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EUROPEAN COMMISSION

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COM(2010) 105 final
2010/0067 (CNS)

Proposal for a

COUNCIL REGULATION (EU)

**implementing enhanced cooperation in the area of the law applicable to divorce and
legal separation**

{COM(2010) 104 final}

EXPLANATORY MEMORANDUM

1. INTRODUCTION

1.1 Background

On 17 July 2006 the Commission adopted, on the basis of Article 61(c) and Article 67(1) of the Treaty establishing the European Community (now Article 81(3) of the Treaty on the Functioning of the European Union), a proposal¹ for a Council Regulation amending Regulation (EC) No 2201/2003² as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters ('Rome III'). The aim was that the Council should adopt the proposal by unanimity, after consulting the European Parliament. The European Parliament gave its opinion on the proposal on 21 October 2008³.

The Commission's proposal was discussed in the Committee on Civil Law Matters (Rome III), beginning in October 2006. However, unanimity could not be reached on all the proposed solutions regarding applicable law rules in the Regulation or on the proposed derogations. On 5 and 6 June 2008 the Council accordingly took note of the lack of the unanimity needed to go ahead with the Rome III Regulation, and of the existence of insurmountable difficulties that made unanimity impossible both then and in the near future. It observed that the objectives of Rome III could not be attained within a reasonable timescale by applying the relevant Treaty provisions.

On 25 July 2008 the Council noted that at least eight Member States intended to ask the Commission to present a proposal for enhanced cooperation and that other Member States might take part once the Commission had made its proposal. It considered that only an official request to the Commission by those Member States would elicit a Commission proposal that would enable each delegation to make up its own mind whether enhanced cooperation was appropriate and whether to participate in it. It concluded that any request by at least eight Member States to the Commission to present a proposal for enhanced cooperation would not prejudice the rest of the procedure and, in particular, the authorisation the Council would be asked to grant.

On 28 July and 12 August 2008 and 12 January 2009, a total of ten Member States⁴ addressed a request to the Commission indicating that they wished 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 to that effect.

The proposal for a Council Decision authorising enhanced cooperation on the law applicable to divorce and legal separation and this proposal for a Council Regulation implementing such enhanced cooperation, which the Commission has adopted at the same time, are the Commission's response to the request by the ten Member States, which are hereinafter called 'the participating Member States'. The proposal for a Council Decision contains a detailed

¹ COM(2006) 399.

² Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, p. 1.

³ OJ C 15 E, 21.1.2010, p. 128.

⁴ Bulgaria, Greece, Spain, France, Italy, Luxembourg, Hungary, Austria, Romania and Slovenia.

assessment of the legal conditions governing, and the appropriateness of, the introduction of enhanced cooperation in the area of the law applicable to divorce and legal separation.

2. GROUNDS FOR AND OBJECTIVES OF THE PROPOSAL

2.1 Strengthening legal certainty and predictability

In matrimonial proceedings of an international nature, the fact that national laws are very different, especially as regards conflict-of-law rules, leads to much legal uncertainty. The great differences between and the complexity of national conflict-of-law rules make it very difficult for international couples to predict which law will apply to their divorce or legal separation proceeding. The participating Member States do not provide any possibility for the spouses to choose the applicable law in such proceedings. This may lead to the application of a law with which the spouses are only tenuously connected and to an outcome that does not meet their legitimate expectations. Nor does it encourage amicable solutions.

Having due regard to the relevant parts of the explanatory memorandum to the Commission's proposal for a Regulation of 17 July 2006 (Rome III), the purpose of this proposal for a Regulation is to introduce a clear legal framework in the European Union, covering applicable law rules in the area of divorce and legal separation and allowing the parties a degree of freedom of choice of applicable law. Unlike in the Commission's original proposal, the enhanced cooperation measure concerns only applicable law and not jurisdiction, the aim being to avoid affecting Union law, namely Regulation (EC) No 2201/2003, which the original proposal was intended to amend. Despite being among the provisions inserted by the Committee on Civil Law Matters (Rome III)⁵, Article 20e-1 has not been included in this proposal for a Regulation. That article contains in essence a rule on jurisdiction and is closely bound up with Article 7a on *forum necessitatis*, which has likewise not been included as it, too, dealt with jurisdiction.

2.2 Increasing flexibility by introducing some party autonomy

There is currently very little party autonomy in matrimonial matters. The proposal renders the legal framework more flexible by introducing a limited possibility for the spouses to choose another law as the law applicable to their divorce or legal separation proceeding. To avoid the application of laws with which they have little or no connection, the spouses' choice is confined to laws with which the marriage has a close link.

