

EN

EN

EN



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 23.12.2008
COM(2008) 893 final

2008/0259 (COD)

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**

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Grounds for and objectives of the proposal

Pursuant to Article 65 of Title IV of the EC Treaty, introduced by the Treaty of Amsterdam, several Community instruments in the field of civil justice have been adopted.¹

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

Apart from pre-existing bilateral agreements, there may also be a need for the conclusion of new agreements with third countries governing areas of civil justice that come within the purview of Title IV of the EC Treaty. In line with the development of the European judicial area related to cooperation in civil and commercial matters, the Community has acquired exclusive external competence to negotiate and conclude international agreements with third countries on a number of important subject matters referred to in Title IV of the EC Treaty. This was confirmed by the ECJ in its Opinion 1/03 of 7 February 2006 relating to the conclusion of the new Lugano Convention.² The Court confirmed that the Community has

¹ Council Regulation (EC) 1346/2000 on insolvency proceedings, OJ L 160, 30.6.2000, p. 1.
Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1.
Council Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ L 174, 27.6.2001, p. 1.
Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, p. 1.
Council Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 26, 31.1.2003, p.41.
Council Directive 2004/80/EC relating to compensation to crime victims, OJ L 261, 6.8.2004, p. 65.
European Parliament and Council Regulation (EC) No 805/2004 creating a European Enforcement Order for uncontested claims, OJ L 143, 30.4.2004, p. 15.
European Parliament and Council Regulation (EC) No 1896/2006 creating a European order for payment procedure, OJ L 399, 30.12.2006, p. 1.
European Parliament and Council Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, p. 40.
European Parliament and Council Regulation (EC) No 861/2007 establishing a European Small Claims Procedure, OJ L 199, 31.7.2007, p. 1.
European Parliament and Council Regulation (EC) No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, OJ L 324, 10.12.2007, p. 79.
European Parliament and Council Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6.
European Parliament and Council Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters, OJ L 136, 21.5.2008, p.3.

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

acquired exclusive competence to conclude international agreements with third countries, on matters affecting the rules set out *inter alia* in Regulation (EC) No 44/2001 ("Brussels I"), in particular on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. In its opinion the Court found that the analysis of the provisions of the new Lugano Convention relating to the rules on jurisdiction demonstrated that those provisions affect the uniform and consistent application of the Community rules on jurisdiction and the proper functioning of the system established by those rules.³ With regard to the proposed Convention's rules on recognition and enforcement of judgements the Court came to a similar conclusion. It found that the Community rules on the recognition and enforcement of judgments are indissociable from those on the jurisdiction of courts, with which they form a unified and coherent system, and that the new Lugano Convention would affect the uniform and consistent application of the Community rules as regards both the jurisdiction of courts and the recognition and enforcement of judgments and the proper functioning of the unified system established by those rules.⁴

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

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

The foregoing is in line with the conclusions of the JHA Council of 19 April 2007.⁶

The Commission has accepted that a procedure should be devised also for agreements affecting the Rome II⁷ and Rome I⁸ Regulations⁹.

³ Opinion 1/03 Lugano, para. 161.

⁴ Opinion 1/03 Lugano, para.172.

⁵ Similar solution was adopted earlier for the civil aviation sector: see Regulation (EC) No 847/2004 on the negotiation and implementation of air service agreements between Member States and third countries, OJ L 157, 30.4. 2004, p. 7.

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

⁷ Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) sets out in Recital 37 that "*the Commission will make a proposal to the European Parliament and the Council concerning the procedures and conditions according to which Member States would be entitled to negotiated and conclude on their own behalf agreements with third countries in individual and exceptional cases, concerning sectoral matters, containing provisions on the law applicable to non-contractual obligations*".

⁸ Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) contains a similar recital (Recital 42).

Accordingly, the Commission proposes that such a procedure should be devised for certain bilateral agreements concerning sectoral matters. The proposed procedure therefore covers two different categories of sectoral subject matters. One proposal relates to sectoral matters pertaining to jurisdiction, recognition and enforcement in matrimonial matters, matters of parental responsibility and maintenance obligations and applicable law in matters relating to maintenance obligations. The other proposal concerns sectoral matters pertaining to the law applicable to contractual and non-contractual obligations.

