



EUROPEAN PARLIAMENT

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*Committee on Legal Affairs*

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**2010/0067(CNS)**

26.10.2010

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## **DRAFT REPORT**

on the proposal for a Council regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation  
(COM(2010)0105 – C7-0102/2010 – 2010/0067(CNS))

Committee on Legal Affairs

Rapporteur: Tadeusz Zwiefka

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

- \* Consultation procedure
- \*\*\* Consent procedure
- \*\*\*I Ordinary legislative procedure (first reading)
- \*\*\*II Ordinary legislative procedure (second reading)
- \*\*\*III Ordinary legislative procedure (third reading)

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

### ***Amendments to a draft act***

In amendments by Parliament, amendments to draft acts are highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the draft act which may require correction when the final text is prepared – for instance, obvious errors or omissions in a language version. Suggested corrections of this kind are subject to the agreement of the departments concerned.

The heading for any amendment to an existing act that the draft act seeks to amend includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend. Passages in an existing act that Parliament wishes to amend, but that the draft act has left unchanged, are highlighted in **bold**. Any deletions that Parliament wishes to make in such passages are indicated thus: [...].

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## DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

**on the proposal for a Council regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation  
(COM(2010)0105 – C7-0102/2010 – 2010/0067(CNS))**

**(Special legislative procedure – consultation – enhanced cooperation)**

*The European Parliament,*

- having regard to the Commission proposal to the Council (COM(2010)0105),
  - having regard to Article 81(3) of the Treaty on the Functioning of the European Union, pursuant to which the Council consulted Parliament (C7-0102/2010),
  - having regard to its position of 16 June 2010<sup>1</sup> approving the draft Council decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation,
  - having regard to Council Decision 2010/405/EU of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation<sup>2</sup>,
  - having regard to Rules 55 and 74g(3) of its Rules of Procedure,
  - having regard to the report of the Committee on Legal Affairs and the opinions of the Committee on Civil Liberties, Justice and Home Affairs and the Committee on Women's Rights and Gender Equality (A7-0000/2010),
1. Approves the Commission proposal as amended;
  2. Calls on the Commission to alter its proposal accordingly, pursuant to Article 293(2) of the Treaty on the Functioning of the European Union;
  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, the Commission and the national parliaments.

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<sup>1</sup> Texts adopted, P7\_TA(2010)0216.

<sup>2</sup> OJ L 189, 22.7.2010, p. 12.

## Amendment 1

### Proposal for a regulation Citation 2

*Text proposed by the Commission*

Having regard to Council Decision [...] of [...] authorising enhanced cooperation in the area of the law applicable to divorce and legal separation<sup>7</sup>,

<sup>7</sup>OJ L [...], [...], p. [...].

*Amendment*

Having regard to Council Decision **2010/405/EU of 12 July 2010** authorising enhanced cooperation in the area of the law applicable to divorce and legal separation<sup>1</sup>,

<sup>1</sup>OJ L 189, 22.7.2010, p. 12.

Or. en

## Amendment 2

### Proposal for a regulation Recital 1

*Text proposed by the Commission*

(1) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is assured. For the gradual establishment of such an area, the Union **must** adopt measures relating to judicial cooperation in civil matters having cross-border implications.

*Amendment*

(1) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is assured. For the gradual establishment of such an area, the Union **is to** adopt measures relating to judicial cooperation in civil matters having cross-border implications, **particularly when necessary for the proper functioning of the internal market.**

Or. en

## Amendment 3

### Proposal for a regulation Recital 2

*Text proposed by the Commission*

(2) Pursuant to Article 81(3) of the Treaty

*Amendment*

(2) Pursuant to Article 81 of the Treaty on

on the Functioning of the European Union, *the Council is to adopt measures concerning family law with cross-border implications.*

the Functioning of the European Union, *the measures in question are to include those aimed at ensuring the compatibility of the rules applicable in the Member States concerning conflict of laws.*

Or. en

#### Amendment 4

##### Proposal for a regulation

##### Recital 6

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

(6) Bulgaria, Greece, Spain, France, Italy, Luxembourg, Hungary, Austria, Romania and Slovenia subsequently addressed a request to the Commission indicating that they intended to establish enhanced cooperation between themselves in the area of applicable law in matrimonial matters and asking the Commission to submit a proposal to the Council for that purpose.

