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on the law applicable in matrimonial matters

Committee on Civil Liberties, Justice and Home Affairs

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I. Background and context of the proposal

This proposal for a regulation aims to establish a clear, comprehensive legal framework covering *both* the rules on jurisdiction and the recognition and enforcement of judgments in matrimonial matters *and* the rules regarding the laws that are applicable, while additionally adding a certain degree of autonomy for the parties. It is a response to an instruction by the European Council, which invited the Commission in November 2004 to present as of 2005 a green paper on the resolution of conflicts of law relating to divorce, and constitutes the result of the wide-ranging consultation that was carried out.

The proposal represents an innovation in that the first Community instruments adopted in the area of family law – Council Regulation (EC) No 1347/2000[1] and Council Regulation (EC) No 2201/2003,[2] which repealed and replaced Council Regulation (EC) No 1347/2000 as of 1 March 2005 – laid down rules on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses handed down in the context of a matrimonial procedure, without, however, addressing the question of the rules governing the law applicable.

Up to now, therefore, an 'international' couple wishing to divorce is subject to the rules of jurisdiction of Regulation (EC) No 2201/2003 (known as 'Brussels II(a)' or 'Brussels II bis'), under which the spouses may choose among several different jurisdiction criteria. Once divorce proceedings are brought before the courts of a Member State, the law applicable is determined by reference to that State's rules on conflicts of jurisdiction. These national laws on conflicts of jurisdiction turn out to be extremely diverse.

The combination of this disparity between the national rules on conflicts of jurisdiction and the current Community provisions on jurisdiction can lead to a number of problems in the case of 'international' divorces. Apart from the lack of legal certainty resulting from the difficulty for the spouses of determining which law is applicable in their case,[3] there is also what the Commission regards as the genuine risk of a 'rush to court', an expression denoting a situation where the better-informed of the spouses attempts to bring the case quickly before the court working within the legal system that best serves his or her interests. In addition, Community citizens resident in third countries may have trouble finding a jurisdiction empowered to deal with divorce cases and having a divorce judgment handed down in a third country recognised in their own country.

The Commission proposal aims to limit these risks and make good these shortcomings, inter alia by establishing the option for the parties of choosing the court and the law applicable by mutual agreement. In so doing it is responding to an inescapable reality, namely the fact that the rise in mobility of citizens within the European Union has led to a rise in the number of 'international' marriages and, in consequence, divorces, that is to say, marriages and divorces where the spouses are of different nationalities or live in a Member State of which neither is a

[1] 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, 30.6.2000, p. 19.

[2] Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, p. 1.

[3] See on this subject the document SEC (2006) 949 of 17.7.2006, p. 5.

national.[1]

II. Analysis of the proposal

Article 3a: choice of court by the parties in divorce and legal separation proceedings

This article introduces the possibility for the spouses of choosing by mutual agreement the court that will have jurisdiction in their divorce proceedings. It has the undeniable advantage of increasing the parties' autonomy and allowing them the freedom to confer jurisdiction on the court with which they have the closest links, subject to certain connection criteria.

In the opinion of the rapporteur, this article calls for a number of comments.

First, it must be ensured that the criterion for establishing a connection is strongly and precisely enough worded, without on the other hand being unnecessarily restrictive.

On wonders whether it would not be useful to add a definition of the concept of the 'common habitual residence' which is mentioned in letter (b), no definition being included at present. If there is to be a definition, we need to think about what should be included in the definition. In the view of the rapporteur, this could go beyond the objective facts to include the spouses' intentions, or not, to make the residence a permanent, or at least a long-term, one.

As to the time criterion in point (b), it seems somewhat arbitrary, particularly since different lengths of time are found in other articles.[2] Given that the concept of the 'common habitual residence' is already made more restrictive by the addition of the word 'last', one wonders whether it is necessary to add a further time criterion. If it is, one needs to see whether the three-year period laid down in the proposal is justified.

Then, it must be ensured that the choice made by the parties is an informed choice, i.e. that the two spouses are well informed as to the practical implications of their choice. We need to think about the best way of ensuring that comprehensive, reliable information is made available to the signatories of the agreement conferring jurisdiction before it is signed.[3] It is also important that access to the information should be available regardless of the respective financial situations of the two spouses, for example through consultation and legal aid services such as already exist in some Member States. This applies also, and above all, to Article 20a, which concerns the choice of law by the parties.

