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COMMISSION COMMUNICATION
“TOWARDS GREATER EFFICIENCY IN OBTAINING AND
ENFORCING JUDGEMENTS IN THE EU”

[COM(97) 609 final - 97/0339(CNS)]

UNICE PRELIMINARY COMMENTS

UNICE has noted the Commission's Communication “Towards greater efficiency in obtaining and enforcing judgements in the European Union” which sets itself the chief aim of achieving ‘free movement of judgements’ in the European Union.

While UNICE understands that interested circles are essentially consulted on the second part of the Communication, in which the Commission presents “avenues to be explored for an improvement of the administration of justice in the European Union”, it will nevertheless formulate some preliminary observations on all three chapters of the Communication, including the Proposal for a Council Act establishing the proposed new Convention.

I. FREE MOVEMENT OF JUDGEMENTS

UNICE would agree with the Commission that the double prospect of tighter integration and enlargement may warrant a review of the rules governing the recognition and enforcement of judgements in the European Union and it therefore broadly welcomes the European Commission's efforts to improve the ‘free movement of judgements’ throughout the Union.

1. *Revision of the Brussels and Lugano Conventions*

UNICE agrees with the Commission and Member States that the current revision of the Brussels and Lugano Conventions should not generate a major upheaval in the Conventions or modify the general structure and the underlying principles that have proved their worth.

In this context, the Commission's proposal to align the Brussels and Lugano Conventions raises no fundamental objections, subject to the specific comments on the Proposal for a Council Act under Section III below.

2. *Simplified recognition and enforcement procedure*

UNICE is of the opinion that simplification of the enforcement and registration (exequatur) procedures is highly desirable and it agrees that abolition, in due course, of the registration procedure is a reasonable objective to pursue.

This, however, would be premature at this stage and can only be envisaged once sufficient approximation of Member States' procedural systems for enforcing judgements has taken place and provided that any proposed amendments give due consideration to the overarching need to protect the rights of the defending party.

3. *Provisional and protective measures*

An effective system of provisional and protective measures is of vital importance in the context of recognition and enforcement of foreign judgements. UNICE therefore generally supports the Commission's suggestion that provisional and protective measures be given a more uniform definition in the Member States.

In contrast, UNICE would, at this juncture, be more reluctant to support the Commission's proposal that there be a clear rule "conferring jurisdiction to order provisional / protective measures on the courts of the Member State in whose territory they may effectively be executed, even if the courts of another Member State have jurisdiction to determine the substance of the case". In UNICE's view, as long as differences persist between Member States' definitions of 'provisional / protective measures' this could lead to forum shopping to the disadvantage of the defending party.

More generally, UNICE would like to stress that provisional and protective measures are a very important part of Member States' procedural law regimes and are of great practical importance to companies. It therefore considers it essential that the business community be thoroughly consulted on any future developments and it looks forward to contributing to any future debate on this topic.

II. AVENUES TO BE EXPLORED FOR IMPROVING THE ADMINISTRATION OF JUSTICE IN THE EU

The second section of the Commission's Communication goes beyond the current legislative proposals and seeks to prompt a debate on a Community approach to certain aspects of national procedural laws. In UNICE's view, these proposals are akin to establishment of some form of European regime of civil procedural law and deserve serious consideration. At this stage in the debate, UNICE would limit itself to the following general comments.

1. *Procedure for obtaining a writ of execution in the State of origin*

In principle, the establishment of a 'European payment order' would be seen as a reasonable proposal. European companies have a clear interest in being able to seize bank balances in other countries more easily.

However, UNICE would stress – as the Commission points out itself in its Communication – that there are quite considerable differences in judicial systems and administration of justice. UNICE therefore believes that further alignments in this area should take place before concrete proposals can be made to harmonise payment orders or other such measures.

The same comment would apply regarding the training of judges and other officers of justice. It should not be possible for unqualified officers to issue such payment orders in one country when a highly qualified judge would be needed in another. Such differences would in practice have a discriminatory effect.

2. *Transparency regarding assets*

While UNICE acknowledges that transparency regarding the debtor's assets is an important element in safeguarding the rights of the creditor effectively, it would nevertheless strongly oppose

introduction at Community level of the obligation for debtors to swear an ‘oath of disclosure’ as mentioned in the Communication.

On the contrary, UNICE would encourage the Commission to take measures to ensure that annual accounts are published in a transparent and comparable manner in all Member States. This would enable creditors to make an informed assessment of the creditworthiness of any possible business partners.

3. *Exchange of information between enforcement authorities*

UNICE fully agrees with the Commission that the exchange of information and cooperation between enforcement authorities should be improved and it sees this as a crucial element of the European Union's efforts towards a more efficient justice system.

III. COMMENTS ON THE PROPOSAL FOR A COUNCIL ACT

Regarding the proposal for a Council Act “establishing the Convention on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters in the Member States of the European Union” UNICE would like to offer the following comments at this stage.

1. *Article 5.1*

UNICE questions the limitation of Article 5.1 to contracts for the sale of goods only. It sees no reason why contracts for the supply of services should be excluded from this provision.

In addition, the present wording of Article 5.1 raises doubts as to which court has jurisdiction in cases of a sale by mail-order, for example. UNICE therefore suggests that the present wording of Article 5.1 of the Brussels Convention (“in the courts for the place of performance of the obligation in question”) should be maintained.

2. *Article 36.3*

UNICE considers Article 36.3 to be unacceptable. In practice, if the judgement authorising enforcement is enforceable in anticipation, any opposition procedure against such a judgement given *in absentia* would become meaningless. Such an arrangement would seriously undermine the rights of the defending party.

3. *Article 37a.1(1) and Article 50.1 - ‘Public order’ test*

With regard to Article 37a.1 – and to Article 50.1 – UNICE fails to understand why the ‘public order’ test has been deleted. Although in practice of minor relevance, a claim of incompatibility of a foreign judgement with the public order of the Member State of enforcement *must* remain possible in extreme cases.

CONCLUDING REMARKS

While the whole debate surrounding the wide issue of litigation in Europe essentially requires the expert knowledge of professionals from the judiciary and academia, UNICE would stress that these questions are of great practical importance to companies and it would therefore appreciate being closely involved in any further discussions on this subject.

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