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Implications of the ECJ ‘Lugano II’ Opinion for European Union’s External Actions Concerning Private International Law

Abstract: *The remarkable ‘Lugano II’ opinion, given by the Court of Justice of the European Union in 2006 (case 1/03), has had the implications going far beyond the specific matter it decided, namely the competence of the EC to conclude the second Lugano Convention. Following ‘Lugano II’ numerous international agreements have been concluded with direct or indirect reference to the Court’s opinion as justification for the EU’s exclusive competence in a given area. This refers, among others, to the Hague Convention on the Choice of Court Agreements of 30 June 2005, the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, and the Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance. Therefore the Court of Justice, by its flexible reading of the so-called ERTA doctrine regarding the EU’s implied external competence to conclude international agreements, has created a powerful instrument for the unification of sources of private international law sensu largo (especially rules concerning conflict of laws) and the undertaking by the EU of external actions in other areas of EU law.*

Introduction

The purpose of this article is to present the implications of the ‘Lugano II’ opinion for the EU’s conduct of external relations. This remarkable opinion of the Court of Justice of the European Union (further referred to as the ‘Court of Justice’) has had the implications going far beyond its particular subject,

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namely the competence of the EC to conclude the new Lugano Convention. This is demonstrated by the conclusion, after the '*Lugano II*' opinion, of numerous international agreements with direct or indirect reference to the opinion as justification for the EU's exclusive competence in a given area. As a consequence the Court of Justice, by its flexible reading of the so-called ERTA doctrine regarding the EU's implied external competence to conclude international agreements, has created a powerful instrument for the unification of sources of private international law.

It must be noted that all legal developments discussed in this article took place before the entry into force of the Treaty of Lisbon. Therefore the legal instruments often refer to the European Community, which subsequently was succeeded by the European Union.

1. Evolution of the European Union's competence in the area of private international law

The provisions of the Treaty establishing the European Economic Community of 25 March 1957 (the Rome Treaty) did not originally contain any provisions concerning the Community's competence in the area of private international law or the rules of international civil procedure. It was only the Amsterdam Treaty of 1997 that introduced to the Rome Treaty provisions on '*judicial co-operation in civil matters*'. Since the entry into force of this amending treaty, on 1st May 1999, according to Article 61 lit. c of the EC Treaty '*in order to establish progressively an area of freedom, security and justice, the Council shall adopt measures in the field of judicial cooperation in civil matters as provided for in Article 65*'. The measures provided for in Article 65 shall include, *inter alia*, promoting in the Member States the compatibility of rules concerning the conflict of laws (private international law *sensu stricto*), as well as improving and simplifying rules of international civil procedure – i.e. provisions concerning jurisdiction and effectiveness (recognition and enforcement) of foreign judgments in civil and commercial cases, as well as cross-border service of documents and cooperation in the taking of evidence.¹ The Amsterdam Treaty introduced a basis for internal Community legislation in the field of '*judicial co-operation in civil matters*', but it was '*silent*' whether the European Community possessed the competence to conclude international agreements in this area. It was only the Court of

¹ In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark is not taking part in the adoption of measures under the Title IV of the Treaty establishing the European Community, including judicial cooperation in civil matters.

Justice's '*Lugano II*' opinion, discussed below, that made it clear that the European Community has exclusive competence with regard to international agreements on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Under the Treaty on the functioning of the European Union² (TFEU) the European Union – not anymore the European Community – is equipped with legal personality and is the actor on international arena capable of being a party to international agreements.³

The internal competence of the European Union in the area of '*judicial co-operation in civil matters*' has not changed substantially. According to Article 81 of the TFEU the Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases, and such co-operation may include the adoption of measures for the approximation of the laws and regulations of the Member States. For this purposes the EU institutions shall adopt measures aimed at ensuring:

- '(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;
- (b) the cross-border service of judicial and extrajudicial documents;
- (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
- (d) cooperation in the taking of evidence; (...).'

Areas of judicial co-operation not mentioned explicitly before in the EC Treaty are now, under TFEU: effective access to justice, the development of alternative methods of dispute settlement, and support for the training of the judiciary and judicial staff.

It is worth noting that the adoption of the abovementioned measures is not any longer confined to the proper functioning of the internal market, as the TFEU currently states that the measures are to be adopted '*particularly*' when it is necessary for the proper functioning of the internal market.

It follows from the above that private international law and the law of international procedure are sometimes, both in the Rome Treaty and EU official documents, 'hidden' under the not very precise terminology of '*judicial cooperation in civil matters*'. The latter may suggest a more technical character of the issues regulated, whereas the core of the EU legislation in this field includes norms indicating the applicable substantive law (called sometimes choice-of-law norms), norms concerning jurisdiction of courts, norms

² Treaty on the Functioning of the European Union, OJ C 83, 30.3.2010, p. 47.

³ See: Article 47 of the Treaty on the European Union, as amended by the Treaty of Lisbon, OJ C 83, 30.3.2010, p. 13.

on recognition and enforcement of foreign judgments, as well as specific issues of international civil proceedings (service of documents and taking evidence abroad).

