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BH 204

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N O T E

Subject: Explanatory report on the Protocol, drawn up on the basis of Article K.3 of the Treaty on European Union, on the interpretation by the Court of Justice of the European Communities of the Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters

Delegations will find attached the abovementioned explanatory report, following the work of the Working Party of Legal/Linguistic Experts.

EXPLANATORY REPORT

ON THE PROTOCOL, DRAWN UP ON THE BASIS OF ARTICLE K.3 OF THE TREATY ON
EUROPEAN UNION,
ON THE INTERPRETATION BY THE COURT OF JUSTICE
OF THE EUROPEAN COMMUNITIES OF THE CONVENTION
ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS
IN MATRIMONIAL MATTERS

(Text approved by the Council on 28 May 1998)

I. GENERAL REMARKS

1. At its meeting on 10 and 11 December 1993, the European Council instructed the Working Party on Extension of the Brussels Convention to consider the possibility of extending the scope of the Brussels Convention to family matters.

In the course of work on such extension, which led to the Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters, it was considered necessary to give the Court of Justice jurisdiction to interpret its rules, in order to ensure uniform application. A draft protocol on the interpretation by the Court of Justice was thus drawn up.

Following the political compromise of December 1997, the Presidency requested the views of the European Parliament, in accordance with Article K.6 of the Treaty on European Union, on the text of the draft Convention and on the essential elements of the draft Protocol. The views of the European Parliament were published in the Official Journal on (1).

On 28 May 1998 the Council adopted the two instruments drawing up, on the one hand, the Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters, hereinafter referred to as "the Convention", and, on the other hand, the Protocol on the interpretation by the Court of Justice of the European Communities of the Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters (2), the subject of this explanatory report. Both these instruments were signed on the same day by the representatives of all the Member States.

(1) OJ L

(2) OJ L

2. (a) The enacting terms drawn up are based primarily on Article 177 of the EC Treaty. They echo to a very large extent the Protocol of 3 June 1971 (hereinafter referred to as the 1971 Protocol) on 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 and the Protocol of 25 May 1997 on the interpretation, by the Court, of the Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters (hereinafter referred to as the 1997 Protocol).

In particular, the Protocol subsumes the two methods of bringing proceedings before the Court provided for in the 1971 Protocol.

- (b) The procedures for the entry into force of the Protocol are similar to those established by the first and second Protocols of 19 December 1988 (hereinafter referred to as the 1988 Protocols) on the interpretation by the Court of Justice of the Convention on the Law applicable to Contractual Obligations and identical to those provided for in the 1997 Protocol.

The principle of assignment of jurisdiction to the Court is referred to in the Convention under discussion (Article 45), but it is the Protocol which defines the conditions for bringing proceedings and the national courts competent to do so.

The entry into force of the Convention, which will take place after its ratification by the fifteen Member States, must precede that of the Protocol, which is subject only to adoption by three of those States.

Accordingly, the earliest that the Protocol can enter into force is at the same time as the Convention. As a result, only the courts of a Member State that is a party to both the Convention and the Protocol will be able to ask the Court of Justice for a ruling or an opinion on a question of interpretation.

- (c) Lastly, the final provisions are similar to those laid down in this area by the Council of the European Union in respect of the Conventions established in the context of Title VI of the Treaty on European Union. They correspond to those of the Convention, *mutatis mutandis*.

II. COMMENTS ON THE ARTICLES

Article 1

3. Article 1 establishes the principle, posited in the 1971 and 1997 Protocols, of assignment of jurisdiction to the Court of Justice for interpreting the provisions of the Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and of the Protocol itself.

Article 2

4. Article 2 is a new provision by comparison with the 1971, 1988 and 1997 Protocols. Paragraph 1 thereof provides that each Member State shall indicate, in accordance with whichever of the alternative systems provided for in paragraph 2 is chosen, which courts in that Member State may request the Court of Justice to give preliminary rulings on questions of interpretation.

The reason for this provision is that some delegations wanted jurisdiction restricted to the highest courts. They took the view that judgments on matters covered by the Convention needed to be given as promptly as possible in order not to prejudice the interests of individuals where there are proceedings for divorce, legal separation or marriage annulment (especially because there is no possibility for the national courts to give provisional, including protective measures, in these cases) or proceedings relating to parental responsibility for the children of both spouses. Therefore only cases brought before the highest national courts would appear likely to require referral to the Court of Justice.

The mechanism provided for in that Article is inspired by Article K.7 as worded in the Treaty of Amsterdam, which was signed in 1997.

Each Member State must indicate its choice of courts at the time of the notification referred to in Article 9(2). Although the text does not say so, it is clear from the discussions that Member States which have indicated that only the highest courts may request the Court of Justice to give a preliminary ruling could at any time extend that option to other courts sitting in an appellate capacity.

5. Paragraph 2 defines the courts of the Member States which are competent to make a referral to the Court of Justice for a preliminary ruling on a question of interpretation, on the basis of the declaration made by the Member State concerned pursuant to paragraph 1.

These are, firstly, the highest courts of Member States, which are listed in Article 3(1).

Secondly, under the terms of paragraph 2, the courts of Member States sit in an appellate capacity. This essentially refers, therefore, to appeal courts, except when they are sitting as tribunals of first instance, and to other national courts hearing cases in their capacity as appeal courts.

Courts sitting in judgment at first instance, however, have no power to refer questions to the Court of Justice.

