



**COUNCIL OF
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NOTE

from: General Secretariat
to: Permanent Representatives Committee/Council

Subject: Proposal for a Regulation of the European Parliament and of the Council
establishing a procedure for the negotiation and conclusion of bilateral agreements
between Member States and third countries concerning sectoral matters and
covering applicable law in contractual and non-contractual obligations
- Outcome of the European Parliament's first reading
(Strasbourg, 4 to 7 May 2009)

I. INTRODUCTION

The Rapporteur, Mr Tadeusz ZWIEFKA (EPP/ED - PL) initially presented a report on behalf of the Committee on Legal Affairs, consisting of 45 amendments (amendments 1-45) to the proposal for a Regulation.

Consequently, in accordance with the provisions of Article 251(2) of the EC Treaty and the joint declaration on practical arrangements for the codecision procedure¹, a number of informal contacts took place between the Council, the European Parliament and the Commission with a view to reaching an agreement on this dossier at first reading, thereby avoiding the need for a second reading and conciliation.

¹ OJ C 145, 30.6.2007, p.5.

As a result of these contacts, the Rapporteur and the EPP/ED, PSE, ALDE, UEN and the Greens/EFA political groups presented a number of compromise amendments to the proposal for a Regulation. These amendments had been agreed during the informal contacts referred to above.

III. VOTE

When the plenary voted on 7 May 2009, it adopted 46 amendments (amendments 4-5, 13, 15-16, 39, 45-75, 77-78, 80-84, 89, 92) to the proposal for a Regulation. The amendments adopted correspond to what was agreed between the three institutions and ought therefore to be acceptable to the Council. Consequently, once the legal linguists¹ have scrutinised the text, the Council should be in a position to adopt the legislative act.

The text of the amendment adopted and the European Parliament's legislative resolution are set out in the Annex hereto. The amendment is presented in the form of a consolidated text where added wordings are highlighted in *bold and italics*, the symbol "■" indicates deleted text and the symbol "||" indicates changes of a linguistic or clerical nature.

¹ Delegations with legal-linguistic observations can send them to the secretariat of the Council's Directorate for the Quality of Legislation (secretariat.jl-codecision@consilium.europa.eu) until 3.6.2009, in order better to prepare the lawyer-linguists' meeting with national experts.

Bilateral agreements between Member States and third countries concerning sectoral matters and covering applicable law in contractual and non-contractual obligations *I**

European Parliament legislative resolution of 7 May 2009 on the proposal for a regulation of the European Parliament and of the Council establishing a procedure for the negotiation and conclusion of bilateral agreements between Member States and third countries concerning sectoral matters and covering applicable law in contractual and non-contractual obligations (COM(2008)0893 – C6-0001/2009 – 2008/0259(COD))

(Codecision procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to the European Parliament and the Council (COM(2008)0893),
 - having regard to Article 251(2) and Articles 61(c), 65 and 67(5) of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C6-0001/2009),
 - having regard to Rule 51 of its Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs and the opinion of the Committee on Civil Liberties, Justice and Home Affairs (A6-0270/2009),
1. Approves the Commission proposal as amended;
 2. Calls on the Commission to refer the matter to Parliament again if it intends to amend the proposal substantially or replace it with another text;
 3. Instructs its President to forward its position to the Council and the Commission.

Position of the European Parliament adopted at first reading on 7 May 2009 with a view to the adoption of Regulation (EC) No .../2009 of the European Parliament and of the Council establishing a procedure for the negotiation and conclusion of **■ agreements on particular matters concerning applicable law in contractual and non-contractual obligations**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c), 65 and 67(5) thereof,

Having regard to the proposal from the Commission **||**,

Having regard to the opinion of the European Economic and Social Committee¹,

Acting in accordance with the procedure laid down in Article 251 of the Treaty²,

Whereas:

