The Committee will meet at 10.15 am in Committee Room 6.

1. **Item in private:** The Committee will consider whether to take item 5 in private.

2. **Scottish Commissioner for Human Rights Bill:** The Committee will consider the Bill at Stage 2 (Day 2).

3. **Criminal Proceedings etc. (Reform) (Scotland) Bill:** The Committee will consider motion S2M-4847 in the name of Pauline McNeill MSP—

   That the Justice 1 Committee considers the Criminal Proceedings etc. (Reform) (Scotland) Bill at Stage 2 in the following order: sections 1 to 5, sections 7 to 66, section 6, section 67, schedule and sections 68 to 71.

4. **Justice and Home Affairs in Europe:** The Committee will consider an update on recent developments in relation to the proposals relating to applicable law and jurisdiction in divorce matters.

5. **Forthcoming Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill:** The Committee will consider its approach to the forthcoming Bill.

Callum Thomson
Clerk to the Committee
Papers for the meeting—

Agenda item 2


Members should also bring with them copies of the marshalled list and the groupings of amendments, both available from the Document Supply Centre on the morning of Tuesday 26 September 2006. Copies of these documents will also be emailed to members as soon as they are available.

Agenda item 4

Note by the Clerk and SPICe

J1/S2/06/34/1

Agenda item 5

Note by the Clerk (PRIVATE PAPER)

J1/S2/06/34/2

Documents for information—

The following documents are circulated for information:

- Correspondence from Deputy Minister for Environment and Rural Development on the Community Right To Buy (Definition Of Excluded Land) (Scotland) Order 2006;

- Justice and Home Affairs Council, Provisional Agenda, Luxembourg 5/6 October 2006;


- Note by the European Officer and SPICe on the proposal for an EU Directive on certain aspects of mediation in civil and commercial matters; and


Forthcoming meetings—

Tuesday 26 September, Committee Room 3;
Wednesday 27 September, Committee Room 2;
Tuesday 3 October, Committee Room 5;
Wednesday 4 October, Committee Room 1;
Tuesday 24 October, Committee Room 1; and
Tuesday 31 October, Committee Room 1.
JUSTICE 1 COMMITTEE
European Justice and Home Affairs

Commission Proposal for a Regulation on jurisdiction and applicable law in matrimonial matters

Note by the Senior Assistant Clerk

Background

1. The Committee has continued in recent months to engage actively in fulfilling its scrutiny role in respect of European Union Justice and Home Affairs (EU JHA) legislative developments. This has been set in the context of a work programme dominated by scrutiny of Executive legislation.

2. In September 2005, the Committee, conducted a short inquiry in relation to two European Commission Green Papers, firstly on applicable law and jurisdiction in divorce matters and, secondly, succession and wills. The Committee submitted its findings to the Commission in the form of a letter.

3. This note provides an update on recent developments in relation to the proposals relating to applicable law and jurisdiction in divorce matters and invites the Committee to make a submission to the House of Lords European Union Select Committee.

Recent developments


5. The proposal, which revises existing Council Regulation (EC) no. 2201/2003 of 27 November 2003, does not harmonise the national laws on divorce, but seeks to establish common rules to determine which divorce law will apply when spouses of different nationalities wish to divorce.

6. The proposal would give spouses a limited possibility to choose the applicable law and the competent court in divorce proceedings where there is mutual consent. In the absence of choice, the proposal sets out rules intended to ensure that the divorce will be governed by a law with which the spouses have a close connection. Finally, the proposal revises the existing jurisdiction rules to ensure access to court for EU citizens.

Implications for Scotland

7. Scotland presently applies the principle of “lex fori” (the law of the forum or domestic law) to all divorces. This means that Scots divorce law is applied to all cases brought before a Scottish court regardless of the nationality of the spouses. Evidence gathered from lawyers and the judiciary during the Committee’s inquiry last year suggested that this works
satisfactorily. Evidence from these witnesses suggested that if harmonised applicable law rules were introduced, arguments could be made in favour of selecting at least two laws other than that of the forum leading to uncertainty for the litigants. Scottish courts would face the prospect of being required to apply foreign law in divorce cases, a requirement to which they are not accustomed. Witnesses considered that the added complexity of such cases would inevitably lead to delays and increased costs for the parties involved.

Scottish Executive assessment
8. Following publication of the proposal in July, the Convener wrote to the Minister for Justice to seek an initial assessment from the Scottish Executive of the potential implications of the proposed Regulation for the Scottish legal system and users of it. The Minister’s response is attached as Annex A.

9. In her response, the Minister makes clear that neither the Executive nor the UK Government have yet finalised their position on the draft proposals. However, key issues identified in the Commission’s proposals include—

- introduction of an applicable law regime requiring Scottish Courts to apply the law of another country to a cross-border divorce case could incur additional expense and delay for the parties and courts involved

- if ‘rush to court’ can be demonstrated as a major concern, possibility of a rule allowing transfer of a case to a court better placed to hear the case should be considered

- current scope of the instrument is ‘universal’, which would mean that the law of a third, non-Member State could be applied to a cross-border divorce case in Scotland. This could be at odds with Article 65 of the treaty which necessitates that rules in this area are ‘[…]necessary for the proper functioning of the internal market[…]’

10. The Minister proposes to write again at the end of October to set out the Scottish Executive position and its input into the UK opt-in decision.

COSAC subsidiarity and proportionality check
11. The Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC) has selected the above Commission proposal to test national parliaments’ systems for carrying out a subsidiarity and proportionality check.

12. COSAC is a forum for co-operation between Committees of the national parliaments dealing with European Affairs as well as representatives from the European Parliament.
13. In 2005, the COSAC UK Presidency\(^1\) proposed to COSAC that it was important for COSAC to discuss how scrutiny of subsidiarity and proportionality in national parliaments might be improved and how those national parliaments who wished to do so could coordinate that scrutiny amongst themselves to heighten its impact.

14. The Presidency therefore proposed that COSAC should select a specific Commission proposal or proposals in order that those national parliaments who wanted to could co-ordinate their efforts and so that individual parliaments or chambers could test their internal procedures for scrutinising a proposal within a defined period of time (six weeks\(^2\)). Such an exercise would be called a "subsidiarity and proportionality check". The proposal on applicable law in matrimonial matters was subsequently selected for such a check.

15. The Committee clerks have been in contact with counterparts at the European Union Select Committee of the House of Lords regarding this exercise. The Lords Committee, in conjunction with the Commons European Scrutiny Committee, will respond to COSAC on behalf of the UK Parliament. Input from the Justice 1 Committee would be welcomed.

