Opinion of the European Economic and Social Committee on the ‘Green Paper on applicable law and jurisdiction in divorce matters’

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On 14 March 2005 the European Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the Green Paper on applicable law and jurisdiction in divorce matters.

The Section for Employment, Social Affairs and Citizenship, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 5 September 2005. The rapporteur was Mr Retureau.

At its 420th plenary session, held on 28/29 September 2005 (meeting of 28 September), the European Economic and Social Committee adopted the following opinion by 161 votes to four with eight abstentions.

1. Commentary on the Commission’s proposal

1.1 The Commission has published a Green Paper to launch a consultation on jurisdiction, conflict of law and mutual recognition in international divorce matters. Its proposed scope of application would, however, be restricted to EU Member States (it should be noted that the Green Paper on Succession and wills adopts an approach that also includes persons and assets in third countries).

1.2 A number of international instruments are directly or indirectly relevant:

— The United Nations 1966 Covenant on economic, social and cultural rights and the European Conventions on human rights, recognising the freedom to marry and the requirement for full and free consent, the absence of which would render the marriage voidable.

— The 1970 Hague Convention on the recognition of divorces and legal separations. The following Member States are parties to the Convention: Cyprus, Denmark, Estonia, Finland, Latvia, Lithuania and Luxembourg.

— The Brussels II Regulation No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, which is not applicable in Denmark, and which replaces the aforementioned Hague Convention for all EU Member States except Denmark.

— The Concordats between the Vatican and Portugal, Spain, Malta and Italy respectively on canonical marriages, their dissolution, and the recognition of the decisions of the Vatican Tribunals (The Roman Rota’s jurisdiction over the annulment of canonical marriages — generally indissoluble for admissible grounds under canon law (1)).

— Bilateral agreements, for instance the agreement between Finland and Sweden, which will remain in force between these two countries. Some Member States have also entered into agreements on applicable law in family matters with third countries, especially with regard to the recognition of foreign marriages and divorces.

— The ‘opt in’ and ‘opt out’ protocols annexed to the Treaties, which exclude Denmark and grant the United Kingdom and Ireland the possibility to opt out of civil law legislation.

1.3 It would be pointless to deny the complexity of an issue that involves particularities specific to different religions and cultures that are deeply embedded in the collective consciousness but which have also undergone, as is the case for family law in general, profound changes over several decades. Nevertheless, within the European legal area and common area of freedom, and bearing in mind the free movement of persons, the European legislative authorities cannot ignore the fact that a significant percentage of marriages end in divorce, and that a growing number of them have an international character.

(1) It should be noted that, in December 2004, the Spanish parliament deliberated draft legislation amending national law on marriage and divorce. Although strongly opposed by the Church, same-sex marriages have recently been approved in Spain (already legal in a number of EU Member States). In France, a civil contract may be signed between two people who cannot marry legally: a PACS – civil solidarity pact – is registered by a court and is a kind of substitute for marriage. Whether it be regarded as an institution and/or contract, the marriage or quasi-marriage is still limited to two people of legal age and incest is still prohibited; it should be considered whether termination of a civil agreement such as the French PACS should be included in the draft legislation on divorce proposed by the Green Paper or whether it should merely be governed by law on contractual obligations.
1.4 Ongoing developments in national family law stem mainly from the principles of democracy (parliament’s right to enact laws), individual freedom and equality, and are matters of public policy at Community level and in all Member States. Thus there is a trend towards contractualisation in family law (same-sex marriages or civil contracts, divorce by consent, succession agreements, etc.).

1.5 These developments seem irreversible although their pace may vary. The cultural prevalence of religious ideas which may be deep rooted appears to affect the pace and substance of changes which may clash with ideas and rules that stem from long traditions, as well as with legal and social concepts and principles that reflect them.

1.6 At all events the Member States’ national laws vary considerably in divorce and legal separation matters and with regard to the conditions for annulling a marriage and the consequences arising therefrom; one Member State does not recognise divorce (Malta). For this reason, the Green Paper (wisely) does not propose to harmonise substantive law.

