



COMMISSION EUROPÉENNE

SERVICE JURIDIQUE

Bruxelles, le 25 novembre 2008

JUR (2008) 70238 – [REDACTED]

*Avis du Service juridique\**

**NOTE A L'ATTENTION DE**

**M. J. FAULL, DIRECTEUR GENERAL DG JLS**

**Objet:** Inter-service consultation on a Commission Proposal for a Council Regulation on negotiation and conclusion of agreements between Member States and third countries covering jurisdiction, recognition and enforcement of judgments and decisions in matters relating to family law, including maintenance obligations, and applicable law and cooperation in matters relating to maintenance obligations and for Regulation of the European Parliament and of the Council on negotiation and conclusion of agreements between Member States and third countries concerning sectoral matters and covering applicable law in civil and commercial matters.

**Ref.** Votre note JLS.E2 PDL/amj D(2008)16314 du 29.10.2008 enregistrée au SJ comme CONS (08) 10279 du 5.11.2008 et votre note JLS.E2 PDL/amj D(2008)16314 du 29.10.2008 enregistrée au SJ comme CONS(08)10301 du 6.11.2008

Vous avez consulté le Service Juridique sur deux propositions de règlements portant sur la mise en place d'une procédure relative à la négociation et la conclusion par les Etats membres d'accords avec des pays tiers concernant respectivement la loi applicable en matière civile et commerciale, dans des matières sectorielles, et la compétence, la reconnaissance, l'exécution des décisions en matière familiale, y inclus en ce qui concerne les obligations alimentaires, de même que la loi applicable dans cette matière.

1. A titre liminaire, le Service Juridique rappelle que pour l'ensemble de ces matières, la négociation et la conclusion d'accords avec un ou plusieurs Etats tiers relève de la compétence exclusive de la Communauté. Dans son avis relatif à la compétence

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\* Document de la Commission protégé en vertu de l'article 4 du règlement (CE) n° 1049/2001 du Parlement européen et du Conseil (JO L 145 du 31.5.2001, p. 43).

communautaire pour conclure la convention de Lugano<sup>1</sup>, la Cour a en effet confirmé explicitement que la Communauté a acquis la compétence exclusive pour conclure des accords internationaux avec des Etats tiers dans des matières affectant les règles du règlement 44/2001, "Bruxelles I", sur la compétence, la reconnaissance et l'exécution des jugements en matière civile et commerciale. Le raisonnement de la Cour vaut, mutatis mutandis, pour tous les instruments adoptés par la Communauté et contenant des règles de conflits de loi et de juridictions, de même que des règles sur la reconnaissance et l'exécution des jugements. Il en découle que la Communauté a compétence exclusive pour négocier et conclure les accords avec des pays tiers envisagés par les propositions en objet.

2. Eu égard au nombre traditionnellement élevé d'accords entre Etats membres et Etats tiers dans les domaines visés par les propositions et compte tenu du fait qu'un intérêt dans le chef de la Communauté pour conclure tous ces accords ne peut être présumé, votre proposition envisage de prévoir une procédure d'examen et, le cas échéant d'autorisation pour déléguer aux Etats membres la compétence externe de la Communauté afin de leur permettre, via la procédure mise en place, de négocier et conclure souscrire les accords envisagés.

Le Service Juridique admet que l'exercice, par les Etats membres, de la compétence communautaire externe est juridiquement possible, à titre exceptionnel et à des conditions précises tant de forme que de substance<sup>2</sup>. Une telle délégation ne peut conduire à une remise en cause ni de l'intégrité du droit communautaire, ni de l'existence de la compétence externe communautaire. Son champ doit donc être limité de façon stricte et l'intérêt de la Communauté à négocier et conclure l'accord concerné doit d'abord faire l'objet d'une évaluation rigoureuse.

C'est à la lumière de ces principes qu'il convient d'examiner les propositions en objet.

D'une manière générale, le Service Juridique constate que leur champ d'application est très large, tant en ce qui concerne les domaines visés que les types d'accords envisagés, et que la procédure d'évaluation des accords notifiés par les Etats membres contient des critères beaucoup trop imprécis.

3. S'agissant, en premier lieu, du **champ de la délégation envisagée**, il couvre à ce stade la quasi-totalité des instruments communautaires adoptés dans le domaine du droit international privé. Alors même que le Conseil a introduit dans les préambules des demandes visant les règlements Rome I, Rome II, et le futur règlement sur les obligations alimentaires, la proposition ajoute, bien que cela ne réponde à aucune demande formelle du Conseil, le règlement Bruxelles II sur la compétence, la reconnaissance et l'exécution en matière familiale. Le Service Juridique estime que si un champ d'application aussi vaste devait être maintenu, il serait incompatible avec les deux principes de base qui doivent régir une délégation exceptionnelle. Plus le champ d'application de la délégation

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<sup>1</sup> Avis 1/03 du 7 février 2006, Rec 2006, p I-1145

<sup>2</sup> Voir le règlement (CE) n° 847/2004 du Parlement européen et du Conseil du 29 avril 2004 concernant la négociation et la mise en œuvre d'accords relatifs à des services aériens entre les Etats membres et les pays tiers.

est étendu en ce qui concerne les matières susceptibles de faire l'objet d'un exercice de la compétence communautaire externe par les Etats membres, plus la Commission rencontrera de difficultés pour s'opposer à l'extension de ce régime au règlement Bruxelles I, dont la révision doit commencer en 2009. Il est en effet tout à fait certain que les Etats membres demanderont le même régime et s'il est accordé, c'est l'intégralité du droit communautaire des conflits de juridictions et de loi qui sera ainsi soumis à délégation. **L'exercice de la compétence externe par la Communauté deviendrait alors l'exception, et son exercice par les Etats membres, la règle.** Une telle évolution remettrait donc en cause tant l'intégrité du droit communautaire que l'existence même de la compétence externe communautaire.

4. En second lieu, le Service Juridique considère que les accords **régionaux** doivent être exclus du champ de la délégation. L'inclusion de tels accords dans le champ des règlements entraînera une affectation sévère de l'acquis. Comme le démontre le libellé des propositions à cet égard, lesquelles se réfèrent à des liens "géographiques" ou "historiques" plutôt vagues, il est très malaisé de limiter la définition des accords régionaux et le risque est grand que l'on étende progressivement le champ des règlements aux accords multilatéraux. Mais surtout, l'intérêt communautaire doit être présumé dès lors que plusieurs Etats membres sont concernés, et il n'y a dans ces cas là pas lieu à délégation.

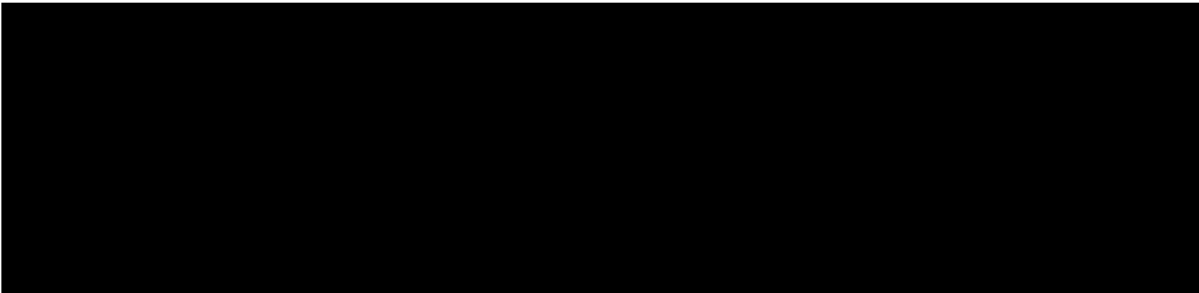
5. En troisième lieu, il est important de reformuler **les règles et conditions** qui s'appliquent à la procédure d'évaluation par la Commission de la présence ou de l'absence d'un intérêt pour la Communauté de l'accord notifié par un Etat membre. Ce processus doit être articulé en deux étapes. Premièrement, la Commission doit constater que l'Etat tiers concerné et la Communauté ne sont pas liés par un accord existant dans le domaine en cause et l'improbabilité d'un tel accord dans un proche avenir. Ce n'est que sur base d'un tel constat que la Commission peut envisager d'autoriser l'Etat membre concerné, pour autant qu'il soit démontré, d'une part, qu'il existe un intérêt spécifique de l'Etat membre à conclure un tel accord, en particulier en raison de liens géographiques, économiques, culturels ou historiques avec l'Etat tiers, et, d'autre part que l'accord n'affectera pas l'application uniforme et cohérente des règles communautaires ni ne nuira au fonctionnement du système communautaire.

6. Les propositions sous objet appellent également plusieurs autres observations :

- l'expression "negotiating directives" doit être absolument évitée, ce terme étant réservé aux directives de négociations données par le Conseil dans le cadre de la mise en œuvre de l'article 300 CE,
- il est important que la Commission se soumette de bonne foi à un délai de réponse lorsqu'un accord envisagé est notifié par un Etat membre ou lorsque l'accord a été négocié et qu'il est notifié à la Commission en vue d'une autorisation de conclure. Il est suggéré de prévoir un délai de trois mois. Dans ce cas, le délai donné au Comité pour se prononcer doit être limité à un mois,
- il est important de prévoir d'ores et déjà le texte de la "sunset clause" que les Etats membres devront insérer dans leurs accords avec les pays tiers,
- le Royaume Uni et l'Irlande doivent impérativement participer à l'adoption de ces règlements en fonction de leurs opt-in respectifs.

Vous trouverez ci-joint, en track changes, la proposition de règlement dans le domaine des obligations alimentaires, telle que modifiée par le Service Juridique. Ces modifications valent, *mutatis mutandis*, pour la proposition concernant la loi applicable en matière civile et commerciale.

En dernier lieu, au vu de l'importance de cette procédure de délégation de l'exercice des compétences externes communautaires aux Etats membres, le Service Juridique estime que la Commission devrait en débattre et que par conséquent les propositions de règlements devraient être adoptées en procédure orale.



