



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 26 November 2010**

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**Interinstitutional file:  
2010/0067 (CNS)**

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**NOTE**

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from:	Coreper
to:	Council
No. prev.doc.:	16424/10 JUSTCIV 202 JAI 971
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Subject:	Proposal for a Council Regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation - Compromise solution

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1. Delegations will find enclosed 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 as redrafted following the meetings of the Friends of the Presidency on 12 July and 11 October 2010 as well as the JHA Counsellors meeting on 16 November 2010 and as agreed on by Coreper on 18 November 2010.
2. All changes to the text of the Commission proposal are marked in **bold** or by (...) for deleted text.

2010/0067 (CNS)

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 **2010/405/EU** of **12 July 2010** authorising enhanced cooperation in the area of the law applicable to divorce and legal separation<sup>1</sup>,

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 Parliament<sup>2</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>3</sup>,

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.

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<sup>1</sup> OJ L **189**, **22.7.2010**, p. **12**.

<sup>2</sup> OJ C [...], [...], p. [...].

<sup>3</sup> 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, **Malta**, Austria, **Portugal**, 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 (...). On 3 March 2010, Greece withdrew its request.
- (7) On **12 July 2010** the Council adopted Decision **2010/405/EU** 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. **The Commission and the Member States participating in enhanced cooperation shall ensure that they promote participation by as many Member States as possible. This Regulation should be binding in its entirety and directly applicable only in the participating Member States in accordance with the Treaties.**
- (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.
- (9a) **The substantive scope and enacting terms of this Regulation should be consistent with Regulation (EC) No 2201/2003. However, it should not apply to marriage annulment.**

**This Regulation should apply only to the dissolution or loosening of marriage ties. The law determined by the conflict-of-law rules of this Regulation should apply to the grounds for divorce and legal separation.**

**Preliminary questions such as legal capacity and the validity of the marriage, and matters such as the effects of divorce or legal separation on property, name, parental responsibility, maintenance obligations or any other ancillary measures should be determined by the conflict-of-law rules applicable in the participating Member State concerned.**

- (10) In order to clearly delimit the territorial scope of this Regulation, the Member States participating in the enhanced cooperation must be specified **in accordance with Article 1(2)**.
- (10x) **This Regulation should be universal, i.e. its uniform conflict-of-law rules may designate the law of a participating Member State, the law of a non-participating Member State or the law of a State which is not a member of the European Union.**
- (10a) See (19x)
- (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 matters<sup>4</sup>, **as amended by Decision 568/2009/EC of 18 June 2009<sup>5</sup>**, could 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. (...).
- (14) Spouses should be able to choose the law of a country with which they have a special connection or the **law of the *forum*** 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.**

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<sup>4</sup> OJ L 174, 27.6.2001, p. 25.

<sup>5</sup> OJ L 168, 30.6.2009, p. 35.

- (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 **participating** 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) **Rules on material and formal validity should be defined so that the informed choice of the spouses is facilitated and that their consent is respected with a view to ensuring legal certainty as well as better access to justice. As far as formal validity is concerned,** 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 **at the time the agreement is concluded** lays down additional formal rules, those rules **should** 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. **If, at the time the agreement is concluded, the spouses are habitually resident in different participating Member States which lay down different (...) formal rules, compliance with the formal rules of one of these States would suffice. If, at the time the agreement is concluded, only one of the spouses is habitually resident in a participating Member State which lays down additional formal rules, these rules should be complied with.**
- (18) An agreement designating the applicable law should be able to be concluded and modified at the latest **at the time** the court is seized, and even during the course of the proceeding if the **law of the *forum*** so provides. In that event, it should be sufficient for such designation to be recorded in court in accordance with the **law of the *forum***.
- (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 considers more favourable to his own interests, this Regulation should introduce harmonised conflict-of-law 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.**
- (19x) **When this Regulation refers to nationality as a connecting factor for the application of the law of a State, the question of how to deal with cases of multiple nationality should be left to national law, in full observance of the general principles of the European Union.**

