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CCBE Response to the Green Paper from the European Commission on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition

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1. INTRODUCTION

The Council of Bar and Law Societies of Europe represents more than 700,000 European lawyers through its member bars and law societies of the European Union and the European Economic Area. 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 citizens and lawyers.

Following the Green Paper on matrimonial property regimes presented by the European Commission setting out its proposed next steps in this area, this paper is the response of the CCBE to some of the questions raised. Our comments follow the order of questions of the Commission.

The CCBE welcomes the opportunity to offer answers on the issues raised in the Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition. These are issues that should not be considered in isolation but discussed alongside and in coherence with the approach taken on current EU proposals on divorce and on wills and succession.

On some occasions, because of the marked difference in treatment of property questions under the civil law and common law systems, we have given answers which reflect a divergence of opinion between the two systems.

In common law systems, there is no concept of a matrimonial property regime recognised on divorce or "primary" marital regime as such. There is however a "secondary" marital regime, since the common law system does have a system of rules applicable on dissolution of marriage by divorce or death. Some believe that part of these rules would fall within the Green Paper proposals' efforts towards harmonisation of marital regimes across the EU. Another school of thought, reflected in the response of the Bar Council of England and Wales to the Green Paper, feels that the divergence is so great that if the proposals were to come into effect, there would be no impact on the law of England and Wales on divorce. The Bar Council of Northern Ireland shares this view in respect of its jurisdiction.

Question n° 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?

One should clearly make a distinction between on the one hand mandatory rules applicable to all spouses whatever the matrimonial regime chosen, which many Members States have under the name of "fundamental status" or "primary regime" and, on the other hand, rules governing the property consequences which arise during the marriage and those applying when it is dissolved.

As a matter of fact, some Member States, mainly Common Law ones, are not familiar with the primary regime and its rules governing property relationships during the marriage. In English and Northern Irish law the fact and status of marriage have no effect whatever on the proprietary relations between spouses either vis-à-vis each other or with third parties such as creditors.

This difference explains why the CCBE cannot give a unanimous response to this question.

Common Law lawyers would not like these "primary regime" rules to be covered by the future instrument. Many English family law practitioners believe that English divorce law would simply not be affected by an instrument based on the Green Paper.

On the other hand, lawyers from countries which have the concept of primary regime and apply the rules of the matrimonial property regime during the marriage would like them to be covered by the future instrument.

Indeed, the primary regime aims to govern the everyday life of spouses and give simple solutions to questions arising thereof. Some aim to guarantee the independence of spouses: acts of the professional life and of household acts; others ensure to safeguard the interests of the family: protection of housing, and judicial empowerments.

The objective of these rules is to establish security on a daily basis for spouses and for third parties. This justifies that the future instrument does not ignore them and that it applies to property which arises thereof during the living together of the couple and not only at the separation or the dissolution of the marriage.

This could also apply to rules which govern property effects arising out of the matrimonial property regime during the marriage. Protecting sometimes the interest of each spouse, sometimes the interest of third parties, they have features similar to some rules of the fundamental status (inter alia empowerments, organisation of the rights of each spouse). Their purpose can enable to have them included in the future instrument and that the latter applies during the living together without waiting for its dissolution.

Question n° 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, 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?

a) The most important objectives to take account of are the simplicity, the foreseeable nature for the citizens, and legal security.

We also consider it necessary to safeguard the consistency of rules applicable to the matrimonial property regime with other rules relating to family law (divorce, maintenance obligations, …).

In the CCBE response to the Green Paper on divorce, the CCBE put forward the common nationality of the parties as the first connecting factor.

But given the fact that the draft regulation on the law applicable to divorce opted for the spouse's habitual residence as first factor, the CCBE agrees with the choice.

The habitual residence seems to be a good choice to the extent that it is also consistent with the criterion of the first habitual residence chosen by the The Hague Convention.

However, the CCBE thinks that this choice imposes two conditions:

- that the spouses are free to choose the law applicable according to certain eligibility criteria if they want to do so. This will notably enable spouses with the same nationality not to be governed by the law of their habitual residence;

and especially, the CCBE continues to call on a more precise and comprehensive definition of the concept of habitual residence, which is proper to family law

- Case law definitions of the habitual residence kept by European jurisdictions in other fields do not seem indeed to be appropriate to family issues. However, the CCBE notes that the definition of habitual residence which has evolved in the European Court of Justice from cases outside the sphere of family law (and which is referred to at Paragraph 32 of the Borras Report) has been applied by the French Cour de Cassation and also by the English High Court in cases under Brussels II Revised.

b) Common Law lawyers would like the future instrument to apply only to the dissolution of the matrimonial property regime, if indeed it has any application at all on divorce.

On the other hand, lawyers from Member States where matrimonial property regimes include rules applicable during the marriage would like the same criteria be kept for the couple's life as they are for the time being for the breaking up of relations, without the applicable law being different according to the period of the couple's life where it must apply.