###### *Amendment*

(6) **Belgium**, Bulgaria, **Germany**, Greece, Spain, France, Italy, **Latvia**, Luxembourg, Hungary, **Malta**, Austria, **Portugal**, Romania and Slovenia subsequently addressed a request to the Commission indicating that they intended to establish enhanced cooperation between themselves in the area of applicable law in matrimonial matters and asking the Commission to submit a proposal to the Council for that purpose. **On 3 March 2010 Greece withdrew its request.**

Or. en

#### Amendment 5

##### Proposal for a regulation

##### Recital 7

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

(7) On [...] the Council adopted Decision [...] authorising enhanced cooperation in the area of the law applicable to divorce and legal separation.

###### *Amendment*

(7) On **12 July 2010** the Council adopted Decision **2010/405/EU** authorising enhanced cooperation in the area of the law applicable to divorce and legal separation.

Or. en

## Amendment 6

### Proposal for a regulation Recital 9a (new)

*Text proposed by the Commission*

*Amendment*

***(9a) The substantive scope and enacting terms of this Regulation should be consistent with Regulation (EC) No 2201/2003. This Regulation should apply only to the dissolution of a marriage or to the cessation of marital obligations (legal separation). It should not apply to the legal capacity of natural persons, the existence, validity or recognition of a marriage, the annulment of a marriage, the name of the spouses, the property consequences of the marriage, parental responsibility, maintenance obligations, trusts or successions, even if they arise merely as a preliminary question within the context of divorce or legal separation proceedings.***

Or. en

### *Justification*

*It is necessary to clarify the scope of the Regulation, both in a recital and in the enacting terms, at least in terms of what is excluded. Consideration might be given, for the sake of the citizen, to specifying that it covers the grounds for divorce/legal separation.*

## Amendment 7

### Proposal for a regulation Recital 10

*Text proposed by the Commission*

*Amendment*

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

(10) In order clearly to delimit the territorial scope of this Regulation, the Member States participating in the enhanced cooperation must be specified ***in accordance with Article 1(2).***



## Amendment 8

### Proposal for a regulation Recital 10a(new)

*Text proposed by the Commission*

*Amendment*

***(10a) This Regulation should be universal, i.e. its uniform conflict-of-law rules may designate the law of a participating Member State, the law of a non-participating Member State or the law of a State which is not a member of the European Union.***

Or. en

## Amendment 9

### Proposal for a regulation Recital 10b(new)

*Text proposed by the Commission*

*Amendment*

***(10b) When this Regulation refers to nationality as a connecting factor for the application of the law of a State, the question of how to deal with cases of plural nationality should be left to national law, in full observance of the general principles of the European Union.***

Or. en

## Amendment 10

### Proposal for a regulation Recital 11

#### *Text proposed by the Commission*

(11) This Regulation should apply irrespective of the nature of the court or tribunal seised.

#### *Amendment*

(11) This Regulation should apply irrespective of the nature of the court or tribunal seised. ***Where applicable, a court should be deemed to be seised in accordance with Regulation (EC) No 2201/2003.***

Or. en

## Amendment 11

### Proposal for a regulation Recital 12

#### *Text proposed by the Commission*

(12) In order to allow the spouses to choose an applicable law with which they have a close connection or, in the absence of such choice, in order that that law might apply to their divorce or legal separation, the law in question should apply even if it is not that of a participating Member State. Where the law of another Member State is designated, the network created by Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters<sup>10</sup> ***can*** play a part in assisting the courts with regard to the content of foreign law.

