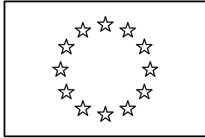

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 7.4.2009
SEC(2009)500 final

COMMISSION STAFF WORKING DOCUMENT

relating to Commission proposals for Regulations 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)893) and concerning sectoral matters and covering jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, parental responsibility and maintenance obligations, and applicable law in matters relating to maintenance obligations (COM(2008)894)

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This Commission Staff Working Document outlines some of the preparatory work carried out by the Commission when drawing up the proposals in question. In particular, it reflects the alternative solutions presented to Member States' experts during the meetings held on 11 March and 26 May 2008 to discuss a mechanism for bilateral agreements of Member States with third states in the areas falling under exclusive external Community competence. It must be thus underlined that the assessments referred to or views expressed in this working document do not necessarily reflect fully the final positions of the European Commission as taken in the Commission proposals adopted on 19 and 23 December 2008.

It has also to be mentioned that the Commission published on 27 February another Staff Working Document (SEC (2009) 275 final), presenting the legal analysis of the Commission Legal Service on the legality of the Commission proposals.
It summarizes the main statements from the Legal Service's opinion on the issue of the Member States' bilateral agreements with the third states in general and on the draft Commission proposals.

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1. BACKGROUND

On 19 April 2007, the JHA Council, in the context of the draft Regulation on Maintenance Obligations, suggested that, as regards future bilateral agreements and any amendments of existing bilateral agreements with particular third countries, a *"procedure for the negotiation and conclusion of such agreements, inspired by existing precedents in Community law, inter alia, the procedure for air service*[1]" 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* [by the proposed Regulation]." Although the adoption of such a procedure was not expressly made a condition for the adoption of the Maintenance Regulation, it is understood that certain Member States make the adoption of the Maintenance Regulation conditional on the presentation (and possible adoption) of a Commission's proposal on the matter.

[1] 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.

While the urgency to find a solution to the problem of bilateral agreements arose in the area of maintenance obligations, the problem of the conclusion of bilateral agreements by Member States in areas falling (partly) under exclusive Community competence is clearly a horizontal one and is equally relevant in the context of other civil law instruments, notably the Rome II Regulation[2] and Rome I Regulation[3]. Recital 37 of this Regulation states: "*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 negotiated and conclude on their own behalf agreements with third countries in individual and exceptional cases, concerning sectoral matters, contains provision on the la applicable to non-contractual obligations*.". Regulation Rome I on the law applicable contains a similar provision (Recital 42).

2. CURRENT SITUATION

The Commission proposals follow the commitments taken during the negotiations on Rome I and Rome II Regulations and Maintenance Regulation that provide for the establishment authorisation procedure to Member States to negotiate bilateral agreements with third states in the areas covered by those Regulations. The scope of the above-mentioned Regulations fall entirely under the exclusive Community external competence.

It has also to be mentioned that there is another Regulation dealing with some matters relating to family law, namely Council Regulation (EC) N° 2201/2003 which concerns matrimonial matters and parental responsibility.[4]

During the preparatory work of Commission's proposals COM (2008) 893 and 894, it was decided to add to the scope of the proposal concerning maintenance obligations also the issues of matrimonial matters and parental responsibility. Both matters fall under exclusive Community competence, because of the practical need of citizens of Member States to have some legal instrument to deal with third countries in very sensitive cases of child abduction and visiting rights.

Therefore, the scope of the proposals is limited to:

- agreements concerning sectoral matters and covering the law applicable to contractual and non contractual obligations (COM(2008) 893) and

- agreements concerning sectoral matters and covering jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, parental responsibility and maintenance obligations, and applicable law in matters relating to maintenance obligations (COM(2008) 894).

There might indeed be the necessity for Member States to set-up provisions concerning applicable law in contractual and non-contractual matters to regulate very specific situations

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2 Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II).

3 Regulation (EC) No 593/2008 on the law applicable to contractual obligations.

4 Council Regulation (EC) No 2201 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000

with third countries. Many of them relate to airport, road or railways management (especially questions of liability and work conditions).

An example of this kind of sectoral agreements could be the Convention of 4 July 1949 between France and Switzerland concerning the construction and management of the Basel-Mulhouse Airport and the Agreement of 25 April 1977 between Germany and Swizterland concerning the road between Lörrach and Weil am Rhein on Swiss territory.

Several Member States have written to the Commission in order to inquire about the possibility to negotiate and/or conclude bilateral agreements in the area of civil justice covered by the Community legislation, in particular family law matters.

