Civil judicial cooperation: jurisdiction, recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility

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The Council discussed certain important issues concerning this proposal, in particular the rules regarding the choice of court by the parties, the choice of applicable law, the rules applicable in the absence of choice of law, the respect for the laws and traditions in the area of family law and the question of multiple nationality.

A very large majority of delegations agreed on the guidelines proposed by the Presidency according to which the Regulation should contain a rule on a limited choice of court for divorce and legal separation by the spouses and on conflict-of-law rules. In this regard, the Regulation should contain, firstly, a rule giving spouses a limited possibility of choice of law for divorce and legal separation and, secondly, a rule applicable in the absence of choice.

The Council took note of the position of two delegations that recalled that, in the absence of choice of law by the parties, the court seized should apply lex fori. However, such delegations underlined that they are prepared to continue the negotiations on this instrument.

The Council recognised that the draft Regulation should not imply modifications of the substantive family law of the Member States with respect to divorce or legal separation. One delegation underlined however that the respect of the national legal order should not jeopardise the coherent application of Community law.

The Council gave a mandate to continue work on the draft Regulation on the basis of the following guidelines:

Choice of court by the parties (Article 3a): Regulation No 2201/2003 ("Brussels IIa-Regulation") provides for a number of alternative grounds for jurisdiction, but does not give spouses the possibility to conclude a choice of court agreement. According to the Commission proposal, such choice of court agreement should be possible for divorce and legal separation. However, spouses may only choose a court of a Member State with which they have a close connection. Most delegations supported in principle the possibility for such limited choice of court by the spouses. In this context, the Presidency suggests that the spouses should be able to choose any court which has jurisdiction already under the general rules of the Brussels IIa Regulation as well as the courts of a Member State of which one of them is a national, or where the spouses had their last habitual residence within a certain time period before the court is seised. Questions such as the moment in time when these conditions must be satisfied need further discussion. The Presidency believes that the rule on choice of court by the parties has also to take into account the interests of a weaker spouse.

Choice of the applicable law by the parties (Article 20a): according to the Commission proposal, spouses may, to a limited extent, designate the law applicable to divorce or legal separation by agreement. During the negotiations, most delegations could in principle support the idea of giving the spouses a limited possibility to choose the applicable law to their divorce or legal separation. However, spouses may only choose a law of a State with which they have a close connection. In this context, the Presidency

suggests that the spouses should be able to choose the law of the State where they have their habitual residence, or where they had their last habitual residence insofar as one of them still resides there, or the law of the State of which one of the spouses is a national or the law of the forum. Questions such as until what moment in time the choice can be made need further discussion. Such a rule on the choice of the applicable law should take into account the interests of both spouses and ensure the protection of a weaker spouse.

Rules applicable in the absence of choice of law (Article 20b): during the negotiations, many delegations supported the idea of harmonising the conflict-of- law rules in the absence of a choice of law. However, some delegations expressed doubts or opposition to this idea. The Presidency considers that, with a view to reaching the proposed objective, it is necessary to provide for a conflict-of-laws rule applicable in the absence of a choice of law by the parties. Several proposals are on the table on this issue none of which is yet acceptable to all delegations. The Presidency believes that it is necessary to find a balanced overall solution on this issue. Future work will examine whether it would not be necessary to expressly indicate that lex fori shall apply where the foreign divorce law would discriminate against one of the spouses or where the foreign law does not provide for divorce.

Respect for the laws and traditions of the Member State in the area of family law: the proposal does not establish the legal institution of divorce in a Member State which does not have such an institution nor does it oblige a Member State to introduce divorce in its national law. Moreover, nothing in the proposal obliges the courts of a Member State whose law does not provide for divorce to pronounce a divorce by the application of the conflict-of- laws rules of the proposal. Therefore, the Presidency suggests that this should be clearly stated in the text of this instrument. The Presidency suggests that it should be stated clearly in the text that the proposal does not determine the law applicable to a marriage. The definition of marriage and the conditions of the validity of a marriage are matters of substantive law and are therefore left to national law.

Multiple nationality: one of the connecting factors used in the proposal is the nationality of the spouses. However, the proposal does not take any position as to the question how to deal with the fact that a spouse may have more than one nationality. The Presidency considers that this question should be addressed and suggests that work be continued to draft an appropriate recital on cases of multiple nationality.