Cc: Mme. C. DAY, Secrétaire Général  
M. E. LANDABURU, Directeur général DG RELEX  
M. M. LEIGH, Directeur général DG ELARG

Annexe



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, [DATE]  
COM(2008)

Proposal for a

**COUNCIL REGULATION**

**establishing a procedure for negotiation and conclusion of bilateral agreements between  
Member States and third countries covering jurisdiction, recognition and enforcement  
of judgments and decisions in matters relating maintenance obligations, and applicable  
law in matters relating to maintenance obligations**

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

#### • Grounds for and objectives of the proposal

Pursuant to article 65 of Title IV of the EC Treaty, introduced by the Treaty of Amsterdam, several Community instruments in the field of civil justice have been adopted on the basis of Article 65 of the EC Treaty.<sup>1</sup>

Apart from this Community law *acquis*, the field of civil justice is for many Member States also characterised by a number of bilateral agreements which they concluded with third countries prior to the entry into force of the relevant provisions of the Amsterdam Treaty or prior to their accession to the European Community. To the extent that such pre-existing agreements contain provisions that are not compatible with the EC Treaty, Member States need to take all steps to eliminate the incompatibilities, pursuant to article 307 EC Treaty. The European Court of Justice has confirmed that if necessary, Member States are required to denounce treaties that are incompatible with the *acquis*.

Apart from pre-existing bilateral treaties, there may be also the need for the conclusion of new agreements with third countries governing areas of civil justice that come within the purview of Title IV of the EC Treaty.

In line with the development of the European judicial area related to cooperation in civil and commercial matters, the Community has acquired exclusive external competence to negotiate

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Council Regulation (EC) No 1346/2000 on insolvency proceedings, OJ L 160, 30.6.2000, p. 1.

Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p.1

Council Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ L 174, 27.6.2001, p. 1.

Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, p. 1.

Council Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 26, 31.1.2003, p.41.

Council Directive 2004/80/EC relating to compensation to crime victims, OJ L 261, 6.8.2004, p. 65.

European Parliament and Council Regulation (EC) No 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 143, 30.4.2004.

European Parliament and Council Regulation (EC) No 1896/2006 of 12 December 2006 creating a European order for payment procedure, OJ L 399, 30.12.2006, p.1.

European Parliament and Council Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, p.40.

European Parliament and Council Regulation (EC) No 861/2007 establishing a European Small Claims Procedure, OJ L 199, 31.7.2007, p.1.

European Parliament and Council Regulation (EC) No 1393/2007 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.

European Parliament and Council Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p.6.

European Parliament and Council Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters, OJ L 136, 21.5.2008, p.3.

and conclude international agreements with third countries on a number of important subject matters referred to in Title IV EC Treaty. This was confirmed by the ECJ in its Opinion 1/03 of 7 February 2006 relating to the conclusion of the new Lugano Convention.<sup>2</sup> The Court confirmed that the Community has acquired exclusive competence to conclude international agreements with third countries, on matters affecting the rules set out *inter alia* in Regulation (EC) No 44/2001 "Brussels I", in particular on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. In its opinion the Court found that in the analysis of the provisions of the new Lugano Convention relating to the rules on jurisdiction demonstrated that those provisions affect the uniform and consistent application of the Community rules on jurisdiction and the proper functioning of the system established by those rules.<sup>3</sup> In regard to the proposed Convention's rules on recognition and enforcement of judgements the Court came to a similar conclusion. It found that the Community rules on the recognition and enforcement of judgments are indissociable from those on the jurisdiction of courts, with which they form a unified and coherent system, and that the new Lugano Convention would affect the uniform and consistent application of the Community rules as regards both the jurisdiction of courts and the recognition and enforcement of judgments and the proper functioning of the unified system established by those rules.<sup>4</sup>

Consequently, it must be assumed that the European Community has acquired exclusive competence for the negotiation and conclusion of many of the bilateral agreements referred to above.

Nevertheless, it has to be assessed there exists currently a sufficient Community interest for the Community to replace all of existing or proposed such agreements between Member States and third countries with Community agreements. For that reason is necessary to establish a procedure with a twofold purpose. The first is to allow the Community to assess whether there is such a sufficient Community interest for the conclusion of a particular agreement. The second is to authorise Member States to conclude the agreement at issue if there is no current Community interest in the conclusion of a Community agreement.<sup>5</sup>

It is in line with the conclusions of the conclusions of the JHA Council of 19 April 2007.<sup>6</sup>

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<sup>2</sup> Opinion 1/03 of 07 February 2006, Rec.2006,p.I-1145.

<sup>3</sup> Opinion 1/03 LUGANO, § 161.

<sup>4</sup> Opinion 1/03 LUGANO, § 161

<sup>5</sup> Such a solution was adopted earlier for the civil aviation sector see Regulation (EC) No 847/2004 of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries OJ L 157/2004, p. 7.

<sup>6</sup> On 19 April 2007, the JHA Council suggested that, as regards future bilateral agreements and any amendments of existing bilateral agreements with particular third countries relating to maintenance obligations, a "*procedure for the negotiation and conclusion of such agreements, inspired by existing precedents in Community law, inter alia, the procedure for air service*" should be introduced. "*That procedure should establish criteria and conditions for assessing whether the conclusion of such an agreement is in the Community's interest. Where that is not the case, the procedure should establish criteria and conditions for the negotiation and conclusion of such agreements by Member States, particularly if the prospective agreement's provisions differ from Community rules, so as to ensure that agreements do not compromise the system established*".

The Commission has accepted that such a procedure should be devised for agreements affecting the Rome I<sup>7</sup> and Rome II<sup>8</sup> Regulations.

The Commission has also accepted that a similar authorisation procedure should be proposed in relation to bilateral agreements in the area of maintenance obligations.

Accordingly, the Commission proposes that such a procedure should be devised for certain bilateral agreements in matters relating to maintenance obligations falling within the scope of Council Regulation (European Community) on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations on the one hand, and civil and commercial law on the other.

The present proposal concerns a procedure for authorisation to Member States in first area mentioned. Simultaneously with this proposal, the Commission puts a separate proposal forward for a similar procedure for the area of civil and commercial law. As the area of maintenance obligations is governed by unanimity, these proposals must be put forward in separate acts.

## **2. CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT**

The Commission evaluated a range of different options to achieve the objective described above, although without carrying out a formal impact assessment, taking into account the particular nature of the subject. Two meetings with experts from the Member States were held in Brussels, on 11 March and 26 May 2008, to exchange ideas and views.

Generally, as regards the scope of the proposal, the Member States would have preferred a horizontal instrument which would take into account both the sectoral type of bilateral agreements and the "Lugano type" agreements concerning jurisdiction, recognition and enforcement of judicial decisions in civil and commercial matters, and even the "broad agreements" on legal cooperation which may cover criminal, civil, family or administrative matters.

Nevertheless, such agreements dealing with issues such as jurisdiction, recognition and enforcement in civil and commercial area in general are likely to undermine the Community legal framework established in the area of civil judicial cooperation, and therefore to excessively affect the existing *acquis* which is based on a concept of integration and of legal certainty for the European citizens with a view to facilitating their access to justice.

Consequently, since this must be regarded as a derogation procedure in relation to Community law, the system proposed by the Commission is limited to the essential minimum to achieve the objectives described above.

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<sup>7</sup> Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) contains an identical recital (Recital 42).

<sup>8</sup> Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) sets out in Recital 37



Several options were examined by the Commission for the setting up of the procedure.

The "passive" status quo, i.e. opting not to take any measures to solve the problem, would make it impossible for the Member States to conclude agreements with third countries in the identified fields.

The "active" status quo would involve opting not to develop any legislative procedure for the re-delegation of Community powers. All agreements of the Member States with third countries would have to be negotiated and concluded by the Community according to the procedure of Article 300 of the EC Treaty, even if only one Member State needs or has an interest in such an agreement.

The next option consists in the issuing of an authorisation by the Community, based on general criteria laid down by a legislative instrument (for example, a Regulation) or by a Council Decision (on the basis of the aforementioned legislative instrument). The advantage of this option is that there would be a simpler procedure establishing a common approach in all situations. The drawback of this option is that it presupposes that conditions allowing the Member State to negotiate and conclude agreements with third countries should be established in advance. Since the area of judicial cooperation in civil matters is constantly making progress within the Community, this would entail the need to establish different criteria for each instrument of the *acquis* (Regulation Brussels I, Regulation Brussels II, Regulation Rome I, Regulation Rome II, draft Regulation on maintenance obligations, etc ...).

In contrast, the last option selected by the Commission envisages a specific authorisation to be granted on a case-by-case basis after having assessed the agreement notified by the Member State on the basis of objective criteria. The Commission issues negotiating directives to the Member State, if necessary, and conducts an evaluation of the outcome before allowing the agreement to be finally concluded.

### **3. LEGAL ELEMENTS OF THE PROPOSAL**

#### **• Summary of the proposed action**

The objective of the proposal is to establish a procedure for the Community to make an assessment of whether there is a sufficient Community interest in the conclusion of proposed bilateral agreements with third countries, and in the absence thereof, authorise Member States to conclude these agreements with third countries in certain fields concerning judicial cooperation in civil and commercial matters falling under the exclusive competence of the Community. Because the authorisation to Member States derogates from the rule that the Community is exclusively competent to conclude international agreements on these matters, the procedure must be regarded as an exceptional measure and must be limited in scope.

It is proposed to limit the establishment of the procedure in question to two subject matters: the field to maintenance obligations on the one hand, and the fields of the law applicable to contractual and non-contractual obligations for sectoral issues, and, on the other hand. The enclosed proposal deals with the first matter.

The Commission proposes the following guarantees in order to preserve the 'acquis communautaire' including the integrity of the Community system in the area under consideration.

The procedure is based on prior notification of the draft agreement by the Member States that wish to obtain the authorisation to (re-)negotiate and conclude the agreement with the third country on the basis of specific conditions to be evaluated on a case-by-case basis.

The Commission must first determine whether the Community has already concluded an agreement on the same subject matter with the third country concerned. If that is not the case, the Commission must determine whether such an agreement expected in the near future. If no such agreement is expected in the near future the Commission may grant authorisation, provided that the two following conditions are met: (a) the Member State concerned has demonstrated that there is a specific interest of the applying Member State to conclude an agreement with the third country, related in particular given the existence of economical, geographical, cultural or historical ties between the Member State and that third country; and (b) the Commission determines that the proposed agreement is not expected to affect the uniform and consistent application of the Community rules in place nor the proper functioning of the system established by those rules.

The procedure also proposes the inclusion in the agreements of "sunset clauses" to limit the validity in time of the agreements concluded by the Member States until the point at which the Community concludes an agreement on the same subjects with the third country concerned. ~~(NEED FORMULATION OF SUNSET CLAUSE)~~

- **Legal basis**

procedureThe legal basis for the enclosed proposal is based on Article 61, point c) of the Treaty, which confers powers on the Community to adopt measures in the field of judicial cooperation in civil matters, as provided for in Article 65, in accordance with Article 67(2). The measure will therefore be adopted by the Council acting unanimously, after consulting the European Parliament.

