Facilitating Cross-Border Family Life – Towards a Common European Understanding

EUFams II and Beyond

Thomas Pfeiffer
Quincy C. Lobach
Tobias Rapp
(Eds.)

HEIDELBERG
UNIVERSITY PUBLISHING

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Preface

This volume constitutes the final study within the research project *EUFams II: Facilitating Cross-Border Family Life – Towards a Common European Understanding* and entails papers presented at the online final conference held on 30 October 2020. EUFams II was a project on European private international law in family and succession matters conducted between September 2018 and December 2020 and funded by the European Commission. The project built on the predecessor study *Planning the future of cross-border families: a path through coordination* (*EUFam's*) initiated by the University of Milan.

The EUFams II project was coordinated by the Institute for Comparative Law, Conflict of Laws and International Business Law of Heidelberg University in cooperation with the Universities of Lund (*Ulf Maunsbach* and *Michael Bogdan*), Milan (*Ilaria Viarengo* and *Francesca Villata*), Osijek (*Mirela Župan*), Valencia (*Rosario Espinosa Calabuig*), Verona (*Maria Caterina Baruffi*), and the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law (*Burkhard Hess*).

In my capacity as coordinator, I would like to express my gratitude to all the project partners and their respective research teams for the fruitful cooperation throughout the project. I would also like to thank *Katharina Boele-Woelki, Alegría Borrás Rodríguez* (†), *Fausto Pocar,* and *Vesna Tomljenović* for their support as members of the project's Academic Advisory Board. My gratitude extends to all those having contributed to the success of EUFams II by participating in national and international exchange seminars, the empirical study, or other project activities. A special thanks goes to the speakers, discussants, and participants of the online final conference which replaced the originally planned conference in Heidelberg.

Finally, my special gratitude goes to my staff members at the Institute for Comparative Law, Conflict of Laws and International Business Law, particularly to my co-editors *Quincy Lobach* and *Tobias Rapp.* They did not only unburden me of most of the administrative work; they also provided remarkable input in relation to the general design of the project. I would also like to thank *Till Menke* and *Marcel Zühlsdorff* for their contributions to the implementation of the project, *Christoph Blüm* and *Elias Krist* for the organization of the final conference as well as my assistant *Ingrid Lesch* for her support, which included correspondence as well as complicated book keeping matters. A final thanks goes to *Johannes Tegel* for the diligent preparation of the manuscript of this volume.

Most importantly, however, I would like to emphasize that the project aimed at facilitating life for cross-border families by a better coordination of legal systems in Europe. We should be most grateful if this project provided a small contribution to the efforts to achieve this important goal.

Heidelberg, 28 May 2021 *Thomas Pfeiffer*

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Abbreviations

1956 Hague Maintenance Convention	Convention of 24 October 1956 on the law applicable to maintenance obligations towards children
1961 Hague Minors Protection Convention	Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants
1968 Brussels Convention	1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters
1973 Hague Maintenance Convention	Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations
1978 Hague Matrimonial Property Convention	Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes
1980 European Custody Convention	European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children
1980 Hague Child Abduction Convention	Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
1996 Hague Child Protection Convention	Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children
2007 Hague Maintenance Convention	Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance
2007 Hague Maintenance Protocol	Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations
2007 Lugano Convention	Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
Brussels I Regulation	Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
Brussels I bis Regulation	Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
Brussels II Regulation	Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses

Brussels II bis Regulation	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
Brussels II ter Regulation	Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction
Citizens' Rights Directive	Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC
CJEU	Court of Justice of the European Union
COM (2016) 411 final	Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)
Taking of Evidence Regulation	Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters
EJN	European Judicial Network
EJTN	European Judicial Training Network
ERA	Europäische Rechtsakademie
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
European Enforcement Order Regulation	Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims
HCCH	Hague Conference on Private International Law
Maintenance Regulation	Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations
Matrimonial Property Regulation	Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes
OJ	Official Journal of the European Union
Partnership Property Regulation	Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships

Public Documents Regulation	Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012
Rome III Regulation	Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation
Succession Regulation	Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN Child Convention	Convention on the Rights of the Child

Introduction: The EUFams II Project

Thomas Pfeiffer, Quincy C. Lobach, and Tobias Rapp

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I. Background

EUFams II was a study on European private international law in family and succession matters conducted between September 2018 and December 2020 by academic institutions from various EU Member States and funded by the European Commission.[1] The project's objective was to assess the functioning and the effectiveness of the framework of international and European family law, detect potential problems, and propose possible improvements. Ultimately, it aimed at developing a common European expertise and understanding to secure the uniform, coherent, and consistent application of European family law, so as to facilitate the cross-border movement of persons within the EU. The project built on the predecessor study "Planning the future of cross-border families: a path through coordination (EUFam's)" initiated by the University of Milan.

1 The project was funded by the European Union's Justice Programme (2014–2020), Grant no. 800780. The content of the project represents the views of the authors only and is their sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

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The EUFams II project was coordinated by the Institute for Comparative Law, Conflict of Laws and International Business Law of Heidelberg University (*Thomas Pfeiffer*) in cooperation with the Universities of Lund (*Ulf Maunsbach* and *Michael Bogdan*), Milan (*Ilaria Viarengo* and *Francesca Villata*), Osijek (*Mirela Župan*), Valencia (*Rosario Espinosa Calabuig*), Verona (*Maria Caterina Baruffi*), and the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law (*Burkhard Hess*). It was supported by an Academic Advisory Board (*Katharina Boele-Woelki, Alegría Borrás Rodríguez, Fausto Pocar,* and *Vesna Tomljenović*).

Additional information on the EUFams II project can be found on the designated website.[2]

II. Objectives and methodology

The EU's system of private international law in family and succession matters has rapidly extended its material scope over the last two decades. Of particular interest to the EUFams II research group were the following instruments: Brussels II bis and ter Regulation, Rome III Regulation, Maintenance Regulation, 2007 Hague Maintenance Protocol, Property Regimes Regulations, Succession Regulation, Public Documents Regulation, 1980 Hague Child Abduction Convention, and 1996 Child Protection Convention. These instruments deal with family law matters in a fragmentary, yet interconnected manner. Consequently, demarcation and the interplay of different instruments have become increasingly important. Potential difficulties include the determination of the scope of the regulations, their interplay and actual workability, and the application of their provisions in practice.

Against this background, the EUFams II research group was interested in gaining insight into the actual implementation of these instruments and application of their provisions throughout the EU. Ultimately, the consortium aimed at revealing potential difficulties for, obstacles to, and problems with matters of free movement and cross-border family life. Insofar, the project's focus was laid on translational research.

In the explorative phase, an empirical legal study on the functioning of European family and succession law in practice was conducted by means of a questionnaire. Moreover, a database collecting cases from courts across the EU was set up. Finally, five national exchange seminars gathering renowned

2 www.uni-heidelberg.de/eufams (available in English, German, French, Italian, Spanish, Swedish, Croatian, Greek, Czech, and Slovak, last consulted 14. 10. 2020).

academics and practitioners were hosted by the members of the consortium, with the aim of identifying shortcomings and deficiencies of European family and succession law on the national level.

In the comparative phase, an international exchange seminar was hosted in Luxembourg. The seminar endeavored to foster mutual learning and the extrapolation of national good practices on the European level. In addition, the database's contents were analyzed in a comparative study on national case law. In a thematic report, national implementation laws were compared and critically assessed.

In the final phase, which built on the totality of the explorative and comparative research activities and outputs, topics of a more general nature and with an overarching character were dealt with at the online final conference, culminating in this volume.

III. Research outputs

1. Empirical study

An empirical study conducted between January and March 2019 by means of an online questionnaire available in nine languages constituted the first stage of the EUFams II project. It aimed at exploring the general familiarity of various groups of (legal) professionals (e.g. judges, lawyers/attorneys, notaries, state officers, scholars/academics, social counsellors) with the framework of European family and succession law. In total, 1,394 professionals participated in the survey. The main findings of the survey are extensively presented from a European perspective in a publicly available report.[3] A summarized version focusing on Germany has been published elsewhere.[4]

2. National exchange seminars

National exchange seminars were hosted by the partners in Osijek (7 and 8 March 2019), Lund (11 April 2019), Heidelberg (17 May 2019), Verona (17 May 2019), and Valencia (17 May 2019). They aimed at shedding light on the challenges faced by national legal systems, the interplay between

3 *Lobach/Rapp,* An Empirical Study on European Family and Succession Law, http://www2.ipr.uni-heidelberg.de/eufams/index-Dateien/microsites/download.php?art=projektbericht&id=2 (last consulted 14. 10. 2020).

4 *Lobach/Rapp,* Zeitschrift für das gesamte Familienrecht 2020, 83.

national and European law, and the impact of recent decisions of the CJEU on the domestic legal order. The discussions and findings of the seminars were summarized in national reports on Croatia[5], Sweden[6], Germany[7], Italy[8], and Spain[9]. In addition, a volume containing the German conference proceedings was published separately.[10]

3. International exchange seminar

An international exchange seminar was hosted by the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law on 25 October 2019. On the basis of the controversial and problematic issues addressed in the national reports, the international exchange seminar aimed at identifying common patterns, exploring possible solutions, and sharing good practices with regard to the application of the EU instruments in family law. The conference proceedings were presented in the corresponding report.[11]

5 *Župan/Šego/Poretti/Drventic,* Report on the Croatian Exchange Seminar, http://www2.ipr.uni-heidelberg.de/eufams/index-Dateien/microsites/download.php?art=projektbericht&id=10 (last consulted 14. 10. 2020).

6 *Maunsbach,* Report on the Swedish Exchange Seminar, http://www2.ipr.uni-heidelberg.de/eufams/index-Dateien/microsites/download.php?art=projektbericht&id=11 (last consulted 14. 10. 2020).

7 *Zühlsdorff,* Report on the German Exchange Seminar, http://www2.ipr.uni-heidelberg.de/eufams/index-Dateien/microsites/download.php?art=projektbericht&id=12 (last consulted 14. 10. 2020).

8 *Baruffi/Danieli/Fratea/Peraro,* Report on the Italian Exchange Seminar, http://www2.ipr.uni-heidelberg.de/eufams/index-Dateien/microsites/download.php?art=projektbericht&id=9 (last consulted 14. 10. 2020).

9 *Espinosa Calabuig/Quinzá Redondo,* Report on the Spanish Exchange Seminar, http://www2.ipr.uni-heidelberg.de/eufams/index-Dateien/microsites/download.php?art=projektbericht&id=14 (last consulted 14. 10. 2020).

10 *Pfeiffer/Lobach/Rapp* (eds.), Europäisches Familien- und Erbrecht – Stand und Perspektiven, 2020.

11 *Brosch/Mariottini,* Report on the International Exchange Seminar, http://www2.ipr.uni-heidelberg.de/eufams/index-Dateien/microsites/download.php?art=projektbericht&id=17 (last consulted 14. 10. 2020).

4. Case law database and comparative analysis

A case law database containing cases from the courts of various EU Member States was set up as part of the predecessor project and was optimized and enlarged over the course of EUFams II. Along with standardized data for each judgement, the database also comprises a summary of both the facts and the decision given by the court as well as a short critique. The database currently contains more than 1,100 cases and can be accessed online.[12]

The collected cases served as a profound foundation for the subsequent comparative report on national case law[13] which aimed at unveiling the application of European family and succession law as practiced by national courts.[14] Moreover, it was observed that the effectiveness and functioning of European family and succession law greatly depends on the interplay between the national legal system and the European framework. Therefore, a report on national implementation laws was dedicated to this issue.[15]

IV. Online final conference and final study

The final conference of the EUFams II project was hosted online by Heidelberg University on 30 October 2020. The project partners presented the papers published in this volume which accordingly serves as the project's final study. The contributors were invited to present historical developments, discuss the status quo, and draw the lines along which European family and succession law may develop in the near future. Overall, this volume endeavors to inspire its readership and the scientific community at large to engage in further research along and across these lines.

