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Proposal for a

COUNCIL DECISION No .../2010/EU

authorising enhanced cooperation in the area of the law applicable to divorce and legal separation

{COM(2010) 105 final}

EXPLANATORY MEMORANDUM

1. INTRODUCTION

1. On 17 July 2006, the Commission adopted a proposal¹ for a Council Regulation amending Regulation (EC) No 2201/2003² as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters ('Rome III')³.
2. The legal basis for the proposed Council Regulation was Articles 61(c) and 67(1) of the Treaty establishing the European Community⁴. The proposal related to judicial cooperation in civil matters having 'aspects relating to family law'. This legal basis prescribed unanimity. The European Parliament delivered its opinion on 21 October 2008⁵.
3. Starting in October 2006, the Commission proposal was in the Committee on Civil Law Matters (Rome III). It was a priority for the German, Portuguese and Slovenian Presidencies. In April 2007, the proposal was discussed at a meeting of the Council and the Ministers agreed on certain guidelines.
4. By mid-2008, discussions had come to a point where it appeared that a few Member States had specific problems which made it impossible for them to accept the proposed Regulation. In particular, one Member State did not consider it appropriate that its courts should apply foreign divorce law, which it regards as more restrictive than its own divorce law, and wished to continue applying its own substantive law to any divorce requested in its courts (*lex fori* approach). At the same time, a large majority of Member States were of the opinion that rules on applicable law were an essential element of the proposed Regulation. They supported the principle laid down in the proposal of applying the law of the country with which the spouses have a close connection, which, in certain cases, would mean the application of foreign divorce law.
5. Successive Council presidencies and the Commission tried to find solutions within the proposed Regulation by devising different options that would give greater scope for the application of the law of the forum without jeopardising the main objectives of the proposal. These joint efforts were however unsuccessful.

¹ COM(2006) 399.

² Council 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 (OJ L 338, 23.12.2003, p. 1).

³ In accordance with Articles 1 and 2 of Protocol No 5 (now Protocol No 22) on the position of Denmark annexed to the Treaties, Denmark was not taking part in the adoption of the proposed Regulation, and was not bound by it or subject to its application. In accordance with Article 3 of Protocol No 4 (now Protocol No 21) on the position of the United Kingdom and Ireland annexed to the Treaties, Ireland and the United Kingdom had not given notice of their wish to take part in the adoption and application of that proposed Regulation.

⁴ Now Article 81(3) of the Treaty on the Functioning of the European Union.

⁵ P6_TA(2008)0502, (OJ C 15 E, 21.1.2010, p. 128).

6. Therefore, at the Council meeting of 5 and 6 June 2008, Ministers 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’. The Council established that ‘the objectives of the proposed Regulation could not be attained within a reasonable period by applying the relevant provisions of the Treaties’⁶.
7. In July-August 2008, nine Member States (Bulgaria, Greece, Spain, Italy, Luxembourg, Hungary, Austria, Romania and Slovenia) addressed a request to the Commission indicating that they wished 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. In January 2009, France also addressed a similar request. On 3 March 2010, Greece withdrew its request.
8. This proposal is the Commission’s response to these requests.

2. LEGAL BASIS FOR THE ENHANCED COOPERATION

9. Enhanced cooperation is regulated by Article 20 of the Treaty on 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:
 - 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) TFEU⁷.

3. ASSESSMENT OF THE LEGAL CONDITIONS FOR ENHANCED COOPERATION

3.1. Authorising decision as last resort and participation of at least nine Member States

10. Article 20(2) TEU lays down that the decision authorising enhanced cooperation can be adopted by the Council only as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and that at least nine Member States participate in it.

⁶ Document 10383/08 PV/CONS 36 JAI 311 of 10 July 2008.

⁷ Article 20(1) TEU refers to the application of ‘the relevant provisions of the Treaties’; for the area of applicable law in divorce, this means the provisions in Chapter 3 (Judicial cooperation in civil matters) of Title V (Area of freedom, security and justice) of the Treaty on the Functioning of the European Union.

11. As mentioned above, the Council concluded at its meeting of 5 and 6 June 2008 that there was no unanimity to go ahead with the 2006 proposal and that insurmountable difficulties existed, making a decision requiring unanimity impossible at the time and in the foreseeable future. The Council established that the objectives of the proposed Regulation could not be attained within a reasonable period by applying the relevant provisions of the Treaties. The Council thus concluded that no other solution for the Union as a whole could be found, and enhanced cooperation could be used as a last resort.
12. To date, the Commission has received requests from nine Member States (Bulgaria, Spain, France, Italy, Luxembourg, Hungary, Austria, Romania and Slovenia) indicating that they intend to establish enhanced cooperation between themselves in the area of applicable law in matrimonial matters.

