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from: Austrian delegation

to: Working Party on Civil Law Matters (Matrimonial Property Regimes and Registered Partnerships)

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Subject: Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes
Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships
– Comments from the Austrian delegation on Chapters I-II

**Comments by the Austrian delegation on Chapters I and II of the
Regulation on matrimonial property regimes**

Article 1 (Scope):

Paragraph 3 point (c): This exception should be deleted entirely, since other "normal" civil-law contracts between spouses (leases, contracts of employment, works contracts) are not also excluded from the scope. It should be left for a precise definition in Article 2(a) and (b), and the jurisprudence of the courts, to establish which contracts are to be considered as forming part of matrimonial property regimes. It is not appropriate to generally exclude specific types of contract from the scope.

Paragraph 3 point (e): This exception should be deleted for the same reasons as the exception in Article 3 point (c). Excluding companies' articles of association, in general, from the scope would in fact be misleading since companies, or shares in companies, which spouses own as investments are to be regarded as matrimonial savings under the matrimonial property regime and so are to be included in the division of matrimonial property. This does not alter the fact that disputes arising from the ownership interest in a business, and other disputes between spouses based on civil-law contracts in general, do not fall within the scope of the Regulation.

Paragraph 3 point (f): The exception should be aligned with the Succession Regulation.

Article 2 (Definitions):

Point (a) matrimonial property regime: This definition constitutes the key definition of the draft Regulation and should reflect the purpose of the Regulation more clearly: in order to distinguish the scope clearly from that of the Rome I and Brussels II Regulations, a distinction must be drawn between typical property relations between spouses and agreements between spouses under the matrimonial property regime on the one hand and other contractual relations between spouses (e.g. contracts of employment, works contracts, leases and articles of association) on the other hand.

The definition of a matrimonial property regime should include the reciprocal property claims of the spouses on the basis (as a result) of the marriage. This would also be more in tune with Article 2 point (a) of the Regulation on the property consequences of registered partnerships which includes rules "resulting from the link created by the registration of the partnership".

Point (b) marriage contract: The Austrian delegation proposes removing this term from the definitions in Article 2 as it is used only in Article 20 of the text and could, if necessary, be defined more precisely there. The reference to marriage contracts in the definition of Member State of origin in Article 2 point (e) is - as shown below - in any case inappropriate.

If a definition is required, it should be expressed more clearly by referring to "matrimonial property relationships".

Point (c) authentic instrument:

The definition should - in line with the Succession Regulation - be expanded to include the expression "an instrument in matrimonial property matters".

Point (e) Member State of origin:

A definition like the one in Article 2(e) of the Succession Regulation is sufficient. The phrase "the instrument liquidating the common property" should be deleted as this must be via a judicial decision, a judicial settlement or an authentic instrument in order for it to be recognised and enforced within the meaning of Chapter IV.

The phrase "the marriage contract concluded" should be deleted, as if an authentic instrument is drawn up in a Member State in respect of a marriage contract, the only issue which matters for recognition and enforcement of the instrument is where it was drawn up and not where the marriage contract was concluded. If the marriage contract is (without having been authenticated) the basis for a judicial decision or a judicial settlement, then the rules for its recognition or enforcement apply. The unauthenticated marriage contract is only significant with regard to the applicable law, but that is not linked to the "Member State of origin".

The phrase "the court settlement approved" should be supplemented by "or concluded" (as in Article 2 point (h)).

Point (f) Member State addressed:

See comments on point (e) above.

Point (g) court:

The definition should be aligned on the definition of "court" in Article 2(2) of the revised Hungarian and Polish Presidency version of the Succession Regulation (JustCiv173). This key concept, for Chapter IV of the draft inter alia must, in order to safeguard the rule of law, be defined in such a way that it covers only those authorities and persons which also have a judicial function. Core aspects of the judicial function are impartiality, the need to ensure a fair hearing and the possibility of appeal against its decisions.

All settlements in the field of matrimonial property law which have been concluded in the presence, or with the assistance, of persons or authorities with no judicial function (such as lawyer settlements, mediation agreements or private agreements) can and should only be recognised and enforced in another Member State if the agreement has been the subject of an authentic instrument within the meaning of Article 2 point (c).

Any other solution would run the risk that rules in those Member States which, in order to protect spouses who are vulnerable, stipulate that certain matrimonial property agreements will only be valid if concluded e.g. in the legal form of a notarial act, will be circumvented.

Point (h) court settlement:

See explanations under (g) above.

