Regulation (EC) No 662/2009 of the European Parliament and of the Council of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations

REGULATION (EC) No 662/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 13 July 2009

establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission,

Acting in accordance with the procedure laid down in Article 251 of the Treaty[(1)],

Whereas:

(1) Title IV of Part Three of the Treaty provides the legal basis for the adoption of Community legislation in the field of judicial cooperation in civil matters.

(2) Judicial cooperation in civil matters between Member States and third countries has traditionally been governed by agreements between Member States and third countries. Such agreements, of which there is a large number, often reflect special ties between a Member State and a third country and are intended to provide an adequate legal framework to meet specific needs of the parties concerned.

(3) Article 307 of the Treaty requires Member States to take all appropriate steps to eliminate any incompatibilities between the Community *acquis* and international agreements concluded between Member States and third countries. This may involve the need for the re-negotiation of such agreements.

(4) In order to provide an adequate legal framework to meet specific needs of a given Member State in its relations with a third country, there may also be a manifest need for the conclusion of new agreements with third countries relating to areas of civil justice that come within the purview of Title IV of Part Three of the Treaty.

(5) In its Opinion 1/03 of 7 February 2006 relating to the conclusion of the new Lugano Convention, the Court of Justice of the European Communities confirmed that the Community has acquired exclusive competence to conclude an international agreement like the Lugano Convention with third countries on matters affecting the rules laid down in Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the

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recognition and enforcement of judgments in civil and commercial matters[(2)] (Brussels I).

(6) It is for the Community to conclude, pursuant to Article 300 of the Treaty, agreements between the Community and a third country on matters falling within the exclusive competence of the Community.

(7) Article 10 of the Treaty requires Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty. This duty of loyal cooperation is of general application and does not depend on whether or not the Community competence is exclusive.

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

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

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

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

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

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

(13) If the Commission requests additional information from a Member State in connection with its assessment as to whether that Member State should be authorised to open negotiations with a third country, such a request should not affect the time limits within which the Commission is to give a reasoned decision on the application of that Member State.

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

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

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

(17) The European Parliament, the Council and the Commission should ensure that any information identified as confidential is treated in accordance with Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents[(3)].

(18) Where the Commission, on the basis of its assessment, intends not to authorise the opening of formal negotiations or the conclusion of a negotiated agreement, it should, before giving its reasoned decision, give an opinion to the Member State concerned. In the case of refusal to authorise the conclusion of a negotiated agreement the opinion should also be submitted to the European Parliament and to the Council.

(19) In order to ensure that the negotiated agreement does not constitute an obstacle to the implementation of the Community's external policy on judicial cooperation in civil and commercial matters, the agreement should provide either for its full or partial denunciation in the event of the conclusion of a subsequent agreement between the Community or the Community and its Member States, on the one hand, and the same third country, on the other hand, on the same subject matter, or for a direct replacement

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of the relevant provisions of the agreement by the provisions of such subsequent agreement.

(20) Provision should be made for transitional measures to cover situations where, at the time of the entry into force of this Regulation, a Member State has already started the process of negotiating an agreement with a third country, or has completed the negotiations but has not yet expressed its consent to be bound by the agreement.

(21) In order to ensure that sufficient experience has been gained concerning the application of this Regulation, the Commission should submit a report on such application no earlier than eight years after the adoption of this Regulation. In that report, the Commission, exercising its prerogatives, should confirm the temporary nature of this Regulation or examine whether this Regulation should be replaced by a new Regulation covering the same subject matter or including also particular matters falling within the exclusive competence of the Community and governed by other Community instruments, as referred to in recital 5.

(22) If the report submitted by the Commission confirms the temporary nature of this Regulation, Member States should still be able, after the submission of the report, to notify the Commission of ongoing or already announced negotiations with a view to obtaining an authorisation to open formal negotiations.

(23) 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.

(24) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland have given notice of their wish to take part in the adoption and application of this Regulation.

(25) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application,

HAVE ADOPTED THIS REGULATION:

Article 1

Subject matter and scope

1 This Regulation establishes a procedure to authorise a Member State to amend an existing agreement or to negotiate and conclude a new agreement with a third country, subject to the conditions laid down in this Regulation.

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

2 This Regulation shall apply to agreements concerning particular matters falling, entirely or partly, within the scope of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)[4]

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and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)[(5)].

3 This Regulation shall not apply if the Community has already concluded an agreement with the third country concerned on the same subject matter.

Article 2

Definitions

1 For the purposes of this Regulation, the term 'agreement' shall mean:

a a bilateral agreement between a Member State and a third country;

b a regional agreement between a limited number of Member States and of third countries neighbouring Member States which is intended to address local situations and which is not open for accession to other States.

2 In the context of regional agreements as referred to in paragraph 1(b), any reference in this Regulation to a Member State or a third country shall be read as referring to the Member States or the third countries concerned, respectively.

Article 3

Notification to the Commission

1 Where a Member State intends to enter into negotiations in order to amend an existing agreement or to conclude a new agreement falling within the scope of this Regulation, it shall notify the Commission in writing of its intention at the earliest possible moment before the envisaged opening of formal negotiations.

2 The notification shall include, as appropriate, a copy of the existing agreement, the draft agreement or the draft proposal, and any other relevant documentation. The Member State shall describe the subject matter of the negotiations and specify the issues which are to be addressed in the envisaged agreement, or the provisions of the existing agreement which are to be amended. The Member State may provide any other additional information.

Article 4

Assessment by the Commission

1 Upon receipt of the notification referred to in Article 3, the Commission shall assess whether the Member State may open formal negotiations.

2 In making that assessment, the Commission shall first check whether any relevant negotiating mandate with a view to concluding a Community agreement with the third country concerned is specifically envisaged within the next 24 months. If this is not the case, the Commission shall assess whether all of the following conditions are met:

a the Member State concerned has provided information showing that it has a specific interest in concluding the agreement due to economic, geographic, cultural, historical, social or political ties between the Member State and the third country concerned;

b on the basis of the information provided by the Member State, the envisaged agreement appears not to render Community law ineffective and not to undermine the proper functioning of the system established by that law; and