Although these matters are regulated at the international level (by the relevant Conventions of the Hague Conference on Private International Law, in particular the 1980 Convention on international child abduction and the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children), there is a clear need for the citizens of the Member States to be able to benefit from bilateral agreements with third countries as regards matrimonial matters and parental responsibility (especially as regards guardianship, cross-border right of access, child abduction) in order to facilitate their access to justice in States which are often neighbouring or connected for historical and social reasons.

It is a matter of fact that, whilst the 1980 Convention on child abduction has been ratified by a large number of States (81), including all EU Member States, it is not in force in any State of Islamic tradition.

The 1996 Convention on parental responsibility, which will be (by 2010) in force between all EU Member States, has been ratified only by Morocco and not any other Islamic country.

As a consequence of this situation, there is a total lack of legal framework to deal with these cases: if mediation or diplomatic contacts fail, no possible solution can be found, except a bilateral agreement between the Member State and the third State concerned.

The so-called "Malta process" initiated by the Hague Conference of Private International Law in 2004 intends to address this problem and draws the attention of, in particular Islamic countries, to the possibility to accede to some Hague Conventions in family law. This is a long-term objective also for the Community which encourages third countries to take part in this multilateral framework.

Anyway, in the short and medium-term, the solution can be only represented by a bilateral agreement of the Member State concerned with the relevant third country, which can also take into account the specificities of their relations.

Obviously, the problem is more sensible in the Member States which have a high level of immigration from Islamic countries, as for instance, Belgium, France, Spain and Sweden.

For example, the following bilateral agreements of France are intended to address family law issues:

- Convention relative aux enfants issus de couples mixtes séparés franco-algériens du 21 juin 1988.

- Convention franco-libanaise concernant la coopération en certaines matières familiales du 12 juillet 1999

- Convention relative au statut des personnes et de la famille et à la coopération judiciaire du 10 août 1981: Maroc

- Convention relative à la loi applicable et à la compétence en matière de droit des personnes et de la famille du 18 mai 1971: Serbie

- Tunisie: Convention relative à l'entraide judiciaire en matière de droit de garde des enfants, de droit de visite et d'obligations alimentaires du 18 mars 1982.

It is worth to mention also the 2002 agreement between Belgium and Morocco on guardianship and visiting rights and on maintenance obligations, signed but not yet ratified because of the exclusive external Community competence; and the judicial agreement between Sweden and Egypt regarding co-operation in civil and personal status matters concluded in 1996.[5]
Obviously, Member States may have a need to conclude a new bilateral agreement on these matters with a certain third country (in particular, taking into account the fact that otherwise there may be no legal framework to effectively resolve, e.g. family law disputes of mixed couples), or to revise and update the existing agreement.

The procedure set up in the proposals for Regulations is intended to address these needs. Therefore, the Commission has committed presenting a proposal on a "mechanism" for bilateral agreements of Member States with third countries in 2008[6].

3. LEGAL FRAMEWORK

There is no doubt under the ERTA case (22/70) of ECJ as developed by its Opinion 2/91 that once the European Community has exercised its internal competence by adopting provisions laying down common rules, the Community acquires exclusive external competence in the sense that Member States no longer have the right acting individually or collectively to undertake obligations which affect those rules or alter their scope. In accordance with the ECJ Opinion 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 (the Lugano Opinion, Case 1/03), the analysis to be performed in order to determine areas that fall within the Community's exclusive competence, must take account of (see the Lugano Opinion, para. 127):

– the area covered by internal Community rules;

– the nature and content of the provisions of the future international agreement;

– the nature and content of Community rules.

5 The Commission has provided the European Parliament with a list of the available bilateral agreements in the areas covered by the proposals based on the information provided by Member States.

6 COM (2007) 640 final, Communication from the Commission of 23.10.2007: Commission Legislative and Work Programme for 2008.

Additionally, as indicated by the ECJ in the Lugano Opinion, it must be examined whether the agreement is not capable of undermining:

– the uniform and consistent application of the Community rules; and

– the proper functioning of the system which the Community rules establish (with reference to ERTA judgement, paras. 17-18).

Furthermore, it should be noted that it is not required that the areas covered by the international agreement and the Community legislation coincide fully (the Lugano Opinion, para. 126). Finally, it is also necessary to look not only at the current state of Community law, but also at its future developments, insofar as this can be foreseen (the Lugano Opinion, para. 126).

If there is European Community's competence for a particular international agreement, or a part thereof, Member States may not enter into negotiations for the agreement or for the relevant part that falls under European Community competence, nor *a fortiori*, sign or ratify the agreement.

