

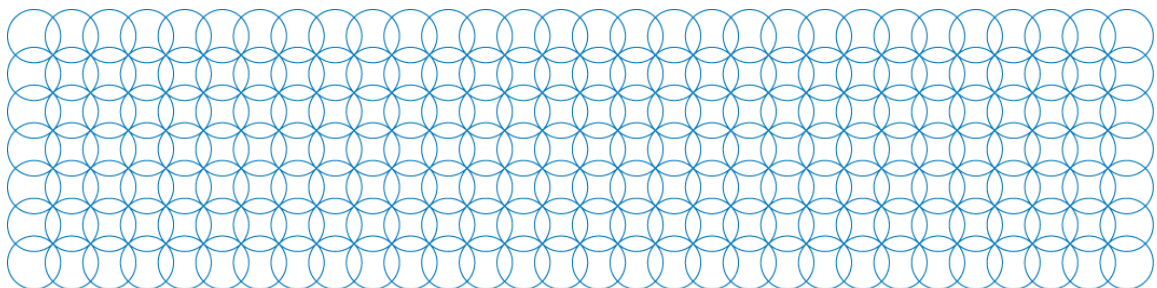


Matrimonial Property Regimes and the property consequences of registered partnerships - How should the UK approach the Commission's proposals in these areas?

Consultation Paper CP 8/2011

This consultation begins on 15 April 2011

This consultation ends on 20 May 2011





Ministry of
JUSTICE

**Matrimonial Property Regimes and the
property consequences of registered
partnerships - How should the UK approach
the Commission's proposals in these areas?**

A public consultation

**A joint consultation produced by the Ministry of Justice, Scottish
Government and the Department of Finance & Personnel, Northern Ireland). It
is also available on the Ministry of Justice website at www.justice.gov.uk**

About this consultation

- To:** This consultation is aimed at individuals and organisations with an interest in international family law issues which arise in the context of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and as a result of the property consequences of registered partnerships
- Duration:** From 15 April 2011 to 20 May 2011
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- Additional ways to feed in your views:** For further information please use the “Enquiries” contact details above,
- Response paper:** A response to this consultation exercise is due to be published by 22 August 2011 at:
<http://www.justice.gov.uk>

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Matrimonial Property Regimes and the property consequences of civil partnerships – How should the UK approach the Commission's proposals?

Introduction

1. The European Commission has published two proposed Regulations concerning jurisdiction, applicable law and the recognition and enforcement of decisions in matters concerning matrimonial property regimes and the property consequences of registered partnerships. This consultation paper seeks views on whether it is in the UK's national interests to be a party to these Regulations, i.e. whether the UK should opt in to the proposals or not and/or be party to the forthcoming negotiations on these proposals. The Commission's proposals can be found at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0126:FIN:EN:PDF>

and

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0127:FIN:EN:PDF>

This paper also seeks views on the specific provisions contained in these instruments which will be used to inform the UK's position on whether it should participate in the Regulations or not. Negotiations on both these proposals will commence shortly.

2. Although in the main this consultation follows the Code of Practice on Consultation issued by the Cabinet Office, the Lord Chancellor and Secretary of State for Justice has decided that a shorter consultation period than the Code provides is appropriate as the UK is required to make a decision as to whether to opt in to the proposals or not, and must make that decision within three months of publication of the proposals. This consultation is being issued by the Ministry of Justice on a UK basis: the terms of the consultation have been agreed with the devolved administrations in Scotland and Northern Ireland.
3. An impact assessment has been completed and indicates that the following groups are likely to be affected:
 - the judiciary (when determining jurisdiction, applying foreign law and recognising judgments in international family cases);
 - the legal profession (specialist lawyers or law firms working in international family law and property matters);
 - third parties such as mortgage providers and any person who has, or is contemplating, entering into a legal relationship with one or more of those in the relationship, for example by lending money (as the relevant applicable law rules will govern the legal relationship between the partners/spouses and such third parties);

- the advice and mediation community (particularly those who provide advice/mediation services to individuals on family issues); and
 - individuals (any individual, where a legally recognised relationship involves a cross-border element relating to the matrimonial property regime or the property consequences of the partnership).
4. It is probable that the proposals will lead to additional costs for some sectors and individuals. The Ministry of Justice has prepared an impact assessment, separate from this consultation. Comments on the impact assessment would be particularly welcome.
5. We would welcome responses to the following questions:

Q1. Is it in the national interest for the Government, in accordance with Protocol 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice annexed to the Treaty on the Functioning of the European Union, to opt in to negotiations on the Commission's proposed Regulations? Please explain the reasons for your decision.

