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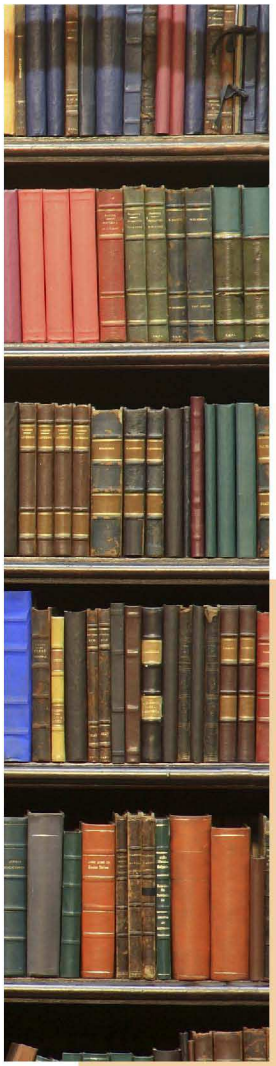

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The Proposal for enhanced cooperation in the area of cross-border divorce (Rome III)

NOTE

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LEGAL AFFAIRS

The Proposal for enhanced cooperation in the area of cross-border divorce (Rome III)

NOTE

Abstract

This note provides an in-depth analysis of the main provisions of the *Rome III* Proposal of 2010 implementing enhanced cooperation for 14 Member States in the area of the law applicable to divorce and legal separation. It further identifies some difficulties of future application of the proposed provisions and suggests to reconsider in particular the following issues: the scope of application, the question as to *when* the spouses may designate the applicable law, the desirability of legal counselling, the use of the last habitual residence as a connecting factor, dual nationality, the conversion of legal separation into divorce, the (non-)application of foreign law and the "Malta" provisions.

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EXECUTIVE SUMMARY

Background

It has been frequently observed that the substantive law concerning divorce differs substantially between the European Union Member States: from Maltese law where a marriage cannot be dissolved to Swedish law where a divorce may be obtained almost immediately and by unilateral request. In addition, there is a comparable divergence with regard to conflict of law rules, from the regular application of the *lex fori* to the application of the national law of the spouses, the law of their habitual residence or the law with the "closest connection". These discrepancies may seem to be in dissonance with the fact that within the European Union there has been a free movement of divorce decisions since 2001, which provides that divorces obtained in one Member State are recognized in all other Member States.

When in 2008 it was established within the Council that the objectives of an intended cooperation in the field of the law applicable to divorce and legal separation among *all* Member States could not be attained within a reasonable period, the question arose how such a quandary could be resolved. Finally, a few Member States took action. They requested the Commission to commence the *enhanced cooperation* procedure. Astonishingly, international divorce law is the first test-case of this procedure within the civil law cooperation in the European Union. It may only be used as a last resort.

On 12 July 2010, the Council, after having obtained the consent of the European Parliament, authorised fourteen Member States (Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Latvia, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain) to establish enhanced cooperation among them in the area of the law applicable to divorce and legal separation by applying the relevant provisions of the European Treaties. On 24 March 2010 the Commission published a Proposal for a Council Regulation (EU) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (*Rome III* Proposal). After consulting the Permanent Representatives Committee (Coreper II), the Spanish Presidency submitted a new version on 1 June 2010 which contains additions to the initial Commission Proposal (see Annex). The Council has not yet adopted the *Rome III* Regulation. Moreover, the European Parliament is to be consulted.

The Rome III Proposal

The *Rome III* Proposal only contains uniform conflict of laws rules. In understanding and interpreting the proposed rules it is to be regretted that no explanatory report exists. The Recitals preceding the provisions do not provide sufficient answers. This briefing note makes some suggestions for improvements. All in all, the *Rome III* Proposal needs to be reedited and at some points to be reconsidered.

- **Choice of law at the moment the court is seized**

According to the *Rome III* Proposal the spouses have the freedom to determine the applicable divorce law. Since at all stages of the marriage – at the beginning, during its duration and at the end the spouses may make use of this possibility – the following question arises: What are the advantages of *not* restricting the possibility to designate the applicable divorce law to the moment that the application for divorce is lodged? There is a

difference between a marriage contract and a separation/divorce contract. A choice of the applicable divorce law in a marriage contract is binding for the near and remote future, whereas an agreement at the moment that the spouses divorce is restricted to that very moment in time. It takes into account the circumstances of the spouses at the moment they decide to obtain a divorce, whereas at the beginning of the marriage the spouses do not usually consider a divorce. The close connection with the law that has been chosen at the time the agreement was made might no longer exist at the moment of the divorce. Assumingly, the spouses make a more thoughtful and informed choice concerning the applicable divorce law at the moment they want to terminate their marriage than at the moment when they enter into the marriage, which might have taken place many years or even decades ago.

- **Legal counselling**

Another aspect which from the point of view of the weaker spouse should be taken into account concerns legal advice. The various options which Article 3 offers need to be well considered. The formal requirements - the agreement should be in writing, dated and signed - does not guarantee that both spouses know what exactly the effect of their choice will be. In particular, legal practitioners frequently advocate more legal counselling in advance. Their experience with international divorce cases should be taken seriously. Internet-based systems which provide legal information are difficult to comprehend by non-lawyers. Besides, lawyers will also need additional training about *Rome III* not only if they practise in participating Member States, but also outside the enhanced cooperation system since it is of vital importance to know in which Member State the divorce application should be lodged.

- **The last habitual residence of the spouses**

It cannot be detected why the *Rome III* Proposal makes use of the *last habitual residence of the spouses* as a connecting factor. The last common habitual residence is subject to the condition that one of the spouses still resides there and in some circumstances the joint habitual residence should not have ended more than one year before the court was seized. It is difficult to determine when these conditions are fulfilled. If no significant reasons can be provided as to why this complicated connecting factor is used for the determination of the applicable law it should be deleted. This would make the provisions which determine the applicable law (Article 3 and Article 4) easier to apply.

- **Dual nationality**

In the case the spouses have more than one nationality, national law is to be consulted which of the nationalities is decisive. The *Rome III* Proposal requires that this national law is in compliance with the general principles of the European Union. This is not further specified. The decisions of the European Court of Justice might be of relevance in this respect, but it is far from clear what exactly is meant.

- **Conversion of legal separation into divorce**

For only half of the participating Member States is a special rule for the dissolution of the marital bond after legal separation deemed necessary. This provision obliges the courts to apply the same law to the dissolution of the marriage as the one that has been applied to the legal separation. It is not clear how the spouses may deviate from this accessory connection. Furthermore, the reference in Article 4a(2) to Article 4 if the law that has been

designated by the accessory connection rule does not have a provision for a conversion procedure might cause problems. In this case the application of the lex fori should be favoured.

- **(Non-) application of foreign law**

One of the main arguments of some Member States not to engage in the enhanced cooperation is that the proposed conflict of law rules might lead to the application of foreign law. The *Rome III* Proposal, however, accepts this outcome but a few *safety mechanisms* have been introduced. A court of a participating Member State shall not apply a discriminatory divorce law. The application of the lex fori safeguards that fundamental principles are not violated. In turn, this puts an obligation on the European legislator in so far as it should be made clear from the outset which divorce laws of all legal systems in the world violate the principle that men and women have equal access to divorce. On the other hand, the non-application of a law where religion plays a role (such as Islam), for example, may cause problems for the individual spouses. They cannot remarry because in their home country a foreign divorce which has not been pronounced according to their own law will not be recognized. In our multicultural societies in Europe these problems should also be adequately addressed. Probably, a convention between the Union and other countries on the recognition of divorces is an option to redress these problems.

- **The Malta provisions**

Three provisions of the *Rome III* Proposal take into account that neither a divorce nor a dissolution of the marriage after legal separation can be obtained in Malta. If, according to Article 4a (1), Maltese law has been applied to the legal separation and if the courts of the six other Member States are subsequently requested to dissolve the marriage, they should be allowed to apply their own law, since the reference in Article 4a (2) makes no sense. This would be in accordance with Article 5 which also allows the courts of the participating Member States other than Malta to apply their own law if the rules of the *Rome III* Proposal refer to Maltese law when a divorce is requested. Article 7a concerns the mirror situation. Maltese courts cannot be obliged to grant a divorce even if a foreign law which allows for a divorce is to be applied. In Malta the proposed Regulation will have a very limited scope of application. Only cross-border legal separations will be decided according to the enhanced cooperation rules. More importantly, it is to be regretted that the other participating Member States do not object to including Article 7a in a European Regulation. It addresses a purely national point of view in respect of divorce. This specific *Malta rule* is a retrograde step in striving for a right to divorce in Europe. It gives the wrong signal.

