New Community rules on applicable law and jurisdiction in divorce matters to increase legal certainty and flexibility and ensure access to court in "international" divorce proceedings

The Commission proposes to introduce harmonised rules on applicable law and to revise the existing jurisdiction rules in divorce matters. The aim is to enhance legal certainty and flexibility for the thousands of couples who are involved in "international" divorce proceedings each year in the European Union. Another aim is to ensure access to court for EU citizens living in third States.

Background

The proposal is part of the ongoing work within the EU to create a genuine judicial area based on the principle of mutual recognition of judgments, as set out in the Programme for mutual recognition of judgments of 2000 and confirmed by the European Council in the Hague in November 2004. There are currently no Community rules on applicable law in divorce matters. Council Regulation (EC) No 2201/2003 of 27 November 2003 ("the new Brussels II Regulation) sets out uniform rules on jurisdiction and recognition of divorce judgments, but does not include rules on applicable law.

The Commission launched a public consultation in 2005 including the publication of a Green Paper on applicable law and jurisdiction in divorce matters in March 2005, to which it received approximately 65 replies. The majority of respondents considered Community action necessary to improve legal certainty and flexibility and ensure access to court.

Therefore, the European Commission is now proposing to introduce harmonised rules on applicable law and to revise the existing jurisdiction rules in divorce matters. The aim is to enhance legal certainty and flexibility for the thousands of couples who are involved in "international" divorce proceedings each year in the European Union. Another aim is to ensure access to court for EU citizens living in third States.

The need for Community action

The growing mobility of citizens within the European Union has led to an increasing number of couples where the spouses are of different nationalities, or where they live in different Member States, or where spouses have the same nationality but live in a Member State other than their State of origin.
The national laws vary greatly concerning the grounds for divorce as well as the procedures. For example, Maltese law does not allow for divorce, but recognises foreign divorce judgments given by competent foreign courts. The differences can be explained by different cultural and historical reasons. The current proposal does not harmonise the national laws on divorce, but seeks to make it easier for couples to know which divorce law that will apply to their divorce.

The applicable law is currently determined on the basis of national rules on applicable law, often referred to as "conflict-of-law rules". Certain Member States determine the applicable law on the basis of a scale of connecting factors (e.g. nationality of the spouses) to ensure that the divorce is governed by the legal order with which it has the closest connection. Other Member States apply systematically their domestic laws ("the law of the forum") to divorce proceedings, irrespective of the nationality of the spouses. These differences make it difficult for couples to predict which law that will apply to their divorce.

The public consultation revealed that couples in the EU currently face practical and legal problems and that the current situation may lead to results which do not correspond to their legitimate expectations: First, it is currently difficult for spouses to predict which law that will apply to their divorce proceedings. Second, spouses have currently little or no possibility to choose the applicable law to their divorce. Third, the current rules may induce a spouse to "rush to court" before the other spouse to obtain a decision that is more favourable to him or her. Finally, the current rules do not guarantee sufficient access to court, especially for citizens living in third States.

Facts and figures
In view of the high number of divorces in the European Union, questions of applicable law and jurisdiction in divorce matters affect a significant number of citizens. The Commission has collected data on the number of "international" divorces in the Member States for the years 2000-2004. These statistics are available as part of the Impact Assessment which accompanies the proposal.

The information provided by the 13 Member States for which data are available show that the number of "international" divorces of the total number of divorces has increased for all States, except Portugal and Estonia. The rate of international divorces is highest in Estonia (ca 50%) and lowest in Hungary (1.5%). The highest number of international divorces was recorded in Germany (36.93 in 2004) and the lowest number was recorded in Slovenia (256 in 2004). Based on the available data, there are approximately 2.2 million marriages per year in the European Union. It is estimated that approximately 350,000 of these marriages are international. There are around 875,000 divorces per year in the European Union. Based on the available data, it is estimated that around 170,000, or around 16% of these divorces, are of international character.

Summary of the proposal
The proposal revises Council Regulation (EC) no. 2201/2003 of 27 November 2003 by introducing harmonised rules on applicable law and by revising the jurisdiction rules in divorce matters to achieve the following objectives:

- Strengthen legal certainty and predictability
The proposal introduces harmonised conflict-of-law rules in matters of divorce and legal separation to enable spouses to know the applicable law. The proposed rule is based in the first place on the choice of the spouses. In the absence of choice, the applicable law is determined on the basis of a scale of connecting factors which ensure that the divorce is governed by a law with which the spouses have a close connection.

