



EUROPEAN COMMISSION

LEGAL SERVICE

Brussels, 29 September 2008
JUR(2008)50253 [REDACTED]

NOTE TO J. FAULL, DIRECTOR GENERAL JLS

Subject: Signature de la convention du Conseil d'Europe sur les relations personnelles de d'enfant, du 15 mai 2003 – Your note 12935

Reference is made to the above request for consultation regarding the Council of Europe (COE) Convention No 192 on Contact concerning Children, which was opened for signature on 15 May 2003.

1. Your request for advice concerns a proposal initiated by the Council Secretariat and tabled under the previous Presidency as a Presidency Working Document with the Committee on Civil Law Matters on 27 May 2008. The purpose of this proposal is to 'unblock' a situation that has arisen in regard to this COE Convention.

According to the analysis set out in the Working Document this COE Convention covers subject matters both within Member States' national competence (substantive rules on contacts with children)¹ and matters that fall within the exclusive competence of the European Community (rules on jurisdiction and enforcement as confirmed by the ECJ in the *Lugano Opinion* 1/03).² In the Working Document it is argued that the substantive law provisions form the 'core' of the COE Convention and that the provisions on jurisdiction and enforcement are 'ancillary'. However, the Working Document also recognises at the same time that none of these provisions can stand alone: it accepts that as the various provisions of the COE Convention are intrinsically linked, Member States cannot become a party to this convention without approval of the European Community. It is further noted that the COE Convention explicitly allows the European Community to become a party as well (e.g., see article 22(1) of the COE Convention).

¹ According to the Working Document and the DG JLS's request for advice, the substantive law rules set out in the convention would fall under Member States' national competence.

² According to the Working Document and the DG JLS's request for advice, provisions on jurisdiction and enforcement would fall under exclusive European Community competence, pursuant to Council 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, repealing Regulation (EC) No 1347/2000, *Official Journal L 338 (2003) pages 0001 – 0029*.

The problem that the Working Document seeks to address is that **EC Member States in the Council are divided as to whether they wish to be bound by the substantive rules** set out in this COE Convention. The Working Document states that whereas a "substantial" number of Member States have signalled their wish to be bound, not all Members States can agree with the substantive rules set out in this COE Convention. With regards to Community competence this COE Convention concerns an area of family law and unanimity applies.

To solve this problem the Working Document proposes a formula whereby Member States that are willing to accept the substantive rules of the COE Convention could do so, whilst Member States that are opposed to those rules, would not be bound. In short, it is proposed that (1) the European Community should allow Member States, that wish to do so, proceed with signature and ratification of the COE Convention for the parts falling under their national competence and (2) that the **European Community would itself become a party to the COE Convention for the provisions that fall under its competence, but that this result would only bind the Member States that wish to become bound by the substantive rules of the COE Convention**.³ To ensure this result, the Community would make a declaration to this effect on signing and concluding the COE Convention.

2. The Legal Service would note from the outset that the **COE Convention is not widely ratified**. Only 17 of the 47 COE States have signed the COE Convention, and thus far only 5 of these have ratified or acceded (Albania, the Czech Republic, Romania, San Marino and the Ukraine). For the moment only the Czech Republic and Romania have become a full contracting party to the COE Convention No 192. If the proposal of the Working Document were to be followed, a number of Member States that have thus far signed the COE Convention may or may not proceed with ratification, more in particular: Austria, Belgium, Bulgaria, Cyprus, Greece, Italy, Malta, Poland and Portugal. This would still leave a substantial number of EC Member States out of the equation. Further, although this is not raised your request for advice, the Legal Service wishes to point out that from a Community law perspective, the fact that the Czech Republic⁴ and Romania,⁵ have ratified this COE Convention after their accession to the European Community is

³ The Working Document seems contradictory with regard to the question of which EC Member States would be bound by the Community's accession: in paragraph 12 it states that the Community's signature and conclusion would be accompanied by a declaration according to which the Community's accession to the COE Convention would bind only the Member States that have become a party to the COE Convention, whereas in paragraph 13 it is stated that the Community "will thus accept that Articles 14, 15 and 16 can apply throughout the Community". Both statements cannot be reconciled. As the DG JLS's request for advice refers to the example of the Council Decision of 2004 regarding the Protocol to amend the (Paris) Convention on Third Party Liability in the Field of Nuclear Energy, the Legal Service assumes that what is being proposed is that the Community accedes to the COE Convention but that Member States that chose not to become a party to this COE Convention would not be bound by the Community's accession.

⁴ According to the COE website, the Czech Republic has signed this convention on 15 May 2003 (a few months before its accession to the European Community); followed by ratification on 27 September 2004 (after its accession to the European Community).

⁵ According to the COE website, Romania has signed this convention on 15 May 2003; followed by ratification on 16 July 2007 (after its accession to the European Community).

obviously problematic: by concluding the COE Convention these States have unlawfully exercised competences that are exclusive to the Community.⁶

3. The Legal Service has already expressed informally its reservations to the course of action proposed in the Working Document.