- **Subsidiarity principle**

The proposal falls under the exclusive competence of the Community. The subsidiarity principle therefore does not apply.

- **Proportionality principle**

The proposal complies with the proportionality principle for the following reasons:

The proposed procedure constitutes an exception to the exercise of exclusive Community competence in the matters set out above. It is limited to what is strictly necessary to allow Member States to conclude agreements with third countries in the fields identified and sets out a number of criteria that need to be met. An authorisation for Member States will only be given if the proposed agreement can be considered as having only a limited impact on the applicable Community system.

The proposed procedure makes use of the comitology procedure, as a legislative procedure is not considered necessary and taking into account the fact that the proposed procedure concerns the implementing powers of the Commission.

The proposed procedure thus reduces the administrative cost which falls on the Community and on the national governments to the essential minimum.

- **Choice of instruments**

Proposed instrument(s): Regulation.

Other means would not be adequate for the following reasons.

As the proposed procedure provides for a derogation from Community law, a Regulation is the instrument which is directly applicable and provides the fullest guarantees as regards legal certainty and equal treatment.

#### **4. BUDGETARY IMPLICATION**

The proposal has no implication for the Community budget.

#### **5. ADDITIONAL INFORMATION**

- **Review / revision / sunset clause**

The proposal includes a review clause.

- **Detailed explanation of the proposal(s)**

Scope (Art. 1)

Article 1 defines the scope of the proposal on agreements concerning maintenance obligations.

The proposal is intended for bilateral agreements only.

The proposed procedure (Art. 2-8)

The proposed procedure is intended to establish a functional arrangement with reduced formalities.. At the same time, it ensures that the the 'acquis communautaire' can be safeguarded

The procedure stipulates (Article 2) that the Member State shall notify the Commission in writing of its intention to undertake negotiations on a new agreement or in order to amend an existing agreement. The notification must include a copy of the draft agreement and any other relevant documentation. This notification is to be made not later than three months before the beginning of the negotiations with the third country concerned.

Upon receipt of the notification, the Commission will need to assess (Article 3) whether the Member State can proceed with the negotiations. The assessment comprises the following steps: The Commission must first determine whether the Community has already concluded an agreement on the same subject matter with the third country concerned. If that is not the case, the Commission must determine whether such an agreement expected in the near future. If no such agreement is expected in the near future the Commission may grant authorisation,

provided that the two following conditions are met: (a) the Member State concerned has demonstrated that there is a specific interest of the applying Member State to conclude an agreement with the third country, related in particular given the existence of economical, geographical, cultural or historical ties between the Member State and that third country; and (b) the Commission determines that the proposed agreement is not expected to affect the uniform and consistent application of the Community rules in place nor the proper functioning of the system established by those rules.

If the Commission, in the light of the conditions referred to above, considers that there are no obstacles to the conclusion of the proposed agreement (Article 4), it can permit the Member State to open the negotiations. Where necessary, the Commission can propose negotiation guidelines and can request the inclusion of particular clauses. The agreement shall also contain a 'sunset clause' for its termination, should the European Community decide to conclude an agreement with the third country in question (We would need the text of this sunset clause) .

The decision on whether or not to permit the negotiations is taken by the Commission with the assistance of an advisory committee under Article 3 of Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission<sup>9</sup>. As it is aimed at limiting formalities to the essential minimum, the advisory procedure is justified. The Commission shall submit to the Committee a draft of the measures to be taken, on which the committee expresses an opinion. The Commission then decides, taking this opinion into account as far as possible, and informs the committee of the manner in which the opinion has been taken into account.

If the outcome of the Commission's evaluation is negative, the Commission does not give its authorisation and submits this decision to the opinion of an advisory committee.

The Commission can decide to take part in the negotiations between the Member State and the third country as an observer. If the Commission itself does not participate, it has to be informed of the results during the various stages of the negotiation, in order to be able to deliver to the Member State its opinion on the content of the agreement before its final conclusion in the interests of efficiency (Article 5).

The final stage of the procedure concerns the conclusion of the agreement (Article 6). Before signing, the Member State concerned shall notify the Commission of the results of the negotiations and provide it with the text of the agreement. The Commission will assess whether the agreement is in conformity with the negotiating directives and whether the conclusion of the agreement can be considered to have a negative impact on the operation of the Community system in place, in particular whether it is likely to affect the 'acquis communautaire' in force. In case the Commission's evaluation is positive, it will give the authorisation. If the assessment is negative, the Member State concerned is not authorised to proceed with the agreement. This decision is taken in accordance with the management procedure under Article 4 of Council Decision 1999/468/EC.

It is proposed that the Commission takes its decision in relation to each relevant stages of the assessment procedure within three months of the relevant notification by the Member State.

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<sup>9</sup> Council Decision laying down the procedures for the exercise of implementing powers conferred on the Commission (1999/468/EC), OJ L184, 17.7.1999, p.23.

### Transitional and final provisions

Article 8 lays down transitional provisions which are to be applied in cases where, at the time of the entry into force of the regulation, the Member State concerned has already started negotiations with the third country or has already concluded them, but has not yet given its consent to be bound by the agreement.

The procedure also applies if negotiations are already concluded at the time of the entry into force of the procedure, but the agreement has not yet been ratified by the Member State in question.

Article 9 stipulates that the Commission will submit to the Council and to the Economic and Social Committee a report concerning the application of the procedure at the latest by January 2014, and then every five years thereafter to the European Parliament. The report is accompanied, as appropriate, by proposals for the amendment of the Regulation.

Proposal for a

## COUNCIL REGULATION

of [...]

**establishing a procedure for negotiation and conclusion of bilateral agreements between Member States and third countries covering jurisdiction, recognition and enforcement of judgments and decisions in matters relating to maintenance obligations, and applicable law in matters relating to maintenance obligations**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c), 67(2) and 67(5) thereof,

Having regard to the proposal from the Commission<sup>10</sup>,

Having regard to the opinion of the European Parliament<sup>11</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>12</sup>,

Whereas:

(1) Title IV of the Treaty establishing the European Community (hereinafter "the Treaty") provides the legal basis for the adoption of Community legislation in the field of judicial cooperation in civil matters.

(2) Judicial cooperation in civil matters between Member States and third countries has traditionally been governed by agreements between Member States and third countries.

(3) Article 307 of the Treaty requires the elimination of any incompatibilities between the Community acquis and international agreements concluded by Member States and third countries. This may involve the need for amending or re-negotiation of these agreements.

(4) There may also be the need for the conclusion of new agreements with third countries governing areas of civil justice that come within the purview of Title IV of the EC Treaty.

(5) The ECJ confirmed in its Opinion 1/03 of 7 February 2006 relating to the conclusion of the new Lugano Convention, that the Community has acquired exclusive external competence to negotiate and conclude international agreements with third countries on a number of important subject matters referred to in Title IV EC Treaty. In particular,

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<sup>10</sup> OJ C [...], [...], p. [...].

<sup>11</sup> OJ C [...], [...], p. [...].

<sup>12</sup> OJ C [...], [...], p. [...].

the Court confirmed that the Community has acquired exclusive competence to conclude international agreements with third countries, on matters affecting the rules set out *inter alia* in Regulation (EC) No 44/2001 "Brussels I", in particular on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

- (1) Thus, pursuant to Article 300 of the Treaty, it is for the Community to conclude such agreements between the Community and a third country, as far as Community competence is concerned.
- (2) An assessment is needed of whether there exists currently a sufficient Community interest for the Community to replace all of existing or proposed bilateral agreements between Member States and third countries with Community agreements. Consequently, it is necessary to establish a procedure with a twofold purpose. The first is to allow the Community to assess whether there is such a sufficient Community interest for the conclusion of a particular bilateral agreement. The second is to authorise Member States to conclude the agreement at issue if there is no current Community interest in the conclusion of such an agreement.
- (3) This procedure is without prejudice to the exclusive competence of the Community and the provisions of articles 300 and 307 of the Treaty. A coherent and transparent procedure should be established to authorise Member States to amend existing agreements with third countries or to negotiate and conclude new agreements in exceptional circumstances, in particular where the Community itself has not indicated its intention to exercise its external competences to conclude the agreement.

Because it derogates from the rule that the Community is exclusively competent to conclude international agreements on these matters, the proposed procedure must be regarded as an exceptional measure and must be limited in scope.

The present regulation should be limited to the field of maintenance obligations.

- (4)
- (5) In view of the fact that an agreement concluded by a Member State has the potential to affect the functioning of the area of justice, as established by Community instruments, authorisation should be required both in order to start or continue negotiations and to conclude an agreement. This will enable the Commission to evaluate the expected impact of the possible outcome of negotiations on Community law and where necessary propose particular negotiation guidelines or request the inclusion of particular clauses in the proposed agreements.
- (6) In order to ensure that an agreement concluded by a Member State does not render Community law ineffective and undermine the proper functioning of the systems established by its rules the Commission can propose particular negotiation guidelines and can request the inclusion of particular clauses in the proposed agreements.
- (7) Moreover, the authorisation to a Member State to negotiate and conclude an agreement with a third country in an area falling under the exclusive competence of the Community should be limited in time. In order to ensure that the agreement does not

constitute an obstacle to the implementation of the Community's external policy on judicial cooperation in civil matters, the agreement should provide for its denunciation, when a Community agreement concluded with the same third country on the same subject matter enters into force.

- (8) It is necessary to provide for transitional measures to cover a situation where, at the time of the adoption[or entry into force?] of this Regulation, a Member State is in the process of negotiations with a third country or has concluded the negotiations but has not yet expressed its consent to be bound by the agreement. *[please explain why]*
- (9) The measures necessary for implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission<sup>13</sup>.
- (10) In accordance with the principle of proportionality, as set out in Article 5 of the Treaty, this Regulation does not go beyond what is necessary in order to achieve its objective.
- (11) [In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, and without prejudice to Article 4 of the said Protocol, the United Kingdom and Ireland are not taking part in the adoption of this Regulation and are not bound by or subject to its application.]
- (12) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.

HAS ADOPTED THIS REGULATION:

### *Article 1*

#### ***Subject matter and scope***

1. This Regulation establishes a procedure to authorise a Member State to amend an existing bilateral agreement between that Member State and a third country, or to negotiate and conclude a new bilateral agreement subject to the conditions laid down in the following provisions..

This Regulation shall apply to bilateral agreements covering jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, and falling, entirely or partly, within the scope of Council Regulation (EC) No [...] on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations

### *Article*

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<sup>13</sup> OJ L 184, 17.7.1999, p. 23.



