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SUMMARY OF REPLIES TO THE GREEN PAPER ON THE CONFLICT OF LAWS IN MATTERS CONCERNING MATRIMONIAL PROPERTY REGIMES, INCLUDING THE QUESTIONS OF JURISDICTION AND MUTUAL RECOGNITION

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With the "Green Paper on the conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition", as adopted on 17 July 2006,[1] the European Commission launched a wide-ranging consultation exercise, aimed at gathering the opinions of interested parties on a future Community instrument designed to harmonise the rules on the conflict of laws as regards marriage settlement and the property consequences of the separation of unmarried couples, and the rules concerning jurisdiction, recognition and enforcement of acts with specific significance in this area, e.g. marriage contracts and amendments to such contracts.

The Commission received 40 replies to the Green Paper, from governments, academia and associations of legal practitioners. To keep the preparatory work on a possible legislative initiative transparent, these contributions are accessible on the Directorate-General for Justice Freedom and Security website,[2] unless the author expressly asked for his answer to remain confidential.[3]

In general, the Green Paper received a warm welcome. Despite certain comments considering this project to be too ambitious or drafted without a proper understanding of the legal traditions of certain Common law systems – it being recalled that England and Wales do not have a matrimonial property regime as understood in continental Europe –, the content of the Green Paper and the usefulness of a Community initiative on this issue was not contested.[4]

This document, drafted by the Commission, gives an overview of the arguments put forward in the replies to the Green Paper. It was prepared with the sole objective of providing a platform for discussions at the time of the public hearing in 2008, and is by no means intended to reflecting all the opinions expressed by contributors. Therefore, the fact that an argument is not included in this document does not mean that the Commission will not take account of all the comments received should it – eventually – prepare a legislative proposal on this matter.

The general feeling is that the confusion that not only professionals but also their customers suffer, due to the non-existence of applicable international conventions in this field (only three Member States have ratified the Hague Convention on the law applicable to matrimonial property regimes, of 14 March 1978), and the exclusion of these matters from the scope of the Community instruments currently in force, are in themselves very good reasons to try to establish a single, comprehensive legal instrument.

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1 COM (2006) 400 final, SEC (2006) 952

2 http://ec.europa.eu/justice_home/news/consulting_public/matrimonial_property/news_contributions_matrimonial_property_en.htm

3 The list of the contributions accessible to the public appears is in the Annex.

4 The adoption of a registration system in all Member States for publicity of matrimonial property regimes was considered beyond the scope of Community competence (Article 65 of the Treaty).

1. Scope of the future instrument

The question of the scope of the future instrument provoked various reactions according to the point of view considered.

As for the objective scope of the instrument, there is general agreement that it should deal with all issues traditionally governed by Private International Law (in particular, the issue of the conflict of laws). Some opinions were expressed that the future instrument should also address the issue of a mechanism to indicate the existence of marriage settlements.

In terms of the subjective scope, many contributors are of the view that the future instrument should deal with both married couples and registered partnerships. Nevertheless, the question is raised as to whether the same rules should apply to both cases.

Very few respondents are in favour of including other forms of de facto unions (non-formalised cohabitation) in the same instrument. On the contrary, many contributors question the political feasibility of a project with such an extremely wide scope and recommend proceeding in stages and dealing with the diverse types of unions in separate instruments.

Consequently, in accordance with the view expressed by a majority of contributors, this document examines the question of applicable law and other traditional Private International Law issues (i.e. jurisdiction, recognition and enforcement) with reference to both married couples and registered partnerships.

2. Scope of applicable law

Many of the contributions to the Green Paper touched on this issue, especially as regards the effects of marriage. The majority of replies propose that applicable law should govern not only the effects which arise from matrimonial causes (separation, nullity or divorce), but also those which occur during the lifetime of the marital relationship. This also applies to registered partnerships.

Respondents in favour of assigning broad scope to applicable law stress the acute need for legal certainty in this matter, which would require, in their view, a single legal status for all aspects of the matrimonial **relationship as a whole**, including personal aspects. More respondents are in favour of limiting the scope of applicable law to the property effects of marriage. The reasons given by the latter are different: on the one hand, there are those who, although aware of the concept of “personal effects” and identify it with that of the "primary regime", fear excessive interference in Member States' substantive law; on the other hand, some are unaware of the concept of "personal effects" and hence of "primary regime”.

Nonetheless, some contributors who are in favour of regulating only the property effects of marriage would like the future instrument to settle the question of spouses'

representation during the marriage and, in general, in accordance with the model of the Hague Convention of 14 March 1978, would like the scope of such an instrument to be clarified by way of an exhaustive "negative list" of questions that should remain outside the future instrument, such as maintenance obligations between spouses.

3. Objective connecting factors

As regards the objective connecting factors to be considered by default when spouses have not chosen the law applicable to the marriage, the question arose of their applicability to registered partnerships, since very few contributors are in favour of applying the same rules to both cases and most of them agree to adopt the place where the partnership was registered as the connecting factor.

