

Opinion 1/03

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)

OPINION OF THE COURT (Full Court)

7 February 2006

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

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Competence of the Community to conclude international agreements

Competence of the Community to conclude the new Lugano Convention

– The rules on the jurisdiction of courts

– Rules on the recognition and enforcement of judgments in civil and commercial

matters

In Opinion 1/03,

REQUEST for an opinion pursuant to Article 300(6) EC made on 5 March 2003 by the Council of the European Union,

THE COURT (Full Court),

composed of V. Skouris, President, C.W.A. Timmermans, A. Rosas (Rapporteur), K. Schiemann, J. Makarczyk and J. Malenovský, Presidents of Chambers, J.-P. Puissochet, R. Schintgen, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues, R. Silva de Lapuerta, K. Lenaerts, P. Kūris, E. Juhász, G. Arestis, A. Borg Barthet, M. Ilešič, J. Klučka, U. Lõhmus and E. Levits, Judges,

Registrars: H. von Holstein, Assistant Registrar, and M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 October 2004,

after considering the observations submitted on behalf of:

- the Council of the European Union, by J. Schutte and J.-P. Hix, acting as Agents,
- the Czech Government, by T. Boček, acting as Agent,
- the Danish Government, by J. Molde, acting as Agent,
- the German Government, by W.-D. Plessing, A. Dittrich and A. Tiemann, acting as Agents,
- the Greek Government, by A. Samoni-Rantou and S. Chala, acting as Agents,
- the Spanish Government, by N. Díaz Abad, acting as Agent,
- the French Government, by R. Abraham, G. de Bergues and A. Bodard-Hermant, acting as Agents,
- Ireland, by D. O'Hagan and J. Gormley, acting as Agents, and by P. Sreenan SC and N. Hyland BL,
- the Italian Government, by I.M. Braguglia, acting as Agent,
- the Netherlands Government, by S. Terstal, acting as Agent,
- the Polish Government, by S. Królak, acting as Agent,
- the Portuguese Government, by L. Fernandes and R. Correia, acting as Agents,
- the Finnish Government, by A. Guimaraes-Purokoski, acting as Agent,
- the Swedish Government, by A. Kruse, acting as Agent,
- the United Kingdom Government, by R. Caudwell, acting as Agent, and A. Dashwood, Barrister,
- the European Parliament, by H. Duintjer Tebbens and A. Caiola, acting as Agents,
- the Commission of the European Communities, by J. Iglesias Buhigues, A.-M. Rouchaud-Joët

and M. Wilderspin, acting as Agents,

after hearing First Advocate General Geelhoed and Advocates General Jacobs, Léger, Ruiz-Jarabo Colomer, Tizzano, Stix-Hackl, Kokott and Poiares Maduro in closed session on 15 April 2005,

gives the following

Opinion

- 1 The request concerns the exclusive or shared competence of the European Community to conclude the new convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters intended to replace the existing Lugano Convention ('the agreement envisaged' or 'the new Lugano Convention').
- 2 Pursuant to Article 300(6) EC 'the European Parliament, the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article 48 of the Treaty on European Union.'

Context of the request for an opinion

Relevant provisions of the EC Treaty

- 3 Part Three of the EC Treaty includes Title IV, added by the Treaty of Amsterdam and amended by the Treaty of Nice, which provides the legal basis for the adoption inter alia of Community legislation in the field of judicial cooperation in civil matters.

- 4 Article 61(c) EC provides:

'In order to establish progressively an area of freedom, security and justice, the Council shall adopt:

...

- (c) measures in the field of judicial cooperation in civil matters as provided for in Article 65.'

- 5 Article 65 EC provides as follows:

'Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as necessary for the proper functioning of the internal market, shall include:

- (a) improving and simplifying:
 - the system for cross-border service of judicial and extrajudicial documents;
 - cooperation in the taking of evidence;
 - the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;
- (b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;
- (c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.'

6 Article 67(1) EC provides:

‘During a transitional period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament.’

7 It should also be noted that under Article 69 EC, Title IV of Part Three of the EC Treaty applies ‘subject to the provisions of the Protocol on the position of the United Kingdom and Ireland and to the Protocol on the position of Denmark ...’. It is clear from the respective wording of those two Protocols that the Protocol on the position of Denmark (‘the Danish Protocol’) functions differently from the Protocol on the position of the United Kingdom and Ireland since the latter enables the United Kingdom and Ireland to be bound, if they so wish, by instruments adopted pursuant to Article 61(c) EC without thereby being obliged to renounce that protocol as such. By contrast, this option is not open to Denmark. Consequently, the instruments adopted on the basis of Title IV in the field of judicial cooperation in civil matters are not binding on Denmark and do not apply to it.

8 Article 293 EC (formerly Article 220 of the EC Treaty), which falls within Part Six of the Treaty, containing the General and Final Provisions, provides:

‘Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:

...

– the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.’

9 Other provisions of the Treaty were used as the legal basis for sectoral Community instruments which contain ancillary rules on jurisdiction. The Council cites by way of example Title X of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), based on Article 235 of the EC Treaty (now Article 308 EC), and Article 6 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1), based on Article 57(2) of the EC Treaty (now, after amendment, Article 47(2) EC) and Article 66 of the EC Treaty (now Article 55 EC).

Community instruments existing at the time of the request for an opinion

Regulation (EC) No 44/2001

10 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) establishes a general scheme for jurisdiction and the recognition and enforcement of judgments applicable in the Community in civil and commercial matters.

11 That regulation replaced, as between all the Member States apart from Denmark, the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters concluded at Brussels on 27 September 1968 (OJ 1978 L 304, p. 34) on the basis of the fourth indent of Article 220 of the EEC Treaty (which became the fourth indent of Article 220 EC, now the fourth indent of Article 293 EC), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1 and – amended text – p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1, ‘the Brussels Convention’).

- 12 Pursuant to the Danish Protocol, Regulation No 44/2001 does not apply to Denmark. Pursuant to Article 3 of the Protocol on the position of the United Kingdom and Ireland, by contrast, those Member States notified their intention to adopt and apply that regulation.
- 13 The Court of Justice has jurisdiction to interpret Regulation No 44/2001 under the conditions defined in Articles 68 EC and 234 EC.

The Brussels Convention

- 14 Since, under the Danish Protocol, Regulation No 44/2001 does not bind the Kingdom of Denmark and does not apply to it, it is the Brussels Convention which continues to apply to relations between that Member State and the States bound by Regulation No 44/2001. It should, however, be noted that on 19 October 2005, an agreement was signed at Brussels between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the signature of which was approved on behalf of the Community by Council Decision 2005/790/EC of 20 September 2005 (OJ 2005 L 299, p. 61), subject to the Council decision relating to the conclusion of that agreement.
- 15 Furthermore, the scope of Regulation No 44/2001 is circumscribed by Article 299 EC, which defines the territorial scope of the Treaty, whereas the Brussels Convention as a convention under international law extends to certain overseas territories belonging to various Member States. In the case of the French Republic, these are the French overseas territories and Mayotte, and for the Netherlands, Aruba. The other Member States are not concerned. The Convention therefore continues to apply to those territories.
- 16 Under the Protocol concerning the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters signed in Luxembourg on 3 June 1971 (OJ 1975 L 204, p. 28), the Court of Justice has jurisdiction to interpret the Brussels Convention.

The Lugano Convention

- 17 The Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988 (OJ 1988 L 319, p. 9, 'the Lugano Convention') arose from the creation of the European Free Trade Association ('EFTA') and the establishment between the Contracting States of that association and the Member States of the European Union of a system similar to that of the Brussels Convention. It was ratified by the States concerned, apart from the Principality of Liechtenstein. Following the subsequent accession to the European Union of several EFTA Member States, the only Contracting States which are not currently Member States of the European Union are the Republic of Iceland, the Kingdom of Norway and the Swiss Confederation. The Republic of Poland ratified that Convention on 1 November 1999 but became a Member of the European Union on 1 May 2004.
- 18 The Lugano Convention runs in parallel to the Brussels Convention in that its objective is to apply, in relations between a State which is a party to the Brussels Convention and an EFTA Member State which is a party to the Lugano Convention, and in relations between the EFTA Member States which are parties to the Lugano Convention inter se, a system which is, with some exceptions, the same as that established by the Brussels Convention.
- 19 The Court of Justice has no jurisdiction to interpret the Lugano Convention. However, a mechanism for the exchange of information in respect of judgments delivered in application of that Convention was established by Protocol No 2 on the uniform interpretation of the Convention and the Member and non-Member States of the European Union signed declarations to ensure as uniform an interpretation as possible of that Convention and of the equivalent provisions in the Brussels Convention. Furthermore, Protocol No 3 to the Lugano Convention on the application of Article 57 thereof provides that if one Contracting State is of the opinion that a provision contained in an act of the institutions of

the European Communities is incompatible with the Convention, the Contracting States are promptly to consider amending the Convention, without prejudice to the procedure established by Protocol No 2.

