 - (e) special requirements relating to the enforcement of intellectual property rights in the digital environment,
 - (f) international cooperation,
 - (g) enforcement practices,
 - (h) institutional arrangements, and
 - (i) final provisions.

¹ See 11125/09 JUR 292 PI 56 COUR 55

21. As regards civil enforcement issues, the Union endeavours to reach an agreement which would provide added value to the Agreement on Trade-Related Aspects of Intellectual Property Rights and which would follow the logics of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.
22. Concerning the section on special requirements related to the enforcement of intellectual property rights in the digital environment, the Union endeavours to reach an agreement which would follow the logic of the EU acquis, and in particular Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal Market (Directive on electronic commerce), Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society and Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights.
23. In general the EU's objectives are to preserve the EU acquis, inter alia by ensuring that the future agreement covers all types of intellectual property rights and by avoiding imposing an obligation to provide for punitive damages.
24. The Working Party on Civil Law Matters should keep the negotiations on this Agreement under consideration, in particular as regards its aspects relating to civil enforcement.

VII. COMMUNICATION FROM THE COMMISSION ON CROSS-BORDER BUSINESS TO CONSUMER E-COMMERCE IN THE EU

25. On 27 October 2009 the Commission submitted to the Council a communication¹ on cross-border business to consumer e-commerce in the EU that sets out the foundation for a strategy for making cross-border e-commerce work better. The communication identifies the effect of fragmented consumer protection rules on contracts in conjunction with rules on conflict of laws as one of the main challenges to be tackled. Promotion of alternative dispute resolution schemes and the European small claims procedure are highlighted as means to promote cross-border e-commerce.
26. Progress on all the elements of the strategy will be monitored closely through the Consumer Market Scoreboard, a tool developed by the European Commission to assess how specific markets are performing for consumers.
27. The Working Party on Civil Law Matters should keep the matter under consideration.

VIII. THE WHITE PAPER ON DAMAGES ACTION FOR BREACH OF EC ANTITRUST RULES

28. The Commission published on 3 April 2008 a White Paper suggesting a new model for achieving compensation for consumers and businesses who are victims of antitrust violations. On 26 March 2009 the European Parliament adopted a resolution on the White Paper.²
29. The Working Party on Civil Law Matters should keep the matter under consideration.

¹ See 15058/09 CONSOM 198 MI 397 TELECOM 221

² European Parliament resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI))

IX. THE GREEN PAPER ON CONSUMER COLLECTIVE REDRESS

30. The Commission submitted on 1 December 2008 a Green Paper on Consumer Collective Redress.¹ This paper discusses the different options for consumer collective redress at EU level and launches a discussion on the way forward.
31. The Commission launched a consultation process on the follow-up to be given to the Green Paper. The aim of the consultation was to present the first working analysis of the impact of the options in the light of the replies to the Green Paper on consumer collective redress and to gather further information, preferably with concrete examples and/or figures on the concrete impact of the policy options, in particular on each national redress systems. The period for consultation ended on 3 July 2009.²
32. The Working Party on Civil Law Matters should keep the matter under consideration.

X. CONCLUSION

33. At its meeting on 18 January 2010 the Working Party on Civil Law Matters (General Questions) is invited to take note of the information in points II to IX and to examine whether follow-up is needed on any of the items.

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

² See http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm for more details.

THE DRAFT DIRECTIVE ON COMBATING LATE PAYMENT IN COMMERCIAL TRANSACTIONS (RECAST)²⁰

Recitals

(4) Judicial claims related to late payments are already facilitated by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters²¹, Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims²², Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure²³ and Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure²⁴. However, in order to discourage late payment in commercial transactions, it is necessary to lay down complementary provisions.

Article 2(9)

(9) "enforceable title" means any decision, judgment or order for payment issued by a court or other competent authority, including²⁵ those that are provisionally enforceable, whether for immediate payment or payment by instalments, which permits the creditor to have his claim against the debtor collected by means of forced execution; ~~it shall include a decision, judgment or order for payment that is provisionally enforceable and remains so even if the debtor appeals against it.~~

²⁰ 11575/3/09 REV 3

²¹ OJ L 12, 16.1.2001, p. 1.

²² OJ L 143, 30.4.2004, p. 15.

²³ OJ L 399, 30.12.2006, p.1.

²⁴ OJ L 199, 31.7.2007, p.1.

²⁵ **DELETED**: add "where applicable in a Member State" (see MD 05/09). COM: not necessary. It is already the case in the current Directive and it does not imply that a provisional judgement shall apply.

Article ~~59~~

Recovery procedures for unchallenged claims

1. Member States shall ensure that an enforceable title can be obtained, irrespective of the amount of the debt, ~~normally~~ **normally**²⁶ within 90 calendar days of the lodging of the creditor's action or application at the court or other competent authority, provided that the debt or aspects of the procedure are not disputed. ~~This duty shall be carried out by Member States in conformity with their respective national legislation, regulations and administrative provisions. This duty shall be carried out by Member States in conformity with their respective national legislation, regulations and administrative provisions.~~²⁷
2. ~~The respective n~~National legislation, regulations and administrative provisions shall apply the same conditions for all creditors²⁸ who are established in the ~~European~~ Community.
3. ~~The 90 calendar day period referred to in paragraph 1 shall not include the following~~
When calculating the period referred to in paragraph 1, the following shall not be taken into account :
 - (a) periods for service of documents;
 - (b) any delays caused by the creditor, such as periods devoted to correcting applications.

²⁶ **DELETED**: keep "normally", it gives flexibility.

COM: reservation.

²⁷ COM: reservation.

²⁸ **DELETED**: add: ",according to their size," (see MD 15/09). **DELETED**: opposed.

~~4. This Article shall be without prejudice to the provisions of the Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters²⁹~~

4. Paragraphs 1, 2 and 3 shall be without prejudice to the provisions of Regulation (EC) ~~1986~~**1896/2006** **of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure³⁰**.

²⁹ ~~Consolidated version in OJ C 27, 26.1.1998, p. 3.~~

³⁰ **OJ L 399, 30.12.2006, p.1.**