The large number of bilateral agreements that exist will make it necessary to develop a mechanism to allow the screening of such agreements and allow the Community to decide whether or not the Community should negotiate and conclude the agreements in question or authorise the Member States to do so. For agreements that fall wholly or partly within European Community exclusive competence, the latter option means that the Member States need to be authorized by the Community to act within the areas of exclusive community competence.

The jurisprudence of the ECJ allows for such an option of authorisation of the Member States. The ECJ has in the sphere of the common commercial policy repeatedly held that national/bilateral measures taken by the Member States are permissible, by virtue of the specific authorisation of the Community[7].

There is also a precedent in the transport sector, i. e. Air Service Regulation[8] adopted by the co-decision procedure. Examination of this precedent shows[9]:

(1) The European Parliament and the Council has agreed with the Regulation setting out the authorisation procedure for the Member States to conclude bilateral agreements in area that may partly deal with the matters for which the EC is exclusively competent.

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[7] Case 41/76 *Donckerwolcke v Procureur de la République* [1976] ECR 1921, para.33; Case 174/84 *Bulk Oil v Sun International* [1986] ECR 559, para. 36; Case 5/84 *Tezi Textiel BV v Commission* [1986] ECR 887, para.58-59 (national measures by Member States must be only for serious reasons and for a limited period). See too the recent Opinion of Advocate General Kokott delivered on 26 March 2009 in case C-13/07 Commission v.Council, at point 60. « Admittedly, the Member States may exceptionally also act within the areas of exclusive Community competence if the Community specifically authorises them to do so (30). » . Footnote (30) to this opinion reads as follows :"*Donckerwolcke and Schou*, [1976] ECR 1921,, paragraph 32; Case 174/84 *Bulk Oil* [1986] ECR 559, paragraph 31; Case C-70/94 *Werner* [1995] ECR I-3189, paragraph 12; and Case C-83/94 *Leifer and Others* [1995] ECR I-3231, paragraph 13; this case-law has also been incorporated in the respective second halves of the sentences in Article I-12(1) TCE and Article 2(1) TFEU.(…)".

[8] See footnote 1.

[9] See *inter alia* the following recitals 2, 4, 6-8 and Article 1 of the Regulation.

(2) The Regulation sets out very few substantive criteria (but allows for inclusion of standard clauses to be developed later).

(3) The Regulation allows for comitology procedure[10].

(4) Even if the Air Service Regulation in principle concerns mixed agreements, it could be considered as a valuable precedent in respect to the present procedure. In fact, the Community can only authorise Member States to conclude agreements which fall under its exclusive competence. Therefore, in the case of agreements covering matters of civil judicial cooperation, the agreement could fall as a whole under the exclusive Community competence (if, for instance, it deals only with matters of parental responsibility or child abduction), but could also be a mixed agreement where only certain provisions (for instance, covering maintenance obligations) fall under exclusive Community competence.

As an example Bulgaria has concluded a number of agreements with third States which cover also family matters:

- Alger - Treaty on judicial and legal assistance in civil, commercial, family and criminal matters;
- Vietnam - Treaty on legal assistance in civil, family and criminal matters;
- Democratic People's Republic of Korea - Treaty on rendering of mutual legal assistance in civil, family and criminal matters;
- Cuba - Treaty on legal assistance in civil, family and criminal matters;
- Mongolia - Treaty on rendering of mutual legal assistance in civil, family and criminal matters;
- Syria - Treaty on legal assistance in family, civil and criminal matters

(5) This is even truer for the proposal concerning applicable law, where the provisions concerned by the proposed procedure are typically included in general sectoral agreements dealing with specific matters, e. g. management of roads or airports.

4. POSSIBLE WAYS FORWARD

At the expert meetings held on 11 March and 26 May 2008 different alternatives to deal with the current situation were taken into account.

4.1. Status Quo

In the **passive status quo** no specific measure would be taken regarding the problem. In view of the background illustrated in Chapters 1 and 2 above, this option is both politically and practically difficult to accept.

[10] See Recital 13 and Article 7.

In the **active status quo** no specific new mechanism would be developed. Practically this would mean that any and all bilateral agreements with third countries would have to be negotiated and concluded by the Community as a whole (Article 300 EC), even if only one Member State has a need or interest to have such an agreement.

This solution has the advantage that this is provided for in article 300 European Community Treaty and does not require development of specific new policies.

The disadvantage of this solution lies in the fact that the Community would need to be involved in negotiations of agreements which have potentially little or no value for the Community as a whole. It would also have heavy resource implications for the Commission.

Politically such solution is problematic, at least in the areas where the Commission has already committed itself to proposing a solution which *does* allow Member States in certain cases to negotiate and conclude bilateral agreements on their own (Rome II and the draft Maintenance Regulation).

