



Council of the
European Union

Brussels, 8 June 2017
(OR. en)

7744/16
EXT 1

JUSTCIV 51

PARTIAL DECLASSIFICATION

of document: 7744/16 RESTREINT UE/EU RESTRICTED

dated: 13 April 2016

new status: Public

Subject: Recommendation for a COUNCIL DECISION authorising the opening of negotiations on a Convention on the recognition and enforcement of judgments in civil and commercial matters (the Judgments Convention) in the framework of the Hague Conference on Private International Law

Delegations will find attached the partially declassified version of the above-mentioned document.



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COVER NOTE

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	13 April 2016
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2016) 216 final
Subject:	Recommendation for a COUNCIL DECISION authorising the opening of negotiations on a Convention on the recognition and enforcement of judgments in civil and commercial matters (the Judgments Convention) in the framework of the Hague Conference on Private International Law

Delegations will find attached document COM(2016) 216 final.

Encl.: COM(2016) 216 final



EUROPEAN
COMMISSION

Brussels, 13.4.2016
COM(2016) 216 final

Recommendation for a

COUNCIL DECISION

authorising the opening of negotiations on a Convention on the recognition and enforcement of judgments in civil and commercial matters (the Judgments Convention) in the framework of the Hague Conference on Private International Law

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

- **Reasons for and objectives of the proposal**

The establishment of a multilateral convention on the recognition and enforcement of judgments in civil and commercial matters is part of the Union's policy aimed at increasing growth in international trade and foreign investment and the mobility of citizens around the world, in line with the conclusions of the European Council of 18-19 October 2012¹, the various new trade initiatives with important partners such as US, Japan, India, Canada, individual ASEAN countries. The increase in international trade, foreign investment, and global mobility of citizens increases the legal risks for those companies and citizens involved and the potential costs of protecting international investments. Businesses transacting internationally seek legal certainty. The need for legal certainty does not only arise for companies but equally for workers, consumers, and citizens generally travelling and having civil and commercial relations outside the European Union. The Judgments Convention would contribute to create a stable and predictable legal environment globally both for EU citizens and EU companies operating in third countries, thus promoting trade and economic growth.

Today, each State determines whether and under which conditions its courts exercise jurisdiction and judgments emanating from other States may be recognised and enforced in its jurisdiction.² This situation creates legal uncertainty, which does not benefit international trade and commerce. Indeed, the absence of a recognition and enforcement regime at international level means that EU parties cannot foresee, today, whether the judgment which they obtained in a dispute will be recognised and enforced in a third State where they may need to seek recognition and enforcement. Parties may have to duplicate legal proceedings in order to enforce their rights. This does entail not only legal uncertainty but a waste of costs and time. The costs and time involved vary and in particular depend on the States which are concerned, on the organisation and effectiveness of their legal system and their procedure.

The 81 world-wide members from the Hague Conference on Private International Law approved the opening of negotiations on the draft Convention on 17 March 2016. Following a mandate given by the Council of General Affairs and Policy ('the Hague Council') of the Hague Conference in 2012, a Working Group was established for the development of a draft text of the Convention on the recognition and enforcement of judgments. The EU, along with several other Members of the Hague Conference, such as USA, China, Brazil, Canada, Russia, Korea, Australia, Japan, and India participated in the preparatory work carried out by the Group. The Group finalised its work in October 2015 and delivered an informal draft text of a Convention on recognition and enforcement of judgments in civil and commercial

¹ The Council underlined "that an ambitious trade agenda could lead in the medium term to an overall increase of 2% in growth and the creation of over 2 million jobs" and commended in particular to work towards a comprehensive transatlantic trade and investment agreement.

² In 1971, an international convention was prepared under the auspices of the Hague Conference on Private International Law but this Convention has remained inoperative.

matters³. Following approval by the Council of General Affairs and Policy on 17 March 2016, the formal negotiations will start in a Special Commission of the Hague Conference on 1 June 2016.

- **Consistency with existing policy provisions in the policy area**

The EU has internally a well-developed system of mutual recognition and enforcement of judgments in civil and commercial matters among Member States. This system has been updated most recently (Regulation 1215/2012). No such system exists at the international level. Each State determines whether and under which conditions its courts exercise jurisdiction and judgments emanating from other States may be recognised and enforced in its jurisdiction. This situation creates legal uncertainty, which does not benefit international trade and commerce. The EU has remedied this situation to some extent, by concluding an international convention with the EEA States and Switzerland (the 2007 Lugano Convention).

