

# EUROPEAN PARLIAMENT

2004



2009

---

*Committee on Civil Liberties, Justice and Home Affairs*

**2006/0135(CNS)**

9.1.2008

**\***

## **DRAFT REPORT**

on the proposal for a Council regulation amending regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters  
(COM(2006)0399 – C6-0305/2006 – 2006/0135(CNS))

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Evelyne Gebhardt

Draftsman (\*): Carlo Casini, Committee on Legal Affairs

(\*): Associated committees - Rule 47 of the Rules of Procedure

### ***Symbols for procedures***

- \* Consultation procedure  
*majority of the votes cast*
- \*\*I Cooperation procedure (first reading)  
*majority of the votes cast*
- \*\*II Cooperation procedure (second reading)  
*majority of the votes cast, to approve the common position  
majority of Parliament's component Members, to reject or amend  
the common position*
- \*\*\* Assent procedure  
*majority of Parliament's component Members except in cases  
covered by Articles 105, 107, 161 and 300 of the EC Treaty and  
Article 7 of the EU Treaty*
- \*\*\*I Codecision procedure (first reading)  
*majority of the votes cast*
- \*\*\*II Codecision procedure (second reading)  
*majority of the votes cast, to approve the common position  
majority of Parliament's component Members, to reject or amend  
the common position*
- \*\*\*III Codecision procedure (third reading)  
*majority of the votes cast, to approve the joint text*

(The type of procedure depends on the legal basis proposed by the Commission.)

### ***Amendments to a legislative text***

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

## CONTENTS

	<b>Page</b>
DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION .....	5
EXPLANATORY STATEMENT .....	17



## DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the proposal for a Council regulation amending regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters

(COM(2006)0399 – C6-0305/2006 – 2006/0135(CNS))

(Consultation procedure)

*The European Parliament,*

- having regard to the Commission proposal to the Council (COM(2006)0399),
  - having regard to Article 61, point (c) and Article 67(1) of the EC Treaty, pursuant to which the Council consulted Parliament (C6-0305/2006),
  - having regard to Rule 51 of its Rules of Procedure,
  - having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs and the opinion of the Committee on Legal Affairs (A6-0000/2008),
1. Approves the Commission proposal as amended;
  2. Calls on the Commission to alter its proposal accordingly, pursuant to Article 250(2) of the EC Treaty;
  3. Calls on the Council to notify Parliament if it intends to depart from the text approved by Parliament;
  4. Asks the Council to consult Parliament again if it intends to amend the Commission proposal substantially;
  5. Instructs its President to forward its position to the Council and Commission.

Text proposed by the Commission

---

Amendments by Parliament

---

Amendment 1  
RECITAL 6 a (new)

***(6a) The possibility of choosing the law applicable to divorce and to legal separation should not harm the interests of the child.***

*Justification*

*Articles 12 and 13 of Regulation No 2201/2003 also apply to the choice of jurisdiction. Hence it is essential that the interests of the child be taken into consideration.*

Amendment 2  
RECITAL 6 b (new)

***(6b) Before the competent jurisdiction and the applicable law are designated, it is important for the spouses to have access to up-to-date information concerning the essential aspects of national and Community law and of the procedures relating to divorce and legal separation. In order to safeguard such access to information of an appropriate quality, the Commission must regularly update the information contained in the public Internet-based information system set up by means of Council Decision No 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters<sup>1</sup>.***

---

***OJ L 174, 27.6.2001, p. 25.***

*Justification*

*It must be ensured that the choice made by the parties is an enlightened one, i.e. that both spouses are duly informed of the practical implications of their choice. With this in mind, consideration should be given to the best way of ensuring that comprehensive, reliable information is made available to the signatories of the agreement on the assignment of competence before the act is signed.*

Amendment 3  
RECITAL 6 c (new)

***(6c) The possibility of choosing by common agreement the jurisdiction and the applicable law 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 enlightened choice on the part of the two spouses concerning the legal implications of the agreement concluded.***