History of the travaux préparatoires for the agreement envisaged

- 20 At a meeting held on 4 and 5 December 1997, the Council appointed an *ad hoc* group of representatives of the Member States of the Union and of the Republic of Iceland, the Kingdom of Norway and the Swiss Confederation to work towards a parallel revision of the Brussels and Lugano Conventions. Essentially, the discussions had the twin objectives of modernising the system of those two Conventions and eliminating differences between them.
- 21 The mandate of the *ad hoc* group was based on Article 220 of the EC Treaty and the work of that group was completed in April 1999. It had reached agreement on a text revising the Brussels and Lugano Conventions. That agreement was ratified at the political level by the Council at its 2 184th meeting which took place on 27 and 28 May 1999 (Document 7700/99 JUSTCIV 60 of 30 April 1999).
- 22 Following the entry into force of the Treaty of Amsterdam, which conferred new powers on the Community in respect of judicial cooperation in civil matters, it was no longer possible to incorporate the amendments proposed by the *ad hoc* group in respect of the Brussels Convention system by means of a revision of that Convention based on Article 293 EC. The Commission therefore submitted to the Council on 14 July 1999 a proposal for a regulation to incorporate into Community law the result of the work of that group. On 22 December 2000 the Council therefore adopted, on the basis of Article 61(c) EC and Article 67(1) EC, Regulation No 44/2001, which entered into force on 1 March 2002.
- 23 As regards the Lugano Convention, the Commission submitted on 22 March 2002 a recommendation for a Council decision authorising the Commission to open negotiations for the adoption of a convention between the Community and, in the light of the protocol applicable to it, Denmark, on the one hand, and Iceland, Norway, Switzerland and Poland, on the other, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, to replace the Lugano Convention of 16 September 1988 (Document SEC(2002) 298 final).
- 24 At its 2 455th meeting, which took place on 14 and 15 October 2002, the Council authorised the Commission to begin negotiations for the purposes of adopting the new Lugano Convention, without prejudice to the question whether the conclusion of the new Convention falls within the Community's exclusive competence, or within the shared competence of the Community and the Member States. The Council also adopted negotiating directives.
- 25 At its 2 489th meeting on 27 and 28 February 2003, the Council decided to submit the present request for an opinion to the Court of Justice.

Purpose of the agreement envisaged and the Council's request for an opinion

- 26 In paragraphs 8 to 12 of its request for an opinion, the Council describes the purpose of the agreement envisaged as follows:
- ‘8. The agreement envisaged would establish a new (Lugano) Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The purpose and content of the agreement envisaged emerge from the negotiating directives, which in turn refer to the text of the revised version (7700/99) and to Council Regulation No 44/2001; the aim is, as far as possible, to align the substantive provisions of the agreement envisaged on the provisions of Regulation No 44/2001.
9. Paragraph 1 of the negotiating directives states that the agreement envisaged should reproduce

the text of the revised version on which the Council reached agreement on 27 and 28 May 1999 and that the text of Titles II to V of the agreement should be adapted to correspond, as far as possible, to the text of Regulation No 44/2001, while the texts of the agreement and its Protocols will have to be adapted to allow for the fact that the Community will be a Contracting Party.

10. The substantive provisions of the agreement envisaged are therefore expected to be as follows:

- Title I relating to the scope should reproduce the text of Article 1 of the revised version.
- Title II on jurisdiction should, as far as possible, correspond to Chapter II of Regulation No 44/2001. However, Article 12a(5) of the revised version might if necessary take the place of Article 14(5) of Regulation No 44/2001.
- Title III on recognition and enforcement should, as far as possible, correspond to Chapter III of Regulation No 44/2001. The provision on legal aid would however contain a second paragraph.
- Title IV on authentic instruments and court settlements should, as far as possible, correspond to Chapter IV of Regulation No 44/2001.
- Title V containing general provisions should, as far as possible, correspond to Chapter V of Regulation No 44/2001.

11. Paragraph 2 of the negotiating directives relates to the provisions of Title VII et seq. of the agreement envisaged:

- Paragraph 2(a) of the negotiating directives provides that “the Convention must be amplified to establish the relationship with Community law and in particular with Regulation No 44/2001. In this sense, the system already provided for in Article 54B of the 1988 Lugano Convention should be applied. In particular, judgments given in a Member State shall be recognised and enforced in another Member State in accordance with Community law.”
- Paragraphs 2(b) and (c) of the negotiating directives relate respectively to agreements on specific matters and to non-recognition agreements.
- Paragraphs 2(d) and (e) of the negotiating directives provide that the envisaged agreement must contain provisions that make it possible to regulate the particular situation of Denmark, the French overseas territories and the Netherlands Antilles and Aruba. While Regulation No 44/2001 does not apply to Denmark, the French overseas territories or the Netherlands Antilles and Aruba, the agreement envisaged should in principle also apply to these countries and territories in the same way as the 1988 Lugano Convention.
- Paragraph 2(f) of the negotiating directives provides that the agreement envisaged must enter into force only after ratification by at least two Contracting Parties. Subject to the application of transitional provisions and to its entry into force with regard to the Contracting Parties concerned, the agreement envisaged will replace the 1988 Lugano Convention between the Contracting Parties concerned.

12. The revised text also provides for certain amendments to the final provisions of the 1988 Lugano Convention, in particular those relating to accession to the Convention and the provisions of Protocols No 1, 2 and 3 annexed to the Convention.’

27 The Council’s request for an opinion reads as follows:

‘Does the conclusion of the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as described in paragraphs 8 to 12 of this memorandum, fall entirely within the sphere of exclusive competence of the Community or within the

sphere of shared competence of the Community and the Member States?’

- 28 At the hearing, the Council stated that the question of competence to enter into international agreements on judicial cooperation in civil matters, within the meaning of Article 65 EC, frequently arises in practice and that the Member States are divided on the point. In its view, in its request for an opinion, the Council argues in favour neither of exclusive competence nor of shared competence but has endeavoured to analyse as accurately as possible the various aspects of the Court’s case-law.

Written observations of the Member States and of the institutions

- 29 Pursuant to the first subparagraph of Article 107(1) of the Rules of Procedure, the request for an opinion was served on the Commission and on the Parliament, which both submitted observations. Pursuant to the second paragraph of Article 24 of the Statute of the Court of Justice, the Court also requested the Member States to submit observations on that request. Written observations were thus lodged by the German, Greek, Spanish, French, Italian, Netherlands, Portuguese, Finnish, Swedish and United Kingdom Governments and by Ireland.

Admissibility of the request

- 30 The Council, supported by the Spanish, French and Finnish Governments and the Parliament and Commission, considers that the request for an opinion is admissible.

- 31 The request complies with the requirements of Article 107(2) of the Rules of Procedure, which states that ‘the Opinion may deal not only with the question whether the envisaged agreement is compatible with the provisions of the EC Treaty but also with the question whether the Community or any Community institution has the power to enter into that agreement’. As regards the sharing of competence between the Community and the Member States, it is settled case-law that a request for an opinion on whether an agreement falls wholly within the exclusive competence of the Community or within shared Community and Member State competence is admissible (Opinion 2/00 [2001] ECR I-9713, paragraph 19). That is precisely the purpose of the question referred by the Council.

- 32 Furthermore, in order to verify whether the agreement in question is ‘envisaged’ within the meaning of Article 300(6) EC, it is noted that, according to the Court, it suffices that the purpose of the agreement be known (Opinion 2/94 [1996] ECR I-1759, paragraph 11). That is so in the present case since the negotiating directives sufficiently determine the purpose and content of that agreement and the matters it must govern.

Substance

- 33 In its request for an opinion, the Council sets out the three aspects of the question of the Community’s competence to conclude the agreement envisaged. It considers, first of all, whether there is express external competence, then whether there is implied external competence and, lastly, whether such competence is exclusive.

Existence of express external competence

- 34 The Council, supported in this respect by all the Member States which submitted observations to the Court and by the Parliament and the Commission, points out that the subject-matter of the agreement envisaged falls within the scope of Article 61(c) EC and Article 67 EC. That legal basis does not expressly give the Community external competence.

Existence of implied external competence

- 35 The Council, all the Member States which submitted observations to the Court, the Parliament and the Commission maintain that in order to determine whether there is implied external competence

reference should be made to Opinion 1/76 [1977] ECR 741, as clarified in Opinion 1/94 [1994] ECR I-5267; the content of those Opinions was summarised by the Court in the *Open Skies* judgments (Case C-467/98 *Commission v Denmark* [2002] ECR I-9519, paragraph 56; Case C-468/98 *Commission v Sweden* [2002] ECR I-9575, paragraph 53; Case C-469/98 *Commission v Finland* [2002] ECR I-9627, paragraph 57; Case C-471/98 *Commission v Belgium* [2002] ECR I-9681, paragraph 67; Case C-472/98 *Commission v Luxembourg* [2002] ECR I-9741, paragraph 61; Case C-475/98 *Commission v Austria* [2002] ECR I-9797, paragraph 67; and Case C-476/98 *Commission v Germany* [2002] ECR I-9855, paragraph 82).

