



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 28 June 2007**

**11295/07**

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**Interinstitutional File:  
2006/0135 (CNS)**

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**LIMITE**

**JUSTCIV 183**

**NOTE**

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from : German Presidency and incoming Portuguese Presidency  
to : Committee on Civil Law Matters (Rome III)

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No. prev. doc. : 7144/07 JUSTCIV 47  
No. Cion prop. : 11818/06 JUSTCIV 174

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Subject : Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters

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Delegations will find herewith the text as drafted by the German Presidency and the incoming Portuguese Presidency on the basis of the meetings of the Committee on Civil Law Matters (Rome III) and of the comments of delegations (17021/06 and ADD 1 to 18).

It is recalled that the Committee on Civil Law Matters examines in parallel a proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of judgments and cooperation in matters relating to maintenance. As many delegations have pointed out, it appears necessary to ensure that the two draft instruments on family law are compatible. However, it is also recalled that the context of the instruments is different and that therefore the solutions discussed in the framework of the draft Regulation on maintenance need not necessarily be transferred to the draft Regulation ROME III and vice versa.

Proposal for a  
**COUNCIL REGULATION**  
amending Regulation (EC) No 2201/2003 as regards jurisdiction **as well as** introducing rules  
concerning applicable law in matters of **divorce and legal separation**

[...]

*Article 1*

Regulation (EC) No 2201/2003 is amended as follows:

- (1) the title is replaced by the following:

“Council Regulation (EC) N° 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and (...) matters of parental responsibility as well as applicable law in **matters of divorce and legal separation** ”

- (2) the following Article 3a is inserted:

“Article 3a

*Choice of court by the parties in proceedings relating to divorce and legal separation*

1. The spouses may agree that a court or the courts of a Member State **shall** have jurisdiction in a proceeding between them relating to divorce or legal separation provided **that** (...) they have a substantial connection with that Member State by virtue of the fact that

(a) (...) <sup>1</sup>

(b) (...) <sup>2</sup>

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<sup>1</sup> See subparagraph (e).

<sup>2</sup> See subparagraph (d).

- (c) **at the time the agreement is concluded**, one of the spouses **has the nationality**<sup>3</sup> of that Member State [or, in the case of the United Kingdom and Ireland, has his or her “domicile” in the territory of one of the latter Member States]<sup>4</sup>, **or**
- (d) **at the time the agreement is concluded**, it is the **Member State** of the spouses’ last (...) habitual residence for **at least** three years **provided that that period did not end more than three years before the court was seised**, or
- (e) **at the time the court is seised**<sup>5</sup>, **that court has jurisdiction under Article 3**.

2. An agreement conferring jurisdiction may be concluded and modified at any time, but at the latest at the time the court is seised.

3. **Such agreement shall at least** be expressed in writing, **dated** and signed by both spouses.

**[However, if the law of the Member State where either of the spouses has his or her habitual residence at the time the agreement is concluded provides for stricter formal requirements for such agreements or if the agreement is part of a marriage contract, those requirements or the formal requirements for the marriage contract have to be satisfied. If the spouses are habitually resident in different Member States and the laws of both Member States provide for stricter formal requirements, the agreement is formally valid if it satisfies the requirements of either of those laws.]**<sup>6</sup>

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<sup>3</sup> A recital should indicate that the question of how to deal with cases of multiple nationality is left to national law. This recital would refer not only to this provision, but also to other provisions using nationality as a connecting factor (see Articles 7(b), 20a(1)(b) and 20b(1)(c) and (1a)).

<sup>4</sup> The consequences of the fact that the UK and Ireland have not opted in to this instrument have to be analysed in a horizontal manner. The Committee should return to this and other relevant provisions once the horizontal issue has been solved.

<sup>5</sup> It is noted that the majority of Member States expressed a preference for this alternative.

<sup>6</sup> This proposal tries to find an alternative to the connecting factor of the "place where the agreement is concluded", which might lead to arbitrary results. It would mean that if the spouses are habitually resident in a third country, only the first subparagraph of paragraph 3 applies.

