Study to inform a subsequent Impact Assessment on the Commission proposal on jurisdiction and applicable law in divorce matters

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DRAFT FINAL REPORT

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1 EXECUTIVE SUMMARY

1.1 Introduction

This is the Executive Summary of a 'Study to inform a subsequent Impact Assessment on the Commission proposal on jurisdiction and applicable law in divorce matters'. When preparing a legislative proposal the Commission and other European Union (EU) policy makers have to make political and technical choices that need to be endorsed by thorough evaluation of the impacts of different 'policy options'. As part of this process, the present study outlines current challenges associated with 'international divorces' in the EU and the relevant legislation. In particular, the study considers how current problems can be addressed by outlining the impacts of alternative policy options for the Union. The work was undertaken by the European Policy Evaluation Consortium (EPEC), with one of the Consortium partners, GHK, leading the study for DG Justice, Freedom and Security (DG JLS). The views expressed in this report, naturally, remain those of the authors and do not necessarily reflect those of the Commission.

1.2 Policy background

One consequence of the increasing mobility of citizens within the EU is a growing number of 'international marriages' encompassing one or more of the following circumstances:

- Spouses of different nationalities.
- Spouses who live in different Member States.
- Spouses who live in an EU country where they are not nationals.

Each Member State has its own legislation in the areas of separation, divorce, maintenance of spouses and children, custody, guardianship and other family law matters. The legislative relationship between Member States are governed by Regulation 2201/2003 (the New Brussels II Regulation[1]), which entered into application on the 1st of March 2005. This Regulation harmonises the EU Member States' (except Denmark) rules of private international law in relation to: *jurisdiction*, i.e. which Member States' courts can hear and determine a case; and *recognition and enforcement* of a court judgement made in another Member State. It does not contain rules on which Member States' laws apply in a given case, i.e. the applicable law or 'conflict-of-law' rules.

In order to tackle obstacles currently faced by international couples who want to divorce, it is envisaged that the Commission will put forward a legislative proposal on applicable law in divorce matters. This is outlined in the Commission's Work Programme for 2006. In this context, DG JLS launched a wide-ranging public consultation by presenting a Green

[1] Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning *Jurisdiction and the recognition and enforcement of judgements in matrimonial matters of parental responsibility*

Paper on applicable law and jurisdiction in divorce matters in March 2005.[2] It is important to note that the proposals in the Green Paper are not concerned with changing the substantive content of the EU Member States' national divorce laws (i.e. what constitutes grounds for divorce), but rules of private international law which determine matters such as whether the courts of a particular Member State have authority to hear and decide a case with an international element (e.g. when a case concerns individuals of different nationalities). Consideration will be given to whether the legislative proposal should be confined to divorce or apply also to other matrimonial matters in terms of legal separation and marriage annulment.

1.3 Problem assessment – Scale of the issue

Statistics on international divorces and marriages in the EU Member States have been collected from national statistical offices and used to assess the potential number of people that may be affected by legislation on international divorce matters. Data on international marriages were available in seventeen Member States. Fourteen countries provided figures on international divorces. The remaining countries have confirmed that they do not collect such data.

There are in the order of 2.2 million marriages and 875,000 divorces in the EU per year (excluding Denmark). All EU countries have a significant number of international marriages and divorces. It is estimated that 350,000 (16%) of the 2.2 million marriages are 'international' and that around 170,000 of the 875,000 divorces (20%) are between international couples. The larger EU countries account for a high proportion of international marriages and divorces. The composition of marriages, in terms of the countries of origin of the spouses, varies markedly between Member States. Very often international marriages involve third country nationals. In the period 2000-2004 the incidence of divorce between international couples appears to have remained stable generally with some minor observable increases.

1.4 Problem assessment – Applicable law and jurisdiction

There are marked differences between the Member States in terms of both the relative difficulty and length of time it takes to acquire a divorce. The three most extreme examples include:

- Malta – where divorce is not permitted;
- Ireland – which necessitates a waiting period of 4 years and court approval of a number of cumulative conditions; and,
- Sweden – which requires no explanation of the grounds for divorce and where divorce may be granted directly if no children are involved ('divorce on demand').

There are also differences between the Member States in terms of the right to legal separation and marriage annulment. Legal separation exists in twelve Member States. In seven of these it is possible to convert the separation into divorce after a specified number of years. Marriage annulment exists in all but two Member States.

[2] COM(2005) 82 final of 14.3.2005: *Green Paper on applicable law and jurisdiction in divorce matters*

EU citizens involved in an 'international marriage' who want to apply for a divorce may face a number of problems. These are summarised below:

- **Problem 1 – Difficulties for the spouses to predict what law will apply**

What law will apply to a divorce is dependent on the national 'conflict-of-law rules' of the Member State in which a divorce petition is lodged before a court. Some countries always apply the law of the country in which the court is based according to the lex fori principle (7 countries). Others use a hierarchy of 'connecting factors' (the link between an EU citizen and a country, e.g. nationality or habitual residence) to determine what law is applicable (16 countries). The latter could result in the law of another State being applied in order to ensure application of the law with which the spouses feel 'closest connected'. In some countries the spouses have a limited possibility to choose applicable law before a set of connecting factors is applied.

- **Problem 2 – Insufficient party autonomy and flexibility**

The national conflict-of-law rules foresee in principle only one solution in a given situation, for example, the application of the law of the spouses' common nationality. Most national laws do not allow for any party autonomy. This may in certain situations not be sufficiently flexible. It fails, for example, to take into account that citizens may feel closely connected with a Member State where they have lived for a long time although they are not nationals of that State. On the other hand, in some cases individuals live in another country than their country of origin for a number of years and still feel more comfortable having the law of their nationality applied.

- **Problem 3 – Risk of rush to court**

Current rules result in some spouses trying to be the first one to lodge a divorce petition so that a divorce may be granted by a law in a particular country. Reasons for this include having ancillary matters (e.g. maintenance obligations) judged by a particular law or on grounds of expediency and ease (divorce is quicker in some Member States than others). This 'rush to court' problem may occur as the new Brussels II Regulation includes provisions for alternative grounds of jurisdiction and that the competent court that is 'first seized' will have jurisdiction (courts seized later have to decline jurisdiction). Aside from the actual 'rush to court' there are also other negative implications associated with this process. Among these is the capacity for mediation interventions, which may be overlooked as a result of a greater focus by applicants on safeguarding individual interests by lodging an early petition. The situation is particularly problematic for financially weak spouses who are unable to hire an experienced lawyer to find out where it is best to lodge a divorce petition. These processes therefore have the potential to increase feelings of tension and animosity between spouses at a particularly sensitive juncture, which can only have detrimental implications for any children involved.

- **Problem 4 – Risk of difficulties for EU citizens living in a third State**

EU citizens who live in a third State and who want to get divorced may experience problems accessing a court in the EU. The national rules on residual jurisdiction which establish this right are different and do not always guarantee access to court on the basis

of the nationality of one of the spouses. In some cases the spouses cannot apply for divorce in the third State or the EU which means that they have no access to court.

The current problems and associated drivers (with indication whether they are within or outside Community competence) are outlined in Table 1.1 below.

Table 1.1 – Problems and drivers

Problem	Definition of problem	Driver within Community competence	Driver outside Community competence
Problem 1	Difficulties for the spouses to predict what law will apply. EU citizens are also unlikely to be aware that the conditions for getting divorced may change drastically when they move to other Member States.	▪ Different national conflict-of-law rules. ▪ Impreciseness and difficulties in establishing national connecting factors.	▪ Different national substantive divorce laws, i.e. differences in ease and length of time for getting divorced.
Problem 2	Insufficient flexibility and party autonomy for citizens to choose applicable law and competent court.	▪ In most Member States conflict-of-law rules only provide one given solution in a specific situation. ▪ Insufficient party autonomy, i.e. spouses are only able to choose applicable law (within limitations) in a few countries. ▪ The jurisdiction rules of the new Brussels II Regulation do not allow spouses to apply for divorce in a Member State of which only one of them is a national.	▪ Different national substantive divorce laws, i.e. differences in ease and length of time for getting divorced.
Problem 3	Rush-to-court, i.e.: ▪ No time for mediation efforts. ▪ Application of law with which the defendant does not feel connected and which does not take account of his/ her interests.	▪ Different national conflict-of-law rules. ▪ 'Lis pendens' rule on competent court first seized. ▪ Several grounds of jurisdiction in Article 3 of the New Brussels Regulation.	▪ Different national substantive divorce laws, i.e. differences in ease and length of time for getting divorced. ▪ Differences in national laws on ancillary and other matters related to divorce.
Problem 4	Difficulties for citizens in third countries: ▪ Access to court. ▪ Difficulties in getting the divorce recognised.	▪ Different (or non-existence of) national laws on residual jurisdiction in divorce matters. ▪ Jurisdiction rules in Article 3 and 7.	▪ National rules on recognition of divorces from third States.

1.5 Objectives of the Commission proposal on jurisdiction and applicable law in divorce matters

General objective:

In 1998[3] the European Council in Vienna emphasised the importance of a common judicial area to make life for EU citizens easier, in particular as concerns matters that affect their 'everyday life' such as divorce. The importance of a common judicial area and making the life easier for citizens have also been acknowledged in the Tampere programme of 1999 (achieved in 2004) and The Hague Programme of 2005.

More specifically, in the area of divorce, the general policy objective would be *to provide solutions to enhance at the same time legal certainty and flexibility in order to meet the legitimate expectations of EU citizens*. Direct benefits to EU citizens within or divorced from an 'international marriage' would be, for example, reduced 'distress' associated with divorces either being granted or not being granted on grounds that do not meet the legitimate expectations of both, or either, spouse; decreased time taken for judgements to be made; decreased costs associated with proceedings and reduced differential effects of high costs on disadvantaged groups.

Specific objectives:

The objectives of the Commission's proposal on jurisdiction and applicable law in divorce matters are as follows:

- To increase the legal certainty and predictability for 'international' spouses entering or considering divorce proceedings in the EU.
- To introduce limited party autonomy for 'international' spouses to choose applicable law and competent court.
- To ensure that the law of the Member State with which the spouses feel closest connected is applied.
- To increase flexibility in terms of access to courts in Member States for citizens living in the EU.
- To reduce or eliminate the risk of 'rush to court' by one spouse to the disadvantage of the other.
- To ensure that EU citizens in an 'international marriage' living outside the EU have appropriate access to courts in the EU for divorce proceedings.

[3] Common rules on jurisdiction and enforcement of judgements in civil and commercial matters date, however, back to 1968 between the original six EU Member States. Further steps were taken in 1993, when the Maastricht Treaty identified Judicial co-operation in civil matters as an area of common interest for EU Member States, and with the Treaty of Amsterdam, which made Judicial co-operation in civil matters a European Community policy linked to the free circulation of people. A programme of measures for implementation of the

1.6 Description of policy options

There are a number of potential options to address the problems EU citizens face in relation to 'international' divorces and meet the policy objectives. The following policy options were identified in the course of the study:

Policy option 1 – Status quo

This policy option assumes that no new policy initiatives would take place at EU level. In assessing this policy option consideration will be given to whether existing activities and trends will affect the nature and severity of the problems identified.

Policy option 2 – Harmonising the conflict-of-law rules and introducing a limited possibility for the spouses to choose applicable law

- *Harmonisation of the national conflict-of-law rules*. A uniform set of conflict of law rules for all EU Member States would be agreed to determine applicable law.
- *Give the spouses a limited choice of applicable law*. Before the set of uniform conflict-of-law rules would be applied, spouses could be provided with a 'limited' choice of applicable law. The choice would be limited to laws of Member States with which spouses have a connection and by means of formal requirements for the parties' agreement on applicable law (e.g. timing, written statement before a notary or judge, provision of legal advice etc.)

Policy option 2 would be supported by a *public policy* clause, which would allow the Member States to deny application of a law contradictory to their fundamental values and family policies.

Policy option 3 – Revising the Community rules for determining the competent court

In Article 3 of the New Brussels II Regulation seven alternative grounds for establishing what court is competent to handle an international divorce are provided. Courts in more than one country may be competent to handle the same divorce. The grounds for jurisdiction could be revised in either of the following ways:

- *Policy Option 3a: Extending the number of alternative grounds in Article 3*.
- *Policy Option 3b: Decreasing the number of alternative grounds in Article 3.*
- *Policy Option 3c: Replacing current alternative grounds in Article 3 with a set of jurisdiction rules*, based on connecting factors, which establish competent jurisdiction in hierarchical order.

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principle of mutual recognition of decisions in civil and commercial matters was adopted by the Justice and Home affairs Council on 30 November 2000.

Policy option 4 – Giving the spouses a limited possibility to choose the competent court ("prorogation")

Spouses could be provided with a limited choice of court. By choosing the competent court, the spouses would indirectly also choose the applicable law since this currently is determined by the national conflict of law rules. The choice would be limited to those Member States with which they have a connection and be established in accordance with formal requirements.

Policy option 5 – Introducing a limited possibility to transfer a case to the courts of another Member State

The possibility of transferring a case where 'exceptional circumstances' apply to safeguard a vulnerable spouse could be introduced. Such exceptional circumstances could include cases where one spouse has 'rushed' to court in order to have the divorce ruled by a specific law and where it is evident that the divorce law clearly disadvantages the other spouse.

Policy option 6 – Adopting common rules on residual jurisdiction to ensure that EU citizens living outside the EU can apply for divorce in a Member State

Common rules would be adopted at Community level on residual jurisdiction to ensure that divorcing EU citizens in an international marriage living in a country outside the Union have access to court in an EU Member State.

Policy option 7 – Introducing an Optional European Marriage Regime

All EU citizens entering an international marriage would be offered a choice of an additional European marriage certificate, which would confer the same legal arrangements and rules in all the EU Member States in cases of subsequent divorce proceedings.

Policy option 8 – Increasing co-operation between the Member States

Policy option 8 is a non-legislative instrument whereby the EU would provide some financial support to encourage relevant co-operation activities between Member States, including:

- *Support to exchanging best practice on family courts*.
- *Networks of expertise on different national divorce laws*, e.g. existing networks, such as the European Judicial Network in Civil and Commercial matters, could be contracted and encouraged to provide information on the contents and workings of national divorce law.
- *Information campaign* to inform EU citizens on differences between the Member States requirements for getting divorced and what a move to another EU country would mean.

On the basis of financing of similar EU initiatives, it could be envisaged that the EU could devote around 5 million euro annually to supporting such co-operation activities between the Member States.

1.7 Assessment of the policy options and the preferred policy option

An assessment of each of the identified policy options has been undertaken on the basis of assessment criteria that relate to the solution of different problems, the policy objectives and impacts on Fundamental Rights, with reference to the relevant Articles of the European Charter of Fundamental Rights. A common grid was used for systematic comparison of the options. Impacts on legal professions and Member States' administrative systems have also been identified.

The individual assessments indicate that none of the policy options completely addresses the problems nor fully achieves the policy objectives. However, by combining different aspects of the different policy options, a higher degree of effectiveness could be achieved. Based on the assessments, and in view of the stakeholder consultations, there would be merit in basing the preferred option on the following policy options:

- Policy Option 2: Harmonisation of the national conflict of law rules and giving the spouses a limited possibility to choose applicable law;
- Policy Option 3: Introducing a hierarchy of jurisdiction grounds;
- Policy Option 4: Introducing a limited possibility for the spouses to choose the competent court ('prorogation'); and
- Policy Option 6: Adopting common rules on residual jurisdiction to ensure that EU citizens living outside the Union have access to court.

Aspects of Policy Option 8 as to support possible application of foreign law could also be adopted (optional).

Appropriate safeguard mechanisms including a public policy clause to reject application of foreign law could be adopted.

This preferred policy option was not presented in the Green Paper on divorce matters, and issues concerning political support from the Member States need to be clarified.

As concerns whether harmonised rules should be confined to divorce or apply also to legal separation and marriage annulment, in view of the specifics of the preferred policy option, there would be merit in governing both legal separation and divorce by Community provisions, but treating marriage annulment in accordance with national rules.

1.8 Subsidiarity and proportionality

The subsidiarity principle ensures that within the EU intervention is taken at the most appropriate level to achieve the policy objectives and address the problems in the current situation. The proportionality principle provides that measures taken are proportionate to the size and extent of the problems (i.e. that public authorities do not 'use the hammer to

crack the nut'). Action at EU level is not to go beyond what is necessary. The legal basis for Community action in the area is established in Articles 61(c) and 65 of the Treaty establishing the European Community. These provisions state that in order to establish a genuine European law-enforcement area, the Community is to *adopt measures in the field of judicial cooperation in civil matters in so far as necessary for the proper functioning of the internal market*. Furthermore, the principle of proportionality, as set out in Article 5 of the Treaty establishing the European Community, provides that common action shall not go beyond what is necessary to achieve that objective.

National substantive rules are not affected by the proposed Community action. Cases involving nationals of only one Member States are also not affected. Due to the transnational nature of the problem, i.e. that the cases concerned always involve spouses from more than one country, and due to that there currently are no indications of convergence of either national conflict-of-law rules or substantive laws in the area, neither national, bilateral nor action involving several, but not all Member States, would address the problems described. It is clear that without Community action in the area of divorce matters, the problems identified would not be resolved and the policy objective of a common judicial area that make life for the EU citizens easier would not be achieved. Common action therefore respects the principle of subsidiarity provided for by Article 2 of the Treaty on European Union and Article 5 of the Treaty establishing the European Community.

In relation to the proper functioning of the internal market, there are a large and growing number of EU citizens that are affected directly and indirectly by international divorces and associated problems. Divorce amongst those of the same nationality is traumatic and can be costly. The situation is likely to be worse on average for international divorcees because of the problems indicated. The absence of a European area of justice in divorce matters is contrary to agreed EU level objectives. The costs of the proposed reforms are modest and the benefits are, in comparison, very large. Simply reducing uncertainty should reduce legal costs before consideration is given to the wider impacts on lawyers. The proposed action would create a level playing field to the extent that this is possible whilst Member States retain full sovereignty over grounds for divorce and associated divorce law. The only other option that would achieve the same, which is, though, not within the competences of the EU, would be the introduction of a European marriage regime. However, in addition to that the EU does not have the competence to harmonise substantive law, many people might not choose this option, i.e. its benefits would be limited, irrespective of the difficulties of reaching a consensus on the need.

2 INTRODUCTION

2.1 Introduction

This is the report of a 'Study to inform a subsequent Impact Assessment on the Commission proposal on jurisdiction and applicable law in divorce matters'. The work was undertaken by the European Policy Evaluation Consortium (EPEC), with one of the Consortium partners, GHK, leading the study on behalf of DG Justice, Freedom and Security (DG JLS).

The purposes of this report are to provide:

- An assessment of the scale and nature of current problems facing 'international couples' who are divorcing;
- A description of the policy options;
- An assessment of each of the policy options;
- An elaboration of the preferred option; and
- Proposals for monitoring and evaluating indicators.

The report takes account of the conclusions of four meetings between EPEC and DG JLS (on 28 July, 26 September, and 14 December 2005, and 20 February 2006) and also comments related to the Preliminary Report (submitted on 10 October 2005), the Interim Report (submitted on 25 November 2005) and the Preliminary Draft Final Report (submitted on 30 December 2005). In addition, the Report reflects the results of a public consultation organised by DG JLS, additional stakeholder interviews[4] and a meeting of Member State experts held on 14 March 2006.

2.2 Aims and objectives

A formal Commission Impact Assessment will analyse the impact of a number of policy options put forward in the Green Paper on applicable law and jurisdiction in divorce matters[5] on relevant target groups. This was included as part of the Commission's Work Programme for 2006.

In accordance with the Terms of Reference for the present assignment, the aim of the study is to provide the following information and assessments to inform the formal Impact Assessment[6]:

[4] The interviews were undertaken to collect further information on the problems and proposed policy options from legal professionals and family organisations.

[5] COM(2005) 82 final of 14.03.2005: *Green Paper on applicable law and jurisdiction in divorce matters*

[6] The Commission services are, however, not bound by the conclusions of this study.

- To provide statistical data on the number of "international" divorces in the EU Member States;
- To identify trends as they relate to the numbers of divorces by mutual consent;
- To present information regarding national laws on residual jurisdiction in divorce matters in the Member States;
- To provide information about national procedural laws in relation to provision of evidence on the content of foreign law, and how many Member States provide for divorce by 'joint application' (used e.g. in Art. 3 of the New Brussels II Regulation);
- To identify additional problems and policy options to those included in the Green Paper;
- To assess the practical, legal and social impact of the different policy options identified in the Green Paper as they relate to specific target groups, also from the point of view of the principle of proportionality; and
- To assess the need for special safeguards to protect vulnerable groups.

Annex 2 provides an overview of work undertaken and challenges encountered in relation to collecting statistical data.

2.3 Report structure

In line with the Commission Impact Assessment Guidelines, this report presents and considers in turn:

- Section 3 Glossary
- Section 4 Policy background
- Section 5 Problem assessment: scale
- Section 6 Problem assessment: legal difficulties
- Section 7 Objectives
- Section 8 Policy options
- Section 9 Assessment of each of the policy options
- Section 10 Elaboration of the preferred option
- Section 11 Monitoring and evaluation

Supporting material is provided in annexes.

3 GLOSSARY

Table 3.1 below provides a glossary of terms used in the report.[7]

Table 3.1 – Glossary

Term	Explanation
Definitions	
Applicable law*	When a legal relationship between private individuals has an international dimension (e.g. when they are of different nationalities or do not live in the same country), the laws of several different countries might be applied. A court hearing an action does not necessarily apply its national law to settle the dispute. The law that is actually applicable is decided according to the national conflict-of-law rules by that Member State.
Autonomous grounds for divorce	*This concept referred to in the Green Paper needs to be clarified.*
Connecting factor	A factor that connects a citizen to a certain country, i.e. nationality or habitual residence.
Conflict-of-law rules	When laws of more than one State could be applicable to a potential divorce because it includes an 'international element' (e.g. spouses of different nationalities), the law to be applied is decided on in accordance with the national rules on applicable law, i.e. the country's conflict-of-law rules. Currently there are two main systems of conflict-of-law rules in the EU Member States: (1) those that always apply the law of the forum according to the *lex fori* principle, and; (2) those that base applicable law on a hierarchy of connecting factors, which could result in that the law of another State is applied to ensure application of the law with which the spouses feel closest connected. The set of connecting factors in some cases includes lex fori.
Forum-shopping	Forum-shopping is a specific concept of international law. A person starting an action before a court might be tempted to choose a forum not because it is the most appropriate forum but because the conflict-of-laws rules that it applies will prompt the application of the law that he or she prefers.

[7] All explanations originate from Commission documents or the Commission's website except for the expression ground-shopping which originates from Masha Antokolskaia: *Convergence of divorce laws in Europe* (Vrije Universiteit Amsterdam, The Netherlands)

Table 3.1 – Glossary

Term	Explanation
Ground-shopping	The Member States require different grounds for divorce. In the Member States which offer multiple possibilities to obtain a divorce, it is possible for spouses to 'ground-shop' and chose to lodge a divorce petition based on the ground which will result in the fastest divorce. As an example, spouses who agree to divorce could apply for a divorce based on the ground 'mutual consent', but as in some countries it is faster to get divorced based on a fault ground, spouses may choose the fault ground as a faster option instead of the mutual consent ground.
International divorces	Divorces encompassing one or a number of the following circumstances: (1) Spouses of different nationalities; (2) Spouses who live in different Member States; (3) Spouses who live in an EU country where they are not nationals.
Legal separation	Legal separation, unlike divorce, does not dissolve a marriage. The duty of support and the obligation of fidelity remains in most cases, but the duty of co-habitation is suspended. Legal separation does not exist in all Member States, only the following: France, Ireland, Luxembourg, Netherlands, Portugal, United Kingdom, Italy, Belgium, Denmark, Spain, Lithuania, Poland and Malta[8]. It is possible to convert legal separation into divorce in certain Member States.
Lex fori	Refers to the 'law of the forum', i.e. application of the national law of the court before which an action is brought.
Lis pendens	When two spouses bring divorce proceedings before courts of different Member States, the competent court first seized is bound to take the case pursuant to the 'lis pendens' rule in Article 19(1) of the New Brussels II Regulation.
Marriage annulment	All Member States except Sweden and Finland provide for marriage annulment for errors of consent, form or violations of conditions relating to public policy (e.g. incest, kinship, under legal age, bigamy, cohesion, threat, sham marriages). In some Member States this entails retroactive annulment from the date of the marriage ("ex tunc"), whilst in other States, annulment is only valid from the date of the annulment ("ex nunc").[9]
Prorogation of jurisdiction	Allows the spouses to agree upon the competent court in divorce cases.
Residual jurisdiction	When no court of a Member State has jurisdiction pursuant to the New Brussels II Regulation, Article 7 allows the courts of the Member States to avail themselves of jurisdiction on the basis of national law (residual jurisdiction).

[8] SEC(2005) 331 of 14.03.2005: *Commission Staff Working Paper: Annex to Green Paper on applicable law and jurisdiction in divorce matters*.

[9] SEC(2005) 331 of 14.03.2005: *Commission Staff Working Paper: Annex to Green Paper on applicable law and jurisdiction in divorce matters*.

Table 3.1 – Glossary	
Term	**Explanation**
Rush to court	The rule on 'lis pendens' may induce a spouse to apply for divorce before the other spouse has done so to prevent the courts of another Member State from acquiring jurisdiction.
Legislation	
Brussels I	The expression Brussels I is often used to refer to Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. This instrument governs the conferment of international jurisdiction as between the Member States of the European Union and the conditions and procedures for recognition and enforcement of judgements given in the Member States, authentic instruments and court settlements. It replaced the Brussels I Convention of 27 September 1968 as regards all Member States except Denmark.
Brussels II	The expression Brussels II is often used to refer to Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for the children of both spouses. The Regulation lays down rules governing international jurisdiction and the recognition and enforcement of judgements in cases concerning divorce, separation and annulment of marriage and judgements concerning parental responsibility for the children of both spouses given in connection with them. It replaced the Brussels II Convention of 28 May 1998 as regards all Member States except Denmark.
New Brussels II	Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters of parental responsibility replaces the Brussels II Regulation as of 1st March 2005. However, the rules on matrimonial matters from the Brussels II Regulation remain practically unchanged, and the New Brussels II Regulation does not entail any changes regarding provisions on applicable law in divorce. The changes introduced mainly concerned the rules governing parental responsibility.

4 POLICY BACKGROUND

4.1 Introduction

One consequence of the increasing mobility of citizens within the European Union (EU) is a growing number of "international" marriages,[10] encompassing one or a number of the following circumstances:

- Spouses of different nationalities.
- Spouses who live in different Member States (MS).
- Spouses who live in an EU country where they are not nationals.

The following sub-sections provide a brief overview of current policies and legal arrangements in the field of international divorce matters in the EU, considering in turn:

- The current role of the EU.
- The creation of a common judicial area in civil matters.
- The Commission Green Paper on jurisdiction and applicable law in divorce matters.

4.1.1 The New Brussels II Regulation (Council Regulation 2201/2003)

Each Member State has its own legislation in the areas of separation, divorce, maintenance of spouses and children, custody, guardianship and other family law matters. The role of the EU is to ensure that decisions made in one Member State are recognised and enforced in other Member States, and to establish what country has jurisdiction to hear a specific case.

The relations between Member States are governed by Regulation 2201/2003 (the New Brussels II Regulation[11]), which entered into application on 1st March 2005. This Regulation provides that a decision regarding a matrimonial matter made in one Member State must be recognised in the other Member States without any special procedures.[12]

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[10] COM(2005) 82 final of 14.3.2005: *Green Paper on applicable law and jurisdiction in divorce matters*

[11] Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning *Jurisdiction and the recognition and enforcement of judgements in matrimonial matters of parental responsibility*

[12] There is, though, the possibility for any interested party to ask the court in the other Member State to not recognise the decision if (1) such recognition is clearly contrary to public policy; (2) if the decision contradicts another decision; (3) if the were certain procedural defects, in particular if one party was not properly served with the relevant papers and did not put in an appearance as a result.

The New Brussels II Regulation replaces the earlier Brussels II Regulation,[13] which laid down rules governing international jurisdiction and the recognition and enforcement of judgements in cases concerning divorce, separation, the annulment of a marriage and judgements concerning parental responsibility for the children of both spouses given in connection with them. Changes introduced in the New Brussels II Regulation mainly concern rules governing parental responsibility, whilst the rules on divorce from the earlier Brussels II Regulation remain practically unchanged.

The New Brussels II Regulation harmonises the EU Member States' (except Denmark[14]) rules of private international law in relation to *jurisdiction* (i.e. which Member States courts can hear and determine a case) and *recognition and enforcement* of a court judgement made in another Member State. It does not contain rules on which Member States laws apply in a given case, i.e. the applicable law or 'conflict-of-law' rules.

4.1.2 Creation of a common judicial area in civil matters

In 1998[15] the European Council in Vienna recognised the need for a common judicial area to make life easier for EU citizens in matters that affect their 'everyday life', including divorce. It requested the Commission to undertake further work to examine the possibility to harmonise the national rules on applicable law in divorce matters to prevent "forum shopping".

The EU leaders at the Tampere European Council in October 1999 agreed on the priorities for action of which the following two are relevant for divorce matters:

- Mutual recognition of judicial decisions; and
- Access to justice.

The cornerstone of judicial co-operation in civil matters is the principle of mutual recognition, i.e. that judicial decisions should be recognised and enforced in other EU Member States without any additional actions.

The Tampere programme, which was achieved in 2004, was followed by The Hague Programme[16], which invited the Commission to present a Green Paper on Applicable Law and Jurisdiction in Divorce Matters together with an associated Working Paper.

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[13] Council Regulation (EC) No 1347/2000 of 29 May 2000 on *Jurisdiction and the recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for the children of both spouses*

[14] The New Brussels II Regulation covers all Member States except Denmark, and Denmark is therefore not considered in this report. Also, it should be noted that the UK consists of three jurisdictions: England/Wales, Scotland and Northern Ireland, which will be referred to as UK when the legislations are similar in substance.

[15] Common rules on jurisdiction and enforcement of judgements in civil and commercial matters, often referred to as the Brussels Convention, date, however, back to 1968 between the original six EU Member States. Further steps were taken in 1993, when the Maastricht Treaty identified judicial co-operation in civil matters as an area of common interest for EU Member States, and with the Treaty of Amsterdam, which made judicial co-operation in civil matters a European Community policy linked to the free circulation of people. A programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters was adopted by the Justice and Home affairs Council on 30 November 2000.

[16] The new five year programme for the development of an area of freedom, security and justice in the EU.

4.1.3 The Commission Green Paper on jurisdiction and applicable law in divorce matters

In order to tackle problems currently faced by international couples who want to divorce, the Commission intends to put forward a legislative proposal on applicable law in divorce matters. This is outlined in the Commission's Work Programme for 2006. To this end, DG JLS launched a wide-ranging public consultation by presenting a Green Paper on applicable law and jurisdiction in divorce matters in March 2005.[17]

It is important to note, that the proposals in the Green Paper are not concerned with changing the substantive content of the EU Member States' national divorce laws (i.e. what constitutes grounds for divorce), but rules of private international law which determine matters such as whether the courts of a particular Member State have authority to hear and decide a case with an international element (i.e. when a case concerns individuals of different Member States).

The Green Paper identified a number of apparent problems due to the current state-of-play concerning applicable law and jurisdiction in divorce matters, namely:

- Lack of legal certainty and predictability for the spouses.
- Insufficient party autonomy.
- Risk of results that do not correspond to the legitimate expectations of the EU citizens.
- Risk of difficulties for EU citizens living in a third state.
- Risk of rush to court.

The Green Paper proposed a number of policy options to address the identified problems, which can be summarised as follows:

- Maintain the current situation.
- Harmonise the conflict-of-law rules based on a set of uniform connecting factors.
- Introduce a limited possibility for the spouses to choose the applicable law and the competent court.
- Revise the jurisdiction rules of the new Brussels II Regulation.
- Provide a possibility to transfer a divorce case to the courts of another Member State if the centre of gravity of the marriage was situated in that State.
- Combine different options.

[17] COM(2005) 82 final. The Paper invited third parties to submit comments by 30 September 2005. In the Green Paper, the Commission also indicated its intention to organise a public hearing on the subject, to which all those responding would be invited to attend.

5 PROBLEM ASSESSMENT – SCALE OF THE ISSUE

5.1 Introduction

This section of the report provides an overview of the numbers of international marriages and divorce cases in the EU Member States using data from the Member States' statistical offices. The number of people that may, potentially, be affected by any proposed changes to international divorce legislation is examined by presenting:

- An overview of total numbers of international marriages and divorce cases in the Member States.
- Numbers of international marriages and divorce cases by 10,000 persons.
- Frequency of international marriages and divorce cases between nationals of specific Member States.

The latter is relevant for outlining patterns and clusters of countries between which nationals are frequently involved in divorce cases. The section starts by briefly outlining data availability.

5.2 Availability of data on international marriages and divorces

Statistical data relating to 'international divorces' for the years 2000-2003 have been prioritised.[18] The data are, however, limited in so far that figures are not available for all Member States (only 14 countries could provide numbers of international divorces). To supplement the data on international divorces, figures for international marriages (available in 17 Member States) have also been incorporated into the analysis to provide an indication of the numbers of those likely to be affected by legislation relating to international divorce matters.[19]

In terms of the data accessed, Member States are not consistent in their recording and collection of data. Whereas some Member States provide information on the nationality[20] of both the husband and wife who have married or divorced, other Member States only give information on:

- Numbers of spouses of the nationality of the country for which the data are provided;

[18] Data for the years 2000-2004 were requested, but data from 2004 were only very rarely available at the time of the information collection.

[19] In addition to divorces, this study also covers separations and marriage annulments, but as such data are only very rarely available they have not been included in this report.

[20] Nationality will be used as to make a distinction between spouses in international divorces and marriages in this report. In some cases, Member States instead mention country of birth or do not specify whether data refer to nationality or country of birth, and in one case (Sweden until 2004) data are provided both by citizenship and country of birth.

- Numbers of spouses of the nationality of the country for which the data are provided and another national (nationality not specified);

- Numbers of spouses who are both of another nationality (not specified) than that of the country in which they are getting divorced.

Statistical information relating to international marriages was more readily available than relating to international divorces. Table 5.1 provides an overview of what data have been accessed for each Member State by year.[21]

[21] Data have been accessed either directly on the websites of national statistics offices or by telephone and e-mail contact in those cases where no data could be retrieved. Unavailability of data has been confirmed by the statistical offices and governments in the Member States.

Table 5.1 – Overview of statistics available on international marriages and divorces

Country	Confirmation from national Statistics Office	Year	Source	International marriages				Year	Source	International divorces			
				International marriages			Figures			International divorces			Figures
				No breakdown	By country	Breakdown EU/others				No breakdown	By country	Breakdown EU/others	
Austria	OK	2003	Statistik Austria		☑		☑	1993-2003	Statistik Austria	☑			☑
Belgium	OK	1198-2002	Institut national statistique		☑	☑	☑	2002	Institut national statistique		☑	☑	☑
Czech Republic	OK	2003	Statistical office		☑		☑	2003	Statistical office		☑		☑
Cyprus	OK	2004	Statistical Service		☑		☑	2004	Statistical Service		☑		☑
Germany	OK	2000-2004	Statistical office		☑		☑	1998-2004	Statistical office		☑		☑
Estonia	OK				☑		☑		Statistical office		☑		☑
Spain	No separation between national and international divorces	1998-2000	Statistical office		☑		☑						
Finland	OK	2001-2003	Statistical office	☑			☑	2000-2003	Statistical office	☑			☑
France	No separation between national and international divorces	1980-2004	Insee	☑			☑						
Greece	No separation between national and international marriages or divorces												
Hungary	OK				☑		☑	2000-2004	Justice and home affairs unit, permanent representation of Hungary in Brussels		☑		☑
Ireland	No separation between national and international marriages or divorces												
Italy	OK	1992-2003	Istat-annual report 2004	☑			☑	2002	Istat	☑			☑
Lavia	No separation between national and international divorces	2003	Statistical office	☑			☑						
Lithuania	No separation between national and international marriages or divorces							2001	Statistical office	☑			
Luxemburg	OK	1980-2003	Statistical office		☑		☑	2000-2004	Statistical office		☑		☑
Malta	OK/Marriages	2001-2003	Statistical office	☑			☑						
Netherlands	OK	1996-2004	Statistical office		☑		☑	1996-2004	Statistical office		☑		☑
Poland	No separation between national and international divorces	1989-1997	University of Warsaw	☑			☑	2000-2004	Permanent representation in Brussels		☑		☑
Portugal	OK	2003	Statistical office		☑		☑	2000-2003	Statistical office		☑		☑
Slovak Republic	OK	1950-1990			☑		☑						
Slovenia	OK	2002	Statistical office		☑		☑	2004	Statistical office		☑		☑
Sweden	OK	2000-2004	Statistics Sweden		☑		☑	2000-2004	Statistics Sweden		☑		☑
United Kingdom	No separation between national and international marriages or divorces												

5.2.1 International marriages

Data on international marriages have been accessed for 17 countries. Of these, 9 countries (Germany, Estonia, France, Hungary, Italy, Luxembourg, the Netherlands, Portugal and Sweden) presented comprehensive data for 2000-2003. 2 countries (Belgium and Finland) provided figures for 3 years, whilst 6 Member States (Austria, Czech Republic, Cyprus, Spain, Latvia, and Portugal) only had figures for 1 year. Latvian statistical data could not be utilised since only details on spouses' ethnicity and not nationality were provided. Maltese statistics report the number of men and women who get married in Malta each year but do not record the nationality of the partner. Slovenian data do not show figures for marriages by nationality but for "husband-wife families" by ethnic affiliation in 2002; this figure exceeds the Eurostat data for marriages for the year. The remaining 4 countries (Greece, Ireland, Lithuania and United Kingdom) do not provide any information on marriages with a breakdown by nationality.

5.2.2 International divorces

Data relating to international divorces have been analysed for 14 countries. Of the 14, only 8 Member States (Germany, Estonia, Finland, Hungary, Luxembourg, the Netherlands, Portugal and Sweden) presented complete information for the 4 years (2000-2003) with a clear breakdown of the nationality of the spouses. A further 5 Member States (Belgium, Czech Republic, Cyprus, Italy, and Slovenia) provided data for 1 or 2 years. The information provided by the national statistical office for Austria shows how many Austrian men and women, as well as foreigners, seek a divorce every year but no data are available in relation to the nationality of spouses.

Polish data[22] confirm the number of individuals living in Poland seeking a divorce but do not record nationality. It is therefore impossible to ascertain the nationality of individuals seeking divorce and the data were not included in the analysis. The statistics offices and government departments in the remaining 8 Member States (Spain, France, Greece, Ireland, Slovak Republic, Latvia and the United Kingdom) have confirmed that they do not hold information regarding the nationality of spouses getting divorced. [23]

In Malta divorce is not permitted. Therefore, efforts were made to obtain data on 'international' legal separations and marriage annulments. However, the Maltese statistical office has confirmed that no such data are collected.

5.3 Numbers of international marriages

Table A1.1 in Annex 1 provides the number of international marriages by Member State for the years 2000-2004.

The figures show that in some countries[24] there was an increase in the rate of international marriages during the years 2000-2003. In France the rate increased from 7.1 to 9.4 per 10,000 population and in Luxembourg it also slightly increased (from 26.3 to 26.8).

[22] provided by the permanent representation in Brussels.

[23] Malta does not allow divorce and Denmark has an exception from the New Brussels II Regulation.

[24] for which data on international marriages were accessible for more than one year.

However, in the Netherlands and Germany, the rate decreased in 2003 compared with 2002 (in the Netherlands from 13.5 to 12.2, and in Germany from 9 to 8.6). The highest rate of international marriages on total numbers of marriages has been recorded in Estonia. Hungary has the lowest rate. In terms of the number of international marriages, Germany has recorded the highest number of international marriages (73,719 in 2002) whilst Luxembourg recorded the lowest in the same period (1,100 in 2002).

5.4 Numbers of international divorces

Table A1.2 in Annex 1 provides the number of international divorce cases by Member State 2000-2004.

The rate of international divorces of the total number of divorces has increased for all countries except Portugal and Estonia for the period 2000-2004. The rate of international divorces is highest in Estonia and lowest in Hungary. Germany has recorded the highest number of international divorces (36,933 in 2004) compared with Slovenia, which reports the lowest number (256 in 2004). By means of summary (listing the countries by rate of international divorces, starting with the highest):

- **Estonia:** This country had the highest rate of international divorces compared with the total number of divorces across the countries for which data were available (52.2% in 2001; 2,251 cases). The divorce rate peaked in 2001 and since then there has been a slight decrease in international divorces (49.64% in 2003; 1,972 cases). A significant proportion of these divorces (around 78%) involve foreigners only (i.e. no Estonian national involved).

- **Cyprus:** Data were only accessed for one year, 2004. In this year the number of international divorce cases was 594 (37%). Of these cases, 14% involved a Cyprian national with another EU citizen whilst 51% included a Cyprian and a non-EU national. 20% of the divorces included foreigners only.

- **Netherlands:** The international divorce rate increased from 2000 to 2004. The number of international divorces, however, decreased from 9,151 cases in 2000 to 9,134 in 2004. The total number of international divorces reached its peak in 2001 with 9,770 divorces (26% of total divorces).

- **Sweden:** The rate and number of international divorces have increased steadily in the period 2000 (4,575 cases, 21.28% of total divorces) to 2003 (4,725 cases, 22.36%). Whilst the number of international divorces increased in this period, the number of national divorces decreased (from 16,927 in 2000 to 16,405 in 2004).

- **Germany:** The proportion of international divorces increased on a yearly basis from 15% in 2000 to 17% in 2004 (of total divorces). The number of international divorces has increased from 28,475 cases in 2000 to 36,933 in 2004.

- **Belgium:** The number of international divorces in 2002 was 4,461, representing 15% of the total number of divorces this year. Most of these international divorces concerned couples of the type “Belgian-foreigner” (78%) whereas 22% involved two foreigners. Data were accessed for one year only.

- **Finland:** The proportion of international divorces of the total number of divorces increased in the period 2000-2003; from 11% (1,556 cases) in 2000 to 14% (1,880) in 2003. During the same period the number of national divorces decreased, from 12,357 in 2000 to 11,595 in 2003. About 75% of the cases relate to "Finnish-foreigner" couples while 25% relate to divorces between foreigners only.

- **Slovak Republic:** No numbers have been accessed for the relevant time period. The only information available is the proportion of international divorces 1980-1989, which was 12%.

- **Slovenia** has the lowest number of international divorce cases among the studied countries (256), which represent 11% of the total number of divorce cases. Data have only been accessed for 2004.

- **Italy:** National figures have only been accessed for 2002. In this period 3,854 international divorces were granted in Italy, representing 9% of the total number of divorces.

- **Czech Republic:** Data for 2003 (the only year available) identify that 4% (1,316 cases) of the total number of divorces in this country related to international marriages. Of these cases, 3.6% included foreigners only, whereas 32% (435 cases) were between a Czech national and a citizen of another EU Member State. 643 cases (47%) included a Czech and a third country national.

- **Portugal:** The rate and the number of international divorces decreased in the period 2000 to 2003. In 2000, there were 748 international divorces in Portugal (4%), whilst in 2003 the number was down to 614 (3%). The highest number was noted in 2002, with 884 international divorces (3%).

- **Hungary:** Data show that the percentage of international divorces is very low compared to other countries, only around 1.5% each year in the period 2000 to 2004. The number of cases has risen from 376 in 2000 to 421 in 2004. At the same time national divorces increased from 23,611 cases to 24,217 in 2004. In around 4% of the cases, the couple was composed by two foreigners, and about 15% involved a Hungarian and another EU citizen.

- **Austria:** The data accessed for Austria do not include characteristics of the cases, but only provide the total number of cases and the nationality and sex of the persons involved. It is not possible to make a distinction between cases only involving Austrian nationals and cases with mixed couples. For instance, in 2000 there were 19,552 divorces in Austria, of which 17,943 involved Austrian men and 1,609 involved foreign men. The number of Austrian women was 18,020 and the number of foreign women was 1,532. It is not possible to retrieve information on who was married to whom. There is, however, an indication of an increasing rate of international divorces, in that the number of foreign individuals involved remained practically unchanged for both foreign men and women in 2002 and 2003, whilst the total number of divorces dropped by 850 cases (from 19,597 to 18,727).

The proportion of divorces, including cases involving foreigners only, has generally increased in all Member States in the period 2000 to 2003. The exceptions to this are Hungary and Portugal. The rate is highest in Estonia (78% in 2002 and 2003) and lowest in the Czech Republic (3.59% in 2003) and Hungary (3.54% in 2001). In Luxembourg, half of the international divorce cases involve foreigners only, but also in the Netherlands and Sweden this type of divorce almost reach 50% (around 45% of total international cases). The proportions for Belgium, Germany, Finland and Portugal are around 25%.

5.5 Numbers of international marriages and divorce cases by 10,000 persons

Using the data on international divorces and marriages provided by the Member States and the total population living in each county, a weighted average has been calculated for international marriages and divorces for 2003.[25] These rates, which represent the number of international divorce and marriage cases per 10,000 persons, are provided in Table 5.2 below.

Table 5.2 – Weighted average for international marriages and divorce cases in relation to 10,000 persons

International marriages							
	Countries sampled: AU, CZ, DE, EE, FI, FR, HU, IT, LU, LV, NL, PT, SE						
Year	Total population of the sample	Total international marriage cases in sampled countries	International marriages per 10,000 persons in sampled countries	Total EU population except Denmark	Estimation of total number of international marriages in the EU	Total national marriage cases in sampled countries	National marriages per 10,000 persons in sampled countries
	A	**B**	**C** B/(A/10,000)	**D**	**E** C*(D/10,000)	**F**	**G** F/(A/10,000)
2003	272,819,000	212,758	7.8	449,187,000	350,299	1,063,227	39

International divorces							
	Countries sampled: CZ, DE, EE, FI, HU, LU, NL, PT, SE						
Year	Total population of the sample	Total international marriage cases in sampled countries	International divorces per 10,000 persons in sampled countries	Total EU population except Malta and Denmark	Estimation of total number of international divorces in the EU	Total national divorce cases in sampled countries	National divorces per 10,000 persons in sampled countries
	A	**B**	**C** B/(A/10,000)	**D**	**E** C*(D/10,000)	**F**	**G** F/(A/10,000)
2003	145,430,000	55,811	3.8	448,790,000	172,230	315,408	21.7

The data identify that in 2003 there were, on average, almost 8 international marriages per 10,000 persons.[26] This can be compared with the numbers of national marriages (39 per 10,000 persons) identifying that on average every fifth marriage relates to an international couple. Based on these calculations it is possible to make an estimation of the total number of international marriages in the EU. This would be 350,299 cases if the remaining Member States have the same rate of international marriages as those indicated by the data used for the analysis.

[25] Due to the limited availability of data, weighted average has only been calculated on EU level for the year (2003) for which most data were accessed.

[26] Based on the numbers of international marriages in the 13 countries for which data were available.

International data regarding divorces[27] identified that there were almost 4 international divorce cases per 10,000 persons. The numbers of national divorce cases were around 22 per 10,000 persons. Based on this estimate, the total number of international divorce cases in the EU Member States would be 172,230 cases per year.

Given that the rates of international marriages and divorces do not vary enormously amongst the larger EU countries, it is generally safe to assume that the bulk of the incidences of divorces involving international couples will take place in or involve spouses living in these countries.

5.6 Frequency of international marriages and divorce cases between specific Member States

Tables A1.3 and A1.4 in Annex 1 provide an overview of the most frequently occurring combinations of spouses from different countries who are either entering into a marriage or seeking a divorce. The tables show the number of divorces and marriages between nationals and foreigners for the years 2000-2004. For each country the five most frequently occurring nationalities are presented.

In terms of international marriages, numbers are available for 14 countries: Austria, Belgium, Czech Republic, Cyprus, Germany, Estonia, Spain, Hungary, Luxembourg, Latvia, Netherlands, Portugal, Sweden and Slovenia. However, the data for Spain do not include marriages between foreigners and the Slovenian data show figures for "husband-wife families" by ethnic affiliation in 2002 and not for marriages.

In relation to international divorce rates, a breakdown was possible to make for 11 countries, namely Belgium, Czech Republic, Cyprus, Germany, Estonia, Hungary, Netherlands, Luxembourg, Portugal and Sweden. For Austria, the data only indicate the number of persons getting divorced and not the cases, whilst the data for Slovenia show for 2004 only the number of divorces between Slovenian and nationals of former Yugoslavia.

There are interesting patterns of international marriages and divorces between citizens from certain Member States. Firstly, the most frequent international marriages and divorces are contracted between partners of neighbouring countries or with countries which have a close "historical" or cultural link. As an example of the latter, in 2003, 31% of Portuguese mixed marriages were contracted with Brazilians. In many of the New Member States, marriages and divorces with Russians are very frequent.

In other countries there are identifiable links with migration flows, for instance in Belgium and Germany. In the period studied, the most frequent international marriages in Belgium were with Moroccans (around 16.5%) and in Germany with Turks (around 10%). In the Czech Republic in 2003 almost 6% of international marriages and 12% of international divorces involved Vietnamese nationals.

[27] Data accessed for 9 Member States in 2003.

The composition of international marriages and divorces varies between Member States. In some of the Member States, such as Luxembourg and Belgium, a majority of marriages and divorces are between EU nationals. In other Member States, e.g. Czech Republic, the Netherlands and Estonia, the majority of international marriages involve non-EU nationals. Further details are provided by country below:

- In **Austria**, marriages and divorces are contracted mainly with persons from former Yugoslavia, Turkey and Germany. Other recurring countries are Czech Republic, the Slovak Republic, Romania and Poland. The majority of these countries are neighbours whilst the significant number of Austrian-Turkish marriages and divorces reflects the importance of the Turkish minority.

- **Belgian** statistics show that a majority of international marriages (around 16.5%) and divorces (almost 29%) are contracted with Moroccans, while France, Italy and the Netherlands are the most common EU Member States foreign spouses originate from. The 5th most frequent nationality is Turkish.

- **Czech** nationals marry and divorce mainly Slovaks, Ukrainians, Vietnamese and Russians. Poland appears as the 5th most frequent country for divorces whilst Germany is the third most common country for marriages. The proximity with these countries (apart from Vietnam) is the most evident link.

- The most frequent countries for **Cyprus** for both marriages and divorces are Ukraine, Russia, Romania and Greece. United Kingdom is the 5th most common country as far as divorces are concerned.

- As concerns **Germany** it is more difficult to trace any patterns, apart from Turkey and former Yugoslavia. The most frequent combinations seem to differ for marriages and divorces. German nationals mainly marry Polish, Russians, Romanians and divorce Italians, Spanish and Greeks.

- The majority of the countries listed for **Estonia** are direct neighbours (e.g. Finland, Russia and Byelorussia) while others (Ukraine, Lithuania and Germany) also have a strong proximity link.

- Statistics for **Spain** show that marriages in this country involve Cubans in 21% of the cases, 10% Germans, 8% Argentineans an in 4% persons with Swiss nationality. The language link with Argentina is quite evident.

- The five most frequent cases for **Hungary** are all countries very close geographically. Marriages and divorces with Romanians are the most frequent case whereas other common countries are Ukraine, Germany, former Yugoslavia and Russia.

- **Luxembourg** statistics only provide data for marriages and divorces with EU nationals. The most frequent cases are bordering countries such as France, Belgium and Germany. Other frequent nationalities are Italian (both marriages and divorces) and Portuguese (only for divorces).

- Marriages in **Latvia** in 2003 were mainly contracted with Russians, Ukrainians and Lithuanians. The only EU Member State listed in the most frequent countries list is the United Kingdom.

- **Dutch** citizens seem to marry and divorce mainly Turks, Germans, Moroccans and Belgians. Two of these countries are bordering countries while the other two represent very strong minorities within the country. Suriname, a former Dutch colony, is the third most frequent country as far as divorces are concerned.

- A strong link with former colonies is also present in **Portugal** as the three most frequent countries are Brazil, Angola and Mozambique for divorces and Brazil, Cap vert and Angola for marriages. Recurring EU Member States are France, Spain and Germany (the former only for divorces).

- The three most frequent countries as far as international marriages in **Sweden** are concerned are Finland, Norway and Denmark. Other common combinations are Swedish-British and Swedish-German marriages. For 2002, the 5th position was taken by the United States. As far as divorces are concerned, the most common nationalities are: Finnish, Polish, Norwegian, Iranian and Turkish. For 2004, Denmark and Germany were also listed in the five most frequent countries list.

- Finally, **Slovenia** seems to privilege marriages with neighbouring or near countries such as Croatia, Serbia, Hungary, Italy and Bosnia. The statistics concerning international divorces highlighted only the importance of former Yugoslavian countries.

5.7 Summary of problem assessment – scale of the problem

There are in the order of 2.2 million marriages in the EU per year. In the order of 350,000 of these marriages are international.

There are around 875,000 divorces in the EU per year (excluding Denmark). It is estimated that around 170,000 of these divorces are of international character.

The incidences of divorces from international marriages appear to be generally stable with evidence of minor increases.

The composition of marriages in terms of the countries of origin of spouses varies markedly between Member States. Very often international marriages involve third country nationals.

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

6 PROBLEM ASSESSMENT – APPLICABLE LAW AND JURISDICTION

6.1 Introduction

This section identifies, describes and assesses problems in relation to current applicable law and jurisdiction in international divorce matters in the EU. The section starts with a general overview outlining hypothetical links between the problems and their causes. Thereafter follows a brief description of national substantive divorce laws to situate the issues. The problems identified in these sub-sections are then further elaborated. The section ends with a consideration of the problems that may particularly affect vulnerable groups.

6.2 Identification of problems and their drivers

Five examples of problems that occur in the present situation are identified in the Green Paper on divorce matters. These problems mainly stem from the spouses in "international" marriages having legitimate expectations as to which national law will apply when they get divorced, and feeling they have a right to get divorced under the law of the country with which they feel closest connected. The examples of problems presented in this section demonstrate that, in some situations, currently the protection of interests of EU citizens appears to be insufficient.

The following problems are identified in the Green Paper:

1. Lack of legal certainty and predictability for the spouses.
2. Insufficient party autonomy.
3. Risk of results that do not correspond to the legitimate expectations of the citizens.
4. Risk of difficulties for EU citizens living in a third State.
5. Risk of rush to court.