Article 3

6. This Article defines the highest courts of the Member States which are competent to make a referral to the Court of Justice for a preliminary ruling on a question of interpretation.

The list is limitative and any other supreme courts which might exist in Member States have no powers of referral, even if their decisions have civil impact.

7. The list given in paragraph 1 may be modified at the request of the Member State concerned. That possibility was introduced for the first time by the 1997 Protocol.

Such modification may prove necessary, for example, where a change takes place in a Member State's judicial system.

The request must be sent to the Secretary-General of the Council, in his capacity as depositary of the Protocol. He informs the other Member States of the request as quickly as possible, including the States which are not yet party to the Protocol.

The decision on the modification of the list is taken by the Council in accordance with the rules of procedure applicable.

Once it has been adopted, the modification displays its effects under the conditions specified in the Council decision (stipulating for instance the date of entry into force of the modification). Given the nature of the decision, it did not seem necessary for it to be adopted by the Member States in accordance with their respective constitutional requirements. Provision has therefore been made for specific rules, which constitute an exception to the amendment procedure laid down in Article 11 of the Protocol.

In the event of accession to the Protocol by a State which becomes a member of the European Union, that State will have to indicate, when it deposits its instrument of accession the conditions for application of Article 2 and which of its highest courts will be competent to ask the Court of Justice to rule on a question of interpretation (Article 10(3)).

Such a mechanism allows for monitoring by Member States, even those not party to the Protocol, of the courts designated, which should enable the system to continue to operate on a sound basis.

Article 4

8. This Article, which is based on Article 177 of the EC Treaty and subsumes Article 3 of the 1971 Protocol and Article 3 of the 1997 Protocol, concerns the procedure for referral for a preliminary ruling.

Paragraph 1 stipulates that, where the courts listed in Article 3(1) consider an interpretation necessary to enable them to give judgment, they must refer such questions to the Court of Justice.

Insofar as it imposes a requirement on the highest courts, the purpose of such a provision is to promote uniform application of the Convention within the Member States of the European Union.

9. Article 4(2) stipulates that, when sitting in an appellate capacity, courts have the option of referring a question to the Court of Justice with a request for interpretation where they consider a decision necessary on a point raised in a case pending before them.

Article 5

10. All Member States, even those not party to the Protocol, as well as the Commission and the Council of the European Union, are entitled to submit statements of case or written observations to the Court of Justice, once the latter has received a request for interpretation.

Article 6

11. This Article replicates Article 4 of the 1971 Protocol and Article 4 of the 1997 Protocol. It makes provision for a second procedure, which enables the Procurators-General of the Courts of Cassation or any other authority designated by the Member States to ask the Court of Justice for a ruling on a question of interpretation, where they are of the opinion that a judgment by a court in their State which has become *res judicata* conflicts with the interpretation given on that point by the Court of Justice or by such court as referred to in Article 2(2) of another Member State party to the Protocol.

This provision is also designed to ensure uniform interpretation of the Convention.

It is for the competent judicial authority to assess the advisability of making a request for interpretation to the Court of Justice in such a case.

Article 7

12. As in the 1971 and 1997 Protocols, this Article establishes the principle that the Statute of the Court of Justice and its Rules of Procedure are to apply.

Article 8

13. This Article, which stipulates that this Protocol may not be subject to any reservation, requires no particular comment.

Article 9

14. This Article makes provision for the entry into force of the Protocol in accordance with the rules laid down in this regard by the Council of the European Union.

In order to enable the Court of Justice to exercise its jurisdiction as soon as possible, the entry into force of the Protocol has been set at the expiry of a ninety-day period following deposit of its instrument of adoption by the third of the fifteen States which were members of the European Union on 28 May 1998, the date of adoption by the Council of the Act drawing up this Protocol, to do so.

However, the Protocol cannot enter into force before the Convention. In accordance with Article 47 of the latter, the Convention will enter into force ninety days after notification of completion of the constitutional procedures required for its adoption by the Member State which, as a Member of the European Union at the time the Council draws up the Act establishing the Convention, is the last to complete that formality.

Thus, advance application of the Convention within the meaning of Article 47(4) cannot provide a legal basis for the assignment to the Court of Justice of jurisdiction in respect of interpretation, within the meaning of Article 45 thereof. Neither would adoption of the Protocol by all the Member States entitle the Court of Justice to interpret the provisions of the Convention as long as the latter had not entered into force.

Article 10

15. This Article stipulates that the Protocol is open to accession by any State which becomes a member of the European Union. Conversely, a State which is not a member of the European Union can accede neither to the Convention nor to the Protocol.

With regard to the procedures for acceding to the Protocol, the Article makes provision in particular for simplified procedures for modifying the list of the highest courts contained in Article 3(1), following the designation of those of a new Member State.

Between the date of deposit of the instrument of accession and the date of entry into force of the Protocol with respect to the acceding Member State, the Council is to adopt the modifications to be made to the list of highest courts.

Article 11

16. This Article concerns the procedure for amending the Protocol.

Only Member States which are party to the Protocol, and the Commission, are entitled to propose amendments.

The Council recommends adoption by the Member States, in accordance with their respective constitutional requirements, of the amendments it adopts.

This procedure does not apply to the simple modification of the list of highest courts.

Article 12

17. This Article entrusts to the Secretary-General of the Council the role of depositary of the Protocol.

The Secretary-General is to inform the Member States of all notifications concerning the Protocol and ensure their publication in the "C" series of the Official Journal.