It will be particularly useful to allow spouses to come to an agreement on these matters in cases of divorce by mutual consent. This will act as a strong incentive for the couples concerned to deal in advance with the consequences of possible marital breakdown and will encourage amicable divorce, which is crucial in the case of couples with children. The Rome III Regulation will also help third-country nationals to integrate by affording them the opportunity to substitute the law of their new residence for their national law.

Special safeguards are introduced to ensure that the spouses are aware of the consequences of their choice and to protect the weaker spouse.

⁵ See Council of the European Union document 9712/08.

2.3 Preventing a 'rush to court' by one spouse

Finally, the proposal addresses the problem of a 'rush to court' by one spouse, i.e. where 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 regards as more favourable to his or her own interests. This may lead to the application of a law with which the other spouse has little connection or which fails to take into account his or her interests. It further renders reconciliation efforts difficult and leaves little time for mediation.

The introduction of harmonised conflict-of-law rules should greatly reduce the risk of a rush to court, since any court seised in one of the participating Member States would apply the law designated on the basis of common rules.

In the absence of choice, the applicable law would be determined on the basis of a scale of connecting factors giving priority to the law of the spouses' habitual residence, which will ensure that the divorce or legal separation proceeding is governed by a legal system with which the couple has a close connection. This will greatly increase legal certainty and predictability both for the spouses concerned and for practitioners.

The rule on the law applicable in the absence of choice is intended to protect the weaker spouse by giving priority to the application of the law of the family's habitual residence prior to separation, irrespective of the court seised by one or other spouse. It would therefore enable spouses easily to predict which law will apply to their divorce or legal separation proceeding.

3. CONSULTATION OF INTERESTED PARTIES AND ASSESSMENT OF THE IMPACT OF THE ENHANCED COOPERATION MEASURE

Publication of the Commission's July 2006 proposal was preceded by a wide-ranging consultation of interested parties. The latest version resulting from the negotiations in the Council, which the Commission partly reproduces in its proposal, does not differ markedly from the Commission's July 2006 proposal. This version retains the same solutions of principle for the law applicable to divorce and legal separation proceedings (e.g. the choice of applicable law, the spouses' habitual residence as principal connecting factor, the public policy exception, etc.).

The Commission carried out an impact assessment which it attached to its original July 2006 proposal. This remains relevant to the question of the applicable law, and reference will be made to it here⁶. The present Commission proposal implements enhanced cooperation in the area of the law applicable to divorce and legal separation. Under the second paragraph of Article 20 of the Treaty on European Union, the enhanced cooperation procedure may be used only as a last resort. Thus, the Commission may propose enhanced cooperation, and the Council may give its agreement, only on matters which the Council has already dealt with and on which it has concluded that no other solution can be found, inasmuch as the 'objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole'. It follows that the Commission can change neither the area of the enhanced cooperation – in this case, the law applicable to divorce and legal separation – nor the fundamental rules of the instrument as set out in the latest version of the text negotiated in the Council. Moreover, the content of the Commission's proposal implementing enhanced cooperation is limited by the

⁶ SEC(2006) 949.

scope specified in the participating Member States' requests for enhanced cooperation, i.e. applicable law in matrimonial matters. In the present case, a new impact assessment covering the same subject area does not therefore appear appropriate.

4. LEGAL ELEMENTS OF THE PROPOSAL

4.1 Legal basis

The legal basis for this proposal is Article 81(3) of the Treaty on the Functioning of the European Union, which confers on the Council the power to adopt measures concerning family law having cross-border implications after consulting the European Parliament.

The proposal concerns the law applicable to divorce and legal separation. These are matters governed by family law. The proposal's rules on the applicable law come into play only in international situations, that is to say, for example, those where the spouses are of different nationalities or live in different Member States or in a Member State of which at least one of them is not a national. The cross-border requirement in Article 81(3) of the Treaty on the Functioning of the European Union is consequently fulfilled.

4.2 Principle of subsidiarity

The objectives of the proposal can be met only at Union level by way of common rules governing applicable law, if necessary through enhanced cooperation. These conflict rules must be identical if the proposal's objective of increasing legal certainty, predictability and flexibility for citizens is to be attained. One-sided action by the Member States would therefore run counter to these objectives. There is no international convention in force between the Member States on the question of applicable law in matrimonial matters. The public consultation and the impact assessment carried out at the time of the Commission's July 2006 proposal have demonstrated that the scale of the problems addressed by the present proposal is significant and concerns tens of thousands of citizens each year. Given the nature and the scale of the problem, the objectives can be achieved only at Union level.