The term ‘judicial cooperation in civil matters’ should not replace the traditional term of ‘private international law’ (preferably with the extension *sensu largo*, which emphasises that it refers not only to rules determining the applicable law, but also to issues of international civil procedure), which has been used almost in every European country for years. We do not need new names for areas already delineated. It can be suggested that the current Treaty terminology should be replaced by the older, traditional and better understood terms. Since it goes far beyond technical co-operation of judicial organs of the Member States, the term ‘*private international law sensu largo*’ should be preferred.

2. Opinion of the Court of Justice of 7 February 2006 on the competence of the European Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (case No. 1/03)⁴

If there is no express legal basis for the conclusion of an international agreement, the external competence of the EU may be based on the doctrine of implied powers.⁵ This doctrine was developed in the jurisprudence of the Court of Justice, in the ERTA case⁶ in particular. The Court of Justice held that the European Community’s competence to conclude international agreements flows ‘not only from an express conferment by the Treaty (...) but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions’ (ERTA case, par. 16). If the European Community adopts common rules, the member states do not have the right to undertake obligations with third countries which affect those rules or alter their scope (ERTA case, par. 22). The ‘common rules’ are acts of EU secondary legislation, covering a given area

⁴ Opinion of the Court 1/03 of 7 February 2006 [2006] ECR I-1145.

⁵ For more extensive reading, see: P. Eeckhout, *External Relations of the European Union. Legal and Constitutional Foundations*, Oxford 2004, p. 58–94; P. Koutrakos, *EU International Relations Law*, Oxford-Portland-Oregon 2006, p. 77–135; *Developments in EU External Relations Law*, ed. M. Cremona, Collected Courses of the Academy of European Law, Oxford 2008; Ch. Kaddous, *External action under the Lisbon Treaty in: Ceci n’est pas une Constitution – Constitutionalisation without a Constitution?*, eds. I. Pernice, E. Tanchev, Nomos 2009, p. 172.

⁶ 22/70 Commission v. Council [1971] ECR 263.

to a large extent. If the conclusion of an envisaged international agreement would affect those acts or alter their scope, the EU's competence is exclusive. It follows from the foregoing that the conclusion whether the EU's competence is exclusive or not must be 'drawn from a specific analysis of the relationship between the agreement envisaged and the Community law in force and from which it is clear that the conclusion of such an agreement is capable of affecting the Community rules' (*Lugano II* Opinion, par. 124). The ERTA doctrine was consistently developed in the jurisprudence of the Court of Justice⁷ and finally it received Treaty recognition and basis in Article 216 par. 1 *in fine* TFEU. However, the jurisprudence remains of vital importance in order to determine whether a given envisaged agreement may affect the common rules or alter their scope. The more extensive the reading of the conditions supporting the exclusive competence of the EU, the more far reaching the ERTA doctrine.

If the character of EU competence is in doubt, the Court of Justice is empowered, according to Article 218 (11) TFEU (previously Article 300 (6) TEC), upon the request of a member state, the European Parliament, or the Council or Commission, to give an opinion as to whether an envisaged agreement is compatible with the Treaties. In light of the rules of procedure of the Court of Justice 'the opinion may deal not only with the question whether the envisaged agreement is compatible with the provisions of the Treaties but also with the question whether the Union or any Union institution has the power to enter into that agreement' (Article 107 (2) of the Rules of Procedure of the Court of Justice). In the event of an adverse ruling by the Court of Justice, the envisaged agreement may not enter into force unless it is amended or the Treaties are revised.

On March 2002 the Commission submitted a recommendation to the Council for a decision authorizing the Commission to open negotiations for the adoption of a convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters between the European Community and Denmark on the one hand, and Iceland, Norway, Switzerland and Poland on the other. The purpose of the second Lugano Convention was to replace the earlier Convention of 16 September 1988 (which was a 'twin sister' of EEC Brussels Convention of 1968) and to establish international relations with 'close' EFTA countries. The new Convention 'mirrors' the Council Regulation 44/2001 of 22 December 2000 on jurisdiction

⁷ The most important judgments are: Opinion 2/91 of 19 March 1993 [1993] ECR I-1061; Opinion 1/94 of 15 November 1994 [1994] ECR I-5267; C-467/98 *Commission v. Denmark* [2002] ECR I-9519 (one of the so-called 'open skies' judgments); C-45/07 *Commission v. Greece* [2009] ECR I-701; Opinion 1/08 of 30 November 2009 [2009] ECR I-11129.

and the recognition and enforcement of judgments in civil and commercial matters.⁸ It was the existence of the latter Regulation that cast doubts as to the character of the European Community's competence to conclude the new convention.

On 5 March 2003 the Council of the European Union submitted to the Court of Justice a request for an opinion whether the conclusion of the new Lugano Convention fell entirely within the sphere of exclusive competence of the European Community, or within the sphere of shared competences of the European Community and the Member States.