Question n° 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?

Without any chosen internal law by the spouses before their marriage or at its dissolution, it seems to the majority preferable to use different connecting factors according to different aspects of the situation covered by the applicable law.

The usual distinction between movables and immovables seems to impose itself.

The connecting factor to decide on the lot of movables and immovables could be the one proposed in the response to question 2.

As far as immovables are concerned, a simple and efficient connecting factor, having regard to the diversity of rules in each State for which harmonisation seems ambitious and premature, would be the *lex situs* of immovables.

Question n° 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?

If it seems advisable that the rules aimed to ensure the protection of the interests of the family and spouses in everyday life (primary regime) could be changed in case of modification of some connecting factors, notably in case of changing the habitual residence provided that a duration criteria is set, this would not apply to the matrimonial property regime.

If the spouses are allowed to choose the internal law applicable both before the wedding and during the divorce, and to modify the rules during the marriage, it does not seem appropriate to authorise the automatic change of the law applicable to the dissolution of the matrimonial property regime in case of the modification of some connecting factors. It would generate too much legal insecurity. Ill-informed spouses might ignore the successive avatars of their regime. Divorce procedures might present disadvantages or unsuspected consequences making the proceedings tougher and more complex, which is not desirable.

Another indirect effect may be feared. Thirds parties contracting with spouses would tend to systematically require the simultaneous intervention of spouses for all acts so as to have guarantees, which would then undermine the independence of spouses and ruin number of rules protecting it in matrimonial property regimes.

All the more, a retroactive effect would generate even more legal insecurity.

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?

The majority feels strongly that individuals should be allowed to choose the applicable law in relation to division of matrimonial property assets. A choice of any current connecting factor would seem to be a reasonable European approach. The connecting factors should be through nationality, domicile or habitual residence. This will allow for exercise of party autonomy and lead to greater legal certainty.

The chief arguments in favour of allowing a couple to choose applicable law are that it allows parties autonomy in their private lives and dispenses with the need for the courts to decide questions of applicable law.

Parties would need to seek independent legal advice prior to making a decision on choice of applicable law.

The views of the common law jurisdictions have been summarised above.

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

Although we would prefer immovable property to be governed by the *lex situs*, if the regulation were not to apply this, then it would be appropriate for the parties to be able to choose that immovable property should be governed by the *lex situs.*

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)?

Yes it should be possible to make or change this choice at any time, provided the parties have independent legal advice.

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

Since we are only concerned as to the secondary regime, we are not overly concerned, but would think it logical that the choice would not have retrospective effect.

Question n° 6 :

Should the formal requirements for the agreement be harmonised?

It is not necessary to harmonise the formal requirements for the agreement except to ensure that the parties take independent legal advice at the time when the choice was made or later amended.

The important thing is to ensure that the agreement is valid and legitimate in accordance with the domestic law of the place where the agreement is made applicable at the time. This agreement can then be mutually recognised and enforced throughout the European Union.

Question n° 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?

The CCBE is always driven by the will of simple and consistent rules for all family issues.

Therefore, the CCBE considers that the judge deciding on divorce must also decide on the issue of matrimonial property regime.

This view is shared by lawyers from all countries, including the common law jurisdictions.

As a matter of fact, the financial implications of divorce depend very much on the outcome of the liquidation of the matrimonial property regime. It is impossible to assess a compensatory indemnity without knowing the property of each spouse resulting from the liquidation of matrimonial property regime.

The will is that both issues be treated at the same time and thus confirms the need for both issues to be decided by the same judge.

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?

Yes. We would trust that immovables would be dealt with by the court of the *lex situs* in relation to both issues.

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, contract between spouses)?
b) Should there be a single general criterion or several alternative criteria as provided for by Regulation No 2201/21003 (e.g. habitual residence, common nationality)?

See above question 7.

The issue is purposeless for divorce. The rule of jurisdiction will be the same since the will is that the same judge decides on both issues.

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?

It is difficult to give a clear simple answer to this question. It would be preferable in an ideal world for a single court to rule on all the types of assets even when they are located on the territory of several Member States. In practice, it may be difficult to achieve in relation to immovables in other jurisdictions.

However, this is already the position in certain common law jurisdictions on divorce but not on death, including England and Northern Ireland.

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

The answer is again different for Member States that have or do not have primary regime.

Question 10:

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

We are in favour of party autonomy. However, it would be more logical if the court with jurisdiction were to be the courts of the state whose law applies to the majority of the matrimonial assets, so that the court were applying its own law.

In principal, we would not object to the parties having the ability to elect another jurisdiction, but would suggest that it should be one linked to domicile, residence or nationality.

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?

