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*Committee on Women's Rights and Gender Equality*

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**2011/0059(CNS)**

7.5.2012

## **OPINION**

of the Committee on Women's Rights and Gender Equality

for the Committee on Legal Affairs

on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes  
(COM(2011)0126 – C7-0093/2011 – 2011/0059(CNS))

Rapporteur: Marina Yannakoudakis

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## SHORT JUSTIFICATION

### Introduction

With an increase in the mobility of people within the EU's Member States there comes a natural rise in the number of cross state marriages in which couples can own multiple properties. In addition, couples who are living in different Member States at the time of death may have complications with the positioning of their assets when spread over multiple legal jurisdictions.

It is estimated that "in 2007 cross border couple divorces stood at 140,000 (13%) of the 1,040,000 divorces that took place in the EU in the same year."<sup>1</sup> It is therefore vital that there is clarification on which Member State matrimonial property jurisdiction applies when such separations occur.

This opinion is from the FEMM committee, and looks towards the protection of the more vulnerable spouse, but also recognises that both men and women are equal in the eyes of the law. The opinions main objective is to raise awareness for women, so that should they be faced with the legal consequences of a matrimonial property regime, they are in the position to make an informed and even handed decision in what is inevitably a difficult time. This opinion offers practical solutions to matrimonial property regimes, while upholding and respecting the sovereign jurisdiction of the Member States.

### Definition and scope

The Rapporteur notes that the definition of "matrimonial property regime" varies across the EU. Therefore, it is vital to clearly delineate a scope of assets that should be included in the proposal. For example, maintenance payments in some Member States fall under the scope of the matrimonial property regime, while in others they do not.

The Rapporteur is mindful that the scope of the Commission draft text relates to matrimonial property only, and that registered partnerships are considered under a separate, but related Commission proposal.<sup>2</sup> However, the Rapporteur would like to emphasize that the same equalities and rights should be afforded to all EU citizens, regardless of the nature of a union, but with due consideration to the national laws of individual Member States.

### Main challenges

The main challenge within this opinion is dealing with two different scenarios. The first being the death of a spouse, and the second being matrimonial divorce. These two scenarios are complicated by the subsidiarity principle, where matrimonial property regimes are governed by individual Member States sometimes through bilateral or multilateral conventions. This

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<sup>1</sup> "EU Citizen Report 2010 Dismantling the obstacles to EU citizens' rights", Page 5  
[http://ec.europa.eu/justice/citizen/files/com\\_2010\\_603\\_en.pdf](http://ec.europa.eu/justice/citizen/files/com_2010_603_en.pdf) " (27.10.2010)

<sup>2</sup> The proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships (COM(2011)127).

has created diversity in the legal systems of the Member States which the Rapporteur asks are respected and upheld within the narrow scope of the Commission's proposal.

While drafting this opinion the Rapporteur was mindful that not all Member States had signed up to this draft directive, and therefore it was hoped that this proposal would be flexible in allowing those that had not to re-examine their position. Further, there was no clear agreement amongst the Member States on a related Commission proposal on "successions and wills"<sup>1</sup> which is at present being scrutinized in the Council.

### **Supporting a vulnerable spouse and/or third parties**

The Rapporteur understands that during divorce proceeding women are sometimes, but not necessarily in every case, the more vulnerable spouse due to men often being the main source of financial income for a marriage and/or family unit. Therefore, the Rapporteur asks that women be adequately supported during this difficult time. In addition, protection should be afforded to third parties, especially in the case of dependent children. In line with this approach, special consideration should be given to the family home through the protection from disposal of this asset until the competent court has made a ruling, so that the vulnerable spouse and their dependents will have a guaranteed home under which to live.

The European Commission's proposal addresses the issue of property rights in the case of divorce, and provides flexibility for divorcing couples to adopt the appropriate matrimonial regime where common agreement can be reached. However, in the scenario where there is no such agreement the proposal must be mindful in protecting the weaker party, and any changing circumstances within a marriage.

### **In the event of a death of a spouse**

The Rapporteur takes the view that problems may occur when a spouse dies and the remaining spouse has no choice as to which rules and legal provisions must apply. This is covered in the "successions and wills" draft report, mentioned prior, but where there is no will in place one must try and ensure the remaining spouse is protected, and has the flexibility to administer the estate while taking account of the surviving spouse's wishes.

### **Taxation**

The issue of taxation on assets must fall under Member State jurisdiction as the habitual residence criteria governs the jurisdiction covered. However, not all Member States have bilateral or multilateral taxation agreements in place which means that in the event of a spouse dying there must be assurance that double taxation does not occur.