The Court of Justice held that the conclusion of the second Lugano Convention fell entirely within the sphere of exclusive competence of the European Community. The implied external competence was based on the ERTA doctrine. The existence of the external competence to conclude the Lugano II Convention was derived from common rules, namely the Council Regulation 44/2001. It underlined that the purpose of the exclusive competence of the European Community is primarily to preserve the effectiveness of European Community law and the proper functioning of the system established by its rules.⁹ It seems that the need to ensure the uniform and consistent application of Community rules and the full effectiveness of Community law prevails over any other circumstances that would cast doubt on the exclusive character of the Community's competence. Thus the teleological approach of the Court of Justice to the '*competence issue*' is clearly visible and is much stronger reinforced than it previously used to be in the jurisprudence. Therefore the Court of Justice, in the '*Lugano II*' opinion, enhanced the flexibility of the ERTA doctrine.

The Court of Justice, analysing the content of Regulation 44/2001, concluded that '*the unified and coherent system of rules on jurisdiction for which it provides, any international agreement also establishing a unified system of rules on conflict of jurisdiction such as that established by that regulation is capable of affecting those rules of jurisdiction*'.¹⁰ As a consequence the Court of Justice held that although the new Lugano Convention had the same purpose as the regulation and its provisions implemented the same body of law, it is not excluded that the Convention would affect Community rules.¹¹ The Court of Justice rejected arguments put forward by the Council and some Member States that a disconnection clause contained in an envisaged agreement may guarantee that the application of common rules will not be affected

⁸ OJ L 12, 16.1.2001, p. 1.

⁹ See: par. 122, 128–129, 131 and 133 of the opinion 1/03.

¹⁰ See: par. 151 of the '*Lugano II*' opinion.

¹¹ See: par. 152 of the '*Lugano II*' opinion.

by the conclusion of an international agreement.¹² It was the Court of Justice's opinion that, on the contrary, such a clause may provide an indication that such an agreement may affect Community rules. Firstly, because the clause provided for in the new Lugano Convention did not have as its purpose '*to ensure that Regulation 44/2001 is applied each time that it is possible, but rather to regulate in a consistent manner the relationship between that regulation and the new Lugano Convention*'.¹³ Secondly, the application of the disconnection clause is subject to exceptions, with the result that the EU Regulation No 44/2001 is not applied each time that it is possible to do so.¹⁴

The '*Lugano II*' opinion, apart from its background strictly related to the particular legal instruments before it, may be understood in more general terms. There are some aspects of the opinion determining consequences which go far beyond the particular question raised by the Council.

Firstly, the Court of Justice noted that the rules on the recognition and enforcement of judgments are indissociable from those on the jurisdiction of courts. Altogether these norms form a unified and coherent system.¹⁵ The result thereof is that any Union regulation on jurisdiction, recognition and enforcement of judgments in a particular area shall be regarded as part of an interlinked, unified and coherent system of rules capable of being affected by an international agreement concluded by the Member States alone.

Secondly, the vital, more general aspect of the '*Lugano II*' opinion involves the need to ensure coherence and transparency of the legal system. A plurality of sources of law is detrimental to these values. This is particularly so with regard to the sources of private international law. The Court of Justice held that '*international provisions containing rules to resolve conflicts between different rules of jurisdiction drawn up by various legal systems using different linking factors may be a particularly complex system which, to be consistent, must be as comprehensive as possible. The smallest lacuna in those rules could give rise not only to the concurrent jurisdiction of several courts to resolve the same dispute, but also to a complete lack of judicial protection, since no court may have jurisdiction to decide such a dispute.*'¹⁶ It seems therefore that in particular in a multilevel system of law with a plurality of legislators it is desirable to concentrate the competence to ensure coherence,

¹² The purpose of a disconnection clause is to guarantee that the conclusion of an international agreement will be without prejudice to application of Community law. The disconnection clause is provided for in Article 64 of the Lugano Convention.

¹³ See: par. 130 and 154–155 of the '*Lugano II*' opinion.

¹⁴ See: par. 156 of the '*Lugano II*' opinion. The exceptions are provided for in Article 54 B (2) of the Lugano Convention.

¹⁵ See: par. 162–172 of the '*Lugano II*' opinion.

¹⁶ See par. 141 of the '*Lugano II*' opinion.

transparency and simplicity of the regulations to the benefit of the ultimate interested parties. Seen from that perspective, the exclusive external competence of the European Union seems to be justified and corresponds to the exclusive internal competence in the area covered by Regulation 44/2001.

Thirdly, the more flexible approach to the ERTA doctrine, focused on the effectiveness of Community law, may also be applied in order to determine the external competence of the European Union in other areas.¹⁷ These more general aspects of the opinion have already influenced legal developments in European Union law.

3. Legal developments influenced by the Court of Justice's 'Lugano II' opinion

3.1. Negotiation and conclusion of bilateral agreements between Member States and third countries concerning particular areas of private international law sensu largo.

