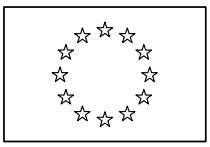

COMMISSION OF THE EUROPEAN COMMUNITIES

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GREEN PAPER

on applicable law and jurisdiction in divorce matters

(presented by the Commission)

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The purpose of this Green Paper is to launch a wide-ranging consultation of interested parties on the questions of applicable law and jurisdiction in matrimonial matters. The Green Paper describes problems that may arise under the current situation and proposes a number of possible solutions. The attached Commission working document provides information on the Member States' substantive, procedural and conflict-of-law rules in divorce matters.

The Commission invites interested parties to submit comments before 30 September 2005 to the following address:

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Interested parties are requested to mention explicitly if they do not wish their comments to be published on the Commission's website.

The Commission plans to organise a public hearing on this subject. All those responding will be invited to attend.

1. BACKGROUND

There are currently no Community provisions on applicable law in divorce. Council Regulation (EC) No. 1347/2000[1] ("the Brussels II Regulation") includes rules on jurisdiction and recognition in matrimonial matters, but does not comprise rules on applicable law. The entry into application of Council Regulation (EC) No. 2201/2003[2] ("the new Brussels II Regulation"), which replaces the Brussels II Regulation as of 1 March 2005, will not entail any change in this respect, since it takes over the rules on matrimonial matters from the Brussels II Regulation practically unchanged.

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1 Council Regulation (EC) 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility for children of both spouses, OJ L160, 30.06.2000, p. 19.

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 of 23.12.2003, p. 1.

The European Council in Vienna emphasised in 1998 that the aim of a common judicial area is to make life simpler for the citizens, in particular in cases affecting the everyday life of the citizens, such as divorce.[3] In November 2004, the European Council invited the Commission to present a Green Paper on the conflict-of-law rules in matters relating to divorce ("Rome III") in 2005.[4]

The increasing mobility of citizens within the European Union has resulted in an increasing number of "international" marriages where the spouses are of different nationalities, or live in different Member States or live in a Member State of which they are not nationals. In the event that an "international" couple decide to divorce, several laws may be invoked. The aim of the rules on applicable law, often referred to as "conflict-of-law rules", is to determine which of the different laws that will apply. In view of the high number of divorces within the European Union, applicable law and international jurisdiction in divorce matters affect a considerable number of citizens. As an example, approximately 15 per cent of the divorces pronounced in Germany each year (approximately 30.000 couples) concern couples of different nationalities.[5]

2. SHORTCOMINGS OF THE CURRENT SITUATION

An "international" couple who want to divorce are subject to the jurisdiction rules of the new Brussels II Regulation, which allow the spouses to choose between several alternative grounds of jurisdiction (see point 3.6 of the attached working document). Once a divorce proceeding is brought before the courts of a Member State, the applicable law is determined pursuant to the national conflict-of-law rules of that State. There are significant differences between the national conflict-of-law rules (see point 3.4 of the attached working document).

The combination of different conflict-of-law rules and the current jurisdiction rules may give rise to a number of problems in the context of "international" divorces. Apart from the lack of legal certainty and flexibility, the current situation may also lead to results that do not correspond to the legitimate expectations of citizens. Moreover, Community citizens who are resident in a third State may face difficulties in finding a competent divorce court and to have a divorce judgment issued by a court in a third State recognised in their respective Member States of origin. There is finally a risk of "rush to court" under the current situation.

2.1. Lack of legal certainty and predictability for the spouses

Considering the difference between, and complexity of, the national conflict-of-law rules in divorce matters, it is often difficult to predict which national law will apply in a given case. This is particularly the case in family situations where the spouses have no common habitual residence or nationality, but the problem may also arise when couples of the same nationality split up and move to different Member States.

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3 OJ C19, 23.01,1999, p. 1.

4 The Hague Programme: strengthening freedom, security and justice in the European Union, adopted by the European Council 4-5 November 2004.