- **Recognition of marriages**

If the law of the forum does not recognize the marriage in question, the court seized will not be obliged to grant a divorce. This issue - the recognition of marriages - falls outside the scope of the *Rome III* Proposal. Therefore Article 7a, which is seemingly drafted in order to meet the concerns of those Member States which do not want to recognize same-sex marriages, should be deleted. Logically, a marriage which cannot be recognized according to the national recognition rules of a Member State cannot be dissolved. More importantly, this provision is not at all in line with the principle of free movement of citizens. It proves that the *Rome III* Proposal cements traditional family law values.

Outlook

It is possible that some of the Member States which at this moment do not participate in the Regulation will join the other 14 Member States at a later stage. However, still a large number will not participate. In the future the enhanced cooperation in the area of the law applicable to divorce and legal separation might be used as precedence in other areas.

A review procedure is foreseen in the *Rome III* Proposal. Five years after the Regulation has entered into force a comparison and evaluation can take place. By then one of the pertinent questions might, for example, be how often and under which circumstances foreign divorce law has been applied by the participating Member States' courts.

1. BACKGROUND: 12 YEARS OF EU LAWMAKING IN THE FIELD OF CROSS-BORDER DIVORCE

For more than 12 years, EU Member States have been in the process of unifying their rules on cross-border divorce law.[1] It all started in May 1998 with the adoption of a Convention – the so-called *Brussels II* Convention - which contained rules on jurisdiction and the enforcement of judgments in matrimonial matters.[2] This Convention never entered into force. Instead – due to the entry into force of the Amsterdam Treaty in May 1999[3], which paved the way for European legislative measures in cross-border situations – the Convention was transformed into a regulation. On 1st March 2001 the *Brussels II* Regulation[4] entered into force for the then 15 Member States (except for Denmark[5]) and from 1st May 2004 onwards it also became effective – as part of the *acquis communautaire* – in the 10 European countries which acceded to the EU on that date. Shortly afterwards, on 1st March 2005, *Brussels II* was replaced by the *Brussels II bis* Regulation.[6] The scope of application in respect of issues of parental responsibility was widened whereas matters regarding divorce and legal separation essentially remained untouched.[7] In the same year, 2005, it was announced that the *Brussels II bis* Regulation was to be amended.[8] The proposed amendment, which was presented by the Commission in 2006,[9] was aimed at complementing the Community's jurisdiction and recognition rules with conflict of laws

[1] See A. Borrás, From Brussels II to Brussels II *bis* and Further, in: K. Boele-Woelki/C. González Beilfuss (eds), Brussels II bis: Its Impact and Application in the Member States, European Family Law Series No. 14, 2007, pp. 3-22.
[2] OJ 1998, C 221/1.
[3] OJ 1997, C 340/1.
[4] Council Regulation (EC) No. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ L 160/19.
[5] In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the TEU Union and the TFEU, Denmark does not participate in the adoption of this Regulation and is therefore neither bound by it nor subject to its application.
[6] Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, OJ L 338.
[7] No differences exist, as regards their substantive content, between the *Brussels II* and the *Brussels II bis* versions of the jurisdiction rules concerning divorce, only the numbering of the articles was changed. The issues addressed in articles 2 to 8 of *Brussels II* moved to articles 3-7 of *Brussels II bis*.
[8] The latest version dates from 28 June 2007, 2006/0135 (CNS) 11295/07.
[9] Proposal for a Council Regulation amending Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters. Brussels 17 July 2006 COM (2006) 399 final, 2006/0135 (CNS).

rules relating to divorce.[10] As a corollary, the proposed amendment of the *Brussels II bis* Regulation was named *Rome III*. Until then, the designation *Rome* was used for instruments which only contained conflict of laws rules,[11] whereas *Brussels* indicated that only procedural issues were addressed, such as jurisdiction, recognition and enforcement.[12]

The proposed *Rome III* Regulation[13] contained two significant elements: Firstly, spouses were to be allowed to jointly select a competent court and, secondly, conflict of laws rules for cross-border divorce cases were to become part of Community law.[14]

Whereas the adoption of the *choice of forum* was generally welcomed, the *conflict of laws rules* were highly disputed. The discussions were passionate and extensive.[15] The proposal to allow spouses to agree on the law applicable to divorce did not meet with considerable opposition; by contrast, the conflict of laws rule in the absence of a party choice of law resulted in controversy. It was proposed that when the spouses have not made a choice of the applicable law, the law which is applicable will be the law of the state (a) where the spouses have their common habitual residence, or failing that (b) where the spouses had their last common habitual residence insofar as one of them still resides there, or failing that (c) of which both spouses are nationals,[16] or failing that (d) where the application is lodged. The intended universality of this multi-stage conflict of laws rule could lead to the application of foreign law, not only of the divorce law of another Member State but also of the law of third-country jurisdictions.

Some Member States considered the application of foreign divorce law to be unacceptable. Instead, they favour the application of the *lex fori* as a basic rule. In the **United Kingdom** and in **Ireland**, a competent court always applies its own law. However, under the Treaty of Amsterdam, these Member States have retained the right not to opt in concerning the adoption of instruments if these are not consistent with **English** or **Irish** law respectively. Consequently, the **United Kingdom** and **Ireland** have not used their right to opt in with regard to the proposed regulation. The position of **Sweden** and **Finland** is different. In these jurisdictions, the right to divorce is considered to be a fundamental right. As a result "a spouse should be free to end a marriage without risking time-consuming or costly proceedings" and it should be kept in mind that the "basically unlimited right to divorce is also an important issue of equality between men and women."[17] **The Netherlands** also belongs to the group of *lex fori* countries. A Bill providing for the establishment of Book 10 of the **Dutch** Civil Code (Private International Law) was submitted to Parliament on 18

[10] See F. Pocar, Osservazioni a margine della proposta di regolamento sulla giurisdizione e la legge applicabile al divorzio, in: S. Bariatti (ed), La famiglia nel diritto internazionale privato comunitario, 2007, pp. 267-278.
[11] OJ L 177/6: Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (*Rome I*) and OJ L 199/40: Regulation (EC) No. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (*Rome II*).
[12] OJ L 12/1: Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*Brussels I*) and *Brussels II bis*.
[13] See *supra* note 9.
[14] See for a comparison between *Rome III* and the American approach: L. Silberman, Rethinking Rules of Conflict of Laws in Marriage and Divorce in the United States: What Can We Learn from Europe?, Tulane Law Review, 2008, pp. 1999-2020.
[15] See for all the arguments that have emerged: Th.M. de Boer, The Second Revision of the Brussels II Regulation: Jurisdiction and Applicable Law, in: K. Boele-Woelki/T. Sverdrup (eds), European Challenges in Contemporary Family Law, European Family Law Series No. 19, 2008, pp. 321-341; See further M. Jänterä-Jareborg, Jurisdiction and Applicable Law in Cross-Border Divorce Cases in Europe, in J. Basedow & H. Baum & Y. Nishitani (eds), Japanese and European Private International Law in Comparative Perspective, 2008, pp. 317-343 and V. Lazić, Recent Developments in Harmonizing 'European Private International Law' in Family Matters, European Journal of Law Reform 2008, pp. 75-96.
[16] In the case of the United Kingdom and Ireland: where both spouses have their "domicile".
[17] See Jänterä-Jareborg, *supra* note 15, pp. 317-343 (340).

September 2009.[18] It received the approval of the Council of State and the Lower House.[19] Research into the case law in the last 30 years has led to the conclusion that under the existing Statute (which dates from March 1981 and takes the application of the law of the parties' common national law as a starting point) **Dutch** law is actually applied in a vast majority of cases. Therefore the Bill provides for the application of the **Dutch** *lex fori* unless the common national law is designated by the parties or unless such designation by one party is not contested by the other party.

