



**COUNCIL OF
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The text of this document is identical to the previous version.



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Brussels, 23 May 2001

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CONFIDENTIAL

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NOTE

from : Coreper (Second part)

to : Council

No. Cion prop. : 6972/01 JUSTCIV 30

Subject : Recommendation for a Council Decision on the opening of negotiations, within the framework of the Hague Conference, for a worldwide Convention on jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters

1. Negotiations have been taking place for several years in the framework of the Hague Conference on Private International Law on a Convention on jurisdiction and foreign Judgments in civil and commercial matters.

2. The Special Commission on General Affairs and Policy of the Hague Conference agreed in May 2000 that the Diplomatic Conference devoted to drawing up such a Convention should be divided into two sessions:
 - the first session, which will take place from the 6 to 20 June 2001, will discuss proposals that have been made, but without decisions being taken at this session, unless consensus or a near consensus is reached on certain proposals;

- the second session, which will take place late this year or at the beginning of next year, will proceed according to the normal rules for Diplomatic Conferences.
3. On 7 March 2001 the Commission submitted to the Council a Recommendation for a Council Decision on the opening of negotiations, within the framework of the Hague Conference, for a worldwide Convention on jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters.
 4. It is recalled that the United Kingdom and Ireland will take part in the adoption and application of this Decision.
 5. Denmark, 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, will not participate in the adoption of this Decision.
 6. At its meeting on 23 May 2001, Coreper noted that there was agreement on all provisions of the proposed Decision and took note of the unilateral statements set out in Annex III to this document.
 7. However, Coreper agreed that this item should be submitted as a “B” point in the agenda of the JHA Council on 28 May 2001 in order to allow the French delegation to express its views on the Directives for negotiations.
 8. On the basis of the foregoing, the Council is called to:
 - adopt the Directives for negotiations, as set out in Annex I;
 - authorise the opening of the negotiations in accordance with the joint Council and Commission statement, set out in Annex II, and agreed at the Council on 22 December 2000 when adopting the Regulation (EC) N° 44/2001;
 - take note of the statements set out in Annex III, relating to the Directives for negotiations.

1.1 The negotiating method

1. While respecting the Treaty, and in particular Article 300 thereof, the negotiations will be conducted according to the procedures laid down in point 4 of the Joint Council and Commission Statement on the negotiations within the framework of the Hague conference on Private International Law, issued on the adoption of Regulation (EC) N° 44/2001 and reproduced in Annex II.
2. These Directives for negotiations are devised for the first part of the Nineteenth Session of the Hague Conference on Private International Law that will take place in June and may be reviewed in the light of these negotiations. Therefore, the Council and the Commission will consider the results of this working method at the close of the first part of the Nineteenth Session.

1.2 Substance

1.2.1 General principles

3. The general structure of the Preliminary draft Convention adopted by the Special Commission of the Hague Conference on 30 October 1999 must be preserved, insofar as it establishes a so-called "mixed Convention". Thus, the Convention shall provide for direct grounds of jurisdiction ("white list"), a list with prohibited grounds of jurisdiction ("black list"), the possibility to use rules of jurisdiction under national law, provided that this is not prohibited by the Convention ("grey area") and rules on recognition and enforcement of decisions given by a court in a Contracting state.
4. The Convention must be a balanced text which, in exchange for an open system of circulation of judgments, lays down appropriate rules of jurisdiction, which are as clear and precise as possible, guaranteeing the litigant adequate legal certainty and predictability. In addition, the text must balance the objectives that need to be reached, in particular the protection of certain categories of parties, such as consumers, and the need to make sure that competitive disadvantages for Community litigants are not introduced or exacerbated.
5. The negotiations must aim for the widest possible consensus between the participating States, so as to maximise the chances of a wide subsequent ratification and provide for a broad worldwide application of the Convention to the benefit of Community litigants. However, these objectives must not jeopardise the search for a balanced and adequate text according to the principles laid down in these directives. Furthermore, the objective to reach wide consensus should not preclude, at the first session of the Diplomatic Conference, the use of more than one option.