**Principles of subsidiarity and proportionality**

16. Article 5 of the Treaty establishing the European Community ("the Treaty") states—

> "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the action cannot be sufficiently achieved by the Member States, and can therefore, by reason of the effects of the proposed action, be better achieved by the Community.

> Any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty."

17. The Protocol to the Treaty\(^3\), on the application of the principles of subsidiarity and proportionality, explains how member states have agreed these principles should be applied by the European institutions when they carry out their functions.

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\(^1\) The COSAC Presidency comprises the delegation of the Parliament of the State holding the EU Presidency

\(^2\) The existing Protocol on the Role of National Parliaments provides that six weeks should elapse between a proposal being made available in all languages to the European Parliament and the Council and being place on a Council agenda for decision

18. The institutions, in exercising the powers conferred on them in areas which do not fall within the Community’s exclusive competence, are to ensure compliance with the principles of subsidiarity and proportionality. At its simplest this means that in these areas the Community can only legislate if Community objectives (a) cannot be fully achieved by the actions of the member states themselves, and therefore (b) can be better achieved by action at Community level (subsidiarity). Any such action can only go as far as is necessary to achieve the objectives of the Treaty (proportionality).

Action

19. The clerks, in conjunction with SPICe, have prepared a report (attached as Annex B) highlighting relevant issues with the proposal regarding subsidiarity and proportionality. This report has drawn upon the evidence gathered by the Committee during its scrutiny of the Commission’s Green Paper in September 2005.

20. The Committee is invited to consider the terms of the attached report and, if satisfied, to agree to submit the report to the House of Lords European Union Select Committee as a contribution to the COSAC subsidiarity and proportionality check.

21. The Committee is also invited to agree to copy the response to the Scottish Executive and Scottish MEPs for information.
Thank you for your letter dated 18 August about the EU Commission’s ‘Rome III’ proposals which issued on 17 July 2006, seeking to amend the existing Brussels II bis Regulation (EC) No 2201/2003 on matrimonial matters and parental responsibilities, to introduce applicable law rules and amend jurisdictional rules in divorce matters.

I very much welcome the opportunity to update the Committee on the Executive’s continued engagement on the development of this EU JHA dossier in the important area of family law. As you highlighted in your letter, this is a key dossier for the Executive as an EU instrument in this area would impact on Scots divorce law in cross-border cases, and therefore our continued engagement is vital to promote and safeguard the interests of the people of Scotland.

As you are already aware, the UK Government submitted its response to the Commission’s Green Paper on this dossier last November. The response fully accommodated the Scottish position and indicated that the United Kingdom remained unconvinced of the need for an instrument regulating cross-border divorces in the absence of clear evidence that it was necessary. This remains the Scottish and UK position and would seem to chime in with the Committee’s view you express in the final sentence of the second paragraph of your letter.

The Executive continues to engage with key stakeholders who have an interest in these proposals; including family law practitioners, the Faculty of Advocates, members of the judiciary, international family law and private international law academics, and domestic family law policy leads. My officials have informally invited a number of key stakeholders to share their views on the Commission’s proposals at a point later this month. This will enable us to further inform the Scottish position, which in turn will inform the overall UK position on the draft proposals. In this way, further, informal consultation will also inform the Executive position on the UK’s opt-in, which will be fed into the UK Government’s opt-in decision by the official deadline of 26 October.
I note that you request an initial assessment on the potential implications of the proposed Regulation for our jurisdiction. Once stakeholders have shared their views and the Executive’s position is fully finalised, I would be happy to share our position with you at that time. However, in the absence of a fully-informed and finalised Executive position, I thought it might be helpful if I set out a number of the key issues in the Commission’s proposals, which we are currently considering

- The Commission’s proposals would introduce limited party autonomy in the choice of court (Article 3a). The Scottish Executive and UK Government are supportive of initiatives which would offer parties more autonomy in choosing which country’s court would deal with their case in commercial matters cases, but it will be necessary to assess these proposals carefully in the context of divorce matters and assess what risks, if any, could be incurred where coercion of a more vulnerable party might be an issue.

- The amended Regulation would introduce an applicable law regime where Scottish courts could be obliged to apply the law of another country to a cross-border divorce case. This could present problems for Scotland where our jurisdiction has no experience of applying foreign law to divorce cases. In Scotland and the other UK jurisdictions foreign law must first be proven and averred, which could incur additional expense and delay for the parties and courts involved. In addition, it will be also be worth considering whether a party could use the process of proving foreign law to deliberately frustrate and delay a case to his or her advantage.

- The current proposal includes a public policy exemption at Article 20e which would permit a Member State’s courts not to apply foreign law divorce rules which were ‘manifestly incompatible’ with its own public policy. On the face of it, this provision would seem to appease concerns about the application of ‘exotic’ laws with which our jurisdictions were unfamiliar.

- Despite the Green Paper’s discussion on, and the subsequent support demonstrated for to the possibility of introducing a rule to transfer a case to a court better placed to hear the case, this type of provision seems to have been deliberately omitted from the proposals altogether. The Brussels II bis Regulation already contains such a rule in respect of parental responsibilities at Article 15, and if ‘rush to court’ can really be demonstrated as a major concern in international divorces, this type of rule would seem to provide a logical solution in response.

- According to the current draft the scope of the instrument is ‘universal’, which would mean that the law of a third, non-Member State could be applied to a cross-border divorce case in Scotland. This issue will require further consideration as it may be regarded as being at odds with the Article 65 provision of the Treaty which necessitates that rules in this area are ‘[…]necessary for the proper functioning of the internal market[…]’

Throughout the UK Government’s opt-in decision-making process it will be important to remember that this family law dossier is a ‘unanimity’ dossier. That is to say that once negotiations have concluded at a future point, the finalised instrument would
require unanimity in the Council before it could be adopted. It will interest the Committee to know that intelligence from the Commission this week would suggest that the Presidency intends to bring forward the first working group meeting to 10 October. If this date is confirmed, an Executive official will participate in the UK delegation at that meeting.

I realise that I am not in a position to provide you with a full account of the Scottish position on the proposals and on the UK Government opt-in decision at this particular point in time, but as I explained, I hope to be able to write to you again at the end of next month to set out the Scottish Executive position and our input into the opt-in decision.

I hope this information is helpful in the interim.

CATHY JAMIESON
JUSTICE 1 COMMITTEE

Report on the subsidiarity and proportionality of
Proposal for a
COUNCIL REGULATION
amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters

Introduction

1. The Justice 1 Committee of the Scottish Parliament has prepared this report as a contribution to the subsidiarity and proportionality check being carried out by national parliaments and co-ordinated by the Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC).

