Question 1:

Do you consider that in the internal market all judgments in civil and commercial matters should circulate freely, without any intermediate proceedings (abolition of exequatur)?

If so, do you consider that some safeguards should be maintained in order to allow for such an abolition of exequatur? And if so, which ones?

The answer to the first part of the question is **"No"**; we consider that exequatur should not be abolished. Without relevant changes in the judicial structure of Members States, its abolition is not justified.

We must point out that this part of the Green Paper suggests that the goal is not only the elimination of exequatur as a proceeding, but also the elimination of all the grounds for refusal of recognition, grounds that at present are listed in articles 34 and 35 of Regulation 44/2001. Certainly, we must distinguish between the elimination of the procedure (exequatur) and the elimination of the grounds for refusal of recognition, because it is possible to eliminate the procedure and, at the same time, to maintain those grounds. In this case, the authorities who are entitled to execute the decision coming from another Member State should verify that the conditions for recognition are fulfilled (the recognition is not contrary to public policy in the Member State in which recognition is sought, the defendant was correctly served with the document which instituted the proceedings, etc.).

We think, however, that when the Green Paper refers to the abolition of exequatur, it also means abolition of the possibility of denying recognition in a Member State of decisions adopted in another Member State. The references to Regulation 4/2009 and the simplification of extraterritorial effectiveness of decisions related to uncontested claims supports the view that the Green Paper proposes not merely the abolition of the exequatur procedure, but also the elimination of controls over decisions adopted in other Member States. We do not agree with this proposal.

First: The Green Paper argues that applications for declarations of enforceability are almost always successful and recognition and enforcement of foreign judgments is very rarely refused (p. 3 of the Green Paper). This argument is not convincing. Maybe it is the existence of exequatur what ensures that the proceedings in the State of origin will respect all the guarantees and that jurisdiction rules will be accurately applied. If exequatur would be eliminated, it would be easier for the plaintiff to find a "favorable" court that would not apply properly the rules of Regulation 44/2001 on service of documents instituting proceedings and jurisdiction.

It is true that the "mutual trust principle" implies that the authorities of the State where recognition is sought should trust the authorities of the State of origin of the decision. But this principle of mutual trust does not guarantee by itself that the decision in the State of origin will fulfill every condition to be recognized. It would be useful to study, for example, the application of Regulation 805/2004, in order to verify in which cases judicial decisions or documents have been certificated as European Enforcement Orders without fulfilling the requirements asked for European Enforcement Orders. In other words, before extending the mechanism of Regulation 805/2004 to contested claims, it

would be necessary to study deeply how the still very young Regulation 805/2004 has worked in practice.

In any case, we think that suppressing exequatur (in the sense of suppressing controls on the recognition and enforcement of decisions adopted in other Member States) is only advisable if there is a certain integration of Member States' judicial bodies. Without this integration, "mutual trust" is only a rhetorical argument that is not solid enough to justify a completely free movement of judgments from one Member State to another.

An example will suffice in order to show that there is at present no integration between judicial bodies. Imagine that a person (A) resident in Member State X is reached in his own State of residence by an unfair decision adopted in Member State Y. At present A does not have any real possibility of demanding the responsibility of the courts of State Y in State X. Expecting A to claim responsibility in State Y places an unreasonable burden on A. To eliminate exequatur it is necessary that citizens can really trust the "mutual trust principle", and this implies that citizens have the real possibility of demanding the responsibility of another Member State's courts, in the same way they can demand it against domestic courts. It is unfair that a citizen is exposed to a Member state decision as if it were an internal decision without having the corresponding possibility of requesting damages from the court that issued that decision in the place where the damage was suffered.

A possible measure in order to strengthen mutual confidence would be the expedition of the certificate of enforceability in the Member State of origin by a Community judge. This kind of judge would be present in all Member States and he or she would exercise a real control over the decision, not just a merely formal one. The decisions certified by this Community judge would be enforceable without exequatur, but in the State of enforcement it still would be possible to deny recognition on the ground that it would be contrary to the public policy of that Member State. The reason to maintain this control will be explained later on.

