



Brussels, 6.6.2013
COM(2013) 338 final

2013/0177 (NLE)

Proposal for a

COUNCIL DECISION

**authorizing Austria and Malta to accede to the Hague Convention of 15 November 1965
on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial
Matters in the interest of the European Union**

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

1.1. Purpose of the proposal

The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (hereinafter: the Hague Service Convention) provides for the channels of transmission to be used when a judicial or extrajudicial document has to be transmitted from one Contracting State to the Convention to another Contracting State for the service in the latter. The Hague Service Convention simplifies the method of transmission of judicial and extrajudicial documents. The main channel of transmission, in lieu of consular and diplomatic channels, is through a Central Authority, who shall serve the documents or shall arrange to have them served. The Convention also provides for several alternative methods of transmission (e.g. postal channels). It also aims to establish a system which, to extent possible, brings actual notice of the document to be served to the recipient in sufficient time to enable him to defend himself. Furthermore, the Convention facilitates proof that the service has been effected abroad, by means of certificates contained in a uniform model.

The Hague Service Convention falls within the exclusive external competence of the European Union following the adoption of the Union internal rules on service of documents in the Council Regulation (EC) No 1348/2000, repealed by the Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and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 1348/2000¹. Consequently, the Member States cannot conclude the Hague Service Convention without being authorized to do so.

24 Member States had acceded to the Hague Service Convention before the adoption of EU legislation. The remaining Member States which have to be authorised to accede to the convention are Austria and Malta².

The Commission therefore proposes that the Council authorizes Austria and Malta to accede to the Hague Service Convention in the interest of the European Union. The Convention does not have a clause allowing the EU itself to accede.

1.2. Importance of accession to the Hague Service Convention

The Hague Service Convention, improving the transmission of judicial and extrajudicial documents abroad is particularly important for the European Union and its Member States because it facilitates judicial cooperation in cross-border litigation in relations with the third states, parties to the Convention. The Convention is broadly ratified, counting 67 Contracting States at the moment.

¹ 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 1348/2000, OJ L 324, 10.12.2007, p. 79.

² Malta has already deposited its instrument of accession without being authorised and the Commission has taken necessary measures. Following accession, on 1 August 2012, Malta made following declaration: "Malta declares that its accession to the Convention will only take effect upon the completion of procedures relating to the said accession within the European Union and, in particular, the adoption of a Council Decision authorizing Malta to accede to this Convention. Once this adoption takes place, Malta will notify the depositary of the date when the said Convention will become applicable to Malta" (declaration published at the website of the Hague Conference on Private International Law http://www.hcch.net/index_en.php?act=status.comment&csid=1101&disp=eif).

Austria and Malta have expressed their interest in acceding to the Hague Service Convention. Their accession to the Convention would correspond with the policy commitment of acceding to the instruments of the Hague Conference on Private International Law, where there is an EU interest, undertaken by the EU when it became a member of the Hague Conference in 2007.

Furthermore, the EU in its external relations has been promoting the accession of third countries to the Hague Service Convention as an efficient and reliable system for the service of judicial and extrajudicial documents. It would be consistent with this approach that all the Member States of the EU itself are Contracting States to the Convention.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

In the relevant working party in the Council Austria and Malta have confirmed their interest in acceding to the Hague Service Convention. The Permanent Bureau of the Hague Conference on Private International Law has conveyed interest of third countries Party to the Convention to extend it to all EU Member States.

3. LEGAL ELEMENTS OF THE PROPOSAL

3.1. Competence of the EU with respect to the Hague Service Convention

In accordance with Article 3(2) of the Treaty on the Functioning of the European Union and the case law³ of the European Court of Justice, the matter of service of judicial and extrajudicial documents falls into the exclusive external competence of the European Union, because of the adoption of internal Union legislation by means of Regulation (EC) No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters. The Member States therefore no longer have the right to contract obligations with third countries which affect these rules.

In particular, Article 3(2) TFEU provides that the Union has exclusive competence for the conclusion of an international agreement in so far as its conclusion may affect common rules or alter their scope. Under this rule, in accordance with the case law, an agreement falls within the EU's exclusive competence when it can be demonstrated that the subject matter of the agreement falls within the scope of internal common rules, or within an area already largely covered by such rules, or rules have been adopted in areas falling outside common policies and, in particular, in areas where there are harmonising measures, regardless of whether there is or is not a contradiction between those common rules and the agreement.