12 http://www2.ipr.uni-heidelberg.de/eufams/index.php?site=entscheidungsdatenbank (last consulted 14. 10. 2020).

13 *EUFams II Consortium,* Comparative Report on National Case Law, http://www2.ipr.uni-heidelberg.de/eufams/index-Dateien/microsites/download.php?art=projektbericht&id=20 (last consulted 14. 10. 2020).

14 Additional publications referring to the case law database include *Župan,* Utjecaj zastite ljudskih prava na suvremeno medunarodno privatno pravo, in: Barbić/Sikirić (eds.), Medunarodno privatno pravo – interakcija medunarodnih, europskih i domacih propisa, 2020, p. 125.

15 *EUFams II Consortium,* Report on National Implementation Laws, http://www2.ipr.uni-heidelberg.de/eufams/index-Dateien/microsites/download.php?art=projektbericht&id=18 (last consulted 14. 10. 2020).

1. The main connecting-factors: party autonomy and habitual residence

Habitual residence serves as the main objective connecting-factor in European family and succession law. *Thomas Pfeiffer* investigates whether the notion of habitual residence is of a unitary nature or differs throughout the regulations. Moreover, he addresses various selected issues, such as the relevance of subjective elements for the purposes of establishing habitual residence and particularities pertaining to minors. Finally, the contribution discusses procedural aspects of the ascertainment (e.g. *ex officio*) of habitual residence.

An important paradigm shift of the last decades has been the gradual introduction of party autonomy in European family and succession law. Despite the (initial) skepticism of some Member States, party autonomy plays an important role in the current instruments. *Ulf Maunsbach* investigates the historical developments in European and Swedish law alike, and the opportunities parties have under the current framework to choose the competent court and/or the applicable law, be it directly or indirectly. The author arrives at the conclusion that a trend towards increased party autonomy balanced by a similarly increased possibility for court discretion to take into account the interest of weaker parties can be observed.

2. International child protection

International child protection is characterized by a plurality of sources resulting in difficulties of demarcation and interplay between the pertinent instruments, all of which rely on what at first glance appear to be similar concepts, such as the best interest of the child, the right of the child to be heard, and habitual residence (of very young children). *Rosario Espinosa Calabuig* and *Laura Carballo Piñeiro* criticize that the legal and cultural divergencies between Member States cannot be sufficiently accounted for by the predominantly procedural and technical rules on international child protection.

3. Judicial training

The EUFams II project has on numerous occasions identified a lack of knowledge and awareness of the legal framework amongst legal operators. This deficiency is one of the most important challenges of present European family

and succession law. Education and training of those engaged in applying the law may be an important measure to close the existing knowledge gap. *Mirela Župan, Ivana Kunda,* and *Paula Poretti* describe and assess the various educational measures pertaining to European family and succession law currently offered by various institutions, both at the national as well as at the European level. Additionally, they analyze the benefits and downsides of specialization in the judiciary and of professional networks (e.g. liaison judges, EJN, IHNJ).

4. Defining marriage and other unions

The notion of marriage continues to be one of the most controversial in European family law and gives rise to numerous questions, ranging from personal status to financial aspects. In a joint contribution, *Ilaria Viarengo, Francesca Villata, Nicolò Nisi, Lenka Valkova, Diletta Danieli,* and *Cinzia Peraro* engage in a comparative analysis of the various concepts of formalized relationships in substantive national law as well as in private international law. They particularly focus on same-sex marriages and registered partnerships open to same-sex as well as opposite-sex couples against the background of EU free movement law, recent CJEU case law, and the respective scopes of application of various regulations.

5. Third country nationals

Migration from third countries to the EU and vice versa, notably against the backdrop of the so-called refugee crisis and Brexit, have emphasized the need for a predictable legal framework providing practicable solutions in matters involving third country nationals. Against that background, *Marlene Brosch* and *Cristina M. Mariottini* examine the European framework and its implementation in national case law involving third country nationals, with a focus on procedural aspects. Substantive aspects such as legal concepts unknown to domestic law, questions of personal status, and public policy in relation to third country nationals are dealt with by *Marcel Zühlsdorff.*

The Notion of Habitual Residence

Thomas Pfeiffer

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Abstract This contribution summarizes key aspects of habitual residence as a connecting-factor and a basis of jurisdiction in European private international and procedural law. It addresses its significance for avoiding discrimination based on nationality in the EU and its relevance for integrating migrants in the societies of the countries where they reside. Finally, the contribution discusses some key questions of habitual residence, i.e. the foreseeability of its application or the appropriateness of a uniform versus a differentiated interpretation of this term, as well as practical matters such as the habitual residence of children or its *ex officio* application by courts.

Keywords European family and succession law, habitual residence, connecting-factors.

Pfeiffer, Thomas, The Notion of Habitual Residence, in: Pfeiffer, Thomas/Lobach, Quincy C./Rapp, Tobias (Eds.), Facilitating Cross-Border Family Life – Towards a Common European Understanding. EUFams II and Beyond, Heidelberg 2021, p. 9–19. DOI: https://doi.org/10.17885/heiup.853.c11708

I. Introduction

European family and succession law applies to matters of personal life. As a consequence, private international law typically refers to personal factors as a means of referring to a certain legal system. Traditionally, there are three significant options: nationality, domicile, and residence. The instruments of European family and succession law, however, demonstrate a clear preference for habitual residence, in particular compared to the traditional preference for nationality in many Member States.

II. Reasons for preferring habitual residence over nationality

There are two main reasons for preferring habitual residence over nationality as a connecting-factor in the EU. One has to do with the avoidance of discrimination based on nationality, the other is an answer to the migration of workers in a more general manner.

1. Avoiding discrimination in the EU

It is a *leitmotiv* of European law that EU citizens must not be discriminated against on the basis of their nationality. This principle is closely related to the fundamental freedoms under the TFEU. In private international law, it is relevant for access to courts on a non-discriminatory basis as well as for integration into the civil society in cases where EU nationals live in another Member State. In other words, reference to a connecting-factor other than nationality is necessary for establishing a single market without establishing a single citizenship.

2. Migration in general

The latter aspect is relevant also for migrant workers in general.[1] From the perspective of those Member States which formerly preferred nationality as the main connecting-factor in international family and succession law, the result was that family and succession matters of foreign nationals were

1 For a short analysis see already *Pfeiffer*, IPRax 2016, 310 (311).

predominantly governed by the law of their home country. The preference for nationality was initially based on the idea that nationals are subjected to the laws of their nation. A more modern reason, however, was that most people rarely change their citizenship. Referring to nationality as a connecting-factor ensured a stable point of reference and thus served the goal of continuity in relation to questions of personal status. Moreover, nationality is easy to determine, and – unlike residence and domicile – difficult to manipulate. All in all, it served the purpose of legal certainty. Moreover, nationality was supposed to reflect the country with which a person's long-term life interests were associated. Especially in international family and succession law, these long-term life interests are at the same time interwoven with a person's cultural background. The legitimate expectations of those subject to the law are often that their personal lives will be governed by rules that correspond to their own cultural identity. On the other hand, the link to residence and domicile stands more for the aspects of integration and adaptation.

In recent decades, the effects of the principle of citizenship should be seen against the background of the broad European migratory flows. In practice, the principle of nationality has led above all to the fact that the family and inheritance relationships of foreign nationals have often been judged not according to the laws of the country where they live, but according to their home country's law. Behind this was a concept that for a long time shaped the typical view on migrant workers. Traditionally, many Member States did not see themselves as countries of immigration. The workers who were called from abroad were addressed as "guest workers". The general expectation was that these "guests" would work in their host country for a few years or sometimes a bit more, but then eventually return to their home countries. The principle of citizenship in private international law was a reflection of this idea. Migrants were not considered a permanent part of the society of their host State; the focus of their long-term life interests was seen to lie in their home countries. The principle of nationality was intended to respect not only these long-term life interests, but also their lasting cultural roots in their country of origin. At the same time, it was ensured that their family and succession matters were judged according to the same rules as in their home countries. This was intended to realize another important goal of private international law, namely the avoidance of so-called limping legal relationships, i.e. a situation in which, for example, a person is considered divorced in one country while still married in the other. The application of the principle of nationality was thus both an expression of respect for the native culture of foreigners and an expression of a policy aiming at

the non-integration of migrant workers into the societies of their host State. This was intended to maintain the ties of foreigners to their home countries as much as possible, to not impair their opportunities to return, but rather to promote their willingness to return. Today, this conception of legal policy has given way to a more integration-oriented approach which is reflected by an application of the laws of the country where persons habitually reside. It is a part of the personal integration of migrants, also of non-discrimination, that their family relations are governed by the rules of their country of residence.

3. The necessity of contractual options

Today's world is characterized by the coexistence of very different concepts of life. Migration of workers may in many cases result in the permanent residence in the host country, and in other cases a return to the home country, or in a move to yet another country. If migrant workers stay permanently in their host country, this will typically affect the next generation as well. This is very different in the case of the migration of retired persons, who may simply prefer living in a more pleasant or warmer area of Europe for the last period of their lives. This pluralism is the reason why a "one size fits all"-solution is not acceptable in private international law anymore. Applying habitual residence as the most significant connecting-factor in European private international law is acceptable only because the relevant instruments also offer the possibility to choose other options.

III. Short survey of EU provisions

1. Jurisdiction

Insofar as jurisdiction is concerned, habitual residence is referred to in Art. 3 Brussels II bis Regulation for matters relating to divorce or similar issues and Art. 8 Brussels II bis Regulation in relation to parental responsibility. Art. 3 Brussels II bis Regulation provides for several alternatives, partly based on the present or past habitual residence of the spouses or, with certain modifications, to the habitual residence of one of the spouses. Art. 8 Brussels II bis Regulation refers to the habitual residence of the child, not the parents. In the Maintenance Regulation, Art. 3 offers a choice between the habitual residence of the creditor and the defendant as a basis for jurisdiction. Art. 4

Succession Regulation refers to the habitual residence of the deceased at the time of death. The Matrimonial Property Regulation indirectly refers to habitual residence in case of the death of a spouse (Art. 4) and in cases of divorce or a similar issue (Art. 5). In other cases, there is a direct reference to the habitual residence of the spouses or their last habitual residence or the habitual residence of the respondent (Art. 6 Matrimonial Property Regulation). A jurisdictional reference to the place of habitual residence of the partners is also provided for in Art. 6 Partnership Property Regulation. Prior to the enactment of the Maintenance Regulation, the habitual residence of the person entitled to maintenance was referred to as a basis for jurisdiction in the original version of the Brussels Convention, and still is in Art. 5 no. 2 of the 2007 Lugano Convention.