There are links between these problems. In order to be able to identify the drivers of the problems, and the most appropriate policy measures to address them, there is merit in elaborating distinct descriptions of what the main aspect of each problem is. In relation to the first problem, it concerns specifically *Difficulties for the spouses to predict what law will apply.* Relatedly, problem 3, which concerns the limited awareness of EU citizens that conditions for getting divorced vary between Member States (leading to a risk of results that do not correspond to legitimate expectations), this is an aspect of Problem 1. As such this will not be considered as a separate problem in this study.

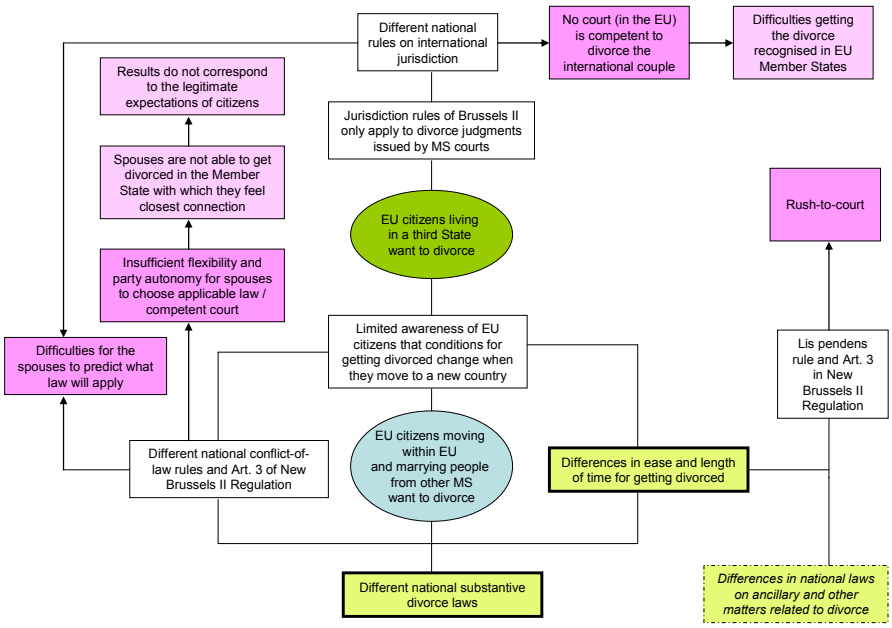
Problem 2 relates to *Insufficient flexibility and party autonomy for citizens to choose applicable law and competent court*. This concerns the ability of spouses to be able to pursue a divorce within the Member State with which they feel closest connected (and results that do not correspond to legitimate expectations). The fourth problem has two distinctive problematic aspects. These are: *Access to court* and *Difficulties getting a divorce obtained in a third State recognised in the EU.* The fifth problem, *rush to court*, is distinct from the others in its character.

On the basis of this, hypotheses of links between the problems and their causes have been made. Figure 6.1 below outlines the current problems and their drivers. In the figure, a separation has been made between:

- Causes which are within Community competences to deal with (white);
- Causes which are outside the Community competences (yellow);
- Causes which are outside the scope of this assignment (yellow, dashed line).
- The main problems to be addressed (dark pink);
- Associated problems (light pink).

The figure also identifies the actions of EU citizens (blue and green circles), which are underlying factors that put the legislative provisions into play. The figure is followed by Table 6.1, which further describes the relationship between the problems and their drivers. With due regard for the principle of subsidiarity, clear distinction has been made between what aspects can be dealt with at a Community level, and what aspects are outside the scope of Community competences.

Figure 6.1 – Problems and drivers due to the current state-of-play



Key to Figure 6.1

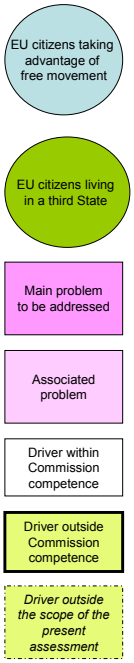


Table 6.1 – Problems and drivers			
Problem	**Definition of problem**	**Driver within Community competence**	**Driver outside Community competence**
Problem 1	Difficulties for the spouses to predict what law will apply. EU citizens are also unlikely to be aware that the conditions for getting divorced may change drastically when they move to other Member States.	▪ Different national conflict-of-law rules. ▪ Impreciseness and difficulties in establishing national connecting factors.	▪ Different national substantive divorce laws, i.e. differences in ease and length of time for getting divorced.
Problem 2	Insufficient flexibility and party autonomy for citizens to choose applicable law and competent court.	▪ In most Member States conflict-of-law rules only provide one given solution in a specific situation. ▪ Insufficient party autonomy, i.e. spouses are only able to choose applicable law (within limitations) in a few countries. ▪ The jurisdiction rules of the new Brussels II Regulation do not allow spouses to apply for divorce in a Member State of which only one of them is a national.	▪ Different national substantive divorce laws, i.e. differences in ease and length of time for getting divorced.
Problem 3	Rush-to-court, i.e.: ▪ No time for mediation efforts. ▪ Application of law with which the defendant does not feel connected and which does not take account of his/ her interests.	▪ Different national conflict-of-law rules. ▪ 'Lis pendens' rule on competent court first seized. ▪ Several grounds of jurisdiction in Article 3 of the New Brussels Regulation.	▪ Different national substantive divorce laws, i.e. differences in ease and length of time for getting divorced. ▪ Differences in national laws on ancillary and other matters related to divorce.
Problem 4	Difficulties for citizens in third countries: ▪ Access to court. ▪ Difficulties in getting the divorce recognised.	▪ Different (or non-existence of) national laws on residual jurisdiction in divorce matters. ▪ Jurisdiction rules in Article 3 and 7.	▪ National rules on recognition of divorces from third States.

In relation to the problems and their drivers, one 'root cause' of current problems is that the Member States have different substantive divorce laws, which means that conditions for getting divorced change when EU citizens move to other countries. The EU does not have the competence to unify the Member States substantive divorce laws, but for the assessment of the occurrence of problems, it is relevant to identify between what countries there are substantive differences in relation to grounds for divorce since it is in these cases EU citizens are likely to experience problems.

The following sub-sections briefly summarise the main differences between the national substantive laws on divorce, legal separation and marriage annulment. A more in-depth description of each of the problems and their respective main drivers is presented in section 6.4.

6.3 Problem drivers – differences between national substantive divorce laws

There are significant differences between the EU Member States with regard to substantive divorce legislation, i.e. what the grounds for divorce are. The differences are far from being merely of a legally technical nature as the Member States' divorce laws are rooted in cultural, social and legal national traditions, and result from different ideological perceptions and different family policies.[28] Due to the significant differences between the national regulations in the different jurisdictions in the EU Member States, and the cultural constraints inherent in this field, family law scholars have previously stipulated a fundamental reservation as concerns making family law the subject of harmonisation and unification.[29]

The different requirements for obtaining a divorce have their roots in different concepts of the balance between the state and the autonomy of the spouses in the divorce process. Because divorce laws have been liberalised to a different extent in the Member States, five historical grounds for obtaining a divorce are simultaneously present in the EU.[30] A divorce petition can be lodged on the basis of one of these so-called 'autonomous grounds', which can broadly be categorised as follows:

- **Fault-based** divorce (divorce as sanction);
- Divorce based on the **irretrievable breakdown** of the marriage (divorce as remedy or failure);
- Divorce on the ground of **separation** for a stated period of time;
- Divorce by **mutual consent** (divorce as an autonomous decision by the spouses themselves); and
- Divorce on **demand** (divorce as a right).

[28] Antokolskaia M., *The Search for a Common Core of European Divorce Law: State Intervention v. Spouses Autonomy*, Vrije Universiteit Amsterdam, The Netherlands.

[29] T.M.C. ASSER INSTITUUT, *Practical problems resulting from non-harmonisation of law rules in divorce matters* JAI/A3/2001/04, FINAL REPORT, The Hague, THE Netherlands, December 2002.

[30] Antokolskaia M., *The Search for a Common Core of European Divorce Law: State Intervention v. Spouses Autonomy*, Vrije Universiteit Amsterdam, The Netherlands.

A summary of the main characteristics of each of these grounds are outlined in Annex 3.

6.3.1 Multiple grounds for divorce

Many countries apply not one, but multiple grounds for divorce. In these cases, consenting spouses have the possibility to engage in 'ground shopping'[31] in that they can 'choose' the shortest way to divorce.[32] Table 6.2 provides an overview of the number of autonomous grounds for divorce in each Member State.[33] The countries in which divorce can be obtained 'on demand', or where it is not possible to get a divorce, have been put in two separate categories.

Table 6.2 – Number of autonomous grounds for divorce by country

Divorce on demand	3 autonomous grounds	2 autonomous grounds	1 autonomous ground	Impossible to get divorced
▪ Finland ▪ Sweden	▪ Austria ▪ Belgium ▪ France ▪ Latvia ▪ Lithuania ▪ Luxembourg ▪ Portugal	▪ Cyprus ▪ Estonia ▪ Greece	▪ Czech Republic ▪ Germany ▪ Ireland ▪ Italy ▪ Poland ▪ Hungary ▪ The Netherlands ▪ Slovak Republic ▪ Slovenia ▪ Spain ▪ United Kingdom	▪ Malta

6.3.2 Establishment of the autonomous grounds of divorce

If looked beyond above described five more or less pure functional types of divorce grounds, the most recent survey of current divorce law in the EU provided by the CEFL[34] reveals a phenomenon, which has been labelled 'functional disequivalence'.[35] The term 'functional disequivalence' is used to describe a scenario where the five autonomous divorce grounds are strongly interrelated and where the fulfilment of one

[31] See glossary Section 3.

[32] Masha Antokolskaia: *Convergence of divorce laws in Europe* (Vrije Universiteit Amsterdam, The Netherlands.

[33] SEC(2005)331 of 14.03.2005 *Commission Staff Working Paper: Annex to the Green Paper on applicable law and jurisdiction in divorce matters.*

[34] Commission For European Family Law.

[35] Masha Antokolskaia: *Convergence of divorce laws in Europe* (Vrije Universiteit Amsterdam, The Netherlands.

ground can require that also one, or several of the other grounds, are established. In particular, in the case of 'irretrievable breakdown' virtually every type of divorce can be hidden, from fault-based to divorce by consent. The extent to which this is the case varies between the Member States.

Further examples relate to jurisdictions which do not provide for fault-based divorce, but that nonetheless take into account grounds such as adultery, unreasonable behaviour and desertion as factors when establishing the irreparable breakdown of a marriage. In Belgium, while 'irretrievable breakdown' underpins all types of divorce it is not considered in itself a ground for divorce. In addition, divorce by consent in some Member States satisfies the 'irretrievable breakdown' condition. Another of the five 'autonomous grounds' that is taken into account for establishing the irretrievable breakdown of a marriage in several Member States is a period of separation.[36]

6.3.3 EU Member States with comparatively liberal and more restrictive divorce grounds

Given that the Member States have different requirements for obtaining a divorce, it is sometimes more difficult and can take longer to get divorced in some Member States than in others. The three most extreme examples are considered below:

- In Malta divorce is not allowed;[37]
- In Ireland divorce can be obtained after a waiting period of 4 years and upon court approval of a number of cumulative conditions; and
- In Sweden there is no inquiry into the reasons for wanting a divorce and a waiting period of six months is only required in cases where there is no mutual consent between spouses and they have a child younger than 16 ('divorce on demand').

The highly complex picture in relation to the establishment of grounds for divorce renders comparison of how liberal or restrictive a certain Member State is, in terms of approving a divorce, extremely difficult. Also, whereas the difference between fault-based divorce and divorce on the ground of irretrievable breakdown previously dominated the substantive divorce laws of the EU Member States,[38] this distinction is now losing its relevance. For instance, there are no longer any countries in the EU, even after Enlargement, which maintain fault-based divorce as the sole ground for divorce. Spouses can therefore always choose between fault and non-fault grounds.

Table 6.3 below provides a classification of the EU Member States according to how liberal their divorce laws are. Rather than presenting the detail of what each of the autonomous grounds in the different Member States actually stand for, the comparison

[36] See glossary Section 3

[37] Divorces decided on in other MS are, however, recognised in accordance with 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, OJ L 338 of 23.12.2003

[38] In 1960 fault-based divorce existed in 13 Western European countries, divorce upon the irretrievable breakdown of marriage in 7, and mutual consent divorce in 6, while 4 countries did not allow divorce at all. In 1980 fault grounds were retained in 8 jurisdictions, and no-fault divorce had extended to 12, which was also the case for mutual consent divorce. However, attempts to delete the fault grounds in England in Wales in 1996, in France 2005, and in Belgium have failed: Latvia and Lithuania recently introduced fault grounds in their divorce law.

focuses on whether divorce is possible upon the mutual consent ground[39] whether as an autonomous ground or as to establish another autonomous ground.[40] The countries in which divorce is available on demand, and conversely, where it is impossible to get divorced, have been categorised at the respective polar ends of the classification.

Table 6.3 – EU Member States with comparatively liberal and more restrictive divorce grounds

Divorce on demand	Comparatively liberal divorce grounds (possibility to divorce upon mutual consent grounds exists)	Comparatively strict divorce grounds (divorce upon mutual consent grounds not possible)	Impossible to get divorced
Sweden	*Austria*	Cyprus	Malta
Finland	**Belgium**	Ireland	
	Czech Republic	Italy	
	Estonia	Poland	
	France	Slovak Republic	
	Germany	Slovenia	
	Greece	Spain	
	Hungary		
	Latvia		
	Lithuania		
	Luxembourg		
	Netherlands		
	Portugal		
	United Kingdom		

Table A1.4 in Annex 1 outlines the most frequently occurring international divorce cases in 12 countries. This provides some indication about whether divorces frequently occur between countries which have comparatively liberal grounds, and those with less liberal grounds, since there are in these cases problems related to access to divorce could be anticipated to be most likely to occur

In order to be able to feasibly estimate how frequent such cases are, data on international divorces have, however, to be available in both relevant countries. For example, to estimate the divorce rate between Polish and Swedish nationals, one has to sum the Polish-Swedish divorce cases (1) in Poland, (2) in Sweden, and (3) in all

[39] It may be highlighted that simply looking at how liberal or how strict a Member State seems to be in view of granting a divorce upon mutual consent grounds does not say much about the accessibility of divorce in practice. For instance, it is often faster to get divorced based on a fault ground even though fault grounds can be said to be less liberal. As an example, uncontested fault-based divorce in England and Wales sometimes provides faster access to divorce than divorces based on non-fault grounds, and are therefore chosen by the spouses by mutual agreement. (Masha Antokolskaia: *The Search for a Common Core of European Divorce Law: State intervention v Spouses Autonomy*)

[40] **Countries with mutual consent as a separate ground are marked in bold.** *Countries in which mutual consent is covered under the designation of irretrievable breakdown, and constitutes an irrefutable presumption thereof are written in italics.*

the other 23 Member States. Taking these considerations into account, Table 6.4 below provides an overview of links between Member States that appear amongst the five most frequently occurring international divorces by country. The Member States marked in bold are those which have been categorised in another cluster in Table 6.3 above (i.e. with more liberal / strict grounds for divorce). Countries marked in bold and underlined are two steps away.

Table 6.4 – Divorces between nationals of countries with comparatively liberal or stricter grounds for divorce

Member State in which divorce is taking place and nationality of one spouse	Member State from which other spouse originates
Austria	Germany, **Poland**
Belgium	**Italy**, France, Netherlands
Czech Republic	**Slovak Republic**, **Poland**
Cyprus	**Greece, United Kingdom**
Germany	**Italy**, **Spain**, Greece
Estonia	**Finland**
Hungary	Germany
Luxemburg	France, Belgium, Germany, Portugal, **Italy**
The Netherlands	Germany, Belgium
Portugal	France, **Spain**, Germany
Sweden	Finland, **Poland**, **German**y

6.3.4 Legal separation and marriage annulment

'Matrimonial matters' not only includes divorce, but also legal separation and marriage annulment. Neither of these concepts exits in all Member States. Table 6.5 below provides an overview of current arrangements in the Member States.[41]

[41] SEC(2005)331 of 14.03.2005 *Commission Staff Working Paper: Annex to the Green Paper on applicable law and jurisdiction in divorce matters*

Table 6.5 – Existence of legal separation and marriage annulment in the Member States		
Legal separation		**Existence of marriage annulment**
Existence of separation	***Possibility to convert into divorce (after number of years)***	
Spain	Yes (1-5)	Yes
Belgium	Yes (3)	Yes
France	Yes (3)	Yes
Italy	Yes (3)	Yes
Luxembourg	Yes (3)	Yes
Portugal	Yes (2)	Yes
Denmark	Yes (1)	Yes
Ireland	No	Yes
Malta	No	Yes
Netherlands	No	Yes
Poland	No	Yes
United Kingdom	No	Yes
No legal separation		
Austria	No	Yes
Czech Republic	No	Yes
Cyprus	No	Yes
Estonia	No	Yes
Germany	No	Yes
Greece	No	Yes
Hungary	No	Yes
Latvia	No	Yes
Slovak Republic	No	Yes
Slovenia	No	Yes
Finland	No	No
Sweden	No	No

The table shows that neither the concept 'legal separation' nor 'marriage annulment' exists in all Member States. Legal separation exists in twelve Member States. In seven of these it is possible to convert the separation into divorce after a specified number of years. Marriage annulment exists in all but two Member States.

No problems due to the current differences in relation to either legal separation or marriage annulment were identified in the Green Paper. However, there may be benefits in governing these matters by the same rules as divorce, in particular since legal separation in some countries can be converted into divorce after a certain number of years. Advantages and disadvantages of confining rules to divorce only, or to include legal separation and marriage annulment, will be raised in relation to the assessment of the relevant policy options.

6.4 Problems due to the current state-of-play

The following sub-sections provide more in-depth descriptions of legal problems EU citizens in 'international marriages' who want to divorce may face:

- Problem 1 – Difficulties for the spouses to predict what law will apply.
- Problem 2 – Insufficient flexibility and party autonomy for citizens to choose competent court and applicable law.
- Problem 3 – Risk of rush to court.
- Problem 4 – Risk of difficulties for EU citizens living outside the EU.

The descriptions have been based on relevant research, interviews with stakeholders and Green Paper responses.

6.4.1 Problem 1 – Difficulties for the spouses to predict what law will apply

Because of the different substantive laws relating to divorce matters in the Member States, there are huge implications for EU citizens in terms of the national law that oversees their divorce both in terms of time, requirements of proof of separation periods, grounds for the breakdown of marriage, fault etc. It also has significant implications for maintenance obligations and other ancillary matters.

Currently there is a problem for spouses to predict what law will apply since this is dependent on the national conflict-of-law rules of the Member State in which a divorce petition is lodged. Since there are currently no uniform conflict of law rules, and the rules applied in the Member States are very different, this makes it very difficult for spouses to foresee under what law the divorce will be governed.

To provide a brief overview of the complexity of the current situation, there are two main systems of conflict-of-law rules in the EU Member States:[42] (1) those that always apply the law of the forum according to the *lex fori* principle; and (2) those that base applicable law on a hierarchy of connecting factors,[43] which could result in that the law of another State is applied (to ensure application of the law with which the spouses feel closest connected). The set of connecting factors in some cases includes lex fori. In a restricted number of countries the spouses have a limited choice to choose

[42] All Member States that recognise legal separation apply the same conflict-of-law rules to divorce and legal separation, whilst marriage annulment in general is governed by the law where the marriage was contracted, faults of form or their personal capacity, or in accordance with the spouses' nationality.

[43] A 'connecting factor' is the link between an EU citizen and a country, e.g. nationality or habitual residence.

applicable law before a set of connecting factors is applied. Table 6.6 below provides an overview of what countries belong to each group.[44]

Table 6.6 – Categorisation of Member States according to application of the lex fori principle or a set of connecting factors

Lex fori	Connecting factors
▪ Cyprus ▪ Finland ▪ Ireland ▪ Latvia ▪ Sweden* ▪ United Kingdom*	▪ Austria ▪ Belgium** ▪ Czech Republic ▪ Estonia ▪ Germany** ▪ Greece ▪ Italy ▪ Hungary ▪ Lithuania ▪ Luxembourg ▪ Netherlands** ▪ Poland ▪ Portugal ▪ Slovak Republic ▪ Slovenia ▪ Spain**

* *Possibility to take account of foreign law in certain cases*

** *Spouses have limited possibility to choose applicable law before connecting factors are applied*

France does not apply either of the systems, but have unilateral choice-of-law rules. This means that jurisdiction rules establish that French law is applied if both spouses are French nationals or domiciled in France or no foreign law claims jurisdiction while French courts have jurisdiction.

There is no problem to foresee what law will apply in the 6 countries which apply law according to the lex fori principle, since the law of the Member State in which the court is situated always will be applied. However, problems in predicting law can occur in those countries which use a system of connecting factors, which provide a possibility to apply foreign law. Connecting factors currently in use include nationality, common habitual residence (or domicile in the case of the United Kingdom and Ireland), 'closest connection', and lex fori. Impreciseness and difficulties in defining common habitual residence in some cases lead to difficulties in foreseeing what law will apply. Table 6.7

[44] SEC(2005)331 of 14.03.2005 *Commission Staff Working Paper: Annex to the Green Paper on applicable law and jurisdiction in divorce matters*

below provides an overview of the sets of connecting factors that are currently applied by the Member States[45].

[45] SEC(2005)331 of 14.03.2005 Commission Staff Working Paper – Annex to Green Paper on Applicable Law and Jurisdiction in Divorce Matters.

Table 6.7 – Overview of Member States' systems of connecting factors

Country	1st connecting factor	2nd connecting factor	3rd connecting factor	Fourth connecting factor
First connecting factor based on spouses' (limited) choice of law				
Belgium	Possibility to choose the law of the nationality of one of the spouses or Belgian law	Common habitual residence	Last common habitual residence if one spouse still resides there	Nationality of either spouse
Netherlands	Possibility to choose Dutch divorce law (irrespective of nationality or habitual residence of the spouses) or the law of the spouses' foreign nationality	*Common nationality*	Common habitual residence	**Lex fori**
First connecting factor based on residence / domicile				
Estonia	Common residence	*Common nationality*	Last common residence if one spouse still resides there	Closest connection
Lithuania	Common domicile	Last common domicile	**Lex fori**	
First connecting factor based on nationality				
Slovenia	*Common nationality*	*Cumulative application of the national laws of both spouses (i.e. conditions for divorce must be met under both laws)*	**Lex fori** (if divorce is not possible by cumulative application of both laws and one spouse resides in Slovenia	**Lex fori** (if divorce is not possible by cumulative application of both laws, the spouses do not reside in Slovenia and one spouse is of Slovenian nationality)
Greece	*Last common nationality if one spouse still retains it*	Last common habitual residence during the marriage	Closest connection	
Austria	*Common nationality or last common nationality if one spouse still retains it*	Common habitual residence	Last common habitual residence if one spouse still resides there	
Portugal	*Common nationality*	Common habitual residence	Closest connection	
Luxembourg	*Common nationality*	Common effective residence	**Lex fori**	
Italy	*Common nationality*	The law of the State where the marriage has been principally based	**Italian law** applies where divorce and legal separation are not provided for under the applicable foreign law	
Germany	*Common nationality or last common nationality if one spouse still retains it*	Common habitual residence or last common habitual residence if one spouse still resides there	Closest connection	Possibility to choose applicable law if the spouses do not have common nationality and neither spouse is a national of the State in which both spouses are habitually resident, or that the spouses are habitually resident in different States
Poland	*Common nationality*	Common domicile	**Lex fori**	
Spain	*Common nationality*	Common habitual residence	Last common habitual residence if one spouse still resides there	**Lex fori** if one spouse has Spanish nationality or habitual residence in Spain and: (a) no law is applicable under connecting factors 1-3 or (b) the divorce petition is filed before a Spanish court jointly or by one spouse with the consent of the other, or (c) if the laws designated under connecting factors 1-3 do not recognise divorce or only in a discriminatory manner or contrary to public order
Slovak Republic	*Common nationality*	**Lex fori**		
Hungary	*Common nationality*	**Lex fori** if one spouse has Hungarian nationality	Common domicile	**Lex fori**
Czech Republic	*Common nationality*	**Lex fori**		

Most Member States (12 out of a total of 16 countries) that apply a system of connecting factors, have common nationality as a first connecting factor. Two countries first give the spouses a limited possibility to choose applicable law, and two Member States have common residence (domicile) as their first connecting factor. All Member States include nationality as a connecting factor at some point in their system, whilst residence (domicile) is not applied at all by 3 Member States.

EU citizens are unlikely to be aware of these different legal systems and that the requirements and conditions for divorcing may change substantially as a result of a move. They may thereby find themselves subject to a divorce law with which they do not feel closely connected. This may run against the legitimate expectations of the citizens.

Table 6.8 – Problem 1: Summary of problem and drivers	
Problem:	Difficulties for spouses to foresee what law will be applied to govern their divorce. EU citizens are also unlikely to be aware that the conditions for getting divorced may change drastically when they move to other Member States.
Drivers within Community competence:	- Different conflict-of-law rules in the Member States - Impreciseness and difficulties in establishing national connecting factors
Driver outside Community competence	- Different grounds for getting divorced in the Member States

6.4.2 Problem 2 – Insufficient flexibility and party autonomy for citizens to choose competent court and applicable law

As described in the previous section on Problem 1, applicable law is determined either on the basis of a number of connecting factors, or in accordance with the lex fori principle, i.e. the law of the forum. In principle, national conflict-of-law rules only foresee one solution in a given situation, e.g. the application of the law of the spouses' common nationality, and do not take account of the wishes of the spouses except in a few Member States in which the spouses have a (limited) choice of applicable law (see Table 6.7 in the previous Section 6.4.1). This may in certain situations not be sufficiently flexible. It fails for example to take into account that citizens may feel closely connected with a Member State where they have lived for a long time although they are not nationals of that State. Therefore, currently EU citizens are not always able to get divorced according to the law of the Member State with which they feel the closest connection.

Most Member States base applicable law on common nationality of the spouses as a first connecting factor, which fails to take into consideration those cases when spouses have integrated in a new country and would like that law to apply. On the other hand, in some cases individuals live in another country than their country of origin for a number of years and still feel more comfortable having the law of their nationality applied.

Application of lex fori can also lead to that another law than the one with which the spouses feel closest connected is applied.

Another problem put forward in the Green Paper, also linked to the spouses' wishes to have a certain law applied, is that of results perhaps not meeting EU citizens' 'legitimate expectations' due to that conditions for getting divorced can change drastically when they move to another Member State, which they may only have a limited knowledge of. This could lead to results that do not live up to their expectations in those cases when applicable law is determined on other grounds than their nationality.

Concerning the frequency of this problem, it is difficult to determine how often it occurs due to individual preferences and considerations. The rigidity of rules to only allow one solution in a given situation indicates, though, that there may be cases when spouses' wishes are not fulfilled.

In terms of spouses' legitimate expectations to be met, one must know what their expectations and knowledge of differing rules are before being able to assess whether they are being met, or not, under current conditions. 11 Member States have nationality as first connecting factor, which means that in these countries the spouses would still be able to get divorced according to the law of their origin. However, a number of stakeholders who are working in this field commented that in their experience, most spouses in fact believe that the applicable law is that of the country where they got married – which may not be the same as their nationality. Other Green Paper respondents also commented that couples living in "international" marriages and moving freely in the EU Member States are only rarely aware of what law might be applicable in their divorce case. Due to this, they seldom have any 'legitimate' expectations on applicable law.

Table 6.9 – Problem 2: Summary of problem and drivers

Problem:	Insufficient flexibility and party autonomy for EU citizens to choose applicable law and competent court.
Drivers within Community competences:	- In most Member States conflict-of-law rules only provide one given solution in a specific situation - Insufficient party autonomy, i.e. spouses are only able to choose applicable law (within limitations) in a few countries - The jurisdiction rules of the new Brussels II Regulation do not allow spouses to apply for divorce in a Member State of which only one of them is a national
Driver outside Community competences:	- Different grounds for getting divorced in the Member States

6.4.3 Problem 3 – Risk of rush to court

Article 3[46] of the New Brussels II Regulation includes seven alternative jurisdiction grounds, i.e. it lists seven possibilities for when courts in the Member States are competent to rule a divorce proceeding (without any hierarchy of what court is competent before another. In some cases, only one of the alternative jurisdictions is applicable, whereas in some situations courts in more than one Member State could have jurisdiction to grant a divorce, depending on the individual situations. In accordance with the 'lis pendens' rule (Article 19) the competent court before which a divorce petition is first lodged will have jurisdiction.

The combination of the rules in Article 3 and Article 19 could lead to that the spouses 'rush to court' in order to have the divorce granted by a law in a particular country (for instance with the aim to have ancillary matters, e.g. maintenance obligations, judged by a certain law or because it is possible to divorce faster in some Member States than others). This can in turn lead to application of a law with which the defendant does not feel closest connected or which does not take his/her interests into account. According to the lis pendens rule the court first seized is bound to handle the case if divorce proceedings are brought before courts in different Member States. This mechanism has been adopted in order to ensure legal certainty, avoid duplication of litigation, parallel actions and the possibility of irreconcilable judgments. However, it brings along a number of negative consequences, in particular for 'vulnerable spouses', e.g. those who cannot afford lawyers who investigate where it is most beneficial to get divorced. This leads to situations where the "stronger" party (e.g. thanks to qualified legal counsel) uses alternative circumstances decisive for determining jurisdiction to the detriment of the other spouse, and files for divorce first with the goal of securing him/herself a "more favourable jurisdiction". According to practitioners, women are most often the weaker party in such situations.

The will of one spouse to have a certain law applied instead of another encourages the parties to engage in conflict. It further renders reconciliation difficult because there is no time for mediation efforts due to the necessity to lodge first in order to safeguard one's own interests. Rush to court also put increased pressure on families at a time when they are already in difficulties, which is particularly negative if there are children involved. Furthermore, it can cause additional distress and animosity for spouses in cases where one party has not truly accepted that the marriage has irretrievably broken down. For some spouses it can also come as a surprise that the marriage has broken down. These individuals are at a particular disadvantage due to the lis pendens rule, which can lead to situations where they do not have any possibility to impact on where the divorce is dealt with.

Concerning the reason for wanting to have the divorce governed by a certain law, it can to some extent be explained by the differences in relation to how easy or quick it is to get divorced according to the different substantive divorce laws of the Member States. However, even though the time needed for obtaining a divorce decree may have some impact on the rush-to-court problem, in practice this is often due to financial considerations in the context of financial provisions ancillary to divorce[47]. For instance,

[46] The full text of Article 3 is provided in Annex 4.

[47] In this context should be mentioned that these issues are governed by international private law under article 8 of the Hague Convention of 2 October 1973 on maintenance obligations, but this convention has not been ratified by all Member States.

maintenance for wives can vary from nothing to a substantial share and can be for a limited period or for life. In some Member States there are also strong linkages between applicable divorce law and the law that governs the consequences thereof. In fact, in several Member States the decision of what divorce law is applicable determines which law is applicable also concerning financial matters relating to divorce. For example, in some EU Member States, pre-marital and inherited assets are not part of the divorce settlement, whilst they are in others such as the Netherlands, Finland, and the United Kingdom (England and Wales).

The high frequency and seriousness of the rush-to-court problem has been emphasised by several practitioners, amongst them a UK practitioner who commented that the introduction of the lis pendens rule in the Brussels II Regulation in fact meant that practices changed amongst lawyers in the United Kingdom, from a conciliatory to an aggressive approach. Whereas they previously had encouraged spouses to first attempt mediation, they now advise their clients to file for divorce as quickly as possible in order to ensure a favourable outcome. Reference was made to an extreme case where one spouse lodged a divorce petition 30 minutes after the other, which resulted in a loss of hundreds of thousands of euro for the latter spouse. The practitioner added that this change of practice only relates to cross border cases and that the conciliatory approach is maintained in matters involving two UK nationals.

Concerning changes to the legal provisions that allow such situations to occur, one Green Paper respondent noted that “rush-to-court” will never be completely avoided even though legal provisions are revised, since in the absence of harmonised procedural and substantive law, both statutory and case-law, there will always be a temptation to gain an advantage by going to court at an early stage.

There are no figures available on exact number of cases where one spouse has ‘rushed to court’, but it can be anticipated that it can occur in all cases where there is not mutual consent to get divorced. Even in mutual consent cases there may be strong incentives to get the divorce governed by a specific law due to financial considerations.

Table 6.10 – Problem 3: Summary of problem and drivers	
Problem:	Rush to court, i.e.: - Application of a law with which the defendant does not feel closest connected or which does not take his/her interests into account. - No time for mediation efforts
Drivers within Community competences:	- Different national conflict-of-law rules - 'Lis pendens' rule on competent court first seized - Several grounds of jurisdiction in Article 3 of the New Brussels Regulation
Drivers outside Community competences:	- Different national substantive divorce laws, i.e. differences in ease and length of time for getting divorced - Differences in national laws on ancillary and other matters related to divorce

6.4.4 Problem 4 – Risk of difficulties for EU citizens living outside the EU

EU citizens who live in a third State and want to get divorced may have two problems: firstly, getting access to a court and secondly, getting the divorce recognised in the EU.

Regarding the first problem, according to Article 7 of the New Brussels Regulation, national residual rules establish the possibility for EU citizens who live in a country outside the EU to get divorced in an EU Member State[48]. The national rules are based on different criteria such as nationality, residence or domicile. A summary of current jurisdiction rules is provided in Annex 5. Not all Member States allow citizens to apply for divorce on the basis on their nationality. This may have as a result that cases arise that are not admissible in any court in a given Member State or in a third country. Such a situation deprives the parties of their right of access to a court which contravenes a fundamental right.

Concerning the second problem, recognition of divorce between the EU Member States is governed in the New Brussels II Regulation, whereas recognition of divorce in a third State is governed by national rules and agreements with specific States. Cases may arise where the couple have difficulties getting the divorce recognised in their country of origin.

[48] Article 6 of the New Brussels II Regulation further specifies that a spouse who is a national of a Member State may only be sued in another Member State on the basis of the jurisdiction rules of the Regulation and not on the basis of national jurisdiction rules.

Table 6.11 – Problem 4: Summary of problem and drivers	
Problem:	Difficulties for EU citizens living in a third State: - Access to a court - Getting the divorce recognised in the EU
Drivers within Community competences:	- Different (or non-existence of) national laws on residual jurisdiction in divorce matters - Jurisdiction rules in Article 3 and 7.
Drivers outside Community competences:	- National rules on recognition of divorces from third States

6.5 Vulnerable groups

Specific safeguards for vulnerable groups are dealt with directly in relation to the assessment of each of the policy options in the following sections. This section includes some general considerations regarding factors that contribute to making groups vulnerable, e.g. features related to their social status, gender, language skills, children etc.

Concerning the identification of vulnerable groups, many of the Green Paper respondents and stakeholders interviewed have highlighted that the most common features of groups of people who are likely to get the most unfavourable results from the divorce proceedings are as follows:

- Spouses in a financially weak situation;
- Women – who often constitute the spouse in a financially weak position and who often takes custody over children; and
- Spouses who follow their partner to another country (also in a majority of cases women).

Financially weak spouses may face a number of problems in relation to international divorce cases, from the inability to allocate financial resources to hire a lawyer to start divorce proceedings, to becoming a victim of a rush to court race. Spouses who are not able to afford proper legal aid may end up in divorce proceedings which are set according to the terms of the wealthier spouse, who has had better opportunities to receive high quality legal advice concerning what law will be most beneficial in relation to the consequences of the divorce.

In general most experts interviewed find current legislation and procedures concerning international divorces highly complex and outcomes difficult to predict. This results in considerable costs for quality legal advice (the more complex the problem the more expensive the lawyer) which might only be affordable to a very limited number of wealthy spouses. Financially weaker spouses risk, on the other hand, receiving inappropriate judgements in the “wrong” countries. To address this problem respondents

propose different solutions, including State reimbursed legal services, information on international divorce online, a family court system and support to the NGOs that provide spouses with legal advice and psychological support in the divorce process.

Even though some progress has been made in relation to equal opportunities and treatment within the EU, women often constitute the weaker party in international divorce cases due to a generally weaker financial and social status. Moreover, women still tend to assume the primary responsibility for childcare after the divorce[49], which places them in the role of 'receiver', dependent on the ability of the court to preserve the social and financial situation they had during the marriage after the divorce[50].

Although Member States have introduced particular safeguards in their legislation with the intent to protect the rights of (the spouse with) the child, also in this field stakeholders suggest that harmonisation of conflict-of-law rules could provide more security in terms of the procedures to follow. A spouse who follows their husband or wife abroad are particularly vulnerable because they do not always recognise the legal consequences the move might result in, including changed conditions for getting divorced. In particular, this concerns spouses who are unemployed in the new country, do not speak the local language, and who may have problems returning to their country of origin as the new county has become the place of residence of their child(ren).[51]

Considerations to take into account in further legislative proposals include efforts to make the divorce process as simple and as cheap as possible so that financially weaker parties, often women, are not disadvantaged. Currently, in cases where conflict-of-laws are an issue, the legal arguments can be complicated. This may make it necessary to obtain advice from lawyers from at least two Member States in order to ascertain in which country it is most beneficial to get divorced. This is not possible for parties that cannot afford to hire experts in international law, or who have not prepared to face the divorce proceedings (the other side has rushed to court or filed in the application for divorce in secrecy), or are (financially) dependant on their partner.

6.6 Problems in relation to the application of foreign law

All the main problems identified above relate to problems divorcing 'international' spouses are experiencing in the current situation. However, in the course of the study, one additional problem was identified, namely difficulties in applying foreign law in divorce proceedings. This problem is in a first instance relevant to the situation of practitioners, although the spouses also bear the consequences.

The main reason for applying foreign law is to ensure application of the law with which the spouses are closest connected. 16 Member States provide this possibility. However, stakeholders, both from the 16 Member States where application of foreign law is

[49] In all countries in the region for which there are data, women constitute the majority of single-parent families. The largest share of single fathers is found in Belgium, where approximately one out of four single parents is a father. The largest share of single mothers is found in Estonia, where approximately nineteen out of twenty single parents are women *(TRENDS IN EUROPE AND NORTH AMERICA The Statistical Yearbook of the Economic Commission for Europe 2003)*

[50] In some countries a spouse who can be proved to have contributed to the breakdown of the marriage may not have a right to make any financial claims towards the other party.

[51] According to most Member States' legislation the place of the residence of the child automatically gives jurisdiction to the local court, thus a spouse cannot seek the protection under a familiar law.

possible, and from the Member States that only apply national law, have identified a number of different problems, both for legal professionals and citizens.

According to stakeholders, the main problems are as follows:

- **(Legal) culture:** The courts and lawyers have to deal with unfamiliar legal systems. Understanding legal culture is the result of legal education and training. Also, application of a foreign divorce law by national judges may be contrary to their inclination, in particular when there are big differences between the substantive divorce laws, e.g. Sweden (where divorce is available 'on demand') compared to Ireland (where a separation period of 4 years is required and upon court approval of a number of cumulative conditions).

- **Difficulties in correctly interpreting the applicable law**. Not all law is codified, and not all countries have a clear distinction between substantive and procedural law. Foreign courts therefore have to ascertain what part of a code is substantive law[52]. This also results in **uncertainty** due to the possible lack of the lawyer's or judge's knowledge of the core of the law applied. The foreign legal system might be so different in its concepts and procedures that even if a translation of statutes is available, practitioners and judges may be unable to understand the meaning or may apply it entirely differently to the courts of the country whose law they apply.

- **Requires experienced experts** in 25 Member States' divorce laws – and countries outside the EU.

Experts are necessary to understand the legal system of other Member States, which causes the following problems for spouses:

- **Excessive time taken to decide the case,**

- **Inevitable further costs,** and,

- **Financial discrimination** between the parties who can afford private experts and those who cannot.

As a result of the problems highlighted, court rulings may differ significantly between the country from which the law originates and a country where it is applied as a 'foreign law', regardless of the fact that the same substantive law is applied. Despite the problems, the Member States which allow application of foreign law consider it important to allow the application of foreign law to ensure application of the law with which the spouses are closest connected.

The number of cases where foreign law appears to be limited. Stakeholders in several countries commented that foreign law only in rare occasions is applied either because the spouses choose the lex fori or in other cases because the judge does not feel comfortable applying the foreign law.

[52] The Member States currently have two different systems of finding out the content of foreign law; it is either (1) the responsibility of the spouses or (2) done by the judge 'ex officio'. Annex 11 outlines the systems of some of the Member States.

All Member States but Ireland have ratified the Council of Europe 1968 Convention on Information of foreign law. Interviews with stakeholders highlighted that very few even knew that this Convention exists, and even fewer had experience of using it.

6.7 Summary of problem assessment – applicable law and jurisdiction

One major driver of current problems is that the Member States have different substantive divorce laws, which means that conditions for getting divorced change when EU citizens move to other countries. There are marked differences between the Member States concerning how difficult it is and how long it takes to get divorced. The three most extreme examples include Malta where divorce is not allowed, Ireland, where a waiting period of 4 years and court approval of a number of cumulative conditions are required, and Sweden with no inquiry into the reasons and where divorce may be granted directly if no children are involved ('divorce on demand'). The EU does not have competence to harmonise the Member States' substantive divorce laws.

There are also differences between the Member States in relation to provisions for legal separation and marriage annulment. Not all Member States have both of these concepts in place. Legal separation exists in twelve Member States. In seven of these it is possible to convert the separation into divorce after a specified number of years. Marriage annulment exists in all but two Member States.

EU citizens in 'international marriages' who want to divorce may therefore face a number of problems:

- **Problem 1 – Difficulties for the spouses to predict what law will apply**

What law will apply to a divorce is dependent on the national 'conflict-of-law rules' of the Member State in which a divorce petition is lodged before a court. Some countries always apply the law of the country in which the court is based according to the lex fori principle (7 countries), whilst others use a hierarchy of 'connecting factors' (the link between an EU citizen and a country, e.g. nationality or habitual residence) to determine what law is applicable (16 countries). The latter could result in the law of another State being applied in order to ensure application of the law with which the spouses feel 'closest connected'. In some countries the spouses have a limited possibility to choose applicable law before a set of connecting factors is applied.

- **Problem 2 – Insufficient flexibility and party autonomy for citizens to choose competent court and applicable law**

The national conflict-of-law rules foresee in principle only one solution in a given situation, e.g. the application of the law of the spouses' common nationality. Most national laws do not allow for any party autonomy. This may in certain situations not be sufficiently flexible.

- **Problem 3 – Risk of rush to court**

Current rules may lead to spouses trying to be the first one to lodge a divorce petition ('rush to court') in order to have the divorce granted by a law in a particular country (for instance with the aim to have ancillary matters, e.g. maintenance obligations, judged by a certain law or because it is possible to divorce faster in some Member States than others).

- **Problem 4 – Risk of difficulties for EU citizens living outside the EU**

EU citizens who live in a third State and want to get divorced may experience problems accessing a court in the EU. The national rules on residual jurisdiction which establish this possibility are different and do not always guarantee access to court on the basis of the nationality of one of the spouses. In some cases the spouses cannot apply for divorce in the third State or the EU which means that they have no access to court.

7 OBJECTIVES

7.1 General objectives

In 1998[53] the European Council in Vienna emphasised a common judicial area to make life for the EU citizens easier, in particular as concerns **matters that affect everyday life such as divorce**. More specifically in the area of divorce, the general policy objective would be *to provide solutions to enhance at the same time legal certainty and flexibility in order to meet the legitimate expectations of EU citizens*. Direct benefits to EU citizens within or divorced from 'international married couples' would be reduced negative consequences in terms of, for example: the 'distress' associated with divorces either being granted or not being granted on grounds that do not meet the legitimate expectations of both, or either, spouse; the time taken for judgements to be made; the costs of proceedings and the differential effects of high costs on disadvantaged groups.

The importance of a common judicial area and making life easier for citizens was acknowledged by EU leaders at the Tampere European Council in October 1999, and resulted in three priorities for action, of which two are relevant for actions in the area of family law and international divorces[54]:

- Mutual recognition of judicial decisions; and,
- Access to justice/access to court

The Tampere programme, which was achieved in 2004, was followed by The Hague Programme[55], which invited the Commission to present a Green Paper on Applicable Law and Jurisdiction in Divorce Matters together with an associated Working Paper. The goals agreed in the Hague Programme provide the ultimate objectives of work in the area of jurisdiction and applicable law in divorce matters.

The objective of the Hague programme is to improve the common capability of the EU and the Member States to amongst others guarantee fundamental rights, minimum procedural safeguards and the access to justice, to further realise the mutual recognition of judicial decisions and certificates both in civil matters, and to eliminate legal and judicial obstacles in litigation in civil and family matters with cross-border implications. This should be achieved by improving access to courts, practical judicial cooperation, approximation of law and the development of common policies. Furthermore, the Hague Programme is set out to meet the expectations of EU citizens and is based on the general principles of EU added value and of subsidiarity, proportionality and solidarity.

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[53] Common rules on jurisdiction and enforcement of judgements in civil and commercial matters, often referred to as the Brussels Convention, date, however, back to 1968 between the original six EU Member States. Further steps were taken in 1993, when the Maastricht Treaty identified Judicial co-operation in civil matters as an area of common interest for EU Member States, and with the Treaty of Amsterdam, which made Judicial co-operation in civil matters a European Community policy linked to the free circulation of people. A programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters was adopted by the Justice and Home affairs Council on 30 November 2000.

[54] The third priority is 'better crime victims' compensation'.

[55] The new five year programme for the development of an area of freedom, security and justice in the EU.

The Hague Programme includes the following relevant objectives concerning judicial co-operation in civil matters[56]:

1. **Facilitating civil law[57] procedures across borders**. The main policy objective in this area relate to that borders between countries in the EU should not constitute an obstacle to:

    - the settlement of civil law matters;

    - the bringing of court proceedings; and,

    - the enforcement of decisions in civil matters.

2. **Mutual recognition of decisions** is imperative to protect citizens' rights and securing the enforcement of these rights across borders. Recognition of divorces throughout the EU is already ensured through the Brussels II Regulation. However, the Hague Programme includes as an objective to increase the effectiveness of existing instruments on mutual recognition by 'standardising procedures and documents and developing minimum standards for aspects of procedural law, such as the service of judicial and extra-judicial documents, the commencement of proceedings, default, enforcement of judgments and transparency of costs'.

3. **Enhancing co-operation**. Greater co-operation between Member States is envisaged with the aim to achieving smooth operation of instruments involving co-operation of judicial or other bodies.

In addition to these five objectives which are specifically set out in relation to judicial co-operation in civil matters, the Hague Programme also includes a number of relevant horizontal objectives under the headings 'general orientations' and 'specific orientations – strengthening freedom'. These include:

Protection of fundamental rights. It should be ensured that fundamental rights are not only respected in accordance with the Charter on Fundamental Rights, but also actively promoted in all activities of the Union.

Integration of third-country nationals. Fair treatment third-country nationals and their descendants in the EU should be ensured as it enhances stability and cohesion in the Union. Integration of third country nationals build on the following principles: integration is a continuous, two-way process involving both legally-resident third-country nationals and the host society; integration includes, but goes beyond, anti-discrimination policy; and, integration implies respect for the basic values of the EU and fundamental human rights.

Confidence-building and mutual trust. Judicial co-operation in civil matters could be enhanced by strengthening mutual trust and by progressive development of a judicial culture in the EU. Mutual confidence should be based on the certainty that all EU

[56] Instruments in these areas should be completed by 2011. Such instruments should cover matters of private international law and should not be based on harmonised concepts of 'family', 'marriage' etc. Rules of uniform substantive law should be introduced only as an accompanying measure whenever necessary to effect mutual recognition of decisions or to improve judicial cooperation in civil matters.

[57] Including family law.

citizens have access to a judicial system meeting high standards of quality. Strengthening mutual confidence requires an explicit effort to improve mutual understanding among judicial authorities and different legal systems. Both confidence and mutual trust can be facilitated by co-operation between judicial authorities.

Initiatives in the area of jurisdiction and applicable law on divorce matters also contribute to the EU goal of **free movement of people**. In order for individuals and companies to be able to fully exercise their rights within the entire EU, the incompatibilities between judicial and administrative systems between Member States should be removed.

7.2 Specific objectives of Commission proposals on jurisdiction and applicable law in divorce matters

The following articulate more precisely the potential objectives of the Commission's proposals on jurisdiction and applicable law in divorce matters:

- To increase the legal certainty and predictability for 'international' spouses entering or considering divorce proceedings in the EU.
- To introduce limited party autonomy for 'international' spouses to choose applicable law and competent court.
- To ensure that the law of the Member State with which the spouses feel closest connected is applied.
- To increase flexibility in terms of access to courts in Member States for citizens living in the EU.
- To reduce or eliminate the risk of 'rush to court' by one spouse to the disadvantage of the other.
- To ensure that EU citizens in an 'international marriage' living outside the EU have appropriate access to courts in the EU for divorce proceedings.

A related objective that could address aspects of the problems arising for 'international married couples' seeking divorce is:

- To increase the awareness of 'international married couples' of the implications to them of differences in divorce laws between EU countries and EU countries and third countries.

These objectives form the basis of the assessment criteria put forward in Section 9 for comparison of the policy options described in Section 8.

In terms of the relationship and a possible hierarchical order between these objectives, there is clearly a trade-off between the two objectives 'increasing flexibility' and 'ensuring legal certainty'. The relative priority for these objectives will need to be defined at the political level.[58] The relationships between the objectives, problems and drivers are indicated in Table 7.1 below.

[58] Stakeholders have not been consistent in determining what objective is most important to achieve. Their preferences are in general in line with legal and cultural traditions in their country of origin.

Table 7.1 – Relationship between problems, drivers and objectives

Problem	Driver within Community competence	Driver outside Community competence	Policy objectives
1. Difficulties for the spouses to predict what law will apply. EU citizens are also unlikely to be aware that the conditions for getting divorced may change drastically when they move to other Member States.	▪ Different national conflict-of-law rules. ▪ Impreciseness and difficulties in establishing national connecting factors.	▪ Different national substantive divorce laws, i.e. differences in ease and length of time for getting divorced.	*To increase the legal certainty and predictability for 'international' spouses entering or considering divorce proceedings in the EU.*
2. Insufficient flexibility and party autonomy for citizens to choose applicable law and competent court.	▪ In most Member States conflict-of-law rules only provide one given solution in a specific situation. ▪ Insufficient party autonomy, i.e. spouses are only able to choose applicable law (within limitations) in a few countries. ▪ The jurisdiction rules of the new Brussels II Regulation do not allow spouses to apply for divorce in a Member State of which only one of them is a national.	▪ Different national substantive divorce laws, i.e. differences in ease and length of time for getting divorced.	*To introduce limited party autonomy for 'international' spouses to choose applicable law and competent court.* *To ensure that the law of the Member State with which the spouses feel closest connected is applied.* *To increase flexibility in terms of access to courts in Member States for citizens living in the EU.*
3. Rush-to-court, i.e.: ▪ No time for mediation efforts. ▪ Application of law with which the defendant does not feel connected and which does not take account of his/ her interests.	▪ Different national conflict-of-law rules. ▪ 'Lis pendens' rule on competent court first seized. ▪ Several grounds of jurisdiction in Article 3 of the New Brussels Regulation.	▪ Different national substantive divorce laws, i.e. differences in ease and length of time for getting divorced. ▪ Differences in national laws on ancillary and other matters related to divorce.	*To reduce or eliminate the risk of 'rush to court' by one spouse to the disadvantage of the other.*
4. Difficulties for citizens in third countries: ▪ Access to court. ▪ Difficulties in getting the divorce recognised.	▪ Different (or non-existence of) national laws on residual jurisdiction in divorce matters. ▪ Jurisdiction rules in Article 3 and 7.	▪ National rules on recognition of divorces from third States.	*To ensure that EU citizens in an 'international marriage' living outside the EU have appropriate access to courts in the EU for divorce proceedings.*

In addition to above policy objectives, other relevant impacts relating to reducing negative consequences for divorcing 'international' spouses include:

- Decreased costs and shorter divorce proceedings;
- Decreased risk of foreign law being incorrectly applied; and,
- Ensuring safeguards for the vulnerable spouse.

For **legal professions**, the following impacts have been identified[59]:

- Increased efficiency (e.g. in terms of making legal assessments of where to lodge a divorce petition);
- Increased workload and resulting new work opportunities;
- Reduced difficulties when applying unfamiliar laws / procedures;
- Initial training on new Community legislation; and,
- (Continuous) training.

For **Member States** impacts relate to what extent changes of the legal system at national level are necessary, associated costs and political acceptability.

[59] Other impacts, such as increased mobility and better status have not been considered relevant.

8 POLICY OPTIONS

8.1 Introduction

There are a number of potential options to solve the problems EU citizens face in relation to 'international' divorces. The following policy options were identified in the course of the study:

- Policy option 1 – Status quo;
- Policy option 2 – Harmonising the conflict-of-law rules and introducing a limited possibility for the spouses to choose applicable law;
- Policy option 3 – Revising the Community rules for determining the competent court;
- Policy option 4 – Giving the spouses a limited possibility to choose the competent court ("prorogation")
- Policy option 5 – Introducing a limited possibility to transfer a case to the courts of another Member State
- Policy option 6 – Adopting common rules on residual jurisdiction to ensure that EU citizens living outside the EU can apply for divorce in a Member State
- Policy option 7 – Introducing an Optional European Marriage Regime; and,
- Policy option 8 – Increasing co-operation between the Member States.

The policy options identified include EU level policy measures and maintaining the status quo, reflected in the Commission's Green Paper. To complete an Impact Assessment, it was decided that it would be beneficial to assess a non-legislative option building on existing activities (policy option 8) and a 'radical' EU level alternative (policy option 7), in addition to various EU legislative actions (policy options 2 to 6).

The following sub-sections outline the main characteristics of each of the eight options.

8.2 Policy Option 1: Status quo scenario – maintain the current situation

This policy option assumes that no new policy initiatives would take place at EU level. In assessing this policy option consideration will be given to whether existing activities and trends will affect the nature and severity of the problems identified. The following existing instruments are especially relevant in the status quo option:

- EC regulation 2201/2003 (the New Brussels II Regulation[60]), which entered into application on 1st March 2005. This Regulation harmonises the EU Member

[60] Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning *Jurisdiction and the recognition and enforcement of judgements in matrimonial matters of parental responsibility*

States' (except Denmark[61]) rules of private international law in relation to *jurisdiction*, i.e. which Member States courts can hear and determine a case, and *recognition and enforcement* of a court judgement made in another Member State. It does not contain rules on which Member States laws apply in a given case, that is the applicable law or 'conflict-of-law' rules.