A first attempt to establish a multilateral framework for the recognition and enforcement of judgments has resulted in the conclusion of the 2005 Choice of Court Agreements Convention. This convention ensures the recognition and enforcement of judgments in cases where the parties have agreed on the court having jurisdiction to hear the dispute. The Union has ratified the Convention in 2015, which has allowed this Convention to enter into force on 1 October 2015. The 2005 Convention is part of the Union *acquis*.

Beyond the 2005 Choice of Court Convention, which has only a limited scope of application, no global multilateral framework for the circulation of judgments exists.

The envisaged multilateral convention would thus complement the existing framework in the Union on the recognition and enforcement of judgments, ensuring the circulation of judgments beyond the existing circulation among EU and EEA States and Switzerland.

- **Consistency with other Union policies**

At external level, the Judgments Project is part of a gradual process of opening up borders for the circulation of judgments world-wide. The process builds on the 2005 Choice of Court Agreements Convention which has entered into force in 2015, aiming at extending the scope of judgments which may circulate among States. It aims to do so without interfering with specialised conventions which may exist in particular areas such as maritime and transport matters.

From the perspective of the Union, the project builds on the internal *acquis*, in particular Regulation 1215/2012 which regulates the matter, albeit in a more integrated manner, within the EU. This *acquis* has been revised recently and the matter of the "internationalisation"

³ It is limited to the recognition and enforcement of judgments. The draft text, submitted by the Working Group for the attention of the Hague Council of March 2016 of the Conference (Preliminary Document No 7A) is available at <https://assets.hcch.net/docs/06811e9c-dddf-4619-81af-71e8836c8d3e.pdf>. The draft text does not provide for any direct rules on jurisdiction of the courts.

of its rules was considered based on a study carried out at the time. The legislator decided, at the time of the revision, not to internationalise the EU rules unilaterally but to strive at a multilateral framework in the context of the Hague Conference. The Judgments Project is the realisation of this political objective set at EU level.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

Since the entry into force of the Amsterdam Treaty, judicial cooperation in civil and commercial matters has been covered by Article 81 of the Treaty on the Functioning of the European Union (TFEU). In line with the European Court of Justice's guidelines in Opinion 1/03 of 7 February 2006 on the competence of the Union to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the negotiation and conclusion of the Judgments Convention comes in the scope of the EU's exclusive external competence. The proposal for a Council Decision on the negotiating directives is thus based on Articles 81 and 218(3) and (4) of the TFEU.

- **Subsidiarity (for non-exclusive competence)**

Not applicable

- **Proportionality**

The objective of the future convention is to ensure the mutual recognition and enforcement of judgments among States. Such mutual recognition can only be achieved on the basis of an international convention concluded between States which commit to mutually recognise each other's judgments.

The possibility to negotiate multilateral or bilateral conventions on recognition and enforcement of judgments is no longer available to the Member States because external competence in matters of international jurisdiction and recognition and enforcement of judgments in civil and commercial matters lies exclusively with the European Union.

Unilateral action at EU level would not reach the objective of reciprocal recognition of judgments: while it would ensure common rules for judgments from third States entering the EU, it would not ensure recognition and enforcement of judgments given by the courts of EU Member States in third States.

Finally, establishing a multilateral framework would be more efficient than entering into negotiations with third States at a bilateral level. Depending on how many States will adhere to the future convention, it would ensure a common legal framework to deal with third State judgments wherever they come from. It would also ensure one common legal framework for EU citizens and companies seeking recognition and enforcement of judgments given by the courts of EU Member States in third States.

- **Choice of the instrument**

Not applicable

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

Not applicable

- **Stakeholder consultations**

On the eve of the start of preparatory work on the Judgments Convention in the Hague Conference, a public consultation of stakeholders and experts took place in 2012-2013 on the basis of a questionnaire on the jurisdiction and the recognition and enforcement of judgments on a world-wide level, prepared by the European Commission.