4.2. Specific Authorisation

As mentioned above, the case law of the ECJ gives the Community the possibility to **authorise Member States to act in areas of exclusive Community competence provided that such authorisation is specific**. This includes also negotiation and conclusion of bilateral agreements with third countries.

Any such authorisation, whether general or case specific, requires development of criteria and procedure under which it can be guaranteed that the exercise of the external exclusive Community competence by the individual Member States does not compromise the Community law system.

The April JHA Council suggested the first and main criterion for the assessment of any bilateral agreement, which is: the existence of "Community interest" in the conclusion of such an agreement.

As the recognition of the existence of exclusive Community competence for a particular matter entails *per se* the existence of a Community interest, use of this criterion in the context of a possible authorisation to Member States must be explained and qualified. What is meant is that even in cases where the Community has exclusive competence, it can choose not to exercise this competence and authorize Member States to negotiate and conclude international agreements that fall wholly or partially under the Community's exclusive competence, provided that these agreements do not compromise the integrity of the Community's exclusive competence.

In accordance with the jurisprudence of the ECJ, Member States can be authorized to act within the sphere of exclusive community competence only in exceptional cases: for example, where the Community's exclusive competence has arisen relatively recently and where the Community is faced with numerous bilateral Member States agreements that appear to have a very limited scope, dimension, or added value for the Community. In such a situation the Community may initially wish to authorise Member States to negotiate amendments to the existing bilateral agreements or negotiate and conclude new bilateral agreements of the same kind, whilst retaining the power for the Community to exercise this exclusive competence at a later stage, if considered necessary. Any such authorisations to Member States must be

subject to the strict conditions mentioned (limited in scope, on a case by case basis, reversibility of the authorisation to Member States) in order to avoid compromising the *acquis communautaire.*

Where it is apparent that the Community does not immediately exercise its external competence in relation to these bilateral agreements, "cooperation between Community institutions and Member States is needed with a view to enabling the latter to amend the existing agreements in a manner consistent and in accordance with the Community's interest"

4.2.1. General specific authorisation

General authorisation could be given by a **legislative instrument (e.g. regulation),** as is the case for instance with the Air Services Regulation[11], or by a Council **decision.**

The advantage of going for a legislative instrument is that it would simplify the procedure with a common approach for all agreements.

The disadvantage of this option is that it assumes that criteria (conditions) are (can be) developed and set in advance, generally.

Apart from criteria assessing the cases where Member States could be authorized to act within the areas of exclusive community competence, the European Community would also need to decide on criteria for the conduct of negotiations and the permissible substantive contents of the agreements so as to ensure that the Community system on a particular subject matter is not impaired. In view of the wide range of subjects covered by the ever developing area of civil justice within the Community, it might well be that the concrete criteria would need to be different for different instruments (subject matters)[12] of the *acquis* covered by the mechanism. The comparison with the Air Service Regulation, to which the April JHA Council made specific reference as a possible inspiration for the new mechanism, allows understanding the problems with the formulation of general criteria in the area of civil justice.

The said Regulation makes the negotiation and conclusion by a Member State of a bilateral agreement with a third State conditional upon the requirement that

- any relevant standard clauses, developed and laid down jointly between Member States and the Commission, are included in such negotiations, and
- the notification procedure set out under the regulation is complied with.

Upon notification the Commission may conclude that the negotiations are likely to:

- undermine the objectives of Community negotiations underway with the third country concerned, and/or
- lead to an agreement which is incompatible with Community law.

It must be noted that this regulation foresees the possibility of "parallel" bilateral agreements (Community with third State and Member State with the same third State). Such parallel

[11] See footnote 1.

[12] This would depend on the degree of the specificity of conditions. If very general conditions are adopted such rules can apply generally to the whole civil justice area.

agreements would exist when EC had negotiated and concluded an agreement under a horizontal mandate. This is given by the specific aspects of exclusive Community competence which, according to the "open skies" case law is given only for 4 issues falling within the usual scope of air service agreements.

As regards these conditions of general authorisation, there are some criteria of the Air Services regulation which also appears to work for the area of civil justice is the requirement of notification.

4.2.2. Individual specific authorisation.

This solution would mean that each time the need arises, upon the request (notification) by a Member State, the assessment of lack of Community interest would be made and subsequently negotiations would be authorised, under specified conditions (if need be).

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5. PROCEDURE AND CRITERIA: GENERAL OBSERVATIONS

The starting point for this exercise is that **it is for the European Community to exercise its external competences** in accordance with the institutional procedures set out in article 300 EC Treaty.