Q2. What are your views on the specific issues raised in this paper concerning the proposals being made by the European Commission in their draft proposals?

Q3. Do you agree with the impact assessment? If not, please explain why.

Q4. Are there any other specific comments you may wish to make?

The proposed Regulations

Background

6. The European Commission published two proposals in March which are designed to regulate jurisdiction and applicable law as they apply both to the daily management of the property of spouses and registered partners and to how issues relating to the distribution of assets in cross-border situations are handled following the ending of a couple's relationship through divorce, separation or death. The Commission's proposed Regulations would create rules on which court should have jurisdiction to deal with such issues, which law should apply (including in some circumstances an ability for couples to choose the law) and provide a mechanism for the recognition and enforcement of court judgments throughout the EU.
7. It is the Commission's view that, in relationships with an international connection, it is difficult for people to know which courts have jurisdiction and which laws apply to their personal situation and to their property when that relationship ends. The Commission's objective is to ensure greater legal certainty for parties in order to prevent parallel proceedings and to discourage forum shopping.

The proposals

8. The first proposal (a proposed Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes) aims at dealing with the daily management of the property of spouses and issues relating to the distribution of assets in cross-border situations following the ending of a couple's relationship through divorce, separation or death. The second proposal (a proposed Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships) relates to non-marriage registered partnerships (including UK civil partnerships) but not restricted to same-sex relationships. As not all Member States have registered partnerships, and therefore jurisdictional rules and rules on applicable law cannot be the same as for marriages, the Commission has decided to create separate proposals. The Commission believes it would be too difficult to deal with rules governing these different circumstances in one instrument.

9. Certain matters are excluded from scope – capacity of spouses (or partners), maintenance obligations, gifts between the spouses or partners, succession rights of the survivor, companies set up between spouses or partners, and the nature of rights *in rem* relating to a property and the disclosure of such rights. In addition, for registered partnerships, “the personal effects” of the registered partnership are excluded.

10. The rules of jurisdiction for married couples relate back to Regulation 2201/2003 (Brussels IIa) for divorce cases and the proposed Regulation on Succession and Wills for the death of a spouse. However these circumstances are treated differently. While married couples must agree between themselves that the court deciding their divorce can also consider the property consequences following the divorce, the court with jurisdiction in succession matters will always have jurisdiction in such cases although it is somewhat unclear whether it has *exclusive* jurisdiction. Otherwise jurisdiction is based on a hierarchy of connecting factors - the spouses' common habitual residence, failing which the last common habitual residence in which one still resides, then the defendant's habitual residence, and finally their common nationality (or domicile, for the UK and Ireland). The spouses can also choose the courts of the Member State whose law the spouses choose. For registered partners, the common nationality factor is replaced by the place of registration of the partnership, and an additional rule allows a court to refuse jurisdiction if its law does not recognise such partnerships. The partners cannot make a choice of jurisdiction.

11. Married parties may choose the law that will apply on the basis of their habitual residence or nationality. Where no choice has been made, again a hierarchy will come into play starting with habitual residence, then common nationality and moving to the law of the country with which the couple has the strongest connection. The applicable law is not restricted to the law of an EU Member State and applies to the totality of the couple's property (within the scope of the Regulation). These rules do not prevent Member States applying public policy restrictions; but such restrictions may be applied only where the applicable law in question is manifestly incompatible with the public order of the forum. For registered partners the only law applicable is that of the Member State which registered the partnership. Married couples (but not registered partners) can agree during the marriage to change the applicable law governing their property, and may make their choice retrospective. However, such retrospective effect is subject to a saving for previously acquired rights of third parties under the previous law.

12. The intention of both proposals is that the relevant applicable law should also govern legal relationships between the spouses or partners and any third parties such as mortgage providers or any person who has, for example, lent money to one or more of those in the relationship. However, some protection against the application of another law is

provided to third parties in cases where any conditions of disclosure or registration provided by the law in the country in which the third party or a spouse has its or their habitual residence have not been satisfied, unless the third party was aware or ought to have been aware of the relevant applicable law.