Point (x) definition of Member State of enforcement:

As in the Succession Regulation, there should be a definition for the Member State of enforcement; this is particularly necessary if - as is proposed later - the references to the Brussels I Regulation are removed and incorporated into the text of the Regulation.

Re Article 3 (Jurisdiction in the event of the death of one of the spouses):

1. Article 3 should also cover jurisdiction if the succession proceedings are initiated, as in many MS, *ex officio* and not by application; the provision might read as follows: "*The courts of a Member State in which proceedings concerning the succession of a spouse under Regulation ...are pending shall also have jurisdiction to rule on matters of the matrimonial property regime arising in connection with the subject-matter of the proceedings.*"
2. The courts of the MS which have jurisdiction to rule on the succession proceedings should only have jurisdiction over matrimonial property claims as well at the request of the surviving spouse. For, in line with Article 4 of the Regulation, the surviving spouse should not be obliged to pursue his matrimonial property claims in a MS where the spouses never had a common residence and where there may be no common property. This would mean that the court must apply foreign law in respect of matrimonial property questions which, given the complexity of the matter, may not be in the interest of the surviving spouse.

Harmony between international jurisdiction and the applicable law should be one of the main goals of the Regulation, so that only in exceptional cases should (without the approval of the parties) a court of a Member State in which the spouses have never had a common residence have jurisdiction over matrimonial property proceedings. This would, however, be the case if the succession court is the one which must have jurisdiction.

3. The Regulation text does not make it sufficiently clear whether it is the specific court with jurisdiction over the succession or "only" a court in the Member State in which the succession proceedings are being conducted which has jurisdiction over "matters" (or, better, "proceedings") relating to the matrimonial property regime. Austria supports the second option, i.e. to regulate only the international jurisdiction, as otherwise the Regulation would interfere unduly with the national judicial structure. The parties would also be best served if those courts and judges which, within the national judicial system, deal regularly with matters of matrimonial property law, also have jurisdiction for dividing the property. Lastly, the Regulation's also establishing territorial jurisdiction could not prevent a situation in which, owing to the division of work within the courts, two different judges (or judges and judicial officers) would ultimately have jurisdiction with two sets of proceedings required.

Re Article 4 (Jurisdiction in cases of divorce, legal separation or marriage annulment):

First paragraph: The wording "arising in connection with the application" should be reconsidered, since a divorce application contains no matrimonial property claims. What is envisaged here is, rather, claims (not matters) seeking a decision on matrimonial property and related to the divorce, legal separation or marriage annulment.

While many Member States expressed support in the Working Party for the divorce court being automatically granted jurisdiction over matrimonial property matters, the Austrian delegation stresses that it does not support such an amendment for the following reasons: based on the jurisdiction provisions of the Brussels IIa Regulation (Article 3 et seq), spouses can, under certain circumstances, choose between several jurisdictions. The spouse who is first to submit the divorce application can thus "select" the court which will rule on matrimonial property matters. That spouse will not necessarily be the financially weaker spouse. For the reasons already set out regarding Article 3, only in exceptional cases should the court of a MS in which the spouses

never had a common residence have jurisdiction (without the approval of the parties).

Second paragraph: The Regulation should also make it easier for the spouses to agree the jurisdiction of the divorce court even after the final conclusion of divorce proceedings. It is often only after the divorce that spouses realise that they also need to settle their matrimonial property relations. The rule on agreeing the jurisdiction "during the proceedings" should make it clear that it concerns the divorce proceedings. On the basis of Article 10, the agreement must already exist at the time when an application (inter alia) for a decision on matrimonial property "matters" is made. There are no provisions on the admissibility of appropriate electronic forms of writing. Since the rule in the last sentence of Article 4 is already implicit in the first paragraph, it should be deleted.

Re Article 5 (Jurisdiction in other cases):

Paragraph 1: For reasons of legal certainty, the Austrian delegation is in favour of the proposed hierarchy of jurisdiction?

Paragraph 2: The parties should also be able to agree that the courts of the Member State whose law is applicable to their matrimonial property regime under Article 17 of the Regulation shall have jurisdiction. This could in many ways help to establish harmony between international jurisdiction and the applicable law. The provisions on the agreement of international jurisdiction should be combined in a single article which should also refer to possibilities for the electronic form.

Re Article 6 (Subsidiary jurisdiction):

The provision should be supplemented by requirements which prevent exorbitant jurisdiction. Jurisdiction should in particular depend on the applicant having his habitual residence in a MS (or on the defendant being a national of a MS). Spouses who do not (any longer) have their habitual residence in a MS (and who are not nationals of a MS either) but who have property in the MS would then rely on Article 7 to establish international jurisdiction.