- 36 They state that, according to the principle established in Opinion 1/76, implied external competence exists not only whenever internal competence has already been used in order to adopt measures to implement common policies, but also where internal Community measures are adopted only on the occasion of the conclusion and implementation of the international agreement. Thus, competence to bind the Community in relation to non-member countries may arise by implication from the Treaty provisions establishing internal competence, provided that participation of the Community in the international agreement is necessary in order to attain one of the Community's objectives (see Opinion 1/76, paragraphs 3 and 4, and the *Open Skies* judgments, in particular *Commission v Denmark*, paragraph 56).
- 37 In subsequent cases, the Court stated that with regard to the existence of implied exclusive competence, in particular, the situation envisaged in Opinion 1/76 is that where internal competence may be effectively exercised only at the same time as external competence (Opinion 1/94, paragraph 89), the conclusion of the international agreement thus being necessary in order to attain objectives of the Treaty that cannot be attained by establishing autonomous rules (the wording adopted in the *Open Skies* judgments, in particular *Commission v Denmark*, paragraph 57). In the words used by the Court in paragraph 86 of Opinion 1/94, attainment of the Community objective should be 'inextricably linked' to the conclusion of the international agreement.
- 38 The Council points out that the Community has already adopted internal rules in respect of jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which shows that it must have implied competence to conclude the agreement envisaged. It cites in that regard Regulation No 44/2001, but also, by way of example, Title X of Regulation No 40/94 and Article 6 of Directive 96/71.
- 39 It observes that neither the Member States nor the Commission claimed that the agreement envisaged was necessary. The Parliament considers that it is not, since the judicial cooperation in civil matters referred to in Article 65 EC can very easily be limited to measures addressed to the courts and authorities of the Member States alone, without those measures concerning relations with non-member countries, as the wording of that article makes plain that the measures envisaged are to be adopted 'insofar as necessary for the proper functioning of the internal market'.
- 40 In the German Government's submission such necessity is in any event precluded since the internal legislation does not require the simultaneous participation of non-member countries.
- 41 The Greek Government, which maintains that jurisdiction and the recognition and enforcement of judgments in civil and commercial matters constitute three separate areas which are only partially covered by Regulation No 44/2001, submits that the part of each of those areas not covered by that regulation is not inextricably linked to the conclusion of the international Convention. To argue the contrary would be inimical to the autonomy of international procedural law. As partial Community legislation, therefore, that regulation does not give rise to exclusive external competence on the basis of the criteria established in Opinion 1/76.
- 42 The Finnish and United Kingdom Governments submit that the conclusion of the agreement envisaged is not inseparable from the exercise of internal Community competence. The United Kingdom cites in support the fact that the Lugano Convention was concluded 10 years after the

signature of the Brussels Convention and that the adoption of Regulation No 44/2001, which occurred long before the Lugano Convention was updated, gave rise to no objection.

Existence of exclusive competence based on the principles arising from the *ERTA* judgment

43 According to the Council, all the Member States which submitted observations to the Court, the Parliament and the Commission, the relevant case-law whether or not implied external competence of the Community is exclusive is Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263, as clarified in Opinion 2/91 [1993] ECR I-1061 and Opinion 1/94; the Court summarised its position in the *Open Skies* judgments, in which it distinguished three situations.

44 Paragraphs 17 and 18 of the *ERTA* judgment read as follows:

‘17 In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.

18 As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system.’

45 Paragraphs 81 to 84 of *Commission v Denmark* read as follows:

‘81 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.

82 According to the Court’s case-law, that is the case where the international commitments fall within the scope of the common rules (*ERTA* judgment, paragraph 30), or in any event within an area which is already largely covered by such rules (Opinion 2/91, paragraph 25). In the latter case, the Court has held that Member States may not enter into international commitments outside the framework of the Community institutions, even if there is no contradiction between those commitments and the common rules (Opinion 2/91, paragraphs 25 and 26).

83 Thus it is that, whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires an exclusive external competence in the spheres covered by those acts (Opinion 1/94, paragraph 95; Opinion 2/92 [1995] ECR I-521, paragraph 33).

84 The same applies, even in the absence of any express provision authorising its institutions to negotiate with non-member countries, where the Community has achieved complete harmonisation in a given area, because the common rules thus adopted could be affected within the meaning of the *ERTA* judgment if the Member States retained freedom to negotiate with non-member countries (Opinion 1/94, paragraph 96; Opinion 2/92, paragraph 33).’

46 The United Kingdom Government invites the Court to reconsider the statement of principle in paragraph 82 of *Commission v Denmark*, for reasons related to the general principles of the Treaty governing the limits of Community competences and the internal consistency of the case-law on the effect of an international agreement within the meaning of the *ERTA* judgment.

47 The United Kingdom Government submits, first, that the second criterion adopted by the Court in paragraph 82 of *Commission v Denmark*, referring to paragraph 25 of Opinion 2/91, namely ‘in any event within an area which is already largely covered by [common] rules’ is neither clear nor precise,

which gives rise to uncertainty and is unacceptable when it comes to limiting the competences of the Member States, whereas according to the first paragraph of Article 5 EC the Community enjoys conferred powers only.

- 48 It points out, second, that it is difficult to reconcile that test with the particular cases of an *ERTA* effect given as examples of that second test in paragraphs 83 and 84 of *Commission v Denmark*. That test is not relevant in determining whether there is an *ERTA* effect where clauses relating to the treatment of third-country nationals are included in a measure, since the exclusivity of the competence is restricted to the specific matters regulated by that measure. It is rather the first limb of the general test which applies, namely 'where the international commitments fall within the scope of the common rules'. The same applies in the third case, that of complete harmonisation, which necessarily means that the domain in question is not just 'largely' covered by the Community rules. Abandoning that test would give greater precision in defining an *ERTA* effect whilst ensuring that the Member States fulfil their duty of loyal cooperation when acting in the international sphere.
- 49 Examining the first situation envisaged in paragraph 83 of *Commission v Denmark*, citing paragraph 95 of Opinion 1/94 and paragraph 33 of Opinion 2/92, namely 'whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries', the Council, supported by the German and French Governments, considers that it is not relevant in the case of Regulation No 44/2001 since it follows from Articles 2 and 4 of that regulation that the relevant test for the application of that regulation is domicile and not nationality.
- 50 The Italian Government points out that it is possible to argue in favour of an implied extension of Regulation No 44/2001 with regard to nationals of non-member countries since Article 4 of that regulation provides that, with regard to persons who are not domiciled in the Community, jurisdiction is governed by the law of each Member State and Articles 32 to 37 of that regulation lay down a system of recognition of judgments delivered by the courts of the other Member States.
- 51 The Commission submits that Regulation No 44/2001 contains 'provisions relating to the treatment of nationals of non-member countries', in that Articles 2 and 4 of that regulation render it applicable to relations between States, beyond the external frontiers of the Community, without any geographical limit or restriction of personal scope.
- 52 Regulation No 44/2001 thus incorporates the rules of territorial competence for the Member States as regards defendants domiciled outside the Community, providing the basis for the exclusive competence of the Community to conclude the agreement envisaged.
- 53 The Swedish Government submits that legislation on judicial cooperation in civil matters is not addressed directly to individuals but to the courts which must apply it. The decisive factor as regards the scope of Regulation No 44/2001 is therefore not whether a national of a non-member country falls within the provisions of that regulation, but whether a court has its seat in the Union.
- 54 Examining the second situation envisaged in paragraph 83 of *Commission v Denmark*, citing paragraph 95 of Opinion 1/94 and paragraph 33 of Opinion 2/92, namely whenever the Community 'has expressly conferred on its institutions powers to negotiate with non-member countries', the Council, supported at least impliedly by most governments which submitted observations to the Court, argues that that is not the position in the present case.
- 55 The Commission notes that the Council regularly authorised it to enter into international negotiations on the provisions to be included in international instruments and concerning the rules of international jurisdiction and the recognition and enforcement of judgments without the Member States ever claiming that they alone could negotiate the rules of jurisdiction applicable to defendants domiciled outside the Member States.
- 56 Furthermore, the Italian Government, the Parliament and the Commission point out the difference between the wording of Article 71(1) of Regulation No 44/2001, which provides that 'this regulation

shall not affect any conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments' and that of Article 57(1) of the Brussels Convention, which provides that 'this Convention shall not affect any conventions to which the Contracting States are or will be parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments'. They infer from the removal of the words 'or will be parties' in Article 71 that that regulation is impliedly based on the premiss that the Community is alone competent to conclude agreements concerning civil and commercial matters in general. According to the Parliament, that interpretation applies all the more in the case of the Lugano Convention, which matches entirely the area covered by Regulation No 44/2001.

57 The Portuguese Government challenges such an inference. It submits that the wording of Article 71 of Regulation No 44/2001 shows that the rules set out in that regulation always take precedence over all the other rules laid down by general conventions governing the same situations. In any event, the agreement envisaged regulates in principle situations to which that regulation does not apply.

58 Examining lastly the third case defined in paragraph 84 of *Commission v Denmark*, citing paragraph 96 of Opinion 1/94 and paragraph 33 of Opinion 2/92, namely 'where the Community has achieved complete harmonisation in a given area', the Council takes into account, first, the determination of the relevant area, then any effect of a disconnection clause in the agreement envisaged, and, third, the possible impact of the identity between the provisions of the agreement envisaged and the internal Community rules.

– Determination of the relevant area

59 In order to determine the relevant area, the Council, in common with most of the Member States which submitted observations to the Court, suggests that it is not sufficient to have regard only to the title of the area but that it is necessary to compare in detail the material, personal and territorial scope of Regulation No 44/2001 with that of the agreement envisaged and to determine whether the provisions of the latter affect the Community rules. The Italian Government notes, on the other hand, that the Court has never carried out an assessment of the effect on Community provisions of the international undertakings entered into by the Member States, but has always merely compared the areas covered, on the one hand, by an international agreement and on the other by the Community rules.

60 Several of those governments stress that the scope of the area in question must be analysed having regard to the legal basis of Regulation No 44/2001 and to Article 65 EC. Under that provision, the Community is competent to adopt measures 'in so far as necessary for the proper functioning of the internal market'. Ireland and the Portuguese Government also point out that the expression used in Article 65(b) is not 'approximating the rules' but 'promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction', which implies that there is no overall internal conferment of competence in respect of jurisdiction, recognition and enforcement, but rather a conferment subject to a case-by-case analysis. The Swedish Government also stresses the distinction between mutual recognition and harmonisation of the substantive rules, in support of the argument that, in the absence of such harmonisation, the extension to non-member countries of a system of recognition of judgments cannot be imposed on a Member State unless that State records its agreement that the legal system of that non-member country satisfies the requirements of legal certainty so that it can waive the protection which it accords to its own nationals.

