NEW INSTRUMENTS OF JUDICIAL COOPERATION IN CIVIL AND COMMERCIAL MATTERS[1]

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ABSTRACT: *Since 1 May 1999, the day when the Treaty of Amsterdam entered into force, we have been able to observe a fundamental change in view of the field of civil procedure law cooperation. In the Treaty of Amsterdam the European Union set as a goal the establishment of the area of freedom, security and justice, putting an especially large emphasis on judicial cooperation in civil matters.*

On the basis of Treaty of Amsterdam the Council adopted a Regulation (EC) No 743/ 2002 establishing a general Community framework for a period from 2002 to 2006 to facilitate the implementation of judicial cooperation in civil matters. This document defines those spheres where must promote the judicial cooperation in civil matters: alternative dispute resolution, parental responsibility, common procedural rules on small claims, uncontested claims and maintenance claims, minimum standard of legal aid in cross-border cases etc.

The legislative plan for the next five years in this field as described bellow: a draft instrument on recognition and enforcement of decisions on maintenance, including provisional and protective measures in 2005; a Green Paper in matters of succession, including the questions of jurisdiction and recognition in 2005; a Green Paper in matters concerning matrimonial property regimes, including the questions of jurisdiction and recognition in 2006. Instruments in these areas should be completed by 2011.

The aim of this presentation is to demonstrate the new challenges of this legislation area.

KEYWORDS: *Treaty of Amsterdam, civil procedure law, Regulation (EC) No 743/2002, enforcement of decisions,*

JEL CLASSIFICATION: *K 40, K 20*

1. INTRODUCTION

Since 1 May 1999, the day when the Treaty of Amsterdam entered into force, we have been able to observe a fundamental change in view of the field of civil procedure law cooperation. In the Treaty of Amsterdam the European Union set as a goal the establishment

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of the area of freedom, security and justice, putting an especially large emphasis on judicial cooperation in civil matters.

On the basis of Treaty of Amsterdam the Council adopted a Regulation (EC) No 743/2002[2] establishing a general Community framework for a period from 2002 to 2006 to facilitate the implementation of judicial cooperation in civil matters. This document defines those spheres where must promote the judicial cooperation in civil matters:

1. to promote judicial cooperation in civil matters, aiming in particular at: ensuring legal certainty and improving access to justice; promoting mutual recognition of judicial decisions and judgments; promoting the necessary approximation of legislation; or eliminating obstacles created by disparities in civil law and civil procedures;

2. to improve mutual knowledge of Member States' legal and judicial systems in civil matters;

3. to ensure the sound implementation and application of Community instruments in the area of judicial cooperation in civil matters; and

4. to improve information to the public on access to justice, judicial cooperation and the legal systems of the Member States in civil matters.[3]

The Brussels European Council of 4 and 5 November 2004 adopted the Hague Programme: Strengthening freedom, security and justice in the European Union[4] (hereinafter referred to as "the Hague Programme"). In June 2005, the Council and the Commission adopted the Action Plan implementing the Hague Programme[5].

The objective of the Hague Programme is to improve the common capability of the Union and its Member States to guarantee fundamental rights, minimum procedural safeguards and access to justice, to carry further the mutual recognition of judicial decisions and certificates in civil matters, and to eliminate legal and judicial obstacles in litigation in civil and family matters with cross-border implications. The legislative plan for the future in this field:

- Green Paper on succession;
- Green Paper on conflicts of laws and jurisdiction on divorce matters (Rome III);
- Proposal on conflicts of laws regarding contractual obligations (Rome I);
- Proposal on small claims;
- Proposal on maintenance obligations;
- Adoption of the Rome II proposal on conflicts of laws regarding non-contractual obligations;
- Adoption of a regulation establishing a European payment order procedure;
- Adoption of a directive on certain aspects of mediation in civil and commercial matters;
- Green Paper on the conflicts of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition;
- Green Paper(s) on the effective enforcement of judicial decisions;
- Green Paper on minimum standards for certain aspects of procedural law;
- Evaluation of the possibility of complementing the abolition of exequatur, and legislative proposals if appropriate;

[2] OJ L-115, 1.5.2002, p. 1.
[3] Council Regulation (EC) No 743/2002 Article 2
[4] OJ C-53, 3.3.2005, p. 1.
[5] OJ C-198, 12.8.2005, p. 1.

- Proposal for amending Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.[6]

Instruments in this area should be completed by 2011.

The aim of this study is to examine the execution of the Hague Programme at this time, and to demonstrate the latest legislative results and the preparatory acts[7].