6. The negotiations must be founded on the general principle that on-line and off-line relationships should be given equivalent legal certainty.

1.2.2 Accession Clause

7. The Convention must contain a clause permitting the accession of regional economic integration organisations, in particular the European Community.

1.2.3 Disconnection

8. The Convention must contain a disconnection clause which ensures a smooth link between the instruments of Community law and the Convention and, as far as possible and where appropriate, safeguards the application of current or future Community instruments, in particular the rules contained in Regulation (EC) N° 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and in sectoral instruments containing rules on the international jurisdiction of courts.
9. The disconnection clause must also take into consideration the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, the special relations with Denmark and with the contracting States to the Lugano Convention.
10. A formal proposal for the text of the disconnection clause should be presented after the draft text of the Convention is sufficiently stabilised and after this text and the relevant Community law has been carefully evaluated. In any event, it will not be possible for the text of the disconnection clause to be agreed until the rules on jurisdiction are established.

Jurisdiction

11. With regard to jurisdiction, the defendant's domicile should be the essential criterion.
12. Where the defendant is domiciled in the territory of a State bound by a European instrument indicated in paragraphs 8 and 9, the European instrument should apply. Exceptions should however be made to this principle. In particular, the Convention should apply:
 - a) where a prorogation agreement designates a court in a Contracting State not bound by a European instrument, unless such an agreement violates rules in the European instrument protecting consumers, employees or insured persons;
 - b) where a court in a Contracting State not bound by a European instrument has jurisdiction under the Convention due to the appearance of the defendant;
 - c) where the court to which the Convention grants exclusive jurisdiction is a court in a State not bound by a European instrument;

13. Furthermore, the Convention must safeguard the protection that consumers, employees and insured persons are guaranteed by Community legislation, within its scope of application.
14. Where the defendant is habitually resident in the territory of a Contracting State not bound by a European instrument, the Convention should apply. Exceptions should however be made to this principle. In particular, it is necessary for European instruments to apply:
 - a) where a court situated in a State bound by a European instrument has exclusive jurisdiction according to the rules of that instrument;
 - b) where a court in a State bound by a European instrument has jurisdiction due to an express prorogation agreement, or due to the appearance of the defendant;
 - c) in the event of *lis pendens* and related actions between two courts in States bound by a European instrument.
15. Where the court asked to decline jurisdiction in exceptional circumstances is a court in a Contracting State not bound by a European instrument, the Convention should apply, regardless of where the defendant is domiciled or habitually resident.
16. Where the court asked to decline jurisdiction in exceptional circumstances is a court in a Contracting State bound by a European instrument, the European instrument should apply,
 - a) where the plaintiff and the defendant are both domiciled in States bound by a European instrument;
 - b) where the court is asked to decline jurisdiction in favour of a court in another State bound by a European instrument.

Recognition and enforcement

17. With regard to recognition and enforcement, where a judgment is given by a court of a State bound by a European instrument, that judgment is to be recognised or enforced in another European State according to the rules of such instrument. Further consideration should be done on the possibility to control the use of jurisdiction grounds prohibited by the "black list" under the Convention.
18. However, where a judgment is given by a court of one Member State of the European Community, that judgment is to be recognised and enforced in another Member State according to the Community rules.

19. A decision handed down in a State bound by a European instrument should be recognised and enforced in a Contracting State not bound by a European instrument, in accordance with the rules laid down in the Convention. Furthermore, a decision handed down in a Contracting State not bound a European instrument, should be recognised in all the contracting States, including the States bound by a European instrument, in accordance with the rules laid down in the Convention.

Special areas of community legislation

20. The Convention should not preclude the application in the Member States of provisional or protective measures, according to rules laid down in Community law.
21. The Convention should not preclude the application of rules on jurisdiction, recognition and enforcement contained in existing or future Community instruments concerning industrial property rights.

