

Opinion of the European Economic and Social Committee on the Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters

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On 20 September 2006 the Council decided, in accordance with Article 262 of the Treaty establishing the European Community, to consult the European Economic and Social Committee on the abovementioned proposal.

The Section for Employment, Social Affairs and Citizenship, which was asked to prepare the Committee's work on the matter, adopted its opinion on 7 November 2006 (rapporteur working alone: Mr Retureau).

At its 431st plenary session of 13 and 14 December 2006 (meeting of 13 December), the European Economic and Social Committee adopted the following opinion by 108 votes to two, with one abstention.

1. Summary of the opinion

1.1 The Committee, consulted on the first initiative, basically approves the extension, through amendments, of the questions of jurisdiction and law applicable to Regulation No 2201/2003, thereby supplementing on these points a regulation which dealt with the recognition of legal decisions on matrimonial and childcare matters. It has already expressed its views — at the time of the Green Paper on Divorce — on legal jurisdiction and applicable law, and would refer to this highly detailed opinion (¹).

1.2 However, it wonders whether it is advisable to deal separately with the issue of distribution of jointly-held assets (buildings, furniture and other property rights), by widening the scope *rationae personae* of this distribution to unmarried couples (which may also have children in common).

1.3 Perhaps it would have been more logical to deal, on the one hand, with all the consequences of the dissolution of a marriage and of the custody of children in common in a complete Regulation No 2201/2003 and, on the other hand, with all the consequences of the separation of an unmarried couple living under a contractual or *de facto* arrangement in a new regulation. That would doubtless have improved clarity and understanding of applicable law and made it easier to accept the legal decisions which often regulate all the conditions and consequences of a divorce or separation in a single, final judgment.

2. Commission proposals

2.1 Two initiatives by the Commission concerning applicable law in matrimonial matters have just been submitted to the Council; one concerns the separation of married couples and proposes amendments to Regulation No 2201/2003, which came into force on 1 January 2005, while the other concerns the distribution of jointly-held assets, whether these be from the liquidation of a marriage settlement or a separation either of couples governed by a contract other than marriage or of *de facto* couples.

2.2 The legal basis of the proposal is Article 61(c) of the Treaty, which gives the Community powers to adopt measures

concerning legal cooperation in civil matters, as referred to in Article 65.

2.3 Speaking about these two initiatives, Commissioner Fratini declared: 'These initiatives will simplify life for couples in the EU They will increase legal certainty and enable couples to know which law will apply to their matrimonial property regime and their divorce. The aim is not to harmonise the national laws on divorce, which are very diverse, but to ensure legal certainty, flexibility and access to court'.

2.4 Because of the high divorce rate in the European Union, a considerable number of citizens each year are concerned by the issue of applicable law and jurisdiction in matrimonial matters.

2.5 The entry into force of Council Regulation (EC) No 2201/2003, which repealed and replaced Council Regulation (EC) No 1347/2000 from 1 March 2005, did not, however, include rules on applicable law. Council Regulation (EC) No 2201/2003 allows spouses to choose between several alternative grounds of jurisdiction. Once a matrimonial proceeding is brought before the courts of a Member State, the applicable law is determined on the basis of the national conflict-of-law rules of that State, which are based on very different criteria. The majority of Member States determine the applicable law on the basis of a scale of connecting factors that seek to ensure that the proceeding is governed by the legal order with which it has the closest connection. Other Member States apply systematically their domestic laws (*lex fori*) to matrimonial proceedings. Belgium allows spouses to choose between Belgian law and the law governing the foreign marriage.

3. General comments

3.1 The initiative examined in this opinion concerns the law applicable to divorce, legal separation or the annulment of an 'international' marriage (where couples are of different nationalities or of the same nationality but residing in a Member State other than their own), and to the custody of their joint minor children. It therefore concerns issues relating to the dissolution of the bond of marriage between spouses when an extraneous element is present, without exceeding the scope *rationae materiae* of Regulation No 2201/2003.

(¹) EESC opinion of 29.9.2005 on the Green Paper on applicable law and jurisdiction in divorce matters, rapporteur: Mr Retureau (O) C 24 of 31.1.2006).