3.2. Area covered by the Treaties

13. Article 329(1) TFEU lays down that enhanced cooperation can be established ‘in one of the areas covered by the Treaties’.
14. The nine Member States have requested to be allowed to establish enhanced cooperation between themselves ‘in the area of applicable law in matrimonial matters (Rome III)’. This means the conflict-of-law rules that determine which substantive law applies to an international divorce that has connections with more than one legal order. Conflict-of-law rules are mentioned as a specific item in the list of measures under Article 81(2) TFEU, while Article 81(3) TFEU distinguishes between conflict-of-law rules in civil and commercial matters in general and measures concerning family law. The Commission considers that conflict-of-law rules in family law constitute an area, admittedly a limited but well-defined area, within the meaning of the Treaties, in which enhanced cooperation may be established.
15. In this context, it should be clarified that the area of the proposed enhanced cooperation, ‘the law applicable to divorce and legal separation’, does not comprise conflict-of-law rules for the property consequences of divorce⁸. Also, the subject is not the substantive law on divorce, i.e. grounds for divorce or the procedure to apply for divorce.

⁸ The Commission is preparing a legislative initiative on matrimonial property regimes and consequences of separation of couples with cross-border elements, as requested most recently by the Stockholm Programme. The process has included a Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition - COM(2006) 400. The initiative will cover the private international law rules on matrimonial property regimes both during the marriage and in the case of dissolution through divorce or separation. The conflict-of-law rules on divorce itself and on matrimonial property regimes are separate, and enhanced cooperation in one area does not prejudice the legislation in the other area.

3.3. Furthering the objectives of the Union, protecting its interests and reinforcing its integration process

3.3.1. General context

16. Taking due account of the relevant parts of the Impact Assessment⁹ for and the Explanatory Memorandum to the above-mentioned 2006 Commission proposal, the purpose of the enhanced cooperation is to provide a clear and comprehensive legal framework, covering applicable law rules in matters of divorce and legal separation and allowing the parties a certain degree of autonomy in choosing the applicable law.
17. The Commission widely consulted stakeholders as part of the above-mentioned impact assessment process. This was done through a Green Paper on applicable law and jurisdiction in divorce matters issued in 2005¹⁰. The Green Paper identified a number of shortcomings in the existing situation and identified different possible policy options to address the problems. The options included inter alia the status quo, harmonisation of the conflict-of-law rules, introducing a limited possibility for the spouses to choose the applicable law and finally a combination of the different solutions. The Commission organised a public hearing and an expert meeting in 2006. Most of the responses acknowledged the need to enhance legal certainty and predictability, to introduce limited party autonomy and to prevent a ‘rush to court’. Certain stakeholders expressed concerns that the harmonisation of conflict-of-law rules would oblige courts to apply foreign law and that this might lead to delays and additional costs in matrimonial proceedings. A public opinion survey found that 60 % of Europeans expect the EU to play a role to facilitate legislation as regards divorce in another Member State¹¹.
18. Enhanced cooperation in the area of the law applicable to divorce and legal separation would concern tens of thousands of ‘international’ couples who divorce each year in the EU. Many Europeans from different Member States get married every year and, accordingly, there are also many ‘international’ divorces each year in Europe.
19. There are approximately 122 million marriages in the EU, and something in the order of 16 million (13 %) are assumed to be ‘international’¹². As an example, in the year 2007, there were 2 400 000 marriages in the European Union and approximately 300 000 of these were ‘international’. Although ‘international’ marriages are mainly concentrated in a few of the larger European countries, they occur everywhere across the European Union and consequently concern a large number of European citizens.

⁹ SEC(2006) 949, see http://ec.europa.eu/governance/impact/ia_carried_out/cia_2006_en.htm#jls. The Impact Assessment report was informed by a ‘Study to inform a subsequent Impact Assessment on the Commission proposal on jurisdiction and applicable law in divorce matters’ prepared by the European Policy Evaluation Consortium (EPEC) in 2006, see http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm.

¹⁰ COM(2005) 82 .

¹¹ Flash Eurobarometer No 188 — Consular Protection and Family Law.

¹² The information in these paragraphs is based on the final report of the EPEC Impact Assessment Study on Community instruments concerning matrimonial property regimes and property of unmarried couples with transnational elements, 2010.

