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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	8 February 2023
To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2023) 64 final
Subject:	Proposal for a COUNCIL DECISION on an authorisation addressed to France to negotiate a bilateral agreement with Algeria on matters related to judicial cooperation concerning family law matters

Delegations will find attached document COM(2023) 64 final.

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2023/0027 (CNS)

Proposal for a

COUNCIL DECISION

on an authorisation addressed to France to negotiate a bilateral agreement with Algeria on matters related to judicial cooperation concerning family law matters

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

The continuous development of the EU acquis on issues related to judicial cooperation in civil and commercial matters has consequences also on the international plan, with a large part of these issues now falling within the EU exclusive external competence, as confirmed by the constant jurisprudence of the Court of Justice of the European Union. EU rules may indeed be affected or altered by international commitments where such commitments are concerned with an area which is already covered by a large extent by such rules[1]. In this context, the negotiation of bilateral agreements of Member States with third countries has been limited to the possibilities offered by the special mechanism provided by Regulation (EC) No 662/2009,[2] Council Regulation 664/2009[3] and Article 351 TFEU.

By means of a *note verbale* dated 26 July 2016, the Embassy of Algeria in France contacted the latter proposing the opening of negotiations for a new bilateral agreement concerning judicial cooperation in civil and commercial matters. The aim was to modernize and consolidate in one instrument the three already existing instruments of judicial cooperation between France and Algeria concluded in 1962, 1964 and 1980.

By letter dated 8 December 2016, France approached the Commission asking for an authorisation to negotiate and conclude a bilateral agreement with Algeria in civil and commercial matters. It was added that the inclusion of family matters in the agreement was not yet decided. A draft agreement was provided, which included inter *alia* provisions on service of documents, taking of evidence, recognition and enforcement of decisions, legal aid. It was acknowledged by France that at least some provisions of the draft agreement would fall within the EU exclusive external competence.

France explained that the old instruments into force were not anymore capable to address in an efficient way the very close bilateral cooperation between France and Algeria and there was a general need to align their provisions to EU standards on the same matters. For instance, it was not possible to notify documents by registered mail or electronic means. In the context of the taking of evidence, the use of video-link was not permitted.

However, while recognizing the exceptional economic, cultural, historical, social and political ties between France and Algeria, the Commission remarked that, in its judicial cooperation with third States, the EU broadly relies on the existing multilateral framework, such as the one created by the Hague Conference on Private International Law (HCCH). This ensures that the same legal framework applies to a large number of States with different legal backgrounds and offers considerable benefits. Therefore, the EU promotes the accession of its partner

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1 For instance, Opinion 1/13 of the European Court of Justice, paragraph 73.

2 Regulation (EC) No 662/2009 of the European Parliament and of the Council of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations, *OJ L 200, 31.7.2009, p. 25–30*

3 Council Regulation (EC) No 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations**,** *OJ L 200, 31.7.2009, p. 46–51*

States – in particular, the Mediterranean countries such as Algeria - to the relevant international conventions in the civil justice area, many of which were drawn up by the HCCH.

The Commission concluded that, against this backdrop, authorising a Member State to negotiate and conclude bilateral agreements with third countries in the area of civil justice falling outside the scope of Regulation (EC) No 662/2009 and Council Regulation (EC) No 664/2009 would be not in line with the EU policy in this field.

After a further exchange of letters, the issue was not anymore brought to the Commission's attention, until November 2019. The outstanding problem was discussed in depth several times, both at political and technical level. During these meetings, it was clarified by France that the provisions of the draft agreement are deemed to be applied also in family law matters, notwithstanding the lack of an explicit reference to them in the text. A slightly amended draft agreement was sent to the Commission in July 2020. By note dated 9 April 2021 (received by the Commission on 9 July 2021), France further clarified the scope of the draft agreement and provided a new version where the provisions concerning the exercise of the legal profession were expunged from the text.

France explained that the provisions concerning recognition and enforcement of decisions, service of documents and taking of evidence are to be applied also to matters concerning family law, in particular divorce, separation and annulment of marriage, parental responsibility, child abduction, maintenance obligations, matrimonial property rights and registered partnerships. Of particular importance for France was the recognition of divorce by mutual consent. France assured the Commission that the extensive use of the public order exception by the French judiciary when dealing with Algerian decisions is a guarantee of the respect of human rights, gender equality and child protection.