<sup>10</sup> OJ L 174, 27.6.2001, p. 25.

#### *Amendment*

(12) In order to allow the spouses to choose an applicable law with which they have a close connection or, in the absence of such choice, in order that that law might apply to their divorce or legal separation, the law in question should apply even if it is not that of a participating Member State. Where the law of another Member State is designated, the network created by Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters<sup>1</sup>, ***as amended by Decision 568/2009/EC of 18 June 2009<sup>2</sup>, could*** play a part in assisting the courts with regard to the content of foreign law.

<sup>1</sup> OJ L 174, 27.6.2001, p. 25.

<sup>2</sup> OJ L 168, 30.6.2009, p. 35.

Or. en

## Amendment 12

### Proposal for a regulation Recital 13

#### *Text proposed by the Commission*

(13) Increasing the mobility of citizens calls for more flexibility and greater legal certainty. In order to achieve that objective, this Regulation should enhance the parties' autonomy in the areas of divorce and legal separation by giving them a limited possibility to choose the law applicable to their divorce or legal separation. ***Such possibility should not extend to marriage annulment, which is closely linked to the conditions for the validity of marriage, and for which autonomy on the part of the parties is inappropriate.***

#### *Amendment*

(13) Increasing the mobility of citizens calls for more flexibility and greater legal certainty. In order to achieve that objective, this Regulation should enhance the parties' autonomy in the areas of divorce and legal separation by giving them a limited possibility to choose the law applicable to their divorce or legal separation.

Or. en

## Amendment 13

### Proposal for a regulation Recital 15

#### *Text proposed by the Commission*

(15) Before designating the applicable law, it is important for spouses to have access to up-to-date information concerning the essential aspects of national and Union law and of the procedures governing divorce and legal separation. To guarantee such access to appropriate, good-quality information, the Commission regularly updates it in the Internet-based public information system set up by ***Council*** Decision 2001/470/EC.

#### *Amendment*

(15) Before designating the applicable law, it is important for spouses to have access to up-to-date information concerning the essential aspects of national and Union law and of the procedures governing divorce and legal separation. To guarantee such access to appropriate, good-quality information, the Commission regularly updates it in the Internet-based public information system set up by Decision 2001/470/EC, ***as amended by Decision 568/2009/EC.***

Or. en

## Amendment 14

### Proposal for a regulation

#### Recital 17

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

(17) Certain safeguards should be introduced to ensure that spouses are aware of the implications of their choice. The agreement on the choice of applicable law should at least be expressed in writing, dated and signed by both parties. However, if the law of the participating Member State in which the two spouses have their habitual residence lays down additional formal rules, those rules **must** be complied with. For example, such additional formal rules may exist in a participating Member State where the agreement is inserted in a marriage contract.

##### *Amendment*

(17) Certain safeguards should be introduced to ensure that spouses are aware of the implications of their choice. The agreement on the choice of applicable law should at least be expressed in writing, dated and signed by both parties. However, if the law of the participating Member State in which the two spouses have their habitual residence **at the time when the agreement is concluded** lays down additional formal rules, those rules **should** be complied with. For example, such additional formal rules may exist in a participating Member State where the agreement is inserted in a marriage contract. ***If, at the time when the agreement is concluded, the spouses are habitually resident in different participating Member States which lay down different formal rules, compliance with the formal rules of one of those States would suffice. If, at the time when the agreement is concluded, only one of the spouses is habitually resident in a participating Member State which lays down formal rules, those rules should be complied with. Furthermore, the competent court should satisfy itself that the spouses have been given legal advice by a competent legal practitioner and that they understand the consequences of making or not making a choice of law.***

Or. en

##### *Justification*

*It is considered essential that the spouses receive proper legal advice in particular on the consequences of making a choice of law to govern their divorce or legal separation.*

