Position Paper on the proposal for a Regulation on matrimonial property regimes and the proposal for a Regulation on the property consequences of registered partnerships

The CNUE considers that citizens should be able to benefit from an effective right of free movement within the EU and thus be subject to a lighter administrative burden and fewer associated costs, and that the proposal for a Regulation on matrimonial property regimes and the proposal for a Regulation on registered partnerships constitute a noteworthy step towards achieving this.

It considers that the solutions which have already been tried and tested by the European legislator in areas closely linked to those in question, in particular those of the Rome III Regulation (Regulation No 1259/2010) and the Regulation on international successions adopted by the Council on 7 June 2012, could serve as inspiration for the Regulations currently being drawn up.

Considering that these two topics are of particular importance to the European notariat, it would like, as usual, to state its position and actively participate in the negotiation process for these texts.

The European notariat has contributed since the beginning of Commission's work through its participation in the PRM-III group of experts from the notariat, and has issued position papers for the various consultations. At the 'Clearer patrimonial regimes for international couples' conference organised by the CNUE and DG Justice on 17 October 2011, the legislative proposals were discussed in detail with experts from the political arena, academia and notarial practice. With a view to providing better information for EU citizens, the CNUE will launch the Couples in Europe portal on 9 November. By means of this web portal dealing with the national matrimonial property regimes of the 27 Member States, available in 22 languages, the European notariat aims to help provide citizens with better access to justice.

The CNUE considers that it would be neither useful nor advisable to adopt an independent European matrimonial property regime – i.e. a 28th regime – which could be used by the parties and which would exist alongside the various national regimes in force, and that it would be wiser to adopt rules of private international law, as is usual in such cases, in order to facilitate and stimulate the choice of applicable law and thus the choice between the various national regimes in force.

To this end, the Notaries of Europe propose:

A/ In relation to the scope of the future Regulations:

1. That the two Regulations expressly exclude property law from their scope, as in the Regulation on international successions.

- Because each State has sovereignty over its property transfer and disclosure system and, consequently, each national body of law adopts a system for transferring ownership and other property rights and regulates in its own way the nature, operation and consequences of this system, closely linking property law (essentially concerning real estate) to the process of drafting the documents which are to be recorded in the public registers and then recording these documents in the register. The entry of a notarial document in the land register is the sole responsibility of the
State which holds the register, and the State determines the requirements for disclosure. The legal requirements for the transfer of property, which by serving to effectively ensure the legality of the transaction aim to protect the public interest, should be regulated by the law of the State in which the property is situated (lex rei sitae).

2. That the aforementioned exclusion be expressly codified in the Article relating to exclusions from the scope of the regulations, as well as in the recitals.

3. That the current wording of the proposals be modified to follow that of the Regulation on international successions, since the exclusion of only real nature from the scope is not sufficient; the constitution, modification, transmission and termination of property rights for immovable and movable property which must be recorded in the public registers, as well as the recording of such property in the public registers, should also be excluded from the scope. The same applies to the procedures for and the legal effects of disclosure.

The Article in question should thus read:

"The following shall be excluded from the scope of this Regulation:

... any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register."

There should also be recitals similar to Recitals 18 and 19 of the Regulation on international successions, with the appropriate modifications.

B/ In relation to courts

1. That the term "court" be defined as it is in the Regulation on international successions, i.e. covering not only courts in the true sense of the word, but also authorities who exercise judicial functions by delegation of power by a court. Conversely, the term "court" should not cover authorities who are empowered under national law of some States to deal with matters in this area but do not exercise any judicial functions.

The following provisions should thus be included:

"This Regulation shall not affect the competence of the authorities of the Member States to deal with matters of matrimonial property regimes.

For the purposes of this Regulation, the term "court" means any judicial authority and all other authorities and legal professionals with competence in matters of matrimonial property regimes which exercise judicial functions or act pursuant to a delegation of power by a judicial authority or act under the control of a judicial authority, provided that such other authorities and legal professionals offer guarantees with regard to impartiality and the right of all parties to be heard and provided that their decisions under the law of the Member State in which they operate:

(a) may be made the subject of an appeal to or review by a judicial authority; and
(b) have a similar force and effect as a decision of a judicial authority on the same matter."

These provisions should be complemented by recitals based on Recitals 20, 21 and 22 of the Regulation on international successions, without prejudice to any modifications.