**[Member States shall inform the Commission of their formal requirements for agreements on choice of court or for marriage contracts. The Commission shall make this information publicly available<sup>7</sup>.] <sup>8</sup>**

**4. The jurisdiction conferred by agreement shall be exclusive unless the spouses have agreed otherwise.**

**5. Notwithstanding an agreement conferring exclusive jurisdiction, a court of a Member State before which the defendant enters an appearance shall have jurisdiction insofar as this court would otherwise have jurisdiction under this Regulation in accordance with Articles 3, 5 or 7. This rule shall not apply where an appearance was entered to contest the jurisdiction.”**

(3) In Articles 4 and 5, the terms “Article 3” are replaced by the terms “Articles 3, 3a **and 7**”.

(4) Article 6 is deleted;<sup>9</sup>

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<sup>7</sup> If such provision is included, it might also be moved to the final provisions of Regulation 2201/2003.

<sup>8</sup> At the last meeting, the majority of delegations felt that it may not be necessary to impose the same formal requirements for a choice of court agreement as for a choice of law agreement.

<sup>9</sup> Some delegations expressed concerns with respect to the deletion of Art. 6 as this provision defines the scope of application of Regulation (EC) No 2201/2003 in the sense that it provides that EU-citizens and those who habitually reside in a Member State may only be sued in accordance with the provisions of that Regulation. If Art. 6 was to be deleted, the exclusive nature of the provisions on jurisdiction could be questioned with the consequence that courts may apply national law in addition to the Draft Regulation. Consideration should be given as to whether a recital could clarify that the deletion of Article 6 does not change the exclusive nature of the provisions on jurisdiction.

- (5) Article 7 is replaced by the following:

"Article 7

***Subsidiary jurisdiction***

Where **neither of the spouses** is habitually resident in the territory of a Member State and **the spouses** do not have a common nationality of a Member State, [or, in the case of the United Kingdom and Ireland, do not have their “domicile” **in** the territory of one of the latter Member States,]<sup>10</sup> the courts of a Member State **shall have jurisdiction** by virtue of the fact that:

- (a) the spouses **previously** had their (...) habitual residence in the territory of that Member State for at least [three] years **provided that that period did not end more than three years before the court was seised**, or
- (b) **either** of the spouses has the nationality of that Member State[, or, in the case of **the** United Kingdom and Ireland, has his or her “domicile” in the territory of one of the latter Member States]<sup>11</sup>.”

- (6) In Article 12 (1), the terms “Article 3” are replaced by the terms “Articles 3 and 3a”<sup>12</sup>.

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<sup>10</sup> See footnote on Article 3a(1)(c).

<sup>11</sup> See footnote on Article 3a(1)(c).

<sup>12</sup> It should be discussed whether Article 7 should be mentioned.

(7) The following Chapter IIa is inserted:

“CHAPTER IIa

Applicable law in matters of divorce and legal separation<sup>13 14 15 16</sup>

Article 20a

*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:

**(a1) the law of the State where the spouses are habitually resident<sup>17</sup> at the time the agreement is concluded, or**

**(a) the law of the State where the spouses were last habitually resident, insofar as one of them still resides there<sup>18</sup> at the time the agreement is concluded, or**

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<sup>13</sup> Further consideration will be given to the problems resulting from the absence of divorce in the substantive law of one Member State. It is suggested that it should be clearly stated in the text that nothing in this Regulation should oblige the courts of a Member State whose procedural law does not provide for divorce to pronounce a divorce by virtue of the application of the provisions of this Regulation.

<sup>14</sup> It is recalled that the scope of the applicable law covers only divorce and legal separation as such, but not the consequences relating to property, maintenance and other issues (see recital 8 of Regulation 2201/2003).

<sup>15</sup> A recital should indicate that this Regulation does not determine the law applicable to a marriage. The definition of marriage and the conditions of the validity of marriage are matters of substantive law and are therefore left to national law. Consequently, the court of a Member State which has jurisdiction as regards divorce or legal separation may assess the existence and validity of a marriage according to its own law (including conflict-of-law rules).

<sup>16</sup> The Committee should discuss the question whether the Regulation needs to address cases where the only court which has jurisdiction is situated in a Member State where the law does not provide for divorce.

<sup>17</sup> Note for the translators: See Article 3(1)(a), 1st indent, of Regulation 2201/2003.

<sup>18</sup> Note for the translators: See Article 3(1)(a), 2nd indent, of Regulation 2201/2003.