- (1) Title IV *of Part Three* of the Treaty establishing the European Community (hereinafter "the EC 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. *Such agreements, of which there are a large number, often reflect special ties between a Member State and a particular third country and are intended to provide an adequate legal framework to meet specific needs of the parties concerned.*
- (3) Article 307 of the EC Treaty requires *the Member States to take all appropriate steps to eliminate* any incompatibilities between the Community acquis and international agreements concluded by Member States *with* third countries. This may involve the need for *the* re-negotiation of *such* agreements.
- (4) *In order to provide an adequate legal framework to meet specific needs of a given Member State in its relations with a third country there* may also be a *manifest* need for the conclusion of new agreements with third countries *relating to* areas of civil justice that come within the purview of Title IV *of Part Three* of the EC Treaty.
- (5) The *Court of Justice of the European Communities* confirmed in its Opinion 1/03 of 7 February 2006 relating to the conclusion of the new Lugano Convention³ **■** that the Community has acquired exclusive **■** competence to **■** conclude *an international agreement like the Lugano Convention* with third countries **■** on matters affecting the rules **■** in Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and

¹ OJ C , , p. .

² *Position of the European Parliament of 7 May 2009.*

³ *Opinion 1/03 [2006] ECR I-1145.*

the recognition and enforcement of judgments in civil and commercial matters¹ ("*Brussels I*").

- (6) ***It is for the Community to conclude***, pursuant to Article 300 of the EC Treaty, agreements between the Community and a third country ***on matters falling within the exclusive competence of the Community***.
- (7) Article 10 of the EC Treaty requires Member States to facilitate ***the*** achievement of the Community's tasks and to abstain from any measure which could ***jeopardise*** the attainment of the objectives of the Treaty. This duty of ***loyal*** cooperation is of general application and does not depend on whether the Community competence is exclusive or not.

(9) ***With regard to agreements with third countries on specific civil justice issues falling within the exclusive competence of the Community***, a coherent and transparent procedure should be established to authorise ***a Member State*** to amend ***an*** existing ***agreement*** or to negotiate and conclude ***a new agreement***, in particular where the Community itself has not indicated its intention to exercise its external ***competence*** to conclude ***an*** agreement ***by way of an already existing mandate of negotiation or an envisaged mandate of negotiation***. This procedure is without prejudice to the exclusive competence of the Community and the provisions of Articles 300 and 307 of the EC Treaty. ***It*** must be regarded as an exceptional measure and must be limited in scope and in time.

(9a) ***This Regulation should not apply if the Community has already concluded an agreement with the third country or third countries concerned on the same subject-matter. Two agreements should be considered to concern the same subject matter only if, and to the extent that, they regulate in substance the same specific legal issues. Provisions simply stating a general intention to cooperate on such issues should not be considered as concerning the same subject-matter.***

(9a) ***Exceptionally, certain regional agreements between a few Member States and a few third countries, for example two or three, intended to address local situations and not open for accession to other States should be covered by this Regulation.***

(12) In order to ensure that an agreement ***envisaged*** by a Member State does not render Community law ineffective and ***does not*** undermine the proper functioning of the system established by its rules ***and equally to ensure that it does not undermine the Community's external relations policy as decided by the Community***, the Member State concerned ***should be required to notify the Commission of its intentions with a view to obtaining an authorisation to open or continue formal negotiations on an agreement as well as to conclude an agreement. Such a notification should be made by letter or by electronic means. It should contain all relevant information and documentation enabling the Commission to assess the expected impact on Community law of the outcome of the negotiations.***

¹ *OJ L 12, 16.1.2001, p. 1.*

(12a) *It should be assessed whether there is sufficient Community interest in concluding a bilateral agreement between the Community and the third country concerned or, where appropriate, sufficient Community interest in replacing an existing bilateral agreement between a Member State and a third country with a Community agreement.*

To that end, all Member States should be informed of any notification received by the Commission concerning an agreement envisaged by a given Member State in order to allow them to demonstrate their interest in joining the initiative of the notifying Member State. If, from this exchange of information, a sufficient Community interest were to emerge, the Commission should consider proposing a negotiating mandate with a view to the conclusion of an agreement between the Community and the third country concerned.