The present proposal concerns a procedure for granting authorisation to Member States in the second area mentioned, that is the law applicable to contractual and non contractual obligations for sectoral matters. Simultaneously with this proposal, the Commission is putting forward a separate proposal for a similar procedure for the area of matrimonial matters, parental responsibility and maintenance obligations. As the latter is governed by unanimity, these proposals must be put forward in separate acts.

2. CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

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

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

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

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

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

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

⁹ It may indeed be necessary to enact provisions concerning the applicable law in contractual and non-contractual matters in these cases in order to regulate specific situations. These may relate, for example, to issues of airport or road management. Examples of this kind of sectoral agreements are 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 Switzerland concerning the road between Lörrach and Weil am Rhein on Swiss territory.

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

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

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

3. LEGAL ELEMENTS OF THE PROPOSAL

- **Summary of the proposed action**

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

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

It is proposed to limit the procedure in question only to sectoral issues related to matrimonial matters, parental responsibility and maintenance obligations on the one hand, and, on the other hand, to the law applicable to contractual and non-contractual obligations. The enclosed proposal deals with the second subject matter.

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

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

If the Community has already concluded an agreement on the same subject matter with the third country concerned, the Member State is not allowed to negotiate or conclude the agreement with the third country concerned and any application submitted will be rejected. If that is not the case, the Commission must determine whether such an agreement is expected in the near future. If no such agreement is expected in the near future the Commission may grant authorisation, provided that the following two conditions are met: (a) the Member State concerned has demonstrated that it has a specific interest in concluding an agreement with the third country, related in particular to the existence of economic, geographic, cultural or historical ties between the Member State and that third country; and (b) the Commission determines that the proposed agreement is of limited impact on the uniform and consistent application of the Community rules in place and on the proper functioning of the system established by those rules.

The procedure also provides for the inclusion in the agreements of sunset clauses to limit the validity in time of the agreements concluded by the Member States until the point when the Community concludes an agreement on the same subject matters with the third country concerned.

- **Legal basis**

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

- **Subsidiarity principle**

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

- **Proportionality principle**

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

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

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

The proposed procedure thus reduces the administrative burden falling on the Community and on the national governments to the essential minimum.

- **Choice of instruments**

Proposed instrument(s): Regulation.

Other means would not be adequate for the following reasons:

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

4. BUDGETARY IMPLICATION

The proposal has no implication for the Community budget.

5. ADDITIONAL INFORMATION

- **Review/revision/sunset clause**

The proposal includes a review clause and a sunset clause.

- **Detailed explanation of the proposal**

Scope (Article 1)

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

Definitions (Article 2)

Article 2 states that only bilateral agreements between a Member State and a third State are covered by the procedure established by the present proposal. Therefore, multilateral agreements (including in particular regional agreements) are not covered by the proposed procedure.

The proposed procedure (Articles 3-8)

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

The procedure requires (Article 3) the Member State to notify the Commission in writing of its intention to undertake negotiations on a new agreement or in order to amend an existing agreement. The notification must include a copy of the draft agreement if available and any other relevant documentation. This notification is to be made not later than three months before the beginning of the negotiations with the third country concerned.

Upon receipt of the notification, the Commission will need to assess whether the Member State can proceed with the negotiations (Article 4). If the Community has already concluded an agreement on the same subject matter with the third country concerned, the application will be automatically rejected. The assessment comprises the following steps. If no agreement has been yet concluded by the Community with the third country concerned, the Commission must determine whether such an agreement is expected in the near future. If no such agreement is expected in the near future the Commission may grant authorisation, provided that the following two conditions are met: (a) the Member State concerned has demonstrated

that it has a specific interest in concluding an agreement with the third country, related in particular to the existence of economical, geographical, cultural or historical ties between the Member State and that third country; and (b) the Commission determines that the proposed agreement is of limited impact on the uniform and consistent application of the Community rules in place and on the proper functioning of the system established by those rules.

If the Commission considers, in the light of the conditions referred to above, that there are no obstacles to the proposed agreement, it can permit the Member State to open the negotiations (Article 5). Where necessary, the Commission can propose negotiating guidelines and can request the inclusion of particular clauses.

The agreement must also contain a sunset clause for its termination, should the European Community conclude an agreement with the third country in question.

