

Opinion of the European Economic and Social Committee on the 'Proposal for a Council regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation'

COM(2010) 105 final/2 — 2010/0067 (CNS)
(2011/C 44/29)

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On 29 April 2010, the Council decided to consult the European Economic and Social Committee, under Article 304 of the Treaty on the Functioning of the European Union (TFEU), on the

Proposal for a Council regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation

COM(2010) 105 final/2 — 2010/0067(CNS).

The Section for Employment, Social Affairs and Citizenship, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 16 June 2010.

At its 464th plenary session, held on 14 and 15 July 2010 (meeting of 14 July 2010), the European Economic and Social Committee adopted the following opinion by 134 votes to one, with six abstentions.

1. Recommendations

1.1 The legal basis is Article 81(3) of the Treaty on the Functioning of the European Union which confers upon the Council the competence to adopt measures in the field of family law with cross-border implications; the proposal complies with the foreign element stipulated by the treaties.

1.2 The Committee notes with interest the possibility opened up by this proposal for a regulation to implement the enhanced cooperation procedure ⁽¹⁾ provided for by Articles 326 et seq. of Title III of the Treaty on the Functioning of the European Union in an area that is neither straightforward nor easy, that of law. It hopes that in future, the use of enhanced cooperation, also in other areas, will enable obstacles and difficulties to be overcome so as to move forward in fields or issues which cannot achieve unanimity at the time, but on which a given number of Member States wish to deepen their cooperation.

1.3 The Committee endorses the Commission's observation that the principles of subsidiarity and proportionality are complied with in the proposed regulation, which would be applicable by the requesting Member States following its adoption. The initiative is in line with the Charter of Fundamental Rights and Member States' international commitments on human rights.

1.4 The proposed solutions are designed to prevent a rush to the court having jurisdiction by one of the spouses and to meet their legitimate expectations as regards the applicable law, in principle, that of their habitual residence at the time of filing for legal separation or divorce. Marriage annulment proceedings are

not covered by the proposed regulation, and all other issues are governed by existing Community law on matrimonial matters and matters of parental responsibility for the children of both spouses.

1.5 The Committee also notes that the proposed regulation has no impact on the substantive law of the Member States.

1.6 Lastly, it endorses a proposal which would offer a quicker resolution to divorce or legal separation procedures between residents of countries which have joined this cooperation, thus contributing to the free movement of persons and of judgments that have acquired the force of *res judicata*.

2. Commission proposal

2.1 Rules on the law applicable to divorce and legal separation are not yet part of Community law on matrimonial matters. The first Community instrument adopted in the area of family law, Council Regulation (EC) No 1347/2000, set out rules on jurisdiction, recognition and enforcement of judgments in matrimonial matters as well as judgments on parental responsibility for children of both spouses given in the context of a matrimonial proceeding. It did not, however, include rules on applicable law.

2.2 The entry into force of Council Regulation (EC) No 2201/2003, which repealed and replaced Council Regulation (EC) No 1347/2000 as of 1 March 2005, did not entail any change in this respect.

⁽¹⁾ OJ C 83/189, 30.3.2010.

2.3 However, 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 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.

2.4 The failure by Member States in recent years to reach a unanimous agreement on solutions regarding applicable law and conflict-of-law rules with regard to divorce and legal separation, and the fact that there does not seem to be any prospect of a solution in the near future, has prompted several Member States to propose enhanced cooperation between themselves to this end, pending a final agreement on this matter, which requires unanimity within the Council. Thus, ten Member States addressed a request to the Commission indicating that they wished to establish enhanced cooperation between themselves in the area of applicable law in matrimonial matters and asking the Commission to submit a proposal to the Council to that effect. On 3 March 2010, Greece withdrew its request⁽²⁾. However, other Member States are considering joining the enhanced cooperation. To date, fourteen Member States have expressed an interest.