Background

2. As part of its role in scrutinising EU Justice and Home Affairs matters, the Justice 1 Committee has been actively following the development of the proposal. This included a short inquiry conducted at Green Paper stage which culminated in the Committee making representations to the Commission.

3. Scotland presently applies the principle of lex fori to all divorces and evidence received from lawyers and the judiciary is that this works satisfactorily. Evidence from these witnesses suggested that if harmonised conflict-of-law rules were introduced, arguments could be made in favour of selecting at least two laws other than that of the forum leading to uncertainty for the litigants. Scottish courts would face the prospect of being required to apply foreign law in divorce cases, a requirement to which they are not accustomed. Witnesses considered that the added complexity of such cases would inevitably lead to delays and increased costs for the parties involved.

4. The Committee considers that this result would be contrary to efforts at both a Scottish and EU level to promote access to justice and, consequently, the Committee is opposed to the harmonisation of conflict-of-law rules.

5. In relation to the jurisdiction provisions contained in the Brussels Ila Regulation, witnesses also pointed out that the existence of several grounds of jurisdiction (without hierarchy) in the Brussels Ila Regulation may actually be the source of some of the difficulties outlined in the examples as the existence of a choice of grounds of jurisdiction can effectively result in a different applicable law.
6. Evidence provided by Scottish stakeholders clearly suggested that a number of proposals contained in the Green Paper could have a negative impact on Scots substantive law and court processes. The Committee believes that, ultimately, this would result in added complexity in many legal proceedings, creating delay and additional cost for ordinary citizens.

7. The Committee is convinced that one of the most important features of family law is to ensure a high degree of certainty for the parties involved. For the vast majority of international divorces in Scotland that certainty is best served by the current Scots private international law rules. The Committee believes that the Commission’s proposals would only serve to create greater uncertainty.

Principles of subsidiarity and proportionality

8. Article 5 of the Treaty establishing the European Community (“the Treaty”) states—

“The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the action cannot be sufficiently achieved by the Member States, and can therefore, by reason of the effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty.”

9. The Protocol to the Treaty, on the application of the principles of subsidiarity and proportionality, explains how member states have agreed these principles should be applied by the European institutions when they carry out their functions.

10. The institutions, in exercising the powers conferred on them in areas which do not fall within the Community’s exclusive competence, are to ensure compliance with the principles of subsidiarity and proportionality. At its simplest this means that in these areas the Community can only legislate if Community objectives (a) cannot be fully achieved by the actions of the member states themselves, and therefore (b) can be better achieved by action at Community level (subsidiarity). Any such action can only go as far as is necessary to achieve the objectives of the Treaty (proportionality).
11. The Protocol teases out these generalities. It explains—

- In **paragraph 2**, that the application of the principles of subsidiarity and proportionality must respect—
  
  (i) the general provisions and objectives of the Treaty (including maintaining the *acquis communitaire* and the institutional balance),

  (ii) the principles developed by the European Court of Justice on the relationship between national and Community law and

  (ii) Article 6(4) of the Treaty on European Union (“the Union shall provide itself with the means necessary to attain its objectives and carry through its policies”)

- In **paragraph 3**, that subsidiarity is a dynamic concept which allows Community action within the limits of its powers to be expanded where circumstances warrant it, and be restricted or discontinued where it is no longer justified;

- In **paragraph 4**, that the reasons for any proposed Community legislation should be stated and must be substantiated by qualitative or, wherever possible, quantitative indicators;

- In **paragraph 5**, that both aspects (a) and (b) of the principle of subsidiarity must be met. To assess this the following guidelines should be used—

  (i) the issue under consideration has transnational aspects that cannot be satisfactorily regulated by action by member states;

  (ii) actions by member states alone or lack of Community action would conflict with the requirements of the Treaty (e.g. need to correct distortion of competition);

  (iii) action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the member states.

- In **paragraph 6**, that the form of the Community action must be as simple as possible (subject to the satisfactory achievement of the objective and the need for the measure to be effectively enforced): other things being equal, directives should be preferred to regulations, and framework directives to detailed measures.

- In **paragraph 7**, that Community measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the Treaty. In particular—
(ii) Community law should be respected, but care should also be taken to respect well established national arrangements and the organisation and working of the legal systems of member states;

(iii) (subject to the need for proper enforcement) Community measures should provide member states with alternative ways to achieve the objectives of the measures

- In paragraph 9 that the Commission should—

  (i) (except where urgent or confidential) consult widely before proposing legislation;

  (ii) justify the relevance of its proposals with regard to the principle of subsidiarity - whenever necessary the explanatory memorandum will give details in this respect & the financing of the measures in whole or in part from the Community budget must be explained; and

  (iii) take account of the need for any burden, financial or administrative, falling on the Community, national governments, businesses and citizens, to be minimised.

Subsidiarity and proportionality check

12. The proposal is in an area in which the Community does not have exclusive competence, so the principles of subsidiarity and proportionality should be complied with, and the requirements of the Protocol should be met. It is helpful, therefore, if the Proposal is considered for compliance with the paragraphs of the Protocol referred to above.

Subsidiarity (paragraphs 3 and 5)

13. Firstly, consideration should be given to whether the proposed Regulation is within the powers of the Council. The legal bases quoted in the proposed Regulation are Article 61 (c) and 67. Article 61 (c) enables the Council to adopt measures in the field of judicial co-operation in civil matters as provided for in Article 65. Article 65 provides—

   “Measures in the field of judicial co-operation in civil matters having cross-border implications, to be taken in accordance with Article 67 and in so far as necessary for the proper functioning of the internal market, shall include:

   (b) promoting the compatibility of the rules applicable in the Member states concerning the conflict of laws and of jurisdiction”
14. The Explanatory Memorandum states the objective of the Proposal is—

“To provide a clear and comprehensive legal framework in matrimonial matters in the EU, and ensure adequate solutions to the citizenry in terms of legal certainty, predictability, flexibility and access to Court.”

15. The Proposal is justified as facilitating the proper functioning of the internal market by eliminating any obstacles to free movement of persons arising out of the remaining differences between national laws with regard to applicable law and jurisdiction in matrimonial matters. The test of necessity in Article 65 is a high one. It is a considerably higher standard than desirability. The basis of the Council Proposal is statistical analysis, and extrapolation (see the more detailed comments on this in paragraphs 22 to 29), accompanied by some illustrative hypothetical scenarios. Whilst this approach suggests areas which it might be desirable to address, it seems less than adequate as an indication of need for and justification of legislation at Community level.

16. It is considered that an actual need for measures at Community level has not been adequately demonstrated, and so the requirements of Article 65 have not been met. Consequently the requirement in paragraph 3 of the Protocol that Community action should be within the limits of its powers is not met.