- Increase flexibility by giving spouses a limited possibility to choose applicable law and competent court

The proposal renders the legal framework more flexible by introducing a limited possibility for the spouses to choose (a) the applicable law and (b) the competent court in proceedings on divorce and legal separation. This is likely to be particularly useful in cases of divorce by mutual consent. The choice is limited to laws and courts with which the spouses have a close connection, either because they live or have lived in that State, or because they are nationals of the State in question. Safeguards are introduced to ensure that both spouses are aware of the consequences of their choice. The choice must therefore be in writing and signed by both spouses.

- Prevent "rush to court" by one spouse

The proposal reduces the incentive for a spouse to "rush to court" before the other spouse to obtain a result that is more favourable to him or her. "Rush to court" renders reconciliation efforts difficult and leaves no room for mediation. It may also lead to the application of a law which fails to take into account the defendant's interests. The proposal will reduce the incentive of "rush to court" since the applicable law will be designated on the basis of common rules independently of which court that is seized.

- Ensure access to court for EU citizens living in third States

Finally, the proposal improves access to court in divorce proceedings for spouses of different nationalities who live in a third State. The current rules do not effectively ensure that a court of a Member State is competent in divorce matters for EU citizens who live in a third State, but leave this to national law. However, the national rules are based on different criteria and do not always effectively ensure access to court for EU nationals living in third States. This may lead to situation where no jurisdiction in the EU or in a third State has jurisdiction to deal with a divorce application. The proposal introduces therefore a uniform and exhaustive jurisdiction rule to ensure access to court for EU citizens living in third States.

**Q&A**

- Does this instrument harmonise e divorce laws? establish Community rules concerning divorce?

No, the proposal does not harmonise the national divorce laws. It fully respects the divorce laws of the Member States, which remain very different for historical and cultural reasons. The EU has no competence to legislate in matters of substantive family law, such as divorce. The proposal is limited to the questions of applicable law and jurisdiction in divorce matters. It aims at ensuring legal certainty, flexibility and access to court and at facilitating the free movement of citizens rules on divorce matters continue to apply.

- Does this proposal aim at harmonising legislations?

This proposal will not entail harmonisation of current national legislations on divorce matters. The proposal aims only at introducing harmonised rules on applicable law and to revise the existing jurisdiction rules in divorce matters.
• Does this proposal regulation facilitate divorces? Will it lead to "forum shopping"?

No, the proposal will not make it easier or more difficult to divorce not necessarily (see examples below). It introduces a limited choice for the spouses to choose the applicable law and the competent court to enhance legal certainty and promote amicable solutions between the spouses. However, the new rules do not lead to "forum shopping" since the choice is limited to laws and courts with which the spouses have a close connection. It will not enable spouses to divorce in another Member State with more liberal divorce legislation unless they have a close connection with this State.

Is there a real need for this regulation?

Yes: Based on the available data, there are approximately 2.2 million marriages per year in the European Union. It is estimated that approximately 350,000 of these marriages are international. There are around 875,000 divorces per year in the European Union. Based on the available data, it is estimated that around 170,000, or around 16 % of these divorces, are of international character. This includes divorces between spouses of different nationalities and spouses of the same nationality living in another Member State.

• Do unmarried couples fall under this proposal?

No, the proposal applies only to divorce matters. It does not apply to the separation of unmarried couples.

• Practical examples:

A 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 by mutual consent. The couple may apply for divorce in either Italy or Portugal pursuant to the current legal framework (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 very difficult to predict what the applicable law will be under these highly complex rules. in their situation.

The proposed rules will make it easy for the couple to know what the applicable law will be and it would also allow them to choose the applicable law to their divorce proceeding. The choice would be limited to laws with which they have a close connection, i.e. Portuguese or Italian law.
**A Finnish/Swedish couple moving to Ireland**

A Finnish/Swedish couple move from Stockholm to Dublin. 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 current legal framework (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 and applied for divorce in that country. The spouses are not able to quit their jobs for this purpose, but would like to avoid the application of Irish divorce law, which requires a four year separation period to establish that the marriage has broken down.

The proposal revises the jurisdiction rules to make them more flexible. The new rules would allow the Finnish/Swedish couple to agree that a Finnish or a Swedish court would have jurisdiction in their divorce proceeding. This would allow the Finnish-Swedish couple living in Ireland to divorce before Finnish or a Swedish court without having to return to their home countries. This new rule will promote amicable agreement and facilitate free movement of citizens.

**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 current legal framework (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 seizes a Finnish court immediately, which pronounces the divorce after six months, despite the wife’s strong objections.

This example shows how the current situation may lead to "rush to court" and the application of a law which fails to take into account the defendant's interests. The proposal would ensure that the divorce would be governed by a law with which Polish spouses have a close connection. The applicable law would be based in the first place on the choice of the spouses. If the spouses do not agree, the court will apply the law with which the spouses have the closest connection, in this case Polish law.