This is appropriate since relevant property may constitute a sufficiently close connection; where there is no link other than property, the provisions on *forum necessitatis* pursuant to Article 7 ensure adequate legal protection provided that the latter article is amended as proposed below.

Re Article 7 (Forum necessitatis):

The Austrian delegation proposes that the wording of this provision be amended in accordance with the revised version of the Brussels I Regulation (Article 26 point (b)) and, as in that provision, be extended to cases in which recognition or enforcement of a decision issued (or which might be issued) in a third State would not be possible in the Member State in which the court was seised. Article 7 should not refer to Article 6, since this would mean proceedings pursuant to Article 6 having to be conducted in each Member State in which property is located. Such proceedings would be difficult to coordinate.

Re Article 8 (Counterclaims):

The reference to Article 6 should be deleted.

Re Article 10 (Examination as to jurisdiction):

It must also be possible for jurisdiction to be based on the appearance of the defendant. Consequently, a provision corresponding to Article 5 of the Regulation on decisions relating to maintenance obligations ought to be incorporated into the text of the Regulation. Otherwise, Article 10 would be inconsistent with Articles 4 and 5(2) of the proposal, which attach great importance to the free choice of the parties with regard to property rights. It is also difficult to justify why spouses should require greater protection in settling their property regime claims than they would in the case of maintenance claims.

Re Article 12 (Lis pendens):

Paragraph 2: In general, setting courts deadlines for reaching decisions is likely to give rise to problems. A court should issue a ruling once all the grounds for that ruling have been fully ascertained, and not because a deadline is set to expire. Moreover, the jurisdiction of the court first seised cannot be (finally) established until a decision has been taken regarding any appeals lodged against an initial jurisdiction ruling; in cases where such appeals are lodged, a six-month deadline will generally be too short.

Furthermore, it does not seem wise to introduce a deadline without specifying the legal consequences for non-compliance. The Austrian delegation supports the requirement for the court first seised to provide information, as laid down in the second sentence of paragraph 2.

Re Article 13 (Related actions):

This provision should be aligned with the corresponding provision in the revised version of the Brussels I Regulation (Article 30), i.e. the addition "and its law permits the consolidation thereof" should, in particular, be deleted. The permissibility of consolidating proceedings under a Member State's national law is difficult for judges in other Member States to ascertain; moreover, such consolidation is not absolutely necessary in order to avoid the risk of irreconcilable judgments.

Re Article 14 (Provisional measures):

This provision should be aligned more closely with the revised version of the Brussels I Regulation (Articles 31 and 35).

Austrian delegation's comments on Chapters I and II of the Regulation on the property consequences of registered partnerships:

Re Article 1 (Scope):

Paragraph 1: The term "*vermögensrechtliche Aspekte*" does not define the scope of the Regulation sufficiently clearly; it would be better to refer to the "*Güterstand eingetragener Partner*", since – as in the English-language version ("property consequences") – this would then tally with the concept defined in Article 2 point (a).

Paragraph 3(a): This exception should be deleted since it is already evident from Article 1(1) and Article 2 point (a). Moreover, there is no corresponding exception in the list of exclusions contained in Article 1(3) of the Regulation on matrimonial property regimes.

Paragraph 3(d): See the comments regarding Article 1(3) point (c) of the Regulation on matrimonial property regimes.

Paragraph 3(f): See the comments regarding Article 1(3) point (e) of the Regulation on matrimonial property regimes.

Paragraph 3(g): See the comments regarding Article 1(3) point (f) of the Regulation on matrimonial property regimes.

Re Article 2 (Definitions):

Point (a) (property consequences): The English and French texts differ from one another in this crucial provision of the Regulation (using the terms "consequences" and "effets" respectively). This definition should be worded uniformly in such a way that the same term can be used in Article 1(1) and in Article 2(d), points (g) and (h). At present, only the English-language version satisfies this requirement. The German translation of this definition must be corrected and supplemented.

Point (c) (authentic instrument):

See the comments regarding Article 2 point (c) of the Regulation on matrimonial property regimes.

Point (e) (Member State of origin):

A definition based on Article 2 point (e) of the Succession Regulation is sufficient.

Unlike the corresponding definition in the Regulation on matrimonial property regimes, there is no reference here to court settlements, even though Article 30 provides that such settlements should also be recognised and enforced.

