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

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The Committee on Legal Affairs adopted, under the consultation procedure, the report drawn up by Tadeusz ZWIEFKA (EPP, PL) amending the proposal for a Council regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation. The main amendments are as follows:

Exclusion from the scope: Members clarified that the Regulation shall not apply to the following matters, even if they arise merely as a preliminary question within the context of divorce or legal separation proceedings: (a) the legal capacity of natural persons; (b) the existence, validity or recognition of a marriage; (c) the annulment of a marriage; d) the name of the spouses; (e) the property consequences of the marriage; f) parental responsibility; g) maintenance obligations; (h) trusts or successions.

The report notes that the Regulation should apply only to the dissolution or loosening of marriage ties. The law determined by the conflict-of-law rules of the Regulation should apply to the grounds for divorce and legal separation. Preliminary questions on issues such as legal capacity and others matters referred to above or any other ancillary measures, should be determined by the conflict-of-law rules applicable in the participating Member State concerned.

Relationship with Regulation (EC) No 2201/2003: it is clarified that the Regulation shall not affect the application of Regulation (EC) No 2201/2003.

Definition of "court": the term "court" shall cover all authorities in the participating Member State shaving jurisdiction in the matters falling within the scope of the Regulation.

Universal application: the Regulation should be universal, in the sense that its uniform conflict-of-law rules may designate the law of a participating Member State, the law of a non-participating Member State or the law of a State which is not a member of the European Union.

Choice of law applicable by the parties: the spouses may agree to designate the law applicable to divorce and legal separation, provided that it is one of the laws prescribed in the text. A new recital notes that where the Regulation refers to nationality as a connecting factor for the application of the law of a State, the question of how to deal with cases of multiple nationality should be determined in accordance with national law, in full observance of the general principles of the European Union.

With regard to consent and material validity, the text states that the existence and validity of an agreement on choice of law or of any term thereof shall be determined by the law which would govern it under this Regulation if the agreement or term were valid. Nevertheless, a spouse, in order to establish that he or she did not consent, may rely on the law of the country in which he or she has his or her habitual residence at the time the court is seised if it appears from the circumstances that it would not be reasonable to determine the effect of his or her conduct in accordance with the law specified in the text.

A new provision on formal validity specifies that the agreement shall be expressed in writing, dated and signed by both spouses. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing. However, if the law of the participating Member State in

which the spouses have their habitual residence at the time the agreement is concluded lays down additional formal requirements for agreements of that type, those requirements shall apply. If the spouses are habitually resident in different participating Member States at the time the agreement is concluded and the laws of those States lay down different formal requirements, the agreement shall be formally valid if it satisfies the requirements of either of those laws. If only one of the spouses is habitually resident in a participating Member State at the time the agreement is concluded and that State lays down additional formal requirements for agreements of that type, those requirements shall apply.

Conversion of legal separation into divorce: Members state that where the court is seised of an application to convert a legal separation into divorce and the parties have not made any choice as to the law applicable, the law which applied to the legal separation should also apply to the divorce. Such continuity would promote predictability for the parties and increase legal certainty. If the law applied to the legal separation does not provide for the conversion of legal separation into divorce, the divorce should be governed by the conflict-of-law rules which apply in the absence of a choice by the parties. This should not prevent the spouses from seeking divorce on the basis of other rules laid down in this Regulation.

Differences in national law: it is specified that nothing in the Regulation shall oblige the courts of a participating Member State whose law does not provide for divorce, or does not deem the marriage in question valid for the purposes of divorce proceedings, to pronounce a decree of divorce by virtue of the application of the Regulation.

States with two or more legal systems: in the absence of rules designating the applicable law, spouses choosing the law of the State of the nationality of one of them should at the same time indicate, where the State whose law is chosen comprises several territorial units each of which has its own system of law or a set of rules in respect of divorce, which territorial unit's law they have agreed upon.

Mediation: lastly, a recital notes that if the spouses are unable to agree on the applicable law, they should complete a mediation procedure including at least one consultation with an authorised mediator.