(12b) *If the Commission requests additional information from a Member State in connection with its assessment as to whether that Member State should be authorised to open negotiations with a third country or third countries, such a request should not affect the length of the period within which the Commission must give a reasoned decision on the application of that Member State to open such negotiations.*

(12c) *When authorising the opening of formal negotiations, the Commission should, where appropriate, be able to propose negotiating guidelines or request the inclusion of particular clauses in the envisaged agreement. The Commission should be kept fully informed throughout the different stages of the negotiations as far as matters falling within the scope of this Regulation are concerned and may be allowed to participate as an observer in relation to those matters.*

(12d) *When notifying the Commission of their intention to enter into negotiations with a third country, Member States need only inform the Commission of elements which are of relevance for the assessment to be made by the Commission. The authorisation by the Commission and any possible negotiating guidelines or, as the case may be, the refusal by the Commission should concern only matters falling within the scope of this Regulation.*

(12e) *All Member States should be informed of any notification to the Commission concerning envisaged or negotiated agreements and of any reasoned decision by the Commission under this Regulation. Such information should however fully comply with possible confidentiality requirements.*

(12f) *The Commission, the Council and the European Parliament should ensure that any information identified as confidential is treated in accordance with Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents¹.*

(12g) *In situations where the Commission, on the basis of its assessments, intends not to authorise the opening of formal negotiations or the conclusion of a negotiated agreement, the Commission should, before giving its reasoned decision, give an opinion to the Member State concerned. In the case of conclusion of a negotiated agreement the opinion should be addressed to the Council and to the European Parliament.*

¹ *OJ L 145, 31.5.2001, p. 43.*

- (13) In order to ensure that the *negotiated* agreement does not constitute an obstacle to the implementation of the Community's external policy on judicial cooperation in civil and commercial matters, the agreement should provide for *either* its denunciation *in part or in full in the event of a subsequent agreement between the Community or the Community and its Member States and* the same third country on the same *subject matter or for the direct replacement of the relevant provisions by the provisions of such a subsequent agreement*.
- (14) *Provision should be made* for transitional measures to cover situations where, at the time of the entry into force of this Regulation, *a Member State is* in the process of *negotiating* with a third country or *has concluded* the negotiations but **█** not yet expressed *its* consent to be bound by the agreement.
- (14a) *In order to ensure that sufficient experience has been gathered on the application of this Regulation the Commission should submit its report no earlier than eight years after the adoption of this Regulation. In this report, exercising its prerogatives, the Commission should confirm the temporary nature of this Regulation or examine whether this Regulation should be replaced by another covering the same subject matters or including also particular matters falling within the exclusive competence of the Community and governed by other Community instruments such as those referred to in Recital 5.*
- (14b) *If the report to be submitted by the Commission confirms the temporary nature of this Regulation, a Member State should still, after the submission of the report, be able to notify the Commission of ongoing or already announced negotiations with a view to obtaining an authorisation to open formal negotiations.*
- █**
- (16) 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) *In* accordance with Article 3 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, *the United Kingdom and Ireland have given notice of their wish to* take part in the adoption and application of this Regulation **█** .
- (18) 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,

HAVE ADOPTED THIS REGULATION:

Article 1

Subject matter and scope

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

This procedure is without prejudice to the respective competencies of the Community and its Member States.

2. This Regulation shall apply to agreements concerning *particular* matters falling, entirely or partly, within the scope of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (*Rome I*)¹ and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (*Rome II*)².
3. *This Regulation shall not apply if the Community has already concluded an agreement with the third country or third countries concerned on the same subject-matters.*

Article 2

Definitions

1. For the purposes of this Regulation, the term "agreement" shall *mean*:
 - (a) a bilateral agreement between a Member State and a third country;
 - (b) a regional agreement between a limited number of Member States and of third countries neighbouring Member States of the European Union intended to address local situations and not open for accession to other States.
- 1a. *In the context of regional agreements as defined in paragraph 1(b), the reference to a third country shall be read as referring to the third countries concerned for the purposes of this Regulation.*
2. For the purposes of this Regulation, "Member State" shall mean any Member State *with the exception of* Denmark.

¹ OJ L 177, 4.7.2008, p. 6.

² OJ L 199, 31.7.2007, p. 40.