- The Hague Convention on matrimonial matters[62] which was adopted in 1970 under the umbrella of the Hague Conference on Private International Law. To date, it has been ratified by 8 EU Member States.

Member States have also concluded bilateral agreements with third States.

8.3 Policy Option 2: Harmonising the national conflict-of-law rules and introducing a limited possibility for spouses to choose applicable law

This policy option would involve legislative action at Community level through harmonisation of conflict-of-law rules. Such rules could include providing spouses with a limited choice of law. In detail, policy option 2 would entail the following:

- *Harmonisation of the national conflict-of-law rules*. A uniform set of conflict of law rules for all EU Member States would be triggered to determine applicable law. A uniform system could be based on the principle of lex fori (application of national law in all cases) or a set of connecting factors with appropriate specifications, such as (last) common habitual residence or common nationality, making sure that safeguards for children and vulnerable parties are put into place.
- *Give the spouses a limited choice of applicable law*. Before the set of uniform conflict-of-law rules would be triggered, spouses could be provided with a 'limited' choice of applicable law. The choice would be limited to laws of Member States with which spouses have a connection. A number of alternative connecting factors would be specified in the legislation, e.g. (last) common habitual residence and the nationality of one of the spouses. The choice would also be limited by means of formal requirements for the parties' agreement on applicable law, e.g. timing, written statement before a notary or judge, provision of legal advice etc., which would provide a safeguard to abuse of the vulnerable spouse.

Policy option 2 would be supported by a *public policy* clause, which would allow the Member States to deny application of a law contradictory to their fundamental values and family policies.

[61] The New Brussels II Regulation covers all Member States except Denmark, and Denmark is therefore not considered in this report. Also, it should be noted that the UK consists of three jurisdictions: England/Wales, Scotland and Northern Ireland, which will be referred to as UK when the legislations are similar in substance.

[62] *Convention on the Recognition of divorces and legal separations*, The Hague, 1 June 1970.

8.4 Policy Option 3: Revising the Community rules for determining the competent court

This policy option involves legislative action at the Community level in terms of revision of the jurisdiction rules of the New Brussels II Regulation which establishes the grounds for jurisdiction (Art. 3). The following three possibilities have been identified (the possibilities are alternative and only one of options 3a, 3b and 3c would be adopted):

- *Policy Option 3a: Extending the number of alternative grounds in Article 3*.
- *Policy Option 3b: Decreasing the number of alternative grounds in Article 3.*
- *Policy Option 3c: Replacing current alternative grounds in Article 3 with a set of jurisdiction rules*, based on connecting factors, which establish competent jurisdiction in hierarchical order.

8.5 Policy Option 4: Giving the spouses a limited possibility to choose the competent court ("prorogation")

Spouses could be provided with a limited choice of court. By choosing the competent court, the spouses would indirectly also choose the applicable law since this currently is determined by the national conflict of law rules. The choice would be limited to those Member States with which they have a connection. Alternative connecting factors such as (last) common habitual residence and nationality of one of the spouses would be specified in the legislation. As for policy option 2, formal requirements for the parties' agreement on competent court, e.g. timing, written statement before a notary or judge, provision of legal advice etc. would provide a safeguard to abuse of the vulnerable spouse. Choice of court could be made possible before the 'objective' jurisdiction grounds are triggered.

8.6 Policy Option 5: Introducing a limited possibility to transfer a case to the courts of another Member State

A possibility to transfer a case in 'exceptional circumstances' to safeguard the vulnerable spouse could be introduced. Such exceptional circumstances include cases where one spouse has rushed to court in order to have the divorce ruled by a specific law and where it is evident that even though that court is competent, it is clearly very disadvantageous to the other spouse to have the divorce ruled by that law. In such cases, a transfer to another Member State could be made possible, e.g. on the basis that the marriage was principally based in another country than where the divorce is judged.

8.7 Policy Option 6: Adopting common rules on residual jurisdiction to ensure that EU citizens living outside the EU can apply for divorce in a Member State

This policy option involves legislative action at Community level in the form of adopting common rules on residual jurisdiction to ensure that divorcing EU citizens living in a country outside the Union have access to court in an EU Member State.

8.8 Policy Option 7: Introducing an Optional European Marriage Regime

Since the differences between the Member States' substantive divorce laws create difficulties, policy option 7 would create a uniform substantive law for such cross-border

cases in the form of an optional marriage status, a 'European Marriage'[63]. All EU citizens entering an international marriage would be offered a choice of an additional European marriage certificate, which would confer the same legal arrangements and rules in all the EU Member States in cases of subsequent divorce proceedings. In other words, for those spouses that have a European marriage status, the same laws and rules would apply irrespective of which EU Member State they reside in at time of filing for divorce. The European Marriage would be open to all marriages between EU citizens. In addition, people could also apply for such a marriage retrospectively.

A European marriage would be committed to the common basic values as expressed in the European Convention on Human Rights and the Charter of Fundamental Rights. The specifics of such a marriage regime would need to be agreed between the Member States. Comparative research has revealed some common principles, but further studies would need to be conducted to outline a credible proposal.

8.9 Policy Option 8: Increasing co-operation between Member States

Policy option 8 is a non-legislative instrument whereby the EU would provide some financial support to encourage relevant co-operation activities between Member States. The following activities could benefit from EU level support:

- *Support to exchanging best practice on family courts*. At the moment, some EU Member States have special family courts that deal exclusively with family law cases, also those with an international dimension, including international divorces. Feedback from such courts indicates that they are very useful specialised institutions that deal with family law matters in an effective way, due to concentration of expertise. EU could financially support Member States learning about specialist family courts from each other and encourage the establishment of such courts across the EU.
- *Networks of expertise on different national divorce laws*. A network of expertise on European Laws (liaison judges and / or lawyers) that could provide effective assistance on matters relating to their respective laws could be set up. The existing networks, such as the European Judicial Network in Civil and Commercial matters, could be contracted and encouraged to provide information on the contents and workings of national divorce law[64]. In addition, co-operation and exchange of information could be supported by specialised national institutes such as Max Planck Institute in Germany or the International Legal Institute in the Netherlands.
- *Information campaign*. An information campaign could be organised to inform EU citizens on differences between the Member States requirements for getting divorced and what a move to another EU country would mean.

On the annual basis, on the basis of financing of similar EU initiatives, it could be envisaged that the EU could devote around 5 million euro to supporting of such co-operation activities between the Member States.

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[63] Dethloff: *Europäische Vereinheitlichung des Familienrechts* (Archiv für civilistische Praxis 204 (2004) 544–568).

[64] Note should also be taken of the Council of Europe 1968 Convention on Information of Foreign Law ratified by all Member States but Ireland.

9 ASSESSMENT OF THE POLICY OPTIONS

9.1 Introduction

This section provides an assessment of each of the identified policy options described in Section 8. The assessment has been undertaken on the basis of assessment criteria that relate to the solution of the different problems presented in Section 6, the policy objectives described in Section 7 and impacts on Fundamental Rights in relation to the relevant Articles of the European Charter of Fundamental Rights. A common grid has been used for systematic comparison of the options.[65]

The assessment of the individual policy options is followed by a comparison of the different options on the basis of the identified assessment criteria. All above criteria relate, though, to impacts on spouses in 'international marriages' who are divorcing. In addition, legal professions (e.g. lawyers, judges and notaries) and Member States administrations would also be affected by the implementation of the different options. Therefore, the options have also been compared on the basis of the main impacts on each of these, including positive and negative impacts on spouses and legal professions, extent of changes to Member States legal systems and costs for Member States' administrations. The section ends with a summary assessment of the options.

9.2 Assessment of the individual policy options

The following Tables provide assessments of each of the individual policy options:

- Table 9.1 – Policy Option 1: Status Quo
- Table 9.2 – Policy option 2: Harmonising the conflict-of-law rules and introducing a limited possibility for the spouses to choose applicable law;
- Table 9.3 – Policy option 3: Revising the Community rules for determining the competent court;
- Table 9.4 – Policy option 4: Giving the spouses a limited possibility to choose the competent court ("prorogation")
- Table 9.5 – Policy option 5: Introducing a limited possibility to transfer a case to the courts of another Member State
- Table 9.6 – Policy option 6: Adopting common rules on residual jurisdiction to ensure that EU citizens living outside the EU can apply for divorce in a Member State

[65] The information in this Section is mainly informed by practitioners' (i.e. lawyers, judges and notaries'), family associations' and Member States' responses to the Green Paper on applicable law and jurisdiction in divorce matters, the Public Hearing on the Green Paper on 6 December 2005, the Member States' Expert Meeting on 14 March 2006, and additional interviews that have been undertaken in selected countries by the EPEC team members. Summaries of the interviews that have been undertaken are included in Annex 12. Comments by stakeholders on advantages and disadvantages of aspects of the policy options that were included in the Green Paper are included for Policy Option 2 in Annex 7; Policy Option 3 in Annex 8; Policy Option 4 in Annex 9; and Policy Option 5 in Annex 10. Information on policy option 6 is included in Annex 5. The section has also been informed by relevant background literature.

- Table 9.7 – Policy option 7: Introducing an Optional European Marriage Regime; and,

- Table 9.8 – Policy option 8: Increasing co-operation between the Member States.

Before each Table is presented, a brief description of the content of the relevant policy option is provided.

Summary of Policy option 1 – Status quo

This policy option assumes that no new policy initiatives would take place at EU level. In assessing this policy option consideration is given to whether existing activities and trends will affect the nature and severity of the problems identified.

Table 9.1 – Policy Option 1 Summary Assessment
Status quo

Objective to be achieved / problem addressed	***Anticipated impact effectiveness (rated from * to *****)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
To increase legal certainty concerning applicable law and competent court	-	Difficulties for EU citizens to predict what Member State's law will apply are not likely to improve without harmonisation of rules (or substantive laws).
To increase party autonomy for citizens to choose applicable law / competent court	**	Currently 4 Member States allow spouses a (limited) choice of law. More Member States may introduce this possibility on their own initiative.
To increase flexibility in terms of access to courts in Member States for citizens living in the EU	**	Current alternative grounds in Article 3 of the New Brussels II Regulation provide some flexibility as more than one court might be competent to handle a case.
To ensure application of the law of the Member State with which the spouses feel closest connected	**	Application of the law with which the spouses feel closest connected is more likely in those countries where spouses have a possibility to choose law (4) and in those countries which have a possibility to apply foreign law (16). Member States which currently have a system based on lex fori are unlikely to change their legal system to one based on connecting factors, but some Member States might introduce a possibility to choose applicable law.
To reduce the risk of 'rush to court'	-	The problem, which basically concerns all divorces except mutual consent cases, is not likely to diminish without harmonisation of rules (or substantive laws) in relation to divorce and ancillary matters.
To ensure access to court for EU citizens living outside the EU	*	Might improve if Member States conclude bilateral agreements with third countries.
Impacts on fundamental rights		
▪ Equality before the law (between men and women)	-	Not likely to change.
▪ Non-discrimination of EU nationals	-	Not likely to change.
▪ Non-discrimination of third State nationals living in the EU	-	Not likely to change.
▪ Right to effective remedy (fair trial); reasonable time	-	Not likely to change.
Benefits and advantages of policy option	No additional financial commitment is required. This policy option will therefore not add to the financial or administrative burden on authorities.	
Disadvantages of policy option	It will not achieve the policy objectives. The problems in the current situation will remain mostly unsolved.	

Table 9.1 – Policy Option 1 Summary Assessment Status quo	
Issues raised in Green Paper, additional stakeholder and Public Hearing consultations	Some consultees commented that the New Brussels II Regulation only very recently came into force (March 2005) and were of the opinion that it is too early to make changes to the Regulation. Moreover, there were hard negotiations between Member States to reach an agreement on the current Regulation. Revising the legislation again would have negative impacts in terms of costs and time, not only for Member States, but also for professionals who need to be trained on the new legislation.
Political acceptability	Maintaining the status quo would mean that no measures are taken at EU level and it is left to the Member States to make changes to their own national rules / make bilateral or international agreements etc. if they consider the situation to be unsatisfactory. This can therefore be considered a politically neutral option as it does not demand changes to the Member States' legal systems, and it is unlikely to be met with resistance within Member States.

Summary of Policy Option 2 – Harmonising the conflict-of-law rules and introducing a limited possibility for the spouses to choose applicable law;

- A **uniform set of conflict of law rules** for all EU Member States would be triggered to determine applicable law.
- Before the set of uniform conflict-of-law rules would be triggered, **spouses could be provided with a 'limited' choice of applicable law**. The choice would be limited to laws of Member States with which spouses have a connection and by means of formal requirements for the parties' agreement on applicable law (e.g. timing, written statement before a notary or judge, provision of legal advice etc.)

Policy option 2 would be supported by a public policy clause, which would allow the Member States to deny application of a law contradictory to their fundamental values and family policies.

Table 9.2 – Policy Option 2 Summary Assessment

Harmonisation of conflict-of-law rules including giving spouses a limited possibility to choose applicable law

Objective to be achieved / problem addressed	***Anticipated impact effectiveness (rated from * to *****)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
To increase legal certainty concerning applicable law	*****	Legal certainty will be increased since the same system of conflict of law rules will be applied in all Member States. This will make it easier for the spouses to foresee what law will apply in their specific case.
To increase party autonomy for citizens to choose applicable law / competent court	****	Party autonomy and flexibility would be increased for those couples who are able to come to a common agreement on applicable law. This is likely to be more common in divorce cases based on mutual consent. Figures for 4 countries are available which indicate that 70-90% of all divorces are made based on mutual consent. By definition, this option would not benefit the couples who are unable to come to an agreement.
To increase flexibility in terms of access to courts in Member States for citizens living in the EU	****	Flexibility will be greatly increased for those couples who are able to agree on competent court
To ensure application of the law of the Member State with which the spouses feel closest connected	****	The combination of giving spouses a limited choice and harmonising conflict-of-law rules based on connecting factors will increase the number of cases where the spouses feel closely connected to the law that is applied.
To reduce the risk of 'rush to court'	*****	The option encourages agreement between the spouses on applicable law, which reduces the risk for 'rush to court'. This risk would also be greatly reduced if the applicable law will be determined by harmonised conflict-of-law rules on the basis of connecting factors.

Table 9.2 – Policy Option 2 Summary Assessment **Harmonisation of conflict-of-law rules including giving spouses a limited possibility to choose applicable law**		
To ensure access to court for EU citizens living outside the EU	***	The legislation will have universal application and be applicable also to EU citizens living outside the EU, i.e. citizens who can agree on law may access courts in EU Member States.
Impacts on fundamental rights		
▪ Equality before the law (between men and women)	*****	Rush to court will be prevented which is particularly important to safeguard vulnerable parties, who often are women, from having the divorce judged by a law that will provide an unfavourable outcome for their part.
▪ Non-discrimination of EU nationals	*****	The same rules will apply independently of nationality.
▪ Non-discrimination of third State nationals living in the EU	*****	The same rules will apply to EU and non-EU citizens (so-called "universal application").
▪ Right to effective remedy (fair trial); reasonable time	****	Since the spouses either choose law or the same conflict of law rules will be applied in all Member States less time will be needed to determine applicable law.
Benefits and advantages of policy option	Most of the problems would be addressed to some extent[66], a few even to a high extent. In particular this policy option would increase legal certainty, prevent 'rush to court', increase party autonomy and flexibility for the benefit of the spouses. It would also to a high degree ensure application of the law of the Member State with which the spouses feel closest connected, in particular for those spouses who can agree on law.	
Disadvantages of policy option	The policy option would not address all problems. In particular, it would not lead to improvements for all EU citizens living outside the Union, only those who would be able to agree on applicable law. It would also mean that foreign law can be applied in certain cases which may lead to certain disadvantages (e.g. translation costs, lengthier process, incorrect application of the law). Capacities of legal professionals to do so may be limited. The policy option would imply some costs for the EU and/or the Member States administrative systems, such as adopting supporting measures to facilitate application of foreign law etc. Practitioners would also need to be trained.	
Issues raised in Green Paper, additional stakeholder and Public Hearing consultations	A number of stakeholders considered harmonised conflict-of-law rules the most efficient way to ensure legal certainty and prevent 'rush to court'. The difficulties of applying foreign law were emphasised by certain stakeholders, including in those countries that currently apply foreign law. The consultees also agree that in case an option including application of foreign law would be adopted, a public policy clause should be included as a safeguard to give the Member States a possibility to refuse application of a foreign law contradictory to their public policy. Application of foreign law is, though, seen as an important means to ensure application of the law with which the spouses feel closest connected in the Member States that currently have a system based on connecting factors. Stakeholders have in general been very positive towards the introduction of limited choice of applicable law and/or competent court. However, this view was held only if formal requirements for setting up the agreement and appropriate safeguards for vulnerable parties are put into place. Also, it was emphasised that the choice should not be completely unrestricted, but that the spouses need to have a link to the Member State based on nationality or (last) common habitual residence.	

[66] The extent of benefits depends on the precise wording of the legislation.

Table 9.2 – Policy Option 2 Summary Assessment **Harmonisation of conflict-of-law rules including giving spouses a limited possibility to choose applicable law**	
Political acceptability	Independent of legal tradition in relation to how difficult it is and how long time it takes to get divorced, Member State representatives across the EU have been very positive towards the introduction of either limited choice of applicable law or competent court. A number of Member States are also in favour of introducing harmonised conflict-of-law rules. There is, though, reluctance from Member States with a "lex fori" tradition to change their legal system. Also, Member States with a system based on connecting factors prefer their 'own' hierarchy of connecting factors (on the basis of either nationality or common habitual residence).

Summary of Policy option 3 – Revising the Community rules for determining the competent court

In Article 3 of the New Brussels II Regulation seven alternative grounds for establishing what court is competent to handle an international divorce are provided. Courts in more than one country may be competent to handle the same divorce. The grounds for jurisdiction could be revised in either of the following ways:

- Policy Option 3a: Extending the number of alternative grounds in Article 3.
- Policy Option 3b: Decreasing the number of alternative grounds in Article 3.
- Policy Option 3c: Replacing current alternative grounds in Article 3 with a set of jurisdiction rules, based on connecting factors, which establish competent jurisdiction in hierarchical order.

Table 9.3 – Policy Option 3 Summary Assessment
Revising the Community rules for determining the competent court

Objective to be achieved / problem addressed	***Anticipated impact effectiveness (rated from * to *****)*** ***Explanation of rating and aspects of the policy option necessary to achieve impact***		
	a) the grounds of jurisdiction are extended **3a**	**b) the grounds of jurisdiction are reduced** **3b**	**c) introduce a hierarchy for the grounds of jurisdiction** **3c**
To increase legal certainty concerning applicable law	**–** An increased number of courts may be competent to handle a case.	******** A decreased number of grounds to establish competent court will lead to fewer or only one court with jurisdiction which increases transparency of the legal system.	******** In each case only courts in one Member State will be competent. However, applicable law will still be determined by national conflict-of-law rules
To increase party autonomy for citizens to choose applicable law / competent court	**–** None of the aspects of the policy options include any action to increase party autonomy. Party autonomy will even be reduced in those countries that currently allow choice of law.		
To increase flexibility in terms of access to courts in Member States for citizens living in the EU	******** In many cases the citizens are able to access courts in an increased number of Member States.	**–** A decreased number of grounds will lead to decreased access to courts in different Member States.	**–** In each case courts in only one Member States will have jurisdiction.

Table 9.3 – Policy Option 3 Summary Assessment Revising the Community rules for determining the competent court			
To ensure application of the law of the Member State with which the spouses feel closest connected	**** If the grounds for jurisdiction are extended, there is a greater chance that the law with which the spouses feel closest connected is applied as there will be an increased number of competent courts.	– If the grounds for jurisdiction are decreased, there is a reduced chance that the law with which the spouses feel closest connected is applied as there will be a decreased number of competent courts.	– If a hierarchy of jurisdiction is introduced, there is a reduced chance that the law with which the spouses feel closest connected is applied as the system will only provide one solution.
To reduce the risk of 'rush to court'	– There will be increased incentives to lodge a petition first as increased numbers of Member States courts will have jurisdiction.	**** In many cases there will be fewer or only one competent court.	***** In each case courts in only one Member States will have jurisdiction.
To ensure access to court for EU citizens living outside the EU	None of the aspects of the policy options include any action ensure access to court for EU citizens living outside the EU.		
Impacts on fundamental rights			
▪ Equality before the law (between men and women)	***** All rules will apply independently of gender.		
▪ Non-discrimination of EU nationals	***** All rules will apply independently of nationality		
▪ Non-discrimination of third State nationals living in the EU	***** All rules will apply to EU and non-EU citizens (so-called "universal application").		
▪ Right to effective remedy (fair trial); reasonable time	– Increased flexibility will lead to longer time to determine competent court	*** Decreased flexibility will shorten the time to determine applicable court.	**** A hierarchy will decrease the time to determine competent court.
Benefits and advantages of policy option	The option would increase flexibility and help ensuring application of the law with which the spouses feel closely connected.	The option would increase legal certainty and reduce the 'risk of rush to court'.	The option would increase legal certainty and prevent rush to court.

Table 9.3 – Policy Option 3 Summary Assessment Revising the Community rules for determining the competent court			
Disadvantages of policy option	The option would not increase legal certainty, party autonomy, reduce the risk of 'rush to court' or ensure access to court for citizens outside the EU.	The option would not increase party autonomy, or ensure access to courts for citizens outside the EU. Moreover, it would decrease flexibility in terms of access to courts in Member States, and thereby decrease chances of application of the law with which the spouses feel closest connected.	The option would not increase party autonomy or ensure access to courts for citizens outside the EU. Moreover, it would decrease flexibility in terms of access to courts in Member States, and thereby decrease chances of application of the law with which the spouses feel closest connected.
Issues raised in Green Paper, additional stakeholder and Public Hearing consultations	Only a very limited number of stakeholders suggested to extend the grounds for jurisdiction. Other policy options were considered as a better way to solve the problems by the vast majority.	Only a very limited number of stakeholders suggested to decrease the grounds for jurisdiction. Other policy options were considered as a better way to solve the problems by the vast majority.	Stakeholders have considered it a very interesting option, in particular in combination with limited party autonomy.
Political acceptability	Most Member States are against re-opening the discussions on the grounds of jurisdiction		

Summary of Policy option 4 – Giving the spouses a limited possibility to choose the competent court ("prorogation")

Spouses could be provided with a limited choice of court. By choosing the competent court, the spouses would indirectly also choose the applicable law since this currently is determined by the national conflict of law rules. The choice would be limited to those Member States with which they have a connection and be established in accordance with formal requirements.

Table 9.4 – Policy Option 4 Summary Assessment

Introduce a limited possibility for the spouses to choose competent court ("prorogation")

Objective to be achieved / problem addressed	***Anticipated impact effectiveness (rated from * to *****)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
To increase legal certainty concerning applicable law	**	Legal certainty will increase for those couples who are able to agree on competent court. However, even for those spouses who agree on court, it will still be difficult to predict what law the court will apply, since this is dependent on the different national conflict of law rules.
To increase party autonomy for citizens to choose applicable law / competent court and flexibility	****	Party autonomy will be greatly increased for those couples who are able to agree on competent court.
To increase flexibility in terms of access to courts in Member States for citizens living in the EU	****	Flexibility will be greatly increased for those couples who are able to agree on competent court.
To ensure application of the law of the Member State with which the spouses feel closest connected	***	Will increase to some extent for those spouses who agree on competent court, but applicable law will still be determined by national conflict of law rules which somewhat decreases the positive impact.
To reduce the risk of 'rush to court'	****	The policy option would encourage spouses to come to and agreement and decreases the risk of "rush to court".
To ensure access to court for EU citizens living outside the EU	***	The legislation will have universal application and be applicable also to EU citizens living outside the EU, i.e. citizens who can agree on competent court may access courts in EU Member States.
Impacts on fundamental rights		
▪ Equality before the law (between men and women)	*****	The rules will apply independently of gender.
▪ Non-discrimination of EU nationals	*****	The same rules will apply independently of nationality.
▪ Non-discrimination of third State nationals living in the EU	*****	The same rules will apply to EU and non-EU citizens (so-called "universal application").
▪ Right to effective remedy (fair trial); reasonable time	**	Some positive impact for those spouses who can agree on competent court, but applicable law will still be established by the competent court.

Table 9.4 – Policy Option 4 Summary Assessment **Introduce a limited possibility for the spouses to choose competent court ("prorogation")**	
Benefits and advantages of policy option	It would greatly increase party autonomy, flexibility and access to court for spouses who are able to agree on competent court. Legal certainty will also be increased for these spouses, but as applicable law will still be determined by national conflict of law rules there will not be complete transparency.
Disadvantages of policy option	It may present a risk of pressure on the vulnerable spouse.
Issues raised in Green Paper, additional stakeholder and Public Hearing consultations	The vast majority of stakeholders were in favour of introducing a limited possibility for the spouses to agree on the competent court.
Political acceptability	Member States are open to increasing party autonomy by allowing spouses a limited choice of court and / or applicable law.

Summary of Policy Option 5 – Introducing a limited possibility to transfer a case to the courts of another Member State

A possibility to transfer a case in 'exceptional circumstances' to safeguard the vulnerable spouse could be introduced. Such exceptional circumstances include cases where one spouse has rushed to court in order to have the divorce ruled by a specific law and where it is evident that even though that court is competent, it is clearly very disadvantageous to the other spouse to have the divorce ruled by that law.

Table 9.5 – Policy Option 5 Summary Assessment
Introduce a limited possibility to transfer a case to the courts of another Member State

Objective to be achieved / problem addressed	***Anticipated impact effectiveness (rated from * to *****)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
To increase legal certainty concerning applicable law	-	Legal certainty is likely to decrease since a spouse may request that a case is transferred to another Member State.
To increase party autonomy for citizens to choose applicable law / competent court	*	The option will not lead to party autonomy as such, but will include a possibility to request that a case is moved.
To increase flexibility in terms of access to courts in Member States for citizens living in the EU	****	Flexibility will be greatly increased as the case can be transferred to another Member State.
To ensure application of the law of the Member State with which the spouses feel closest connected	*****	The only time when transferring a case would become relevant is when it is deemed that the marriage was principally based in another Member States than the Member State where the case was handled. This objective would thereby be achieved.
To reduce the risk of 'rush to court'	*****	The risk of 'rush to court' would decrease since the defendant could request that a case is transferred to a court in another Member State if the marriage was closer connected to that country.
To ensure access to court for EU citizens living outside the EU	-	No impact as the rule would only concern transfers between courts of Member States.
Impacts on fundamental rights		
▪ Equality before the law (between men and women)	*****	The rules will apply independently of gender.
▪ Non-discrimination of EU nationals	*****	The same rules will apply independently of nationality
▪ Non-discrimination of third State nationals living in the EU	*****	The same rules will apply to EU and non-EU citizens (so-called "universal application").
▪ Right to effective remedy (fair trial); reasonable time	**	Some positive impact for those spouses who can agree on competent court, but applicable law still must be established by the competent court.
Benefits and advantages of policy option	This option would reduce incentives to "rush to court" in a Member State to the detriment of the other spouse, as it would enable the defendant to request that the case is transferred to a Member State with which the marriage is more closely connected.	

Table 9.5 – Policy Option 5 Summary Assessment **Introduce a limited possibility to transfer a case to the courts of another Member State**	
Disadvantages of policy option	It may entail additional delays and costs for spouses.
Issues raised in Green Paper, additional stakeholder and Public Hearing consultations	The majority of stakeholders are against the idea of introducing a transfer because of the negative impacts in terms of additional delays and costs for the spouses.
Political acceptability	Most Member States are against this option.

Summary of Policy Option 6 – Adopt common rules on residual jurisdiction to ensure that citizens living in third States have access to a court in the EU

Common rules would be adopted at Community level on residual jurisdiction to ensure that divorcing EU citizens in an international marriage living in a country outside the Union have access to court in an EU Member State.

Table 9.6 – Policy Option 6 Summary Assessment

Adopt common rules on residual jurisdiction to ensure that citizens living in third States have access to a court in the EU

Objective to be achieved / problem addressed	***Anticipated impact effectiveness (rated from * to *****)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
To increase legal certainty concerning applicable law and competent court	**	Legal certainty is likely to increase since the rules on residual jurisdiction will be uniform. However, it will only increase for EU citizens in international marriages living outside the Union.
To increase party autonomy for citizens to choose applicable law / competent court	–	No impact.
To increase flexibility in terms of access to courts in Member States for citizens living in the EU	–	No impact.
To ensure application of the law of the Member State with which the spouses feel closest connected	*	Increases to a minor extent for EU citizens in international marriages living outside the Union.
To reduce the risk of 'rush to court'	–	No impact.
To ensure access to court for EU citizens living outside the EU	*****	EU citizens in an international marriage living outside the Union would be ensured access to court.
Impacts on fundamental rights		
▪ Equality before the law (between men and women)	*****	The rules will apply independently of gender.
▪ Non-discrimination of EU nationals	*****	The same rules will apply independently of nationality. These rules will only apply to citizens living outside the EU.
▪ Non-discrimination of third State nationals living in the EU	*****	The same rules will apply independently of nationality. These rules will only apply to citizens living outside the EU.
▪ Right to effective remedy (fair trial); reasonable time	**	The positive impact is limited to EU citizens in international marriages outside the EU.
Benefits and advantages of policy option	The option would ensure access to court for EU citizens in 'international' marriages living outside the EU.	
Disadvantages of policy option	The option addresses a problem that is distinct from the other problems identified, and it therefore has very limited impact on achieving objectives other than ensuring access to court for EU citizens living outside the EU.	

Table 9.6 – Policy Option 6 Summary Assessment **Adopt common rules on residual jurisdiction to ensure that citizens living in third States have access to a court in the EU**	
Issues raised in Green Paper, additional stakeholder and Public Hearing consultations	Many stakeholders were not clear on what the policy option involved as it was not described in the Green Paper, and many comments were therefore not relevant. However, a vast majority of the additional stakeholder interviewed were in favour of introducing the option, including those who originated from a country where the EU citizens may apply for divorce on the basis of their nationality.
Political acceptability	In general in favour of adopting common rules.

Summary of Policy Option 7 – Introducing an Optional European Marriage Regime

All EU citizens entering an international marriage would be offered a choice of an additional European marriage certificate, which would confer the same legal arrangements and rules in all the EU Member States in cases of subsequent divorce proceedings.

Table 9.7 – Policy Option 7 Summary Assessment
Introduce an optional European Marriage Regime

Objective to be achieved / problem addressed	***Anticipated impact effectiveness (rated from * to *****)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
To increase legal certainty concerning applicable law and competent court	****	Legal certainty is completely ensured for people who choose the European Marriage status as the same law will apply all over EU and will not change if the spouses move or are of different nationality. It will not increase legal certainty to people who do not choose it.
To increase party autonomy for citizens to choose applicable law / competent court	****	This objective is achieved for all those couples who agree on the European Marriage status. It may not be achieved for those couples who choose the current system.
To increase flexibility in terms of access to courts in Member States for citizens living in the EU	****	The EU citizens will have the option to choose the European Marriage status.
To ensure application of the law of the Member State with which the spouses feel closest connected	****	The EU citizens will have the option to choose the European Marriage status.
To reduce the risk of 'rush to court'	***	For those who choose the European Marriage status the problem will be eliminated, but not for the others.
To ensure access to court for EU citizens living outside the EU	***	This depends on the precision of the legislation, i.e. if EU citizens living outside the borders of the Union may maintain their European Marriage status or choose to get married under its provisions.
Impacts on fundamental rights		
▪ Equality before the law (between men and women)	*****	The rules will apply independently of gender.
▪ Non-discrimination of EU nationals	*****	The same rules will apply independently of nationality. These rules will only apply to citizens living outside the EU.
▪ Non-discrimination of third State nationals living in the EU	*****	The rules will apply to EU nationals and non-EU nationals having previously lived in the EU.
▪ Right to effective remedy (fair trial); reasonable time	***	Positive impact for those spouses who can agree on European Marriage status, but no change to the others.
Benefits and advantages of policy option	The option directly addresses the problems, which are completely solved for those citizens who choose the European Marriage status. For those who do not choose it, the situation will remain unchanged. A European Marriage status will also promote the sense of European citizenship.	

Table 9.7 – Policy Option 7 Summary Assessment **Introduce an optional European Marriage Regime**	
Disadvantages of policy option	There may be high administrative costs for developing the instrument, including a long and complicated preparatory period with hard negotiations between the Member States on the specifics of a European Marriage status, which will raise religious and cultural issues.
Issues raised in Green Paper, additional stakeholder and Public Hearing consultations	There is some support amongst practitioners who have been informed about the suggestion to develop the instrument.
Political acceptability	This policy option is unlikely to be acceptable in the foreseeable future due to cultural and religious differences and different traditions between the Member States. The political climate is not very favourable. It would require harmonisation of substantive family law for which the EU does not have legal basis to act.

Summary of Policy Option 8 – Increasing co-operation between Member States

Policy option 8 is a non-legislative instrument whereby the EU would provide some financial support to encourage relevant co-operation activities between Member States:

- Support to exchanging best practice on family courts.
- Networks of expertise on different national divorce laws, e.g. new or existing networks, such as the European Judicial Network in Civil and Commercial matters, could be contracted and encouraged to provide information on the contents and workings of national divorce law.
- Information campaign to inform EU citizens on differences between the Member States requirements for getting divorced and what a move to another EU country would mean.

On the annual basis, on the basis of similar EU initiatives, it could be envisaged that the EU could devote around €5 million to supporting of such co-operation activities between the Member States.

Table 9.8 – Policy Option 8 Summary Assessment
Increasing co-operation between Member States

Objective to be achieved / problem addressed	***Anticipated impact effectiveness (rated from * to *****)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
To increase legal certainty concerning applicable law and competent court	*	Uncertainty for spouses would be decreased with better information. It would be less likely that courts make radical mistakes when applying foreign law if specialist courts are set up, and if supporting measures such as practitioners / judges network can be used.
To increase party autonomy for citizens to choose applicable law / competent court and flexibility	–	No impact.
To ensure application of the law of the Member State with which the spouses feel closest connected	–	No impact.
To reduce the risk of 'rush to court'	–	No impact.
To ensure access to court for EU citizens living outside the EU	–	No impact.
Impacts on fundamental rights		
▪ Equality before the law (between men and women)	–	No impact.
▪ Non-discrimination of EU nationals	–	No impact.
▪ Non-discrimination of third State nationals living in the EU	–	No impact.
▪ Right to effective remedy (fair trial); reasonable time	–	No impact.
Benefits and advantages of policy option	The Member States will not be obliged to make any system or legislative changes, and there are direct benefits both for spouses and practitioners. Specialist courts will make divorce proceedings in cases of application of	

Table 9.8 – Policy Option 8 Summary Assessment Increasing co-operation between Member States	
	foreign law faster.
Disadvantages of policy option	The policy option does not solve any of the fundamental sources of the problems even though it will facilitate application of foreign law and assist in making EU citizens more aware of the complexity of the current situation (which means they will be better prepared in case of a divorce).
Issues raised in Green Paper, additional stakeholder and Public Hearing consultations	Lack of awareness has been raised as a problem, both with regard to the judicial process and for spouses who divorce. Problems that occur due to that judges (and lawyers) are unfamiliar with foreign law have been raised by many stakeholders, who have experiences of foreign law being wrongly applied. That there would be merit in more support by specialists when the law of another State is to be applied has been highlighted by many stakeholders. Stakeholders in countries which have specialised family courts promote such courts to also be set up in those Member States which do not have such a system.
Political acceptability	This policy option would be realistic and politically neutral in terms of not demanding any changes to Member States' current legal systems.

9.3 Comparison of policy options

This section provides a comparison of the policy options by outlining *who is affected, how and to what extent* by the implementation of each of the options. The following four summary tables are provided in turn:

- Table 9.9 – Comparison of policy options against the main objectives
- Table 9.10 – Comparison of policy options against impacts on spouses
- Table 9.11 – Comparison of policy options against impacts on legal professions
- Table 9.12 – Comparison of policy options against impacts on Member States

Table 9.9 – Comparison of policy options against the main objectives

Policy objectives / Policy options	Legal certainty	Party autonomy	Flexibility (access to courts in EU)	Applying law with which spouses feel closest connected	Reduce 'rush to court'	Access to court for EU citizens living outside the EU	Fundamental rights			
							Equality	*Non-discrimination of EU nationals*	*Non-discrimination of third State nationals in EU*	*Right to effective remedy (trial); time*
1) Status quo	–	**	–	**	–	*	–	–	–	–
2) Harmonise C-O-L rules, give spouses limited choice of law	*****	****	****	****	*****	***	*****	*****	*****	*****
3) Revising the Community rules for determining the competent court										
a. Extend	–	–	****	****	–	–	*****	*****	*****	–
b. Decrease	****	–	–	–	****	–	*****	*****	*****	***
c. Hierarchy	****	–	–	–	****		*****	*****	*****	****
4) Give spouses a limited choice of competent court ("prorogation")	**	****	****	***	****	***	*****	*****	*****	**
5) Limited possibility to transfer a case to another MS	–	*	****	*****	*****	–	*****	*****	*****	**
6) Common rules on residual jurisdiction	**	–	–	*	–	*****	*****	*****	*****	**
7) European Marriage	–	****	–	***	****	**	**	**	***	–
8) MS co-operation	****	****	****	****	***	***	*****	*****	*****	***

Table 9.10 – Comparison of policy options against impacts on spouses		
Policy options	**Positive impacts**	**Negative impacts**
1) Status quo	NA	All problems identified would remain unchanged.
2) Harmonise C-O-L rules, give spouses limited choice of law	Increased legal certainty***** Increased party autonomy**** Increased flexibility**** Increased application of law with which spouses feel closely connected **** Prevents rush to court***** Ensures access to court for citizens living outside EU*** *Encourages the spouses to come to an agreement on applicable law*	Limitations of party autonomy and associated benefits to spouses who agree on law. *Risk of pressure on the vulnerable spouse to agree on law.* *In cases when foreign law is applied there is a risk of:* - *Increased costs and lengthier divorce processes* - *Foreign law being wrongly applied*
3) Revising the Community rules for determining the competent court		
a. Extend	Increases flexibility**** Increased application of law with which spouses feel closely connected ****	Decreases legal certainty. No party autonomy. Increases risk of 'rush to court'. Does not ensure access to court for citizens living outside EU.
b. Decrease	Increases legal certainty**** Reduces risk of 'rush to court'****	No party autonomy. Decreases flexibility. Decreased application of law with which spouses feel closely connected. Does not ensure access to court for citizens living outside EU.
c. Hierarchy	Increases legal certainty**** Reduces risk of rush to court*****	No party autonomy. Decreases flexibility. Decreased application of law with which spouses feel closely connected. Does not ensure access to court for citizens living outside EU.
4) Give spouses a limited choice of competent court ("prorogation")	Increased legal certainty** Increased party autonomy**** Increased flexibility**** Increased application of law with which spouses feel closely connected *** Prevents rush to court**** Ensures access to court for citizens living outside EU***	Limitations of party autonomy and associated benefits to spouses who agree on competent court. *Risk of pressure on the vulnerable spouse to agree on court.* *In cases when foreign law is applied there is a risk of:* - *Increased costs and lengthier divorce processes* - *Foreign law being wrongly applied.*

Table 9.10 – Comparison of policy options against impacts on spouses

Policy options	Positive impacts	Negative impacts
	Encourages the spouses to come to an agreement on competent court	
5) Limited possibility to transfer a case to another MS	Increased flexibility**** Increased application of law with which spouses feel closely connected ***** Prevents rush to court*****	Decreases legal certainty. No party autonomy as such. Does not ensure access to court for citizens living outside EU. *Lengthier and costlier divorce processes to first determine whether the case should be transferred or not and than executing the actual transfer.*
6) Common rules on residual jurisdiction	Increased legal certainty** Increased application of law with which spouses feel closely connected ** Ensure access to court for citizens living outside EU*****	No party autonomy as such. Does not reduce 'rush to court'.
7) European Marriage	Increased legal certainty**** Increased party autonomy**** Increased flexibility**** Increased application of law with which spouses feel closely connected **** Prevents rush to court****	The positive impacts are limited to those spouses who can agree on choosing the European Marriage (EM) status. For the other citizens the problems in the current situation will remain.
8) MS co-operation	Increased legal certainty* *In cases when foreign law is applied, benefits compared to the current situation include:* - *Decreased costs and shorter divorce processes* - *Decreased risk for foreign law being wrongly applied*	No impact on party autonomy. No impact on extent of application of law with which spouses feel closely connected. Does not reduce 'rush to court'. Does not ensure access to court for citizens living outside the EU.

Table 9.11 – Comparison of policy options against impacts on legal professions

Policy options	Positive impacts	Negative impacts
1) Status quo	No training on a new legal system would be necessary.	Difficulties making a legal assessment of where to lodge a divorce petition would remain. Problems associated with application of foreign law would remain.
2) Harmonise C-O-L rules, give spouses limited choice of law	Increased efficiency as the same rules will apply across the EU which facilitates the legal assessment. New work opportunities can be created due to increased workload to ensure that formal requirements are fulfilled when spouses agree on applicable law.	Initial training on the revised EU legislation. Training on formal requirements when spouses agree on law. In cases of application of foreign law: - Application of unfamiliar foreign laws/procedures - Continuous training on application of foreign law
3) Revising the Community rules for determining the competent court		
a. Extend		Decreased efficiency as the legal assessment will be more difficult due to increased numbers of grounds for establishing competent courts. Some initial training on the revised legislation.
b. Decrease	Increased efficiency as there will be fewer grounds for jurisdiction.	Some initial training on the revised legislation.
c. Hierarchy	Increased efficiency as there will be only one solution in each given case.	Initial training on the revised legislation.
4) Give spouses a limited choice of competent court (“prorogation”)	Increased efficiency as the spouses may agree on competent court. New work opportunities can be created due to increased workload to ensure that formal requirements are fulfilled when spouses agree on applicable law.	Initial training on the revised legislation. Training on formal requirements when spouses agree on law.
5) Limited possibility to transfer a case to another MS	Decreased efficiency as one spouse may request that a case is transferred. New work opportunities might be created since the workload increases.	Initial training on the revised legislation. Training on requirements for transferring a case.
6) Common rules on residual jurisdiction	New work opportunities might be created in those countries that currently do not give citizens the possibility to access court on the basis of their nationality.	Initial training on the revised legislation.
7) European Marriage	Greatly increased efficiency in those cases spouses have chosen the EM since no legal assessment of competent court or applicable law is necessary. New work opportunities might be created terms of professionals specialised on the new law.	Initial training on the revised legislation.
8) MS co-operation	Increased efficiency in cases where foreign law is applied since the option includes measures to facilitate application of foreign law. New work opportunities are likely to be created to assist in application of foreign law.	Increased efficiency in cases where foreign law is applied since the option includes measures to facilitate application of foreign law. New work opportunities are likely to be created to assist in application of foreign law.

Table 9.12 – Comparison of policy options against impacts on Member States' administrative and legal systems and associated costs

Policy options	Changes to legal systems and assessment of costs
1) Status quo	There would be no other changes or costs than those triggered by individual MS on their own initiative.
2) Harmonise C-O-L rules, give spouses limited choice of law	There will be some to major changes to the national legal systems, to a higher extent in those 6 MS that currently have systems based on lex fori than those with a system based on connecting factors as the option would involve a possibility to apply foreign law. The option would imply costs at EU and / or national level for facilitating application of foreign law. The costs are likely to be higher in those countries with lex fori systems. National level measures include setting up national institutes or courts specialised in application of foreign law. Costs can be assessed by looking at existing institutes and courts, e.g. in the NL, Germany and Austria. For EU level support, see policy option 8.
3) Revising the Community rules for determining the competent court	
a. Extend	The option does not result in any major changes to the national legal systems and no major costs are associated.
b. Decrease	The option does not result in any major changes to the national legal systems and no major costs are associated.
c. Hierarchy	The option would replace the current alternative grounds of jurisdiction that determine what MS courts are competent to handle a case. This option would therefore not imply any major changes to the national legal systems or costs as the MS would be able to keep their respective conflict of law systems based on connecting factors or lex fori.
4) Give spouses a limited choice of competent court ("prorogation")	Giving the spouses a limited choice of competent court would not imply any major changes to the national legal systems or costs as the MS would be able to keep their respective conflict of law systems based on connecting factors or lex fori. Foreign law will therefore only be applied in those MS which already have a system based on connecting factors. Since stakeholders indicate that foreign law is often wrongly applied in these countries, it may be scope in adopting supportive measures in these MS, see comments on costs in policy option 2.
5) Limited possibility to transfer a case to another MS	The option does not result in any major changes to the national legal systems and no major costs for MS administrations are associated except that the option would result in increased workload for the courts.
6) Common rules on residual jurisdiction	The option does not result in any major changes to the national legal systems and no major costs for MS administrations are associated.
7) European Marriage	The option would not replace Community or national rules on competent court or applicable law, but provide an additional measure that could be chosen by citizens. However, there would be lengthy research processes and costs for developing the instrument, including a long and complicated preparatory period with hard negotiations between the Member States on the specifics of the EM status. The option is unlikely to be acceptable by the Member States in the foreseeable future due to differences between the Member States regarding culture, religion and legal traditions. In addition, it would require harmonisation of substantive law for which the EU does not have legal basis.
8) MS co-operation	EU would provide some financial support (e.g. 5 million euro/year) for different measures to facilitate application of foreign law and/or an information campaign for EU citizens about e.g. the differences in the MS legal systems and consequences of a move. It is likely that MS need to bear some costs for these initiatives depending on the content of the initiative(s). Costs can be assessed on the basis of similar existing activities at EU and national levels.

9.4 Summary assessments

The main advantages and disadvantages of each of the policy options are described below:

The benefits of maintaining the '**Status quo**', Policy Option 1, are that no additional financial commitment or legislative or system changes would be required. Given that the New Brussels II Regulation only very recently came into force, revising the legislation again would have negative impacts in terms of costs and time, not only for Member States, but also for professionals who need to be trained on the new legislation. However, Policy Option 1 will not address the policy objectives because actions of individual Member States will not improve the situation for divorcing international spouses. Problems such as difficulties for spouses to predict what law will be applied and rush to court will not be reduced. The latter problem, which concerns all divorces, except mutual consent cases, is not likely to diminish without harmonisation of rules (or substantive laws) in relation to divorce and ancillary matters. There are currently no evident trends towards convergence of Member States' substantive divorce laws. Application of the law of the Member State with which spouses feel closest connected might be improved to some degree, but this is entirely dependent on the individual Member States and whether they decide to change their conflict of law rules on their own initiative and introduce a possibility to choose applicable law. Access to court for EU citizens outside the EU may improve if Member States change their national laws. Negative consequences for the spouses in terms of distress, time taken, high costs and rights of the weaker spouse are likely to remain unchanged. Fundamental rights would not be furthered by this option. Current trends, which indicate that EU citizens are increasingly taking advantage of the free movement, mean that there is a likelihood of an increased number of international marriages and international divorces in the future. This means that more EU citizens will be subject to the problems described above.

Policy Option 2, Community legislative action in terms of '**Harmonisation of the national conflict of law rules and giving the spouses a limited possibility to choose applicable law'** would lead to a number of improvements compared to the current situation. It would to a high extent increase legal certainty, party autonomy and flexibility. Rush to court, which has been identified by several stakeholders as the most severe current problem since it decreases mediation efforts and leads to disadvantages for the vulnerable spouse, would be completely prevented. In those cases when spouses cannot agree on applicable law, it will be 'automatically' determined through the harmonised conflict-of-law rules. The policy option would also to a high degree ensure application of the law of the Member State with which the spouses feel closest connected, as long as they can agree on a law, based for instance on a limited choice between the law of their (last) common habitual residence, nationality and lex fori. Data for four countries (Italy, Luxembourg, Austria and Poland) show that between 70 and 90% of the divorces are made with mutual consent. Consistency of approach and rights would also be improved. The main drawbacks of the policy option are that there would be a possibility for courts to apply foreign law, which is regarded as highly problematic by practitioners because of practical problems. It might 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 if this is done by the judge 'ex officio'. Moreover, there is a risk that the foreign law is wrongly applied. Several stakeholders consulted had direct experience of this. The adoption of measures to facilitate application of foreign law should reduce the negative consequences in terms of delays, increased costs, and risks that the foreign law is wrongly applied (see Policy Option 8). In terms of impacts on legal professions, the option would lead to increased efficiency as the harmonised conflict-of-law rules would simplify the legal assessment. It could also lead to new work opportunities because of formal requirements for spouses who agree on law[67]. Training on the new legislation would be needed. Regarding political acceptability, in general Member States are in favour of giving spouses a limited choice of law, but it is unlikely that they will be able to agree content of harmonised conflict of law rules as it would imply changes to current national legal systems. There is strong resistance to this in particular from those countries that have a conflict of law rules system based on lex fori.

Policy Option 3, Community legislative action in terms of '**Revising the Community rules for determining competent court**' would only address spouses' problems to a minor extent. This is independent of which of the alternative revisions that would be made to current jurisdiction grounds in Article 3 of the New Brussels II Regulation: (a) extending the grounds; (b) decreasing the grounds; or (c) introducing a hierarchy of jurisdiction grounds. Each of the sub-options implies a trade-off between legal certainty and flexibility. Moreover, none of the sub-options would give EU citizens in international marriages living outside the EU access to court or increase party autonomy. Two of the sub-options (decreased grounds and introducing a hierarchy of jurisdiction grounds) would even decrease party autonomy. Both of these sub-options would though, reduce the risk of 'rush to court' and also increase efficiency for legal professions as there would be fewer grounds for jurisdiction (which would simplify the legal assessment). Extending the grounds would on the other hand decrease the efficiency. All sub-options would result in increasing training needs for legal professions on the new legislation. However, none of the sub-options would lead to any major changes to the national legal systems or costs. Even though the sub-option does not imply any major changes to MS current legal systems, most MS are against re-opening the discussions on the grounds of jurisdiction.

Policy Option 4, Community legislative action in terms of '**Introducing a limited possibility for the spouses to choose the competent court ('prorogation')**', would have some positive impact on most of the policy objectives, but only for those spouses who can agree on competent court. The main difference between introducing a limited choice of applicable law (policy option 2) and limited choice of competent court (this policy option) is that by choosing competent court, the spouses only indirectly choose the applicable law. At first sight, it may seem better to allow spouses to directly choose the law. However, to allow them instead a limited choice of jurisdiction would mean that the

[67] Whether this refers to notaries, judges or lawyers depend on the Member States' legal systems and who is responsible for establishing such agreements formally.

Member States could keep their current conflict of law rules (i.e. the two different systems based either on (1) application of the national law only, or (2) the possibility to apply foreign law). It was evident in consultations that there is reluctance to change these systems. For legal professions, giving spouses a limited possibility to choose competent court would lead to increased efficiency and could also lead to creation of new work opportunities due to formal requirements for establishing the agreement. Training on the new legislation and the formal requirements would be necessary. As the option would only lead to benefits for spouses who can agree on law, it would need to be supported by 'objective grounds' to establish competent court for those spouses who are unable to agree on law, e.g. combining it with current jurisdiction rules or revisions of these indicated in policy option 3. Member States are in general supportive to giving the spouses a limited choice of court and / or applicable law.

Policy Option 5 would imply Community legislative action in terms of '**Introducing a limited possibility to transfer a case to the courts of another Member State**'. The main objectives of introducing a possibility to transfer a case in exceptional circumstances are to decrease the risk and negative consequences of 'rush to court' and ensure that the vulnerable spouse is not abused. This policy option therefore has a status as a 'supporting measure' to safeguard the vulnerable party. Advantages include increased flexibility, increased application of the law with the marriage was most closely connected and reduced risk of 'rush to court'. It would, however, not improve several of current problems. In particular, it would decrease legal certainty, not affect party autonomy or ensure access to court for EU citizens living outside the EU. For legal professions it would lead to increased workload and decrease efficiency as one spouse may request that the case is transferred. Training on the new provisions would be necessary. Due to negative consequences associated with the introduction of the option in terms of delays of the divorce proceedings (due to the necessity to first determine whether the case should be transferred or not and than executing the actual transfer) and additional costs for the spouses, Member States and other stakeholders are in general against adoption of this policy option.

Policy Option 6, Community legislative action in terms of '**Adopting common rules on residual jurisdiction to ensure that EU citizens living outside the Union have access to court**' addresses a separate problem. In some cases, EU citizens in international marriages living outside the EU may currently not apply for divorce either in the country they are living in or in the EU (on the basis of their nationality). This option therefore addresses a fundamental right of access to court. Positive impacts are mainly evident in terms of achieving the specific objective of access to court. It would also increase legal certainty for EU citizens in international marriages outside the EU and to some extent increase application of the law with which this group of spouses feel closest connected since some spouses may want to move back to their country of origin. Member States are in general in favour of adopting a common rule on 'residual jurisdiction', including those Member States that currently have rules that give their nationals access to court.

Policy Option 7, Community legislative action in terms of '**Introducing an optional European Marriage regime**', the radical policy option, would drastically improve the situation for those EU citizens who would choose such a marriage status. It would ensure legal certainty, application of the law they have chosen, prevent 'rush to court' and increase party autonomy. One disadvantage of the option is that probably not all EU citizens would choose such a European Marriage status, which means that those citizens that do not would still be subject to the rules which currently apply and thereby liable to the associated problems. However, the main drawback is in terms of feasibility. Firstly, it can be envisaged that there would be a lengthy and difficult preparatory period for developing a proposal for such an instrument. Secondly, once such a proposal has been finalised, there is a high probability of prolonged negotiations between the Member States to agree on the content, based on tradition and cultural and religious differences. Costs associated with developing and implementing the instrument may be high. The option is unlikely to be acceptable by the Member States in the foreseeable future due to differences between the Member States regarding culture, religion and legal traditions. In addition, it would require harmonisation of substantive law for which the EU does not have legal basis to act.