4.3 Principle of proportionality

The proposal complies with the principle of proportionality in that it is strictly limited to what is necessary to achieve its objectives. It will not entail any additional financial or administrative burdens on citizens and only a very limited additional burden on the national authorities concerned.

4.4 Choice of instrument

The nature and objective of the proposal are such that an act in the form of a Regulation is required. The need for legal certainty and predictability calls for clear, uniform rules. The proposed rules on applicable law are detailed and precise and require no transposal into national law. To leave the participating Member States any room for discretion in implementing these rules would jeopardise the objectives of legal certainty and predictability.

4.5 Position of the United Kingdom, Ireland and Denmark

The United Kingdom and Ireland do not participate in cooperation in matters covered by Part Three, Title V, of the Treaty on the Functioning of the European Union unless, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of

the area of freedom, security and justice annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, they give notice of their wish to participate. By virtue of Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, Denmark is not participating in the adoption of the proposed Regulation and it is neither bound by it nor subject to its application.

5. BUDGETARY IMPACT, SIMPLIFICATION AND CONSISTENCY WITH OTHER UNION POLICIES

5.1 Budgetary impact

The proposal will have no impact on the Union budget.

5.2 Simplification

The proposal will bring about a simplification of administrative procedures both for citizens and for practitioners. In particular, the harmonisation of conflict-of-law rules will considerably simplify procedures by enabling them to determine the applicable law on the basis of a single set of rules replacing the existing national conflict-of-law rules of the participating Member States.

5.3 Consistency with other Union policies and with the Union's objectives

The proposal respects the fundamental rights and observes the principles recognised, in particular, by the Charter of Fundamental Rights of the European Union as general principles of Union law.

6. COMMENTS ON THE ARTICLES

Article 1

The proposed Regulation applies to all situations where there is a conflict of laws, i.e. situations in which there are aspects of the case which take it outside the domestic social life of one country and which may involve several legal systems. It comes into play, therefore, only in international situations, such as, for example, those where the spouses are of different nationalities or live in different Member States or in a Member State of which at least one of them is not a national ('international couples').

The proposed rules on applicable law are limited to divorce and legal separation and do not apply to marriage annulment proceedings, for which both the autonomy of the parties and the choice of laws other than that of the court seised are deemed inappropriate. As far as rules on jurisdiction are concerned, marriage annulment, like divorce and legal separation, is covered by Regulation (EC) No 2201/2003.

Article 2

By virtue of Article 2, this is a universal Regulation, meaning that its uniform conflict rules can 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. This is a firmly-rooted principle of the law concerning conflict of laws which already exists in the 1980 Rome Convention, the conventions concluded within the framework of the Hague Conference, and

the national conflict rules of the participating Member States. Safeguard clauses have been introduced to prevent the application of foreign laws on divorce or legal separation which are incompatible with the common values of the European Union. Where the law of another Member State is designated, the European Judicial Network in civil and commercial matters can play a part in assisting the courts with regard to the content of foreign law.

Article 3

The vast majority of national conflict-of-law rules provide for only one solution in a given situation. The proposal seeks to afford the spouses greater flexibility by allowing them to choose the law applicable to divorce and legal separation. The only laws which may be chosen are those with which the spouses have a close connection by virtue of their habitual residence or their last common habitual residence if one of them still lives there, the nationality of one of the spouses, and the *lex fori*.

The same conflict-of-law rules should apply to legal separation and to divorce, since legal separation is in many cases a prerequisite for divorce. The participating Member States that recognise legal separation apply the same conflict-of-law rules to divorce and legal separation.

This increased party autonomy will improve legal certainty and predictability for the spouses. Certain formal requirements need to be respected in order to ensure that both spouses are aware of the consequences of their choice and to protect the weaker spouse. The Commission shares the European Parliament's opinion that it is necessary to prevent the parties' choice of applicable law from leading to application of a law that is contrary to fundamental rights and Union law. The text therefore limits the parties' choice to foreign laws on divorce or legal separation which are compatible with the common values of the European Union.

Article 4

In the absence of choice by the spouses, the applicable law would be determined on the basis of a scale of successive connecting factors, based in the first place on the habitual residence of the spouses. This uniform rule will ensure legal certainty and predictability. The introduction of harmonised conflict-of-laws rules should considerably reduce the risk of a rush to court, since any court seised in the participating Member States would apply the same law designated on the basis of common rules.