1.2.4 Rules relating to jurisdiction

22. The jurisdiction rules must be established by general and special heads of jurisdiction and give solutions which strike a balance between the interests involved.
23. The heads of jurisdiction specified in Community law must as far as possible be included in the list of the heads of jurisdiction required by the Convention (white list); in any event, it is essential that the application of all the heads of jurisdiction specified in Community law is safeguarded, even when these judgments cannot be recognised or enforced under the Convention.
24. The Convention must provide for a general forum corresponding to the defendant's place of residence, such as the habitual residence or domicile which, which regard to natural persons, should not imply the multiplication of fora.
25. The Convention must provide for special heads of jurisdiction at least with regard to torts or delicts and contracts.
26. All efforts have to be made to include in the Convention specific rules on consumer and employment disputes. These rules must ensure adequate protection of consumers and employees.
27. The Convention must contain rules of exclusive jurisdiction on matters relating to rights in rem in immovable property. Further consideration should be done on the possibility to include rules of exclusive jurisdiction on the validity, nullity or dissolution of legal persons and the validity or nullity of entries into public registers.

28. The Convention should include special jurisdiction rules at least for proceedings relating to the registration, validity, nullity or revocation of patents, trade marks, designs or other similar rights required to be deposited or registered, establishing exclusive jurisdiction of the courts of the Contracting State in which the deposit or registration has been applied for or has taken place. Exceptions might be necessary where the matters referred to arise as incidental questions.
29. The concept of activity based jurisdiction, that is a ground of jurisdiction connected with the defendant's activity in the State of the forum, is undesired. If however, in trying to reach broad consensus, the inclusion of an activity-based jurisdiction in the Convention is unavoidable for contracts, such an inclusion would have to meet the requirements indicated in paragraph 30.
30. Firstly, it would be necessary to have general "doing business" jurisdiction in the list of prohibited grounds of jurisdiction. Secondly, such a rule would have to be surrounded by all appropriate safeguards to ensure sufficient legal predictability and to avoid as far as possible disputes relating to jurisdiction. In determining such safeguards, account must be taken in particular of the amount and intensity of the activity establishing jurisdiction and of the link between the activity, the contract and the forum.
31. The Convention must contain a list of prohibited heads of jurisdiction in order to prevent the exercise of jurisdiction when there are no substantial links between a Contracting State and the dispute. The list of prohibited heads of jurisdiction must be non-exhaustive and be completed by a general clause, unless any other solution could be found to that purpose.
32. The list of black-listed fora must be established by seeking a balance between the jurisdiction which the Member State renounce and that which third countries renounce, while also taking into consideration the practical benefits for European litigants stemming from the easier recognition and enforcement of foreign judgments. The overall effect for European litigants must be positive.
33. All efforts should be made to ensure that the Convention provides for the duty of the judge seised to decline jurisdiction automatically in the event of violation of the rules relating to the black-listed fora, where the defendant does not appear.
34. The convention must safeguard the possibility for the Member States of the Union to apply all the heads of jurisdiction provided for by their national law with regard to defendants habitually resident in non-Contracting States.

1.2.5 Procedural rules

35. The Convention must contain clear rules relating to lis pendens.
36. Any power given to the court seised to decline jurisdiction in favour of another equally competent court (forum non conveniens) must be limited to exceptional circumstances and strictly circumscribed. Special attention must be paid to safeguarding the plaintiff's interests. For that purpose, the Convention must include adequate mechanisms to safeguard the plaintiff's legal security when jurisdiction is declined in favour of a court competent under the national law of a Contracting State (the grey area) or in favour of a court in a non-Contracting State. In addition it must not be possible for such a power to be exercised where the plaintiff uses a special protective head of jurisdiction or where the court has exclusive competence under the Convention.

