



**COUNCIL OF
THE EUROPEAN UNION**

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LIMITE

**JUSTCIV 214
JAI 1008**

NOTE

from:	Coreper
to:	Council
No. Cion prop.:	8176/1/10 JUSTCIV 57 JAI 271
No. prev. doc.	16425/10 JUSTCIV 203 JAI 972
Subject:	Proposal for a Council Regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation - General approach

I. INTRODUCTION

1. On 17 July 2006, the Commission submitted to the Council a proposal for a Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters.
2. At its meeting on 5 and 6 June 2008 the Council concluded that there was no unanimity to go ahead with the proposed Regulation and that insurmountable difficulties existed, making unanimity impossible at that time and in the foreseeable future. It established that the objectives of the proposed Regulation could not be attained within a reasonable period by applying the relevant provisions of the Treaties.¹

¹ 9985/08 JUSTCIV 111.

3. In these circumstances, Greece, Spain, Italy, Hungary, Luxembourg, Austria, Romania and Slovenia addressed a request to the Commission by letters dated 28 July 2008 indicating that they wished to establish enhanced cooperation between them in the area of applicable law in matrimonial matters and that they expected the Commission to submit a proposal to the Council to that end. Bulgaria addressed an identical request to the Commission by a letter dated 12 August 2008 and France by a letter dated 12 January 2009. On 3 March 2010, Greece withdrew its request. Germany, Belgium and Latvia joined the request by letters dated respectively 15 April 2010, 22 April 2010 and 17 May 2010, Malta on 31 May 2010 and Portugal on 4 June 2010.
4. On 16 April 2010 the Commission presented to the Council a revised proposal for a Council Decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation² and a revised proposal for a Council Regulation (EU) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.³
5. The Decision authorising enhanced cooperation was adopted by the Council on 12 July 2010⁴ after receiving the consent of the European Parliament.

II. STATUS OF CONSULTATION OF EP AND EESC

6. The Council consulted the European Parliament by a letter dated 28 April 2010 and the European Economic and the Social Committee by a letter dated 29 April 2010. The Economic and Social Committee adopted its report on 14-15 July 2010.⁵
7. The Presidency was informally in contact with the European Parliament. The European Parliament is scheduled to adopt its report by the end of 2010.

² 8143/1/10 JUSTCIV 56 JAI 267.

³ 8176/1/10 JUSTCIV 57 JAI 271.

⁴ OJ L 189, 22.7.2010.

⁵ 12497/10 CES 45.

III. PROPOSAL FOR A COUNCIL REGULATION IMPLEMENTING ENHANCED COOPERATION IN THE AREA OF THE LAW APPLICABLE TO DIVORCE AND LEGAL SEPARATION

a) Objective of the proposal

8. The objective of this proposal is to provide a comprehensive legal framework in matrimonial matters ensuring legal certainty and predictability, and to allow the spouses to a certain extent to choose the law applicable to divorce. The proposal, however, does not cover the consequences of a divorce or legal separation relating to property, maintenance, parental responsibility or other issues as preliminary questions in the context of divorce proceedings.

b) Text of the proposal

9. At the meeting of the JHA Council on 3-4 June 2010 a general approach on key elements of the text in document 10153/10 was reached between the Member States that participate in enhanced cooperation. It was acknowledged that outstanding issues would have to be examined further.
10. Following the JHA Council, the Friends of the Presidency group met to examine the proposal at its meetings on 12 July and 11 October 2010 and the JHA Counsellors on 16 November 2010.
11. The text of the proposal has been modified on the basis of oral and written comments of the delegations and having in mind the level of consensus reached in 2008 on the text of the Regulation.⁶

⁶ 9712/08 JUSTCIV 106.

12. Coreper examined the proposal on 18 November 2010. Following Coreper, technical adjustments were made to Articles 8 and 11 of the text. Coreper also agreed that the JHA Council would make the declaration as set out in Annex I to this note.
13. Upon the adoption of the Regulation the Commission, Malta and Finland would like to make a declaration as contained respectively in Annexes II, III and IV to this note.
14. The Presidency would like to submit this text as a whole for a general approach to the JHA Council on 2-3 December 2010.