Article 20a: Choice of law by the parties

One wonders about the fact that this article and Article 3a (above) are not in line with each

[1] By way of illustration, the rate of international divorces is currently highest in Estonia (78%), close to 50% in Luxembourg, the Netherlands and Sweden, and 25% in Belgium, Germany, Finland and Portugal. (SEC(2006) 949 du 17.7.2006, p. 8.

[2] See, for example, Article 20a(c).

[3] Involvement of a notary would have been a viable option if the profession had existed in all the Member States, but it does not.

other. Where Article 3a lays down 'the place of the spouses' last common habitual residence for a minimum period of three years' as the criterion, Article 20a speaks of 'the law of the State where the spouses have resided for at least five years'. Extending the period of residence suggests a desire to ensure that the link with the former State of residence is stronger in the case of choice of law, the implications of which are greater, than in the case of the choice of competent court. However, the fact that the restriction created by the word 'last' qualifying 'residence' is removed goes in the opposite direction, so that, taken overall, the Commission's intentions remain unclear.
So the question that arises is the same as in the case of Article 3a (above): should the concept of the 'last' habitual common residence be introduced here, and is the time criterion in the proposal appropriate?

In the range of criteria for choice proposed for deciding on the law that is to be applicable, one is surprised to see that the law of the State in which the marriage contract was signed is not included. Even though the Member States do not all have similar laws as regards the conclusion of marriage contracts, nationals of States where such a possibility is provided for could be given the option of referring to the law of that State when divorcing, which would give a great advantage in terms of consistency and predictability.

Let us again note at this point the importance of providing the spouses with precise, comprehensive information regarding the consequences of their choice of the law applicable for divorce, particularly as the law of the Member States differs considerably on many points, including, for example, the grounds for and forms of divorce, the conditions for obtaining a divorce, the required period of separation and other matters that are decisive to the proceedings. In addition, since laws are not immutable, it could happen that an agreement on the law applicable signed at any given moment did not correspond to the legitimate expectations of the parties at the time when it should produce its effects, the law of the country in question having changed in the meantime. In any event, a mechanism needs to be provided for informing the parties reliably of any change that occurs in the law they have opted for, giving them also the right to withdraw where appropriate. We should note, finally, that in some Member States, such as Belgium, Germany[1] and France, the effects of a divorce have to be considered and settled at the same time as the divorce, so that by choosing the law that is applicable the spouses will in some cases also determine *de jure* and *de facto* which law will apply to questions called 'subsidiary', but which are in fact essential, such as the effects of the divorce in terms of money and property (alimony, division of goods held in common, attribution of the family home, child maintenance).[2] Hence the need, to which the rapporteur wishes to draw the reader's attention, to clarify the links between this proposal for a regulation and the one concerning maintenance obligations that is currently under consideration.[3]

[1] In Germany the family court judge looks concurrently at the application for divorce and subsidiary questions raised within the time limits, and in principle rules at the same time on all of these matters. Generally speaking, the divorce cannot be made final until the subsidiary questions have been resolved (See Council Doc. 8839/00, p. 67).
[2] Making an informed choice is very important for the economically weaker spouse, especially when the choice of law applicable involves the loss of advantages such as the possibility under German law, for example, of sharing the pension rights acquired by the two spouses.
[3] Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations COM (2005) 649 final of 15/12/2005.

Article 20b: Applicable law in the absence of choice by the parties

This is a key article of the regulation, which reflects some crucial choices made by the Commission following a consultation on the basis of the Green Paper. In its proposal the Commission has quite clearly aligned itself with the States which, in cases of 'international' divorce, decide on the applicable law on the basis of a range of criteria designed to guarantee that the spouses will have applied to them the law with which they have the closest link. In so doing, the Commission has departed from the system practised by a different category of States, which systematically apply the law of the forum ('*lex fori*').

One question we must ask at an early stage, therefore, is whether this is a judicious choice, or whether it should be called into question.