13. The recognition and enforcement rules follow broadly the existing rules in Regulation 44/2001 (sometimes known as “Brussels I”). The court of enforcement cannot review the substance of a decision from the court of another Member State. However a court can refuse to recognise a decision if it is manifestly contrary to the public policy of the requested Member State. The proposal on registered partnerships says that a decision in such cases cannot be refused on the basis that the law of the requested Member State does not recognise such partnerships nor the property effects following the ending of a partnership.

The purpose of this paper

14. The legal basis for both proposals is Article 81(3) of the Treaty on the Functioning of the European Union (TFEU). This concerns measures in the field of judicial cooperation in family law matters which have cross border implications, and the procedure for adoption of a proposal is unanimity in the Council.
15. As this is a judicial cooperation matter, the UK's Protocol annexed to the Treaty on the Functioning of the European Union will apply. This means that the UK's participation in the revised Regulation will depend upon the UK notifying the EU of its wish to take part in the adoption and application of the Regulations (known as “opt in”) within 3 months of the publication of the proposals. If the UK elects to participate, it will automatically be legally bound by any proposal finally adopted by the Council of Ministers. If the UK elects not to participate, it will not be legally bound by the revised Regulation. The UK's right to opt in at the beginning of negotiations must be exercised no later than the end of June 2011.
16. The primary purpose of this consultation exercise is to seek the views of interested individuals and organisations as to whether it would be in the national interest for the UK to participate in the proposed Regulations published by the Commission, i.e. to opt in. In view of the deadline laid down in the Protocol, the Government is now seeking views on this issue by 20 May 2011. Views are sought in particular on the potential advantages and disadvantages of the proposals and whether they would provide a satisfactory system of rules of private international law in this area.

Devolution

17. The UK consists of three separate jurisdictions: England and Wales, Scotland and Northern Ireland. Responsibility for the law in this area is devolved to each jurisdiction: in Scotland, to the Scottish Government's Justice Directorate and in Northern Ireland to the Departments of Justice and Finance and Personnel.

Gibraltar

18. Gibraltar, although a British Overseas Territory, is subject to EU Regulations in this field. The UK has responsibility on behalf of Gibraltar for the negotiation of the relevant European instruments, and those instruments are directly applicable in Gibraltar if the UK decides to opt in.

Consideration of the likely effects of the proposals

19. The Government understands the Commission's reasons for proposing separate instruments for marriage and registered partnerships given the difficulty presented by the fact that not every Member State's law contains the concept of registered partnership, whereas marriage is part of the law throughout the Union. It accepts that the rules on jurisdiction, applicable law and recognition and enforcement follow the precedents of other instruments and, in general, may be helpful in circumstances where property regimes exist in the Member States. Certain benefits are likely to accrue to European citizens as a result of the proposals, in terms of the predictability of the law that will apply to a property regime, and the ability to ensure recognition and enforcement of decisions on property matters that previously was a matter for the private international law rules of each Member State and could lead to extensive delay and expense in enforcing property rights.
20. However the Government has identified a number of potential difficulties arising from the proposals from the perspective of the UK. These are discussed further in this paper.

