Council of the
European Union

Brussels, 11 December 2019
(OR. en)

6515/04
DCL 1

JUSTCIV 29

DECLASSIFICATION

of document:	ST 6515/04 RESTREINT UE
dated:	24 February 2004
new status:	Public
Subject:	Draft recommendation for a Council Decision authorising the Commission, on behalf of the European Community, to open negotiations for the adoption of a Convention on Maintenance Obligations in the Hague Conference on Private International Law

Delegations will find attached the declassified version of the above document.

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

COUNCIL OF
THE EUROPEAN UNION

Brussels, 24 February 2004

6515/04

RESTREINT UE

JUSTCIV 29

NOTE

from :	General Secretariat of the Council
to :	Committee on Civil Law Matters (General Questions)
No. prev. doc. :	6512/04 JUSTCIV 28 (RESTREINT UE)
No. Cion prop. :	8187/03 JUSTCIV 60 (RESTREINT UE)
Subject :	Draft recommendation for a Council Decision authorising the Commission, on behalf of the European Community, to open negotiations for the adoption of a Convention on Maintenance Obligations in the Hague Conference on Private International Law

Please find herewith the observations made by delegations in reply to CM 251/04 of 20 January 2004.

CZECH REPUBLIC

We refer to the e-mail of 20 January 2004 in the above mentioned matter and have the honour to inform you that Czech Republic welcomes the negotiation for the Convention on maintenance obligations in the Hague Conference on Private International Law and supports the authorisation the Commission to open the negotiations. Czech Republic has no comments to the proposal on the negotiating directives (doc. 8187/03 JUSTCIV 60 RESTREINT UE).

GERMANY

Germany proposes the following changes and deletions of the negotiations directives:

" (1) The Commission shall ensure that the future Hague Convention on maintenance obligations contains rules of jurisdiction and is as far as possible compatible with the Council Regulation (EC) No 44/2001.The Commission must report to the Council on the results and on any difficulties arising in the course of negotiations.

(2) The Commission shall ensure that the future Hague Convention contains provisions enabling the Community to accede to it."

We would appreciate our proposals to be reflected in the final version of the mandate.

SPAIN

1. Spain is a party to the four Hague Conventions concerning maintenance and to the New York Convention on the same subject; this shows the importance attached by it to the matter, with the introduction of all necessary arrangements for maximum effectiveness in the fulfilment of maintenance obligations. Spain is therefore playing an active part in the preparation of a new Hague Convention on maintenance, with the aim of improving on all previous instruments, in particular the 1956 New York Convention on the Recovery Abroad of Maintenance.

2. The Special Commission preparing the new Convention held its first meeting in May 2003 and a drafting committee then met in January 2004 to try and give effect to that Commission's conclusions. Although the proposed wording to be considered at the Special Commission's second meeting, in June 2004, has not yet been published, it cannot go beyond the conclusions reached at the previous meeting and will therefore only be able to put forward draft provisions on cooperation between authorities and on recognition and enforcement of judgments. It is also hard to imagine direct jurisdiction or applicable law rules being included in future, with the result that the scope remains very limited.

3. For the Community, the 1968 Brussels Convention already contained a specific provision on maintenance in Article 5(2), a clause now included in Regulation No 44/2001, so that maintenance qualifies for the enforcement procedure laid down by the latter. The rules in question thus involve direct jurisdiction and the recognition and enforcement of judgments.

   In Tampere, moreover, the European Council called on the Council to make arrangements for "accelerated cross-border litigation" on, inter alia, "maintenance claims". Following a meeting of experts held on 3 November 2003, the Commission announced that it planned to submit a green paper before Easter. Experience of the recent adoption of the Brussels II Regulation, concerning access rights, certainly sets a strong precedent suggesting that swift progress can also be made on maintenance obligations.