The fact that the rule is based in the first place on the habitual residence of the spouses and, failing that, on their last habitual residence if one of them still lives there will result in the law of the court seised being applied in the vast majority of cases (but not always, as in the case where one of the spouses returns to his or her home country and seises a court there in accordance with the rules on jurisdiction laid down by Regulation (EC) No 2201/2003). Cases in which a foreign law is applicable will therefore be very few in number.

Article 5

This provision contains a rule intended to avoid discrimination. In certain situations where the applicable law makes no provision for divorce or 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 apply.

Article 6

To allow renvoi would jeopardise the objective of legal certainty. Designating a law under uniform conflict-of-law rules consequently means designating the substantive rules of that law and not its rules of private international law.

Article 7

The mechanism of the public policy exception allows the court to disregard the rules of the foreign law designated by the conflict-of-law rule where the application of the foreign law in a given case would be contrary to the public policy of the State of the court seised. The word "manifestly" means that use of the public policy exception must be exceptional.

Article 8

Where a State consists of several territorial units each with its own substantive law of divorce and legal separation, this Regulation must also apply to conflicts of laws between those territorial units so as to ensure legal certainty, foreseeability and the uniform application of European Union rules to all conflict situations.

Article 9

This provision ensures transparency for citizens of the rules applicable to marriage contracts in the participating Member States. The Commission will make this information publicly available on the website of the European Judicial Network in civil and commercial matters.

Article 10

This article relates to the instrument's temporal scope.

Article 11

The proposed provisions seek to strike an appropriate balance between, on the one hand, compliance with the international obligations of the participating Member States and, on the other, the objective of the construction of a genuine European area of justice. Paragraph 1 permits the participating Member States to continue to apply the conflict-of-law rules contained in the bilateral or multilateral agreements to which they are party when the Regulation is adopted. However, the coexistence of two parallel systems – the application by some participating Member States of the rules of the agreements they have ratified, and the application by the other participating Member States of the rules of the proposed Regulation – would run counter to the proper functioning of the European area of justice.

Articles 12 and 13

The articles on the instrument's revision, entry into force and application are standard provisions.

Proposal for a

COUNCIL REGULATION (EU)

implementing enhanced cooperation in the area of the law applicable to divorce and legal separation

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 81(3) thereof,

Having regard to Council Decision [...] of [...] authorising enhanced cooperation in the area of the law applicable to divorce and legal separation⁷,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Parliament⁸,

Having regard to the opinion of the European Economic and Social Committee⁹,

Acting in accordance with a special legislative procedure,

Whereas:

- (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.
- (2) Pursuant to Article 81(3) of the Treaty on the Functioning of the European Union, the Council is to adopt measures concerning family law with cross-border implications.
- (3) On 14 March 2005 the Commission adopted a Green Paper on applicable law and jurisdiction in divorce matters. The Green Paper launched a wide-ranging public consultation on possible solutions to the problems that may arise under the current situation.
- (4) On 17 July 2006 the Commission proposed a Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters.
- (5) At its meeting in Luxembourg on 5 and 6 June 2008, the Council concluded that there was a lack of unanimity on the proposal and that there were insurmountable

⁷ OJ L [...], [...], p. [...].

⁸ OJ C [...], [...], p. [...].

⁹ OJ C [...], [...], p. [...].

difficulties that made unanimity impossible both then and in the near future. It established that the proposal's objectives could not be attained within a reasonable period by applying the relevant provisions of the Treaties.

- (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.
- (7) On [...] the Council adopted Decision [...] authorising enhanced cooperation in the area of the law applicable to divorce and legal separation.
- (8) According to Article 328(1) of the Treaty on the Functioning of the European Union, when enhanced cooperation is being established, it is to be open to all Member States, subject to compliance with any conditions of participation laid down by the authorising decision. It is also to be open to them at any other time, subject to compliance with the acts already adopted within that framework, in addition to those conditions.
- (9) This Regulation should create a clear, comprehensive legal framework in the area of the law applicable to divorce and legal separation in the participating Member States, provide citizens with appropriate outcomes in terms of legal certainty, predictability and flexibility, and prevent a situation from arising where 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.
- (10) In order to clearly delimit the territorial scope of this Regulation, the Member States participating in the enhanced cooperation must be specified.
- (11) This Regulation should apply irrespective of the nature of the court or tribunal seised.
- (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 matters¹⁰ can play a part in assisting the courts with regard to the content of foreign law.
- (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.

¹⁰ OJ L 174, 27.6.2001, p. 25.