1.7 Instead it recommends that legislation in divorce matters with an international (European) dimension be developed in two directions:

— jurisdiction (establishing the court with jurisdiction and ensuring recognition of its decisions in all Member States);

— choice of law to be applied by the court of jurisdiction.

1.8 The provisions of the Brussels II Regulation on the choice of national jurisdiction and the mutual recognition of court decisions without exequatur are already applicable in divorce matters. The question is whether they suffice in their present form, and to what extent a State would be able to set domestic public policy provisions against the enforcement of a ruling delivered by a court of jurisdiction in another Member State applying different substantive law to that specific case (not necessarily its national ordinary law).

1.9 One major problem is the substantial differences between domestic rules on the admissibility of divorce applications with an international dimension. Cases might arise that were not admissible in any court in a given Member State. Such a situation would deprive the parties of their right of access to a court, which contravenes a fundamental right and is therefore unacceptable.

1.10 A rule on the attribution of jurisdiction is required to guarantee access to a court — but what form should it take?

1.11 The applicable law sometimes facilitates procedures, but it may also prolong and complicate them. It may impose restrictions on the grounds or conditions that may be invoked. If lex fori is to be the only applicable law then this could result in a ‘rush to court’. The initiating petitioner could choose the court and national law most favourable to his/her claim, while the other party might consider his/her rights to be vitiated by a system of law which did not necessarily satisfy his/her expectations if, for example, it had little or no connection with the matrimonial law or nationality of the spouses.

1.12 Should it be permissible to transfer the case to another jurisdiction if the respondent alleges that there are stronger or equally valid factors connecting the case with another court, or if there are few or no objective factors connecting the case with the court first petitioned and the substantive provisions it applies to such a case?

1.13 The transfer option should be allowed (but avoiding a case being referred back and forth between different jurisdictions) and should be decided within a reasonable timeframe (urgency/procedure) to prevent tactics designed to postpone an examination of the facts. The parties are entitled to a final decision within a reasonable period of time even in contentious divorce cases.

1.14 The national court will apply either its domestic common law or national rules of international private law. The question (not broached in the Green Paper) of applying the rules of a third State (the law of the spouses’ nationality for instance) is nevertheless important in cases where one or both spouses are third-country nationals — a common enough occurrence in the European Union.

1.15 The Committee welcomes the Green Paper’s guidelines for future work and would recommend preventing the transfer of legal proceedings to a third country if one of the spouses is a Member State national, irrespective of the law of the marriage contract.

1.16 In addition to the recognition of divorces, the question of recognising annulments and legal separation should also be considered. National systems of law differ regarding the conditions for annulments and their consequences (especially for putative marriages). Moreover, even where a national legal system does not provide for divorce, all Member States must recognise on their territory not just the validity of a divorce obtained in another Member State but also all the legal, property and status consequences thereof.
1.17 The Hague Convention criteria for attributing jurisdiction are in order of importance: the place of habitual residence (domicile in common law) of the petitioner, or the continuous residence of the petitioner for at least one year in the country where he/she institutes proceedings (2), the last place where the spouses habitually resided together prior to the institution of proceedings, and the nationality of either or both of the spouses.

1.18 Regulation 2201/2003 (8th Recital) provides that ‘As regards judgements on divorce, legal separation or marriage annulment, this Regulation should apply only to the dissolution of matrimonial ties and should not deal with issues such as the grounds for divorce, property consequences of the marriage or any other ancillary measures.’ Nevertheless, it cannot be denied that the financial and other consequences of divorce may vary according to which court has jurisdiction or which law applies, and that couples will be able to take this into account when they choose a court.

1.19 Furthermore, national courts’ final judgements should be automatically recognised throughout the European Union without the need for any further validation procedure or appeal against enforcement (3). The certificate issued to facilitate enforcement should not, therefore, be subject to appeal.