Other Member States such as **Poland** and the **Czech Republic** do not participate because – for reasons of principle – they call for caution in using the provisions of the EU Treaties on enhanced co-operation. These countries have also raised doubts as to the effects of enhanced co-operation on the relationships of EU Member States with third countries, in particular countries in Eastern Europe.

As a result of the predominantly *lex fori* approach in some Member States, in 2008 unanimity on adopting the proposed amendment to the *Brussels II bis* Regulation was not reached. This occurred for the first time during the Union's legislative activities in cross-border family law matters. When it was established within the Council that the objectives of an intended co-operation among *all* Member States could not be attained within a reasonable period, the question arose as to how this quandary could be resolved. Several scenarios were possible:[20]

(1) *Brussels II bis* was to remain unchanged.
(2) *Brussels II bis* was to be revised so as to take on board additional clauses on choice of court agreements.
(3) *Brussels II bis* was not only to be complemented with rules on choice of court agreements but also with rules on choice of the applicable law by the parties.
(4) Member States were to return to the table to renegotiate a less ambitious *Rome III* instrument.
(5) At least nine Member States were to proceed with negotiations on an instrument which should be adopted under the *enhanced co-operation* procedure.

[18] *Vaststelling en invoering van Boek 10 (Internationaal privaatrecht) van het Burgerlijk Wetboek (Vaststellings- en Invoeringswet Boek 10 Burgerlijk Wetboek)*, Lower House, 32 137.
[19] The legislative procedure is completed when the Upper House has given its consent.
[20] See K. Boele-Woelki, To Be or Not to Be: Enhanced Cooperation in International Divorce Law Within the European Union, Victoria University of Wellington Law Review 2008, pp. 779-792.

2. PROCEDURE: WHAT DOES THE ENHANCED COOPERATION ENTAIL?

In the course of 2008 some Member States requested the Commission to come up with a Proposal for enhanced cooperation.[21] This procedure is, at present, regulated by Article 20 of the Treaty on European Union (TEU) and Articles 326 to 334 of the Treaty on the Functioning of the European Union (TFEU). The various steps to be taken are the following: First, a group of at least nine[22] Member States should address a request to the Commission to establish enhanced cooperation. If the Commission complies with the request (which it is not obliged to do) it will draft and submit a proposal to the Council of Ministers to that effect. The Council grants authorization – by acting unanimously - to proceed with the enhanced cooperation after obtaining the consent of the European Parliament.[23]

The decision authorizing enhanced cooperation shall only be adopted by the Council when it has been established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole. This requirement – enhanced cooperation is the last resort - was regarded as having been fulfilled in respect of the proposed amendment of *Brussels IIbis*. After almost two years of negotiations no unanimity had been reached. In addition, however, enhanced cooperation in the field of divorce and legal separation must meet the conditions of Article 20 (1) TEU. Do conflict of laws rules in this area (1) further the objectives of the Union, (2) protect its interests and (3) reinforce its integration process?[24] At least in respect of the last objective, it has to be admitted that enhanced cooperation by definition has disintegrating instead of integrating effects for the Union as a whole. On the other hand, enhanced cooperation would remain a dead letter, since the Act to be adopted under the enhanced cooperation will not contribute – by definition – to the integration process of all Member States. Since the enhanced cooperation procedure is possible under the Treaties of the EU these disintegrative effects should not only be seen from the Union's perspective as a whole. The other two conditions – furthering the Union's objectives and protecting its interests - are more important. In this respect the question is whether the area of international divorce law is not too specific and in fact too insignificant to allow Europe to be split up into two parts,[25] or, to put it differently, to give up the unanimity which, to date, has always been achieved in cross-border family law matters. The provisions of the Treaties on enhanced cooperation have never been previously applied. They are meant to enable a limited group of Member States to achieve a higher degree of integration in a distinct policy area of the EU, for example with respect to patent law. The provisions were not designed to create a uniform legal regime on a very specific subject for merely some of the Member States. In respect of the effects of using the enhanced co-operation procedure the Member States had and still have different views. Hence, the final decision on enhanced co-operation in the field of divorce and legal separation was a political rather than a legal decision.

On 12 July 2010, the Council, after having obtained the consent of the European Parliament, authorised fourteen Member States (**Austria**, **Belgium**, **Bulgaria**, **France**, **Germany**, **Hungary**, **Italy**, **Latvia**, **Luxembourg**, **Malta**, **Portugal**, **Romania**, **Slovenia**

[21] Introduced by the Treaty of Amsterdam of 1997 which was amended by the Treaty of Nice in 2001 in view of the enlargement of the European Union to 27 Member States.
[22] Article 20 (2) TEU.
[23] Article 329 TFEU.
[24] Doubts have been expressed by the Statement of the Finnish delegation of 19 May 2010, Inter institutional file 2010/0067 (CNS), JUSTCIV 99, JAI 437.
[25] 14 Member States apply uniform conflict of law rules, the other 13 Member States apply their national conflict of law rules. Many of them favour the application of the lex fori as the default rule.

and **Spain**) to establish enhanced cooperation among them in the area of the law applicable to divorce and legal separation by applying the relevant provisions of the Treaties.[26] At this moment in time – 15 October 2010 – the Council has not yet adopted the Regulation which is to be the object of enhanced cooperation. Moreover, the European Parliament is to be consulted.[27] Once this latter step has been taken, only the Member States participating in enhanced co-operation are allowed to take part in the final vote on the adoption of the Regulation. All Member States, however, are allowed to participate in the deliberations.[28] Enhanced cooperation will only bind participating Member States. Non-participating Member States may join the enhanced co-operation at any time.[29]

Currently, the legal map of the Union in respect of the intended enhanced cooperation in the area of divorce and legal separation is as follows:

Blue/dark: participating Member States
Yellow/light: non-participating Members States

[26] OJ L 189 of 12 July 2010
[27] The European Economic and Social Committee will also be consulted on the regulation. See EU Council Secretariat Factsheet of 4 June 2010.
[28] Article 330 TFEU.
[29] Article 328 (1) TFEU.

3. THE MAIN PROVISIONS OF THE PROPOSAL FOR A REGULATION ON THE LAW APPLICABLE TO DIVORCE AND LEGAL SEPARATION

On 24 March 2010 the Commission published a Proposal for a Council Regulation (EU) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.[30] After consulting the Permanent Representatives Committee (Coreper II), the Spanish Presidency submitted a new version on 1 June 2010 which contains additions to the initial Commission Proposal.[31] Subsequently, the Belgian Presidency prepared a note for the Friends of the Presidency Group which contains additional changes.[32] This latter version of 23 September 2010 (hereinafter: *Rome III* Proposal) was used in preparing this briefing note. It focuses on the main provisions of Chapter I (Scope) and Chapter II (Uniform rules on the law applicable to divorce and legal separation).

Generally, it should be noted that the new *Rome III* Proposal differs to a certain extent from the old *Rome III* Proposal which was aimed at amending *Brussels II bis*. The enhanced cooperation Proposal does not contain any jurisdiction rules. These kinds of rules belong to the *acquis communitaire* which may not be affected by enhanced cooperation. As a result, the new *Rome III* Proposal only contains uniform rules on the law applicable to divorce and legal separation (conflict of laws rules).

3.1. Material scope

According to Article 1(1) of the Proposal the Regulation shall apply to divorce and legal separation[33] in situations involving a conflict of laws.[34] As a result, two requirements must be fulfilled.

First, it concerns either a divorce, which terminates a marriage, or it concerns a legal separation which loosens the marital bond, i.e. by removing the obligation to cohabit, but which does not bring the marriage to an end. The dissolution of the marriage after a judicial (legal) separation which is distinct from both divorce and legal separation is not mentioned in Article 1(1), however from the newly inserted Article 4a[35] it can be derived that the "conversion of legal separation into divorce" is also covered. According to Article 1(3) a "court" can either be a judicial or an administrative body.

Second, the rules of the Regulation are only to be applied if the divorce or legal separation has cross-border aspects. It is not further specified in which situations a conflict of laws is involved. Obviously, however, if spouses have different nationalities or different habitual residences at the time the competent authority is seized the applicable national law is to be determined.

