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CCBE RESPONSE TO THE EUROPEAN COMMISSION GREEN PAPER ON DIVORCE

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1. INTRODUCTION

The Council of Bars and Law Societies of Europe (CCBE) represents, through its member bars and law societies of the European Union and the European Economic Area, over 700,000 European lawyers. In addition to membership from EU bars, it has also observer representatives from a further seven European countries' bars. The CCBE responds regularly on behalf of its members to policy consultations which affect European lawyers.

Following the Green Paper on applicable law and jurisdiction in divorce matters presented by the European Commission and setting out its proposed next steps in this area, this paper is the response of the CCBE to most questions raised in this document.

Our remarks follow the order of the questions raised by the Commission in its document regarding the optional instrument.

The CCBE very much welcomes the initiative of the Commission to propose an instrument under Section IV of the Treaty in the area of divorce.

The CCBE would like to support the findings of the Commission in the Green Paper (p. 3), that such an instrument will be very beneficial to the citizens of Europe and provide legal safety and efficient legal co-operation.

Unifying the rules regarding choice of applicable law to divorce will limit forum shopping and its side-effects.

Question 1. Are you aware of other problems than those identified above that may arise in the context of "international" divorces?

It may be interesting to tie the issue of matrimonial regimes with that of divorce taking account of the disparity also existing in this area.

The issue of taxation of compensatory benefits, which may differ from one Member State to another, is also a hot topic.

As a matter of fact, it is not only divorce procedures which cause problems, but also their consequences and notably maintenance payments.

Besides, harmonised conflict rules should include the European definitions of common residence and usual residence which are used in family law.

Question 2. Are you in favour of harmonising conflict-of-law rules? What are the arguments for and against such solution?

Harmonising conflict rules is necessary in view of the significance of marriages between persons of different nationalities and the problems these couples have, should they divorce.

Indeed, the disorder in this area creates significant legal uncertainty even if some convergence (a preference for divorce by consent and the diminution of the notion of fault) can be seen in most Member States.

Significant differences nevertheless remain in the legislations of the different Member States, as much in the reasons for the divorce (by consent, irreversible breaking off of the marriage, fault, de facto separation, without reasons), as in the procedure (administrative only, several appearances before the court, mandatory legal representation, linked to the issue of parental responsibility or dealt with separately, expeditious procedure for some reasons, etc.).

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Having regard to the current Regulation, the applicable law will be different depending on the court to which the reference is made.

Since Regulation Brussels IIa gives preference to the first court to which the matter is referred, the determination of the applicable law can only result from the speed with which the party refers the matter to the court. The will of one spouse to have one law applied instead of another encourages the parties to engage in conflict.

Question 3. What would be the most appropriate connecting factor?

Even though it may seem advisable to leave more room to the will of the spouses in the choice of the applicable law, one should however limit it and supervise the choice, given the difficulty which may arise from the drafting of agreements on future situations, and on the issue of parental responsibility.

One should at least provide for connecting factors in cases where spouses have not made any choice.

The most relevant connecting factors are:

- In case of common nationality: the nationality of the parties,
- In case of different nationalities: the country to which the spouses have the most objective links; if it is not possible to determine that, the place of permanent common residence of the spouses; if that is not applicable, that of the spouse with whom minor children (or the European connecting factor, ECF, which is mentioned below)
- If not applicable, *lex fori*.

Lex fori is however subject to controversy.

For some, applying *lex fori* would be the same as « judging by accident » a divorce which is an extremely important event in a couple's life, in a place of accidental residence (traineeship, temporary job, etc.), which does not raise any major drawback with regard to the competent court, but which may raise some with regard to the applicable law given the divergences which are still important between the laws of the Member States.

Applying *lex fori* in such circumstances could even be painful and aggravate the conflict for spouses who are already suffering and are often very attached to their own legal culture.

Supporters of *lex fori* highlight that it could be applied in cases of urgent measures to be taken, namely with regard to children or even when there is no other connecting factor.

It should be pointed, too, out that *lex fori* is the one best known by judges.

The CCBE recommends that a new and uniform European Connecting Factor (see next paragraph) be defined in the instrument. In recommending the same connecting factor for jurisdiction the instrument would ensure that the competent court will apply its own law.