2.5 Noting that the proposal for enhanced cooperation did not call into question existing Community law, the Commission drew up a proposal for a regulation, pointing out that the initial ten Member States' initiative constituted a step forward vis-à-vis its own proposal to amend Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters of 17 July 2006 (COM(2006) 399 final), which is still before the Council and has not been adopted. The impact assessment carried out at the time remains valid, and another assessment is not necessary.

2.6 In accordance with Article 329(1) of the Treaty on the Functioning of the European Union, on 4 June 2010 European justice ministers authorised by a qualified majority the Commission proposal to establish enhanced cooperation with some of them on divorce and legal separation. The European Parliament gave its assent a few days later (on 16 June 2010). It only remains now to await the formal adoption by the Council of the EU of the decision authorising enhanced cooperation.

2.7 Concerning the regulation implementing enhanced cooperation, the ministers approved a general approach to the key elements and requested that issues pending be examined afresh. The Council of the EU, acting on the basis of Article 81(3) of

the Treaty on the Functioning of the European Union, must approve this regulation unanimously⁽³⁾.

3. The Committee's comments

3.1 The Committee has already stated on several occasions that European citizens must be able to have final court decisions that have acquired force of *res judicata* with regard to them in one Member State recognised in another Member State without being obliged to use an enforcement procedure.

3.2 In the area of civil and in particular matrimonial law, the Committee had adopted an opinion on the Green Paper on divorce⁽⁴⁾ which in fact served as inspiration for the draft regulation which is still blocked in the Council and endorsed the measures proposed in the field of mutual recognition of judgments, conflicts of legislation and jurisdiction in applicable law.

3.3 At the time, it had warned the Commission about the possible contradictions between the applicability of foreign law, in particular of certain third countries, and provisions in this law which could run counter to Community public policy or the laws of the court (unequal treatment of men and women, custody systematically awarded to one of the spouses on the basis of their gender, etc.). The Committee is therefore pleased that a public policy exception clause will exclude any provisions of an applicable foreign law which, for example, might go against the EU Charter of Fundamental Rights, which is now part of primary law (with the same legal value as the treaties). Member States will invoke the international public policy of their domestic court to bring an exception to a third-country law which violates it.

3.4 The Committee again endorses the solutions selected to determine the competent court, in principle that of the last joint habitual residence of the spouses⁽⁵⁾. This is intended to avert the possibility of either spouse rushing to court if there were different criteria for determining the competent court. However, the applicable law could be the one closest to the law on marriage, according to cumulative criteria, a law which the weaker spouse would be entitled to expect, and not necessarily that of the court as is currently the case in some Member States. The applicable law can also be chosen by joint agreement between the spouses insofar as there are objective connecting factors.

⁽²⁾ The countries proposing enhanced cooperation: Austria, Belgium, Bulgaria, Spain, France, Germany, Hungary, Italy, Latvia, Luxembourg, Malta, Portugal, Romania and Slovenia.

⁽³⁾ Article 81(3) stipulates that measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament. Measures implementing enhanced cooperation in this area must be adopted according to the rules laid down in this article.

⁽⁴⁾ See OJ C 24, 31.1.2006, p. 20.

⁽⁵⁾ Subject to some minimum length of residence (generally one month or one year) at the date when the procedure opens.

3.5 This would provide greater certainty and security in an area often characterised by conflict, whether divorce or separation (often the preliminary step towards divorce proceedings). The other rules applicable to matrimonial matters are the same as set out in Regulation (EC) No 2201/2003, in force in all Member States.

3.6 The Committee therefore endorses and supports the draft regulation, and hopes that the enhanced cooperation procedure,

which is being used for the first time and which could have been used since the Treaty of Amsterdam came into effect in 1999, will finally become part of the body of usual procedures, allowing Europe to move forward in areas requiring unanimity but where unanimity is not to be expected quickly. This will avoid any bottlenecks or delays in the adoption of common legislation or measures and enable countries wishing to do so to cooperate more closely, despite the absence of unanimity or a quorum.

Brussels, 14 July 2010.

The President
of the European Economic and Social Committee
Mario SEPI