5 Source: Statistisches Bundesamt. Deutschland.

Example 1: the Portuguese-Italian couple living in different Member States

A Portuguese man and an Italian woman get married in Italy. The husband returns immediately to Portugal after the wedding for professional reasons while the wife stays in Italy. After two years, the couple decide to divorce. The couple may apply for divorce in either Italy or Portugal pursuant to the new Brussels II Regulation. The courts in these States apply, in the first place, the law of the common nationality of the spouses. In the present case where the spouses are of different nationalities, the Italian courts would apply the law of the State "where the marriage has been principally based". The Portuguese courts would instead apply the law of the spouses' common habitual residence, or, failing that, the law with which the spouses have the "closest connection". The spouses find it difficult to predict what the applicable law will be in their situation.

2.2. Insufficient party autonomy

The national conflict-of-law rules foresee in principle only one solution in a given situation, e.g. the application of the law of the spouses' nationality or the law of the forum ("lex fori"). This may in certain situations not be sufficiently flexible. It fails for example to take account of the fact that citizens may feel closely connected with a Member State although they are not nationals of that State. Introducing a certain degree of party autonomy allowing the parties to choose the applicable law could render the rules more flexible and enhance legal certainty and predictability for the spouses.

Example 2: the Italian couple living in Germany

A couple of Italian nationality live in Munich since twenty years and feel perfectly integrated in German society. When their children leave home, the couple decide to divorce by consent. They would like to divorce under German law, with which they feel the most closely connected, and which requires only one year of separation in cases of divorce by consent, compared to three years of separation required under Italian law. The new Brussels II Regulation allows the spouses to apply for divorce in either Germany or Italy. Nevertheless, since German as well as Italian conflict-of-law rules are based, in the first place, on the common nationality of the spouses, the courts of both countries would apply Italian divorce law.

2.3. Risk of results that do not correspond to the legitimate expectations of the citizens

Citizens are increasingly taking advantage of the benefits of the internal market by moving to another Member State for professional reasons. They are unlikely to be aware that the conditions for divorce may change drastically as a result of their move. This may happen for instance in the case where spouses of different nationalities move to a Member State of which none of them is a national. Since the new Brussels II Regulation does not allow spouses to apply for divorce in a Member State of which only one of them is a national in the absence of another connecting factor, spouses may find themselves in a situation where the only

possibility is to seise the courts of the Member State of their habitual residence. This may in certain circumstances lead to results that do not correspond to their legitimate expectations.

Example 3: the Finnish/Swedish couple moving to Ireland

A Finnish/Swedish couple move from Stockholm to Dublin where they are offered interesting jobs. Their marriage deteriorates and they finally decide to divorce. The couple would expect the divorce proceedings to be rather simple and swift, as it would be under Finnish or Swedish law, since they both want to divorce and do not have any children. However, only Irish courts have jurisdiction according to the new Brussels II Regulation and Irish courts apply Irish law ("lex fori") to divorce proceedings, irrespective of the nationality of the spouses. The only way to ensure the application of Swedish or Finnish divorce law would be if a spouse returned to his or her Member State of origin for at least six months and then applied for divorce in that country. Neither spouse is willing or able to quit his or her job and leave Ireland for six months for this purpose. On the other hand, they want to avoid the application of Irish divorce law, which requires a four year separation period to establish that the marriage has broken down. They are surprised that the conditions for divorce have changed so dramatically, due to their decision to move to another Member State.

2.4. Risk of difficulties for Community citizens living in a third State

Whilst the rules of recognition of the new Brussels II Regulation apply to all divorce judgments issued by a court of a Member State, the rules of jurisdiction do not cover all situations. This may give rise to difficulties for Community citizens living in a third State. Situations may arise where none of the grounds of jurisdiction of the Regulation is applicable. The courts of the Member States may in such circumstances avail themselves of the national rules on international jurisdiction. However, the fact that these rules are not harmonised may lead to situations where no court within the European Union or elsewhere is competent to divorce a couple of Community citizens of different nationalities who live in a third State. Moreover, if a divorce is pronounced in a third State, the couple may face serious difficulties to have the divorce recognised in their respective Member States of origin.