2. Applicable law

It seems fair to say that, in European family and succession law, habitual residence has become the most significant statutory connecting-factor. For divorces, this can be derived from Art. 8 (a)–(c) Rome III Regulation. In relation to matrimonial property, Art. 26 (1) Matrimonial Property Regulation refers to the first common habitual residence of the spouses after their marriage. In addition, Art. 26 (3) (a) Maintenance Regulation refers to a previous longer common habitual residence as a possible ground for deviating from the reference to the first common habitual residence. Furthermore, the habitual residence of the spouses (or either spouse) is an option for a contractual choice of law under Art. 22 (1) Matrimonial Property Regulation. The situation is slightly different with regard to the Partnership Property Regulation, which – for political reasons – mainly refers to the law of the State of registration; however, even with regard to the cases covered by this instrument, habitual residence serves as a connecting-factor in exceptional cases under Art. 26 (2). Art. 21 (1) Succession Regulation, like the jurisdictional rule in its Art. 4, refers to the habitual residence of the deceased at the time of death. In cases under the Maintenance Regulation, a reference to the habitual residence of the creditor follows from its Art. 15 in conjunction with Art. 3 (1) Hague Maintenance Protocol.

IV. Key issues

Questions of habitual residence have been discussed intensively and extensively in private international law in general and European private international law in particular.[2] It is not the purpose of this contribution to repeat this discussion, but rather to point out those aspects of these discussions which cause the most significant practical problems.

1. Foreseeability – habitual residence as a general clause

The first and probably most significant problem is foreseeability. From a methodological perspective, the term "habitual residence" is a general clause and not a sharply defined notion. The theoretical as well as the practical answer to this problem seem to be identical: It is highly desirable to determine foreseeable, adequate criteria that define habitual residence. It can be seen from the national reports within the EUFams II project that national courts have understood and accepted this necessity.[3] However, defining criteria for determining a person's habitual residence is only a first step. It is typical for legal arguments that the relevance of certain facts may differ, depending on the presence or absence of other factors. This is particularly true for determining habitual residence. The workplace may be relevant for determining the habitual residence of a person who works full-time, but it will probably be less relevant in case of a student travelling around on a work-and-travel basis. The relevance of arguments also oscillates between form and substance. If a person's life is very stable and deeply rooted in a certain environment, it will, in many instances, suffice to find out this person's domicile in order to determine the habitual residence; considering a specific intent may be unnecessary if the objective factors are sufficiently clear.[4] The situation is much more complicated in cases of a more volatile lifestyle where all factors indicating personal, economic, and social integration may be relevant. It may even be that under Art. 12 Brussels II bis Regulation (choice of court

2 Most thoroughly *Rentsch,* Der gewöhnliche Aufenthalt im System des Europäischen Kollisionsrechts.

3 See e.g. *EUFams II Consortium,* Comparative Report on National Case Law, parts C.III.3 and D.III.1.a.

4 *EUFams II Consortium,* Comparative Report on National Case Law, part D.III.1.a.

agreement in the best interest of a child), factors other than the child's actual residence are accepted as being more important.[5]

In this context, a common feature of all general clauses is that their interpretation may be influenced by "fore-structured" understandings. To a certain extent, the project indicates that this is also the case in relation to habitual residence. From a bird's eye perspective, in hard cases, habitual residence as a connecting-factor serves the purpose of determining whether a person is part of this or of that society. French courts seem to include a person's nationality in the list of relevant criteria[6], which may have to do with the fact that nation on the one hand, and society on the other, are very closely related to each other in French legal and political thinking. By contrast, the German legal discussion would rather look at a person's intent in these situations in order to determine whether a person will, in the long run, rather be a part of this or that society.[7] However, a German argument would probably take into account a person's nationality indirectly, i.e. as a circumstance that may indicate a person's long-term plans and interest.

While these observations are not meant as a comprehensive methodological analysis of the problems raised by referring to habitual residence as a connecting-factor, they indicate the significance of legal thinking. Making use of general concepts such as habitual residence in European private international law results in a higher significance of different fore-structured legal understandings. Such different understandings may exist as a result of differences in legal, political, philosophical, cultural, economic or social thinking in different Member States, which is not per se a bad thing. To some extent, this situation will be mitigated by CJEU case law, which is available already[8] and will grow over time. However, in order to achieve greater and better harmonization, concepts such as habitual residence require more exchange and more common legal education.

A more difficult issue is whether rules of thumb[9] would be helpful. That may be the case if they really fit the purpose and are generally accepted

5 *EUFams II Consortium,* Comparative Report on National Case Law, part B.III.2; see also part F.III.10.

6 *EUFams II Consortium,* Comparative Report on National Case Law, part C.III.3.

7 *EUFams II Consortium,* Comparative Report on National Case Law, part D.III.1.a.

8 See in particular CJEU 29.11.2007, C-68/07 (*Sundelind Lopez/Lopez Lizazo*); CJEU, 02.04.2009, C-523/07 (*A*); CJEU, 22.12.2010, C-497/10 (*Mercredi/Chaffe*); CJEU, 09.10.2014, C-376/14 PPU (*C/M*); CJEU, 15.02.2017, C-499/15 (*W and V/X*); CJEU, 08.06.2017, C-111/17 PPU (*OL/PQ*); CJEU, 28.06.2018, C-512/17 (*HR*); CJEU, 17.10.2018, C-393/18 PPU (*UD/XB*); CJEU, 16.07.2020, C-80/19 (*EE*).

9 For an example, see *EUFams II Consortium,* Comparative Report on National Case Law, part D.III.1.b.bb.

throughout the Member States. The latter would usually require that these rules of thumb are backed by some European authority (CJEU case law; statements of the Commission or similar). Rules of thumb developed by national courts will help only where they are advocated in cross-border exchanges or legal writing and well-received in a majority of Member States. Experience indicates that this simply does not happen at all or, without intervention by the legislator, happens only in very rare cases.

2. Uniform or differentiated interpretation

Another standard question, namely whether a uniform or differentiated interpretation of habitual residence applies, has also been discussed within the Project, e.g. at the final conference.

To answer this question, one should have in mind that the reference to habitual residence is, by itself, made in a different manner in different European instruments. In particular, there are differences with regard to the persons concerned and with regard to time. A very good example is the Succession Regulation which refers to the habitual residence of the deceased (who will certainly not be a party to any proceedings relating to the estate under this instrument) at the time of death. By contrast, the Matrimonial Property Regulation refers to the spouses, i.e. the parties to the legal relationship governed by this Regulation. Moreover, it refers to the first common habitual residence after their marriage, so that the relevant habitual residence may be determined more easily.

As a consequence, the factors (or rather the weight of the various factors) relevant for determining habitual residence will, in any event, vary according to the differences in relation to the relevant persons or moment in time. Against this backdrop, the question of whether a uniform or differentiated concept of habitual residence should apply, depends on the level of abstraction. In the very specific normative settings of the various references to habitual residence, the relevance of criteria may differ. The overall duration of residence will be more relevant when persons travel back and forth between two different abodes[10] than in a case where the first habitual residence needs to be determined for purposes of the Matrimonial Property Regulation. The intent of an adult may be more relevant than the personal intent of a minor, whose residence is generally determined by persons having custody.[11]

10 *EUFams II Consortium,* Comparative Report on National Case Law, part C.III.3.

11 *EUFams II Consortium,* Comparative Report on National Case Law, parts D.III.1.a and b.

Moreover, since the habitual residence depends on a broad variety of factual elements, establishing the relevant facts will result in very specific problems with regard to different instruments. In relation to the Matrimonial Property Regulation, e.g. the determination of a couple's first common habitual residence may relate to events that occurred a long time ago[12]; the reference to the habitual residence of the deceased raises the problem that the most important source of information for its determination, i.e. the deceased himself, is not available anymore in case of any controversy.

3. Habitual residence of children

The most controversial specific issue seems to be determining the habitual residence in cases involving divorce, separation or custody. Firstly, this may have to do with the highly emotional and, sometimes, extremely controversial character of custody matters between parents in the course of their separation or divorce. Secondly, children typically do not decide themselves where they live, but depend on the decisions of others. As a consequence, it is more difficult to determine their long-term plans and interest; courts cannot and do not rely on the child's plans and intentions.[13] Thirdly, the habitual nature of a child's residence and its long-term perspective is influenced by its best interest, so that any decision on habitual residence seems to include substantive best-interest aspects.[14] Fourthly, in relation to children, the legal framework is more complicated than in other cases because of the relevance of further international instruments, such as the Hague Child Abduction Convention.

In general, however, it seems fair to say that these complications may be seen as a mere consequence of the general complexity of determining habitual residence. One of the answers to these problems is the option for a prorogation agreement in Art. 12 Brussels II bis Regulation and, as of 1 August 2022, Art. 10 Brussels II ter Regulation; it may be worthwhile discussing whether these options may be extended in the future.

12 *Baruffi/Danieli/Fratela/Peraro,* Report on the Italian Exchange Seminar, part F.III.

13 *EUFams II Consortium,* Comparative Report on National Case Law, parts C.III.3 and D.III.1.b.aa.

14 E.g. *EUFams II Consortium,* Comparative Report on National Case Law, parts F.III.2 and G.III.3.

4. *Ex officio* scrutiny of jurisdiction

The rules of European family law provide for a scrutiny of the jurisdiction of the court seized *ex officio* (Art. 17 Brussels II bis Regulation, Art. 10 Maintenance Regulation, Art. 15 Property Regimes Regulations). A different rule, however, is stated by Art. 9 Succession Regulation, which provides for jurisdiction based on appearance.

This difference is a consequence of third party interests involved in family law cases. Yet, the Comparative Report indicates that some courts seem to abstain from an *ex officio* scrutiny of their jurisdiction in cases where no party has raised any objections against the proceedings.[15] This certainly has to do with the circumstance that the existence of third party interests, including public interest aspects, is an abstract possibility; relevant third party interests do not necessarily exist in all cases. Therefore, these cases raise the question whether the underlying approach should be legalized, i.e. to enact a rule that a court may base its jurisdiction on an appearance without objection, if it is manifest that no relevant third party rights are at stake.

V. Conclusions

Very significant policy reasons underline that, for reasons of European integration and as an answer to problems of immigration, habitual residence is and should be the most significant connecting-factor in European family and succession law, as long as it is accompanied by contractual choice of law options. Most problems relating to habitual residence stem from its nature as a general clause; foreseeability and application will certainly be improved over time by CJEU case law. However, international exchange and the further development of a common European understanding are important factors as well. It may also be discussed whether the role of agreements between the parties should be enhanced in the future.

15 *EUFams II Consortium,* Comparative Report on National Case Law, parts B.III.4 and G.III.1.

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Party Autonomy in European Family and Succession Law

*Ulf Maunsbach**

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Abstract In this contribution, party autonomy is discussed in relation to European family and succession law. The topic is briefly introduced, followed by a survey covering the main EU-instruments with particular emphasis on the parties' possibility to influence choice of court and law by agreements. Thus, autonomy as described in this contribution embraces both prorogation

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and choice of law. The contribution also includes a brief comparison with the development of party autonomy in Sweden and some general conclusions are presented. It is observed that party autonomy in European family and succession law can be described as an area characterized by a number of dividing interests and that we can see a trend towards increased party autonomy balanced by a similarly increased possibility for court discretion to take into account the interest of weaker parties. This fosters a development towards incomprehensible rules and legal instruments that leads to the conclusion that complexity is the new black.

Keywords party autonomy, European family and succession law, Swedish international family law, Nordic international family law.

I. Introduction

Over the last decades, European family and succession law has seen a gradual implementation of party autonomy. Irrespective of potential skepticism, party autonomy plays an important role in the current European instruments and it seems likely that this is an on-going development, and that the importance of party autonomy will increase rather than decrease. However, the fact that party autonomy exists and is generally acclaimed, does not mean that the recent development is impervious to criticism. There might well be reasons to examine ways to improve and enhance the current system. This contribution aims at creating grounds for such discussions.