## *Definitions*

For the purposes of this Regulation, the following definitions shall apply:

(a) The term "agreement" shall be understood, for the purposes of this Regulation, as meaning a bilateral agreement between a Member State and a third country

For the purposes of this Regulation, "Member State" shall mean any Member State other than Denmark.

## *Article 2*

### *Notification to the Commission*

1. Where a Member State intends to enter into negotiations with a third country to amend an existing agreement or to conclude a new agreement falling within the scope of this Regulation, it shall notify the Commission of its intention in writing.

The notification shall include a copy of the existing agreement, the draft agreement or the draft proposal by the third country, if available, and any other relevant documentation. The Member State shall describe the objectives of the negotiations and shall specify the issues which are to be addressed, or the provisions of the existing agreement which are to be amended, and shall provide any other relevant information.

2. The notification shall be made at least three months before formal negotiations are scheduled to commence with the third country concerned.

## *Article 3*

### *Assessment by the Commission*

1. Upon notification, the Commission shall make an assessment as to whether the Member State can pursue negotiations with the third country concerned.
2. In making its assessment the Commission must first determine whether the Community has already concluded or envisages to conclude an agreement on the same subject matter with the third country concerned. If no such agreement is expected in the near future the Commission may grant authorisation, provided that the two following conditions are met: (a) the Member State concerned has demonstrated that there is a specific interest to conclude the bilateral agreement with the third country, related in particular given the existence of economical, geographical, cultural or historical ties between the Member State and that third country; and (b) the Commission determines that the proposed agreement is not expected to affect the uniform and consistent application of the Community rules in place nor the proper functioning of the system established by those rules.

#### *Article 4*

##### **Authorisation to open negotiations**

If the Commission concludes that there are no obstacles to the agreement in the light of the circumstances and conditions referred to in Article 3, it may authorise a Member State to open negotiations on the new agreement or on amendments to the existing agreement with the third country concerned.

If necessary, the Commission may propose negotiation guidelines and can request the inclusion of particular clauses in the proposed agreement.

The agreement shall provide for the clause on its denunciation in the event that the Community concludes an agreement with the same third country on the same subject matter

2. If the Commission concludes that there are obstacles to the agreement in the light of the circumstances and conditions referred to in Article 3, the Member State shall not be authorised to open the negotiations with the third country concerned.
3. The Commission shall take a decision on the authorisation referred to in paragraphs 1 and 2 in accordance with the procedure referred to in Article 7 (2)
4. The Commission shall give its decision on the application within three months upon receipt of the notification referred to in Article 2.

#### *Article 5*

##### ***Negotiations***

The Commission may participate as an observer in the negotiations between the Member State and the third country. If the Commission does not participate as an observer, it shall be kept informed of the progress and results throughout the different stages of negotiations.

#### *Article 6*

##### **Authorisation to conclude agreements**

1. Before initialling the agreement, the Member State concerned shall notify the Commission of the outcome of the negotiations and shall transmit the text of the agreement to the Commission.
1. Upon notification, the Commission shall make an assessment as to whether the negotiated agreement complies with its initial assessment. In making this further assessment at this stage the Commission must examine whether the proposed agreement includes the suggestions and requests made by the Commission, in particular as regards the inclusion of particular clauses referred to in article 4(1) and 4(2) (clause on denunciation?) and whether the conclusion of the proposed

agreement would render the Community law ineffective and would undermine the proper functioning of the systems established by its rules.

2. If the Commission takes the view that the negotiations have resulted in an agreement which does not fulfil the requirements referred to in paragraph 2 ~~(NEED TO CHECK CORRECT PARAGRAPH)~~, the Member State shall not be authorised to conclude the agreement.
3. If the Commission takes the view that the negotiations have resulted in an agreement which fulfils the requirements referred to in paragraph 2, ~~(NEED TO CHECK CORRECT PARAGRAPH)~~ the Member State may be authorised to conclude the agreement.
4. The Commission shall take a decision on the authorisation referred to in paragraphs 3 and 4[decide whether or not to authorise the conclusion?] in accordance with the procedure referred to in Article 7(3).

The Commission shall give its decision on the application within three months upon receipt of the notification referred to in paragraph 1 above.

#### *Article 7*

##### ***Committee procedure***

1. The Commission shall be assisted by a committee.
2. Where reference is made to this paragraph, the advisory procedure laid down in Article 3 of Decision 1999/468/EC shall apply, in compliance with Article 7 thereof.
3. Where reference is made to this paragraph, the management procedure laid down in Article 4 of Decision 1999/468/EC shall apply, in compliance with Article 7 thereof.
4. The period provided for in Article 4 (3) of Decision 1999/468/EC shall be one month

#### *Article 8*

##### ***Transitional provisions***

1. Where a Member State has already started negotiation of an agreement with a third country at the time of entry into force of this Regulation, Article 2 (1) and Articles 3 to 6 shall apply.

Where the stage of the negotiations so permits, the Commission may propose negotiating guidelines or the inclusion of specific clauses, as referred to in Article 4(1).

2. Where a Member State has already completed negotiations at the time of entry into force of this Regulation, without having, Article 2(1) and Article 6 (2) to (5) shall apply.

When deciding whether or not to authorise conclusion of the agreement, the Commission shall also assess whether or not there are any obstacles to the agreement in the light of the criteria and conditions referred to in Article 3(2). (NEED TO CHECK THE CORRECT PROVISION)

#### *Article 9*

##### ***Review***

No later than January 2014[what date?], and every five years thereafter, the Commission shall submit a report on the application of this Regulation to the European Parliament, the Council and the European Economic and Social Committee, accompanied where necessary, by legislative proposals.

#### *Article 10*

##### ***Entry into force***

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, [...]

*For the Council*  
*The President*



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, [DATE]  
COM(2008)

Proposal for a

**COUNCIL REGULATION**

**establishing a procedure for ~~on~~ negotiation and conclusion of bilateral agreements between Member States and third countries covering jurisdiction, recognition and enforcement of judgments and decisions in matters relating to family law, including maintenance obligations, and applicable law in matters relating to maintenance obligations**

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

#### • Grounds for and objectives of the proposal

Pursuant to article 65 of Title IV of the EC Treaty, introduced by the ~~The Treaty of Amsterdam, by linking judicial co-operation in civil and commercial matters to the free movement of persons in the framework of Title IV of the Treaty establishing the European Community, lent a real impetus to judicial cooperation in this area. As a result, since 2000, several Community instruments in the field of civil justice have been adopted on the basis of Article 65 of the EC Treaty.~~<sup>1</sup>

~~In line with the development of the European judicial area related to cooperation in civil and commercial matters, the Community has acquired, within the scope of Community instruments adopted in this field, exclusive external competence to negotiate and conclude international agreements with third countries. Apart from this Community law *acquis*, the field of civil justice is for many Member States also characterised by a number of bilateral agreements which they concluded with third countries prior to the entry into force of the relevant provisions of the Amsterdam Treaty or prior to their accession to the European Community. To the extent that such pre-existing agreements contain provisions that are not compatible with the EC Treaty, Member States need to take all steps to eliminate the incompatibilities, pursuant to article 307 EC Treaty. The European Court of Justice has confirmed that if necessary, Member States are required to denounce treaties that are incompatible with the *acquis*.~~

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Council Regulation (EC) No 1346/2000 on insolvency proceedings, OJ L 160, 30.6.2000, p. 1.

Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p.1

Council Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ L 174, 27.6.2001, p. 1.

Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, p. 1.

Council Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 26, 31.1.2003, p.41.

Council Directive 2004/80/EC relating to compensation to crime victims, OJ L 261, 6.8.2004, p. 65.

European Parliament and Council Regulation (EC) No 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 143, 30.4.2004.

European Parliament and Council Regulation (EC) No 1896/2006 of 12 December 2006 creating a European order for payment procedure, OJ L 399, 30.12.2006, p.1.

European Parliament and Council Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, p.40.

European Parliament and Council Regulation (EC) No 861/2007 establishing a European Small Claims Procedure, OJ L 199, 31.7.2007, p.1.

European Parliament and Council Regulation (EC) No 1393/2007 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.

European Parliament and Council Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p.6.

European Parliament and Council Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters, OJ L 136, 21.5.2008, p.3.

Apart from pre-existing bilateral treaties, there may be also be the need for the conclusion of new agreements with third countries governing areas of civil justice that come within the purview of Title IV of the EC Treaty.

In line with the development of the European judicial area related to cooperation in civil and commercial matters, the Community has acquired exclusive external competence to negotiate and conclude international agreements with third countries on a number of important subject matters referred to in Title IV EC Treaty. This was confirmed by the ECJ in its Opinion 1/03 of 7 February 2006 relating to the conclusion of the new Lugano Convention.<sup>2</sup> The Court confirmed that the Community has acquired exclusive competence to conclude international agreements with third countries, on matters affecting the rules set out *inter alia* in Regulation (EC) No 44/2001 "Brussels I", in particular on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. In its opinion the Court found that it the analysis of the provisions of the new Lugano Convention relating to the rules on jurisdiction demonstrated that those provisions affect the uniform and consistent application of the Community rules on jurisdiction and the proper functioning of the system established by those rules.<sup>3</sup> In regard to the proposed Convention's rules on recognition and enforcement of judgements the Court came to a similar conclusion. It found that the Community rules on the recognition and enforcement of judgments are indissociable from those on the jurisdiction of courts, with which they form a unified and coherent system, and that the new Lugano Convention would affect the uniform and consistent application of the Community rules as regards both the jurisdiction of courts and the recognition and enforcement of judgments and the proper functioning of the unified system established by those rules.<sup>4</sup>

Consequently, it must be assumed that the European Community has acquired exclusive competence for the negotiation and conclusion of many of the bilateral agreements referred to above.

Nevertheless, it has to be assessed there exists currently a sufficient Community interest for the Community to replace all of existing or proposed such agreements between Member States and third countries with Community agreements. For that reason is necessary to establish a procedure with a twofold purpose. The first is to allow the Community to assess whether there is such a sufficient Community interest for the conclusion of a particular agreement. The second is to authorise Member States to conclude the agreement at issue if there is no current Community interest in the conclusion of a Community agreement.<sup>5</sup>

It is in line with the conclusions of the However, if the Community were to assume that the necessary conditions to start negotiations with certain third countries do not (or do not yet) exist, the external relations with these States in the field concerned could be hampered because the Member States no longer have the competence to act.

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<sup>2</sup> Opinion 1/03 of 07 February 2006, Rec.2006,p.I-1145.