Example 4: the German/Dutch couple living in a third State

A German/Dutch couple live in a third State since many years. Their relationship deteriorates and the German wife would like to divorce, preferably before a German court. However, she cannot apply for divorce in Germany or in any other Member State. None of the grounds of jurisdiction of the new Brussels II Regulation is applicable since the couple are not habitually resident in a Member State and are not of common nationality. In such circumstances, the courts of the Member States may avail themselves of their national rules of jurisdiction. However, the German wife cannot apply for divorce in Germany under the German rules of jurisdiction, since the Dutch husband can only be sued in Germany according to the jurisdiction rules of the Regulation according to Article 6, which offers a certain protection to respondents. Nor can she apply for divorce in the Netherlands, since Dutch law does not provide for internal jurisdiction rules in these circumstances. Consequently, the German wife is unable to apply for divorce in any Member State. Her only hope is that the courts of the third State will have jurisdiction to deal with the matter. Even if that would be the case, it may be difficult to have a divorce pronounced in the third State recognised in Germany.

2.5. Risk of "rush to court"

The rule on "lis pendens" (see point 3.6.3 of the attached working document) may induce a spouse to apply for divorce before the other spouse has done so to prevent the courts of another Member State from acquiring jurisdiction ("rush to court"). This may lead to situations where an applicant applies for divorce in a particular Member State to obtain a certain result, e.g. to circumvent the application of a particular divorce law. "Rush to court" may have negative consequences for the defendant if it leads to the application of a law with which he or she does not feel closely connected and which does not take account of his or her interests. This risk may be illustrated by the following example:

Example 5: the Polish husband going to Finland to work

A Polish couple, married since twenty years, live in Poland with their children. The husband receives an interesting offer to work in Finland for two years. The couple agree that the husband shall accept the offer and that the wife shall stay in Poland. After one year, the husband tells his wife that he wants to divorce. He is aware that divorce proceedings under Polish law are lengthy and that the court must establish that the marriage has broken down completely and irreparably. However, Finnish courts would have jurisdiction under the new Brussels II Regulation, since the husband has lived in Finland for more than one year. Finnish courts apply Finnish law to divorce proceedings according to the principle of "lex fori". As a result, the Polish husband can obtain a divorce after six months' consideration period, notwithstanding his wife's objections. Since the husband wants to obtain a divorce as quickly as possible, he seises a Finnish court immediately, which pronounces the divorce after six months, despite the wife's strong objections.

Question 1: Are you aware of other problems than those identified above that may arise in the context of "international" divorces?

3. POSSIBLE WAYS FORWARD

3.1. Status quo

One possibility would be to leave the situation unchanged and not introduce any legislative change. It could be argued that the problems identified are not sufficiently serious or do not occur sufficiently frequently to warrant Community action.

3.2. Harmonising the conflict-of-law rules

Another way of addressing the problem would be to introduce harmonised conflict-of-law rules based on a set of uniform connecting factors. This solution would have the advantage of ensuring legal certainty (example 1). Depending on the contents of the harmonised rules, it could also increase party autonomy (example 2) and contribute to finding satisfactory solutions for the citizens (example 3). It may at least partly reduce the need for "rush to court" (example 5), since any court seised would apply the divorce law designated on the basis of common rules.

The connecting factors would need to be carefully considered in order to ensure legal certainty and predictability and at the same time allow for some flexibility. The objective would be to ensure that a divorce is governed according to the legal order with which it has the closest connection. A number of connecting factors, which are commonly used in international instruments and national conflict laws, could be envisaged, such as the spouses' last common habitual residence, the common nationality of the spouses, the last common nationality if one spouse still retains it or "lex fori".

Question 2: Are you in favour of harmonising conflict-of-law rules? What are the arguments for and against such solution?

Question 3: What would be the most appropriate connecting factors?

Question 4: Should the harmonised rules be confined to divorce or apply also to legal separation and marriage annulment?

Question 5: Should the harmonised rules include a public policy clause enabling courts to refuse to apply a foreign law in certain circumstances?

3.3. Providing to spouses the possibility to choose the applicable law

Another possibility would be to introduce a limited possibility for the spouses to choose the applicable law in divorce proceedings. The possibility to choose the applicable law could enhance legal certainty and predictability for the spouses in particular in divorces by mutual consent. A certain party autonomy would also render the rules more flexible than current rules which in principle only foresee one possible solution. It could finally facilitate access to courts in certain cases. This solution could be particularly useful when the spouses agree to divorce, such as the Portuguese-Italian couple (example 1) and the Italian couple living in Germany (example 2).