Three years after the opinion 1/03 was handed down, the EU institutions adopted two regulations. The first is the Council Regulation 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obli-

¹⁷ See A. Borrás, *Competence of the Community to conclude the revised Lugano convention on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. Opinion 1/03 of 7 February 2006: comments and immediate consequences*, "Yearbook of Private International Law" Vol. VIII/2006, p. 37, U.G. Schroeter, *Alleinige Außenzuständigkeit der EG im Bereich des Internationalen Zivilverfahrensrechts: Anmerkung zu EuGH, Gutachten 1/03 vom 6. Februar 2006*, "Zeitschrift für Gemeinschaftsprivatrecht" No. 4/2006, p. 203–205, T. Baume, *Competence of the Community to conclude the new Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters: Opinion 1/03 of 7 February 2006*, "German Law Journal" Vol. 7/8/2006, p. 681, N. Lavranos, *Opinion 1/03, Lugano Convention (Full Court) of 7 February 2006*, "Common Market Law Review" Vol. 43/2006, p. 1097, M. Niedźwiedz, P. Mostowik, *Wspólnota Europejska jako strona umów międzynarodowych w dziedzinie prawa prywatnego międzynarodowego. Uwagi na tle opinii Trybunału Sprawiedliwości WE w sprawie 1/03 (The European Community as a party to international agreements on private international law. Remarks on the opinion 1/03 of the Court of Justice)*, "Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego" Vol. VII/2009, p. 71–118.

¹⁸ OJ L 200, 31.7. 2009, p. 46.

gations.¹⁸ The second is Regulation 662/2009 of the European Parliament and of the Council of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations.¹⁹

Both regulations refer, in their preambles, directly to the ‘Lugano II’ opinion.²⁰ From their content it is clearly visible that they are anchored in the Court of Justice’s findings in that opinion, in particular with regard to the flexible reading of the ERTA doctrine. The regulations are also the answer to the question put forward by the Spanish government at the hearing in the opinion 1/03 proceeding. The Spanish Government noted that, in areas other than those covered by regulation 44/2001, a Member State retains the freedom to conclude agreements with non-member countries. In relation to agreements governing areas covered by that regulation, the Spanish Government was of the opinion that the Court of Justice should qualify its case-law and differentiate between multilateral and bilateral agreements. The reason it proffered was that certain Member States may have a particular interest in negotiating with a particular non-member country on those areas, either because of geographical proximity or because of historical links between the two States concerned.²¹ In the opinion itself the Court of Justice did not address these issues clearly and unequivocally. But the two regulations discussed herein shed additional light on these issues.

To state the matter briefly and to the point, the two legal acts can be described as ‘exceptions confirming the rule’. It is interesting to note that in the explanatory memoranda to the Commission’s proposals for these regulations, the conclusions stemming from the ‘Lugano II’ opinion, were generalised and extended to other areas of private international law and to matters having a scope other than rules on jurisdiction, recognition and enforcement of judgments in civil and commercial matters. Referring to the ‘Lugano II’ opinion, the explanatory memoranda explain that the Court of Justice *‘found that the Community rules on the recognition and enforcement of judgments are indissociable from those on the jurisdiction of courts, with which they form a unified and coherent system, and that the second Lugano Convention would affect the uniform and consistent application of the Community rules as regards both the jurisdiction of courts and the recognition and enforcement of*

¹⁹ OJ L 200, 31.7.2009, p. 25.

²⁰ See: point 5 of the preamble to Regulation No. 662/2009 and point 5 of the preamble to Regulation No. 664/2009.

²¹ See: par. 102 of the ‘Lugano II’ opinion.

judgments and the proper functioning of the unified system established by those rules'.²² It is interesting to note that the reference to the particular area, namely civil and commercial matters, has disappeared, resulting in a more general statement that the European Union has exclusive competence in the areas other than those covered by Regulation 44/2001, which was the basis for the exclusive implied competence of the European Community confirmed in the remarkable opinion. Consequently, it seems to follow from the two regulations that the European Union now claims exclusive competence for the negotiation and conclusion of international agreements on particular matters concerning the law applicable to contractual and non-contractual obligations and agreements concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, as well as matters of parental responsibility and the law applicable to matters relating to maintenance obligations.

Thus the EU legislator has smoothly switched from the exclusive external competence derived as an implied competence from Regulation 44/2001, as confirmed in '*Lugano II*', to exclusive external competence derived from other Community regulations in the field of private international law *sensu largo*, i.e. both rules concerning international civil procedure and conflict of laws rules (rules indicating the applicable law).²³ The EU legislator seems to depart from what the Court of Justice held with regard to the application of the ERTA doctrine. The Court of Justice held that '*it must next be determined under what circumstances the scope of the common rules may be affected or distorted by the international commitments at issue and, therefore, under what circumstances the Community acquires an external competence by reason of the exercise of its internal competence*'.²⁴

The content of the regulations needs to be examined in order to confirm the abovementioned assertions. The procedures established in both regula-

²² *Proposal of the Council regulation establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations*, COM (2008) 894 final, p. 3; *Proposal of the regulation of the European Parliament and of the Council establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations*, COM (2008) 893 final, p. 3.

