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2016/0061 (NLE)

Proposal for a

**COUNCIL DECISION**

**authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships**

## EXPLANATORY MEMORANDUM

### 1. INTRODUCTION

1. On 16 March 2011, the Commission adopted a proposal<sup>1</sup> for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and a proposal<sup>2</sup> for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships<sup>3</sup>.
2. The legal basis for the proposed Council Regulations is Article 81(3) of the Treaty on the Functioning of the European Union. The proposals concern judicial cooperation in civil matters covering ‘aspects relating to family law’. This legal basis stipulates that measures are adopted by the Council acting unanimously after consulting the European Parliament.
3. Starting in December 2012, the Commission proposals were discussed in the Council Working Party on Civil Law Matters (Matrimonial property regimes and the property consequences of registered partnerships). In December 2012, the proposals were discussed at a Council meeting and the Ministers agreed on certain guidelines aimed at facilitating negotiations on the two proposals.
4. The European Parliament delivered its favourable opinion and comments on the two proposals on 10 September 2013<sup>4</sup>. The comments of the European Parliament were taken into account, notably with regard to keeping the exequatur procedure in both proposals and incorporating provisions on enforceability equivalent to those laid down in the Succession Regulation<sup>5</sup>, as well as on including provisions on jurisdiction based on the appearance of the defendant. At the request of the European Parliament, provisions on choice of law and choice of court were included in the proposal on the property consequences of registered partnerships.
5. By December 2014, most technical issues had been settled and the file was ready for a political agreement. The large majority of Member States were keen to adopt the proposals at that time. However, some Member States had difficulties given the politically sensitive nature of the proposals. The Italian Presidency presented the matter to the JHA Council, which decided to grant a reflection period until December 2015 to Member States which continued to have difficulties. These difficulties were mainly linked to the fact that the institutions of same-sex marriages and/or registered partnerships were not known in a number of Member States. Some of these Member States considered that the compromise texts as presented to the Council offered sufficient safeguards to ensure that their courts would not have to deal with foreign institutions unknown in their legal system. Other Member States, however, expressed

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<sup>1</sup> COM (2011) 126

<sup>2</sup> COM (2011) 127

<sup>3</sup> In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaties, Denmark did not take part in the adoption of the proposed Regulation and was not bound by it or subject to its application. In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaties, Ireland and the United Kingdom did not give notice of their wish to take part in the adoption and application of the proposed regulations.

<sup>4</sup> A7-0253/2013 and A7-0254/2013

<sup>5</sup> Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

concern that, even if the future instruments would not require them to introduce unknown institutions in their national law, the recognition in their country of the property consequences of such foreign institutions would have an indirect effect on their national family law and policy. For most Member States, it was key to adopt both proposals as a package so as to ensure equal treatment of couples throughout the Union.

6. Intensive consultations took place in the course of 2015, in particular under the Luxembourg Presidency. Modifications were introduced in the proposals to make them acceptable to all Member States. Nevertheless, after considering the revised compromise texts, the Council concluded, at its meeting of 3 December 2015, that it would not be possible to reach an EU-wide agreement for the adoption of the two regulations within a reasonable period of time<sup>6</sup>. However, many delegations stated their willingness to consider establishing enhanced cooperation on the matters covered by the regulations.
7. From December 2015 to February 2016, seventeen Member States (Sweden, Belgium, Greece, Croatia, Slovenia, Spain, France, Portugal, Italy, Malta, Luxembourg, Germany, the Czech Republic, the Netherlands, Austria, Bulgaria and Finland) addressed a request to the Commission indicating their wish to establish enhanced cooperation between themselves in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, and that the Commission should submit a proposal to the Council to that end.
8. This proposal is the Commission's response to these requests.

## **2. LEGAL BASIS FOR THE ENHANCED COOPERATION**

9. Enhanced cooperation is governed 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).
10. The Commission proposal for a Council Decision authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property regimes of international couples, covering both matrimonial property regimes and the property consequences of registered partnerships, is based on Article 329(1) TFEU.

