



Bruxelles, le 6 juin 2006

JUR(2006)70529 [REDACTED]

*Avis du Service juridique**

NOTE À L'ATTENTION DE M. FAULL, DIRECTEUR GÉNÉRAL DG JLS

Objet : Proposition de règlement du Conseil modifiant le règlement (CE)n°2201/2003 relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale et en matière de responsabilité parentale abrogeant le règlement (CE) n°1347/2000 en ce qui concerne la compétence et le droit applicable en matière matrimoniale.

Réf. : votre note du 17 mai 2006 nr. 5991

1. Le projet de proposition sous objet, introduit d'une part une modification des règles actuelles concernant la compétence juridictionnelle en matière matrimoniale et d'autre part des nouvelles règles harmonisant la loi applicable dans ces mêmes matières. L'objectif de cette initiative est d'améliorer la sécurité juridique pour les citoyens et d'assurer une flexibilité aux époux en leur permettant de choisir la juridiction et la loi applicable en cas de divorce.
2. Les règles qui régissent les critères de compétence juridictionnelle et celles concernant la loi applicable sont actuellement régies par des textes séparés. L'inclusion dans un même texte des règles harmonisées en matière de droit applicable constitue la grande innovation de la proposition qui de ce fait étend le champ d'application du règlement de manière substantielle au règlement de conflit des lois.
3. Le Service Juridique peut donner son accord à cette proposition sous réserve des quelques modifications que vous trouverez en annexe.
4. En particulier, le Service juridique est d'avis qu'il faut :
 - Modifier le titre de la proposition pour indiquer de manière claire qu'il s'agit d'une modification du règlement 2201/2003, et de l'introduction des règles concernant la loi applicable.

[REDACTED]

* Document de la Commission protégé en vertu de l'article 4 du règlement (CE) n° 1049/2001 du Parlement européen et du Conseil (JO L 145 du 31.5.2001, p. 43).

- Supprimer l'article 2a qui correspond à l'actuel art. 6. En effet, cet article est superflu et porte à confusion. Les articles 3,4, et 5 précisent qu'elle est la juridiction compétente pour les époux qui ont leur résidence habituelle sur le territoire d'un Etat membre ou dans le cas du RU et d'IRL ont leur domicile sur le territoire de l'un de ces Etats membres, sans qu'il soit nécessaire de répéter dans une autre disposition qu'il s'agit d'une compétence « exclusive » ou « géographique ».
- Supprimer l'art. 2. En effet, il va de soi que le règlement en question sera d'application aux procédures qui seront introduites après le 1^{er} mars 2008 qui sera l'entrée en vigueur du règlement.





COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels,
COM (2006) final

Proposal for a

COUNCIL REGULATION

amending Regulation (EC) No 2201/2003 ~~concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000~~, as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters

(presented by the Commission)

(SEC (2006) XXX)

COUNCIL REGULATION

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(1) thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Parliament²,

Having regard to the opinion of the European Economic and Social Committee³,

Whereas:

- (1) The European Union has set itself the objective of maintaining and developing the European Union as an area of freedom, security and justice in which the movement of persons is ensured. For the gradual establishment of such an area, the Community is to adopt, among others, the measures relating to judicial cooperation in civil matters needed for the proper functioning of the internal market.
- (2) There are currently no Community rules in the field of applicable law in matrimonial matters. Council Regulation (EC) No 2201/2003 of 27 November 2003 sets out rules on jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, but does not include rules on applicable law.
- (3) The European Council held in Vienna on 11 and 12 December 1998 ~~in Vienna in 1998~~ invited the Commission to consider the possibility of drawing up a legal instrument on the law applicable to divorce. In November 2004, the European Council invited the Commission to present a Green Paper on conflict-of-law rules in divorce matters.
- (4) In line with its political mandate, the Commission presented a Green Paper on applicable law and jurisdiction in divorce matters on 14 March 2005. The Green Paper launched a wide public consultation on possible solutions to the problems that may arise under the current situation.