2. LEGISLATIVE RESULTS OF THE HAGUE PROGRAMME

2.1. Regulation (EC) No 1393/2007[8]

In 2000 the European Union adopted the Council Regulation (EC) No 1348/2000[9] laying down procedural rules to make it easier to send documents from one Member State to another. The Regulation applied between all Member States of the EU including Denmark which has concluded a parallel agreement[10] on Regulation 1348/2000 with the European Community. This agreement entered into force on 1st July 2007.

The adoption of the Regulation was followed by the adoption of a Report[11]. This Report was prepared in accordance with Article 24 of the Regulation. It concluded that since its entry into force in 2001, the application of the Regulation generally improved and expedited the transmission and the service of documents between Member States. Nevertheless, in the period of adaptation which is still ongoing, many persons involved in the application of the Regulation, in particular local bodies, still do not have sufficient knowledge about the Regulation. Furthermore, the application of certain provisions of the Regulation is not fully satisfactory.

As of 13 November 2008, the Regulation will be replaced by Regulation (EC) No 1393/2007 which has been adopted on the 13 November 2007. The most important modifications with respect to Council regulation (EC) No 1348/2000 are:

- Introduction of a rule providing that the receiving agency shall take all necessary steps to effect the service of the documents as soon as possible, and in any event within one month of receipt.

- Introduction of a new standard form to inform the addressee about his right to refuse to accept the document to be served at the time of service or by returning the documents to the receiving agency within one week.

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[6] Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union, OJ C-198, 12.8.2005. p. 20-21.

[7] 'Preparatory documents' means all documents corresponding to the various stages of the legislative budgetary process. They include Commission legislative proposals, Council common positions, legislative and budgetary resolutions and initiatives of the European Parliament, and opinions of the European Economic and Social Committee and of the Committee of the Regions, etc.

[8] Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000; OJ L-324, 10.12.2007, p. 79-120.

[9] Council regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters; OJ L-160, 30.6.2000, p. 37-52.

[10] Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters; OJ L-300, 17.11.2005, p. 55-60.

[11] Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the application of Council Regulation (EC) 1348/2000 on the service in the Member States of Judicial and Extrajudicial documents in civil or commercial matters; COM (2004) 0603 final

- Introduction of a rule providing that costs occasioned by recourse to a judicial officer or to a person competent under the law of the Member State addressed shall correspond to a single fixed fee laid down by that Member State in advance which respects the principles of proportionality and non-discrimination.

- Introduction of uniform conditions for service by postal services (registered letter with acknowledgement of receipt or equivalent).

2.2. Regulation on the law applicable to non-contractual obligations (Rome II)[12]

The Hague Programme called for work to be pursued actively on the rules of conflict of laws regarding non-contractual obligations (Rome II). The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.

The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) and the instruments dealing with the law applicable to contractual obligations.

This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. It shall not apply, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii).[13]

This Regulation shall apply from 11 January 2009.

2.3. New simplified and accelerated procedures in the European Union

The European Union faces the challenge of ensuring that in genuine European Area of Justice individuals and businesses are not prevented or discouraged from exercising their rights by the incompatibility or complexity of the legal and judicial systems in the Member States.

At present, Community legislation with respect to simplified and accelerated procedures is limited to Article 5 of Directive 2000/35/EC on combating late payment in commercial transactions which requires the Member States to ensure the availability of recovery procedures for uncontested claims so that an enforceable title can be obtained normally within 90 calendar days in conformity. Under the directive, Member States are, however, not required to adopt a specific procedure or to amend their existing legal procedures in a specific way. It remains therefore to be seen if the transposition of Article 5 will entail significant changes in the procedural systems of the Member States.

The Programme of measures[14] for the implementation of the principle of mutual recognition of decisions in civil and commercial matters adopted by the Council on 30 November 2000 provides for the adoption of measures in this respect in three stages. In the first stage, a European Enforcement Order for uncontested claims should be introduced,

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[12] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II); OJ L-199, 31.07.2007, p. 40-49.

[13] Article 1 of Regulation (EC) No 864/2007

[14] Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters; OJ C-12, 15.1.2001, p. 1-9.

and the settlement of cross-border litigation on Small Claims should be simplified and speeded up.

Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure[15] will allow creditors to recover their uncontested civil and commercial claims before the courts of the Member States according to a uniform procedure that operates on the basis of standard forms. Due to the existence of a procedure that will be common in all Member States, the need for creditors to familiarise themselves with foreign civil procedures will be reduced to a minimum.

