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*Committee on Civil Liberties, Justice and Home Affairs*

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**2011/0059(CNS)**

6.9.2012

## **OPINION**

of the Committee on Civil Liberties, Justice and Home Affairs

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: Evelyne Gebhardt

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## SHORT JUSTIFICATION

The European Commission's proposal is designed to regulate jurisdiction and applicable law as they apply both to the daily management of the property of spouses and to how issues relating to the distribution of assets in cross-border situations are handled following the ending of a couple's relationship through divorce, separation or death. The Commission's objective is to ensure greater legal certainty for parties in order to prevent parallel proceedings, and to discourage the practice of plaintiffs seeking to have their dispute heard in the court thought most likely to provide a favorable judgment (forum shopping).

Divorce and death of a spouse are circumstances treated differently. While married couples must agree between themselves that the court with jurisdiction for divorce proceedings, legal separation or marriage annulment may also consider the property consequences following the divorce, the court with jurisdiction in succession matters will always have jurisdiction in such cases although it is somewhat unclear whether it has exclusive jurisdiction. Otherwise jurisdiction is based on a hierarchy of connecting factors.

Article 16 constitutes an innovation as it allows the spouses to designate by common agreement the law applicable to their matrimonial property regime. The rapporteur is in favour of allowing spouses to choose the law of the State in which they have or have had their habitual common residence or the law of the State of which one of the spouses is a national. Furthermore, the rapporteur wishes to provide spouses more possibilities to choose the applicable law for their property regime.

It then has to be ensured that the choice made by the parties is an informed one, i.e. that both spouses have been duly informed of the practical implications of their choice. In this regard, consideration needs to be given to the best way of ensuring that comprehensive reliable information is made available to the secretaries of the agreement on the assignment of competence before the act is signed. Access to information must also be provided, irrespective of each spouse's financial situation. It must be ensured that both spouses receive comprehensive accurate information concerning the implications of their choice of the law applicable to the matrimonial property regime especially since there are great disparities between the applicable Member States' laws.

Furthermore, since laws do change, it may be that an agreement designating the applicable law which was signed at a given moment no longer meets the legitimate expectations of the parties at the time at which it should deploy its effects, since the legislation of the Member State in question has in the meantime been amended. Therefore, the Rapporteur welcomes the Commission proposal in that regard, as married couples can agree during the marriage to change the applicable law governing their property, and may make their choice retrospective. However, offering the same options as under Art.16 would be welcome.

Where no choice has been made, again a hierarchy will come into play starting with habitual residence, then common nationality and moving to the law of the country with which the couple has the strongest connection. The rapporteur considers that the place where the marriage was celebrated should be a distinct criterion, as the choice by the parties of a country to celebrate their marriage should be presumed as implying possible acceptance of the law of that country as well.

The Regulation provides that the law applicable to matrimonial property will apply to all the couple's property, movable or immovable, irrespective of their location.

The proposed Regulation provides for an uniform procedure for the recognition and enforcement of decisions, authentic acts and legal transactions concerning matrimonial property regimes originating in another Member State.

The rapporteur welcomes that the rules on jurisdiction, applicable law and recognition and enforcement follow the precedents of other instruments. Certain benefits are likely to accrue to European citizens as a result of the proposal, in terms of the predictability of the law that will apply to a property regime, and the ability to ensure recognition and enforcement of decisions on property matters that previously was a matter for the private international law rules of each Member State and could lead to extensive delay and expense in enforcing property rights.

Finally, the rapporteur very much regrets the fact that two separate proposals for Regulations on matrimonial property regimes and on property consequences of registered partnerships were issued, as well as the substantial differences between them. According to the rapporteur this separation constitutes discrimination on grounds of sexual orientation.

## AMENDMENTS

The Committee on Civil Liberties, Justice and Home Affairs 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

##### *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, ***movables or immovables***, and the

as a result of the couple's separation or the death of one of the spouses.

liquidation of the regime, in particular as a result of the couple's separation or the death of one of the spouses.

