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Committee on Legal Affairs

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DRAFT RECOMMENDATION

on a proposal for a Council decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation
(COM(2010)0104 – C7-xxxxxx – 2010/0066(NLE))

Committee on Legal Affairs

Rapporteur: Tadeusz Zwiefka

Symbols for procedures

- * Consultation procedure
- *** Consent procedure
- ***I Ordinary legislative procedure (first reading)
- ***II Ordinary legislative procedure (second reading)
- ***III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the proposal for a Council decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation (COM(2010)0104 – C7-xxxxxx – 2010/0066(NLE))

(Consent)

The European Parliament,

- having regard to the proposal for a Council decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation (COM(2010)0104),
 - having regard to the request for consent submitted by the Council pursuant to Article 329(1) of the TFEU (C7-xxxxxx),
 - having regard to Rules 74g and 81(1) of its Rules of Procedure,
 - having regard to the recommendation of the Committee on Legal Affairs (A7-0000/2010),
- A. whereas on 17 July 2006 the European 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 ("Rome III") (COM(2006) 399);
- B. whereas that proposal was based on Articles 61(c) and 67(1) of the EC Treaty, which required a unanimous vote in the Council;
- C. whereas on 21 October 2008 Parliament, acting under the consultation procedure, approved the Commission proposal as amended (P6_TA(2008)0502);
- D. whereas, already by mid-2008, it had become clear that some Member States had specific problems which made it impossible for them to accept the proposed regulation; whereas, in particular, one Member State was unable to accept that its courts might have to apply foreign divorce law, which it regarded as more restrictive than its own divorce law, and wished to continue applying its own substantive law to any divorce requested in its courts; whereas, in contrast, a large majority of Member States considered that rules on applicable law were an essential element of the proposed regulation and that such rules would in some cases entail courts' applying foreign law;
- E. whereas, at its meeting on 5 and 6 June 2008, the Council concluded that "there was no unanimity to go ahead with the proposed Regulation and that insurmountable difficulties existed, making a decision requiring unanimity impossible now and in the foreseeable future" and that "the objectives of the proposed Regulation could not be attained within a reasonable period by applying the relevant provisions of the Treaties";
- F. whereas, according to Article 20 TEU, a minimum of nine Member States may establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences, while using its institutions and exercising those competences by

applying the provisions of the Treaties, subject to the limits and in accordance with the arrangements laid down in that article and in Articles 326-334 TFEU;

- G. whereas, to date, twelve Member States¹ have indicated their intention to establish enhanced cooperation between themselves in the area of the applicable law in matrimonial matters;
- H. whereas Parliament has verified compliance with Article 20 TEU and Articles 236-334 TFEU;
- I. whereas, in particular, this enhanced cooperation may be regarded as enhancing the Union's objectives, protecting its interests and reinforcing its integration process within the meaning of Article 20 TEU, in the light of the Commission's extensive consultation of stakeholders as part of its impact assessment in connection with its Green Paper (COM(2000) 82), the large number of "international" marriages and the approximately 140 000 divorces with an international element in the Union in 2007, bearing in mind that two of the countries intending to participate in the enhanced cooperation, Germany and France, had the highest share in new "international" divorces in that year;
- J. whereas harmonisation of conflict-of-law rules will facilitate the mutual recognition of judgments in the area of freedom, security and justice in that it will reinforce mutual trust; whereas at present 26 different sets of conflicts rules as regards divorce exist in the Member States participating in judicial cooperation in civil matters and the establishment of enhanced cooperation in this field will reduce this number to 14, thus making for greater harmonisation of the rules of private international law and reinforcing the integration process;
- K. whereas it appears clearly from the antecedents of this initiative that the proposed decision is being put forward in the last resort and that the objectives of the cooperation could not be attained within a reasonable period; whereas at least nine Member States intend to participate in it; whereas therefore the requirements of Article 20 TEU are satisfied;
- L. whereas the requirements of Articles 236-334 TFEU are also satisfied;
- M. whereas in particular enhanced cooperation in this area complies with the Treaties and Union law since it will not affect the *acquis*, since the only Union rules existing in this area relate to jurisdiction, recognition and enforcement of judgments and not to the applicable law; whereas it will not cause any discrimination on grounds of nationality contrary to Article 18 TFEU since the proposed conflicts rules will apply to all parties before the courts of the participating Member States irrespective of their nationality or residence;
- N. whereas the enhanced cooperation will not undermine the internal market or social and territorial cohesion, will not constitute a barrier to or discrimination in trade between Member States, nor distort competition; whereas, instead, it will facilitate the proper functioning of the internal market by eliminating possible obstacles to free movement of persons and simply matters for individuals and practitioners in the participating Member

¹ Austria, Belgium, Bulgaria, France, Germany, Italy, Latvia, Luxembourg, Hungary, Romania, Spain and Slovenia.

