



**CCBE POSITION ON THE PROPOSALS FOR COUNCIL
REGULATIONS ON JURISDICTION, APPLICABLE LAW AND THE
RECOGNITION AND ENFORCEMENT OF DECISIONS IN MATTERS OF
MATRIMONIAL PROPERTY REGIMES (COM (2011) 126/2) AND
REGARDING PROPERTY CONSEQUENCES OF REGISTERED
PARTNERSHIPS (COM (2011) 127/2)**

CCBE Position on the proposals for Council regulations on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (COM (2011) 126/2) and regarding property consequences of registered partnerships (COM (2011) 127/2)

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 31 member countries and 11 further associate and observer countries, and through them around 1 million European lawyers.

On 25 November 2006, the CCBE responded to the European Commission Green Paper on the settlement of conflicts of law relating to matrimonial property regime - in a paper available at:

http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/en_divorce_ccbe_resp1_1182240859.pdf

The CCBE welcomes the proposals for Council regulations on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (COM (2011) 126/2) and regarding property consequences of registered partnerships (COM (2011) 127/2).

The proposals should be amended first to include the principles identified in the EU Regulation on cross-border successions 650/2012 for a description of the concept of habitual residence and for the referral of disputes to courts which are better placed.

In addition, in order for new instruments to allow better movement of persons with greater legal certainty, the CCBE would suggest several measures to proceed with the on-going legislative work.

1) Enhanced co-operation

The legal basis of the proposals is Article 81 § 3 of the TEU, which gives the Council the power to adopt measures on family law with cross-border implications after consulting the European Parliament.

Marriage is dissolved either by death or by divorce; in both cases, the matrimonial property regime should be liquidated.

Unlike the EU cross-border successions Regulation 650/2012 (qualified majority within the Council allowing opting out), the Council should act unanimously after consulting the Parliament.

As for Regulation 1259/2000 on the law applicable to divorce and legal separation, it will be possible to implement the enhanced co-operation procedure.

To the extent that divorce involves liquidating the matrimonial property regime of the spouses if they have lived in a civil law country, it is desired by the CCBE to once again resort to the enhanced co-operation procedure for the adoption of the proposed Regulations on matrimonial property regimes and registered partnerships.

However, there are within the European Union many couples who are also living in common law countries: such couples would also be concerned by divorce/cross-border successions as it also results in the liquidation of their matrimonial financial interests.

Domestic rules in Common law countries do not really recognise the concept of matrimonial property regime, but their domestic legislation recognises some internal corrective mechanisms in the event of unequal funding by the spouses of property acquired on behalf of both as an example, or in case of the need for further protection of the marital home.

The proposals mentioned below are intended to prevent any further separation between the common and civil law concepts of property relations between spouses.

2) Definition of the matrimonial property regime

The definition in Article 2 is deemed inaccurate as it ignores mixed concepts such as - in Germany – ‘*Versorgungsausgleich*’ (equalisation of social benefits in the event of liquidation of the matrimonial property regime, unless agreed otherwise in the matrimonial covenant).

This mixed matter cannot be included within the scope of the Regulation as - based on the country in which pension contributions have been paid - the equalisation through transfer of points will or will not be possible.

It would be wise to clearly list all national institutions which are not included in the scope of the regulation, rather than referring to concepts such as law enforcement or public order (how would one reasonably assume that equalisation of pension rights falls under law enforcement or public order?).

3) Competence

An agreement on the competent jurisdiction in divorce cases can be reached at any time by the spouses before or throughout the proceedings (Article 4).

Spouses with malicious intentions should not be entitled to reach an agreement on jurisdiction in matrimonial property matters (under the matrimonial property regime Regulation) without concomitantly establishing an agreement on the competent legislative jurisdiction in divorce matters (under Regulation 1259/2000).

To be valid, the agreement on jurisdiction over matrimonial property matters in the event of a divorce must concomitantly provide for an agreement on the ruling jurisdiction for the divorce, even if limited to the applicable law.

4) The choice of applicable law

a) No objective reason should deprive partners to choose the applicable law for their property regime; for example, French and German partners who live in Belgium should be able to opt for the French or German regime.

Discrimination between married couples, who could, and unmarried couples, who could not, does not seem consistent with the principles of civil law in Europe.

b) Consequences of a choice of applicable law are very important as the choice of law may lead to a very significant imbalance between the spouses.

The CCBE suggests giving enhanced value to acts of free choice established with the assistance of two independent counsels on the one hand, or with a precise description of advantages and disadvantages of the choice made in case of assistance of a single counsel on the other. In view of the seriousness of the choice that the spouses need to make, it is important that they receive legal advice.

This could be added to the objectives of the Regulations (recital 24).

5) Law enforcement and public order

The CCBE does not believe any matrimonial property provisions in force in a member country are offensive to the point that they can be seen as conflicting with law enforcement in another state or considered contrary to public order in another state.

For harmonisation purposes, and in order not to be used as pretexts by parties acting in bad faith, it is suggested to remove amendments related to public order and law enforcement, except in specific cases.

6) Movement of authentic acts and acts with comparable status and effects

The CCBE has released a study which highlights the diversity of acts which are comparable to authentic instruments:

http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/Report_Authentic_Act1_1302619714.pdf

In matrimonial property matters, there are mainly two types of acts:

- The act which defines rules, often called marriage contract - which is always consensual,
- The act which organises or ends the matrimonial property regime (dissolution, liquidation), which is often negotiated and the result of mutual concessions.

In countries with authentic acts, the first type of act is often established by a notary, and the second type of act is often established by other legal professionals, first and foremost lawyers.

In countries without authentic acts, these two types of acts are established by other legal professionals, first and foremost lawyers.

The second type of act should not be confused with legal transactions (e.g. liquidation of a community of property regime without real estate but with financial assets in different countries through an instrument established by lawyers).

In order not to exclude acts established by professionals in countries without authentic acts (including countries which would initially not participate in enhanced co-operation) and not to exclude acts of settlement or dissolution established by professionals from all countries, it is necessary to ensure that the provisions of Articles 32 and following (matrimonial property regimes proposal) and Articles 28 et seq. (registered partnerships proposal) shall deal with the recognition and enforcement of authentic acts and instruments with comparable effects which are established by non-judicial authorities.