- (14) Spouses should be able to choose the law of a country with which they have a special connection or the *lex fori* as the law applicable to divorce and legal separation. The law chosen by the spouses must be consonant with the fundamental rights enshrined in the Treaties and the Charter of Fundamental Rights of the European Union. The possibility of choosing the law applicable to divorce and legal separation should not harm the superior interests of the child.
- (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.
- (16) The informed choice of the two spouses is a basic principle of this Regulation. Each spouse should know exactly what are the legal and social implications of the choice of applicable law. The possibility of choosing the applicable law by common agreement 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 informed choice on the part of the two spouses concerning the legal implications of the choice-of-law agreement concluded.
- (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.
- (18) An agreement designating the applicable law should be able to be concluded and modified at the latest when the court is seised, and even during the course of the proceeding if the *lex fori* so provides. In that event, it should be sufficient for such designation to be recorded in court in accordance with the *lex fori*.
- (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.
- (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.

- (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 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.
- (22) Since there are States and participating Member States in which two or more systems of law or sets of rules concerning matters governed by this Regulation coexist, there should be a provision governing the extent to which this Regulation applies in the different territorial units of those States and participating Member States.
- (23) Since the objectives of this Regulation, namely the enhancement of legal certainty, predictability and flexibility – and hence the facilitation of the free movement of persons within the European Union – in international matrimonial proceedings, cannot be sufficiently achieved by the Member States acting alone owing to the scale and effects of this Regulation, these objectives can be better achieved at Union level, where appropriate by means of enhanced cooperation between those Member States, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.
- (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 Regulation must be applied by the courts of the participating Member States in observance of those rights and principles,

HAS ADOPTED THIS REGULATION:

Chapter I – Scope

Article 1 *Material scope*

1. This Regulation shall apply, in situations involving a conflict of laws, to divorce and legal separation.
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.

Article 2
Universality

The law designated by this Regulation shall apply whether or not it is the law of a participating Member State.

Chapter II – Uniform rules on the law applicable to divorce and legal separation

Article 3
Choice of applicable law by the parties

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:

- (a) the law of the State of the spouses' habitual residence at the time of conclusion of the agreement;
- (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;
- (c) the law of the State of nationality of one of the spouses at the time of conclusion of the agreement;
- (d) the *lex fori*.

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.

3. The agreement referred to in paragraph 2 shall be expressed in writing, dated and signed by both spouses. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.

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.

4. 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*.

Article 4
Applicable law in the absence of a choice by the parties

In the absence of a choice pursuant to Article 3, divorce and legal separation shall be subject to the law of the State:

- (a) where the spouses are habitually resident at the time the court is seised; or, failing that,
- (b) where the spouses were last habitually resident, provided that the period of residence did not end more than one year before the court was seised, in so far as one of the spouses still resides in that State at the time the court is seised; or, failing that,
- (c) of which both spouses are nationals at the time the court is seised; or, failing that,
- (d) where the court is seised.

Article 5
Application of the lex fori

Where the law applicable pursuant to Article 3 or Article 4 makes no provision for divorce or does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the *lex fori* shall apply.

Article 6
Exclusion of renvoi

Where this Regulation provides for the application of the law of a State, it refers to the rules of law in force in that State other than its rules of private international law.

Article 7
Public policy

Application of a provision of the law designated by virtue of this Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum.

Article 8
States with more than one legal system

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.
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.

Chapter III – Other provisions

Article 9
Information to be provided by participating Member States

1. At the latest by [*three months after the date of application of this Article*], participating Member States shall communicate to the Commission their national provisions, if any, concerning:
 - (a) the formal rules applicable to agreements on the choice of applicable law; and
 - (b) the possibility of designating the applicable law in accordance with Article 3(4).

The participating Member States shall apprise the Commission of any subsequent changes to these provisions.

2. The Commission shall make all information communicated in accordance with paragraph 1 publicly available through appropriate means, in particular through the website of the European Judicial Network in civil and commercial matters.

Article 10

Transitional provisions

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).

2. This Regulation shall be without prejudice to agreements on the choice of applicable law concluded in accordance with the law of a participating Member State whose court is seised before the date of application of this Regulation.

Article 11

Relationship with existing international conventions

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.

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.

Article 12

Review clause

By [*five years after the entry into force of this Regulation*] 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.

Chapter IV – Final provisions

Article 13

Entry into force and date of application

This Regulation shall enter into force on the twentieth day following its publication in the *Official Journal of the European Union*.

It shall apply from [*twelve months after the date of adoption of this Regulation*], with the exception of Article 9, which shall apply from [*six months after the date of adoption of this Regulation*].

This Regulation shall be binding in its entirety and directly applicable in the participating Member States in accordance with the Treaties.

Done at Brussels,

For the Council

The President