But it might also be necessary to take into account any international aspects which occurred during the marriage. Suppose the wife is **German** and the husband is **Dutch** at the time of marrying. During the marriage he opts for **German** nationality and loses his **Dutch** nationality. The spouses live in Germany and request a divorce in **Germany**. Does

[30] COM (2010)105.
[31] Interinstitutional file:2010/0067 (CNS) 10153/10, JUSTCIV 106, JAI 46.
[32] Interinstitutional file: 2010/0067 (CNS), 14021/10, JUSTCIV 162, JAI 770.
[33] Recital 9a stresses that the material scope of Rome III should be consistent with Brussels II bis, however Rome III should not apply to marriage annulment.
[34] The same formulation of the material scope is used in Art. 1(1) Rome I and Art. 1 (1) Rome II.
[35] Version of 23 September 2010.

only the connection with **Germany** at the time the court is seized matter (internal relationship) or should other relevant connecting factors during the marriage also be taken into account? The answer should be in the affirmative. It is possible that the spouses made a choice for **Dutch** law to apply to an eventual divorce at the moment the husband still had **Dutch** nationality. This choice of law is to be recognized by the courts in **Germany** according to the rules on the choice of law by the spouses under Article 3 of the Proposal.

This means that the Regulation also applies if during the marriage one of the spouses had a foreign nationality or his/her habitual residence in a country other than the one where the divorce proceedings commence.

Finally, it should be noted that the proposed Regulation only speaks of "spouses" which excludes registered partners. The dissolution of registered partnerships does not fall within the scope of application.

3.2. Universal application and exclusion of renvoi

According to the firmly rooted principle in the private international law instruments of the EU and the Hague Conference on Private International Law the Regulation will have a universal scope of application. Under the heading "Universality"[36] Article 2 determines that the law designated[37] by the Regulation shall apply whether or not it is the law of a participating Member State. No distinction is made between the law of participating Member States and non-participating Member States.[38] Furthermore intra-Union and extra-Union situations are dealt with on an equal basis. The law designated under the Regulation can also be the law of non-Member States. The national conflict of law rules of the 14 participating Member States will be replaced by the conflict of law rules of the enhanced cooperation Regulation.

In accordance with the generally accepted rule in private international law,[39]Article 6 of the Proposal excludes *renvoi*. According to this provision the designation of a law under the rules of the Regulation means designating the substantive rules of that law (*Sachnormverweisung*). The conflict of law rules of the law which has been designated are not to be consulted. The exclusion of the *renvoi* provision, however, would be better "located" in Chapter I than in Chapter II where it has been put in between provisions dealing with corrections (Application of the lex fori, Public policy and Differences in national law) to the law that has been determined by Article 3 (Choice of law by the parties) and Article 4 (Applicable law in the absence of a choice by the parties).

3.3. Choice of the applicable law

The uniform conflict of law rules contained in Chapter II of the Proposal (Articles 3-8) start with the situation where the spouses are in agreement on the law which will be applied to govern their divorce or legal separation.

[36] Rome I and Rome II use the heading "Universal application".
[37] Art. 2 Rome I/Rome II use the term "specified".
[38] See Recital 10 (x).
[39] Art. 20 Rome I/Rome II determine: The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation.

3.3.1. Conditions

Article 3 of the Proposal with the heading[40] "Choice of applicable law by the parties"[41] provides the spouses with many options.[42] However, the choice of the applicable divorce law is subject to the condition that the spouses may only choose the law with which they have a close connection.[43] They must be either nationals of or have their (last) habitual residence in the country whose law they choose. This close connection does not necessarily need to refer to both spouses. Also the nationality of one spouse is sufficient to express a connection between the chosen divorce law and the spouses. In addition, it is required that the connection of the spouses with the selected divorce law exits at the time when the agreement is concluded between the spouses. Retrospectively, a court, for example, might be confronted with the question whether at the time the agreement was concluded both spouses had had their last habitual residence in the country whose law had been chosen and whether at that moment one of the spouses still resided there (Article 3 (1) sub. b). Eventually, these facts are to be established and proven after many years.

Additionally, it can be questioned why the Proposal does not prescribe any time limits for the spouses when concluding an agreement about the applicable divorce law. A choice is possible and subsequently binding when it has been made many years previously – in a marriage contract - when the spouses usually were not thinking of a divorce at all. Admittedly, however, in "big money" marriages[44] many spouses – or at least their legal advisors – are aware of the fact that more than 30% of all new marriages will end in divorce. From their point it is reasonable to stipulate in which jurisdiction an eventual divorce will take place and which law should be applied. However, only the choice of the applicable divorce law will bind the spouses according to the *Rome III* proposal but not the choice of forum since *Brussels II bis* does not allow the parties to select the competent court.

Moreover, during the period after the conclusion of the agreement certain circumstances and connecting factors (nationality and habitual residence) might change. These changes will no longer be taken into account, except if both spouses agree to change their initial choice. If one of the spouses is not willing to modify the agreement, the other spouse has no other option than to resign him/herself to the choice which he/she has agreed to. Therefore, in order to protect the spouses from a thoughtless and uninformed choice the **Dutch** legislator, for example, has restricted the possibility of the spouses to designate the applicable divorce law to the moment that the court is seized.[45] Hence, the European legislator should reconsider the question of *when* the spouses may specify the applicable divorce law.

3.3.2. Which laws may be chosen?

Depending on *when* the spouses choose the applicable law, two, three or four options are

[40] The same kind of conflict of law rules are contained in the Rome I and II Regulations which have different titles: "Freedom of Choice" (Art. 3 Rome I) and "Determination of applicable law" (Rome II).
[41] The text of Article 3 refers to spouses and not to parties.
[42] This is considered to be in accordance with the fundamental rights recognised in the Treaties and the Charter of Fundamental Rights of the European Union.
[43] Recital 14 speaks of a "special connection".
[44] See, for example, the most recent decision of the UK Supreme Court of 20 October 2010, Radmacher *v* Granatino, [2010] UKSC 42.
[45] See Art. 10:56 (2) Dutch Civil Code (Bill). See note 18.

available.[46] They may select:

I. at the moment of entering into the marriage or shortly afterwards (marriage contract)
   1. the law of their habitual residence (Article 3 (1) sub. a)
   2. the law of their nationalities (Article 3 (1) sub. c)

II. during the marriage
   the laws indicated under I *or*
   3. the law of their last habitual residence insofar as one of the spouses still resides there (Article 3 (1) sub. b)

III. end of the marriage (separation/divorce contract)
   the laws indicated under II *or*
   4. the law of the lex fori (Article 3 (1) sub. d)

Once the spouses have determined the applicable law they are bound by their choice until they both agree to modify their choice. This may occur at any time, but at the latest when the court is seized.

3.3.3. Why should the law be determined by the spouses?

Several questions arise in relation to the choice of the applicable law. *First*, why should this possibility be provided? The answer is obvious. The freedom to choose provides legal certainty for the spouses. Their choice of the applicable divorce law is to be recognized by the court. As a result, the applicable law will not come as a surprise. *Second*, what are the reasons for making a choice between the two, three or four options which are provided by Article 3? The reasons may vary. One can think of the liberal divorce grounds of the selected law - e.g. a factual separation is not required - which makes it an easy matter to obtain a divorce. The choice of the lex fori might depend on where the divorce proceedings take place. In turn, this "choice of forum",[47] which may be based on one of the many grounds for jurisdiction of Article 3 *Brussels II bis*, can be influenced by several aspects, such as the costs of the proceedings, the remuneration for lawyers, the familiarity with the procedure and/or mediation facilities. Finally, only the courts of the country where the spouses' children have their habitual residence are generally competent to decide on parental responsibilities and contact between the children and the non-resident parent and the spouses may want the court to decide not only on the divorce, but also concerning all its consequences.

3.3.4. Formal requirements

In order to ensure that spouses are aware of the implications of their choice[48] their agreement shall at least be expressed in writing,[49] dated and signed by the spouses (Article 3 (3)). The question arises whether these safeguards sufficiently ensure an informed choice by the spouses which, according to Recital 16, is considered to be a basic principle of the Regulation. In connection with the drafting of both the Maintenance Regulation[50] and the

[46] These moments in time are not specified in Art. 3; however, it follows from the connecting factors that different situations can be distinguished. A joint habitual residence of the newly-weds, for example, can only be established after the marriage; the period of cohabitation before the marriage is not taken into account.
[47] In a strict sense a choice of forum is not possible under the *Brussels II bis* Regulation.
[48] Recital 17.
[49] Equivalent to writing are communications by electronic means which provide a durable record of the agreement. See also Article 4 (2) for the choice of forum in the Maintenance Regulation.
[50] Art. 3(2) Maintenance Regulation: A choice of court agreement shall be in writing. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.