Scope and Rules on Jurisdiction

<i>Matrimonial Property Regimes</i>	<i>Registered Partnerships</i>
<p style="text-align: center;"><i>Article 1</i></p> <p style="text-align: center;">Scope</p> <p>1. This Regulation shall apply to matrimonial property regimes.</p> <p style="padding-left: 40px;">It shall not apply in particular to revenue, customs or administrative matters.</p> <p>2. In this Regulation, “Member State” means any Member State with the exception of Denmark, [the United Kingdom and Ireland].</p> <p>3. The following are excluded from the scope of this Regulation:</p> <ul style="list-style-type: none"> (a) the capacity of spouses; (b) maintenance obligations; (c) gifts between spouses; (d) the succession rights of a surviving spouse; (e) companies set up between spouses; and (f) the nature of rights <i>in rem</i> relating to a property and the disclosure of such rights. 	<p style="text-align: center;"><i>Article 1</i></p> <p style="text-align: center;">Scope</p> <p>1. This Regulation shall apply to matters of the property consequences of registered partnerships.</p> <p style="padding-left: 40px;">It shall not apply in particular to revenue, customs or administrative matters.</p> <p>2. In this Regulation, “Member State” means any Member State with the exception of Denmark, [the United Kingdom and Ireland].</p> <p>3. The following are excluded from the scope of this Regulation:</p> <ul style="list-style-type: none"> (a) the personal effects of registered partnerships; (b) the capacity of partners; (c) maintenance obligations; (d) gifts between partners; (e) the succession rights of a surviving partner; (f) companies set up between registered partners; and (g) the nature of rights <i>in rem</i> relating to a property and the disclosure of such rights.
<p style="text-align: center;"><i>Article 3</i></p> <p>Jurisdiction in the event of the death of one of the spouses</p> <p>The courts of a Member State seized by an application concerning the succession of a spouse under Regulation (EC) ... [of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession] shall also have jurisdiction to rule on matters of the matrimonial property regime arising in connection with the application.</p>	<p style="text-align: center;"><i>Article 3</i></p> <p>Jurisdiction in the event of the death of one of the partners</p> <p>1. The courts of a Member State seized by an application concerning the succession of a registered partner under Regulation (EC) ... [of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession] shall also have jurisdiction to rule on matters of the property consequences of the partnership arising in connection with the application.</p> <p>2. The court may decline jurisdiction if its law does not recognise the institution of registered partnership. The court with jurisdiction shall then be established in accordance with Article 5.</p>

<i>Matrimonial Property Regimes</i>	<i>Registered Partnerships</i>
<p style="text-align: center;"><i>Article 4</i></p> <p style="text-align: center;">Jurisdiction in cases of divorce, legal separation or marriage annulment</p> <p>The courts of a Member State called upon to rule on an application for divorce, judicial separation or marriage annulment under Regulation (EC) No 2201/2003, shall also have jurisdiction, where the spouses so agree, to rule on matters of the matrimonial property regime arising in connection with the application.</p> <p>Such an agreement may be concluded at any time, even during the proceedings. If it is concluded before the proceedings, it must be drawn up in writing and date and signed by both parties.</p> <p>Failing agreement between the spouses, jurisdiction is governed by Articles 5 <i>et seq.</i></p>	<p style="text-align: center;"><i>Article 4</i></p> <p style="text-align: center;">Jurisdiction in cases of separation of the partners</p> <p>The courts of a Member State seized by an application for dissolution or annulment of a registered partnership shall also have jurisdiction, if the partners so agree, to rule on the property consequences arising in connection with the application.</p> <p>Such an agreement may be concluded at any time, even during the proceedings. If it is concluded before the proceedings, it must be drawn up in writing and date and signed by both parties.</p> <p>Failing agreement between the spouses, jurisdiction is governed by Articles 5 <i>et seq.</i></p>
<p style="text-align: center;"><i>Article 5</i></p> <p style="text-align: center;">Jurisdiction in other cases</p> <p>1. In cases other than those provided for in Articles 3 and 4 jurisdiction to rule on proceedings in a matter of the spouses’ matrimonial property regime shall lie with the courts of the Member State:</p> <ul style="list-style-type: none"> (a) of the spouses’ common habitual residence, or failing that, (b) of the last common habitual residence if one of them still resides there, or, failing that, (c) of the defendant’s habitual residence, or failing that, (d) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of their common “domicile”. <p>2. Both parties may also agree that the courts of the Member State whose law they have chosen as the law applicable to their matrimonial property regime in accordance with Articles 16 and 18 shall have jurisdiction to rule on matters of their matrimonial property regime.</p> <p>Such an agreement may be concluded at any time, even during the proceedings. If it is concluded before the proceedings, it must be drawn up in writing and dated and signed by both parties.</p>	<p style="text-align: center;"><i>Article 5</i></p> <p style="text-align: center;">Jurisdiction in other cases</p> <p>1. In cases other than those provided for in Articles 3 and 4 jurisdiction to rule on proceedings concerning the property consequences of a registered partnership shall lie with the courts of the Member State:</p> <ul style="list-style-type: none"> (a) of the partners’ common habitual residence, or failing that, (b) of the last common habitual residence if one of them still resides there, or, failing that, (c) of the defendant’s habitual residence, or failing that, (d) of registration of the partnership. <p>2. The courts referred to in points (a), (b) and (c) of paragraph 1 may decline jurisdiction if their law does not recognise the institution of registered partnership.</p>