IV. CONCLUSION

15. In the light of the above the JHA Council is invited to:
 - (a) reach general approach on the compromise text of the Regulation as set out in 17045/10 between the Member States participating in enhanced cooperation;
 - (b) take note that after the European Parliament has adopted its report and after revision by jurists-linguists of the Council the Regulation will be formally adopted;
 - (c) agree on the text of the declaration of the Council as set out in Annex I and as it will be adopted upon the adoption of the Regulation;
 - (d) take note of the declarations of the Commission, Malta and Finland as set out respectively in Annexes II, III and IV.

DECLARATION OF THE COUNCIL

The Council invites the Commission to submit at its earliest convenience to the Council and to the European Parliament a proposal for the amendment of Regulation (EC) No 2201/2003 with the aim of providing a forum in those cases where the courts that have jurisdiction are all situated in Member States whose law either does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings (*forum necessitatis*).

DECLARATION OF THE EUROPEAN COMMISSION ON ARTICLE 7A

In the Commission's view, Article 7a, which permits judges of a participating Member State, whose law does not provide for divorce, not to apply the same rules as the other participating Member States, is a derogation that negates the very purpose of the enhanced cooperation authorised by Council Decision 2010/405/EU.

The European Commission stresses that the inclusion of this provision in the enacting terms of the Council Regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation does not in any way restrict or limit the powers of the European Commission under Articles 329 and 331 of the Treaty on the Functioning of the European Union with respect to any existing or future enhanced cooperation. Furthermore, the European Commission reserves all rights under Article 263 of the Treaty on the Functioning of the European Union.

The European Commission emphasises that Article 7a is to be seen without prejudice to the obligation of a Member State whose law does not provide for divorce to assume jurisdiction and entertain a petition for divorce where it is seised in conformity with the rules of jurisdiction in Council Regulation (EC) No 2201/2003.

**DECLARATION OF MALTA ON THE COUNCIL REGULATION IMPLEMENTING
ENHANCED COOPERATION IN THE AREA OF THE LAW APPLICABLE TO
DIVORCE AND LEGAL SEPARATION**

Malta welcomes the agreed text of the Council Regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation as contained in Document 17045/10 dated 26 November 2010. In particular, Malta welcomes the text of Article 7a which makes it clear that nothing in the Regulation shall oblige the Member State whose law does not provide for divorce to pronounce a divorce by virtue of the application of the Regulation.

The area of the law applicable to divorce and legal separation is a very sensitive one and full respect should be paid to the particularities of the legal systems of all Member States. In this regard, Malta recalls that the development of the area of judicial cooperation in civil matters having cross-border implications is subject to the overarching principle enshrined in Article 67(1) of the Treaty on the Functioning of the European Union, that the Area of Freedom, Security and Justice be constituted with respect for fundamental rights and the different legal systems and traditions of the Member States. Any imposition on Malta to introduce divorce in its substantive law by virtue of a Union instrument would therefore constitute a direct breach of this Article. Without the inclusion of Article 7a, the Implementing Regulation would impose on the Maltese courts the obligation to apply the institute of divorce within their jurisdiction despite the fact that this is not provided for under Maltese law. The imposition of this new obligation on Maltese courts by virtue of the Implementing Regulation would go beyond the competence of the Union in this area.

Article 20(1) of the Treaty on the European Union requires that the enhanced cooperation is open at any time to all Member States. Under Article 328(1) of the Treaty on the Functioning of the European Union, the Commission is obliged to ensure that it promotes participation by as many Member States as possible. Without the inclusion of Article 7a in the Implementing Regulation Malta would have been prevented from participating in the enhanced cooperation. In the light of these Articles Malta particularly regrets the Commission's lack of support for the inclusion of Article 7a.

**DECLARATION OF FINLAND ON THE COUNCIL REGULATION IMPLEMENTING
ENHANCED COOPERATION IN THE AREA OF THE LAW APPLICABLE TO
DIVORCE AND LEGAL SEPARATION**

Finland considers that enhanced cooperation is a better alternative than cooperation of unofficial groups outside the institutional system of the European Union.

However, Finland regrets that the enhanced cooperation is about to be launched for the first time in the field of family law which is closely connected with fundamental values and traditions of Member States. Finland is of the opinion that the Union should act together and seek flexible solutions which respect the judicial traditions of the different Member States. This way clear and uniform rules would be offered to the citizens living in the area of the Union.

Finland finds it unfortunate that in the negotiations on the original proposal for the Rome III Regulation not enough flexibility was found to take account in an impartial way of national differences of the Member States. In this context Finland in particular takes note of Article 7a of the now proposed draft Regulation.