1.20 General jurisdiction lies with the territory (the Member State or part of the Member State in the case of the United Kingdom, where different rules apply in England and Wales, Scotland, Northern Ireland, and Gibraltar). The Regulation takes up the Hague criteria in practically the same order and adds a further criterion: in the event of a joint application, either of the spouses’ habitual places of residence. With regard to nationality, it should be the same for both spouses if the application is filed in the country of origin, irrespective of the actual place of residence or domicile of either spouse. The required length of residence is reduced to six months if the petitioner’s nationality is that of the State of residence.

1.21 With regard to residual jurisdiction, Article 7(2) provides that a petitioner who is a national of a Member State may file his/her petition in his/her Member State of residence in accordance with the rules of jurisdiction applicable in that State if his/her spouse is a national of a third State or does not have his/her habitual residence (domicile in common law) in a Member State. However, this could give rise to a positive conflict of jurisdiction with a court in a third country petitioned by the other spouse. Furthermore, if no Member State court was competent, but that of a third country was, and one or both of the ex-spouses were nationals of a Member State or had established their habitual residence there and wished to have the foreign judgement recognised by all the Member States or at the very least in their respective countries of nationality or residence, they would be subject in these countries to the law applicable to foreign judgements or the mutual recognition provisions of any international agreements; should Brussels II be reviewed in this respect for nationals of a Member State?

1.22 Thus the Community Regulation under consideration lays down criteria for attributing jurisdiction that are more numerous and explicit than the provisions of the Hague Convention, and the criteria set out in the Regulation should therefore form the basis for the criteria to be laid down in the specific regulation on divorce (e.g. reference to these provisions and to those on mutual recognition of judgements).

1.23 However, neither the Hague Convention nor the Brussels II Regulation lay down provisions for the law applicable to divorce; the Regulation’s scope of application is restricted to divorce, legal separation and annulment proper, and it does not address the grounds for dissolving a marriage or the consequences thereof. The latter remain within the scope of the applicable national law.

1.24 It should be noted, for instance, that approximately 15 % of applications for divorce, legal separation, or annulment in Germany have an international dimension. The number of divorces with a European dimension in the Member States is not known.

2. The Committee’s proposals and additional considerations

2.1 At present, the conflict-of-law rules applied are the national rules of the Member State of the court petitioned. As a result, the law applied in identical circumstances may differ considerably, depending on the country where proceedings have been instituted.

2.2 The Green Paper gives a number of well-chosen examples on this subject. Some of these examples concern jurisdiction — cases where negative conflicts and consequent denial of rights could arise — whereas others deal with the diversity of the approaches adopted. The outcome might fail to meet the expectations of either or both of the spouses. In any case, this leads to a certain degree of legal uncertainty and lack of predictability, and in some cases, could result in ‘forum shopping’ and ‘a rush to court’ due to the litis pendens rule of the Brussels II Regulation (the first forum before which a case is brought will have jurisdiction provided there is a connecting factor).

2.3 The problem arises mainly when the spouses share neither nationality nor residence, or if they have the same nationality but reside in States of which they are not nationals.
2.4 The Committee agrees that, in such situations, the parties should be granted a degree of latitude in choosing the applicable law. Alternatively, respondents should be allowed to invoke their expectations regarding applicable law or request that the case be transferred to another jurisdiction that has the most objective links with the marriage. Where the petitioner chooses a jurisdiction and the ordinary national law that it applies, and where the defendant chooses another competent jurisdiction or another applicable law, the preliminary ruling on jurisdiction or relevant law should be given by the court of first instance before which the petitioner first brought the proceedings and be dealt with as a matter of urgency.

2.5 In cases where the only connecting factor is the nationality of one of the parties, the regulation requires jurisdiction to be assigned to the courts of the country of habitual residence, where the applicable law might not, however, correspond to the parties’ shared expectations (for instance, they might wish to apply the law of a country which has closer links with the marriage).

2.6 The parties’ freedom of choice should therefore play a role, and the rules should not be based exclusively on mechanical application of connecting factors. For instance, a choice between the law of nationality and the lex fori could be allowed, but without the right of transfer.