Article 3

Notification to the Commission

1. Where a Member State intends to enter into negotiations *in order* to amend an existing agreement or to conclude a new agreement falling within the scope of this Regulation, it shall notify the Commission *in writing* of its intention *at the earliest possible moment before the envisaged opening of formal negotiations*.
2. The notification shall include, *as appropriate*, a copy of the existing agreement, the draft agreement or the draft proposal **■**, and any other relevant documentation. The Member State shall describe the *subject-matter* of the negotiations and shall specify the issues which are to be addressed *in the envisaged agreement*, or the provisions of the existing agreement **■** which are to be amended. *The Member State may* provide any other *additional* information.

■

Article 4

Assessment by the Commission

1. Upon *receipt of the* notification, the Commission shall *assess* whether the Member State *may open formal* negotiations **■**.
2. *The* Commission shall, in making *this* assessment, first check whether any relevant *negotiating mandate with a view to a* Community agreement with the third country *or third countries* concerned is *specifically envisaged within the next 24 months*. If this is not the case, the Commission *shall assess whether all of* the following conditions are met:
 - (a) the Member State concerned has *provided information that it has* a specific interest in concluding the **■** agreement *due to* economic, geographic, cultural, historical, *social or political* ties between the Member State and *the* third country *concerned*; **■**
 - (b) *on the basis of the information transmitted by the Member State*, the *envisaged agreement appears not to render Community law ineffective and appears not to undermine* the proper functioning of the system established by *its* rules; *and*
 - (c) *the envisaged agreement would not undermine the object and purpose of the Community's external relations policy as decided by the Community*.
3. *If the information transmitted by the Member State is not sufficient for the purposes of making the assessment, the Commission may request additional information*.

Article 5

Authorisation to open negotiations

1. If *the envisaged* agreement *meets the* conditions *referred to in Article 4(2)*, the Commission *shall authorise the* Member State to open *formal* negotiations on the agreement **■**. If necessary, the Commission may propose negotiating guidelines and *may* request the inclusion of particular clauses in the *envisaged* agreement.

2. *The agreement shall contain a clause providing for either*
 - (a) *full or partial* denunciation *of the agreement* in the event *of a subsequent agreement between the European Community or the Community and its Member States and the same third country or third countries on the same subject matter, or*
 - (b) *direct replacement of the relevant provisions of the agreement by provisions of a subsequent agreement between the European Community or the Community and its Member States and the third country or the third countries on the same subject matter.*

The clause referred to in point (a) of the first subparagraph should be worded along the following lines: "(the name of the Member State) shall denounce this agreement in part or in full if and when the European Community or the Community and its Member States conclude an agreement with (the name of the third country or third countries) on the same matters of civil justice as those governed by this agreement".

The clause referred to in point (b) of the first subparagraph should be worded along the following lines: "The agreement/provisions (specify) shall cease to be applicable on the day an agreement between the European Community or the Community and its Member States and (the name of the third country or third countries) has entered into force in respect of the matters governed by the latter agreement/provisions".

3. **■** The Commission shall give *a reasoned* decision on the application of the Member State within **90 days** of receipt of the notification referred to in Article 3.

Article 5a

Refusal to authorise the opening of formal negotiations

1. *If, on the basis of its assessment under Article 4, the Commission intends not to authorise the opening of formal negotiations on the envisaged agreement, it shall give an opinion to the Member State concerned within 90 days of receipt of the notification referred to in Article 3.*
2. *Within 30 days of the submission of the opinion of the Commission, the Member State concerned may request the Commission to enter into discussions with it with a view to*

finding a solution.

3. *If the Member State concerned does not request the Commission to enter into discussions with it within the time-limit referred to in paragraph 2, the Commission shall give a reasoned decision on the application of the Member State within 130 days of receipt of the notification referred to in Article 3.*
4. *In the event that discussions are held within the meaning of paragraph 2, the Commission shall give a reasoned decision on the application of the Member State within 30 days of the closure of the discussions.*

Article 6

Participation of the Commission in the negotiations

The Commission may participate as an observer in the negotiations between the Member State and the third country *as far as matters falling within the scope of this Regulation are concerned*. If the Commission does not participate as an observer, it shall be kept informed of the progress and results throughout the different stages of *the* negotiations.

