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NOTE

From:	General Secretariat of the Council
To:	Working Party on Civil Law Matters (General Questions)
No. prev. doc.:	10636/3/16 REV 3
Subject:	Questions relating to judicial cooperation in civil matters examined in other Union draft instruments

I. INTRODUCTION

1. The purpose of this document is to provide the Working Party on Civil Law Matters, which has been entrusted with the task of "[ensuring] *coherence in EU action in civil law matters, in particular those covered by Article [81 TFEU]*" and "*also [advising] on questions concerning judicial cooperation in civil matters arising in other areas of the (...) Treaty*"¹, with an update on the following proposed Directives.:
 - (a) representative actions for the protection of the collective interests of consumers,
 - (b) credit servicers, credit purchasers and the recovery of collateral,
 - (c) cross-border conversions, mergers and divisions,

¹ See doc. 6166/2/99 REV 2

- (d) better enforcement and modernisation of EU consumer protection rules
- (e) promoting fairness and transparency for business users of online intermediation services;
- (f) unfair trading practices in business-to-business relationships in the food supply chain,
- (g) a pan-European Personal Pension Product (PEPP).

2. With a view to preparing this update, delegations were invited on 12 June 2018 to provide written comments.

II. ISSUES

A. **Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC**

3. On 11 April 2018, the Commission submitted a proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC². The Commission proposal is based on Article 114 TFEU. The proposal is being examined by the Working Party on Consumer Protection and Information and the Competitiveness Council is the Council configuration in charge of this legislative file.
4. The proposal aims to modernise and replace Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests³. It aims to enable qualified entities, which represent the collective interests of consumers, to seek remedy through representative actions against infringements of provisions of Union law. In doing so, the proposal aims to strike a balance between facilitating access to justice, to safeguard consumers' interests and ensuring adequate safeguards from abusive litigation.

² 7877/18

³ OJ L 110, 1.5.2009, p. 30-36

5. The text of the proposal introduces the following provision in Article 2(1):
- "1. This Directive shall apply to representative actions brought against infringements by traders of provisions of the Union law listed in Annex I that harm or may harm the collective interests of consumers. It shall apply to domestic and cross-border infringements, including where those infringements have ceased before the representative action has started or before the representative action has been concluded.*
 - 2. This Directive shall not affect rules establishing contractual and non-contractual remedies available to consumers for such infringements under Union or national law.*
 - 3. This Directive is without prejudice to the Union rules on private international law, in particular rules related to court jurisdiction and applicable law."*
6. Further explanation of this Article is given in recital 9, which states the following: *"This Directive should not establish rules of private international law regarding jurisdiction, the recognition and enforcement of judgments or applicable law. The existing Union law instruments apply to the representative actions set out by this Directive"*
7. Article 16 of the proposal relates to cross-border representative actions may be of interest. Paragraph 2 states the following: *"Member States shall ensure that where the infringement affects or is likely to affect consumers from different Member States the representative action may be brought to the competent court or administrative authority of a Member State by several qualified entities from different Member States, acting jointly or represented by a single qualified entity, for the protection of the collective interest of consumers from different Member States.*

8. This provision is further clarified in the second and third sentences of recital 41 of the proposal, which read as follows: *"Furthermore, qualified entities from different Member States should be able to join forces within a single representative action in front of a single forum, subject to relevant rules on competent jurisdiction. For reasons of efficiency and effectiveness, one qualified entity should be able to bring a representative action in the name of other qualified entities representing consumers from different Member States."*
9. The Working Party on Consumer Rights and Information, which is in charge of examining this proposal, is currently carrying out the article-by-article examination of the proposed Directive.

B. Proposal for a Directive of the European Parliament and of the Council on credit servicers, credit purchasers and the recovery of collateral.