Transnational aspects

17. It is clear that the issues raised have transnational aspects, but it is less clear that these matters cannot be satisfactorily regulated by action by member states.

18. Scotland applies the rules of jurisdiction on divorce in Council Regulation (EC) No. 2201/2003 (“the Regulation”). The applicable law is lex fori, the law of Scotland. It is not clear why the Community has an opinion that EU citizens do not realise that many laws, including family law, differ from state to state, but we consider that on that matter it misdirects itself. Even if that were right, in Scotland at least, all citizens have ready access to lawyers qualified to advise on Scottish divorce law. Legal aid funding may be available. Citizens can therefore ascertain, with certainty, and at reasonable cost, what the applicable law is, and what the effects of the application of that law in their circumstances is likely to be.

19. Should one or other spouse (or both of them) fulfilling the requirements of Article 3(1) of the Regulation, be able to demonstrate that their marriage has broken down irretrievably, and the court is able to make suitable dispositions as regards any children of the marriage, and any matrimonial assets, then in almost all circumstances a divorce will be granted. The case where divorce might not be granted is severe financial hardship of the defender, a domestic public policy ground.

20. Subject to any failings of the Regulation itself, it appears that Scots law already meets the objective of the Proposal, and the matter is already
satisfactorily regulated within this particular jurisdiction (being certain, predictable, relatively flexible and accessible). However, the main problems appear to be perceived shortcomings arising from the provisions of Articles 4, 7 and 19 of the Regulation.

21. If these provisions are a problem, they are transnational measures and arguably should be corrected by other transnational measures. However, given the view expressed on the limits of Community powers, the need for any measure is not demonstrated.

Qualitative and quantitative indicators (paragraph 4)

22. In the Impact Assessment the Commission reports on the findings of a qualitative study of international divorces and marriages in the EU.

23. It is accepted that this study was restricted at the outset in its analysis by the data that could be provided by national authorities. However, on the other hand, it is suggested that its conclusions in the Impact Assessment on the estimated numbers of international marriages and divorces do not seem to place sufficient weight on the limitations of the analysis that could be carried out with the data available.

24. The Commission sought statistics on international marriages and divorces from 23 out of the 25 member states as Denmark is not participating in adoption of the Regulation and Malta does not permit divorces. However, it appears to have encountered 2 main problems:

- the way the data was collected in some member states did not make it suitable for analysis (e.g. a number of member states, including the UK, do not hold information relating to the nationality of people getting divorced); and
- not all member states could provide data for all years – ultimately the Commission selected 2003 for its analysis as that was the year when the most data was available.

25. The Commission concluded in the Impact Assessment that the number of international divorces in the EU as a whole (excluding Denmark) in 2003 could be estimated around 170,000 (16% of the total number of divorces in the EU that year). Furthermore, international marriages in the EU in 2003 (excluding Denmark) could be estimated at around 350,000 in 2003 (16% of the total number of marriages in the EU that year).

26. Yet the Commission reached these conclusions by extrapolating from data from 9 out of the 23 member states in the case of international divorces, and 13 of the 23 member states in the case of international marriages. Furthermore, data from a number of member states, large in population

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4 Impact assessment pp 7-13 and Annexes 3 and 4
5 Page 13.
6 Page 13, footnotes 13 and 14.
terms (including the UK, France, Spain, Poland and Italy), was not available, or was not suitable for analysis, in 2003. This makes it difficult to accept unqualified statements such as:

“All EU countries have significant numbers of international marriages, the larger EU countries in population terms account for a high proportion of international marriages and divorces.”

27. Furthermore, the difficulty with the Commission’s estimates is that they assume similar rates of international marriages and divorces in all EU countries. However, arguably, factors such as language barriers, cultural differences between countries and geographical proximity to other countries could affect rates of international marriages and therefore divorces in a particular country.

28. There is a notable variation in the rates of some of member states that were used in the analysis. For example, in Luxembourg 43% of divorces were international divorces in 2003, yet in Hungary the equivalent figure was 1.54% and in Portugal it was 3%.

29. In the Impact Assessment the Commission suggests that the rates of international marriages and divorces do not vary enormously amongst the “larger EU countries”. This statement is surprising in view of the fact that the data of a number of EU countries with large populations did not form part of the analysis.

30. In light of the difficulties identified with the quantitative data used in the Impact Assessment, it is suggested that the Commission should not have relied upon this exclusively and that further qualitative research should have been conducted.

Form of Community Action (paragraph 6)

31. The Impact Assessment for the Proposal identifies 6 options for achieving the objective of the Proposal:

- Option 1 – no action
- Option 2 - increased co-operation between member states
- Option 3 – harmonising conflict of law rules, and introducing a limited possibility for spouses to choose applicable law
- Option 4 – Revising the rules of jurisdiction in Article 3 of the Regulation
• Option 5 – Giving the spouses a limited possibility to choose the competent court

• Option 6 – Revising the rule on residual jurisdiction in Article 7 of the Regulation

32. The options chosen for action in the Proposal are 3, 5 and 6.

33. Option 4 (revising the grounds of jurisdiction), rather than option 3 (harmonising the choice of law rules), was the UK Government’s and the Scottish Executive’s preferred option at Green Paper stage.

34. Like the Explanatory Memorandum to the Proposal the Impact Assessment identifies 4 objectives which the chosen policy option(s) should ideally achieve:

- enhance legal certainty and predictability
- increase flexibility and party autonomy
- prevent ‘rush to court’ by one spouse
- ensure access to the court

35. One criticism of the comparison of Options 3 and 4 in the Impact Assessment is that like is not being compared with like. Option 3 has been formulated to include a choice of law for the parties (and if the parties failed to reach agreement on that choice harmonised conflict of law rules then apply). Consequently Option 3 comes out well in the analysis not only in relation to legal certainty, predictability and preventing rush to court, but also in relation to increasing party autonomy and flexibility.\(^\text{10}\)

36. In contrast, Option 4 does not include any element of choice for the parties and so is criticised in the analysis for not increasing party autonomy.\(^\text{11}\) Yet Option 4 could have been formulated in a similar manner to Option 3 so that the policy option would have included a limited opportunity for the parties to choose the competent court and, if the parties failed to reach agreement on this choice, revised jurisdiction rules would apply (i.e. Options 4 and 5 could have been combined in the analysis). The comparison between Options 3 and 4 would then have been a much more appropriate one.

