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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

Bringing legal clarity to property rights for international couples

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1. INTRODUCTION

The main purpose of creating a European judicial area is to offer European citizens legal certainty and ease of access to justice in any cross-border situation they may find themselves in. Various instruments have been adopted by the European Union with this goal in mind.

However, as shown in the 2010 EU Citizenship Report presented by the Commission on 27 October 2010¹, many obstacles remain that impede the full exercise of Union citizenship rights, in particular the right to free movement. Among the obstacles identified by the Commission was the uncertainty surrounding the property rights of international couples made up, *inter alia*, of nationals of different Member States or living in a Member State other than their State of origin.

Of the approximately 122 million marriages in the EU, around 16 million (13%) have such a cross-border dimension. Of 2.4 million marriages celebrated in the EU in 2007, about 300 000 fell into this category. So did 140 000 (13%) of the 1 040 000 divorces that took place in the EU in the same year. In addition, 8 500 international couples in registered partnerships were dissolved by separation and 1 266 were ended by the death of one of the partners.

The differences between national legal systems often produce unexpected and sometimes unwelcome consequences for international couples when it comes to the management of their property.

When a union is dissolved by divorce, separation or the death of one of the partners, the couple or the surviving partner faces many difficulties, including the division of the property acquired during their life together, as shown by the following example:

A Greek-Hungarian couple marry in Greece and live there together for three years. They then decide to go and live in Hungary. After two years in Hungary the marriage breaks up. According to the conflict-of-law rule that applies in Greece, the liquidation of the matrimonial property is subject to Greek law (the connecting factor that decides the law that applies is the common habitual residence of the spouses at the time of their marriage). According to the Hungarian conflict-of-law rule, however, it is Hungarian law which governs the liquidation of the marriage (the connecting factor being the common habitual residence of the spouses at the time of their divorce).

How to establish jurisdiction in such a case? The couple have lived in both Greece and Hungary. Should the Greek courts or the Hungarian courts deal with the liquidation of the matrimonial property?

¹ EU Citizenship Report 2010: Dismantling the obstacles to EU citizens' rights, COM(2010) 603.

In this example, if the Hungarian husband believes that Hungarian law might be more advantageous because it will better protect his interests, he may rush to bring an action in the Hungarian courts. This is called 'rush to court'. So, under the current rules, the better informed spouse can initiate proceedings and put the other spouse at a disadvantage.

Currently, the rules applicable to the property relationships of international couples fail to prevent such situations and do not provide the legal certainty necessary for the management and division of couples' property.

2. LEGAL FRAMEWORK

The Union is currently formulating a policy to make life easier for citizens, particularly international couples, in cross-border situations.

A number of instruments dealing with private international law in the area of family law have been adopted, including the Brussels IIa Regulation of 27 November 2003² and the Rome III Regulation of 20 December 2010³.

When an international couple decides to divorce or separate, the Brussels IIa rules enable them to identify which court has jurisdiction to rule on their divorce, and how the decision on the dissolution of their union can 'move' from one Member State to another and be recognised and enforced in a Member State other than the State where the decision was delivered.

The Rome III Regulation supplements these rules by offering spouses the possibility of choosing the law applicable to their divorce proceedings. This Regulation is the outcome of enhanced cooperation on the law applicable to divorce⁴, which was the first example of enhanced judicial cooperation.

These instruments provide legal certainty, predictability and greater flexibility for spouses engaged in divorce and legal separation proceedings. They are used to determine the applicable law and the court with jurisdiction on the basis of objective criteria.

But nothing in these instruments covers issues of private international law relating to the property relationships of international couples.

The same is true of the proposal for a Regulation on successions, which is currently being negotiated⁵. The objective of that proposal is to enable people living in the European Union to organise their succession in advance and to effectively guarantee the rights of heirs and of other persons linked to the deceased and of creditors of the estate. However, it does not cover the property aspects of marriage and registered partnerships.

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.

³ Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

⁴ This enhanced cooperation has involved 14 Member States: Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Latvia, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain.

⁵ Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM(2009) 154.

