



**COUNCIL OF
THE EUROPEAN UNION**

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LIMITE

**JUSTCIV 106
JAI 464**

NOTE

from:	Presidency
to:	Council
No. prev.doc.	9771/1/10 JUSTCIV 98 JAI 430
No. Cion prop.:	8176/1/10 JUSTCIV 57 JAI 271
Subject:	Proposal for a Council Regulation (EU) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation

1. Delegations will find in the Annex the text of the draft proposal for a Council Regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation after the meetings of the JHA Counsellors on 5 May 2010 and 17 May 2010 and in the light of the comments sent by the Member States after the meeting on 5 May 2010.
2. At the meeting of Coreper on 19 May 2010 general approach on key elements of this document was reached between the Member States that participate in enhanced cooperation. Several other Member States also expressed their positive approach on the text subject to further reflections.
3. All changes compared to the text of the Commission proposal are marked in **bold** or by (...) for deleted text.

Proposal for a

COUNCIL REGULATION (EU)

implementing enhanced cooperation in the area of the law applicable to divorce and legal separation

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 81(3) thereof,

Having regard to Council Decision [...] of [...] authorising enhanced cooperation in the area of the law applicable to divorce and legal separation¹,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Parliament²,

Having regard to the opinion of the European Economic and Social Committee³,

Acting in accordance with a special legislative procedure,

Whereas:

- (1) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is assured. For the gradual establishment of such an area, the Union must adopt measures relating to judicial cooperation in civil matters having cross-border implications, **particularly when necessary for the proper functioning of the internal market.**
- (2) Pursuant to Article 81 (...) of the Treaty on the Functioning of the European Union, **these measures are to include those aimed at ensuring the compatibility of the rules applicable in the Member States concerning conflict of laws.**
- (3) On 14 March 2005 the Commission adopted a Green Paper on applicable law and jurisdiction in divorce matters. The Green Paper launched a wide-ranging public consultation on possible solutions to the problems that may arise under the current situation.

¹ OJ L [...], [...], p. [...].

² OJ C [...], [...], p. [...].

³ OJ C [...], [...], p. [...].

- (4) On 17 July 2006 the Commission proposed a Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters.
- (5) At its meeting in Luxembourg on 5 and 6 June 2008, the Council concluded that there was a lack of unanimity on the proposal and that there were insurmountable difficulties that made unanimity impossible both then and in the near future. It established that the proposal's objectives could not be attained within a reasonable period by applying the relevant provisions of the Treaties.
- (6) **Belgium**, Bulgaria, **Germany**, Greece, Spain, France, Italy, **Latvia**, Luxembourg, Hungary, Austria, Romania and Slovenia subsequently addressed a request to the Commission indicating that they intended to establish enhanced cooperation between themselves in the area of applicable law in matrimonial matters and asking the Commission to submit a proposal to the Council for that purpose. On 3 March 2010, Greece withdrew its request.
- (7) On [...] the Council adopted Decision [...] authorising enhanced cooperation in the area of the law applicable to divorce and legal separation.
- (8) According to Article 328(1) of the Treaty on the Functioning of the European Union, when enhanced cooperation is being established, it is to be open to all Member States, subject to compliance with any conditions of participation laid down by the authorising decision. It is also to be open to them at any other time, subject to compliance with the acts already adopted within that framework, in addition to those conditions.
- (9) This Regulation should create a clear, comprehensive legal framework in the area of the law applicable to divorce and legal separation in the participating Member States, provide citizens with appropriate outcomes in terms of legal certainty, predictability and flexibility, and prevent a situation from arising where one of the spouses applies for divorce before the other one does in order to ensure that the proceeding is governed by a given law which he or she considers more favourable to his or her own interests.
- (10) In order to clearly delimit the territorial scope of this Regulation, the Member States participating in the enhanced cooperation must be specified.
- (10a) When this Regulation for the application of the law of a State refers to nationality as a connecting factor, the question of how to deal with cases of multiple nationalities is left to national law, in full respect of the general principles of the European Union.**
- (11) This Regulation should apply irrespective of the nature of the court or tribunal seized. **Where applicable, a court should be deemed to be seized in accordance with Regulation (EC) No 2201/2003.**