The variations observed in the list of connecting factors arranged hierarchically by contributors do not present any particular problems. The spouses' common habitual residence generally precedes nationality. However, there are contributors who are reluctant to drop spouses' common nationality as the first connecting factor. The law most closely connected to the marriage and the *lex fori* appear as closing factors in almost all the lists submitted.

The question of whether the Commission should opt for a unitary system or for a secessionist system was raised in the Green Paper in questions 2 (b) and 3. Most contributors propose that the same criteria should be applied both to the lifetime of the marriage bond and to the time of its dissolution, as well as to all type of assets.

Nevertheless, in their reply to question 3, a number of contributors expressed the opinion that, as regards immovables, the *lex rei sitae* should be applied if spouses voluntarily chose it, as provided for in Articles 3(4) and 6(4) of the Hague Convention of 1978.

In addition, in order to minimise the possible practical disadvantages of a unitarian solution to the issue of conflict of law, it was also proposed that certain relevant aspects of rights *in rem* should be governed by the law of the place where immovables are situated.

As for registered partnerships, the replies to *question 19 (c)* show basic agreement on the applicability of a unitary system, with similar arguments used as for married couples. This is the system used in the majority of Member States, for the sake of simplicity.

4. Autonomy of parties' will or "professio juris" (question 5)

As regards the choice of law applicable to the marital relationship, there seems to be no major problems. In line with the criterion adopted by the Hague Convention of 1978 in favour of the internal law designated by the spouses at any given time (i.e. either before or during the marriage), the idea of allowing spouses to choose the law applicable to their matrimonial property regime was warmly welcomed, since it facilitates the organisation of their relations *vis-á-vis* third parties and between themselves. It should be noted that this criterion is based on the principle of equality that should govern the relationship between spouses. This why some contributors consider this kind of criterion not to be

appropriate when there is a matrimonial cause, since equality cannot always be guaranteed in such a situation.

There is general agreement that this choice is limited:

1) As regards the law that can be chosen, most are favour of using objective connecting factors. The choice should of course be based on criteria which are closely connected to spouses (e.g. the habitual residence of at least one of the spouses or the nationality of the spouses at the time the choice is made). The need for consistency with the future Rome III Regulation is also underlined.

The requirement concerning close connection with the spouses of the chosen law would mitigate the pernicious effects on third parties that the possibility of successive choices of applicable law with retroactive effect could have.

2) As for the form of the choice (question 6), very few contributors are of the view that it is not necessary to harmonise the formal requirements of the agreement between spouses. On the contrary, most are of the opinion that the choice should be expressly formulated, normally in a marriage contract in writing before a notary, thus rejecting the possibility of tacit choice. The reasons for this are two-fold: the legal advice or recommendations on the choice that the notary can provide spouses with, on the one hand, and the fact that such a document would be more easily recognised and enforced *a posteriori*, on the other. Some contributors express the opinion that this matter should be based on Articles 11-13 of the Hague Convention of 1978; others think that the same criteria should apply as in the future Rome III Regulation.

As regards registered partnerships, the possibility of choosing applicable law is implicit in contributions reflecting the opinion that the rules that apply to marriage are also applicable to this kind of relationship, since the possibility for spouses to choose is not denied in any of them. The majority of contributors are in favour of specific conflict rules for the registered partnership and focus more on the question of whether to adopt the place where the partnership was registered as the connecting factor than on the question of choice of applicable law by the partners.

5. Automatic change in the law applicable to the matrimonial property regime (question 4)

The acceptance, by most of the contributors, of the retroactive effect of the law chosen by spouses demonstrates the general preference for greater autonomy of spouses' will, in line with Articles 6, 7(1) and 8 of the Hague Convention of 1978. In contrast, the rule on automatic change of applicable law provided for in Article 7(2) of the latter is not so well received by the majority of contributors, who express their concern at the "surprise effects" that such an automatic change may have on spouses, thus undermining the fact (as recognised by some respondents) that this change of applicable law *ex lege* ties in with the adoption of habitual residence of spouses as the connecting factor in the future instrument. Even contributors who do not object to the provision of the Hague Convention of 1978 on the automatic change of applicable law insist on introducing some measure in the future instrument in order to inform spouses of the consequences of such a change.

In any case, the contributors agree on preserving third parties' rights whenever the applicable law is changed. However, some of them think that the autonomy of spouses' will to change the applicable law does not imply any risk for third parties, because of the publicity system generally linked to the exercise of such a faculty.

6. Jurisdiction of judicial and non-judicial authorities

Most contributors are in favour of imposing rules on non-judicial authorities governing jurisdiction similar to those applicable to judicial authorities. The main reason for this is that the parity between them has been already recognised, for instance, in the Brussels II Regulation, and in most national laws. The broad definition of "jurisdiction" in Article 2 of the latter provides a proper basis for such a solution and could be used as a basis for the future instrument in the opinion of the contributors.

As with the rules on the conflict of laws, questions 7 to 9 asked whether it is possible to consider different courts to be competent to decide on matrimonial or succession disputes and the liquidation of matrimonial property resulting thereof, as well as on property matters arising while the couple are living together and in respect of different types of assets (movables and immovables).