20. In 2007 there were 1 040 000 divorces in the 27 Member States of the European Union, of which 140 000 (13 %) had an ‘international’ element. The Member States with the highest share of new ‘international’ divorces in the European Union in 2007 were Germany (34 000), France (20 500) and the UK (19 500).

3.3.2. *Current situation in the area of the law applicable to divorce and legal separation*

21. Currently, with no Union rules, 26 different sets of conflict-of-law rules on divorce exist in the 24 Member States that participate in judicial cooperation in civil matters in the EU and in the two Member States that may opt in¹³. Most Member States determine the applicable law on the basis of a scale of connecting factors that seek to ensure that the proceedings are governed by the legal order with which the marriage has the closest connection. Other Member States apply systematically their domestic laws (*lex fori*) in matrimonial proceedings.

22. The current situation may give rise to a number of problems in matrimonial proceedings with an ‘international’ element. The fact that national laws are very different both with regard to the substantive law and the conflict-of-law rules leads to legal uncertainty. The great differences between and the complexity of the national conflict-of-law rules make it very difficult for ‘international’ couples to predict which law will apply to their matrimonial proceedings. A large majority of Member States do not provide any possibility for the spouses to choose the applicable law in matrimonial proceedings. This may lead to the application of a law with which the spouses are only tenuously connected and to a result that does not correspond to the legitimate expectations of citizens. Finally, the current rules may induce a spouse to ‘rush to court’, i.e. to seize a court before the other spouse has done so to ensure that the proceedings are governed by a particular law and thereby to safeguard his or her interests.

23. It is very difficult to estimate the economic disadvantages caused by the non-harmonisation of the conflict-of-law rules on divorce. In the context of the impact assessment study carried out to inform the Commission about matrimonial property regimes, it was found that the notional costs of problems relating to international marriages in divorce situations could total up to EUR 205 million in the EU. The costs could accrue to courts, the spouses and third parties¹⁴.

3.3.3. *Benefits of enhanced cooperation in the area of the law applicable to divorce and legal separation*

24. Nine Member States are requesting enhanced cooperation in the area of the law applicable to divorce and legal separation: Bulgaria, Spain, France, Italy, Luxembourg, Hungary, Austria, Romania and Slovenia. The total population of these

¹³ Denmark does not take part in the adoption of measures proposed pursuant to Title V of Part Three TFEU and the measures are not binding upon or applicable in Denmark, in accordance with Articles 1 and 2 of the Protocol (No 22) on the position of Denmark annexed to the Treaties. Unlike Denmark, the UK and Ireland are entitled to participate in cooperation under Title V of Part Three TFEU, in accordance with Article 3 of the Protocol (No 21) on the position of the United Kingdom and Ireland annexed to the Treaties. In the UK, although there are separate jurisdictions of England/Wales, Scotland and Northern Ireland, the choice-of-law rules in divorce are similar.

¹⁴ EPEC Impact Assessment Study on Community instruments concerning matrimonial property regimes and property of unmarried couples with transnational elements, final report, 2010.

nine requesting Member States is 216.3 million. This is almost half (44 %) of the Union population¹⁵. The proportion of ‘international’ marriages and divorces is around 13 % in these participating Member States¹⁶, 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 elements¹⁷. Enhanced cooperation is open to all Member States; the more Member States participating in it, the higher would be the number of citizens concerned.

25. Enhanced cooperation in the area of the law applicable to divorce and legal separation would bring citizens the following benefits:
26. *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. This will greatly enhance legal certainty and predictability for the spouses concerned as well as for practitioners.
27. *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.
28. *Preventing a ‘rush to court’ by one spouse.* Finally, 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 seised within the participating Member States would apply the law designated on the basis of common rules.

¹⁵ Total population of the Union in 2009: 494 million.

¹⁶ The number of divorces with ‘international’ elements in 2007, and their proportion of all divorces in the requesting Member States: Bulgaria: 700/4 %; Spain: 14 500/11 %; France 20 500/13 %; Italy 3 000/6 %; Luxembourg: 500/48 %; Hungary: 500/2 %; Austria: 5 000/25 %; Romania: 500/1 % and Slovenia: 300/10 %.

¹⁷ EPEC Impact Assessment Study on Community instruments concerning matrimonial property regimes and property of unmarried couples with transnational elements, final report, 2010.