Commission's proposals – Scope

21. Article 1 of both Regulations covers scope. In the matrimonial property regimes proposal, the Commission states that the concept of matrimonial property regimes should be given an autonomous interpretation in order to enable a couple to manage their property as well as liquidate it as a result of the separation or death of one of the spouses. As a result, the Commission has excluded a number of matters which are covered by other EU Regulations or will be covered by future EU Regulations, for example maintenance, succession etc. Both also exclude gifts, and companies set up between the spouses or partners. In addition, the proposed Regulation on the property consequences of registered partnerships excludes the personal effects of such partnerships.
22. For both proposals, the Commission also states that the Regulations will not affect the nature of rights *in rem* relating to property or the classification of property and of rights. Nor will they determine the prerogatives of the holder of such rights. The disclosure of property rights, in particular the functioning of land registers and the effects of failing to make an entry in such a register, are also excluded from the scope of the Regulations.

Commission's proposals - Jurisdiction

23. Article 3 of both proposals states that a court of a Member State which has been seised of an application concerning the succession of a spouse or registered partner shall also have jurisdiction to rule on either matrimonial property regime matters or those related to the property consequences of the registered partnership. On the registered partnership proposal, however, there is an exception. A court may decline jurisdiction if its law does not recognise the concept of registered partnerships. Jurisdiction would then have to be determined on the basis of Article 5, for example the partners' common habitual residence, last common habitual residence, or the Member State of registration of the partnership.
24. Article 4 proposes that where spouses or partners separate, the jurisdiction of the court of a Member State dealing with the divorce, dissolution or the annulment of a marriage or registered partnership could, if the partners agree, deal with the matrimonial property or property consequences of a registered partnership which arise as a result of divorce, dissolution or separation.
25. Article 5 proposes rules that would govern the jurisdiction that would apply in other cases. In registered partnerships, however, this would be dependant on whether the Member State designated recognised registered partnerships under its domestic law. Further provision is made in Articles 6 and 7 of both proposals for grounds of subsidiary jurisdiction and forum necessitatis.

Government's assessment

26. The concept of matrimonial property regimes (or the equivalent for civil partnerships) does not clearly exist in England and Wales and Northern Ireland as regards legal relationships during the currency of the marriage or registered partnership. Similarly the concept does not apply in the laws of England and Wales or Northern Ireland after the relationship ends. Courts in these jurisdictions have wide distributive discretion when considering ancillary relief which arises on divorce, or dissolution of a civil partnership. Prior to divorce or dissolution, the general law of property applies to the couple's property and in particular to their relations with third parties.
27. The law in Scotland is different. Section 39 of the Family Law (Scotland) Act 2006 provides that "any question in relation to the rights of spouses to each other's immoveable property arising by virtue of the marriage shall be determined by the law of the place in which the property is situated." On divorce, and dissolution of a civil partnership, the law in Scotland lays down key principles for the court to follow and provides that matrimonial property should in general be valued at the relevant date and shared equally.
28. However, the Government considers that these proposals would create problems for all UK jurisdictions given that the proposals do not cover all aspects of financial provision on divorce or dissolution. When considering ancillary relief or equivalent financial provision courts in the UK only consider domestic law and take account of a wider range of issues than matrimonial property regimes in other Member States usually cover – e.g. maintenance (needs and resources), the division of capital, including gifts and jointly owned companies (both of which are excluded from the scope of the Commission's proposals), and matters such as pension sharing and discretionary trusts (where the scope of these proposals is unclear). In short, a wide view is taken of the capital resources available to the parties.
29. Under the Commission's proposals, it is possible that courts in different Member States could take jurisdiction to deal with different aspects of financial provision on divorce or dissolution. Maintenance would be considered by the courts with jurisdiction under Regulation 4/2009 which might not necessarily coincide with divorce jurisdiction in the individual case; assets within scope of the Commission proposals would be considered by the courts with jurisdiction under these proposals; and residual assets such as gifts or an interest in a joint business could be considered in a court in the UK (or the courts of another country if they could deal with such assets under their residual private international law rules). Contrary to the intentions of the Regulation this could increase costs and delay to parties where the case has a UK connection and cause confusion. It might also be the subject of tactical litigation. This is not assisted by the fact that, on the current drafting of the proposals, it

would appear that there is no obligation on the parties to submit to the jurisdiction of the court hearing the divorce – rather, the divorce court can only hear the property matters if the parties agree to that jurisdiction. No connection is made to the court with jurisdiction to hear the maintenance case at all, although in practice there will frequently be an overlap of jurisdictional rules between the Maintenance Regulation and these proposals.