The phrase "the partnership contract concluded" should be deleted since, in cases where an authentic instrument relating to a partnership contract is drawn up in a Member State, such an instrument is recognised and enforced solely on the basis of where it was drawn up, not where the contract was concluded. Where the partnership contract forms the basis for a court decision or court settlement (without having been authenticated), the rules governing the recognition or enforcement of such a decision or settlement apply. The significance of a partnership contract which has not been authenticated lies solely in the law applicable, which, however, bears no relation to the "Member State of origin". The phrase "the instrument liquidating the common property" should also be deleted since such an instrument will have to take the form of a court decision, a court settlement or an authentic instrument in order to be recognisable and enforceable within the meaning of Chapter IV.

Point (f) (Member State addressed): See the comments regarding point (e).

Point (g) (court): See the comments regarding Article 2 point (g) of the Regulation on matrimonial property regimes.

Point (h) (court settlement):

See the comments regarding Article 2 point (h) of the Regulation on matrimonial property regimes.

Paragraph (x) (definition of the Member State of enforcement):

As in the Succession Regulation, a definition of the Member State of enforcement should be included; this would be particularly necessary if – as proposed later – the references to the Brussels I Regulation are removed and incorporated into the text of the Regulation.

Re Article 3 (Jurisdiction in the event of the death of one of the partners):

As proposed re the corresponding provision of the Regulation on matrimonial property regimes, it should be specified here too that the courts of the Member State which have jurisdiction to rule on succession proceedings should have jurisdiction to rule on property claims as well only at the request of the surviving partner. See also the comments regarding Article 3 of the Regulation on matrimonial property regimes.

Paragraph 2: The Austrian delegation acknowledges that some Member States have specified this arrangement as an essential precondition for granting their consent to the Regulation, and therefore does not oppose it.

Re Article 4 (Jurisdiction in cases of separation of the partners):

See the comments regarding Article 4 of the Regulation on matrimonial property regimes.

Re Article 5 (Jurisdiction in other cases):

Paragraph 1: For reasons of legal certainty, the Austrian delegation is in favour of the proposed hierarchy of jurisdiction. However, as in the Regulation on matrimonial property regimes, the nationality of both partners and their common "domicile" should be incorporated as point (d) in paragraph 1, i.e. before the point containing the words "of registration of the partnership", and point (b) of Article 6 should be deleted accordingly, since it is difficult to justify why a Member State should be able to decline jurisdiction if both partners have their common "domicile" there but not if they are both nationals of that Member State.

Paragraph 2: See the comments regarding Article 3(2).

Re Article 6 (Subsidiary jurisdiction):

The ground of jurisdiction defined in point (b) should not be merely subsidiary and should therefore be incorporated into Article 5. Conversely, on the basis of Article 3(2) and Article 5(2) of the proposal for a Regulation, subsidiary jurisdiction with regard to property or properties (point (a)) must be granted without the need to fulfil any further requirements. Contrary to its position regarding the Regulation on matrimonial property regimes, the Austrian delegation therefore does not propose making any additions to this provision.

Re Article 7 (Forum necessitatis):

On account of Article 3(2) and Article 5(2) of the proposal for a Regulation, a *forum necessitatis* should be provided for not only where proceedings would be impossible or cannot reasonably be brought in a third State, but also where proceedings cannot reasonably be brought in a Member State whose law does not recognise the institution of registered partnership. Article 7 should not refer to Article 6, since this would mean the partners having to conduct proceedings in each Member State in which property is located (and whose law may not recognise the institution of registered partnership). Such proceedings would be difficult to coordinate, and in many cases, moreover, the parties could not reasonably be expected to undertake them. The order of Articles 6 and 7 could therefore be reversed, in order to emphasise the subsidiary nature of Article 6.

Re Article 8 (Counterclaim):

The reference to Article 6 should be deleted.

Re Article 10 (Examination as to jurisdiction):

It must also be possible for jurisdiction to be based on the appearance of the defendant. Consequently, a provision corresponding to Article 5 of the Regulation on decisions relating to maintenance obligations ought to be incorporated into the text of the Regulation. Otherwise, Article 10 would be inconsistent with Articles 4 and 5(2) of the proposal, which attach great importance to the free choice of the parties with regard to property rights. It is also difficult to justify why spouses should require greater protection in settling their property regime claims than they would in the case of maintenance claims.

Re Article 12 (Lis pendens):

See the comments regarding Article 12 of the Regulation on matrimonial property regimes.

Re Article 13 (Related actions):

See the comments regarding Article 13 of the Regulation on matrimonial property regimes.

Re Article 14 (Provisional measures):

See the comments regarding Article 14 of the Regulation on matrimonial property regimes.