29. Some concerns have been expressed that the harmonisation of conflict-of-law rules would oblige courts to apply foreign divorce law and that this might lead to delays and additional costs in matrimonial proceedings. Such problems should be rare in practice since the connecting factors would lead to the application of the law of the forum in the large majority of cases. The experience of the Member States which today use connecting factors that lead to the application of foreign law does not reveal major difficulties. The current conflict-of-law rules in the nine requesting Member States include such connecting factors that in certain cases already lead to the application of foreign law by their courts. Thus enhanced cooperation would not be problematic in terms of additional costs or delays. Finally, the adoption of measures to facilitate the application of foreign law should reduce possible negative consequences¹⁸.
30. 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.

3.3.4. *Fulfilling the requirements of Article 20(1) TEU*

31. Article 20(1) TEU requires that enhanced cooperation aims to further the objectives of the Union, protect its interests and reinforce its integration process.
32. One of the tasks of the Union is to offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured (Article 3(2) TEU). The area of justice includes developing judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments (Article 81(1) TFEU). For this purpose, the Union can adopt measures aimed at ensuring, firstly, the mutual recognition and enforcement between Member States of judgments, and secondly, the compatibility of the rules applicable in the Member States concerning conflict of laws (Article 81(2)(a) and (c) TFEU).
33. The harmonisation of conflict-of-law rules facilitates the mutual recognition of judgments. The fact that courts of the Member States apply the same conflict-of-law rules to determine the law applicable to a given situation reinforces mutual trust in judicial decisions given in other Member States¹⁹.

¹⁸ Decision No 568/2009/EC of the European Parliament and of the Council amending Council Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters introduces such a measure by requiring the contact points to supply any information to facilitate the application of the law of another Member State that is applicable under EU or international instruments; see Article 5(2)(c) as amended.

¹⁹ Programme of measures to implement the principle of mutual recognition of decisions in civil and commercial matters, adopted on 30 November 2000, (OJ C 12, 15.1.2001, p. 1).

34. Enhanced cooperation in the area of the law applicable to divorce and legal separation between the requesting Member States would further the Union objective of ensuring the compatibility of the rules applicable in the Member States concerning conflict of laws, in that it would increase the level of compatibility as compared to the current situation. As explained above, 26 different legal sets of conflict-of-law rules on divorce exist in the 26 Member States that participate in judicial cooperation in civil matters. In the situation of enhanced cooperation between the nine requesting Member States, there would be 18 different legal regimes, thus bringing greater harmonisation in conflict-of-law rules and reinforcing the integration process in this part of the EU.

3.4. Compliance with the Treaties and Union law

35. In accordance with Article 326 TFEU, enhanced cooperation must comply with the Treaties and Union law.

36. The enhanced cooperation would not affect the existing *acquis*. It would be established in an area that is covered by the shared competences of the Union but where to date no common Union rules exist. The first Union instrument adopted in the area of family law, Council Regulation (EC) No 1347/2000²⁰, set out rules on jurisdiction, recognition and enforcement of judgments in matrimonial matters as well as judgments on parental responsibility for children of both spouses given in the context of matrimonial proceedings. It did not, however, include rules on applicable law. The entry into force of Council Regulation (EC) No 2201/2003, which repealed and replaced Council Regulation (EC) No 1347/2000 as of 1 March 2005, did not entail any change in this respect. The question of applicable law was not raised during the negotiations on this Regulation, which took over virtually unchanged the provisions on matrimonial matters from Council Regulation (EC) No 1347/2000.

37. Enhanced cooperation in the area of the law applicable to divorce and legal separation would not cause discrimination based on nationality, as prohibited by Article 18 TFEU, because the proposed conflict-of-law rules will be universal in nature and they will apply to all the proceedings before the courts of the participating Member States, whatever the parties' nationality or residence. On the other hand, the courts of the non-participating countries will apply their domestic conflict-of-law rules under their private international law as they do currently.

3.5. No undermining of the internal market or economic, social and territorial cohesion; no barrier to or discrimination in trade; no distortion of competition

38. Article 326 TFEU provides that enhanced cooperation must not undermine the internal market and economic, social and territorial cohesion; and it must not constitute a barrier to or discrimination in trade between Member States or distort competition between them.

²⁰ Council Regulation (EC) No 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (OJ L 160, 30.6.2000, p. 19).