²³ See: D. McClean, *Bilateral agreements with non-member states after Lugano opinion in: The external dimension of EC private international law in family and succession matters*, eds. A. Malatesta, S. Bariatti, F. Pocar, CEDAM 2008, p. 55–76, S. Bariatti, *Bilateral agreements with non-member states after the Lugano opinion: some procedural issues in: ibidem*, p. 77–86.

²⁴ C-467/98 *Commission v. Denmark* [2002] ECR I-9519, par. 81.

tions are parallel, therefore they can be discussed together. As stated in the explanatory memoranda, aims of procedures established by both regulations are twofold. Firstly, their purpose is to allow the Union to assess whether it has a sufficient interest in the conclusion of a particular agreement. Secondly, they establish a procedure to authorise Member States to conclude the agreement at issue if there is no common Union interest in the conclusion of an agreement.

The scope of the regulations is limited to bilateral agreements and they apply, appropriately, to agreements concerning matters falling, entirely or partly, within the scope of: Council Regulation No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility (Brussels II bis),²⁵ or Council Regulation No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations,²⁶ to the extent that those matters fall within the exclusive competence of the Community (as far as Regulation 664/2009 is concerned) and as far as the regulation 662/2009 is concerned, agreements concerning particular matters falling, entirely or partly, within the scope of Regulation No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ('Rome I')²⁷ and Regulation No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ('Rome II').²⁸

Where a Member State intends to enter into negotiations in order to amend an existing agreement or to conclude a new agreement falling within the scope of the two regulations, it must notify the Commission in writing of its intention at the earliest possible moment before the envisaged opening of formal negotiations. Upon receipt of the notification it is for the Commission to assess whether the Member State may open negotiations. The regulations refer to the circumstances that the Commission shall take into account in making such an assessment.²⁹

Then a special procedure takes place. Within 90 days of receipt of the notification, the Commission must give a reasoned decision on the application of the Member State authorizing it to open formal negotiations on that agreement. If it is not in the interest of the Community, the Commission may re-

²⁵ OJ L 338, 23.12. 2003, p. 1.

²⁶ OJ L 7, 10.1.2009, p. 1.

²⁷ OJ L 177, 4.7. 2008, p. 6

²⁸ OJ L 199, 31.7.2007, p. 40.

²⁹ See: Articles 3–4 of Regulation 664/2009 and Regulation 662/2009.

fuse to authorise the opening of the negotiations. If it intends to do so, it shall give an opinion to the Member State concerned within 90 days of receipt of the notification. The Member State in turn may, within 30 days of receipt of the opinion, request the Commission to enter into a discussion in order to find a solution. If the Commission was not requested by the Member State to enter into a discussion, it shall give a reasoned decision on the application of the Member State within 130 days of the notification made pursuant to the regulation. If the Member State enters into a discussion with a view to finding a solution, the Commission shall give a reasoned decision on the application of the Member State within 30 days of the closure of the discussions.³⁰

The Commission may influence the content of an envisaged agreement by proposing negotiating guidelines, and may request the inclusion of particular clauses in the envisaged agreement. Moreover, further provisions of the regulations also determine the content of the agreement. The envisaged agreement shall contain a clause providing for either:

- a) full or partial denunciation of the agreement in the event of the conclusion of a subsequent agreement between the Community or the Community and its Member States, on the one hand, and the same third country, on the other hand, on the same subject-matter; or
- b) direct replacement of the relevant provisions of the agreement by the provisions of a subsequent agreement concluded between the Community or the Community and its Member States, on the one hand, and the same third country, on the other hand, on the same subject-matter.³¹

The Commission may either participate in the negotiations between the Member State and the third country as an observer, or it shall be kept informed of the progress and results of particular stages of the negotiations. Before the negotiated agreement is signed, the Member State concerned shall notify the outcome of the negotiations to the Commission and shall transmit to it the text of the agreement. If the conclusion of the agreement does not fall within the scope of the Community's interests, the Commission shall, within 90 days of the receipt of the notification, give a reasoned decision authorising the Member State to conclude the agreement. The Commission may refuse to authorise the conclusion of the negotiated agreement and it shall give a reasoned opinion on the application of the Member State. The opinion shall also be submitted to the European Parliament and to the Council. The Member State concerned may request the Commission to enter into discussions in order to find a solution. If the Member States does not

³⁰ See: Article 6 of Regulation 664/2009 and Regulation 662/2009.

