EUROPEAN PARLIAMENT

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Committee on Legal Affairs

2008/0259(COD)

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***I
DRAFT REPORT

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))

Committee on Legal Affairs

Rapporteur: Tadeusz Zwiefka

Symbols for procedures

*	Consultation procedure *majority of the votes cast*
**I	Cooperation procedure (first reading) *majority of the votes cast*
**II	Cooperation procedure (second reading) *majority of the votes cast, to approve the common position* *majority of Parliament's component Members, to reject or amend the common position*
***	Assent procedure *majority of Parliament's component Members except in cases covered by Articles 105, 107, 161 and 300 of the EC Treaty and Article 7 of the EU Treaty*
***I	Codecision procedure (first reading) *majority of the votes cast*
***II	Codecision procedure (second reading) *majority of the votes cast, to approve the common position* *majority of Parliament's component Members, to reject or amend the common position*
***III	Codecision procedure (third reading) *majority of the votes cast, to approve the joint text*

(The type of procedure depends on the legal basis proposed by the Commission.)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics.*** In the case of amending acts, passages in an existing provision that the Commission has left unchanged, but that Parliament wishes to amend, are highlighted in **bold**. Any deletions that Parliament wishes to make in passages of this kind are indicated thus: [...]. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). Suggested corrections of this kind are subject to the agreement of the departments concerned.

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

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 (A6-0000/2009),

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.

Amendment 1

Proposal for a regulation
Recital 9

Text proposed by the Commission	*Amendment*
(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	(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***.	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.

Or. en

Justification

This amendment is necessary as a result of the deletion of the second paragraph of Article 11.

Amendment 2

Proposal for a regulation
Recital 11

Text proposed by the Commission	*Amendment*
(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.	(11) According to ***those*** 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 ***those*** instruments. ***For the purposes of this Regulation, it is appropriate to construe the term "sectoral" as meaning "particular". The Regulation should also cover intra-regional agreements***.

Or. en

Justification

Without further clarification, the term "sectoral" could give rise to considerable legal uncertainty and restrict the utility of the Regulation to such an extent as to render it virtually otiose. This change of terminology should apply throughout the Regulation, in particular in the title.

There is a manifest need for these arrangements also to cover intra-regional agreements.

Amendment 3

Proposal for a regulation
Article 1 – paragraph 2

Text proposed by the Commission	*Amendment*
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.	2. This Regulation shall apply to bilateral ***and intra-regional*** agreements between Member States and third countries concerning ***particular*** 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.

Or. en

Justification

Without further clarification, the term "sectoral" could give rise to considerable legal uncertainty and restrict the utility of the Regulation to such an extent as to render it virtually otiose. This change of terminology should apply throughout the Regulation, in particular in the title.

Amendment 4

Proposal for a regulation
Article 3 – paragraph 1

Text proposed by the Commission	*Amendment*
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***.	1. Where a Member State intends to enter ***into*** 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 ***application by letter or by electronic means***.

Or. en

Justification

It is necessary to rectify the inconsistency with the second subparagraph of Article 5(3), which provides that "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" and to specify the formalities for notification (writing or electronic mail).

Amendment 5

Proposal for a regulation
Article 4 – paragraph 2 – introductory wording

Text proposed by the Commission	*Amendment*
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:	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 ***specifically envisaged within the next twelve months***. If this is not the case, the Commission ***shall check*** that the following two conditions are met:

Or. en

Justification

The words "the Commission may grant authorisation" are apt to create difficulties in connection with Article 5 on "Authorisation to open negotiations". With the wording proposed, it is clear that once the Commission has carried out the check provided for in Article 4 and found that the conditions are met, it will proceed to authorise the opening of negotiations.

Amendment 6

Proposal for a regulation
Article 4 – paragraph 2 – point b

Text proposed by the Commission	*Amendment*
(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	(b) the Commission determines that the proposed agreement ***does not have a significant*** impact on the uniform and consistent application of the Community

proper functioning of the system established by those rules.	rules in place and on the proper functioning of the system established by those rules.

Or. en

Justification

If strictly construed, the words "limited impact" could render the Regulation largely useless in practice.