## Amendment 15

### Proposal for a regulation Recital 19

#### *Text proposed by the Commission*

(19) Where no applicable law is chosen, and with a view to guaranteeing legal certainty and predictability and preventing a situation from arising in which one of the spouses applies for divorce before the other one does in order to ensure that the proceeding is governed by a given law which he or she considers more favourable to his or her own interests, this Regulation should introduce harmonised conflict-of-laws rules on the basis of a scale of successive connecting factors based on the existence of a close connection between the spouses and the law concerned. ***These*** connecting factors ***have been*** chosen ***so that the*** divorce or legal separation ***proceeding is*** governed by a law with which the spouses have a close connection, ***and they are based first and foremost on the law of the spouses' habitual residence.***

#### *Amendment*

(19) Where no applicable law is chosen, and with a view to guaranteeing legal certainty and predictability and preventing a situation from arising in which one of the spouses applies for divorce before the other one does in order to ensure that the proceeding is governed by a given law which he or she considers more favourable to his or her own interests, this Regulation should introduce harmonised conflict-of-law rules on the basis of a scale of successive connecting factors based on the existence of a close connection between the spouses and the law concerned. ***Such*** connecting factors ***should be*** chosen ***in such a way as to ensure that proceedings relating to*** divorce or legal separation ***are*** governed by a law with which the spouses have a close connection.

Or. en

## Amendment 16

### Proposal for a regulation Recital 19a (new)

#### *Text proposed by the Commission*

#### *Amendment*

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

*applied to the legal separation does not provide for the conversion of legal separation into divorce, the divorce should be governed by the conflict-of-law rules which apply where the parties have not made any choice.*

Or. en

## Amendment 17

### Proposal for a regulation Recital 20

#### *Text proposed by the Commission*

(20) In certain situations, such as where the applicable law makes no provision for divorce or where it does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the law of the court seised should nevertheless apply.

#### *Amendment*

(20) In certain situations, such as where the applicable law makes no provision for divorce or where it does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the law of the court seised should nevertheless apply. ***This should, however, be without prejudice to the public policy clause (ordre public).***

Or. en

## Amendment 18

### Proposal for a regulation Recital 21

#### *Text proposed by the Commission*

(21) Considerations of public interest should allow courts in the Member States the opportunity in exceptional circumstances to disregard the application of foreign law in a given case where it would be manifestly contrary to the public policy of the forum. However, the courts should not be able to apply the public-policy exception in order to disregard the

#### *Amendment*

(21) Considerations of public interest should allow courts in the Member States the opportunity in exceptional circumstances to disregard the application of ***a provision of*** foreign law in a given case where it would be manifestly contrary to the public policy of the forum. However, the courts should not be able to apply the public-policy exception in order to

law of another *Member* State when to do so would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof, which prohibits all forms of discrimination.

disregard *a provision of* the law of another State when to do so would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof, which prohibits all forms of discrimination.

Or. en

## Amendment 19

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

*Text proposed by the Commission*

*Amendment*

***(21a) Where this Regulation refers to the fact that the law of a participating State does not provide for divorce, this should be interpreted as meaning that the concept of divorce is unknown to the applicable law.***

Or. en

## Amendment 20

### Proposal for a regulation Recital 24

*Text proposed by the Commission*

*Amendment*

(24) This Regulation respects fundamental rights and observes the principles ***enshrined*** in the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof, which states that any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. This

(24) This Regulation respects fundamental rights and observes the principles ***recognised*** in the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof, which states that any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. This

Regulation must be applied by the courts of the participating Member States in observance of those rights and principles,

Regulation must be applied by the courts of the participating Member States in observance of those rights and principles,