## **3. MEASURES IMPLEMENTING ENHANCED COOPERATION**

11. The Commission proposal for a Council Decision deals with the authorisation of enhanced cooperation in the single area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property regimes of international couples, covering both matrimonial property regimes and the property consequences of registered partnerships. Proposals for specific measures implementing the enhanced cooperation are submitted together with this proposal. The key elements of these measures are outlined below.
12. Having regard to the Council's conclusions of 3 December 2015 and the requests of the Member States wishing to establish enhanced cooperation between themselves in

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<sup>6</sup> CS-PRES/2015/14937

this area, the measures implementing enhanced cooperation should include the following elements:

- (a) a proposal for a Regulation of the Council on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes. This proposal should be based on the compromise text presented in the JHA Council of 3 December 2015<sup>7</sup>;
  - (b) a proposal for a Regulation of the Council on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships. This proposal should be based on the compromise text presented in the JHA Council of 3 December 2015<sup>8</sup>.
13. The objectives pursued by the provisions on matrimonial property regimes and the property consequences of registered partnerships are equivalent. However, the formulation of these provisions cannot be the same given the specificities of each of these institutions and, in particular, the fact that registered partnerships do not exist in all Member States. In this connection, the impact assessment accompanying the 2011 Commission proposals<sup>9</sup> found that cross-border couples in registered partnerships face particular difficulties as this institution is not known in all Member States. Tailor-made rules must therefore be established in respect of marriages and registered partnerships, which makes it difficult to address both institutions in one single instrument. In order to facilitate the reading and application of the regulations by the authorities of the Member States, the two institutions are treated in two proposals implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property regimes of international couples, covering both matrimonial property regimes and the property consequences of registered partnerships. This approach also corresponds to the Member States' request that enhanced cooperation corresponds in substance to the two compromise texts presented to the Council on 3 December 2015 so as to ensure participation by as many Member States as possible.
14. The Communication accompanying the 2011 Commission proposals already emphasised that the scope of the area of civil justice cooperation concerned was the property regimes of international couples. The Council and the European Parliament also dealt with the two original Commission proposals as a package. Finally, pursuant to Article 329(1) TFEU, according to which Member States that wish to establish enhanced cooperation between themselves must specify the scope of such enhanced cooperation, the requesting Member States indicated that they wished to establish enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of both matrimonial property regimes and the property consequences of registered partnerships.
15. In view of the above, the proposed regulations implement enhanced cooperation in the single area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property regimes of international couples, covering both matrimonial property regimes and the property consequences of registered partnerships. In order to ensure non-discrimination of citizens, the proposed regulations should therefore be adopted simultaneously and be treated as a package

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<sup>7</sup> Council document 14651/15 + COR1 REV1

<sup>8</sup> Council document 14652/15

<sup>9</sup> SEC(2011) 327 final

for the purposes of the establishment of, and future participation in, the enhanced cooperation.

#### **4. ASSESSMENT OF THE LEGAL CONDITIONS FOR ENHANCED COOPERATION**

##### **4.1. Authorising decision as a last resort and participation of at least nine Member States**

16. Article 20(2) TEU provides 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 must participate in it.
17. As mentioned above, the Council concluded at its meeting of 3 December 2015 that it would not be possible to reach an EU-wide agreement in relation to both regulations within a reasonable period of time<sup>10</sup>. The Council thus noted that no other solution for the Union as a whole could be found and that enhanced cooperation could be used as a last resort.
18. To date, the Commission has received requests from seventeen Member States (Sweden, Belgium, Greece, Croatia, Slovenia, Spain, France, Portugal, Italy, Malta, Luxembourg, Germany, the Czech Republic, the Netherlands, Austria, Bulgaria and Finland) indicating their wish to establish enhanced cooperation between themselves in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and the property consequences of registered partnerships.