Hague Protocol on the Law Applicable to Maintenance of 2007[51] it has been frequently advocated that legal advice should be made obligatory when it comes to a choice of the competent court and the applicable law.[52] This also applies in the context of the choice of the applicable divorce law. Recital 15 refers to good-quality information about divorce law which the Commission provides in its European Judicial Network in civil and commercial matters. This "solution" is insufficient, however. The Internet-based public information system only covers the laws of 27 Member States; it is not regularly updated;[53] the information provided is incomplete and, finally, information about non-Union systems is not available.[54]

3.4. The applicable law in the absence of any choice

In many cases spouses have not agreed on the law to be applied due to different reasons. They possibly do not know that they have this option or, more likely, they disagree about which law should be chosen. Imaginable is also the situation where one of the spouses – as a matter of principle - does not want to comply with the suggestions of the other spouses, or refuses to sign any agreement or does not react at all. In these situations the law to be applied is objectively to be determined by the court. Article 4 provides a four-step default rule. *Successively* the following laws apply:

1st the law of the habitual residence of the spouses at the time when the court is seized
2nd the law of the last habitual residence of the spouses subject to two conditions
- the joint habitual residence of the spouses did not end more than one year before the court was seized *and*
- one of the spouses still resides there

3rd the law of the common nationality of the spouses at the time when the court is seized
4th the lex fori

The application of Article 4 can be illustrated by the following example of a **Swedish-Finnish** couple who lived in **Sweden** before they separated. One spouse moved to **Finland**, the other to **Belgium**. At the time when the court in **Belgium** is seized they have no joint habitual residence (Article 4 sub. a). They had their last joint habitual residence in **Sweden**, but neither of them still resides there (Article 4 sub. b). They have no common nationality (Article 4 sub. c), thus **Belgian** law as the lex fori (Article 4 sub. d) applies. If the divorce proceedings commence in **Finland**, the courts will also apply the lex fori as a result of applying the **Finnish** conflict of law rules.

3.4.1. (Last) habitual residence and nationality indicate a close connection

Recital 19 of the Proposal stresses that the connecting factors chosen in Article 4 should ensure that proceedings relating to divorce or legal separation are governed by a law with

[51] Article 8 (2) Hague Protocol on the law applicable to maintenance 2007: Such agreement shall be in writing or recorded in any medium, the information contained in which is accessible so as to be usable for subsequent reference, and shall be signed by both parties.
[52] See K. Boele-Woelki/A. Mom, Vereinheitlichung des internationalen Unterhaltsrechts in der Europäischen Union: ein historischer Schritt, Familie, Partnerschaft und Recht 2010 (still to be published)
[53] The information on Dutch divorce law, for example, does not mention the obligation of the spouses to submit a parenting plan for their children; otherwise a divorce cannot be obtained. This requirement was introduced into Dutch law on 1 March 2009.
[54] The Commission on European Family Law (CEFL) provides on its website www.ceflonline.net detailed information about various European family law systems. The comparative material is also published in the European Family Law series, see www.intersentia.be in 2003 (divorce and maintenance between former spouses), 2005 (parental responsibilities) and in 2009 (property relations between spouses).

which the spouses have a close connection. Article 4 gives priority to the law of the (last) habitual residence of the spouses as the law to govern the divorce or legal separation. The (last) habitual residence can be in the same country as where the court is seized but can also be outside the Member State whose courts have been seized because, for example, the spouses both have the nationality of this Member State (Article 3 (2) *Brussels II bis*). If this is the case, the court has to apply foreign law based upon either Article 4 sub. a or sub. b. If the spouses have no (last) common habitual residence foreign law is also to be applied if the spouses have a common nationality. Suppose that **French** courts are requested to dissolve the marriage of a **Moroccan** couple. Since more than two years only one of the spouses has lived in **France**. According to Article 4 sub c of the Proposal **Moroccan** law is to be applied as the law of the common nationality of the spouses.[55]

3.4.2. Dual nationality

If one or both spouses has/have dual nationality the question arises how the courts will apply the connecting factor of nationality as used in Article 3 (1) sub. c and in Article 4 sub. c. Recital 10a states that the question of how to deal with cases of multiple nationalities is left to national law, in full respect of the general principles of the European Union. The question arises how "the full respect of the general principles of the European Union" should be interpreted. In respect of Article 3 (2) *Brussels II bis* the European Court of Justice (ECJ) in the case *Hadadi/Mesko*[56] held that this provision of the Regulation providing for the jurisdiction of the courts of the Member State of which the spouses have nationality cannot be interpreted differently according to whether the two spouses have the same dual nationality or only one, the same, nationality. The case involved a **Hungarian-French** couple holding both nationalities who had not been living in **Hungary** for a long time. Their only link with that country was the **Hungarian** nationality. The ECJ decided that the **Hungarian** courts also had jurisdiction. The most effective nationality need not be determined.

If it comes to the applicable law it is questionable whether this approach – no effective test in case of multiple nationalities – which has been chosen to solve a jurisdictional issue can be applied. Generally, a distinction is made between the one (jurisdiction) and the other (applicable law). Due to the requirements of legal certainty the formal nationality is usually a sufficient ground for jurisdiction. Regarding the applicable law the situation is different. The proposed reference to national law is in accordance with the generally accepted approach in private international law instruments of, e.g. the Hague Conference on Private International Law. Two possibilities exit. Either a person with dual nationality is only considered a national of the State with which he is effectively linked or preference is given to the internal law if the person possesses the nationality of this country irrespective of whether he or she possesses another nationality. In respect of the choice of law by the spouses according to Article 3 (1) sub c it can be argued that the final choice of the applicable law is made by the spouses and that, therefore, also a formal nationality may serve that purpose. For the application of the default rule – Article 4 –, however, national law will be consulted. However, which general principles of the European Union are to be taken into account in that national law?

[55] Subject to Article 5.
[56] ECJ 16 July 2009, case C-168/08, *OJ* 17 September 2009, C220, p. 11.

3.5. Conversion of legal separation into marriage

The newly inserted[57] Article 4a determines which law is to be applied when, after a legal separation, the spouses request that their marriage should be dissolved. Only in half of the participating Member States does the institution of legal separation exist. They all belong to the Romanistic family (**Belgium**, **France**, **Italy**, **Luxembourg**, **Malta**, **Portugal** and **Spain**)[58] except **Malta** which is based on English common law and Roman civil law. As a result only in these countries is it possible to dissolve the marriage after a legal separation. Article 4a characterises this dissolution of the marital bond as a *conversion of a legal separation into divorce*. It is questionable whether in this context the use of the term "divorce" is correct; admittedly, however, as a general term it "covers" the various forms of the dissolution of the martial bond. In the other seven Member States a conversion of a legal separation into divorce is not possible. In these countries the spouses can only request a divorce. Which law should be applied to this second step which the spouses decide to take? Article 4a(1) contains an accessory conflict of law rule. The law that governed the legal separation also governs the conversion, subject, however, to the condition that the "parties (*this should be spouses, KBW)* have not chosen otherwise." What exactly is meant by "chosen otherwise" is not clear. Should the spouses indicate another applicable law or should they only determine that the accessory connection should not take place in respect of their decision to finally dissolve their marriage? Does the default rule of Article 4 apply in the latter case? Furthermore, the following question arises: what about the requirement of the closest connection if the dissolution of the marriage takes place many years after the legal separation? After the legal separation the spouses might have changed their nationalities and/or their habitual residences.

Article 4a contains a second paragraph which specifically refers to the situation in **Malta** where a legal separation cannot be converted into a dissolution of the marriage. If the courts of one of the other six Member States are requested to dissolve the marriage of spouses who obtained their legal separation in **Malta** these courts "shall apply Article 4" according to Article 4a(2). In this case Article 4 might also refer to a foreign law where, like in **Malta**, a legal separation cannot be converted into a dissolution of the marriage because these institutions do not exist in that law. Did the drafters think about this possibility which only provides a 'one-way street' or do they want the courts to apply the lex fori instead?