61 By contrast, the Italian Government considers that the provisions of Regulation No 44/2001 establish a comprehensive system in the area of jurisdiction and recognition and enforcement of judgments in civil and commercial matters. That interpretation is confirmed by the case-law of the Court on the Brussels Convention to the effect that the Convention created an enforcement procedure which constitutes an autonomous and complete system, including remedies (*Case 148/84 Brasserie du Pêcheur* [1985] ECR 1981, paragraph 17). Consequently, competence to conclude the agreement

envisaged lies exclusively with the Community.

- 62 The Parliament submits that the concept of area should cover only the material scope of Regulation No 44/2001 and that it is not relevant to take account of its personal and territorial scope. It concludes that the agreement envisaged falls entirely within the subject-matter of that regulation, namely a body of rules for determining, in cross-border disputes, jurisdiction and the conditions for recognition and enforcement, in States bound by that agreement and that regulation, of judgments in civil and commercial matters and that the Community therefore has exclusive competence to conclude such an agreement.
- 63 The Commission submits that the agreement envisaged falls entirely within the scope of Regulation No 44/2001 since all the situations to which that agreement applies are already included in the scope of the Community rules, the purpose of which is to avoid conflict or absence of jurisdiction. It should be noted that even where they refer to national law, the rules on jurisdiction are nevertheless Community rules. Similarly, situations where the Community courts do not have jurisdiction are not lacunae or gaps which a Member State can fill but definitive choices on the part of the Community legislature.
- 64 As regards the area covered by Chapter II of Regulation No 44/2001 relating to the jurisdiction of the courts of the Member States, the Council and most of the governments which submitted observations to the Court refer to the wording of Article 4(1) of that regulation, which states that 'if the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State'. They conclude from this that that regulation may be interpreted as meaning that Chapter II thereof in principle applies only where the defendant is domiciled in the territory of a Member State and that, with a few exceptions, the Member States remain competent to determine the jurisdiction of their courts where the defendant is not domiciled in the Community. The agreement envisaged does not therefore encroach upon the Community rule.
- 65 The French Government points out that Article 4(1) of Regulation No 44/2001 may be interpreted as a delegation of power from the Community to the Member States, so that there is Community competence. However, it does not agree with that interpretation and stresses, in common with the United Kingdom Government, that that provision is declaratory in that it draws the consequence from Article 2(1) of that regulation which restricts the application of the general rule of competence to defendants domiciled in a Member State. That interpretation is confirmed by the use of the indicative in the ninth recital to that regulation, which states that 'a defendant not domiciled in a Member State is in general subject to national rules of jurisdiction applicable in the territory of the Member State of the court seised ...'.
- 66 The Finnish Government also disputes the argument that Article 4(1) of Regulation No 44/2001 amounts to the adoption of common rules within the meaning of the *ERTA* judgment. Whilst it is true that in *Case C-398/92 Mund & Fester* [1994] ECR I-467 the Court held that both the Brussels Convention and the national provisions to which it refers are linked to the Treaty, the case giving rise to that judgment did not concern the interpretation of Article 4 of that Convention (which corresponds to Article 4 of the regulation), but a situation in which the two parties were domiciled in a Contracting State. Furthermore, the fact that a provision refers to the Treaty does not automatically mean that the questions concerning the scope of that provision fall within the Community's competence, since the Treaty does not merely transfer a certain competence to the Community but it also fixes the obligations with which the Member States are required to comply in exercising their own competence (see, in particular, *Case C-466/98 Commission v United Kingdom* [2002] ECR I-9427, paragraph 41). Lastly, the conventions on jurisdiction entered into by the Member States are also included in the concept of 'the law of [a] Member State' used in Article 4(1) of the same regulation and it cannot be argued that it is only by incorporating a certain rule in that regulation that the Community acquired exclusive competence to conclude international agreements in the matters falling within the scope of that rule.
- 67 The Council and most of the Member States which submitted observations to the Court point out that

Regulation No 44/2001 lays down a number of cases in which, as an exception to the principle in Article 4(1) thereof, the jurisdiction of the courts of the Member States is determined by the provisions of that regulation even if the defendant is not domiciled in a Member State. These are:

- exclusive jurisdiction as referred to in Article 22 (for example, proceedings relating to immovable property rights, to the validity of decisions of legal persons, to the validity of entries in public registers and to the enforcement of judgments);
- prorogation of jurisdiction as referred to in Article 23 (in the case of the conclusion of a convention conferring jurisdiction);
- provisions of jurisdiction protecting a weak party:
 - in relation to insurance (Article 9(2))
 - in relation to consumer contracts (Article 15(2))
 - in relation to individual employment contracts (Article 18(2));
- provisions relating to *lis pendens* and related actions (Articles 27 to 30).

68 According to the Council and most of the Member States which submitted observations to the Court, the agreement envisaged might, in respect of those exceptions, alter the part of Regulation No 44/2001 relating to the jurisdiction of the courts. Thus the German Government considers that the rules on jurisdiction laid down by that agreement may alter or modify the scope of the rules on jurisdiction in that regulation and that, in respect of certain parts of the new Lugano Convention, there is thus exclusive competence on the part of the Community. The Portuguese Government submits however that the exception does not disprove the rule and that it is not necessary, in that regard, to envisage all the situations in which there might be exclusive Community competence.

69 That is also the case for a clause such as Article 54B(2) of the Lugano Convention, which provides for a number of situations in which the agreement envisaged applies in any event (exclusive jurisdiction, prorogation of jurisdiction, *lis pendens* and related actions and, in relation to recognition and enforcement, where either the State of origin or the State in which recognition or enforcement is sought is not a member of the Community).

70 Such a clause could affect the scope of Regulation No 44/2001. Thus, the rules of the agreement envisaged which concern exclusive jurisdiction impose jurisdiction on a court of a non-member country even if the defendant is domiciled in the Community. Those few exceptions cannot however affect the general scope of that regulation and justify exclusive Community competence.

71 Ireland makes three observations in this regard. First of all, it is difficult to know in what specific situation a provision such as Article 54B(2) of the Lugano Convention might entail a conflict between Regulation No 44/2001 and the agreement envisaged since all the situations laid down by that provision are outside the scope of that regulation. Next, since that provision is identical to Article 54B(2) in the version currently in force, and the Community will be a party to the new Lugano Convention, which should be a mixed agreement, it cannot be argued that the Member States enter into obligations with non-member countries which affect Community rules. The situation is therefore different from that in which a Member State enters into obligations with non-member countries without the Community's participation. Lastly, the fact that a clause such as Article 54B(2) affects Community rules means only that the Community has exclusive competence to negotiate that particular provision and the Member States retain competence in relation to the other provisions of the agreement envisaged.

72 The Parliament submits as regards the jurisdiction of courts that Regulation No 44/2001 does not apply solely to proceedings claimed to be intra-Community since that regulation also applies where a

defendant domiciled outside the Community is sued in a court of a Member State. It is the Community which established the rule of jurisdiction set out in Article 4 of that regulation and the Member States have no power to amend it. At most they can amend their applicable national laws with the consent of the Community. The scope of that Article 4 is therefore altered by the agreement envisaged, since defendants domiciled in the Contracting States of the Lugano Convention can no longer be sued in a court of a Member State under the national rules on jurisdiction whereas Article 4 provides that those rules may, in principle, be invoked against any defendant domiciled outside the Community.

73 Adopting the same logic as the Parliament, the Commission submits that the effect on Regulation No 44/2001 is the very subject-matter of the negotiations. As for the rules on jurisdiction, the agreement envisaged also necessarily neutralises the rule laid down by Article 4 of that regulation which confers a residual competence on the courts of the Member States with regard to defendants domiciled in a non-Member State of the Community, but which is a party to the Lugano Convention. Article 4 would therefore be affected if the Member States were able to conclude such clauses in the light of the extension of the effect of that article to non-member countries.

74 The Commission therefore challenges the arguments which base the competence of the Member States on Article 4 of Regulation No 44/2001. It submits, first, supported on that point by the Parliament, that the rule set out in that article was established by the Community legislature and that, accordingly, the Member States no longer have competence to decide that, in their relations with non-member countries, it is no longer the national laws that apply, but different rules. It notes, second, that any rule of jurisdiction negotiated in the context of the agreement envisaged applicable to defendants domiciled outside the Community would affect the harmonised rules of jurisdiction since the objective of those rules is to avoid conflict or absence of jurisdiction and cases of *lis pendens* or irreconcilable judgments.

75 As regards that part of Regulation No 44/2001 relating to the recognition and enforcement of judgments, namely Chapter III, the Council and most of the Member States which submitted observations to the Court point out that the scope of the agreement envisaged and that of the regulation do not in any way coincide. The German Government in particular submits that that regulation does not apply to judgments which are external to the Community. The Portuguese Government considers the question of how the mutual recognition of judgments of courts of the Member States of the Community could be affected by the establishment of rules on recognition of the judgments of courts of non-member countries: Regulation No 44/2001 covers the recognition and enforcement by a Member State of a judgment delivered by a court of another Member State, whereas the agreement envisaged concerns the recognition and enforcement by a Member State of a judgment delivered by a court of a non-member country and, by a non-member country, of a judgment delivered by a court of a Member State.