Regulation (EC) No 1393/2007 applies to civil and commercial matters when it is necessary to transmit judicial or extrajudicial documents for service from one Member State to another. Agencies designated by the Member States are responsible for transmitting and receiving documents. The Regulation sets up a system that reflects the one provided for by the Hague Service Convention, therefore the subject matter of the Hague Service Convention clearly falls within the scope of the EU internal legislation. Consequently, the European Union has exclusive competence over the Hague Service Convention.

³ Opinion 1/03 of the Court of 7 February 2006 on the competence of the Community to conclude the new Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, European Court reports 2006 Page I-01145.

Furthermore, the Union has already exercised its external competence in the matter of service of documents by concluding international agreement with Denmark on the service of documents⁴.

3.2. Authorization of the Member States

Since the Hague Service Convention has no Regional Economic Organization clause, it is not possible for the European Union to become a Contracting Party to the Convention. It is therefore necessary for the Union to exercise its powers through its Member States and thus authorise the Member States concerned to accede to the Hague Service Convention in the interest of the Union. There are several precedents in the area of civil justice, the most recent one is evidenced by the Council Decision 2008/431/EC authorising certain Member States to ratify, or accede to, in the interest of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law⁵.

The Hague Service Convention provides for a possibility for the Contracting States to make declarations with regard to a number of its provisions, e.g. Article 8(2), Article 10, Article 15(2), Article 16(3). The EU Member States, Contracting States to the Convention, entered various declarations. The situation is not uniform: e. g. a number of Member States entered declaration on Article 8(2) granting diplomatic and consular agents the power to serve documents on their own national only, while some others opposed only to methods of transmission provided in Article 10. Declarations pursuant to Article 16(3) providing for application for relief are different e.g. as concerns the time limit to fill the application. Against this backdrop, it is not reasonable to require the Member States concerned to make uniform declaration(s), if any. In conclusion, the Member States concerned should, when acceding to the Convention, make all appropriate declarations allowed under its provisions that they deem necessary. The text of such declarations should be attached to the Council decision though.

⁴ Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 299, 16 11 2005, p. 62.

⁵ OJ L 151, 11.06.2008, p. 36.

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authorizing Austria and Malta to accede to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters in the interest of the European Union

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 81(2) and 218(6)(a) thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament⁶,

Whereas:

- (1) The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (hereinafter referred to as the "Hague Service Convention") simplifies methods of transmission of judicial and extrajudicial documents between the Contracting States. It thus facilitates judicial cooperation in cross-border civil and commercial litigation. The Hague Service Convention has been broadly ratified globally. Promotion of the accession by third states to the Hague Service Convention is a part of the EU external policy in the area of civil justice.
- (2) The European Union has exclusive external competence with regard to the Hague Service Convention insofar as its provisions affect the rules laid down in Regulation (EC) No 1393/2007 of the European Parliament and 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 1348/2000⁷.
- (3) The Hague Service Convention is not open to participation by regional organizations. As a result, the European Union is not in a position to accede to the Convention.
- (4) Given that the Hague Service Convention is important for the European Union interests, the Council should authorize the Member States which had not concluded the Hague Service Convention before adoption of the Union measures to accede to the Convention in the interest of the European Union, subject to the conditions laid down in this Decision. The Member States to which this decision is addressed are Austria and Malta.
- (5) The Hague Service Convention provides for a possibility for the Contracting States to make declarations with regard to a number of its provisions. Accordingly, Austria and Malta should, when acceding to the Convention, make all appropriate declarations

⁶ OJ C , , p. .

⁷ OJ L 324, 10.12.2007, p. 79.

allowed under its provisions that they deem necessary. The text of such declarations should be attached to this Decision.

- (6) The United Kingdom and Ireland are bound by Regulation (EC) No 1393/2007 of the European Parliament and of the Council 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 1348/2000⁸ and are therefore taking part in the adoption of this Decision.
- (7) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application,

HAS ADOPTED THIS DECISION:

Article 1

1. Without prejudice to the European Union's powers, Austria and Malta shall accede to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters in the interest of the European Union.
2. The text of the Hague Service Convention is attached to this Decision as Annex I.

Article 2

1. When acceding to the Hague Service Convention, Austria and Malta shall make the appropriate declarations allowed under the provisions of the Convention.
2. The text of the declarations is attached to this Decision as Annex II.

Article 3

1. Member States concerned shall take the necessary steps to deposit their instruments of accession to the Hague Service Convention within a reasonable time and, if possible, before 31 December 2014.
2. Member States concerned shall inform the Council and the Commission, before 1 July 2014, of the prospective date of conclusion of their accession procedures.