Or. en

## Amendment 21

### Proposal for a regulation Article 1 – title

*Text proposed by the Commission*

*Amendment*

***Material*** scope

***Substantive*** scope

Or. en

## Amendment 22

### Proposal for a regulation Article 1 – paragraph 1a (new)

*Text proposed by the Commission*

*Amendment*

***1a. This Regulation shall not apply to the following matters, even if they arise merely as a preliminary question within the context of divorce or legal separation proceedings:***

***(a) the legal capacity of natural persons;***

***(b) the existence, validity or recognition of a marriage;***

***(c) the annulment of a marriage;***

***(d) the name of the spouses;***

***(e) the property consequences of the marriage;***

***(f) parental responsibility;***

***(g) maintenance obligations;***

***(h) trusts or successions.***



*Justification*

*It is necessary to clarify the scope of the Regulation, both in a recital and in the enacting terms, at least in terms of what is excluded.*

**Amendment 23**

**Proposal for a regulation**  
**Article 1 – paragraph 2**

*Text proposed by the Commission*

2. For the purposes of this Regulation, 'participating Member State' means a Member State which participates in enhanced cooperation on the law applicable to divorce and legal separation by virtue of Council Decision [...] of [...] authorising enhanced cooperation in the area of the law applicable to divorce and legal separation.

*Amendment*

2. For the purposes of this Regulation, 'participating Member State' means a Member State which participates in enhanced cooperation on the law applicable to divorce and legal separation by virtue of Council Decision **2010/405/EU of 12 July 2010** authorising enhanced cooperation in the area of the law applicable to divorce and legal separation, **or by a decision adopted in accordance with the second or third subparagraph of Article 331(1) of the Treaty on the Functioning of the European Union.**

**Amendment 24**

**Proposal for a regulation**  
**Article 1a (new)**

*Text proposed by the Commission*

*Amendment*

**Article 1a**  
**Definition**

***For the purposes of this Regulation, the term 'court' shall cover all the authorities in the participating Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1(1) which are seised pursuant to***

## **Amendment 25**

### **Proposal for a regulation**

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

*Text proposed by the Commission*

1. The spouses may ***choose by mutual agreement*** the law applicable to divorce and legal separation, provided that ***such law is in conformity with the fundamental rights defined in the Treaties and in the Charter of Fundamental Rights of the European Union and with the principle of public policy, from among*** the following laws:

*Amendment*

1. The spouses may ***agree to designate*** the law applicable to divorce and legal separation, provided that ***it is one of*** the following laws:

## **Amendment 26**

### **Proposal for a regulation**

#### **Article 3 – paragraph 1 – point b**

*Text proposed by the Commission*

(b) the law of the State ***of the spouses' last habitual residence if*** one of them still ***lives*** there at the time ***of conclusion of*** the agreement;

*Amendment*

(b) the law of the State ***where the spouses were last habitually resident, in so far as*** one of them still ***resides*** there at the time ***when*** the agreement ***is concluded; or***

## Amendment 27

### Proposal for a regulation Article 3 – paragraph 1 – point c

*Text proposed by the Commission*

(c) the law of the State of nationality of *one of the spouses* at the time *of conclusion of* the agreement;

*Amendment*

(c) the law of the State of nationality of *either spouse* at the time *when* the agreement *is concluded; or*

Or. en

## Amendment 28

### Proposal for a regulation Article 3 – paragraph 2

*Text proposed by the Commission*

2. Without prejudice to paragraph 4, an agreement designating the applicable law may be concluded and modified at any time, but at the latest when the court is seised.