2. That, in the absence of a Choice of Court Agreement (only possibly in exceptional circumstances), a hierarchical list of connecting factors be established in order to determine the competent court, preferable to that of the place of habitual residence.

3. That in the proposal for a Regulation on matrimonial property regimes, for cases in which it is possible to conclude a Choice of Court Agreement there be a requirement that the body chosen be the same body that deals with the divorce, separation or annulment of the marriage, or the body pertaining to the State of which it was agreed to apply the national law; and that in the proposal for a Regulation on the property consequences of registered partnerships, the body chosen be the same body that deals with the dissolution of the registered partnership.

4. That, as regards the formal requirements for Choice of Court Agreements, and in order to take account of the added value of authentic instruments (in particular the legal advice provided by an independent and impartial public official, ensuring legality, etc.), it would be advisable for certain safeguards concerning the form of the choice of applicable law to be introduced, based on those provided in the framework of the Rome III Regulation, i.e. the Choice of Court Agreement “should at least be expressed in writing, dated and signed by both parties. However, if the law of the Member State in which the two spouses have their habitual residence at the time the agreement is concluded lays down additional formal rules, those rules should be complied with. If the spouses have their habitual residence in different Member States whose respective laws provide for additional formal requirements, the agreement shall be valid if it complies with the requirements of one of those laws.
If the agreement forms part of a marriage contract, the formal requirements of that contract must be met.”

5. That the agreement may be concluded at any time.

6. That the court responsible for the succession also be responsible for the matrimonial property regimes and the property consequences of registered partnerships, as stipulated in the proposals, with no possibility of an alternative agreement.

7. That it be specified that the court of the place of common habitual residence shall have jurisdiction when the application is filed.

8. To ensure that citizens who have made a choice of applicable law have access at all times to amicable procedures through notaries appointed by the public authorities in the country of the law chosen, that the Regulations contain solutions similar to those provided for in Article 8 of the Regulation on successions and the related Recital 29, and in Recital 43.

1See Article 3.3(i) of the Directive on consumer rights.
C/ In relation to applicable law:

1. That the spouses have the freedom to choose the law governing their matrimonial property regime, provided that one of them has a certain connection to this law, whether by nationality or place of habitual residence, which must always be mentioned at the time the professio iuris is concluded.

- That, in agreement with the position the CNUE had defended, registered partners have the same freedom of choice regarding the law governing their partnership, as long as one of the partners has a connection to the chosen law. Only in the absence of professio iuris or when the law chosen does not cover registered partnerships should the law of the place where the partnership was registered be applied, subsidiarily.

2. That since this is a matter of applicable law, it seems appropriate to expressly exclude property law, in the form described above.

3. That the choice of applicable law, expressly effectuated retroactively, not in any way prejudice the rights of third parties.

4. That where the spouses make a choice of applicable law, it also be possible to agree on a concrete matrimonial property regime in the legal system identified thereby. The choice of a concrete matrimonial property regime should be effectuated in the framework of a marriage contract which includes the choice of applicable law and respects all rules relating to form, substance and disclosure provided for by the new applicable law for the validity of a marriage contract.

5. That the form governing the professio iuris (Art. 19) and the marriage contract (Art. 20) be clearly distinguished from the evidential value and the execution of authentic instruments as instrumentum (Art. 32 and 33), and that only authentic instruments meeting the conditions required by the Court of Justice's Unibank ruling be governed by Art. 32 and 33.

The clear distinction between negotium governed by the chapter on applicable law (by Articles 19 and 20, in relation to form) and instrumentum governed by the rules on the acceptance and enforcement of authentic instruments is binding as acquis, following the rules laid down by the Regulation on international succession. This acquis should be translated into these Regulations in particular by means of a provision modelled on the first sentence of Art. 59.3 of the Regulation on international successions, as follows:

"Any challenge relating to the legal acts or legal relationships recorded in an authentic instrument shall be made before the courts having jurisdiction under this Regulation and shall be decided upon under the law applicable pursuant to Chapter III."

6. That, to avoid "lex shopping" for the law with the fewest strict formal requirements, and taking into account the added value of authentic instruments for the parties involved and for third parties...
(administrations, co-contractants, etc.), both the marriage contract and the agreement to be bound by a particular law should take the form required for a marriage contract either by the lex loci actus or the lex causae. In all cases, contracts should at minimum be established in writing, signed and dated by both parties, without prejudice to the application of additional formal requirements of the law of the place of habitual residence of the spouses and, if they have different habitual residences, the law of the place of habitual residence of one of the spouses, or that of the spouse resident in an EU Member State, as provided for in Article 7 of the Rome III Regulation.