30. Difficulties are also likely to arise in relation to succession on death. One reason for this is the lack of any clarity as to what constitutes "matrimonial property" both in other countries as well as in the UK. The result is that some aspects of succession law may fall within the scope of the matrimonial property proposal even though it excludes "the succession rights of a surviving spouse". As it is unclear whether that instrument's rules of jurisdiction are fully aligned with those in the proposed Succession Regulation this could lead to an unwelcome fragmentation of succession proceedings with different proceedings taking place in different jurisdictions.
31. It is as yet unclear whether the UK will opt in to the proposed succession Regulation and thus whether it will be applied within the UK. However, the relationship between that proposal and the matrimonial property proposal has other potential difficulties. The proposed Regulation on succession excludes from its scope certain property law rights and in particular joint property interests which pass by survivorship on death. This legal interest is one of the most important elements of the property laws of each of the UK jurisdictions and one of the commonest means for the transmission of property between spouses and unmarried partners. It also falls outside the scope of English succession proceedings. If however it falls within the scope of these proposals on property that could be highly problematic because they envisage in certain circumstances the application of some foreign law. This could disrupt the operation of this area of law with wide-reaching and unpredictable consequences for the transmission of immovable property in the UK jurisdictions.
32. Further clarification will also be sought regarding whether other important resources, such as pension funds or discretionary trusts, are within scope.
33. It also needs to be considered how the availability of Regulations in this area and the rules on jurisdiction might affect where people choose to litigate. This could have an impact on lawyers' business in this area. The legal professions may wish to consider what effects UK participation or non-participation might have here.

Applicable law

<i>Matrimonial Property Regimes</i>	<i>Registered Partnerships</i>
<p style="text-align: center;"><i>Article 15</i></p> <p style="text-align: center;">Unity of the applicable law</p> <p>The law applicable to a matrimonial property regime under Article 16, 17 and 18 shall apply to all the couple's property.</p>	<p style="text-align: center;"><i>Article 15</i></p> <p style="text-align: center;">Determination of the applicable law</p> <p>The law applicable to the property consequences of registered partnerships is the law of the State in which the partnership was registered.</p>
<p style="text-align: center;"><i>Article 16</i></p> <p style="text-align: center;">Choice of applicable law</p> <p>The spouses or future spouses may choose the law applicable to their matrimonial property regime as long as it is one of the following laws:</p> <ul style="list-style-type: none"> (a) the law of the State of the habitual common residence of the spouses or future spouses, or (b) the law of the State of habitual residence of one of the spouses at the time this choice is made, or (c) the law of the State of which one of the spouses or future spouses is a national at the time this choice is made. 	
<p style="text-align: center;"><i>Article 17</i></p> <p style="text-align: center;"><i>Establishing the applicable law where no choice is made</i></p> <p>1. If the spouses do not make a choice, the law applicable to the matrimonial property regime shall be:</p> <ul style="list-style-type: none"> (a) the law of the State of the spouses' first common habitual residence after their marriage or, failing that, (b) the law of the State of the spouses' common nationality at the time of their marriage or, failing that, (c) the law of the State with which the spouses jointly have the closest links, taking into account all the circumstances, in particular the place where the marriage was celebrated. <p>2. Paragraph 1(b) shall not apply if the spouses have more than one common nationality.</p>	

<i>Article 18</i>	
Change of applicable law	
<p>The spouses may, at any time during the marriage, make their matrimonial property regime subject to a law other than the one hitherto applicable. They may designate only one of the following laws:</p>	
<p>(a) the law of the State of habitual residence of one of the spouses at the time this choice is made;</p>	
<p>(b) the law of a State of which one of the spouses is a national at the time this choice is made.</p>	
<p>Unless the spouses desire otherwise, a change of the law applicable to the matrimonial property regime made during the marriage shall be effective only in the future.</p>	
<p>If the spouses choose to make this change of applicable law retrospective, the retrospective effect may not affect the validity of previous transactions entered into under the law applicable hitherto or the rights of third parties deriving from the law previously applicable.</p>	