- (19a) **If the court is seized in order to convert a legal separation into divorce, and where the parties have not made any choice as to the law applicable, the law which applied to the legal separation should also (...) apply to the divorce. Such continuity would promote predictability for the parties and increase legal certainty. (...) If the law applied to the legal separation does not provide for the conversion of legal separation into divorce, the divorce should be governed by the conflict-of-law rules which apply in the absence of a choice by the parties. This should not prevent the spouses from seeking divorce on the basis of other rules in this Regulation.**
- (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 seized 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 **a provision 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 **a provision of** 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 (...) law of the participating Member State whose court is seized does not provide for divorce, this should be interpreted to mean that the law of this Member State does not have the institute of divorce. In such a case, the court should not be obliged to pronounce a divorce by virtue of this Regulation.**
- Where the Regulation refers to the fact that the law of the participating Member State whose court is seized does not deem the marriage in question valid for the purposes of divorce proceedings, this should be interpreted to mean *inter alia* that such a marriage does not exist in the law of that Member State. In such a case, the court should not be obliged to pronounce a divorce or a legal separation by virtue of this Regulation.**
- (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, **or the extent to which this Regulation applies to different categories of persons of those States and participating Member States.**

- (22a) **In the absence of rules designating the applicable law, parties choosing the law of the State of the nationality of one of them should at the same time indicate which territorial unit's law they have agreed upon in case the State whose law is chosen comprises several territorial units each of which has its own system of law or a set of rules in respect of divorce.**
- (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, relation with Regulation (EC) 2201/2003, definition and universal application**

### *Article 1* *(...) Scope*

1. This Regulation shall apply, in situations involving a conflict of laws, to divorce and legal separation.
    - 1a. **This Regulation shall not apply to the following matters, even if they arise merely as a preliminary question within the context of divorce or legal separation proceedings:**
      - (a) **the legal capacity of natural persons**
      - (b) **the existence, validity or recognition of a marriage**
      - (c) **the annulment of a marriage;**
      - (d) **the name of the spouses;**
      - (e) **the property consequences of the marriage;**
      - (f) **parental responsibility;**
      - (g) **maintenance obligations;**
      - (h) **trusts or successions.**
  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 **2010/405/EU of 12 July 2010** authorising enhanced cooperation in the area of the law applicable to divorce and legal separation, **or by a decision adopted (...) in accordance with the second or third subparagraph of Article 331(1) of the Treaty on the Functioning of the European Union.**
- (...)



*Article 1x*

*Relation with Regulation (EC) No 2201/2003*

**This Regulation shall not affect the application of Regulation (EC) No 2201/2003.<sup>6</sup>**

*Article 1a*

*Definition*

**For the purposes of this Regulation, the term "court" shall cover all the authorities in the participating Member States with jurisdiction in the matters falling within the scope of this Regulation.**

*Article 2*

*Universal application*

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

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<sup>6</sup> OJ L 338, 23.12.2003, p.1.

## 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 nationality **of either spouse at the time the agreement is concluded, or**
  - (d) the law of the *forum*.
2. Without prejudice to paragraph 3, an agreement designating the applicable law may be concluded and modified at any time, but at the latest **at the time** the court is seized.
3. **If the law of the *forum* 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 law of the *forum*.**

### Article 3a

#### *Consent and material validity*

1. **The existence and validity of an agreement on choice of law or of any term thereof, shall be determined by the law which would govern it under this Regulation if the agreement or term were valid.**
2. **Nevertheless, a spouse, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence at the time the court is seized if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.**

*Article 3b*  
*Formal validity*

1. The agreement referred to in Article 3 (1) and (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.
2. However, if the law of the participating Member State in which the two spouses have their habitual residence at the time the agreement is concluded lays down additional formal requirements for this type of agreement, those requirements shall apply.
3. If the spouses are habitually resident in different participating Member States **at the time the agreement is concluded** and the laws of those (...) States provide for different (...) formal requirements, the agreement shall be formally valid if it satisfies the requirements of either of those laws.
4. If only one of the spouses is habitually resident in a participating Member State at the time the agreement is concluded and that State lays down additional formal **requirements** for this type of agreement, those rules shall apply.