7. That to avoid discrimination, the same formal rules should apply to registered partnerships, not only as regards the professio iuris which should also be granted to these couples but also concerning the form of their partnership contracts as in Article 19 of the proposal for a Regulation on matrimonial property regimes for married couples, especially since partnership contracts are legally equivalent to marriage contracts in many Member States in which registered partnerships exist.

8. That the European legislator not be obliged to define the concept of habitual residence, which is already defined in the case law of the Court of Justice. It would, however, be appropriate to insert the following two recitals, on the basis of Recitals 23 and 24 of the Regulation on international succession:

"In order to determine the habitual residence, the authority dealing with the matrimonial property regime should make an overall assessment of the circumstances of the life of the spouses, taking account of all relevant factual elements, in particular the duration and regularity of their presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation.

In certain cases, determining the spouses' habitual residence may prove complex. Such a case may arise, in particular, where the spouses, or one of the spouses, for professional or economic reasons has gone to live in another Member State to work there, sometimes for a long time, but has maintained a close and stable connection with their State of origin. In such a case, the spouses could, depending on the circumstances of the case, be considered still to have their habitual residence in their State of origin in which the centre of interests of their family and their social life is located. Other complex cases may arise where the spouses have lived in several States alternately or travelled from one State to another without settling permanently in any of them. If the spouses are nationals of one of those States or have all their main assets in one of those States, their nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances."

9. That the extent to which the law of another State may be applied remain the public policy exception, which is different from that of overriding mandatory provisions.

10. That if reference is made to the law of a third State, the reference must involve not only internal substantive law but also international private law. The solution adopted in the Regulation on international successions could be used as a basis for this.
11. That the proposed Regulations should also resolve the matter of States with more than one body of law, by adopting the solution provided in the Regulation on international successions.

12. That the possibility should remain to define the scope of the law by listing its specific applications, without disregarding the difficulties that this would pose.

13. That transitional provisions which better ensure legal certainty should be included, those in Art. 39.3 of the proposal for a Regulation of matrimonial property regimes being insufficient since they do not protect spouses who marry before the date of application of the Regulation but select the law applicable to their marital property regime after this date. The Notaries of Europe therefore propose that Art. 39.3 be amended as follows:

"Chapter III shall apply only to spouses who:

a) marry after the date of application of this Regulation or
b) specify the law applicable to the matrimonial property regime after the date of application of this Regulation. In this case Chapter III applies from the time this choice is made."

D/ Relating to the acceptance and enforcement of authentic instruments

1. That the definition of an authentic instrument be that given in the proposed regulations based on other Community legal texts and the Unibank judgment.

2. That it may be appropriate to clarify in the recitals of the proposed Regulations the nature of the notary as an authority, as in Recitals 20-22 of the Regulation on successions and in Directive on consumer rights (cf. the first sentence of Art. 3.3).

3. That the terminology used in the proposed Regulations be perfected, preferably to follow that of the Regulation on successions, which refers to "acceptance" rather than "recognition" of authentic instruments.

4. That the abolition of the exequatur, legislation and other similar requirements and formalities would be appropriate, recalling the advances made within the European notariat to facilitate the guaranteed acceptance of authentic instruments.

5. That the acceptance of the authentic instrument be favoured, which would reduce the instances of them being refused.

6. That the evidential value of an authentic instrument in a Member State be equivalent to that which it possesses in the State of origin, within the limits that the law of the State of destination applies to its own authentic instruments and on the condition that it is not in clear violation of public policy in the Member State concerned.

7. That only authentic instruments as defined by the Court of Justice's Unibank judgment be enforceable.
8. That in order to protect the consistency of public registers as provided for in other Community international private law instruments currently in force, the formal requirements for entering the authentic instruments into the public registers should be dealt with by the law of the Member State to which the register pertains.

In particular, the Regulation should provide (as is provided in other international private law legislation currently in force) that the law of the Member State where the property is situated may provide that the law applicable to the matrimonial property regime may not be relied on by a spouse in a legal relationship involving the property with a third party if the conditions of disclosure or registration provided for in the law of that State are not satisfied.

9. That, to facilitate the disclosure of matrimonial property regimes, the possibility of interconnecting the various national registers should be assessed in the long term, keeping in mind the achievements of the European Network of Registers of Wills Association (ENRWA).

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