- (b) the law of the State of the nationality of either spouse [or, in the case of **the United Kingdom and Ireland, of the “domicile” of either spouse,**]<sup>19</sup> **at the time the agreement is concluded, or**
- (c) (...)
- (d) the law of the **forum.**<sup>20</sup>

**2. An agreement designating the applicable law may be concluded and modified at any time, but at the latest [at the time the court is seised] [at the first court hearing or, in the absence of a court hearing, in the course of the first exchange of writs, or in case of a joint application, in the writ of application].**

**3. Such agreement shall at least be expressed in writing, dated and signed by both spouses.**

**However, if the law of the Member State where either of the spouses has his or her habitual residence at the time the agreement is concluded provides for stricter formal requirements for such agreements or if the agreement is part of a marriage contract, those requirements or the formal requirements for the marriage contract have to be satisfied. If the spouses are habitually resident in different Member States and the laws of both Member States provide for stricter formal requirements, the agreement is formally valid if it satisfies the requirements of either of those laws.**

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<sup>19</sup> It should be examined whether this provision needs to be extended to “domicile” in cases of other countries using a similar concept, or whether an explanation to this effect in a recital would be sufficient.

<sup>20</sup> It is understood that *lex fori* would only apply if the court seised has jurisdiction under the Regulation.

**[Member States shall inform the Commission of their formal requirements for agreements on choice of court or for marriage contracts. The Commission shall make this information publicly available.]<sup>21</sup>**

**[4. Where the agreement is made before the court in the course of proceedings, it is sufficient that the agreement is recorded in court.]<sup>22 23</sup>**

Article 20b

*Applicable law in the absence of choice by the parties*

**1. In the absence of a choice pursuant to Article 20a, 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<sup>24</sup>** or, failing that,

(b) where the spouses **were last habitually resident** insofar as one of them still resides there<sup>25</sup> **at the time the court is seised** or, failing that,

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<sup>21</sup> See footnotes on Article 3a(3).

<sup>22</sup> Paragraph 4 is only necessary if agreements can also be concluded at the initial stage of the court proceedings (see paragraph 2).

<sup>23</sup> An alternative option may be the following text for paragraphs 2 to 4:

"2. An agreement designating the applicable law may be concluded and modified at any time, but at the latest at the time the court is seised.

3. [unchanged]

4. If the law of the forum so provides, the spouses may also designate the law applicable before the court in the course of proceedings. In such a case, it is sufficient that the agreement is recorded in court."

<sup>24</sup> Note for the translators: See Article 3(1)(a), 1st indent, of Regulation 2201/2003.

<sup>25</sup> Note for the translators: See Article 3(1)(a), 2nd indent, of Regulation 2201/2003.



- (c) of **the nationality of both spouses**<sup>26</sup> (...) [, or, in the case of **the United Kingdom and Ireland, of the “domicile” of both spouses,**]<sup>27</sup> **at the time the court is seised or, failing that,**
- (d) where the **court is seised.**<sup>28</sup>

**[1a. By derogation to paragraph 1(b), the law of the forum shall apply where:**

- (a) one of the spouses so requests; and**
- (b) during their marriage, the spouses had their last habitual residence in the State referred to in paragraph 1(b) for less than [three] years; and**
- (c) the requesting spouse has a substantial connection with the Member State of the court seised by virtue of the fact that he or she**
  - (i) has been habitually resident in that Member State for at least [ten] years, provided that that period did not end more than [three] years before the court is seised; or**
  - (ii) is a national of that Member State.]**

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<sup>26</sup> Note for the translators: See Article 3(1)(b) of Regulation 2201/2003.

<sup>27</sup> See footnote on Article 20a(1)(b).

<sup>28</sup> It is understood that *lex fori* would only apply if the court seised has jurisdiction under the Regulation.

**2. Where the law applicable pursuant to paragraph 1 (a), (b) or (c) does not provide for divorce, the law of the forum shall apply.<sup>29</sup>**

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Article 20c

*Application of foreign law*<sup>32</sup>

**(deleted)**

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<sup>29</sup> A recital could clarify that the provision covers cases where the applicable law does not know the concept of divorce at all as well as cases where the applicable law does not allow one of the spouses to lodge an application for divorce.