The principle of freedom of choice has increasingly been used in international conventions regarding choice-of-law in the field of contract law, but to a lesser extent in family law. There are nevertheless exceptions, such as the recent Belgian law on private international law that allows spouses to choose between the law of the nationality of one of the spouses or Belgian law (i.e. "lex fori").[6]

To leave the parties an unlimited choice could result in the application of "exotic" laws with which the parties have little or no connection. It would therefore seem preferable to restrict the choice to certain laws with which the spouses are closely connected (e.g. by virtue of the nationality of one or both spouses, last common habitual residence or "lex fori"). One possibility would be to restrict the choice to the law of the forum State ("lex fori") in order to ensure that courts would not be obliged to apply foreign law.

[6] Article 55 paragraphe 2 of « Loi portant le Code de droit international privé » of 16 July 2004, published 27.07.2004.

The modalities for the choice would obviously need to be further explored. It could be required that the choice should be expressed explicitly and in writing at the time the divorce application is introduced. One would also need to consider whether special safeguards would be needed to protect a spouse against undue pressure from the other spouse to choose a particular law. Special considerations may also be necessary if the spouses have children.

The choice of a law by the parties would obviously imply the choice of the substantive rules of the divorce forum, and not its rules on private international law (exclusion of so-called "renvoi"). The contrary would jeopardise the objective of creating legal certainty.

Question 6: Should the parties be allowed to choose applicable law? What are the arguments for and against such a solution?

Question 7: Should the choice be limited to certain laws? If yes, what would be the appropriate connecting factors? Should it be limited to the laws of the Member States? Should the choice be limited to "lex fori"?

Question 8: Should the possibility to choose applicable law be confined to divorce or should it apply also to legal separation and marriage annulment?

Question 9: What should be the appropriate formal requirements for the parties' agreement on the choice of law?

3.4. Revising the grounds of jurisdiction listed in Article 3 of Regulation No. 2201/2003

The grounds of jurisdiction listed in Article 3 of Council Regulation No. 2201/2003 were originally designed to meet objective requirements, to be in line with the interests of the parties, involve flexible rules to deal with mobility and to meet individuals' needs without sacrificing legal certainty.[7]

It could be argued that the jurisdiction rules do not entirely meet these objectives. In the absence of uniform conflict-of-law rules, the existence of several alternative grounds of jurisdiction may lead to the application of laws with which the spouses are not necessarily the most closely connected (example 5). On the other hand, the grounds of jurisdiction may in certain cases not be sufficiently flexible to meet individuals' needs (example 3).

One possibility could be to revise the jurisdiction rules. However, the consequences of any revision would need to be carefully considered. Hence, a restriction of the grounds of jurisdiction may have adverse consequences in terms of flexibility and access to courts, unless the parties are given the opportunity to choose the competent court (see below point 3.6). On the other hand, adding new grounds of jurisdiction may further exacerbate the lack of legal certainty.

[7] Point 27 of the Explanatory report on the Convention of 28 may 1998 on Jurisdiction and the Recognition and Enforcement of Judgment in Matrimonial Matters (on which the Brussels II Regulation is based), OJ C 221, 16.07.1998, p. 27.

Question 10: In your experience, does the existence of several grounds of jurisdiction result in "rush to court"?

Question 11: Do you believe that the grounds of jurisdiction should be revised? If so, what would be the best solution?

3.5. Revising the rule on residual jurisdiction in Article 7 of Regulation No. 2201/2003

Another question is whether the rule on residual jurisdiction of the new Brussels II Regulation should be revised. The current rules may lead to situations where no court in the European Union or indeed anywhere has jurisdiction to deal with a divorce application (example 4). In the event that a court of a third State has jurisdiction, the ensuing divorce decision is not recognised within the European Union pursuant to the new Brussels II Regulation, but only pursuant to national law or applicable international treaties. This is likely to cause difficulties if the couple subsequently seek to have the divorce recognised in their respective countries of origin.

Question 12: Do you consider that the harmonisation of the jurisdiction rules should be reinforced and that Article 7 of Regulation No. 2201/2003 should be deleted, or at least limited to cases where no EU citizens are involved? If yes, what should these rules look like?

