



COMMISSION OF THE EUROPEAN COMMUNITIES

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GREEN PAPER

**ON CONFLICT OF LAWS IN MATTERS CONCERNING MATRIMONIAL
PROPERTY REGIMES, INCLUDING THE QUESTION OF JURISDICTION AND
MUTUAL RECOGNITION**

(presented by the Commission)

(SEC(2006) 952)

1. INTRODUCTION

This Green Paper launches a wide-ranging consultation exercise on the legal questions which arise in an international context as regards matrimonial property regimes and the property consequences of other forms of union. It presents the various aspects of the matter on which there is apparent need for the adoption of Community legislative rules.

The Commission calls on all interested persons to send in their replies and any other useful contributions by no later than 30 November 2006 to the following address:

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Respondents should state whether they object to their replies and observations being placed on the Commission's website.

TERMS USED

International jurisdiction: Aptitude of the courts in a particular country to judge an international dispute.

Conflict of laws: Situation in which two or more national laws may be applicable to relationships (facts, contracts, family relationships, etc.) that are connected with more than one State. The conflict rules determine which country's domestic law is best placed to govern the legal relationship in question.

Marriage contract: Contract concluded prior to the celebration of the marriage with a view to organising property relationships between the spouses.

Exequatur: Procedure allowing a court judgment, an arbitration award, a notarial act or a legal settlement given or ordered in one State to be enforced on the territory of another State.

Forum: Court having jurisdiction in, or dealing with, a dispute.

Matrimonial property regime: Matrimonial property rights of the spouses. Matrimonial property regimes are the sets of legal rules relating to the spouses' financial relationships resulting from their marriage, both with each other and with third parties, in particular their creditors.

Registered partnership: Partnership of two people who live as a couple and have registered their union with a public authority established by the law of their Member State of residence. For the purposes of the Green Paper, this category will also include relationships within unmarried couples bound by a “registered contract” along the lines of the French “pacs”¹

Non-marital cohabitation (living together): Situation in which two people live together on a stable and continuous basis without this relationship being registered with an authority.

The adoption of a European instrument relating to matrimonial property regimes was among the priorities identified in the 1998 Vienna Action Plan². The programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, adopted by the Council and the Commission at the end of 2000³, provided for the development of an instrument on jurisdiction and the recognition and enforcement of decisions as regards matrimonial property regimes and property consequences of the separation of unmarried couples. The Hague programme, which was adopted by the European Council on 4 and 5 November 2004 and established the implementation of the mutual recognition programme as a first priority, and the Council and Commission Action Plan implementing it⁴ called on the Commission to submit a Green Paper on “the conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition”.⁵

To ensure that all property aspects of family law are examined, the Green Paper addresses issues touching both on matrimonial property regimes and on the property consequences of other forms of union. In all the Member States, more and more couples are formed without a marriage bond. To reflect this new social reality, the Mutual Recognition Programme states that the question of the property consequences of the separation of unmarried couples must also be addressed. The area of justice must meet the citizen’s practical needs.

A particular consequence of the increased mobility of persons within an area without internal frontiers is a significant increase in all forms of unions between nationals of different Member States or the presence of such couples in a Member State of which they do not have the nationality, often accompanied by the acquisition of property located on the territory of several Union countries. The preliminary study commissioned by the Commission in 2002⁶ revealed that more than 5 million foreign EU nationals lived in another Member State of the Union, while there were around 14 million non-EU foreign residents in the Union in 2000. This study estimates that almost 2.5 million items of real property were owned by spouses and located in Member States different from that of their residence. The Commission impact study⁷ relating to its proposal for a Regulation on applicable law and jurisdiction in divorce

¹ See Study in comparative law on the rules governing conflicts of jurisdiction and laws on matrimonial property regimes and the implementation for property issues of the separation of unmarried couples in the Member States, 30 April 2003, ASSER-UCL Consortium commissioned by the Commission, pp. 206 *et seq.*, at http://europa.eu.int/comm/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm

² OJ C 19, 23.1.1999.

³ OJ C 12, 15.1.2001.

⁴ Hague Programme, “Strengthening freedom, security and justice in the European Union”, included in the conclusions of the Presidency of the European Council of 4 November 2004.

⁵ Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union; (OJ C 198, 18.8.2005, p. 1).

⁶ See footnote 1.

⁷ This impact study will be published at the same time as the Commission adopts this proposal.

matters shows that there are approximately 170 000 international divorces in the Union each year, i.e. 16% of all divorces.

Practical and legal difficulties frequently occur at the time of the distribution and/or management of these couples' property. They are often linked to the great disparity between rules both of substantive law and of private international law governing the property effects of marriage and of other forms of union in the Member States.