France also communicated to the Commission the most recent data available concerning its close relationship with Algeria. In 2021, there were 611. 084 major Algerian citizens living in France, making them the first foreign community. This number does not includes minors, bi-nationals or people staying illegally in France. 31.980 French nationals are currently resident in Algeria, following the data included in the registers of French citizens living abroad. On the economic and commercial side, France is the second commercial partner of Algeria and the first investor outside the hydrocarbon sector.

Taking into account the new data provided by France, and the explanations given during several technical meetings, which took place in the period 2019-2021, the Commission decided to reassess the situation.

It was evident that an accession of Algeria to the core Conventions developed by the Hague Conference on Private International Law would not happen in the foreseeable future. This was made clear by Algeria through a note verbale dated 14.2.2021 addressed to France and transmitted by France to the Commission.

Indeed, notwithstanding the efforts of the Commission (periodical JLS Sub-Committees with Algeria, where the issue of Algeria joining the Hague Conventions was constantly raised; participation of Algeria to all editions of the Euro-Med Justice Programme financed by the Commission) and of the HCCH (participation to the "Malta Process" initiated by the HCCH, where the advantages of acceding to the multilateral framework where explained), Algeria has

always refused to engage constructively without elaborating on the reasons underpinning this choice.

On the other hand, an EU-Algeria agreement related to judicial cooperation in civil matters is not planned by the Commission. EU policy on this matter is based on multilateralism, so that the accession of third States to the multilateral framework developed by the HCCH would by itself create a common legal framework beetween the EU and its Member States on one side and Algeria on the other side. Bilateral agreements between the EU and a third country, even where the third country consistently refuses to accede to HCCH Conventions, could be contemplated only where a sufficiently strong Union interest can be identified based on the substantial relevance of judicial cooperation with this country across Member States and not only for an individual Member State. That is not the case here.

Furthermore, as explained more in detail in the next chapter, neither the possibility offered by Article 351 TFEU nor an authorisation under Regulations 662 and 664/2009 were applicable in the present case.

Therefore, the Commission concluded that an *ad hoc* authorization under Article 2 TFEU to France could be considered. France may be authorised to negotiate (and at a later stage conclude) a bilateral agreement with Algeria in matters falling within the EU exclusive external competence, having considered the exceptional ties which link these two countries, provided that this would not constitute an obstacle to the development and the implementation of the Union's policies.

It is understood that multilateralism remains a cornerstone of the EU policy towards third countries in the field of judicial cooperation in civil and commercial matters and that this authorisation to negotiate, if granted by the Council, has to be considered exceptional and by no means considered as a precedent. The mere refusal of a third State to accede to the HCCH Conventions should not be regarded as a the only pre-requisite to grant an authorisation under Article 2 (1) TFEU, but evidence of the exceptional situation of the relationship of a Member State with a given third country should be duly demonstrated.

- **Consistency with existing policy provisions in the policy area**

The renegotiation of existing bilateral agreements in matters falling within the EU exclusive external competence is allowed, under Article 351 TFEU, to the acceding States to the European Union, in order to eliminate any incompatibilities between the EU acquis and the international agreements concluded by those Member States and third countries prior to their date of accession. Several Member States have already taken advantage of this Article in order to update legal assistance agreements concerning judicial cooperation in civil and commercial matters with third countries and the Commission has been kept informed of this process. However, the wording of Article 351 TFEU does not allow the Member States founders of the European Economic Community to update the agreements concluded after 1 January 1958. The possibility to renegotiate bilateral agreements with third countries in order to align them with the acquis is therefore precluded to those Member States, including France, whose agreements to re-negotiate date from 1962, 1964 and 1980[4].

This situation was somehow mitigated by the adoption of Regulation (EC) No 662/2009 and Council Regulation (EC) No 664/2009, which, by way of exception and under strict

[4] On the interpretation of Article 351 TFEU, see Case C-435/22 PPU, paragraphs 115-126, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62022CJ0435

conditions, allow Member States to negotiate and conclude international agreements in certain matters of EU exclusive competence. However, the scope of these two Regulations is very narrow and not able to cover the several matters dealt with in the France-Algeria draft agreement. The Regulations are indeed of exceptional nature and should be interpreted in a restrictive manner.

Against this backdrop, Article 2 paragraph 1 TFEU reads: *"When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts".*

As recalled above, this provision could be used to empower France to open negotiations with Algeria. The 2019 Council conclusions on the future of the judicial cooperation in civil matters[5] are open to this possibility, recalling *"that a multilateral approach is an essential element also in the field of civil justice(...)For particular cases where multilateral cooperation is not an option, the Council invites the Commission to present effective alternative to cater for citizens' and companies needs".*

As the future agreement will be inspired by the EU acquis and the HCCH Conventions, the related negotiations could contribute to the raise awareness with Algeria of the advantages that acceding to the multilateral framework could offer

- **Consistency with other Union policies**

Algeria is a very important partner for Europe, because of its proximity and size, its stabilising role in the region and on the African continent, and above all because of the close ties that have long united EU Member States to Algeria.