The decision on whether or not to permit the negotiations is taken by the Commission with the assistance of an advisory committee under Article 3 of Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission¹⁰. As it is aimed at limiting formalities to the essential minimum, the advisory procedure is justified. The Commission submits to the Committee a draft of the measures to be taken, on which the committee expresses an opinion. The Commission then decides, taking this opinion into account as far as possible, and informs the committee of the manner in which the opinion has been taken into account.

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

The Commission can decide to take part in the negotiations between the Member State and the third country as an observer. If the Commission itself does not participate, it has to be informed of the results during the various stages of the negotiation, in order to be able to deliver to the Member State its opinion on the content of the agreement before its final conclusion in the interest of efficiency (Article 6).

The final stage of the procedure concerns the conclusion of the agreement (Article 7). Before initialling the agreement, the Member State concerned must notify the Commission of the outcomes of the negotiations and provide it with the text of the agreement. The Commission will assess whether the agreement is in conformity with the negotiating guidelines and whether the conclusion of the agreement can be considered to have a negative impact on the operation of the Community system in place, in particular whether (in which extent) it is likely to affect the *acquis communautaire* in force. If the Commission's evaluation is positive, it will give its authorisation. If the assessment is negative, the Member State concerned is not authorised to proceed with the agreement. This decision is taken in accordance with the management procedure under Article 4 of Council Decision 1999/468/EC.

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

Transitional and final provisions (Articles 9-11)

¹⁰ Council Decision laying down the procedures for the exercise of implementing powers conferred on the Commission (1999/468/EC), OJ L 184, 17.7.1999, p. 23.

Article 9 lays down transitional provisions which are to be applied in cases where, at the time of the entry into force of the Regulation-, the Member State concerned has already started negotiations with the third country or has already concluded them, but has not yet given its consent to be bound by the agreement.¹¹

The proposed procedure thus also applies to this situation, subject to the necessary adjustments: notification of the (draft) agreement to the Commission; assessment by the Commission on the basis of the conditions listed in Article 4 of the proposal; authorisation to continue the negotiations and establishment of negotiating guidelines if the stage of negotiations so permits; and authorisation to conclude the agreement.

Article 10 stipulates that the Commission will submit to the European Parliament, the Council and the Economic and Social Committee a report concerning the application of the Regulation at the latest by January 2014. The report is to be accompanied, by an appropriate legislative proposal, given that the application of the Regulation is limited until the 31st December 2014.

¹¹ An example of this situation could be the draft agreement between France, Switzerland and the European Organisation for Nuclear Research (CERN) concerning the law applicable to the undertakings acting in the premises of CERN to supply cross-border services. This agreement gives an example of a sectoral agreement falling within the scope of Regulation (EC) No 593/2008 ("Rome I"), and therefore it is subject to the proposed procedure.

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**

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 Commission¹²,

Having regard to the opinion of the European Economic and Social Committee¹³,

Acting in accordance with the procedure laid down in Article 251 of the Treaty¹⁴,

Whereas:

- (1) Title IV 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.
- (3) Article 307 of the EC Treaty requires the elimination of any incompatibilities between the Community *acquis* and international agreements concluded by Member States and third countries. This may involve the need for re-negotiation of these agreements.
- (4) There may also be a need for the conclusion of new agreements with third countries governing areas of civil justice that come within the purview of Title IV of the EC Treaty.
- (5) The ECJ confirmed in its Opinion 1/03 of 7 February 2006 relating to the conclusion of the new Lugano Convention, that the Community has acquired exclusive external competence to negotiate and conclude international agreements with third countries on a number of important subject matters referred to in Title IV of the EC Treaty. In particular, the Court confirmed that the Community has acquired exclusive

¹² OJ C , , p. .

¹³ OJ C , , p. .

¹⁴ OJ C , , p. .