37. Option 4 is also criticised in the analysis for not giving EU citizens with international marriages living outside the EU access to the court.\(^\text{12}\) Yet this is a specific problem which is only addressed by Option 6 (revising the rule of residual jurisdiction). Any proposal for a regulation could have

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\(^\text{10}\) see Table 6.1 on p 21
\(^\text{11}\) Para 6.4.
\(^\text{12}\) Para 6.4.
featured Option 6 to address the specific problem of citizens outside the EU in conjunction with other options to address the main problems relating to international divorces – indeed, this is the approach taken in the current Proposal. Accordingly, it seems unfair in policy terms to criticise Option 4 for not addressing a specific problem with a specific solution and inconsistent in terms of the analysis as Option 3 does not receive similar criticism.

38. Setting aside, for the moment, reservations as to the need for any measures, two points may be made. If the choice of mode of action is to be a Regulation, then the deletion of Article 6, and preferably also Article 7, would enable member states to introduce domestic measures to meet most of the perceived difficulties. It is considered that such action would be as effective as the proposals and would be the simplest possible.

39. Introducing choices for spouses on jurisdiction and applicable law on the face of it seem desirable measures. But the choice of applicable law will require all jurisdictions to have expertise in the law of 24 other member states. This will cause most difficulty in member states where the lex fori is applied, but in any state, provision will require to be made for expertise in that law to be applied during proceedings. Being able to make use of the European Judicial Network may assist, but this proposed measure will still result in additional complication and additional cost, to the spouse or the member state (or both). In Scotland the additional costs will fall on the spouses. It seems doubtful that this measure satisfies the criterion of being as simple as possible, even when considered against the satisfactory achievement of the stated objective.

40. In relation to the perceived problem of a ‘rush to court’ by spouses, it is questionable whether the benefits of harmonising the applicable law are proportionate to the costs of doing so. A less disruptive way of tackling the same problem might be to reduce the number of potential grounds of jurisdiction or introduce a hierarchy in the potential heads of jurisdiction to prevent a free for all situation (as set out in Option 4).

41. One further alternative would be to soften the rule that once a divorce action is raised in a particular court that is the court that will have jurisdiction. Instead, the option could be created for a court to transfer a case to another court in exceptional circumstances. This appeared as an option in the Green Paper which preceded the Proposal but was not analysed in the Impact Assessment.

42. Taking all these points together, it is doubtful whether the current Proposal respects the requirement to legislate only to the extent necessary.

43. Paragraph 6 of the Protocol recommends the use of directives in preference to regulations. This Proposal appears to be an area in which the use of directives would be much more effective in achieving the objectives sought than a Regulation. This is demonstrated by the very existence of the Proposal. Setting out the objectives to be achieved in a
directive, and leaving the choice of form and method to individual member states, would allow states to make provision tailored to their legal system and would allow local effective solutions to be found to the problems of flexibility and access that are perceived to exist. Leaving such action at member state level would allow adjustment of provision to meet changing circumstances or ECJ case law, perhaps without the need for further legislation at Community level.

44. It is concluded that the choice of Regulation as the form of legislative measure does not respect the guidance on that point given in paragraph 6 of the Protocol to the treaty on the application of the principles of subsidiarity and proportionality.

Scope for national decision (paragraph 7)

45. The comments in the section above also apply in this context. The Proposal does not respect the requirement that there be as much scope for national decision as possible as—

(i) It is considered that insufficient care has been taken to respect well-established national arrangements and the organisation and working of the legal systems of the member states. This is most stark in the application of foreign law in those jurisdictions which currently apply only lex fori; and

(ii) There is no provision of alternative ways for member states to achieve the objectives of the measures.

Consultation and justification (paragraph 9)

46. The Commission has consulted widely through the publication of a Green Paper in 2005 and a subsequent public hearing and meeting of experts.

47. In keeping with the conclusions reached above, it is suggested that the Commission has failed to justify the relevance of the Proposal with regard to the principle of subsidiarity.

Financial and administrative burdens (paragraph 9)

48. The Explanatory Memorandum describes the costs of the Proposal as follows:

“it is expected that the present proposal will not entail any additional financial or administrative burdens on citizens and only a very limited additional burden on national authorities”\(^{13}\)

49. Similarly, when the principle of proportionality is discussed in the Impact Assessment the costs of the Proposal are described as “modest”.\(^{14}\)

\(^{13}\) Explanatory Memorandum, p 7.

\(^{14}\) Impact Assessment, para 10.
50. The confident statements about limited costs that feature in relation to the discussion of the proportionality principle can be contrasted with the analysis of the costs associated with each policy option contained elsewhere in the Impact Assessment.\textsuperscript{15} The Commission concedes—

“With regard to the financial and organisation resources required for the implementation of each policy option, it is generally very difficult to estimate the exact costs and administrative burden of the proposed policy options, with exception of policy option 2”

51. In relation to option 3 (harmonisation of the conflict of law rules etc) the Commission describes the potential costs to member states in the following terms—

“This Policy Option would entail an important change of the national legal systems, in particular in the Member States that currently only apply lex fori. It would imply some costs on Member States’ administrative and legal systems for training purposes. (...) It would also entail some costs at EU and/or national level to facilitate the application of foreign law. This could include the setting up of national institutes or specialised courts”\textsuperscript{16}

52. In contrast to the statement in the Explanatory Memorandum, the Commission also envisages costs on private individuals in relation to option 3—

“The main drawbacks of the policy option are that it would entail the application of foreign law by the courts in certain cases. Certain practitioners consider this to be a practical problem which could lead to lengthier divorce processes and thereby additional costs for spouses. Who will bear the main costs for finding out the content of foreign law depends on whether the spouses are required to provide the judge with this information or whether it is done by the judge”\textsuperscript{17}

53. In Scotland these costs would be borne by the spouses.

54. The costs of option 1 (the status quo) are assessed at nil, the costs of option 2 (increased co-operation between member states) are assessed at 5 million euros per year and as options 3, 5 and 6 do not require any major change to national legal systems the Commission concludes that there will be no “major costs” on member states’ administrative and legal systems as a result of implementing these policy options. This conclusion is, at best, speculative.

\textsuperscript{15} Impact Assessment, para 6.
\textsuperscript{16} Impact Assessment, para 6.3.
\textsuperscript{17} Para 6.3.
Conclusions

55. As a contribution to the COSAC subsidiarity and proportionality check of the Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, the Justice 1 Committee has considered the Proposal and concluded, inter alia, that—

- the test of necessity in Article 65 has not been met;

- it is doubtful that the Proposal respects the need to legislate only to the extent necessary. The imposition of a move away from the application of the lex fori only is particularly unwelcome, as it will add a layer of complication and cost that is considered unhelpful and unnecessary; and

- the use of a Regulation as opposed to a Directive, and the resultant lack of discretion and flexibility at national level, does not respect the principle of subsidiarity.