The European Union cooperates with Algeria in the framework of the European Neighbourhood Policy and its Southern dimension, the "Renewed partnership with Southern Neighbourhood – A new Agenda for the Mediterranean"[6]. Relations between the EU and Algeria are based on the Association Agreement, which entered into force in 2005. This constitutes the legal framework governing relations between the parties in economic, commercial, political, social, and cultural matters. It has enabled a rapprochement between Algeria and the EU through close technical cooperation on the various axes of the agreement.

Article 85 on legal and judicial cooperation makes reference, in relation to judicial civil cooperation, to strengthening mutual assistance with regard to cooperation in the handling of disputes or cases of a civil, commercial or family nature. Such cooperation may include, where appropriate, the negotiation of agreements.

[5] OJ C 419, 12.12.2019

[6] Joint Communication to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions: Renewed partnership with the Southern Neighbourhood A new Agenda for the Mediterranean, https://www.eeas.europa.eu/sites/default/files/joint_communication_renewed_partnership_southern_neighbourhood.pdf

The possibility for Member States to re-negotiate bilateral agreements with third countries is allowed in other fields of EU policies, both through a specific mechanism or an empowerment granted under Article 2 (1) TFEU, mostly in technical matters relating to transport. For example, Regulation (EC) 847/2004[7], sets out guidelines for the adaptation by Member States of existing bilateral air service agreement and criteria for the negotiations and conclusion of future bilateral agreements between Member States and third countries; it also established a specific procedure for the authorisation.

The empowerment procedure under Article 2 (1) TFEU has been recently used in transport matters, for instance in the context of an agreement between Italy and Switzerland[8] and another between Germany and Switzerland[9].

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

The legal basis for this proposal is Articles 2(1) TFEU and 81(3) TFEU, as the present proposal is meant to address the provisions of the draft agreement France-Algeria which refer to judicial cooperation in matters related to family law, with the exclusion of civil and commercial matters, which are considered in a parallel initiative.

• Subsidiarity (for non-exclusive competence)

Not applicable as the proposal falls within the exclusive competence of the Union.

• Proportionality

The objective of the proposal is to authorise, pursuant to Article 2(1) TFEU, the negotiation of a bilateral agreement between France and Algeria on matters pertaining to judicial cooperation in family law matters, which fall within the EU exclusive external competence. Consequently, the proposed Council Decision does not go beyond what is necessary to achieve this objective.

As explained above, the only option in line with the available legal framework and the EU policy in relation to judicial cooperation in civil matters, which is based on multilateralism and does not foresee the negotiation of an EU-Algeria agreement on this topic, is an authorisation to France to negotiate a bilateral agreement with Algeria.

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7 Regulation (EC) No 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries, OJ L 157, 30.4.2004, p. 7–17; Corrigendum to Regulation (EC) No 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries (Official Journal of the European Union L 195 02/06/2004, p.3-6)

8 Decision (EU) 2020/854 of the European Parliament and of the Council of 18 June 2020 empowering Italy to negotiate and conclude an agreement with Switzerland authorising cabotage operations in the course of the provision of international road passenger transport services by coach and bus in the border regions between the two countries, *OJ L 198, 22.6.2020, p. 47–48*

9 Decision (EU) 2020/853 of the European Parliament and of the Council of 18 June 2020 empowering Germany to amend its bilateral road transport agreement with Switzerland with a view to authorising cabotage operations in the course of the provision of international road passenger transport services by coach and bus in the border regions between the two countries, *OJ L 198, 22.6.2020, p. 44–46.*

- **Choice of the instrument**

Empowerment under Article 2(1) TFEU should be granted by the Union legislator, in accordance with the legislative procedure referred to in Article 81 (3) TFEU. The proposed act, in its nature as individual empowerment, is to be adopted in response to a corresponding request made by France. It should therefore take the form of a decision, addressed to France. Consequently, the proposed Decision of the Council represents an adequate instrument to empower France, in accordance with Article 2(1) TFEU, to act in this matter.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Stakeholder consultations**

This proposal is based on a request by France and concerns only this Member State.