Article 4

This Decision shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

Article 5

When acceding to the Hague Service Convention, Austria and Malta shall inform the Permanent Bureau of the Hague Conference on Private International Law in writing that accession has taken place in accordance with this Decision.

⁸ OJ L 324, 10.12.2007, p. 79.

Article 6

This Decision is addressed to Austria and Malta in accordance with the Treaties.

Done at Brussels,

*For the Council
The President*

ANNEX I

CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS (Concluded 15 November 1965)

The States signatory to the present Convention,
Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,
Desiring to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure,
Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.
This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER I – JUDICIAL DOCUMENTS

Article 2

Each Contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States and to proceed in conformity with the provisions of Articles 3 to 6.
Each State shall organise the Central Authority in conformity with its own law.

Article 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.
The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

Article 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

Article 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either –
a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or
b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.
Subject to sub-paragraph (b) of the first paragraph of this Article, the document may always be served by delivery to an addressee who accepts it voluntarily.
If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.
That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.

The certificate shall be forwarded directly to the applicant.

Article 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 8

Each Contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

Each Contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another Contracting State which are designated by the latter for this purpose.

Each Contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with –

- a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
- b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
- c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 11

The present Convention shall not prevent two or more Contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding Articles and, in particular, direct communication between their respective authorities.

Article 12

The service of judicial documents coming from a Contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed.

The applicant shall pay or reimburse the costs occasioned by –

- a) the employment of a judicial officer or of a person competent under the law of the State of destination,
- b) the use of a particular method of service.

Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.

It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that –

- a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or
- b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each Contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this Article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled –

- a) the document was transmitted by one of the methods provided for in this Convention,
- b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,
- c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled –

- a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and
- b) the defendant has disclosed a prima facie defence to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each Contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.

This Article shall not apply to judgments concerning status or capacity of persons.

CHAPTER II – EXTRAJUDICIAL DOCUMENTS

Article 17

Extrajudicial documents emanating from authorities and judicial officers of a Contracting State may be transmitted for the purpose of service in another Contracting State by the methods and under the provisions of the present Convention.

CHAPTER III – GENERAL CLAUSES

Article 18

Each Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 19

To the extent that the internal law of a Contracting State permits methods of transmission, other than those provided for in the preceding Articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

Article 20

The present Convention shall not prevent an agreement between any two or more Contracting States to dispense with –

- a) the necessity for duplicate copies of transmitted documents as required by the second paragraph of Article 3,
- b) the language requirements of the third paragraph of Article 5 and Article 7,
- c) the provisions of the fourth paragraph of Article 5,
- d) the provisions of the second paragraph of Article 12.

Article 21

Each Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following –

- a) the designation of authorities, pursuant to Articles 2 and 18,
- b) the designation of the authority competent to complete the certificate pursuant to Article 6,
- c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to Article 9.

Each Contracting State shall similarly inform the Ministry, where appropriate, of –

- a) opposition to the use of methods of transmission pursuant to Articles 8 and 10,
- b) declarations pursuant to the second paragraph of Article 15 and the third paragraph of Article 16,
- c) all modifications of the above designations, oppositions and declarations.

Article 22

Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905, and on 1st March 1954, this Convention shall replace as between them Articles 1 to 7 of the earlier Conventions.

Article 23

The present Convention shall not affect the application of Article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of Article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.

These Articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

Article 24

Supplementary agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the Parties have otherwise agreed.

Article 25

Without prejudice to the provisions of Articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the Contracting States are, or shall become, Parties.

Article 26

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.
It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 26.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 28

Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 29

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 27, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 26, and to the States which have acceded in accordance with Article 28, of the following –

- a) the signatures and ratifications referred to in Article 26;
- b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 27;
- c) the accessions referred to in Article 28 and the dates on which they take effect;
- d) the extensions referred to in Article 29 and the dates on which they take effect;
- e) the designations, oppositions and declarations referred to in Article 21;
- f) the denunciations referred to in the third paragraph of Article 30.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Tenth Session of the Hague Conference on Private International Law.

ANNEX II

Declarations of the Member States to be made

Austria makes the following declarations:

(...)

and

Malta makes the following declarations:

Pursuant to Article 8 of the Convention, the Government of Malta declares, that it is opposed to service of documents within the territory of Malta effected directly through the diplomatic or consular agents of other Contracting States, in accordance with the first paragraph of the said Article 8, other than upon the national of the Contracting State effecting such service.

Pursuant to Article 10 of the Convention, the Government of Malta declares, that it is opposed to the use by other Contracting States of any of the methods of transmission and service of documents mentioned in the said Article 10 within its territory.