##### **4.2. Area covered by the Treaties**

19. Article 20(1) TEU provides that enhanced cooperation can only be established "within the framework of the Union's non-exclusive competences" and Article 329(1) TFEU provides that enhanced cooperation can be established 'in one of the areas covered by the Treaties, with the exception of fields of exclusive competence'.
20. The seventeen requesting Member States have requested to be allowed to establish enhanced cooperation between themselves in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and the property consequences of registered partnerships, thereby establishing conflict-of-law rules in this area. Conflict-of-law rules are not included in the list of exclusive competences set out in Article 3(1) TFEU. They are mentioned as a specific item in the list of measures under Article 81(2) TFEU, with Article 81(3) TFEU distinguishing between conflict-of-law rules in civil and commercial matters in general and those concerning family law.
21. Conflict-of-law rules in family law thus constitute a well-defined area falling outside the Union's exclusive competences, within the meaning of the Treaties, in which enhanced cooperation may be established.

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<sup>10</sup> CS-PRES/2015/14937

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

#### 4.3.1. General context

22. Taking account of the Impact Assessment and the Explanatory Memorandum accompanying the 2011 Commission proposals, the purpose of enhanced cooperation is to provide a clear and comprehensive legal framework covering jurisdiction, applicable law and the recognition and enforcement of decisions in the matter of property regimes of international couples, covering both matrimonial property regimes and the property consequences of registered partnerships. The proposals aim in particular, in line with current trends in family law, at allowing parties a degree of autonomy in choosing the applicable law.
23. In 2003 the Commission commissioned a study on matrimonial property regimes and the property of unmarried couples in private international law and internal law<sup>11</sup> which highlighted the existence of problems in this area. These problems arise in particular when citizens make use of their right to free movement in the European Union, exposing their property regimes to potentially conflicting laws. In 2006 the Commission adopted a Green Paper<sup>12</sup> on conflicts of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition, which further identified shortcomings in the existing situation.
24. The Commission also set up an expert group to assist it in its work on future legislative proposals composed of experts acting independently of the Member States. A public hearing was organised on 28 September 2009, with 99 Member State participants. The expert group, as well as academics, lawyers, notaries and members of the civil society attended the forum in order to discuss the need for a Union instrument on the property regimes of international couples.
25. The Stockholm Programme<sup>13</sup> called for the principle of mutual recognition to "be extended to fields that are not yet covered but essential to every day life, e.g. matrimonial property rights and the property consequences of the separation of couples".
26. The 2011 Commission proposals were generally deemed necessary in order to treat coherently the property regimes of couples under a single applicable law and by one single authority; to enable international married couples to choose the law to be applied to their property; to increase legal certainty for registered partnerships with an international dimension by applying, as a general rule, the law of the State of registration to the property of registered couples; to enable citizens to have various procedures handled by the same court and thereby avoid parallel proceedings and conflicting judicial decisions; and to improve predictability for international couples by simplifying procedures for the recognition and enforcement of decisions and the circulation of authentic instruments throughout the European Union.
27. The proposals are also a key complement to Regulation No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and

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<sup>11</sup> ASSER-UCL Consortium, *Study in comparative law on the rules governing conflicts of jurisdiction and laws on matrimonial property regimes and the implementation for property issues of the separation of unmarried couples in the Member States*.

<sup>12</sup> See: [http://europa.eu.int/comm/justice\\_home/doc\\_centre/civil/studies/doc\\_civil\\_studies\\_en.htm](http://europa.eu.int/comm/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm)  
COM(2006) 400 final.

<sup>13</sup> Official Journal C 115, 4 May 2010.

enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. This is so because the liquidation of the property regimes is very often a question preceding the liquidation of the estate of a deceased person. The efficiency of the European Certificate of Succession would be substantially improved if uniform conflict-of-laws rules were applied to the property regimes of couples throughout the European Union.