States, without causing any discrimination to arise as between citizens;

- O. whereas enhanced cooperation will respect the rights, competences and obligations of the non-participating Member States in so far as they will maintain their existing private international law rules in this area, there are no international agreements between participating and non-participating Member States which would be breached by the enhanced cooperation and it will not interfere with the Hague Conventions on parental responsibility and maintenance obligations;
- P. whereas Article 328(1) provides that enhanced cooperation is to be open at any time to all Member States that wish to participate;
- Q. whereas Article 333(2) TFEU allows the Council (or, more precisely, those members of the Council representing the Member States participating in enhanced cooperation) to adopt a decision stipulating that it will act under the ordinary legislative procedure, rather than the special legislative procedure provided for in Article 81(3) TFEU, under which Parliament is merely consulted,
 - 1. Consents to the proposal for a Council Decision;
 - 2. Calls on the Council to adopt a decision pursuant to Article 333 (2) TFEU stipulating that, when it comes to the proposal for a Council Regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, it will act under the ordinary legislative procedure;
 - 3. Instructs its President to forward its position to the Council and the Commission.

EXPLANATORY STATEMENT

On 17 July 2006 the Commission adopted a proposal for the so-called Rome III Regulation based on Articles 61(c) and 67(1) of the Treaty establishing the European Community¹. The proposal was intended to amend the existing rules on jurisdiction set out in the Brussels IIbis Regulation and to introduce common rules to designate the law applicable to cross-border divorce cases. Manifestly, it did not seek to harmonise the Member States' substantive law of divorce law.

The Council had to decide unanimously after consulting the European Parliament (under Article 67(1) TEC²). On 21 October 2006 the European Parliament approved the Commission proposal as amended. It is recalled that, in the case of measures concerning family law with cross-border implications, Parliament is only consulted and this remains the case even after the entry into force of the Lisbon Treaty.

In the Council the proposal ran into insuperable difficulties. In the first place, the law applicable to divorce varies from one Member State to another. Secondly, in Malta a marriage cannot be dissolved by divorce. Thirdly, during the discussions in the Council, objections were raised as to the proposal's compliance with the principles of subsidiarity and proportionality. The proposal did not obtain the required unanimity in the Justice and Home Affairs Council at its meeting on 5 and 6 June 2008 and the initiative failed.

By July 2008 it was clear that a group of ten Member States was prepared for the first time in the history of the European Union to activate the enhanced cooperation mechanism in order to take the Rome III Regulation forward. A minimum of nine Member States is required under Article 20 TEU in order for enhanced cooperation to take place. At present, there are twelve. At the time of the adoption of the Commission proposal there were nine (Austria, Bulgaria, France, Italy, Luxembourg, Hungary, Romania, Spain and Slovenia) as Greece had withdrawn its initial request on 3 March 2010. Since then Germany, Belgium and Latvia have joined the request for enhanced cooperation.

Your rapporteur appreciates that this is an historic occasion - it is the first time that the enhanced cooperation procedure will be used - and that it marks at the same time a regrettable departure for the Union in the area of civil and family law where we have been remarkably successful in adopting legislation for the whole of Europe, notwithstanding the special positions of Denmark, Ireland and the United Kingdom.

However, he firmly believe that these considerations are overridden by the need to resolve the legal problems that European citizens face when confronted with cross-border divorce or separation proceedings. We owe it to our citizens to do what we can in order to ensure that these intrinsically painful episodes in their lives are not made even more difficult to bear by the difficulties associated with the courts' having to deal with the problems of applicable law, which are hard to comprehend even for many lawyers.

¹ Proposal for a Council regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (COM(2006) 399 final).

² See now Art. 81(3) TFEU;

Your rapporteur wishes to thank Mrs Gebhardt, the rapporteur for the Civil Liberties Committee, for agreeing to forgo drawing up an opinion on this matter in order to allow this procedure to be concluded as rapidly as possible.