

Enhanced cooperation in the area of the law applicable to divorce and legal separation.

Council Decision

2010/0066(NLE) - 24/03/2010 - Preparatory document

PURPOSE: to authorise enhanced cooperation in the area of the law applicable to divorce and legal separation.

PROPOSED ACT: Council Decision.

BACKGROUND: for the progressive establishment of an area of freedom, security and justice, the Union is to adopt measures relating to judicial cooperation in civil matters with cross-border implications.

On 14 March 2005, the Commission adopted a Green paper on applicable law and jurisdiction in divorce matters. On 17 July 2006, the 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. In June 2008, the Council adopted political guidelines which recorded that there was no unanimity to go ahead with the proposed Regulation and insurmountable difficulties existed, making unanimity impossible at the time and in the foreseeable future.

In 2008 and 2009, 10 Member States - Bulgaria, Greece, Spain, France, Italy, Luxembourg, Hungary, Austria, Romania and Slovenia - addressed a request to the Commission indicating that they intended to establish enhanced cooperation between themselves in the area of applicable law in matrimonial matters and that the Commission should submit a proposal to the Council to that end. On 3 March 2010, Greece withdrew its request.

This proposal for a Council Decision would authorise enhanced cooperation in the area of the law applicable to divorce and legal separation, and the [proposal for a Council Regulation](#) implementing this enhanced cooperation, that the Commission adopted simultaneously, represent the Commission's response to the **nine Member States**.

The total population of the nine requesting Member States is 216.3 million. This is almost half (44%) of the Union population. The proportion of 'international' marriages and divorces is around 13% in these participating Member States, i.e. on average the same level as usually occurring in the EU. The estimated numbers for divorces are around 440 000 divorces in these countries annually and 53 000 of these having international elements. Enhanced cooperation is open to all Member States; the more Member States participating in it, the higher would be the number of citizens concerned.

IMPACT ASSESSMENT: the document accompanying the Commission's proposal describes the advantages of enhanced cooperation in the area of the law applicable to divorce and separation (see below). Please refer also to the summary of the proposal for a Council Regulation of 24/03/2010 implementing this enhanced cooperation.

LEGAL BASE: enhanced cooperation is regulated by Article 20 of the Treaty on the European Union (TEU) and Articles 326 to 334 of the Treaty on the Functioning of the European Union (TFEU). The implication of these provisions is that two proposals are needed to implement enhanced cooperation in the area of the law applicable to divorce and legal separation:

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a Commission proposal for a Council Decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation, based on Article 329(1) TFEU, and

- a Commission proposal for a Council Regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, based on Article 81(3) TFEU.

CONTENT: the Commission considers that the benefits of using enhanced cooperation in the area of the law applicable to divorce and legal separation are numerous compared to the option of the status quo and that the advantages in this particular case of enhanced cooperation outweigh the possible disadvantages.

Such enhanced cooperation would offer citizens the following advantages:

- **strengthening legal certainty and predictability:** the enhanced cooperation will introduce harmonised conflict-of-law rules in matters of divorce and legal separation to enable spouses to easily predict which law will apply to their matrimonial proceedings. This is based in the first place on the choice of the spouses. The choice is confined to laws with which the marriage has a close connection to avoid the application of 'exotic' laws with which the spouses have little or no connection. In the absence of choice, the applicable law is determined on the basis of a scale of connecting factors which will ensure that the matrimonial proceedings are governed by a legal order with which the marriage has a close connection.
- **increasing flexibility by introducing limited party autonomy:** there is currently very limited scope for party autonomy in matrimonial matters. The national conflict-of-law rules provide in principle for only one solution in a given situation, e.g. the application of the law of the common nationality of the spouses or the application of the law of the forum. In the enhanced cooperation, the legal framework will be more flexible by introducing a limited possibility for the spouses to choose the applicable law concerning divorce and legal separation. To allow spouses to come to an agreement could be particularly useful in cases of divorce by mutual consent.
- **preventing a 'rush to court' by one spouse:** enhanced cooperation in the area of the law applicable to divorce and legal separation addresses the problem of the 'rush to court' by one spouse. This may lead to the application of a law with which the defendant does not feel closely connected or which fails to take into account his or her interests. It further renders reconciliation efforts difficult and leaves little time for mediation. The introduction of harmonised conflict-of-law rules are likely to greatly reduce the risk of a 'rush to court', since any court seized within the participating Member States would apply the law designated on the basis of common rules.

From the **institutional standpoint**, the enhanced cooperation is better than the possibility of interested Member States entering into negotiations on an international agreement on the matter of the law applicable to divorce and legal separation. This alternative would certainly be less advantageous. Even if the acts adopted in enhanced cooperation are binding only on participating Member States, they nevertheless fall under Union control in that area. Thus, the Commission can monitor their correct application under the Treaties and the Court of Justice of the EU has the jurisdiction to give preliminary rulings concerning their interpretation, thus ensuring the coherent and unified interpretation of measures adopted in enhanced cooperation.

Furthermore, the Commission considers that all the **legal conditions** set by the Treaties for the enhanced cooperation are fulfilled: i) conformity with the Treaties and Union law; ii) not undermine the internal market and economic, social and territorial cohesion; iii) does not constitute a barrier to or discrimination in trade; iv) does not distort competition; v) respects the competences, rights and obligations of those Member States that do not participate in it; vi) respects the fundamental rights set out in the Charter of Fundamental Rights of the European Union.

As a result, the Commission proposes **authorising the enhanced cooperation between the requesting Member States**. The Commission stresses that the enhanced cooperation in the area of the law applicable to divorce and legal separation is open at any time to all Member States and it encourages the Member

States that have not yet so requested to participate in the enhanced cooperation, thus boosting its benefits and advantages.