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

- (6) Thus, pursuant to Article 300 of the EC Treaty, it is for the Community to conclude such agreements between the Community and a third country, as far as Community competence is concerned.
- (7) Article 10 of the EC Treaty requires Member States to facilitate achievement of the Community's tasks and to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty. This duty of genuine cooperation is of general application and does not depend on whether the Community competence is exclusive or not.
- (8) An assessment is needed of whether there currently exists sufficient Community interest in replacing all existing or proposed bilateral agreements between Member States and third countries with Community agreements. Consequently, it is necessary to establish a procedure with a twofold purpose. The first is to allow the Community to assess whether there is such sufficient Community interest in the conclusion of a particular bilateral agreement. The second is to authorise Member States to conclude the agreement at issue if there is no current Community interest in the conclusion of such an agreement.
- (9) A coherent and transparent procedure should be established to authorise Member States to amend existing agreements with third countries or to negotiate and conclude new agreements in exceptional circumstances, in particular where the Community itself has not indicated its intention to exercise its external competences to conclude the agreement. This procedure is without prejudice to the exclusive competence of the Community and the provisions of Articles 300 and 307 of the EC Treaty. Because it derogates from the rule that the Community is exclusively competent to conclude international agreements on these matters, the proposed procedure must be regarded as an exceptional measure and must be limited in scope and in time.
- (10) According to the recitals of Regulations of the European Parliament and of the Council (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II)¹⁵ and No 593/2008 on the law applicable to contractual obligations (Rome I)¹⁶, the Commission should make a proposal to the European Parliament and the Council concerning the procedures and conditions according to which Member States would be entitled to negotiate and conclude on their own behalf agreements with third countries containing provisions on the law applicable to non-contractual or contractual obligations.
- (11) According to these Regulations, the proposed mechanism should apply only to agreements in individual and exceptional cases, concerning sectoral matters and containing rules in the fields covered by these instruments.

¹⁵ OJ L 199, 31.7.2007, p. 40.

¹⁶ OJ L 177, 4.7.2008, p. 6.

- (12) In order to ensure that an agreement proposed by a Member State does not render Community law ineffective and undermine the proper functioning of the system established by its rules, authorisation should be required both in order to start or continue negotiations and to conclude an agreement. This will enable the Commission to assess the expected impact of the (possible) outcome of negotiations on Community law. In relevant cases, the Commission can propose negotiating guidelines or request the inclusion of particular clauses in the proposed agreements.
- (13) In order to ensure that the agreement does not constitute an obstacle to the implementation of the Community's external policy on judicial cooperation in civil and commercial matters, the agreement should provide for its denunciation, when a Community agreement with the same third country on the same subject matters of applicable law is concluded.
- (14) It is necessary to provide for transitional measures to cover situations where, at the time of the entry into force of this Regulation, Member States are in the process of negotiations with a third country or have concluded the negotiations but have not yet expressed their consent to be bound by the agreement.
- (15) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission¹⁷.
- (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) The United Kingdom and Ireland, 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 the Treaty establishing the European Community, are taking part in the adoption and application of this Regulation, in so far as they took part in the adoption and application of the Regulations covered by this Regulation or have accepted the former Regulations after their adoption.
- (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 bilateral agreement between that Member State and a third country, or to

¹⁷ OJ L 184, 17.7.1999, p. 23.

negotiate and conclude a new bilateral agreement subject to the conditions laid down in the following provisions.

2. This Regulation shall apply to bilateral agreements between Member States and third countries concerning sectoral matters and covering applicable law in civil and commercial matters, and falling, entirely or partly, within the scope of Regulation (EC) No 593/2008 on the law applicable to contractual obligations and Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations.

Article 2

Definitions

1. For the purposes of this Regulation, the term "agreement" shall be understood as meaning bilateral agreement between a Member State and a third country.
2. For the purposes of this Regulation, "Member State" shall mean any Member State other than Denmark.

Article 3

Notification to the Commission

1. Where a Member State intends to enter negotiations with a third country to amend an existing agreement, or to conclude a new agreement falling within the scope of this Regulation, it shall notify the Commission of its intention in writing.
2. The notification shall include a copy of the existing agreement, the draft agreement or the draft proposal by the third country concerned, if available, and any other relevant documentation. The Member State shall describe the objectives of the negotiations and shall specify the issues which are to be addressed, or the provisions of the existing agreement, which are to be amended, and shall provide any other relevant information.
3. The notification shall be made at least three months before formal negotiations are scheduled to commence with the third country concerned.