56. The Committee considers that the Proposal breaches the principles of subsidiarity and proportionality.

57. The Committee remains opposed in principle to the development of any further Community instruments in the area of family law. The Committee considers that the Commission has failed to provide any compelling evidence of significant need or demand from EU citizens for Community action in this area.
Further to the Committee’s consideration of the Community Right to Buy (Definition of Excluded Land)(Scotland) Order 2006 on Wednesday, 13 September, I thought it might be helpful if I clarified the position on whether Motherwell or Wishaw were excluded settlements under the legislation.

I have considered further the possible intention of Stewart Stevenson, MSP’s question. If the purpose of the question was simply to establish whether Motherwell or Wishaw are excluded settlements, the answer is no, as neither are listed as such in the Schedule to the Order. However, if the intention of the question was to ascertain whether or not Motherwell or Wishaw were excluded land, the position is very different.

The Order provides for definitive maps to be made available to clarify to interested parties land which is excluded from the legislation, thereby defining all other land as “Registrable land” under section 33 of the Land Reform (Scotland) Act 2003. While Motherwell and Wishaw are not listed in the Schedule to the Order as excluded settlements as defined by the General Register Office for Scotland (GROS), they are part of the larger Glasgow settlement. This is because there is a continuous band of urban postcode units containing developed land between Glasgow and Motherwell, and extending to Wishaw. In order for Motherwell or Wishaw to be a separate settlement, there would need to be rural postcode units containing less developed land forming a rural postcode unit (or units) between these areas. The effect of the GROS determination of the Glasgow settlement is that Motherwell and Wishaw, while not being excluded settlements in their own right, are excluded land and therefore not registrable land. The definitive maps therefore play an important part in clarifying exactly which areas of land are excluded.
Also, as the Long Title to the Act indicates that the legislation applies to bodies representing rural communities, a body formed to represent the Motherwell or Wishaw communities could not register an interest in land under the Act. However, this does not prevent these communities from creating a representative body to buy land on behalf of, and for the benefit of, their community outwith the Act, as there is no requirement for community bodies to use the Community Right to Buy legislation in order to apply for financial assistance from any source. As you may know, the Big Lottery Fund’s Investing in Growing Community Assets Programme, the successor to the Scottish Land Fund, has been extended to cover the whole of Scotland, therefore financial assistance could be available for the Motherwell and Wishaw communities if community land ownership was an aspiration.

I hope this is helpful in clarifying the position of Motherwell and Wishaw in relation to the Community Right to Buy.

RHONA BRANKIN
Purpose

1. This note provides the Committee with an update on recent progress in relation to the proposal for an EU Directive on certain aspects of mediation in civil and commercial matters.

Introduction

2. The purpose of the proposed Directive\(^1\) is to reduce the difficulties associated with resolving cross-border litigation and to promote the use of mediation amongst member states.

3. In particular, the Directive would establish minimum common rules on suspension of prescription and limitation periods where mediation is undertaken. Prescription and limitations periods are the periods parties have by law to commence their court action after the date of the event leading to the court action, before their claim is barred (limitation) or extinguished (prescription). The Directive would also address confidentiality and the enforcement of settlement agreements reached by parties.

Background

4. The proposal for a Directive was initiated following the introduction of the voluntary European Code of Conduct for Mediators\(^2\) (July 2004). Initial debate on the Directive centred around whether it should cover all mediation carried out in member states, thereby creating a European standard for mediation, or to apply the Directive only to ‘cross-border’ mediations. The Commission was of the view that a European standard was the aim of the Directive whilst the Council’s Legal Service believed that any Directive going beyond cross-border cases would beyond the scope of the legislative power granted to the European Institutions in the EU Treaties. A majority of Member States supported the Council’s legal view.

5. Legislating in respect of mediation at a Community level is complicated by the absence of a common approach by Member States. Some Member States

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\(^2\) Text of European Code of Conduct available online at: [http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.htm](http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.htm)
categorise rules relating to mediation as part of their substantive law, i.e. part of the law determining the substance of the rights and obligations of parties towards each other. Other member states consider that rules about mediation are part of their procedural law, i.e. the rules relating to how a person’s rights and obligations will be enforced.

6. As well as complicating the creation of any European standard, this difference of approach is significant in the context of ‘private international law’, i.e. the branch of law which regulates private relationships which have a cross-border element. For private international law treats as two separate issues 1) which member state’s court (or other forum) can hear a dispute between parties; and 2) which member state’s substantive law should be applied to resolve that dispute.

7. Discussions in the JURI committee of the European Parliament (which has co-decision on this issue) on 14 September 2005, centred on the utility of such a broad proposal at all and whether indeed the Directive would contravene the subsidiarity principle, a view later echoed by the Council (1-2 December 2005).

Justice 1 Committee consideration

8. The Justice 1 Committee last considered an update on the proposed Directive in March 2006.\(^3\) It had previously taken evidence on the Green Paper proposals prepared by the European Commission and submitted its views to both the Green Paper and a preliminary draft text of a proposal for a Directive.

Current developments

9. The JURI committee’s rapporteur on the Directive, Arlene McCarthy MEP delivered her draft report\(^4\) to the committee on 11 September 2006. This report (plus amendments) will be considered by the JURI committee at its next meeting (2-3 October 2006).

10. The report represents a significant softening of the stance of Arlene McCarthy toward the Directive. Initially Ms McCarthy questioned the need for a directive at all. She considered that any attempt to ‘regulate’ mediation could stifle its development, and impede the use of the voluntary code. However, as a result of her on-line consultation and the evidence presented by the experts invited to the Committee’s April hearing, the rapporteur has conceded that there is overwhelming support for the principle of having a directive.

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\(^3\) Justice 1 Committee, 7th Meeting 2006
11. The key proposal of Ms McCarthy concerns prescription and limitation periods in cross-border cases. Rather than opting for a general definition of cross-border cases (a solution adopted elsewhere), which would cause difficulties in practice, the rapporteur proposes to limit the provisions on limitation periods to cross-border cases, since it is only these provisions that will impact in any substantial way on national legal systems. In effect this would mean that mediation in each Member State would continue to be conducted under the State’s current arrangement but where a cross-border case existed then provisions concerning prescription and limitation would apply.

12. The report also includes more general points under three broad headings; procedure, scope and definition:

**Procedure**
- It should be stressed that mediation is a voluntary procedure.
- Mediation should not prevent parties from exercising their right of access to the judicial system.
- There should be established minimum rules on confidentiality.
- Member States should encourage training of mediators to ensure that the conduct of mediation is fair, effective and competent in relation to the parties and that the procedures are suited to the circumstances of the dispute.