<sup>30</sup> During the last meeting a majority of delegations were against inserting a provision on discrimination. In a spirit of compromise it is suggested to include a recital indicating that where the law applicable does not provide for the same rights with respect to divorce or legal separation for each spouse, the law of the forum should apply.

<sup>31</sup> The French delegation has proposed the following wording for Article 20b (document 7153/07 JUSTCIV 49):

- "1. In the absence of a choice pursuant to Article 20a, where both parties enter an appearance and neither requests application of another law, divorce and legal separation shall be subject to the lex fori.
2. In other cases, divorce and legal separation shall be subject to:
  - (a) the law of the spouses' common habitual residence or, failing that,
  - (b) the law of their common nationality or, failing that,
  - (c) the law of the spouses' last common habitual residence, insofar as one of them still resides there or, failing that,
  - (d) the lex fori.

The application of a law other than the lex fori [defined according to the criteria laid down in paragraph 2] must be requested before any claim or defence on the merits.

3. Where the law applicable pursuant to paragraphs 1 and 2 does not provide for divorce, the lex fori shall apply to the application for divorce."

<sup>32</sup> It is suggested to move this provision to a recital that could read as follows: "When a court has to apply the law of another Member State it may make use of, in particular, the European Judicial Network in Civil and Commercial Matters to obtain information on the contents of that law."

## Article 20c1

### *Universal application*

**The law designated by this Regulation shall be applied whether or not it is the law of a Member State.**<sup>33</sup>

## Article 20d

### *Exclusion of renvoi*

The application of a law designated under this Regulation means the application of the rules (...) **in force in that State** other than its rules of private international law.<sup>34</sup>

## Article 20e

### *Public policy*<sup>35</sup>

The application of a provision of the law designated by this Regulation may be refused only if such application is manifestly incompatible with the public policy (**ordre public**) of the forum." <sup>36</sup>

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<sup>33</sup> Note for the translators: See Article 3 of PE-CONS 3619/07.

<sup>34</sup> Note for the translators: See Article 15 of the 1980 Rome Convention (*mutatis mutandis*).

<sup>35</sup> One example for the application of public policy could be cases where the application of a foreign divorce law would discriminate one of the spouses, for example by not providing for the same rights for each spouse with respect to divorce or legal separation.

<sup>36</sup> Note for the translators: See Article 26 of PE-CONS 3619/07.

## **Article 20f**

### ***States with more than one legal system***<sup>37</sup>

- 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 as a State for the purposes of identifying the law applicable under this Regulation.**
  
- 2. A 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 solely between the laws of such units.**

### ***Article 1a***

#### ***Transitional provisions***

- 1. The provisions of this Regulation shall apply to legal proceedings instituted, and to agreements referred to in Articles 3a and 20a concluded after the date of application in accordance with Article 2.**
  
- 2. However, an agreement referred to in Articles 3a and 20a concluded in accordance with the national law of a Member State before the date of application of this Regulation (...) shall also be given effect, provided that it fulfils the conditions set out in Articles 3a and 20a.**

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<sup>37</sup> Note for the translators: See - mutatis mutandis - Article 25 of PE-CONS 3619/07.

**3. This Regulation does not prejudice agreements [referred to in Articles 3a and 20a] [on the choice of the law applicable to divorce or legal separation] concluded in accordance with the provisions of the law of the Member State<sup>38</sup> of the court seised before the date of application of this Regulation.**

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*Article 2*

*Entry into force*

This Regulation shall enter into force on **the** twentieth day following (...) its publication in the *Official Journal of the European Union*.<sup>40</sup>

It shall apply from [...].

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels,

*For the Council*

*The President*

[...]

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<sup>38</sup> The term "provisions of the law of the Member State" includes the conflict-of-law rules of that Member State.

<sup>39</sup> It needs to be discussed how to deal with the question of existing and future agreements with third States.

<sup>40</sup> Delegations have expressed their need for future bilateral agreements or amendments to existing bilateral agreements with third States. Consideration should be given as to whether reference should be made to a future mechanism introducing a procedure for the negotiation of such agreements as agreed upon by the Ministers on 19 April 2007 with respect to the Draft Regulation on Maintenance Obligations. Such instrument should be in place at the latest at the time of the entry into force of this Regulation.