3.2 The EESC recognises that the proposal will guarantee citizens suitable solutions as regards legal certainty, predictability, flexibility and access to court. It is in accordance with the legal basis which is regularly applied to issues of civil and commercial law.

3.3 Certain national laws do not require the spouses to be of different sexes, unlike a majority of national legislations, but the EESC notes that the aim of the amended regulation is not to harmonise national laws but to determine the applicable law in all actual cases comprising an extraneous element and to enable the circulation of judgments without *exequatur*. So, even fundamental differences between national laws do not, in principle, prevent the application of the amended regulation proposed by the Commission.

3.4 The EESC has already issued an opinion on the law applicable to divorce on the occasion of the recent divorce Green Paper, and therefore refers primarily to this opinion to express its views on the present proposal. It would again stress the importance of the above-mentioned regulation for multinational couples, because it clarifies and simplifies the conditions of access to a judge and the free circulation of legal decisions in the internal market.

3.5 The EESC would point out that the proposal admits that two distinct situations arise depending on whether spouses agree or disagree as regards jurisdiction and applicable law, and that the amended regulation would grant major advantages and greater flexibility in the first case, but apply a rather mechanical model in the second. This differs from the situations envisaged by the Green Paper on divorce, which proposed more flexible solutions in the event of a disagreement between spouses. The EESC would have liked this flexibility concept to be maintained, although it recognises that the Commission proposal is simpler and prevents any lengthening of procedures.

3.6 The proposal allows the extension of jurisdiction if the plaintiffs agree on this point. It completely rules out the procedure of transfer, which the EESC could accept under certain conditions (jurisdiction of the first court petitioned to rule on the transfer, urgency of judgment), as it said in its opinion on the divorce Green Paper.

3.7 As regards the public policy exception, the proposal allows a judge, in exceptional cases, to refuse to recognise a foreign legal decision if it is manifestly contrary to the public policy of the forum. However, differences could occur between Member States, and a judgment recognised in one country may not be recognised in another, thus preventing freedom of circulation of the legal decision and creating an inappropriate obstacle.

3.8 The EESC feels that, as regards the recognition of judgments that may originate from non-EU countries in particular, it may well be worth specifying that judgments which seek to be recognised are obliged to comply with the European Convention for the Protection of Human Rights and Fundamental Freedoms, and with the Charter adopted in 2000 by the Nice Council, as well as with the principle of strict legal equality between spouses. Any state petitioned with a request for recognition and noting obvious divergences from the fundamental rights of the European Union should oppose circulation of the judgment on the grounds of 'exception for reasons of Community public policy'.

3.9 In order to guarantee uniform recognition throughout the Member States, no exception for reasons of national public policy should be allowed against another country; only an exception for reasons of Community public policy could be permitted. That would avoid any feeling of arbitrary treatment arising as regards a refusal of recognition from a given forum.

4. Specific comments

4.1 The fact that the Commission is presenting two separate initiatives is a consequence of the difference in the scope *rationae personae* of each of the proposals. The proposal on the distribution of assets concerns all couples, whether married or not.

4.2 However, one may well wonder why such a distinction has been proposed; the liquidation of a marriage calls for specific solutions depending on the nature of the rules governing it (legal rules in the absence of a marriage contract, or legal contractual arrangements) and of any gifts between spouses which may be covered by specific provisions compared with other gifts, particularly as regards inheritance.

4.3 Perhaps it would have been more logical to deal with all the consequences, including the financial ones, of a dissolution of a marriage and the custody of joint children in an expanded Regulation No 2201/2003 and draw up a new regulation to deal with all the consequences of the separation of couples who are not married, possibly of the same sex, and who live under a legal contractual arrangement (like the PACS in France) or a *de facto* arrangement (e.g. as a concubine).

4.4 That would undoubtedly have made the applicable law clearer and more understandable and made it easier to recognise the legal decisions which often regulate all the conditions and consequences of divorce or separation in a single judgment, especially as the situation of the children of 'non-typical' couples — and not just that of their assets — also has to be resolved.

Brussels, 13 December 2006.

The President
of the European Economic and Social Committee
Dimitris DIMITRIADIS