2.7 Regarding canonical annulments granted by ecclesiastical courts, some Member States have declared that they submit such decisions for recognition to their civil courts on the basis of a concordat or convention with the Holy See (Italy, Portugal, Spain, Malta). Canonical annulments could come into conflict with the domestic laws of other Member States because these countries do not recognise the canonical grounds for annulment, or for procedural reasons.

2.8 Where such annulments come into procedural or substantive conflict with domestic public policy or with the European Convention on the Protection of Human Rights and Fundamental Freedoms, the State where proceedings have been instituted must refuse exequatur or recognition of the ecclesiastical decision. The petitioner should then be able to institute standard civil annulment, separation or divorce proceedings. Otherwise, the only remedy available would be to appeal to the European Court of Human Rights in Strasbourg, which would unduly prolong procedures.

2.9 Although the number of cases of negative conflict of jurisdiction may be relatively low, the Committee considers that a Community initiative is justified if such instances would result in the violation of a fundamental right, i.e. the right of access to a court with jurisdiction to grant and settle divorce, legal separation or annulment.

2.10 This should therefore lead to an acknowledgement of the need to harmonise rules on conflict of law and jurisdiction in order to prevent such denial of a right.

2.11 However, these rules should include a public policy reservation with regard to the recognition or exequatur of a court judgement with a European interest delivered in a third country if that judgement adversely affects a fundamental right of one of the parties recognised under European law or breaches other imperative provisions of domestic public policy that the court is automatically bound to invoke.

2.12 Nor should Community law require all Member States to recognise a divorce, annulment or legal separation granted in a third country and concerning residents of the Union who do not have the nationality of a Member State without prior exequatur procedure if another Member State has already accepted such a judgement on the basis of a bilateral agreement with that third country.

2.13 The Committee believes that prorogation of jurisdiction should be allowed in cases of joint petitions for divorce, provided that there is a link with the court of choice. A notarial act could be required for the joint application for prorogation.

2.14 The Committee considers that a comparative country-by-country study should be carried out into the actual consequences of divorce, as regards parental rights, custody of minors and assets; these factors should not be overlooked if there is a possibility of a ‘ rush to court ’. In any case, it would be difficult to do as the Green Paper does and address the issue of divorce without any consideration of the family and property consequences thereof, which can differ from one country to another depending on the applicable law or the prevailing case law of national courts (e.g. in the area of custody and parental responsibility).

2.15 However, this does not mean that procedural difficulties should be overcome and preliminary rulings on jurisdiction and relevant law should be given by the court of the Italian Court’s ruling enforcing the decision delivered by the court of the Roman Rota on appeal on the grounds that the latter had violated the right to adversarial proceedings.

(1) Poland has not reported its concordat with the Vatican.
(2) See the European Court of Human Rights, Application No 30882/96, (20 July 2001) Pellegrini v. Italy: the ECHR overturned the Italian Court’s ruling enforcing the decision delivered by the court of the Roman Rota on appeal on the grounds that the latter had violated the right to adversarial proceedings.

2.15 If they have not already done so, the Member States should be asked to consider all available opportunities for introducing alternative methods of conflict resolution, such as mediation (7), in the area of divorce, separation and annulment with a European dimension. This would facilitate access to justice, and would help shorten the proceedings for the parties involved.

2.16 The Committee is keeping an open mind on an issue that is important for citizens and their mobility; it will follow the result of the consultations undertaken by the Commission and any more specific proposals for regulations that may emerge afterwards; a revamp of the New Regulation Brussels II or a specific divorce regulation are possibilities. The Committee would also like to know more precisely, broken down by country, the number of applications for divorce with a Community dimension, the number of cases of negative conflicts of jurisdiction and other relevant information. In this way it will be able to examine more thoroughly the problems surrounding any future proposals for legislation on the competence and applicable law in divorce matters.


The President
of the European Economic and Social Committee
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