4. The following points need to be borne in mind here: (a) Existing Community acts relate only to jurisdiction and the recognition and enforcement of judgments; hence, Community competence can be said to arise for those matters only and not for cooperation between authorities or applicable law. (b) The idea of drawing up a new Community instrument cannot stand in the way of Member States' use of their powers, without showing any disloyalty towards the Community, while taking into account the existing body of law and the intention, under the Tampere remit, merely to simplify or eliminate the enforcement procedure, in accordance with the principle of mutual recognition.

Without prejudice to the limited extent of Community competence, as addressed below, Spain therefore considers it crucial for the draft negotiating directives to be adopted by the Council before the next meeting of the Special Commission preparing the Convention.

5. As a result of the above, we consider that the negotiating directives should be amended in the following ways:

(1) It should be expressly established that competence is shared between the Community and the Member States and that the Convention is therefore not to be negotiated by the Commission alone, but also by the Member States for any matters for which they have not transferred their powers to the Community. It will consequently have to be noted that the Community enjoys competence only as regards international jurisdiction and the recognition and enforcement of judgments.

(2) The last part of the first negotiating directive should be deleted, so as to confine it to compatibility with the Community legislation currently applicable, with the omission of "or likely to be adopted and with the general objectives of the Community strategy on judicial cooperation in civil matters", a vague phrase with clear expansionist designs, which has no place in a text of this kind.

(3) A point should be added concerning the need to include in the draft being drawn up a disconnection clause allowing for the application of Community instruments between Member States in matters covered by the future Convention.

(4) The explanatory memorandum should be amended in the light both of the above points and of the passage of time since the proposal was submitted.

6. Spain would lastly like to point out that it may have difficulty in signing and ratifying the Convention now being prepared in The Hague, should the Gibraltar issue, as previously arising for other Conventions, not have been resolved by then.

FRANCE

The first meeting of the Special Commission of the Hague Conference on Private International Law, to launch negotiations on an international convention on maintenance obligations, was held from 5 to 16 May 2003.

It was limited to a general debate on the various areas likely to be covered by the future Convention. On the other hand, the next meeting of the Special Commission, to be held in June 2004, is to give its views on a draft of which a substantial part has already been drafted by the working party instructed to do so.

The Council should give the Commission the mandate it requests to open negotiations on this draft and should appoint a committee to assist it with this task in accordance with Article 300 TEC.

While the scope of the future Convention is not yet known in sufficient detail, this is no argument to contest Community competence on the subject.

The 1999 Special Commission unanimously made the following recommendation:
"The Special Commission on the operation of the Hague Conventions relating to maintenance obligations and of the New York Convention on the Recovery Abroad of Maintenance,

- *[...]*
- *[...]*
- *recommends that the Hague Conference should commence work on the elaboration of a new worldwide international instrument.*

The new instrument should:

- *contain as an essential element provisions relating to administrative cooperation,*

– ***be comprehensive in nature, building upon the best features of the existing Conventions, including in particular those concerning the recognition and enforcement of maintenance obligations;***

– *[...]*

– *be structured to combine the maximum efficiency with the flexibility necessary to achieve widespread ratification".*

This approach was confirmed at the meeting of the Special Commission on General Affairs in May 2000 and by the Commission on General Affairs and Policy of the Nineteenth Diplomatic Session of the Hague Conference which met in April 2002.

Nothing in the work currently underway suggests that the scope of the Convention might be limited to administrative cooperation.

It is therefore highly likely that the draft Convention, as submitted to the next Commission, will affect Community legislation and, primarily, Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which determines, in particular, the jurisdiction of the courts where the maintenance creditor is domiciled or habitually resident (Article 5) and establishes a detailed regime for the recognition and enforcement of judgments in this area.

The adoption of internal European Community rules has the effect of conferring exclusive competence on the Community in the area concerned for the conclusion of international conventions. In its AETR judgment, the Court of Justice of the European Communities stated that *"each time the Community [..] adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules. As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system"* [1].