A new European Connecting Factor should be created for the purposes of the future instrument because the expressions 'domicile' and 'habitual residence' have different meanings in different Member States. The 'European Connecting Factor' (ECF) is the same as the one proposed by the CCBE in the area of succession, but it will need to be adapted for divorce as instead of concerning only the deceased, it concerns both spouses and children. For divorce, it must refer to the following elements:

- permanent residence which is common for the whole family, or if not, then the residence of the spouse with whom minors have been living, such residence to be for at least 1 or 2 years (the CCBE would recommend 2 years);
- only one ECF permitted;
- should someone move back to his/her country of citizenship, he or she doesn't need to reside for a minimum period in that country in order to obtain again the ECF but it will attach immediately.

In the area of divorce, this ECF will only be applied if there is no common nationality of the spouses, which remains the first connecting factor for the CCBE.

Question 4. Should the harmonised rules be confined to divorce or apply also to legal separation and marriage annulment?

Harmonised rules should also include legal separation. As far as marriage annulment is concerned a distinction should be made between annulment on the form of the marriage and that on the merits of the particular case. In case of annulment based on form, it is advisable to apply the law of the place of marriage. For annulment based on merits, harmonized rules should also apply.

The issue of annulment may develop in coming years due to forced marriages in some immigrant families.

On the other hand, the new Brussels II Regulation (2201/2003) provides already in its Article 1 on the scope of application that it is applicable to divorce as well as to legal separation and marriage annulment.

Question 5. Should the harmonised rules include a public policy clause enabling courts to refuse to apply a foreign law in certain circumstances?

Including a public policy clause seems necessary to enable courts to refuse to apply foreign law in certain circumstances, and notably when the law would be too different from the legal background, such as the prohibition to divorce (e.g. in the legislation of Malta) or the application of the mechanism of repudiation (existing in some North African legislations).

Question 6 Should the parties be allowed to choose applicable law? What are the arguments for and against such a solution?

1) This issue shows the problems related to current developments in European society.

Usually, in all European countries, marriage, and therefore divorce, is a matter of public policy.

In most Member States, marriage is still considered as an institution and not as a contract.

Yet, many European citizens claim for a greater freedom in the area of family relationships. In order to satisfy this claim, there needs to be a contract for these relationships, which we can find in a number of national laws.

As a consequence, contracts of civil partnership are developing as well as divorce by consent procedures.

In some Member States, the autonomy of will is already provided for in the area of matrimonial regimes where public policy plays a role which is more and more reduced.

This issue is more difficult for divorce itself.

Yet the trend, observable in the majority of Member States, to distinguish the issue of children from that of divorce and the relationship between the spouses, could enable a development towards the autonomy of will of the parties, even for the issue of divorce.

Actually, even if it may seem risky to let parents choose the law applicable to the organisation of life of their children, it seems possible to satisfy the will of international couples to keep control of their other matrimonial affairs at the time of the divorce.

Some countries (Spain, Belgium, the Netherlands, and Germany, etc.) have admitted the possibility for spouses to choose the law applicable to divorce.

We can hardly imagine how citizens of such States, who have this freedom, would accept to be deprived from it today by a Community rule.

2) Free choice can also be based more on strictly judicial issues.

Choosing freely the law applicable to divorce provides relationships between spouses with a legal system known in advance when they divorce.

If the spouses use this possibility, their situation will be simplified because:

- if we remain in a system where each court applies its own conflict rule, the difficult determination of the applicable law can be avoided; this will also avoid the automatic link, often artificial, between judicial jurisdiction and the applicable law.
- if there is a single European conflict rule, we will avoid any inadequacies in this rule regarding the situation of spouses. It would also be so if the conflict rule would determine the law of one residence for strictly professional reasons in a country which would not be one of the spouses.

Given the above, the CCBE agrees, in principle, to authorise parties to choose the law applicable to their divorce.

The CCBE is however aware of the difficulties underlying such autonomy.

The main drawback is to ask jurisdictions to apply foreign law which is unfortunately sometimes still quite remote from their national laws.

This drawback should progressively disappear with the convergence of legal systems in family law, but it remains certainly a real difficulty.

A solution may be to impose on parties who chose the applicable law, to provide the judge with a copy of the said law.