**Scope**
- The directive should apply to cross border cases only.
- In the case of domestic issues, Member States should encourage and promote the application of the European Code of Conduct for Mediators.

**Definition**
- Reference should be made to the terms as defined in the voluntary code, rather than seeking to introduce special definitions for cross-border mediation.

**Next steps**

13. Ms McCarthy’s report together with amendments will be considered at the next meeting of the JURI committee on the 2 – 3 October 2006, when a final draft is likely to be agreed. Barring any division the report will pass through its first reading in the full parliament shortly thereafter.

14. It is expected that the document will be considered by Council during the Finnish Presidency. The final proposal is unlikely to be adopted by the Parliament and Council before 2008.
Conclusion

15. The Committee is invited to note recent progress on the proposed Directive on certain aspects of mediation in civil and commercial matters.

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European Officer

&
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Senior Research Specialist
SPICe
Provisional Agenda  
Justice and Home Affairs Council (JHA)  
Luxembourg – 5/6 October 2006

Please note that this Pre-council Report is based on a provisional agenda which was published in July and may be subject to change. At this stage we do not know which Ministers will be representing the UK.

HAGUE PROGRAMME

Mid-Term review of Hague Programme

The Hague Programme was adopted in 2004 as the way ahead in Justice and Home Affairs, and was supplemented by a detailed Action Plan in June 2005. Its purpose was to continue the work begun developing co-operation within the EU in JHA by the earlier Tampere Programme. To try to ensure a degree of flexibility the Hague Programme contains review and update provisions, and the Commission Communications are part of this process, designed to stimulate debate, which might lead to certain realignments and changes of approach. The Communications cover (1) an overall review of JHA priorities, including a proposal to move from unanimity in the Council to QMV and co-decision with the European Parliament in police and judicial co-operation in criminal matters (2) a review of progress on individual dossiers (3) proposals on improving evaluation of the effect of EU measures (4) proposals to adapt the provisions relating to the European Court of Justice under Title IV TEC, which covers asylum and immigration, and co-operation in civil matters.

Implications will depend on how discussions on these Communications proceed over the coming months, during the Finnish Presidency. The Commission proposals may be adopted as they are, rejected, or then modified. At this stage, however, some of the potential implications include (a) the need to modify engagement tactics if decision making procedures are changed (b) the possibility of earlier referrals to the ECJ in relation to certain civil law matters (c) increased workload for officials in connection with new evaluation procedures.

CRIMINAL JUDICIAL CO-OPERATION

Council Framework Decision on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

The aim of this proposal is to provide a simple and speedy process for transfer of EU nationals/residents to their countries of origin/association to serve their sentence following extradition and/or conviction. Most prisoner transfers currently take place under the Council of Europe Convention on the Transfer of Sentenced Persons, which in most cases requires the consent of the prisoner. Only the additional protocol to the Convention provides for transfer without consent where the prisoner is to be deported or where the prisoner has fled. The draft FD differs from this and other international agreements in that it proposes an obligation on the existing State to accept back its own nationals and those normally resident there, and in most cases transfer will not require the consent of the prisoner. These issues
continue as the focus of discussion. Impact on Scotland is not expected to be great as there are few foreign prisoners here.

Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings

Aimed at setting common minimum standards with regard to certain procedural rights throughout the EU, current drafts focus on the provision of certain basic information, access to legal advice free of charge, where appropriate, and access to free interpretation and translation. This Framework Decision would apply not only to individuals who found themselves in another Member State, but as an all encompassing measure applying throughout the EU to all citizens. Published by the Commission in early 2004, this initiative first appeared at working group level in September 2004. Progress in the working group has been slow, mainly due to the difficulty in arriving at a common approach where procedure may vary in its detail across different jurisdictions in the EU. Some delegations still question whether in fact there is a legal base for this initiative within current Treaties. A possible alternative of a Resolution focusing on practical measures is also now being considered by the working group.

There may still be implications for Scotland from this dossier, depending on how negotiations go, mainly in relation to the potential interface with the initial 6 hour detention period.

There may still be implications for Scotland from this dossier, depending on how negotiations go, mainly in relation to the potential interface with the initial 6 hour detention soon.

(poss) Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights. Proposal for a council framework decision to strengthen the criminal law framework to combat intellectual property offences

Published as combined package COM(2005)276 Final on 12 July 2005. The Commission has now published a new proposed Directive on 26 April 06, replacing the previous combination of Directive/FD, in line with its interpretation of ECJ Case C 176/03. The UK has questioned the need for any new measures arguing that sufficient approximation has already been achieved through the Directive on the Enforcement of Intellectual Property Rights 2004/48/EC. The domestic legislation in this area is thought to be entirely reserved.

Draft Framework Decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings

This proposal has relatively limited scope. Where there may be new criminal proceedings on the basis on new facts against an individual, it seeks to set out some minimum conditions for taking into account previous criminal convictions from other EU Member States. The key principle it proposes is that such previous convictions should in general be treated in the same fashion as equivalent domestic convictions. The Presidency hopes to be in a position to conclude negotiations soon.

The Scottish Executive supports this initiative as it will help provide a level playing field across the EU. It will facilitate better informed decision making by the courts and other practitioners, in for example deciding on the most appropriate sentence or rehabilitation
measure. The taking account of previous convictions from other Member States is already possible in Scottish procedure.

(poss) Missing persons and unidentified bodies.


Integrated border management strategy

The Executive has a co-ordination role with regard to the provision of services for asylum seekers and refugees. Any change to operations in Scotland will be for the Home Office to implement.

POLICE AND JUDICIAL CO-OPERATION

Principle of Availability

The draft Framework Decision sets out how law enforcement agencies with equivalent competencies should have access to databases held in other Member States. It proposes direct online access to available information between Member States and to index data for information not available online. The kinds of information involved may include DNA profiles, fingerprints, ballistics, vehicle registration information, telephone numbers and data for identification of persons contained in civil registers.

Commission adopted Framework Decision in October 2005. Will be discussed in Multi-Disciplinary Working Group. There has as yet been no substantive working group discussion of this dossier. Delegations are continuing to reflect on the general scope of the Commission proposal. There may be implications for Scottish law enforcement agencies depending on how the principle of availability is developed.

Future of Europol
A High Level Conference on "The Future of Europol" was held in Vienna in February. The Friends of the Presidency Group was also established to prepare an Options paper on the future development of Europol. The UK was actively involved in influencing the draft Council Conclusions. An emerging prevailing view in the Friends of the Presidency Group is that the policy focus should be on ensuring that Europol achieves its full potential within the framework of the existing Europol Convention and associated legal structures. Although there appears to be no philosophical objection to converting the Europol Convention into a more flexible Council Decision, there is a widely supported view that this should not divert attention from the more immediate imperative of credible delivery of expected outcomes within the new Organised Crime Threat Assessment (OCTA) framework. There are no apparent separate implications for Scotland on this matter.

