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PROPOSAL

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To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
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Subject:	Proposal for a DECISION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on an authorisation addressed to France to negotiate a bilateral agreement with Algeria on matters related to judicial cooperation in civil and commercial matters

Delegations will find attached document COM(2023) 65 final.

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EUROPEAN
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Proposal for a

DECISION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**on an authorisation addressed to France to negotiate a bilateral agreement with Algeria
on matters related to judicial cooperation in civil and commercial 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 rules¹. 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 664/2009³ and Article 351 TFEU.

By means of a note verbale dated 26 July 2016, Algeria contacted France 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 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 and 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 in 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 with 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

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

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 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 brought to the Commission's attention again in November 2019 and 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 France further clarified the scope of the draft agreement and provided a new version where provisions concerning the exercise of the legal profession present in earlier versions were expunged from the text.

France also communicated to the Commission the most recent data available concerning its close relationship with Algeria. In 2021, there were 611. 084 adult Algerian citizens living in France, making them the first foreign community. This number does not include 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 in the “Malta Process” initiated by the HCCH, where the advantages of acceding to the multilateral framework were 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 between 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 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 that are 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 1980⁴.

This situation was somewhat 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 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 range of matters dealt with in the France-Algeria draft agreement. The Regulations are 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*

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>

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 matters⁵ 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.

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) 847/2004⁷ sets out guidelines for the adaptation by Member States of existing bilateral air service agreements and criteria for the negotiation and conclusion of

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

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)

future bilateral agreements between Member States and third countries; it also establishes 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 Switzerland⁸ and another between Germany and Switzerland⁹.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The legal basis for this proposal is Articles 2(1) TFEU and 81(2) TFEU, as the present proposal is meant to address the provisions of the draft agreement France-Algeria which refer to judicial cooperation in civil and commercial matters, with the exclusion of family law 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 civil and commercial matters, which fall within the EU exclusive external competence. Consequently, the proposed Decision of the European Parliament and of the Council 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.

- **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 (2) 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 European Parliament and of the Council represents an adequate instrument to empower France, in accordance with Article 2(1) TFEU, to act in this matter.

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.

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 Decision of the European Parliament and of the Council.

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 81(2) thereof,

Having regard to the proposal from the European Commission,

Acting in accordance with the ordinary 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 a bilateral agreement with Algeria, 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 part¹⁰ 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.

¹⁰ 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

- (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 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*. 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(2) 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.

HAVE ADOPTED THIS DECISION:

Article 1

France is hereby empowered to negotiate an agreement with Algeria on matters related to judicial cooperation in civil matters, 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 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 European Parliament and the Council of the European Union is required before the Parties are allowed to conclude the agreement;
- inform Algeria that the authorisation from the European Parliament and 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,¹¹ 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 European Parliament
The President

For the Council
The President

¹¹ Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast), *OJ L 405*, 2.12.2020, p. 40–78