Policy Option 8, non-legislative action in terms of '**Increasing co-operation between the Member States**' would not require any legislative changes at EU or national level, but some financial support would be provided from the EU to Member States for cooperation activities. The option would be largely focussed on improving the current situation rather than changing it. As such, it would not solve any of the fundamental sources of the problems and will only address some of the problems to some degree. It would therefore not go far towards addressing the policy objectives. However, in a political climate that may be reluctant to make changes to the current system, this may be the most feasible option in terms of political acceptability. Actions include (1) Support to exchanging best practice on family courts; (2) Networks of expertise on different national divorce laws (e.g. new or existing networks, such as the European Judicial Network in Civil and Commercial matters, could be contracted and encouraged to provide information on the contents and workings of national divorce law); and, (3) Information campaign targeted at EU citizens. Depending on what actions would be adopted, positive impacts include that it would lead to higher effectiveness in cases where foreign law is applied, which would lead to decreased costs, shorter divorce processes and decreased numbers of cases where foreign law is applied incorrectly. Informing EU citizens about the problems would result in higher awareness and preparedness for the results of a move to another EU Member States, but it could have negative impacts on the trust in the EU citizenship and common judicial area, and decrease incentives for moving within the EU.

9.5 The preferred policy option

These considerations indicate that none of the individual policy options completely addresses the problems nor achieves the policy objectives. However, by combining different aspects of the policy options, a higher degree of effectiveness could be achieved. Based on the assessments, and in view of the stakeholder consultations, there would be merit in basing the preferred option on the following policy options:

- Policy Option 2: Harmonisation of the national conflict of law rules and giving the spouses a limited possibility to choose applicable law;
- Policy Option 3: Introducing a hierarchy of jurisdiction grounds;
- Policy Option 4: Introducing a limited possibility for the spouses to choose the competent court ('prorogation'); and,
- Policy Option 6: Adopting common rules on residual jurisdiction to ensure that EU citizens living outside the Union have access to court.

Aspects of Policy Option 8 as to support possible application of foreign law could also be adopted (optional).

The key characteristics and the assessment of the preferred policy option are provided in Section 10, which also outlines relevant safeguard mechanisms.

10 ELABORATION OF THE PREFERRED OPTION

10.1 Introduction

This Section provides a more detailed elaboration of the proposed preferred policy option. The policy option is firstly outlined with the associated legal actions and safeguard mechanisms and then assessed on the basis of its potential benefits, risks and indirect impacts.

10.2 Key features of the preferred policy option

On the basis of the assessment of the eight policy options presented in Section 9, it is clear that none of the individual policy options completely addresses the problems or fully achieves the policy objectives. However, by combining different aspects of the policy options, a higher degree of effectiveness could be achieved.

The preferred policy option, which represents the most effective means to addressing current problems, is therefore proposed to include the following aspects of the assessed options:

- Harmonisation of the national conflict of law rules and giving the spouses a limited possibility to choose applicable law (Policy Option 2);
- Introducing a hierarchy of jurisdiction grounds (Policy Option 3);
- Introducing a limited possibility for the spouses to choose the competent court ('prorogation') (Policy Option 4); and,
- Adopting common rules on residual jurisdiction to ensure that EU citizens living outside the Union have access to court (Policy Option 6).

The characteristics of each of these aspects of the preferred policy option are presented below in terms of benefits and disadvantages, as well as mechanisms that would safeguard vulnerable parties.

10.3 Harmonisation of conflict of law rules and introducing a hierarchy of jurisdiction grounds

Community legislation that includes both a hierarchy of jurisdictions and harmonisation of conflict of law rules as supporting measures for cases when spouses cannot agree on court or law (see Section 10.4 below) is more effective than adopting only one of the systems as long as they are based on the same connecting factors linking the spouses to a particular country. If the same criteria are used to determine both competent court and applicable law, and if the first criterion is common habitual residence, this would lead to a situation where lex fori is applied in most of the cases, and problems associated with the application of foreign law could be avoided to a high extent. The hierarchy of connecting factors for both conflict and law rules and hierarchy of jurisdiction could, for instance, be:

1. Common habitual residence
2. Last common habitual residence
3. Common nationality
4. Lex fori

Legislation on connecting factors must be carefully drafted. Stakeholders have highlighted that 'habitual residence' may be subject to circumvention if not properly specified[68].

Measures to be adopted to facilitate application of foreign law are described in Section 10.5 below.

10.4 Providing the spouses with a limited choice of jurisdiction and applicable law

Providing the spouses with the possibility of a limited choice of jurisdiction or applicable law would drastically improve the probability that the law with which the spouses are closest connected is applied. It would also increase party autonomy (in mutual consent cases), increase flexibility and promote mediation efforts.

Concerning safeguard mechanisms, in order to prevent the creation of a 'divorce paradise' where spouses apply for a divorce in a Member State with which they have no connection, their choice of court or applicable law should be limited to countries with which they have a connection based on alternative connecting factors, e.g. common habitual residence, nationality and lex fori.

Formal requirements for setting up the agreement should also be established. Such requirements could include specifications of time for setting up the agreement and possible modifications (whether it would be possible during the entire time of the marriage until the time for divorce), that both parties must have been informed of the consequences of their divorce by a lawyer (or similar) and that the agreement should be concluded in writing before a notary or similar legal representative.

10.5 Additional measures – safeguard mechanisms

- A **public policy clause** could be included, which would allow the Member States to deny application of a law contradictory to their fundamental values and family policies.

- Article 7 could be revised to ensure that **EU citizens living outside the EU would have access to a court** in the EU in case they want to get divorced[69] (Policy Option 6). Currently, not all Member States allow citizens to get divorced in

[68] Common habitual residence could be restricted to only apply after a given number of years. Practitioners point to that 1 or 2 years may be too little for citizens to fully settle down in a country and have suggested from 5 to even 10 or 15 years.

[69] For example, where no court of a Member State has jurisdiction pursuant to the above rules, the courts of a Member State are competent by virtue of the fact that one of the spouses has the nationality of that Member State or the spouses had their last habitual residence in that Member State.

the country on the basis of their nationality (see Annex 5). Negative outcomes need to be considered, including problems for citizens who remain in the third country where the divorce may not be recognised. This could be regarded as an intrusive measure by third countries.

- **Supporting measures** from Policy Option 8 could be adopted to assist cases when foreign law is applied, e.g. promoting best practice on family courts, specialised legal institutes and a network of expertise. It would be merit in further exploring the role of the European Judicial Network in this context.

10.6 Legal separation and marriage annulment

In view of the specifics of the policy option, it would be merit in governing both legal separation and divorce by Community provisions, but treating marriage annulment in accordance with national rules.

Considering that legal separation is sometimes treated as the necessary precursor to divorce, there are clearly benefits in treating both divorce and legal separation by the same law. All but two Member States currently provide for legal separation. Spouses who choose competent court should be made aware that not all Member States provide for legal separation when they make their choice.

However, as concerns marriage annulment, it should be borne in mind that the nullity declaration is a reaction to defects in the contracting of a marriage. Member States' annulment arrangements primarily pursue public-order objectives (e.g. preventing bigamy). The validity of marriage is therefore better determined according to the conditions of the law which provided for the prerequisites of entering into the marriage, or possibly by the national law of the spouse concerned. Stakeholders have emphasised that issues related to the validity of marriage do not belong to the autonomy of the spouses, since they are related to the protection of the public interest.

10.7 Summary assessment of the preferred policy option against the main objectives

Table 10.1 below provides the detailed assessment of the preferred policy option against the main objectives. After this table, impacts on legal professions and Member States are described.

Table 10.1 – Summary assessment of the Preferred Policy Option against the main objectives		
Objective to be achieved/ problem addressed	***Anticipated impact effectiveness (rated from * to *****)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
To increase legal certainty concerning applicable law and competent court	****(*)	Harmonised conflict of law in combination with a hierarchy of jurisdictions, based on the same connecting factors with common habitual residence as first connecting factor will ensure legal certainty as far as possible in the current situation where substantive laws still will differ between Member States. Not only will there be clarity in terms of having a common system throughout the EU, but also, having common habitual residence as first connecting factor, will result in that lex fori probably will be applied in a majority of cases when the spouses cannot agree on law. This means that the problems related to application of foreign law will be scarce. Introducing a possibility to choose applicable law or competent court will also increase legal certainty.
To increase party autonomy for citizens to choose applicable law / competent court	****	Party autonomy will be greatly increased for those couples who are able to agree on competent court and applicable law.
To increase flexibility in terms of access to courts in Member States for citizens living in the EU	***(*)	Flexibility will be greatly increased for those couples who are able to agree on competent court. For other spouses, the hierarchy in combination with harmonised applicable law rules will only provide for one solution in each given case.
To ensure application of the law of the Member State with which the spouses feel closest connected	****	Will increase to a high extent for those spouses who agree on competent court or applicable law. For other spouses, the hierarchy in combination with harmonised applicable law rules will only provide for one solution in each given case.
To reduce risk of 'rush to court'	*****	Rush to court would be completely prevented by the adoption of this policy option. If the spouses cannot agree on competent court or law, jurisdiction and applicable law will be 'automatically' determined through the hierarchy of jurisdictions and harmonised conflict of law rules.
To ensure access to court for EU citizens living in third countries	*****	EU citizens' access to court could be ensured by a revision to Article 7 of the New Brussels II Regulation to allow spouses to get divorced in the EU on the virtue of their nationality. Furthermore, EU citizens in international marriages may choose competent court or applicable in the EU independent on whether they live in the EU in a

Table 10.1 – Summary assessment of the Preferred Policy Option against the main objectives		
Objective to be achieved/ problem addressed	***Anticipated impact effectiveness (rated from * to *****)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
		country outside the borders of the Union.
Impacts on fundamental rights		
▪ Equality before the law (between men and women)	*****	The rules will apply independently of gender.
▪ Non-discrimination of EU nationals	*****	The same rules will apply independently of nationality.
▪ Non-discrimination of third State nationals living in the EU	*****	The rules will apply to EU nationals and non-EU nationals having previously lived in the EU.
▪ Right to effective remedy (fair trial); reasonable time	*****	The combination of giving the spouses a limited choice of competent, harmonised conflict of law rules and a hierarchy of competent court would greatly increase efficiency of determining competent court and applicable law.
Benefits and advantages of options	There are clear benefits of this policy option, since it addresses the problems and achieves the objectives to a higher extent than any of the other options. Only a policy option including changes to substantive laws (which is not within the Community competences) would be able to achieve a higher rating.	
Disadvantages of policy option	The adoption of the policy option is dependent on what rules the Member States can agree on e.g. the content of harmonisation of conflict of law rules and competent court.	
Issues raised in Green Paper, additional stakeholder and Public Hearing consultations	The vast majority of stakeholders are in favour of introducing a limited choice of court and applicable law for spouses. Many are also in favour of harmonising conflict of law rules. A high number of stakeholders have commented on problems in relation to application of foreign law and emphasised the importance of adopting supporting measures to facilitate such application e.g. finding out content of the law. There is a favourable environment to adopting common rules on residual jurisdiction.	
Political acceptability	Some Member States indicated that, due to the previous lengthy negotiation process to agree on the New Brussels II Regulation, they are unwilling to make other than only minor changes to the grounds for jurisdiction in the Regulation. In general, there seems to be support for providing the spouses with a choice of court and applicable law as well as adopting common jurisdiction rules.	

10.8 Impacts of the preferred policy option on legal professions and Member States

This section briefly outlines the impacts of the preferred policy option on legal professions and Member States.

For **legal professions**, the option would have the following impacts.

Table 10.2 – Impacts of the preferred option on legal professions by aspect of policy option

Positive impacts	***Negative impacts***
Harmonisation of conflict of law rules	
▪ Increased efficiency as the same rules will apply across the EU which facilitates the legal assessment.	▪ Initial training on the new Community legislation. ▪ In cases of application of foreign law: - Application of unfamiliar foreign laws/procedures - Requirements for continuous training on application of foreign law
Introducing a hierarchy of jurisdiction grounds	
▪ Increased efficiency in making a legal assessment of competent court as there will be only one solution in each given case.	▪ Initial training on the revised Community legislation.
Introducing a limited possibility for spouses to choose competent court and applicable law	
▪ New work opportunities in relation to establishing agreement between spouses.	▪ Initial training on new Community legislation and formal requirements for establishing agreement between spouses
Adopting common rules on residual jurisdiction to ensure that EU citizens living outside the Union have access to court	
▪ Increased workload might be created in those countries that currently do not give citizens the possibility to access court on the basis of their nationality.	▪ Initial training on the new Community legislation

For **Member States** the following changes to legal systems and costs assessments would occur.

Table 10.2 – Impacts of the preferred option on Member States by aspect of policy option

Changes to legal systems	*Assessment of costs*
Harmonisation of conflict of law rules	
There will be some major changes to the national legal systems. This will be necessary to a higher extent in those 6 MS that currently have systems based on lex fori than those with a system based on connecting factors as the option would involve a possibility to apply foreign law.	The option would imply costs at EU and / or national level for facilitating application of foreign law. The costs are likely to be higher in those countries with lex fori systems. National level measures include setting up national institutes or courts specialised in application of foreign law. Costs can be assessed by looking at existing institutes and courts, e.g. in the NL, Germany and Austria. Possibilities for EU level support are described under policy option 8.
Introducing a hierarchy of jurisdiction grounds	
The option would replace the current alternative grounds of jurisdiction that determine what Member States courts are competent to handle a case. This aspect of the option would therefore not imply any major changes to the national legal systems.	This aspect of the option would not imply any costs to Member States as no changes to their legal systems are required.
Introducing a limited possibility for spouses to choose competent court and applicable law	
Giving the spouses a limited choice of competent court would not lead to any major changes, whilst limited choice of applicable law would lead to some to major changes to the national legal systems, to a higher extent in those 6 MS that currently have systems based on lex fori than those with a system based on connecting factors as the option would involve a possibility to apply foreign law.	For limited choice of competent court, no major costs are associated; for limited choice of applicable law see costs for harmonisation of conflict of law rules above.
Adopting common rules on residual jurisdiction to ensure that EU citizens living outside the Union have access to court	
The option would replace national rules on residual jurisdiction.	In those countries that currently do not give citizens the possibility to access court on the basis of their nationality there might be an increased workload for the courts, but otherwise no major costs are associated with this option.

10.9 Subsidiarity and proportionality

The subsidiarity principle ensures that within the EU intervention is taken at the most appropriate level to achieve the policy objectives and address the problems in the current situation. The proportionality principle provides that measures taken are proportionate to the size and extent of the problems (i.e. that public authorities do not 'use the hammer to crack the nut').

Action at EU level is not to go beyond what is necessary. The legal basis for Community action in the divorce area is established in Articles 61(c) and 65 of the Treaty establishing the European Community. These provisions state that in order to establish a genuine European law-enforcement area, the Community is to 'adopt measures in the field of judicial cooperation in civil matters in so far as necessary for the proper functioning of the internal market'. Furthermore, the principle of proportionality, as set out in Article 5 of the Treaty establishing the European Community, provides that common action shall not go beyond what is necessary to achieve the objectives.

National substantive rules are not affected by the proposed Community action. Cases involving nationals of only one Member States are also not affected. Due to the transnational nature of the problem, i.e. that the cases concerned always involve spouses from more than one country, and due to that there currently are no indications of convergence of either national conflict-of-law rules or substantive laws in the area, neither national, bilateral nor action involving several, but not all Member States would address the problems described. Furthermore, the problems caused by current Community provisions on jurisdiction, including 'rush to court', insufficient legal certainty and party autonomy, would remain.

The fact that the courts of the Member States would apply the same conflict rules to determine the law applicable to a practical situation would increase legal certainty and thereby reinforce EU citizens' trust in judicial decisions given in other Member States and the free movement of people[70]. For individuals to be able to fully exercise their rights wherever they might be in the Union, the EU has acknowledged that the incompatibilities between judicial and administrative systems between Member States have to be removed[71]. It is clear that without Community action in the area of divorce matters, the problems identified would not be resolved and the policy objective of a common judicial area that make life for the EU citizens easier would not be achieved. Common action therefore respects the principle of subsidiarity articulated in the Article 2 of the Treaty on European Union and Article 5 of the Treaty establishing the European Community.

There are a large and growing number of EU citizens that are affected directly and indirectly by international divorces. Divorce amongst those of the same nationality is traumatic and can be costly. The situation is likely to be worse for international divorcees because of the problems indicated. The absence of a European area of justice in divorce matters is contrary to agreed EU level objectives. The costs of the proposed reforms are

[70] The Treaty of Amsterdam made judicial co-operation in civil matters a European Community policy linked to the free circulation of people.

[71] 2005 Hague programme

modest and the benefits are, in comparison, very large. Simply reducing uncertainty should reduce legal costs before consideration is given to the wider impacts on lawyers. It would create a level playing field to the extent that this is possible whilst Member States retain full sovereignty over grounds for divorce and associated divorce law. The only other option that would achieve the same impacts would be the introduction of a European marriage regime. However, it is not within the Community competence and the EU does not have the competence to harmonise substantive law. In addition, many people might not choose this option, i.e. its benefits would be limited, irrespective of the difficulties of reaching a consensus on the need.

10.10 EU added value

The EU added value in acting to provide spouses with a limited choice of court and applicable law, supported by harmonised conflict of laws and establishment of competent jurisdiction on the basis of objective grounds, can be identified in the following areas.

The problems that the preferred policy option would address stem from transnational and cross-border nature of the marriages involved. It was demonstrated earlier that the number of international divorces in the EU is around 170,000 cases per year or 16% of all divorces. Feedback from practitioners suggest that a significant proportion of these divorcing couples experience a number of legal problems arising from the current rules governing international marriage and divorce. No Member State acting alone would be able to address and solve the problems identified in the current situation. In contrast, the preferred policy option, based on legislative intervention by the EU, would address the problems arising from the transnational character of international marriages and subsequent divorces.

In addition, the lack of EU action in this area would significantly damage the legitimate interests of EU citizens, who have certain expectations of the functioning and effective European area of justice. In the current situation, divorcing international couples face considerable legal uncertainty, no choice except in a very limited number of countries, inconsistency of the approach and experience distress and high cost in international divorce proceedings. The preferred policy option of EU legislative action would be able to address such problems.

The preferred policy option would also meet the EU obligation to safeguard and ensure the protection of citizens' fundamental rights. In particular, it would ensure that the international spouses are not discriminated because of their nationality, that an effective remedy to their situation takes reasonable time and everybody is equal before the law. Finally, it would ensure that EU citizens in international marriages living outside the EU have access to court.

11 MONITORING AND EVALUATION

Monitoring and evaluation of the preferred policy option are important elements to ensure its efficiency and effectiveness in addressing the problems and meeting policy objectives. Table 11.1 below suggests several indicators to evaluate the progress made by the preferred option towards achieving each of the objectives set for such a legislative instrument.

Evaluation would require regular follow-up surveys of divorcing couples and legal practitioners, as well as collection of information from judicial records from the Member States. A proper, regular and systematic assessment of effectiveness and efficiency of the preferred policy option would have cost implications, which might require support, in terms of financial and human resources, from the European Commission.

Table 11.1 – Potential monitoring and evaluation indicators of the preferred Policy Option

Objectives	Evaluation indicators	Sources of information
To increase legal certainty concerning applicable law and competent court	Time taken for legal professions to determine applicable law and competent court. Related costs for spouses. Divorcing international spouses' perceptions of legal certainty (i.e. clarity of what law is applicable and court competent to handle their case).	Regular follow up surveys of divorcing spouses and legal practitioners
To increase party autonomy for citizens to choose applicable law / competent court	Numbers of established agreements between spouses on competent court and applicable law. Numbers of divorce cases handled where applicable law and competent court are based on an established agreement between spouses. Divorcing international spouses' perceptions of party autonomy (e.g. extent, relevance of connecting factors etc.).	Regular follow up surveys of divorcing spouses and legal practitioners Judicial records from Member States
To increase flexibility in terms of access to courts in Member States for citizens living in the EU	Divorcing international spouses' perceptions of flexibility. Legal professions' perceptions of flexibility.	Regular follow up surveys of divorcing spouses and legal practitioners
To ensure application of the law of the Member State with which the spouses feel closest connected	Divorcing international spouses' perceptions of whether the law with which they feel closest connected is applied.	Regular follow up surveys of divorcing spouses
To reduce risk of 'rush to court'	Legal professions' perceptions of whether jurisdiction rules provide the possibility to 'rush to court' and estimation of numbers of cases when this occur.	Regular follow up surveys of legal practitioners
To ensure access to court for EU citizens living in third countries	Numbers of divorcing international spouses living outside the EU experiencing problems accessing court.	Regular follow up surveys of legal practitioners
Impacts on fundamental rights		
▪ Equality before the law (between men and women)	Women's / financially weaker parties' perceptions of fairness of divorce proceedings	Regular follow up surveys of divorcing spouses and legal practitioners
▪ Non-discrimination of EU nationals	Divorcing international spouses' (who are national of an EU Member State) and legal professions' perceptions of (non-) discrimination.	Regular follow up surveys of divorcing spouses and legal practitioners
▪ Non-discrimination of third State nationals living in the EU	Divorcing international spouses' (who are third State nationals) and legal professions' perceptions of (non-)discrimination.	Regular follow up surveys of divorcing spouses and legal practitioners
▪ Right to effective remedy (fair trial); reasonable time	Length of divorce proceedings	Regular follow up surveys of divorcing spouses and legal practitioners Use of EU-level expert networks to assess the consistency

ANNEX 1 – NUMBERS OF INTERNATIONAL MARRIAGES AND DIVORCES

The following breakdown of data has been made when calculating numbers of international divorces and marriages:

- **Total population**
- **Weighted average for 2003** (calculated on the basis of data available from 13 countries on international marriages and 9 countries on international divorces as of numbers of marriages or divorces in relation to 10,000 persons)
- **Total number of marriages / divorces** (adding national marriages / divorces and international marriages / divorces)
- **Total number of national marriages** / **divorces** (including only nationals of the Member State for which the data is provided)
- **Total number of international marriages / divorces** (adding the total number of mixed divorces / marriages including a national of the Member State for which the data is provided and the numbers of divorces / marriages between two foreigners)
- **Total number of mixed divorces / marriages between the national of the Member State for which the data is provided** and divorces / marriages with citizens of:
    1. Other EU Member States
    2. Non-EU Member States
    3. Other and unknown (this number may include both with EU citizens and citizens of Non-EU Member States)
    4. Double nationality
- **Other and unknown**
- **Foreigners getting divorced in the country** (this number includes divorces / marriages between two foreigners either of the same nationality or different nationality, however, none of them national of the country for which the data is provided. No distinction between EU or Non-EU nationals has been made at this stage)

Eurostat data on total numbers of marriages and divorces have also been included for each country in order to provide an overall picture of numbers recorded in the Member States.

The following tables are included in turn:

- Table A1.1 – International marriages in the Member States
- Table A1.2 – International divorces in the Member States
- Table A1.3 – Five most frequently occurring international marriages by Member State (The most frequent country has been shaded dark. Member States are written in *italics*.)
- Table A1.4 – Five most frequently occurring international divorces by Member State

Table A1.1 – International marriages in the Member States

Country	Year	MARRIAGES															
				Total marriages (national + international)													
		Total population	International marriages per 10,000 persons	*From national data*	*EUROSTAT data*	National marriages	**Total International marriages**	**% of total marriages**	Marriages between the national and a foreigner	% of total inter-national	Marriages between the national and another EU national	% of total inter-national	Marriages between the national and a non-EU national	% of total inter-national	Other and unknown	Marriages between foreigners in the country	**% of total inter-national**
		A	A.1 D/(A/10000)	B		C	D (F+O)	E (D/B)	F (H+L+N)	G (F/D)	H	I (H/D)	L	M (L/D)	N	O	P (O/D)
AT	2000	8,002,000			39228.00												
	2001	8,020,000			34213.00												
	2002	8,065,000			36570.00												
	2003	8,102,000	14.17	37195	37195.00	25713	**11482**	**30.87%**	9943	86.60%	1758	15.31%	3883	33.82%	4302	1539	13.40%
BE	2000	10,239,000	8.64	45123	45123.00	36281	**8842**	**19.60%**	7065	79.90%					40	1777	
	2001	10,263,000	8.46	42110	42110.00	33424	**8686**	**20.63%**	7072	81.42%					21	1614	
	2002	10,263,000	8.86	40434	40434.00	31343	**9091**	**22.48%**	7363	80.99%	3066	33.73%	4283	47.11%	14	1728	19.01%
	2003	10,355,000			41805.00												
CZ	2000				56321.00												
	2001				52374.00												
	2002	10,206,000			52732.00												
	2003	10,203,000	4.62	48943	48943.00	44227	**4716**	**9.64%**	4647	98.54%	2245	47.60%	1771	37.55%	631	69	1.46%
CY	2000				9775.00												
	2001				10574.00												
	2002	705,000			10284.00												
	2003	715,000															
	2004			5349		2643	**2706**	**50.59%**	1988	73.47%	336	12.42%	1303	48.15%	349	718	26.53%
DE	2000	82,163,000	8.89	418550	418550.00	345477	**73073**	**17.46%**	61162	83.70%	11030	15.09%	50132	68.61%		11911	16.30%
	2001	82,259,000	8.76	389591	389591.00	317496	**72095**	**18.51%**	60687	84.18%	10492	14.55%	50195	69.62%		11408	15.82%
	2002	82,440,000	8.94	391963	391963.00	318244	**73719**	**18.81%**	62468	84.74%	10543	14.30%	51925	70.44%		11251	15.26%
	2003	82,536,000	8.57	382911	383000.00	312145	**70766**	**18.48%**	60198	85.07%	10246	14.48%	49952	70.59%		10568	14.93%
	2004			396992		330535	**65457**	**16.53%**	56238	85.92%	18736	28.62%	37502	57.29%		9219	14.08%
DK																	
EE	2000	1,372,000	19.22	5486	5486.00	2848	**2637**	**48.08%**	703	26.66%	125	4.74%	520	19.72%	58	1934	73.34%
	2001	1,367,000	21.39	5647	5647.00	2723	**2924**	**51.78%**	809	27.67%	129	4.41%	595	20.35%	85	2115	72.33%
	2002	1,361,000	20.84	5853	5853.00	3016	**2837**	**48.47%**	757	26.68%	134	4.72%	553	19.49%	70	2080	73.32%
	2003	1,356,000	20.58	5699		2909	**2790**	**48.96%**	680	24.37%	91	3.26%	519	18.60%	70	2110	75.63%
ES	2000	39,960,000			216451.00				7614	14.91%	1568	3.07%	6046	11.84%			
	2001	40,376,000			206254.00												
	2002	40,850,000			209066.00												
	2003	41,550,000			203344.00												
FI	2000	5,171,000			26150.00												
	2001	5,181,000	3.45		24830.00	23041	**1789**	**7.76%**	1477	82.56%						312	17.44%
	2002	5,194,000	3.50		26969.00	25153	**1816**	**6.73%**	1502	82.71%						314	17.29%
	2003	5,206,000	3.34		25815.00	24078	**1737**	**6.73%**	1429	82.27%						308	17.73%
FR	2000	58,748,000	7.14	305385	297922.00	263445	**41940**	**13.73%**	35263	84.08%						6677	15.92%
	2001	59,042,000	8.15	296882	288255.00	247744	**48138**	**16.27%**	40691	84.53%						7447	15.47%
	2002	59,342,000	8.97	286320	279087.00	233072	**53248**	**18.60%**	45191	84.87%						8057	15.13%
	2003	59,635,000	9.44	282927	273100.00	226610	**56317**	**19.91%**	47579	84.48%						8738	15.52%
GR	2000				48880.00												
	2001				57000.00												
	2002	10,968,000			57872.00												
	2003	11,006,000			56595.00												
HU	2000	10,221,000	2.21		48110.00	45855	**2255**	**4.69%**	2076	92.06%	298	13.22%	1167	51.75%	611	179	7.94%
	2001	10,200,000	2.19		43583.00	41348	**2235**	**5.13%**	2058	92.08%	282	12.62%	1101	49.26%	637	177	7.92%
	2002	10,174,000	2.18		46008.00	43792	**2216**	**4.82%**	2039	92.01%	282	12.73%	1124	50.72%	633	177	7.99%
	2003	10,142,000	2.33		45398.00	43035	**2363**	**5.21%**	2197	92.98%	267	11.30%	1268	53.66%	662	166	7.02%
	2004			43791		41240	**2551**	**5.83%**	2397	93.96%	286	11.21%	1498	58.72%	613		
IE	2000				19168.00												
	2001																
	2002	3,899,000			19246.00												
	2003	3,963,000			20047.00												

Country	Year	MARRIAGES															
				Total marriages (national + international)													
		Total population	International marriages per 10,000 persons	*From national data*	*EUROSTAT data*	National marriages	**Total International marriages**	**% of total marriages**	Marriages between the national and a foreigner	% of total inter-national	Marriages between the national and another EU national	% of total inter-national	Marriages between the national and a non-EU national	% of total inter-national	Other and unknown	Marriages between foreigners in the country	**% of total inter-national**
		A	**A.1 D/(A/10000)**	B		C	D (F+O)	E (D/B)	F (H+L+N)	G (F/D)	H	I (H/D)	L	M (L/D)	N	O	P (O/D)
IT	2000	56,929,000	3.51		284410.00	264409	**20001**	**7.00%**	15,958	79.79%						4043	20.21%
	2001	56,967,000	3.78		260904.00	239391	**21513**	**8.10%**	17,127	79.61%						4386	20.39%
	2002	56,993,000	4.49		265635.00	240045	**25590**	**9.50%**	20,052	78.36%						5538	21.64%
	2003	57,321,000	4.75		261609.00	234393	**27216**	**10.30%**	20,004	73.50%						7212	26.50%
LT	2000				16906.00												
	2001				15764.00				7,961								
	2002	3,475,000			16151.00												
	2003	3,462,000			16975.00												
LU	2000	433,000	26.33	3156	2148.00	2016	**1140**	**36.12%**	581	50.96%	285	25.00%			419	559	49.04%
	2001	439,000	25.06	2866	1983.00	1766	**1100**	**38.38%**	549	49.91%	270	24.55%			386	551	50.09%
	2002	444,000	26.01	2889	2022.00	1734	**1155**	**39.98%**	566	49.00%	272	23.55%			402	589	51.00%
	2003	448,000	26.81	2801	2001.00	1600	**1201**	**42.88%**	582	48.46%	267	22.23%			409	619	51.54%
LV	2000				9211.00												
	2001				9258.00												
	2002	2,345,000			9738.00												
	2003	2,331,000	10.37	9989	9989.00	6671	**2418**	**24.21%**	1,928	79.74%						490	20.26%
MT	2000				2545.00												
	2001				2194.00											455	
	2002	394,000			2240.00											576	
	2003	397,000			2350.00												
NL	2000	15,864,000	12.84	88074	88074.00	67697	**20377**	**23.14%**	12,249	60.11%	3026	14.85%	9223	45.26%		8128	39.89%
	2001	15,987,000	12.61	82091	79677.00	61935	**20156**	**24.55%**	12,074	59.90%	2933	14.55%	9141	45.35%		8082	40.10%
	2002	16,105,000	13.45	86808	83970.00	64142	**21666**	**25.25%**	13,199	60.92%	3026	13.97%	10173	46.95%		8467	39.08%
	2003	16,192,000	12.21	80427	81135.00	60661	**19766**	**24.58%**	12,282	62.14%	2901	14.68%	9381	47.46%		7484	37.86%
	2004			73441		56478	**16963**	**23.10%**	11,024	64.99%	2655	15.65%	8369	49.34%		5939	35.01%
PL	1996				203641.00				3,154		1527		1568		59		
	1997				204850.00				3,372		1464		1852		56		
	1989-1997								30,435		17334		12565		680		
	2000				211150.00												
	2001				195122.00												
	2002	38,242,000			191935.00												
	2003	38,218,000			195446.00												
PT	2000				63752.00												
	2001				58390.00												
	2002	10,329,000			56457.00												
	2003	10,407,000	4.20	54 130	53675.00	49 758	**4 372**	**8.08%**	3,977	90.97%	412	9.42%	3 170	72.51%		395	9.03%
SK	1980-1989							**10.90%**									
	2000				25903.00												
	2001				23795.00												
	2002	5,379,000			25062.00												
	2003	5,379,000			26002.00												
SL	2000				7201.00												
	2001				6935.00												
	2002	1,994,000	426.21	409561	7064.00	324575	**84986**	**20.75%**	43616	51.32%	1515	1.78%	15 055	17.71%	27046	41370	48.68%
	2003	1,995,000			6774.00												
SE	2000				39895.00												
	2001	8,882,000	7.51		35778.00	29106	**6672**	**18.65%**	3,005	45.04%	1334	19.99%	1 642	24.61%	29		
	2002	8,909,000	8.06		38012.00	30834	**7178**	**18.88%**	3,146	43.83%	1377	19.18%	1748	24.35%	21		
	2003	8,940,000	8.52		39041.00	31427	**7614**	**19.50%**	3,247	42.65%	1491	19.58%	1725	22.66%	31		
	2004					34671			3,500		1726		1745		29		
UK	2000				305912.00												
	2001																
	2002	59,139,000															
	2003	59,328,000															

Table A1.2 – International divorces in the Member States

Country	Year			DIVORCES															
				Total divorce (national +international)															
		Total population	International divorces per 10,000 persons	*From national data*	*EUROSTAT data*	National divorces	**Total International divorces**	**% of total divorces**	Divorces between the national and a foreigner	**% of total inter-national**	Divorces between the national and another EU national	**% of total inter-national**	Divorces between the national and a non-EU national	**% of total inter-national**	Other and unknown	Double nationality	Divorces between foreigners in the country	**% of total inter-national**
		A	A.1 D/(A/10000)	B		C	D (F+P)	E (D/B)	F (H+L+N+O)	G (F/D)	H	I (H/D)	L	M (L/D)	N	O	P	Q (P/D)
AT	2000	8,002,000		19552	19552													
	2001	8,020,000		20582	20582.0													
	2002	8,065,000		19597	19597.0													
	2003	8,102,000		18727	18787.0													
BE	2000	10,239,000			27002.0													
	2001	10,263,000			29314.0													
	2002	10,263,000	4.35	30628	30628.0	26167	**4461**	**15%**	3478	77.96%	1500	33.62%	1959	43.91%	19		983	22.04%
	2003	10,355,000			31373.0													
CZ	2000				29704													
	2001				31586													
	2002	10,206,000			31758													
	2003	10,203,000	1.34	32824	32824.0	31459	**1365**	**4.16%**	1316	96.41%	435	31.87%	643	47.11%			49	3.59%
CY	2000				1182.0													
	2001				1197.0													
	2002	705,000			1320.0													
	2003	715,000																
	2004			1614		1020	**594**	**37%**	476	80.13%	82	13.80%	306	51.52%	88		118	19.87%
DE	2000	82,163,000	3.47	194468	194408.0	165993	**28475**	**14.64%**	21389	75.12%	1521	5.34%	4703	16.52%	15165		7086	24.88%
	2001	82,259,000	3.73	197498	197498.0	166853	**30645**	**15.52%**	23022	75.12%	1532	5.00%	5126	16.73%	16364		7623	24.88%
	2002	82,440,000	3.99	204214	204214.0	171314	**32900**	**16.11%**	24818	75.43%	1594	4.84%	5769	17.53%	17455		8082	24.57%
	2003	82,536,000	4.26	213975		178794	**35181**	**16.44%**	26539	75.44%	1603	4.56%	6233	17.72%	18703		8642	24.56%
	2004			213691		176758	**36933**	**17.28%**	27670	74.92%	1636	4.43%	6115	16.56%	19919		9263	25.08%
DK																		
EE	2000	1,372,000	15.64	4230	4230.0	2084	**2146**	**50.73%**	489	22.79%	44	2.05%	406	18.92%	39		1657	77.21%
	2001	1,367,000	16.47	4312	4312.0	2061	**2251**	**52.20%**	494	21.95%	64	2.84%	404	17.95%	26		1757	78.05%
	2002	1,361,000	14.81	4074	4074.0	2058	**2016**	**49.48%**	441	21.88%	48	2.38%	364	18.06%	29		1575	78.13%
	2003	1,356,000	14.54	3973		2001	**1972**	**49.64%**	453	22.97%	38	1.93%	384	19.47%	31		1519	77.03%
ES	2000	39,960,000			38973.0													
	2001	40,376,000			37630.0													
	2002	40,850,000			42017.0													
	2003	41,550,000																
FI	2000	5,171,000	3.01		13913.0	12357	**1556**	**11.18%**	1181	75.90%							375	24.10%
	2001	5,181,000	3.26		13568.0	11879	**1689**	**12.45%**	1236	73.18%							453	26.82%
	2002	5,194,000	3.19		13336.0	11677	**1659**	**12.44%**	1226	73.90%							433	26.10%
	2003	5,206,000	3.61		13475.0	11595	**1880**	**13.95%**	1372	72.98%							508	27.02%
FR	2000	58,748,000																
	2001	59,042,000			112600.0													
	2002	59,342,000			127643.0													
	2003	59,635,000																
GR	2000				11119.0													
	2001				11500.0													
	2002	10,968,000			11080.0													
	2003	11,006,000			11100.0													
HU	2000	10,221,000	0.37		23987.0	23611	**376**	**1.57%**	356	94.68%	63	16.76%	166	44.15%	128		20	5.32%
	2001	10,200,000	0.33		24391.0	24052	**339**	**1.39%**	327	96.46%	49	14.45%	159	46.90%	119		12	3.54%
	2002	10,174,000	0.39		25506.0	25110	**396**	**1.55%**	379	95.71%	62	15.66%	188	47.47%	129		17	4.29%
	2003	10,142,000	0.38		25046.0	24660	**386**	**1.54%**	369	95.60%	40	10.36%	179	46.37%	139		17	4.40%
	2004				24638	24217	**421**	**1.71%**	399	94.77%	67	15.91%	181	42.99%	151		22	5.23%
IE	2000				2623.0													
	2001				2838.0													
	2002	3,899,000			2591.0													
	2003	3,963,000																

Country	Year			DIVORCES														
				Total divorce (national +international)														
		Total population	International divorces per 10,000 persons	*From national data*	*EUROSTAT data*	National divorces	**Total International divorces**	**% of total divorces**	Divorces between the national and a foreigner	**% of total inter-national**	Divorces between the national and another EU national	**% of total inter-national**	Divorces between the national and a non-EU national	**% of total inter-national**	Other and unknown	Double nationality	Divorces between foreigners in the country	**% of total inter-national**
		A	A.1 D/(A/10000)	B		C	D (F+P)	E (D/B)	F (H+L+N+O)	G (F/D)	H	I (H/D)	L	M (L/D)	N	O	P	Q (P/D)
IT	2000	56,929,000			37573.0													
	2001	56,967,000			40051.0													
	2002	56,993,000	0.68	41835	40972.0	37981	**3854**	**9.21%**	3601	93.44%							253	6.56%
	2003	57,321,000																
LT	2000				10882.0													
	2001				11024.0													
	2002	3,475,000			10579.0													
	2003	3,462,000			10599.0													
LU	2000	433,000	9.93	1030	1030.0	600	**430**	**42%**	200	46.51%	155	36.05%			45		230	53.49%
	2001	439,000	9.50	1029	1028.0	612	**417**	**41%**	192	46.04%	141	33.81%			51		225	53.96%
	2002	444,000	10.41	1092	1092.0	630	**462**	**42%**	196	42.42%	148	32.03%			48		266	57.58%
	2003	448,000	9.93	1026	1026.0	581	**445**	**43%**	202	45.39%	149	33.48%			53		243	54.61%
	2004			1055		567	**488**	**46%**	213	43.65%	159	32.58%			54		275	56.35%
LV	2000				6134.0													
	2001				5740.0													
	2002	2,345,000			5952.0													
	2003	2,331,000			4828.0													
MT																		
NL	2000	15,864,000	5.77	34650	34650.0	25499	**9151**	**26.41%**	4945	54.04%	1385	15.13%	3560	38.90%			4206	45.96%
	2001	15,987,000	6.11	37104	37104.0	27334	**9770**	**26.33%**	5402	55.29%	1497	15.32%	3905	39.97%			4368	44.71%
	2002	16,105,000	5.73	33179	33179.0	23948	**9231**	**27.82%**	4906	53.15%	1360	14.73%	3546	38.41%			4325	46.85%
	2003	16,192,000	5.71	31479	32173.0	22236	**9243**	**29.36%**	4723	51.10%	1194	12.92%	3529	38.18%			4520	48.90%
	2004			31098		21964	**9134**	**29.37%**	4756	52.07%	1223	13.39%	3533	38.68%			4378	47.93%
PL	2000				42770.0													
	2001				45308.0													
	2002	38,242,000			45414.0													
	2003	38,218,000			48632.0													
PT	2000		0.73	19638	19104.0	18890	**748**	**3.81%**	487	65.11%	142	18.98%	337	45.05%	3	4	261	34.89%
	2001		0.77	19398	18851.0	18612	**786**	**4.05%**	526	66.92%	150	19.08%	370	47.07%	3	3	260	33.08%
	2002	10,329,000	0.86	28422	27708.0	27538	**884**	**3.11%**	647	73.19%	210	23.76%	435	49.21%	2		237	26.81%
	2003	10,407,000	0.59	23282	22182.0	22668	**614**	**2.64%**	492	80.13%	156	25.41%	334	54.40%		2	122	19.87%
SK	1980-1989							**12.17%**										
	2000				9273.0													
	2001				9817.0													
	2002	5,379,000			10960.0													
	2003	5,379,000			10716.0													
SL	2000				2125.0													
	2001				2274.0													
	2002	1,994,000			2457.0													
	2003	1,995,000			2277.0													
	2004			2411		2155	**256**	**11%**	227	88.67%								
SE	2000				21502.0	16927	**4575**	**21.28%**	2760	60.33%	796	17.40%	1922	42.01%	42		1815	39.67%
	2001	8,882,000			21022.0	16415	**4607**	**21.92%**	2761	59.93%	791	17.17%	1927	41.83%	43		1846	40.07%
	2002	8,909,000	5.29		21332.0	16619	**4713**	**22.09%**	2644	56.10%	680	14.43%	1975	41.91%	44		2069	43.90%
	2003	8,940,000	5.29		21130.0	16405	**4725**	**22.36%**	2617	55.39%	621	13.14%	1975	41.80%	51		2108	44.61%
	2004					15346			2697		761		1904		32			
UK	2000				154628.0													
	2001				156814.0													
	2002	59,139,000			160726.0													
	2003	59,328,000																

Table A1.3 – Five most frequently occurring international marriages by Member State

Marriages															
Country	2004			2003			2002			2001			2000		
	Number of marriages nationals - foreigners	% of international marriages	% of total marriages	Number of marriages nationals - foreigners	% of international marriages	% of total marriages	Number of marriages nationals - foreigners	% of international marriages	% of total marriages	Number of marriages nationals - foreigners	% of international marriages	% of total marriages	Number of marriages nationals - foreigners	% of international marriages	% of total marriages
AT															
Former Yugoslavia				**2850**	24.82%	7.66%									
Turkey				**967**	8.42%	2.60%									
Germany				**814**	7.09%	2.19%									
Czech rep. and Slovakia				**550**	4.79%	1.48%									
Hungary				**311**	2.71%	0.84%									
BE															
Morocco							**1561**	17.17%	3.86%	**1398**	16.09%	3.32%	**1418**	16.04%	3.14%
France							**709**	7.80%	1.75%	**761**	8.76%	1.81%	**862**	9.75%	1.91%
Italy							**706**	7.77%	1.75%	**783**	9.01%	1.86%	**890**	10.07%	1.97%
Netherlands							**506**	5.57%	1.25%	**505**	5.81%	1.20%	**544**	6.15%	1.21%
Turkey							**268**	2.95%	0.66%	**247**	2.84%	0.59%			
Poland													**220**	2.49%	0.49%
CZ															
Slovakia				**1135**	24.07%	2.32%									
Ukraina				**747**	15.84%	1.53%									
Germany				**447**	9.48%	0.91%									
Vietnam				**277**	5.87%	0.57%									
Russia				**192**	4.07%	0.39%									
CY															
Ukraina	**251**	12.63%	4.69%												
Russia	**242**	12.17%	4.52%												
Greece	**222**	11.17%	4.15%												
Romania	**159**	8.00%	2.97%												
Moldova	**150**	7.55%	2.80%												
DE															
Turkey	**6727**	10.28%	1.70%	**7414**	10.48%	1.94%	**7625**	10.34%	1.95%	**6743**	9.35%	1.73%	**5784**	7.92%	1.38%
Poland	**5790**	8.85%	1.46%	**6317**	8.93%	1.65%	**6524**	8.85%	1.66%	**6135**	8.51%	1.57%	**6029**	8.25%	1.44%
Former Yugoslavia				**3054**	4.32%	0.80%	**3671**	4.98%	0.94%	**3838**	5.32%	0.99%	**5849**	8.00%	1.40%
Russia	**2624**	4.01%	0.66%	**3036**	4.29%	0.79%	**3149**	4.27%	0.80%	**3066**	4.25%	0.79%	**2971**	4.07%	0.71%
Romania	**2528**	3.86%	0.64%												
EE															
Russia				**412**	60.59%	7.23%	**437**	57.73%	7.47%	**469**	57.97%	8.31%	**415**	59.03%	7.57%
Finland				**55**	8.09%	0.97%	**99**	13.08%	1.69%	**86**	10.63%	1.52%	**94**	13.37%	1.71%
Ukraina				**42**	6.18%	0.74%	**52**	6.87%	0.89%	**51**	6.30%	0.90%	**51**	7.25%	0.93%
Bielorussia				**24**	3.53%	0.42%	**18**	2.38%	0.31%	**21**	2.60%	0.37%	**15**	2.13%	0.27%
Germany				**18**	2.65%	0.32%	**99**	13.08%	1.69%	**22**	2.72%	0.39%	**15**	2.13%	0.27%
ES														❷	
Cuba													**1605**	21.08%	0.74%
Germany													**754**	9.90%	0.35%
Argentina													**620**	8.14%	0.29%
Switzerland													**316**	4.15%	0.15%
HU															
Romania	**1046**	41.00%	2.39%	**752**	31.82%	1.66%	**750**	33.84%	1.63%	**767**	34.32%	1.76%	**773**	34.28%	1.61%
Ukraina	**302**	11.84%	0.69%	**343**	14.52%	0.76%	**221**	9.97%	0.48%	**236**	10.56%	0.54%	**206**	9.14%	0.43%
Germany	**149**	5.84%	0.34%	**144**	6.09%	0.32%	**163**	7.36%	0.35%	**178**	7.96%	0.41%	**183**	8.12%	0.38%
Former Yugoslavia	**107**	4.19%	0.24%	**125**	5.29%	0.28%	**104**	4.69%	0.23%	**86**	3.85%	0.20%	**108**	4.79%	0.22%
Russia	**28**	1.10%	0.06%	**30**	1.27%	0.07%	**28**	1.26%	0.06%	**38**	1.70%	0.09%	**51**	2.26%	0.11%
LU															
Germany				**78**	6.49%	2.78%	**88**	7.62%	3.05%	**75**	6.82%	2.62%	**71**	6.23%	2.25%
France				**78**	6.49%	2.78%	**79**	6.84%	2.73%	**81**	7.36%	2.83%	**82**	7.19%	2.60%
Italy				**50**	4.16%	1.79%	**57**	4.94%	1.97%	**52**	4.73%	1.81%	**62**	5.44%	1.96%
LV															
Russia				**156**	8.09%	1.56%									
Ukraina				**56**	2.90%	0.56%									
Lithuania				**41**	2.13%	0.41%									
UK				**27**	1.40%	0.27%									
NL															
Germany	**963**	5.68%	1.31%	**1049**	5.31%	1.30%	**1136**	5.24%	1.32%	**1116**	5.54%	1.36%	**552**	2.71%	0.63%
Morocco	**832**	4.90%	1.13%	**924**	4.67%	1.15%	**1009**	4.66%	1.18%	**935**	4.64%	1.14%	**893**	4.38%	1.01%
Turkey	**1191**	7.02%	1.62%	**1410**	7.13%	1.75%	**1735**	8.01%	2.02%	**1443**	7.16%	1.76%	**1305**	6.40%	1.48%
Belgium	**493**	2.91%	0.67%	**536**	2.71%	0.67%	**590**	2.72%	0.69%	**517**	2.56%	0.63%	**552**	2.71%	0.63%
PT															
Brasil				**1374**	31.43%	2.54%									
Cap Vert				**206**	4.71%	0.38%									
Angola				**152**	3.48%	0.28%									
France				**77**	1.76%	0.14%									
Spain				**80**	1.83%	0.15%									
SE															
Finland	**471**			**515**	6.76%	1.32%	**490**	6.83%	1.29%	**493**	7.39%	1.38%			
Norway	**358**			**324**	4.26%	0.83%	**334**	4.65%	0.88%	**301**	4.51%	0.84%			
Denmark	**275**			**277**	3.64%	0.71%	**226**	3.15%	0.59%	**263**	3.94%	0.74%			
UK	**249**			**210**	2.76%	0.54%	**244**	3.40%	0.64%	**173**	2.59%	0.48%			
Germany	**170**			**155**	2.04%	0.40%									
USA							**171**	2.38%	0.45%	**139**	2.08%	0.39%			
SL							❸								
Croatia							**8171**	18.73%	2.00%						
Serbia							**4068**	9.33%	0.99%						
Hungary							**974**	2.23%	0.24%						
Italy							**541**	1.24%	0.13%						
Bosnia							**532**	1.22%	0.13%						

❷ Does not include figures for foreigners with foreigners

❸ "Husband-wife families" by ethnic affiliation

Table A1.4 – Five most frequently occurring international divorces by Member State

Divorces															
Country	2004			2003			2002			2001			2000		
	Number of divorces nationals - foreigners	% of international divorces	% of total divorces	Number of divorces nationals - foreigners	% of international divorces	% of total divorces	Number of divorces nationals - foreigners	% of international divorces	% of total divorces	Number of divorces nationals - foreigners	% of international divorces	% of total divorces	Number of divorces nationals - foreigners	% of international divorces	% of total divorces
AT				❶			❶			❶			❶		
Former Yugoslavia				**997**			**1026**			**1041**			**1004**		
Turkey				**469**			**442**			**464**			**433**		
Germany				**280**			**241**			**363**			**376**		
Romania				**183**			**144**			**177**			**154**		
Poland				**136**			**127**			**168**			**123**		
BE															
Morocco							**1004**	28.87%	3.28%						
Italy							**518**	14.89%	1.69%						
France							**393**	11.30%	1.28%						
Netherlands							**180**	5.18%	0.59%						
Turkey							**147**	4.23%	0.48%						
CZ															
Ukraina				**234**	17.14%	0.71%									
Slovakia				**217**	15.90%	0.66%									
Vietnam				**167**	12.23%	0.51%									
Russia				**126**	9.23%	0.38%									
Poland				**87**	6.37%	0.27%									
CY															
Romania	**81**	17.02%	5.02%												
Russia	**55**	11.55%	3.41%												
Ukraina	**54**	11.34%	3.35%												
Greece	**40**	8.40%	2.48%												
UK	**39**	8.19%	2.42%												
DE															
Turkey				**3389**	9.63%	1.58%	**3060**	9.30%	1.50%	**3117**	10.17%	1.58%	**3033**	10.65%	1.56%
Former Yugoslavia				**2844**	8.08%	1.33%	**2709**	8.23%	1.33%	**2009**	6.56%	1.02%	**1670**	5.86%	0.86%
Italy				**1019**	2.90%	0.48%	**1030**	3.13%	0.50%	**978**	3.19%	0.50%	**961**	3.37%	0.49%
Spain				**309**	0.88%	0.14%	**304**	0.92%	0.15%	**301**	0.98%	0.15%	**283**	0.99%	0.15%
Greece				**275**	0.78%	0.13%	**260**	0.79%	0.13%	**253**	0.83%	0.13%	**277**	0.97%	0.14%
EE															
Russia				**318**	70.20%	8.00%	**300**	68.03%	7.36%	**345**	69.84%	8.00%	**333**	68.10%	7.87%
Finland				**28**	6.18%	0.70%	**40**	9.07%	0.98%	**58**	11.74%	1.35%	**33**	6.75%	0.78%
Ukraina				**27**	5.96%	0.68%	**30**	6.80%	0.74%	**33**	6.68%	0.77%	**34**	6.95%	0.80%
Bielorussia				**19**	4.19%	0.48%	**13**	2.95%	0.32%	**10**	2.02%	0.23%	**17**	3.48%	0.40%
Lithuania				**4**	0.88%	0.10%	**9**	2.04%	0.22%	**2**	0.40%	0.05%	**7**	1.43%	0.17%
HU															
Romania	**111**	26.37%	0.45%	**118**	30.57%	0.47%	**99**	25.00%	0.39%	**103**	30.38%	0.42%	**106**	28.19%	0.44%
Ukraina	**35**	8.31%	0.14%	**27**	6.99%	0.11%	**44**	11.11%	0.17%	**19**	5.60%	0.08%	**28**	7.45%	0.12%
Germany	**41**	9.74%	0.17%	**32**	8.29%	0.13%	**36**	9.09%	0.14%	**32**	9.44%	0.13%	**36**	9.57%	0.15%
Former Yugoslavia	**16**	3.80%	0.06%	**19**	4.92%	0.08%	**20**	5.05%	0.08%	**20**	5.90%	0.08%	**14**	3.72%	0.06%
Russia	**16**	3.80%	0.06%	**14**	3.63%	0.06%	**21**	5.30%	0.08%	**16**	4.72%	0.07%	**14**	3.72%	0.06%
LU															
France				**39**	19.31%	3.80%	**43**	21.94%	3.94%	**39**	20.31%	3.79%	**45**	22.50%	4.37%
Belgium				**29**	14.36%	2.83%	**21**	10.71%	1.92%	**31**	16.15%	3.01%	**16**	8.00%	1.55%
Germany				**27**	13.37%	2.63%	**32**	16.33%	2.93%	**18**	9.38%	1.75%	**21**	10.50%	2.04%
Portugal				**23**	11.39%	2.24%	**11**	5.61%	1.01%	**20**	10.42%	1.94%	**24**	12.00%	2.33%
Italy				**23**	11.39%	2.24%	**33**	16.84%	3.02%	**25**	13.02%	2.43%	**36**	18.00%	3.50%
NL															
Germany	**459**	5.03%	1.48%	**442**	4.78%	1.40%	**534**	5.78%	1.61%	**532**	5.45%	1.43%	**543**	5.93%	1.57%
Morocco	**366**	4.01%	1.18%	**405**	4.38%	1.29%	**402**	4.35%	1.21%	**382**	3.91%	1.03%	**365**	3.99%	1.05%
Turkey	**514**	5.63%	1.65%	**453**	4.90%	1.44%	**388**	4.20%	1.17%	**415**	4.25%	1.12%	**366**	4.00%	1.06%
Suriname	**361**	3.95%	1.16%	**359**	3.88%	1.14%	**385**	4.17%	1.16%	**378**	3.87%	1.02%	**394**	4.31%	1.14%
Belgium	**232**	2.54%	0.75%	**239**	2.59%	0.76%	**244**	0.74%	0.74%	**266**	2.72%	0.72%	**240**	2.62%	0.69%
PT															
Brasil				**108**	17.59%	0.46%	**117**	13.24%	0.41%	**68**	8.65%	0.35%	**57**	7.62%	0.29%
Angola				**72**	11.73%	0.31%	**108**	12.22%	0.38%	**114**	14.50%	0.59%	**98**	13.10%	0.50%
Mozambique				**22**	3.58%	0.09%	**43**	4.86%	0.15%	**53**	6.74%	0.27%	**50**	6.68%	0.25%
France				**49**	7.98%	0.21%	**70**	7.92%	0.25%	**65**	8.27%	0.34%	**58**	7.75%	0.30%
Spain				**27**	4.40%	0.12%							**24**	3.21%	0.12%
Germany							**36**	4.07%	0.13%	**31**	3.94%	0.16%			
SE															
Finland	**533**			**238**	5.04%	1.13%	**232**	4.92%	1.09%						
Poland	**158**			**131**	2.77%	0.62%									
Denmark	**129**						**125**	2.65%	0.59%						
Turkey	**120**			**138**	2.92%	0.65%	**149**	3.16%	0.70%						
Germany	**105**														
Iran				**150**	3.17%	0.71%	**151**	3.20%	0.71%						
Norway				**145**	3.07%	0.69%	**153**	3.25%	0.72%						
SL															
Countries of former Yougoslavia	79	34.80%	3.28%												
❶	Number of persons getting divorced														

ANNEX 2 – WORK UNDERTAKEN AND OBSTACLES ENCOUNTERED

Table A2.1 below presents an overview of work undertaken as part of each of the four Key Tasks as outlined in the proposal and the additional tasks:

Table A0.1 – Work undertaken as part of ToR Key Tasks and Additional Tasks

Tasks	Work undertaken as part of the task
Task 1: Assessment of the problem	
Task 1.1. Provide statistical data on the number of international divorces in the different Member States	All websites of the 24[72] Member States' national statistics offices were searched for data on international divorces and marriages. Those countries for which data could not be accessed this way have been contacted by telephone and e-mail. Statistics (or a confirmation that no such data are collected) have been received from all Member States.
Task 1.2. Provide a brief comparative analysis of the national laws on residual jurisdiction in divorce matters	Information on residual jurisdiction legislation has been collected through a survey with the national permanent representations in Brussels, which were asked to confirm or update information that was available from 1998[73], or, in case of those Member States for which no information was available, new information. The relevant information for all Member States is included Annex 5.
Task 1.3. Identify existing problems and issues not identified in the Green Paper	A review of background documents (see Bibliography) and responses to the Green Paper have been undertaken. Interviews with 15 practitioners (lawyers and judges) in selected countries and 2 interviews with representatives of family organisations have been undertaken and analysed. Summaries of all interviews that have been undertaken are included in Annex 12.
Task 2: Description of the policy options available and any combination of these	See Task 1.3

[72] Denmark is excepted from the study.