## Amendment 2

### 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, ***an annulment or divorce*** or the death of one of the spouses.

## Amendment 3

### Proposal for a regulation Recital 19

#### *Text proposed by the Commission*

(19) To facilitate spouses' management of their property, this Regulation will authorise them to choose the law applicable to all the property covered by their matrimonial property regime, regardless of the nature or location of the property, among the laws with which they have close links because of residence or their nationality. This choice may be made at any moment, at the time of ***the marriage*** or during the course of the marriage.

#### *Amendment*

(19) To facilitate spouses' management of their property, this Regulation will authorise them to choose the law applicable to all the property covered by their matrimonial property regime, regardless of the nature or location of the property, among the laws with which they have close links because of residence or their nationality. This choice may be made at any moment, at the time of, ***after*** or during the course of the marriage.

#### *Justification*

*As divorce proceedings and matrimonial property regime resolution do not necessarily have to take place at the same time, the choice of the law applicable should cover the time after the marriage as well.*

## Amendment 4

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

#### *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 circumstances.

#### *Justification*

*For every individual case, individual circumstances should be taken into account in order to settle the spouses' closest links. Given that places where marriages are celebrated tend to be chosen for reasons other than the applicable law, there is no reason to emphasize the likelihood of this choice.*

## Amendment 5

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

*Text proposed by the Commission*

*Amendment*

***(21a) The term “habitual residence” should be interpreted in accordance with the purpose of this Regulation. Its meaning should be determined by the judge in each individual case and on the basis of the facts. The term does not refer to a concept of national law but, rather, to a separate concept established in Union law.***

*Justification*

*A definition of the term habitual residence should be provided so as to avoid as much as possible arbitrary interpretations. The court, of course, has to examine all relevant facts before it applies the definition.*

## Amendment 6

### 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 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.

(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 ***either*** 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.

## Amendment 7

### Proposal for a regulation Recital 32

#### *Text proposed by the Commission*

(32) This Regulation respects fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, in particular Articles 7, 9, 17, 21 and 47 concerning, respectively, respect for private and family life, the right to marry and to found a family according to national laws, property rights, the prohibition of any form of discrimination and the right to an effective remedy and to a fair trial. The Member States' courts must apply this Regulation in a manner consistent with these rights and principles.

#### *Amendment*

(32) This Regulation respects fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, in particular Articles 7, 9, 17, **20, 21, 23** and 47 concerning, respectively, respect for private and family life, the right to marry and to found a family according to national laws, property rights, ***equality before the law***, the prohibition of any form of discrimination, ***equality between women and men*** and the right to an effective remedy and to a fair trial. The Member States' courts must apply this Regulation in a manner consistent with these rights and principles ***enshrined in the Charter of Fundamental Rights, in particular the principles of equality before the law, non-discrimination on grounds of sex or sexual orientation, and equality between women and men.***

#### *Justification*

*While acknowledging the results of the Commission's fundamental rights impact assessment, the rapporteur underlines that particular attention must be paid to the principles of equality before the law (Art. 20 of the Charter of Fundamental Rights), non-discrimination (Art. 21 of the Charter), and equality between women and men (Art. 23 of the Charter) when courts apply the Regulation.*

## Amendment 8

### Proposal for a regulation Recital 32

#### *Text proposed by the Commission*

(32) This Regulation respects fundamental

#### *Amendment*

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rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, in particular Articles 7, 9, 17, 21 and 47 concerning, respectively, respect for private and family life, the right to marry and to found a family according to national laws, property rights, the prohibition of any form of discrimination and the right to an effective remedy and to a fair trial. The Member States' courts must apply this Regulation in a manner consistent with these rights and principles.

rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, in particular Articles 7, 9, 17, **20**, 21, **23**, **24** and 47 concerning, respectively, respect for private and family life, the right to marry and to found a family according to national laws, property rights, ***equality before the law***, the prohibition of any form of discrimination, ***equality between women and men, the rights of the child*** and the right to an effective remedy and to a fair trial. The Member States' courts must apply this Regulation in a manner consistent with these rights and principles.