³¹ See: Article 5 of Regulation 664/2009 and Regulation 662/2009.

so request, the Commission shall give a reasoned decision on the application of the Member State within 130 days of receipt of the notification. If the Member State enters into a discussion with a view to finding a solution, the Commission shall give a reasoned decision on the application of the Member State within 30 days of the closure of the discussions. The decision of the Commission shall be sent to the European Parliament and to the Council.³²

It follows from the foregoing that, under the procedures established by Regulations 664/2009 and 662/2009, the autonomy of the Member States to amend, negotiate and conclude bilateral agreements referred to by the two legal instruments is very limited, and they can act only under the strict supervision of the Commission. This is why it was postulated above that the two legal instruments are in the nature of exceptions confirming the rule, namely that the Community has exclusive competence in the areas covered by above-mentioned existing Regulations, i.e. 2201/2003, 864/2007, 593/2008 and 4/2009.

This conclusion is not changed by the provision inserted³³ in Article 1 par. 1, second sentence of Regulations 664/2009 and 662/2009 respectively. According to it the procedure under the two Regulations is without prejudice to the respective competencies of the Community and of the Member States. This provision, read in conjunction with Article 1 par. 2 of the respective regulations 664/2009 and 662/2009, merely indicates that the international bilateral agreements in question may not cover issues not only pertaining to the exclusive competence of the Community and may refer only to other particular matters not regulated in the abovementioned internal legislation.

The question arises whether the Member State concerned may challenge the Commission's decision of refusal to authorise the opening of formal negotiations or conclusion of the agreement. It seems that it would be possible for a Member State to challenge under Article 263 TFEU,³⁴ the Commission's reasoned decisions falling within Article 6 par. 3 and 4, and Article 9 par. 3 and 4 of the respective regulations 664/2009 and 662/2009. The rea-

³² See: Articles 7–9 of Regulation 664/2009 and Regulation 662/2009.

³³ The proposals of the two regulations mentioned above did not contain this provision.

³⁴ According to Article 263 TFEU: 'The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties. (...) *The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be*'.

soned decisions are legal instruments adopted by the Commission and addressed to the Member State concerned and intended to produce legal effects vis-à-vis third parties, as they influence the rights and obligations of those third countries seeking to enter into international relations with the Member State.

Another issue that may arise is: what would be the consequences for a Member State which concludes an agreement in breach of the Commission's refusal to authorise the conclusion of such agreement? It would seem that the Member State concerned may be challenged by the Commission before the Court of Justice under 258 TFEU³⁵ for breach of Union law if it indeed encroached upon the exclusive competence of the EU by concluding the agreement. However, it must be noted that in light of public international law, the agreement concluded by the Member State with the third country would still be valid.

There is no doubt that the two regulations are firmly anchored in the flexible reading of the ERTA judgment in the '*Lugano II*' opinion 1/03. The EU legislator seems to suggest a kind of a '*quick ERTA test*', based on a presumption that if an EU regulation exists in a certain area of judicial co-operation in civil matters, the EU has exclusive competence in that area. This is a pure parallelism *in foro interno* – *in foro externo*. The EU legislator also develops a more general aspect of opinion 1/03, namely the need to ensure coherence and transparency of the legal system by holding the internal and external powers in one and the same hand, to the presumed benefit of the individuals affected by the legal rules.

3.2. Accession by the European Community to the Hague Conference on Private International Law

Soon after the issuance of opinion 1/03, the Council adopted decision 2006/719/EC of October 2006 on the accession of the Community to the Hague Conference on Private International Law (HCCH).³⁶ The European Community applied for the membership of the HCCH as early as 19 December 2002 and requested the opening of negotiations. The entry into force of the Amsterdam Treaty providing for EC competence to adopt measures in the field of judicial co-operation in civil matters having cross-bor-

³⁵ According to Article 258 TFEU: 'If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.'

³⁶ OJ L 297, 26.10. 2006, p. 1.

der implications, as well as the fact that developments in the great body of legal legislation on this issue overlapped wholly or in part with areas of work of the HCCH, accelerated the EC's need to join in the work of the HCCH.³⁷

This process was also dependent upon amendments to the Statute of the HCCH allowing for the accession of the regional economic integration organization. Finally, it seems that opinion 1/03 also in a way accelerated the accession of the EC to the HCCH, in order to grant the EC a status corresponding to its new role as a major international player in the field of civil judicial cooperation and enabling it to exercise its external competence by participating as a full member in the negotiations of conventions by the HCCH in areas relating to its competence.³⁸

3.3. Signing by the European Community of the Hague Convention on the Choice of Court Agreements of 30 June 2005

In 2002 the Member States of the European Union took part in work on the Hague Convention on Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters within the framework of the Hague Conference on Private International Law. At that time it was suggested in the literature that the Member States were not exclusively competent to conclude the Convention because they shared their competence with the European Community.³⁹ The existence of the Community's competence was derived from the Council Regulation 44/2001. In 2003 the scope of the Convention was reduced to the jurisdiction based on the choice of court agreement and recognition and enforcement of judgments handed out by a court designated in a non-exclusive choice of court agreement.