Amendment 7

Proposal for a regulation
Article 5 – paragraph 1 – subparagraph 1

Text proposed by the Commission	*Amendment*
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.	1. If the ***conditions referred to in Article 4(2) are met, the*** Commission ***shall*** authorise a Member State to open negotiations on the agreement with the third country concerned. If necessary, the Commission may propose guidelines and can request the inclusion of particular clauses in the proposed agreement.

Or. en

Justification

This paragraph raises the question of the Commission's discretion to refuse authorisation even where the Member State has met the conditions required in order to open negotiations. Such a power would appear abusive and hence "may authorise" should be replaced by "shall authorise".

It is noted that the terminology as between the different language versions differs considerably: for instance, the French version reads "directives de negotiation" in contrast with the English "negotiating guidelines" and has "exiger l'inclusion de clauses particulières" whereas the English reads "request the inclusion of particular clauses". The French version must be aligned with the English, since the former is inconsistent with the Commission's status as observer. This observation also applies to the second subparagraph of Article 9(1), which also refers to "directives de negotiation".

Amendment 8

Proposal for a regulation
Article 5 – paragraph 3 – subparagraph 2

Text proposed by the Commission	*Amendment*
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.	The Commission shall give its decision on the application of the Member State within ***three*** months of receipt of the notification referred to in Article 3.

Or. en

Justification

For the sake of the internal consistency of the Regulation and credibility vis-à-vis third countries, this time limit should be aligned with Article 3(3).

Amendment 9

Proposal for a regulation
Article 7 – paragraph 2

Text proposed by the Commission	*Amendment*
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.	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 ***has a significant 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.

Or. en

Justification

This amendment is also designed to produce internal consistency within the Regulation. The criteria set out in Article 7 should be the same as those set out in Article 4. Consequently, this amendment simply takes over the wording of Article 4.

Amendment 10

Proposal for a regulation
Article 7 – paragraph 4

Text proposed by the Commission	*Amendment*
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.	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 ***shall*** be authorised to conclude the agreement.

Or. en

Justification

This Commission shall have no discretion at this stage.

Amendment 11

Proposal for a regulation
Article 7 – paragraph 5 – subparagraph 1

Text proposed by the Commission	*Amendment*
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)***.	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(2)***.

Or. en

Amendment 12

Proposal for a regulation
Article 8

Text proposed by the Commission	*Amendment*
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.	1. The Commission shall be assisted by a committee, ***set up pursuant to this Regulation, which shall also be used for*** 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.	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***.	3. ***The committee shall take its decisions in accordance with the written procedure provided for in Article 22 of Council Decision 2006/683/EC, Euratom of 15 September 2006 adopting the Council's Rules of Procedure***[1].
4. The period provided for in Article 4 (3) of Decision 1999/468/EC shall be ***three months***.	4. The period provided for in Article 4 (3) of Decision 1999/468/EC shall be ***one month***.
	[1] OJ L 285, 16.10.2006, p. 47.

Or. en

Justification

The proposed comitology procedure (a combination of the advisory and the management procedures) is disproportionately cumbrous and slow.

Amendment 13

Proposal for a regulation
Article 9 – paragraph 1 – subparagraph 2

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

Or. en

Justification

See the justification for the amendment to the first subparagraph of Article 5(1).

Amendment 14

Proposal for a regulation
Article 10

Text proposed by the Commission	*Amendment*
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.	No later than ***1*** 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***, in particular on the possible extension of its scope to other legislative instruments, such as Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters***[1]. ***The Commission's current review of Regulation (EC) No 44/2001 shall be extended to take this question fully into account.*** ***[1] OJ L 12, 16.1.2001, p. 1.***

Or. en

Justification

This interest in subsequently extending this Regulation to take in jurisdiction and recognition and enforcement of judgments is manifest.

Amendment 15

Proposal for a regulation
Article 11 – paragraph 2

Text proposed by the Commission	*Amendment*
It shall apply until 31 December 2014.	***deleted***

Or. en

Justification

This need for such a sunset clause is not apparent. In any event 31 December 2014 is unrealistic having regard the time needed to adopt the Regulation and for Member States to conduct negotiations with third countries, particularly in view of the ponderous, time-consuming procedures laid down in the Regulation. In any event, the review clause set out in Article 10, which provides for the Commission to report to the other institutions by 1 January 2014, makes this sunset clause unnecessary.