Before party autonomy can actually be analyzed and discussed, it is necessary to agree on a definition. In this contribution, I have chosen a rather broad definition and will use the concept of party autonomy in relation to parties' mutual choice of both law as well as court.[1] Unilateral dispositions will thus not be directly covered, but the inclusion of unilateral options will be touched upon when necessary in order to convey the bigger and more complete picture.

This study will focus primarily on the developments within the EU and use European instruments as examples and objects. In addition, the national developments of party autonomy in family and succession law in Sweden

1 For a discussion about different definitions of party autonomy, see *Mills,* Party Autonomy in Private International Law, p. 14–24.

(and to some extent the Nordic countries) will be provided as a comparative example.

II. The development of party autonomy in family and succession law – history and justification

Traditionally, party autonomy has not played a significant role in family law, most likely due to the public interests involved.[2] From the outset, party autonomy in general has been regarded as somewhat controversial and surrounded by opposing interests. Party autonomy may be regarded as part of personal freedom – a vested right conferred directly on individuals and as such closely related to human rights and individual freedom and fairness. However, party autonomy can also be described as a privilege granted by the State regarding interests (jurisdiction, application of law, and recognition and enforcement) which are indispensably connected to the State.[3]

Much could be said regarding different justifications for party autonomy and I will not develop these discussions thoroughly. Obvious opposing interests are the ones described above – individual freedom versus State sovereignty – and the inclusion of party autonomy in this regard is usually justified with utilitarian and/or liberal arguments.[4]

Another way to view party autonomy would be to discuss this version of individual freedom as part of the realm of contractual freedom in general, but due to its special nature, party autonomy can be described as a separate entity – an agreement of its own kind (*sui generis*) – and thus an agreement that must be treated according to its own conditions.[5]

The early examples of party autonomy are to be found in the area of commercial law.[6] In family and succession law, the resistance to party autonomy was more persistent. Both family and succession law are more sensitive areas, fenced by protectable interests of the weaker parties, and it is logical that the State should be more involved (i.e. wielding more influence and greater control) in these areas than in relation to commercial transactions.

2 *Mills*, Party Autonomy in Private International Law, p. 444.
3 *Mills*, Party Autonomy in Private International Law, p. 6, 8.
4 *Mills*, Party Autonomy in Private International Law, p. 29–90; *Basedow*, The Law of Open Societies: Private Ordering and Public Regulation in the Conflict of Laws, p. 149–152; *Nygh*, Autonomy in International Contracts, p. 258.
5 *Mills*, Party Autonomy in Private International Law, p. 21.
6 E.g. the Hague Convention of 15 June 1955 on the Law Applicable to International Sales of Goods.

But the need for foreseeability and individual freedom also exists in relation to family and succession law, and it may actually be stated that party autonomy as a form of exercising human rights is a claim that can be said to be strongest in relation to family law.[7] Hence, it is logical that that there has been a trend towards party autonomy in family and succession law, but it is also natural that the freedom that this creates is connected to special protection mechanisms. In contrast to the principal rule in commercial law, where party autonomy usually is provided in an open-ended fashion (i.e. with more or less complete freedom to choose), the principal rule in family law is rather limited (occasionally described as indirect) autonomy.[8]

Limited party autonomy is usually designed in relation to different objective connecting-factors and autonomy in this context means that the parties are allowed to choose between a number of given options, usually selected in view of their strong connection to the dispute at hand. Hereinafter, I will use the term limited autonomy to denote this situation and I will use the term indirect autonomy for situations where parties can influence choice of court and law by means other than an agreement. One such example is when jurisdiction is conferred to a court by the appearance of the defendant. Another example is when a number of different options focusing on objective connecting-factors are expressed directly in law, providing the plaintiff with an individual possibility to choose (among the different alternatives). This kind of freedom is indeed individual, but it does not really encompass party autonomy, as these choices are unilateral acts and not agreements between the parties.

As regards the recent developments in family law, it can first of all be concluded that modern families do not fit the traditional and conservative framework, which indicates that family law (including its international dimension) needs to adapt. This adaption is, as will be further developed below, on-going. As indicated above, the usual way to address party autonomy in this area of law is to provide the parties with means to choose between different forms of objective criteria. There may also be additional choices, e.g. due to multicultural identity providing room for a choice between different forms of personal identities that can be transferred into different objective criteria, but such elaborate choices will not be included in the presentation that follows.[9]

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7 *Mills*, Party Autonomy in Private International Law, p. 72.

8 *Mills*, Party Autonomy in Private International Law, p. 14.

9 Multicultural identity and its effects on autonomy are discussed by *Mills*, Party Auton-

III. Party autonomy in European family and succession law

1. Introductory remarks

Although this contribution deals with family and succession law, it may be relevant to remember that party autonomy was an integral part of the original Brussels Convention of 1968. It may thus be stated that party autonomy has been a living concept since the beginning of the development of European private international law.[10]

It will therefore be no surprise that party autonomy was also considered in relation to the first instrument in family law – the Brussels II regulation – that was negotiated during the 1990s and adopted in 2000. From the outset, it can be concluded that the EU version of party autonomy in family and succession law is primarily designed as limited.

In this section, the different European instruments will be covered in chronological order and a specific focus will be put on different provisions that provide for (limited) party autonomy. Indirect autonomy is treated in a more synoptical manner. A comparison with the development of party autonomy in Sweden will follow in section IV, and further analysis in section V and VI.

2. The Brussels II Regulations

a. Past

The Brussels II Regulation was inspired by the 1996 Hague Child Protection Convention and thus the first version of the Regulation is – in important aspects – similar to the Convention. There are no express provisions regarding party autonomy in the Brussels II Regulation, but the Regulation allows for different types of choices. As regards divorce proceedings, the choice is comprised of the possibility for the parties to choose among the jurisdictional rules that are present in the Regulation (Art. 3–6). All choices are based on a strong connection to the forum and in principle (not least due to the express wording of Art. 7), imply that there are no additional possibilities

omy in Private International Law, p. 445. Related problems are discussed in CJEU, 02. 10. 2003, C-148/02 (*Garcia Avello/Belgium*), where the CJEU is providing guidelines for handling dual nationality issues which opens the way for indirect choices.

10 See further *Jenard* Report, p. 36–38.

to prorogate jurisdiction, and that there is no possibility to derogate jurisdiction in the sense that it is not possible to enter into an agreement in order to prevent a court that bases its jurisdiction on the rules in Art. 2–6 from hearing a case.[11] As regards divorce jurisdiction, the only provision that provides for party autonomy would be Art. 2 (a) indent 4, where the parties have a possibility to actively promote the competence of a specific court by a joint application.

As regards parental responsibilities, the Brussels II Regulation is (almost) silent when it comes to party autonomy. However, a sign of potential party autonomy is visible in Art. 3 (2), which provides that courts of a Member State exercising divorce jurisdiction shall have jurisdiction in a matter relating to parental responsibility over a child of both spouses also in some situations where the child is not habitually resident in that Member State. A precondition is that at least one of the spouses has parental responsibility in relation to the child and that the jurisdiction of the court has been accepted by the spouses and is in the best interests of the child.

The provision speaks of acceptance in relation to jurisdiction and it is, if anything, similar to the tacit choice of jurisdiction that may be found in Art. 26 Brussels I bis Regulation. This is not an express choice of court provision, but it is an indirect possibility for parties to actively give competence to a court (in addition to the divorce competence that is provided for by the Regulation).

b. Present

When the Brussels II Regulation was amended and transformed into the present Brussels II bis Regulation, the rules on party autonomy were further developed, particularly in relation to parental responsibility.

The Brussels II bis Regulation still provides limited options for autonomy in relation to divorce proceedings. The old Art. 2 (a) indent 4 is now to be found in Art. 3 (a) indent 4, and there is no change of wording. As regards parental responsibility, the old Art. 3 (2) has been extensively developed and amended and there is now an expressed, open-ended (albeit limited) provision regarding "real" party autonomy that is to be found in Art. 12 (3). The old provision in Art. 3 (2) has been transferred into a slightly amended version in the new Art. 12 (1). This provision still deals with the possible

11 *Magnus/Mankowski,* in: Magnus/Mankowski, Brussels II bis Regulation, Introduction note 129 et seq.

extension of jurisdiction for divorce courts to also handle questions regarding parental responsibility. The difference is that the old "acceptance" requirement has been enhanced insofar as the jurisdiction is to be accepted, expressly or otherwise, in an unequivocal manner by the spouses and by the holders of parental responsibility. The provision still provides room for the court's discretion in the sense that it is mandatory that the jurisdiction is in the best interest of the child.[12] In this regard, it is relevant to note that the possibility to prorogate jurisdiction is mentioned as an exception to the principle rule that competence should reside with the court where the child has its habitual residence and that the Regulation is shaped in order to secure the best interest of the child.[13]

The real novelty (as regards party autonomy) in the Brussels II bis Regulation is Art. 12 (3), which provides for a choice of court possibility for cases regarding parental responsibility irrespective of the divorce jurisdiction of the court. Art. 12 (3) states that courts of a Member State shall also have jurisdiction (in addition to the possibilities mentioned in Art. 12 (1) about extension of the competence for divorce courts) in relation to parental responsibility if the child has a substantial connection with that Member State and the jurisdiction of the courts has been accepted, expressly or otherwise, in an unequivocal manner by all the parties to the proceedings. Also, in relation to this provision, there exists room for discretion built on the fact that the seized court shall take into account the best interest of the child.

As regards the close connection criteria, it is mentioned that such a connection can be created by the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State (Art. 12 (3) (a) Brussels II bis Regulation).

When it comes to the application of the Brussels II bis Regulation, there are some CJEU cases. In case C-436/13 (*E/B*), some issues regarding Art. 12 (3) were discussed, namely temporal aspects with regard to the competence that may be established through this provision.[14] It was argued that a court, once competent under Art. 12 (3), should remain competent in "similar issues" even after the case was finally decided. The CJEU however, firmly declined

12 It may be noted that the English version of Art. 12 uses different expressions in Art. 12 (3) – best interest of the child – and Art. 12 (1) (b) – superior interest of the child. It seems, however, that this difference it not supposed to impose a different meaning. See *Pataut,* in: Magnus/Mankowski, Art. 12 Brussels II bis Regulation note 51 et seq. and 55. The conclusion is further confirmed by other language versions (e.g. the Swedish version) where the same wording applies in both provisions.