39. Enhanced cooperation in the area of the law applicable to divorce and legal separation does not present problems as regards these legal conditions. Indeed, the proposal implementing enhanced cooperation in the area of the law applicable to divorce and legal separation will serve to facilitate the proper functioning of the internal market since it will eliminate any obstacles to the free movement of persons who are currently faced with problems due to existing differences between the national laws with regard to applicable law in matrimonial matters. The increased legal certainty on the conflict-of-law rules on divorce will thus have a positive effect on couples who exercise their right to free movement between the participating Member States.
40. Given the nature of the proposal, concerning as it does only the relations between two individuals, it does not affect enterprises or legal relations in the market and neither does it affect trade or competition in the Union. Finally, the proposal would not affect the regional policy of the Union
41. Indeed, in providing for the harmonisation of conflict-of-law rules the proposal would considerably simplify the situation for private parties and practitioners, who within the participating Member States will be able to determine the applicable law on the basis of one single set of rules that will replace the existing numerous national conflict-of-law rules of the participating Member States in this area.
42. Even if not all couples in the Union will benefit from the legal certainty or the simplification brought by the proposal, the situation of the couples before courts of non-participating Member States will not deteriorate compared to the situation today; thus the proposal will not cause any unjustified differentiated treatment between citizens.
- 3.6. Respecting the rights, competences and obligations of non-participating Member States**
43. Article 327 TFEU requires that any enhanced cooperation respects the competences, rights and obligations of those Member States that do not participate in it.
44. The adoption of the common conflict-of-law rules for nine Member States does not affect the rules of the non-participating Member States. The non-participating Member States will continue to have their own private international law rules on the matter of the law applicable to divorce and legal separation.
45. According to the proposal, a couple residing in a participating Member State would be able to choose the law to be applied to their divorce. A limited choice-of-law for divorce is not totally unknown in the Member States today; there are cases where it is allowed, e.g. under the Dutch or German matrimonial legislation. If, under the enhanced cooperation, the couple who made a choice-of-law agreement later moves to a non-participating Member State and seises a court there for divorce, the recognition of the choice-of-law agreement will depend upon the domestic law of the court seised. If the couple has chosen the law of the court seised, it should be less problematic for the court to respect the choice-of-law agreement.

46. At the level of public international law, there are no such international agreements on the law applicable to divorce and legal separation between the participating and non-participating Member States that would be breached by the enhanced cooperation.
47. Finally, it can be noted that enhanced cooperation in the area of the law applicable to divorce and legal separation does not affect non-participating Member States as regards applicable law rules in areas closely related to divorce, such as conflict-of-law rules on parental responsibility or on maintenance obligations. The conflict-of-law rules on parental responsibility are governed by the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and the measures for the protection of children. Currently, eight Member States are party to the Convention, and the remaining 18 Member States must ratify it or accede to it before 5 June 2010²¹. The conflict-of-law rules on maintenance obligations are laid down by the 2007 Hague Protocol on the law applicable to maintenance obligations²², to be applied pursuant to Article 15 of Regulation (EC) No 4/2009 relating to maintenance obligations²³ that will apply from 18 June 2011. The rules on the law applicable to divorce and to attribution, exercise or extinction of parental responsibility or to maintenance obligations are independent. The court that exercises jurisdiction to decide upon an application for divorce in a non-participating Member State applies its domestic conflict-of-law rules to decide the law applicable to divorce and legal separation, the rules of the 1996 Hague Convention to determine the law applicable to parental responsibility and the rules of the 2007 Hague Protocol and Regulation (EC) No 4/2009 to determine the law applicable to maintenance obligations.

3.7. Conclusion on the fulfilment of legal conditions

48. On the basis of above, the Commission concludes that all the legal conditions set by the Treaties for the enhanced cooperation are fulfilled.

3.8. Respect for fundamental rights

49. Enhanced cooperation in the area of the law applicable to divorce and legal separation respects the fundamental rights set out in the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof on non-discrimination. The conflict-of-law rules proposed in the Regulation implementing the enhanced cooperation will be applied to all divorces in the participating Member States without discrimination on any ground.

²¹ Council Decision 2008/431/EC authorising certain Member States to ratify, or accede to, in the interest of the European Community, the 1996 Hague Convention on Protection of Children (OJ L 151, 11.6.2008, p. 36).

²² Council Decision 2009/941/EC on the conclusion by the European Community of the 2007 Hague Protocol on the law applicable to maintenance obligations (OJ L 331, 16.12.2009, p. 17).

²³ Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ L 7, 10.1.2009, p. 1).

3.9. Conclusion on enhanced cooperation

50. 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. The common conflict-of-law rules on divorce and legal separation will considerably facilitate the lives of tens of thousands of couples in the participating Member States. This is in line with the Stockholm Programme, in which the European Council considered that the process of harmonising conflict-of-law rules at Union level should continue in areas where it is necessary, such as separation and divorces²⁴. Therefore, 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, in accordance with Article 328 TFEU, and it encourages the Member States that have not yet so requested to participate in the enhanced cooperation, thus boosting its benefits and advantages.