10. On 14 March 2018, the Commission submitted a proposal for a Directive of the European Parliament and of the Council on credit servicers, credit purchasers and the recovery of collateral⁴ ('AECE-proposal). The Commission proposal is based on Articles 53 and 114 TFEU. The proposal is being examined by the Working Party on Financial Services (NPLS) and the Economic and Financial Affairs Council is the Council configuration in charge of this legislative file.
11. The proposal aims, together with other measures put forward by the Commission, to create the appropriate environment for credit institutions to deal with NPLs on their balance sheets and to reduce the risk of future NPL accumulation. It aims to do so by enabling credit institutions to better deal with loans once these become non-performing by improving conditions to either enforce the collateral used to secure the credit or to sell the credit to third parties. An "accelerated extrajudicial collateral enforcement" (AECE) procedure requires Member States to create an extrajudicial dispute resolution mechanism through which creditors can quickly recover value from collateral when a loan becomes non-performing.

⁴ Doc. 7403/18

12. Certain provisions in the proposal could be of interest for judicial cooperation in civil law matters, in particular 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 Regulation)⁵.
13. In particular, the first sentence of Article 24(3) of the proposal states the following: *"Where Member States establish the extrajudicial enforcement procedure by means of appropriation, the right of the creditor to retain the asset in or towards satisfaction of business borrower's liability shall be governed by the applicable laws in each Member State."*
14. Furthermore, Article 24(5) of the proposal states the following: *"For the purposes of point (a), where the parties cannot agree upon the appointment of a valuer for the purposes of realising the collateral referred to in paragraph 2, a valuer shall be appointed by a decision of a judicial court, in accordance with the national law of the Member State in which the business borrower is established or is domiciled."*
15. In a dispute on the appointment of a valuer in cases with cross-border elements, this provision would establish an applicable law rule, as it refers to the "national law of the Member State in which the business borrower is established or is domiciled." 18. It is recalled that paragraph 1 of Article 3 of the Rome I Regulation states the following:
- "A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract."*

⁵ OJ L 177, 4.7.2008, p. 6–16

16. Article 4 of the Rome I Regulation regulates the cases in which the parties did not make a choice on the law applicable to the contract. That Article states the following:

"1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:

...

(c) a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;

...

2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has habitual residence.

17. Article 24(5) of the proposal would also relate to a jurisdiction rule in case of a dispute with cross-border elements given that the text refers to "a decision of a judicial court". However, the provision of the proposal does not seem to specify which judicial court would be competent for such a case.

18. It is recalled also that the Rome I Regulation, pursuant to Article 23 thereof, does not prejudice the application of provisions of EU law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations.

19. Finally, the proposal also contains a link with the ongoing negotiations on the Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30⁶ ('Preventive Restructuring and Second Chance Proposal').

⁶ Doc. 14875/16

20. Article 32 of the proposal states the following:

"1. This Directive shall be without prejudice to the Directive (EU) 20XX/XX of the European Parliament and of the Council.⁷"

2. Member States shall ensure that where insolvency proceedings are initiated in respect of a business borrower, the realisation of collateral pursuant to national laws transposing this Directive is subject to a stay of individual enforcement actions in accordance with applicable national laws."

21. Recital (50) of the proposal clarifies the above-mentioned Article, indicating the following:

"In order to ensure consistency with pre-insolvency and insolvency rules, Member States should ensure that where a preventive restructuring proceeding, as provided for in the Proposal for a Directive of the European Parliament and of the Council on preventive restructuring and second chance, is initiated in respect of the business borrower, the realisation of the collateral pursuant to an AECE is subject to a stay of individual enforcement actions in accordance with applicable national laws transposing that Directive. In the case of any insolvency proceedings which are initiated in respect of the business borrower, the realisation of the collateral pursuant to an AECE should also be subject to a stay of individual enforcement actions in accordance with applicable national laws. It should be left to national law whether secured creditors have preferential access to the collateral under this accelerated mechanism even once insolvency proceedings are open."

22. The current version of the Council position of Article 6 of the Preventive Restructuring, and Second Chance Proposal states the following:

" Without prejudice to paragraph 3, Member States shall ensure that a stay of individual enforcement actions may cover all types of creditors, including secured and preferential creditors."