The Legal Service is of the view that the course of action proposed in the Working Document is at odds with the principle of **unity in international representation of the Community**. When the Community ratifies or accedes to an international agreement it binds all of its Member States, by virtue of article 300(7) EC Treaty. The exceptions to this rule are set out in primary law and concern the special situation of Denmark, the United Kingdom and Ireland, pursuant to the respective protocols annexed to the Amsterdam Treaty. Any exceptions to this principle should be interpreted and applied restrictively. This is in line with the principle that **acts of Community law must apply as a rule, to all Member States**.

In addition the Legal Service regards the proposed course of action as a means of **circumventing the voting rules set out in the EC Treaty**, *in casu* the voting rules that apply to the area of civil justice dealing with family law.

4. In the request for advice reference is made to the precedent of the **Protocol to amend the (Paris) Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960, as amended in 1982**. In its decision authorising the Member States that were contracting Parties to the Paris Convention to ratify or accede to the Protocol in the interest of the Community, the Council considered that only those Member States that were already contracting parties to the 1960 Convention itself, should ratify the Protocol in the interest of the Community.⁷ As a result, Austria, Ireland and Luxembourg were not asked to comply with this decision.

In the view of the Legal Service the example of this nuclear protocol constitutes a **singular case justified by objective and special circumstances which should not be taken as a precedent** for the area of civil justice. There were objective reasons for the continued opposition by the three (non-nuclear) countries concerned to being bound by a Protocol to a Convention regarding nuclear matters to which they were not a party.⁸ In

⁶ Withdrawal of ratification by these States is not an option as the COE Convention has already entered into force for both states. For the Czech Republic the COE Convention entered into force on 1 September 2005; for Romania on 1 November 2007.

⁷ Council Decision of 8.03.2004, OJ, L 97, 1.4.2004, p. 53.

⁸ More in particular, under recital (8) of the Council Decision on conclusion of the Protocol explicit reference is made to the fact that three of the Member States, namely Austria, Ireland and Luxembourg, are not Parties to the Paris Convention and states as follows: "[G]iven that the Protocol amends the Paris Convention, that Regulation (EC) No 44/2001 authorises the Member States bound by that Convention to continue to apply the rules on jurisdiction provided for in it and that the Protocol does not substantially amend the rules on jurisdiction of the Convention, it is objectively justified that this Decision should be addressed only to those Member States that are Parties to the Paris Convention. Accordingly, Austria, Ireland and Luxembourg will continue to base themselves on the Community rules contained in Regulation (EC) No 44/2001 and to apply them in the area covered by the Paris Convention and by the Protocol amending that Convention."

addition the Commission made it absolutely clear at the time that this approach would not constitute a precedent.⁹

From a more general perspective the Legal Service cannot exclude that with regard to certain (mixed) international agreements only a limited number of Member States would need to be involved, alongside the Community. For instance, the 1996 Convention on the Protection of the Alps (Alpine Convention) was concluded by the Community and only four of the EC Member States (Germany, Austria, Italy and France).¹⁰ The 1990 Agreement on Cooperation on Management of Water Resources in the Danube Basin was concluded between Germany and the then EEC on the one hand and Austria on the other.¹¹ However, it should be noted that in both cases these agreements are binding for all Member States of the Community, even if the territorial application of the agreement is limited for **objective geographical reasons** to the Alpine region for the first convention and the German and Austrian Danube Basin for the second convention.

In the present case, the Working Document does **not provide any elements that would point to objective circumstances that could justify the proposed course of action**. Accepting this proposal would set a precedent that would have negative consequences for the entire field of external relations in matters of civil justice. There are many international agreements that present similar features as the COE Convention at issue in the request for advice: agreements that cover matters that from an internal Community law perspective area 'mixed' but which Member States cannot adhere to without Community approval, because of the close linkage between the various provisions, even if there are only a few articles that fall under exclusive Community competence.

5. In addition, the Legal Service notes that so-called 'disconnection clause' set out in article 20(3) of the COE Convention¹² does not amount to an absolute shield between the COE Convention and EC Member States. It implies that EC Member States that have ratified the COE Convention will be obliged to apply the provisions of the COE Convention in relation to other EC Member States that have ratified or acceded to the Convention (unless there would be specific European Community rules on the subject).

6. In conclusion, the Legal Service cannot support a request that the Commission take an initiative along the lines proposed in the Working Document with regard to the Council of Europe (COE) Convention No 192 on Contact concerning Children. Accepting the proposal set out in the Presidency Working document would set a damaging precedent as it would open the door for an increase in the territorial fragmentation of the EC's external

⁹ SI (2002) 927 Declaration by the Commission: "*The Commission would like to stress that any exception from the basic principle that acts of Community law apply to all Member States must be duly justified under the Treaties. (...). The Commission therefore does not regard the approach chosen by the Council as a precedent for future cases.*"

¹⁰ Council Decision 96/191/EC [1996] OJ L 61/31.

¹¹ Council Decision 90/160/EC [1990] OJ L 90/18.

¹² "In their mutual relations, States Parties which are members of the European Community shall apply Community rules and shall therefore not apply the rules arising from this Convention, except in so far as there is no Community rule governing the particular subject concerned".

relations in matters of civil justice, in matters for which the European Community is exclusively competent and on grounds which are not provided for in the EC Treaty.