1.2.6 Rules relating to recognition and enforcement

37. The recognition and enforcement of judgments must extend to all judgments based on a jurisdiction rule laid down by the Convention (white list) or on heads of jurisdiction which, in the specific case, prove to conform with these rules.
38. The Convention must safeguard the application of arrangements laid down by national law to all judgments based on jurisdictions not provided for but also not prohibited by the Convention.
39. The Convention must prohibit the recognition and enforcement of all judgments based on jurisdictions prohibited by the Convention. However, this prohibition must not have the effect of preventing the recognition and enforcement in a Member State of the judgments of courts of another Member State.
40. The Convention must contain protective rules which make it possible to monitor compliance by the court of origin, with the rules of jurisdiction laid down by the Convention.
41. The Convention must also contain protective rules which make it possible to monitor compliance, by the court of origin, of the rights of defence, impartiality and fairness of the proceedings and to safeguard the conformity of the proceedings before that court with the fundamental procedural principles of the State addressed. It must also be possible for recognition and enforcement to be refused where the judgment would be inconsistent with a judgment given in the State addressed or likely to be recognised or enforced there, and where recognition or enforcement would be incompatible with the public policy of the State addressed.
42. However, it must not be possible for recognition and enforcement to be refused on the grounds that the court addressed considers that the court of origin should have used the power on declining jurisdiction in favour of another competent court (forum non conveniens).

43. If copyrights and related rights are to be included in the Convention, consideration will need to be given to its special features so as to ensure that any appropriate safeguards are put in place.
44. The Convention must make it possible to withhold the recognition and enforcement of judgments awarding non compensatory damages, or at least to confine recognition and enforcement to the amount of similar or comparable damages which could have been awarded to the State addressed.

1.2.7 Other issues

45. Any clause in the Convention dealing with the application of the Convention in relation to certain States must take into account the necessity to protect Community litigants from risks connected with litigation in States where the judicial system does not meet adequate standards, and with recognition and enforcement of judgments from such States.
46. When devising the list of prohibited grounds of jurisdiction consideration should be made to the need to make exceptions for litigation by victims of violations of human rights. Any such exception must be defined narrowly and precisely.
47. Consideration should be made to the need to include a review clause in the Convention.

Extract from the joint Council and Commission Statement on the negotiations within the Framework on the Hague Conference on Private International Law

[...]

4. – Work on drawing up the Hague convention on jurisdiction and foreign judgments in civil and commercial matters began several years ago; it has so far been the Member States which have conducted the negotiations. In order that negotiation of this convention can continue after the Regulation has been adopted, the Council and the Commission have agreed on the following working method.

This method, which is quite without prejudice to the scope of the Community's external powers, is designed to ensure the continuity of the current negotiations, while making sure that Community positions are consistent and that Member States take an effective part in the negotiations.

That working method is as follows:

- The Community negotiating directives, laid down in advance by the Council, may be adjusted and added to in the course of negotiations, in the light of developments. To that end, coordination meetings will be held whenever necessary; they will be convened by the Presidency-in-Office of the Council, at the suggestion of a Member State or of the Commission.
- The Presidency-in-Office of the Council and the Commission will state the Community positions contained in the negotiating directives; to that end, they may submit drafting proposals. Member States may express their own views, as long as these are not incompatible with the negotiating directives laid down by the Council. They may make suggestions and reply to suggestions submitted by other States in the course of negotiation. Written suggestions from Member States will be forwarded to the Presidency-in-Office of the Council and to the Commission in advance.
- Should a serious difficulty arise, owing to a disagreement or to the need to take a new approach which departs from the Community negotiating directives, the matter will be referred to the Council.

The Council and the Commission will consider the results of this working method at the close of the negotiations.

[...]

Declaration by the German Delegation on paragraph 46
of the Directives for negotiations

“In the context of paragraph 46, it should be taken into account that such an exception clause is – in principle – only justified, if and so far as proceedings in another State, that has jurisdiction according to the general rules, are not possible or cannot reasonably be required.”

Declaration by the Netherlands and Belgian Delegations on paragraph 28
of the Directives for negotiations

“The Netherlands and Belgian Delegations can agree with paragraph 28 on the assumption that the wording of this paragraph shall not impede the development of future instruments which provide for jurisdiction rules in the area of intellectual property.”