The CCBE also considered the risk of a choice imposed by one of the spouses who is in a position of strength.

The question of the moment of the choice of the law applicable is also important and will be dealt with in question 9.

But these reservations do not change the essence of the principled answer above which is favourable. They simply pave the way for the answers to subsidiary questions which are those of the condition of exercise of this right to choose.

Question 7. Should the choice be limited to certain laws? If yes, what would be the appropriate connecting factors? Should it be limited to the laws of the Member States? Should the choice be limited to "lex fori"?

1) The CCBE agrees that the choice of the spouses should be controlled.

The CCBE believes first that the choice should be limited to laws of Member States.

Even though there are quite significant differences, there is undoubtedly a convergence between laws of Member States which in the end will facilitate the exercise of the autonomy of will – this would not be possible if the choice was to be extended to other countries.

This limitation would favour the unity and the working out of an agreement on all rules applicable to family matters in the EU.

We can also consider that courts in Member States probably know more about laws of other Members States than of countries outside the European Union, which will limit cases where the judge does not know the law applicable.

On a more general basis, one should absolutely avoid choosing laws when there is no connecting factor with the interest of the family. The spouses must be familiar with the law chosen. Otherwise, the objective of legal security cannot be achieved.

2) As far as appropriate connecting factors are concerned:

- The CCBE also believes that the chosen law should be linked with at least one of the spouses, whether it is to nationality or the ECF.

In this respect, the CCBE calls for the adoption of a European connecting factor (ECF) as mentioned above (question 3) or at least a common European definition of usual residence in family matters (see notably the specific provisions of Regulation Brussels IIa on the United Kingdom and Ireland which concern common domicile).

- The CCBE thinks that spouses should not have a choice limited to lex fori. There should be the possibility to be able to choose the law well before the divorce procedure starts. Of course, having the choice of parties limited to lex fori would facilitate the work of the courts, but would not fulfil the objective of a legally foreseeable nature which is only possible through a choice made before the divorce procedure starts.

Besides, the principle of lex fori is inadequate for situations of geographical mobility which are more frequent now.

Question 8. Should the possibility to choose applicable law be confined to divorce or should it apply also to legal separation and marriage annulment?

The CCBE considers that marriage annulment should be dealt with separately from legal separation and divorce.

In the procedure of marriage annulment, there are facts which are linked to formalities specific to each Member State where the marriage takes place.

The CCBE thinks that the law applicable to the nullity of marriage should be the law of the place of marriage relating to conditions about the form of the marriage, and the national law of the spouse concerned for the conditions about capacity and consent.

On the other hand, the CCBE is in favour of the possibility to choose the applicable law for legal separation and divorce, the only difficulty being that some Member States do not recognise legal separation.

The CCBE points out that the law chosen for divorce should be the same as that chosen for legal separation, if one or the other is chosen before the lodging of any procedure.

Question 9. What should be the appropriate formal requirements for the parties' agreement on the choice of law?

The CCBE first considers that the choice can be made at any moment, either at the time of marriage, or during the marriage, when a divorce procedure is lodged or during the procedure itself.

Once this choice is made, it should not be possible to modify it.

But this choice should not arise from the superiority of one of the spouses, and formal conditions should guarantee the freedom of agreement.

The formal conditions of the choice are relatively simple if the choice is made when the procedure is lodged.

As a matter of fact, in such a case, one can ask the parties to let their choice be known before the judge, either directly or through their lawyer.

Procedural rules applicable for each Member State, either during the declaration of the will of the parties, or during their arguments, are sufficient to guarantee the freedom of agreement.

If the choice is made at the time of the marriage, there are two possibilities:

- Either the choice is made at the marriage, but it may cause a psychological problem to say yes to the marriage and at the same time, to decide on the law applicable if there is a divorce.
- The other solution is to tie the choice of the law applicable to divorce with that of the marital regime but this would certainly limit the development of the autonomy of parties as statistics shows that throughout the Member States few couples choose their marital regime. Besides, this notion covers legal realities which are very different among the Member States.

On a general basis, the CCBE considers that formalities applicable to such a declaration should guarantee the perfect information of both spouses, and the verification of their mutual consent. The choice should be made expressly.