[73] Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgements in Matrimonial Matters from 1998.

Table A0.1 – Work undertaken as part of ToR Key Tasks and Additional Tasks	
Tasks	Work undertaken as part of the task
Task 3: Identification and assessment of impacts from policy options:	
Task 3.1 Identifying the groups and institutions affected	Groups and institutions affected are identified in the Green Paper. The survey with stakeholders (see Task 1.3) included questions on how groups and institutions will be affected by different policy options. The Green Paper responses provided additional information.
Task 3.2 Identifying practical, social and legal impacts	Information has been gathered from background documentation and Green Paper responses. Stakeholder interviews were also conducted to obtain further information on practical, social and legal impacts.
Task 3.3 Assessing the need for special safeguards to protect vulnerable groups	See Tasks 3.1 and 3.2
Task 3.4 Assessing the proportionality of each option	An assessment has been undertaken on the basis of the information collected as part of other Tasks.
Task 4: Comparing and assessing the preferred option	An assessment of the strengths and weaknesses of the preferred option has been undertaken.
Additional task 1: Additional questions to stakeholders in relation to the problem assessment and policy options	The stakeholders previously interviewed (see Task 1.3) were re-contacted and asked for further inputs. For those countries which were not previously included in the survey, respondents were identified from the Public Hearing participants list. Table 2.2 below outlines what information was collected from the different stakeholders. The initial request for information was circulated on 22 December 2005, asking stakeholder to submit answers by 20 January 2006. Despite numerous reminders and allocation of additional stakeholders in countries where difficulties to obtain answers were experienced, by 20 March 2006, information had not been received from the following countries: Austria, Malta, the Netherlands, and Poland. It was agreed between the Commission and EPEC that this Task should be considered finalised even though not all information had been received.
Additional task 2: Trends on numbers of divorces by mutual consent	Desk research has been undertaken. Data were available for four countries: Poland, Italy, Austria, and, Luxembourg. The relevant information is provided in Annex 7.

Table A0.1 – Work undertaken as part of ToR Key Tasks and Additional Tasks	
Tasks	Work undertaken as part of the task
Additional task 3: Information on national procedural laws in relation to provision of evidence on the content of foreign law	See Additional Task 1. The information collected is provided in Annex 11.

Collection of additional information

Due to a Commission's request for additional information in light of stakeholder consultations, Table A2.2 below outlines the specificities of the additional information collected and the main issues and Sections to be informed.

Table A2.2 – Issues to be informed by additional information collection			
Section	**Main issue**	**Information collected**	**Stakeholders**
Section 6	Problem Assessment – legal provisions	How many Member States provide for 'joint application' which is used e.g. in Article 3 of the New Brussels II Regulation.	All Member States (previous interviewees and additional stakeholders identified in Public Hearing (PH).
Section 6.4.4	Problem 4: Risk of rush to court	Whether current rules lead to rush to court in practice.	Selected countries (previous interviewees)
Section 6.4.5	Problem 5: Difficulties for EU citizens living in third States	If current national rules on residual jurisdiction pose a problem in practice and whether a uniform rule is preferable.	Selected countries (previous interviewees)
Section 9	Assessment of Policy option 3	Advantages and disadvantages of introducing a hierarchy of jurisdictions	Selected countries (previous interviewees)
Section 9	Assessment of Policy Option 2	Requirement in the Member States for parties to provide evidence on foreign law or if this is done 'ex officio'.	All Member States (previous interviewees and identified in PH).
Section 9	Assessment of Policy Option 2	Does the Council of Europe 1968 Convention on Information on Foreign Law work in practice?	Selected countries (previous interviewees)
Section 9	Assessment of Policy Option 2 and 3	Trends on numbers of mutual consent cases	Literature research.
Section 10	Preferred policy option	Link between divorce and ancillary matters, i.e. if specified issues must be considered together for a divorce case to be treated.	All Member States (previous interviewees and identified in PH).

Obstacles encountered in relation to collecting statistics on the number of international divorces in the Member States in order to be able to assess the number of EU citizens concerned

During the analysis of the data on international divorces and marriages collected, the following issues emerged:

- Even though most national statistics offices in the EU Member States provide characteristics of persons getting divorced, e.g. age, sex, previous marriage status and even occupational status, not all Member States collect information on nationality of spouses who are getting divorced. When such data are collected by the national statistics offices, the breakdown is not consistent between the countries. Data were therefore analysed and put into a common format by the EPEC team. Some Member States provide, by gender of the spouse, numbers of foreign spouses by country (e.g. how many Swedish men got divorced from women from specified countries, and how many Swedish women got divorced from men from specified countries), and how many foreigners who got divorced in the country (i.e. number of divorces taking place in the country that did not include any national of the country in which the divorce took place). Other Member States provide data only for the most frequently occurring countries or numbers of cases including foreigners without specifying country of origin. This renders comparison of numbers quite problematic.

- Statistics on divorces including spouses of different nationalities have been prioritised. However, as it became evident that not all countries collect such data, statistics on international marriages have also been included in the analysis. These data show trends in relation to increasing or decreasing numbers of marriages of an international character that could be subject to an international divorce case.

- In addition to divorces, this study also covers separations and marriage annulments. However, as data on the incidences on these matters are only very rarely available they have not been included in this report.

ANNEX 3 – GROUNDS FOR DIVORCE

The grounds for divorce as stipulated in the substantive divorce laws of the EU Member States can broadly be categorised as follows:

(1) **Fault-based** divorce (divorce as sanction)

(2) Divorce based on the **irretrievable breakdown** of the marriage (divorce as remedy or failure)

(3) Divorce on the ground of **separation** for a stated period of time

(4) Divorce by **mutual consent** (divorce as an autonomous decision by the spouses themselves)

(5) Divorce on **demand** (divorce as a right)

The main characteristics of each of these grounds are briefly outlined in turn below.

(1) Fault-based divorce

The fault-based divorce at least in theory requires an enquiry into a matrimonial offence. Examples of such offences are serious or renewed violations of marital duties and obligations, such as domestic violence, adultery and failure to fulfil financial obligations, which renders it intolerable for spouses to continue living together.[74]

However, the strictness of this inquiry has in many Member States been watered down over the years. This is for instance the case in England and Wales where procedures have changed from a required court enquiry to more of a so-called administrative divorce[75]. This, in combination with a possibility to obtain divorce immediately, can in some cases make fault-based divorce an attractive form even for consenting spouses. Moreover, from having been the sole ground for divorce in many Member State, fault-based divorce is now only one of several options, and can even provide the fastest way to divorce[76]. This means, that even though retaining fault grounds still has a symbolic meaning, it does not say much about the divorce law of a specific country. Furthermore, abolishing this ground for divorce does not imply that divorce automatically becomes any easier accessible.

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[74] Masha Antokolskaia: *Convergence of divorce laws in Europe* (Vrije Universiteit Amsterdam, The Netherlands)

[75] In England and Wales, undefended divorces are now granted under a special procedure without any court hearing, which more resembles an administrative divorce compared to previous divorce trials.

[76] In England and Wales current law provides the spouses with the possibility of a fault-based divorce within 4-6 months. This can be compared to the repealed provisions of The Family Law Act of 1996, which made it impossible get divorced earlier than after a one-year long 'reflection' period, which for consenting spouses with children even was extended by 6 months. Even though the 1996 Act removed the obligation to prove a reason for the breakdown of the marriage, the new system included a clause that the spouses should settle ancillary matters beforehand, which in fact may be harder than proving adultery, behaviour or separation.

- Requires matrimonial offence
- Has moved from court-enquiry to administrative divorce for instance in England and Wales
- Can obtain divorce faster than on other grounds (in some cases)

(2) Irretrievable breakdown of marriage

Irretrievable breakdown of the marriage is based on either one or both of the following two criteria:

Subjective criterion: Convincing the court or other competent authority

Objective criterion: Period of separation

Combining these two criteria makes divorce more difficult to obtain.

Examples of subjective criteria include a period of factual separation, minimal age of the spouses, a minimal duration of the marriage, statement of the reasons, a written agreement between the spouses on the exercise of parental responsibility and property relations between the spouses etc.[77]

As concerns the objective criterion, accessibility of divorce basically depends on the length of the separation period. In most jurisdictions this period is rather lengthy, which makes this form of divorce less attractive.

Divorce upon an irretrievable breakdown[78] in the narrow sense is granted upon the subjective criterion alone, i.e. when the court is convinced that that marriage cannot be saved, or upon the subjective as well as the objective criterion, i.e. in addition a certain separation period.

In jurisdictions that prescribe the subjective criterion alone, court inquiry is nearly a dead letter in non-contested cases. However, in contested cases it may be quite intrusive, especially in countries where allocation of the fault is required (e.g. Poland and Bulgaria).

In jurisdictions that combine subjective and objective criteria, proving the breakdown is twice as difficult, since even after the stated period of separation has expired, the court could refuse a divorce if it is not convinced that the marriage has irretrievably broken down.[79]

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[77] Green Paper on applicable law and jurisdiction in divorce matters

[78] Polish law requires the court to verify that the breakdown of the marriage is not only irreparable but also complete. In some States, mutual consent makes it unnecessary to investigate the reasons for the breakdown (Czech Republic, Hungary)

[79] Irish law stipulates for instance that the spouses have to wait for a divorce for four years and even then the court is entitled to refuse the divorce if it is not convinced that the breakdown of the marriage is irretrievable or that the financial provisions for the spouse and any dependent members of the family are sufficient.

(3) Divorce based on a period of separation

The jurisdictions where divorce is granted after the simple expiry of the stated period of separation often call this an 'irrefutable presumption of the irretrievable breakdown of a marriage'[80], but in some Member States it is considered an autonomous ground. In both cases a divorce is granted automatically and without further inquiry into the causes. Factual separation can also provide only one of several cumulative conditions for obtaining a divorce.

The accessibility of divorce basically depends on the length of the separation period. These periods vary quite significantly: six years in Austria, England and Wales and in Scotland, four years in Switzerland and Greece, three years in Italy and Portugal, two years in Germany and France and one year in Denmark, Norway and Iceland. As in most jurisdictions these periods are rather lengthy, this form of divorce is not really attractive if a shorter route is available to the spouses.

(4) Divorce by consent

Divorce by consent means that the court with competent authority grants divorce automatically and without inquiry into the reasons for divorce if the spouses have agreed thereon. This is in some jurisdictions covered under the designation of irretrievable breakdown, and constitutes an irrefutable presumption thereof. In other countries consent is presented as a separate ground.

However, the multiple restrictions of the right of divorce by consent which often are applied makes this a less attractive and speedy form of divorce[81]. In some countries the marriage has to be of a certain duration, whilst other countries allow consensual divorce only after a certain period of separation. In most countries an agreement to divorce alone is not sufficient and the spouses are required to reach an agreement on ancillary matters as well. This list of restrictions reveals that most of the countries are still reluctant to recognise the autonomous decisions of the spouses alone as a sufficient ground for divorce. The state in one way or another has to protect the spouses from their own 'inconsiderate' decisions.

(5) Divorce on demand

Divorce on demand where each of the spouses is actually considered to be entitled to divorce, irrespective of the objections of the other spouse, is explicitly recognised in Sweden and Finland. This is, beyond doubt, the easiest form of divorce, fully respecting the autonomous decisions of the spouses (one of them) and accepting as a fact that the State is not capable of keeping marriage intact against the will of even one of the spouses. The only state intervention in this kind of divorce in Sweden is a short waiting period of six months if one of the spouses does not consent or if the spouses have custody of a child less than sixteen years of age. Conversely, no consideration period is required if the divorce application is based on consent and the spouses do not have custody of children

[80] Masha Antokolskaia: *Convergence of divorce laws in Europe* (Vrije Universiteit Amsterdam, The Netherlands

[81] Only Dutch and Russian law allows divorce on the ground of simple consent without any further restrictions.

below the age of 16. A consideration period of six months is always required under Finnish law.[82]

[82] Law Commission: *Facing the Future: A Discussion Paper on the Ground for Divorce (*

ANNEX 4 – RELEVANT ARTICLES OF THE NEW BRUSSELS II REGULATION CONCERNING JURISDICTION

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

Article 3

General jurisdiction

1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State

a) in whose territory:

- the spouses are habitually residence, or
- the spouses were last habitually resident, insofar as one of them still resides there, or
- in the event of a joint application, either of the spouses is habitually resident, or
- the applicant is habitually resident if she or she resided there for at least a year immediately before the application was made, or
- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her 'domicile' there;

b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the 'domicile' or both spouses.

1. For the purpose of this Regulation, 'domicile' shall have the same meaning as it has under the legal system of the United Kingdom and Ireland.

Article 6

Exclusive nature of jurisdiction under Articles 3, 4 and 5

A spouse who:

(a) is habitually resident in the territory of a Member State; or

(b) is a national of a Member State, or, in the case of the United Kingdom and Ireland, has his or her "domicile" in the territory of one of the latter Member States,

may be sued in another Member State only in accordance with Articles 3, 4 and 5.

Article 7

Residual jurisdiction

1. Where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5, jurisdiction shall be determined, in each Member State, by the laws of that State.

2. As against a respondent who is not habitually resident and is not either a national of a Member State or, in the case of the United Kingdom and Ireland, does not have his 'domicile' within the territory of one of the latter Member States, any national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that State, avail himself of the rules of jurisdiction in that State.

Article 19

Lis pendens and dependent actions

1. Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.

2. Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.

3. Where the jurisdiction of the court first seized is established, the court second seized shall decline jurisdiction in favour of that court.

In that case, the party who brought the relevant action before the court second seized may bring that action before the court first seized.

ANNEX 5 – RESIDUAL JURISDICTION IN THE MEMBER STATES

A survey on Residual Jurisdiction rules in the Member States has been undertaken. An initial email with individualised tables including information from OJ/S C 221/43 of 16.07.1998 for relevant countries, letters and queries were sent to all Permanent Representations in Brussels on 19 October. Table A5.1 provides the relevant information on national residual jurisdiction rules.

Table A5.1 – Residual jurisdiction in the Member States			
Information provided in OJ/S C 221/43 of 16.07.1998		**Updated information 24.03.2006**	
Law	Text	Law	Text
Austria			
NA	NA	The residual jurisdiction in divorce matters is provided for in § 76 par. 2 Jurisdiktionsnorm (JN)	The Austrian courts have jurisdiction where (1) one of the spouses has Austrian citizenship or (2) the defendant has its habitual residence in Austria or (3) the claimant has its habitual residence in Austria. Austrian jurisdiction is also applied if the spouses either had their last common residence in Austria or the claimant has no citizenship or at the time of marriage had the Austrian citizenship.
Belgium			
NA	NA	Code de droit international privé (Loi du 16 juillet 2004, M.B. 27 juillet 2004, entrée en vigueur le 1er octobre 2004)	- Article 42 : Belgian jurisdictions are competent to rule on all matters relating to the marriage or the effects thereof, the matrimonial regime, the divorce or division of property, in addition to the general provisions of the present law if: 1° in case of a joint application, one of the spouses has habitual residence in Belgium at the time the divorce petition is lodged ; 2° the last common habitual residence of the spouses was in Belgium less than 12 months before the divorce petition is lodged ; 3° the petitioner has habitual residence in Belgium at least 12 months before the divorce petition is lodged ; or 4° the spouses are Belgian at the time the divorce petition is lodged. - Article 43 : The Belgian jurisdictions are also competent to rule on matters: 1. intending to convert a decision made in Belgium on division of property into divorce, or to examine/revise a decision made in Belgium concerning the effects of a marriage, divorce or division of property. 2° ….(concern the validity of the marriage). It is also relevant to take into account Articles 5-14 of the Code of international private law concerning jurisdiction and in particular Article 5 concerning international jurisdiction on the basis of domicile or habitual residence of the defendant Article 6 concerning voluntary prorogation of international jurisdiction

Table A5.1 – Residual jurisdiction in the Member States			
Information provided in OJ/S C 221/43 of 16.07.1998		**Updated information 24.03.2006**	
Law	Text	Law	Text
			Article 9 concerning international connection Article 10 concerning provisional and protective measures and executive measures Article 11 concerning exceptional attribution to international jurisdiction Article 14 concerning international litispendence
Cyprus			
NA	NA	The Family Court Law No.23 of 1990 (as amended) Relevant Section: 11 (jurisdiction of Family Courts)	The section 11 provides that the prerequisite for the Family Court to acquire jurisdiction over a divorce case is for the couple to have at least three months residence in Cyprus. The nationality of the couple has no effect on the Court's jurisdiction.
Czech Republic			
NA	NA	The Act No. 97 /1963 Coll., concerning Private International Law and the Rules of Procedure relating thereto The act has not changed since 1998 and is still in force	Section 38 Jurisdiction in family matters states: (1) Czech courts have jurisdiction in matrimonial matters (proceedings concerning divorce, invalidation of marriage, and determination as to the existence of a marriage) if at least one of the spouses is Czech citizen. (2) If none of the spouses is a Czech citizen, Czech courts shall have jurisdiction: (a) if at least one of the spouses is domiciled in this country and the decisions of the Czech courts can be recognized in the states of which the two spouses are citizens or, (b) if at least one of the spouses has resided in the Czech republic for long time, or (c) if the case involves invalidity of a marriage, which to be

Table A5.1 – Residual jurisdiction in the Member States			
Information provided in OJ/S C 221/43 of 16.07.1998		**Updated information 24.03.2006**	
Law	Text	Law	Text
			proclaimed under Czech law even without a motion to this effect, provided that both spouses are living in this country.
Denmark			
NA	NA	Department of Family Affairs states that Regulation (EC) no. 2201/2003 does not apply to Denmark	According to Danish law, Danish authorities have jurisdiction in divorce cases if the following situations: (1) The defendant lives in Denmark (2) The petitioner lives in Denmark and has either lived here for the last 2 years or has lived here previously. (3) The petitioner has Danish citizenship and the authorities in the country, where the petitioner is living, refuses to deal with the divorce case, because of his or her Danish citizenship. (4) Both spouses are Danish citizens, at the defendant does not oppose to the divorce case being handled by Danish authorities. (5) Divorce is sought on the base for a legal separation, granted in Denmark within the last 5 years. Please note, that "living" in relation to jurisdiction in divorce cases means "domicile" and not "habitual residence".
Estonia			
NA	NA	On 1 January 2006 new Code of Civil Procedure (*tsiviilkohtumenetluse seadustik*) will enter into force in Estonia. There is no translation into English available yet. However, the permanent representation for Estonia	According to Article 102 paragraph 3 of the new Code of Civil Procedure Estonian courts have jurisdiction in divorce matters if: 1 at least one of the spouses is Estonian national or was Estonian national at the time of conclusion of the marriage; 2 both of the spouses are resident in Estonia or 3 one of the spouses is resident in Estonia, unless it is likely that none of the states of which the spouses are nationals would recognize the decision. Rules of jurisdiction in divorce matters are exclusive.

Table A5.1 – Residual jurisdiction in the Member States			
Information provided in OJ/S C 221/43 of 16.07.1998		**Updated information 24.03.2006**	
Law	Text	Law	Text
		in Brussels made a summary of the content of the relevant provision into English. The translation should be available on www.legaltext.ee soon.	
Finland			
Section 8 of the 'Laki eräistä kansainvälisluontoisista perheikeudellisista suhteista' / Lag angående vissa familjerättsliga förhållanden av internationell natur' (International Relations Act) revised in 1987	Finnish courts will hear matrimonial cases even where neither spouse is habitually resident in Finland if the courts of the State of habitual residence of either of the spouses do not have jurisdiction or if application to the courts of the State of habitual residence would cause unreasonable difficulties, and, furthermore, in the circumstances it would appear to be appropriate to assume jurisdiction *(forum convenience)*.	Section 119 of the Marriage Act ('avioliittolaki' / 'äktenskapslag') revised in 2001 and partly in 2004	(1) A matter pertaining to divorce may be ruled admissible in Finland, if: (a) either spouse is domiciled in Finland; or (b) the petitioner has been domiciled in Finland or otherwise has a close link to Finland and he or she cannot institute divorce proceedings in the foreign state where either spouse is domiciled, or this would cause unreasonable inconvenience to the petitioner, and the admissibility of the matter in Finland is justified in view of the circumstances. (2) A public prosecutor in Finland may bring an action, as referred to in section 27(2) (i.e., upon the ground that the spouses are each other's direct descendants or ascendants, siblings or half-siblings), for the divorce of the spouses, if: (a) the marriage ceremony has been performed by a Finnish authority; and (b) either spouse is domiciled in Finland. (3) and (4) – *(Not relevant)*. (5) The provisions in paragraphs (1) – (3) apply only in so far as not otherwise provided in Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 or in an international agreement binding

Table A5.1 – Residual jurisdiction in the Member States			
Information provided in OJ/S C 221/43 of 16.07.1998		**Updated information 24.03.2006**	
Law	Text	Law	Text
			on Finland.
France			
Article 14 of the Civil Code	Would give France jurisdiction if the petitioner had French nationality	No update to be made	No update to be made
Germany			
Sections (1), (3) and (4) of Article 606 of the 'Zivilprozessordnung'	German courts have international jurisdiction when (1) one spouse is German or was German when the marriage took place; (2) one spouse is stateless and is habitually resident in Germany; or (3) one spouse is habitually resident in Germany, except where any judgement reached in their case could not be recognised in any of the States to which either spouse belongs.	§ 606a subparagraph (1) first sentence of the "Zivilprozeßordnung	The German courts have jurisdiction in matrimonial matters: (1) if one of the spouses is a German national or was at the time of conclusion of the marriage; (2) if both spouses have their habitual residence within this country; (3) if one of the spouses is a stateless person with his habitual residence within this country; or (4) if one of the spouses has his habitual residence within this country, unless it is obvious that the decision to be pronounced would not be recognized under the law of any state of which the spouse is a subject.
Greece			
NA	NA		According to Article 14 of the Civil Code, Greece applies a system of connecting factors where spouses may apply for divorce based on: 1. Common nationality during the marriage, if one spouse still retains it 2. Their last common habitual residence during the marriage 3. The law with which the spouses are closest connected.

Table A5.1 – Residual jurisdiction in the Member States			
Information provided in OJ/S C 221/43 of 16.07.1998		**Updated information 24.03.2006**	
Law	Text	Law	Text
Hungary			
NA	NA		Under the Hungarian Law Decree No 13 of 1979 on Private International Law (which is applicable if no international treaty or EC Regulation is applicable) Hungarian courts have exclusive jurisdiction for divorce of a Hungarian national. This jurisdiction however is not exclusive if the Hungarian national, or if both spouses are Hungarian nationals, one of them is domiciled or habitually resident abroad (Section 62/B). Hungarian courts have jurisdiction in divorce cases of foreign nationals only if one of the spouses is domiciled or habitually resident in Hungary (Section 62/D, paragraph 2). The notions of domicile and habitual residence are defined in the above legislation without any explicit time limits. Section 12, paragraph 1: "Domicile is the place where someone lives permanently or with the intention of settling down. Section 12, paragraph 2: Habitual residence is the place where someone has been residing for a longer period of time without the intention of settling down. Therefore the residual jurisdiction which may be applied under Art 7 of 2201/2003/EC Regulation seems to be: (1) if the applicant is a Hungarian national, Hungarian courts have jurisdiction under internal law even without the six month residence required by Art 3.1.a) of the Regulation, (2) if the respondent is a Hungarian national, (3) if the non-Hungarian applicant is habitually resident in Hungary (in internal law there is no explicit time limit for habitual residence like the one year in Art 3, paragraph 1.a. of the Regulation - if the Hungarian court may determine under other circumstances that the applicant is habitually resident in Hungary even after a shorter period

Table A5.1 – Residual jurisdiction in the Member States			
Information provided in OJ/S C 221/43 of 16.07.1998		**Updated information 24.03.2006**	
Law	Text	Law	Text
			of time – it has jurisdiction).
Ireland			
Section 39 of the Family Law Act, 1995; and Section 39 of the Family Law (Divorce) Act, 1996; and Section 31 of the Judicial Separation and Family Law Reform Act, 1996	The courts would have jurisdiction in matters of annulment, divorce, and legal separation when either of the spouses is domiciled, for the purposes of Art 2(3), in the State on the date of institution of proceedings	No update to be made	No update to be made
Italy			
Articles 3, 4,32 and 37 of Law 218 of 31 May 1995 on the reform of the Italian system of private international law	'The rules are of this nature'.	Law 218 of 31 May 1995 on the reform of the Italian system of private international law	Art. 32 of the Law 218 states that an Italian judge can decide of a case in divorce and separation matters if: -<u>One of the spouses is Italian</u>: this implies that, for example, an Italian judge can be competent if the claimant is Italian and the defendant is American and if they have lived in the US until the introduction of the divorce demand. Also if the defendant is a citizen of another Member State and the claimant is Italian and in case their habitual residence is a country outside the EU (as none of the fora stated in art. 3 of the BII regulation can be applied). - <u>The marriage was celebrated in Italy:</u> and this irrespectively of any other link with Italy. In this frame, two EU citizens of different nationalities, none of them Italian (for example a Belgian and a Dutch), who have their habitual residence outside Italy but who have celebrated their marriage in Italy can introduce the divorce demand in Italy. -<u>one of the titles of the art 3 of the law is applicable:</u> a. if the respondent has his residence or domicile in Italy

Table A5.1 – Residual jurisdiction in the Member States			
Information provided in OJ/S C 221/43 of 16.07.1998		**Updated information 24.03.2006**	
Law	Text	Law	Text
			b. in divorce cases even if the claimant has the residence or domicile in Italy or, in case of a joint application, even if one of the spouses have the residence or domicile in Italy
Latvia			
NA	NA	Section 238 of the Civil Procedure Law	An action for annulment or dissolution of a marriage may also be brought in a court according to the place of residence of the plaintiff if: (1) there are minor children with the plaintiff; (2) the marriage to be dissolved is with a person who has, in accordance with prescribed procedures, been found to be lacking capacity due to mental illness or regarding whom a trusteeship has been established in accordance with the provisions of section 365 of the Civil Law; (3) the marriage to be dissolved is with a person who is serving a sentence in a penal institution; or (4) the marriage to be dissolved is with a person whose place of residence is unknown or who resides in a foreign country.
Lithuania			
NA	NA	Code of Civil Procedure of the Republic of Lithuania	Article 784. Jurisdiction of family legal relation proceedings: (1) Family proceedings shall fall under the jurisdiction of courts of the Republic of Lithuania if at least one of the spouses is a citizen of the Republic of Lithuania or a stateless person with permanent place of residence in the Republic of Lithuania. (2) When both spouses are permanent residents of the Republic of Lithuania, their domestic proceedings shall be heard exclusively by courts of the Republic of Lithuania. (3) Courts of the Republic of Lithuania shall have a remit to hear family proceedings in cases when both spouses are foreigners permanently

Table A5.1 – Residual jurisdiction in the Member States			
Information provided in OJ/S C 221/43 of 16.07.1998		**Updated information 24.03.2006**	
Law	Text	Law	Text
			residing in the Republic of Lithuania.
Luxembourg			
NA	NA	Article 234 of Luxembourg's Civil Code	The territorial competence in divorce matters is regulated by article 234 of Luxembourg's Civil Code. This article stipulates that either the jurisdiction of the country where the spouses have their common residence or the one where the defending party has his residence is competent. But, this article is not an imperious rule. But, this article is not an imperious rule, so that spouses can, in a contract, give competence to another Court.
Malta			
NA	NA	NA	In Malta, divorce is not yet legal, although there is a Green paper that is soon to go through. So far, between Maltese, separation is legal but they cannot marry again after that. However, in the case of marriage between a Maltese and other resident of the EU, divorce is feasible, but according to the legislation of the other person's country in the other person's country only (so still not in Malta). This is where Brussels II applies. The Maltese respondent forwarded a link to Malta's responses to divorce questions from the JLS website. The link is below, and further below find answers to relevant questions: http://europa.eu.int/comm/justice_home/ejn/divorce/divorce_mlt_en.htm#1 **What should I do to have a decision on divorce/legal separation/marriage annulment issued by a court in another Member State recognised in Malta?** In order to have a decision affecting the marital status of a person recognised in Malta, the interested party must register the decision at the Public Registry. However, this decision must comply with the criteria stipulated in Article 33 of the Marriage Act (Chap. 255 – Laws of Malta)

Table A5.1 – Residual jurisdiction in the Member States			
Information provided in OJ/S C 221/43 of 16.07.1998		**Updated information 24.03.2006**	
Law	Text	Law	Text
			which stipulates that such a decision is recognised for all purposes of law in Malta provided that it is given by a competent court of the country in which either of the parties to the proceedings is a citizen or is domiciled. **To which court should I turn to oppose the recognition of a decision on divorce/legal separation/marriage annulment issued by a court in another Member State? Which procedure applies in these cases?** To oppose the recognition of a decision affecting the marital status of a person issued by a court in another Member State, the interested party has to file a writ of summons in the First Hall, Civil Court which is the competent court in Malta and in front of the Court of Magistrates (Superior Jurisdiction) in the case of Gozo. **Which divorce law does the court apply in a divorce proceeding between spouses who do not live in Malta or who are of different nationality?** We do not have divorce legislation in Malta, however Article 33 of the Marriage Act stipulates that a decision of a foreign court regarding the status of a married person or affecting such status is recognised for all purposes of law in Malta provided that the decision is given by a competent court of the country in which either of the parties to the proceedings is a citizen or is domiciled.
Netherlands			
No jurisdiction in their internal legal system which can be defined as residual for the purpose of Art. 2 of the Convention	NA	Application of New Brussels II Regulation	Application of the New Brussels II Regulation only.
Poland			

Table A5.1 – Residual jurisdiction in the Member States			
Information provided in OJ/S C 221/43 of 16.07.1998		**Updated information 24.03.2006**	
Law	Text	Law	Text
NA	NA	Provisions on jurisdiction are contained mainly in articles 1096 - 1116 of the Polish Act of 17 November 1964 CODE OF CIVIL PROCEDURE.	According to its article 1100 (1) The domestic jurisdiction shall cover matrimonial cases, even if only one of the spouses holds Polish citizenship or, not holding any citizenship, has the place of residence in Poland. (2) If both spouses have their place of residence in Poland, the jurisdiction provided in the preceding subparagraph is exclusive. (3) In addition, the domestic jurisdiction covers matrimonial cases between foreign persons residing in Poland. It results that in cases relating to divorce, in which at least one of the spouses holds Polish citizenship, Polish courts always have jurisdiction.
Portugal			
NA	NA	Artigos 65º e 65ºA do Código de Processo Civil Português	Art. 65º Factors relating to international competences (1) Without prejudice whether it refers to international treaties, conventions, Community regulations or specific legislation, Portuguese courts have jurisdiction based on the verification of any of the following circumstances: (a) Ter o réu ou algum dos réus domicílio em território português, salvo tratando-se de acções relativas a direitos reais ou pessoais de gozo sobre imóveis sitos em país estrangeiro; (b) Dever a acção ser proposta em Portugal, segundo as regras de competência territorial estabelecidas em lei portuguesa; (c) Ter sido praticado em território português o facto que serve de causa de pedir na acção, ou algum dos factos que a integram; (d) Não poder o direito invocado tornar-se efectivo senão por meio de acção proposta em território português, ou constituir para o autor dificuldade apreciável a sua propositura no estrangeiro, desde que entre o objecto do litígio e a ordem jurídica nacional

Table A5.1 – Residual jurisdiction in the Member States			
Information provided in OJ/S C 221/43 of 16.07.1998		**Updated information 24.03.2006**	
Law	Text	Law	Text
			haja algum elemento ponderoso de conexão, pessoal ou real. (2) Para os efeitos da alínea a) do número anterior, considera-se domiciliada em Portugal a pessoa colectiva cuja sede estatutária ou efectiva se localize em território português, ou que aqui tenha sucursal, agência, filial ou delegação. Artigo 65º-A Competência exclusiva dos tribunais portugueses Sem prejuízo do que se ache estabelecido em tratados, convenções, regulamentos comunitários e leis especiais, os tribunais portugueses têm competência exclusiva para: (1) As acções relativas a direitos reais ou pessoais de gozo sobre bens imóveis sitos em território português; (2) Os processos especiais de recuperação de empresa e de falência, relativos a pessoas domiciliadas em Portugal ou a pessoas colectivas ou sociedades cuja sede esteja situada em território português; (3) As acções relativas à apreciação da validade do acto constitutivo ou ao decretamento da dissolução de pessoas colectivas ou sociedades que tenham a sua sede em território português, bem como à apreciação da validade das deliberações dos respectivos órgãos; (4) As acções que tenham como objecto principal a apreciação da validade da inscrição em registos públicos de quaisquer direitos sujeitos a registo em Portugal; (5) As execuções sobre bens existentes em território português.
Slovak Republic			
NA	NA	In relation to international divorces when no court of a Member State has	Part I Provisions concerning conflict of laws and the legal status of foreigners;

Table A5.1 – Residual jurisdiction in the Member States			
Information provided in OJ/S C 221/43 of 16.07.1998		**Updated information 24.03.2006**	
Law	Text	Law	Text
		jurisdiction pursuant to Council Regulation (EC) No. 2201/2003 (Brussels II Regulation), e.g. when one or both of the spouses reside in a non-Member State The Act of 4 December 1963 No. 97 Collection of Laws On Private International Law and Rules of Procedure Relating Thereto as amended by Act No. 158/1969, Act No. 234/1992, Act 264/1992, Act No. 48/1996, Act No. 589/2003 and Act No. 36/2005 Collection of Laws (excerpts)	Division I; Conflict of Laws; Family law; Relations between spouses Section 22: (1) Dissolution of marriage by divorce shall be governed by the law of the State whose nationals the spouses are at the time the divorce proceedings are initiated. If the spouses are nationals of two different States, the Slovak law shall apply. (2) If, under the provisions of paragraph I, such foreign law would be applicable which does not permit divorce or does permit it under extremely difficult conditions, and the spouses or at least one of them have been living in the Slovak Republic for a longer period of time, the Slovak law shall apply. (3) The above provisions shall also apply to the declaration of marriage invalid or to the determination whether a marriage does or does not exist. Part II International Procedural Law; Division 1; Jurisdiction of Slovak judicial authorities; Jurisdiction in family matters Section 38: (1) Slovak courts shall have jurisdiction in matrimonial matters (divorce, declaration of a marriage invalid or determination whether a marriage does or does not exist) if at least one of the spouses is a Slovak national. (2) If none of the spouses is a Slovak national, Slovak courts shall have jurisdiction: (a) if at least one of the spouses resides in this country and the decision is recognisable is the national States of both spouses, or

Table A5.1 – Residual jurisdiction in the Member States			
Information provided in OJ/S C 221/43 of 16.07.1998		**Updated information 24.03.2006**	
Law	Text	Law	Text
			(b) if a least one of the spouses has dwelt in the Slovak Republic for a prolonged period of time, or (c) if invalidity of marriage is concerned which shall be declared under the Slovak law even without a motion to this effect, provided both spouses live here.
Slovenia			
NA	NA	Private International Law and Procedure Act (Official Gazette RS No. 56/99; "Zakon o mednarodnem zasebnem pravu in postopku")	The rules of jurisdiction provided for in Article 68 of the Private International Law and Procedure Act could be described as "residual"; according to Paragraph 1, indent 3, the Slovenian courts have jurisdiction in matrimonial cases also when the respondent does not have permanent residence in Slovenia if the last joint permanent or temporary residence of the spouses was in Slovenia and the applicant is resident in Slovenia at the time of application. Apart from that, other grounds for international jurisdiction in matrimonial matters which exist in Slovenian law are similar to the rules contained in the New Brussels II Regulation, these being that when the respondent does not have permanent residence in Slovenia, the Slovenian courts have jurisdiction: (1) if both spouses are Slovene citizens, regardless of where they have their permanent residence; or (2) if the applicant is a Slovene citizen with permanent residence in Slovenia. In addition, the Slovenian courts have jurisdiction in matrimonial cases if both spouses are foreign citizens and their last joint permanent residence was in Slovenia, but only if the respondent agrees and if the regulations of the country whose citizens the spouses are permit such jurisdiction (Article 69).

Table A5.1 – Residual jurisdiction in the Member States			
Information provided in OJ/S C 221/43 of 16.07.1998		**Updated information 24.03.2006**	
Law	Text	Law	Text
Spain			
One of the rules contained in Article 22(3) of the 'Ley Orgánica del Poder Judical' (Law on the judicial system) of 1 July 1985	Allows the application to be made in Spain when the applicant is Spanish and is resident in Spain but does not meet any of the requirements in Art 2(1) of this Convention such as the express or tacit submission referred to in Art 22(2). Apart from that, all the other grounds for international jurisdiction in matrimonial matters which exist in Spanish law are contained in the Convention, these being that both spouses are habitually resident in Spain at the time of the application or that both spouses are of Spanish nationality, whatever their place of residence, provided that the application is made either jointly or with the agreement of the other spouse.		
Sweden			
Lag om vissa rättsförhållanden rörande äktenskap och förmynderskap' (Act on certain international legal relations concerning marriage and guardianship) 1904, as amended in 1973.	A Swedish court have jurisdiction in matters of divorce if both spouses are Swedish citizens, if the petitioner is Swedish and is habitually resident in Sweden or has been so at any time since reaching the age of 18 or if, in other cases, the government gives its consent to the cases being heard in Sweden. The government can give its consent only if one of the spouses is Swedish or the petitioner cannot bring the case before the courts of the State of which he is national.	Lag om vissa rättsförhållanden rörande äktenskap och förmynderskap' (Act on certain international legal relations concerning marriage and guardianship) 1904, as amended in 1973.	A Swedish court has jurisdiction in matters of divorce if (1) both spouses are Swedish citizens; (2) the petitioner is Swedish citizen and is habitually resident in Sweden or has been so at any time since reaching the age of 18; (3) the petitioner is not Swedish citizen but is habitually resident in the country since at least one year; (4) the defendant is habitually resident in Sweden; (5) the case concerns invalidity of a marriage which was contracted in Sweden; or (6) if, in other cases, the government gives its consent to the cases being heard in Sweden. The government can give its consent only if one of the spouses is Swedish citizen or the petitioner cannot bring the case before the courts of the State of which he is national.

Table A5.1 – Residual jurisdiction in the Member States			
Information provided in OJ/S C 221/43 of 16.07.1998		**Updated information 24.03.2006**	
Law	Text	Law	Text
United Kingdom			
Not mentioned.	With regard to divorce, separation and annulment proceedings this Article (not mentioned?) may cover grounds of jurisdiction based on the 'domicile' of either party in the UK at the time the application is made r on habitual residence for a year immediately preceding that date. In the case of divorce and separation, the Sheriff Courts in Scotland have jurisdiction if one party is either resident in the place for 40 days ending not more than 40 days before that date and has no known residence in Scotland on that date. If a court out with the UK is conducting relevant proceedings, UK courts have a wide discretion to decline jurisdiction, provided that those proceedings continue, and, in addition, that the proceedings continue before a judicial body that has jurisdiction under its national legislation.	S. 5 Domicile and Matrimonial Proceedings Act 1973	S. 5 of the Domicile and Matrimonial Proceedings Act 1973 makes provision where proceedings are for; (1) divorce or judicial separation, residual jurisdiction is based on either party to the marriage being domiciled in England and Wales or Scotland, at the date proceedings are commenced and (2) for nullity, residual jurisdiction is based upon (a) either party to the marriage is domiciled in England and Wales or Scotland on the date when proceedings are begun or (b) either party to the marriage died before the date proceedings had begun and either at death had been domiciled in England and Wales or Scotland or had been habitually resident in England and Wales or Scotland throughout the period of one year ending with the date of death. "In the case of divorce and separation, the Sheriff Courts in Scotland have jurisdiction if either of the general conditions are fulfilled above, or in addition, (a) if either party was resident in the place for 40 days ending on the date when the action was begun or (b) if either party had been resident in the place for a period of not less than 40 days ending no more than 40 days before that date and has no known residence in Scotland on that date." If a court outside the UK is conducting relevant proceedings, UK courts have a wide discretion to stay proceedings, provided that those proceedings continue, and, in addition, that the proceedings continue before a judicial body that has jurisdiction under its national legislation. Schedule 1, Domicile and Matrimonial Proceedings Act 1971

ANNEX 6 – CONNECTING FACTORS

Box A6.1 – Overview over connecting factors

Nationality

- Common nationality
- Current common nationality
- Common nationality of the spouses at the moment of lodging a petition for divorce
- Former common nationality if one of the spouses still holds it

Habitual residence

- Permanent residence which is common for the whole family
- The residence of the spouse with whom minors have been living
- Current joint residence
- Last place of common residence
- Law of the country in which the spouses had their habitual residence during the marriage if one of the spouses retains this residence
- Law of the State in which one of the spouses has his/her habitual residence and in which both the spouses bring up the divorce petition to a court.
- Residence of the spouses when applying for divorce
- The laws of the residence of one of the parties
- Habitual residence as a connecting factor for matters concerning divorce, child support and parental responsibility so that the same law would be applicable to the divorce and to the ancillary proceedings entailed by the divorce or separation.

(Domicile)

European Connecting Factor (only to be applied if there is no common nationality of the spouses)

Place where the spouses married

Closest connection (strongest link with a Member State)

Nationality or domicile, and habitual residence of the parties and their children.

ANNEX 7 – SUPPORTING MATERIAL FOR THE ASSESSMENT OF POLICY OPTION 2

Policy Option 2: Harmonising the national conflict-of-law rules and introducing a limited possibility for the spouse to choose applicable law

The Green Paper on divorce matters puts forward the possibility to harmonise conflict-of-law rules based on a uniform set of connecting factors. It also puts forward the possibility to provide spouses with a (limited) possibility to choose applicable law, which, as is already the case in some countries, could be a first option before a uniform system of conflict-of-law rules based on set of connecting factors or lex fori is applied. However, no such uniform set of connecting factors was proposed in the Green Paper, which merely identified a number of connecting factors commonly used in international instruments without any internal preference.

This Annex provides a summary of issues raised and views expressed in the public consultation and additional stakeholder interviews. The information has informed the assessment of Policy Option 2 in Section 9. Advantages and disadvantages are described in relation to:

- A7.1: Introducing uniform conflict-of-law rules in the EU, and,
- A7.2: Spouses (limited) possibility to choose applicable law.

A7.1: Advantages and disadvantages of introducing uniform conflict-of-law rules

Table A7.1 below summarises the main advantages and disadvantages of harmonising conflict-of-law rules for spouses and legal professions / Member States respectively.

Table A7.1 – Advantages and disadvantages of harmonisation of conflict-of-law rules	
Spouses	**Legal professions / Member States**
Advantages	
▪ **Legal** and **judicial certainty** for the spouses in that the same rules govern what law will apply	▪ ***Simplifies determining*** *the* ***applicable law*** *and* ***facilitates*** *the* ***legal assessment*** *of the situation*
▪ ***Diminishes*** *the* ***rush for jurisdiction***	**Ensures that the same law will apply independently of which court that is seized**
▪ Leads to **transparency**	
Disadvantages	
▪ **Differences in the application of the rules.** Member States might interpret the harmonised rules differently.	
▪ *Decreases* ***party autonomy****	▪ ***Makes determining*** *the* ***applicable law*** *and the* ***legal assessment*** *of the situation more difficult*
▪ *Results do not correspond to* ***legitimate expectations****	▪ Potential **difficulties** in **finding a common approach** given the current different approaches of Member States.
*	▪ Possibility of **unsatisfactory harmonisation?**
	▪ **Legal, political and cultural difficulties** implementing such a strategy in the short term
	▪ Resolution of some problems may result in the **emergence of other problems** depending on the current systems in the Member States, e.g. adoption of uniform conflict-of-law rules would **not resolve problems related to the application of a foreign law** unless lex fori would be adopted.

* *Dependent on the substance of the uniform system of conflict-of-law rules and the previous systems in the Member States.*

Whilst most positive impacts identified concern advantages for spouses who lodge a divorce petition, practical disadvantages of introducing a uniform system of conflict-of-law rules regard difficulties in elaborating and agreeing on what such a system would include have also been identified, which according to some stakeholders[83] may be a premature undertaking.

Concerning exactly what advantages or disadvantages harmonised conflict-of-law rules could result in for the spouses depend to a high extent on the precise content of such a system, particularly as regards the choice of connecting factors. For instance, party autonomy could be increased if the spouses were allowed a (limited) choice of law as a

[83] Green Paper respondents and additional stakeholder interviewees.

first solution, whilst this would not be the case if applicable law or competent court was purely based on connecting factors such as nationality or habitual residence.

One main practical issue raised was that of readiness of the Member States to adopt a uniform system which is very different from their current one, since national conflict rules generally have emerged from a long process of legal development based on national traditions. Conflict rules harmonised on an EU basis may simplify the foreseeability across the EU but could also compromise solutions that would be preferable in individual cases and in view of Member State family policies and legal traditions.

In principle, despite concerns about the practicability and possibility of elaborating uniform system, most respondents could see clear advantages in harmonised conflict-of-law rules by increasing the transparency for international couples who want to divorce. As concerns differences in the application of the law, which was also raised as a problem, ensuring clear rules and clear guidance as to interpretation of the rules could reduce the likelihood of different interpretations. If issues relating to elaboration and content of such a system could be solved, most disadvantages would be overcome.

Some concerns about whether it is legally possible to adopt such a system have been raised. By summary:

- **Interference with the sovereignty of the Member States**. Respect for the traditions of national legal systems governing family matters is recognised *per se* in relation to judicial co-operation in civil matters in the EU, and it may be questionable whether there are sufficient grounds to change the status quo for the conflict-of-law rules on divorce matters.

- There are also issues concerning whether harmonisation of international private law in divorce matters is **sufficiently connected with the internal market**[84].

Even though this assignment is confined to international divorces, separations and marriage annulments, and does not include considerations in relation to consequences of such cases, a vast majority of practitioners strongly emphasise that harmonisation of conflict-of-law rules relating to divorce cannot be considered in isolation from other related matters. It is commented that harmonisation only of conflict-of-law rules in relation to divorce is insufficient and unsatisfactory, unless such measures are accompanied by conflict-of-law rules applicable to the consequences of divorce. Often problems in divorce cases, e.g. incentives to rush to court, arise from ancillary matters, such as the determination and division of marital property, child custody and maintenance as well as alimony. Due to this, problems that occur due to the current situation would not be possible to solve solely by harmonising the conflict-of-law rules applicable in divorce cases.

[84] Provided the Community has appropriate power under Article 61(c) read in conjunction with Article 65(b) of the EC Treaty. For this it is particularly necessary to ensure that, as required by the EC Treaty, the provisions of the future legal instrument are confined to determining cases involving cross-border elements and ones where they are necessary for the proper functioning of the Single Market.

Advantages and disadvantages of a system based on lex fori compared to a set of connecting factors

Table A7.2 below summarises the main advantages and disadvantages for spouses and legal professions / Member States respectively in relation to the implementation of a system based on lex fori compared to a set of connecting factors, which provides the possibility to apply foreign law.

Table A7.2– Advantages and disadvantages of a system based on lex fori or connecting factors			
Advantages		**Disadvantages**	
Spouses	**Legal professions / Member States**	**Spouses**	**Legal professions / Member States**
Lex fori – law of the forum			
Clarity without complexity	**Simplest and easiest** for the courts to apply. It is not necessary to interpret and apply the law of another Member State which may be quite different.	Reinforces the **risk of rush-to-court** which results from the multiple competences in Article 3 of the New Brussels II Regulation.	The vast **majority of Member States** do not apply the lex fori principle but have **systems of connecting factors.**
Foreseeability (certainty) for the citizens	**Continuity and consistency as regards law applied**	Applying lex fori could be the same as '**judging by accident**' unless it is ensured that the law is applied in the country with which the spouses feel closest connection.	
Connecting factors – could result in applying law of another State			
The harmonisation of conflict-of-law rules **increases transparency** and thereby the **legal certainty** and **predictability** for the spouses.	**Most Member States have a system of connecting factors in place**. All Member States have established rules governing divorce, and rules governing the institution of marriage itself, including rules applicable to mixed-nationality marriages, on the basis of longstanding traditions regarding their **culture**, **legislative structures** and their **social conventions**. They may accordingly not be inclined to change their respective systems.	*The real difficulty for practitioners may not be the area of conflict of laws as such but the fact that the courts and lawyers may have to **deal** with **unfamiliar legal systems**. This results in a number of different problems, both for lawyers and citizens.*	
Prevents rush-to-court		Regardless of the fact that the same substantive law is applied, **court rulings may differ significantly**.	**(Legal) culture**: **Understanding legal culture is the result of legal education and training.** Also, application of a foreign Divorce Law by national judges may be contrary to their inclination in particular when there are big differences between the substantive divorce laws, e.g. Sweden compared to Ireland.

Table A7.2– Advantages and disadvantages of a system based on lex fori or connecting factors			
Advantages		**Disadvantages**	
Spouses	**Legal professions / Member States**	**Spouses**	**Legal professions / Member States**
		Uncertainty through lack of lawyer's or judge's knowledge of the core of the law applied	**Difficulties in correctly interpreting the applicable law**. Not all law is codified, and not all countries have a clear distinction between substantive and procedural law, and foreign courts therefore have to ascertain what part of a code is substantive law.
		Risk of **investigations into foreign law** which are **haphazard**	Impracticality: does one **import the process** (the rules) **or only the law**. The foreign legal system may be so different in its concepts and procedures that even if a translation of statutes is available, practitioners and judges are unable to understand the meaning or may apply it entirely differently to the courts of the country whose law they apply.
		Involves experts to understand the legal system of other Member States, which leads to: ▪ **Excessive time** ▪ **Inevitable further costs**	Requires an **increase of availability** and **numbers of experienced experts** on up to 25 Member States' divorce laws
		Risk of **hazardous translations**	
		Financial discrimination between the parties who can afford private experts and those who cannot.	The question of **applying the rules of a third state** (the law of the spouses' nationality for instance), e.g. in cases where one or both spouses are third-country.

The main considerations of benefits of each of the systems relate to the practical advantages in applying the law of the court (lex fori), which results in certainty and foreseeability for the spouses as well as a speedy process, compared to application of the (foreign) law with which the spouses feel closest connected, ensured on the basis of a number of connecting factors. This could result in that the spouses are more content with the results of the divorce proceedings and that the outcomes correspond to their legitimate expectations.

As regards negative implications caused by implementation of the systems, currently application of lex fori in combination with the lis pendens rule bring along disadvantages such as 'rush to court' and problems therewith related, whilst the main drawbacks of applying a foreign law relate to impracticability of establishing the content of a foreign law, time delays due to necessity of translations and difficulties in correctly interpreting the substance of the foreign applicable law etc.

A major concern raised by a high number of practitioners concerning application of foreign law regard serious problems in relation to severe time delays in delicate family law cases where a decision should be made as promptly as possible. Also, court rulings may differ significantly even though the same substantive law is applied in two Member States. Furthermore, there could be uncertainties as to whether the connecting factors really ensure that the law with which the spouses feel closest connected is in fact applied.

Advantages and disadvantages of connecting factors

A number of connecting factors can be identified, mainly based on citizens' (common) habitual residence (or domicile) or nationality. Box A7.1 in Annex 7 provides an overview over these and additional connecting factors and specifications thereof (no internal preference order).