13 Recital 12 Brussels II bis Regulation.

14 CJEU, 01. 10. 2014, C-436/13 (*E/B*).

this proposition and clarified that the jurisdiction of a court in matters of parental responsibility must be verified and established in each specific case where a court is seized, which implies that it does not continue after pending proceedings have been brought to a close.[15]

In case C-656/13 (*L/M*), there were two questions regarding Art. 12 (3).[16] The first question dealt with the scope of application, with the CJEU confirming that this provision must be interpreted as allowing, for the purposes of proceedings in matters of parental responsibility, the jurisdiction of a court of a Member State which is not that of the child's habitual residence, to be established even where no other proceedings are pending before the court chosen.[17] The second question regarded the expression "accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings". The CJEU concluded that it cannot be considered that the jurisdiction of the court seized by one party has been "accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings" within the meaning of that provision where the defendant in those first proceedings subsequently brings a second set of proceedings before the same court and, on taking the first step required in the first proceedings, pleads the lack of jurisdiction of that court.[18]

In case C-215/15 (*Gogova/Iliev*), it was clarified that an absent defendant on whom the document instituting proceedings had not been served and who was unaware that proceedings had commenced, cannot in any event be regarded as accepting that jurisdiction.[19] Thus, the requirements in Art. 12 (3) that prorogation shall be "accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings" is not fulfilled solely because the legal representative of the defendant, appointed in view of the impossibility of serving the document instituting proceedings on the defendant, has not pleaded the lack of jurisdiction before the court that is to take a decision on its competence.[20]

Finally, in case C-565/16 (*Saponaro/Xylina*), it is clarified that the joint lodging of proceedings by the parents of the child before the court of their choice is an unequivocal acceptance by them of the competence of that court.[21] It is further established that a prosecutor who, according to the law of

15 CJEU, 01. 10. 2014, C-436/13 (*E/B*), note 45–50.
16 CJEU, 12. 11. 2014, C-656/13 (*L/M*).
17 CJEU, 12. 11. 2014, C-656/13 (*L/M*), note 52.
18 CJEU, 12. 11. 2014, C-656/13 (*L/M*), note 59.
19 CJEU, 21. 10. 2015, C-215/15 (*Gogova/Ilev*).
20 CJEU, 21. 10. 2015, C-215/15 (*Gogova/Ilev*), note 47.
21 CJEU, 19. 04. 2018, C-565/16 (*Saponaro and Xylina*).

the forum State, has the capacity of a party to the proceedings commenced by the parents, is a party to the proceedings within the meaning of Art. 12 (3) (b). In the capacity of party to the proceedings, it is possible to preclude jurisdiction by opposition, but the lack of such opposition may be regarded as an implicit agreement, meaning that the condition of the unequivocal acceptance of prorogation of jurisdiction by all the parties to the proceedings may be held to be satisfied.[22]

In summary, it can be concluded that the Brussels II bis Regulation provides a limited version of party autonomy with choices that are based on existing strong objective connections to the forum. It can also be noted that the Regulation provides for plenty of room for court discretion (usually based of the best interest of the child) and for a specific provision on *forum non conveniens* (Art. 15).

In this regard, it can be stated that the Regulation does not really contain an expression of party autonomy, but is rather an expression of efficiency in relation to proceedings, with some options.[23]

c. Future

The Brussels II ter Regulation does not entail any substantive amendments as regards party autonomy. The question of party autonomy is furthermore not directly commented on in the discussions that preceded the new Regulation.[24] One observation is that the title of Art. 12 Brussels II bis Regulation (which will be Art. 10 in the Recast) is amended from prorogation of jurisdiction to choice of court. In an earlier version of the now adopted Regulation, it was suggested that this title should be "Choice of court for ancillary and autonomous proceedings" which, in a sense, would be a better description inasmuch as it indicates that this provision does not really entail any freedom of choice for the parties, but rather some limited options for specific situations.[25] Nevertheless, it can be concluded that party autonomy exists (albeit in in a limited fashion) in relation to jurisdiction regarding divorce and parental responsibility proceedings, but the principal rule is still that jurisdiction should be based on the express rules in the Regulation and all posibilities to find a competent court are based on a true and strong connection to the forum. Hence, the novelty in the Brussels II ter Regulation is not the

22 CJEU, 19. 04. 2018, C-565/16 (*Saponaro and Xylina*), note 40.
23 *Pataut,* in: Magnus/Mankowski, Art. 12 Brussels II bis Regulation note 1–9.
24 COM (2016) 411 final.
25 COM (2016) 411 final, p. 37.

introduction of party autonomy, but rather the introduction of a far reaching discretion for courts to take into account the best interest of the child and an express *forum non conveniens* provision that allows a court to deny its competence in favor of a more suitable court.

In light of the fact that the Brussels II ter Regulation was adopted in 2019, it is not likely that there will be a development towards enhanced party autonomy in the fields covered by the Regulation in the near future.[26]

A potential development of a new form of party autonomy would be the strengthened position for children affected by disputes, by the fact that they are to be heard to a greater extent than before. Such hearings have a potential influence on jurisdiction and may thus be developed as an expression of indirect party autonomy, with the twist that children in these circumstances are to be regarded as third parties. Irrespective of this, it is not unlikely that there will be a development where spouses with parental responsibility will try to affect the issue of competence by influencing their children. Such a development is likely inevitable when the child's voice becomes more influential, but it is a development that needs to be closely monitored in order to make sure that it is the interest of the child that is in focus and not the indirect interest of parents – trying to influence the court's decision regarding its own competence by exercising influence over their children.

3. Maintenance

a. Introductory remarks

As regards maintenance, the EU has chosen a two-pronged solution. Questions regarding jurisdiction and recognition and enforcement are covered by the Maintenance Regulation and questions regarding choice of law are answered by the 2007 Hague Maintenance Protocol. This latter instrument was adopted by the EU as a member of the HCCH and thereby became applicable in the EU Member States. Instead of turning the Protocol into a regulation (e.g. by including rules on choice of law directly into the Maintenance Regulation), it was decided that the Protocol should be directly applicable in the Member States. In this section, aspects regarding party autonomy will be discussed first in relation to the Regulation and thereafter to the Protocol.

26 The Brussels II ter Regulation was adopted on 25.06.2019, but it will not be applied until 01.06.2022 (cf. Art. 100 (1) Brussels II ter Regulation).

b. The Maintenance Regulation

The Maintenance Regulation contains a specific provision in Art. 4 regarding choice of court. This is a concrete expression of party autonomy, but it is still an autonomy with limitations. The recitals clarify that party autonomy in this regard exists in order to increase legal certainty, but it is also emphasized that such autonomy should not be allowed in the case of maintenance obligations towards a child under the age of 18.[27]

The options that are available for choice of court agreements are all forums with an established strong connection to the dispute, making it possible for the parties to agree on a court of a Member State in which one of the parties is habitually resident or of which one of the parties has the nationality. In addition, spouses or former spouses may also choose the court which has jurisdiction to settle their dispute in matrimonial matters or the court of the Member State of the spouses' last common habitual residence for a period of at least one year (Art. 4 (1)).

The jurisdiction conferred by an agreement shall be exclusive unless the parties have agreed otherwise; additionally, the agreement shall be in writing (Art. 4 (1) and (2) Maintenance Regulation). It is also to be observed that the choice of court agreements discussed in Art. 4 are not applicable in relation to a child under the age of 18 (Art. 4 (3)). The Regulation also provides an indirect autonomy inasmuch as it allows "tacit" agreements (Art. 5).

As regards the application of the Regulation, there is no case law that specifically deals with the rules on party autonomy in Art. 4. In order to find a case that actually addresses aspects of autonomy in relation to maintenance, we need to look at Art. 5 and its rule regarding jurisdiction based on the appearance of the defendant. In this regard one case that may be of interest is C-468/18 (*R/P*).[28]

The case regards a complicated, but not unusual, situation with three heads of claims: divorce, parental responsibility, and maintenance. The Romanian court seized was competent regarding the application for divorce, but not for the parental responsibility claim. The question regarding the competence to hear the maintenance claim was addressed to the CJEU, among other things, regarding the fact that the defendant had appeared without contesting the court's competence. Thus, the application of Art. 5 was discussed and the CJEU concluded that the Romanian court was to be regarded

27 Recital 19 Maintenance Regulation.
28 CJEU, 05. 09. 2019, C-468/18 (*R/P*).

as competent if the defendant, in accordance with Art. 5, had appeared before that court.

c. The 2007 Hague Maintenance Protocol

As regards choice of law, the 2007 Hague Maintenance Protocol is the central instrument. The Protocol entails a rather strict regulation in favor of the law of the State of the habitual residence of the creditor (Art. 3).

Regarding autonomy, there are several relevant provisions. To begin with, the Protocol leaves some room for indirect autonomy. One such example is that the creditor will, by seizing a competent court or other authority, influence the choice by making the law of the forum applicable. This is not real party autonomy though, and the influence is limited by safeguards in the situation where the creditor is unable, by virtue of the law of the forum, to obtain maintenance from the debtor, allowing a court to apply e.g. the law of the State of the habitual residence of the creditor (Art. 4 of the 2007 Hague Maintenance Protocol).

In addition, there is a specific rule regarding spouses that allows the parties to object against the application of Art. 3 and 4 of the Protocol, and thereby compel the court to apply a law to which the marriage has a closer connection. This would typically be the State of the spouses' last common habitual residence (Art. 5).

In addition, there are express rules in favor of party autonomy. In Art. 7, it is provided that the maintenance creditor and the debtor, for the purpose only of a particular proceeding (e.g. an on-going divorce proceeding or a proceeding regarding parental responsibility), in a given State may expressly designate the law of that State as applicable to a maintenance obligation.

Furthermore, Art. 8 provides that the maintenance creditor and the debtor may at any time designate one of the following laws as applicable to a maintenance obligation: a) the law of any State of which either party is a national at the time of the designation; b) the law of the State of the habitual residence of either party at the time of designation; c) the law designated by the parties as applicable or the law in fact applied to their property regime; d) the law designated by the parties as applicable, or the law in fact applied to their divorce or legal separation.

But there are still certain safeguards. To begin with, choice of law agreements under Art. 8 are not applicable in respect of a person under the age of 18 or of an adult who, by reason of an impairment or insufficiency of his or her personal faculties, is not in a position to protect his or her interest

(Art. 8 (3)). Another safeguard deals specifically with questions of renouncement in relation to which the law of the State of the habitual residence of the creditor at the time of the renouncement shall be applied, irrespective of potential choice of law agreements.

Finally, Art. 8 (5) provides room for court discretion inasmuch as it allows the court to refuse to apply the law designated by the parties where the application of that law would lead to manifestly unfair or unreasonable consequences for any of the parties.

Thus, it can be concluded that the Protocol provides an open-ended party autonomy rule, but it is still a rule that is embedded in a safe environment and there is still plenty of room for discretion. As regards the application of the Protocol, there are no decisions from the CJEU dealing with party autonomy.

4. The Rome III Regulation

In order to complement the Brussel II bis Regulation it was discussed to establish another regulation on conflict of laws in relation to divorce proceedings. This, however, appeared to be a mission impossible if all Member States were to agree on a joint wording. Thus, some Member States decided to pursue the project in line with the existing possibilities of enhanced cooperation and this made the Rome III Regulation possible. The Regulation, however, is not applicable in Sweden which had strong dissenting opinions in the negotiations.

In relation to this Regulation, it is emphasized that the increased mobility among EU citizens calls for flexibility and legal certainty and, in order to pursue these objectives, party autonomy should be enhanced.[29] Autonomy, however, should be limited to the laws of the countries with which the spouses have a special connection. Moreover, their choice should be informed in order to ensure that the two spouses are aware of the legal implications of the choice of law agreement that they have concluded.[30]

The provision on party autonomy in Art. 5 Rome III Regulation provides the spouses with a possibility to choose among four explicit options: the law of the State where the spouses are habitually resident, the law of the State where the spouses were last habitually resident, insofar as one of them still

29 Recital 15 Rome III Regulation.

30 Recital 16 and 18 Rome III Regulation.

resides there at the time the agreement is concluded, the law of the State of nationality of either spouse or the law of the forum (Art. 5 (1)).