3. PROPERTY ASPECTS: THE REASON FOR ACTING NOW

Recently, in the Stockholm Programme (An open and secure Europe serving and protecting citizens⁶), the European Council asked that mutual recognition be extended to areas crucial for the daily lives of citizens. Issues relating to matrimonial property regimes and the property consequences of the separation of couples are explicitly included among them⁷.

Furthermore, the European Parliament has backed a Commission initiative on matrimonial property regimes⁸, stressing that the priorities in the field of civil justice should be to fulfil the needs of citizens by simplifying judicial machinery and introducing simpler, more transparent and more accessible procedures.

In July 2006 the Commission adopted a Green Paper on the conflict of laws in matters of matrimonial property regimes⁹, including jurisdiction and mutual recognition. This launched wide-ranging public consultations, the results of which confirmed the need for European legislation, both for matrimonial property regimes and the property consequences of registered partnerships.

The Commission considers that if the expectations of citizens are to be fully met the time has come to supplement the existing legal framework with provisions on property relationships. This is why, in accordance with the undertaking it made in the 2010 Citizenship Report, it is presenting proposals to offer clear European answers to the problems experienced by international couples in these areas.

4. A PRIVATE INTERNATIONAL LAW APPROACH FOR CITIZENS

The management of spouses' property during their life together and when the union between them comes to an end is governed by the national laws of the Member States.

The substantive law of matrimonial property regimes varies from one Member State to another, although most Member States draw a distinction between legal matrimonial regimes, on one hand, and contractually agreed regimes, on the other. The legal regime is the one that will be applied if the spouses do not opt for any other arrangement. Where the spouses make a choice, this is referred to as a contractually agreed regime.

Whether property owned or acquired by the spouses belongs to both of them jointly is determined by the rules of the matrimonial regime to be applied. In the community-of-property system some or all of the property owned or acquired by a spouse becomes common property and belongs to both spouses, whereas in the separation-of-property system, property

⁶ OJ C 115, 4.5.2010.

⁷ In 1998 these issues were referred to in the Vienna Action Plan (OJ C 19, 23.1.1999), and two years later in the programme for mutual recognition of decisions in civil and commercial matters (OJ C 12, 15.1.2001).

⁸ European Parliament Resolution of 25 November 2009 on the communication from the Commission to the European Parliament and the Council - An area of freedom, security and justice serving the citizen - Stockholm Programme; European Parliament Resolution of 23 November 2010 on civil law, commercial law, family law and private international law aspects of the Action Plan Implementing the Stockholm Programme.

⁹ Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition, COM(2006) 400 and SEC(2006) 952.

belongs to one or other of the spouses. These are general principles, which operate in different ways in the laws of the Member States.

There is a registered partnership where two people live as a couple and have registered their union with a public authority of their Member State of residence. This is a recent institution, which is currently recognised in law in 14 Member States¹⁰. Like marriage, a registered partnership has effects on the property relationship of the partners, which are governed by national law. Differences between national laws are even more pronounced here than in the case of matrimonial property regimes.

Like substantive law on the property rights of international couples, the national rules of private international law applied to the matter vary greatly from one Member State to another. This situation does not offer sufficient legal security to couples who have decided to exercise their right to free movement.

Given these differences, to offer citizens all the legal certainty they need there are three approaches that could be envisaged at European level:

- One, which is already followed in practice, is to leave it to the Member States to find solutions within the framework of bilateral agreements. The Franco-German agreement of February 2010 is an example of this approach¹¹. But even when open to accession by other Member States (as the Franco-German agreement is), such agreements cannot deal with all the practical problems that arise nor, consequently, provide a comprehensive European response.
- Another approach would be to harmonise the substantive law governing the property consequences of marriage and registered partnerships. However, this approach is excluded by the Treaty, which do not endow the Union with powers in these areas, nor indeed as regards the forms of union that give rise to the property relationships, namely marriage and registered partnerships.
- A third approach, which is possible under the Treaty, is to adopt rules of private international law at European level covering the property consequences of marriage and registered partnerships.

For this reason, as it promised in the Action Plan Implementing the Stockholm Programme that it approved on 20 April 2010¹², the Commission is proposing the following initiatives:

- a proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes;
- a proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions on the property consequences of registered partnerships.