2. MATRIMONIAL PROPERTY REGIMES

Matrimonial property regimes are excluded from Community instruments adopted so far. The Hague Convention on the law applicable to matrimonial property regimes of 14 March 1978 has been ratified only by France, Luxembourg and the Netherlands.

Since it is currently not possible to harmonise the rules of substantive law, this Green Paper will deal with the fundamental issue of the conflict rules. A summary of the rules laid down in the Member States' national laws is annexed to this Green Paper.

The scope of the conflict rules could potentially cover a broad range of questions (the validity of contracts, liquidation and division of the property, etc).

The question of jurisdiction will naturally be addressed in order to guarantee consistency between the future rules and those covering judicial proceedings in matters of divorce and succession. In addition, solutions should be sought which leave room for autonomous choice of court by the parties.

The property aspects of marriage are frequently settled on a non-contentious basis. To simplify matters for practitioners and to offer an effective response to the citizen's practical problems, the role and powers of non-judicial authorities and the recognition of extrajudicial documents established by them should also be considered.

Lastly, European legislation should probably also facilitate the citizen's life by envisaging the registration of matrimonial property agreements in the Member States.

2.1. Scope

Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility⁸, which came into force on 1 March 2005, does not cover the property consequences of the dissolution of the marriage.

Matters already covered by previous legal instruments, such as maintenance responsibilities, which are governed by Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters⁹, in operation since 1 March 2002, and by the Commission proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations¹⁰, should logically be excluded from the scope of the future instrument.

⁸ OJ L 338, 23.12.2003, p.1.

⁹ OJ L 12, 16.1.2001, p. 1.

¹⁰ COM (2005) 649 final, 15.12.2005; 2005/0259 (CNS)

It will also be worth checking whether other personal aspects of the marriage need to be covered by the future instrument in so far as they can have consequences for the couple's property (the right of representation between spouses, the protection of the family home, contribution to the costs of married life, etc.).

The subject of matrimonial property regimes is generally seen as including both the property consequences of the dissolution of marriage and those arising during its lifetime. While the couple are still living together, debts incurred as a result of the common or individual acts of the spouses have to be attributed to their common or individual property, in order to divide the burden both as between them and in relation to third parties.

Question 1:

a) Should certain personal aspects of the marriage settlement not covered by the instruments referred to above or only the property consequences of the marriage bond be included in the future instrument? If so, which ones and why?

b) Should the future instrument apply to the property consequences of that bond arising while the parties are still living together or only when they separate or the marriage bond is dissolved?

2.2. Conflict of laws

2.2.1. Connecting factors and choice of applicable law

To make matters easier for legal practitioners, the future rules should be of a universal nature, enabling either the law of a Member State or the law of a third country to be applicable.

The determination of the law applicable to matrimonial property regimes presupposes the identification of one or more connecting factors.

And it will be necessary to determine whether the selected connecting factor must be the same for all aspects of the matrimonial property regimes covered by the applicable law or whether different criteria should be used for certain aspects of the situation (“*dépeçage*”)? An example here concerns immovable property, for which the connecting factor sometimes used is the *lex loci situationis*.

Question 2:

a) What connecting factors should be used to determine the law applicable to matrimonial property regimes? And what should be the order of priority where there are several such factors (the spouse's first habitual residence of the spouses, their nationality, etc.? Other connecting factors?)

b) If the future instrument applies to all the property consequences of the marriage bond, should the same criteria be envisaged both for the lifetime of the bond and for the time of its dissolution?

Question 3:

Should the same connecting factors be used for all aspects of the situation covered by the applicable law or could different factors be used for different aspects (“depeçage”)? If so, what situations should be taken into account?

Moreover, thought must be given to a solution in cases where connecting factors designated by the conflict rule (such as residence) have changed or moved with the passage of time. The Hague Convention of 14 March 1978, for instance, allows the law applicable to the matrimonial property regime to change automatically when the spouses change residence or nationality (Article 7) if they did not designate themselves the applicable law or conclude a marriage contract. The effects of the change of law applicable to the matrimonial property regime may or may not have retroactive effect, depending on the national solution.

Question 4:

Should the automatic change of the law applicable to the matrimonial property regime be allowed in the event of changes in certain connecting factors, such as the spouses' habitual residence?

If so, can such change have retroactive effect?