¹ OJ C [...], [...], p. [...].

² OJ C [...], [...], p. [...].

³ OJ C [...], [...], p. [...].

- (5) ~~The overall objective of t~~This Regulation ~~should is to~~ provide a clear and comprehensive legal framework in matrimonial matters in the European Union and ensure adequate solutions to the citizens in terms of legal certainty, predictability, flexibility and access to court.
- (6) With the aim of enhancing legal certainty, predictability and flexibility, this Regulation ~~should allows~~ for some party autonomy. It ~~introduces~~ consequently the possibility for spouses to agree upon the competent court in proceedings for divorce and legal separation. It also ~~should gives~~ the parties a certain possibility to choose the law applicable to divorce and legal separation. ~~The rules~~ Such possibility ~~should do~~ not extend to marriage annulment, which is closely linked to the conditions for the validity of the marriage, and for which parties' autonomy is ~~considered inappropriate~~.
- (7) In the absence of choice of applicable law, ~~this~~ Regulation ~~should introduces~~ harmonised conflict-of-law rules based on a scale of connecting factors to ensure legal certainty and predictability and to prevent "rush to court". ~~The~~Such connecting factors ~~should have been chosen as~~ to ensure that proceedings relating to divorce or legal separation will be governed by a law with which the marriage has a close connection.
- (8) Considerations of public interest ~~should justify~~ the possibility in exceptional circumstances to disregard the application of the foreign law in a given case where this would be manifestly contrary to the public policy of the forum.
- (9) The residual rule on jurisdiction ~~is should be revised~~ to enhance predictability and access to courts for spouses of different nationalities living in a third State. To this end, the Regulation ~~should sets out~~ a harmonised rule on residual jurisdiction to enable couples of different nationalities to seise a court of a Member State with which they have a close connection by virtue of their nationality or their last common habitual residence.
- (10) Article 12 of Council Regulation (EC) No 2201/2003 ~~should be is amended~~ to ensure that a divorce court designated pursuant to Article [3a] 2a has jurisdiction also in matters of parental responsibility connected with the divorce application provided the conditions set out in Article 12 ~~of the same Regulation~~ are met, in particular that the jurisdiction is in the best interests of the child.

(11) ~~Regulation (EC) No 2201/2003 should therefore be amended accordingly.~~

(11)(12) ~~Since the objectives of the action to be taken in accordance with the principles of the Treaty, the objectives of this Regulation, namely to enhance legal certainty, flexibility and access to court in international matrimonial proceedings, cannot be sufficiently achieved by the Member States and can therefore, by reason of scale, be better achieved by the at Community level, the Community may adopt measures in accordance with the principles of subsidiarity as set out in Article 5 of the Treaty. The goals of the proposed Community action, in accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary to attain these objectives. The scope of the rules is strictly limited to what is necessary. The Regulation does not require any harmonisation of the substantive rules.~~

~~(12)~~(13) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union as general principles of Community law. In particular, it seeks to ensure full respect for the right to a fair trial as recognised in Article 47 of the Charter.

~~(13) In the light of the foregoing, Regulation (EC) No 2201/2003 should be amended.~~

(14) [The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.]

(15) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application.

HAS ADOPTED THIS REGULATION:

Article 1

~~Regulation (EC) No 2201/2003 is amended as follows:~~

~~(1) The following Article 2a is inserted in Section 1 of Chapter II:~~

"Article 2a

~~Geographical scope of Articles 3-5~~

~~A spouse who:~~

~~(a) is habitually resident in the territory of a Member State; or~~

~~(b) is a national of a Member State, or, in the case of the United Kingdom and Ireland, has his or her "domicile" in the territory of one of the latter Member States;~~

~~may be sued in another Member State only in accordance with Articles 3, 3a, 4 and 5."~~

~~(1) the title is replaced by the following:~~

~~"Council Regulation (EC) N° 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility as well as applicable law in such matters"~~