¹⁰ Austria, Belgium, the Czech Republic, Denmark, Germany, Finland, France, Hungary, Ireland, Luxembourg, Netherlands, Slovenia, Sweden and the United Kingdom.

¹¹ A bilateral agreement concluded between Germany and France in February 2010 establishing an optional matrimonial property regime with sharing of acquired property.

¹² COM(2010) 171.

Although the two proposals are very similar in structure and in content, the Commission believes it will be easier to deal with the specific features of each type of union in two separate pieces of legislation rather than one covering both. Across the EU marriage and registered partnership are different legal institutions. Marriage is a long-established institution that exists in all 27 Member States, whereas the registered partnership is a more recent institution that exists in only 14 Member States, as mentioned earlier. Some of the legal arrangements proposed for the two institutions will inevitably differ.

Because both marriage and registered partnerships may or may not be open to opposite-sex couples or to same-sex couples, depending on the Member State, the two proposals are gender neutral¹³. While the objective of giving a clear legal answer to the problems experienced by international couples in this area is the same, presenting two separate instruments will ensure that the rules governing each institution are clear, and more easily comprehensible to citizens and professionals alike.

In view of their close links, the two proposals are being presented together, as a package, to underline the Commission's determination to facilitate the daily lives of international couples regardless of whether they have entered into a marriage or a registered partnership. The Commission calls on the Council to follow this comprehensive approach.

Both proposals are fiscally neutral and will not entail any changes in the Member States' national tax laws.

5. RESPECT FOR FUNDAMENTAL RIGHTS

In accordance with the strategy for the effective implementation of the Charter of Fundamental Rights by the European Union¹⁴, the Commission has checked that the two proposals comply with the rights set out in the Charter.

They do not affect the right to respect for private and family life nor the right to marry and to found a family according to national laws, as provided for in Articles 7 and 9 of the Charter.

The right to property referred to in Article 17 of the Charter is strengthened. The predictability of the law applicable to all the couple's property will in fact enable spouses and partners to exercise their property rights more effectively.

The Commission has also checked that the proposals comply with Article 21, which prohibits any discrimination, and has therefore made certain that the two proposals are gender neutral. Thus the Commission does not differentiate on the basis of sexual orientation.

Finally, the proposal would increase citizens' access to justice in the EU, in particular for married couples and registered partnerships. It will facilitate implementation of Article 47 of the Charter of Fundamental Rights, which guarantees the right to an effective remedy and to a

¹³ Under the proposal dealing with matrimonial property regimes, for example, a same-sex marriage allowed by Portuguese law will be treated in the same way as an opposite-sex marriage. A partnership registered in France may be between persons of the opposite sex or persons of the same sex, and both kinds of partnership will be covered by the proposal on the property consequences of registered partnerships.

¹⁴ Communication from the Commission, COM(2010) 573 of 19.10.2010.

fair trial. By setting out objective criteria for establishing the courts with jurisdiction, parallel proceedings and appeals precipitated by the most active party can be avoided.

6. SUBSTANCE OF THE PROPOSALS

The Commission's proposals set out to answer the following questions:

- Which court has jurisdiction over the liquidation of a matrimonial property regime or the property consequences of a registered partnership?
- Which law is applicable to this liquidation?
- Is the decision of the court or other competent authority of a Member States easily recognised and enforced in another Member State?

6.1. Determining the court with jurisdiction: centralisation of procedures and consistency with the existing European Union law

The proposed Regulations would establish which court has jurisdiction to liquidate a matrimonial property regime or the property consequences of a registered partnership. The Commission proposes that a single court should handle a divorce or legal separation and the consequent liquidation of the matrimonial property regime.

Consistency is sought with the existing or proposed European rules on jurisdiction in other Union legislative instruments.

The courts with jurisdiction to rule on divorce or legal separation proceedings under the Brussels IIa Regulation already referred to would have their jurisdiction extended to the liquidation of the matrimonial property regime as a result of a divorce or legal separation.

Similarly, if one of the spouses or partners dies, the court with jurisdiction over the succession¹⁵ would have its jurisdiction extended to matters of matrimonial property regimes and the property consequences of partnerships.