*Justification*

*It must be ensured that the choice made by the parties is an enlightened one, i.e. that both spouses are duly informed of the practical implications of their choice. All the authorities must ensure that both spouses are aware of the implications of their agreement.*

Amendment 4  
RECITAL 7 a (new)

***(7a) The meaning of the term 'habitual residence' should be interpreted in accordance with the purposes of this Regulation. It should be determined by the judge in each individual case and on the basis of facts. The term does not refer to a concept of 'habitual residence' pursuant to national law but, rather, to a separate concept established in Community law.***

Amendment 5  
RECITAL 9 a (new)

***(9a) The enlightened consensus of the two spouses is a basic principle of this Regulation. Each partner in the couple should know exactly what legal and social implications follow from the choice of jurisdiction and of applicable law.***

*Justification*

*It is possible that, under the rule governing the conflict of laws, the law of another Member State may be designated. In such a case the judge must apply the foreign law, which may cause problems for the jurisdictions concerned. Provision must also be made for the judge to be able to consult an appropriate source.*

Amendment 6

ARTICLE 1, POINT (1)

Title (Regulation (EC) No 2201/2003)

(1) the title is replaced by the following:

“Council Regulation (EC) N° 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility as well as ***applicable law in matrimonial matters***”.

(1) the title is replaced by the following:

“Council Regulation (EC) N° 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, as well as ***the law applicable to divorce and legal separation***”.

Amendment 7

ARTICLE 1, POINT (2)

Article 3a, paragraph 1, point (a) (Regulation (EC) No 2201/2003)

(a) ***any of the grounds of jurisdiction listed in Article 3 applies***, or

(a) ***at the time when the agreement is concluded, the jurisdiction of that Member State is competent pursuant to Article 3, or***

*Justification*

*The precise moment at which the criteria apply must be specified.*



Amendment 8  
ARTICLE 1, POINT (2)  
Article 3a, paragraph 1, point (b) (Regulation (EC) No 2201/2003)

(b) it is the *place* of the spouses' *last common* habitual residence for a minimum period of three years, or

(b) *at the time when the agreement is concluded*, it is the *Member State in which* the spouses *have had their* habitual residence for a minimum period of three years, *provided that this situation did not come to an end more than three years before the jurisdiction was seised*, or

*Justification*

*The precise moment at which the criteria apply must be specified.*

Amendment 9  
ARTICLE 1, POINT (2)  
Article 3a, paragraph 1, point (c) (Regulation (EC) No 2201/2003)

(c) one of the spouses is a national of that Member State or, in the case of the United Kingdom and Ireland, has his or her "domicile" in the territory of one of the latter Member States.

(c) *at the time when the agreement is concluded*, one of the spouses is a national of that Member State or, in the case of the United Kingdom and Ireland, has his or her "domicile" in the territory of one of the latter Member States.

*Justification*

*The precise moment at which the criteria apply must be specified.*

Amendment 10  
ARTICLE 1, POINT (2)  
Article 3 a, paragraph 2 (Regulation (EC) No 2201/2003)

2. An agreement conferring jurisdiction shall be expressed in writing and signed by both spouses at the latest at the time the court is seised."

2. An agreement conferring jurisdiction shall be expressed in writing, *dated* and signed by both spouses at the latest at the time the court is seised."

*However, if the law of the Member State*

*in which one of the spouses has his or her habitual residence at the time when the agreement is concluded stipulates additional formal requirements for such agreements, those requirements must be met. If the spouses have their habitual residence in different Member States whose respective laws stipulate additional formal requirements, the agreement shall be valid if it meets the requirements of one of those laws.  
If the agreement forms part of a marriage contract, the formal requirements of that contract must be met.*

*Justification*

*This provides clarification in situations in which the law of a Member State or the marriage contract stipulates stricter requirements than those laid down in the Regulation.*

Amendment 11

ARTICLE 1, POINT (3)

Articles 4 and 5 (Regulation (EC) No 2201/2003)

(3) In Articles 4 and 5, the terms “Article 3” are replaced by the terms “Articles 3 *and* 3a”.