3.6. Application of the lex fori

When deviating from the law that has been designated by the spouses by virtue of Article 3 or determined by the court on the basis of Article 4, the lex fori shall apply according to Article 5. This variation in the law to which either Article 3 or Article 4 refers may only take place in two situations:

(1) the law makes no provision for divorce; *or*
(2) the law does not grant one of the spouses equal access to divorce or legal separation on the ground of his/her sex.

Situation (1) encapsulates the situation where the applicable law does not recognise the

[57] Version of 23 September 2010.
[58] The 1804 French Code Civil forms the basis upon which the jurisdictions have developed. Maltese law is also based on English common law and Roman civil law.

concept of divorce at all.[59] Hence, this clause has been specifically drafted for **Malta** only because, to date, no divorce can be obtained in this country, whereas in the rest of the Union a divorce is possible. The reasons why **Malta** is participating in the enhanced cooperation are difficult to comprehend because the **Maltese** courts will only be allowed to apply the rules of the Regulation in respect of a legal separation – which is possible in **Malta** - and not in the case of a request for divorce. The consequence of Article 5 is that in order to accommodate **Maltese** couples who want to obtain a divorce in one of the other 13 participating Member States these courts may apply their own law. These foreign divorces are to be recognized in **Malta** according to Article 21 *Brussels II bis*. However, the law of **Malta** may change. A Private Member's Bill introducing the Family Law (Divorce) Act has been submitted to the **Maltese** House of Representatives in July 2010.[60] Whether, finally, also **Malta** as the last Member State in the Union will legislate for divorce is uncertain. The Catholic Church strongly opposes this[61] and in 2011 a referendum will probably be held.

Situation (2) which allows the courts to apply their internal law does refer to foreign laws which make a distinction between men and women regarding their access to divorce. Assumingly this rule refers to jurisdictions, where for instance, religion (such as Islam) plays a central role. These systems disrespect the principle of the spouses' equality by applying different rules to women than to men. If, for example, the parties have chosen **Moroccan** law, or in the absence of such a choice, if both spouses have no common habitual residence but a common **Moroccan** nationality, this result will be disregarded by applying the lex fori because **Moroccan** law in general makes a distinction in its rules which are gender-based. If Article 5 is to be interpreted in this way a list of all jurisdictions where both spouses do not have equal access to divorce on grounds of their sex should be made. From the outset the laws of these jurisdictions cannot then be applied by a court bound by Article 5 of the Regulation. Another possibility is that the court has to assess whether in the concrete case the applicable law discriminates against the wife or the husband. This would complicate the application of Article 5.

3.7. Public policy

In particular situation (2) of Article 5 encapsulates the notion of public policy. Discriminatory divorce rules may not be applied. If this provision would not exist, the application of a law which does not grant equal access to divorce to one of the spouses could be rejected by referring to the public policy clause of Article 7 which states that the application of a provision of such a law may be refused only if it is manifestly incompatible with the public policy of the forum. It is not clear which other situations than the one concretized by Article 5 will fall under the public policy exception. One may think of situations where the applicable foreign law is based on a "guilt-based ground", which in many Member States have totally and intentionally been eradicated.[62] On the other hand the courts of Member States where stringent divorce grounds exist might consider that a foreign law where one of the spouses unilaterally can request a divorce violates their public policy and will therefore not be applied. For both situations more clarity should be provided. Is the public policy to be interpreted according to national standards of each participating Member State or should a European perspective prevail? This discussion illustrates that the

[59] Recital 21a.
[60] See http://www.maltatoday.com.mt/news/jeffrey-pullicino-orlando/pullicino-orlando-presents-divorce-law-to-parliament. The Prime Minister has openly declared he is against and the leader of the opposition in favour.
[61] See http://www.maltatoday.com.mt/news/divorce/divorce-a-matter-of-informed-conscience-say-theologians-in-new-declaration.
[62] See Jänterä-Jareborg, *supra* note 15, p. 339.

substantive divorce laws in Europe should be harmonized so that the differences become less pronounced. How such a process might develop has been proposed by the Commission on European Family Law.[63]

When a court will determine that a foreign law rule is incompatible with public policy the question arises what other law should be applied to the case at hand. No general rule is given in the event that the public policy exception does apply. The decision will then be left to the courts. One possibility is to resort to the application of the lex fori.

3.8. Differences in national law

The next provision of the Proposal, Article 7a, with the meaningless title "Differences in national law"[64] regulates two situations in which the courts are not obliged to grant a divorce. This is the case when the law of the forum:

(1) does not provide for divorce *or*
(2) does not recognize the marriage in question.

Situation (1) again refers to the **Maltese** courts which in applying the Regulation cannot be obliged to grant a divorce. This follows from Recital 21. Obviously **Malta** convinced the other 13 participating Member States that this provision is essential, although it only applies in **Malta**. The message is that taking part in the enhanced cooperation Regulation should not provide any leeway for the introduction of divorce into **Maltese** law.

Situation (2) does not fall under the scope of the proposed Regulation. Presumably, some Member States do not want to grant a divorce to same-sex couples. In some jurisdictions in Europe, in the United States of America (in some states), in parts of Latin America and in South Africa same-sex couples may enter into a marriage. In the vast majority of jurisdictions, not only in Europe, this possibility still does not exit, however. The preliminary question whether a marriage is to be recognized is to be decided by the national recognition rules for marriages of the court seized. If, according to these rules, a marriage cannot be recognized, then it cannot be dissolved either. As a result, situation (2) should not be regulated in an instrument determining the question of the law which is applicable to divorce and legal separation.

Finally, it should be noted that Article 7a is a novelty in comparison with the initial *Rome III* Proposal of the Commission. It has been newly inserted by the Council and seemingly reflects the position of the Member States in the enhanced cooperation.

[63] *Supra* note 54.
[64] Since by definition conflict of law rules operate because of differences in national law the title makes no sense.

4. ASSESSMENT OF THE PROPOSAL AS REGARDS ITS CONTENT

The new *Rome III* Proposal of 2010 contains, as far as the conflict of law rules (subjective and objective determination of the applicable law) are concerned, more or less the same rules as the old *Rome III* Proposal of 2006. In understanding and interpreting the proposed rules neither the explanatory memorandum of the Commission' Proposal[65] nor the Recitals preceding the provisions of the Proposal provide sufficient answers. Based upon the above analysis some suggestions for improvements are made in the following. All in all, the Proposal needs to be reedited and at some points to be reconsidered.

4.1. Choice of law at the moment the court is seized

Generally, the freedom of the spouses to determine the applicable divorce law is to be welcomed. Since at all stages of the marriage – at the beginning, during its duration and at the end - such a choice can be made, it is, however, questionable whether this total freedom should be maintained. What are the advantages of not restricting the possibility of the spouses to designate the applicable divorce law to the moment that the application is lodged? There is a difference between a marriage contract and a separation/divorce contract. A choice of the applicable divorce law in a marriage contract is binding for the near and remote future, whereas an agreement at the moment that the spouses divorce is restricted to that very moment in time. It takes into account the circumstances of the spouses at the moment they decide to obtain a divorce, whereas at the beginning of the marriage the spouses do not usually consider a divorce. The close connection with the law that has been chosen at the time the agreement was made might no longer exist at the moment of the divorce. Assumingly, the spouses make a more thoughtful and informed choice concerning the applicable divorce law at the moment they want to terminate their marriage than at the moment when they enter into the marriage, which might have taken place many years or even decades ago.

4.2. Legal counselling

Another aspect which from the point of view of the weaker spouse should be taken into account concerns legal advice. The various options which Article 3 offers need to be well considered. The formal requirements - the agreement should be in writing, dated and signed - does not guarantee that both spouses know what exactly the effect of their choice will be. In particular, legal practitioners frequently advocate more legal counselling in advance. Their experience with international divorce cases should be taken seriously. Internet-based systems which provide legal information are difficult to comprehend by non-lawyers. Besides, lawyers will also need additional training with regard to the Proposal not only if they practise in participating Member States, but also outside the enhanced cooperation system since all Member States – except Denmark - are bound by *Brussels II bis*. In view of the *lis pendens* rule of Article 19 (1) *Brussels II bis* it is of vital importance to know in which Member State the divorce application should be lodged.