<sup>3</sup> Opinion 1/03 LUGANO, § 161.

<sup>4</sup> Opinion 1/03 LUGANO, § 161.

<sup>5</sup> Such a solution was adopted earlier for the civil aviation sector see Regulation (EC) No 847/2004 of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries OJ L 157/2004, p. 7.

~~For this reason, the Member States have asked the Commission to propose a mechanism to allow them to re-negotiate and/or conclude bilateral agreements<sup>6</sup> in certain areas of civil justice cooperation falling within the exclusive competence of the Community.~~

~~conclusions of the JHA Council of 19 April 2007.<sup>7</sup> On 19 April 2007, the JHA Council suggested that, as regards future bilateral agreements and any amendments of existing bilateral agreements with particular third countries relating to maintenance obligations, a "procedure for the negotiation and conclusion of such agreements, inspired by existing precedents in Community law, inter alia, the procedure for air service" should be introduced. "That procedure should establish criteria and conditions for assessing whether the conclusion of such an agreement is in the Community's interest. Where that is not the case, the procedure should establish criteria and conditions for the negotiation and conclusion of such agreements by Member States, particularly if the prospective agreement's provisions differ from Community rules, so as to ensure that agreements do not compromise the system established".~~

~~There is a need for the citizens of the Member States concerned to be able to benefit from such bilateral agreements in order to facilitate their access to justice in States which are often neighbouring or connected for historical reasons with their own Member State, especially on issues of family law, such as maintenance obligations, but also divorce, childcare, cross-border right of access, etc.<sup>8</sup>~~

~~Moreover, the Commission has accepted that such a procedure should be devised for agreements affecting the Rome I<sup>9</sup> and Rome II<sup>10</sup> Regulations.~~

~~The Commission has also accepted that a similar authorisation procedure should be proposed in relation to bilateral agreements in the area of maintenance obligations. On 19 April 2007, the JHA Council suggested that, as regards future bilateral agreements and any amendments of existing bilateral agreements with particular third countries relating to maintenance obligations, a "procedure for the negotiation and conclusion of such agreements, inspired by~~

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<sup>6</sup> ——— It is evidently possible to apply the same system to regional agreements.

<sup>7</sup> On 19 April 2007, the JHA Council suggested that, as regards future bilateral agreements and any amendments of existing bilateral agreements with particular third countries relating to maintenance obligations, a "procedure for the negotiation and conclusion of such agreements, inspired by existing precedents in Community law, inter alia, the procedure for air service" should be introduced. "That procedure should establish criteria and conditions for assessing whether the conclusion of such an agreement is in the Community's interest. Where that is not the case, the procedure should establish criteria and conditions for the negotiation and conclusion of such agreements by Member States, particularly if the prospective agreement's provisions differ from Community rules, so as to ensure that agreements do not compromise the system established".

<sup>8</sup> In other words, the scope of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000 falls into the suggested procedure.

<sup>9</sup> Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) contains an identical recital (Recital 42).

<sup>10</sup> Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) sets out in Recital 37



existing precedents in Community law, inter alia, the procedure for air service" should be introduced. "That procedure should establish criteria and conditions for assessing whether the conclusion of such an agreement is in the Community's interest. Where that is not the case, the procedure should establish criteria and conditions for the negotiation and conclusion of such agreements by Member States, particularly if the prospective agreement's provisions differ from Community rules, so as to ensure that agreements do not compromise the system established"

as part of the negotiations on instruments of the law applicable to the contractual and non-contractual obligations, the Commission undertook to propose measures concerning the conclusion by Member States of bilateral agreements with third countries in these areas. Thus, Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) sets out in Recital 37 that "the Commission will make a proposal to the European Parliament and the Council concerning the procedures and conditions according to which Member States would be entitled to negotiate and conclude on their own behalf agreements with third countries in individual and exceptional cases, concerning sectoral matters, containing provisions on the law applicable to non-contractual obligations". Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) contains an identical recital (Recital 42). Indeed, it may be necessary to enact provisions concerning the applicable law in contractual and non-contractual matters in these cases in order to regulate very specific situations. These may relate, for example, to issues of airport, road or railways management.<sup>11</sup>

The aim of this proposal is to establish a system that allows the Member States to conclude agreements with third countries in certain fields which fall under the exclusive competence of the Community, while striking a balance between respect for the integrity of Community competence and sufficient flexibility to enable the Member States to develop relations with third countries under certain clearly defined conditions.

Accordingly, the Commission proposes that such a procedure should be devised for certain bilateral agreements in matters relating to maintenance obligations falling within the scope of Council Regulation (European Community) on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations on the one hand, and civil and commercial law on the other.

The present proposal concerns a procedure for authorisation to Member States in first area mentioned. Simultaneously with this proposal, the Commission puts a separate proposal forward for a similar procedure for the area of civil and commercial law. As the area of maintenance obligations is governed by unanimity, these proposals must be put forward in separate acts.

The different legal basis of the fields concerned (family law, and civil and commercial law) requires the Commission to present two legislative proposals which will, however, make up a

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<sup>11</sup> Examples of this kind of sectoral agreements are Convention of 4 July 1949 between France and Switzerland concerning the construction and management of the Basel-Mulhouse Airport and Agreement of 25 April 1977 between Germany and Switzerland concerning the road between Lörrach and Weil am Rhein on Swiss territory.

~~uniform mechanism. The present act concerning family law will have to be adopted unanimously by the Council, while the act on the applicable law has to be adopted by qualified majority by the Council and the European Parliament in accordance with the co-decision procedure.~~

### ~~•General context~~

~~The case law of the European Court of Justice relating to the exclusive external competences of the Community for the conclusion of international agreements has its origins in Judgment 22/70 ERTA.<sup>12</sup> According to this case law, the Community is entitled to conclude international agreements even when the EC Treaty does not expressly confer external powers on it. In particular, the Court stated that "each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules".<sup>13</sup>~~

~~This case law was developed as regards civil judicial cooperation in Opinion 1/03 of the Court ("Lugano").<sup>14</sup> According to the Court, the provisions of the new Lugano Convention relating to the rules on jurisdiction, recognition and enforcement of judgments in civil and commercial matters "affect the uniform and consistent application of the Community rules on jurisdiction and the proper functioning of the system established by those rules".<sup>15</sup> The rules to which the Court refers are those of Regulation (EC) No 44/2001 "Brussels I", "which contains a set of rules forming a unified system which apply not only to relations between different Member States (...), but also to relations between a Member State and a non-member country".<sup>16</sup>~~

~~Consequently, due to the existence of this unified and coherent system, any international agreement that also establishes a unified system of rules on conflict of jurisdiction or on recognition and enforcement of judgments would affect the Community rules by introducing into the common system elements capable of affecting its operation, which would in turn prejudice the full effectiveness of Community law.~~

~~The consequence of the case law of the Court is that, in the area of civil judicial cooperation where the European Community has already legislated, the Member States have lost their powers to negotiate and conclude international agreements with third countries. However, it is up to the Community to establish the possibility of allowing the Member States, without prejudice to the exclusive competence of the Community, to re-negotiate and conclude agreements of this type under certain circumstances.~~

~~There is a precedent in the form of Regulation (EC) No 847/2004 on the negotiation and the implementation of agreements on air services between Member States and third countries<sup>17</sup> [10], which stipulates that all bilateral agreements between the Member States and~~

<sup>12</sup> Judgment 22/70 ERTA of 31 March 1971.

<sup>13</sup> Judgment ERTA, § 17.

<sup>14</sup> Opinion 1/03 LUGANO of 7 February 2006.

<sup>15</sup> Opinion 1/03 LUGANO, § 161.

<sup>16</sup> Opinion 1/03 LUGANO, § 144.

<sup>17</sup> Regulation (EC) No 847/2004 of the European Parliament and of the Council on the negotiation and implementation of agreements on air services between the Member States and the third countries, OJ L 157, 30.4.2004, p.7-17.

~~third countries that contain provisions contrary to Community law should be modified or be replaced by new agreements that are compatible with it. Similarly, the Member States may wish to make changes to the existing agreements and to enact provisions to ensure the implementation of those agreements until the entry into force of an agreement concluded by the Community.~~

~~Regulation (EC) No 847/2004 therefore established a mechanism to make it possible for the Member States to start negotiations with a third country concerning a new agreement or the modification of an existing agreement on air services, of its annexes or of any other bilateral or multilateral related arrangement, the subject matter of which falls partly within the competence of the Community. It must be stressed, however, that competence as regards air services is shared between the Community (which has exclusive competence in some areas) and the Member States, while judicial cooperation in civil matters, according to the "Lugano" opinion, falls in principle within the exclusive competence of the Community.~~

## **2. CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT**

The Commission evaluated a range of different options to achieve the objective described above, although without carrying out a formal impact assessment, taking into account the particular nature of the subject. Two meetings with experts from the Member States were held in Brussels, on 11 March and 26 May 2008, to exchange ideas and views.

Generally, as regards the scope of the proposal, the Member States would have preferred a horizontal instrument which would take into account both the sectoral type of bilateral agreements and the "Lugano type" agreements concerning jurisdiction, recognition and enforcement of judicial decisions in civil and commercial matters, and even the "broad agreements" on legal cooperation which may cover criminal, civil, family or administrative matters.

Nevertheless, such agreements dealing with issues such as jurisdiction, recognition and enforcement in civil and commercial area in general are likely to undermine the Community legal framework established in the area of civil judicial cooperation, and therefore to excessively affect the existing *acquis* which is based on a concept of integration and of legal certainty for the European citizens with a view to facilitating their access to justice.

Consequently, since this must be regarded as a derogation ~~mechanism~~ procedure in relation to Community law, the system proposed by the Commission is limited to the essential minimum to achieve the objectives described above.

Several options were examined by the Commission for the setting up of the ~~mechanism~~ procedure.

The "passive" status quo, i.e. opting not to take any measures to solve the problem, would make it impossible for the Member States to conclude agreements with third countries in the identified fields.

The "active" status quo would involve opting not to develop any legislative ~~mechanism~~ procedure for the re-delegation of Community powers. All agreements of the Member States with third countries would have to be negotiated and concluded by the Community according to the procedure of Article 300 of the EC Treaty, even if only one Member State needs or has an interest in such an agreement.