By summary, most Member States, 11 out of a total of 15 countries that apply a system of connecting factors, have common nationality as first connecting factor, whilst two countries first give the spouses a limited possibility to choose applicable law, and two Member States have common residence (domicile) as first connecting factor. All Member States include nationality as a connecting factor at some point in their system, whilst residence (domicile) is not applied at all by 3 Member States.

9 Member States apply lex fori as last option if no other connecting factor is applicable. With one exception, the Member States that do not apply lex fori as a last resort base applicable law on "closest connection"[85]. Such a factor could be applied for instance in those cases when both spouses have left their common habitual residence, which could imply that it would be necessary to establish with what law the parties were closest connected during the main part of their marriage or still are. Establishing closest connection is an uncertain and to some extent unpredictable option, and is therefore only applied as a last possibility.[86]

[85] Belgium has nationality as last connecting factor.

[86] A full review over what Member States apply what connecting factors is included in Section 6.4.1.

The advantages and disadvantages of the connecting factors nationality and habitual residence are provided in Tables A7.3 and A7.4 below.

Table A7.3 – Advantages and disadvantages of connecting factors – Nationality		
Specification	**Advantages**	**Disadvantages**
▪ Common nationality ▪ Current common nationality ▪ Common nationality of the spouses at the moment of lodging a petition for divorce ▪ Former common nationality if one of the spouses still holds it	**Preciseness of the definition.** No questions such as 'length of residence' have to be answered (compared to when "habitual residence" is used as connecting factor).	There are cases of **double nationality** within the EU.
	Consistency, legal certainty and safeguard to manipulation. A person's nationality cannot be changed as quickly and easily as his/her habitual residence, i.e. it is subject to manipulation to a much less extent.	In an area of freedom and equality where all citizens should have equal rights, it may be difficult to **base different treatment on nationality of the parties**.
	Presumption: Citizens **can remain most closely linked** to their **country of origin** even though they have lived for years in another country. In such cases nationality ensures satisfactory solutions (e.g. when parties have been assigned to long periods of work abroad and want to divorce in their country of origin).	In some cases nationality might **not** be **sufficiently flexible** to take account of individual cases where spouses feel closer connected to their current country of residence than their country of origin
	Good understanding of the **language** of the court proceedings	

Table A7.4 – Advantages and disadvantages of connecting factors – Habitual residence (domicile)		
Specification	**Advantages**	**Disadvantages**
▪ Permanent residence which is common for the whole family ▪ The residence of the spouse with whom minors have been living ▪ Current joint residence ▪ Last place of common residence ▪ Law of the country in which the spouses had their habitual residence during the marriage if one of the spouses retains this residence ▪ Law of the State in which one of the spouses has his/her habitual residence and in which both the spouses bring up the divorce petition to a court. ▪ Residence of the spouses when applying for divorce ▪ The laws of the residence of one of the parties ▪ Habitual residence so that the same law would be applicable to the divorce and to the ancillary proceedings entailed by the divorce or separation.	**Social and legal integration:** Ensures that spouses can divorce in a country and a system of law with which there is a genuinely close connection even though this country is not their country of origin.	**Difficulties** in **establishing** whether there really is a question of **'integration'** in the country of habitual residence. Even though people have been living abroad for a long time, they can still feel closer connected to the country of their nationality than their new country.
	Last place of common residence (LCR) is relatively simple to **establish**.	**Difficulties in defining habitual residence with sufficient precision**, i.e. legal certainty is not ensured. Also, increasing mobility of couples may make LCR more difficult to establish in future. If couples have two homes in two different jurisdictions and regularly make use of both, LCR may not be immediately obvious. Increasingly, couples work in different cities (and occasionally in different jurisdictions) mid-week. Weekends may be spent in either jurisdiction.
	A citizen who chooses to move to another country should, by choosing this country, also **be prepared** to **follow the laws of the country**.	Could be **subject to manipulation** to a higher extent than nationality if people **move** between countries to be able to apply a different law.
	Would be beneficial to use when the **parties** are **stateless** or **refugees**.	There are currently **two different systems** in the Member States; those which use the term **habitual residence** and those which use **domicile**. These terms are **not identical**.
	Giving priority to the law of the (last) common habitual residence will **more often allow a court** to **apply** its **lex fori**.	

One advantage of using either of these two connecting factors, i.e. nationality or habitual residence (domicile), is that they have already been agreed as significant factors in both the Brussels II and the New Brussels II Regulation and are already in use throughout the EU.

Which of the two connecting factors should have primacy over the other depends to some extent on what the main objective of harmonisation is; to try to ensure closest connection (flexibility) or to provide the parties with legal certainty. The main benefit in applying nationality as connecting factor would be the preciseness of definition, consistency, legal certainty and safeguard to manipulation, but in some cases it would not be sufficiently flexible to take integration into another country than the country of origin into consideration. Applying habitual residence (domicile) as connecting factor is based on the presumption of social and legal integration into the new country, but the main drawbacks lie in the definition of what is the habitual residence (domicile) and whether integration has occurred[87].

Even though each of these two connecting factors clearly has both advantages and disadvantages, the main problem in applying law based on either one of the factors is that it in the end is based on individual preferences what country one feels most closely connected to. Some individuals live abroad for a number of years and still feel most closely connected to the legal system in their country of origin, whilst others integrate in their new society and legal system quickly.

In recommending the same connecting factor for jurisdiction, the instrument should also ensure that the competent court will apply its own law.

It would also be possible to apply law based on the **place where the spouses married**, which would provide for certainty, but would have disadvantages in that the spouses may not have any other connection to that country than simply that this was where they married.

Amongst practitioners[88] there is a very strong consensus that a public policy clause is indispensable[89]. It is considered that such a clause is necessary to enable Member States to refuse to apply a foreign law which does not comply with fundamental values in relation to national family public policy. The public policy clause should regard legislation of both Member States and third countries since the substantive divorce laws of the Member States still remain very different. Refusal to apply a foreign law would notably occur when the foreign applicable law is too different from that of the 'host' country, such as the prohibition to divorce (e.g. in the case of Malta), application of the mechanism of repudiation (existing in some North African legislations) and when

[87] To predict the applicable law in the event of divorce is more pronounced if the primary connecting factor is the spouses' "common" nationality rather than their habitual residence, which is more subject to change. However, even though the main benefit of having nationality as first connecting factor, basing applicable law thereon may also result in application of the law with which the spouses feel closest connected. Likewise, in those cases where there is no problem to establish habitual residence, legal certainty is ensured.

[88] Lawyers, notaries and judges responding to the Green Paper on Divorce matters.

[89] Those practitioners who are in favour of lex fori are of the view that a Member State should never have to apply the legislation of another State, but if future proposals would include such measures, they regard a public policy clause as imperative.

the law of a third country is contrary to principles of equal entitlement. However, such a measure would require that Member Sates defined more accurately the core of their national family public policy. Ideally, the public policy clause would also include provisions that the forum seized should be able to order an automatic transfer to the appropriate forum with no possible refusal from the appropriate forum to accept the transfer.

Including such a reservation is in accordance with Article 64 EC. Some practitioners added, that even if no such clause were included in the rules, courts in several countries are likely to agree that this proviso is, in any case, an established legal principle, but that it would be preferable to establish this explicitly in a specific clause.

A7.2: Advantages and disadvantages of introducing a (limited) possibility for spouses to choose applicable law

The simplest of the systems that could be adopted would be to give the spouses an entirely free choice of law applicable to their divorce. However, in view of the negative consequences of application of 'exotic' laws, the choice could be limited based on a number of different alternative factors.

Table A7.5 below outlines advantages and disadvantages of allowing spouses a (limited) choice of law.

Table A7.5 – Spouses choice of applicable law	
Advantages	**Disadvantages**
The possibility of a choice of law could be a means to **respect tradition as well as the individual's wishes**. This leads to **acceptance** and the **appropriate application of the law** that is best suited to the case at hand	There would be a higher requirement **on responsibility and information** on behalf of the spouses.
"**Party autonomy**" and **flexibility**. It is recognised amongst family practitioners that parties often feel that divorce is a process over which they have little control.	**Connecting factors** must be provided for in cases where spouses have not made any choice.
Given the high divorce rates the parties have a **legitimate interest** in making their decision to marry partly dependent on the **requirements and consequences of a divorce**. The possibility of choosing the law applicable to the divorce would give interested parties a means of working out the conditions in which they could withdraw from the marriage.	An argument against this might be concern for **insufficient protection of the more vulnerable spouse**, who might for example not have legal counsel and would be unable him/herself to evaluate such a choice, and thereby be abused and made profit of.
It could be **cost-efficient** in those cases when there is a mutual agreement between the spouses to choose a particular law that is, according to their personal feeling, most **closely connected** with them.	In case there would be a possibility to applying a law foreign in the jurisdiction in which the proceedings are raised **costs may be high** (translation, application of unfamiliar laws etc).
The ability to choose the applicable law would further enable the parties to **avoid the application of a body of divorce law** which they might regard as **incompatible with their values** if one or both of them moved to a different Member State. This means that the spouses are more likely to accept and abide by the outcome.	It could lead to **circumvention of mandatory provisions**.
It **makes the spouses more active** in the procedures and reinforces the roles of the spouses in the solution of their matrimonial crises, and in principle, should lead to a **solution that is most convenient** to them, **simplifies the road to the divorce or separation, reduces economic, personal, psychological and social costs, reduces frictions and divergences and leads to the best stability and normality of the relations between the spouses and their children after the crises**.	It may be an option in cases of mutual agreement between spouses without children, but the issue will be much more sensitive in those cases when the spouses have minors. Choices made at the time of the divorce threaten to be made under duress or at any rate pressure. They may just be conceivable only when the spouses live under the separation of goods regime, have no under-age children and there are no problems of maintenance. Even though it may seem advisable to leave more room to the will of the spouses in the choice of the applicable law, it would be advisable to **limit it and supervise the choice**, given the difficulty which may arise from the drafting of agreements on future situations, in particular as regards the issue **of parental responsibility**.
It is in **accordance with current laws** of the EU. Some countries (Spain, Belgium, the Netherlands, and Germany, etc.) already have admitted the possibility for spouses to choose the law applicable to divorce. Citizens of such States, who have this freedom, would be deprived of this right if a contradictory Community rule was adopted.	The danger is that the parties do not tell the truth but make a **tactic choice** – it may be that they make this tactical choice together or one spouse influences the other to consent. The last risk can be prevented by a declaration of choice before a judge. The first can be prevented by limiting the laws the spouses can choose between.

Practitioners in the EU who responded to the Green Paper almost unanimously favoured a restriction on the choice of law so as to avoid the application of the law of a

country to which the spouses are unrelated and to prevent the application of the law for inappropriate purposes.

Limited choice based on connecting factors

Proposals for alternative connecting factors to limit spouses' choice of law are summarised in Box A7.1 below.

Box A7.1 – Proposals for connecting factors to limit spouses' choice of law

Residence

- the law that governed relations between the spouses at the time of the marriage
- where they most lived or last lived during their marriage
- habitual residence
- any country of their residence, or previous residence
- common habitual residence; last common habitual residence, if one of the parties is still living there
- the centre of family life
- where the children of the family live

Nationality

- nationality
- common nationality
- last common nationality
- nationality of either spouse

Closest connection

- strongest link with a Member State
- place where the couple were married

Lex fori

Other possible connecting factors

- place of residence of the children,
- place where the majority of the ancillaries are situated etc.

There was no real consensus amongst practitioners whether the choice of law should be restricted to those legal systems with which both spouses have a connection or if a link with 'at least one of the spouses' would be sufficient.

Restriction to lex fori

Even though lex fori was mentioned by many as one factor choice of law could be based on, limiting the choice of law to lex fori only was strictly advised against due to a number of problems this could result in. Amongst such problems, it was mentioned that there could be insufficient objective connecting factors with that country. It was also emphasised that the principle of lex fori is inadequate for situations that occur due to geographical mobility. Problems related to mobility concern for instance the risk to jeopardise agreements and marital planning or estate planning of the parties, and that such a precaution should not be overthrown by moving around. This may disfavour free movement, since parties may hesitate to move to another country if they fear that they may have to take up a re-negotiation of their pre-nuptial agreements or their other marital or estate-related arrangements.

Considering the advantages of lex fori, it was acknowledged that having the choice of parties limited to lex fori would be beneficial in that it would facilitate the work of the courts. Furthermore, lex fori is advantageous for women since it is the simplest legal solution and therefore may result in less legal and financial barriers for women to obtaining the necessary legal advice and securing the most beneficial outcome. However, limiting the choice to lex fori would under the current lis pendens rule increase the risk for "rush to court", which is likely to put those women who are at a financial disadvantage at a further disadvantage, since they are unlikely to have the resources to act quickly enough to secure the best jurisdiction or applicable law.

Limited choice restricted to (some) cases of mutual consent

Other limitations included that choice-of-law should only be possible in case of mutual consent to divorce and what law should be applicable. Some practitioners added that this should include that the parties agreed both on their divorce and all its consequences, i.e. ancillary relief and their matrimonial regime unless they had agreed special provisions in this respect. Several practitioners emphasised that choice should only be possible for spouses without minor children.

Concerning the impact of providing the spouses with a limited possibility to choose law, the numbers of mutual consent cases in the Member States are relevant. Through literature research it became evident that not much data on the number of cases are available. Data for four Member States (Austria, Italy, Luxembourg and Poland) show, however, that in all these countries, between 70 and 90% of the divorces are made based on mutual consent. Figures are provided for each of the countries below.

Austria:

90% of all divorces in Austria are divorces by mutual consent, based on a divorce settlement in court[90].

[90] *AUSTRIA'S NATIONAL REPORT ON THE IMPLEMENTATION OF THE "PLATFORM FOR ACTION" FOURTH WORLD CONFERENCE ON WOMEN BEIJING 1995* forwarded by the Federal Minister for Women's Affairs and Consumer Protection, Vienna, March 1998.

Italy:

Table A7.6 – Legal separations and divorce judgments by form of case closure and geographical coverage(in percentage) - Year 2002

Geographical coverage (a)	Legal separation			Divorce		
	Mutual consent	Judicial	Total	Mutual consent	Judicial	Total
North	89.7	10.3	100.0	80.7	19.3	100.0
Centre	88.9	11.1	100.0	78.8	21.2	100.0
South	77.8	22.2	100.0	66.9	33.1	100.0
Italy	**86.7**	**13.3**	**100.0**	**77.6**	**22.4**	**100.0**

(a) Where the Courts have declared the separation and divorce judgements

Luxembourg:

Table A7.7 – B 323 Divorces in general, divorces by mutual consent and divorces by autonomous grounds in Luxembourg

	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
SPECIFICATION											
Divorces in general	582	759	727	817	1,001	1,017	1,043	1,030	1,029	1,092	1,026
Law of 05.12.78*	72	74	45	57	76	53	374	371	298	342	257
Divorces by autonomous grounds	260	272	250	329	327	294	16	19	7	16	8
Divorces by mutual consent	250	413	432	431	598	670	653	653	724	734	761
Divorces by mutual consent (% of total)	*43%*	*54%*	*59%*	*53%*	*60%*	*66%*	*63%*	*63%*	*70%*	*67%*	*74%*

* The law of 05.12.78 provides each of the spouses with the possibility to request divorce in case of separation for an uninterrupted period of at least three years

Poland

Table 5. Divorces in 1997 by the period between filing a petition and a valid decision (Demographic Yearbook 1998. GUS. Warszawa)

Table A7.8 – Divorces by mutual consent Poland							
Category	Total	Time between filing a petition and a valid decision					
		One month	2 - 3	4 - 6	7 - 11 months	1 year	2 years and more
Total	**42549**	**1218**	**7090**	**12026**	**11425**	**8103**	**2687**
By fault of husband	10256	145	969	2327	3218	2732	865
By fault of wife	1111	25	111	233	329	307	106
By mutual fault	1963	14	78	236	503	713	419
By mutual consent	29219	1034	5932	9230	7375	4351	1297
By mutual consent (% of total number of divorces)	*69%*	*85%*	*84%*	*77%*	*65%*	*54%*	*48%*

Table 6. Stating fault in divorce proceedings (Demographic Yearbook 1998. GUS. Warszawa)

Table A7.9 – Divorces by mutual consent Poland						
Years	Total divorces	By fault of husband	By fault of wife	By mutual fault	By mutual consent	*By mutual consent (% of total number of divorces*
1994 r.	31574	7575	883	1695	21421	*68%*
1995 r.	38115	9173	1010	1914	26018	*68%*
1996 r.	39449	9430	1025	1918	27076	*69%*
1997 r.	42549	10256	1111	1963	29219	*69%*

Limited choice based on geographical factors

Practitioners were split in regard to limiting choice of law to the EU Member States or whether it ought to also be possible to choose a third State.

It was suggested that there would be merit in limiting the choice to laws of Member States in case applicable law would not be restricted to lex fori. This was based on the presumption that even though there are quite significant differences between laws of Member States there are even greater differences with the legal systems of many other countries. Limiting the choice to Member States would therefore limit cases where the judge does not know the law applicable. It was also suggested that such a limitation would favour the unity within the EU and an agreement on all rules applicable to family matters in the EU.

Reasons for not confining choice of law to Member States were that any restriction to legal systems of Member States should be rejected to avoid an insular situation. Cases may occur in which the application of a third State's law is more appropriate than the law of an EU Member State. Such cases include when the spouses lived in a third State most part of their marriage, where the spouses had their previous place of common habitual residence or whose nationality they both hold. Application of a law that is contradictory to a Member State's public policy could be prevented through the adoption of a public policy clause[91].

Another factor to take into account is whether choice-of-law rules that the courts are required to apply are equally valid for third-country nationals residing in that country.

Formalities

In order to ensure the appropriate application of a possible choice of law principle, a number of formal requirements could be adopted to safeguard the interests of vulnerable parties. Such provisions would have the aim to guarantee that the choice of applicable law is a serious choice, which is not subject to deception or coercion, and that vulnerable parties are not abused or made profit of.

Possibilities for formal requirements include considerations as regards:

- Timing – in particular when such a choice should be made
- Requirements for drawing up / registering the agreement
- Possibilities for modifications

Specifics of each of these requirements are outlined below.

[91] However, the Community competence to regulate such situations may be questioned. A definite answer may be given, however, after the ECJ opinion in the Lugano II case.

Timing:

Formal requirements could specify that the spouses need to decide on applicable law to be made at a certain point during the marriage or in connection with the divorce procedures:

1. **Before the divorce procedure starts**, i.e. before the dispute arises:
    - In connection with the **wedding**
        - Before the wedding
        - At the marriage ceremony before the registrar
        - Included as a clause in the prenuptial agreement
    - If the choice is made later **during the time of the marriage**, it should be exercised in a specific form (before a competent authority or a notary) by way of a marriage contract.

The rules could be strengthened by including provisions such as lodging an application for divorce within one year of agreement on choice of law invalidates the agreement. It could also be made compulsory for spouses who do not share the same nationality to agree on a legal system when they are getting married. Spouses who share the same nationality could be allowed to make this choice. However, a disadvantage of making it compulsory to agree on a law already at the time of the marriage is that it may be very difficult to foresee future moves and circumstances that will affect the choice of law. Such problems could be prevented if the spouses for instance were allowed to change the agreement if they moved to another country, but if such provisions are necessary, the advantages of having made the choice at an early stage of the marriage are less obvious.

Another factor that needs to be taken into account if making it compulsory to choose law in connection with the wedding is that it may result in a psychological dilemma to say yes to the marriage and at the same time decide on the law applicable if the marriage would end in a divorce.

Those in favour of deciding on applicable law before the time of divorce (either at the time of the wedding itself or later on during the marriage), considered that otherwise the outcome would be determined by the circumstances of the divorce process. Another reason for establishing law before the dispute would be to avoid manipulation from either one of the parties.

2. The agreement should not be concluded in advance, but **immediately prior** to the planned **divorce**.

The formal conditions of the choice are relatively simple if the choice is made when the procedure is lodged, as in such cases, the parties could be asked to let their choice be known before the judge, either directly or through their lawyer. Procedural rules applicable for each Member State, either during the declaration of the will of the parties, or during their arguments, could be sufficient to guarantee the freedom of agreement.

The negative aspects of making the choice of law at the time for divorce are problems in relation to manipulation of the weaker party to agree on a law that may not be in his or her main interest. Sometimes, before their divorce, the spouses may be in an unequal situation for one or another reason and that could influence their agreement on the law to be applied to their divorce.

In writing, directly in relation to the divorce. The spouses should not have to suffer for a decision they made perhaps years ago before they knew where they were going to live and how the future would turn out. In Austria this is already the case

3. The choice can be made at **any moment**, either at the time of marriage, or during the marriage, when a divorce procedure is lodged or during the procedure itself. There seems to be three possible solutions: a) the possibility to make a joint choice of jurisdiction (prorogation of competence); at the time an issue arises. b) the possibility of anticipating the difficulty arising in a pre/nuptial agreement and committing to a jurisdiction, c) at the time of divorce, a joint choice on the applicable Law within whatever jurisdiction is available.

It was highlighted that giving the spouses the choice of law for divorce proceedings would also have consequences for determining ancillary matters.

Possibilities for modification:

- Once this choice is made, it should not be possible to modify it.
- If they should move they should be able to reconsider.
- If a spouse feels disadvantaged as a result of an earlier choice of law in relation to the divorce it could be possible to make a plead that the choice of law was invalid on grounds such as perceived unfairness in the way the consent was generated or subsequent developments not foreseen at the time of the marriage. However, if such a possibility would be allowed, the courts are faced with a new problem. Rules would therefore have to be adopted to govern the law applicable to the choice of law and its effects.

ANNEX 8 – SUPPORTING MATERIAL FOR THE ASSESSMENT OF POLICY OPTION 3

Policy Option 3: Revising the Community rules for determining the competent court

The Green Paper on divorce matters puts forward the possibility to revise the rules on competent court in Art. 3 of the New Brussels II Regulation. In the stakeholder consultation, a policy option that would be to replace current alternative grounds for jurisdiction in Article 3 of the New Brussels II Regulation with a hierarchy of jurisdictions was identified. Advantages and disadvantages of this possibility are presented below. Since this policy option was not included in the Green Paper, stakeholders have been re-contacted to obtain further views on advantages and disadvantages of such an option.

This Annex also includes information on what Member States provides for 'joint application' as this concept is currently included in Article 3 of the New Brussels II Regulation. Some stakeholders indicated that the current formulation provided a problem in those countries where the concept does not exist. The relevant information is presented by Member State in Table A8.2 below.

A8.1: Introduction of a hierarchy of jurisdictions

Instead of current alternative jurisdiction grounds in Article 3 of the New Brussels II Regulation, a hierarchy of jurisdiction could be adopted. Such a hierarchy would determine competent court by 'automacy' based on a hierarchy of connecting factors such as (last) common habitual residence, common nationality and lex fori. The advantages and disadvantages of the two first mentioned connecting factors are included in tables A7.3 (nationality) and A7.4 (habitual residence) in Annex 7.

A preliminary assessment of advantages and disadvantages of introducing a hierarchy of jurisdictions is provided in Table A8.1 below.

Table A8.1 – Advantages and disadvantages of introducing a hierarchy of competent courts	
Spouses	**Legal professions / Member States**
Advantages	
▪ Leads to **transparency**	
▪ **Legal** and **judicial certainty** for the spouses in that the same rules not only govern what court is competent but also determines the hierarchy of jurisdictions	▪ Establishes what **court is competent** on the basis of 'objective' factors
▪ **Prevents** the **rush for jurisdiction**	▪ **Simplifies determining** the **applicable law** (even though this still will be governed by national conflict of law rules) and **facilitates** the **legal assessment** of the situation
▪ Encourages **mediation efforts** since there will be no more rush to court	▪ Leaves little room for **different interpretation of the rules** amongst the Member States
Disadvantages	
▪ Decreases **party autonomy**	▪ **Makes determining** the **applicable law** and the **legal assessment** of the situation more difficult
▪ Results may not correspond to **legitimate expectations***	▪ Potential **difficulties** in **finding a common approach** given the current different approaches of Member States.
	▪ **Legal, political and cultural difficulties** implementing such a strategy in the short term
	▪ Resolution of some problems may result in the **emergence of other problems** depending on the current systems in the Member States, e.g. adoption of a common hierarchy of jurisdictions would **not resolve problems related to the application of a foreign law**.

Table A8.2 – Overview of what Member States provide for 'joint application'			
Country	**Yes**	**No**	**Comments / problems**
CZ		☑	Czech national law **does not** provide for a "joint application" in divorce matters. The divorce is an adversary proceeding.
CY		☑	Cyprus **does not** provide for a "joint application".
DE		☑	Germany **does not** provide for joint application, but both parties can apply for divorce separately. Has one party filed for a divorce application the German law foresees three possibilities for the other spouse to react: - consent by mere declaration (which is not a motion) - filing for divorce too, which has the consequence that should the spouse who filed first withdraw his/her application the procedure continues on the basis of the second application, and, - motion for dismissal of application because the other spouse does not think that the marriage has failed. The New Brussels II Regulation would be read in the sense that both parties file for divorce.
EE	☑		The concept 'joint application' **does exist** in Estonia. However, divorce applications are only very rarely submitted on the basis of 'joint application' due to requirements of settling all issues relative to divorce by common agreement beforehand (e.g. children, maintenance obligations, division of property etc.). Settlements of divorce processes based on joint application are not done by courts but by the same institution that married the couple (administrative procedure).
ES	☑		In Spanish Civil Procedure the criterion of 'joint application' **does exist** and is quite common in practice, according to Art. 777 of the Spanish Civil Procedure Code. So, no problem of interpretation of art. 3 Council Regulation 2201/2003 arises.
FI	☑		**Yes**, Finnish law on divorce provides for a joint application.
FR		(☑)	In France 'joint application' **does not exist** as such, but there is a possibility to lodge a divorce petition based on mutual consent (Art. 2.3.3) in which case the spouses agree on everything. In these cases the place of jurisdiction the spouses agree has very little value. The concept is not really applicable in France. What will happen in practice is that one party will lodge the application and the other will not contest. This can be ensured through a written agreement between the parties in which it is stated that one of them will lodge the petition whilst the other spouse does not contest what has been stated. Currently there is not a problem to 'go around' the legislation. However, according to case law of the French supreme court, judges with discretionary power should refuse to apply law which is not in accordance with the Brussels II Regulation. At the moment this is not done due to lack of knowledge.
GR	☑		**Yes**, according to Article 1441 of the Hellenic Civil Code (divorce by mutual consent) when the spouses have mutually agreed to divorce, they can demand it by a joint application, which is judged according to the procedure of the graceful jurisdiction (Article 739

Table A8.2 – Overview of what Member States provide for 'joint application'			
			and following the Civil Procedure Code).
HU	☑		**Yes**, according to Article 18 Section 1 of Act no. VI of 1952 on marriage, family and guardianship (Family Code) the court may dissolve the marriage at the request of either of the spouses or at the *joint request* of the spouses, if their married life gets completely and irremediably spoilt. However, the fact that the parties submitted jointly their petition for dissolution of marriage and ancillary matters does not influence the jurisdiction of the Hungarian court. The parties may *come to an agreement* on the dissolution of their marriage and on the ancillary questions related in Article 18 Section 2 of the Family Code. The above Article states: „The *declaration of the uniform view of the spouses*, without any influence, based on the final decision of the spouses aiming at the dissolution of the marriage, shows that their married life is completely and irremediably spoilt. The decision can be regarded as final, if a) the spouses agree on the keeping of the child and the payment of child-support, the maintenance of the relation between the parent and the child, the payment of spousal support, the usage of the joint home and the distribution of the joint properties of the spouses – except if the joint real property is terminated – and if this agreement is accepted also by the court, *or* b) the spouses have lived separately, in separate homes, for at least three years, and if they prove that they have agreed on the keeping of the child and the payment of child support in accordance with the interest of the child." On the grounds of Article 148 Section 2 of the Act III of 1952 on the Code of Civil Procedure if the agreement is in conformity with the legal rules and the just interest of the parties, the court shall approve it by a judge's order. However, by Article 290 Section 2 of the Code of Civil Procedure the court must not decide on the dissolution of a marriage – if the parties have requested the dissolution of marriage by identical acts of will on the basis of point a) of Section 2 of Article 18 of the Family Code – *until* an agreement has been reached on *all questions* determined therein and it is affirmed by court.
IE	☑		**Joint applications occur** in Ireland in the form of uncontested divorces.
IT	☑		**Yes**, the concept of joint application is known within the Italian legislation. If the parties agree completely on the conditions upon which they want to divorce, they can introduce a joint application. Some courts accept the introduction of the joint application by the parties without the assistance of a lawyer. Anyway, not all the courts apply that rule. If the parties are not assisted by a lawyer, they have to provide personally all the documents which are required. The spouses who want to proceed with a joint application, have to introduce an appeal to the chancellery of the court saying that they wish to appear before the presiding judge in order to obtain the proclamation of the approval of separation or divorce. In the joint request, the spouses have to mention the causes of their separation or divorce as well as the conditions of maintenance obligations and care provisions if they have some minor children.
LT	☑		Joint application of both spouses for the divorce **is possible** according to the Article 3.52 of the Civil Code.
LV	☑		**Yes**, Section V on the Divorce of Marriage, Article 70 of the Civil law of Latvia (Part 1 – Family Law) states that marriage is divorced by the court on the basis of the application of one or both spouses. Article 74 further specifies that if the spouses live separated less than 3 years (reconciliation period of separation needed to obtain the

Table A8.2 – Overview of what Member States provide for 'joint application'			
			divorce) the marriage can be divorced in case (Sub-point 2) if both spouses demand the divorce of the marriage or if one of the spouse demands it and the other side agrees to divorce the marriage.
LU	☑		**Yes,** no problems have been experienced so far concerning the procedure of the "joint application", which seems to fit the legislation of Luxembourg.
PT	☑		**Yes,** in Portugal is possible to make a joint application either at the civil registry's office or at the court. This application involves the agreement of both spouses to the dissolution of the marriage and to the payment of maintenance to the spouse in need, the exercise of paternal authority with regard to minor children, the disposal of the marital home and the arrangements which will apply during the proceedings with regard to maintenance, exercise of paternal authority and use of the home.
SK		☑	Slovak legal order (again Act No. 99/1963 as amended) **does not** provide for joint application. Such application would probably be evaded, because divorce proceedings need an applicant and a respondent (as it is a litigation) and joint application would allow identification of parties as applicant and respondent. Thus the court would probably ask the parties to choose the position of applicant and respondent, and would consider joint application as an application of applicant and opinion of the other, only submitted to the court in one document.
SL	☑		According to Slovenian law a divorce **can also be granted** on the basis of the agreement of spouses, there should not be any problems interpreting the criterion "joint application" in Slovenia when determining the jurisdiction of a member state.
SE	☑		**Yes,** Swedish law provides for joint application.
UK		☑	**No**. However, the lawyer interviewed indicated that in his experience both as a practitioner and as a part-time family court judge, and also being on the committees of international family lawyers in England, this is not a problem. A few years ago, the government were going to introduce the opportunity for joint applications for a divorce petition but then did not go through with the proposal. Most practitioners in England interpret the relevant jurisdictional basis of joint application as referring to what would have happened in England if a joint application for a divorce would have been allowed.
No information provided from: Austria, Belgium, Malta, The Netherlands or Poland			

ANNEX 9 – SUPPORTING MATERIAL FOR THE ASSESSMENT OF POLICY OPTION 4

A10.1: Advantages and disadvantages of introducing a (limited) possibility for spouses to choose competent court

An alternative to allowing the spouses a (limited) choice of law would be to provide them with a (limited) possibility to choose competent court. The differences between these options would be that if the spouses were able to choose competent court, the applicable law would in the current situation without harmonisation of conflict-of-law rules, be dependent on the national conflict-of-law rules. By choosing competent court without harmonisation of conflict-of-law rules, the spouses would, if the choice was limited based on a number of connecting factors, to some extent be able to foresee what law would be applicable and thereby at least indirectly be able to choose substantive law.

What concerns limiting the choice of competent court for the spouses, such provisions would be similar to those identified for restricting choice of applicable law in the previous section, including mutual agreement etc.

Table A10.1 below summarises arguments in favour of or against providing the spouses with a (limited) possibility to choose competent court. Many of the advantages and disadvantages are similar to those identified in relation to choice of applicable law.

Table A10.1 – Advantages and disadvantages of providing the spouses with a limited possibility to choose competent court	
Advantages	**Disadvantages**
Greater flexibility and a **jurisdiction more tailored to individual cases**. In the absence of harmonised conflict rules the parties' choice-of-forum could also determine the applicable national conflict rules and ultimately therefore the substantive law applicable to the divorce, which could ensure that the divorce is governed by the law with which the spouses feel closest connected.	Unless international private law is harmonised, **the possibility of a jurisdiction agreement leads to a largely arbitrary influencing of divorce law**. Additionally, in a marriage crisis, it is again only practicable for divorces by agreement.
This would **simplify practice**.	There is a risk of **conferring too much privilege, taking the form of coercion and deception**.
Enhances legal certainty and flexibility. This would be particularly useful where parties do not have a common nationality or domicile.	There is a risk that one spouse will bring **pressure** to bear or exert **undue influence on the other spouse** in order to obtain his or her consent **to a legal system** that operates in his or her favour. Agreements concluded only after the dispute has begun should be treated with great caution.
Nothing speaks against that the spouses who have made a **matrimonial agreement** and **can agree on applicable law** should not be able to **choose the competent court**.	In certain circumstances parties would make a **tactical choice** when seeking "suitable" courts.
Today, a divorce claim is not an exotic matter, but something on average every third marriage faces. **All other standard contracts allow such a choice of competence** and marriage should be subject to the same options.	The **proceedings** could be **delayed** (for example because foreign summonses were necessary) and, in the case of nationals of third countries, **recognition of judgments could be jeopardised**.
This could be a way of **solving the problem of lack of jurisdiction** in the courts of a Member State where the **spouses are habitually resident in a third country.**	There does not seem to be any problems as regards choosing court in a Member State, but it **becomes problematic as to third countries**.
The **concurrent jurisdiction of the courts of several Member States and the resultant forum-shopping can be avoided** as regards the divorce proceedings in the event of an exclusive choice-of-court clause.	The problem with divorce agreements, let alone jurisdiction agreements is, even more so than with matrimonial property contracts, that the **spouses are psychologically inhibited** about them.

Choice of competent court could be allowed either to court within both EU Member States and third States or be restricted to EU Member States only.

One Green Paper responded raised the issue that if the privileged status of EU citizens under Article 6 is to be maintained, the choice should be confined to the courts of the Member States. Other respondents did not consider it necessary to restrict the choice to EU countries only.

The majority of respondents considered that prorogation of competence should be possible each time the parties, or one of them, have a strong connecting factor with one another EU Member State. Such factors include Member States in which:

- one or both of the spouses have their habitual residence (domicile)
- last residence
- based on nationality

Formal agreements

Concerning formal agreements, the same considerations are valid as for applicable law in Annex 7.

ANNEX 10 – SUPPORTING MATERIAL FOR THE ASSESSMENT OF POLICY OPTION 5

Provide a possibility to transfer a divorce case to the courts of another Member State if the centre of gravity of the marriage was situated in that State

One possibility to decrease incentives to 'rush to court' could be to introduce the possibility to transfer cases to a court of another Member State in exceptional circumstances[92].

Most stakeholders are against the introduction of such a possibility, mainly in view of probable time delays and how unjustified transfers should be dealt with. Even those who are in favour of providing the possibility to transfer a case are concerned about the time delay as well as increased costs.

Table A10.1 below outlines advantages and disadvantages of introducing a possibility to transfer a case.

Table A10.1 – Advantages and disadvantages with the introduction of a possibility to transfer a case

Advantages	Disadvantages
Could **prevent "rush to court"** and circumstances in which neither spouse has any connection to the State whose courts have jurisdiction.	There would be a danger of **tactical transfers** to **delay the divorce process**, caused intentionally by the dissatisfied spouse.
Could **prevent circumstances** in which **neither spouse has any connection to the State** whose courts have jurisdiction	Transfers could result in serious **practical difficulties** such as different **languages** of the different courts and **procedural rules**.
If parties were given the possibility to jointly request a transfer of a case to the court of another Member State it could have the benefits of **simplifying procedures** and giving primacy to the **autonomy** of individuals.	There is a risk of a **protracted dispute** over whether a transfer can take effect which has as a result **procedural delays.**
No negative judgement is necessary in case of a lack of competence, a case's withdrawal not either. The **costs could decrease**.	Difficulties in **how unjustified transfers should be dealt with**. Whilst the Green paper presents a model case where such a procedure would mean support for a spouse who is at a disadvantage this may be an extraordinary situation. Transferring a case would necessarily involve long delays with the proceedings.

[92] This could for instance include cases when a spouse has unilaterally applied for divorce against the will of the other spouse on the basis of centre of gravity of the marriage.

Table A10.1 – Advantages and disadvantages with the introduction of a possibility to transfer a case	
Advantages	**Disadvantages**
It seems **equitable** that parties should be enabled to request transfer of a case to the court another jurisdiction in exceptional circumstances such as those set out in the Green Paper.	This question **requires very detailed, thorough legislation** in relation to a number of **complex issues** (e.g. who may make such a motion, under what conditions, and until what juncture during proceedings would such a motion be permissible, along with resolving the question of a remedial measure against a ruling on a transfer, etc.).
This would only be preferable in case of application of **factors** concerning residence or nationality which may **not be sufficiently flexible** to account for closest connection.	In order for such a procedure to be applied in a uniform manner, it would involve having the possibility to **appeal** to the **European Court of Justice**, which would prolong such cases even more.
Allowing transfer of cases would approach **justice to the citizens** and **ensuring** that the **case** is handled according to the **law which is closest to them**.	Requiring for the making of a motion for transferring a case to a court in a different Member State **the expression of consent of both married persons would negate the intended purpose of this institution**. It would seem more advantageous to introduce the possibility of choosing the applicable law or stipulations on jurisdiction (see above).
It could perhaps be **possible for judges** to transfer cases to another court in relation to those cases when **foreign law** is applicable and there are language issues and difficulties in interpreting the foreign law.	Too extensive a possibility of transferring would **reduce clarity** and **increase legal uncertainty**.

Restrictions on the possibility to transfer a case include prevention of that a case is transferred back and forth several times and that it should be decided within a reasonable time-frame (urgency / procedure) to prevent tactics designed to postpone an examination of the facts. Several stakeholders argue that transfer of cases must be considered in relation to ancillary matters and maintenance obligations.

Table A10.2 below indicates in what countries and what ancillary matters must be dealt with by the same court as the international divorce case.

Table A10.2 – Ancillary Matters that must be handled by the same court that handles the international divorce (by Member State)							
Country	**division of real property**	**division of personal property**	**maintenance obligations – spouse**	**maintenance obligations – child**	**parental responsibility**	**inheritance rights**	**Comment**
AT	No response.						
BE	No.	No.	No.	No.	No.	No.	In Belgian law there are no provisions which state that the divorce and the consequences thereof have to be handled by the same court. However, in mutual consent cases the spouses are to settle the matters themselves.
CZ	Yes (If the parents do not reach an agreement)	Yes (If the parents do not reach an agreement)	NA	Yes (If the parents do not reach an agreement)	Yes (If the parents do not reach an agreement)	NA	In the Czech national procedural law two ancillary matters are very close to the divorce proceedings: parental responsibility and division of property of the spouses.
CY	No	No	No	No	No	No	
DE	No	No	No	No	No	No	In Germany divorce and ancillary matters are treated separately but the spouse can 'dock' these procedures onto the divorce procedure. Once an ancillary matter has been docked on at the divorce procedure, the divorce cannot be granted without the docked procedure being decided on at the same time.
EE	No	No	No	No	No	No	Estonian law does not require a divorce to be treated together with ancillary matters other than when a divorce application is made as a 'joint application'. In these cases all ancillary matters have to have been resolved by the spouses. The courts, however, recommend that the

Table A10.2 – Ancillary Matters that must be handled by the same court that handles the international divorce (by Member State)							
Country	**division of real property**	**division of personal property**	**maintenance obligations – spouse**	**maintenance obligations – child**	**parental responsibility**	**inheritance rights**	**Comment**
							spouses try to resolve issues in relation to ancillary matters before going to court. In such cases the divorce does not have to be dealt with in court but in administrative institutions.
ES	Yes (for everyday use of the common house of the spouses' former habitual residence)	Yes (for dissolution of common property of the spouses, dissolution of matrimonial property)	Yes	Yes	Yes	NA	
FI	No	No	No	No	No	No	
FR	Yes	Yes	Yes	Yes	No (but Yes in practice)	NA (but Yes in practice)	In France a new law came into force in May 2004. A-D must be treated in relation to the divorce. However, matters concerning children should be possible to handle completely separately from a divorce. However, in practice judges tend to decide on all matters.[93]

[93] As an example, the French lawyer interviewed, was very recently involved in a case where the wife and child resided in England, whilst the husband resided in France. As the husband is French he applied for divorce in France. The judge did not question the jurisdiction. A non-conciliation order was the first step in the divorce. The judge ordered contact rights for the father, to be able to see the child every other weekend. This order was impossible to respect since the mother and child live in England whilst the father is resident in France. The lawyer of the mother asked for Art. 41 to be applied and went to London, where new conditions to apply the order were set up, since the previous order from France is not possible to apply in practice. The lawyer of the mother asked the French judge to go through with the divorce, as the proceedings at this time had been going on for quite some time, and stay proceedings relating to the child provisions whilst English courts put up an interim measure. This should be possible in theory, but the judge refused to grant the divorce until the matters in relation to the child were decided on.

Table A10.2 – Ancillary Matters that must be handled by the same court that handles the international divorce (by Member State)							
Country	**division of real property**	**division of personal property**	**maintenance obligations – spouse**	**maintenance obligations – child**	**parental responsibility**	**inheritance rights**	**Comment**
GR	No	No	No	No	No	No	According to Article 16 of the Hellenic Civil Code « Divorce and legal separation are governed by the law applicable to the spouses' personal relations at the time the divorce or separation procedure is initiated". Article 14 in the above Code provides a hierarchical system of connecting factors: "The personal relationship of spouses is dealt with in the following order: 1. according to the law of their last common nationality during the marriage, if one of the two maintains it; 2. according to the law of their last common residence during the marriage; 3. according to the law to which the spouses have the closest connection". Otherwise, to follow the 'dominant opinion', there is reason to distinguish between effects and consequences of the dissolution of a marriage; that is, between relations created for the first time because of the divorce, and the pre-existing relations, governed by their relevant law, which are disrupted due to the divorce. Article 16 of the C. C. only applies to the first type of relations. For example, the damages – the interests owed by the spouse responsible for the dissolution of the marriage to the other. On the other hand, questions concerning personal and property relations between the spouses, the relationships between children and parents as well as questions of succession are handled under their own lex causae, determined respectively by the

Table A10.2 – Ancillary Matters that must be handled by the same court that handles the international divorce (by Member State)							
Country	**division of real property**	**division of personal property**	**maintenance obligations – spouse**	**maintenance obligations – child**	**parental responsibility**	**inheritance rights**	**Comment**
							articles 14, 15 , 18 and 28 of the C.C.
HU	No, (see comment for exceptions)	No, (see comment for exceptions)	No, (see comment for exceptions)	No, (see comment for exceptions)	No, (see comment for exceptions)	No, (see comment for exceptions)	Hungarian law does not contain such a generally applicable provision according to which the court with competence to handle a divorce has to decide on the ancillary questions also. Nevertheless, the court before which the divorce has been initiated *may also act* on the questions related to the dissolution of the marriage (such as the distribution of the joint property, child placement, parental supervision, child support, access rights) *provided that the Hungarian court has jurisdiction over these issues* on the grounds of the relevant legal rules (EU norms, international treaties/reciprocity or in lack of these the Law-Decree 13 of 1979 on the Private International Law). There are however cases in relation which the law stipulates that the court proceeding in the divorce matter shall decide by all means on the issues related to the parties common children's placement and support as well. According to Article 290 Section 1 of the Act III of 1952 on the Code of Civil Procedure in the case of annulment or dissolution of a marriage, the court shall decide *on the placement and maintenance of the couple's infant children – if necessary – even without a request for this.*
IE	Yes	Yes	Yes	Yes	Yes	Yes	Yes, divorce and ancillary matters are

Table A10.2 – Ancillary Matters that must be handled by the same court that handles the international divorce (by Member State)							
Country	**division of real property**	**division of personal property**	**maintenance obligations – spouse**	**maintenance obligations – child**	**parental responsibility**	**inheritance rights**	**Comment**
							generally treated together in Irish divorce applications. Under the present regime all of the matters listed are dealt with by the Irish court but because there have been so few applications it is difficult to say if this will continue.
IT	No	No	Yes (see comments)	Yes (see comments)	Yes (see comments)	No	**maintenance obligations – spouse** **maintenance obligations – child** **parental responsibility** In order to avoid any prejudice to the parties involved in a divorce, considering that the procedure is time consuming, Italian law has envisaged the possibility (if invoked by the parties) for the Tribunal to declare a partial judgement and remit the ancillary matters to the investigating judge. In any case, the judge responsible for divorce has to tackle the issue of maintenance obligations of the spouse (if required) and of minor children or major age progeny if not economically independent.
LT	Yes	Yes	Yes	Yes	Yes	Yes	According to the Art. 3.53, 3.59 of the Civil Code of Lithuania it is not possible to divide the divorce question and the questions of the consequences of divorce. All consequences of the divorce - division of common property, residence of child, maintenance, etc, must

Table A10.2 – Ancillary Matters that must be handled by the same court that handles the international divorce (by Member State)							
Country	**division of real property**	**division of personal property**	**maintenance obligations – spouse**	**maintenance obligations – child**	**parental responsibility**	**inheritance rights**	**Comment**
							be decided in the single divorce case.
LV	Yes (or have to be settled before)	No	No	Yes (or have to be settled before)	Yes (or have to be settled before)	No	Section V on the Divorce, Article 77 of the Civil law of Latvia (Part 1 – Family Law) states that marriage is not divorced if both spouses have not agreed on the custody of the child born within this marriage, child's maintenance obligations, division of the common property or the corresponding demands have not been settled before the divorce and is not brought to court together with the marriage divorce case.
LU	Yes	Yes	Yes	Yes	Yes	Yes	All of the direct consequences of divorce will be decided by the same Court as the one who grants divorce. But, if the spouses want to change something afterwards (like the maintenance obligations), it is not necessarily the same Court who will be competent (everything depends on the residence of the two parties)
MT	No response.						
NL	No response.						
PL	No response.						
PT	Yes (type of property not specified by the respondent)	Yes (type of property not specified by the respondent)	Yes	Yes	Yes	NA	In Portugal some consequences of the divorce need to be decided by a court or by the civil registry's office in relation to the divorce. If there is a **joint application**, when the

Table A10.2 – Ancillary Matters that must be handled by the same court that handles the international divorce (by Member State)							
Country	**division of real property**	**division of personal property**	**maintenance obligations – spouse**	**maintenance obligations – child**	**parental responsibility**	**inheritance rights**	**Comment**
							divorce is filled there must be an agreement regarding the following matters: division of property, maintenance obligations for spouses and for children (if applicable), parental responsibility, and agreement with regard the disposal of the marital home. In the case of a contested divorce (divorce applied for in court by one of the spouses against the other, founded on a culpable violation of conjugal duties) the following legal consequences of the divorce will be addressed by the court: personal relations between the spouses; division of property of the spouses; arrangements for the children, in particular maintenance and the method of paying maintenance; and the obligation to pay maintenance to the other spouse.
SK	Yes	Yes	Yes	Yes	Yes	NA	However, the division of real and personal property comes to the court only if the parties can not settle the matter themselves. The settlement consists of an agreement or elapse of 3 years period, after which the personal property belong to that person who uses them and real property is in joint ownership.
SL	No	No	Yes (if such a claim is raised by the spouse)	Yes (if such a claim is raised by the spouse)	Yes (if such a claim is raised by the spouse)	No	In divorce matters the following ancillary matters have to be treated to grant a divorce: maintenance obligations - child; parental responsibility. Maintenance obligations - spouse are treated in divorce matters only if such a claim is raised by the spouse. All other matters are treated separately.

Table A10.2 – Ancillary Matters that must be handled by the same court that handles the international divorce (by Member State)							
Country	**division of real property**	**division of personal property**	**maintenance obligations – spouse**	**maintenance obligations – child**	**parental responsibility**	**inheritance rights**	**Comment**
SE	No	No	No	No	No	No	In Sweden, ancillary matters are usually treated separately from the divorce decision. Nevertheless, they could be raised in relation to divorce.
UK	Yes	Yes	Yes	No (see comments)	No (see comments)	No (see comments)	In England and Wales almost all of these matters are dealt with as ancillary to a divorce. Indeed, as a matter of law, the court's powers only arise in the context of divorce. There are a couple of exceptions. If both parents and the child are resident in England and Wales, the child support agency deals with child support irrespective of any divorce. Generally issues regarding children are completely freestanding and can be dealt with independently of any divorce, including issues of parental responsibility. Inheritance rights are not a substantial issue in England and Wales on a relationship breakdown although the family court has power to dismiss inheritance claims against a former spouse. Apart from these, the financial implications of relationship breakdown arise because the courts make orders referable to the breakdown, such as divorce.

ANNEX 11 – BURDEN OF PROOF TO PROVIDE CONTENT OF FOREIGN LAW

In most Member States application of foreign law to determine a divorce case is possible. Procedural laws differ between the Member States in relation to provision of information on the foreign law to be applied. In some countries the spouses have to provide evidence on the content, whilst in other countries the court applies the law 'ex officio'. In some countries, national institutes have been set up to provide assistance in such cases. Table A11.1 below provides an overview of the role of the parties in determining the content of the foreign law or if it is for the Court, ex officio, to seek the content of the foreign law by Member State

Table A11.1 – Burden of proof to provide content on foreign law	
The burden of proof of the content of this law lie with the parties	**The Court, ex officio, seeks the content of the foreign law**
CYPRUS In Cyprus, as regards divorce, the lex fori applies. In other family matters, however, where foreign law is applicable under the Cyprus conflict of law rules, that law should be proved as a matter of fact by expert witnesses. The burden of proof of the content of the foreign law lies with the parties.	**CZECH REPUBLIC** The Czech courts apply foreign law according to *the Act on international private and procedural law (97/1963 Coll)*: *§ 53* *(1) In order to find out the content of foreign law, the authority of justice shall take all necessary measures; unless the content of the foreign law is known to it, it may also ask the Ministry of Justice for information for this purpose.* *(2) Should doubts occur in the course of hearing of the matters mentioned in § 1, authorities of justice may ask the Ministry of Justice for a statement.*
GERMANY In Germany the spouses have to provide the information and evidence which is necessary to decide the case. The burden of proof lies with the parties. The parties have to explain the content of the foreign law which makes it necessary that lawyers must have a very detailed knowledge of the content of the foreign law. The lawyers have – in the petition which stat the procedure – to formulate a certain request. Without knowing the foreign law the lawyers would not even be able to formulate that request. Is the content of the foreign law contented, the judge orders an expert's opinion if the applicant has offered such a proof.	**FRANCE** Art. 12 in the French civil law states that proceedings and content of foreign law should be established ex officio. Case law from 25 May 1978 by the French supreme court establishes that it is the responsibility of the judge to find the content of the foreign law. However, in practice, the party who has the money to find expertise and provide content will do so, as even the prosecution and bar association in Paris, where as much as one out of two buildings is bought by foreigners, do not have any translator even for translations from English to French. The judges in France do not have much resource to establish foreign law.
SPAIN When Foreign Law is to be applied, Art. 281.2º Spanish Civil Procedure code 1/2000 states that the concerned party must prove the Foreign Law. So, the parties and not the court must prove the Foreign Law when applicable. In some exceptional cases (for example: the concerned party has no enough economic resources to pay for the proof of the Foreign Law), the court must prove the content of the Foreign Law. When concerned parties do not prove the Foreign Law, the Spanish courts usually apply Spanish substantive Law or, in other cases, simple dismiss the action, even if the Spanish Civil	**HUNGARY** The Hungarian law makes possible the application of foreign law in cases initiated before the competent Hungarian courts. Pursuant to the Law-Decree no. 13 of 1979 on the International Private Law the Hungarian court having competence over the case shall examine, ex officio, the question of the applicable law and shall, ex officio, enquire about a foreign law not known to it; if necessary shall obtain the opinion of an expert. In addition, the court may also consider the evidence presented by the party. In the last resort, if it is impossible to establish the contents of a foreign law, the Hungarian law shall apply (Articles 1-9). However if the parties

Table A11.1 – Burden of proof to provide content on foreign law	
The burden of proof of the content of this law lie with the parties	**The Court, ex officio, seeks the content of the foreign law**
Procedure Code does not contain any provision on that matter. ("What if the parties do not prove the Foreign Law?" is a question with no answer in Spanish Private International Law). The court is not entitled to apply the Foreign law 'ex officio', except to those exceptional cases in which providing information on the Foreign Law is really impossible to the parties.	mutually request that the foreign law applicable in accordance with this Law-Decree be disregarded, the Hungarian law shall apply in place of that law, or, in the case of the possibility of selecting the applicable law (for example: contractual and labour law), the law so selected shall apply (Article 9).
IRELAND Irish Courts require that where foreign law is relied upon by a party in proceedings evidence of the law must be provided by the parties. The onus does not lie with the Court.	**LITHUANIA** According to the Art. 1.29 of the Civil Code of Lithuania it is possible to apply foreign to in the divorce case. In the event when the application of foreign law is provided by the rules of private international law, the question of foreign law is a question of law, but not of fact. So in the cases, provided by the conflict of laws rules, also in the event of international treaties, the content of applicable foreign law must be established by the court ex officio (Art. 1.12 of the Civil Code)
LUXEMBOURG Jurisprudence (Cour 29 November 2000) has decided that the burden of proof concerning the content of the foreign law lies with the parties. If they do not succeed in proving this content, the judge normally applies "lex fori".	**PORTUGAL** Portuguese legal system considers foreign law as law, and not as a fact. As such, it is not for the parties to prove the content of foreign law; judges apply the law "ex officio" and must investigate the content of foreign law themselves, even if the parties have not raised the issue in the proceedings. Portuguese procedural law disposes that the burden of proof is on the party relying on the foreign law, but this party must only prove the existence and content of the foreign law, the court must seek "ex officio" the knowledge of this law.
ENGLAND AND WALES As England and Wales is one of the countries applying national law, foreign law can be taken into account in particular cases. This is a relatively recent innovation in case law. The circumstances are relatively narrow. England and Wales was originally an accusatorial jurisdiction rather than an	**SLOVENIA** In Slovenia the foreign law is taken into account when necessary. In such cases it is applied ex officio. The parties may, if they wish, provide evidence on the contents of the foreign law, but they are not obliged to do so. The duty to seek the content of the foreign law lies with the court (the court may seek the assistance of the Ministry of Justice which provides evidence on the content of the foreign law).