4.3. The last habitual residence of the spouses

Article 3 (1) sub. a second indent of the *Brussels II bis* Regulation grants jurisdiction to the courts of the last habitual residence of the spouses as long as one of the spouses still

[65] COM(2010)104.

resides there. It cannot be detected why the *Rome III* 2010 Proposal also makes use of this connecting factor in Article 3 (1) sub. b and in Article 4 sub. b. The last common habitual residence of the spouses which is subject to the condition that one of the spouses still resides there is difficult to determine. Article 4 sub. b even makes this connecting factor subject to a second condition. The joint habitual residence should not have ended more than one year before the court was seized. If no significant reasons can be provided as to why this complicated connecting factor is used for the determination of the applicable law it should be deleted. This would make both Article 3 and Article 4 easier to apply.

4.4. Dual nationality

The problem of dual nationalities of the spouses is addressed in Recital 10a. In that case national law is to be consulted. In applying the default rule it is the law of the court seized, whereas in the case of a choice of the applicable law by the parties this can be any national law, for instance the law of the place where the agreement is made. Compliance with the general principles of the European Union, which are not further defined, is required. The decisions of the European Court of Justice might be of relevance in this respect, but it is far from clear what exactly is meant. If the European legislator, prefers that in Article 3 (1) sub. c also an ineffective nationality should be considered to be sufficient, it is advisable to regulate this issue accordingly.

4.5. Conversion of legal separation into divorce

For only seven of the participating fourteen Member States a special rule for the dissolution of the marital bond after legal separation is deemed necessary. This provision obliges the courts to apply the same law to the dissolution of the marriage as the one that has been applied to the legal separation. It is not clear how the spouses may deviate from this accessory connection. In addition, the following question arises: what about the requirement of the closest connection if the dissolution of the marriage takes place many years after the legal separation? Rome III assumes that the spouses still have a bond with the law that has been applied to the legal separation, but this is not necessarily the case if they have changed their nationalities and their habitual residences. Furthermore, the reference in Article 4a(2) to Article 4 if the law that has been designated by the accessory connection rule does not have any provision for a conversion procedure might cause problems. In this case the application of the lex fori should be preferred.

4.6. (Non-) application of foreign law

One of the main arguments of some Member States not to engage in the enhanced cooperation is that the proposed conflict of law rules might lead to the application of foreign law. The new *Rome III* Proposal, however, accepts this outcome but a few "safety mechanisms" have been introduced. It is striking to see that Article 5 which allows the application of the lex fori in case the applicable law disregards the equality principle between men and women meets some of the concerns of those Member States which opposed the old *Rome III* Proposal. To a certain extent their arguments have been taken on board. A court of a participating Member State shall not apply a discriminatory divorce law. The application of the lex fori safeguards that fundamental principles are not violated. In turn, this puts an obligation on the European legislator in so far as it should be made clear from the outset which divorce laws of all legal systems in the world violate the principle that men and women have equal access to divorce. On the other hand, the non-application of **Moroccan** law, for example, may cause problems for the individual spouses. They cannot remarry because in **Morocco** a foreign divorce which has not been pronounced according to **Moroccan** law will not be recognized. In our multicultural societies in Europe

these problems should also be adequately addressed. One possibility would be for the European Commission to take measures to promote the ratification of the Hague Convention on the recognition of divorces and legal separations of 1 June 1970 to which for instance Egypt is also a contracting state.

4.7. The Malta provisions

Three provisions of the *Rome III* Proposal take into account that neither a divorce nor a dissolution of the marriage after legal separation can be obtained in **Malta**. If according to Article 4a (1) **Maltese** law has been applied to the legal separation and if, subsequently, the courts of the six other Member States are requested to dissolve the marriage, they should be allowed to apply their own law, since the reference in Article 4a(2) can also lead to the application of a law which – for other reasons than in **Malta** – does not provide for the possibility to dissolve a marriage after a legal separation. The application of the lex fori provides a solution. This would be in accordance with Article 5 which determines how the courts of the participating Member States other than **Malta** have to solve the problem if the conflict of law rules of Article 3 and Article 4 refer to **Maltese** law. They may apply their own law. Article 7a concerns the mirror situation. **Maltese** courts cannot be obliged to grant a divorce even if a foreign law which allows for a divorce is to be applied according to Article 3 or Article 4. In **Malta** the Regulation will have a very limited scope of application. Only cross-border legal separations will be decided according to the enhanced cooperation rules. More importantly, it is to be regretted that the other participating Member States do not object to including Article 7a in a European Regulation. It addresses a purely national point of view in respect of divorce. The "Malta rule" is a retrograde step in striving for a right to divorce in Europe. It gives the wrong signal.

4.8. Recognition of marriages

The recognition of marriages falls outside the scope of the Proposal. Therefore Article 7a, which is seemingly drafted in order to meet the concerns of those Member States which do not want to recognize same-sex marriages, should be deleted. Logically, a marriage which cannot be recognized according to the national recognition rules of a Member State cannot be dissolved. In conclusion, Article 7a is undesirable and unnecessary. More importantly, this provision is not at all in line with the principle of free movement of citizens. It proves that the *Rome III* Proposal cements traditional family law values.

5. CONCLUSIVE REMARKS

Generally, the term enhanced cooperation has a positive connotation. Within the framework of the Treaties and the legislative measures to be taken by Member States based thereon, however, enhanced cooperation has a different meaning. A two-speed Europe might emerge concerning a specific area of law such as international divorce. As a result, the cooperation of *all* Member States ends where the enhanced cooperation of *some* Member States begins. Is this development to be considered as either progress or a regression? Perceptibly it depends on one's own perspective. If more weight is given to unanimous decisions within the European Union which create uniform rules to be applied the answer is obvious: the enhanced cooperation is a retrograde step. It divides the European Union into different camps with different rules. It should be kept in mind that initially the enhanced cooperation was certainly not instituted with private international law issues in mind. Essentially, it should be used for substantive law in order to further enhance the internal

market and to serve economic purposes. Moreover, in all other areas of law the enhanced cooperation epitomised in the field of international divorce law might be cited as a precedent. From now on it will be easier in any other field of law where unanimity and agreement is required to argue that if enhanced cooperation has taken place here then it may also be used anywhere else.[66] For some it might be – to put it dramatically – the beginning of the end. If, on the other hand, the content of the rules are considered to be more decisive than centralist lawmaking, and if the *Rome III* rules can be easily applied, the enhanced cooperation might also have positive effects.

It is possible that some of the Member States which at this moment do not participate in the Regulation will join the other 14 Member States at a later stage. However, still a large number will not participate.

A review procedure is foreseen in Article 12 of the Proposal. Five years after the Regulation has entered into force a comparison and evaluation can take place. By then one of the pertinent questions might, for example, be how often and under which circumstances foreign divorce law has been applied by the participating Member States' courts.

[66] See the Statement of the Finnish delegation of 19 May 2010, Interinstitutional file 2010/0067 (CNS), JUSTCIV 99, JAI 437.

ANNEX

COUNCIL OF THE EUROPEAN UNION

Brussels, 23 September 2010 (27.09) (OR. fr)

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to:	Friends of the Presidency Group
No. prev.doc.:	10153/10 JUSTCIV 106 JAI 464
No. Cion prop.:	8176/1/10 JUSTCIV 57 JAI 271 REV 1
Subject:	Proposal for a Council Regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation

1. Delegations will find attached 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 it stands following the meeting of the Friends of the Presidency on 12 July 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[67],

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[68],

Having regard to the opinion of the European Economic and Social Committee[69],

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**.

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67 OJ L **189**, **22.7.2010**, p. **12**.

68 OJ C […], […], p. […].

69 OJ C […], […], p. […].

(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.

(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, 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 and asking the Commission to submit a proposal to the Council for that purpose. 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.

(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. It should not cover matters such as the effects of divorce or legal separation on property, name, parental responsibility, maintenance obligations or any other ancillary measures.

(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) **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.**

(11) This Regulation should apply irrespective of the nature of the court or tribunal seised. **Where applicable, a court should be deemed to be seised 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[70]**, as amended by Decision 568/2009/EC of 18 June 2009**[71]**, 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) **In keeping with the fundamental rights recognised in the Treaties and the Charter of Fundamental Rights of the European Union, s**pouses should be able to choose the law of a country with which they have a special connection or the *lex fori* as the law applicable to divorce and legal separation. **(…)**

(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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70 OJ L 174, 27.6.2001, p. 25.