(3) In Articles 4 and 5, the terms “Article 3” are replaced by the terms “Articles 3, 3a *and* 7”.

Amendment 12

ARTICLE 1, POINT (5)

Article 7, point (a) (Regulation (EC) No 2201/2003)

(a) the spouses had their *common previous* habitual residence in the territory of that Member State for at least three years; or

(a) the spouses *previously* had their habitual residence in the territory of that Member State for at least three years, *provided that that period does not precede the seisure of the jurisdiction by more than three years*; or

*Justification*

*'Forum shopping' must be avoided.*

Amendment 13  
ARTICLE 1, POINT (5)  
Article 7 a (new) (Regulation (EC) No 2201/2003)

*Article 7a*

*Forum necessitatis*

*Where the jurisdiction which is competent pursuant to this Regulation is located in a Member State under whose law there is no provision for divorce or the existence or the validity of the marriage in question is not recognised, jurisdiction shall be granted to:*

*(a) the Member State of which one of the spouses is a national; or*

*(b) the Member State in which the marriage took place.*

*Justification*

*This amendment serves to regulate situations in which – pursuant to the criteria laid down in Articles 3, 3a and 7 of the Regulation – the jurisdiction granted does not provide for divorce or does not recognise the existence or the validity of the marriage in question.*

Amendment 14  
ARTICLE 1, POINT (6)  
Article 12, paragraph 1 (Regulation (EC) No 2201/2003)

(6) In Article 12 (1), the terms “Article 3” are replaced by the terms “Articles 3 *and* 3a”.

(3) In Article 12 (1), the terms “Article 3” are replaced by the terms “Articles 3, 3a *and* 7”.

Amendment 15  
ARTICLE 1, POINT (7)  
Article 20 a, title (Regulation (EC) No 2201/2003)

Choice of law by the parties

Choice of *applicable* law by the parties

Amendment 16  
ARTICLE 1, POINT (7)  
Article 20 a, paragraph 1, point (-a) (new) (Regulation (EC) No 2201/2003)

*(-a) the law of the State in which the spouses have their habitual residence at*

***the time when the agreement is concluded;***

*Justification*

*It seems rational that this criterion should be included with the others for the purpose of choosing the applicable law.*

Amendment 17

ARTICLE 1, POINT (7)

Article 20 a, paragraph 1, point (a) (Regulation (EC) No 2201/2003 )

(a) the law of the State of ***the last common*** habitual residence of the spouses insofar as one of them still resides there;

(a) the law of the State of habitual residence of the spouses insofar as one of them still resides there ***at the time when the agreement is concluded;***

*Justification*

*The precise moment at which the criteria apply must be specified.*

Amendment 18

ARTICLE 1, POINT (7)

Article 20 a, paragraph 1, point (b) (Regulation (EC) No 2201/2003 )

(b) the law of the State of the nationality of either spouse, or, in the case of United Kingdom and Ireland, the “domicile” of either spouse;

(b) the law of the State of the nationality of either spouse, or, in the case of United Kingdom and Ireland, the “domicile” of either spouse ***at the time when the agreement is concluded;***

*Justification*

*The precise moment at which the criteria apply must be specified.*

Amendment 19

ARTICLE 1, POINT (7)

Article 20 a, paragraph 1, point (c) (Regulation (EC) No 2201/2003 )

(c) the law of the State where the spouses have ***resided*** for at least ***five*** years;

(c) the law of the State where the spouses have ***previously had their habitual residence*** for at least ***three*** years;

*Justification*

*It seems somewhat arbitrary to have criteria of different lengths stated in Article 20a(1)(c), Article 3a(1)(b) and Article 7(a). The rapporteur is proposing that the periods should all be three years in length.*

Amendment 20

ARTICLE 1, POINT (7)

Article 20 a, paragraph 1, point c (a) (new) (Regulation (EC) No 2201/2003 )

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

*Justification*

*It seems rational that this criterion should be included with the others for the purpose of choosing the applicable law.*

Amendment 21

ARTICLE 1, POINT (7)

Article 20 a, paragraph 2 (Regulation (EC) No 2201/2003 )

2. An agreement designating the applicable law shall be expressed in writing and be signed by both spouses at the latest at the time the court is seised.