Commission’s proposals

34. Article 16 of the draft Regulation on matrimonial property regimes proposes that parties should be accorded a degree of freedom in choosing the applicable law provided that this choice is regulated to prevent a law being chosen which has little relation to a couple’s real situation or past history. Article 15 of the draft Regulation on the property consequences of registered partnerships proposes that the property consequences of such partnerships should be governed by the law of the state of registration of the registered partnership. There is no choice of applicable law for such partnerships, and no ability to subsequently alter the applicable law by agreement.
35. Article 17 of the proposed matrimonial property regimes Regulation proposes that the applicable law, where spouses have not elected to choose the law, should be determined by using a list of connecting factors starting with habitual residence, then common nationality and moving to the law of the country with which the couple has the strongest connection.
36. Article 18 makes provision for spouses who choose the applicable law for the matrimonial property regime at the time of their marriage to change the applicable law at a later stage. Only a voluntary change of applicable law will be possible. The Commission’s proposal here does not provide for any automatic change. Parties must express consent to such a change in order to prevent any legal uncertainty. In addition, and

to prevent a change of applicable law having undesirable effects for spouses, such a change would only be effective in the future unless spouses expressly decide to make it retrospective. It would not affect the previously-acquired rights of third parties in any event.

Government's preliminary assessment

37. Unlike many Member States, courts in the UK do not normally apply foreign law in family cases. Where foreign law is used in civil cases, information is provided on that law by experts and then considered as evidence by the judge. The Government's initial assessment therefore is that unless the applicable law is simpler than the relevant UK law, the need to use experts to prove foreign law will drive up the costs to parties and complicate the resolution of such disputes. This would be particularly true if a married couple take advantage of the opportunity in Article 18 of the matrimonial property proposal to change the applicable law without retrospective effect. This would lead to the possible application of more than one applicable law to a number of different assets. It should be noted that even if courts in the UK were to use foreign law, the applicable law, in often sensitive family matters, would not necessarily be a law from another EU Member State.
38. Difficulties are also likely to arise in relation to succession matters on death. The choice of law rules in the proposed Regulation on succession differ widely from those in the matrimonial property regimes proposal. A possible consequence of this is that a different law could apply to different aspects of a single succession.
39. There are a number of other issues on applicable law which require further clarification. First, in terms of fairness it is questionable whether it is reasonable to prohibit registered partners from being able to make a choice of applicable law in any circumstances. While not all Member States recognise the concept of such partnerships it is not clear why, in appropriate circumstances, partners could not choose the law of a Member State where the law did provide for the concept of registered partnerships. Secondly, there is a need to specify, in the provisions of both proposals, that the applicable law rules refer to the concept of domicile for parties from the United Kingdom or Ireland, whether or not the UK participates in the proposal.

Effects in respect of third parties

<i>Matrimonial Property Regimes</i>	<i>Registered Partnerships</i>
<i>Article 35</i>	<i>Article 31</i>
Effects in respect of third parties	Effects in respect of third parties
<ol style="list-style-type: none"> 1. The effects of the matrimonial property regime on a legal relationship between a spouse and a third party are governed by the law applicable to matrimonial property regimes under the terms of this Regulation. 2. However, the law of a Member State may provide that the law applicable to the matrimonial property regime may not be relied on by a spouse in dealings with a third party if one or other has their habitual residence in the territory of that Member State and the conditions of disclosure or registration provided for in the law of that State are not satisfied, unless the third party was aware of or ought to have been aware of the law applicable to the matrimonial property regime. 3. The law of the Member State in which immovable property is located may provide for a similar rule to that laid down in paragraph 2 in respect of the legal relationship between a spouse and a third party in respect of that property. 	<ol style="list-style-type: none"> 1. The property consequences of a registered partnership for a legal relationship between a partner and a third party are governed by the law of the State where the partnership was registered in accordance with Article 15. 2. However, the law of a Member State may provide that the law applicable may not be relied on by a partner in dealings with a third party if one or other of the partners or the third party has their habitual residence in the territory of that Member State and the conditions of disclosure or registration provided for in the law of that State are not satisfied, unless the third party was aware of or ought to have been aware of the law applicable to the property consequences of the registered partnership. 3. The law of the Member State in which immovable property is located may provide for a similar rule to that laid down in paragraph 2 in respect of the legal relationship between a partner and a third party in respect of that property.

