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TRANSLATION PROVIDED BY THE BELGIAN DELEGATION

NOTE

from :	Belgian delegation
to :	Working Party on Civil Law Matters (Rome III)
Subject :	Proposal for a Council Regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (COM (2010) 105 final/2) (8176/1/10 JUSTCIV 57 JAI 271) - Insertion of a provision and/or recital on multiple nationalities[1]

One of the connecting factors in the proposal is repeatedly the nationality of the spouses (now art. 3.1.c in the event of choice and 4.c law applicable in the absence of choice). However, the proposal does not address the possibility that a spouse can possess multiple nationalities.

During previous activities, it was decided at the request of Belgium, among others, that this issue had to be examined and an appropriate recital was developed for instances of multiple nationalities. This recital specified that the treatment of multiple nationalities was governed by national legislation (recital 5 quater).

This recital is no longer included in the new text.

[1] This document corresponds to the working document by the Belgian delegation which was distributed during the JHA Counsellors meeting on 29 April 2010.

The main objective of the proposal is the introduction of a **clear and comprehensive legal framework** in the area of the law applicable to divorce and legal separation to **strengthen legal certainty and predictability**.

Belgium is convinced that many residents of Belgium and other member states possess dual or multiple nationalities. Belgium is still of the opinion that the problem of multiple nationalities must be solved to attain the objective of legal certainty and predictability.

In order to choose the applicable law (art. 3.1.c), it is important to know whether, for example, a Belgian couple can choose to apply the Moroccan law at the start of or during the proceedings before the Belgian judge, when one of the spouses possesses both the Belgian and the Moroccan nationality.

The previous recital stated clearly that in this hypothesis the Belgian judge can refuse to apply the Moroccan law, because this spouse only possesses the Belgian nationality for Belgium (the Belgian international private law contains a provision in this sense, which is in accordance with the Hague Convention of 12 April 1930).

Moreover, the text does not indicate which nationality should be taken into account in the scale of successive connecting factors (art. 4.c), if both spouses have multiple nationalities in common. For example, both partners could possess the Belgian and Moroccan nationality, or could even have two foreign nationalities in common. According to the recital, the Belgian judge will apply the Belgian IPL, if he receives a request. Spouses would therefore have legal certainty about the applicable law, depending on the judge they applied to.

The decision HADADI of the Court of 16 July 2009 appears to imply that if a provision of community law does not explicitly refer to the national law, it cannot be interpreted according to that national law. The question remains whether a recital will be sufficient in this matter.

Therefore, we propose to include a provision similar to the previous recital in the text with a view to legal certainty (e.g. an article 5a).

"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 the national law."

If such a provision cannot be adopted, we urge that the previous recital is included again.

Finally, Belgium wishes to emphasise the significance of this issue, as the adopted solution will inevitably set a precedent for all future Community texts on the rights of persons (inheritance, matrimonial property rights,…).