Table A11.1 – Burden of proof to provide content on foreign law	
The burden of proof of the content of this law lie with the parties	**The Court, ex officio, seeks the content of the foreign law**
inquisitorial jurisdiction. However the last couple of decades have seen family law in England move towards the inquisitorial with much greater case management by the courts. Nevertheless, if applicable law was imposed on England and Wales against the wishes of the practitioners, the courts would not take the role and that would be left to the practitioners to do so.	
The content of foreign law can be provided by both parties and the judge 'ex officio'	
BELGIUM Art. 15 of the CODIP (Code du droit international privé belge) states that the content of the foreign law has to be determined by the judge. If the judge cannot establish the content of foreign law, he can ask the collaboration of the parties.	
ESTONIA Both the parties and the judge may provide the information. Procedural matters have changed from 1 January 2006. Each of the parties may provide references to relevant Articles of foreign law. However, in case they refer to different articles it is the judge who decides what information is relevant after having seen both sides, listened to them and understood their arguments. Most information is in any case available on Internet.	
GREECE In the framework of the Hellenic law the application of foreign law is obligatory. This stems from Articles 337 and 559 § 1 of the Civil Procedure Code concerning respectively the application and the knowledge of the foreign law and the motives for judicial appeal. In accordance with the first of these provisions the judge applies the foreign law indicated by the conflict-of-law ex officio, if necessary using all the proper means to fully understand and apply it. Understand and apply foreign law may include the parties and specialists on comparative law, either professors of law or other individuals possessing the relevant knowledge in this matter or experts from the Hellenic Institute of International Law and Foreign Law.	
ITALY The Italian legislation consents the application of foreign law in divorce and separation cases. The judge is responsible for determining the law of the State with whom the parties have more links or the State whit whom the parties have the most relevant link. Art. 14 of the law n. 218 (31 May 1995) foresees that the judge applies the law 'ex officio'. To do so, the judge can make use of instruments indicated by the international conventions, of information provided by the Ministry of	

Table A11.1 – Burden of proof to provide content on foreign law	
The burden of proof of the content of this law lie with the parties	**The Court, ex officio, seeks the content of the foreign law**
Justice or by the consular representatives abroad. The judge may also make use of experts in the field or ask the help of the parties. A useful tool may also be provided by the London Convention of 1968 on the information about foreign law, even if the bureaucratic difficulties make its effectiveness less operative. There is not a specialised institution in this field in Italy (such as the Max Plank in Germany). The judge may ask the help of the parties.	
SWEDEN If foreign law is applied, both the judge and the parties work together in determining the content of the foreign law.	
SLOVAK REPUBLIC In the Slovak legal order, the principle „Iura novit curia“ is valid. Act no 97/1963 as amended on international private and procedural law states in its Article 53 that: Section 53 (l) The judicial authority shall take all necessary measures to determine the content of the foreign law; if the content of the foreign law is not known to such an authority, it may request information to this effect from the Ministry of Justice. (2) If in the adjudication of matters specified in paragraph l doubts arise, the judicial authorities may ask the Ministry of Justice for an opinion. The Slovak Republic is a member of the European Convention on Information on Foreign Law, (London 7 June 1968). However, if there is no other way of determining the content of the foreign law or if it is too time-consuming to determine such content, the court may ask one of the parties to submit the content of the foreign law as evidence in the proceedings.	
Comments	
▪ **LATVIA, FINLAND:** Only apply lex fori ▪ **AUSTRIA, MALTA, THE NETHERLANDS and POLAND:** No responses provided	

ANNEX 12 – STAKEHOLDER INTERVIEWS

Based on a clustering of countries presented in Box A3.1 below, stakeholder interviews with lawyers, judges and family associations[94] have been undertaken in selected countries (underlined in the Box below) to collect additional information to inform the assessment of problems and policy options.

The selected countries ensure a geographical spread, a combination of countries with different sizes of populations, and a mix of old and new Member States. This allows for different perspectives on problems and policy options to be taken into account in the assessment.

Summaries of the interviews are included in turn below (by country, in same order as presented in Box A3.1).

[94] Efforts were made to identify stakeholders additional to those who had replied to the Green Paper in order to not duplicate responses.

Box A3.1 – Member States according to ground for divorce

No grounds for divorce

- Sweden
- Finland

Divorce by consent and irreparable breakdown of the marriage

- Estonia
- Greece

Divorce by consent, irreparable breakdown of the marriage and fault

- Austria

Divorce by consent, irreparable breakdown of the marriage and factual separation

- Latvia

Divorce by consent, fault and factual separation

- Lithuania
- Belgium
- France
- Portugal
- Luxemburg

Irreparable breakdown of the marriage

- United Kingdom
- Slovenia
- Slovak Republic
- Hungary
- Netherlands
- Italy
- Germany
- Czech Republic
- Poland

Fault and factual separation

- Cyprus

Factual separation

- Spain
- Ireland

Divorce not possible

- Malta

Country	Sweden
Date	30 November 2005.

*Interviewees: Judges, **lawyers**, notaries, family associations*

Name:

SWEDEN

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1. Please describe your role in relation to 'international' couples who file for divorce.

F. Renstrom has been working as a lawyer since 1988 and is specialised in international private law, in particular international divorce matters. Although it is difficult to provide an estimate of numbers of international divorce cases by year, he confirmed that the number of cases of international character has increased in recent years.

As a general comment on the New Brussels II Regulation, F. Renstrom indicated that the inclusion of parental responsibility even outside marriage was an improvement compared to the previous Brussels II Regulation.

2. In your work, have you come across any of the problems identified in the Green Paper? If yes, please describe some cases when any of these have occurred?

F. Renstrom confirmed that rush to court is a problem in the current situation with different legislation in the Member States. However, according to his experiences, the reason for rush to court is economic considerations and not that spouses want to get divorced quicker or easier. The lis pendens rule is not any news in Sweden.

3. Could you think of any additional problems to those identified in the Green Paper? If yes, please provide a practical example illustrating the problem.

Concerning applicable law in relation to divorce matters, even though the grounds for divorce and time delays differ between the EU Member States, F. Renstrom commented that in reality it is not so much the divorce laws *per se* that result in problems, but the laws in relation to ancillary matters such as maintenance obligations, division of assets, and custody of children. From a Swedish citizen's perspective, it

surely could be considered annoying that the grounds for divorce are different in other Member States (e.g. that *reasons* for getting divorced are required in other countries and that it takes longer to obtain a divorce). The most important issues are, however, the economic consequences of getting divorced.

4. Which of the problems is most important to address as a priority? Least important? Please comment on why.

The problems should not be considered in isolation, but together with legislation on ancillary matters.

5. Considering the policy options identified in the Green Paper:

F. Renstrom strongly advised against separating divorce legislation from ancillary matters, which would be the result if the policy options presented in the Green Paper were adopted. International divorce cases concern such a complex picture of different legislation in relation to maintenance, custody etc., and the economic issues are of such importance that the current proposal should not be adopted.

a) Policy option 2: What set of uniform connecting factors would you propose for harmonisation of the conflict-of-law rules?

NA.

b) Policy option 3: On what grounds would you limit the possibility for spouses to choose the applicable law and the competent court ('prorogation of jurisdiction')?

Providing the spouses with the possibility to choose law seems like a reasonable option. However, it should be limited on the basis of habitual residence and nationality as connecting factors, and only be possible upon mutual consent. Furthermore, it is imperative that the parties are properly briefed by legal advisors and that they are fully aware of all consequences of their decision – not the least with regard to ancillary matters. In general, citizens have a very limited knowledge of international issues, which puts very high demands on information provision. Concerning the time for making the decision, it is most probable that the spouses can make a mutual choice before they enter into divorce considerations.

c) Policy option 4: In what way could the jurisdiction rules of Regulation (EC) No. 2201/2003 (the New Brussels II Regulation) be revised? What would be sufficient and what would be desirable?

NA.

6. Could you think of any additional policy options to those identified in the Green Paper?

Again, divorce should not be treated separately, but together with ancillary matters.

7. Could you please identify positive and negative (1) social and cultural, (2) practical and (3) legal impacts of each of the options on the identified target groups:

See question 8.

8. What would the positive and negative impacts of the different options be on your situation (as a judge/lawyer/family association)?

Costs for divorce processes are currently very high. Due to the need to lodge a divorce petition quickly (i.e. before the other party) and be acquainted with foreign laws, not only in relation to the divorce itself, but also legislation governing the consequences thereof, procedures are currently to organise a telephone conference with other lawyers in order to find the 'right' forum for the client to apply for divorce. This is of course very expensive, as there are also in general 3-4 lawyers working on the case in Sweden, not only once the petition has been lodged but also during preparation of the case. This leads to that some parties are not in such a financial situation that they can afford high quality legal advice. However, working on legal aid is not very interesting for the lawyers. One way to avoid such a situation would be to increase the certainty of competent court and applicable law. However, in reality, one would still need to discuss these issues despite more certainty.

9. What special safeguards mechanisms need to be set up to protect the different vulnerable groups?

NA.

10. Would it be sufficient to implement one of the policy options to solve the problems? Which one?

No.

11. If no, would any combination of options be sufficient to address the problems? Would this be the same as the most desirable combination?

In relation to the policy options, F. Renstrom considered the suggestions to be good but not sufficiently far-reaching. Even though the proposals are a good start, they must be complemented with legislation on ancillary matters. It would be better to not adopt any new legislation or undertake revisions until these issues have been considered together.

Another, separate issue, is the transfer of cases between courts. Such a possibility could have major consequences for one part if there is no mutual consent on applicable law in relation to economic issues (i.e. one spouse could demand transfer of a case due to more advantageous maintenance provisions). This clearly shows the shortcomings of the current proposal and the difficulties if the questions are not considered together. It is imperative that such an option should only be possible upon agreement between the spouses and not be made by the court itself. However, there are some major difficulties in such an option too, in that the judgment criteria are very complex – property, maintenance, wealth etc.

12. Are there any potential conflicts or inconsistencies between the identified options?

NA

13. Could you identify any political or cultural barriers which could hinder the implementation of the policy options?

NA

14. Is any other EU action necessary or desirable to support an effective implementation of the policy options?

Other EU level action such as supporting a practitioners' network would be very welcome. Even though F. Renstrom already has established contacts in those Member States cases most frequently concern (England, France, Spain, Italy, Belgium) it would be very helpful to get a contact point in those countries with less frequent cases. Some initiatives are already being undertaken in this area. For instance, F. Renstrom was invited to a network that had their first meeting in Uppsala, but the objectives with the network were unclear.

Specially educated judges would be even better.

15. Is in your meaning EU-level action justified considering the size and the scope of the problem?

Yes – but ancillary matters and divorce should not be considered separately.

With regard to problems in relation to third countries, they could be invited to join any EU level conventions. A separate convention could be set up with the USA.

16. Can you recommend any literature / other information sources from which this study would benefit?

NA.

Country	Estonia
Date	14 November 2005

*Interviewees: Judges, **lawyers**, notaries, family associations*

Name:

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1. Please describe your role in relation to 'international' couples who file for divorce.

Ms. Tiina Mare Hiob / Tiina Mare Hiob Lawyers office / Lawyer specialised in divorce matters

Divorces of Estonian-Russian couples are quite frequent, also involving Russian speaking persons that have acquired Estonian citizenship. In these cases Estonian law is applied.

The most severe problems during the divorce proceedings are the custody of children. In fact there is no such notion as "custody" in Estonian law, what matters is the place of residence of the child/children. Some divorces including EU nationals mainly concern which one of the spouses has right to custody over the child. If one of the spouses lives in Estonia, Estonian law applies. The spouse with the child has a right to choose the place of the court.

2. In your work, have you come across any of the problems identified in the Green Paper? If yes, please describe some cases when any of these have occurred?

Concerning "rush to court" Ms. Hiob advices her clients who want a fast divorce to bring the case to the Estonian court as quickly as possible because it is extremely easy to get divorced under Estonian law. The marriage is dissolved if one of the spouses claims that it is impossible to continue cohabitation (even if the other side objects).

3. Could you think of any additional problems to those identified in the Green Paper? If yes, please provide a practical example illustrating the problem.

Ms. Hiob finds that international marriages are not a good idea, as she thinks the inner cultural and social differences within the Union are too big to result in a successful

cohabitation and consequently sooner or later 'international' couples are subject to divorce.

4. Which of the problems is most important to address as a priority? Least important? Please comment on why.

As a priority Ms. Hiob proposes to introduce a contract between newly-weds that would state under which law their marriage may be divorced. These arrangements should be made on the administrative level for example by establishing a rule that a marriage is dissolved in the county in which the alliance was initially concluded. This would benefit spouses in the way that it increases predictability concerning the jurisdiction under which the divorce should take place.

5. Considering the policy options identified in the Green Paper:

a) Policy option 2: What set of uniform connecting factors would you propose for harmonisation of the conflict-of-law rules?

Ms. Hiob proposes: *lex fori*, laws of the state where the marriage took place, spouses may have the right to choose.

b) Policy option 3: On what grounds would you limit the possibility for spouses to choose the applicable law and the competent court ('prorogation of jurisdiction')?

Nationality and place of residence. As there are such differences in legal traditions between the EU countries originating in different state and religious circumstances, it is difficult to come up with more factors. Generally in Catholic countries it is harder and takes longer time to get a divorce whilst it is easier in the Nordic countries. In Estonia the process can be completed within three month from the date of filing the claim at the court (even if one of the partners opposes the divorce). Courts in the EU could forward the case to the court closest to the place of the residence of either of the spouses in a similar way to how it is done in Estonia. If the person cannot for whatever reason present him- or herself before the court in Tallinn, the case is forwarded to the relevant regional court that is in the proximity of the person and handled there.

The same problem could be tackled by establishment of the system of Family courts all around the EU (similar to the system existing in the USA) that could more professionally look into the cases of international divorces and other cases related to international Family law. This would also solve the problem of court professionalism, as lawyers and judges would no longer be required to deal with the issues they may not be familiar with.

c) Policy option 4: In what way could the jurisdiction rules of Regulation (EC) No. 2201/2003 (the New Brussels II Regulation) be revised? What would be sufficient and what would be desirable?

NA

6. Could you think of any additional policy options to those identified in the Green Paper?

NA

7. Could you please identify positive and negative (1) social and cultural, (2) practical and (3) legal impacts of each of the options on the identified target groups:

- **'International couples'**

Ms. Hiob proposes that ideally and on the broad scale the family law procedures should be unified just like the procedures of how to lodge a divorce petition. This way persons living wherever in the EU would know the divorce procedures that apply in advance.

- **Vulnerable groups**

NA

- **Legal professions (judges, lawyers, notaries)**

NA

- **Other**

NA

8. What would the positive and negative impacts of the different options be on your situation (as a judge/lawyer/family association)?

For lawyers it would be easier if there were administrative procedures or laws that would establish the applicable law and the competent court at the moment when international coupes are filing documents for marriage.

9. What special safeguards mechanisms need to be set up to protect the different vulnerable groups?

The divorce cases involving minor children should take place as close as possible to the place of residence of the spouse living with these children.

10. Would it be sufficient to implement one of the policy options to solve the problems? Which one?

Administrative procedures should be revised – including simple questions, templates of contracts etc. prepared in the course of application for marriage that would establish the jurisdiction and the competent court as well as previous defence agreements stating the security measures and custody agreements in case of divorce.

11. If no, would any combination of options be sufficient to address the problems? Would this be the same as the most desirable combination?

NA

12. Are there any potential conflicts or inconsistencies between the identified options?

NA

13. Could you identify any political or cultural barriers which could hinder the implementation of the policy options?

NA

14. Is any other EU action necessary or desirable to support an effective implementation of the policy options?

The establishment of an *easily accessible* Family court system should be discussed at EU level. Within this institution judges dealing with international Family law questions would be specifically qualified with expertise and experience in all the legal systems of the EU countries.

15. Is in your meaning EU-level action justified considering the size and the scope of the problem?

Yes. This intervention is necessary for the primary reason to make the procedures easier and more comprehensive for the EU citizens. With 25 Member States, different legal traditions, and increasing mobility within the Union the international divorce problem will grow. It is crucial to deal with it now.

Another idea may be a creation of online database with information about the international divorce problematic.

16. Can you recommend any literature / other information sources from which this study would benefit?

Ms. Hiob suggests looking into the court decisions made in Strasbourg regarding Family law.

Country	Austria
Date	9 November 2005

*Interviewees: Judges, **lawyers**, notaries, family associations*

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1. Please describe your role in relation to 'international' couples who file for divorce.

D. Grain has worked as a lawyer for 10 years and with international divorces for 5 years. Divorces she is dealing with both include Austrians who live abroad who want to get divorced in Austria and foreigners who get divorced in Austria (many of whom come from former Yugoslavia). The number of both these kinds of cases is steadily increasing.

2. In your work, have you come across any of the problems identified in the Green Paper? If yes, please describe some cases when any of these have occurred?

The examples are well presented and D. Grain has practical experiences from such cases herself.

3. Could you think of any additional problems to those identified in the Green Paper? If yes, please provide a practical example illustrating the problem.

D. Grain has not experienced any additional problems.

4. Which of the problems is most important to address as a priority? Least important? Please comment on why.

It is very important to introduce common conflict-of-law rules. Such conflict-of-law rules should include the possibility for spouses to get a limited possibility to choose applicable law, party autonomy is very important.

International divorce cases should be handled by judges specialised in the field to ensure correct application of law.

5. Considering the policy options identified in the Green Paper:

a) Policy option 2: What set of uniform connecting factors would you propose for harmonisation of the conflict-of-law rules?

(1) Limited choice of law; (2) nationality; (3) common habitual residence; (4) last common habitual residence (4) closest connection.

Clarifications:

Choice of law: It is very important to allow flexibility and respect individual circumstances. For instance, there are cases when spouses have lived in the United Kingdom for 20 years but still prefer to get divorced under Austrian law.

Nationality and habitual residence: Nationality is a very important factor, but a time limit could be introduced. For instance, if spouses have lived abroad for 10 or 15 years, habitual residence could have primacy over nationality. This time limit needs to be set quite high though – 1 or 2 years is not long enough, in that case nationality should be accounted for.

It would be easiest if the courts could apply lex fori. In Austria it is possible to apply foreign law. D. Grain has experiences of cases when for instance German law has been applied and it was clearly wrongly applied. This is a major concern. It would be merit in only allowing foreign law to be applied in specialised courts.

b) Policy option 3: On what grounds would you limit the possibility for spouses to choose the applicable law and the competent court ('prorogation of jurisdiction')?

Nationality and habitual residence. It should also be restricted to Member States only.

Such a choice should be written directly in connection with the divorce. It should not be made earlier, as the spouses should not have to suffer for a decision they made perhaps years ago before they knew where they would live and how the future would turn out.

c) Policy option 4: In what way could the jurisdiction rules of Regulation (EC) No. 2201/2003 (the New Brussels II Regulation) be revised? What would be sufficient and what would be desirable?

NA

6. Could you think of any additional policy options to those identified in the Green Paper?

Specialised courts in all Member States.

7. Could you please identify positive and negative (1) social and cultural, (2) practical and (3) legal impacts of each of the options on the identified target groups:

- **'International couples'**

Positive: possibility to a limited choice of law, simplified procedures, increased party autonomy.

Negative: dangers if the choice of law is not made directly in relation to the divorce, as the parties could get disappointed in the results of a decision that was made years ago.

- **Vulnerable groups**

Make it compulsory to make an agreement on applicable law in written and on the basis of common choice.

It is currently not obligatory to be represented by a lawyer in divorce proceedings in Austria. This is negative for women who may be in a financially weak position and who do not hire a lawyer due to poor economic circumstances. It should be made compulsory to have legal representation throughout the EU. This would include the right to legal financial aid.

- **Legal professions (judges, lawyers, notaries)**

There could be positive impacts if a uniform system is introduced as it could simplify the work of legal professions.

- **Other**

NA

8. What would the positive and negative impacts of the different options be on your situation (as a judge/lawyer/family association)?

See above.

9. What special safeguards mechanisms need to be set up to protect the different vulnerable groups?

See above.

10. Would it be sufficient to implement one of the policy options to solve the problems? Which one?

No.

11. If no, would any combination of options be sufficient to address the problems? Would this be the same as the most desirable combination?

Harmonisation of conflict-of-law rules and providing the spouses with a limited choice of law.

12. Are there any potential conflicts or inconsistencies between the identified options?

No.

13. Could you identify any political or cultural barriers which could hinder the implementation of the policy options?

There could be cultural hinders for spouses who have lived very long in a certain country and want a specific law to be applied.

14. Is any other EU action necessary or desirable to support an effective implementation of the policy options?

It would be merit in setting up a practitioners' network of lawyers and specialised courts.

15. Is in your meaning EU-level action justified considering the size and the scope of the problem?

Yes. The system functions at the moment, but not well and there is definitely scope for improvement since problems occur every now and then. One major concern in the present context is the possibility of foreign law being applied incorrectly.

16. Can you recommend any literature / other information sources from which this study would benefit?

BRIEF ANSWERS TO ALL GREEN PAPER QUESTIONS

Green Paper Questions

1. No.
2. Must know the substance of such a possibility in order to be able to comment.
3. See above.
4. Should include all.
5. Yes.
6. Yes. Party autonomy ensures application of law with which spouses feel closest connection (increases transparency)
7. Member States. 10-15 years residence abroad.
8. All should be included.
9. In written
10. Yes.

11. Yes – common conflict-of-law rules

12. Should be limited when no EU citizen is involved

13. Makes it easier and more transparent, party autonomy

14. Only family law – special courts

15. In writing, directly in relation to the divorce. The spouses should not have to suffer for a decision they made perhaps years ago before they knew where they were going to live and how the future would turn out.

16. Should only be possible in agreement between both spouses due to where the marriage was principally based – should not be possible for only one side to decide.

17. For instance issues related to divorces. If the couple has lived in the UK and have children there, in a real case the matters relating to the children are dealt with by English law whilst the divorce is dealt with by Austrian law. It would be preferable if all issues were dealt with by the same court / law.

18. Should not be dealt with on EU level.

Country	Latvia
Date	7 November 2005

Interviewees: Judges, lawyers, notaries, family associations

Name:

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1. Please describe your role in relation to 'international' couples who file for divorce.

Mr. Imants Fridrihsons, Senator, The Department of Civil Cases, The Supreme Court of the Republic of Latvia

In the first half of this year there were 3,335 judgements on divorce cases and 3,153 divorced marriages. Divorce cases constitute a large proportion of all civil law cases and their number, after the confusion with the new provisions in the 2003, has restored its self to the previous level. There is no data on how many of these divorces are 'international'.

2. In your work, have you come across any of the problems identified in the Green Paper? If yes, please describe some cases when any of these have occurred?

Example of **rush to court**. There are considerable differences of applicable law in divorce matters between Latvia and Sweden. While in Latvia the Article 72 of the Civil Law states that marriage can be considered disintegrated and may be dissolved if spouses have lived separately for tree years, in Sweden, however, the consideration period is only six months. Further more in Latvia the law operates (with some exceptions) according to the competition principle, the petitioner and the defendant compete in the court by providing evidence in their defence (or accusing the other person). Related to this is the notion that if any of the spouses can be proved to have contributed to the disintegration of the marriage, he or she cannot claim material support from the other party (to secure the previous level of prosperity). In other words in Latvia the court proceedings / results tend to concentrate on proving who is guilty, in Sweden the focus is on the necessities of the divorced (weaker) parties. These differences may be used to influence the outcome of the divorce case by rushing to either Latvian or Swedish courts. In the case Latvian-Swedish couple consents to

divorce they may choose to file the divorce to a court in Sweden and have a swift trail. However, if they wish to establish the fault of either side and deprive this side of after-divorce material support the petitioner may rush to a Latvian court.

3. Could you think of any additional problems to those identified in the Green Paper? If yes, please provide a practical example illustrating the problem.

Mr. Fridrihsons indicated a problem with the sending an invitation to a person residing in a foreign state. There has been a case when a husband has indicated a false/old address of his spouse in Latvia, who was at that time already living in St. Petersburg. In this way he was trying to use the absence of the opposing side in the court in his favour.

The Article 236 on Authorized Agent of the Law on Civil Process specifies that in the case of non-existence or divorce of the marriage the representative of the side has to be specially authorised to carry out this case. It also notes that the court may find personal participation of the spouses in the proceedings necessary. Here a (financial / lack of time) problem may arise for the person who is expected arrive in the court from a foreign state, or designate a representative.

4. Which of the problems is most important to address as a priority? Least important? Please comment on why.

Mr. Fridrihsons evokes number of national problems: There are no state-played lawyers, no agency to help and support couples with low incomes in the divorce process with legal and personal advice. Sometimes the couples are so poor that they cannot afford to hire a lawyer even to help them to constitute a document separating their property so they could further pursue the 'short' procedure of divorce by consent (avoiding the 3 year-long consideration period).

5. Considering the policy options identified in the Green Paper:

a) Policy option 2: What set of uniform connecting factors would you propose for harmonisation of the conflict-of-law rules?

Mr. Fridrihsons mentions the place of domicile of any of the spouses on several occasions as a connecting factor. Further it is the first file, first trail principle except the case if there are under age children involved in the proceedings. In this case, the trail should take place in the country in which a spouse is living with the children from this marriage. The question thus appears what to do if children are separated and live with both parents in different Member States?

The relevant Article 235 *Cases of marriage divorce after the application of both spouses* of the Civil Process Law states: "(1) Cases of divorce by the agreement of both spouses (Article 77 of the Civil Law), court is examining after the common demand of both married. (2) Application may be filed according to either spouse's place of residence."

b) Policy option 3: On what grounds would you limit the possibility for spouses to choose the applicable law and the competent court ('prorogation of jurisdiction')?

Mr. Fridrihsons adheres to the opinion that the spouses should be given a maximal freedom to choose the applicable law and the competent court in case they have reached a formal consent to divorce. The Latvian Civil Process Law (CPL) used to comprise a norm which allowed the spouses to choose the competent court, but now the CPL (Article 234) specifies which jurisdiction applies to a divorce case. In particular it states: "*The demand to recognize a marriage as nonexistent or to divorce can be raised in the court also by the domicile of the demander, if: 1) demander has under age children; 2) the marriage is to be divorced with the person, which in the predetermined order is recognized as incapacitated because of a mental disability or for which has been established a guardianship according to the Article 365 of the Civil Law; 3) marriage is to be divorced with a person who is serving a sentence in place of imprisonment; 4) marriage is to be divorced with a person whose place of domicile is unknown or who lives in a foreign country*."

c) Policy option 4: In what way could the jurisdiction rules of Regulation (EC) No. 2201/2003 (the New Brussels II Regulation) be revised? What would be sufficient and what would be desirable?

NA

6. Could you think of any additional policy options to those identified in the Green Paper?

NA

7. Could you please identify positive and negative (1) social and cultural, (2) practical and (3) legal impacts of each of the options on the identified target groups:

- **'International couples'**

Inconveniency to travel to another country to (if required) personally assist in the court proceedings, the spouses living abroad run the risk of not receiving the invitation to court because of the manipulation of addresses, the equivalent of French "pacs" does not jet exist in Latvia (although the legislation is being considered in relation to heterosexual couples) so the legal rights and responsibilities assumed by entering in such contract in the other member states may not be recognized in Latvia (this includes, property claims after partners death, rights of the children born in such unions).

Finally Mr. Fridrihsons asserts that handling property matters at the same time with the divorce (if it these have not been settled in advance, like it used to be done before) considerably slows down the process of divorce and consequently adds to the duration of the cases. The lengthy divorce proceedings are of much inconvenience for the persons involved and couples that are still waiting for their case to be handled in the court.

- **Vulnerable groups**

Children

According to the Article 76 of the Civil Law: "*Marriage will not be divorced although it has fallen apart if and as much as the preservation of the marriage in an exceptional cases for special reasons is in the interests of a under aged child born within that marriage*", and Article 77 "*Marriage will not be divorced, if spouses have not agreed about the custody of the child born within this marriage, provision resources for the child, division of the common property or the corresponding demands are not dealt with before the divorce and are not brought up together with the divorce of the marriage*."

The principle of competition does not apply exceptionally in the cases/question concerning under age child. In these questions spouses are not obliged to provide evidence and in stead court assumes the role of demanding evidence according to its own initiative.

The poor parents with under age children are freed of the fee to access the court for divorce proceedings.

Article 178.[1] of the Civil Law states: "The disputes of the parents for the custody of a child is to be settled considering the interests and finding out the position of the child, if he/she is able to formulate it him/her self."

No partner-relationship law to secure the rights of the child born out of the marriage institution (almost half of children in Latvia are born in relationships other than marriages).

Lonely parents

The Article 80 of the Civil Law specifies that a one spouse can ask resources and support from the other **only** it he or she has not contributed with his or her action to the disintegration of the marriage **and** if these resources are necessary for securing the previous level of prosperity or nutrition. This aspect of Latvian legislation is different from countries which place utmost priority on considerations of social justice and security rather than establishing somebody's guilt in the court and can be abused by the rush to court.

Poor couples:

Poorer couples can no longer file a divorce them selves (the right they used to have) and must pay services of a lawyer who is required to make detailed listing the property and how it will be separated. However, if a couple consents on divorce and agrees on the way their property will be separated, this document does not have a legal force and is not double checked by the court. Resulting in an example cited by Mr. Fridrihsons in which a husband is promising to give an apartment as a present to his ex-wife after divorce, but fails to do so. When wife goes to court, she finds out that the apartment is already sold and has new owners. Mr. Fridrihsons suggests that the document separating the property should not be obligatory and in case it is composed, should have a legally binding force.

- **Legal professions (judges, lawyers, notaries)**

According to the Article 56 of the Civil Process Law (The Delivery of the Notice) the notice to the person residing in a foreign country is sent with the mediation of the Ministry of Foreign Affairs of the Republic of Latvia in the order established by the binding international treaty.

Mr. Fridrihsons indicated that despite the order set in the law most of the notices so far have been sent by the Ministry of Justice. This order however will be changed as new procedures are planned to be introduce in the near future, making Ministry of Justice responsible for sending notices to the persons within the EU, notices concerning the cases involving questions concerning custody over children will be dealt with by the Ministry of Children and Family, and the notices to countries outside the EU will be sent by the Foreign ministry.

Mr. Fridrihsons also indicated that unlike the common procedures in other Member States Latvian legal experts, when meeting to discuss propositions for new legislation do not get freed from their primary responsibilities at their workplaces. This to his mind results in most of the work being done after working hours, will less possibility to allocate time and energy for these proposals.

- **Other**

Mr. Fridrihsons mentioned a case involving German-Latvian couple example. This case was carried out without informing the wife residing in Germany.

8. What would the positive and negative impacts of the different options be on your situation (as a judge/lawyer/family association)?

NA

9. What special safeguards mechanisms need to be set up to protect the different vulnerable groups?

NA

10. Would it be sufficient to implement one of the policy options to solve the problems? Which one?

NA

11. If no, would any combination of options be sufficient to address the problems? Would this be the same as the most desirable combination?

NA

12. Are there any potential conflicts or inconsistencies between the identified options?

NA

13. Could you identify any political or cultural barriers which could hinder the implementation of the policy options?

NA

14. Is any other EU action necessary or desirable to support an effective implementation of the policy options?

NA

15. Is in your meaning EU-level action justified considering the size and the scope of the problem?

NA

16. Can you recommend any literature / other information sources from which this study would benefit?

NA

Country	France
Date	17 November 2005

*Interviewees: Judges, **lawyers**, notaries, family associations*

Name:

FRANCE
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1. Please describe your role in relation to 'international' couples who file for divorce.

LL.M, Avocat à la Cour, REL Law Society of England and Wales, Docteur en droit, formerly lecturer in Law, affiliate member of Resolution (UK), accredited specialist in Family Law with the Paris Bar, Péchenard & Associés, Paris.

In her practice, Butruille-Cardew deals with divorce cases in Paris and is also a registered European Lawyer in England and Wales. Sometimes she also works on cases in the USA and Canada.

Approximately 60-70% of the cases she deals with are international. Her practice as an advocate and REL in England has mainly brought her to deal with Franco-English divorces.

2. In your work, have you come across any of the problems identified in the Green Paper? If yes, please describe some cases when any of these have occurred?

As to that the lack of certainty and predictability for the spouses in relation to which national divorce Law will apply, in both her French and English experiences neither country in practice adduces evidence as to a foreign divorce law. The French conflict of law rules will generally designate French divorce law and if not, in practice, the local law is applied perhaps because of unfamiliarity with international law and foreign laws. English judges simply apply English law, although judicial reference has now been made to a "sideways glance" at foreign law.

As to the risk of results that do not correspond to the legitimate expectations of the citizens, of course, in some cases, the grounds for divorce may be so different that the country seized is important, but in almost all international cases it is which country decides ancillary relief that will make a great difference. Whilst ancillary relief can be dealt with separately from the suit divorce, the likelihood of it being so is not great in

practice. What is certain at the moment is that the country that seizes jurisdiction, in the case of England and France will almost certainly apply their law to ancillary relief (in practice).

As to the risk of a "rush to the court", forum shopping, also renders reconciliation difficult because of the necessity to lodge first and sometimes to serve the other party. Harmonization would diminish the rush for jurisdiction, but for this result it must be also harmonization of ancillary relief.

As to the insufficient party autonomy, she is in favour of a growing freedom for the parties to choose their divorce law and therefore get more involved in the separation process, which responds to a general social need in Family Law. It is also important in European terms because further assumption of responsibility and information are needed when a non-national element is involved in the creation of the life of a family.

The risk of difficulties for Community citizens living in a third State*, it is her opinion that Brussels II bis, via article 7 provides an answer to this risk.*

Some examples of the problematic international couples have to face:

The New Brussels II regulation that integrates the rules of Hague Convention on child abduction that defines the practice as taking the child across the border without the consent of both parents. In this context one may consider a following problem – a French couple with a child deciding to move to Italy because the husband has found a better played job there. After a year in Italy the couple decides to divorce and wife wants to return to France to her relatives and possibilities of better employment. Although the child has lived most of his life in France, during the year in Italy, this country has become his permanent place of residence. This means that the wife can no longer freely return to her "home" country and is forced to stay in Italy with the child, with little prospects of social security after divorce.

This case illustrates well the fact that as the mobility for whatever the reason, be it job, and education, training or other within the EU becomes more common and habitual to the perception of people. However, people still have little apprehension of the consequences of their involvement with the foreign "element". In a simple language, it is becoming increasingly simple to do things and complex to undo them. For example, if the above mentioned couple would have moved from one city to another within the territory of France it would be much easier for the wife and child to return to their original place of residence.

Another example involves a French couple who has concealed a matrimonial contract separating all of the propriety and establishing that after divorce things acquired during cohabitation will be separated according to the ownership rights of the person who have acquired them using their own financial resources. However, this couple goes to work in the London and after a wile decide to divorce. Under English jurisdiction their contact is not recognised and their property separated in equal shares. This example evokes the need for bigger party autonomy and a procedure allowing the transfer of the divorce proceedings to another jurisdiction which a couple has/feels more "connection" with.

3. Could you think of any additional problems to those identified in the Green Paper? If yes, please provide a practical example illustrating the problem.

The following problems result from the ones identified in the Green paper.

- Reconciliation of the spouses is rendered difficult. Because of the aggressive path of forum shopping (need to lodge first), mediation and alternative dispute resolution methods are almost impossible to apply in matters of international divorces.

- Article 3 of CE 2201/2003 has in practice ended the application of the concept of forum convenience for ancillary relief because the country seized of the divorce suit will almost automatically deal under its own law with ancillary relief. Such a lack of flexibility, coupled with an insufficient recognition of the parties' autonomy could be regarded as favouring aggressive divorces or/and non fair disclosure practices.

- Alongside a general social need in Family law, there is a further assumption of responsibility when a non-national element is involved in the creation of family life to agree and to find a predictable path in the event of issues. Such a responsibility in international family matters should primarily lie with the parties rather than with the States.

4. Which of the problems is most important to address as a priority? Least important? Please comment on why.

On a pragmatic level harmonisation of conflict of law rules on divorce is a further step and necessary to the harmonization of Family law as has been started by the EU.

She would favour a system based on an harmonisation of conflict of law rules which would not result in massive importation of other European laws and this to avoid a case being in practice run under two or more different Europeans Laws as this would itself create delays and uncertainty and to avoid as far as possible another European Law being applied by national judges.

Her experience of French judges applying foreign Matrimonial Regime Law has led her to have doubts as to the capacity of judges to do so and its practicality: it involves experts, excessive time, uncertainty through lack of knowledge of the core of the law applied, inevitable further costs and hazardous translations. Such a solution would require an increase of availability and numbers of experienced experts on twenty five European divorce laws. It could perhaps be adequately done by government employees such as "liaison judges" and consistency would then result. That would also avoid the existence of a financial discrimination between the parties who can afford private experts and those who cannot. However to my knowledge liaison judges are not always available and do not have sufficient means to provide fast and free translations.

Impracticality: if one were to import the foreign Divorce Law (as against ancillary relief law) the question that arises is does one import the process (the rules) or just the Law (e.g.: delays to lodge, mediation, discretionary powers of judges etc.…).

Some divorce law is much more advanced than others and a country e.g. Sweden would not take kindly to indirectly importing a say Irish concept of divorce. Further, application of a foreign divorce law by national judges may be contrary to their inclination and not very successful within differing European substantive rules on divorce. Such a uniform divorce law based on emerging judges' practice in many nations would itself create uncertainty and likely bad European Divorce Law.

Elaboration of a "substantive" European Divorce Law should be done through the EC commission, if at all. In conclusion, she is in favour of the harmonisation of conflict of Law rules to remedy the difficulties and incoherency arising from the haphazard application of other European Divorce Laws, and reduce the lack of unpredictability and to increase the autonomy to the parties in choosing a particular law.

Harmonisation should therefore reduce the possibility for European Member States to apply another EU Divorce Law to divorces over which that country has jurisdiction, promote a more coherent and global system of dealing with divorce and its consequences by developing a system of expertise of other European Laws (liaison judges) that works together with a fast and efficient system of transfer of cases (or ancillary parts of them) to another jurisdiction.

Recognising parties' autonomy is an alternative to harmonizing of Law. That is recognition of the predominance of the lex fori, unless the parties have agreed otherwise.

She believes that the court which has jurisdiction over the divorce matters should be recognised as automatically having jurisdiction over ancillary matters and children issues **unless** proven to be non convenient.

Harmonisation should also apply to legal separation and marriage annulment to avoid their use as an alternative to harmonized Law, especially when legal separation can be converted into a divorce (e.g.: in France).

5. Considering the policy options identified in the Green Paper:

a) Policy option 2: What set of uniform connecting factors would you propose for harmonisation of the conflict-of-law rules?

Connecting factors: to avoid the import of other European Laws, the connecting factor should be the lex fori. Lex fori would result from the grounds for jurisdiction set in Brussels II (bis) which are based on the existence of a sufficient connecting factor between the parties (or one of them) and the jurisdiction seized.

The multiplicity of these grounds is an important and valuable source of flexibility for the parties. I believe that the jurisdiction seized of the divorce matters should also have jurisdiction over ancillary and children matters **when appropriate**. If not appropriate, it should be a global transfer which is ordered to the European court considered a more appropriate forum. Grounds for transfer could be set according to the Anglo-Saxon doctrine of the convenient forum. First consideration should also be given to the interests of the family. Factors such as centre of gravity of family life, or/and location of its assets could be taken into consideration.

In her experience, a global approach to divorce and its consequences favours reaching of agreements. The feasibility of importing a foreign law to deal with ancillary relief and matrimonial consequences (which requires the existence of liaison judges and the possibility of importing another law being recognised by the lex fori) as against the delay and perhaps impracticality of transferring part of the divorce process (e.g.: only divorce matters, only ancillary relief matters, only children matters or only matrimonial regime matters) to another European state are relevant factors to her decision. Because of French proceedings rules, it would be very difficult for a French Court to isolate its jurisdiction over the matter of ancillary relief from the divorce of the parties. A time limit could be set for the

court of the Member State first seized to decide on the appropriate transfer, and a mechanism like the one existing at article 15 Brussels II (bis) could exist.

b) Policy option 3: On what grounds would you limit the possibility for spouses to choose the applicable law and the competent court ('prorogation of jurisdiction')?

The parties may choose either:

- a joint choice of jurisdiction (prorogation of competence), at the time an issue arises;

- anticipating the difficulty arising in a pre/nuptial agreement and committing to a jurisdiction.

- a joint choice on the applicable aw within whatever jurisdiction is available, at the time of the divorce.

c) Policy option 4: In what way could the jurisdiction rules of Regulation (EC) No. 2201/2003 (the New Brussels II Regulation) be revised? What would be sufficient and what would be desirable?

She believes that a ground of jurisdiction based on the possibility for the parties to make a joint choice of jurisdiction should be recognised in Brussels II (bis).

Most of the time this would determine the application of a Divorce Law. Prorogation of competence should be possible each time the parties, or one of them, have a strong connecting factor with one another European Member State.

Two separate independent lawyers should have advised the parties on the consequences of such a choice.

6. Could you think of any additional policy options to those identified in the Green Paper?

She believes that the parties should be given the possibility, in a post or pre-nuptial agreement to choose their divorce law (or their separation or annulment Law for reasons already given) and if they did not agree at that time the lex fori should apply.

Again, she believes that the assistance of two separate and independent lawyers should be required for any agreement drawn.

Harmonisation of conflict of Law rules on divorce would indirectly harmonise the existing substantive Law on nuptial agreement.

In her experience, she has noticed that the very large freedom recognised in France to the parties to choose their Matrimonial Law (even foreign if they wanted to) in a pre-nuptial agreement rarely leads to inappropriate decisions. In fact and most of the time the parties would choose a French matrimonial regime (separation of property mostly), even if one of them is not a French citizen. Therefore, if the choice of a substantive Divorce Law were made by the parties in a nuptial agreement I would not restrict it by requiring overwhelming connecting factors.

At the time of divorce, if the parties are agreeing on their divorce and all its consequences, they should have the right to choose the applicable Divorce Law, so long as there is a connection between the country chosen with one of their nationalities or the centre of family life.

In these two last solutions, she believes that the choice made by the parties as to the applicable Divorce Law should also apply to ancillary relief and their matrimonial regime unless they have agreed special provisions in this respect.

7. Could you please identify positive and negative (1) social and cultural, (2) practical and (3) legal impacts of each of the options on the identified target groups:

- **'International couples'**

NA

- **Vulnerable groups**

NA

- **Legal professions (judges, lawyers, notaries)**

Clash of generations. Older people (including the representatives of legal professions) find it difficult to understand the mobility of the "new generation" and thus the necessity of the EU level intervention in addressing the problematic of increasingly international societies. The older generation still lives in the paradigm of nation state and consider its competences and tools sufficient while the younger generation celebrates mobility and takes it for granted (often unaware of the problematic connected to it).

- **Other**

A long term option might consist in the elaboration of a European Divorce Law within the Union which would apply to divorcing couples where a non-national element is involved and a member state's court seized.

8. What would the positive and negative impacts of the different options be on your situation (as a judge/lawyer/family association)?

Recognition the parties' autonomy would increase the role of Family lawyers as advisors rather than litigants.

9. What special safeguards mechanisms need to be set up to protect the different vulnerable groups?

Each time a foreign element is involved, she believes the assistance of two independent lawyers should always be required (for proceedings or any type of marital/separation agreement or contract).

Public policy clause should enable a Member State court to refuse to apply a foreign Law which does not conform to International and European Family Public Policy.

Another public policy clause should recognise the right to a Member State court to refuse to apply such conflict of Law rules if it would result in having to apply a Divorce Law contrary to its own national Family Public Policy. Such a type of clause would preserve the Member States sense of identity of principles of law. It would also require that Member Sates defined more accurately the core of their national Family Public Policy, which may constitute a necessary step to further harmonisation.

The forum seized should be able to order an automatic transfer to the appropriate forum with no possible refusal from the appropriate forum to accept the transfer.

Likewise and if proven than another forum is more appropriate to deal with financial issues and children, a global transfer should be ordered and a time limit could be set for the first seized jurisdiction to decide on the appropriate transfer.

10. Would it be sufficient to implement one of the policy options to solve the problems? Which one?

No.

11. If no, would any combination of options be sufficient to address the problems? Would this be the same as the most desirable combination?

She believes a combination of the policy options is necessary as envisaged above.

12. Are there any potential conflicts or inconsistencies between the identified options?

Difficulties concerning non European countries.

13. Could you identify any political or cultural barriers which could hinder the implementation of the policy options?

Lex fori – parties' autonomy – forum non convenience

The recognition of the parties' autonomy in the choice of an appropriate forum or/and substantive law on divorce may be considered as contravening to aspects of French public policy.

The forum non convenience doctrine relies on a pragmatic approach and the recognition of large/discretionary powers to the judges, both of which might be less familiar to the French system.

14. Is any other EU action necessary or desirable to support an effective implementation of the policy options?

The problems of mediation / reconciliation as well as the one of pre/post-nuptial agreements have to be addressed.

15. Is in your meaning EU-level action justified considering the size and the scope of the problem?

EU action is justified but it calls for a need of clarification of the family policy of the EU.

16. Can you recommend any literature / other information sources from which this study would benefit?

Country	Luxemburg
Date	28 November 2005

*Interviewees: Judges, **lawyers**, notaries, family associations*

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LUXEMBURG
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1. Please describe your role in relation to 'international' couples who file for divorce.

Mr Rodesch is a specialist in Family Law and Patrimonial law. He works in a law cabinet composed of four lawyers. They do not deal often with international divorces.

2. In your work, have you come across any of the problems identified in the Green Paper? If yes, please describe some cases when any of these have occurred?

He has no direct experience in this field.

3. Could you think of any additional problems to those identified in the Green Paper? If yes, please provide a practical example illustrating the problem.

No.

4. Which of the problems is most important to address as a priority? Least important? Please comment on why.

The most important problem to address is "lack of legal certainty and predictability for the spouses" as in the current situation there is an important lack of clearness and transparency. This situation is affecting international couples, who want to divorce but do not know what law will be applied.

The "autonomy" and the "rush to court" issues should not be considered as central problems.

5. Considering the policy options identified in the Green Paper:

a) Policy option 2: What set of uniform connecting factors would you propose for harmonisation of the conflict-of-law rules?

The application of the lex fori principle seems to be the more appropriate solution. Applying the jurisdiction of the country makes things clearer and simpler for judges and lawyers.

b) Policy option 3: On what grounds would you limit the possibility for spouses to choose the applicable law and the competent court ('prorogation of jurisdiction')?

The choice of applicable law and competent court should be limited by factors such as the place where the marriage was contracted, the residence and the nationality of the spouses. An excessive autonomy would have a negative impact on the certainty and the predictability of divorce procedures.

c) Policy option 4: In what way could the jurisdiction rules of Regulation (EC) No. 2201/2003 (the New Brussels II Regulation) be revised? What would be sufficient and what would be desirable?

The revision of the Regulation's articles is desirable as it should increase the certainty and the predictability of divorce procedures. The harmonisation of the conflict-of-law rules on a lex fori basis would simplify the possibilities described in Art 3 of the Regulation.

6. Could you think of any additional policy options to those identified in the Green Paper?

No.

7. Could you please identify positive and negative (1) social and cultural, (2) practical and (3) legal impacts of each of the options on the identified target groups:

- **'International couples'**

More certainty would prevent "rush to court" cases and enhance the security of the spouses as far as the divorce procedure is concerned.

- **Vulnerable groups**

The weaker party will have the possibility of obtaining a fair judgement.

- **Legal professions (judges, lawyers, notaries)**

If the lex fori principle is applied everywhere the legal professions would spend less time on research and learning of other legislations, which is a time-consuming and difficult task.

- **Other**

No.

8. What would the positive and negative impacts of the different options be on your situation (as a judge/lawyer/family association)?

The harmonisation of the conflict-of-law rules would make legal advice to international spouses simpler and clearer.

9. What special safeguards mechanisms need to be set up to protect the different vulnerable groups?

The weaker parties should have the possibility to receive free legal advice and be supported by lawyers even if they do not have the financial means.

10. Would it be sufficient to implement one of the policy options to solve the problems? Which one?

Implementing only one policy option would not be sufficient.

11. If no, would any combination of options be sufficient to address the problems? Would this be the same as the most desirable combination?

Harmonisation of the conflict-of-law rules should be complemented by a certain degree of autonomy of the spouses as far as applicable law is concerned. Nevertheless, this autonomy should be limited by factors such as the place where the marriage was contracted, the residence and the nationality of the spouses in order to avoid a too liberal situation.

12. Are there any potential conflicts or inconsistencies between the identified options?

No.

13. Could you identify any political or cultural barriers which could hinder the implementation of the policy options?

Not for the moment.

14. Is any other EU action necessary or desirable to support an effective implementation of the policy options?

The most important thing that should be done at EU level is the organisation of an information campaign in a non-legal and easy language. Citizens should be able to understand easily their rights and the procedure to follow if they decide to divorce.

15. Is in your meaning EU-level action justified considering the size and the scope of the problem?

EU level action is fully justified.

16. Can you recommend any literature / other information sources from which this study would benefit?

No.

Country	United Kingdom
Date	28 October 2005

Interviewees: ***Judges, lawyers****, notaries, family associations*

Name:

UNITED KINGDOM
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1. Please describe your role in relation to 'international' couples who file for divorce.

Law Society Pt II Exams, 1976, Distinction in Accounts. Admitted as Solicitor, June 1978. Qualified as family mediator, June 1997. SFLA Accredited Family Law Specialist Oct 1999. Qualified as arbitrator, Oct 2001. Admitted as Solicitor of Supreme Court, New South Wales, Australia, Oct 2003

Deputy District Judge, Principal Registry of the Family Division, London (appointed 1995). Past member, Lord Chancellor's Family Proceedings Rules Committee

Private practitioner. Since 1985 – big money divorce work. Much has an international element. When he started about 20% had an international element which has now increased to 40% or more.

Hodson worked for 2 years (until last April) in Australia, and is a qualified Australian lawyer as well as being an English mediator and part-time family court judge in London. As years have gone by, more and more cases involving international couples have come up. 20 years ago, these cases were dealt with lawyers in big firms in big cities. Now there are so many families with spouses of different nationalities that also small town lawyers deal with such cases. This can best be described as a 'walking nightmare' – they have absolutely no training in handling such cases, and no experience of dealing with foreign laws.

Hodson has been a Member of Resolution for the past 10 years

2. In your work, have you come across any of the problems identified in the Green Paper? If yes, please describe some cases when any of these have occurred (e.g. between spouses of what countries there have been problems).

Yes – in Green Paper response (Resolution)

3. Could you think of any additional problems to those identified in the Green Paper? If yes, please provide a practical example illustrating the problem.

Yes – in Green Paper response (Resolution)

About 40% of international cases involve EU citizens, and the remaining 60% are with third States. Most include the USA, Caribbean countries, the Indian subcontinent and old Commonwealth countries, which do not use conflict of law rules. Any element of conflict of law would make cases involving these countries difficult to handle.

4. Which of the problems is most important to address as a priority? Least important? Please comment on why.

In particular the "**lis pendens**" rule. The introduction of lis pendens has resulted in major problems and changed practice from advising clients to marriage reconciliation, counselling, mediation and a conciliatory approach to an 'aggressive' approach and lodge a divorce petition as soon as possible in order to secure the best financial outcome for them. The lawyers still have a conciliatory approach in national cases. Hodson was involved in one case where they lodged the divorce petition 30 minutes after the other spouse, which resulted in a loss of hundreds of thousands of euro for his client.

In addition it is a huge disadvantage to more vulnerable parties, mainly women. In many cases women are not particularly well off, and sometimes need legal aid. It is very difficult to get high quality foreign advice on legal aid.

In relation to conflict of law rules, it would be better to introduce a hierarchy of jurisdiction and that courts always applied lex fori. A hierarchy of jurisdiction would also solve the problem of rush to court.

5. Considering the policy options identified in the Green Paper:

a) Policy option 2: What set of uniform connecting factors would you propose for harmonisation of the conflict-of-law rules?

Hodson suggests to first allowing the spouses a limited choice of jurisdiction, then application of a hierarchy of jurisdiction and the court only apply lex.

A hierarchy of jurisdiction rules could be based on

1) agreement, 2) habitual residence (spouses must have lived together in a country for a certain period of time, for instance at least for 7 years).

In Hodson's view, residence is a stronger connecting factor than nationality. Many of his clients left their country of origin many years ago. However, as connecting factory, joint nationality should have primacy over habitual residence which is lower than the time limit (e.g. 7 years).

b) Policy option 3: On what grounds would you limit the possibility for spouses to choose the applicable law and the competent court ('prorogation of jurisdiction')?

A State should only have jurisdiction when there is a substantial connection, for example provided one party is habitually resident in or a national of (or for the UK and Ireland domiciled in) that member state or it is the state where the marriage took place. For the reasons set out below in relation to applicable law, we also propose that the parties can only choose the substantive domestic law of the jurisdiction they choose.

c) Policy option 4: In what way could the jurisdiction rules of Regulation (EC) No. 2201/2003 (the New Brussels II Regulation) be revised? What would be sufficient and what would be desirable?

To avoid the "rush to court" which currently exists it is essential to introduce a hierarchy of jurisdiction. This will avoid the difficulties, for example of a couple, whose closest connection is with Germany, finding themselves before the English courts simply because one decides to issue there and they have been resident there for a short time.

6. Could you think of any additional policy options to those identified in the Green Paper?

Divorce and all the ancillary financial aspects need to be seen and dealt with together.

7. Could you please identify positive and negative (1) social and cultural, (2) practical and (3) legal impacts of each of the options on the identified target groups:

- **'International couples'**

Introducing a hierarchy of jurisdiction would provide certainty.

- **Vulnerable groups**

This is mainly the economically weaker party, who cannot afford good specialist legal advice. In most cases this is the woman. A typical vulnerable party would be a woman who is a mother and a housewife, 30-40 years old, who live abroad and does not speak the language of the foreign country and therefore cannot work in the new country.

Others: those who do not know marriage is breaking down, which is aggravated by the lis pendens rule.