71 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 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) 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 additional 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 when the court is seised, and even during the course of the proceeding if the *lex fori* so provides. In that event, it should be sufficient for such designation to be recorded in court in accordance with the *lex fori*.

(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 or she considers more favourable to his or her 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.**

(19a) In the case of a procedure designed to convert a legal separation into divorce, where the parties have not made any choice as to the law applicable, the law which applied to the legal separation should also be applied to the divorce. Such continuity would promote predictability for the parties and increase legal certainty. Nevertheless, 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 where the parties have not made any choice.

(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 seised 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 applicable law does not provide for divorce, this should be interpreted to mean that the concept of divorce is unknown to the applicable law.

(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.

(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, definition and universality

Article 1
***(…) S**cope*

1. This Regulation shall apply, in situations involving a conflict of laws, to divorce and legal separation.

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 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 pursuant to Article 1(1) thereof which are seised on the basis of section 1 of Chapter II of Regulation (EC) No 2201/2003.

Article 2
Universality

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

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 *lex fori.*

2. Without prejudice to paragraph **2a**, an agreement designating the applicable law may be concluded and modified at any time, but at the latest when the court is seised.

2a. If the *lex fori* 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 *lex fori*.

3. The agreement referred to in paragraph 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.

   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.

   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 **additional** formal requirements, the agreement shall be formally valid if it satisfies the requirements of either of those laws.

   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 rules 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 seised; 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 seised, in so far as one of the spouses still resides in that State at the time the court is seised; or, failing that,

(c) of which both spouses are nationals at the time the court is seised; or, failing that,

(d) where the court is seised.

Article 4a

Conversion of legal separation into divorce

1. Where legal separation is converted into divorce, the law applicable to the divorce shall be the law applied to the legal separation, unless the parties have chosen otherwise.

2. However, if the law applied to the legal separation makes no provision for the conversion of legal separation into divorce, Article 4 shall apply.

Article 5
Application of the lex fori

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 *lex fori* 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 more than one legal system

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 a State for the purpose of determining the law applicable under this Regulation.

2. A participating 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 of law arising **solely** between such units (…).

3. In relation to a State in which two or more systems of law or sets of rules with regard to matters dealt with in this Regulation apply in different territorial units:

(a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit;

(b) any reference to nationality shall refer to the territorial unit designated by the law of that State.

Chapter III – Other provisions

Article 9
Information to be provided by participating Member States

1. At the latest by […][72], 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 subparagraphs 2 to 4 of Article 3(3)**; and

   (b) the possibility of designating the applicable law in accordance with Article 3(**2a**).

   The participating Member States shall apprise 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 in accordance with the law of a participating Member State before the date of application of this Regulation, provided that it fulfils the conditions set out in Article 3(**3**).

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 seised before the date of application of this Regulation.

Article 11
Relationship with existing international conventions

1. **(…) T**his 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**.

[72] ***three months after the date of application of this Article.***

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 **[…]**[73] 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 apprise the Commission of relevant information on the application of this Regulation by their courts.

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 […][74], with the exception of Article 9, which shall apply from […][75].

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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73 ***five years after the entry into force of this Regulation.***
74 ***twelve months after the date of adoption of this Regulation.***
75 ***six months after the date of adoption of this Regulation.***

JUSTCIV 106
JAI 464

NOTE

from:	Presidency
to:	Council
No. prev.doc.	9771/1/10 JUSTCIV 98 JAI 430
No. Cion prop.:	8176/1/10 JUSTCIV 57 JAI 271
Subject:	Proposal for a Council Regulation (EU) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation

1. Delegations will find in the Annex 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 after the meetings of the JHA Counsellors on 5 May 2010 and 17 May 2010 and in the light of the comments sent by the Member States after the meeting on 5 May 2010.

2. At the meeting of Coreper on 19 May 2010 general approach on key elements of this document was reached between the Member States that participate in enhanced cooperation. Several other Member States also expressed their positive approach on the text subject to further reflections.

3. All changes compared to the text of the Commission proposal are marked in **bold** or by **(…)** for deleted text.

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 […] of […] authorising enhanced cooperation in the area of the law applicable to divorce and legal separation[76],

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[77],

Having regard to the opinion of the European Economic and Social Committee[78],

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.

[76] OJ L […], […], p. […].
[77] OJ C […], […], p. […].
[78] 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, Austria, 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 and asking the Commission to submit a proposal to the Council for that purpose. On 3 March 2010, Greece withdrew its request.

(7) On […] the Council adopted Decision […] 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.

(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.

(10) In order to clearly delimit the territorial scope of this Regulation, the Member States participating in the enhanced cooperation must be specified.

(10a) 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 national law, in full respect of the general principles of the European Union.

(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[79]**, as amended by decision 568/2009/EC of 18 June 2009**[80], can 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.. Such possibility should not extend to marriage annulment, which is closely linked to the conditions for the validity of marriage, and for which autonomy on the part of the parties is inappropriate.

(14) Spouses should be able to choose the law of a country with which they have a special connection or the *lex fori* 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**.

(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 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) 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 lays down additional formal rules, those rules must 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.

79 OJ L 174, 27.6.2001, p. 25.
80 OJ L 168, 30.6.2009, p. 35-40.

(18) An agreement designating the applicable law should be able to be concluded and modified at the latest when the court is seised, and even during the course of the proceeding if the *lex fori* so provides. In that event, it should be sufficient for such designation to be recorded in court in accordance with the *lex fori*.

(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 or she considers more favourable to his or her own interests, this Regulation should introduce harmonised conflict-of-laws 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.**

(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 seised 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 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 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 applicable law does not provide for divorce, this should be interpreted in such a way that the applicable law does not know the concept of divorce at all.

(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.

(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

Article 1
Material scope

1. This Regulation shall apply, in situations involving a conflict of laws, to divorce and legal separation.

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 […] of […] authorising enhanced cooperation in the area of the law applicable to divorce and legal separation**, or by a decision taken by the Commission in accordance with Article 331(1), second paragraph, of the Treaty on the Functioning of the European Union**.

3. For the purposes of this Regulation, the term "court" shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to paragraph 1.

Article 2
Universality

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

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 **the** nationality **of either spouse at the time the agreement is concluded, or**

(d) the *lex fori.*

2. Without prejudice to paragraph **2a**, an agreement designating the applicable law may be concluded and modified at any time, but at the latest when the court is seised.

2a. If the *lex fori* 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 *lex fori*.

3. The agreement referred to in paragraph 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.

However, if the law of the participating Member State in which the two spouses have their habitual residence at the time of conclusion of the agreement lays down additional formal requirements for this type of agreement, those requirements shall apply. If the spouses are habitually resident in different participating Member States and the laws of those Member States provide for different formal requirements, the agreement shall be formally valid if it satisfies the requirements of either of those laws.

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 seised; 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 seised, in so far as one of the spouses still resides in that State at the time the court is seised; or, failing that,

(c) of which both spouses are nationals at the time the court is seised; or, failing that,

(d) where the court is seised.

Article 5
Application of the lex fori

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 *lex fori* 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 Member State whose law does not provide for divorce or does not recognise the marriage in question for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation.

Article 8
States with more than one legal system

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 a State for the purpose of determining the law applicable under this Regulation.

2. A participating 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 of law arising between such units only.

Chapter III – Other provisions

Article 9
Information to be provided by participating Member States

1. At the latest by [*three months after the date of application of this Article]*, 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; and

(b) the possibility of designating the applicable law in accordance with Article 3(**2a**).

The participating Member States shall apprise 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 in accordance with the law of a participating Member State before the date of application of this Regulation, provided that it fulfils the conditions set out in the first paragraph of Article 3(**2a**).

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 seised before the date of application of this Regulation.

Article 11
Relationship with existing international conventions

1. **(…) T**his Regulation shall not affect the application of **international** conventions to which one or more participating Member States are part**ies** at the time **when the** Regulation **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 is so far as such conventions concern matters** governed by this Regulation **(…)**.

Article 12
Review clause

By [*five years after the entry into force of this Regulation*] 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 proposed amendments.

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 [*twelve months after the date of adoption of this Regulation*], with the exception of Article 9, which shall apply from [*six months after the date of adoption of this Regulation*].

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

EUROPEAN PARLIAMENT

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

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