The questionnaire included questions on the added value of any initiative in this area and the problems the stakeholders encounter due to the lack of regulation at international level. The majority of the replies were received from companies, legal practitioners and the courts. As regards recognition and enforcement of the Member States' courts judgments in third States, the replies showed that various problems exist, such as lack of recognition and enforcement of foreign judgments by a number of third States or the fact that an interested party faces legal uncertainty about the enforcement procedure when seeking recognition and enforcement in third States.

Representatives of several Member States participated as experts in the Working Group that prepared a draft text of the Convention in the framework of the Hague Conference. For the preparation of the recommendation ('the negotiating mandate'), it is not envisaged to consult other stakeholders or the experts.

As to Member States, these were regularly informed and consulted in the Council Working Party on Civil Law Matters (General Questions) on the progress of the preparatory work and the options examined in the Working Group established in the framework of the Hague Conference.

Once negotiations will have started, there will be an opportunity for stakeholders to express their views on the specific provisions of the future instrument which may be of interest to them. The Commission intends to organise dedicated meetings with stakeholders (e.g. on IP, consumer matters, etc.). The Member States equally consult internally as the process develops.

Finally, the work on the Judgments Convention at a global level is in line with the results of the negotiations on the Brussels I Regulation (recast), where the co-legislators agreed that issues of jurisdiction, recognition and enforcement of third States judgments should be dealt at a global level.

- **Collection and use of expertise**

The Commission has relied, in the preparatory work on the Judgments project, on the expertise available at EU level with the recognition and enforcement of judgments in civil and commercial matters. Regulation 1215/2012 is the successor of Regulation (EC) 44/2001, which itself was the successor of the 1968 Brussels Convention on the same subject matter. Extensive guidance by the European Court of Justice exists in relation to the interpretation and application of these instruments at EU level. The existing *acquis* offers a wealth of expertise on the recognition and enforcement of judgments at EU level.

In the preparatory work, the EU delegation included experts from the Member States, including academics and officials from the Ministry of Justice. Extensive legal doctrine exists on the matter of the recognition and enforcement of judgments. The European Group for Private International Law (GEDIP) prepared draft rules on the recognition and enforcement of third State judgments in a proposal from 2010.

- **Impact assessment**

This proposal is not supported by an impact assessment. The Commission envisages carrying out an IA at the stage of signature or ratification of the Judgments Convention by the EU, once it is clear how the system of recognition and enforcement will be designed and what the content of that system will be.

- **Regulatory fitness and simplification**

Not applicable

- **Fundamental rights**

Having a legal framework for the recognition and enforcement of judgments would improve access to justice both in the EU and in third States for citizens and companies involved in cross-border litigation in line with Article 47 of the EU Fundamental Rights Charter (right to an effective remedy and fair trial) through the recognition and enforcement of judgments given by courts which the parties could reasonably have expected to determine their rights and obligations in the circumstances of the particular case. In order for access to justice to be meaningful, a judgment that is rendered by the relevant court must be capable of effective recognition and enforcement.

4. BUDGETARY IMPLICATIONS

Not applicable

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The application of the Judgments Convention will be monitored by the Hague Conference on Private International Law under whose auspices the convention will be concluded. The Hague Conference organises regular meetings (Special Commissions) to discuss and consider any possible problems in the application.

- **Explanatory documents (for directives)**

The future convention will be accompanied by an explanatory report to be drafted by two rapporteurs. This is usual practice in the Hague Conference on Private International Law.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 81, 218(3) and (4) thereof,

Having regard to the proposal from the European Commission,

Whereas:

In 2012, the Council of General Affairs and Policy of the Hague Conference approved the start of preparatory work on a draft convention on the recognition and enforcement of judgments in civil and commercial matters,

The preparatory work was finalised in October 2015,

The Council of General Affairs and Policy approved the launch of negotiations on the convention at its meeting in March 2016,

Negotiations on a Convention on the recognition and enforcement of judgments in civil and commercial matters (the Judgments Convention) in the framework of the Hague Conference on Private International Law will start on 1 June 2016,

The Union should participate in the negotiations on the Judgments Convention,

HAS ADOPTED THIS DECISION:

Article 1

The Commission is hereby authorised to negotiate, on behalf of the Union, a Convention on the recognition and enforcement of judgments in civil and commercial matters (the Judgments Convention).

Article 2

The negotiating directives are set out in the Annex.

Article 3

The negotiations shall be conducted in consultation with the special committee hereby designated pursuant to Article 218(4) of the Treaty.

Article 4

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*