³⁷ See: K. Boele-Woelki, *Unification of private international law in Europe* in: *Private international law in the international arena – Liber Amicorum Kurt Siehr*, ed. J. Basedow, the Hague 2000, p. 75–76, H. v. Loon, A. Schulz, *The European Community and the Hague Conference on Private International Law in: Justice, Liberty, Security. New Challenges for EU External Relations*, eds. B. Martenczuk, S. v. Thiel, Brussels 2009, p. 99, J.A. Bischof, *Die Europäische Gemeinschaft und die Haager Konferenz für Internationales Privatrecht*, "Zeitschrift für Europäisches Privatrecht" No. 2/2008, p. 339–349.

³⁸ Although the ECJ pinion in case 1/03 itself was not mentioned directly in Council decision 2006/719, the ERTA doctrine was mentioned in Annex II on the declaration of competence of the European Community specifying the matters in respect of which competence has been transferred to it by its Member States. It must be kept in mind that in that context Opinion 1/03 gives the ERTA doctrine a more flexible reading.

³⁹ C.T. Kotuby, *External Competence in Private International Law*, "Netherlands International Law Review" Vol. XLVIII/2001, p. 6; M. Niedzwiedz, *European Community Competence and the Proposed Hague Jurisdiction Convention* in: *The European Union and Governance*, ed. F. Snyder, Brussels 2003, p. 213.

On 5 September 2008 the European Commission issued a proposal for a Council Decision on the signing by the European Community of the Convention on Choice of Court Agreements.⁴⁰ In the explanatory memorandum to its proposal the Commission, in justification of the EC competence in the field covered by the Convention, referred to the Court of Justice's jurisprudence, and to opinion 1/03 in particular.⁴¹ As a result on 25 February 2009 the Council adopted decision 2009/397/EC on the signing on behalf of the European Community of the Convention on Choice of Court Agreements, finding that the Convention falls entirely within the exclusive external competence of the Community.⁴²

3.4. Conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations

On 30 November 2009 the Council adopted decision 2009/941/EC on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.⁴³ According to the preamble to the decision, the European Community (now: European Union) has exclusive competence over all matters governed by the Protocol.⁴⁴ The exclusive character of the competence is derived from Council Regulation 4/2009/EC of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.⁴⁵

It should be recalled that in its '*Lugano II*' opinion, the Court of Justice held that rules on the recognition and enforcement of judgments are indissociable from those on the jurisdiction of courts. Taken together these norms form a unified and coherent system.⁴⁶ The result of this reasoning is that any EU regulation on jurisdiction, recognition and enforcement of judgments in a particular area shall be regarded as part of an interlinked, unified and coherent system of rules, capable of being adversely affected by an international agreement concluded by a Member State alone. This is exactly the reasoning underlying Regulation 4/2009/EC, the adoption of which ipso facto justifies a claim of exclusive competence. As far as the law applicable to maintenance obligations is concerned, according to Article 15 of Regulation

⁴⁰ COM (2008) 538 final.

⁴¹ Ibidem, p. 3.

⁴² OJ L 133, 29.5.2009, p. 1.

⁴³ OJ L 331, 16.12.2009, p. 17.

⁴⁴ See point 5 of the preamble to the Decision 2009/941/EC.

⁴⁵ OJ L 7, 10.1.2009, p. 1.

⁴⁶ See: par. 162–172 of the '*Lugano II*' opinion.

4/2009/EC, the law applicable to maintenance obligations shall be determined in accordance with the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations in the Member States bound by that Protocol. As stated in the preamble to Council decision 2009/941/EC, the application of uniform rules to determine the applicable law will allow for the free circulation of decisions on maintenance obligations within the Community, without any form of control in the Member State where enforcement is sought.⁴⁷ This statement reflects the more flexible reading of the ERTA doctrine in the '*Lugano II*' opinion, focused on effectiveness of Community law. As Regulation 4/2009/EC refers to the Protocol as the determinant of law applicable in internal relations, it is essential for the smooth and effective functioning of the system that the same factors determine the law applicable in relations with third countries. This is particularly important so that the decisions of third-countries' courts can be recognised and enforced all over the European Union. It follows from the foregoing that the '*Lugano II*' opinion influenced the finding of exclusive EU competence in this area also.

3.5. Proposal for the conclusion by the European Community of the Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance

The next development that should be taken into account is the fact that on 28 July 2009 the Commission adopted the proposal for a Council Decision on the conclusion by the European Community of the Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance.⁴⁸ In its explanatory memorandum the Commission, justifying the exclusive competence of the EU to conclude the Convention, refers directly to the '*Lugano II*' opinion.⁴⁹ It points out that the Convention covers the areas regulated in Council Regulation No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.⁵⁰ Therefore in light of the '*Lugano II*' opinion, matters regarding jurisdiction, recognition and enforcement fall within exclusive Community competence. The Commission also expressed the opinion that administrative cooperation and rules on legal aid covered by the Convention fall as

⁴⁷ See: point 3 of the preamble to Regulation 2009/941/EC.

⁴⁸ COM (2009) 373 final.

⁴⁹ Ibidem, p. 4–5.

⁵⁰ OJ L 7, 10.1.2009, p. 1.

well under exclusive Community competence, because these rules would affect Council Regulation 4/2009 on administrative cooperation in the Community.