76 The Commission, on the other hand, submits that Chapter III of Regulation No 44/2001 is also affected by the provisions negotiated by the Member States. It stresses the fact that that regulation and the agreement envisaged contain a single body of rules applicable in principle irrespective of the State in which the court which delivered the judgment has its seat.

77 The Parliament adopts the same argument. In its view, the rules set out in Regulation No 44/2001 are also affected by the agreement envisaged since the fact of limiting the application of Chapter III thereof to judgments of other Member States is a deliberate choice of the legislature. The duty to treat judgments delivered in the Contracting States of the Lugano Convention in the same way, which is laid down by the new Lugano Convention, alters that legal situation.

– The ‘disconnection clause’

78 The Council and most of the Member States which submitted observations to the Court examine the potential impact of the ‘disconnection clause’ provided for in point 2(a) of the negotiating directives, which refers to the principles established in Article 54B of the Lugano Convention. As the Greek

Government states, the effect of that clause is to 'disconnect' a particular matter, capable of providing the basis for exclusive Community competence, from the remainder of the agreement envisaged. The effect of that clause, as formulated in Article 54B(1) of the Lugano Convention, is essentially that the Member States apply inter se Regulation No 44/2001 and not the new Lugano Convention.

- 79 The Council and those governments adopt their view on the point in the light of the case-law of the Court as set out in the *Open Skies* judgments, and in particular paragraph 101 of *Commission v Denmark*, which states as follows:

'That finding cannot be called into question by the fact that, in respect of the air transport to which [Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services (OJ 1992 L 240, p. 15] applies, ... Article 9 [of the bilateral agreement known as the Open Skies agreement concluded in 1995 in the area of air transport between the Kingdom of Denmark and the United States of America] requires that regulation to be complied with. However praiseworthy that initiative by the Kingdom of Denmark, designed to preserve the application of Regulation No 2409/92, may have been, the fact remains that the failure of that Member State to fulfil its obligations lies in the fact that it was not authorised to enter into such a commitment on its own, even if the substance of that commitment does not conflict with Community law.'

- 80 The Council notes that in Opinion 2/91 the Court took into account a clause which appears in Convention No 170 of the International Labour Organisation concerning safety in the use of chemicals at work which authorised its members to apply more restrictive national rules. A fortiori it is appropriate to take account of a rule such as that set out in Article 54B(1) of the Lugano Convention which provides for the application of internal rules instead of those of the agreement envisaged.

- 81 The United Kingdom Government, in particular, stresses the difference between the clause in question in the *Open Skies* judgments and Article 54B of the Lugano Convention. Unlike the cases which gave rise to those judgments, in which the scope of the 'Open Skies' agreement concluded in 1995 with the United States of America and which was challenged by the Commission corresponded to that of the Community rules, the purpose of the clause in Article 54B(1) is to define the respective scope of the two sets of rules, that is, to ensure that the rules contained in the two instruments govern different matters. As the German Government explains, another legal method could just as well have been used and the rules of recognition and enforcement could have been formulated more restrictively so as to apply only to relations between the Member States and the other Contracting States of that Convention.

- 82 The Parliament on the other hand refers to *Commission v Denmark* and concludes that even if a provision corresponding to Article 54B of the Lugano Convention were inserted in the agreement envisaged and if there were no contradiction between that and Regulation No 44/2001, it would not be for the Member States to conclude that agreement.

- 83 Noting that a disconnection clause appears, most often, in a 'mixed' agreement, the Commission submits that the Council's intention, expressed in the negotiating directives, to include such a clause in the agreement envisaged may be regarded as a misguided attempt to prejudge whether or not such an agreement is mixed. It considers that the exclusivity of the external competence of the Community, like the legal basis for Community legislation, must be founded on objective criteria which are verifiable by the Court and not on the mere presence of a disconnection clause inserted in the relevant international agreement. If such a requirement is not satisfied, whether or not the Community's competence is exclusive could be subject to manipulation.

- 84 In this respect the Commission questions the need for a clause the purpose of which is to govern relations between rules establishing a Community system and an international convention the object of which is to extend that system to non-member countries, which ipso facto should not affect the existing Community law. Since the agreement envisaged covers areas where there has been complete harmonisation of the Community rules, the existence of a disconnection clause is wholly irrelevant.

85 The Commission stresses the particular nature of a disconnection clause in an international agreement of private international law, since this is completely different from a classic disconnection clause. In the present case, the purpose is not to ensure that Regulation No 44/2001 is applied each time that it is applicable, but to regulate in a coherent manner the distributive application of that regulation and of the agreement envisaged.

– Identity between the provisions of the agreement envisaged and the internal Community rules

86 Lastly, the Council examines the effect of the identity between the provisions of the agreement envisaged and the internal rules. It does so by reference to the position of Advocate General Tizzano set out in point 72 of his Opinion in the cases giving rise to the *Open Skies* judgments. According to Advocate General Tizzano ‘... Member States may not conclude international agreements, in matters covered by common rules, even if the texts of the agreements reproduce the common rules verbatim or incorporate them by reference. The conclusion of such agreements could prejudice the uniform application of Community law in two distinct respects. First, because the “reception” of the common rules into the agreements would be no guarantee ... that the rules would then in fact be uniformly applied ... Secondly, because in any case such “reception” would have the effect of distorting the nature and legal regime of the common rules, and entail a real and serious risk that they would be removed from review by the Court under the Treaty.’

87 According to the Council, given the identity between the substantive provisions of the two instruments, namely Regulation No 44/2001 and the agreement envisaged, and the objective of the parallel development of the latter and of the internal Community rules, it appears that it cannot be ruled out that the Community has exclusive competence with regard to that agreement as a whole.

88 However, it may also be considered that, given the difference between the areas in question, identity between the provisions of the agreement envisaged and Regulation No 44/2001 is not relevant. In particular, since Article 4(1) of Regulation No 44/2001 recognises that the Member States have competence to regulate the jurisdiction of courts where the defendant is not domiciled in a Member State, there is nothing to prevent those States from ‘transcribing’ the rules of that regulation into their national laws without infringing that regulation. The Council’s interpretation in that regard is supported by the German, Greek, Portuguese and Finnish Governments and by Ireland. The German Government in particular states that the existence of Community competence cannot be inferred from the specific formulation of one provision alone. It is the conferment of competence which determines who will decide the wording of that provision.

89 The Parliament refers to the Opinion of Advocate General Tizzano in the *Open Skies* judgments and concludes that the Community has exclusive competence in the matter.

90 It challenges the Council’s argument that identity between the provisions of the agreement envisaged and those of Regulation No 44/2001 excludes any possibility of contradiction between them. It considers, first, that whether or not there is a contradiction is not decisive in assessing the extent of Community competence and, second, that the application of such an agreement could lead to certain rules of that regulation being set aside, and therefore affect them, notwithstanding the identity between the provisions in question.

91 The Commission considers that the objective of the negotiations relating to the new Lugano Convention, which is purely and simply to export to relations with non-member countries the common rules of Regulation No 44/2001, means that the Community’s competence to enter into those negotiations is necessarily exclusive.

92 It points to the parallels and the links between the Brussels and Lugano Conventions and submits that, if a separate convention was concluded, it was only because it was impossible to ask non-member countries to adhere to a convention based on Article 293 EC and conferring jurisdiction on the Court of Justice. It states that various mechanisms have been introduced in order to preserve a consistent interpretation of the two Conventions.

- 93 The Commission submits that the simple objective of transposing common rules into the new Lugano Convention precludes any competence on the part of the Member States, as that would be incompatible with the unity of the common market and the uniform application of Community law. Only the Community is in a position to ensure the consistency of its own common rules if they are elevated to the international sphere.
- 94 In addition to the argument based on the Court's case-law and in a wider perspective, the Parliament draws the Court's attention to problems of a legal and practical nature which may arise in the case of a mixed agreement, in particular as regards the need to authorise the ratification of the agreement envisaged by all the Member States. It also stresses the requirement of consistency between the internal and external aspects of the Community policy in the creation of an area of freedom, security and justice.
- 95 As to the argument based on the fact that the agreement envisaged will not impinge upon the application of Regulation No 44/2001, but on the contrary will reinforce it by extending its application to other European States, the French Government, taking into account the fact that that agreement applies, in addition to some non-member countries, to all the Member States, questions whether the Community should not be regarded as being alone entitled to control its own legislation, regardless of whether that agreement infringes the Community legislation or contributes to its development. The Member States retain competence to conclude other agreements with non-member countries which do not apply to all the Member States, and provided that those agreements do not affect the application of that regulation. The French Government submits that the Community has exclusive competence to conclude specifically the agreement envisaged.

Oral submissions of the Member States and the institutions

- 96 In order to enable the Member States which acceded to the European Union after the request for an opinion was lodged to submit observations thereon, the Court scheduled a hearing which took place on 19 October 2004. The Council, the Czech, Danish, German, Greek, Spanish, French, Netherlands, Polish, Portuguese, Finnish and United Kingdom Governments, Ireland, the Parliament and the Commission were represented at that hearing. Most of the observations submitted to the Court concerned four questions to which the Court had by letter requested the Member States and the institutions to direct their observations. Those questions concerned:
- the relevance of the wording of Articles 61 EC and 65 EC, in particular the words 'necessary for the proper functioning of the internal market' in Article 65 EC;
 - the relevance of the question of the extent to which a Member State can negotiate, for example, a bilateral agreement with a non-member country governing the problems covered by Regulation No 44/2001, but without necessarily adopting the same criteria as those envisaged in that regulation;
 - whether a distinction can be drawn between the provisions on jurisdiction and those on the recognition and enforcement of judgments, and
 - whether there is any need for the existing case-law to be elaborated upon or clarified.