(poss) Council decision concerning access for consultation of the visa Information System (VIS) by the authorities of Member States responsible for internal security and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences.

This is a reserved area.

CIVIL JUDICIAL CO-OPERATION


The European Parliament was not initially convinced a legislative proposal was the way forward and the rapporteur, Arlene McCarthy MEP, invited a number of experts to attend the Legal Affairs Committee meeting at the end of April. Following that meeting the Rapporteur drafted a report on the Directive taking into account all of these views, which was published on 6 September 2006, and was due to be discussed at the Legal Affairs Committee meeting on 11 September. The Rapporteur commends the initiative in her report, in so far as it will serve to publicise and promote mediation as an alternative means of access to justice and afford a framework of common rules which are sufficiently robust to protect the parties’ interests, yet light enough to allow market-driven solutions. The draft report contains suggested amendments to the text, some of which the UK Government do not support and they have provided their views on the report for the meeting. We await the outcome of the Committee meeting of 11th September.

This Directive should not have significant financial implications for Scotland. It is difficult to know, however, exactly what will be involved until the proposals are finalised.

Proposal for a Council Decision on improving the Community Mechanism for civil protection

(poss) Directive on long term resident status for beneficiaries of international protection
EXPLANATORY MEMORANDUM ON EUROPEAN COMMUNITY LEGISLATION

Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters

11818/06,
11818/06 ADD 1,
11818/06 ADD 2

Submitted by the Department for Constitutional Affairs and the Scottish Executive on 6 September 2006.

Subject Matter
Document 11818/06 is a proposal for a Council Regulation which sets out amendments to Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, widely known as Rome III.

The proposal follows the Commission’s Green Paper (Document COM (2005) 82) which was submitted for scrutiny on 7 April 2005.


Documents 11818/06 ADD 1 and 11818/06 ADD 2 are Commission staff working documents which do not form part of the legislative proposal.

Scrutiny History
This is a new proposal. The Green Paper was submitted for scrutiny on 7 April 2005. The Government’s response to the Green Paper was submitted on 11 November 2006.

Ministerial Responsibility
The Lord Chancellor has responsibility in England and Wales for matters relating to private international law and aspects of that law arising from his ministerial responsibility in Northern Ireland. The Scottish Minister for Justice has equivalent responsibility in Scotland.

Applicability to Gibraltar
An EU instrument in this area would apply to Gibraltar.
Legal basis

The proposal for an EU Regulation on applicable law in divorce matters and on reform of the grounds for jurisdiction by amendment to the revised Brussels II Regulation¹ (in force on 1 March 2005) is brought forward by the Commission on the basis of Article 61 (c) of the EC Treaty. Under the terms of the UK/Ireland protocol concerning Title IV of the Treaty, the UK must decide within three months whether it wishes to opt-in.

European Parliamentary Procedure
The European Parliament must be consulted.

Voting Procedure
As it concerns 'aspects relating to family law' unanimity would be required pursuant to the exception set out in Article 67.5 TEC.

Impact on UK Law
Consideration will need to be given to the operation of the Domicile and Matrimonial Proceedings Act 1973 and to the revised Brussels II Regulation (2201/2003), which came into effect on 1 March 2005. Consideration of the Matrimonial Causes (Northern Ireland) Order 1978 and the Impact the introduction of choice of law provisions will have on domestic legislation.

Application to the European Economic Area
Not applicable.

Subsidiarity
Although Article 65 TEC gives the Community explicit power to promote the compatibility of the rules concerning conflict of laws in the Member States, the Government will wish to be satisfied that the proposal does not go beyond what is necessary to achieve the objectives of the Treaty.

Policy Implications
The underlying policy of the Commission is to simplify and facilitate, through a variety of proposed means including jurisdictional rules, proceedings for divorce for EU nationals who move between EU member states. The amendments to the existing Regulation would be as follows:

- Harmonising the conflict of laws rules: this would involve having the same rules to determine the law to be applied to an international divorce case in all EU member states.

- Giving spouses the possibility of choosing the applicable law to be applied in their case.

• Revising the grounds of jurisdiction listed in Article 3 of the revised Brussels II Regulation. This would introduce the possibility of parties agreeing to the jurisdiction of their choice.

• Revising the rule on residual jurisdiction in Article 7 of the new Brussels II Regulation. (The Commission suggests that the current rule could lead to a situation where no court would have jurisdiction to deal with a divorce case.) This will require careful consideration as it goes further than the provision in Brussels II whereby residual jurisdiction is determined by domestic law.

The Government’s position is that it is important that EU nationals who move between states should continue to have access to legal provisions for divorce. Generally the Government’s view would be that people should be able to apply for divorce in the courts of the EU member state which best establishes jurisdiction and that when UK courts are seised the preferred approach would be to apply the law of the forum.

Applicable law

A number of other Member States have rules which allow foreign law to apply to family proceedings. However, family courts in the UK are not accustomed to applying foreign law. The Government’s approach is that such provisions are not obviously necessary here and that the law of the forum should continue to apply.

The Government is concerned that to apply the law of a foreign jurisdiction in the UK could involve considerable practical difficulties, cause delay and increase costs, because it may be necessary to call expert evidence as to the foreign law. It is Government policy that the costs to parties should be reasonable. The Government is not at this point wholly persuaded that there are such problems with the lex fori principle to justify departure from that principle.

The Commission’s main proposal is to apply the law of the common habitual residence of the spouses but this will require examination in that, in cases involving couples with homes in more than one country, the habitual residence may not be clear cut.

Jurisdictional provisions

The proposed jurisdictional rules seem to extend beyond the provisions within the Brussels IIa Regulation and introduce new rules on residual jurisdiction. This will need to be considered carefully. In extending applicable law to non-Member State law, it would appear that the measure goes further than necessary for the proper functioning of the internal market.
Regulatory Impact Assessment
A Regulatory Impact Assessment will be prepared as necessary.

Consultation
The Government has consulted and will continue to consult interested stakeholders including among the judiciary, legal practitioners and academic experts.

Financial Implications
If foreign law were to apply to some divorce cases there could be financial implications and impact on the courts and on the legal aid fund.

Timetable
The proposal includes an anticipated date of coming into force of 1 March 2008.

Parliamentary Secretary
Department for Constitutional Affairs
Minister for Justice
Scottish Executive

(Approved by the Secretary signed in her absence)