⁷ Directive (EU) .../.... of the European Parliament and of the Council of [...] on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU (OJ L [...], [...], p. [...])

23. The Working Party on Financial Services (NPLS), which is in charge of examining this proposal, is currently carrying out the article-by-article examination of the AECE-proposal. It is the aim of the Austrian Presidency to reach a general approach by December.

C. Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions

24. On 24 April 2018, the Commission submitted a proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions⁸. The Commission proposal is based on Article 50 TFEU. The proposal is being examined by the Working Party on Company Law Package and the Competitiveness Council is the Council configuration in charge of this legislative file.

25. The objective of the Directive is to facilitate and regulate cross-border conversions, mergers and divisions in order to contribute to the abolition of restrictions on freedom of establishment and to provide at the same time adequate and proportionate protection for stakeholders such as employees, creditors and minority shareholders.

26. In this proposal, cross-border conversion is defined as follows in paragraph 2 of Article 86(b):
"an operation whereby a company, without being dissolved, wound up or going into liquidation, converts the legal form under which it is registered in a departure Member State into a legal form of a company of a destination Member State and transfers at least its registered office into the destination Member State whilst retaining its legal personality;"

27. Paragraph 3 of Article 86c states the following:

"Member States shall ensure that the competent authority of the departure Member State shall not authorise the cross-border conversion where it determines, after an examination of the specific case and having regard to all relevant facts and circumstances, that it constitutes an artificial arrangement aimed at obtaining undue tax advantages or at unduly prejudicing the legal or contractual rights of employees, creditors or minority members."

⁸ Doc. 8561/18

28. This provision is further clarified in recital (7) of the proposal, which states the following:
"The right to convert an existing company formed in a Member State into a company governed by another Member State may in certain circumstances be used for abusive purposes such as for the circumvention of labour standards, social security payments, tax obligations, creditors', minority shareholders' rights or rules on employees participation. In order to combat such possible abuses, a general principle of Union Law, Member States are required to ensure that companies do not use the cross-border conversion procedure in order to create artificial arrangements aimed at obtaining undue tax advantages or at unduly prejudicing the legal or contractual rights of employees, creditors or members. In so far as it constitutes a derogation from a fundamental freedom, the fight against abuses must be interpreted strictly and be based on an individual assessment of all relevant circumstances. A procedural and substantive framework which describes the margin of discretion and allows for the diversity of approach by Member States whilst at the same time setting out the requirements to streamline the actions to be taken by national authorities to fight abuses in conformity with Union law should be laid down.
29. It is recalled that in the current version of the Council position on Preventive Restructuring and Second Chance proposal⁹, "restructuring" is defined as follows in Article 2(1)(2):
"restructuring means measures that include changing the composition, conditions or structure of a debtor's assets and liabilities or any other part of the debtor's capital structure, such as sales of assets, sale of the business, either in parts or as a going concern, as well as operational changes, or a combination of those elements";
30. In view of the definition of 'cross-border conversion' in the proposal on cross-border conversions, mergers and divisions, and of the current definition of 'restructuring' in the preventive restructuring and second chance proposal, these provisions may relate to each other. A cross-border conversion could be carried out in context of a restructuring as currently defined in the latest Council position as set out in document 10214/18.

⁹ Doc. 10214/18

31. The link between both proposals is clarified in paragraph 2 of Article 86c of the proposal, which states the following: "*A company shall not be entitled to carry out a cross-border conversion in any of the following circumstances:*

...

(b) *the company is subject to preventive restructuring proceedings initiated because of the likelihood of insolvency;*"

32. The Working Party on Company Law Package, which is in charge of examining this proposal is currently carrying out the article-by-article examination of the proposed Directive. It is the aim of the Austrian Presidency to reach a general approach by December.

D. Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13 EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules

33. On 11 April 2018, the Commission submitted a proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13 EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules.¹⁰ The proposal is based on Articles 114 and 169 TFEU. It is being examined by the Working Party on Consumer Protection and Information and the Competitiveness Council is the Council configuration in charge of this legislative file.