First question put by the Court

- 97 As regards the relevance of the wording of Articles 61 EC and 65 EC and in particular the phrase 'in so far as necessary for the proper functioning of the internal market' in Article 65 EC, the German Government, supported by the French Government, the Parliament and the Commission, submits that that phrase is only relevant in assessing whether, in adopting Regulation No 44/2001, the Community correctly exercised its internal competence. In its view, any internal Community measure adopted on the basis of Article 65 EC must satisfy that condition. By contrast, in order to establish the existence of

external Community competence in the area covered by that regulation it is not essential that the agreement envisaged be itself necessary for the proper functioning of the internal market. That external competence depends simply on the extent to which such an agreement affects or alters the scope of an internal Community rule. The French Government submits that if the fact that Article 65 EC refers only to measures necessary for the proper functioning of the internal market deprived the Community of competence to conclude international agreements, the case-law arising from the *ERTA* judgment would be rendered nugatory.

98 By contrast, the United Kingdom Government, supported by several other governments, considers that the express wording of Article 65 EC defines the scope and intensity of the internal Community system. In particular that wording shows that Regulation No 44/2001 does not entail a complete harmonisation of the rules of the Member States on conflict of jurisdiction. Although several rules set out by that regulation may be regarded as having a certain external scope, such as, in particular, the general rule of jurisdiction based on the fact that the domicile of the defendant is located in the Union, the essential point is that those rules form part of an internal system for resolving conflicts of jurisdiction between the courts of a Member State of the Union. Given the internal scope of Articles 61 EC and 65 EC, they cannot provide the legal basis for the establishment of a comprehensive Community code establishing the rules on international competence of the Community.

99 Moreover, the Czech Government, supported by the Greek, Spanish and Finnish Governments, points out that the wording of Articles 61 EC and 65 EC shows that internal Community competence is confined to the specific objective of the proper functioning of the internal market. Consequently, external Community competence should be restricted to the same objective. Furthermore, the Finnish Government considers that in the case of the Lugano Convention, given that the non-member countries of the Union which are a party to that Convention are not concerned by the establishment of an area of freedom, security and justice or the completion of the internal market, it is difficult to see how the agreement envisaged could be necessary for the proper functioning of the internal market.

Second question put by the Court

100 As for the relevance of the question of the extent to which a Member State can negotiate a bilateral agreement with a non-member country governing the problems covered by Regulation No 44/2001, but without necessarily adopting the same criteria as those adopted in that regulation, most of the governments which submitted observations to the Court, and the Parliament, consider that the only relevant question is whether or not the obligations arising from the bilateral agreement fall within the scope of that regulation. Therefore it makes no difference, in terms of its content, whether or not that agreement corresponds to the Community rules.

101 Such an agreement should therefore be drafted with circumspection to ensure that its provisions do not include the matters covered by Regulation No 44/2001, possibly by means of a disconnection clause. The German, Greek and Finnish Governments, in particular, claim that the presence of such a clause is decisive. The Commission by contrast considers that the very existence of a disconnection clause is clear evidence of an *ERTA* effect.

102 At the hearing, the Spanish Government noted that, in areas other than those covered by Regulation No 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 invited the Court to qualify its case-law, alleging that certain Member States may have a particular interest in negotiating with a non-member country on those areas, either because of geographical proximity or because of historical links between the two States concerned.

103 According to the Parliament, in a bilateral agreement concluded between a Member State and a non-member country the choice of a linking factor other than the domicile of the defendant, the factor adopted by Regulation No 44/2001, necessarily affects the non-member country. Thus, a bilateral agreement using the test of nationality would be incompatible with that regulation since, depending on

the text applied and the criterion adopted, two separate courts would have jurisdiction.

Third question put by the Court

- 104 As regards the possible need to draw a distinction between the provisions on jurisdiction and those on the recognition and enforcement of judgments, several governments, in particular the Czech, German, Greek, Portuguese and Finnish Governments, submit that such a distinction is necessary. According to the Finnish Government, for example, it is clear from the general scheme of Regulation No 44/2001 that the chapter on jurisdiction and that on the recognition and enforcement of judgments are not linked. They are therefore two separate and autonomous sets of rules adopted in the same legal instrument.
- 105 The Spanish Government, by contrast, considers that there is no need to draw such a distinction. First, it is possible that the two areas of application of those provisions contain elements which are not covered by Community law. Second, the two categories of provision form a whole since the objective of Regulation No 44/2001 is to simplify the recognition and enforcement of judgments.
- 106 Similarly, the Parliament and the Commission consider that there is no reason to split the agreement envisaged into two separate parts and to find that the Community has exclusive competence in relation to one and shared competence in relation to the other. According to the Commission, the whole simplified mechanism of recognition and enforcement of judgments, whether it be implemented by Regulation No 44/2001 or established by the Lugano Convention, rests on the fact that the rules on jurisdiction are harmonised and that there is between the Member States sufficient mutual trust to preclude the judges of the State in which recognition or enforcement is sought from having to examine, on a case-by-case basis, whether the jurisdiction of the courts of the State of origin has been respected. In this light, jurisdiction cannot be distinguished from the recognition and enforcement of judgments.

Fourth question put by the Court

- 107 As regards the question whether there is any need for the existing case-law to be elaborated upon or clarified, most of the governments which submitted observations to the Court seek clarification of the case-law arising from the *ERTA* judgment. Furthermore, the same governments support the position taken by the United Kingdom Government in its written observations, that it is necessary to reconsider one of the tests mentioned in that case-law, namely the fact that the international obligations fall within an area already 'largely' covered by Community rules. The Spanish Government submits for example that the Court should be extremely careful before applying to the present request for an opinion the doctrine of implied external competence, which was developed in cases within the economic field, in which the criteria applicable are very different from those which apply in private international law. According to Ireland, complete harmonisation should be necessary in order for there to be implied external Community competence.
- 108 The French Government and the Commission, by contrast, submit that the Community's exclusive competence arises from the fact that the new Lugano Convention seeks to extend to non-member countries the system of cooperation established by Regulation No 44/2001.
- 109 Lastly, as regards the relevance of the fact that the agreement envisaged is intended to reproduce the Community rules, most of the governments submit that there is nothing to preclude the Member States from transcribing the provisions of Community law into their international obligations for which there is no external Community competence. The central question is whether the agreement envisaged is capable of affecting the internal Community rules and not whether the competences are parallel as such.

Opinion of the Court

Admissibility of the request

- 110 The Council's request for an opinion concerns the exclusive or shared competence to conclude the new Lugano Convention.
- 111 The Council is one of the institutions referred to in Article 300(6) EC. The purpose and broad outline of the agreement envisaged have been sufficiently described as required by the Court (Opinion 1/78 [1979] ECR 2871, paragraph 35, and Opinion 2/94, paragraphs 10 to 18).
- 112 Furthermore, according to the settled interpretation of the Court, its opinion 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, most recently, Opinion 2/00, paragraph 3). Article 107(2) of the Rules of Procedure supports that interpretation.
- 113 It follows that the request for an opinion is admissible.

Substance

Competence of the Community to conclude international agreements

- 114 The competence of the Community to conclude international agreements may arise not only from an express conferment by the Treaty but may equally flow implicitly from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions (see *ERTA*, paragraph 16). The Court has also held that whenever Community law created for those institutions powers within its internal system for the purpose of attaining a specific objective, the Community had authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect (Opinion 1/76, paragraph 3, and Opinion 2/91, paragraph 7).
- 115 That competence of the Community may be exclusive or shared with the Member States. As regards exclusive competence, the Court has held that the situation envisaged in Opinion 1/76 is that in which internal competence may be effectively exercised only at the same time as external competence (see Opinion 1/76, paragraphs 4 and 7, and Opinion 1/94, paragraph 85), the conclusion of the international agreement being thus necessary in order to attain objectives of the Treaty that cannot be attained by establishing autonomous rules (see, in particular, *Commission v Denmark*, paragraph 57).
- 116 In paragraph 17 of the *ERTA* judgment, the Court established the principle that, where common rules have been adopted, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with non-member countries which affect those rules. In such a case, the Community also has exclusive competence to conclude international agreements.
- 117 In the situation addressed by the present opinion, that principle is relevant in assessing whether or not the Community's external competence is exclusive.
- 118 In paragraph 11 of Opinion 2/91, the Court stated that that principle also applies where rules have been adopted in areas falling outside common policies and, in particular, in areas where there are harmonising measures.
- 119 The Court noted in that regard that, in all the areas corresponding to the objectives of the Treaty, Article 10 EC requires Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty (Opinion 2/91, paragraph 10).
- 120 Giving its opinion on Part III of Convention No 170 of the International Labour Organisation concerning safety in the use of chemicals at work, which is an area already largely covered by Community rules, the Court took account of the fact that those rules had been progressively adopted

for more than 25 years with a view to achieving an ever greater degree of harmonisation designed, on the one hand, to remove barriers to trade resulting from differences in legislation from one Member State to another and, on the other hand, to provide, at the same time, protection for human health and the environment. It concluded that that part of that Convention was such as to affect those Community rules and that consequently Member States could not undertake such commitments outside the framework of the Community (Opinion 2/91, paragraphs 25 and 26).