The majority of contributors are in favour of a rule designating the same court for the liquidation of matrimonial property in either matrimonial or succession disputes, also take the view that rules need to be adopted on the jurisdiction of the Brussels II A Regulation, in view of the close connection between the latter and the subject matter of this Green Paper. This could be a means of avoiding decisions which are unbalanced or contradictory. Some contributors feel there is a need for applicable law and jurisdiction to match and that only spouses or partners should be entitled to avoid this match, provided that their choice is limited and it does not therefore amount to abuse of law.

As for different courts ruling on the diverse types of assets, a single judge is preferred to rule on the whole of the matrimonial property (*question 9*).

The majority of contributions are in favour of the possibility of choosing jurisdiction (*question 10*). This is also why the transfer of a file from a court in one Member State to a court in another Member State is accepted by those contributors who consider that the model of Article 15 of the Brussels II A Regulation should be used (question 11).

As regards the issue of jurisdiction on registered partnerships, there is general agreement on applying the same rules as to marriage.

7. Recognition and enforcement of decisions issued by judicial authorities and acts established by non-judicial authorities, in particular as regards the registration of an asset in land registers

In line with the opinion expressed by the majority in relation to conflict of laws and jurisdiction, the general approach (*question 17*) is that the rules applicable to recognition and enforcement of judgments should also apply to acts established by non-judicial authorities, in accordance with the solution set out in Article 46 of Brussels II A Regulation.

Numerous contributions consider that it is premature to talk about the abolition of the exequatur procedure and that the reduced exequatur procedure already applicable under the Brussels I and Brussels II Regulations needs to be kept at least. There are far fewer contributions in favour of the total abolition of this procedure (*question 15*).

There is no clear trend as to what the effects of judgments and acts established by non-judicial authorities are as regards the registration of assets in the land register in another Member State, i.e. as regards the update of the latter without further procedures, since it is not clear whether registers of this kind can be treated in the same way as civil registers, as stipulated by Article 21(2) of the Brussels II A Regulation (*question 16*).

8. Registration and publicity of matrimonial property regimes (marriage settlements)

Improvement in the registration of marriage settlements in the European Union (*question 18*) is a matter that has raised considerable doubt, since the question still remains as to the Union's competence to legislate in this area, and as to the added value provided not only by the creation of a register at European level but also through the obligation on Member States to set up a proper registration system.

Thus, the majority of contributors consider the creation of a centralised marriage settlements register at European level to be premature. Only certain contributors familiar with electronic systems for the registration of wills already in place in some Member States are in favour of starting discussions on the setting-up of a European central register, which would make it possible to guarantee legal certainty for all parties involved.

LIST OF CONTRIBUTORS TO THE GREEN PAPER ON THE CONFLICT OF LAWS IN MATTERS CONCERNING MATRIMONIAL PROPERTY REGIMES, INCLUDING THE QUESTION OF JURISDICTION AND MUTUAL RECOGNITION
AS: Advokat Samfundet
ACCLN: Austrian Chamber of Civil Law Notaries / Conseil National du Notariat Autrichien
B: Bundesrat (Upper House of the bicameral Parliament of the Federal Republic of Germany)
BCEAW: Bar Council of England and Wales
BCNI: Bar Council Northern Ireland
CCBE: Conseil de Barreaux européens
CNUE: Council of the Notariats of the European Union
COMECE: Commission des Episcopats de la Communauté Européenne
CRE: Colegio de Registradores de España
DAV: Deutscher Anwaltverein. German Bar Association
DR: Deutscher Richterbund
DJB: Deutscher Juristinnenbund (association des juristes allemandes)
ELRA: European Land Registry Association
GMPE: Groupe Monassier Patrimoine et Enterprise
IAMLEC: International Academy of Matrimonial Lawyers European Chapter (English Fellows)
UHI: Ulrik Huber Instituut voor Internationaal Privaatrecht Groningen (Institut de Droit International Privé)
LSEW: Law Society England and Wales STEP: Society of Trust and Estate Practitioners
LSS: Law Society of Scotland
MFJAU: Ministère Fédéral de la Justice de l'Autriche
MJ-BW: Ministère de Justice Baden-Württenberg
MJBE: Ministère de Justice Belge
MJEL: Ministère de Justice Grec
MJDE: Gouvernement de la République fédérale d'Allemagne
MJDK: Ministère de Justice Danemark
MJET: Ministère de Justice Estonie

MJFI: Ministère Justice Finlande
MJFR: Ministère de Justice Français.
MJIT: Ministère de Justice Italie
MJNL: Ministère de Justice de Pays-Bas
MJPO: Ministère de Justice Pologne
MJRU: Ministère de Justice RU
MJSL: Ministère de Justice de la Slovaquie
MJSV: Ministère de Justice de la Slovénie
MJSU: Ministry of Justice Sweden
MJTZ: Ministère de Justice Tchéquie
MSCE: Mission Suisse de la Communauté Européenne/ Ministère de Justice de la Suisse
ORAK: Osterreichischer Rechtsanwaltskammertag (L'Association des barreaux de l'Autriche)
SFLA: Solicitor Family Law Association of England and Wales/ Resolution first for family law
USM: Università degli Studi di Milano: Ilaria Viarengo e Stefania Bariati