3.6. Providing to spouses the possibility to choose the competent court

Another way forward could be to allow the spouses to agree upon the competent court in divorce cases ("prorogation of jurisdiction"). To allow the parties to agree that a court or the courts of a certain Member State should have jurisdiction in divorce proceedings between them could enhance legal certainty and flexibility and be particularly useful in cases of divorces by consent.

Prorogation of jurisdiction could prove useful also in situations where the spouses are unable to seise a court of a Member State under the current jurisdiction rules, because they do not have common nationality or domicile. As an example, it would allow the Swedish-Finnish couple living in Ireland to agree that a Finnish or a Swedish court would have jurisdiction in their divorce proceeding (example 3). Similarly, it would allow the German-Dutch couple living in a third State to agree on a competent court (example 4). The court designated by the parties would apply the law designated under its national conflict-of-law rules.

The possibility to choose the competent court exists in several Community instruments. Prorogation is possible pursuant to Article 23 of Council Regulation (EC) No. 44/2001. Similarly, Article 12 of the new Brussels II Regulation foresees a limited possibility to choose competent court in matters of parental responsibility.

Prorogation in divorces could be limited to courts of Member States with which the spouses have a close connection, for example by virtue of the nationality or domicile of either spouse or the spouses' last common habitual residence. If the spouses have children, special attention should be paid to ensure coherence of any such rules with the prorogation rule of Article 12 of the new Brussels II Regulation. The modalities and timing for the choice would obviously need to be examined further.

Question 13: What are the arguments for and against introducing a possibility of prorogation in divorce cases?

Question 14: Should prorogation be limited to certain jurisdictions?

Question 15: What should be the formal requirements for the parties' prorogation agreement?

3.7. Introducing the possibility to transfer a case

As explained above (point 2.5.), a spouse may in certain circumstances have an incentive to "rush to court" before the other spouse has done so. This may at least partly be explained by the "lis pendens" rule of the new Brussels II Regulation, which has been criticised as being too rigid and to give an incentive to spouses to "strike first". A possible remedy could be to introduce a possibility to transfer a divorce case, in exceptional circumstances, to a court of another Member State. Article 15 of the new Brussels II Regulation provides for such possibility in matters of parental responsibility.

A transfer could be envisaged in exceptional circumstances and under strict conditions if a spouse applies for divorce in a Member State, but the defendant requests that the case be transferred to a court of another Member State on the basis that the marriage was principally based in that State. To safeguard legal certainty, the "centre of gravity" of a marriage could be established on the basis of a closed list of connecting factors, including for example the last common habitual residence of the spouses if one spouse still lives there and the common nationality of the spouses.

The modalities of a possible transfer mechanism would obviously need to be further elaborated to ensure in particular that it would not result in undue delays. Additional safeguards may be necessary if the divorce proceedings are linked to proceedings on parental responsibility to ensure coherence with Article 15 of the new Brussels II Regulation.

The possibility to transfer a case could provide a remedy to the problems that may arise when one spouse has unilaterally applied for divorce against the will of the other spouse. As an example, it would allow the Polish wife mentioned in example 5 to request the Finnish court to transfer the case to a Polish court on the basis that both spouses being Polish nationals and Poland being the last common habitual residence of the spouses, the "centre of gravity" of the marriage was situated in Poland.

Question 16: Should it be possible to request a transfer of a case to the court of another Member State? What are the arguments for and against such solution?

Question 17: What should be the connecting factors to establish whether a case can be transferred to another Member State?

Question 18: What safeguards would be necessary to ensure legal certainty and avoid undue delays?

3.8. Combining different solutions

The ideas described above are examples of different ways forward. However, none of the ideas could by itself successfully solve all the problems described in chapter 2. One could therefore envisage a combination of different solutions.

As an example, spouses could be allowed to choose competent court based on the nationality of either spouse or their last habitual residence. In addition, spouses could be allowed to choose the applicable law, at least the application of "lex fori". This combination could solve the problems described in examples 1-4 and be particularly useful in divorces by consent. To solve the problems that may arise where only one spouse wants to divorce (example 5), it could be envisaged to introduce a possibility to transfer a case to another Member State.

Question 19: Which combination of solutions do you believe would provide the most appropriate remedy to the problems described?

Question 20: Would you suggest any other solution to solve the problems described in chapter 2?