Commission’s proposal

40. The Commission has said that Article 35 (Article 31 in the proposal for registered partnerships) is designed to reconcile legal certainty for spouses/partners with the protection of third parties against the application of a rule they could not have known or readily foreseen. The Commission has proposed that Member States should be given the possibility, in cases of transactions between a spouse/partner and a third party residing on their territory, to prevent the spouse/ partner relying on the applicable law rules of the proposals as against a third party unless those rules have been disclosed to the third party or the third party had been made aware of it or ought to have been aware of it.

Government's preliminary assessment

41. The Government's initial assessment of the applicable law and its effects on third parties is that this area requires further consideration. The applicable law must apply to relationships with third parties, unless there has been non-compliance with a national system under which these third parties should be notified of the relevant law. Whether to have such a national system is a matter for individual Member States. The Government believes that if the UK was to participate in these proposals a requirement to disclose the relevant applicable law or a system of registering it would probably have to be created. Otherwise, third parties would have reduced certainty about the law applying to their legal relationship with the couple. While corporate entities such as banks might be more able to establish the existence of the relevant applicable law, ordinary individuals entering into a legal relationship with the couple would be more at risk of not understanding the implications. There does not appear to be any provision to allow third parties and the spouses/partners to contract out of the applicable law where they have notice of that law. The only choice seems to be to refuse to contract or enter into the relevant legal relationship.

Conclusion

In considering whether the UK should opt in to the proposed Regulations, it will need to be borne in mind that as the jurisdictions within the UK do not have matrimonial property regimes in the way they are known in most other Member States (and English and Welsh law and Northern Irish law do not have the matrimonial property concept at all) to comply with the proposed Regulations the UK would need to make significant changes to its laws and legal practices. The Government will consider carefully the views of those consulted about these proposals.

Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

- Q1. Is it in the national interest for the Government, in accordance with Protocol 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice annexed to the Treaty on the Functioning of the European Union, to opt in to negotiations on the Commission's proposed Regulations? Please explain the reasons for your decision.**
- Q2 What are your views on the specific issues raised in this paper concerning the proposals being made by the European Commission in their draft proposals?**
- Q3 Do you agree with the impact assessment? If not, please explain why.**
- Q4 Are there any other specific comments you may wish to make?**

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name / organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details / How to respond

Please send your response by 20 May 2011 to:

**Eral Knight
Ministry of Justice
International Directorate
6th Floor
102 Petty France
London SW1H 9AJ**

**Tel: 0203 3334 3843
Email: european.policy.unit@justice.gsi.gov.uk**

If you are replying from Scotland, please copy your response to:

**Simon Stockwell
The Scottish Government
Family Law Team
2nd Floor
St Andrew's House
Edinburgh EH1 3DG**

**Tel: 0131 244 3322
Email: Family.Law@scotland.gsi.gov.uk**

Extra copies

Further paper copies of this consultation can be obtained from the Ministry of Justice and it is also available on-line at <http://www.justice.gov.uk/index.htm>.

Alternative format versions of this publication can be requested from: Eral Knight, Tel: 020 3334 3843, Email: european.policy.unit@justice.gsi.gov.uk

Publication of response

A paper summarising the responses to this consultation will be published within three months of the closing date of the consultation. The response paper will be available on-line at <http://www.justice.gov.uk/index.htm>.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

Matrimonial Property Regimes and the property consequences of registered partnerships – How should the UK approach the Commission's proposals?

Impact Assessment

A partial impact assessment has been included as a separate document to this consultation exercise.

The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.
2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. **Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. **Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

These criteria must be reproduced within all consultation documents.

Consultation Co-ordinator contact details

Responses to the consultation must go to the named contact under the How to Respond section.

However, if you have any complaints or comments about the consultation **process** you should contact the Ministry of Justice consultation co-ordinator at consultation@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

**Better Regulation Unit
Corporate and Access to Justice Analytical Services
7th Floor, Pillar 7:02
102 Petty France
London
SW1H 9AJ**

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