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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 4.3.2009
COM(2009) 100 final

2009/0031 (CNS)

Proposal for a

COUNCIL DECISION

amending Decision 2006/326/EC to provide for a procedure for the implementation of Article 5(2) of the Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL(S)

1. 1. Grounds for and objectives of the proposal(s)

Pursuant to the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in Title IV of the EC Treaty, and as a consequence Community instruments adopted in the field of judicial cooperation in civil matters are not binding upon or applicable in Denmark. However, the application of certain Community instruments has been extended to Denmark by way of the international agreements between the European Community and Denmark concluded on the basis of Article 300 of the EC Treaty. The relevant international agreements, concluded by Council Decisions 2006/325/EC¹ and 2006/326/EC² respectively, are:

- (1) the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters³ and
- (2) the Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters⁴.

Those parallel agreements provide (in Article 5(2)) for the European Community's agreement to be given in cases where Denmark intends to enter into international agreements which may affect or alter the scope of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter: the Brussels I Regulation)⁵ or the European Parliament and Council Regulation (EC) No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 (hereinafter: the Regulation on the service of documents)⁶. Neither the Council Decisions on the conclusion of those parallel agreements nor the parallel agreements themselves stipulate how the Community should take a decision on such agreement. The objective of the proposal(s) is to lay down the procedure for the implementation of Article 5(2) of both parallel agreements, by amending the Council Decisions on their conclusion.

1.2. General context

The parallel agreements provide (in Article 5(1)) that international agreements entered into by the Community based on the relevant Regulations (as annexed to the parallel agreements) are neither binding upon nor applicable in Denmark. Denmark has to

¹ OJ L 120, 5.5.2006, p. 22.

² OJ L 120, 5.5.2006, p. 23.

³ OJ L 299, 16.11.2005, p. 62.

⁴ OJ L 300, 17.11.2005, p. 55.

⁵ OJ L 12, 16.1.2001, p. 1.

⁶ OJ L 324, 10.12.2007, p. 78.

refrain from entering into international agreements which may affect or alter the scope of the relevant Regulations, unless it is done in agreement with the Community and satisfactory arrangements have been made with regard to the relationship between those parallel agreements and the international agreement in question.

The relations between Denmark and the European Community as regards those parallel agreements are regulated by international law. Article 300 of the EC Treaty applies and the Commission consequently cannot enter into international obligations on behalf of the European Community without being specifically delegated such a right. The Council Decisions concerning conclusion of the parallel agreements and the agreements themselves do not delegate to the Commission the power to give agreement on behalf of the European Community. The European Community therefore has to lay down the specific internal procedure to be followed by the European Community (excluding Denmark) for taking decisions regarding its agreement to the conclusion by Denmark of international agreements affecting the Regulations concerned as annexed to the parallel agreements.

For practical reasons the Commission is presenting at the same time two proposals for implementing both parallel agreements. Although it is less likely that Denmark will propose entering into international agreements containing provisions on the service of documents abroad that might affect the parallel agreement on the service of documents, it is necessary to lay down the procedure for implementing this parallel agreement too.

2. CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

A meeting between representatives of the Danish authorities and the Commission was held in 2008 in order to discuss the situation. No further consultations were held since the question of the internal procedure to be followed by the European Community concerns only the European Community, with the exception of Denmark, given that Denmark does not take part in Title IV of the EC Treaty and in this context is to be regarded as a third country.

The Commission evaluated different options for setting up the implementation procedure, although without carrying out a formal impact assessment.

One of the options would have consisted of amending both parallel agreements in order to provide for a particular implementation procedure. This would have been a much heavier procedure (need for a negotiating mandate for the Commission, the negotiations themselves and the procedure to be followed for the conclusion of the agreements) and, since the issue urgently requires a solution, this option was not followed.

The option chosen by the Commission envisages a simple and relatively swift solution, i.e. amending the Council Decisions on the conclusion of the parallel agreements so as to insert the particular provisions on the procedure to be followed by the European Community for taking decisions regarding its agreement to the conclusion by Denmark of international agreement concerned.

3. LEGAL ELEMENTS OF THE PROPOSAL(S)

3.1. Summary of the proposed action

The Commission proposes amending Council Decision 2006/325/EC and Council Decision 2006/326/EC in order to insert into those decisions provisions on the implementation of Article 5(2) of the parallel agreements. The same procedure is provided for the implementation of both parallel agreements.