In this proposal, the application of the *lex fori*, that is to say, of the State to whose courts the matter has been referred, is only mentioned as a last resort, in point (d). If one took the view that this practice, which is probably easier for the courts referred to – which can rule on the basis of a body of law that they know, and not one with which they have to familiarise themselves[1] – should be the rule, and not the exception, the provisions of this proposal for a regulation would have to be changed to make the criterion set out in letter (d) the main criterion. In the absence of any hierarchy among the criteria in Article 3 of 'Brussels II(a)' for designation of the competent court, this would, however, risk reinforcing the tendency towards a 'rush to the courts' which the Commission proposal aims to counteract. A 'rush to the courts' would indeed be unacceptable. Another approach might therefore be to review the criteria for designating the court set out in Article 3 of Regulation (EC) No 2201/2203, to establish a hierarchy among them and to provide in the new regulation that the law of the State in which the application had been filed (currently letter (d)) will apply. This option has the virtues of simplicity, consistency and predictability, but it does not guarantee that the law applicable will be that with which the spouses have the closest links, and also has the disadvantage of being very rigid.

If, on the other hand, one takes the view, like the Commission, that the law of the country with which the parties have the closest links should apply in the divorce proceedings, one is forced to wonder whether the order in which the Commission presents these criteria is appropriate, and whether the list of criteria should be either shortened or lengthened.

Here a number of options are available: one could imagine that the criterion of common nationality featuring in point (c) could be placed above those relating to residence. This could, however, have the effect of multiplying the number of cases in which a foreign law had to be applied. Likewise, one could imagine that the criterion of the habitual common residence of the spouses in point (a) could be linked to a length of time, or that the law of the country where the marriage contract was concluded could be mentioned as an option, for those countries where this system exists.

[1] This is an aspect which, in the view of the rapporteur, should be clarified by lawyers, in this case judges, on the basis of their experience.

One could also envisage applying a rule based first and foremost on *'lex fori'*, while at the same time providing for well-defined exceptions whereby one of the spouses could ask for a foreign law with which the spouses had a close link to be applied. This approach would have the advantage of combining the various systems that exist.

In the current state of the proposal, the situation could arise that a Latvian couple that had been living for a short time in Belgium, where they had their habitual common residence, one of whom applied for a divorce to a Latvian court,[1] came under Belgian law, to which the Latvian court would be forced to refer under Article 20b. The paradoxical nature of this situation gives one pause for thought.

Article 20e: Public policy

In the opinion of the rapporteur, the public policy clause as it stands in the Commission proposal is too vague, and could therefore be susceptible to a wide variety of interpretations. In its present wording, this escape clause is a source of uncertainty for the plaintiff, who could rightly fear, in certain cases, that the court of the forum might refuse to apply the law of his or her country of nationality on public policy grounds.

One may well wonder what use might be made of a clause such as this in the case of marriages legally celebrated between two people of the same sex, given that such marriages are not legal in all the Member States. On this basis, care would have to be taken to ensure that the principle of mutual recognition, which is firmly established in the case of the single market, was recognised with the same force in the context of this regulation, so that any marriage concluded in one Member State has to be recognised as such in any other Member State. The concept of public policy must be better defined, so that, firstly, the law as defined in the Member States – in compliance, of course, with the treaties governing the European Union – can be taken into consideration and, secondly, any possible discrimination is avoided.

One wonders, also, whether the notion of public policy could be extended to cover the concept of 'fault' divorce, which is not, or no longer, recognised in a number of Member States, and which greatly penalises the spouse deemed to be at fault by subjecting them to sanctions in money or property terms (such as the loss of alimony or loss of matrimonial advantages granted by the spouse who is not 'at fault').

III. Conclusion

The aim of this regulation is to give a response to the problems that increasingly frequently affect citizens who have decided to take advantage of the freedom of movement established in the European Union, while at the same time guaranteeing legal certainty and a certain degree of flexibility in the approaches on offer to the question of divorce.

It is essential that the citizens of the European Union should be able to take full advantage of the civic rights granted them not only by their native country, but also by the country of which they are a national or in which they live. But it is equally important that they should be able to

[1] Under Article 3, paragraph 1, point (b) of Council Regulation (EC) No °2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility.

benefit from the rights arising from the acquis communautaire, as well as from those enshrined in the Charter of Fundamental Rights of the European Union.