- (12) In order to allow the spouses to choose an applicable law with which they have a close connection or, in the absence of such choice, in order that that law might apply to their divorce or legal separation, the law in question should apply even if it is not that of a participating Member State. Where the law of another Member State is designated, the network created by Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters⁴, **as amended by decision 568/2009/EC of 18 June 2009**⁵, can play a part in assisting the courts with regard to the content of foreign law.
- (13) Increasing the mobility of citizens calls for more flexibility and greater legal certainty. In order to achieve that objective, this Regulation should enhance the parties' autonomy in the areas of divorce and legal separation by giving them a limited possibility to choose the law applicable to their divorce or legal separation.. Such possibility should not extend to marriage annulment, which is closely linked to the conditions for the validity of marriage, and for which autonomy on the part of the parties is inappropriate.
- (14) Spouses should be able to choose the law of a country with which they have a special connection or the *lex fori* as the law applicable to divorce and legal separation. The law chosen by the spouses must be consonant with the fundamental rights **recognised** in the Treaties and the Charter of Fundamental Rights of the European Union. (...)
- (15) Before designating the applicable law, it is important for spouses to have access to up-to-date information concerning the essential aspects of national and Union law and of the procedures governing divorce and legal separation. To guarantee such access to appropriate, good-quality information, the Commission regularly updates it in the Internet-based public information system set up by Council Decision 2001/470/EC, **as amended by decision 568/2009/EC of 18 June 2009**.
- (16) The informed choice of the two spouses is a basic principle of this Regulation. Each spouse should know exactly what are the legal and social implications of the choice of applicable law. The possibility of choosing the applicable law by common agreement should be without prejudice to the rights of, and equal opportunities for, the two spouses. Hence judges in the Member States should be aware of the importance of an informed choice on the part of the two spouses concerning the legal implications of the choice-of-law agreement concluded.
- (17) Certain safeguards should be introduced to ensure that spouses are aware of the implications of their choice. The agreement on the choice of applicable law should at least be expressed in writing, dated and signed by both parties. However, if the law of the participating Member State in which the two spouses have their habitual residence lays down additional formal rules, those rules must be complied with. For example, such additional formal rules may exist in a participating Member State where the agreement is inserted in a marriage contract.

⁴ OJ L 174, 27.6.2001, p. 25.

⁵ OJ L 168, 30.6.2009, p. 35-40.

- (18) An agreement designating the applicable law should be able to be concluded and modified at the latest when the court is seised, and even during the course of the proceeding if the *lex fori* so provides. In that event, it should be sufficient for such designation to be recorded in court in accordance with the *lex fori*.
- (19) Where no applicable law is chosen, and with a view to guaranteeing legal certainty and predictability and preventing a situation from arising in which one of the spouses applies for divorce before the other one does in order to ensure that the proceeding is governed by a given law which he or she considers more favourable to his or her own interests, this Regulation should introduce harmonised conflict-of-laws rules on the basis of a scale of successive connecting factors based on the existence of a close connection between the spouses and the law concerned. **Such connecting factors should be chosen so as to ensure that proceedings relating to divorce or legal separation are governed by a law with which the spouses have a close connection.**
- (20) In certain situations, such as where the applicable law makes no provision for divorce or where it does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the law of the court seised should nevertheless apply. **This, however, should be without prejudice to the public policy clause (*ordre public*).**
- (21) Considerations of public interest should allow courts in the Member States the opportunity in exceptional circumstances to disregard the application of foreign law in a given case where it would be manifestly contrary to the public policy of the forum. However, the courts should not be able to apply the public-policy exception in order to disregard the law of another (...) State when to do so would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof, which prohibits all forms of discrimination.
- (21a) **Where the Regulation refers to the fact that the applicable law does not provide for divorce, this should be interpreted in such a way that the applicable law does not know the concept of divorce at all.**
- (22) Since there are States and participating Member States in which two or more systems of law or sets of rules concerning matters governed by this Regulation coexist, there should be a provision governing the extent to which this Regulation applies in the different territorial units of those States and participating Member States.
- (23) Since the objectives of this Regulation, namely the enhancement of legal certainty, predictability and flexibility – and hence the facilitation of the free movement of persons within the European Union – in international matrimonial proceedings, cannot be sufficiently achieved by the Member States acting alone owing to the scale and effects of this Regulation, these objectives can be better achieved at Union level, where appropriate by means of enhanced cooperation between those Member States, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

- (24) This Regulation respects fundamental rights and observes the principles **recognised** in the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof, which states that any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. This Regulation must be applied by the courts of the participating Member States in observance of those rights and principles.

HAS ADOPTED THIS REGULATION:

Chapter I – Scope

Article 1 *Material scope*

1. This Regulation shall apply, in situations involving a conflict of laws, to divorce and legal separation.
2. For the purposes of this Regulation, 'participating Member State' means a Member State which participates in enhanced cooperation on the law applicable to divorce and legal separation by virtue of Council Decision [...] of [...] authorising enhanced cooperation in the area of the law applicable to divorce and legal separation, **or by a decision taken by the Commission in accordance with Article 331(1), second paragraph, of the Treaty on the Functioning of the European Union.**
3. **For the purposes of this Regulation, the term "court" shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to paragraph 1.**

Article 2 *Universality*

The law designated by this Regulation shall apply whether or not it is the law of a participating Member State.

