Member State/third country bilateral agreements: judgments and decisions in matrimonial matters, parental responsibility and maintenance obligations

2008/0266(CNS) - 19/12/2008 - Legislative proposal

PURPOSE: to establish a procedure regarding bilateral agreements between Member States and third countries, concerning sectoral matters and covering jurisdiction, recognition and enforcement of judgements and decisions in matrimonial matters, parental responsibility and maintenance obligations and applicable law in matters relating to maintenance obligations.

PROPOSED ACT: Council Regulation.

BACKGROUND: apart from the acquis communautaire, the field of civil justice is characterised by a number of bilateral agreements concluded by Member States with third countries prior to the entry into force of the relevant provisions of the Amsterdam Treaty or prior to their accession to the Community. To the extent that such pre-existing agreements contain provisions that are not compatible with the EC Treaty, Member States must take all steps to eliminate the incompatibilities. Apart from pre-existing bilateral agreements, there may also be a need for the conclusion of new agreements with third countries governing areas of civil justice that come within Title IV of the EC Treaty.

In Opinion 1/03 of 7 February 2006 relating to the conclusion of the new **Lugano Convention**, the Court of Justice held that the Community has acquired exclusive competence to conclude international agreements with third countries, on matters affecting the rules set out inter alia in Regulation (EC) No 44 /2001 ("Brussels I"), in particular on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Consequently, it must be assumed that the Community has acquired exclusive competence for the negotiation and conclusion of many of the bilateral agreements in this field. Nevertheless, it has to be assessed if there currently exists a sufficient Community interest for the Community to replace all such existing or proposed agreements between Member States and third countries with Community agreements. For that reason it is necessary to establish a procedure with a twofold purpose.

IMPACT ANALYSIS: several options were examined by the Commission for setting up the procedure, although without carrying out a formal impact assessment: (a) the "passive" status quo ; (b) the "active" status quo would involve opting not to develop any legislative procedure for the re-delegation of Community powers ; (c) the issuing of an authorisation by the Community, based on general criteria laid down by a legislative instrument(for example, a Regulation) or by a Council decision (on the basis of the aforementioned legislative instrument) (d) a specific authorisation to be granted on a case-by-case basis after having assessed the agreement notified by the Member State on the basis of objective criteria. This last option was selected by the Commission.

CONTENT: the objective of the proposal is to establish a procedure for the Community to make an assessment of whether there is a sufficient Community interest in the conclusion of proposed bilateral agreements with third countries, and in the absence thereof, authorise Member States to conclude these agreements with third countries in certain fields concerning judicial cooperation in civil and commercial matters falling under the exclusive competence of the Community.

Because the authorisation to Member States derogates from the rule that the Community is exclusively competent to conclude international agreements on these matters, the procedure must be regarded as an exceptional measure and must be limited in scope and in time.

It is proposed to limit the procedure in question only to sectoral issues related to matrimonial matters, parental responsibility and maintenance obligations on the one hand, and, on the other hand, to the law applicable to contractual and non-contractual obligations (please see COD/2008/0259.) This proposal deals with the first subject matter.

The procedure is based on prior notification of the draft agreement by the Member States that wish to obtain the authorisation to re-negotiate and conclude the agreement with the third country on the basis of specific conditions to be evaluated on a case-by-case basis.

If the Community has already concluded an agreement on the same subject matter with the third country concerned, the Member State is not allowed to negotiate or conclude the agreement with the third country concerned and any application submitted will be rejected. If that is not the case, the Commission must determine whether such an agreement expected in the near future. If no such agreement is expected in the near future the Commission may grant authorisation, provided that the following two conditions are met:

a) the Member State concerned has demonstrated that it has a specific interest in concluding an agreement with the third country, related in particular to the existence of economic, geographic, cultural or historical ties between the Member State and that third country; and

b) the Commission determines that the proposed agreement is of limited impact on the uniform and consistent application of the Community rules in place and on the proper functioning of the system established by those rules.

The procedure also provides for the inclusion in the agreements of sunset clauses to limit the validity in time of the agreements concluded by the Member States until the point when the Community concludes an agreement on the same subject matters with the third country concerned.