[1] Judgment of 31 March 1971 in Case C-22/70 Commission v. Council [1971] ECR 263.

The French authorities therefore accept the proposed negotiating directives presented by the Commission (COM(2003) 404 final) insofar as they stipulate that *"The Commission shall ensure that the future Hague convention on maintenance obligations is compatible with the Community legislation currently applicable"*.

On the other hand, they believe that there is no reason to give the Commission a mandate to ensure that the future Convention is compatible with Community legislation likely to be adopted on this subject.

While it is solely competent to contract international obligations with third countries in the areas in which it has actually adopted – and not just planned – rules of internal law, the Community cannot claim any external competence which might stem from mere drafts of Community instruments, even where those drafts had been requested by the European Council.

Without prejudice to respect for the obligation of loyal cooperation imposed on the Member States by these drafts, **the French authorities consider that the phrase "or likely to be adopted" should be deleted.**

NETHERLANDS

In response to the request dated 20 January by the Presidency, the delegation of the Netherlands hereby submits its comments with respect to the above draft mandate.

Our delegation would recall that the draft mandate was discussed at a meeting of JAI Counsellors in April, 2003, and was then felt to be too large and too vague and was not adopted before the meeting of the Special Commission in May of that year. The findings made last year are still relevant at the present stage. The mandate should be established in the light of the current distribution of external competence in the field of maintenance law as between the EC and its Member States, on the one hand, and the text of the preliminary draft Convention which will be the subject of negotiations in June, 2004, on the other.

As the preliminary draft has not yet been published, our comments are of a rather general and provisional nature.

1. A first imperative is that the mandate should be flexible enough to allow for adjustment of positions, if appropriate, during negotiations.

2. At the expert meeting held in October by the Commission, a large majority of participating delegations expressed support for an instrument which focuses on administrative co-operation and recognition and enforcement. There was a great deal of scepticism as to the idea of including rules on direct jurisdiction. The mandate should reflect this attitude and the Commission should be instructed not to require the inclusion of a chapter on jurisdiction.

3. There was consensus among experts present at the meeting in October that the scope *ratione materiae* should be as large as possible. In the opinion of the delegation of the Netherlands, spousal maintenance and maintenance arising from a paternity determination, as well as the reimbursement of benefits paid by public bodies in lieu of maintenance should be within the scope of the Convention. The mandate should contain directives on this item. Possibilities to make reservations as to the scope should be kept to a minimum.

4. As regards recognition and enforcement, the criteria of the future instrument should certainly not be stricter than those of the 1973 Maintenance (Enforcement) Convention. There should be no review of the merits and maintenance decision should qualify for recognition and enforcement irrespective of the law applied in the proceedings. A maintenance decision should be recognized and enforced irrespective whether the family relationship from which it arises, is itself recognized in the requested State.

5. In this regard it is recalled that a majority of experts expects that abolishment of "exequatur" will not be achieved at the global level for the time being. It is felt more realistic to consider the inclusion of criteria similar to those of the Brussels 1 Regulation. It may, however, be appropriate that the negotiating directives take into account forthcoming developments within the EC: if mutual enforcement of maintenance decisions among EC member States is made possible without a declaration of enforceability, the inclusion of a disconnection clause in the Convention may have to be contemplated.

6. The mandate should not contain any directives as to the inclusion of a chapter on applicable law. The decision as to whether work should be undertaken on this topic should be taken after further discussion in the Special Commission. The Netherlands would prefer not to include a chapter on applicable law in the future Convention.

7. Negotiations on the chapter on administrative co-operation should, in principle, be left to the Special Commission. It may be appropriate to include a provision allowing Contracting States to establish a closer co-operation among themselves.

8. One issue of co-operation which bears a relation to the issue of direct jurisdiction, may have to be addressed in the negotiating directives: services by central authorities should, in our opinion, extend to a request by a maintenance debtor in one Contracting State to have a maintenance order made in another Contracting State modified by a decision in that other State. This will solve the problem of modification jurisdiction raised in the Preliminary Report by professor Duncan.

