Civil judicial cooperation: jurisdiction, recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility

2006/0135(CNS) - 17/07/2006 - Legislative proposal

PURPOSE : to amend Regulation 2201/2003/EC as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters

PROPOSED ACT : Council Regulation.

CONTEXT : the European Union has set itself the objective of maintaining and developing the European Union as an area of freedom, security and justice in which the movement of persons is ensured. For the gradual establishment of such an area, the Community is to adopt, among others, the measures relating to judicial cooperation in civil matters needed for the proper functioning of the internal market. There are currently no Community rules in the field of applicable law in matrimonial matters. Council Regulation 2201/2003/EC sets out rules on jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, but does not include rules on applicable law. The European Council held in Vienna on 11 and 12 December 1998 invited the Commission to consider the possibility of drawing up a legal instrument on the law applicable to divorce. In November 2004, the European Council invited the Commission to present a Green Paper on conflict-of-law rules in divorce matters. In line with its political mandate, the Commission presented a Green Paper on applicable law and jurisdiction in divorce matters on 14 March 2005. The Green Paper launched a wide public consultation on possible solutions to the problems that may arise under the current situation.

CONTENT : the overall objective of this Proposal is to provide a clear and comprehensive legal framework in matrimonial matters in the European Union and ensure adequate solutions to the citizens in terms of legal certainty, predictability, flexibility and access to court. The current situation may give rise to a number of problems in matrimonial proceedings of an international nature. The fact that national laws are very different both with regard to the substantive law and the conflict-of-law rules leads to legal uncertainty. The great differences between and complexity of the national conflict-of-law rules make it very difficult for international couples to predict which law will apply to their matrimonial proceeding. The large majority of Member States do not provide any possibility for the spouses to choose applicable law in matrimonial proceedings. This may lead to the application of a law with which the spouses are only tenuously connected and to a result that does not correspond to the legitimate expectations of the citizens. In addition, the current rules may induce a spouse to "rush to court", i.e. to seise a court before the other spouse has done so to ensure that the proceeding is governed by a particular law in order to safeguard his or her interests.

Finally, the current rules do not guarantee sufficient access to court. The Proposal amends Council Regulation 2201/2003/EC as regards jurisdiction and applicable law in matrimonial matters to attain the following objectives:

• *Strengthening legal certainty and predictability :* the Proposal introduces harmonised conflict-of-law rules in matters of divorce and legal separation to enable spouses to easily predict which law that will apply to their matrimonial proceeding. The proposed rule is based in the first place on the choice of the spouses. The choice is confined to laws with which the marriage has a close connection to avoid the

application of "exotic" laws with which the spouses have little or no connection. In the absence of choice, the applicable law is determined on the basis of a scale of connecting factors which will ensure that the matrimonial proceeding is governed by a legal order with which the marriage has a close connection. This will greatly enhance legal certainty and predictability for the spouses concerned as well as for practitioners.

• *Increasing flexibility by introducing limited party autonomy :* there is currently very limited place for party autonomy in matrimonial matters. The national conflict-of-law rules foresee in principle only one solution in a given situation, e.g. the application of the law of the common nationality of the spouses or the application of the law of the forum. The proposal renders the legal framework more flexible by introducing a limited possibility for the spouses to choose (a) applicable law and (b) the competent court in proceedings concerning divorce and legal separation. To allow spouses to come to an agreement on these matters could be particularly useful in cases of divorce by mutual consent. Special safeguards are introduced to ensure that the spouses are aware of the consequences of their choice.

• *Ensuring access to court :* the proposal seeks also to improve access to court in matrimonial proceedings. The possibility to choose the competent court in proceedings relating to divorce and legal separation ("prorogation") will enhance access to court for spouses who are of different nationalities. The rule on prorogation applies regardless of whether the couple lives in a Member State or in a third State. In addition, the proposal specifically addresses the need to ensure access to court for spouses of different nationalities who live in a third State. The proposal introduces a uniform and exhaustive rule on residual jurisdiction in order to enhance legal certainty and ensure access to court in matrimonial matters for spouses who live in a third State but would like to bring proceedings in a Member State with which they have a close connection.

• *Preventing “rush to court” by one spouse :* finally, the Proposal addresses the problem of “rush to court” by one spouse, i.e. where one spouse applies for divorce before the other spouse has done so to ensure that the proceeding is governed by a law to safeguard his or her own interests. This may lead to the application of a law with which the defendant does not feel closely connected or which fails to take into account his or her interests. It further renders reconciliation efforts difficult and leaves little time for mediation. The introduction of harmonised conflict-of-law rules are likely to greatly reduce the risk of "rush to court", since any court seized within the Community would apply the law designated on the basis of common rules.