2. An agreement designating the applicable law shall be expressed in writing and be signed by both spouses at the latest at the time the court is seised.

***However, if the law of the Member State in which one of the spouses has his or her habitual residence at the time when the agreement is concluded stipulates additional formal requirements for such agreements, those requirements must be met. If the spouses have their habitual residence in different Member States whose respective laws stipulate additional formal requirements, the agreement shall be valid if it meets the requirements of one of those laws.***

***If the agreement forms part of a marriage contract, the formal requirements of that contract must be met.***

*Justification*

*This provides clarification in situations in which the law of a Member State or the marriage contract stipulates stricter requirements than those laid down in the Regulation.*

Amendment 22

ARTICLE 1, POINT (7)

Article 20 a, paragraph 2 a (new) (Regulation (EC) No 2201/2003 )

***2a. If the lex fori so provides, the spouses may designate the applicable law before the court in the course of the procedure. In such a case it shall be sufficient that the above-mentioned agreement be acknowledged before the court.***

Amendment 23

ARTICLE 1, POINT (7)

Article 20 b, point (a) (Regulation (EC) No 2201/2003 )

(a) where the spouses have their ***common*** habitual residence, or failing that,

(a) where the spouses have their habitual residence ***at the time when the jurisdiction is seised***, or failing that,

*Justification*

*The precise moment at which the criteria apply must be specified.*

Amendment 24

ARTICLE 1, POINT (7)

Article 20 b, point (b) (Regulation (EC) No 2201/2003 )

(b) where the spouse had their ***last common*** habitual residence insofar as one of them still resides there, or failing that,

(b) where the spouses had their habitual residence insofar as one of them still resides there ***at the time when the jurisdiction is seised***, or failing that,

*Justification*

*The precise moment at which the criteria apply must be specified.*

Amendment 25

ARTICLE 1, POINT 7

Article 20 b, point (c) (Regulation (EC) No 2201/2003 )

(c) of which both spouses are nationals, or, in the case of United Kingdom and Ireland, both have their “domicile”, or failing that,

(c) of which both spouses are nationals, or, in the case of *the* United Kingdom and Ireland, ***in which both spouses have their “domicile” at the time at which the jurisdiction is seised,*** or failing that,

*Justification*

*The precise moment at which the criteria apply must be specified.*

Amendment 26

ARTICLE 1, POINT 7

Article 20 b, paragraph 1, point (d) (Regulation (EC) No 2201/2003 )

***(d) where the application is lodged.***

***deleted***

*Justification*

*'Forum shopping' must be prevented.*

Amendment 27

ARTICLE 1, POINT 7

Article 20 e a (new) (Regulation (EC) No 2201/2003 )

***Article 20 e a***

***Information from the Member States***

***1. By ... at the latest<sup>1</sup>, the Member States shall notify the Commission of their national rules concerning the formal requirements applying to agreements relating to the choice of competent jurisdiction and of the law applicable to marriage contracts.***

***The Member States shall notify the Commission of any subsequent change to those rules.***

***2. The Commission shall make available to the public the information which has been notified to it pursuant to paragraph***

***1 by means of appropriate measures, in particular the European Judicial Network in civil and commercial matters.***

***<sup>1</sup> Three months after the date upon which this Regulation comes into force.***

*Justification*

*It must be ensured that the choice made by the parties is an enlightened one, i.e. that both spouses are duly informed of the practical implications of their choice. With this in mind, consideration should be given to the best way of ensuring that comprehensive, reliable information is made available to the signatories of the agreement on the assignment of competence before the act is signed.*



## EXPLANATORY STATEMENT

The purpose of this proposal for a Regulation is to establish a clear, comprehensive legal framework covering *both* rules relating to jurisdiction and the recognition and enforcement of judgments in matrimonial matters *and* the rules relating to the applicable law, by allowing the parties a certain degree of autonomy.