Article 7

Authorisation to conclude the agreement

1. Before *signing* the *negotiated* agreement, the Member State concerned shall notify **█** the outcome of *the* negotiations *to the Commission* and transmit the text of the agreement **█**.
2. Upon *receipt of this* notification the Commission shall *assess* whether the negotiated agreement.
 - (a) *meets the conditions referred to in point (b) of Article 4(2);*
 - (b) *meets the condition referred to in point (c) of Article 4(2), in so far as there are new and exceptional circumstances in relation to that condition; and*
 - (c) *fulfils the requirement under Article 5(1a).*
- █**
4. If **█** the negotiations have resulted in an agreement which fulfils the requirements referred to in paragraph 2, the Member State *shall* be authorised *by the Commission* to conclude the agreement.
5. **█** The Commission shall give a *reasoned* decision on the application of the Member State within *90 days* of receipt of the notification referred to in paragraph 1.

Article 7a

Refusal to authorise the conclusion of the agreement

1. *If, on the basis of its assessment under Article 7(2), the Commission intends not to authorise the conclusion of the negotiated agreement, it shall give an opinion to the European Parliament and to the Council within 90 days of receipt of the notification referred to in Article 7(1).*
2. *Within 30 days of the submission of the opinion of the Commission the Member State concerned may request the Commission to enter into discussions with it with a view to finding a solution.*
3. *If the Member State concerned does not request the Commission to enter into discussions with it within the time-limit referred to in paragraph 2, the Commission shall give a reasoned decision on the application of the Member State within 130 days of receipt of the notification referred to in Article 7(1).*
4. *In the event that discussions are held within the meaning of paragraph 2, the Commission shall give a reasoned decision on the application of the Member State within 30 days of the closure of the discussions.*
5. *The Commission shall notify its decision to the European Parliament and to the Council within 30 days of the decision.*



Article 8a

Confidentiality

When transmitting information to the Commission under Articles 3, 4(3) and 7, the Member State may indicate if any of the information is to be considered confidential and if the information transmitted can be shared with other Member States.

Article 8b

Information to the Member States

The Commission shall send to the Member States the notifications received under Articles 3 and 7 and, if necessary, the accompanying documents, as well as all its reasoned decisions under Articles 5, 5a, 7 and 7a, subject to the requirements of confidentiality.

Article 9

Transitional provisions

1. Where a Member State has already started negotiating an agreement **■** at the time of entry into force of this Regulation, Article 3(1) and 3(2) and Articles 4 to **7a** shall apply.

Where the stage of the negotiations so permits, the Commission may propose negotiating guidelines or **request** the inclusion of particular clauses, as referred to in Article 5(1) **and (1a)**.

2. Where a Member State has already completed negotiations at the time of entry into force of this Regulation, without having concluded the agreement, Article 3(1) and 3(2), Article 7(2) to (5) **and Article 7a** shall apply.

■

Article 10

Review

1. **No earlier than eight years after the date of adoption of this Regulation** the Commission shall **submit** to the European Parliament, the Council and the European Economic and Social Committee a report on **the** application of this Regulation **■**.
2. **This report shall either**
 - (a) **confirm that it is appropriate for this Regulation to expire on the date determined in accordance with Article 10a(1), or**
 - (b) **recommend that this Regulation be replaced as of that date by a new Regulation.**
3. **If this report recommends a replacement of this Regulation as set out in point (b) of paragraph 2, it shall** be accompanied by an appropriate legislative proposal.

Article 10a

Expiry

1. **This Regulation shall expire three years after the submission by the Commission of the report referred to in Article 10.**

The period of three years shall start running on the first day of the month following the last submission of the report to either the European Parliament or the Council.
2. **Notwithstanding the expiry of this Regulation on the date determined in accordance with paragraph 1, all negotiations ongoing on that date which have been entered into by a Member State under this Regulation with a view to amending an existing agreement or**

to negotiating and concluding a new agreement shall be allowed to continue and to be completed on the conditions laid down in this Regulation.

Article 11

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 ||,

For the European Parliament
The President

For the Council
The President