Yes. We agree that this should be allowed where the transferring court thinks transfer is expedient

We recognise the need to allow transfer between courts and consider that such a transfer may be more appropriate than asking one Member State's courts to interpret the law and practice of another. However, we are concerned that the process should not waste the time of two courts. Any transfer should happen at the commencement of proceedings, not half way through proceedings with the result that the first part of the case is heard twice, by two separate courts.

Equally, we are aware of the concern that some courts might unreasonably, decline jurisdiction and that it must only be possible to transfer jurisdiction if it is accepted by the second court.

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?

We do not consider that the regulation and status of the legal professions should be part of a Regulation on matrimonial property assets.

It is the effect and status of the acts in question that should be dealt with in the Regulation or under Community law generally not the person/function of the person executing such an act.

However we would support the provisions in question 15 that refer to the same rules as to recognition (but not enforcement) in relation to acts established by non-judicial authorities, such as marriage contracts, as to judgments?

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?

It is not clear as to whether this question relates to jurisdiction or applicable law or enforcement. We would prefer to see movable property dealt with under one jurisdiction and immovable property dealt with under the *lex situs,* The implementation of such judgements on divorce or death, will require enforcement in the jurisdiction where the assets are located.

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?

As with question 13, it is not overall clear whether this question relates to jurisdiction, applicable law or enforcement. Therefore, the CCBE found it difficult to find an appropriate answer at this point.

Question n°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?

One should remain consistent with other Directive, and more generally with all European norms, and pursue European efforts to harmonise and facilitate the exequatur for judgements.

Therefore, the exequatur should be abolished.

Question n°16 *:*

Could there be a provision to the effect that judgements 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?

In theory we would welcome this provided this does not impact on the exercise of applicable law.

However, it is inconceivable in practice that, for example, the Land Register of England & Wales can show that property is subject to a regime of community. This would require an amazing change in concepts in English law. Judgements need to be enforced locally in the usual way as at the moment.

Such a system would be even more impracticable in jurisdictions such as Northern Ireland and Scotland which lack unitary comprehensive property registers.

Question n° 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?

The CCBE thinks that the answer should be affirmative for various reasons.

On the one hand, this system is already implemented through authentic acts of notaries which are enforceable, i.e. they have the value of a judgement.

Lawyers from some Member States have also that power.

Lawyers are all the more attached to that recognition that some Member States have been proposing for several years, in order to give more security to legal acts, the creation of the act under legal signature which is an act between the authentic act and the private act.

Finally, this recognition would facilitate the movement of legal acts while keeping a perfect security and would enable an easier publicity, safeguarding also the autonomy of the will of parties.

Question n°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?

The Committee is in favour of harmonising the publications and therefore of the creation of a European register accessible to all, a sort of single contact point, as proposed by the Services Directive, for the registration of lawyers.

The contact details of this single point centralising matrimonial property regimes could be given with the documents provided at the celebration of the marriage.

Some Member States have reservations on this initiative as they do not have this type of register. Its centralisation in a country having such a register could enable the creation of a European register in which the majority of lawyers call.

Question n° 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?

The response is delicate because if all Member States have a marriage and matrimonial property regime, they do not all have these partnerships, and even if they have included them in the internal law, they do not always correspond to the same legal realities; one would need to also take accounts of the provisions of the European Convention of Human Rights.

Therefore, some countries do not offer the possibility of registered partnerships for homosexual couples, while other countries on the other hand open them to heterosexual and homosexual couples.

Despite this difficulty, the CCBE thinks that one should provide rules on conflict of law so that these partnerships can be judged because the situation of “partners” is quite uncertain today when they leave the country where they contracted their partnership.

An alternative view would be that dissolution of registered partnerships and assets thereof should be dealt with according to the same rules as dissolution of marriage and property consequences of that. However, this throws up significant issues in relation to European differences and non recognition of same sex marriage and of non marital registered partnerships

The CCBE considers that the only possible law applicable, given the diversity of internal laws, is the law of the place where the partnership was registered.

The CCBE thinks that, as for matrimonial property regimes, the traditional rule under which immovables are governed by *lex loci situationis* should be respected in this field.

Question n° 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?

The security of partnerships also requires that rules of jurisdiction be provided as well.

The CCBE agrees to consider that these rules must be the same as the ones for divorce and matrimonial property regime.

One should simply provide for an additional criterion, the place where the partnership was registered.

Question n° 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?

The CCBE considers that these rules should be similar to those governing divorce judgements, i.e. under regulation 2001/2003.

Question 22:

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

b) 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?

We do not consider it appropriate at this stage for a European instrument to regulate conflict rules and jurisdiction in relation to this issue. It is premature to deal with this considering Member States themselves are at an early stage in their development in this regard.

It is important to emphasise the distinctions between these two types of unions and de facto unions.
For the reasons stated above we would answer questions a)-d) negatively.

Question 23:

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

No – please see above, question 22.