This is therefore the presumption for all the relevant bilateral agreements in the area of civil justice falling within the exclusive Community competence.

However, a legal instrument could exceptionally authorize Member States to negotiate and conclude bilateral agreements under strict conditions and **modalities** guaranteeing that the Community competence is not negated.

The legal instrument proposed will consist of substantive criteria and a procedure to determine whether Member States should be authorised to conclude bilateral agreements on particular subject matters that fall wholly or partially under the Community's exclusive competence.

The legal mechanism for bilateral agreements will provide that following notification of the envisaged bilateral agreement in the area of civil justice by the Member State, the European Community will evaluate whether it should exercise its competence in negotiating and concluding the proposed bilateral agreement, once it is established that its provisions fall wholly or partially under exclusive competence of the EC.

6. BILATERAL AGREEMENTS FOCUSSING ON JURISDICTION AND (OR) RECOGNITION AND ENFORCEMENT IN HORIZONTAL CIVIL AND COMMERCIAL MATTERS

As a general rule, the Community interest is presumed for the bilateral agreements which follow the **model of new Lugano Convention** on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Thus, bilateral agreements, fully focussing on jurisdiction and (or) recognition and enforcement in horizontal civil and commercial matters, should be negotiated and concluded by the Community.

- Example: Convention between Austria and Tunisia on the recognition and enforcement of judgements and authentic acts in civil and commercial matters, signed at Vienna on 23 June 1977

Additionally, the **broad agreements**, covering legal assistance and legal relations in civil, commercial, (family) and criminal matters (the model followed in particular by some of 10 Member States that joined the EU in 2004) also fall under this group, as these agreements cover legal assistance, applicable law, recognition and enforcement of judgments.

- Example: Treaty between the Russian Federation and the Republic of Poland on legal assistance and legal relations in civil and criminal matters, could serve as an example.

Conclusion: the proposed legal mechanism is not intended for the above category of agreements.

7. SECTORAL MATTERS

The Commission's commitment to deal with the problem of bilateral agreements on sectoral matters is already established in Rome I and Rome II regulations, and in the context of negotiations on draft maintenance matters and Rome III. Thus, the sectoral matters that could be covered are:

– Applicable law in civil and commercial matters (as covered by Rome I and Rome II regulations);

– Family law aspects: jurisdiction, recognition and enforcement of judgments, and applicable law as regards matrimonial matters and the matters of parental responsibility, as covered by Brussels II Regulation, including maintenance obligations

Example: France-USA "*Accord par échange de lettres relatif à l'exécution des décisions judiciares concernant la garde des enfants, du droite de visite et des obligations alimentaires du 20 août 1980*"

Conclusion: the proposed legal mechanism may be used for the above categories of sectoral agreements.

8. AGREEMENTS WITH SINGLE PROVISIONS ON CIVIL JUDICIAL COOPERATION

The authorization procedure might also apply to cases of bilateral treaties which do not otherwise fall under exclusive Community competence save for one or two provisions on judicial cooperation and **having single (few) provisions** on civil judicial cooperation.

Example: Austria's consular convention of 18 March 1960 with Yugoslavia.

Conclusion: the proposed legal mechanism may be used for the above category of agreements.

9. CIRCUMSTANCES/CRITERIA TO TAKE INTO ACCOUNT IN THE AD HOC EVALUATION

The legal mechanism would provide for the **circumstances/criteria** to be taken into account when evaluating and establishing whether the Community should itself proceed in the case of bilateral agreements covered by point 3 above.

In keeping with the exceptional nature of any such authorization to Member States to act within the sphere of exclusive community competence, the following elements could be considered:

Circumstances, which demonstrate the lack of Community interest, are:

- the existing special ties between the Member State in question and the third State, which are either historical or geographical, which show that the conclusion of the bilateral agreement would be relevant for this single Member State because, e. g. of immigration and emigration tendencies as between the Member State concerned and the third state;

- The problems to be addressed in the agreement occur very rarely at the Community level and do not have deep impact on the relations between other Member States and the third state concerned.

The assessment that the Community should itself proceed and exercise its competence could be based on the following:

– Identification of a list of third countries with whom the Community should conclude a bilateral agreement either generally or according to specific subject matters, or

– in an individual case based on notification of the envisaged agreement by the Member State.

In order to take into account the exceptional nature of this authorisation, the following additional conditions should be applied:

- - time limit for the agreement. The bilateral agreement in question may become subsidiary to a possible Community instrument/agreement with the third state concerned in future,

- - the agreement can not undermine the integrity of the *acquis communautaire*.An authorisation to Member Sates cannot lead to an agreement which is incompatible with Community law.