28. The 2011 Commission proposals were important as they concerned around 16 million international married couples in the EU who, for instance, live in a Member State other than their own or have property in another Member State.
  29. In 2007, approximately 300 000 international marriages were celebrated in the EU and approximately 500 000 international marriages were dissolved (through divorce or death of one of the spouses). Over 460 million EUR are at stake each year when international marriages are dissolved. In 2007, over 41 000 new registered partnerships in the EU had an ‘international dimension’ with regard to their property. Around 10 000 registered partnerships end in separation or death each year. In addition, the number of registered partnerships increases steadily, particularly as the number of Member States that have introduced the institution of registered partnerships has increased from 17 Member States in 2011 to 20 today. Accordingly, the number of liquidations of partnership property resulting from the dissolution of the partnership or the death of one of its members is increasing.
- 4.3.2. *Current situation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in the area of the property regimes of international couples, including both matrimonial property regimes and the property consequences of registered partnerships*
30. Currently citizens face different practical problems with asset planning when they are in an international marriage or partnership. Union citizens increasingly move across national borders and this leads to an increased number of international couples or couples with an international dimension: spouses of different nationalities, couples living in a Member State of which they are not nationals, owning assets in different Member States, or divorcing or dying in a country other than their own. The problem is that it is very difficult for people to know which courts have jurisdiction and which laws are applicable to their personal situation and the situation of their property. As a result, they face unintended, and disadvantageous, consequences not only in the daily management of their assets but also when the couple separates or a member of the couple dies.
  31. Although Union rules exist on jurisdiction and applicable law in civil and commercial matters and in some areas of family law, no such rules currently exist for property regimes or international couples. The subject is therefore governed by national law and, to a very limited extent, international agreements between Member States.
  32. The causes of current problems for couples in registered partnerships are the same as for married couples. However, there are some important additional challenges for couples in a registered partnership as the concept of registered partnership exists only in 20 Member States, not all Member States have substantive laws governing their property regime and even fewer have adopted jurisdiction rules and conflict-of-law rules.

33. The proposed regulations cover couples who are formally engaged in a family institution, in particular marriage and registered partnerships. “De facto” unions are not covered.
34. The purpose of this enhanced cooperation is to establish a clear legal framework in the participating Member States to determine jurisdiction and the law applicable to the property regimes of international couples, covering both matrimonial property regimes and the property consequences of registered partnerships, and facilitate the movement of decisions and authentic instruments on these matters between Member States.
- 4.3.3. *Benefits of enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in the area of the property regimes of international couples, covering both matrimonial property regimes and the property consequences of registered partnerships*
35. Seventeen Member States have requested enhanced cooperation in the area of the property regimes of international couples, covering both matrimonial property regimes and the property consequences of registered partnerships: Sweden, Belgium, Greece, Croatia, Slovenia, Spain, France, Portugal, Italy, Malta, Luxembourg, Germany, the Czech Republic, the Netherlands, Austria, Bulgaria and Finland. The total population of these seventeen requesting Member States is 340 million. This represents 67% of the Union population<sup>14</sup>. This means that a significant number of the estimated 16 million international marriages in the EU<sup>15</sup> will benefit from this enhanced cooperation. The greater the number of Member States participating in enhanced cooperation, the greater the number of citizens that will benefit from it.
36. Enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in the matter of property regimes of international couples, covering both matrimonial property regimes and the property consequences of registered partnerships, would bring citizens the following benefits:
- (a) treating the property regimes of couples coherently under a single applicable law and by one single authority;
  - (b) enabling international couples to choose the law to be applied to their property;
  - (c) increasing legal certainty for international couples by applying - as a general rule - the law of the State with which the couple has the closest connection;
  - (d) enabling citizens to have various procedures handled by the same court and thereby avoid parallel proceedings and conflicting judicial decisions; and
  - (e) improving predictability for international couples by simplifying procedures for the recognition and enforcement of decisions and the circulation of authentic instruments throughout the EU.

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<sup>14</sup> Eurostat information as of 1 January 2015 (<http://ec.europa.eu/eurostat/tgm/table.do?tab=table&language=en&pcode=tps00001&tableSelection=1&footnotes=yes&labeling=labels&plugin=1>)

<sup>15</sup> 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.