EXPLANATORY STATEMENT

Apart from the *acquis communautaire*, the field of civil justice is also characterised by a number of bilateral agreements concluded by Member States with third countries prior to the entry into force of the relevant provisions of the Amsterdam Treaty or prior to their accession to the 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 Title IV of the EC Treaty.

In Opinion 1/03 of 7 February 2006 relating to the conclusion of the new Lugano Convention[1], the Court of Justice held that the Community has acquired exclusive competence to conclude international agreements with third countries, on matters affecting the rules set out *inter ali*a 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 analysis of the provisions of the new Lugano Convention relating to the rules on jurisdiction showed that those provisions affected the uniform and consistent application of the Community rules on jurisdiction and the proper functioning of the system established by those rules. With regard to the proposed Convention's rules on recognition and enforcement of judgments the Court came to a similar conclusion. It found that the Community rules on the recognition and enforcement of judgments were indissociable from those on the jurisdiction of courts, with which they formed 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.

Consequently, the Commission considers that 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. It must be noted, however, that not all commentators agree with the view taken by the Court in Opinion 1/03[2]. Moreover, it is interesting to note the provisions of Articles 3[3] and 4[1] of the Treaty on the functioning of the European Union.

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[1] [2006] ECR I-1145.

[2] See, for instance, the annotation by Ulrich G. Schroeter (Freiburg) in *European Community Private Law Review* (GPR) 2006, 203 *et seq*, which criticises the Court's reasoning, arguing that it failed to show that Regulation No 44/2001 would be affected by the new Lugano Convention, that it should have scrutinised the EC's internal competence to regulate relations with non-member countries and that it misunderstood the legal relevance of "disconnection clauses". It is also hard to see how exclusive Community competence can be squared with the Danish opt-out.

[3] Article 3

1. The Union shall have exclusive competence in the following areas:

(a) customs union;

(b) the establishing of the competition rules necessary for the functioning of the internal market;

The Commission takes the view that it is necessary to assess whether there 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.

The rapporteur is supportive of the proposed regulation as a potential means of mitigating the inflexibility imposed on Member States by the doctrine of pre-emption in the field of the external competence. This doctrine prevents Member States from entering into useful bilateral and intra-regional agreements with non-member countries falling within that competence. No other solution to this quandary can be envisaged, since the Commission does not have the staff or the time to negotiate Community agreements and moreover in the great majority of cases no Community interest exists in the type of bilateral agreements in question.

However, what the Commission has proposed is limited in scope and, for this reason, your rapporteur has proposed that the review clause also cover a possible future extension to jurisdiction and recognition and enforcement of judgments. The fortunate fact that the Commission is undertaking a review of Regulation (EC) No 44/2001 ("Brussels I") may be of considerable assistance in this regard.

(c) monetary policy for the Member States whose currency is the euro;
(d) the conservation of marine biological resources under the common fisheries policy;
(e) common commercial policy.
2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope. (emphasis supplied)

[1] Article 4
1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.
2. Shared competence between the Union and the Member States applies in the following principal areas:
(a) internal market;
(b) social policy, for the aspects defined in this Treaty;
(c) economic, social and territorial cohesion;
(d) agriculture and fisheries, excluding the conservation of marine biological resources;
(e) environment;
(f) consumer protection;
(g) transport;
(h) trans-European networks;
(i) energy;
(j) area of freedom, security and justice;
(k) common safety concerns in public health matters, for the aspects defined in this Treaty.
3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.
4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs. (emphasis supplied)

The rapporteur has also made other changes intended to make the Regulation more effective: he has altered the reference to "sectoral matters" in order to provide for a greater degree of legal certainty, tightened up the time limits and removed some of the more cumbersome aspects of the procedure.

He has also removed the Commission's discretion with regard to authorising the conclusion of an agreement. As the proposal stood, the Commission could refuse authorisation to conclude a bilateral agreement even if it fulfilled all the conditions required for initial authorisation. This could have caused major diplomatic problems with the third country concerned.

Lastly, the rapporteur would note that his amendments are mirrored in his draft opinion on the parallel proposal for a regulation establishing a procedure for negotiation and conclusion of bilateral agreements 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.