The next option consists in the issuing of an authorisation by the Community, based on general criteria laid down by a legislative instrument (for example, a Regulation) or by a Council Decision (on the basis of the aforementioned legislative instrument). The advantage of this option is that there would be a simpler procedure establishing a common approach in all situations. The drawback of this option is that it presupposes that conditions allowing the Member State to negotiate and conclude agreements with third countries should be established in advance. Since the area of judicial cooperation in civil matters is constantly making progress within the Community, this would entail the need to establish different criteria for each instrument of the *acquis* (Regulation Brussels I, Regulation Brussels II, Regulation Rome I, Regulation Rome II, draft Regulation on maintenance obligations, etc ...).

In contrast, the last option selected by the Commission envisages a specific authorisation to be granted on a case-by-case basis after having assessed the agreement notified by the Member State on the basis of objective criteria. The Commission issues negotiating directives to the Member State, if necessary, and conducts an evaluation of the outcome before allowing the agreement to be finally concluded.

### 3. LEGAL ELEMENTS OF THE PROPOSAL

#### • Summary of the proposed action

The objective of the proposal is to establish a procedure for the Community to make an assessment of whether there is a sufficient Community interest in the conclusion of proposed bilateral agreements with third countries, and in the absence thereof, establish a system authorise allowing the Member States to conclude these agreements with third countries in certain fields concerning judicial cooperation in civil and commercial matters falling under the exclusive competence of the Community.

~~It is proposed, on one hand, to limit the establishment of the mechanism in question to the fields of the law applicable to contractual and non-contractual obligations for sectoral issues, and, on the other hand, to the field of family law covered by Council Regulation (EC) No 2201/2003 on parental responsibility and matrimonial matters, and to maintenance obligations.~~

Because the authorisation to Member States derogates from the rule that the Community is exclusively competent to conclude international agreements on these matters, the This mechanism procedure must be regarded as will have to be considered as an exceptional measure and must be limited in scope, that is limited in scope.

It is proposed to limit the establishment of the procedure in question to two subject matters: the field to maintenance obligations on the one hand, and the fields of the law applicable to contractual and non-contractual obligations for sectoral issues, and, on the other hand. The enclosed proposal deals with the first matter.

The Commission proposes ~~It envisages~~ the following guarantees-guarantees in order to preserve the 'acquis communautaire' including the integrity of the Community system in the area under consideration.

~~The procedure is based on prior notification of the draft agreement by the Member States that wish to obtain to the Commission with a view to obtaining the latter's authorisation to (re-)negotiate and conclude the agreement with the third country on the basis of specific conditions to be evaluated on a case-by-case basis.~~

~~The Commission must first determine whether the Community has already concluded an agreement on the same subject matter with the third country concerned. If that is not the case, the Commission must determine whether such an agreement expected in the near future. If no such agreement is expected in the near future the Commission may grant authorisation, provided that the two following conditions are met: (a) the Member State concerned has demonstrated that there is a specific interest of the applying Member State to conclude an agreement with the third country, related in particular given the existence of economical, geographical, cultural or historical ties between the Member State and that third country; and (b) the Commission determines that the proposed agreement is not expected to affect the uniform and consistent application of the Community rules in place nor the proper functioning of the system established by those rules.~~

~~such as the existence of specific links between the applicant Member State and the third country in question and the limited impact that this agreement would have on the Community system applicable.~~

~~The mechanism procedure also proposes envisages the inclusion in the agreements of "sunset clauses" to limit the validity in time of the agreements concluded stipulated by the Member States until the point at which the Community concludes an agreement on the same subjects with the third country concerned.~~ **NEED FORMULATION OF SUNSET CLAUSE**

- **Legal basis**

~~The scope of the mechanism procedure envisaged differs according to the subject of the relevant agreements: one aspect of the mechanism procedure concerns maintenance obligations and the field covered by Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000; the other concerns the areas of the law applicable to contractual and non-contractual obligations for sectoral issues.~~

~~Consequently, the legal basis for the enclosed proposal on family law is based on Article 61, point c) of the Treaty, which confers powers on the Community to adopt measures in the field of judicial cooperation in civil matters, as provided for in Article 65, in accordance with Article 67(2). The measure will therefore be adopted by the Council acting unanimously, after consulting the European Parliament.~~

~~The legal basis for the proposal on the law applicable to contractual and non-contractual obligations is Article 61(e) and Article 65 of the EC Treaty, which state that the measures in the field of judicial cooperation in civil matters having cross-border implications are to be taken in accordance with Article 67(5), second indent, i.e. on the basis of the co-decision procedure.~~

- **Subsidiarity principle**

The proposal falls under the exclusive competence of the Community. The subsidiarity principle therefore does not apply.

- **Proportionality principle**

The proposal complies with the proportionality principle for the following reasons:

~~As the proposed mechanism procedure envisaged constitutes represents an exception to the exercise of exclusive Community competence in the matters set out above, as regards the (re)negotiation and conclusion of agreements with third countries in the area of civil justice cooperation, it is limited to what is strictly necessary to allow Member States to conclude agreements with third countries in the fields identified and sets out a number of criteria that need to be met. An authorisation for Member States will only be given if this only if certain specific conditions are present and, in particular, if the proposed envisaged agreement can be considered as having only will have a limited impact on the applicable Community system.~~

~~The proposed mechanism procedure will makes use of the comitology procedure, as a legislative procedure is not considered necessary with a view to avoid burdening the authorisation process with a legislative procedure, and taking into account the fact that the proposed procedure mechanism concerns the implementing powers of the Commission.~~

~~The proposed procedure mechanism thus reduces the administrative cost which falls on the Community and on the national governments to the essential minimum.~~

- **Choice of instruments**

Proposed instrument(s): Regulation.

Other means would not be adequate for the following reasons.

~~As the proposed mechanism procedure provides for a derogation from Community law, a Regulation is the instrument which is directly applicable and provides the fullest guarantees as regards legal certainty and equal treatment.~~

#### **4. BUDGETARY IMPLICATION**

The proposal has no implication for the Community budget.

#### **5. ADDITIONAL INFORMATION**

- **Review / revision / sunset clause**

The proposal includes a review clause.

- **Detailed explanation of the proposal(s)**

Scope (Art. 1)

~~Article 1 defines the scope of the proposal on agreements concerning family law, which is confined to the agreements between Member States and third countries covered by Regulation~~

~~(EC) No 2201/2003, in other words, matrimonial matters and parental responsibility, and to those concerning maintenance obligations.~~

The proposal is intended for bilateral agreements only.

~~Article 1 of the proposal on the applicable law limits the scope of the proposal to the fields covered by Regulation (EC) No 593/2008 on the law applicable to contractual obligations and Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations, and only in sectoral matters.~~

The proposed mechanism procedure (Art. 2-8)

~~The proposed envisaged procedure is intended to establish a functional arrangement mechanism is pragmatic and keeps with reduced formalities, to the absolute minimum. At the same time, it ensures that the makes available to the Commission and to the Member States a system which guarantees the safeguarding of the 'acquis communautaire' can be safeguarded.~~

~~The mechanism procedure thus stipulates (Article 2) that the Member State shall notify the Commission in writing of its intention to undertake negotiations on a new agreement or in order to amend an existing agreement. The notification must shall include a copy of the draft agreement available and any other relevant documentation. It is envisaged that tThis notification is to be made not later than three months before the beginning of the negotiations with the third country concerned.~~

~~Upon receipt of the Having received the notification, it is for the Commission will need to assess (Article 3) whether the Member State can proceed with continue the negotiations. The assessment comprises the following steps: on the basis of certain conditions such as (i) a specific interest of the Member State in concluding an agreement in the field concerned with the third country due to the existence of special ties of an economic, geographical, cultural or historical nature between the two States; (ii) the fact that the Community has not yet concluded any agreement on the same subject with the third country and that no such agreement is expected in the immediate future; (iii) the impact that this agreement might have on the Community system applicable.~~

The Commission must first determine whether the Community has already concluded an agreement on the same subject matter with the third country concerned. If that is not the case, the Commission must determine whether such an agreement expected in the near future. If no such agreement is expected in the near future the Commission may grant authorisation, provided that the two following conditions are met: (a) the Member State concerned has demonstrated that there is a specific interest of the applying Member State to conclude an agreement with the third country, related in particular given the existence of economical, geographical, cultural or historical ties between the Member State and that third country; and (b) the Commission determines that the proposed agreement is not expected to affect the uniform and consistent application of the Community rules in place nor the proper functioning of the system established by those rules.

~~If the Commission, in the light of the conditions referred to above, considers that there are no obstacles to the conclusion of the proposed such an agreement (Article 4), it can permit the Member State to open the negotiations. Where necessary, the Commission can propose negotiation guidelines and can request the inclusion of particular clauses. and establishes, if necessary, negotiating directives with which the Member State has to comply.~~

The agreement shall also contain a 'sunset clause' for its termination, should the European Community decide to conclude an agreement with the third country in question (We would need the text of this sunset clause).

The decision on whether or not to permit the negotiations is taken by the Commission with the assistance of an advisory committee under Article 3 of Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission<sup>18</sup>. As it is aimed at limiting formalities to the essential minimum, the advisory procedure is justified. The Commission shall submit to the Committee a draft of the measures to be taken, on which the committee expresses an opinion. ¶ The Commission then decides, taking this opinion into account as far as possible, and informs the committee of the manner in which the opinion has been taken into account.

If the outcome of the Commission's evaluation is negative, ~~for example because negotiations by the Community with the third country on the same subject are about to begin,~~ the Commission does not give ~~its~~ an authorisation and submits this decision to the opinion of an advisory committee.

The Commission can decide to take part in the negotiations between the Member State and the third country as an observer. If the Commission itself does not participate, it has to be informed of the ~~preliminary~~ results during the various stages of the negotiation, in order to be able to deliver to the Member State its opinion on the content of the agreement before its final conclusion in the interests of efficiency (Article 5).

The final stage of the ~~mechanism~~procedure concerns the conclusion of the agreement (Article 6). Before signing, the Member State concerned shall notify the Commission of the results of the negotiations and provide it together with the text of the agreement. The Commission will assess whether the agreement is in conformity with the negotiating directives ~~and~~ and whether if the conclusion of the agreement can be considered to ~~may~~ have a negative impact on the operation of the Community system in place, in particular whether if it is likely to affect ~~make~~ ineffective the 'acquis communautaire' in force. In case the Commission's ~~the event of a positive evaluation is positive,~~ it will give the ~~the~~ Commission will give its authorisation. If the assessment is negative, the Member State concerned ~~s~~ is not authorised to proceed with the sign and conclude the agreement. This decision is taken in accordance with the management procedure under Article 4 of Council Decision 1999/468/EC.