The best way to make sure that these elements have been taken into account is to have a professional third party, say a judge, or a notary, which would exclude in any case the simple signature of a private document.

To ensure more flexibility, one could let the Member States determine the forms of expression of choice.

Question 10. In your experience, does the existence of several grounds of jurisdiction result in “rush to court”?

The consequence of the Brussels II Regulation is that everyone wants to be the first to file a claim with a court. According to this Regulation, several courts in different EU Member States may have the jurisdiction for one and the same case. The jurisdiction is focused on the court that was first approached. In practice, this means that courts are increasingly approached precipitately in order to ensure a particular jurisdiction. Practical experience has shown that this results in problems and that this practice should therefore be changed.

Which court of which EU Member State has the jurisdiction is often important, as the law applied to the same case differs according to the Member State. So far, the courts have had to apply their own private international law. The connecting factor pursuant to the respective private international law systems differs greatly among the legal systems of the EU Member States. In some Member States it is connected to nationality (for example in France and Germany), while other Member States always apply their own law (lex fori, England, Ireland).

The issue of competing jurisdiction will become less important as soon as international private law for matters of family law has been standardized among the EU Member States. This should be the objective.

Question 11. Do you believe that the grounds of jurisdiction should be revised? If so, what would be the best solution?

The provisions of the Brussels II Regulation with regard to the court's jurisdiction on matters of divorce law should be changed in such a way that competing jurisdictions of the Member States' courts no longer exists. Such a change would be a sensible thing to do at least as long as international private law for matters of divorce law has not been standardized among the EU Member States. As soon as all EU Member States decide according to standardized rules which law is to apply to divorce, spousal support and the marital property regime, the issue of the applicable courts' jurisdiction will become less important. Against this background, the current rules on jurisdiction may be maintained.

If the competing jurisdictions of the courts in the EU Member States is abolished, the parties' possibilities to agree on a place of jurisdiction should be extended. In doing so, however, the number of places of jurisdiction should be restricted. The number of courts to be agreed on as the place of jurisdiction must substantially be restricted to those which have competing jurisdictions according to the Convention currently in force.

Question 12. *Do you consider that the harmonisation of the jurisdiction rules should be reinforced and that Article 7 of Regulation No. 2201/2003 should be deleted, or at least limited to cases where no EU citizens are involved? If yes, what should these rules look like?*

Article 6 of the Brussels IIa Regulation occasionally results in a citizen of the Union not being able to bring an action for divorce before any court of the EU. This happens, for example, if the spouses are citizens of different EU Member States and their residence is outside the European Union. Therefore, the CCBE recommends to keep the residual jurisdiction provided for pursuant to Art. 7 which enables the claimant to bring an action before the court in one Member State in the instances stated therein, even if the respective other spouse is not a citizen of the Union.

Question 13. *What are the arguments for and against introducing a possibility of prorogation in divorce cases?*

The CCBE is in favour of introducing a possibility of prorogation of jurisdiction in divorce cases but with certain limitations. The prorogation on the basis of the parties' choice should be allowed only by nationality, the ECF or the applicable law. The parties should have the possibility to choose a Member State but not a particular court in the Member State.

Question 14. *Should prorogation be limited to certain jurisdictions?*

The prorogation should be limited only to the jurisdictions of the Member States of the European Union.

Question 15. *What should be the formal requirements for the parties' prorogation agreement?*

The formal requirements for the parties' prorogation agreement should be the same as the formal requirements for the parties' agreement on the choice of law.

Question 16. *Should it be possible to request a transfer of a case to the court of another Member State? What are the arguments for and against such solution?*

In principle, no renvoi should be allowed among the Member States of the European Union. The choice of law or the connecting factors should define the applicable law.

Question 17. *What should be the connecting factors to establish whether a case can be transferred to another Member State?*

See the answer to question 16.

Question 18. *What safeguards would be necessary to ensure legal certainty and avoid undue delays?*

See the answer to question 16.

Question 19. *Which combination of solutions do you believe would provide the most appropriate remedy to the problems described?*

Please see previous answers. The CCBE is in favour of freedom of choice of law. If there is no chosen law then the connecting factor should be the common nationality of the parties; if they have no common nationality, the ECF should be the connecting factor; if it is not applicable, then lex fori.