Grouping proceedings before a single court will represent a substantial saving, which can be estimated at between €2 000 and €3 000 per case. Citizens will not have to petition in a number of different jurisdictions depending on the particular matter at issue, such as liquidation of an estate or division of property on dissolution of a registered partnership by a death.

6.2. Determining the applicable law: spouses given the option to choose

Different approaches are proposed for marriage and for registered partnerships because of the specific features of each institution.

Married spouses are given the option of choosing the applicable law. Their choice is limited, however, to prevent them from choosing a law with no connection to their marriage. The choice is between the law of their common habitual residence or that of their country of

¹⁵ In accordance with the instrument under negotiation.

nationality. The proposal also contains a list of connecting factors to identify the applicable law in cases where no law has been chosen.

These solutions take into account the mobility of citizens and respect the free will of the spouses, while providing legal certainty for each. If they change their habitual residence from one Member State to another, the spouses may, for example, easily change the law applicable to their matrimonial property regime. This is also the approach adopted in the recent Rome III Regulation on the law applicable to divorce and legal separation.

The same freedom is not however proposed for registered partners. The law applicable to the property consequences of registered partnerships is clearly defined in the proposal. It is the law of the State where the partnership was registered. Given that registered partnerships are not recognised in all EU Member States and there are many differences in the laws of Member States which have introduced this institution into their legal system, the proposal would apply the law of registration.

This rule will, however, have the advantage of making it clearer which law applies to a couple in a registered partnership and what the possible property consequences might be in the event of their separation.

The Commission will inform the public of the legislation and national procedures relevant to matrimonial regimes and the property consequences of registered partnerships by appropriate means, in particular via the website of the European Judicial Network in civil and commercial matters. It will do the same for national rules on effects in respect of third parties.

6.3. Recognition and enforcement of decisions: faster movement and enforcement of decisions in the Union

The proposed provisions on recognition and enforcement of decisions and instruments are similar to those of the draft Regulation on successions¹⁶. These in turn are aligned on the existing provisions for civil and commercial matters¹⁷.

They are designed to ensure the free movement of decisions within the EU and their effective enforcement, whereas at present each Member State has its own national rules for the recognition and enforcement of decisions on these matters.

These proposals are the first measures proposed at EU level concerning the property relationships of international couples. They cover matters which are part of family law. According to the Treaty on the Functioning of the European Union, measures which affect family law need a unanimous decision of the Council. The Commission therefore thought it appropriate to leave the control of decisions in these matters in the hands of the Member State in which recognition and enforcement is sought. Consequently, decisions made in one Member State will be recognised before the courts of the Member State where enforcement is sought on the basis of *exequatur*. This is a procedure that basically consists of a formal

¹⁶ Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM(2009) 154.

¹⁷ The Brussels I Regulation, Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p.1. A proposal for recasting the Brussels I Regulation was adopted on 14 December 2010, COM(2010) 748.

verification of the documents submitted by the applicant, as happens presently in civil and commercial proceedings.

These new provisions are a considerable step forward compared with the current situation where each Member State applies its own procedural rules and has its own grounds for refusing enforcement of foreign decisions, something which seriously hampers the movement of decisions in this area.

At a later stage, once the implementation of the proposed measures and the equivalent provisions of Regulation Brussels IIa has been evaluated, the Commission will consider whether a simpler, more automatic procedure might be envisaged.

7. CONCLUSIONS

The two Regulations proposed are designed to simplify the lives of citizens in what are often difficult moments. They thus fulfil the undertakings made by the Commission in the report on European citizenship.

They will provide greater legal certainty for international couples, whether married or in a registered partnership. They will make it possible to identify the applicable law for the division of property and the relevant jurisdiction if a union comes to an end. The free movement of decisions will also be ensured by their automatic recognition throughout the Union, and there will be a uniform simplified procedure for having decisions enforced.

These two proposals, taken with the existing EU law and the instruments under negotiation, will complete the current legal framework and provide the necessary consistency for judicial cooperation in civil matters, particularly family law. Like the other measures in this area, the proposals will not affect the Member States' substantive law on matrimonial property regimes and the property consequences of registered partnerships. In accordance with the Treaties, substantive law remains a matter of national competence.