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<sup>1</sup> Proposal for a regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, (COM (2009)154)

## AMENDMENTS

The Committee on Women's Rights and Gender Equality calls on the Committee on Legal Affairs, as the committee responsible, to incorporate the following amendments in its report:

### **Amendment 1** **Proposal for a regulation** **Recital 11**

*Text proposed by the Commission*

(11) The scope of this Regulation should extend to all civil matters in relation to matrimonial property regimes, both the daily management of marital property and the liquidation of the regime, in particular as a result of the couple's separation or the death of one of the spouses.

*Amendment*

(11) The scope of this Regulation should extend to all civil matters in relation to matrimonial property regimes, both the daily management of marital property and the liquidation of the regime, in particular as a result of the couple's separation **or divorce** or the death of one of the spouses.

### **Amendment 2**

#### **Proposal for a regulation** **Recital 21**

*Text proposed by the Commission*

(21) Where no applicable law is chosen, and with a view to reconciling predictability and legal certainty with consideration of the life actually lived by the couple, this Regulation must introduce harmonised conflict-of-laws rules to establish the law applicable to all the spouses' property on the basis of a scale of connecting factors. The first common habitual residence of the spouses after marriage should constitute the first criterion, ahead of the law of the spouses' common nationality at the time of their marriage. If neither of these criteria apply, or failing a first common habitual residence in cases where the spouses have dual common nationalities at marriage, the third criterion should be the State with which the spouses have the closest links, taking into account all the circumstances, **including the place where the marriage**

*Amendment*

(21) Where no applicable law is chosen, and with a view to reconciling predictability and legal certainty with consideration of the life actually lived by the couple, this Regulation must introduce harmonised conflict-of-laws rules to establish the law applicable to all the spouses' property on the basis of a scale of connecting factors. The first common habitual residence of the spouses after marriage should constitute the first criterion, ahead of the law of the spouses' common nationality at the time of their marriage. If neither of these criteria apply, or failing a first common habitual residence in cases where the spouses have dual common nationalities at marriage, the third criterion should be the State with which the spouses have the closest links, taking into account all the circumstances, it being made clear that these links are to be

*was celebrated*, it being made clear that these links are to be considered as they were at the time the marriage was entered into.

considered as they were at the time the marriage was entered into.

#### *Justification*

*A number of couples may go abroad to marry which would have unclear implications for the application of a "closest link" clause.*

### **Amendment 3**

#### **Proposal for a regulation Recital 21 a (new)**

*Text proposed by the Commission*

*Amendment*

***(21a) It may be that a vulnerable spouse has been unable to make a free and fair matrimonial property choice due to specific circumstances, such as a situation of economic or financial dependence, a pay gap, lack of access to information or to legal advice, or circumstances related to illness or to domestic violence.***

#### *Justification*

*The case of absence of choice of law is already dealt with in recital 21 of the matrimonial property proposal. Since the proposal provides for rules, when no choice for applicable law is made by the spouses, the proposed amendment only describes some of the circumstances under which a choice of law has not been made possible. For this reason the 'in the absence of a choice of law' has been removed from the original recital text.*

### **Amendment 4**

#### **Proposal for a regulation Recital 24**

*Text proposed by the Commission*

*Amendment*

(24) Given the importance of choosing the law applicable to the matrimonial property regime, the Regulation must contain some guarantees to ensure that spouses or prospective spouses are aware of the

(24) Given the importance of choosing the law applicable to the matrimonial property regime, the Regulation must contain some guarantees to ensure that spouses or prospective spouses are aware of the

consequences of their choice. This choice should be made in the form prescribed for the marriage contract by the law of the State chosen or by that of the State where the instrument is drawn up, and at least be in writing **and** dated and signed by the couple. Any additional formal requirements imposed by the law of the State chosen or that of the State where the instrument is drawn up concerning the validity, disclosure or registration of such contracts should be complied with.

consequences of their choice, ***including free legal aid when one of the spouses is in financial difficulties***. This choice should be made in the form prescribed for the marriage contract by the law of the State chosen or by that of the State where the instrument is drawn up, and at least be in writing, dated and signed by the couple ***and authenticated***. ***In order to ensure adequate protection for the vulnerable spouse or prospective spouse before the choice of applicable law is made, each spouse should be individually informed in advance by a legal practitioner of the legal consequences of this choice.*** Any additional formal requirements imposed by the law of the State chosen or that of the State where the instrument is drawn up concerning the validity, disclosure or registration of such contracts should be complied with.