2.2.2. *The autonomy of the parties' will*

Most of the Member States allow the spouses to choose the law applicable to the matrimonial property regime. If one envisages allowing such a choice in a future instrument, a limited number of connecting factors should obviously be provided for, in particular those involving an actual link with the spouses (e.g. the law of the State of the habitual residence or nationality of one or both spouses). The question whether the choice of applicable law should be subject to formalities and, if so, what formalities will also have to be considered.

There is also the question whether or not this agreement between spouses should be subject to a limitation in time, being applicable only in the event of the couple separating or while the parties are still living together. In that case, care must be taken not to undermine third parties' rights.

Question 5:

a) Should there be the possibility for the spouses of choosing the law applicable to their matrimonial property regime? If so, what connecting factors can be taken into account to allow this choice?

b) Should a multiple choice be allowed whereby some assets would be governed by one law and others by another law?

c) Should it be possible to make or change this choice at any time, before and throughout the marriage or only at a specific time (at the time of dissolution of the marriage bond)?

d) In this case, in the event of a change of applicable law, must the change have retroactive effect?

Question 6:

Should the formal requirements for the agreement be harmonised?

2.3. Rules on jurisdiction

2.3.1. Jurisdiction of the judicial authorities

The Member States have adopted a wide variety of criteria to determine international jurisdiction as regards matrimonial property regimes.

Account will have to be taken of existing Community rules, in particular Regulation (EC) No 2201/2003 referred to above, which regulates certain effects of the marriage in personal terms. Moreover, in view of the interests affected by the future instrument, it would be advisable to preserve a degree of consistency between the rules on jurisdiction and the conflict rules, and to provide for a choice of court by the spouses.

Question 7:

a) In the event of dissolution of the regime by divorce and in the event of separation, should the court having jurisdiction in these matters under Regulation No 2201/2003 also have jurisdiction to rule on the liquidation of the matrimonial property?

b) In the event of succession, should the court having jurisdiction in disputes regarding the succession also have jurisdiction to rule on the liquidation of the matrimonial property?

Question 8:

a) If not, which rules of international jurisdiction should be adopted, in particular for property questions arising while the couple are still living together (e.g. donations between spouses, contracts between spouses)?

b) Should there be a single general criterion or several alternative criteria as provided for by Regulation No 2201/2003 (e.g. habitual residence, common nationality)?

Question 9:

a) Is it possible to provide for a single court to rule on all the types of assets, movable and immovable, even when they are located on the territory of several Member States?

b) Where a third party is party to the dispute, should the rules of the ordinary law apply?

Question 10:

Is it possible to provide that the parties may choose the court? If so, how and on the basis of what rules?

Question 11:

Would it be useful to allow cases to be transferred from a court in one Member State to a court in another Member State in this respect? And if so, on what terms?

2.3.2. *Jurisdiction of non-judicial authorities*

Given the importance of the functions exercised by non-judicial authorities in this field (such as notaries and advocates), it might be worthwhile settling the question of their powers. It should also be examined whether couples could carry out certain formalities with the authorities of their Member State of residence even if an authority of another Member State were designated by the principal rule of jurisdiction.

Question 12:

Should there be rules governing the jurisdiction of non-judicial authorities? If so, should grounds of jurisdiction similar to those applicable to judicial authorities be applied? To that end, could the broad definition of the term “jurisdiction” in Article 2 of Regulation (EC) No 2201/2003 be taken as a starting point?

Question 13:

Should the authority responsible for the liquidation and division of the property also be empowered to act when part of the property is located outside the territory in which it exercises its powers?

Question 14:

If not, should there be a provision to the effect that certain formalities can be performed before the authorities of a Member State other than the one designated by the principal rule of conflict of jurisdiction?

2.4. Rules of recognition and enforcement

2.4.1. Recognition and enforcement of judgments

By laying down uniform rules on the applicable law and jurisdiction, the future instrument will allow a very high degree of mutual trust so that intermediate measures for the recognition and enforcement of judgments can be dispensed with.

Question 15:

Should the future European instrument abolish the exequatur for judgments given within its scope? If not, what grounds for non-recognition of judgments should be provided for?

Question 16:

Could there be a provision to the effect that judgments given in a Member State as regards the property consequences of the marriage should automatically be recognised so as to allow property registers to be updated without further procedures in the other Member States? Should Article 21(2) of Regulation (EC) No 2201/2003 be the inspiration for this?

2.4.2. Recognition and enforcement of non-judicial acts

Given the major role played by non-judicial authorities, it would also be advisable to facilitate the recognition of acts established by them.

Question 17:

Should the same rules as to recognition and enforcement be applied to acts established by non-judicial authorities, such as marriage contracts, as to judgments?

If not, what rules should apply?