²⁴ The Stockholm Programme — An open and secure Europe serving and protecting citizens, adopted by the European Council on 10-11 December 2009.

Proposal for a

COUNCIL DECISION No. .../2010/EU

authorising enhanced cooperation in the area of the law applicable to divorce and legal separation

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 329(1) thereof,

Having regard to the requests made by Bulgaria, Spain, France, Italy, Luxembourg, Hungary, Austria, Romania and Slovenia,

Having regard to the proposal from the Commission,

Having regard to the consent of the European Parliament²⁵,

Whereas:

- (1) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured. For the progressive establishment of such an area, the Union is to adopt measures relating to judicial cooperation in civil matters with cross-border implications.
- (2) Pursuant to Article 81 of the Treaty on the Functioning of the European Union, those measures are to include promoting the compatibility of the rules applicable in the Member States concerning conflict of laws, including measures concerning family law with cross-border implications.
- (3) 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.
- (4) At its meeting on 5 and 6 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. It established that the objectives of the proposed Regulation could not be attained within a reasonable period by applying the relevant provisions of the Treaties.
- (5) In these circumstances, Greece, Spain, Italy, Hungary, Luxembourg, Austria, Romania and Slovenia addressed a request to the Commission by letters dated 28 July 2008

²⁵ OJ C [...], [...], p. [...].

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. Bulgaria addressed an identical request to the Commission by letter dated 12 August 2008 and France joined the request by letter dated 12 January 2009. On 3 March 2010, Greece withdrew its request. In total, nine Member States have requested enhanced cooperation.

- (6) The enhanced cooperation should provide a clear and comprehensive legal framework in the area of divorce and legal separation in the participating Member States and ensure adequate solutions for citizens in terms of legal certainty, predictability and flexibility and prevent a ‘rush to court’.
- (7) The conditions laid down in Article 20 of the Treaty on European Union and in Articles 326 and 329 of the Treaty on the Functioning of the European Union are fulfilled.
- (8) The area of the enhanced cooperation, the law applicable to divorce and legal separation, is identified by Article 81(2)(c) and Article 81(3) of the Treaty on the Functioning of the European Union as one of the areas covered by the Treaties.
- (9) The requirement of last resort in Article 20(2) of the Treaty on European Union is fulfilled in that the Council established in June 2008 that the objectives of the Regulation cannot be attained within a reasonable period by the Union as a whole.
- (10) Enhanced cooperation in the area of the law applicable to divorce and legal separation aims to develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments, and to ensure the compatibility of the rules applicable in the Member States concerning conflict of laws. Thus, it furthers the objectives of the Union, protects its interests and reinforces its integration process as required by Article 20(1) of the Treaty on European Union.
- (11) Enhanced cooperation in the area of the law applicable to divorce and legal separation complies with the Treaties and Union law, and it does not undermine the internal market or economic, social and territorial cohesion. It does not constitute a barrier to or discrimination in trade between Member States and does not distort competition between them.
- (12) Enhanced cooperation in the area of the law applicable to divorce and legal separation respects the competences, rights and obligations of those Member States that do not participate in it. The common conflict-of-law rules in the participating Member States do not affect the rules of the non-participating Member States. The courts of the non-participating Member States continue to apply their existing domestic conflict-of-law rules to determine the law applicable to divorce or legal separation.
- (13) In particular, enhanced cooperation in the area of the law applicable to divorce and legal separation complies with Union law on judicial cooperation in civil matters, in that enhanced cooperation does not affect any pre-existing *acquis*.
- (14) This Decision respects the principles enshrined in the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof.

- (15) Enhanced cooperation in the area of the law applicable to divorce and legal separation is open at any time to all Member States, in accordance with Article 328 of the Treaty on the Functioning of the European Union,

HAS ADOPTED THIS DECISION:

Article 1

Bulgaria, Spain, France, Italy, Luxembourg, Hungary, Austria, Romania and Slovenia are hereby authorised to establish enhanced cooperation between themselves in the area of the law applicable to divorce and legal separation, by applying the relevant provisions of the Treaties.

Article 2

This Decision shall enter into force immediately upon its adoption.

Article 3

This Decision is addressed to the Republic of Bulgaria, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Austria, Romania and the Republic of Slovenia.

Done at Brussels,

*For the Council
The President*