## Amendment 9

### Proposal for a regulation Article 4 – paragraph 1

#### *Text proposed by the Commission*

The courts of a Member State called upon to rule on an application for divorce, judicial separation or marriage annulment under Regulation (EC) No 2201/2003, shall also have jurisdiction, where the spouses so agree, to rule on matters of the matrimonial property regime ***arising in connection with the application.***

#### *Amendment*

The courts of a Member State called upon to rule on an application for divorce, judicial separation or marriage annulment under Regulation (EC) No 2201/2003, shall also have jurisdiction, where the spouses so agree, to rule on matters of the matrimonial property regime.

## Amendment 10

### Proposal for a regulation Article 4 – paragraph 1

#### *Text proposed by the Commission*

The courts of a Member State called upon to rule on an application for divorce, judicial separation or marriage annulment under Regulation (EC) No 2201/2003, shall also have jurisdiction, where the spouses so agree, to rule on matters of the matrimonial property regime arising in

#### *Amendment*

The courts of a Member State called upon to rule on an application for divorce, judicial separation or marriage annulment under Regulation (EC) No 2201/2003, shall also have jurisdiction, where the spouses so agree, to rule on matters of the matrimonial property regime arising in

connection with the application.

connection with the application. ***The agreement between the spouses on property matters shall not jeopardise the interests of the children.***

## Amendment 11

### 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.

#### *Amendment*

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

#### *Justification*

*As divorce proceedings and matrimonial property regime resolution do not necessarily have to take place at the same time, the choice of the law applicable should cover the time after the marriage as well.*

## Amendment 12

### Proposal for a regulation Article 5 – paragraph 1 – introductory wording

#### *Text proposed by the Commission*

1. In cases other than those provided for in Articles 3 and 4 jurisdiction to rule on proceedings in a matter of the spouses' matrimonial property regime shall lie with the courts of the Member State:

#### *Amendment*

1. In cases other than those provided for in Articles 3 and 4 jurisdiction to rule on proceedings in a matter of the spouses' matrimonial property regime shall lie, ***in descending order***, with the courts of the Member State:

## Amendment 13

### Proposal for a regulation

#### Article 5 – paragraph 1 – point d a (new)

*Text proposed by the Commission*

*Amendment*

***(da) of the nationality of the defendant or, in the case of the United Kingdom and Ireland, of his/her domicile.***

*Justification*

*Extending the jurisdiction in cases other than those provided for in Articles 3 and 4 to rule on proceedings in a matter of the spouses' matrimonial property regime leads to a less frequent application of Articles 6 and 7 of this proposal.*

## Amendment 14

### Proposal for a regulation

#### Article 5 – paragraph 2 – subparagraph 2

*Text proposed by the Commission*

*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 and dated and signed by both parties.

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

*Justification*

*For reasons of legal certainty, all agreements according to Article 5 of the proposal should be drawn up in writing, and dated and signed by both parties.*

## Amendment 15

### 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 ***movable or immovable*** property, ***irrespective of its***

*location.*

*Justification*

*This refers to the choice made of a single scheme which enables all questions relating to the spouses' property to be dealt with in one single procedure.*

**Amendment 16**

**Proposal for a regulation**

**Article 16 – paragraph 1 – point c a (new)**

*Text proposed by the Commission*

*Amendment*

***(ca) the law of the State in which the marriage took place, or***

*Justification*

*The law of a country in which the marriage took place should be a recognised option of applicable law for matrimonial property regimes.*

