

The Results of the JHA Council (24-25 July 2008): UK to Opt into Rome I Reg. - Enhanced Cooperation on Rome III Reg.?

On 24 and 25 July the **Justice and Home Affairs Council** held its 2887th session in Brussels, the first under the French Presidency. The official press release is currently available ~~only~~ in French (UPDATE: English version). Among the “Justice” issues, discussed on Friday 25th, **two main points are of particular importance as regards the development of European private international law.**

ROME I - UNITED KINGDOM TO OPT-IN

The United Kingdom has expressed its wish to opt-in to the Rome I Regulation (see p. 26 of the official press release; on our site, see the Rome I section and the programme of the September conference organized by the Journal of Private International Law). The decision follows the public consultation launched in April by the British Ministry of Justice, whose results have not yet been made publicly available.

ROME III - ENHANCED COOPERATION BETWEEN SOME MEMBER STATES?

As we reported in a previous post, the JHA Council of 5-6 June 2008 established that the unanimity required to adopt the Rome III Regulation could not be obtained, and therefore the objectives of the proposed instrument could not be attained within a reasonable period by applying the relevant provisions of the EC Treaty. According to press sources (IrishTimes.com and Reuters), agreement in the Council had appeared difficult to reach since the beginning of negotiations in 2006, due to the opposition of Sweden, which did not intend to put into question the application of its liberal divorce rules.

As a consequence, in the meeting of 25 July, nine Member States informally reported to the Council their decision to launch the “enhanced cooperation” mechanism (see pp. 23-24 of the official press release).

Here is an excerpt of the article published by the EUObserver.com (*emphasis added*):

Austria, France, Greece, Hungary, Italy, Luxembourg, Romania, Slovenia and Spain have teamed up in order **to formally request the European Commission launch the so-called enhanced co-operation mechanism** – allowing a group of countries to move ahead in one particular area, even though other states are opposed.

It is expected that they will make the request on Monday (28 July), one diplomat told the EUobserver. It is the first time such a move has been made.

It will then be up to the commission to make a legal proposal based on the request. This proposal will then go back to member states where it needs to be approved by a qualified majority of governments.

A controversial and politically sensitive issue anyway, this route for dealing with the divorce question has further irked some capitals because, under normal procedures, a decision in this area would have to be taken by unanimity.

Reacting to the move by the nine member states, EU justice commissioner Jacques Barrot said: “The commission will have to examine all the political, legal and practical implications of such an enhanced co-operation.” “We need to get a clearer idea,” he added. [...]

Malta and Sweden are widely considered the most reluctant to give the go-ahead to a EU-wide divorce scheme. Strongly Catholic Malta does not recognise divorce, while Stockholm fears that EU harmonisation in the area could threaten its liberal family law.

*Should the pioneering group achieve closer cooperation in this area, the mechanism must remain open to other countries as well. **Germany, Belgium, Portugal and Lithuania are also believed to be considering joining the initiative.***

The enhanced cooperation mechanism was introduced by the Treaty of Amsterdam in 1997, creating the formal possibility of a certain number of Member States establishing a closer (as it was formerly known in the English version before the Treaty of Nice) cooperation between themselves on matters

covered by the Treaties, using the institutions and procedures of the EU and EC. The relevant provisions of the Treaties (as amended by the Treaty of Nice), laying down the substantive conditions and the procedure for the establishment of the cooperation, are set out in Title VII of the TEU (Articles 43-45, providing the “general framework” of the mechanism) and Articles 11-11a TEC, which add special arrangements for areas covered by the EC Treaty.

A description of the mechanism can be found on this page of the Europa website. Here’s an excerpt detailing the procedure in the Community pillar:

Member States intending to establish enhanced cooperation within the framework of the EC Treaty shall address a request to the Commission, which may submit a proposal to the Council to that effect. Authorisation shall be granted by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament. A member of the Council may still request that the matter be referred to the European Council of Heads of State and Government. Following this final discussion, the matter is referred back to the Council of Ministers, which may act by the majority provided for in the Treaties. The right of veto granted to the Member States by the Treaty of Amsterdam has thus been abolished. [...]

Article 11A lays down the procedure applicable to the subsequent participation of a Member State. The Commission shall decide on the request of a Member State to participate in enhanced cooperation. The role of the Commission is thus more important within the framework of the EC Treaty than within the other pillars.

It is important to note that the provisions on closer/enhanced cooperation were never actually put into effect since their introduction, and that their potential outcome is largely debated (see the controversial issue of the so called “variable geometry”, often referred as “two-speed Europe” or “Europe à la carte”): it will be therefore very interesting to see how they will be applied for the first time, and **what will be the impact of this “acceleration” by some Member States in the frame of the general debate on the future of the European integration**, so much troubled after the Irish referendum on the ratification of the Lisbon Treaty.

An interesting article on the matter (in French) has been written by *Jean*

Quatremer, over at *Coulisses de Bruxelles* blog, reporting the **negative reactions** of some Member States, such as **Czech Republic, Estonia, Finland, Latvia and Poland**, and the **decision of Ireland, Netherlands and the United Kingdom not to participate** in the enhanced cooperation.

It is paradoxical that the “dismal swamp” of the conflict of laws, one of the last sector to be communitarised, could act as a “front runner” in the progress (or regress?) of the European integration.

Further information will be posted as soon as available.