#### 4.3.4. Fulfilling the requirements of Article 20(1) TEU

37. Article 20(1) TEU requires that enhanced cooperation aims to further the objectives of the Union, protect its interests and reinforce its integration process.
38. 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 and jurisdiction (Article 81(2)(a) and (c) TFEU).
39. The harmonisation of rules on conflict of laws and jurisdiction facilitates the mutual recognition of judgments. Indeed, the fact that courts of different Member States apply the same rules to conflicts of jurisdiction and conflicts of laws in order to determine the court competent to deal with a case and the law applicable to that case reinforces mutual trust in judicial decisions given in another Member State<sup>16</sup>.
40. Enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in the matter of property regimes of international couples, covering both matrimonial property regimes and the property consequences of registered partnerships between the requesting Member States would further the Union objective of ensuring the compatibility of the rules applicable in Member States concerning conflicts of laws and jurisdiction. Enhanced cooperation in this area would increase the level of compatibility of Member State rules determining the court competent to deal with a matter of property regimes of international couples and the law that the court should apply, as well as on the recognition and enforcement in one Member State of decisions on this matter given in another Member State, as compared to the current situation in which no harmonised rules on conflicts of law and jurisdiction and on the recognition and enforcement of decisions exist in the area of the property regimes of international couples.

#### 4.4. Compliance with the Treaties and Union law

41. In accordance with Article 326 TFEU, enhanced cooperation must comply with the Treaties and Union law.
42. 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 1347/2000<sup>17</sup>, 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 concerning divorce nor the property consequences of couples. The adoption of

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<sup>16</sup> 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).

<sup>17</sup> 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).

Regulation (EC) No 2201/2003<sup>18</sup>, which repealed and replaced Regulation (EC) No 1347/2000 as of 1 March 2005, did not entail any change in this respect. The conflict-of-law rules regarding divorce and legal separation were adopted in enhanced cooperation in Regulation (EU) No 1259/2010<sup>19</sup> by 16 Member States. The conflict-of-law rules regarding wills and successions were adopted by Regulation (EU) No 650/2012<sup>20</sup>. The question of conflict-of-law rules in the area of the property regimes of international couples, covering both matrimonial property regimes and the property consequences of registered partnerships, should complete the legal framework applying to international couples in the Union.

43. Enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in the matter of property regimes of international couples, covering both matrimonial property regimes and the property consequences of registered partnerships, would not cause discrimination based on nationality, prohibited by Article 18 TFEU, because the proposed conflict-of-law rules would be universal in nature and would apply to all 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 Member States will continue to apply their national conflict-of-law rules under their private international law.
- 4.5. No undermining of the internal market or economic, social and territorial cohesion; no barrier to or discrimination in trade; no distortion of competition**
44. Article 326 TFEU provides that enhanced cooperation must not undermine the internal market or economic, social and territorial cohesion, and must not constitute a barrier to or discrimination in trade between Member States or distort competition between them.
45. Enhanced cooperation in the area of the property regimes of international couples, covering both matrimonial property regimes and the property consequences of registered partnerships, does not present problems as regards these legal conditions. Indeed, the proposals implementing enhanced cooperation in this area will serve to facilitate the proper functioning of the internal market by eliminating obstacles to the free movement of persons who currently face problems due to differences between national laws concerning the property consequences of couples. The legal certainty brought about by harmonised conflict-of-law rules in this area would thus have a positive effect on couples who exercise their right to free movement between the participating Member States.
46. Given the nature of the proposed regulations, which concern only the relations between two individuals, enhanced cooperation would not affect enterprises or legal relations in the market, or trade or competition in the Union. Finally, the enhanced cooperation would not affect the territorial cohesion between regions of the Union.

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<sup>18</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