- 121 In Opinion 1/94, and in the *Open Skies* judgments, the Court set out three situations in which it recognised exclusive Community competence. Those three situations, which have been the subject of much debate in the course of the present request for an opinion and which are set out in paragraph 45 hereof are, however, only examples, formulated in the light of the particular contexts with which the Court was concerned.
- 122 Ruling in much more general terms, the Court has found there to be exclusive Community competence in particular where the conclusion of an agreement by the Member States is incompatible with the unity of the common market and the uniform application of Community law (*ERTA*, paragraph 31), or where, given the nature of the existing Community provisions, such as legislative measures containing clauses relating to the treatment of nationals of non-member countries or to the complete harmonisation of a particular issue, any agreement in that area would necessarily affect the Community rules within the meaning of the *ERTA* judgment (see, to that effect, Opinion 1/94, paragraphs 95 and 96, and *Commission v Denmark*, paragraphs 83 and 84).
- 123 On the other hand, the Court did not find that the Community had exclusive competence where, because both the Community provisions and those of an international convention laid down minimum standards, there was nothing to prevent the full application of Community law by the Member States (Opinion 2/91, paragraph 18). Similarly, the Court did not recognise the need for exclusive Community competence where there was a chance that bilateral agreements would lead to distortions in the flow of services in the internal market, noting that there was nothing in the Treaty to prevent the institutions from arranging, in the common rules laid down by them, concerted action in relation to non-member countries or from prescribing the approach to be taken by the Member States in their external dealings (Opinion 1/94, paragraphs 78 and 79, and *Commission v Denmark*, paragraphs 85 and 86).
- 124 It should be noted in that context that the Community enjoys only conferred powers and that, accordingly, 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.
- 125 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 (see Opinion 1/94, paragraph 103; Opinion 2/92, paragraph 34, and Opinion 2/00, paragraph 46).
- 126 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' (Opinion 2/91, paragraphs 25 and 26) 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 (see, to that effect, Opinion 2/91, paragraph 25).
- 127 That that assessment must include not only the extent of the area covered but also the nature and content of the Community rules is also clear from the Court's case-law referred to in paragraph 123 of the present opinion, stating that the fact that both the Community rules and the international agreement lay down minimum standards may justify the conclusion that the Community rules are not affected, even if the Community rules and the provisions of the agreement cover the same area.

- 128 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.
- 129 Furthermore, any initiative seeking to avoid contradictions between Community law and the agreement envisaged does not remove the obligation to determine, prior to the conclusion of the agreement, whether it is capable of affecting the Community rules (see in particular, to that effect, Opinion 2/91, paragraph 25, and *Commission v Denmark*, paragraphs 101 and 105).
- 130 In that regard, the existence in an 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, to that effect, *Commission v Denmark*, paragraph 101).
- 131 Lastly, 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.
- 132 If an international agreement contains provisions which presume a harmonisation of legislative or regulatory measures of the Member States in an area for which the Treaty excludes such harmonisation, the Community does not have the necessary competence to conclude that agreement. Those limits of the external competence of the Community concern the very existence of that competence and not whether or not it is exclusive.
- 133 It follows from all the foregoing that a comprehensive and detailed analysis must be carried out to determine whether the Community has the competence to conclude an international agreement and whether that competence is exclusive. In doing so, account must be taken not only of the area covered by the Community rules and by the provisions of the agreement envisaged, insofar as the latter are known, but also of the nature and content of those rules and those provisions, to ensure that the agreement is not capable of undermining the uniform and consistent application of the Community rules and the proper functioning of the system which they establish.

Competence of the Community to conclude the new Lugano Convention

- 134 The request for an opinion does not concern the actual existence of competence of the Community to conclude the agreement envisaged, but whether that competence is exclusive or shared. Suffice it to note in this regard that the Community has already adopted internal rules relating to jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, whether in the form of Regulation No 44/2001, adopted on the basis of Articles 61(c) EC and 67(1) EC, or the specific provisions which appear in sectoral regulations, such as Title X of Regulation No 40/94 or Article 6 of Directive 96/71.
- 135 Regulation No 44/2001 was adopted to replace, as between the Member States apart from the Kingdom of Denmark, the Brussels Convention. It applies in civil and commercial matters, within the limits laid down by its scope as defined by Article 1 of that regulation. Since the purpose and the provisions of the regulation are largely reproduced in that Convention, reference will be made, so far

as may be necessary, to the Court's interpretation of that Convention.

136 The purpose of the agreement envisaged is to replace the Lugano Convention, described as 'a parallel Convention to the ... Brussels Convention' in the fifth recital to Regulation No 44/2001.

137 Whilst the text resulting from the revision of the two Conventions referred to above and the negotiating directives for the new Lugano Convention are known, it must be stressed that there is no certainty as to the final text which will be adopted.

138 Both Regulation No 44/2001 and the agreement envisaged essentially contain two parts. The first part of that agreement contains the rules on the jurisdiction of courts, such as those which are the subject of Chapter II of Regulation No 44/2001 and the specific provisions referred to in paragraph 134 of the present opinion. The second part contains the rules on the recognition and enforcement of judgments, such as those which are the subject of Chapter III of Regulation No 44/2001. Those two parts will be the subject of separate analysis.

– The rules on the jurisdiction of courts

139 The purpose of a rule of jurisdiction is to determine, in a given situation, which is the competent court to hear a dispute. In order to do so, the rule contains a test enabling the dispute to be 'linked' to the court which will be recognised as having jurisdiction. The linking factors vary, usually according to the subject-matter of the dispute. But they may also take account of the date when the action was brought, the particular characteristics of the claimant or defendant, or any other factor.

140 The variety of linking factors used by different legal systems generates conflicts between the rules of jurisdiction. These may be resolved by express provisions of the *lex fori* or by the application of general principles common to several legal systems. It may also happen that a law leaves to the applicant the choice between several courts whose jurisdiction is determined by several separate linking factors.

141 It follows from those factors 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 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.

142 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.

143 The purpose of that regulation, and more particularly Chapter II thereof, is to unify the rules on jurisdiction in civil and commercial matters, not only for intra-Community disputes but also for those which have an international element, with the objective of eliminating obstacles to the functioning of the internal market which may derive from disparities between national legislations on the subject (see the second recital in the preamble to Regulation No 44/2001 and, as regards the Brussels Convention, Case C-281/02 *Owusu* [2005] ECR I-1383, paragraph 34).

144 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.

145 Ruling on the Brussels Convention, the Court has held in that connection that the application of the

rules on jurisdiction requires an international element and that the international nature of the legal relationship at issue need not necessarily derive, for the purposes of the application of Article 2 of the Brussels Convention, from the involvement, because of the subject-matter of the proceedings or the respective domiciles of the parties, of a number of Contracting States. The involvement of a Contracting State and a non-Contracting State, for example because the claimant and defendant are domiciled in the first State and the events at issue occurred in the second, would also make the legal relationship at issue international in nature, as that situation may raise questions in the Contracting State relating to the determination of international jurisdiction, which is precisely one of the objectives of the Brussels Convention, according to the third recital in the preamble (*Owusu*, paragraphs 25 and 26).

- 146 The Court has further held that the rules of the Brussels Convention concerning exclusive jurisdiction or express prorogation of jurisdiction are also likely to apply to legal relationships involving only one Contracting State and one or more non-Contracting States (*Owusu*, paragraph 28). It has also held with regard to the Brussels Convention rules on *lis pendens* and related actions or recognition and enforcement, which concern proceedings pending before the courts of different Contracting States or judgments delivered by courts of a Contracting State with a view to recognition and enforcement thereof in another Contracting State, that the disputes with which such proceedings or decisions are concerned may be international, involving a Contracting State and a non-Contracting State, and allow recourse, on that ground, to the general rule of jurisdiction laid down by Article 2 of the Brussels Convention (*Owusu*, paragraph 29).
- 147 In that context, it must be noted that Regulation No 44/2001 contains provisions governing its relationship to other existing or future provisions of Community law. Thus Article 67 thereof provides that that regulation is without prejudice to the application of provisions governing jurisdiction and the enforcement of judgments in specific matters which are contained in Community instruments or in national legislation harmonised pursuant to such instruments. Article 71(1) also provides that that regulation is without prejudice to the application of any conventions with the same purpose as the preceding provisions to which the Member States are already parties. Article 71(2)(a) provides that that regulation is not to prevent a court of a Member State which is a party to such a convention from assuming jurisdiction in accordance with that Convention, even where the defendant is domiciled in another Member State not party thereto.
- 148 Given the uniform and coherent nature of the system of rules on conflict of jurisdiction established by Regulation No 44/2001, Article 4(1) thereof, which provides that 'if the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State', must be interpreted as meaning that it forms part of the system implemented by that regulation, since it resolves the situation envisaged by reference to the legislation of the Member State before whose court the matter is brought.
- 149 As regards that reference to the national legislation in question, even if it could provide the basis for competence on the part of the Member States to conclude an international agreement, it is clear that, on the basis of the wording of Article 4(1), the only criterion which may be used is that of the domicile of the defendant, provided that there is no basis for applying Articles 22 and 23 of the regulation.
- 150 Moreover, even if it complies with the rule laid down in Article 4(1) of Regulation No 44/2001, the agreement envisaged could still conflict with other provisions of that regulation. Thus, in the case of a legal person which is the defendant in proceedings and not domiciled in a Member State, that agreement could, by using the criterion of domicile of the defendant, conflict with the provisions of that regulation dealing with branches, agencies or other establishments lacking legal personality, such as Article 9(2) for disputes arising from insurance contracts, Article 15(2) for disputes arising from consumer contracts, or Article 18(2) for disputes arising from individual contracts of employment.
- 151 It is thus apparent from an analysis of Regulation No 44/2001 alone that, given 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. It is necessary however to continue the analysis by assessing the agreement envisaged in order to determine whether it supports that conclusion.