*Amendment*

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

Or. en

## Amendment 29

### Proposal for a regulation Article 3 – paragraph 2 a (new)

*Text proposed by the Commission*

*Amendment*

**2a. If the lex fori so provides, the spouses may also designate the law applicable before the court during the course of the proceeding. In that event, such designation shall be recorded in court in accordance with the lex fori.**

Or. en

## Amendment 30

### Proposal for a regulation Article 3 – paragraph 3 – subparagraph 2

*Text proposed by the Commission*

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

*Amendment*

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

Or. en

## Amendment 31

### Proposal for a regulation Article 3 – paragraph 3 – subparagraph 2a(new)

*Text proposed by the Commission*

*Amendment*

***If only one of the spouses is habitually resident in a participating Member State at the time when the agreement is concluded and that State lays down additional formal rules for this type of agreement, those rules shall apply.***

Or. en

## **Amendment 32**

### **Proposal for a regulation Article 4 a (new)**

*Text proposed by the Commission*

*Amendment*

#### **Article 4a**

##### ***Conversion of legal separation into divorce***

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

***2. However, where the parties have not chosen the law applicable to the divorce and if the law applied to the legal separation makes no provision for the conversion of legal separation into divorce, Article 4 shall apply.***

Or. en

## **Amendment 33**

### **Proposal for a regulation Article 7 a (new)**

*Text proposed by the Commission*

*Amendment*

#### **Article 7a**

##### ***No provision for divorce/Marriage not deemed valid***

***Nothing in this Regulation shall oblige the courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation.***

*Justification*

*This article ought to be accompanied by a clause providing for a forum necessitatis as proposed in Parliament's resolution of 21 October 2008. For this reason, the rapporteur considers that the Commission should undertake to submit a proposal for the amendment of Regulation (EC) No 2201/2003 limited to the addition of such a clause as a matter of urgency before the promised general review of that regulation. The rapporteur refers in this connection to his amendment to the draft legislative resolution and to his explanatory statement, which discusses this question in detail.*

**Amendment 34****Proposal for a regulation  
Article 8 – paragraph 1***Text proposed by the Commission*

1. Where **a State comprises several territorial units each of which has its own rules of law in respect of divorce and legal separation, each territorial unit** shall be considered a State for the **purpose** of determining the law **applicable under this Regulation**.

*Amendment*

1. Where **this Regulation designates the law of a State which has two or more systems of law, each of them** shall be considered **as being the law of** a State for the **purposes** of determining the **applicable law**.

*Justification*

*Since this Regulation is intended to be universal, it should cater both for States such as the UK and the USA and for States, such as Israel, with personally-based conflict of law systems. This and the following amendments to Article 8 put forward a solution.*

**Amendment 35****Proposal for a regulation  
Article 8 – paragraph 1 a(new)***Text proposed by the Commission**Amendment*

**1a. For the purposes of paragraph 1, a reference made to the law of the State of which a natural person has the nationality shall refer to the system designated by the rules in force in that**

*State or, in the absence of such rules, to the system with which that person has the closest links.*

*For the purposes of paragraph 1, a reference made to the law of a State which has two or more systems of law applicable to different categories of persons shall refer to the system designated by the rules in force in that State or, in the absence of such rules, to the system with which the legal relationship has the closest links.*

Or. en

### **Amendment 36**

#### **Proposal for a regulation Article 8 – paragraph 2**

*Text proposed by the Commission*

2. A participating Member State within which different territorial units have their own rules of law in respect of divorce and legal separation shall not be required to apply this Regulation to conflicts of law arising between such units **only**.

*Amendment*

2. A participating Member State within which different territorial units have their own rules of law in respect of divorce and legal separation shall not be required to apply this Regulation to conflicts of law arising **solely** between such units.

Or. en

### **Amendment 37**

#### **Proposal for a regulation Article 9 – paragraph 1 – point a**

*Text proposed by the Commission*

(a) the formal **rules** applicable to agreements on the choice of applicable law; and

*Amendment*

(a) the formal **requirements** applicable to agreements on the choice of applicable law **pursuant to subparagraphs 2 and 3 of Article 3(3)**; and

Or. en

## Amendment 38

### Proposal for a regulation Article 10 – paragraph 1

*Text proposed by the Commission*

1. This Regulation shall apply only to legal proceedings instituted and to agreements of the kind referred to in Article 3 concluded **after** its date of application pursuant to Article 13.