The choice of law provision in Art. 5 is prompted by a specific rule regarding consent, providing that a spouse that wants to establish that he or she did not consent to the agreement, may rely upon the law of the country in which he or she is habitually resident at the time the court is seized. Provided that it appears from the circumstances that it would not be reasonable to determine the effect of the consent in accordance with the law otherwise applicable according to the Regulation (Art. 6).

As regards the Rome III Regulation, it can be observed that discussions about party autonomy are more elaborate in the recitals compared to prior instruments. This might be an indication that party autonomy is also increasingly accepted in relation to "sensitive issues". Another observation is that the Regulation introduces a concept of consent (i.e. informed agreements). It may be argued that such prerequisites are implied in relation to all agreements, but the fact that this is made explicit in the Rome III Regulation underlines that the freedom to choose in this area of the law is to be handled with caution. It further underlines that courts in this field retain control over the adjudication of justice by a wide-reaching discretion.

As regards the application of the Regulation, there are no decisions from the CJEU that deal with the different provisions regarding party autonomy.

5. The Succession Regulation

Rules regarding succession are to be found in the Succession Regulation. One of the objectives of this Regulation is to enable citizens to know in advance which law will apply to their succession. Such legal certainty should be achieved with harmonized conflict of law rules and the applicable law should – as a principal rule – govern the succession as a whole.[31] Furthermore, it is stated that citizens should have the possibility to organize their succession in advance by choosing the law applicable to their succession. That choice, however, is not open-ended but limited to the law of a State of their nationality in order to ensure a connection between the deceased and the law chosen.[32]

This indicates that there is party autonomy as regards choice of law, but the recitals are quiet as regards prorogation. Still, there are some possibilities

31 Recital 37 Succession Regulation.

32 Recital 38 Succession Regulation.

to choose a court in addition to the limited options to choose the applicable law.

The Regulation actually introduces a dual system which enables a choice of court in the Member State whose law has been chosen by the deceased to govern the succession (Art. 5). Irrespective of an explicit choice of court agreement, a court of the Member State whose law has been chosen may have jurisdiction if the parties to the proceedings have expressly accepted the jurisdiction of the court seized (Art. 7 (c)).

In addition to the limited versions of party autonomy that are provided, there is also a possibility to base jurisdiction on appearance, under specific circumstances (Art. 9 Succession Regulation).

The overall impression is that the rules governing jurisdiction are rather technical and that it is difficult to foresee to what extent party autonomy will actually thrive in this environment. Either way, it is clear that the central provision regarding party autonomy in the Regulation is the rule in Art. 22 regarding choice of law.

The choice of law provision in the Regulation is, in contrast to the intertwined rule about jurisdiction, rather straightforward.[33] According to Art. 22, a person may, as the law to govern his or her succession as a whole, opt for the law of the State whose nationality he or she possesses at the time of making the choice or at the time of death (Art. 22 (1)). The choice shall be made expressly and the substantive validity of the act whereby the choice of law was made shall be governed by the chosen law (Art. 22 (2) and (3)). A specific possibility is provided for persons with multiple nationalities, as they may choose the law of any of the States whose nationality they possess (Art. 22 (1)).

As regards the application of the Regulation, there are so far no decisions from the CJEU that deal with the different provisions regarding party autonomy.

6. The Property Regimes Regulations

There are two mirroring EU-instruments dealing with property regimes. The first concerns matrimonial property regimes (Matrimonial Property Regulation) and the second matters of property consequences of registered

33 It may be relevant to note that similar provisions are included in Art. 5 of the Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons.

partnerships (Partnership Property Regulation). The two instruments are in important aspects identical and will be covered together in the following section, based on the provisions that are to be found in the Matrimonial Property Regulation.

The two Regulations that form part of the enhanced cooperation within the EU leave room for party autonomy in relation to both jurisdiction as well as choice of law.[34] In the recitals, it is emphasized that party autonomy is important in order to make sure that the spouses are able to manage their property, but it is also highlighted that it is important that such agreements should be properly notified and that a choice should be informed and that the parties actually have expressed their clear consent to the agreement.[35]

The provisions in the Property Regimes Regulations are well-aligned with rules on party autonomy in other European instruments. The Regulations establish party autonomy within limits, allowing for choices between forums and laws of Member States with an established connection to the dispute at hand.

As regards jurisdiction, the Regulation makes two distinctions. The first situation relates to situations where a court of a Member State is seized to rule on an application for divorce, legal separation or marriage annulment pursuant to the Brussels II bis Regulation. Such a court shall also have jurisdiction to rule on matters of matrimonial property arising in connection with that application (Art. 5 (1) Matrimonial Property Regulation). In relation to these kinds of situations, there is room for party autonomy for the spouses to agree on jurisdiction and this autonomy comprises a possibility to choose from the courts that are potentially competent according to the Brussels II bis Regulation (Art. 5 (2) Matrimonial Property Regulation).

The second situation relates to other disputes (e.g. disputes not covered by the Brussels II bis Regulation). In these other cases, jurisdiction for matters of matrimonial property shall lie with the courts of a specific Member State according to a hierarchy of exclusive options starting with a court in the Member State in which the spouses are habitually resident, or failing that, where the spouses where last habitually resident or, failing that, where the respondent is habitually resident or, failing that, the court of the Member State of the spouses' common nationality (Art. 6 Matrimonial Property Regulation).

34 The fact that there is room for party autonomy in this area of the law was already established in 1978 when the Hague Convention on Matrimonial Property Regimes was enacted, but the Convention only covers choice of law aspects.

35 Recital 45, 46, and 47 Matrimonial Property Regimes Regulation.

According to Art. 7, there exists party autonomy inasmuch as it is possible for the parties to choose the forum in connection with their choice of law, i.e. if a valid choice of law exists, the parties may also agree that the courts in the country of the chosen law should be competent.

Hence, the choice of law agreement may have an influence on jurisdiction. Choice of law is covered by Art. 22, and it is stated that spouses or future spouses may choose between the law of the State where the spouses or future spouses, or one of them, is habitually resident or the law of a State of nationality of either spouse or future spouse.

The agreement shall be expressed in writing and a certain safeguard exists to make sure that a spouse is able to object that she or he did not consent to the choice of law agreement (Art. 23 and 24 Matrimonial Property Regulation).

As regards the application of the Regulation, there are so far no decisions from the CJEU that deal with the different provisions regarding party autonomy.

IV. Party autonomy in Sweden (and the Nordic countries)

1. Introductory remarks

As regards the development of party autonomy in Sweden, it should be stated, from the outset, that there are only a few examples of party autonomy in family and succession law. In older Swedish legal history, the elements of private international law are sparse. It was not until around 1900 that private international law was actually regulated in Sweden.[36] Nevertheless, there have been discussions about private international law, e.g. in relation to the status of the principle of nationality and the principle of residence, and the dilemma of different countries applying the different principles. Primarily, the discussions have focused on which principle should

36 The sources referred to in this section are commissions of inquiry (SOU), a statement of opinion from a parliamentary committee (LOU, indicating that this statement is from the Law Committee) and Government bills (Prop.), e.g. the Government's proposals for new legislation. The documents are available in Swedish only. Most of the documents can be found on the homepage of the Swedish Parliament (Riksdagen): https://riksdagen.se/en/. Further information on preparatory acts in Sweden can also be found in English. For a more comprehensive discussions regarding the development of party autonomy in Sweden, see *Jänterä-Jareborg*, Partsautonomi och efterlevande makes rättsställning, p. 272–352.

prevail, rather than how the principles should be applied or how to bridge conflicts between countries that apply the different principles.[37]

The first major legal codification in the area of private international law is a general regulation regarding international marriages, but this rather comprehensive regulation does not contain any specific provisions regarding party autonomy.[38]

In contemporary Swedish private international law, there are only three examples of express rules that provide room for party autonomy within the field of family and succession law. The first to mention is the Ordinance (1931:429) on Certain International Legal Relations Concerning Marriage, Adoption and Guardianship, and the second is Act (1990:272) on Certain International Legal Relationships Concerning the Property Effects of Marriage and Co-habitation. A third (and final) example is a recently adopted Act complementing the Property Regimes Regulations.[39] It is a third example, but a more appropriate description would probably be that it is an example derived from the second, as the 1990 Act was revoked by the new 2019 Act. However, considering the fact that the Regulations only apply in relation to marriages and partnerships entered into on or after 29 January 2019, the old revoked Act will be relevant for a long time to come. Hence, both the old and new Act will be discussed below.

2. Ordinance (1931:429) on Certain International Legal Relations Concerning Marriage, Adoption and Guardianship

During the Nordic legislative co-operation in the field of substantive family law during the 1910s and 1920s, requests were made for a treaty regulating certain international family law issues in the relationship between the Nordic countries. This was, however, complicated by the fact that Sweden and Finland applied the principle of nationality, while Denmark, Iceland and Norway applied the principle of residence.

After some initial hesitation, it was considered possible to accept an arrangement which meant that a citizen of one of the Nordic countries, who

37 SOU 1969:60, p. 33.

38 Act (1904:26) on Certain International Aspects Regarding Marriage and Custodianship (Lag (1904:26) om vissa internationella rättsförhållanden rörande äktenskap och förmynderskap).

39 Act (2019:234) on Certain International Aspects Regarding Spouses' and Co-Habitants' Property Regimes (Lag (2019:234) om makars och sambors förmögenhetsförhållanden i internationella situationer).

was domiciled in one of the others, would in the areas unified by the joint legislative work be considered to fall under the authority of that country. On the few points where important differences remained between the substantive rules of the different countries, it was instead considered appropriate to apply the principle of nationality. After agreeing on these main issues, a convention was concluded on 6 February 1931 between Sweden, Denmark, Finland, Iceland, and Norway containing private international law provisions on marriage, adoption and guardianship, which resulted in the 1931 Ordinance (1931:429).[40] In the original text from 1931, there was no mention of party autonomy. Instead, party autonomy in this context became an issue almost 80 years after the entry into force of the original text.

In March 2007, the Swedish government proposed an amendment to the 1931 Ordinance stating that Sweden should approve and accede to the agreement of 26 January 2006 between the Nordic countries amending the Convention of 1931.[41] The provisions of the Nordic Marriage Convention on the law applicable to spouses' property relations had not been amended since the Convention entered into force in 1931. The substantive rules on the spouses' property relations were well coordinated at that time, but in all the years that had passed, the rules became increasingly different between the countries, mainly due to new legislation, but also through a somewhat separated development in case law. After 75 years without a single change, it was considered necessary to update and modernize the legal text.

The purpose of the submitted amendment was thus to adapt the Nordic legislation to other regulations in the field, especially the Law (1990:272) on Certain International Legal Relations Concerning the Legal Effects of Marriage (hereinafter: 1990 Act). Unlike the Nordic Convention, the conflict of law rules in the 1990 Act allowed spouses or prospective spouses to agree on applicable law.

When the Swedish parliament decided to adopt the amendments on 7 June 2007, party autonomy was (finally) introduced into the ordinance through a new wording in Section 3.[42] This provision is, as indicated above, modelled on the similar provision in the 1990 Act and it is a clear example of limited party autonomy, as it provides options that have a close relation to the spouses. It addresses the possibility to agree on the law of a

40 SOU 1969:60, p. 33.

41 Prop. 2006/07:60, p. 1.

42 Act (2007:522) Amending the Ordinance (1931:429) on Certain International Legal Relations Concerning Marriage, Adoption and Guardianship (Lag (2007:522) om ändring i förordningen (1931:429) om vissa internationella rättsförhållanden rörande).

specific country to govern the spouses' property regimes. Such an agreement is, under certain preconditions, valid if it relates to either the law of the country of which either spouse is a national or the country in which either spouse has his/her habitual residence. A third option, available when one or both spouses establish a new habitual residence after marriage, is to designate the law in the contracting State where both spouses had their last habitual residence.