An 'international' couple wishing to get divorced has hitherto being subject to the competence rules laid down in Council Regulation (EC) No 2201/2003<sup>1</sup> (known as 'Brussels IIa'), pursuant to which spouses are able to choose amongst a number of different competence criteria. Once a divorce procedure comes before the courts of a Member State, the applicable law is determined in accordance with that State's rules on conflicts of law. Those rules vary greatly from one Member State to another.

The disparate nature of those rules combined with the current Community provisions on the awarding of competence may give rise to a number of problems where 'international' divorces are concerned. In addition to the lack of legal certainty stemming from the difficulty which spouses have in determining which law will apply to their case<sup>2</sup>, there is a risk (which the Commission regards as real) of a 'dash to court' - an expression denoting a situation in which the better informed spouse will attempt to seize the jurisdiction whose law best serves his or her interests. Furthermore, Community citizens resident in a non-EU country may have difficulty in finding a jurisdiction which is competent to deal with divorce and in securing recognition in their respective countries of origin of a divorce settlement granted in a non-EU country.

The purpose of a Commission proposal is to limit the above risks and to compensate for the above shortcomings, in particular by making it possible for the parties to choose by common agreement the competent jurisdiction and the applicable law.

### Choice of Jurisdiction

Article 3a makes it possible for spouses to designate by common agreement the competent jurisdiction in their divorce procedure. It has the undoubted advantage of increasing the parties' degree of autonomy and enabling them to seize freely (in accordance with certain competence criteria) the jurisdiction with which they have the most links. First and foremost, it must be ensured that the competence criterion is worded with sufficient strength and accuracy without becoming pointlessly restrictive. However, your rapporteur is proposing to add Article 7a, which governs situations in which (pursuant to the Article 3, 3a and 7 criteria) the jurisdiction assigned has no provision for divorce or does not recognise the existence or validity of the marriage in question.

---

<sup>1</sup> Council Regulation (EC) n° 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility and repealing Regulation (EC) n° 1347/2000, OJ L 338, 23.12.2003, page 1

<sup>2</sup> In this connection, see document SEC (2006) 949 of 17.7.2006, p. 5

### Choice of applicable law

Article 20a constitutes an innovation in that for the first time, it allows the spouses to designate by common agreement the law applicable in their divorce procedure. According to the rapporteur it makes sense to allow the possibility of choosing the law of the State in which the spouses have their habitual residence at the time when the agreement is concluded, and also the law of the State in which the marriage took place.

Furthermore, the lack of correspondence between Article 20a and Articles 3, 3a and 7 in terms of duration criteria may be questioned. According to the rapporteur, extending the period of residence in Article 20a seems somewhat arbitrary, for which reason she is proposing to make three years the standard duration.

### Enlightened choice

It then has to be ensured that the choice made by the parties is an enlightened 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 jurisdiction and the law applicable to divorce, especially since the Member States' laws differ considerably in a number of respects (such as the grounds for divorce, the forms which divorce takes, the terms and conditions for obtaining a divorce, the requisite separation period and other key aspects for the procedure). 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.

The rapporteur is proposing a mechanism under which the Commission would be responsible for a public Internet-based information system (operating in connection with the European Judicial Network in civil and commercial matters), where anyone may find up-to-date information concerning the basic aspects of national and Community law. Furthermore, the jurisdiction seized must realise how important an enlightened choice on the part of both spouses is.