However, effect shall also be given to an agreement on the choice of the applicable law concluded **in accordance with the law of a participating Member State** before the date of application of this Regulation, provided that it fulfils the conditions set out in the first **paragraph** of Article 3(3).

*Amendment*

1. This Regulation shall apply only to legal proceedings instituted and to agreements of the kind referred to in Article 3 concluded **as from** its date of application pursuant to Article 13.

However, effect shall also be given to an agreement on the choice of the applicable law concluded before the date of application of this Regulation, provided that it fulfils the conditions set out in the first **subparagraph** of Article 3(3).

Or. en

## Amendment 39

### Proposal for a regulation Article 11 – paragraph 1

*Text proposed by the Commission*

1. **Without prejudice to the obligations of the participating Member States pursuant to Article 351 of the Treaty on the Functioning of the European Union, this Regulation shall not affect the application of *bilateral or multilateral* conventions to which one or more participating Member States are party at the time *of adoption of this Regulation* and which *relate to the subjects covered by it*.**

*Amendment*

1. **This Regulation shall not affect the application of *international* conventions to which one or more participating Member States are party at the time *when this Regulation is adopted or when the decision referred to in Article 1(2) is adopted* and which *lay down conflict-of-law rules relating to divorce or separation*.**

Or. en



## Amendment 40

### Proposal for a regulation Article 11 – paragraph 2

*Text proposed by the Commission*

2. ***Notwithstanding paragraph 1***, this Regulation shall take precedence as between participating Member States over conventions ***which relate to subjects governed by this Regulation and to which the participating Member States are party.***

*Amendment*

2. ***However***, this Regulation shall, as between participating Member States, ***take precedence*** over conventions ***concluded exclusively between two or more of them in so far as such conventions concern matters*** governed by this Regulation.

Or. en

## Amendment 41

### Proposal for a regulation Article 12 – paragraph 1

*Text proposed by the Commission*

By [] at the latest, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied, where appropriate, by ***proposed amendments***.

*Amendment*

***1.*** By five years after the entry into force of this Regulation at the latest, ***and every five years thereafter***, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied, where appropriate, by ***proposals to adapt this Regulation***.

Or. en

## Amendment 42

### Proposal for a regulation Article 12 – paragraph 1 a (new)

*Text proposed by the Commission*

*Amendment*

***1a. To that end, the participating Member States shall apprise the Commission of relevant information on the application of***

*this Regulation by their courts.*

Or. en

#### **Amendment 43**

##### **Proposal for a regulation Article 13 – paragraph 1b (new)**

*Text proposed by the Commission*

*Amendment*

***1b. For those Member States participating pursuant to a decision adopted in accordance with the second or third subparagraph of Article 331(1) of the Treaty on the Functioning of the European Union, this Regulation shall apply as from the date indicated in the decision concerned.***

Or. en

#### **Amendment 44**

##### **Draft legislative resolution Paragraph 1a (new)**

*Text proposed by the Commission*

*Amendment*

***1a. Calls on the Commission to submit a proposal for amendment of Regulation (EC) No 2201/2003, limited to the addition of a clause on forum necessitatis, as a matter of great urgency before the promised general review of that regulation;***

Or. en

*Justification*

*See the justification to the amendment relating to Article 7a and the detailed explanatory statement.*



## EXPLANATORY STATEMENT

The rapporteur appreciates the need for this regulation, even though he realises that there will be much disappointment among citizens and practitioners about its limited scope. One of the reasons for this is the constraints imposed by recourse to the enhanced cooperation procedure. The rapporteur trusts that when the regulation has been adopted, other Member States will join in.

By and large, the rapporteur considers that the changes discussed by the Council to the Commission's proposal are sensible and he has therefore taken most of them over, albeit with some changes. He has also put forward a certain number of amendments of his own.

First, he considers that the idea of leaving the scope virtually undefined is undesirable. He has therefore set out what does not fall within the Regulation in both a recital and an article.