9. Finally, the issue of legal aid may have to be addressed in the negotiating directives.

AUSTRIA

The Austrian delegation wishes to make the following observation:

The Commission's authorisation should make clear that the Convention being drawn up at the Hague Conference is a mixed-type agreement. It should therefore be spelt out that the Member States may take part in the negotiations at the Hague and express their opinions on issues which fall within their remaining external competence.

The primary aim stated in the negotiating guidelines should be to secure unrestricted application of Community law through a suitable disconnection clause. Community accession is a secondary issue, only relevant if full disconnection cannot be achieved.

PORTUGAL

In reference to your communication (CM 251/04) dated 20 January, the Portuguese delegation hereby sends its comments on JUSTCIV 60 - Recommendation from the Commission to the Council to authorise the Commission to open negotiations for the adoption of a Maintenance Convention at the Hague Conference on Private International Law.

Concerning the present draft mandate, we would like to recall that the present text was submitted to a JAI Counsellors meeting before the first Special Commission on maintenance but it was deemed too vague and was not adopted. After the Special Commission, our delegation had the opportunity to express its views in the Civil Law Committee and in the experts meeting on maintenance held on the 3rd of November 2003. Our position remains the same.

The Special Commission was unable to agree on the scope of the future instrument. The project could include dispositions on administrative cooperation, applicable law, jurisdiction and recognition and enforcement of foreign decisions. However, it seems most likely that the preliminary draft will not include rules in some of these areas.

In such circumstances, we understand that the text of a negotiating mandate has to be flexible and may require to be adapted in due course. Nevertheless, it is essential from a practical point of view to know exactly what is considered to be included in the scope of the mandate and we do not think it is clear enough from the mandate which areas are intended to be covered.
In our view, paragraph 1 of the directives needs to be redrafted in the light of the following observations:

1- It is questionable how the Community intends to make the rules of the Convention compatible with solutions that have still not been agreed upon internally, by the adoption of a Community act. Moreover, the Community external exclusive competence under the ERTA doctrine only arises from the moment of entry into force of the Community act, as clearly stated in paragraph 106 of case C-467/98 by the Court of Justice of the European Communities. Accordingly, we believe that the reference to future Community acts ought to be deleted.

2- The reference to the "general objectives of the community strategy on judicial cooperation in civil matters" is simply too imprecise to be included as a negotiation directive. Under article 10 of the EC Treaty, the loyalty principle already obliges Member States, not only to abstain from acting in such a manner as to endanger the Community objectives, but also to have an active role in the protection of those objectives. Thus, the external consequences of "Community general objectives and future acts" are covered by this principle. Hence, we also propose the deletion of the reference to "the general objectives of the Community strategy on judicial cooperation".

3- We consider it relevant that the present draft does not qualify the nature of the Community external competence. It is important to avoid unproductive discussions that relate to the subject under analysis by the Court of Justice of the European Communities in Opinion 1/03.

Our delegation considers that it is crucial to coordinate views concerning international negotiations far in advance. Therefore, we regard as positive all the efforts aimed to establish an effective and timely exchange of views among Member States.

SLOVAKIA

In reference to the communication CM 251/04 JUSTCIV JAI of 20 January 2004 we inform you that that The Ministry of Justice of the Slovak Republic has, in principle, no objection either to the Recommendation for the Council Decision, nor to the negotiating directives for the Commission.

We would like to stress, however, that it would be unfortunate if the negotiating directive No. 1 were to be interpreted in a way which would make a conclusion of the Hague Convention difficult or impossible.

It is clear from the initial phases of the Hague negotiations that the inclusion of direct rules on jurisdiction in such a new Convention might be unacceptable for some third countries.