*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 seized; 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 seized, in so far as one of the spouses still resides in that State at the time the court is seized; or, failing that,
- (c) of which both spouses are nationals at the time the court is seized; or, failing that,
- (d) where the court is seized.

*Article 4a*  
*Conversion of legal separation into divorce*

1. **Where legal separation is converted into divorce, the law applicable to divorce shall be the law applied to the legal separation, unless the parties have agreed otherwise in accordance with Article 3.**

2. **However, if the law applied to the legal separation does not provide for the conversion of legal separation into divorce, Article 4 shall apply, unless the parties have agreed otherwise in accordance with Article 3.**

*Article 5*  
*Application of the **law of the forum***

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 **law of the forum** 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 participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation.**

*Article 8*  
*States with two or more legal systems - territorial*

Where a State comprises several territorial units each of which has its own **system of law or a set of rules concerning matters governed by this Regulation**:

- (a) any reference to the law of such State shall be construed, for the purposes of determining the law applicable under this Regulation, as referring to the law in force in the relevant territorial unit;
- (b) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit;
- (c) any reference to nationality shall refer to the territorial unit designated by the law of that State, or, in the absence of relevant rules, to the territorial unit chosen by the parties or, in absence of choice, to the territorial unit with which the spouse or spouses has or have the closest connection.

(...)

*Article 8a*  
*States with two or more legal systems - inter-personal conflicts*

**In relation to a State which has two or more systems of law or sets of rules applicable to different categories of persons concerning matters governed by this Regulation, any reference to the law of such a State shall be construed as referring to the legal system determined by the rules in force in that State. In the absence of such rules, the system of law or the set of rules with which the spouse or spouses has or have the closest connection applies.**

*Article 8b*  
*Non-application of this Regulation to internal conflicts*

**A participating Member State in which different systems of law or sets of rules apply to matters governed by this Regulation shall not be required to apply this Regulation to conflicts of law arising solely between such different systems of law or sets of rules.**

## Chapter III – Other provisions

### *Article 9*

#### *Information to be provided by participating Member States*

1. At the latest by [...] <sup>7</sup>, 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 **pursuant to Article 3b (2) to (4)**; and
  - (b) the possibility of designating the applicable law in accordance with Article 3(3).

The participating Member States shall inform 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 (...) before the date of application of this Regulation, provided that it **complies with Articles 3a and 3b**.

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 seized before the date of application of this Regulation.

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<sup>7</sup> *Three months after the date of application of this Article.*

*Article 11*  
*Relationship with existing international conventions*

1. Without prejudice to the obligations of the participating Member States pursuant to Article 351 of the Treaty on the Functioning of the European Union, this Regulation shall not affect the application of international conventions to which one or more participating Member States are party at the time when the Regulation is adopted or when the decision referred to in Article 1(2) 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 in so far as such conventions concern matters governed by this Regulation (...).

*Article 12*  
*Review clause*

1. By [...] <sup>8</sup> 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 **proposals to adapt the Regulation**.
2. **To that end, the participating Member States shall communicate to the Commission the relevant information on the application of this Regulation by their courts.**

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<sup>8</sup> *Five years after the entry into force of this Regulation.*

## 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 [...] <sup>9</sup>, with the exception of Article 9, which shall apply from [...] <sup>10</sup>.

**For those Member States participating pursuant to a decision adopted in accordance with the second or third subparagraph of Article 331(1) of the Treaty on the Functioning of the European Union, this Regulation shall apply as from the date indicated in the decision concerned.**

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*

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<sup>9</sup> *Eighteen months after the date of adoption of this Regulation.*

<sup>10</sup> *Six months after the date of adoption of this Regulation.*