<sup>19</sup> Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

<sup>20</sup> Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

47. In providing for the harmonisation of conflict-of-law rules, the proposals would considerably simplify the lives of citizens (and legal professionals) as, within the participating Member States, they would be able to determine jurisdiction and the law applicable to their property regimes and benefit from a simplified circulation of decisions and authentic instruments on this matter.
48. Although not all international couples in the Union will benefit from the legal certainty and simplification brought about by enhanced cooperation, the situation of international couples before courts of non-participating Member States will not deteriorate compared to the situation today. Indeed, non-participating Member States will keep their status quo as they will continue to apply, as they do today, their national law (including their rules on private international law) to cross-border situations dealing with matrimonial property regimes and the property consequences of registered partnerships in order to determine what court should deal with a case on these matters and what law that court should apply. Non-participating Member States will also continue to apply, as they do today, their national law (including their rules on private international law) to the recognition and enforcement of decisions given in one of the participating Member States. For their part, participating Member States will continue to apply, as they do today, their national law (including their rules on private international law) to the recognition and enforcement of decisions given in a non-participating Member State. The situation regarding matrimonial property regimes and the property consequences of registered partnerships will thus be equivalent to the situation regarding other civil justice instruments in which not all Member States participate, such as Regulation No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation and Regulation No 650/2012 on succession and wills.
49. Furthermore, the application of the regulations on matrimonial property regimes and the property consequences of registered partnerships implementing enhanced cooperation will not depend on the nationality of the members of the couple, that is, on whether or not the members of the couple are nationals of a participating Member State. The authorities of participating Member States (for example, a notary or a court), which are bound to apply the regulations, will apply such regulations to all citizens that bring before them a matrimonial property matter or a matter concerning the property consequences of their registered partnership regardless of the nationality of the citizens. By the same token, if a couple composed of one or two citizens of a participating Member State brings their matter before an authority of a non-participating Member State, the authorities of such non-participating Member State will not apply the regulations but their national law (including their private international law) to deal with the international procedural aspects of the matrimonial property regime or the property consequences of the registered partnership.
50. Enhanced cooperation will not therefore cause any unjustified differentiated treatment between citizens.
- 4.6. Respecting the rights, competences and obligations of non-participating Member States**
51. Article 327 TFEU requires that any enhanced cooperation respects the competences, rights and obligations of Member States that do not participate in it.
52. The adoption of common conflict-of-law rules by the seventeen requesting Member States would not affect the rules of the non-participating Member States. Non-participating Member States will continue to apply their own private international

law rules concerning jurisdiction, applicable law and the recognition and enforcement of decisions in the matter of property regimes of international couples.

53. At the level of public international law, there are no international agreements on jurisdiction, applicable law and the recognition and enforcement of decisions in the matter of property regimes of international couples (covering matrimonial property regimes and the property consequences of registered partnerships) between the participating and the non-participating Member States that would be affected by the enhanced cooperation.

#### **4.7. Conclusion on the fulfilment of legal conditions**

54. On the basis of the foregoing, the Commission concludes that all the legal conditions set by the Treaties for the authorisation of the establishment of enhanced cooperation are fulfilled.

#### **4.8. Respect for fundamental rights**

55. Enhanced cooperation in the area of the property regimes of international couples, covering both matrimonial property regimes and the property consequences of registered partnerships, respects the fundamental rights set out in the Charter of Fundamental Rights of the European Union, in particular Article 9 on the right to marry and the right to found a family in accordance with national law and Article 21 on the right to non-discrimination. The conflict-of-law rules proposed in the regulations implementing the enhanced cooperation will be applied to all international couples bound by an institutional link, such as marriage and registered partnership, in the participating Member States without discrimination on any ground.

#### **4.9. Conclusion on enhanced cooperation**

56. The Commission considers that the benefits of establishing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions concerning the property regimes of international couples, covering both matrimonial property regimes and the property consequences of registered partnerships, are numerous compared to the option of keeping the status quo and that the advantages of establishing enhanced cooperation in this area outweigh any possible disadvantage.
57. The common conflict-of-law rules in the area of the property regimes of international couples will considerably facilitate the lives of many 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 “...*matrimonial property rights and the property consequences of the separation of couples*”.<sup>21</sup>
58. Therefore, the Commission proposes authorising the establishment of enhanced cooperation between the requesting Member States. The Commission stresses that enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in the matter of property regimes of international couples, covering both matrimonial property regimes and the property consequences of registered partnerships, is open at any time to all Member States, in accordance with Article 328 TFEU, and encourages Member States that have not yet so

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<sup>21</sup> Official Journal C 115, 4 May 2010.

requested to participate in the enhanced cooperation, thus boosting its benefits and advantages.

Proposal for a

## COUNCIL DECISION

**authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships**

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 Belgium, Bulgaria, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament<sup>22</sup>,

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 16 March 2011, the Commission adopted a proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, and a proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships.
- (4) At its meeting of 3 December 2015 the Council concluded that it would not be possible to reach an agreement within a reasonable period by the Union as a whole for the adoption of the regulations.
- (5) In these circumstances, Malta, Croatia and Belgium subsequently addressed requests to the Commission by letters dated 14 December 2015, 15 December 2015 and 17 December 2015 respectively, and Sweden, Greece, Slovenia, Spain, France, Portugal,

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<sup>22</sup> Official Journal C [...], [...], p. [...].