#### *Justification*

*The spouses(s) access to independent legal advice from a legal practitioner should allow an autonomous and informed choice to be made that protects a spouse who may be in a situation of vulnerability.*

## **Amendment 5**

### **Proposal for a regulation Recital 24 a (new)**

*Text proposed by the Commission*

*Amendment*

***(24a) Spouses or prospective spouses whose union has an international dimension should have access in advance to information on the consequences of choosing a matrimonial property regime and on legal practitioners who can be consulted before a decision on a matrimonial property regime is adopted, in case of doubt or in a situation of vulnerability. Information on matrimonial property regimes can be included in a "welcome pack" that spouses can receive,***

*if they so wish, when making contact with their embassy or national or local authorities, according to the national system. Spouses whose union has an international dimension should be informed individually in advance, when purchasing property abroad, of the benefits of choosing a matrimonial property regime. In all instances the gender equality legislation of the Member States should be upheld.*

## Amendment 6

### Proposal for a regulation Recital 25

#### *Text proposed by the Commission*

(25) Considerations of public interest dictate that courts in the Member States be given the possibility in exceptional circumstances of setting aside the foreign law in a given case where its application 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 set aside the law of another Member State or to refuse to recognise or enforce a decision, authentic instrument or legal transaction drawn up in another State if the application of the public policy exception would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21, which prohibits all forms of discrimination.

#### *Amendment*

(25) Considerations of public interest dictate that courts in the Member States be given the possibility in exceptional circumstances of setting aside the foreign law in a given case where its application 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 set aside the law of another Member State or to refuse to recognise or enforce a decision, authentic instrument or legal transaction drawn up in another State if the application of the public policy exception would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21, which prohibits all forms of discrimination, ***and Article 23, which requires equality between men and women to be ensured in all areas.***



## Amendment 7

### Proposal for a regulation

#### Article 1 – paragraph 3 – introductory wording

*Text proposed by the Commission*

3. The following are excluded from the scope of this Regulation:

*Amendment*

3. The following are excluded from the scope of this Regulation, ***without prejudice to considerations of balance and fairness:***

#### *Justification*

*In some Member States assets remaining are considered together and are dealt with as one issue with consideration to balance and intention of fairness in protecting both spouses, which in most instances is the female who is likely, where applicable, to be the primary caregiver to children. In other Member States such assets are ruled on separately.*

## Amendment 8

### Proposal for a regulation

#### Article 1 – paragraph 3 – point f a (new)

*Text proposed by the Commission*

*Amendment*

***(fa) pension rights, unless the applicable national law provides for pension rights acquired during marriage to be split in the event of divorce.***

#### *Justification*

*If assets are to be ruled on separately, as outlined in the Commission's proposal, it is important to also consider excluding from the scope of this proposed directive gifts from family members, pension rights, insurance policies and retirement funds.*

## Amendment 9

### Proposal for a regulation

#### Article 1 – paragraph 3 – point f b (new)

*Text proposed by the Commission*

*Amendment*

***(fb) insurance policies and retirement funds.***

### *Justification*

*If assets are to be ruled on separately, as outlined in Commission's proposal, it is important to also consider excluding from the scope of this proposed directive gifts from family members, pension rights, insurance policies and retirement funds.*

#### **Amendment 10**

##### **Proposal for a regulation Article 2 – point b**

###### *Text proposed by the Commission*

(b) 'marriage contract': any agreement by which spouses organise their property relationships between themselves and in relation to third parties;

###### *Amendment*

(b) 'marriage contract': any agreement by which spouses, ***on marrying or during their marriage***, organise their property relationships between themselves and in relation to third parties;

#### **Amendment 11**

##### **Proposal for a regulation Article 2 – point g**

###### *Text proposed by the Commission*

(g) 'court': any ***competent judicial authority in the Member States which carries out a judicial function*** in matters of matrimonial property regimes, ***or any other non-judicial authority or person carrying out, by delegation or designation by a judicial authority of a Member State, the functions falling within the jurisdiction of the courts as provided for in this Regulation***;

###### *Amendment*

(g) 'court': ***includes any authorities and legal professionals with competence in matters of matrimonial property regimes which exercise judicial functions, act pursuant to a delegation of power by a court or act under the control of a court, provided that those authorities and legal professionals afford guarantees with regard to their impartiality and the right of all parties to be heard and that their decisions under the law of the Member State in which they operate:***  
***– are subject to appeal to or review by a judicial authority; and***  
***– have force and effect comparable to those of a decision of a judicial authority on the same matter;***