It is proposed that the Commission takes its decision in relation to each relevant stages of the assessment procedure within three months of the relevant notification by the Member State.

### Transitional and final provisions

Article 8 lays down transitional provisions which are to be applied in cases where, at the time of the entry into force of the regulations, the Member State concerned has already started negotiations with the third country or has already concluded them, but has not yet given its consent to be bound by the agreement.

~~The draft agreement between France, Switzerland and the European Organisation for Nuclear Research (CERN) concerning the law applicable to the undertakings acting in the premises of~~

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<sup>18</sup> Council Decision laying down the procedures for the exercise of implementing powers conferred on the Commission (1999/468/EC), OJ L184, 17.7.1999, p.23.



~~CERN to supply cross-border services is an example of a sectoral agreement falling within the scope of Regulation (EC) No 593/2008 "Rome I", and therefore is subject to the proposed mechanism.~~

~~The procedure laid down by the mechanism also applies to this situation, subject to the necessary adjustments: notification of the draft agreement to the Commission; assessment by the Commission on the basis of the objective conditions listed in Article 3 of the proposal; authorisation to continue the negotiations; establishment of negotiating directives if this is still justified.~~

~~The mechanism~~procedure ~~also applies if negotiations are already concluded at the time of the entry into force of the mechanism~~procedure, but the agreement has not yet been ratified by the Member State in question.

~~Concerning family law, one example which could be mentioned relates to the Agreements of 2002 between Belgium and Morocco on guardianship and visiting rights and on maintenance obligations, which have been signed but not yet ratified.~~

~~Article 9 stipulates that the Commission will submit at the latest by January 2014, and then every five years thereafter to the European Parliament, to the Council and to the Economic and Social Committee a report concerning the application of the mechanism~~procedure at the latest by January 2014, and then every five years thereafter to the European Parliament. The report is accompanied, as if appropriate, by proposals for the amendment aiming to adapt of  
this Regulation.

Proposal for a

## COUNCIL REGULATION

of [...]

**establishing a procedure for ~~on~~-negotiation and conclusion of bilateral agreements between Member States and third countries covering jurisdiction, recognition and enforcement of judgments and decisions in matters relating to family law, including maintenance obligations, and applicable law in matters relating to maintenance obligations**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c), 67(2) and 67(5) thereof,

Having regard to the proposal from the Commission<sup>19</sup>,

Having regard to the opinion of the European Parliament<sup>20</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>21</sup>,

Whereas:

~~(1) Judicial cooperation in civil matters between Member States and third countries has traditionally been governed by agreements between Member States and third countries.~~

~~(1) As a result of the changes introduced by the Treaty of Amsterdam as amended by the Treaty of Nice, Title IV of the Treaty establishing the European Community (hereinafter "the Treaty") provides the legal basis for the adoption of Community legislation in the field of judicial cooperation in civil matters.~~

~~(2) Judicial cooperation in civil matters between Member States and third countries has traditionally been governed by agreements between Member States and third countries.~~

~~(3)~~

~~(3) Pursuant to Article 307 of the Treaty requires the elimination of, all existing agreements between Member States and any incompatibilities between the Community acquis and international agreements concluded by Member States and third countries, that contain~~

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<sup>19</sup> OJ C [...], [...], p. [...].

<sup>20</sup> OJ C [...], [...], p. [...].

<sup>21</sup> OJ C [...], [...], p. [...].

~~provisions contrary to Community law should be amended or replaced *[these are not exactly the terms used by the treaty]* by new agreements that are wholly compatible with Community law. This may involve the need for amending or re-negotiation of these agreements.~~

~~(4) There may be also be the need for the conclusion of new agreements with third countries governing areas of civil justice that come within the purview of Title IV of the EC Treaty.~~

~~(5) The ECJ confirmed in its Opinion 1/03 of 7 February 2006 relating to the conclusion of the new Lugano Convention, that the Community has acquired exclusive external competence to negotiate and conclude international agreements with third countries on a number of important subject matters referred to in Title IV EC Treaty. In particular, the Court confirmed that the Community has acquired exclusive competence to conclude international agreements with third countries, on matters affecting the rules set out *inter alia* in Regulation (EC) No 44/2001 "Brussels I", in particular on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.~~

~~(4)(1) In its Opinion 1/03 of 7 February 2006 on the competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *[publication reference?]* the Court of Justice of the European Communities confirmed that the Community has exclusive competence to conclude such agreements with third countries with respect to various aspects of such agreements. Thus, pursuant to Article 300 of the Treaty, it is for the Community to conclude such agreements between the Community and a third country, as far as Community competence is concerned.~~

~~(2) An assessment is needed of whether there exists currently a sufficient Community interest for the Community to replace all of existing or proposed bilateral agreements between Member States and third countries with Community agreements. Consequently, it is necessary to establish a procedure with a twofold purpose. The first is to allow the Community to assess whether there is such a sufficient Community interest for the conclusion of a particular bilateral agreement. The second is to authorise Member States to conclude the agreement at issue if there is no current Community interest in the conclusion of such an agreement.~~

~~(3) This procedure is wWithout prejudice to the exclusive competence of the Community and the provisions of articles Treaty and Article 300 and 307 of the Treaty, thereof, and subject to the provisions of Article 307, However, Member States may wish to continue their relations with certain third countries based on the basis of pre-existing agreements, and therefore may wish to make amendments to these agreements by renegotiating them, or to conclude new agreements and apply them until such time as an agreement on the same subject matter concluded by the Community with the same third country enters into force. *[this seems to be simply a statement of fact – could it be simplified and amalgamated with recital 6?]*~~

~~(4) This Regulation should cover agreements falling entirely or partly within the Community competence. *[Could it cover anything else?]* The term "agreement" should be understood as meaning bilateral or regional agreements. Regional agreements should be interpreted as meaning agreements between geographically and/or historically close~~

~~countries that are not open to accession by countries other than such geographically and/or historically close countries. [This simply repeats what is stated in the enacting terms — if any explanation is necessary in the recitals it should be drafted in more general terms] This Regulation should cover agreements falling entirely or partly within the Community competence.~~

~~(6)(3) The objective of this Regulation is to establish aA coherent and transparent frameworkprocedure procedure should be establishedauthorising to authorise Member States to amend existing agreements between them and with third countries or to negotiate and conclude new agreements in exceptional circumstances, in particular where the Community itself has not or not yet indicated its intention to exercise its external competences to conclude the agreement.~~

~~(6)In the context of negotiations on a proposal for the Council Regulation (EC) No .../... on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations<sup>22</sup>, the Council concluded on 19-20 April, 2007<sup>23</sup> that a procedure for negotiation and conclusion of bilateral agreements by Member States with third countries, inspired by existing precedents in Community law, such as the procedure for air services, should be introduced. The Council found that Within the framework of such a procedure, "should establish criteria and conditions for assessing whether the conclusion of such agreements is in the Community's interest should be established. Where that is not the case, the procedure should establish criteria and conditions for the negotiation and conclusion of such agreements by Member States particularly if the prospective agreement's provisions differ in content from Community rules, so as to ensure that agreements do not compromise the system established by the proposed Regulation".[it is not usual to refer to Council negotiations in the recitals of a legislative act — this could go into the explanatory memorandum, but not the recitals to this act.]~~

Because it derogates from the rule that the Community is exclusively competent to conclude international agreements on these matters, the proposed procedure must be regarded as an exceptional measure and must be limited in scope.

The present regulation should be limited to the field of maintenance obligations.

~~(7)In addition to agreements dealing with the maintenance obligations[they have not yet been mentioned,...], this Regulation should cover apply to agreements dealing with the subjects falling undermatters within the scope of Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000<sup>24</sup> as. This is because the need to regulate the situation also exists in the area of Regulation (EC) No 2201/2003, by virtue of there already existing aa number of bi-lateral agreements already exist between Member States and third countries in this that area and. Often these the third countries concerned are often not Pparties to multilateral agreements.~~

<sup>22</sup> COM(2005)4649 final — CNS 2005-0259.

<sup>23</sup> Document 9566-07 LIMITE.

<sup>24</sup> OJ L 338, 23.12.2003, p. 1.

~~(10)(4)~~ Thus, where the Community itself has not indicated its interest in concluding an agreement with the third country concerned, it should be possible to authorise the Member State could be authorised to negotiate and conclude the an agreement in accordance with under the procedure established in this Regulation, in order to avoid hampering international cooperation in civil matters with the third country concerned, as it is based, or may be based, on such an agreement. Moreover, in view of the exceptional nature of such authorisation, For the sake of clarity, this Regulation should also set out other exceptional circumstances and conditions under which the Commission could authorise a Member State to negotiate and conclude an agreement with the a third country concerned. [This also overlaps with recital 6]

~~(10)(5)~~ In view of the fact that an agreement by the concluded by -a Member State has the potential to affect the functioning of the area of justice, as established by the Community instruments, authorisation should be required both in order to the Regulation, - therefore, should provide for the authorisation to start (or continue) negotiations and the authorisation to conclude an agreement, that This will enables the Commission to evaluate the expected impact of the (possible) outcome of negotiations on Community law and where necessary propose particular negotiation guidelines or request the inclusion of particular clauses in the proposed agreements. [what does this mean? Does it mean that authorisation is necessary to start negotiations and to conclude the agreement and that authorisation to conclude the agreement will depend on the Commission's evaluation of the expected impact of the outcome? Or does that evaluation relate to both phases?]

~~(12)(6)~~ The envisaged agreement by a Member State should not render the Community law ineffective and should not undermine the proper functioning of the systems established by its rules. [Does this not go without saying?] To respect this principle, the authorisation to start open (or continue) negotiations could should establish negotiating directives to be followed by the Member State in the negotiations. Redraft eg to "In order to ensure that an agreement concluded by a Member State does not render Community law ineffective {and undermine the proper functioning of the systems established by its rules} the Commission can propose particular negotiation guidelines and can request the inclusion of particular clauses in the proposed agreements. it may be necessary to establish negotiating directives to be followed by the Member State concerned during negotiations.

~~(12)(7)~~ Moreover, the authorisation to a Member State to negotiate and conclude an agreement with a third country in the an area falling under the exclusive competence of the Community should be limited in time. In order to ensure that the The agreement to be concluded by a Member State should does not constitute an obstacle to the implementation of the Community's external policy on judicial cooperation in civil matters, the agreement - Therefore, the agreement negotiated by a Member State should provide for its denunciation, when the an Community agreement concluded by the Community with the same third country on the same subject matter enters into force.