It would not be helpful if the European countries tried and forced on other countries solutions which they provide (or intend to provide) in their own relations within Community legislation anyway. It is an accepted fact that the intra-European relations will be solved by a disconnection clause in the new Convention as is being done in other Hague Conventions.

If the intention is clear that there should or will be a specific Community instrument in this area anyway, the approach to the negotiations at the Hague should be from the outset only from the perspective of the European countries vis a vis third countries, and not from the perspective of forcing the intra-European solutions on third countries.

FINLAND

We support exchange of and, as far as possible, coordination of views in preparation for international treaty negotiations. The need for and the appropriate timing of agreeing on a negotiating mandate must be assessed on a case by case basis. Generally speaking, a recommendation for a mandate should, in our view, be delivered as soon as it becomes evident that negotiations in question are likely to include issues within exclusive Community competence. In the case at hand the exact scope of negotiations is not yet entirely clear.

Nevertheless, we find it useful to exchange views at this stage on the basis of a draft mandate. Furthermore, it is to be hoped that adequate time is allocated to detailed discussion on the foreseen Draft Convention before the Special Commission on the subject in The Hague in early June.

As to the substance of the draft mandate, we can in broad terms support it. However, the first paragraph of the proposed negotiating directives is not acceptable to us in its present form.

It is understood that legislative work under way within the Community institutions may, already before its finalisation, have repercussions to external competences of Member States by virtue of the loyalty principle enshrined in Article 10 of the Treaty. Such repercussions can not, however, follow from possible future Community instruments "likely to be adopted" or from the general strategic objectives of the Community. The negotiating directives should be reformulated accordingly.

To this end, it is proposed that the words "or likely to be adopted and within the general objectives of the Community strategy on judicial cooperation in civil matters" be deleted from the first paragraph of Annex I. This would bring the sentence in line with drafting conventionally used for mandates in the field of judicial cooperation in civil matters. In practical terms this would imply that Community competence in this matter derives from Regulation 44/2001 only.

UNITED KINGDOM

1. The first Article of the operative part of the mandate should not refer to Community legislation 'likely to be adopted' as this is too uncertain a criterion. Equally uncertain is the reference to 'the general objectives of the Community strategy on judicial cooperation in civil matters.' In addition to objections based on uncertainty it is also important to point out that these criteria cannot create Community competence.

2. Even the first part of the first sentence in the negotiating directives is not necessary at this stage because the mandate should leave open the possibility that existing Community legislation might be altered by the new Hague Convention - ie we should decide if complete disconnection is necessary at a later stage when the provisions of the new Hague Convention are clearer.

3.It should be made clear that the new Hague Convention will definitely cover some matters within Member State competence (eg administrative cooperation) and that therefore it does not come within exclusive Community competence. At this stage it is not clear whether the future Hague Convention will include direct rules of jurisdiction (with certain opt outs) and/or rules on applicable law. It will certainly cover recognition and enforcement of maintenance orders.

4. At this time it is very difficult to see what mandate the Commission should be given. We do not support anything in paragraph 1 of Annex I of the Negotiating Directives. We do support paragraph 3 and paragraph 2 is fine if it relates only to the negotiation of a clause permitting accession of the EU to the new Hague Convention.

5. Given that the question whether the Community has exclusive or mixed competence in relation to jurisdiction and recognition and enforcement of judgments in civil and commercial matters is pending before the European Court of Justice in Opinion 1/03 it would be prudent at the next Hague Special Commission on Maintenance in June 2004 to allow Member States and the Commission to contribute freely to the discussion of ideas at the meeting and to insist upon a further Special Commission at which the Community would be able to speak with one voice on any matters within exclusive Community competence and to have arrived, so far as possible, at common positions in relation to those matters within mixed competence. This has the advantage that the options in relation to the scope and content of the new Hague instrument will be much clearer after June 2004. Thereafter decisions about competence will be easier to agree upon and, following appropriate consultation on the draft that emerges from the June meeting, clear policy lines as to the substance of the negotiations can be agreed in the Council.