## Amendment 12

### Proposal for a regulation Article 4 – paragraph 2

#### *Text proposed by the Commission*

Such an agreement may be concluded at any time, even during the proceedings. If it is concluded before the proceedings, it must be drawn up in writing **and** dated and signed by both parties. ***Failing agreement between the spouses, jurisdiction is governed by Articles 5 et seq.***

#### *Amendment*

Such an agreement may be concluded at any time, even during the proceedings. If it is concluded before the proceedings, it must be drawn up in writing, dated and signed by both parties **and authenticated. Before the agreement is concluded each spouse should be individually informed by a legal practitioner of the legal consequences of this choice.**

#### *Justification*

*The spouses(s) access to independent legal advice from a legal practitioner should allow an autonomous and informed choice to be made that protects a spouse who may be in a situation of vulnerability.*

## Amendment 13

### Proposal for a regulation Article 5 – paragraph 2 – subparagraph 2

#### *Text proposed by the Commission*

Such an agreement may be concluded at any time, even during the proceedings. If it is concluded before the proceedings, it must be drawn up in writing **and** dated and signed by both parties.

#### *Amendment*

Such an agreement may be concluded at any time, even during the proceedings. If it is concluded before the proceedings, it must be drawn up in writing, dated and signed by both parties, **and registered in accordance with the procedure laid down in the Member State where it was concluded.**

## Amendment 14

### Proposal for a regulation Article 13 a (new)

#### *Text proposed by the Commission*

#### *Amendment*

#### ***Article 13a***

*Provision of information to spouses*

*The competent authority shall be obliged to inform the spouse(s), within a reasonable time, of any matrimonial property regime proceedings which are initiated against them.*

**Amendment 15**

**Proposal for a regulation**  
**Article 14 a (new)**

*Text proposed by the Commission*

*Amendment*

**Article 14a**

*Special protective measures*

*Before any decision as to a competent court is taken, special protection shall be afforded to the family home through measures such as protection of that asset from disposal, in accordance with the law of the Member State addressed until the competent court has delivered its ruling.*

*Justification*

*In order to protect the vulnerable spouse and third parties, such as dependents it is important that the family home is protected from rapid disposal until the competent court has ruled, and in accordance with the law of the Member State addressed. This will ensure that during court proceedings, if applicable, the vulnerable spouse and their dependents will have a guaranteed home under which to live.*

**Amendment 16**

**Proposal for a regulation**  
**Article 15**

*Text proposed by the Commission*

*Amendment*

The law applicable to a matrimonial property regime under Article 16, 17 and 18 shall apply to all the couple's property.

The law applicable to a matrimonial property regime under Article 16, 17 and 18 shall apply to all the couple's **common** property.

## Amendment 17

### Proposal for a regulation

#### Article 17 – paragraph 1 – point c

*Text proposed by the Commission*

(c) the law of the State with which the spouses jointly have the closest links, taking into account all the circumstances, ***in particular*** the place where the marriage was celebrated.

*Amendment*

(c) the law of the State with which the spouses jointly have the closest links, taking into account all the circumstances, ***regardless of*** the place where the marriage was celebrated.

*Justification*

*A number of couples may go abroad to marry which would have unclear implications for the application of a "closest link" clause.*

## Amendment 18

### Proposal for a regulation

#### Article 17 – paragraph 2 a (new)

*Text proposed by the Commission*

*Amendment*

***2a. Notwithstanding paragraph 1, in the event of the death of a spouse, and where no choice of a matrimonial property regime has been made, the surviving spouse's wishes should where appropriate take priority and be upheld.***

## Amendment 19

### Proposal for a regulation

#### Article 18 – paragraph 3

*Text proposed by the Commission*

*Amendment*

If the spouses choose to make this change of applicable law retrospective, the retrospective effect ***may*** not affect the validity of previous transactions entered into under the law applicable hitherto or the rights of third parties deriving from the law previously applicable.

If the spouses choose to make this change of applicable law retrospective, the retrospective effect ***shall*** not affect the validity of previous transactions entered into under the law applicable hitherto or the rights of third parties deriving from the law previously applicable. ***Each of the***

*spouses shall be individually informed in advance by a legal practitioner about the legal consequences of this choice.*

*Justification*

*Retrospective decisions will not lead to higher levels of legal certainty for third parties and may give rise to higher legal costs for spouses.*

**Amendment 20**

**Proposal for a regulation  
Article 19 – paragraph 2**

*Text proposed by the Commission*

2. Notwithstanding paragraph 1, the choice must at least be made expressly in a document dated **and** signed by both spouses.

