Opinion pursuant to Article 300(6) EC

(Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters)

Summary of the Opinion

1. International agreements — Conclusion — Preliminary Opinion of the Court  
   (Art. 300(6) EC; Rules of Procedure of the Court, Art. 107(2))

2. International agreements — Conclusion — Competence of the Community — Whether exclusive

3. International agreements — Conclusion — Competence of the Community — Whether exclusive  
   (Art. 65 EC)
4. International agreements — Conclusion — Competence of the Community — Whether exclusive

5. International agreements — Conclusion — Competence of the Community — New convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters replacing the current Lugano Convention — Whether exclusive (Council Regulation No 44/2001)

1. The opinion of the Court pursuant to Article 300(6) EC may be obtained on questions concerning the division, between the Community and the Member States, of competence to conclude a given agreement with non-member countries.

(see para. 112)

2. Since the Community enjoys only conferred powers, any competence, especially where it is exclusive and not expressly conferred by the Treaty, must have its basis in conclusions 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.

In certain cases, analysis and comparison of the areas covered both by the Community rules and by the agreement envisaged suffice to rule out any effect on the former.

However, it is not necessary for the areas covered by the international agreement and the Community legislation to coincide fully. Where the test of ‘an area which is already covered to a large extent by Community rules’ set out in Opinion 2/91 is to be applied, the assessment must be based not only on the scope of the rules in question but also on their nature and content. It is also necessary to take into account not only the current state of Community law in the area in question but also its future development, insofar as that is foreseeable at the time of that analysis.
In short, it is essential to ensure a uniform and consistent application of the Community rules and the proper functioning of the system which they establish in order to preserve the full effectiveness of Community law.

(see paras 124-128)

3. In the context of an international agreement, any initiative seeking to avoid contradictions between Community law and that agreement does not remove the obligation to determine, prior to the conclusion of the agreement envisaged, whether it is capable of affecting the Community rules.

In that regard, the existence in an international agreement of a so-called 'disconnection clause' providing that the agreement does not affect the application by the Member States of the relevant provisions of Community law, does not constitute a guarantee that the Community rules are not affected by the provisions of the agreement because their respective scopes are properly defined but, on the contrary, may provide an indication that those rules are affected. Such a mechanism seeking to prevent any conflict in the enforcement of the agreement is not in itself a decisive factor in resolving the question whether the Community has exclusive competence to conclude that agreement or whether competence belongs to the Member States; the answer to that question must be established before the agreement is concluded.

(see paras 129-130)

4. The legal basis for the Community rules and more particularly the condition relating to the proper functioning of the internal market laid down in Article 65 EC are, in themselves, irrelevant in determining whether an international agreement affects Community rules: the legal basis of internal legislation is determined by its principal component, whereas the rule which may possibly be affected may be merely an ancillary component of that legislation. The purpose of the exclusive competence of the Community is primarily to preserve the effectiveness of Community law and the proper functioning of the systems established by its rules, independently of any limits laid down by the provision of the Treaty on which the institutions base the adoption of such rules.

(see para. 131)
5. 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 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.

In international agreements concluded by the Member States or the Community with non-member countries those rules of conflict of jurisdiction necessarily establish criteria of jurisdiction for courts not only in non-member countries but also in the Member States and, consequently, cover matters governed by Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

That regulation contains a set of rules forming a unified system which apply not only to relations between different Member States, since they concern both proceedings pending before the courts of different Member States and judgments delivered by the courts of a Member State for the purposes of their recognition or enforcement in another Member State, but also to relations between a Member State and a non-member country.

Therefore, given the unified and coherent system of rules on jurisdiction for which Regulation No 44/2001 provides, any international agreement also establishing a unified system of rules on conflict of jurisdiction such as the new convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, intended to replace the existing Lugano Convention, is capable of affecting its rules of jurisdiction.

Moreover, since 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, the new Lugano Convention affects the uniform and consistent application of the Community rules as regards both the jurisdiction of courts and the recognition and enforcement of judgments and the proper functioning of the unified system established by those rules.
Furthermore, a number of clauses in the agreement envisaged, such as the exceptions to the disconnection clause laid down by that agreement concerning the jurisdiction of the courts and the principle itself that judicial decisions delivered by courts of countries not members of the Community are to be recognised in the Member States without any special procedure, demonstrate that the agreement envisaged may have an effect on the Community rules.

Consequently, the conclusion of the new Lugano Convention falls within the Community's exclusive competence.

(see paras 141-142, 144, 151, 156-160, 168, 170, 172-173, operative part)