34. The aims of the proposal are the following:

- Strengthening consumer rights online;
- Giving consumers the tools to enforce their rights and get compensation;
- Introducing effective penalties for violations of EU consumer law;
- Tackling dual quality of consumer products;
- Improving conditions for businesses.

¹⁰ Doc. 7876/18

35. In order to achieve these objectives, the proposal introduces amendments to existing consumer protection instruments, including Directive 2011/83/EU ('Consumer Rights Directive'). One of the aims of amending this Directive is to extend the protection of consumers in respect of digital services, in particular regarding digital services for which consumers do not pay money but provide personal data. These amendments were introduced with the aim of aligning the scope of application of the Consumer Rights Directive with the proposal for a Directive of the European Parliament and the Council on certain aspects concerning contracts for the supply of digital content ('Digital Content Directive'), in particular with regards to the definitions of 'digital content' and 'digital services'.
36. In this regard, the proposal suggests amendments to Article 2 of the Consumer Rights Directive on definitions, in order to include additional definitions of digital content and digital service and the respective contracts for the provision of these products.
37. The definitions of 'contract for the supply of digital content' and 'digital service contract' aim to align the scope of the Consumer Rights Directive with the proposal for a Digital Content Directive by clarifying that the rights and obligations of the Consumer Rights Directive will not apply where the personal data provided by the consumer is exclusively processed by the trader for supplying the digital content or service or for the trader to comply with legal requirements, and the trader does not process this data for any other purpose.
38. The proposed amendments to the Consumer Rights Directive also suggest additions to the pre-contractual information requirements in order to cover the newly defined digital services as regards the pre-contractual information requirements about interoperability and functionality.
39. The Working Party on Consumer Protection and Information, which is in charge of examining this proposal is currently carrying out the article-by-article examination of the proposed Directive.

E. Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services

40. On 26 April 2018, the Commission submitted a proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services.¹¹ The proposal is based on Article 114 TFEU. It is being examined by the Working Party on Competitiveness and Growth (Internal Market) and the Competitiveness Council is the Council configuration in charge of this legislative file.
41. The main goal of this proposal is to establish a fair, trusted and innovation driven ecosystem in the online platform economy in the EU and contribute to a strengthened, better functioning Digital Single Market in terms of innovation, competitiveness, growth and jobs. The proposal aims to give businesses the predictability they need and to ultimately benefit European consumers.
42. The proposal also foresees a provision on judicial proceedings by representative organisations or associations and by public bodies in Article 12. Paragraph 1 of this Article reads as follows:

"Organisations and associations that have a legitimate interest in representing business users or in representing corporate website users, as well as public bodies set up in Member States, shall have the right to take action before national courts in the Union, in accordance with the rules of the law of the Member State where the action is brought, to stop or prohibit any non-compliance by providers of online intermediation services or by providers of online search engines with the relevant requirements laid down in this Regulation."

43. Paragraph 3 of the same Article states the following:

"The right referred to in paragraph 1 shall be without prejudice to the rights of business users and corporate website users to individually take action before competent national courts, in accordance with the rules of the law of the Member State where the action is brought, to address any non-compliance by providers of online intermediation services with the relevant requirements laid down in this Regulation."

¹¹ Doc. 8413/18

44. The proposal in its current form does affect existing rules on jurisdiction and applicable law, as clarified by recital 32 which reads as follows:

"It is appropriate to clarify that this Regulation should not affect the application of the relevant rules on Union law applicable in the areas of judicial cooperation in civil matters, competition, consumer protection, electronic commerce and financial services."

45. The Working Party on Competitiveness and Growth (Internal Market) is currently carrying out the article-by-article examination of the proposed Directive. It is the aim of the AT presidency to reach a general approach in the COMPET Council in November 2018 and to start trilogues with the European Parliament after that.

F. Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain

46. On 12 April 2018, the Commission submitted a proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain.¹² The proposal is based on Articles 39 and 43 TFEU. It is being examined by the Working Party on Horizontal Agricultural Questions (Unfair Trading Practices) and the Agriculture and Fisheries Council is the Council configuration in charge of this legislative file.

47. The main goal of this proposal is to reduce the occurrence of unfair trading practices in the food supply chain in business- to- business relations by introducing a minimum common standard of protection across the EU that consists of a short list of specific prohibited unfair trading practices.

48. The proposal states the following in Article 3(4):

"Member States shall ensure that the prohibitions laid down in paragraphs 1 and 2 constitute overriding mandatory provisions which are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the supply agreement between the parties."

49. Paragraphs 1 and 2 of Article 3 of this proposal set out a list of trading practices which have to be prohibited by the Member States.

¹² Doc. 7809/18

50. Article 3(4) is therefore closely related to and would create an exception to the general rule regarding applicable law as stated in Article 4(3) of the Rome I Regulation, which refers to the free choice of the parties with regards to the law applicable to the contract and Article 4(4), which refers to the following applicable law:

"a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;"

51. It is recalled also that the Rome I Regulation, pursuant to Article 23 thereof, does not prejudice the application of provisions of EU law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations.

52. The Working Party on Horizontal Agricultural Questions (Unfair Trading Practices) is currently finalising the technical examination of the proposal and aims at reaching a Council position by the end of September with a view to come to a political agreement before the elections in the European Parliament.

G. Proposal for a Regulation of the European Parliament and of the Council on a pan-European Personal Pension Product (PEPP)

53. On 29 June 2017, the Commission submitted a proposal for a Regulation of the European Parliament and of the Council on a pan-European Personal Pension Product (PEPP).¹³ The proposal is based on Article 114 TFEU. It is being examined by the Working Party on Financial Services (PEPPS) and the ECOFIN Council is the Council configuration in charge of this legislative file.

54. The main goal of this proposal is to create a quality label for EU personal pension products and increase trust among consumers. It aims to make sure that consumers have greater choice between providers and aims to ensure a level playing field for providers.

55. As the proposal is a Regulation, the rules regarding PEPPs would become directly applicable in all Member States. During the course of the negotiations, Member States had required to provide more clarification on the relation between the scope of the Regulation, other sectoral EU legislation and national laws.

¹³ Doc. 10654/17

56. The latest compromise text suggested by the Presidency, as set out in document 10073/18 includes the following clarification with regards to rules applicable to PEPP in Article 3:

" PEPP shall be subject to:

- (a) this Regulation,*
- (b) relevant sectorial Union legislation as well as the corresponding delegated and implementing acts,*
- (c) the provisions of laws adopted by Member States in implementation of relevant sectorial Union legislation and implementation of measures relating specifically to the PEPP;*
- (d) other provisions of Member States' laws which apply to the PEPP."*

57. This Article is further clarified in a new recital 13a, which states the following:

"This Regulation should lay down uniform rules on the registration, provision, distribution and supervision of PEPP. PEPP should be subject to the provisions in this Regulation, relevant sectorial EU legislation as well as the corresponding delegated and implementing acts. In addition, the laws adopted by Member States in implementation of EU sectorial legislation apply. If not already covered by this Regulation or by sectorial EU legislation, the respective laws of Member States apply. PEPP is also subject to the contract concluded between the PEPP saver and the PEPP provider. There is a set of key characteristics of the product that should be included in the content of the PEPP contract. This Regulation should be without prejudice to the Union rules on private international law, in particular rules related to court jurisdiction and applicable law. This Regulation should also be without prejudice to national contractual, social, labour and tax law."

58. The ECOFIN Council has approved its negotiating mandate on 19 June 2018 and the negotiations with the European Parliament will start in September 2018 with a view to come to a political agreement before the elections in the European Parliament.

III. CONCLUSION

59. The Working Party on Civil Law Matters (General Questions) is invited to take note of the information provided in this note at its meeting on 19 July 2018 and to exchange views on whether further action regarding any of the issues would be necessary.
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