Second: Nowadays, if recognition of the decision of another Member State is contrary to the public policy of the State where recognition is sought, the authorities of this State can deny recognition on the basis of art. 34.1 of Regulation 44/2001. If this possibility of control disappears, Community Law will impose on the authorities and courts of the recognition State the duty of accepting recognition, and if necessary enforceability, of the foreign decision. In some cases, recognition could be contrary to the Constitution of the State where recognition is sought, so the courts of that State would face a hard decision: if they would apply Community Law, they would be acting against the national Constitution; if they would apply their Constitution, this would be a breach of Community Law. For obvious reasons, this kind of problem must be avoided. Therefore, control of public policy is a useful tool for avoiding a dangerous conflict between domestic constitutional law and European Union law.

Third: The Green Paper claims that most of the applications for declarations of enforceability are successful. Taking this into account, one could wonder if it is really necessary to eliminate exequatur. The argument of the Green Paper is that exequatur implies costs and time, but this is not a convincing argument. If the problem is costs or time, the envisaged measures should be focused on these aspects. In short, a single proceeding for execution in England is probably more expensive than the sum of exequatur and execution in Spain. So, the problem is not the exequatur, but the cost of justice in some European States. The issue of time deserves the same comment. It is broadly known that there are some countries where justice is extremely slow, and this will not be solved with the elimination of exequatur.

Fourth: It has been argued that abolition of exequatur is in accordance with the principle of mutual recognition. But it must be stressed that the evolution of this principle in the internal market area shows that it is not absolute nor without conditions. On the contrary, mutual recognition finds some exceptions and authorities of destination or host countries have the possibility to undertake controls and verify equivalence. For example, as far as the recognition of professional qualifications is concerned (today codified in the Directive of 2005), the general system implies that the host State has the possibility of verifying the equivalence of the professional qualification obtained in another State, this verification being made through a short homologation procedure. Therefore, if Community law allows the destination or host State to control administrative decisions adopted in another Member State, should control be of a lesser extent when dealing with judicial decisions?

In conclusion, we consider that a complete abolition of exequatur proceedings would not be advisable. As we have demonstrated, this abolition would cause important risks. However, and as we have already explained, it should be stressed that it is possible to distinguish between the exequatur as a legal procedure and the control of the conditions a foreign decision must fulfill in order to be recognized and enforced (arts. 34 and 35 of Regulation 44/2001). If eliminating exequatur would not mean suppressing control over these conditions, then we would agree with the abolition of the exequatur procedure. Of course, then it would be necessary to foresee that the conditions that at present are controlled through the exequatur procedure could be controlled in the execution procedure. This means that, next to the causes of opposition to execution set down in the laws of each State (for example, that the debt has already been paid), specific causes of opposition should be foreseen when the decision the execution of which is sought has been adopted in another Member State. When the execution of the foreign decision is not intended, the control of these conditions should be made by judicial or administrative authority before whom the decision is presented.

Question 2:

Do you think that the special jurisdiction rules of the Regulation could be applied to third State defendants? What additional grounds of jurisdiction against such defendants do you consider necessary?

How should the Regulation take into account exclusive jurisdiction of third States' courts and proceedings brought before the courts of third States?

Under which conditions should third State judgments be recognised and enforced in the Community, particularly in situations where mandatory Community law is involved or Exclusive jurisdiction lays with the courts of the Member States?

As for the first part of question 2, and as a matter of principle, we consider that it would be convenient that the Regulation set down rules on jurisdiction in cases where the defendant is domiciled in a third State. However, the rules setting the detailed grounds of jurisdiction should be considered carefully, in order to take into account the specific problems raised when the defendant is not domiciled in the European Union. In any case, we consider that in this context a *forum necessitatis* rule (i.e., that the Courts of a Member State could be competent when the plaintiff does not have a reasonable possibility of presenting his case in third States courts) would be advisable. This rule would be in line with the obligations laid down in article 6 of the European Convention on Human Rights, because its aim would be to grant the possibility of an effective access to justice.

As for the second part of question 2, we consider that the doctrine of the *effet réflexe* of article 22 of the Regulation could be adopted, that is to say, in cases where, according to the criteria of article 22, a third State would have exclusive jurisdiction, then the courts of Member States should decline their jurisdiction. An exception to this rule should be established when the courts of the third State would not assume jurisdiction on the case.