It is worth noting that the Commission referred directly to the argument made by the Court of Justice in the '*Lugano II*' opinion that a disconnection clause in the Convention guaranteeing the application of the Regulation 4/2009 as between the Member States '*does not exclude the potential impact of the Convention on Community law*'. The Commission also noted that the rules on administrative cooperation are auxiliary to obtaining and enforcing maintenance decisions and may apply to decisions given in third countries. For these reasons it has proposed that the European Union should conclude the Convention alone.

4. The Stockholm Programme for years 2010–2014: further Europeanization of private international law and international civil procedure

In December 2009 the European Council adopted a legislative plan for the next five years called '*The Stockholm Programme — An Open And Secure Europe Serving And Protecting Citizens*'.⁵¹ It contains, *inter alia*, plans concerning the conclusion by the European Union of international agreements in the field of private international law.

The European Council generally considered it a matter of great importance to clearly define the Union's external interests and priorities in the area of judicial cooperation in civil matters. Therefore it recommended that the EU that it should use its membership of the Hague Conference on Private International Law (HCCH) to actively promote the widest possible accession to the most relevant conventions, and invited the Council, the Commission and the Member States to encourage all partner countries to accede to those multilateral conventions which are of particular interest to the Union. In cases where no legal framework is in place for relations between the Union and partner countries, and where the development of new multilateral cooperation is not possible from the Union's standpoint, the option of bilateral agreements should be also explored.⁵²

The European Council stressed that the Rome Treaty, after the Lisbon Amendments, provides for more efficient procedures for the conclusion of agreements with third countries and recommended that due consideration be

⁵¹ OJ C 115, 4.5.2010, p. 1.

⁵² See: point 3.5.1 of the Stockholm Programme.

given to making more frequent use of such agreements regarding judicial cooperation in the field of civil law. It also noted also that Member States will still maintain the option of entering into bilateral agreements in civil law which comply with EU law, and that an appropriate legal framework has been created by Regulations 664/2009 and 662/2009.⁵³

It was directly expressed that in the upcoming years the European Union should continue to support the Hague Conference on Private International Law and encourage its partners to ratify the conventions where the European Union is or will become a party, or where all Member States are parties⁵⁴. An action plan implementing the Stockholm Programme, prepared by the Commission, proposes future negotiating by the EU of agreements with Norway, Iceland and Switzerland on an additional protocol to the second Lugano Convention on maintenance issues (in 2010), and on judicial cooperation concerning service of documents and taking of evidence (in 2012), as well as about the planned authorisation, in the interest of the EU, for certain Member States to accede to the Hague conventions on the service of documents and on taking of evidence (in 2011).⁵⁵

Conclusions

This article has presented the legal developments in the area of ‘*judicial cooperation in civil matters*’ following opinion 1/03 of the Court of Justice 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. It has been demonstrated that the ‘*Lugano II*’ opinion has substantially influenced the development of European Union legislation, not only in the area of international civil procedure (rules of jurisdiction and the effectiveness of foreign judgments), but also choice-of-law rules (rules determining the applicable law).

The Court of Justice’s opinion has triggered the ongoing process of unification of sources of law in this field at European level. By confirming the exclusive competence of the European Union to conclude the second Lugano Convention, the opinion has made the European Union an impor-

⁵³ See: point 7.4 of the Stockholm Programme.

⁵⁴ See: point 7.6 *in fine* of the Stockholm Programme.

⁵⁵ Communication of 20 April 2010 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: *Delivering an area of freedom, security and justice for Europe’s citizens, action plan implementing the Stockholm Programme*, COM (2010) 171 final, p.27–28.

tant player on the international arena in the field of private international law *sensu largo*.⁵⁶

In the light of the foregoing there is little doubt that the ‘*Lugano II*’ opinion has played an important role in the ‘europaisation’ of the sources of private international law *via* the conclusion of international agreements by the European Union instead of each Member State. It opened, together with EU regulations, a path for unification of this area of law.

Looking at the past four years it can be seen that the role of the European Union on the international arena has been strengthened, and that the EU has shaped the external relations in the fields of private international law and the law of international civil procedure.

Last, but not least, the flexible reading of the ERTA doctrine in the ‘*Lugano II*’ opinion, the application of which is not confined to private international law, makes it an important guide in determining EU external competence in other areas of law.

⁵⁶ See: F. Pocar, *The ‘Communitarization’ of private international law and its impact on the external relations of the European Union* in: *The external dimension of EC private international law in family and succession matters*, op.cit., p. 3–15; A. Malatesta, *The Lugano Opinion and its consequences in family and succession matters* in: *ibidem*, p. 19–30. P. Mostowik, *Międzynarodowe prawo prywatne i postępowanie cywilne w dekadę po wejściu w życie Traktatu Amsterdamskiego (International Private Law and Civil Procedure – a Decade after Enetring into Force of Amsterdam Treaty)*, „Przegląd Sądowy” No. 2/2010, p. 54.