*Amendment*

2. Notwithstanding paragraph 1, the choice must at least be made expressly in a document dated, signed by both spouses **and authenticated. Before the choice of applicable law is made each of the spouses shall be individually informed by a legal practitioner of the legal consequences of this choice.**

**Amendment 21**

**Proposal for a regulation  
Article 20 – paragraph 2**

*Text proposed by the Commission*

2. Notwithstanding paragraph 1, the marriage contract must at least be set out in a document dated **and** signed by both spouses.

*Amendment*

2. Notwithstanding paragraph 1, the marriage contract must at least be set out in a document dated, signed by both spouses **and authenticated.**

**Amendment 22**

**Proposal for a regulation  
Article 27 – point d**

*Text proposed by the Commission*

(d) it is irreconcilable with an earlier

*Amendment*

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decision given in another Member State **or in a third State** involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State addressed

decision given in another Member State involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State addressed.

#### *Justification*

*There is no guarantee of reciprocal recognition with a third state. This will mean that EU Member States judiciaries may have to train in and then apply the foreign law of non-EU third states which may lead to considerable costs, time delays and diminished legal certainty for plaintiffs and third parties.*

### **Amendment 23**

#### **Proposal for a regulation Article 35 – paragraph 2**

##### *Text proposed by the Commission*

2. However, the law of a Member State may provide that the law applicable to the matrimonial property regime may not be relied on by a spouse in dealings with a third party if one or other has their habitual residence in the territory of that Member State and the conditions of disclosure or registration provided for in the law of that State are not satisfied, unless the third party was aware of **or ought to have been aware of** the law applicable to the matrimonial property regime.

##### *Amendment*

2. However, the law of a Member State may provide that the law applicable to the matrimonial property regime may not be relied on by a spouse in dealings with a third party if one or other has their habitual residence in the territory of that Member State and the conditions of disclosure or registration provided for in the law of that State are not satisfied, unless the third party was aware of the law applicable to the matrimonial property regime.

#### *Justification*

*It may prove difficult to ascertain whether a third party "ought to have been aware" especially when considering the international nature of most matrimonial property disputes. This term has been removed as it is unclear in its scope.*

## Amendment 24

### Proposal for a regulation Article 37 – paragraph 3

*Text proposed by the Commission*

3. The Commission shall make all information communicated in accordance with paragraphs 1 and 2 publicly available by appropriate means, in particular through the multilingual internet site of the European Judicial Network in civil and commercial matters.

*Amendment*

3. The Commission shall make all information communicated in accordance with paragraphs 1 and 2 publicly available by appropriate means, in particular, ***though not exclusively***, through the multilingual internet site of the European Judicial Network in civil and commercial matters.

*Justification*

*Information can be communicated by other means, such as a multilingual telephone helpline.*

## Amendment 25

### Proposal for a regulation Article 37 – paragraph 3 a (new)

*Text proposed by the Commission*

*Amendment*

***3a. Member States shall consider taking appropriate measures in order to ensure that spouses whose union has an international dimension have access to information on the consequences of choosing a matrimonial property regime and on legal practitioners who can be consulted.***



## PROCEDURE

<b>Title</b>	Decisions in matters of matrimonial property regimes
<b>References</b>	COM(2011)0126 – C7-0093/2011 – 2011/0059(CNS)
<b>Committee responsible</b> Date announced in plenary	JURI 10.5.2011
<b>Committee(s) asked for opinion(s)</b> Date announced in plenary	FEMM 10.5.2011
<b>Rapporteur(s)</b> Date appointed	Marina Yannakoudakis 19.4.2011
<b>Discussed in committee</b>	27.2.2012
<b>Date adopted</b>	24.4.2012
<b>Result of final vote</b>	+: 23 –: 0 0: 4
<b>Members present for the final vote</b>	Emine Bozkurt, Andrea Češková, Iratxe García Pérez, Zita Gurmai, Mikael Gustafsson, Mary Honeyball, Sophia in 't Veld, Livia Járóka, Nicole Kiil-Nielsen, Silvana Koch-Mehrin, Rodi Kratsa-Tsagaropoulou, Astrid Lulling, Barbara Matera, Elisabeth Morin-Chartier, Angelika Niebler, Siiri Oviir, Joanna Katarzyna Skrzydlewska, Marc Tarabella, Britta Thomsen, Marina Yannakoudakis, Anna Záborská, Inês Cristina Zuber
<b>Substitute(s) present for the final vote</b>	Franziska Katharina Brantner, Christa Klaß, Ana Miranda, Mariya Nedelcheva, Antigoni Papadopoulou