- **Legal professions (judges, lawyers, notaries)**

Negative would be conflict-of-laws that would involve applying laws of other countries. Some English lawyers have commented that in some cases even they are not certain about how to apply law, and how can foreign lawyers then do it?

- **Other**

NA

8. What would the positive and negative impacts of the different options be on your situation (as a judge/lawyer/family association)?

See above.

9. What special safeguards mechanisms need to be set up to protect the different vulnerable groups?

The lis pendens rule should be deleted. Also, there ought to be increased opportunities for legal aid and increased cross border co-operation, including practitioners' networks, with a focal point in each country (or a few in bigger Member States). EU could assist in this matter.

10. Would it be sufficient to implement one of the policy options to solve the problems? Which one?

Yes, a hierarchy of jurisdiction would solve most problems.

11. If no, would any combination of options be sufficient to address the problems? Would this be the same as the most desirable combination?

NA

12. Are there any potential conflicts or inconsistencies between the identified options?

No.

13. Could you identify any political or cultural barriers which could hinder the implementation of the policy options?

Of course, many countries have a cultural barrier, based on succession laws. In Hodson's view it would be easier for countries with conflict of law rules to adopt a system based on lex fori than the opposite.

14. Is any other EU action necessary or desirable to support an effective implementation of the policy options?

Yes, it would be beneficial to have a property law regime, since the rush to court problem in most cases is a consequence of ancillary matters. If the financial outcome would be same everywhere there would be less incentive to rush to court. Currently some countries ignore inheritance, some have life long maintenance and sharing of pensions, whilst others do not.

15. Is in your meaning EU-level action justified considering the size and the scope of the problem?

Yes, definitely. It is a fundamental and crucial problem, which is getting bigger and bigger every day.

16. Can you recommend any literature / other information sources from which this study would benefit?

Country	United Kingdom
Date	16 November 2005

*Interviewees: Judges, **lawyers**, notaries, family associations*

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1. Please describe your role in relation to 'international' couples who file for divorce.

David Truex / Founder and Head of Chambers / International Family Law Chambers / Accredited Specialist Family Lawyer, Barrister and Solicitor (Australia), Solicitor (England and Wales)

Mr. Truex is representing couples in international divorces on a regular basis. He receives at least one case a week, around 50 cases per year.

2. In your work, have you come across any of the problems identified in the Green Paper? If yes, please describe some cases when any of these have occurred?

The main problem is that the current law leads to rush to court. A recent case of involved the husband living in Germany and the wife in London, US, and Russia. The case was handled under the German law according to the nationality of the husband. The case took place in Germany, in disadvantage for the wife, who was not satisfied by the results of the proceedings.

3. Could you think of any additional problems to those identified in the Green Paper? If yes, please provide a practical example illustrating the problem.

According to Mr. Truex, the Green Paper has identified all the main problems.

4. Which of the problems is most important to address as a priority? Least important? Please comment on why.

There are tree problems of utmost importance:

1. rush to court, divorce that is started in a hurry

2. uncertainty, people do not know and cannot predict what law applies and what will be the results of the proceedings

3. difficulty of the principle of the applicable law, that is for example, getting a English judge to understand German law

5. Considering the policy options identified in the Green Paper:

a) Policy option 2: What set of uniform connecting factors would you propose for harmonisation of the conflict-of-law rules?

See question 6.

b) Policy option 3: On what grounds would you limit the possibility for spouses to choose the applicable law and the competent court ('prorogation of jurisdiction')?

NA

c) Policy option 4: In what way could the jurisdiction rules of Regulation (EC) No. 2201/2003 (the New Brussels II Regulation) be revised? What would be sufficient and what would be desirable?

NA

6. Could you think of any additional policy options to those identified in the Green Paper?

Mr. Truex thinks that none of the policy options identified in the Commission Green Paper (question 5. point a. and b.) and the New Brussels II Regulation (question 5., point c.) are the best. He proposes to have two new rules:

1. rule of the *lex fori* – **always** apply the law of the country where the divorce takes place

2. if spouses make a contract, they can specify another law to be applied in their case (so called *prorogation jurisdiction* – term from the Scotch law meaning jurisdiction, which, by the consent of the parties, is conferred upon a judge, who, without such consent, would be incompetent)

7. Could you please identify positive and negative (1) social and cultural, (2) practical and (3) legal impacts of each of the options on the identified target groups:

- **'International couples'**

The main impacts of the present situation are the increased costs due to the complexity of the international divorce legislation and unpredictability of its results. With the complexity of the law increases also the compensation that lawyers demand for their services in the same way with the complexity of procedures increases the administrative costs that spouses have to carry.

- **Vulnerable groups**

In relation to what was said above, it is the poor people who cannot afford the lawyers specialised in the international (comparative) law that will be the most confused and most vulnerable to the risk of receiving inappropriate judgements in the "wrong" countries.

- **Legal professions (judges, lawyers, notaries)**

The application of the legislation discussed in the question five results in a situation when it is harder for the lawyers to find the right answers to international divorce cases, and the divorce processes become unnecessarily complicated and thus more expensive for all parties involved. The main consequences of such complexity are confusion and unpredictability of results.

- **Other**

8. What would the positive and negative impacts of the different options be on your situation (as a judge/lawyer/family association)?

See the answers above

9. What special safeguards mechanisms need to be set up to protect the different vulnerable groups?

Most important is to introduce some form of legal aid to people who cannot afford quality legal services. This is well arranged under the English system as people can ask for government funding for their activities of seeking legal advice.

10. Would it be sufficient to implement one of the policy options to solve the problems? Which one?

No.

11. If no, would any combination of options be sufficient to address the problems? Would this be the same as the most desirable combination?

Mr. Truex has identified a combination of two rules described above that could contribute to improving of the situation (1) always apply *lex fori* of the state where the

proceedings take place, (2) (pre)matrimonial contracts that may include a point on *prorogation jurisdiction.*

12. Are there any potential conflicts or inconsistencies between the identified options?

If the solution proposed by Mr. Truex is accepted, there is one main conflict to resolve. This is the establishing and harmonizing the rules and conditions, which will make the matrimonial contact meaningful. In other words, similar rules that would make the matrimonial contract an effective tool in solving problems related to international divorce have to be established.

13. Could you identify any political or cultural barriers which could hinder the implementation of the policy options?

The biggest barrier probably is political. Each country's legal specialists consider the system that they know as being the best. Considering the difference of law systems and traditions in the EU countries any harmonisation may be very difficult to achieve. The UK and France will probably be the countries the most difficult to convince of this need.

To facilitate the understanding of a foreign law, processes, and choices of souses and legal practitioners translations of M. S. laws have to be made in all Community languages. These should be available online.

Different languages in general is one of the major barriers in international divorce cases, to overcome these quality interpreter services are needed.

14. Is any other EU action necessary or desirable to support an effective implementation of the policy options?

Yes, there is a need for a new EU legislation as well as for proper funding to implement the new law. Proper funding should also be allocated to the development of legal aid, interpretation, and translation services in the court as well as in the legal advising process before the proceedings. Here again online information would be of great help.

15. Is in your meaning EU-level action justified considering the size and the scope of the problem?

It is.

16. Can you recommend any literature / other information sources from which this study would benefit?

The literature and references used in the preparation of the Green Paper.

International Academy of Matrimonial Lawyers (IAML) website.

Country	The Netherlands
Date	15 November 2005

*Interviewees: Judges, **lawyers**, notaries, family associations*

Name:

THE NETHERLANDS
Ms. Wendy van der Stroom-Willemsen
Divorce mediator and forensic mediator
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Ms. Carla Smeets
Member of the Association of Family Lawyers and Divorce Mediators (VFAS)
Certified NMI mediator and a member of the International Academy of Matrimonial Lawyers (IAML)
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1. Please describe your role in relation to 'international' couples who file for divorce.

Ms. Wendy van der Stroom-Willemsen and Ms. Carla Smeets / SmeetsGijbels Family law firm

Carla Smeets is a member of the Association of Family Lawyers and Divorce Mediators (VFAS); she is a certified NMI mediator and a member of the International Academy of Matrimonial Lawyers (IAML).

Wendy van der Stroom is divorce mediator and forensic mediator and a member of the Association of Family Lawyers and Divorce Mediators (VFAS).

Ms. van der Stroom-Willemsen has 15 years of experience exclusively in Family law, Ms. Smeets 18 years. Both have been handling cases of international divorce for more than 10 years as their office has specialised in this field. They estimate a growth in the number of international divorces, also as the consequence of increasing number of expatriate marriages.

2. In your work, have you come across any of the problems identified in the Green Paper? If yes, please describe some cases when any of these have occurred?

Ms. van der Stroom-Willemsen says that the "rush to court" is a common practice in international divorce cases as in different countries different outcomes of proceedings can be expected. The sides try to exploit this by using the first come first trail principle, which in turn predetermines which law, and with court has the competence over the case.

There are also cases of when one part of the divorce proceedings is held in the first country and the second in another (ex: 1st part in Australia, 2nd in the NL). In general, the bigger the dispute between the parties, the bigger the race for desired jurisdictions.

3. Could you think of any additional problems to those identified in the Green Paper? If yes, please provide a practical example illustrating the problem.

One of the additional problems is with the application of the foreign law in the Dutch courts. Spouses in Netherlands have a right to choose the applicable law under which their case will be handled. However, courts in the Netherlands may not always be able to properly apply this law as they are not familiar with it and have to follow the Dutch procedure rules. For example in one of the cases the court had to apply a New Your law, but did not have the corresponding tool to hear witnesses. For the above-mentioned reasons courts generally prefer to apply the law of their country.

Experts of the foreign law applicable in a case may be invited for consultation by the court. However, these may present different opinions and interpretations of the law of their country. There is also a question in relation to who pays for the services of these experts?

Normally when a court applies *lex fori* in the divorce matters it also follows the procedural rules of the country. Consequently, when it is required to apply a foreign law it must also dispose the corresponding legal tools to do so.

4. Which of the problems is most important to address as a priority? Least important? Please comment on why.

First issue to address is the rush to court. When Ms. van der Stroom-Willemsen and Ms. Smeets have a new client one of the first things they do is to call the "other" country's relevant authorities to see how far the divorce procedure is brought in that country, what are the legal consequences of the proceedings and what may be the results if the case is handled there.

Another problem to address is the double procedure. Normally, if the divorce proceedings are already started in another country Dutch court will postpone the procedure in the Netherlands. However, the Dutch court may also go forward with the case if it considers that the trail in the other country will not be beneficial or fair to either of the parties involved in the divorce. In other words, it may postpone the proceedings, but is not absolutely required to do so. This may result in double proceedings and consequently complicate and slow down the divorce procedure, require additional resources from the side of legal practitioners and spouses involved.

5. Considering the policy options identified in the Green Paper:

a) Policy option 2: What set of uniform connecting factors would you propose for harmonisation of the conflict-of-law rules?

The choice of the spouses, common nationality, place of common residence, *lex fori*.

b) Policy option 3: On what grounds would you limit the possibility for spouses to choose the applicable law and the competent court ('prorogation of jurisdiction')?

Party autonomy is very important in the Netherlands. There should be as little as possible restrictions on the choice of the spouses. The choice is limited on the grounds of nationality and domicile. However, if spouses do not have common nationality they may choose the law according to nationality of one of the spouses (the agreement of the other partner is required) or choose to apply the *lex fori* even if they are not Dutch nationals.

After the parties have chosen a foreign law, courts must follow this law, examine what it means and apply it (however, within the framework of Dutch procedure law). System is democratic in the sense that people who not have Dutch nationality may still choose to apply Dutch law. The idea behind above described arrangements is that system that gives more autonomy to the involved parties to choose the applicable law is better than the system that forces parties to divorce under a system that they do not know, like, or identify with.

c) Policy option 4: In what way could the jurisdiction rules of Regulation (EC) No. 2201/2003 (the New Brussels II Regulation) be revised? What would be sufficient and what would be desirable?

Ms. van der Stroom-Willemsen and Ms. Smeets consider that the rules of the Brussels II Regulation are working well enough and should not be changed now that they have been so recently established. Plus the system established by the Regulation is very similar to the one they are used to.

6. Could you think of any additional policy options to those identified in the Green Paper?

No.

7. Could you please identify positive and negative (1) social and cultural, (2) practical and (3) legal impacts of each of the options on the identified target groups:

- **'International couples'**
- **Vulnerable groups**
- **Legal professions (judges, lawyers, notaries)**

Judges and lawyers have to apply the law that they are not familiar with. Plus the procedure law does not fit to the Divorce law.

Although judges often consult International Legal Institute for advice on the application of the foreign law, court expects the parties involved in the case to explain and interpret what the foreign law implies. These interpretations may be manipulative. Interviewees expect the court which must apply the foreign law also to examine it, rather than delegating this task to the parties or invited (foreign law) experts.

Court is bound by its own procedural law. There are cases in which the foreign law cannot be fully applied because of the inconsistencies in procedures between foreign law and Dutch Civil Process law. Example: Under the New York law a sexual abuse claim has to be proved, but the Dutch court has no tool of witnesses' hearing.

One of the possible solutions of this problem is that if spouses choose a foreign law, the case may be forwarded to the court in the respective foreign country.

- **Other**

8. What would the positive and negative impacts of the different options be on your situation (as a judge/lawyer/family association)?

See above.

9. What special safeguards mechanisms need to be set up to protect the different vulnerable groups?

Cannot think of any vulnerable groups.

10. Would it be sufficient to implement one of the policy options to solve the problems? Which one?

Harmonisation – as in other countries parties do not have the right to choose the applicable law of the country that they feel the most connection with. From the other side, when the spouses choose their case to be handled under the foreign law, court has to deal with and apply the law it is not familiar with. If court must apply foreign law it should also be able follow the procedures of the Civil process of that respective country.

Law should also be harmonized to increase predictability of case results and avoid rush to court. If it were possible to get a same outcomes of the proceedings in different Member States the jurisdiction battles could be avoided as well as a situation when the richest get the best legal advice in which country to start the divorce process.

11. If no, would any combination of options be sufficient to address the problems? Would this be the same as the most desirable combination?

NA

12. Are there any potential conflicts or inconsistencies between the identified options?

NA

13. Could you identify any political or cultural barriers which could hinder the implementation of the policy options?

Difficult as interviewees do not posses the necessary broad knowledge of cultural differences in different EU countries. It is also hard to predict the consequences of each of the policy options, as it requires a political vision of the Union.

14. Is any other EU action necessary or desirable to support an effective implementation of the policy options?

Cannot think of any.

15. Is in your meaning EU-level action justified considering the size and the scope of the problem?

Yes, certainly. Ms. van der Stroom-Willemsen and Ms. Smeets handle some 10-20 international divorce cases a year (including the abduction cases). International divorce is a growing problem in the Union.

16. Can you recommend any literature / other information sources from which this study would benefit?

www.asser.nl

www.igi.nl

G. Schmidt at www.iaml.org

Country	The Netherlands
Date	15 December 2005

Questions

Interviewees: ***Judges****, lawyers, notaries, family associations*

Name:

Title / Organisation / Unit / Function:

THE NETHELANDS
Jaap Gisolf
Family law judge in the District Court of Alkmaar
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1. Please describe your role in relation to 'international' couples who file for divorce.

Mr Gisolf is a judge handling predominantly divorce cases in which both parties have already reached a formal agreement. At times he also runs hearings in which couples are still settling disputes over property rights, maintenance rights / obligations, etc. Mr Gisolf has been dealing with divorce cases only for 2 years so much of the information provided in this interview comes from his discussions with colleagues.

Due to that a relatively large number of people who originate from Turkey and Morocco live in the Netherlands, most of the international divorces involve nationals from these countries. Asylum seekers form former Yugoslavia is another large group often involved in international divorce proceedings.

Due to his short carrier in the position of family law judge it is hard for Mr Gisolf to estimate whether the number of international divorce cases has risen lately. However, he is certain that the number has grown in comparison to that some 10-20 years ago.

Application of foreign law:

Mr Gisolf commented that although there have been cases when parties involved in an international divorce case ask specifically to apply foreign law (most of the time Turkish or Moroccan), often their lawyers tend to advise them to choose the lex fori (they would try to avoid the situation in which they need to study and apply foreign law), as they have been predominantly specialised in the local law. This results in a relatively low number of cases where foreign law, as most of the time the law of the forum is applied (preferred/recommended).

How is it done? Is only the law or also the procedures applied?

The Dutch courts have experience in the foreign law most often applied (like the Turkish or Moroccan law). In these cases law and also the corresponding foreign civil procedures are applied (ex: Witnesses are invited according to the Moroccan law).

When the legal experts do not posses the prior knowledge of the foreign law to be applied, they may consult the translations of different laws in the court's library and ask information in one of the law institutes (for example Asser or Internationaal Juridisch Instituut).

How often is law "imported"?

Mr Gisolf has during his two years as a practicing judge not had any international cases where foreign law has been applied. He estimates that there are 1-5 cases a year of this character in his district.

Could you explain the possible problems (or not) of applying foreign law?

The problem is (and the Green Paper does not focus on this one) that national laws and legal terms are different. For example "legal separation" may mean different things in Italy or the Netherlands. This may cause problems.

Another problem is to have the Dutch verdict accepted in a third country (for example in Morocco). The judge and the court have to follow specific procedures, for example the judge has to ask spouses in front of witnesses whether they (for some reason) wish to preserve their marriage. If these foreign procedures are not followed rigorously, there is an increased risk that the court decision will not be recognized as having a legal value in the country of origin from which the law has been imported.

How do you go about language difficulties?

Everything is in Dutch. The foreign law is translated and people who do not speak Dutch may bring interpreters.

Does an international divorce case where foreign law is applied take longer time than a "normal" case?

It does take more time. Often, the legal specialists working on the divorce case have studied Dutch law and are used to its procedures. It is time-consuming for them to research and apply the foreign law and its procedures. As much work in a divorce case is delegated to the staff of the lawyer's office and judge's administrative / legal assistants, who write the verdict for the judge to double-check, introducing a new procedures and a different law slows down the whole process. Following the usual or the standard procedure is of course much easier and the administration and legal work can be done faster.

Is it spouses or the judge who need to find and present the information about the foreign law?

Like in most of the cases, the Dutch courts try to be practical in these issues. Parties are asked to present the aspects of the law that the judge/court is not familiar with or

has misinterpreted. It is of course the final responsibility of the judge and other legal specialists to double check this information and to make sure that the law is applied correctly.

Also in the context of the EU law, the legal specialists can once more consult the law library.

2. In your work, have you come across any of the problems identified in the Green Paper? If yes, please describe some cases when any of these have occurred?

3. Could you think of any additional problems to those identified in the Green Paper? If yes, please provide a practical example illustrating the problem.

When foreign law is applied, there are several problems in terms of implementing procedures and correctly apply the law. The main problem is to ensure that everything is done for the verdict to be accepted in non-EU countries.

4. Which of the problems is most important to address as a priority? Least important? Please comment on why.

The priority is the harmonisation of the separate national laws. This of course is very hard if not impossible at the moment. The main problem is the differences in law, which the Green Paper has not really taken in consideration.

5. Considering the policy options identified in the Green Paper:

a) Policy option 2: What set of uniform connecting factors would you propose for harmonisation of the conflict-of-law rules?

It is important that the parties can choose the applicable law.

b) Policy option 3: On what grounds would you limit the possibility for spouses to choose the applicable law and the competent court ('prorogation of jurisdiction')?

There should not be any room for forum shopping. The parties' right to choose law should be respected. The choice should be limited to the nationality of either of the spouses, law of the country where they have filed for divorce, or the country that the marriage has most connection to. Lex fori will most of the time be chosen as the lawyers in the country know its laws and generally prefer them.

c) Policy option 4: In what way could the jurisdiction rules of Regulation (EC) No. 2201/2003 (the New Brussels II Regulation) be revised? What would be sufficient and what would be desirable?

Mr Gisolf thinks that those issues identified in the New Brussels II regulation are not really the priority. He does not see a problem in how the Brussels II works.

6. Could you think of any additional policy options to those identified in the Green Paper?

Different national laws are the main issue!

7. Could you please identify positive and negative (1) social and cultural, (2) practical and (3) legal impacts of each of the options on the identified target groups:

The cost of the legal proceedings is one of problems that people have to face when starting a divorce. However, this problem is general and does not only apply only to international divorces. In the Netherlands everybody needs an attorney to go to court and the financial system is in place to support the people who cannot afford these services. In the end it is hard to judge whether the State appointed lawyers are really worse or better than those that can be afforded by an average citizen as well as to say who is entitled to the assistance with legal services and who is not.

8. What would the positive and negative impacts of the different options be on your situation (as a judge/lawyer/family association)?

From the practical point of view the choice of the applicable law and jurisdiction should be made as easy as possible. Most lawyers will anyway promote the choice of the lex fori.

9. What special safeguards mechanisms need to be set up to protect the different vulnerable groups?

No.

10. Would it be sufficient to implement one of the policy options to solve the problems? Which one?

The spouses should be provided with the possibility to choose law and jurisdiction.

11. If no, would any combination of options be sufficient to address the problems? Would this be the same as the most desirable combination?

NA

12. Are there any potential conflicts or inconsistencies between the identified options?

Usually not. Because all the legal considerations and choices between options are already made between the client and the lawyer and only then the case is passed to the judge.

13. Could you identify any political or cultural barriers which could hinder the implementation of the policy options?

Making the EU law uniform no doubt would be hard due to various sorts of barriers. Which factors are exactly at play is hard to judge as the scale of the problem is so vast.

14. Is any other EU action necessary or desirable to support an effective implementation of the policy options?

There is not much that can be done concerning the problems brought up in the Green Paper, however, it would maybe be possible to introduce a universal EU divorce law.

15. Is in your meaning EU-level action justified considering the size and the scope of the problem?

NA

16. Can you recommend any literature / other information sources from which this study would benefit?

www.asser.nl;

http://www.iji.nl

Country	Germany
Date	11 January 2006

*Interviewees: Judges, **lawyers**, notaries, family associations*

Name:

GERMANY
Dr. Katharina Jank-Domdey
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Designated Fellow of International Academy of Matrimonial Lawyers
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1. Please describe your role in relation to 'international' couples who file for divorce.

Dr. Katharina Jank-Domdey works as a lawyer in Dusseldorf. Since she is a member of the international academy of matrimonial lawyers she works on quite a lot of cases where foreigners are involved. As she represents only one of the spouses, she assesses the case from a very subjective point of view only in the best interest of her client.

She has given answers only to those kinds of questions of which she has experience.

2. In your work, have you come across any of the problems identified in the Green Paper? If yes, please describe some cases when any of these have occurred?

Yes, whereby the most important problem is the risk of rush to court. The intention is to have a special law applied not to the divorce (who really cares if he is divorced after a six months period or a two years separation?) but on the financial implications of the divorce. The rush-to-court problem arises especially in the following cases:

a) Very often in cases where countries are involved which foresee a cancellation of alimony when one party who asks for alimony is responsible for the breakdown of the marriage (fault-divorce). The 'non-responsible' other spouse will of course try to get the divorce before a court of these countries if it is possible (for example if both Germans live in Monaco). They could of course as well have a divorce in Germany at the court in Berlin-Schoneberg which has jurisdiction for Germans living abroad, but the risk that alimony is granted the wife despite the fact that she is responsible for the breakdown of the marriage is much higher in Germany than it is in Monaco.

b) Very often in cases where the financial outcome is considerably higher in one country than it is in another which is often the case with child support which is significantly lower in Germany than elsewhere (which has to do with the fact that spouses' alimony after divorce is due lifelong according to German law).

c) Very often in cases where prenuptial agreements have been concluded in Germany at the time of marriage. In Germany prenuptial agreements are common. They allow on a broad basis to exclude financial welfare for the other spouse in the case of a divorce. This corresponds with the importance of the Freedom of contract in German law. Spouses who have signed such a contract and have to face a divorce procedure are fully aware that they will not be granted any financial support in German jurisdiction. They therefore try to get another jurisdiction involved, where prenuptial agreements are declared null and void (case which was to read in press: Barbara Becker, wife of ex-tennis pro Boris Becker filed in Florida where the family had a holiday flat).

3. Could you think of any additional problems to those identified in the Green Paper? If yes, please provide a practical example illustrating the problem.

See question 2.

4. Which of the problems is most important to address as a priority? Least important? Please comment on why.

Rush to court.

5. Considering the policy options identified in the Green Paper:

a) Policy option 2: What set of uniform connecting factors would you propose for harmonisation of the conflict-of-law rules?

In the German system approving international jurisdiction of a German court does not have any impact on the question which law is applicable. The question of jurisdiction and the question of applicable law are two different questions. As long as common law countries apply their own law as soon as they have approved their jurisdiction, harmonisation is difficult. If every European court could apply its own law, which means that the lex fori principle would be valid for every country, things would be easier, not only under the aspect 'lack of certainty'. Applying a foreign law – and that is what German courts often have to do – is difficult for judges not having been trained in the foreign law. In divorce matters this is rather easy. Finding out the conditions for a divorce and applying this to the case is not a big thing. But think of difficult procedures concerning property division according to foreign law! The courts usually employ university teachers to get an idea of the foreign law but no doubt the procedure would be better handled in the country where the law comes from.

Country	Poland
Date	9 November 2005

*Interviewees: Judges, **lawyers**, notaries, family associations*

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1. Please describe your role in relation to 'international' couples who file for divorce.

She has been working as a lawyer for 20 years; she is dealing with national and international divorces. The international cases are less frequent: 4-5 a year.

2. In your work, have you come across any of the problems identified in the Green Paper? If yes, please describe some cases when any of these have occurred?

She has recently managed a case of Polish-French couple living in Poland with a child. The French husband wanted to transfer the case to a French court but he failed. Te child was finally entrusted to the Polish mother.

3. Could you think of any additional problems to those identified in the Green Paper? If yes, please provide a practical example illustrating the problem.

NA

4. Which of the problems is most important to address as a priority? Least important? Please comment on why.

The most important problem to address is "risk of difficulties for Community citizens living in a third State" as the couple, which does not know what law applies, could feel "abandoned" by the law.

The least important problem identified by the Green Paper is the "risk of results that do not correspond to the legitimate expectations of the citizens" as the expectations of the citizens are always subjective and difficult meet.

5. Considering the policy options identified in the Green Paper:

a) Policy option 2: What set of uniform connecting factors would you propose for harmonisation of the conflict-of-law rules?

She proposes a harmonization of the conflict-of-law rules on the basis of Lex Fori. In her opinion, a public policy clause should also be introduced, enabling courts to refuse to apply a foreign law in certain circumstances. The court should have an increased autonomy.

b) Policy option 3: On what grounds would you limit the possibility for spouses to choose the applicable law and the competent court ('prorogation of jurisdiction')?

The possibility of the couple to choose the applicable law and court is not the best solution. The choice should be limited at least to their place of residence.

c) Policy option 4: In what way could the jurisdiction rules of Regulation (EC) No. 2201/2003 (the New Brussels II Regulation) be revised? What would be sufficient and what would be desirable?

Was not able to answer.

6. Could you think of any additional policy options to those identified in the Green Paper?

NA

7. Could you please identify positive and negative (1) social and cultural, (2) practical and (3) legal impacts of each of the options on the identified target groups:

- **'International couples'**

In general, the harmonization of conflict-of-law rules should provide security and reliability for international couple that want to divorce. The situation of these people would become transparent and simple.

- **Vulnerable groups**

A particular attention should be given to couples with children. A harmonization of conflict-of-law rules could give them more security as to the procedure to follow.

- **Legal professions (judges, lawyers, notaries)**

It is important for lawyers, judges and notaries to have clear laws ruling the problem of international divorces. The application of the law of their country would have a significant positive impact on these categories, increasing their autonomy and their certainty.

- **Other**

8. What would the positive and negative impacts of the different options be on your situation (as a judge/lawyer/family association)?

The harmonization of conflict-of-law rules with the application of lex fori principle would imply “less work” for lawyers as they do not need to prepare and study foreign legislations.

9. What special safeguards mechanisms need to be set up to protect the different vulnerable groups?

Introduce the public policy clause, which enable courts to refuse to apply a foreign law in certain circumstances.

10. Would it be sufficient to implement one of the policy options to solve the problems? Which one?

The harmonization of conflict-of-law rules with the introduction of the lex fori principle would be a sufficient solution.

11. If no, would any combination of options be sufficient to address the problems? Would this be the same as the most desirable combination?

The harmonization of conflict-of-law rules could be coupled by introducing a possibility of transfer of the case and by providing a public policy clause.

12. Are there any potential conflicts or inconsistencies between the identified options?

NA

13. Could you identify any political or cultural barriers which could hinder the implementation of the policy options?

She does not see barriers to the introduction of harmonized procedures into the Polish law as the use of the lex fori principle would enable the application of national rules.

14. Is any other EU action necessary or desirable to support an effective implementation of the policy options?

No need of EU action as in favour of lex fori.

15. Is in your meaning EU-level action justified considering the size and the scope of the problem?

The rules should be harmonised in all member states. EU-level action justified even if the problem of international divorces does not seem so important.

16. Can you recommend any literature / other information sources from which this study would benefit?

Jan Ciszewski: “Europejskie prawo malzenskie i odpowiedzialnosc rodzicielska…”

Country	Cyprus
Date	7 November 2005

*Interviewees: Judges, **lawyers**, notaries, family associations*

Name:

CYPRUS
John A. Neocleous
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1. Please describe your role in relation to 'international' couples who file for divorce.

He has been dealing with international couples for the last 9 years and worked as a lawyer in over 40 different countries.

In Cyprus there is a paradox of two types of marriages – civil union and religious ceremony. Around 90% international couples are married under by the procedures of civil ceremony. These couples mostly have Lebanese, Syrian, Israelis, and English nationalities. AS Cyprus is an off-shore zone, a lot of Eastern European divorces ex.: Ukrainians, Russians, etc take place here. The number of divorces has increased 5 times during the 5 last years.

2. In your work, have you come across any of the problems identified in the Green Paper? If yes, please describe some cases when any of these have occurred?

Most problems occur with clients outside the EU.

3. Could you think of any additional problems to those identified in the Green Paper? If yes, please provide a practical example illustrating the problem.

In one case a Greek-Cyprian couple, which lived outside the EU then returned back and decided to divorce. The divorce took place in the USA. One of them did not abide the terms of the contract and when they returned to their counties of origin the US law is no longer binding.

4. Which of the problems is most important to address as a priority? Least important? Please comment on why.

The problem of deciding on jurisdiction. Uniform procedures necessary, including harmonisation of reconciliation time, which is considerably differed in various Member States. For example 3 years in Italy and only 3 month in Cyprus.

5. Considering the policy options identified in the Green Paper:

a) Policy option 2: What set of uniform connecting factors would you propose for harmonisation of the conflict-of-law rules?

Most important proposal would be a harmonisation of divorce procedure and timing. Procedure and time are two dimensions to consider in the decision in which country to seek a divorce. For example the Cyprian system is based on Common law and the German on German law, as long as there will be these differences, there will also be ways of abusing the system. For example, if one wants to delay the divorce proceedings one may seek to file the divorce in Portugal.

b) Policy option 3: On what grounds would you limit the possibility for spouses to choose the applicable law and the competent court ('prorogation of jurisdiction')?

NA

c) Policy option 4: In what way could the jurisdiction rules of Regulation (EC) No. 2201/2003 (the New Brussels II Regulation) be revised? What would be sufficient and what would be desirable?

NA

6. Could you think of any additional policy options to those identified in the Green Paper?

Here the interviewee had to interrupt the interview and proposed to send answers to the remainder of the questions by e-mail – still to be received.

Country	Ireland
Date	6 December 2005

*Interviewees: Judges, **lawyers**, notaries, family associations*

Name:

IRELAND
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1. Please describe your role in relation to 'international' couples who file for divorce.

Ms. Dunne is a practicing lawyer and advocate representing either one or the other party in the divorce cases. She has been dealing with divorces since this possibility was introduced in Ireland eight years ago. However, (and this is despite what was expected) there have been relatively few divorce cases since the law allowed this procedure – around 20,000 in the whole 8-year period, of which some 3,500 last year. However, one also has to consider the 4 years long reconciliation period that discourages filing for divorce in Ireland. This means that although their frequency increases, divorces between spouses with different nationalities are relatively rare.

2. In your work, have you come across any of the problems identified in the Green Paper? If yes, please describe some cases when any of these have occurred?

No, she has not (and neither the colleagues that she has consulted). The major problem in Ireland is forum shopping concerning such issues as maintenance, property relieves, etc. Ireland is generally considered as a place with a lengthy divorce procedure. This may be abused by sides if needed, or sides may rush to court in other countries to obtain quicker judgements.

3. Could you think of any additional problems to those identified in the Green Paper? If yes, please provide a practical example illustrating the problem.

No, she has not experienced any additional problems. The Green Paper covers the issues well enough.

4. Which of the problems is most important to address as a priority? Least important? Please comment on why.

The most important issue is to bring certainty concerning the applicable law and jurisdiction. The least important is to provide parties with a choice between different laws as such choice would only increase the uncertainty.

5. Considering the policy options identified in the Green Paper:

a) Policy option 2: What set of uniform connecting factors would you propose for harmonisation of the conflict-of-law rules?

The Green Paper already lists the connecting factors. This list is already exhaustive. Now it is important to let things develop and see with the time how this legislation is applied.

b) Policy option 3: On what grounds would you limit the possibility for spouses to choose the applicable law and the competent court ('prorogation of jurisdiction')?

The possibilities for forum shopping should be limited within the EU25. The possibility for spouses to choose the applicable law should be limited by the application of *lex fori*. However, it is difficult to say because Ireland has not experienced the difficulties described in the Green Paper in the same extent as other EU countries.

c) Policy option 4: In what way could the jurisdiction rules of Regulation (EC) No. 2201/2003 (the New Brussels II Regulation) be revised? What would be sufficient and what would be desirable?

The Brussels II regulation should be left as it is.

6. Could you think of any additional policy options to those identified in the Green Paper?

No.

7. Could you please identify positive and negative (1) social and cultural, (2) practical and (3) legal impacts of each of the options on the identified target groups:

The main difficulty is the cost of the procedures and that of the legal experts. If a case involving a French and Swiss citizen is brought before an Irish court, the services of the experts from these countries will be costly and difficult to obtain. Another problem may be that of recognition of a divorce if the case is dealt with in either the French or the Swiss courts.

8. What would the positive and negative impacts of the different options be on your situation (as a judge/lawyer/family association)?

International cases are difficult to deal with. Richer people who can afford to bring in experts from other jurisdictions. Poorer people cannot afford this. Especially in the divorces based on fault, parties from both sides would be required to bring in evidence, which may prove to be troublesome and expensive.

9. What special safeguards mechanisms need to be set up to protect the different vulnerable groups?

Do not know.

10. Would it be sufficient to implement one of the policy options to solve the problems? Which one?

Efforts have to be made to bring certainty. When people are starting a divorce procedure, they should be able to know its likely results.

11. If no, would any combination of options be sufficient to address the problems? Would this be the same as the most desirable combination?

Do not know. However, some options may not be useful. For example, allowing the parties to choose the forum could be disruptive. In some cases habitual residence of the spouses may be different from domicile and this may cause problems. The choice of the law should be made certain for the spouses. There should be a definition of the habitual residence, as a place in which a couple has lived together for at least 2 or 3 years. One year term is not enough as one of the spouses may move within the EU for job purposes, for example.

12. Are there any potential conflicts or inconsistencies between the identified options?

There could be some confusion between habitual residence, nationality, and domicile as there may be a person having an Irish nationality, living in France and having a domicile in some other country. Nationality should be the decisive criterion.

13. Could you identify any political or cultural barriers which could hinder the implementation of the policy options?

In Ireland the possibility to divorce was introduced into the Constitution by a referendum. The rate of the population in favour of allowing divorce was only very slightly larger (~1%) than those against it. This means that the social attitude towards divorce is still controversial, although slowly changing. For a long time Ireland had its own “way” of dealing with divorce – law of annulment. Because divorce was not possible in Ireland, Irish citizens were divorcing in other countries risking that their separation would not be recognised at home. Before the referendum there was a big public uproar concerning the introduction of divorce because people were fearing massive numbers of couples filing for divorce. Nothing alike actually took place. Divorce rates stayed as low as they were. The present increase in the divorce cases is probably only due to the younger population no longer take marriage as an engagement for life, as the old generation used to perceive it.

14. Is any other EU action necessary or desirable to support an effective implementation of the policy options?

Do not know. A lot will depend on the way the present legislation is applied and the case law developed.

15. Is in your meaning EU-level action justified considering the size and the scope of the problem?

Certainty has to be ensured. There is also a need to address the problem of marriages between Irish citizens and the third country nationals as these, because of their solely utilitarian purpose, sooner or later end up in divorce.

16. Can you recommend any literature / other information sources from which this study would benefit?

No.

Country	Malta
Date	25 November 2005

Interviewees: Judges, lawyers, notaries, family associations

Name:

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General comments from the interviewee on the Maltese situation:

The Maltese position up to 1975 had consistently been that divorce was against Maltese public policy and that therefore not only was no divorce available in Malta to estranged couples but a foreign divorce would not be recognised in Malta for any purpose whatsoever, and this independently of whether the persons were married in, domiciled in, or nationals of Malta. This changed somewhat in 1975 by the enactment of the 1975 Marriage Act in Malta. The Act did not introduce divorce in Malta but it allowed for the recognition of a foreign divorce in certain situations. The situations where a divorce would be recognized according to the 1975 Act were divorces obtained from a Court of a State of which one of the parties to the proceedings was a national or domiciled. In order to be clear on this last point domicile in Malta is interpreted in accordance with the common law as implying much more then habitual or ordinary residence but as the permanent home of the *propositus*. This therefore substantially changed the public policy position in Malta as it could no longer be said that all divorces were against the Malta public policy, but it was changed only limitedly to the extent of recognition above described. This position has been substantially effected by the Brussels II Regulation which provides a much wider framework for jurisdiction in respect to divorce proceedings and in respect to the recognition of foreign divorce judgments. It is pertinent to point out that although the Brussels II Regulation allows the public policy exception it does not allow such to be based on the criterion adopted to affirm jurisdiction over the proceedings. Though the recognition and jurisdiction position in Malta has therefore changed as a result of this regulation, the substantive position still remains unaltered; and that is, divorce is not available in Malta as the law does not cater for such a possibility. The only available remedies under Maltese law for estranged couples are either a personal separation or a suit for annulment.

A further pertinent point to be made is that Maltese law will apply the law of the forum to the determination of a suit for personal separation but it will apply the properly applicable law in terms of its own rules of private international law where a suit for annulment is involved; these are the lex loci celebrations for formalities and the lex domicilii of both parties for capacity. What the applicable law would be if it were possible to have divorce proceedings in Malta is hypothetical as this is not possible independently of the residence, domicile or nationality of the parties. However equating the situation of divorce to that of personal separation Mr Refalo would very much suspect that had divorce to be introduced in Malta the matter would be left to be

regulated by the lex fori as happens in common law countries. It is however clear that even a couple domiciled or nationals of a jurisdiction which allows divorce would not be able to obtain a divorce from a Maltese Court, even though if they obtain a divorce from an appropriate foreign jurisdiction that divorce would be recognized in Malta.

Another issue which is pertinent to the discussion and which does not seem to be covered by the law in Malta or by the Brussels II Regulations is the position of extra judicial divorces. Mr Refalo is here thinking mainly of the position relative to talaq and ghett under Islamic and Rabbinical law respectively. These are not judicial proceedings and would not involve the recognition of foreign judgments. It is also my impression that there is no possibility of obtaining this type of divorce in States members of the EU. Still the issue may yet arise in relation to persons governed by laws which allow such type of divorces and settling within a European jurisdiction. Of course in States which do not have a public policy position in relation to divorce the matter may simply be settled by applying the appropriate applicable law in terms of private international law provided the divorce does not take place within the jurisdiction of a State which does not allow such a type of divorce. In Malta it is possible, though certainly not definite, that such a type of divorce would not be recognised as a matter of public policy. This is however very uncertain as there is as yet no definite case law on the matter.

Mr Ian Refalo submitted the following answers.

1. Please describe your role in relation to 'international' couples who file for divorce.

My role in relation to international couples filing for divorce is that of a lawyer. That is I assist them with legal advice and handle the case for them. Naturally in Malta no couple can file for divorce though they can file for other remedies. In cases involving divorce I would either be assisting them in connection with proceedings in a jurisdiction where divorce is possible or would be advising them regarding the recognition of a divorce judgment obtained in a jurisdiction which allows such a proceeding. I am also interested in the subject from the point of view of international couples intending to marry, as they sometimes require advice on the eventually obtaining situation between them.

As I teach private international law at the Faculty of Laws in Malta the issues also interest me from a purely academic point of view.

2. In your work, have you come across any of the problems identified in the Green Paper? If yes, please describe some cases when any of these have occurred?

The problems described in the green paper are problems arising mainly from differences in the operative private international law systems in different jurisdictions. These lead to a varying applicable law depending upon the choice of jurisdiction. Naturally in the Maltese situation the problem is exacerbated because you have one jurisdiction, the Maltese, where divorce is unavailable, and other jurisdiction where it is more or less easily available. Moreover the choice of jurisdiction will have substantial influence on the remedy available and the type of settlement obtained. Some jurisdictions may provide for a more lucrative remedy then others. This of course induces forum shopping.

3. Could you think of any additional problems to those identified in the Green Paper? If yes, please provide a practical example illustrating the problem.

In addition to the problems envisaged in the green paper you have the problem of extra judicial divorces to which I have already referred to above as well as problems arising from the incidental question. Naturally, the uniformity of the jurisdictional rules should eliminate or obviate the problem of the incidental question in so far as inter European situations are concerned but the problem may still arise in situations involving third States.

4. Which of the problems is most important to address as a priority? Least important? Please comment on why.

I would be of the opinion that by providing a rather wide net of jurisdiction for divorce suits the Brussels II Regulation, in a manner, exacerbates the problems arising from the diversity of private international law rules. On the other hand it is understandable that the jurisdictional framework should be rather wide in order to provide for the possibility of a party obtaining a remedy as easily as possible. It is, however, also to be kept in mind that creating a uniform regulation as to the applicable law in the case of divorces may give rise to problems, especially as you may have jurisdictions, such as the Maltese, where divorce is not contemplated in the law. What happens in a situation where a Court is rightly seized of jurisdiction to grant a divorce but the applicable law does not provide such a remedy? Let us suppose that for the sake of argument you choose the law of the domicile of the parties as determining the applicable law, then two Maltese habitants would not be able to obtain a divorce in accordance with their applicable law, Maltese, but they well may be residing in a jurisdiction which is both competent in terms of Brussels II and able to grant a divorce.

5. Considering the policy options identified in the Green Paper:

As to the policy options identified in the green paper I personally would think that the last common domicile of the parties understood in the sense where they have last habitually resided together should be the dominant factor. Where there is no such last common habitual residence or domicile then I suppose you would have to opt for the system with which the parties have the closest connection. The problem with such a choice is that it may be ideal as a choice but rather difficult to predict. It would moreover render the rights of the parties uncertain as it would make them dependant on a value judgment of a Court the outcome of which may be rather difficult to predetermine. Also allowing the parties to choose a common applicable law or a common jurisdiction may sound good in theory but does present problems in practice; the first point is that you would not wish an exotic choice and would have therefore to restrict the parties' choice to systems which are reasonably connected to their lifestyle. Moreover choice of jurisdiction may create inconvenience as the originally chosen jurisdiction may not always remain the most convenient jurisdiction throughout the lifetime of an individual. The same applies to the system chosen. What may be initially appear to be the most relevant system may, over the passage of years, become totally irrelevant as a result of movement by both parties. I am not too sure that a system the parties would have chosen on marriage remains that relevant say after thirty years of married life especially if the parties have ended up living most of their married life in a jurisdiction different from that of their initial choice.

6. Could you think of any additional policy options to those identified in the Green Paper?

I believe the policy options suggested are the following – 1. to change the jurisdictional rules; 2. to make the applicable private international law rules uniform; 3. to allow parties to make a pre-emptive choice of jurisdiction or of applicable law; and 4. to allow the Courts to assign a case to a jurisdiction to which they consider it most closely connected. In reality perhaps a mix of the suggested avenues could be most successful in solving the problems posed.

7. Could you please identify positive and negative (1) social and cultural, (2) practical and (3) legal impacts of each of the options on the identified target groups:

The impact which the final suggestion would have would depend on the precise mix adopted. I feel that there are here a number of competing interests: these could be described as follows – accessibility and ease of remedies, certainty of outcome, and uniformity of solutions independent of the choice of jurisdiction. It is also clear that the broader the choice of jurisdiction the easier is the remedy available to the aggrieved party but the greater the degree of conflicting solutions.

8. What would the positive and negative impacts of the different options be on your situation (as a judge/lawyer/family association)?

From a lawyer's point of view I suppose certainty is the greatest desideratum. That is one would wish to have a situation where the lawyer could easily advise the parties as to the emerging situation after their marriage as well as to be able to predict the outcome of pending litigation. That type of situation would have the effect of rendering the spouses' situation more certain and therefore would reduce the space for conflict. Naturally allowing a choice of jurisdiction and law to the parties may lead to a larger degree of certainty then at present obtaining, but may involve other undesirable side effects, such as being faced with a choice which is either irrelevant or oppressive to one of the parties.

9. What special safeguards mechanisms need to be set up to protect the different vulnerable groups?

A solution dependant on the parties' choice to be resorted to care would have to be taken to protect the weaker party from an imposed choice which may clearly be detrimental or unfair. There can therefore clearly be no free choice of jurisdiction and law in the area though allowing some freedom of choice to the parties within predetermined limits may ease most of the problems described in the green paper.

10. Would it be sufficient to implement one of the policy options to solve the problems? Which one?

As I have already said I would think that it would be necessary to resort to more then one of the policy options available in order to provide the right mix for a solution.

11. If no, would any combination of options be sufficient to address the problems? Would this be the same as the most desirable combination?

A mix of the policy options would I believe better address the problems posed then resorting to merely one policy option.

12. Are there any potential conflicts or inconsistencies between the identified options?

The question of inconsistencies between the options to a larger degree depends on the manner of their implementation. There is no essential contradiction between them. To explain myself allowing free choice to the parties contradicts determining the applicable law in terms of pre set criteria; on the other hand both options could be harmonized by allowing some choice within the ambit of preset criteria, and providing preset criteria where no choice has been made.

13. Could you identify any political or cultural barriers which could hinder the implementation of the policy options?

The main barrier to the implementation of such policies should arise in respect of those jurisdictions which simply do not provide for divorce. In those situations you have immediately a possible emergent conflict in the adoption of whatever policy option. To explain it this way let us take the case of two Maltese domiciliaries intending to marry and settle in England; they provide in their marriage that their matrimonial affairs should be governed by English law. At some stage they return to Malta; one of the parties then moves to a jurisdiction which allows divorce. At the moment of suing the Court would apply English law allowing the divorce where clearly in terms of their last common domicile that would not have been possible.

14. Is any other EU action necessary or desirable to support an effective implementation of the policy options?

In this area EU action may be desirable but can only be pursued with the greatest of care. It is evident that where marriage and family law are concerned we are dealing with situations which touch the core of the public policy of each Member State and which each State would tend to jealously guard.

15. Is in your meaning EU-level action justified considering the size and the scope of the problem?

The main justification for action lies in the considerable freedom of movement which the European Union guarantees and the ensuing social and family problems which arise from such movement.

Country	EU level family association; Federation of Catholic Family Associations in Europe (FAFCE)
Date	17 November 2005

Interviewees: Judges, lawyers, notaries, ***family associations***

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1. Please describe your role in relation to 'international' couples who file for divorce.

The family association's main aim is "marriage education" for EU citizens.

The national departments provide consultation for spouses before and after the marriage.

2. In your work, have you come across any of the problems identified in the Green Paper? If yes, please describe some cases when any of these have occurred?

The central office does not deal directly with international divorce cases but coordinates the national offices.

3. Could you think of any additional problems to those identified in the Green Paper? If yes, please provide a practical example illustrating the problem.

NA

4. Which of the problems is most important to address as a priority? Least important? Please comment on why.

The most important problem is risk of "rush to court" (ex 5 in the Green Paper) as it the "lis pendens" rule may cause international complications and difficulties for the spouses.

The least important problem to address is the set up of special safeguards as they already exist.

5. Considering the policy options identified in the Green Paper:

a) Policy option 2: What set of uniform connecting factors would you propose for harmonisation of the conflict-of-law rules?

Harmonisation of conflict-of-law rules is welcome. Nevertheless the compatibility with the national law and national culture should be taken into consideration. Only this way legal security could be increased. The most suitable connecting factor is the application of the law of the country where of the marriage was contracted.

b) Policy option 3: On what grounds would you limit the possibility for spouses to choose the applicable law and the competent court ('prorogation of jurisdiction')?

Common agreement between spouses.

c) Policy option 4: In what way could the jurisdiction rules of Regulation (EC) No. 2201/2003 (the New Brussels II Regulation) be revised? What would be sufficient and what would be desirable?

NA

6. Could you think of any additional policy options to those identified in the Green Paper?

Protection of vulnerable groups.

7. Could you please identify positive and negative (1) social and cultural, (2) practical and (3) legal impacts of each of the options on the identified target groups:

- **'International couples'**

A negative impact would be that divorce may become "easier" to obtain. This could lead to an increase in divorces.

- **Vulnerable groups**

Positive impact: children would no longer suffer from time-consuming judgements.

Other vulnerable groups: partners who cannot afford to pay a good lawyer, not independent women (especially in southern countries).

- **Legal professions (judges, lawyers, notaries)**

NA

- **Other**

NA

8. What would the positive and negative impacts of the different options be on your situation (as a judge/lawyer/family association)?

Advice to spouses would be simpler and clearer.

9. What special safeguards mechanisms need to be set up to protect the different vulnerable groups?

Harmonisation will provide more legal security. This is already a safeguard.

10. Would it be sufficient to implement one of the policy options to solve the problems? Which one?

No.

11. If no, would any combination of options be sufficient to address the problems? Would this be the same as the most desirable combination?

Harmonisation and protection of vulnerable groups.

12. Are there any potential conflicts or inconsistencies between the identified options?

NA

13. Could you identify any political or cultural barriers which could hinder the implementation of the policy options?

Marriage has a different cultural connotation in each Member State.

14. Is any other EU action necessary or desirable to support an effective implementation of the policy options?

An interesting idea would be to set up a steering group with experts in the field of international divorces, who could study and compare national laws in this field.

15. Is in your meaning EU-level action justified considering the size and the scope of the problem?

EU action is justified but the Member States' culture and national features should not be forgotten.

16. Can you recommend any literature / other information sources from which this study would benefit?

Country	EU level family association; European Network of Institutes for Family Policy
Date	15 November 2005

Interviewees: Judges, lawyers, notaries, ***family associations***

Name:

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1. Please describe your role in relation to 'international' couples who file for divorce.

Vice-president of the European Network of Institutes for Family Policy / Instituto de Política Familiar (IFP)

IFP has contact with several international couples in Norway and France, but these couples have not shown any awareness of the international divorce problematic. IFP has made a report on family brake-up in Spain and currently is doing a survey on the same subject.

2. In your work, have you come across any of the problems identified in the Green Paper? If yes, please describe some cases when any of these have occurred?

The analysis of family brake-up in Spain also included mixed nationality couples.

Ms. Velarde said that it seems to be assumed in the Commission Green Paper on applicable law and jurisdiction in divorce matters that the shorter the reconciliation period the better. The reconciliation period in Spain is minimum one year. The research undertaken for IFP report has identified that 20 percent of couples in Spain reconcile within this "waiting" period. In terms of scale this means that out of 80 000 separated couples per year, 16 000 reconcile. As follows, the important issue is that the shorter the reconciliation period the less chance there is for the parties to reach reconciliation.

3. Could you think of any additional problems to those identified in the Green Paper? If yes, please provide a practical example illustrating the problem.

No, in terms of divorce.

4. Which of the problems is most important to address as a priority? Least important? Please comment on why.

Focus on family stability and reconciliation as a priority.

5. Considering the policy options identified in the Green Paper:

a) Policy option 2: What set of uniform connecting factors would you propose for harmonisation of the conflict-of-law rules?

Divorce should be a subject of common habitual residence of the spouses. When spouses reside in different countries the law of the current residential country applies. They should assume that they are under the law of the country they live in.

It is better to have longer period of reconciliation (at least one year as minimum) as then the decision to divorce is not made in a hurry and in the middle of the crisis.

b) Policy option 3: On what grounds would you limit the possibility for spouses to choose the applicable law and the competent court ('prorogation of jurisdiction')?

Lex fori of the place of the residence should be applied.

c) Policy option 4: In what way could the jurisdiction rules of Regulation (EC) No. 2201/2003 (the New Brussels II Regulation) be revised? What would be sufficient and what would be desirable?

NA

6. Could you think of any additional policy options to those identified in the Green Paper?

Policies that promote family reconciliation and its benefits from the social point of view as well as family therapy and orientation in the case of crisis. Some action has already been undertaken in these fields in Member States. Funding of the social organisations which are addressing these objectives.

7. Could you please identify positive and negative (1) social and cultural, (2) practical and (3) legal impacts of each of the options on the identified target groups:

- **'International couples'**

Risk of increasing family brake-up possibilities by shortening the period of reconciliation. Further social, psychological, and economic impacts particularly affecting children.

- **Vulnerable groups**

NA

- **Legal professions (judges, lawyers, notaries)**

NA

- **Other**

NA

8. What would the positive and negative impacts of the different options be on your situation (as a judge/lawyer/family association)?

No.

9. What special safeguards mechanisms need to be set up to protect the different vulnerable groups?

NA

10. Would it be sufficient to implement one of the policy options to solve the problems? Which one?

To maintain the current situation would be sufficient.

11. If no, would any combination of options be sufficient to address the problems? Would this be the same as the most desirable combination?

NA

12. Are there any potential conflicts or inconsistencies between the identified options?

NA

13. Could you identify any political or cultural barriers which could hinder the implementation of the policy options?

To have a principle of subsidiary – prioritize national legislation. G. P. addresses these problems sufficiently.

14. Is any other EU action necessary or desirable to support an effective implementation of the policy options?

Insist on positive action to promote family reconciliation in terms of funding and help to resolve and prevent family crisis.

15. Is in your meaning EU-level action justified considering the size and the scope of the problem?

National laws are sufficient.

16. Can you recommend any literature / other information sources from which this study would benefit?

Proposes to translate and send the IFP research on relation between the reconciliation period and couple brake-up in Spain.

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