The procedure does not require presence before the court; it can even be started and handled in a purely electronic way. The claimant only has to submit his application, after which the procedure will lead its own life. It does not require any further formalities or intervention on the part of the claimant. This will ensure a swift and efficient handling of the claim, which should substantially reduce the length of traditional court proceedings.

In addition, no assistance of a lawyer being required, the procedure will keep the costs at a minimum. Language problems are minimised thanks to the availability of standard forms for the communication between the parties and the court that are available in all EU languages.

The Regulation will be applicable from 12 December 2008.

Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure[16] will for the first time provide citizens and businesses all over Europe with a speedy and affordable civil procedure which is uniform in all Member States and in all procedural steps from the commencement of the procedure to the final enforcement of the judgement.

The procedure will apply in civil and commercial matters where the value of a claim does not exceed 2000 €. The procedure applies to pecuniary claims as well as to non-pecuniary claims.

The Regulation introduces standard forms to be used by the parties and the court and establishes time limits for the parties and for the court in order to simplify and speed up litigation concerning small claims. The procedure is a written procedure, unless an oral hearing is considered necessary by the court. The court may hold a hearing or take evidence through a video conference or other communications technology if the technical means are available. The parties are be required to be represented by a lawyer or another legal professional. The unsuccessful party shall bear the costs of the proceedings. However, the court shall not award costs to the successful party to the extent that they were unnecessarily incurred or disproportionate to the claim.

The European Small Claims Procedure will apply from 1 January 2009.

3. LEGISLATION IN PREPARATION IN THE FIELD OF JUDICIAL COOPERATION IN CIVIL AND COMMERCIAL MATTERS

3.1. Proposals for Regulations

3.1.1. Maintenance claims

In order to compel someone in another Member State to pay maintenance, we must use the courts of the State in which we want to have our judgment enforced. Rules of Community law already exist, they can help us to claim our maintenance in a Member State other than our State of residence. These rules will soon be improved.

[15] OJ L-399, 30.12.2006, p. 1-32.
[16] OJ L-199, 31.7.2007, p. 1-22.

Council Regulation (EC) No 44/2001 of 22 December 2001 on jurisdiction and enforcement of judgments in civil and commercial matters (Brussels I)[17] lays down rules on special jurisdiction for the courts concerning maintenance payments. This Regulation has been directly applicable since 1 March 2002, which means that its provisions can be relied on in a court action.

The Tampere European Council in October 1999 called for a further reduction in the legal steps necessary before foreign judgments can be enforced. In November 2000, the Council adopted a Programme[18] for the mutual recognition of court judgments. The ultimate objective is to abolish the requirement, in civil and commercial matters, that the court declare a foreign judgment enforceable (issue an exequatur). In this perspective, maintenance claims are clearly a major priority.

Subsequently, on 21 April 2004 the European Parliament and the Council adopted Regulation (EC) No 805/2004 creating a European Enforcement Order for uncontested claims. It covers claims for maintenance payments, but only where these are considered to be uncontested.

In order to cover the whole range of problems linked to the recovery of maintenance claims, the Commission published a Green Paper in April 2004[19]. On 15 December 2005 the Commission presented to the Council a proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations[20].

The proposal for a Regulation has three main objectives:

1. To make life easier for European citizens by reducing the formalities involved in obtaining and enforcing court orders in any Member State, and by introducing measures specifically aimed at assisting maintenance creditors. It should be possible to take all the necessary steps at the place of normal residence, including measures at the enforcement stage itself, such as the possibility of obtaining attachment on wages or on a bank account, to trigger the cooperation mechanisms or to have access to information making it possible to locate the debtor and to evaluate his assets.

2. To increase legal security by harmonising divergent conflict-of-laws rules.

3. To ensure effective and durable collection of maintenance payments by offering the creditor the possibility of obtaining a court order that has effect in the entire European Union, backed up by a simple and harmonised system to have it enforced.

