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**COVER NOTE**

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| from : | Mr B.R. Bot, Permanent Representative |
| date of receipt : | 30 July 2002 |
| to : | Mr Javier SOLANA, Secretary-General/High Representative of the European Union |
| Subject : | Proposal for a revision of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters |

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(1), the Netherlands Government attaches a proposal for an initiative for the revision of Article 20 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, published in Official Journal L 12 (page 1) of the European Communities, with the request to give it prompt attention.

The Permanent Representative,

Mr. B.R. Bot

Proposal for a revision of

**Council Regulation (EC) No 44/2001 of 22 December 2000**
**on jurisdiction and the recognition and enforcement of judgments**
**in civil and commercial matters**

Regulation (EC) No 44/2001 (hereinafter referred to as the "Brussels I Regulation") came into force on 1 March 2002. Relatively soon afterwards it became clear that, certainly, but possibly not only, in the case of the Netherlands, Article 20(1) of the Regulation was too restrictive because, as currently worded, it negates its own purpose, i.e. greater protection of employees in international labour disputes. It also seems to hamper a major internal market objective, namely the free movement of workers.

Article 20 of the Regulation provides that:

"1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.
2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending."

The special jurisdiction afforded by Article 20 to the court of the employee's domicile is supplemented by the provisions of Article 21, stating that:

"The provisions of this Section may be departed from only by an agreement on jurisdiction:

1) which is entered into after the dispute has arisen; or
2) which allows the employee to bring proceedings in courts other than those indicated in this Section."

This arrangement applies to both disputes concerning termination of a contract of employment and disputes unconnected with such termination, such as compliance with a non-compete clause.

Contracts of employment tend to be terminated through dismissal by the employer, with an employee who wishes to dispute such dismissal on the basis of Article 19 of the Regulation having to sue his employer in the courts for his domicile or that for the place where the employee habitually works or used to work or, if such a place cannot be determined, in the courts for the place where the business which engaged the employee is situated.

Under the labour law of the Netherlands and of at least some of the other Member States, employers, instead of dismissing employees, have the option to petition the court for a judicial annulment of the contract of employment. Such judicial annulment generally offers advantages, for both the employer and the employee: for the employer because the proceedings are shorter than for dismissal, and for the employee because the court will then be able to award him suitable damages.

In a limited number of cases, employers wishing to terminate an employment relationship under Netherlands law – and also under the law of some other Member States – cannot choose between dismissal and judicial annulment. Only the latter possibility is available to them in these cases. In the case of Netherlands law, this applies *inter alia* to the dismissal of employees who are (candidate) members of the works council, employees who are ill and employees under a temporary contract.

In international labour relationships, an employer seeking judicial annulment on the basis of the aforementioned Article 20 of the Brussels I Regulation will have to petition the court for the place where the employee is domiciled for such annulment unless, in accordance with Article 21 of that Regulation, the parties elect to bring proceedings before another court after the dispute has arisen, in which case the court for the place where the employee habitually carries out his work is frequently the first to be considered.

In the case of frontier work in particular – where the employee lives across the border from where he carries out his daily work – that situation benefits neither the employer nor the employee.

In general, it may be said that both parties will find the court for the place where the work is habitually carried out to be the most appropriate for resolving disputes arising from a contract of employment. A particularly close link between the dispute and the court which is to give a ruling will make for better administration of justice and greater procedural convenience. Contracts of employment tend to be subject to the law of the place where the work is habitually carried out and to the local social security legislation relevant to the contract's termination. That court is also best informed as to the socio-economic situation and other material circumstances specific to the employer's business. In general, this means that both the employer and the employee will be placed in the most favourable position possible, because they will be able to submit any cross-border disputes between them not only to the court for the place where the opposing party is established or domiciled, but also to the court for the place where the employee habitually carries out his work.

Proceedings brought in the court for the employee's domicile abroad would not offer those advantages. That court would have to seek expert advice on the content of the labour law applicable to the contract, which tends to be different from its national labour law. Also, on the assumption that the court considered that it had jurisdiction to rule on matters relating to another country's social security legislation – to which jurisdiction the Brussels I Regulation does not apply – it would need to seek expert advice on such matters.

Moreover, proceedings in a country other than that of the place of work will frequently give rise to major language problems. Documents will then require translating, and interpreting must be provided during oral proceedings. Those are costly activities. Employers would be required to advance at least some of those exceptional costs, all or part of which the court would subsequently order the party considered to be in the wrong to cover, depending on the procedural labour law of the petitioned court. Consequently, employees would also run the risk having to cover such costs.

Thus, given the complications involved, an employer who wishes to terminate a contract of employment with an employee domiciled abroad, and can choose between putting an end to the contract by dismissal or by judicial annulment, will not opt for the latter, but dismiss the employee and then wait and see if he decides to dispute his dismissal in the court for his place of work, unless both parties agree that the court for the place of work has jurisdiction.

In those cases in which, under Netherlands labour law or any other labour law applicable, contracts can be terminated only by judicial annulment, an employer with a foreign employee will be obliged to bring proceedings in the court for the place where the employee is domiciled unless he reaches agreement with the employee that another court – i.e. that for the place where the work is habitually carried out – has jurisdiction to rule on termination of the contract. As already stated above, that is not in the interests of either the employer or the employee. Thus, to include a provision in Article 20 of the Brussels I Regulation permitting proceedings to be brought in such cases in the courts for the place where the work is habitually carried out, would also be in the interests of employees engaged in frontier work in particular.

The absence of an appropriate jurisdiction rule for terminating contracts also negatively affects the general policy of the European Community, and in particular promotion of the single market. If, in labour disputes, and in particular when terminating employment contracts, employers were to continue to have to bring proceedings in the courts for the places where their foreign employees are domiciled, they would be less inclined to recruit foreign labour. In its current wording, therefore, Article 20 of the Brussels I Regulation detracts from the principle of free movement of workers.

At the meeting of the Council Committee on Civil Law Matters on 5 April 2002, the Netherlands delegation drew that Committee's attention to the above issue by means of a meeting document proposing the following:

REVISION of Article 20 of Regulation No 44/2001

After paragraph 1 and before the actual paragraph 2 (which will be renumbered in 3), a new paragraph will be added, reading:

2. In a claim for the termination of a labour contract an employee domiciled in a Member State may, in another Member State, be sued in the courts for the place where he habitually carries out his work or, if he does not habitually carry out his work in any country, in the courts for the place where the business which engaged him is or was situated, if
   – the law of that court is applicable to the contract, and
   – if in the case concerned, that law only provides for termination of the contract by court decision.

The purpose of that proposal was to indicate how Article 20 of the Regulation needed to be amended in order to resolve the problems described. When the proposal was presented in the said Committee and also during subsequent discussions, it was found that the improvement in the employees' situation sought by the proposed amendment would not be affected by a slightly broader provision in a new Article 20(2) of the Brussels I Regulation. Indeed, the advantages for employees outlined at the time would stand even if a broader form of words were adopted. In addition, the – albeit limited – reference to the law applicable to the contract was deemed undesirable on the grounds that it obliged the court to pronounce on matters of substantive international private law and of substantive civil law already when jurisdiction was determined.

In view of the above, the Netherlands delegation now proposes the following amendment to Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters:

**PROPOSAL for revision of Article 20 of Regulation No 44/2001**

In Article 20 the current paragraph 2 is renumbered 3, and the following new paragraph inserted:

2. "Proceedings by an employer to terminate a contract of employment may also be brought in the courts for the place where the employee habitually carries out his work or, if the employee doe not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is situated."