The new provision entered into force on 1 December 2008 and it has not given rise to any particular problems. It is a rather straightforward rule that closely follows established principles regarding party autonomy in relation to property regimes and it thus – at least according to the drafters of the provision – provides for a more appropriate regulation with enhanced predictability for spouses in inter-Nordic relationships regarding applicable law.[43]

3. Act (1990:272) on Certain International Legal Relationships Concerning the Property Effects of Marriage and Co-Habitation

As already indicated, one of the main inspirations for the introduction of party autonomy in the Nordic ordinance was the already existing Swedish regulation regarding property regimes in international marriages. In this area – property regimes between spouses – party autonomy has played a more influential role.

The first time party autonomy was mentioned was in Justice *Wallin's* comment on the Parental Code in 1952, in which he spoke in favor of a mixed system. He also emphasized that a principle, that seemed well justified, was that different issues in a family law relationship did not all need to be assessed according to the law of one and the same country. There should be freedom to make a decision according to what was natural for each particular group of issues. In some cases, it could possibly be thought of as a solution of necessity that a party was given the right to choose between different personal statutes.[44] This reasoning is not developed further, and it does not lead to any specific provisions. The discussion, however, suggests that a seed has been planted, from which future provisions regarding party autonomy may grow.

It took some time for that seed to develop, but eventually in SOU 1987:18 on international family law issues and in the Law Committee's report

43 Prop. 2006/07:60, p. 10.

44 SOU 1969:60, p. 41 et seq.

1989/90:LOU32 to the Government Bill 1989/90:87 on certain international issues concerning spouses' property relations, the discussions about the introduction of party autonomy gained momentum. Reference was made to the work on the 1978 Hague Matrimonial Property Convention, in which the importance of party autonomy was emphasized as a solution to bridge the differences between countries that apply the principle of nationality and those applying the principle of habitual residence. The Convention provided the opportunity for spouses to enter into agreements both before and during a marriage. By reaching an agreement on which law is to be applied to their property relationship, spouses could remove any ambiguities and submit to an arrangement that they found objectively appropriate.[45]

Although the arguments for introducing party autonomy into Swedish law were taken from the work on the 1978 Hague Matrimonial Property Convention, it was never intended to ratify it. While discussing this in the governmental report that preceded the final Swedish legislation, the family law experts recommended not acceding to the Convention. The assessment was based, among other things, on the fact that it was unlikely that a large number of States would do so (at the time of submission of the final report, only five States had signed and not a single State had ratified the Convention).[46]

On 1 July 1990, party autonomy was introduced for the first time into Swedish international family law, when the Act (1990:272) replaced the Act (1912:69).

The provision regarding party autonomy is included in Section 3. This provision entails a clear example of limited party autonomy as it provides options that have a close relation to the spouses. It allows them to agree, in writing, that the law of a specific country should be applicable as regards the spouses' property regimes. Such an agreement is, under certain preconditions, valid if it designates either the law of the country of which either spouse is a national or the country in which either spouse has his habitual residence. The provision also provides a similar possibility for a surviving spouse to enter into agreements with the heirs of the deceased.

Compared with the text of the 1978 Hague Convention, that in a way may be regarded as a model for the Swedish Act, it may be noted that the Swedish version is somewhat different. The Convention is generally much more elaborate in its regulations and it establishes a third alternative (besides nationality and domicile) in Art. 3 (3), i.e. the law of the first State where one

45 SOU 1987:18, p. 95.

46 SOU 1987:18, p. 189 et seq.

of the spouses establishes a new habitual residence after marriage. The Convention also expressly deals with immovables and states that it is possible to designate, with respect to all or some of the immovables, the law of the place where these immovables are situated (Art. 3 (3)). In contrast, the Convention has no provision that allows for a surviving spouse to enter into agreements with the heirs of the deceased.

This difference in wording between the Swedish Act and the 1978 Hague Convention is not specifically discussed in the Swedish preparatory acts.

4. Act (2019:234) on Certain International Aspects Regarding Spouses' and Co-Habitants' Property Regimes

In relation to the enactment of the Property Regimes Regulations, Sweden adopted a new legislative act, with the ambition to complement the Regulations and to simplify and update other related Swedish Acts in the field of property regimes in international family law. As described above, the new Act revokes the 1990 Act and relevant provisions regarding property regimes in the 1931 Ordinance are transferred into the new Act (among other things sections 3, that was presented and described above). It is thus relevant to discuss the rules regarding party autonomy in the 2019 Act.

The 2019 Act is divided into different chapters. In addition to the rules that complement the Property Regimes Regulations (chapter 2), there are special rules regarding Nordic relations (chapter 3), other international relations (chapter 4), and co-habitants (chapter 5). This is not the place to present the new Act in detail, but in the following section, I will provide a brief overview.

From the outset, it is interesting to note that party autonomy is an integral part of the 2019 Act and that party autonomy exists as a possibility in all the abovementioned situations. Party autonomy is not specifically discussed in the preparatory works, but treated as a natural and integral part in the legislative process.[47] The 2019 Act only refers to existing rules on party autonomy in the Regulations. But, as regards both Nordic as well as other international regulations, there are specific rules in the 2019 Act. To a large extent, the rules in question are derived from and similar to the rules presented above (IV.2. and IV.3.) but they are generally more elaborate.

As regards Nordic relations, rules on party autonomy are to be found in Chapter 3 Section 8 to 11. The principal rule (section 8) is still that the

47 Prop. 2018/19:50.

spouses may choose either the law of the Nordic country of which either spouse is a national or the Nordic country in which either spouse has his/her habitual residence. A third option, available when one or both spouses establish a new habitual residence after marriage, is to designate the law in the contracting State where both spouses had their last habitual residence. A novelty in the 2019 Act is a specific rule (section 11) regarding immovable property, stating that the law of the Nordic country in which the property is situated shall be applied.

As regards other international relations, there are no specific rules regarding party autonomy, whereas the rules in the Property Regimes Regulations regarding choice of law are of a universal nature. Hence, we have a situation similar to the one described above, where the European regulations are to be applied in relation to marriages and partnerships entered into on or after 29 January 2019, and the old revoked 1990 Act will be applied in relation to older relations, also "other international" relations (e.g. such relations that are not EU or Nordic relations).

Finally, it may be of interest to note that the 2019 Act contains specific rules regarding co-habitants, also allowing for party autonomy. For co-habitants, the 2019 Act provides a possibility to choose the applicable law and it is the "traditional" choice that is available, e.g. a possibility to choose either the law of the country of which either party is a national or the country in which either party has his/her habitual residence. Such an agreement is valid if it is in compliance with other provisions (e.g. some specific rules regarding the distribution of estate) in Chapter 5 of the 2019 Act.

A brief concluding comment regarding the development in Sweden would be that party autonomy in Swedish international family law is a rather novel activity which, up-until recently, was disregarded, but now, it seems, is included as a natural and integral part of new legislation in the field. It seems likely that this rather dramatic – in terms of the limited timeframe – shift in perception is an obvious example of parallel development within the EU having a manifest influence on the mind-set of the national legislator.

V. Assessment of the benefits and risks of party autonomy

As has been discussed in the introductory section, party autonomy is a rather controversial issue that has, throughout history, been placed in the midst of the struggle between State sovereignty and individual (contractual) freedom. After having consulted present EU instruments, it may be concluded

that it seems to be individual freedom that has the upper hand and that it is the libertarian arguments that prevail, indicating a trend towards acceptance of contractual freedom. In parallel, however, it may also be concluded that more space is created for court discretion and that disputes are more frequently allowed to be assessed on a case-by-case basis. The increased possibility for parties to choose, which would usually indicate a development towards enhanced foreseeability, is effectively opposed by the increase in discretion. In the following section, I will identify some areas which illustrate the development as regards party autonomy and I will focus on four different divides, and finally address potential risks that this development may imply.

A first divide regards the realm of contract as opposed to other areas of the law and the fact that party autonomy for obvious reasons is closely related to contractual situations. One initial observation is that the ability to choose means that you, in a sense, take on the role of the legislator. This, however, is a statement that depends on the clarifications of the clauses. These can be regarded as part of the contract (e.g. included in the realm of contractual freedom) or as *sui generis* clauses that should be treated according to a different standard. Either way, it may be concluded that party autonomy thrives more in a contractual environment. Disputes relating to contracts are more accustomed to the idea of party autonomy, whereas in non-contractual obligations a different kind of justification is required. This divide originally established in relation to "obligations" is equally relevant in family and succession law. Hence, disputes in family and succession law may be divided according to this standard, meaning that issues that include contracts (wills, prenuptial agreements, and maintenance agreements) are more likely to be relevant in relation to party autonomy than issues of a non-contractual nature.

Another (second) divide would be the apprehension that some disputes should be regarded as mandatory, whereas others are to be regarded as non-mandatory, e.g. disputes that allow for out of court settlements. A typical example of a mandatory dispute are disputes regarding parental responsibility, disputes regarding parenthood, and disputes regarding divorce, while a typical example of non-mandatory disputes would be disputes regarding maintenance. According to this divide, party autonomy – regarded as a derivate of the party's freedom of choice – is only possible in relation to the latter group but not in relation to the former group.

A third divide is the one between man and money, between soft and hard cases. Family and succession law, on a general note, may be characterized as an area of law that deals with people – real people and people's lives and

families. Such issues and disputes are of a quite sensitive character. In contrast, issues that deal with money and/or property – hard cases – are less sensitive and thus more appropriate to contract on.

A fourth divide is that between private international law and the procedural law of the forum State. Party autonomy in private international law has a number of connotations that directly or indirectly relate to the procedural law that applies in the country of the court in which the dispute at hand is adjudicated. This has major implications regarding the possible strands of development for party autonomy. Private international law may be regarded as one of the areas in substantive EU law that is most manifestly harmonized, whereas procedural law has still to be regarded as a highly national area of law. It can be regarded as self-evident that this may pose problems, and that classification becomes crucial. When it comes to private international law, party autonomy will be an issue that is directly under the auspices of the CJEU. However, when the issue is classified as procedural it will be governed by national law and as such, an issue tackled by national courts applying the *lex fori* with no obligations to find solutions that would be workable outside of the national jurisdiction.

All the divides influence the development of party autonomy. To begin with, it is of crucial importance whether or not one takes as a starting point a libertarian approach – promoting freedom of choice – or if one takes a state sovereignty approach, upholding the idea that freedom to choose law and jurisdiction means that the parties assume the role of the legislator. In addition, it is important to note that there are national cultural differences. Some issues may be regarded as mandatory in some countries, whereas they are regarded as non-mandatory in others. There may also be differences in relation to how mixed conflicts are to be divided, e.g. a conflict dealing with both mandatory and non-mandatory issues or disputes regarding both man and money – hard and soft.

In this regard it needs to be observed that some issues are "vested" into State law and should never be open for the parties' freedom. One obvious example would be issues that involve children (not the least in their capacity as third parties in parental responsibility cases), that need the protection of the State in order to prevent potential abuse of freedom by the parents. Other issues are less sensitive and hence more readily available for a development of increased autonomy.

From a Swedish perspective – being representative of a liberal approach to divorce – it seems likely that we could foresee a cultural development that opens up to the possibility that the EU could agree on harmonized rules that allow spouses to divorce by private contract. This however, it not likely

in the near future and it is highly dependent on the cultural environment in which the mentioned development takes place.