~~(2) The following Article 3a is inserted:~~

"Article 3a

~~Prorogation of jurisdiction~~ Choice of court by the parties in proceedings relating to divorce and legal separation

1. The spouses may agree that a court or the courts of a Member State are to have jurisdiction in a proceeding between them relating to divorce or legal separation provided they have a substantial connection with that Member State by virtue of the fact that:
 - (a) any of the grounds of jurisdiction listed in Article 3 applies, or
 - (b) it is the place of the spouses' last common habitual residence for a minimum period of three years, or
 - (c) one of the spouses is a national of that Member State or, in the case of the United Kingdom and Ireland, has his or her "domicile" in the territory of one of the latter Member States.
2. An agreement conferring jurisdiction shall be expressed in writing and signed by both spouses at the latest at the time the court is ~~seised~~seized."

~~(3)~~ (3) In Articles 4 ~~and 5~~, the terms "Article 3" are replaced by the terms "Articles 3 and 3a".

~~(4)~~ In Article 5, the terms "Article 3" are replaced by the terms "Articles 3 and 3a".

~~(5)~~ Article 6 shall be deleted.

~~(6)~~ ~~(4)~~ ~~Article 6~~ is deleted;

~~(5)~~ Article 7 is replaced by the following:

"Article 7

Residual jurisdiction

Where none of the spouses is habitually resident in the territory of a Member State and do not have a common nationality of a Member State, or, in the case of the United Kingdom and Ireland do not have their "domicile" within the territory of one of the latter Member States, the courts of a Member State are competent by virtue of the fact that:

- (a) the spouses had their common previous habitual residence in the territory of that Member State for at least three years; or
- (b) one of the spouses has the nationality of that Member State, or, in the case of United Kingdom and Ireland, has his or her "domicile" in the territory of one of the latter Member States."

~~(7)~~ (6) In Article 12 (1), the terms "Article 3" are replaced by the terms "Articles 3 and 3a".

~~(8)~~ — (7) The following Chapter IIa is inserted:

"CHAPTER IIa

Applicable law in matters of divorce and legal separation

Article 20a

Choice of law by the parties

1. The spouses may agree to designate the law applicable to divorce and legal separation. The spouses may agree to designate one of the following laws:
 - (a) the law of the State of the last common habitual residence of the spouses insofar as one of them still resides there;
 - (b) the law of the State of the nationality of either spouse, or, in the case of United Kingdom and Ireland, the “domicile” of either spouse;
 - (c) the law of the State where the spouses have ~~previously~~ resided for at least five years;
 - (d) the law of the Member State in which the application is lodged.
2. An agreement designating the applicable law shall be expressed in writing and be signed by both spouses at the latest at the time the court is seised.

Article 20b

Applicable law in the absence of choice by the parties

In the absence of choice pursuant to Article 20a, divorce and legal separation shall be subject to the law of the State:

- (a) where the spouses have their common habitual residence, or failing that,
- (b) where the spouse had their last common habitual residence insofar as one of them still resides there, or failing that,
- (c) of which both spouses are nationals, or, in the case of United Kingdom and Ireland, both have their “domicile”, or failing that,
- (d) where the application is lodged.

Article 20c

Application of foreign law

Where a law of another Member State is applicable, the court may make use of the European Judicial Network in civil and commercial matters to be informed of its contents.

Article 20d

Exclusion of renvoi

The application of a law designated under this Regulation means the application of the rules of that law other than its rules of private international law.

Article 20e

Public policy

The application of a provision of the law designated by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum."

Article 2

~~The provisions of this Regulation shall apply only to legal proceedings instituted to documents formally drawn up or registered as authentic instruments and to agreements concluded between parties after 1 March 2008.~~

Article 23

Entry into force

This Regulation will ~~shall~~ enter into force on twentieth day following that of its publication in the *Official Journal of the European Union*.

~~This Regulation~~ It shall apply from 1 March 2008.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, ... [...]

For the Council
The President
[...]

