

Enhanced cooperation in the area of the law applicable to divorce and legal separation. Implementing rules. Council Regulation

2010/0067(CNS) - 24/03/2010 - Legislative proposal

PURPOSE: to implement enhanced cooperation in the area of the law applicable to divorce and legal separation.

PROPOSED ACT: Council Regulation.

BACKGROUND: for the progressive establishment of an area of freedom, security and justice, the Union is to adopt measures relating to judicial cooperation in civil matters with cross-border implications.

On 14 March 2005, the Commission adopted a Green paper on applicable law and jurisdiction in divorce matters. On 17 July 2006, the Commission adopted a [proposal for a Council Regulation amending Regulation \(EC\) No 2201/2003](#) as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters. In June 2008, the Council adopted political guidelines which recorded that there was no unanimity to go ahead with the proposed Regulation and insurmountable difficulties existed, making unanimity impossible at the time and in the foreseeable future.

In 2008 and 2009, 10 Member States – Bulgaria, Greece, Spain, France, Italy, Luxembourg, Hungary, Austria, Romania and Slovenia - addressed a request to the Commission indicating that they intended to establish enhanced cooperation between themselves in the area of applicable law in matrimonial matters and that the Commission should submit a proposal to the Council to that end. On 3 March 2010, Greece withdrew its request.

The [proposal for a Council Decision](#) would authorise enhanced cooperation in the area of the last applicable to divorce and legal separation, and the proposal for a Council Regulation implementing this enhanced cooperation, that the Commission adopted simultaneously, represent the Commission's response to the **nine Member States**.

IMPACT ASSESSMENT: the Commission carried out an [impact assessment](#) which it attached to its original July 2006 proposal which remains relevant to the question of the applicable law. The present Commission proposal implements enhanced cooperation – a procedure that may be used only as a last resort, according to the Treaty on European Union. Thus, the Commission may propose enhanced cooperation, and the Council may give its agreement, only on matters which the Council has already dealt with and on which it has concluded that no other solution can be found. Moreover, the content of the Commission's proposal implementing enhanced cooperation is limited by the scope specified in the participating Member States' requests for enhanced cooperation, i.e. applicable law in matrimonial matters. In the present case, a new impact assessment covering the same subject area does not therefore appear appropriate.

LEGAL BASE: **Article 81(3) of the Treaty on the Functioning of the European Union (TFEU)**. The objectives of the proposal can be met only at Union level by way of common rules governing applicable law, if necessary through enhanced cooperation. These conflict rules must be identical if the proposal's objective of increasing legal certainty, predictability and flexibility for citizens is to be attained. One-sided action by the Member States would therefore run counter to these objectives. There is no international convention in force between the Member States on the question of applicable law in matrimonial matters.

Given the nature and the scale of the problem which concerns tens of thousands of citizens each year, the objectives can be achieved only at Union level.

CONTENT: the proposed Regulation should create a clear, comprehensive legal framework in the area of the law applicable to divorce and legal separation in the participating Member States, provide citizens with appropriate outcomes in terms of legal certainty, predictability and flexibility, and prevent a situation from arising where one of the spouses applies for divorce before the other one does in order to ensure that the proceeding is governed by a given law which he or she considers more favourable to his or her own interests.

The main objectives of the proposal are as follows:

- **strengthening legal certainty and predictability:** the great differences between and the complexity of national conflict-of-law rules make it very difficult for international couples to predict which law will apply to their divorce or legal separation proceeding. Having due regard to the relevant parts of the explanatory memorandum to the Commission's proposal for a Regulation of 17 July 2006 (Rome III), the purpose of this proposal for a Regulation is to introduce a clear legal framework in the European Union, covering applicable law rules in the area of divorce and legal separation and allowing the parties a degree of freedom of choice of applicable law. The enhanced cooperation measure concerns only applicable law and not jurisdiction, unlike in the Commission's initial proposal;
- **increasing flexibility by introducing some party autonomy:** the proposal renders the legal framework more flexible by introducing a limited possibility for the spouses to choose another law as the law applicable to their divorce or legal separation proceeding. To avoid the application of laws with which they have little or no connection, the spouses' choice is confined to laws with which the marriage has a close link. Special safeguards are introduced to ensure that the spouses are aware of the consequences of their choice and to protect the weaker spouse;
- **preventing a 'rush to court' by one spouse:** the proposal addresses the problem of a 'rush to court' by one spouse, i.e. where one of the spouses applies for divorce before the other one does in order to ensure that the proceeding is governed by a given law which he or she regards as more favourable to his or her own interests. This may lead to the application of a law with which the other spouse has little connection or which fails to take into account his or her interests. The introduction of harmonised conflict-of-law rules should greatly reduce the risk of a rush to court, since any court seized in one of the participating Member States would apply the law designated on the basis of common rules. In the absence of choice, the applicable law would be determined on the basis of a scale of connecting factors giving priority to the law of the spouses' habitual residence, which will ensure that the divorce or legal separation proceeding is governed by a legal system with which the couple has a close connection.

The rule on the law applicable in the absence of choice is intended to protect the weaker spouse by giving priority to the application of the law of the family's habitual residence prior to separation, irrespective of the court seized by one or other spouse. It would therefore enable spouses easily to predict which law will apply to their divorce or legal separation proceeding.

BUDGETARY IMPACT: the proposal has no impact on the budget of the European Union.