Italy, Luxembourg and Germany by letters dated 18 December 2015, indicating that they wished to establish enhanced cooperation between themselves in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and the property consequences of registered partnerships and that the Commission should submit a proposal to the Council to that end. The Czech Republic, the Netherlands, Bulgaria, Austria and Finland addressed identical requests to the Commission by letters dated 28 January 2016, 2 February 2016, 9 February 2016, 16 February 2016 and 26 February respectively. In total, seventeen Member States have requested enhanced cooperation.

- (6) The enhanced cooperation should provide a clear and comprehensive legal framework in the area of the property regimes of international couples, covering both matrimonial property regimes and the property consequences of registered partnerships, in the participating Member States, ensure adequate solutions for citizens in terms of legal certainty, predictability and flexibility and facilitate the circulation of decisions and authentic instruments between the participating Member States.
- (7) In accordance with the Member States' requests for the establishment of enhanced cooperation, the Commission is proposing two substantive acts implementing the enhanced cooperation, one concerning matrimonial property regimes and the other concerning the property consequences of registered partnerships. In order to cover the entire scope of enhanced cooperation in the area of the property regimes of international couples and to ensure non-discrimination of citizens, the two substantive implementing acts should be adopted simultaneously.
- (8) The conditions laid down in Article 20 of the Treaty on European Union and in Articles 326 to 329 of the Treaty on the Functioning of the European Union are fulfilled.
- (9) The area of the enhanced cooperation, namely jurisdiction, applicable law and the recognition and enforcement of decisions in the matter of property regimes of international couples, covering both matrimonial property regimes and the property consequences of registered partnerships, is identified by Article 81(2)(a) and (c) and Article 81(3) of the Treaty on the Functioning of the European Union as one of the areas covered by the Treaties. This is not an area of exclusive competence of the Union.
- (10) The requirement of last resort in Article 20(2) of the Treaty on European Union is fulfilled in that the Council concluded on 3 December 2015 that the objectives of the proposed regulations could not be attained within a reasonable period by the Union as a whole.
- (11) Enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in the matter of property regimes of international couples, covering both matrimonial property regimes and the property consequences of registered partnerships, 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.
- (12) Enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in the matter of property regimes of international

couples, covering both matrimonial property regimes and the property consequences of registered partnerships, 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.

- (13) In particular, enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in the matter of property regimes of international couples, covering both matrimonial property regimes and the property consequences of registered partnerships, complies with Union law on judicial cooperation in civil matters, in that enhanced cooperation does not affect any pre-existing *acquis*.
- (14) Enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in the matter of property regimes of international couples, covering both matrimonial property regimes and the property consequences of registered partnerships respects the competences, rights and obligations of those Member States that do not participate in it. The common rules on jurisdiction, conflict-of-laws and recognition and enforcement in the participating Member States do not affect the rules of the non-participating Member States. The courts of the non-participating Member States will continue to apply their existing domestic rules to determine the jurisdiction and applicable law and to the recognition and enforcement of decisions in the matter of property regimes of international couples, covering both matrimonial property regimes and the property consequences of registered partnerships.
- (15) This Decision respects the principles enshrined in the Charter of Fundamental Rights of the European Union, in particular Articles 9 and 21 thereof.
- (16) Enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in the matter of property regimes of international couples, covering both matrimonial property regimes and the property consequences of registered partnerships 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*

The Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Croatia, the Italian Republic, the Grand Duchy of Luxembourg, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Republic of Finland and the Kingdom of Sweden are hereby authorised to establish enhanced cooperation between themselves in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in the matter of property regimes of international couples, covering both matrimonial property regimes and the property consequences of registered partnerships, by applying the relevant provisions of the Treaties.

*Article 2*

This Decision shall enter into force on the day of its adoption.

Done at Brussels,

*For the Council  
The President*