A similar rule should apply in the case of choice of forum agreements in favour of third-State jurisdictions. This means that when parties choose a third-State court to settle their disputes, the courts of Member States should decline their jurisdiction. In order for this rule to operate, the choice of forum agreement should comply with the conditions of form set down in article 23 of the Regulation (written form or a form in accordance with international commercial practice…) and, at the same time, it should respect the substantive limits imposed by article 22 of the Regulation (the agreement would not be effective in cases of exclusive jurisdiction) and by the rules providing for the protection of weak parties (consumers, workers, insurance). In this type of contracts, choice of forum agreements would operate only in the limited cases allowed by the Regulation (e.g., in the case of labour contracts, article 21).

As far as proceedings brought before the courts of third States are concerned, we think that a flexible *lis pendens* rule should be established, taking into account the great variety of situations that may arise. A model similar to the one established in article 7 of the 1995 Italian Statue on Private International Law could be considered. The basic pattern of this *lis pendens* rule would be the following: when a claim is brought before

the court of a Member State, and this court has notice that the same case is pending in a third State (or even a decision has been rendered in that third State), then it may stay the proceedings if the Member State court considers that, *prima facie*, the decision rendered (or to render) in the third State fulfils the conditions for being recognised in the Member State. This means that the Member State court would undertake a provisional evaluation of the chances of the third country decision (or future decision) of being recognised (for instance, that there is no infringement of public policy, that the proceedings in the third State comply with due process standards…). If, as a result of this provisional evaluation, the court considers that the future decision has a reasonable possibility of being recognised, it may stay the proceedings until the decision is rendered in the third State and the interested party can request for its recognition.
As for the functioning of this rule, two caveats should be stressed: it would have a "facultative" nature, in the sense that it would not establish an automatic obligation to stay the proceedings, but only a possibility that would be left to the discretion of the judge, taking into account the specific circumstances of each case. We think that in a global international context, with so different situation and possible jurisdictions involved, this flexible approach would be preferable to a hard-and-fast *lis pendens* rule. The second caveat would be that the possibility of staying the proceedings implies, if the proceedings in the third State last for a long time, a possible risk of an excessive delay, and this would be contrary to the right that justice is granted timely. To prevent this risk, it should be foreseen that, in case of excessive delay of the proceedings in the third State, the judge of the Member may put an end to the stay and go on with his own proceedings.

As for the third part of question 2, we think that, when dealing with the recognition and / or enforcement of third-country decisions in Member States, the impact of bilateral or multilateral treaties between member States and third countries should be carefully considered and taken into account. The Regulation could limit itself to establishing a general regime of recognition and exequatur for decisions adopted in third countries, which would be applicable without prejudice of the specific rules set down in international treaties with third countries.
As for the content of these rules on recognition and exequatur, it would be advisable to make a thorough study of the rules and judicial practice existing at present in the different member States, especially as for the grounds for refusing recognition. Once this analysis is made, the task of trying to build a regime common to all Member States could be undertaken. Of course, there is no need to say that the content of these rules may not be necessarily the same as the content of those applying for the recognition of EU States' judgements, given the different context.

As for the recognition of third-country decisions in cases where "mandatory Community law is involved", we think that the exact meaning and implications of this expression are rather ambiguous. In any case, we think that it would not be appropriate to establish, as a condition for recognising the decision, a control of the law applied by the third-country judge, except in cases where the public policy of the Member State would be affected. Of course, this public policy exception could be applied to protect both public policy principles of Community law and those of the internal legal system of the Member State concerned.

Question 4:

What are the shortcomings in the current system of patent litigation you would consider to be the most important to be addressed in the context of Regulation 44/2001 and which of the above solutions do you consider appropriate in order to enhance the enforcement of industrial property rights for rightholders in enforcing and defending rights as well as the position of claimants who seek to challenge those rights in the context of the Regulation?

As the Green Paper rightly stresses the possibility to effectively enforce intellectual property rights is of fundamental importance for the good functioning of the internal market. Such rights are crucial in the context of a knowledge society and may be called to play an essential role in order for Europe to overcome the present economic crisis.