~~(14)(8)~~ It is necessary to provide for transitional measures. This Regulation should to cover a situation where, at the time of its the adoption [or entry into force?] of this Regulation, some a Member States might be is in the process of negotiations with the a third country or might have has concluded the negotiations but have has not yet expressed their its consent to be bound by the agreement. [please explain why]

~~(15)~~(9) The measures necessary for implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission<sup>25</sup>.

~~(16)~~(10) In accordance with the principle of proportionality, as set out in Article 5 of the Treaty, this Regulation does not go beyond what is necessary in order to achieve its objective.

~~(17)~~(11) [In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, and without prejudice to Article 4 of the said Protocol, the United Kingdom and Ireland are not taking part in the adoption of this Regulation and are not bound by or subject to its application.]

~~(18)~~(12) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application,

HAS ADOPTED THIS REGULATION:

#### *Article 1*

##### *Subject matter and Scope*

1. This Regulation establishes a procedure to authorising a Member States to amend an existing bilateral agreements between one or more that Member States and a one or more third countryies, or to negotiate and conclude a new bilateral agreements subject to the conditions laid down in the following provisions.in exceptional circumstances.

~~2.~~This Regulation shall apply to bilateral agreements between Member States and third countries covering jurisdiction, recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, and falling, entirely or partly, within the scope of Council Regulation (EC) No 2201/2003. concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, as well as

~~It shall also apply to agreements covering jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, and falling, entirely or partly, within the scope of Council Regulation (EC) No [...] on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [it is unacceptable in a binding legal act to refer to a proposal; when will this regulation be adopted?].~~

<sup>25</sup> OJ L 184, 17.7.1999, p. 23.

~~The term "agreement" shall cover all This Regulation shall apply to international agreements having the effects of the a treaty within the meaning of the Vienna Convention on the Law of Treaties of 1966, whatever their particular designation. [is it necessary ???]~~

#### *Article*

#### *Definitions*

~~For the purposes of this Regulation, the following definitions shall apply:~~

~~(a) The term "agreement" shall be understood, for the purposes of this Regulation, as meaning (a)"agreement" means a bilateral or regional agreements between a Member State or Member States and a third country or third countries;~~

~~(b), whereby 'regional agreement' means should be understood as meaning an agreement between geographically and/ (or) historically close countries that is not open for accession by the countries other the such those geographically and/ (or) historically close countries.~~

~~3. For the purposes of this Regulation, "Member State" shall mean any Member State other than Denmark.~~

#### *Article 2*

#### *Notification by the Member State to the Commission*

1. ~~Where a Member State intends to enter into negotiations with a third country to concerning modification /amend of the an existing agreement or to he conclusion of a new agreement falling within the scope referred to in Article 1 of this Regulation, it shall notify the Commission of its intention in writing.~~

~~This The notification shall include a copy of the existing agreement, the or draft agreement or the draft proposal by the third country, if available, and any other relevant documentation. The Member State shall describe the objectives of the negotiations and shall specify the issues which are to be addressed, or the provisions of the existing agreement; which shall are to be addressed amended, and shall provide any other relevant information.~~

2. The notification shall be made at least three months before formal negotiations are scheduled to commence with the third country concerned.

#### *Article 3*

#### *Assessment by the Commission*

1. Upon notification, the Commission shall ~~establish~~ make an assessment as to whether the Member State can pursue negotiations with the third country concerned.

2. ~~When taking its decision In making its In its assessment the Commission must shall first determine whether take into account the following circumstances and conditions[are they circumstances or conditions? They should be drafted either as conditions that must be fulfilled or as circumstances which the Commission must take into account, or a distinction made between the two]:~~
3. ~~if the Community has already not yet concluded or envisages to conclude any agreement on the same subject matter with the third country concerned, and such an agreement is not expected in the near future~~If no such agreement is expected in the near future the Commission may grant authorisation, provided that the two following conditions are met: (a) the Member State concerned has demonstrated that there is :
4. ~~a. a specific interest of the applying Member State to conclude the bilateral an agreement with the third country, which in particular may be related in particular given to the existence of economical, geographical, cultural or historical special ties between the Member State and that third country, which could be either economical or geographical, cultural or historical; and (b) the Commission determines that the proposed agreement is not expected to~~
- (e) 2. ~~The expected impact of the proposed agreement on the Community regime in place affect the uniform and consistent application of the Community rules in place nor the proper functioning of the system established by those rules.~~

#### Article 4

##### *Decision of the Commission Authorisation to open negotiations*

If the Commission concludes that there are no obstacles to the agreement in the light of the circumstances and conditions referred to in Article 3, it may authorise a Member State to open negotiations on the new agreement or on amendments to the existing agreement with the third country concerned. and, i

If necessary, the Commission may propose negotiation guidelines and can request the inclusion of particular clauses in the proposed agreement. adopt negotiating directives for~~require the Member State to be to followed negotiating directives in the negotiations with the third country.~~

2. The agreement shall provide for the clause on its denunciation in the event that the European Community concludes an agreement with the same third country on the same subject matter.~~[since this article only concerns authorisation for the start of negotiations it is not possible to know whether or not the agreement contains such a clause — does it mean authorisation shall be subject to such a clause being incorporated, or should this provision be moved to the article on authorisation to conclude the agreement?]~~

3. 2. If the Commission concludes that there are obstacles to the agreement in the light of the circumstances and conditions referred to in Article 3, the Member State shall not be authorised to open the negotiations with the third country concerned.



4.3. The Commission shall take a decision on the authorisation referred to in paragraphs 1 and 23 in accordance with the procedure referred to in Article 7 (2)). ~~[Does this mean a formal comitology decision is needed both to authorise and to refuse authorisation? Do the negotiating directives also need to be adopted by comitology?]~~

4. The Commission shall give its decision on the application within three months upon receipt of the notification referred to in Article 2.

#### Article 5

#### *Negotiations* ~~[the paragraph is more about the Commission as an observer than about negotiations]~~

The Commission may participate as an observer in the negotiations between the Member State and the third country. If the Commission does not participate as an observer, it shall be kept informed of the progress and results throughout the ~~about the preliminary results~~ ~~[why only the preliminary results?]~~ during the different stages of negotiations.

#### Article 6

#### *Conclusion of the agreement* Authorisation to conclude agreements

1. Before ~~initialling~~ signature of the agreement, the Member State concerned shall notify the Commission of the outcome of the negotiations and shall transmit the text of the agreement to the Commission.

~~2.1.~~ Upon ~~such~~ notification, the Commission shall make an assessment as to whether the negotiated agreement complies with its initial assessment. In making this further assessment at this stage the Commission must examine whether the proposed agreement includes the suggestions and requests made by the Commission, in particular as regards the inclusion of particular clauses referred to in article 4(1) and 4(2) (~~negotiating directives~~ if any established under Article 4(1), and with Article 4(2) ~~[if it contains a clause on denunciation?]~~ and whether the conclusion of the proposed ~~such an~~ agreement would not render the Community law ineffective and would not undermine the proper functioning of the systems established by its rules.

~~3.2.~~ If this ~~assessment is negative, in that the~~ Commission takes the view that the negotiations have resulted in an agreement which does not fulfil the requirements referred to in paragraph 2 ~~[NEED TO CHECK CORRECT PARAGRAPH]~~, the Member State shall not be authorised to conclude the agreement.

~~4.3.~~ If this ~~assessment is positive, in that the~~ Commission takes the view that the negotiations have resulted in an agreement which fulfils the requirements referred to in paragraph 2, ~~[NEED TO CHECK CORRECT PARAGRAPH]~~ the Member State may be authorised to conclude the agreement.

~~5.4.~~ The Commission shall take a decision on the authorisation referred to in paragraphs 3 and 4 ~~[decide whether or not to authorise the conclusion?]~~ in accordance with the procedure referred to in Article 7(3).

~~.~~ The Commission shall give its decision on the application within three months upon receipt of the notification referred to in paragraph 1 above.

## Article 7

### *Committee procedure*

1. The Commission shall be assisted by a committee.
2. Where reference is made to this paragraph, the advisory procedure laid down in Article 3 of Decision 1999/468/EC shall apply, in compliance with Article 7 thereof.
3. Where reference is made to this paragraph, the management procedure laid down in Article 4 of Decision 1999/468/EC shall apply, in compliance with Article 7 thereof.
4. The period provided for in Article 4 (3) of Decision 1999/468/EC shall be one three months.

## Article 8

### *Transitional provisions*

1. ~~Where a Member State has already started negotiation of an agreement with a third country, at the time of entry into force of this Regulation, the negotiations for an agreement with the third country have been already started by the Member State, and the Member State wishes to continue them those negotiations and conclude the agreement, Article 2 (1) and Articles 3 to 6 shall apply.~~  
~~2. In the case of the agreement referred to in the first paragraph 1, the The authorisation to open negotiations, as referred to in Article 4, shall mean the authorisation to continue negotiations.~~  
~~3. In the case of the agreement referred to in the first paragraph 1, the negotiating Negotiating directives, as referred to in Article 4(1), may be established. Where if the stage of the negotiations so permits, the Commission may propose negotiating guidelines or the inclusion of specific clauses, as referred to in Article 4(1).~~
- 4.2. ~~Where a Member State has already completed negotiations of an agreement with a third country, at the time of entry into force of this Regulation, the negotiations for an agreement with the third country by the Member State has have already been completed, without having but the Member State has not yet expressed its consent to be bound by the agreement, Article 2(1) and Article 6 (2) to -(5) shall apply.~~

5. ~~In the case of the agreement referred to in the fourth paragraph 4, the Commission.~~  
~~When deciding whether or not to authorise conclusion of the agreement, taking the~~  
~~decision under Article 6, the Commission shall also evaluate assess whether or not~~  
~~there are any obstacles to the agreement in the light of the circumstances and criteria~~  
~~and conditions referred to in Article 3(2). (NEED TO CHECK THE CORRECT~~  
~~PROVISION)~~

#### *Article 9*

##### ***Review***

No later than January 2014[what date?], and every five years thereafter, the Commission shall  
~~present submit a report on the application of this Regulation to the European Parliament, the~~  
~~Council and the European Economic and Social Committee a report on the application of this~~  
~~Regulation. If necessary, the report shall be accompanied by proposals to adapt this~~  
~~Regulation.~~ accompanied where necessary, by legislative proposals.

#### *Article 10*

##### ***Entry into force***

This Regulation shall enter into force on the 20~~th~~twentieth day following that of its publication  
in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in Member States in  
accordance with the Treaty establishing the European Community.

Done at Brussels, [...]

*For the Council*  
*The President*