Chapter II – Uniform rules on the law applicable to divorce and legal separation

Article 3 *Choice of applicable law by the parties*

1. The spouses may **agree to designate** the law applicable to divorce and legal separation **provided that it is one of** the following laws:
 - (a) the law of the State **where the spouses are habitually resident at the time the agreement is concluded, or**
 - (b) the law of the State **where the spouses were last habitually resident, insofar as one of them still resides there at the time the agreement is concluded, or**
 - (c) the law of the State of **the nationality of either spouse at the time the agreement is concluded, or**
 - (d) the *lex fori*.

2. Without prejudice to paragraph 2a, an agreement designating the applicable law may be concluded and modified at any time, but at the latest when the court is seised.

2a. If the *lex fori* so provides, the spouses may also designate the law applicable before the court during the course of the proceeding. In that event, such designation shall be recorded in court in accordance with the *lex fori*.

3. The agreement referred to in paragraph 2 shall be expressed in writing, dated and signed by both spouses. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.

However, if the law of the participating Member State in which the two spouses have their habitual residence at the time of conclusion of the agreement lays down additional formal requirements for this type of agreement, those requirements shall apply. If the spouses are habitually resident in different participating Member States and the laws of those Member States provide for different formal requirements, the agreement shall be formally valid if it satisfies the requirements of either of those laws.

Article 4
Applicable law in the absence of a choice by the parties

In the absence of a choice pursuant to Article 3, divorce and legal separation shall be subject to the law of the State:

- (a) where the spouses are habitually resident at the time the court is seised; or, failing that,
- (b) where the spouses were last habitually resident, provided that the period of residence did not end more than one year before the court was seised, in so far as one of the spouses still resides in that State at the time the court is seised; or, failing that,
- (c) of which both spouses are nationals at the time the court is seised; or, failing that,
- (d) where the court is seised.

Article 5
*Application of the *lex fori**

Where the law applicable pursuant to Article 3 or Article 4 makes no provision for divorce or does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the *lex fori* shall apply.

Article 6
Exclusion of renvoi

Where this Regulation provides for the application of the law of a State, it refers to the rules of law in force in that State other than its rules of private international law.

Article 7
Public policy

Application of a provision of the law designated by virtue of this Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum.

Article 7a
Differences in national law

Nothing in this Regulation shall oblige the courts of a Member State whose law does not provide for divorce or does not recognise the marriage in question for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation.

Article 8
States with more than one legal system

1. Where a State comprises several territorial units each of which has its own rules of law in respect of divorce and legal separation, each territorial unit shall be considered a State for the purpose of determining the law applicable under this Regulation.

2. A participating Member State within which different territorial units have their own rules of law in respect of divorce and legal separation shall not be required to apply this Regulation to conflicts of law arising between such units only.

Chapter III – Other provisions

Article 9
Information to be provided by participating Member States

1. At the latest by [*three months after the date of application of this Article*], participating Member States shall communicate to the Commission their national provisions, if any, concerning:

- (a) the formal **requirements** applicable to agreements on the choice of applicable law; and
- (b) the possibility of designating the applicable law in accordance with Article 3(2a).

The participating Member States shall apprise the Commission of any subsequent changes to these provisions.

2. The Commission shall make all information communicated in accordance with paragraph 1 publicly available through appropriate means, in particular through the website of the European Judicial Network in civil and commercial matters.

Article 10
Transitional provisions

1. This Regulation shall apply only to legal proceedings instituted and to agreements of the kind referred to in Article 3 concluded **as from** its date of application pursuant to Article 13.

However, effect shall also be given to an agreement on the choice of the applicable law concluded in accordance with the law of a participating Member State before the date of application of this Regulation, provided that it fulfils the conditions set out in the first paragraph of Article 3(2a).

2. This Regulation shall be without prejudice to agreements on the choice of applicable law concluded in accordance with the law of a participating Member State whose court is seised before the date of application of this Regulation.

Article 11
Relationship with existing international conventions

1. (...) This Regulation shall not affect the application of **international** conventions to which one or more participating Member States are parties at the time **when the Regulation is adopted** and which **lay down conflict of law rules relating to divorce or separation**.

2. **However**, this Regulation shall, (...) as between participating Member States, **take precedence** over conventions **concluded exclusively between two or more of them is so far as such conventions concern matters** governed by this Regulation (...).

Article 12
Review clause

By [*five years after the entry into force of this Regulation*] at the latest, **and every five years thereafter**, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied, where appropriate, by proposed amendments.

Chapter IV – Final provisions

Article 13

Entry into force and date of application

This Regulation shall enter into force on the twentieth day following its publication in the *Official Journal of the European Union*.

It shall apply from [*twelve months after the date of adoption of this Regulation*], with the exception of Article 9, which shall apply from [*six months after the date of adoption of this Regulation*].

This Regulation shall be binding in its entirety and directly applicable in the participating Member States in accordance with the Treaties.

Done at Brussels,

For the Council

The President