3.1.2. The applicable law to contractual obligations (Rome I)

The 1980 Rome Convention[21] entered into force on 1 April 1991 and complements the 1968 Brussels Convention. This Convention, like the Brussels I Regulation, which has replaced it since 1 March 2002, provides that in certain circumstances the courts of several Member States may have jurisdiction over a claim. This entails the risk that a party might seize the court of a particular country not because that court is best placed to settle the

[17] OJ L-12, 16.1.2001, p. 1-23.
[18] Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters; OJ C-12, 15.1.2001, p. 1-9.
[19] Green Paper – Maintenance obligations, COM (2004) 0254 final
[20] COM (2005) 0649 final
[21] OJ C-334, 30.12.2005, p. 1-27.

dispute (e.g. because evidence needed to adjudicate the dispute is concentrated there), but because this court will apply the substantive law most favourable to his claim - the phenomenon of *forum shopping*. By ensuring that the courts in all the European Union countries apply the same law to the same international contract, unification of the conflict of law rules reduces the risk of *forum shopping* within the Community. The rules of the Rome Convention are in force in all Member States, including Denmark.

At the end of 2002 the European Commission presented a Green Paper[22] on the question whether the Rome Convention 1980 should be converted into a Community instrument proper (regulation or directive) and modernised in the substance. In this context around 80 contributions have been received by the Commission. As a result of the consultation process the European Commission adopted on 15 December 2005 a proposal for a Regulation of the Parliament and Council on the Law Applicable to Contractual Obligations ("Rome I")[23] whose intention is to modernise the rules of the Rome Convention and at the same time transform it into a Community legal instrument.

3.1.3. Jurisdiction and applicable law in matrimonial matters (Rome III)

The Commission has launched work on applicable law in divorce matters. The Commission published on 14 March 2005 a Green Paper on applicable law and jurisdiction in divorce matters[24]. It received approximately 65 replies. A public hearing was held on 6 December 2005. As a result of the consultation process, the Commission presented on 17 July 2006 a proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters[25]. The overall objective of this Proposal is to provide a clear and comprehensive legal framework in matrimonial matters in the European Union and ensure adequate solutions to the citizens in terms of legal certainty, predictability, flexibility and access to court.

The Proposal introduces harmonised conflict-of-law rules in matters of divorce and legal separation to enable spouses to easily predict which law that will apply to their matrimonial proceeding. The proposed rule is based in the first place on the choice of the spouses. The choice is confined to laws with which the marriage has a close connection. In the absence of choice, the applicable law is determined on the basis of a scale of connecting factors which will ensure that the matrimonial proceeding is governed by a legal order with which the marriage has a close connection.

The proposal seeks also to improve access to court in matrimonial proceedings. The possibility to choose the competent court in proceedings relating to divorce and legal separation ("prorogation") will enhance access to court for spouses who are of different nationalities. The rule on prorogation applies regardless of whether the couple lives in a Member State or in a third State. In addition, the proposal specifically addresses the need to ensure access to court for spouses of different nationalities who live in a third State.

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[22] Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, COM (2002) 0654 final

[23] COM (2005) 0650 final

[24] COM (2005) 0082 final

[25] COM (2006) 0399 final

3.2. Green Papers

3.2.1. Green Papers on improving the efficiency of the enforcement of judgments

In October 2006, the Commission published a *Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts*[26]

Enforcement law has often been termed the "Achilles' heel" of the European Civil Judicial Area. While a number of Community instruments provide for the jurisdiction of the courts, the procedure to have judgments recognised and declared enforceable and mechanisms for co-operation of courts in civil procedures, no legislative proposal has yet been made for actual measures of enforcement. To date, execution on a court order after it has been declared enforceable in another Member State remains entirely a matter of national law.

Current fragmentation of national rules on enforcement severely hampers cross-border debt collection. Creditors seeking to enforce an order in another Member State are confronted with different legal systems, procedural requirements and language barriers which entail additional costs and delays in the enforcement procedure. In practice, a creditor seeking to recover a monetary claim in Europe will most commonly try to do so by obtaining an attachment of his debtor's bank account(s). Such procedures exist in most Member States and, if working efficiently, can be a powerful weapon against recalcitrant or fraudulent debtors.

However, while debtors are today able to move their monies almost instantaneously, out of accounts known to their creditors into other accounts in the same or another Member State creditors are not able to block these monies with the same swiftness. Under existing Community instruments, it is not possible to obtain a bank attachment which can be enforced throughout the European Union. Notably, the Regulation 44/2001 (Brussels I) does not ensure that a protective remedy such as a banking seizure obtained *ex parte* is recognised and enforced in a Member State other than the one where it was issued.

A possible solution would be to create a European order for the attachment of bank accounts which would allow a creditor to secure a sum of money due to or claimed by him by preventing the removal or transfer of funds held to the credit of his debtor in one or several bank accounts within the territory of the European Union. Such an order would have protective effect only, i.e. it would block the debtor's funds in a bank account without transferring these to a creditor. The procedure would be subject to conditions for granting of the order including an adequate level of debtor protection. An attachment order issued in one Member State would be recognised and enforceable throughout the European Union without the need for a declaration of enforceability.