2.5. Registration and publicity of matrimonial property regimes

It would be worth improving the publicity of matrimonial property regimes in the Union in order to guarantee legal certainty for all parties concerned, in particular creditors. It would also be desirable to exempt spouses from the obligation to renew the formalities regarding publicity about changes affecting their matrimonial property regimes each time they change their residence.

Question 18:

How can the registration of matrimonial property regimes in the Union be improved? For example, should the adoption of a registration system in all the Member States be provided for?

And how should people interested in using this system be informed of it?

3. OTHER FORMS OF UNION

The significant increase in the number of unmarried couples in the Member States is reflected in the corresponding increase in the number of international legal situations facing them. Community law already addresses parental responsibility for the children of unmarried couples through Regulation (EC) No 2201/2003 and maintenance responsibilities through Regulation (EC) No 44/2001.

3.1. Registered partnerships

More and more Member States provide for contracts and partnerships registered with an official authority¹¹. This question is therefore of specific interest in these States but also in others that may be confronted with a variety of legal problems in the event of dissolution of a registered partnership stemming, for example, from the fact that one of the partners resides or has property on their territory.

3.1.1. Conflict of laws

In general, the rules concerning conflict of laws applicable to matrimonial property regimes have not been transposed to the other existing forms of union. Different criteria for the property consequences of registered partnerships could therefore be sought.

Question 19:

a) Should provision be made for specific conflict rules for the property consequences of registered partnerships?

b) Should the law applicable to the property consequences of registered partnerships be the law of the place where the partnership was registered? Other laws?

c) Should the designated law have to govern all matters at issue or should other criteria be used, such as the *lex loci situationis*?

3.1.2. Jurisdiction of the judicial authorities

Few Member States have adopted specific rules of jurisdiction as regards property consequences for unmarried couples. Regulation (EC) No 2201/2003 is not applicable to the dissolution of registered partnerships, which are not within its scope. Regulation (EC) No 44/2001, which does not apply to matrimonial property regimes, could be applicable in certain cases to the property consequences of registered partnerships (e.g. contractual or non-contractual disputes).

The authorities of the country of the place where the partnership is registered have jurisdiction to terminate partnerships registered on their territory. For all that, it could be useful to determine which authorities have jurisdiction to rule, e.g. at the time of separation, on the distribution of the assets of a couple who acquired registered partnership status abroad.

¹¹ Denmark (1989), Sweden (1994), the Netherlands (1998), Belgium, Spain and France (1999), Germany (2000), Finland (2001), Portugal and Luxembourg (2004) and the United Kingdom (2005).

Question 20:

Should there be rules of international jurisdiction to regulate the property consequences of registered partnerships?

If so, what rules? Exclusively the court of the place where the partnership was registered (having jurisdiction to dissolve it)? Or other criteria, such as the habitual residence of the defendant or of one of the partners within the jurisdiction, or the nationality of one or both partners?

3.1.3. Recognition and enforcement of decisions on registered partnerships

Some Member States allow recognition of the dissolution of registered partnerships in accordance with the general rules on recognition or with those applied to the decisions on the marriage (e.g. Germany and the Nordic countries).

Question 21:

By what rules should judgments given in a Member State as regards the property consequences of a registered partnership be recognised in all the Member States?

3.2. De facto unions

Most national laws comprise certain rules laid down by statute or in the case law relating to couples who are neither married nor in a registered partnership. In theory, in the absence of specific rules, the conflict rules applicable to contracts (Rome Convention of 1980 on the law applicable to contractual obligations) and to civil liability or, generally speaking, the law of the country where damage occurred would be expected to apply.

3.2.1. Conflict of laws

Question 22:

a) Should there be specific conflict rules for property relationships based on de facto unions (non-formalised cohabitation)?

If so, what rules?

c) If not, should there at least be specific rules for the effects of separation of such unions in relation to third parties (liability to third parties for the debts of such couples, rights that its members can exercise against a third party, e.g. life assurance)?

d) With regard to immovable property, should the lex loci situationis be applied exclusively?

3.2.2. Jurisdiction of the judicial authorities, recognition and enforcement of judgments

The law on these points is not highly developed, and the ordinary rules of international jurisdiction generally tend to apply, which means in particular that Regulation (EC) No 44/2001 could regulate certain property disputes between members of such couples.

Question 23:

Should there be specific rules on jurisdiction and the recognition of property relationships resulting from de facto unions?

Even if the answers to Questions 22 and 23 are negative, clarity and legal certainty for the citizen and the practitioner would nevertheless be served if the future instrument brought together the scattered rules which already apply to the property consequences of the separation of such couples (e.g. common assets, housing) in international situations.