4. BUDGETARY IMPLICATIONS

This proposal has no impact on the Union budget.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

It is foreseen to closely follow the development of negotiations between France and Algeria in order for the final agreement to have a minimum impact on the acquis. To this end, the Commission shall participate as an observer to the negotiations and shall be kept informed of the progress and results throughout the different stages of negotiations. France and the Commission will report to the Working Party on Civil Law Matters as appropriate. Some directives of negotiation should be issued with the Council Decision.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 81(3) thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Parliament[10],

Acting in accordance with a special legislative procedure,

Whereas:

(1) By letter of 8 December 2016 France requested the Commission to be authorised to negotiate a bilateral agreement with Algeria in matters related to judicial cooperation in civil and commercial matters. The aim was to modernize and consolidate the three existing bilateral agreements of 1962, 1964 and 1980 currently into force.

(2) France provided information showing that it has a specific interest in negotiating the draft agreement transmitted to the Commission, due to the exceptional economic, cultural, historical, social and political ties between France and Algeria.

(3) In particular, France provided data on the high number of Algerian citizens residing on its territory and French citizens living in Algeria and on the specific importance of commercial exchanges between the two countries.

(4) Relations between the EU and Algeria are based on the Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part[11], which entered into force in 2005. This constitutes the legal framework governing relations between the parties in economic, commercial, political, social, and cultural matters.

(5) Article 85 of the Euro-Mediterranean Agreement stipulates that cooperation in the legal and judicial fields is essential and a necessary adjunct to the other forms of cooperation between the EU and Algeria and that such cooperation may include, where appropriate, the negotiation of agreements in these fields.

(6) The EU relationship with third countries in matters related to judicial cooperation in civil and commercial matters relies on the legal framework developed by The Hague Conference on Private International Law, in accordance with the principle of

[10] OJ C , , p. .

[11] Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part, OJ L 265, 10.10.2005, p. 1–228

multilateralism. However, Algeria is not a Member of The Hague Conference on Private International Law and has so far refused to accede to its core Conventions.

(7) Notwithstanding this, the draft agreement appears to be largely inspired by the system established by the Hague Conventions and by the EU legislation adopted on the same matters.

(8) Most of the matters to be dealt with in the draft agreement between France and Algeria affect the EU acquis, in particular the EU legislation concerning family law matters. Consequently, the matters covered by such international commitments fall within the Union's exclusive external competence. Member States may negotiate, or enter into, such commitments only if empowered to do so by the Union in accordance with Article 2(1) of the Treaty on the Functioning of the European Union (TFEU) in conjunction with the substantive legal basis of Article 81(3) TFEU.

(9) Due to the EU competence on most of the matters, France should regularly report to the Commission on the conduct of negotiations. Both France and the Commission will keep the Working Party on Civil Law Matters informed on developments on a regular basis.

(10) There are no indications that the future agreement would necessarily negatively affect the acquis. It is appropriate, however, to provide for directives of negotiation ensuring to minimize the risk of such negative effects.

HAS ADOPTED THIS DECISION:

Article 1

France is hereby empowered to negotiate an agreement with Algeria on matters related to judicial cooperation in civil matters related to family law, provided that the following negotiating guidelines are followed:

– inform Algeria that the European Commission shall take part in the negotiations as an observer and will be informed of any progress and results achieved during the various stages of the negotiations;

– encourage Algeria to consider accession to the core Conventions concerning family law matters developed by the Hague Conference on Private International Law and start a serious analysis of the reasons which has prevented Algeria to do so for the time being;

– inform Algeria that, after the conclusion of negotiations, an authorisation from the Council of the European Union is required before the Parties are allowed to conclude the agreement;

– inform Algeria that the authorisation from the Council of the European Union to conclude the agreement, following a proposal from the Commission, may provide that the agreement may have a limited validity in time (for instance, five years) and may have to be reconsidered afterwards;

– insert a provision to the effect that the decisions recognised in France under this agreement cannot subsequently circulate in other EU Member States;

– ensure that the provisions concerning the right to refuse the service of documents are aligned with the provisions of Article 12(3) of the Service of Documents recast Regulation, meaning the addressee may refuse service of documents either at the time of service or within two weeks of the time of service;

– inform Algeria that, depending on the development of negotiations, other negotiating directives may be needed in due course.

Article 2

The negotiations shall be conducted in consultation with the Commission,

France shall regularly report to the Commission on the steps undertaken pursuant to this Decision and consult it on a regular basis.

Whenever so requested by the Commission, France shall report to it in writing on the conduct and the outcome of the negotiations.

Article 3

This Decision shall enter into force on the […] day following that of its publication in the *Official Journal of the European Union*.

Article 4

This Decision is addressed to the French Republic.

Done at Brussels,

For the Council
The President