- 152 The purpose of the new Lugano Convention is the same as that of Regulation No 44/2001, but it has a wider territorial scope. Its provisions implement the same system as that of Regulation No 44/2001, in particular by using the same rules of jurisdiction, which, according to most of the governments which have submitted observations to the Court, ensures consistency between the two legal instruments and thus ensures that the Convention does not affect the Community rules.
- 153 However, whilst the fact that the purpose and wording of the Community rules and the provisions of the agreement envisaged are the same is a factor to be taken into account in determining whether that agreement affects those rules, that factor alone cannot demonstrate the absence of such an effect. As for the consistency arising from the application of the same rules of jurisdiction, this is not the same as the absence of such an effect since the application of a rule of jurisdiction laid down by the agreement envisaged may result in the choice of a court with jurisdiction other than that chosen pursuant to Regulation No 44/2001. Thus, where the new Lugano Convention contains articles identical to Articles 22 and 23 of Regulation No 44/2001 and leads on that basis to selection as the appropriate forum of a court of a non-member country which is a party to that Convention, where the defendant is domiciled in a Member State, in the absence of the Convention, that latter State would be the appropriate forum, whereas under the Convention it is the non-member country.
- 154 The new Lugano Convention contains a disconnection clause similar to that in Article 54B of the current Convention. However, as was noted in paragraph 130 of the present opinion, such a clause, the purpose of which is to prevent conflicts in the application of the two legal instruments, does not in itself provide an answer, before the agreement envisaged is even concluded, to the question whether the Community has exclusive competence to conclude that agreement. On the contrary, such a clause may provide an indication that that agreement may affect the Community rules.
- 155 Furthermore, as the Commission pointed out, a disconnection clause in an international agreement of private international law has a particular nature and is different from a classic disconnection clause. In the present case, the purpose is not to ensure that Regulation No 44/2001 is applied each time that that is possible, but rather to regulate in a consistent manner the relationship between that regulation and the new Lugano Convention.
- 156 Furthermore, the disconnection clause in Article 54B(1) of the Lugano Convention includes exceptions laid down in Article 54B(2)(a) and (b).
- 157 Thus, Article 54B(2)(a) of the Lugano Convention provides that the Convention applies in any event where the defendant is domiciled in the territory of a Contracting State which is not a member of the European Union. However, where for example the defendant is a legal person with a branch, agency or other establishment in a Member State, that provision may affect the application of Regulation No 44/2001, in particular Article 9(2), for proceedings concerning insurance contracts, Article 15(2) for proceedings concerning consumer contracts, or Article 18(2) for disputes concerning individual contracts of employment.
- 158 The same applies in respect of the two other exceptions to the disconnection clause laid down by the Lugano Convention, namely Article 54B(2)(a) *in fine*, where Articles 16 and 17 of the Convention, which relate to exclusive jurisdiction and the prorogation of jurisdiction respectively, confer a jurisdiction on the courts of a Contracting State which is not a member of the European Union, and Article 54B(2)(b) in relation to *lis pendens* or related actions as provided for in Articles 21 and 22 of the Convention, when proceedings are instituted in a Contracting State which is not a member of the European Union and in a Contracting State which is a member of the European Union. The application of the Convention in the context of those exceptions may prevent the application of the rules of

jurisdiction laid down by Regulation No 44/2001.

159 Some governments, in particular the Portuguese Government, argue that those few exceptions cannot negate the competence of the Member States to conclude the agreement envisaged since that competence must be determined by the main provisions of that agreement. Similarly, Ireland submits that it would be sufficient for the Community alone to negotiate the provision relating to those exceptions, with the Member States retaining competence to conclude the other provisions of that agreement.

160 However, it must be stressed that, as stated in paragraphs 151 to 153 of the present opinion, the main provisions of the agreement envisaged are capable of affecting the unified and coherent nature of the rules of jurisdiction laid down by Regulation No 44/2001. The exceptions to the disconnection clause and the need for a Community presence in the negotiations, envisaged by Ireland, are merely indications that the Community rules are affected in particular circumstances.

161 It follows from the analysis of the provisions of the new Lugano Convention relating to the rules on jurisdiction that those provisions affect the uniform and consistent application of the Community rules on jurisdiction and the proper functioning of the system established by those rules.

– Rules on the recognition and enforcement of judgments in civil and commercial matters

162 Most of the governments which have submitted observations to the Court argue that the rules on the recognition and enforcement of judgments in civil and commercial matters constitute an area dissociable from that of the rules on jurisdiction, which justifies a separate analysis of the effect of the agreement envisaged on the Community rules. They submit in that regard that the scope of Regulation No 44/2001 is limited, since the recognition applies only to judgments delivered in other Member States, and that any agreement having a different scope, insofar as it concerns judgments external to the Community, is not capable of affecting the Community rules.

163 However, as other governments, the Parliament and the Commission submit, the rules of jurisdiction and those relating to the recognition and enforcement of judgments in Regulation No 44/2001 do not constitute distinct and autonomous systems but are closely linked. As the Commission noted at the hearing, the simplified mechanism of recognition and enforcement set out in Article 33(1) of that regulation, to the effect that a judgment given in a Member State is to be recognised in the other Member States without any special procedure being required and which leads in principle, pursuant to Article 35(3) of that regulation, to the lack of review of the jurisdiction of courts of the Member State of origin, rests on mutual trust between the Member States and, in particular, by that placed in the court of the State of origin by the court of the State in which enforcement is required, taking account in particular of the rules of direct jurisdiction set out in Chapter II of that regulation. As regards the Brussels Convention, the Report on the Convention submitted by Mr Jenard (OJ 1979 C 59, p. 1, at p. 46) stated as follows: 'The very strict rules of jurisdiction laid down in Title II, and the safeguards granted in Article 20 to defendants who do not enter an appearance make it possible to dispense with any review, by the court in which recognition or enforcement is sought, of the jurisdiction of the court in which the original judgment was given.'

164 Several provisions of Regulation No 44/2001 confirm the link between the recognition and enforcement of judgments and the rules on jurisdiction. Thus, review of the jurisdiction of the court of origin is, exceptionally, maintained pursuant to Article 35(1) of the regulation where the provisions of that regulation concerning exclusive jurisdiction and jurisdiction in relation to insurance and consumer contracts are in question. Article 71(2)(b) and Article 72 of the regulation also establish such a relationship between the rules on jurisdiction and those on the recognition and enforcement of those judgments.

165 Furthermore, Regulation No 44/2001 makes provision for conflicts which may arise between judgments delivered between the same parties by different courts. Thus, Article 34(3) states that a judgment is not to be recognised if it is irreconcilable with a judgment given in a dispute between the

same parties in the Member State in which recognition is sought, whilst Article 34(4) provides that a judgment is not to be recognised if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

- 166 Furthermore, as stated in paragraph 147 of the present opinion, Article 67 of that regulation governs the relationship of the system established by that regulation not only to the other existing and future provisions of Community law but also to the existing Conventions affecting the Community rules on recognition and enforcement, whether those Conventions contain rules on jurisdiction or provisions on the recognition and enforcement of judgments.
- 167 With regard to conventions to which the Member States are parties, referred to in Article 71 of Regulation No 44/001, the first paragraph of Article 71(2)(b) provides that 'judgments given in a Member State by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be recognised and enforced in the other Member States in accordance with this regulation'. The second paragraph of Article 71(2)(b) provides that 'where a convention on a particular matter to which both the Member State of origin and the Member State addressed are parties lays down conditions for the recognition or enforcement of judgments, those conditions shall apply'. Lastly, Article 72 provides that the regulation 'shall not affect agreements by which Member States undertook, prior to the entry into force of this regulation pursuant to Article 59 of the Brussels Convention, not to recognise judgments given, in particular in other Contracting States to that Convention, against defendants domiciled or habitually resident in a third country where, in cases provided for in Article 4 of that Convention, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3 of that Convention'.
- 168 It is thus apparent from an analysis of Regulation No 44/2001 alone that, because of the unified and coherent system which it establishes for the recognition and enforcement of judgments, an agreement such as that envisaged, whether it contains provisions on the jurisdiction of courts or on the recognition and enforcement of judgments, is capable of affecting those rules.
- 169 In the absence of the final text of the new Lugano Convention, the assessment of any effect of that Convention on the Community rules is to be made having regard, by way of illustration, to the provisions of the current Lugano Convention.
- 170 The first paragraph of Article 26 of that Convention sets out the principle that a judgment given in a Contracting State is to be recognised in the other Contracting States without any special procedure being required. Such a principle affects the Community rules since it enlarges the scope of recognition of judicial decisions without any special procedure, thus increasing the number of cases in which judgments delivered by courts of countries not members of the Community whose jurisdiction does not arise from the application of the provisions of Regulation No 44/2001 will be recognised.
- 171 As regards the existence of a disconnection clause in the agreement envisaged, such as that in Article 54B(1) of the Lugano Convention, it follows from paragraphs 130 and 154 of the present opinion that its presence would not appear to alter that finding as regards the existence of exclusive competence on the part of the Community to conclude that agreement.
- 172 All those factors demonstrate 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 new 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 judgments and the proper functioning of the unified system established by those rules.
- 173 It follows from all those considerations that the Community has exclusive competence to conclude the new Lugano Convention.

In conclusion, the Court (Full Court) gives the following opinion:

The conclusion of the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as described in paragraphs 8 to 12 of the request for an opinion, reproduced in paragraph 26 of this Opinion, falls entirely within the sphere of exclusive competence of the European Community.

[Signatures]