**Amendment 17**

**Proposal for a regulation**

**Article 16 – paragraph 1 – point c b (new)**

*Text proposed by the Commission*

*Amendment*

***(cb) the law of the State with which the spouses jointly have the closest links, or***

*Justification*

*Spouses should be given as wide a range of choices for the applicable law within the scope of this proposal.*

**Amendment 18**

**Proposal for a regulation**

**Article 16 – paragraph 1 – point c c (new)**

*Text proposed by the Commission*

*Amendment*

***(cc) the law of the State of the last***

*common habitual residence, or*

## **Amendment 19**

### **Proposal for a regulation**

#### **Article 16 – paragraph 1 – point c d (new)**

*Text proposed by the Commission*

*Amendment*

*(cd) the law of the State of the spouses’ first common habitual residence after their marriage.*

## **Amendment 20**

### **Proposal for a regulation**

#### **Article 16 – paragraph 1 a (new)**

*Text proposed by the Commission*

*Amendment*

*The term ‘habitual residence’ shall mean a person’s ordinary place of abode.*

#### *Justification*

*A definition of the term habitual residence should be provided so as to avoid as much as possible arbitrary interpretations. The court, of course, has to examine all relevant facts before it applies the definition.*

## **Amendment 21**

### **Proposal for a regulation**

#### **Article 17 – paragraph 1 – introductory wording**

*Text proposed by the Commission*

*Amendment*

1. If the spouses do not make a choice, the law applicable to the matrimonial property regime shall be:

1. If the spouses do not make a choice, the law applicable to the matrimonial property regime shall be, *in descending order*:

## Amendment 22

### 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 circumstances ***or, if that law cannot be established,***

#### *Justification*

*For every individual case, individual circumstances should be taken into account in order to settle the spouses' closest links. Given that places where marriages are celebrated tend to be chosen for reasons other than the applicable law, there is no reason to emphasize the likelihood of this choice.*

## Amendment 23

### Proposal for a regulation

#### Article 17 – paragraph 1 – point c a (new)

*Text proposed by the Commission*

*Amendment*

***(ca) the law of the State in which the marriage took place.***

#### *Justification*

*The choice by the parties of a country in which the marriage takes place should be reasonably presumed as implying possible acceptance of the law of that country as well.*

## Amendment 24

### Proposal for a regulation

#### Article 17 – paragraph 1 a (new)

*Text proposed by the Commission*

*Amendment*

***1a. The term ‘habitual residence’ shall mean a person’s ordinary place of abode.***

### *Justification*

*A definition of the term habitual residence should be provided so as to avoid as much as possible arbitrary interpretations. The court, of course, has to examine all relevant facts before it applies the definition.*

## **Amendment 25**

### **Proposal for a regulation Article 18 – paragraph 1**

#### *Text proposed by the Commission*

The spouses may, at any time during the marriage, make their matrimonial property regime subject to a law other than the one hitherto applicable. They may designate ***only*** one of the ***following*** laws:

***(a) the law of the State of habitual residence of one of the spouses at the time this choice is made;***

***(b) the law of a State of which one of the spouses is a national at the time this choice is made.***

#### *Amendment*

The spouses may, at any time during the marriage, make their matrimonial property regime subject to a law other than the one hitherto applicable. They may ***only*** designate one of the laws ***listed under Article 16 of this Regulation.***

### *Justification*

*When changing the applicable law to their property regimes, spouses should have the same choices as laid out in Article 16 (on the initial choice of property regimes).*

## **Amendment 26**

### **Proposal for a regulation Article 18 – paragraph 2**

#### *Text proposed by the Commission*

Unless the spouses ***desire*** otherwise, a change of the law applicable to the matrimonial property regime made during the marriage shall be effective only in the future.

#### *Amendment*

Unless the spouses ***indicate*** otherwise, a change of the law applicable to the matrimonial property regime made during the marriage shall be effective only in the future.