Secondly, he considers that before parties decide to make a choice of law or to forgo making a choice of law, the court seised should satisfy itself that they have had the benefit of proper legal advice.

Thirdly, the rapporteur agrees that a Member State cannot be required to recognise as a marriage, even for the sole purpose of its dissolution, an act that is not considered to be such by the law of that State and that, in the same way, it would be contrary to the principle of subsidiarity to impose on a judge in a Member State whose law does not provide for such an act a requirement to pronounce the divorce. For this reason, he commends the addition of Article 7a by the Council.

However, without a provision on *forum necessitatis* (which it would be impossible to include in this regulation adopted under the enhanced cooperation procedure), the provision set out in Article 7a, whereby nothing in the regulation is to oblige the courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of the regulation, is extremely problematic. This is because the jurisdiction rules with regard to divorce and legal separation in Regulation No 2201/2003 are peremptory. The relevant articles of that regulation read as follows:

### *SECTION 1*

#### *Divorce, legal separation and marriage annulment*

##### *Article 3*

##### *General jurisdiction*

*1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State*

*(a) in whose territory:*

- the spouses are habitually resident, or
- the spouses were last habitually resident, insofar as one of them still resides there, or
- the respondent is habitually resident, or
- in the event of a joint application, either of the spouses is habitually resident, or
- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there;

(b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the "domicile" of both spouses.

2. For the purpose of this Regulation, "domicile" shall have the same meaning as it has under the legal systems of the United Kingdom and Ireland.

#### Article 4

##### Counterclaim

....

#### Article 5

##### Conversion of legal separation into divorce

...

#### Article 6

##### Exclusive nature of jurisdiction under Articles 3, 4 and 5

A spouse who:

(a) is habitually resident in the territory of a Member State; or

(b) is a national of a 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,

may be sued in another Member State only in accordance with Articles 3, 4 and 5.

#### Article 7

##### Residual jurisdiction

....

The difficulty is best illustrated by an example. The new regulation on applicable law is in force. A and B are nationals of different Member States who entered into a same-sex marriage in one of the Member States which have introduced legislation to permit such marriages. They have been habitually resident for three years in a Member State which does not permit same-

sex marriages but participated in the adoption of the regulation on applicable law under the enhanced cooperation procedure. A and B wish to dissolve their marriage. Under the rules of Regulation No 2201/2003, the only courts having jurisdiction in those circumstances are the courts of the Member State in which they are habitually resident. If they apply to the local court for a divorce, that court has to accept jurisdiction but Article 7a will apply and no divorce will be granted. It is noted that, in the case of divorce, Regulation No 2201/2003 does not provide for prorogation of jurisdiction or for the transfer of the case to a court better placed to hear the proceedings.

This is patently not fair on the couple concerned, who would be put to a considerable amount of inconvenience and loss of time in order to bring their divorce proceedings within the jurisdiction of another court within the meaning of Article 3.

The best way of dealing with this would be to provide for a *forum necessitatis*, which can be done only by amending Regulation No 2003/2001, given the strictures of the enhanced cooperation procedure and the fact that the proposal for a regulation under consideration relates only to the determination of the applicable law.

Parliament's legislative resolution of 21 October 2008 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))<sup>1</sup> contains a proposal for an article on *forum necessitatis*, which reads as follows:

*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.*

Given that the Commission is not under a duty to review Regulation No 2201/2003 until 2012 and will in fact not do so until much later, the rapporteur proposes that, without impinging upon the Commission's right of initiative, that institution should be pressed to come forward as a matter of great urgency with a proposal for amending that regulation solely in order to introduce a clause on *forum necessitatis*.

This draft report represents the rapporteur's initial views. He reserves the right to present further amendments, in particular in the light of the opinion requested from the Legal Service.

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<sup>1</sup> A6 - 0361/2008.