Two situations are distinguished, and a different procedure for the European Community to give its agreement is laid down for each of those situations. The common denominator in both situations is that the Commission is empowered by the Council to give the agreement on behalf of the European Community.

The first situation includes cases where the Member States have already been authorised to conclude the international agreement concerned. This is the case, for example, of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the Bunkers Convention), where the Community has already authorised its Member States, in the interest of the Community, to sign, ratify or accede to it (see Council Decision 2002/762/EC authorising the Member States, in the interest of the Community, to sign, ratify or accede to the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the Bunkers Convention)⁷). Another example is the Protocol of 12 February 2004 amending the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy (see Council Decision 2003/882/EC authorising the Member States which are Contracting Parties to the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy to sign, in the interest of the European Community, the Protocol amending that Convention⁸ and Council Decision 2004/294/EC authorising the Member States which are Contracting Parties to the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy to ratify, in the interest of the European Community, the Protocol amending that Convention, or to accede to it⁹). This first situation will also cover cases where the Community has itself become a party to international agreements affecting the Brussels I Regulation or the Regulation on the service of documents. In the cases described, given the fact that the Community has already reviewed the possibility of those Community instruments being affected by the international agreement concerned and has provided, where necessary, for safeguards to ensure that those Community instruments are applied in the relevant cases, a simple procedure is established. In such situations, the Commission will be empowered to give the agreement to Denmark on behalf of the European Community.

The second situation covers all cases that do not fall into the first category above. In such cases there is a need to discuss with the Member States the possibility of the Regulations concerned being affected by the international agreement which Denmark intends to conclude. The Member States will therefore be involved in the decision-making process through the comitology procedure. In such situations the Commission will be empowered to give the agreement to Denmark on behalf of the European Community through the comitology procedure.

⁷ OJ L 256, 25.9.2002, p. 7.

⁸ OJ L 338, 23.12.2003, p. 30.

⁹ OJ L 97, 1.4.2004, p. 53.

3.2. Legal basis

The legal basis for both proposals is Article 61(c) of the EC Treaty, in conjunction with the first subparagraph of Article 300(2) and the first subparagraph of Article 300(3) thereof.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) thereof, in conjunction with the first subparagraph of Article 300(2) and the first subparagraph of Article 300(3) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament¹⁰,

Whereas:

- (1) The application of the provisions of Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000¹¹ was extended to Denmark by the Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters, concluded by Council Decision 2006/326/EC¹².
- (2) Article 5(2) of the Agreement between the European Community and the Kingdom of Denmark provides that Denmark will abstain from entering into international agreements which may affect or alter the scope of Regulation (EC) No 1393/2007, unless it is done in agreement with the Community and satisfactory arrangements have been made with regard to the relationship between that Agreement and the international agreement in question.
- (3) Neither the Agreement between the European Community and the Kingdom of Denmark itself nor Decision 2006/326/EC stipulates how the European Community is to take a decision on its agreement to the conclusion by Denmark of the international agreement in question.

¹⁰ OJ C , , p. .

¹¹ OJ L 324, 10.12.2007, p. 79.

¹² OJ L 120, 5.5.2006, p. 23.

- (4) The procedure for implementing Article 5(2) of the Agreement between the European Community and the Kingdom of Denmark should be put in place. Such a procedure should ensure that decisions on the European Community's agreement can be taken swiftly.
- (5) A distinction should be made between cases where the European Community has itself already become a party to the international agreement or has authorised its Member States to do so in the interest of the European Community and all other cases.
- (6) Decision 2006/326/EC should be amended accordingly in order to provide for such a procedure.
- (7) The measures necessary for the implementation of this Decision should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission¹³.
- (8) 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 are taking part in the adoption and application of this Decision.
- (9) 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 Decision, which is not therefore binding upon or applicable to Denmark,

HAS DECIDED AS FOLLOWS:

Sole Article

Decision 2006/326/EC is amended as follows:

The following Articles 1a and 1b are inserted:

"Article 1a

For the purpose of applying Article 5(2) of the Agreement the decision on the European Community's agreement shall be adopted by the Commission if:

- (a) The European Community has itself already become a party to the international agreement; or
- (b) The European Community has authorised its Member States to do so in the interest of the European Community.

In all other cases the decision on the European Community's agreement shall be adopted by the Commission in accordance with the advisory procedure referred to in Article 1b(2).

¹³ OJ L 184, 17.7.1999, p. 23.

Article 1b

1. The Commission shall be assisted by a committee.
2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply."

Done at Brussels,

*For the Council
The President*