Article 4

Assessment by the Commission

1. Upon notification, the Commission shall make an assessment as to whether the Member State can pursue negotiations with the third country concerned. If the Community has already concluded any agreement with the third country concerned on the same subject matters, the application of the Member State will be automatically rejected by the Commission.

2. If the Community has not yet concluded an agreement with the third country concerned, the Commission shall in making its assessment first check whether any relevant Community agreement with the third country concerned is expected in the near future. If this is not the case, the Commission may grant authorisation, provided that the following two conditions are met:
 - (a) the Member State concerned has demonstrated that there is a specific interest in concluding the bilateral sectoral agreement with the third country, related in particular to the existence of economic, geographic, cultural or historical ties between the Member State and that third country; and
 - (b) the Commission determines that the proposed agreement is of limited impact on the uniform and consistent application of the Community rules in place and on the proper functioning of the system established by those rules.

Article 5

Authorisation to open negotiations

1. If the Commission concludes that there are no obstacles to the agreement in the light of the conditions referred to in Article 4, it may authorise a Member State to open negotiations on the agreement with the third country concerned. If necessary, the Commission may propose negotiating guidelines and can request the inclusion of particular clauses in the proposed agreement.

The agreement shall provide for the clause on its denunciation in the event that the Community concludes an agreement with the same third country on the same subject matter. The agreement shall include the following clause: "(the name of Member State) will denounce the agreement when the European Community concludes an agreement with (the name of the third country) on the same subject matters of civil justice as governed by the present agreement".

2. If the Commission concludes that there are obstacles to the agreement in the light of the conditions referred to in Article 4, the Member State shall not be authorised to open negotiations with the third country.
3. The Commission shall take a decision on the authorisation referred to in paragraphs 1 and 2 in accordance with the procedure referred to in Article 8(2).

The Commission shall give its decision on the application of the Member State within six months of receipt of the notification referred to in Article 3.

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. If the Commission does not participate as an observer, it shall be kept informed of the progress and results throughout the different stages of negotiations.

Article 7

Authorisation to conclude the agreement

1. Before initialling the agreement, the Member State concerned shall notify the Commission of the outcome of negotiations and shall transmit the text of the agreement to the Commission.
2. Upon notification the Commission shall make an assessment as to whether the negotiated agreement complies with its initial assessment. In making this further assessment the Commission must examine whether the proposed agreement includes the requirements made by the Commission, in particular as regards the inclusion of clauses referred to in Article 5(1) and whether the conclusion of the proposed agreement would render the Community law ineffective and would undermine the proper functioning of the system established by its rules.
3. If the Commission takes the view that the negotiations have resulted in an agreement which does not fulfil the requirements referred to in paragraph 2, the Member State shall not be authorised to conclude the agreement.
4. If the Commission takes the view that the negotiations have resulted in an agreement which fulfils the requirements referred to in paragraph 2, the Member State may be authorised to conclude the agreement.
5. The Commission shall take a decision on the authorisation referred to in paragraphs 3 and 4 in accordance with the procedure referred to in Article 8(3).

The Commission shall give its decision on the application of the Member State within six months of receipt of the notification referred to in paragraph 1.

Article 8

Committee procedure

1. The Commission shall be assisted by a committee, established under Council Regulation (EC) No [...] establishing a procedure for negotiation and conclusion of bilateral agreements between Member States and third countries 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.

2. Where reference is made to this paragraph, the advisory procedure laid down in Article 3 of Decision 1999/468/EC shall apply, in compliance with Article 7 and Article 8 thereof.
3. Where reference is made to this paragraph, the management procedure laid down in Article 4 of Decision 1999/468/EC shall apply, in compliance with Article 7 and Article 8 thereof.
4. The period provided for in Article 4 (3) of Decision 1999/468/EC shall be three months.

Article 9

Transitional provisions

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

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

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) and Article 7(2) to (5) shall apply.

When deciding whether or not to authorise conclusion of the agreement, the Commission shall also assess whether or not there are any obstacles to the agreement in the light of the conditions referred to in Article 4.

Article 10

Review

No later than the 1st January 2014 the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on application of this Regulation, which may be accompanied by an appropriate legislative proposal.

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*.

It shall apply until 31 December 2014.

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

Done at Brussels,

For the European Parliament
The President
[...]

For the Council
The President
[...]