The jurisdictional rules introduced in the 1968 Brussels Convention, which were afterwards incorporated without changes to the Regulation under review, were highly innovative because they broke with the principle of territoriality which had before been interpreted as confining litigation to the courts of the State of registration. That rule which still inspires the exclusive jurisdictional rule of art. 22.4 was limited by the Brussels Convention to proceedings related to the registration or validity of the right. All other proceedings fell under the ordinary jurisdictional rules. The possibility to litigate at the defendant's domicile under art. 2, to proceed against multiple infringers at one of the infringer's domicile (art. 6.1) and the Brussels regime on provisional measures were more and more used by titleholders.

These possibilities were however curtailed by recent case law of the European Court of Justice (Cases GAT and ROCHE NEDERLAND). The Judgments in those two cases were a step back. In practice it is no longer realistic to envisage infringement proceedings outside the State of registration since a validity defence blocks those proceedings. It is as well no longer possible to concentrate proceedings against multiple infringers if the infringed right is nominally different no matter that it shares a common origin as in the case of European patent.

The ECJ judgments in the abovementioned cases should be reversed in the review of the Brussels Regulation. According to our opinion the proposals formulated by CLIP (European Max-Planck Group for Conflict of Laws in Intellectual Property) provide an adequate starting point for further discussion.

Waiting for a European litigation system is in our opinion not an adequate alternative. . Not all industrial property rights will be covered by such a system. Even if such a project is pursued to the end, which is uncertain, it might take years until a unified litigation system can operate in practice.

Question 6:

Do you think that the free circulation of provisional measures may be improved in the ways suggested in the Report and in this Green Paper? Do you see other possibilities to improve such a circulation?

We consider that there is no reason to change the current regime of the free circulation of provisional measures in the sense proposed by the Green Paper. First of all, we must distinguish between the provisional measures ordered by a court with jurisdiction on the substance of the matter and provisional measures ordered by courts without jurisdiction on the merits. It is broadly assumed that the court with jurisdiction on the substance of the matter has also jurisdiction to order provisional measures, even with extraterritorial effect. It must be stressed, however, that this competence is not established *expressis verbis* in Regulation 44/2001. In fact, art. 31 is the only provision devoted to provisional measures. Instead, art. 20.2 of Regulation 2201/2003 clearly leaves the priority of the court with jurisdiction on the merits and subsequently it can be inferred the extraterritorial scope of the provisional measures ordered by this court. Therefore, it would be useful to introduce in the Regulation a provision in order to grant that the courts with jurisdiction on the substance of the matter can also order provisional measures with extraterritorial effect.

The Report and the Green Paper are only focused on the measures "granted by the courts of a Member State having jurisdiction on the basis of Article 31" (p. 9 of the Green Paper). It must be pointed out that it is not easy to establish when a court has jurisdiction on the basis of Article 31. The text of the provision is not clear enough and it has been interpreted that it contains a remission to the domestic law of the court. Before thinking about the extraterritorial effect of provisional measures ordered on the basis of Article 31, it would be necessary to establish which are the accurate grounds of jurisdiction in this matter. In other words, in which cases a court **without jurisdiction on the substance of the matter** is allowed to order provisional measures.

Although the scope on which the Regulation is applied is really distant from the scope of the Regulation 2201/2003, we think art. 20 of Regulation 2201/2003 is again a rule to be taken into account.

For us the answer to the second question is quite evident: the jurisdiction to grant provisional measures exists only when the provisional measures are going to be executed in the State of the court. The court with jurisdiction on the merits can adopt extraterritorial provisional measures, but sometimes it is necessary, in order to avoid delays, that the measure is adopted by the courts of the State where the measure must be effective. In short, there is no reasonable reason to apply for the granting of a provisional measure before the courts of a State that neither has jurisdiction on the substance of the matter nor it is the State where the measure must be executed. Why should the Regulation promote *forum shopping* in the area of provisional measures?

Therefore we think that the courts that have no jurisdiction on the substance of the matter can only order measures without extraterritorial effects, so there is no need of promoting the circulation of such measures.