## Amendment 27

### 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 and signed by both spouses ***and expressing their common wish.***

#### *Justification*

*To protect the interests of each party, there must be certainty that the decision is being taken by common accord.*

## Amendment 28

### Proposal for a regulation Article 19 – paragraph 3

#### *Text proposed by the Commission*

3. If the law of the Member State ***in which the spouses have their common habitual residence at the time of the choice*** referred to in paragraph 1 provides for additional formal requirements for the marriage contract, these requirements must be complied with.

#### *Amendment*

3. If the law of the Member State referred to in paragraph 1 provides for additional formal requirements for the marriage contract, these requirements must be complied with.

## Amendment 29

### 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 and signed by both spouses ***and expressing their common wish.***



### *Justification*

*To protect the interests of each party, there must be certainty that the decision is being taken by common accord.*

### **Amendment 30**

#### **Proposal for a regulation**

#### **Article 22**

*Text proposed by the Commission*

*Amendment*

**Article 22**

***deleted***

***Overriding mandatory provisions***

### *Justification*

*The scope of exceptions allowed by this article is virtually limitless, allowing Member States to disregard any provision contained in the Regulation. Since Article 23 already provides for a public policy exception in specific cases, this article should be deleted.*

### **Amendment 31**

#### **Proposal for a regulation**

#### **Article 37 – paragraph 3**

*Text proposed by the Commission*

*Amendment*

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.

3. The Commission shall make all information publicly available ***in a simple manner*** by appropriate means, through a multilingual internet site ***complementing that*** of the European Judicial Network in civil and commercial matters, ***so as to ensure that all couples and spouses can exercise their rights in an informed way.***

### **Amendment 32**

#### **Proposal for a regulation**

#### **Article 37 – paragraph 3 a (new)**

*Text proposed by the Commission*

*Amendment*

***3a. The Commission shall introduce an***

*information and training tool for the relevant court officials and legal practitioners by setting up an interactive portal in all official languages of the Union, including a system for sharing professional expertise and practices.*

## 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><br>Date announced in plenary         | JURI<br>10.5.2011   |
| <b>Opinion by</b><br>Date announced in plenary                    | LIBE<br>10.5.2011   |
| <b>Rapporteur</b><br>Date appointed                               | Evelyne Gebhardt<br>24.5.2011   |
| <b>Discussed in committee</b>                                     | 21.3.2012                      3.9.2012   |
| <b>Date adopted</b>   | 3.9.2012  |
| <b>Result of final vote</b>                                       | +:                      45<br>–:                      4<br>0:                      0  |
| <b>Members present for the final vote</b>                         | Jan Philipp Albrecht, Edit Bauer, Simon Busuttil, Philip Claeys, Carlos Coelho, Agustín Díaz de Mera García Consuegra, Ioan Enciu, Frank Engel, Cornelia Ernst, Kinga Gál, Kinga Göncz, Nathalie Griesbeck, Sylvie Guillaume, Anna Hedh, Salvatore Iacolino, Lívia Járóka, Teresa Jiménez-Becerril Barrio, Timothy Kirkhope, Juan Fernando López Aguilar, Baroness Sarah Ludford, Monica Luisa Macovei, Véronique Mathieu, Anthea McIntyre, Louis Michel, Antigoni Papadopoulou, Georgios Papanikolaou, Carmen Romero López, Judith Sargentini, Birgit Sippel, Rui Tavares, Nils Torvalds, Axel Voss, Renate Weber, Josef Weidenholzer, Cecilia Wikström, Auke Zijlstra |
| <b>Substitute(s) present for the final vote</b>                   | Anna Maria Corazza Bildt, Cornelis de Jong, Evelyne Gebhardt, Monika Hohlmeier, Franziska Keller, Ádám Kósa, Marian-Jean Marinescu, Antonio Masip Hidalgo, Jan Mulder, Raúl Romeva i Rueda, Glenis Willmott   |
| <b>Substitute(s) under Rule 187(2) present for the final vote</b> | Justas Vincas Paleckis, Iuliu Winkler   |