On the other hand, the European Commission adopted on the 06 March 2008 a *Green Paper on Transparency of Debtors assets*[27].

There is a risk that problems of cross-border debt recovery may be an obstacle to the free circulation of payment orders within the European Union and may impede the proper functioning of the Internal Market. Late payment and non-payment jeopardise the interests

[26] COM (2006) 0618 final
[27] COM (2008) 128 final

of businesses and consumers alike. This is particularly the case when the creditor and the enforcement authorities have no information about the debtor's whereabouts or his assets.

The search for the debtor's address and for information about his financial situation is often the starting point of enforcement proceedings. At present, transparency of debtors' assets is generally achieved at national level through different sources of information, in particular through registers and the debtor's declaration. While the basic structures of the national systems appear similar, there are considerable differences in the conditions of access, the procedures for obtaining information, the content and the overall efficiency of the systems.

Instead of focusing on a single European measure, therefore, it is suggested that a bundle of measures be considered which could help to ensure that the creditor obtains reliable information on his debtor's assets within a reasonable period of time. The possible measures considered in Green Paper are:

- drawing up a manual of national enforcement laws and practices,
- increasing the information available in and improving access to registers,
- exchange of information between enforcement authorities,
- measures relating to the debtor's declaration.

3.2.2. Green Paper on succession and wills

The Commission has published on 1 March 2005 the Green Paper on Succession and Wills[28] which contains aspects of conflict of laws related to this area of law.

The growing mobility of people in an area without internal frontiers and the increasing frequency of unions between nationals of different Member States, often entailing the acquisition of property in the territory of several Union countries, are a major source of complication in succession to estates.

The difficulties facing those involved in a transnational succession mostly flow from the divergence in substantive rules, procedural rules and conflict rules in the Member States. Succession is excluded from Community rules of private international law adopted so far. There is accordingly a clear need for the adoption of harmonised European rules.

Most successions are settled on a non contentious basis. Community legislation dealing exclusively with the designation of courts having jurisdiction in matters of succession and with the recognition and enforcement of their judgments would therefore be insufficient.

To simplify matters for those involved in a transnational succession and to provide an effective response to the practical problems of individual citizens, a Community instrument will also have to deal with the recognition of both judicial and extra judicial documents (wills, deeds, administrative documents). As full harmonisation of the rules of substantive law in the Member States is inconceivable, action will have to focus on the conflict rules. The Commission concludes that there can be no progress on succession in the Community without the question of the applicable law being settled as a matter of priority.

3.2.3. Green Paper on matrimonial property

On 17 July 2006 the Commission adopted a Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition[29].

[28] COM (2005) 0065 final
[29] COM (2006) 0400 final

Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility[30], which came into force on 1 March 2005, does not cover the property consequences of the dissolution of the marriage.

To ensure that all property aspects of family law are examined, the Green Paper addresses issues touching both on matrimonial property regimes and on the property consequences of other forms of union. In all the Member States, more and more couples are formed without a marriage bond. To reflect this new social reality, the Mutual Recognition Programme states that the question of the property consequences of the separation of unmarried couples must also be addressed. The area of justice must meet the citizen's practical needs.

Since it is currently not possible to harmonise the rules of substantive law, this Green Paper will deal with the fundamental issue of the conflict rules. The question of jurisdiction will naturally be addressed in order to guarantee consistency between the future rules and those covering judicial proceedings in matters of divorce and succession. In addition, solutions should be sought which leave room for autonomous choice of court by the parties.

4. CONCLUSION

In the internal market, trade between Member States has intensified and people are moving more and more to settle, work, marry, do business or simply spend their holidays in other Member State. Situations involving people who live in different States have proliferated, and so have the possibilities for disputes. The establishment of a European justice area is now acutely necessary.

The mutual recognition of judgments is the cornerstone of the whole system. A mutual recognition programme[31] has been adopted by the Council and the Commission to determine the main measures that need taking here. In this context, a number of instruments have already been adopted.

The objectives of the Hague Programme should be completed by 2011. We can see that a number of these objectives have been realised so far, in 2008. And it is also true that the legislation work in the field of judicial cooperation in civil and commercial matters is very intensive, so in the future the knowledge of these rules will be very important for lawyers.

[30] OJ L-338, 23.12.2003, p.1.

[31] Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters; OJ C-12, 15.1.2001, p. 1.9.