In relation to the above, there are risks. An overly liberal approach may lead to a situation where the interests of the weaker party are being threatened, and a restrictive approach – purporting to follow strict State interests – may lead to inefficiency.

In this context, it needs to be acknowledged that legislators have a surmountable problem in order to find solutions that are able to balance all different interests involved. When trying to find legislative solutions that manage to balance a variety of interests there are obvious risks. One identifiable risk is that the development continues to be fragmented in contrast to an improved foreseeability. Another risk relates to regulatory design, i.e. the way in which new legislation is structured and constructed. It can be concluded that the development in private international law in this regard has not really enhanced foreseeability. With today's instruments, it is difficult to gain an overview over all options and much is provided in a hidden, indirect way, driving the development towards rules that are incomprehensible and almost impossible to understand and apply. The increased discretion (with the possibility to take into account "the best interest of the child", overriding mandatory rules, etc.) adds additional fuel for the conclusion that complexity is the new black.

Related to the risk of complexity, it may be noted that the acceptance of enhanced cooperation, where some but not all Member States advance with new legislation, entails the risk that harmonization within the EU will develop at different paces.

VI. Party autonomy and potential future developments

As regards the future of party autonomy, a first observation is that we are in the middle of an ongoing cultural shift, where the concept of family is under great pressure. This needs to be acknowledged and monitored. It is a matter of cultural awareness to observe as to the contemporary ways of living: people are more mobile; are less inclined to marry; live in co-habitant relations; are more willing to live in different forms of mixed relations. The law needs to relate to this development. And this development is – from a historical perspective – increasingly rapid. My impression is that this development is continuing, and that we can foresee a development whereby mandatory issues are transformed into non-mandatory issues, expanding the realm of potential issues that may be contracted on. Divorce could be one such example.

Another trend that may enhance party autonomy is the development of harmonized rules regarding recognition and enforcement. If free movement of court decisions is a principal rule, we indirectly give effect to foreign rules. If that is the case, why not apply foreign law directly in the first place? This indicates a form of hidden liberalization through the strict mechanism of recognition (among other things in the Brussel II bis Regulation), and it is likely that this development may be framed as a strong argument for further party autonomy in the future.[48]

The development of alternative forums for dispute resolution, also in the field of family law, adds to the "trend" that the State has a diminished influence over family law matters, indicating that parties might as well choose from the beginning.

Another observation that may indicate a future trend is the development within the EU towards including informed consent as a prerequisite for different types of choices (e.g. Art. 5 Rome III Regulation), establishing further options to complicate the adjudication of disputes and creating more elaborate possibilities for discretion. In addition, we can identify an enhanced focus on the best interest of the child. I am not criticizing this development, but I acknowledge that it may pose problems as it is a dual development that strengthens the position of weaker parties whilst simultaneously diminishing foreseeability. It is likely that this development will continue. Whether or not it guarantees justice will be seen in the future, but the development needs to be monitored. The complexity risk is a real threat and a precondition for efficient party autonomy is that it is possible to comprehend and assess available options.

At the end of the day, party autonomy is about society and it needs to be assessed in a contemporary context. The introduction of party autonomy into private international law is a relatively new phenomenon, so we have most likely only seen the (early) beginning of the development. For lawyers interested in party autonomy, it will be an exciting time to come.

48 The idea that mutual recognition, especially within the frame of instruments like the Brussels II bis regulation that lack common choice of law rules, fosters a form of hidden liberalization is further developed by *Meeusen,* Eur. J. Migr. L. 9 (2007), 287 (304).

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Child Protection in European Family Law

Rosario Espinosa Calabuig and Laura Carballo Piñeiro

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Abstract This contribution questions the effectiveness in practice of the plurality of sources applicable to child protection and aims to highlight some essential concepts that guide the application of the relevant instruments, namely the best interest of the child, the right to be heard, parental responsibility, and habitual residence. In general, child protection in European family law mainly relies on procedural rules that benefit from the mutual trust principle in the EU area of justice, but avoid addressing the legal divergence among Member States in these matters. While being apparently neutral, the reality is that these cultural conflicts reappear at the time of their application, as international child abduction cases illustrate.

Keywords parental responsibility, best interest of the child, international child abduction, Brussels II ter Regulation.

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I. Introduction

Child protection in European family law is mainly provided by rules on international jurisdiction, recognition and enforcement of decisions, and cooperation between authorities that take advantage of the mutual trust principle enshrined in the EU treaties. Conflict rules are dealt with by reference to the relevant Hague conventions seeking to avoid duplication and ensuring at the same time the exclusive competence of the EU in private international law matters. This approach is in line with the weight put on procedure on grounds of the best interest of the child principle, and thus on an almost case-by-case approach when it comes to protecting children. It also has the advantage of setting aside the divergence between EU Member States when it comes to family matters.

With respect to said approach, this contribution focuses on EU rules on parental responsibility that are procedural in content with a particular emphasis on the Brussels II ter Regulation of 25 June 2019. The main point is, nevertheless, that this instrument is not exhaustive, firstly, because maintenance matters are excluded from its scope of application, and secondly, because it coexists with other international and national instruments that have an impact on the family life of the child. Coordination of all these sources is not always a given, and even when it is, their fragmentation increases the difficulties in their application, especially for practitioners. This issue needs further attention regarding the extent to which the benefits of well-balanced rules might be lost if wrongly applied.

In order to provide some clarity, section III highlights some concepts that are key in law-making and decision-making in these matters. The UN Child Convention,[1] essential in shifting the legal status of the child from object to subject of rights, enshrines the best interest of the child as the cornerstone of child protection. In doing so, it also provides a voice to the child, elevating its right to be heard to the rank of a fundamental right. EU rules pay due respect to these rights that have a relation to all parental responsibility matters, a concept that was first developed by the HCCH, but now is part of the EU acquis. The same applies for the role of the habitual residence of the child in setting-up its protection. The next sections of this contribution discuss in which manner these key concepts have been embedded in the provisions on jurisdiction, child abduction, and recognition and enforcement of the Brussels II ter Regulation.

1 *Espinosa Calabuig,* Custodia y visita de menores en el espacio judicial europeo, p. 15; *Kilkelly/Lundy,* Child & Fam. L. Quart. 18 (2006), 331–350.

The examination of conflict rules on child protection has not been undertaken to the extent that EU law continues to make reference in these matters to the 1996 Hague Child Protection Convention. In doing so, the EU does not address the legal divergence in family matters among Member States that remains hidden behind the apparent neutrality of procedural rules. However, cultural conflicts reappear at the time of their application, as international child abduction cases illustrate. They will be mentioned during the examination of this issue in section V.

More specifically, it would have been interesting to examine surrogate motherhood, a phenomenon that convenes interests that are not easy to combine: the interest of becoming a father or a mother, the interest of the surrogate mother, and of course, the interest of the child.[2] In view of woman and child protection, the European Parliament condemned this reproductive practice in any of its commercial forms in 2016.[3] However, procreative tourism is a fact and the essential issue is whether the lack of international regulation provides sufficient protection to the child born out of a surrogacy arrangement and the mother that gives birth.[4]

In fact, the EU institutions have not been exempted from discussing the effects of cross-border surrogacy, at least from a child protection perspective. The CJEU issued two judgments in 2014 addressing the social rights of intended parents who have sought maternity leave or adoptive leave by ways of analogy.[5] The main issue was whether their situation was covered by directives dealing with parents and their occupational health and safety.[6]

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2 See *Coester-Waltjen,* in: Muir Watt et al., Global Private International Law – Adjudication without Frontiers, p. 504–509; *Espinosa Calabuig,* Freedom, Security & Justice: European Legal Studies 2019, 36–57.

3 European Parliament, Report on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter (2015/2229(INI)). In the 2015 report, the European Parliament "[c]ondemns the practice of surrogacy, which undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity; considers that the practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial or other gain, in particular in the case of vulnerable women in developing countries, shall be prohibited and treated as a matter of urgency in human rights instruments" (note 114).

4 About the different legal solutions see *Trimmings/Beaumont,* International Surrogacy Arrangements, p. 20. See also *Guzmán Zapater,* AEDIPr 10 (2010), p. 731.

5 CJEU, 18.03.2014, C-363/12 (*Z/A Government department, The Board of management of a community school*); CJEU, 18.03.2014, C-167/12 (*C.D./S.T.*).

6 Directive 2006/54/EC of the European Parliament and of the Council of 05.07.2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, or Council Directive 2000/78/EC of 27.11.2000 establishing a general framework for equal treatment in employment and

The CJEU answered in the negative and highlighted that a refusal to provide paid leave in these situations does not constitute either discrimination on grounds of sex or disability, or in general an infringement of the equality principle as they are not within the scope of these directives. Accordingly, it falls within the Member States' competence to decide on social rights of intended parents.

In 2016, the Council of Europe made an attempt to regulate the matter, but the recommendation drafted by the Committee on Social Affairs, Health and Sustainable Development of the Parliamentary Assembly was not approved by the latter.[7] The intention was to provide guidelines to safeguard children's rights regarding surrogacy arrangements and collaborate with the HCCH on the ongoing works on surrogacy.[8] The different approach to the abovementioned conflict of interests, taken by the parties to the Council of Europe, has stopped further regulatory attempts but has not prevented the ECtHR from taking a stance on the effects of a surrogacy arrangement in light of the child's rights to protection of private life enshrined in Art. 8 ECHR.[9] For the time being, the issue seems to have reached an impasse, as a number of destination countries are implementing measures to put an end to procreative tourism,[10] alerted by the abuses inherent to these arrangements.

This contribution does not go into these matters in any depth, as the issues raised in terms of child protection by surrogate motherhood go beyond the narrow framework of the Brussels II ter Regulation. Nevertheless, it points out the need for a holistic approach to child protection which for the time being is spread over several different instruments. While legal divergence among States is a deterrent in this endeavor, international cooperation provides a way forward that nevertheless seems to have important

occupation; Council Directive 92/85/EEC of 19.10.1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC).

7 The draft recommendation is available on the Council of Europe's website: https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23015&lang=en (last consulted 01.10.2020).

8 See https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy (last consulted 01.10.2020).

9 ECtHR, 26.06.2014, no. 65192/11 (*Mennesson/France*). The ECtHR has also condemned France for an infringement of Art. 8 ECHR in ECtHR, 26.06.2014, no. 65941/11 (*Labassee/France*); ECtHR, 19.01.2017, no. 44024/13 (*Laborie/France*); and ECtHR, 21.07.2016, no. 9063/14 and 10410/14 (*Foulon and Bouvet/France*). A similar stance was taken against Italy by ECtHR, 24.01.2017, no. 25358/12 (*Paradiso and Campanelli/Italy*).

10 See *Nishitani,* Recueil des Cours 401 (2019), p. 136 (385).

shortcomings. The Covid-19 pandemic has served to highlight these, as travel restrictions have closed borders, revamped the nationality principle, and put a halt to the exercise of fundamental rights such as family reunification or access rights. The exceptionality of this situation does not minimize the evidence confirming how fragile cross-border situations are.

II. Plurality of legal sources in European family law

Child protection is an area where States find it easy to reach compromises at an international level. At least, this seems to be a reasonable explanation for the many international instruments that govern the rights of the child, and whose co-existence leads to a new set of problems requiring coordination. EU Member States are a case in point.

Child protection is marked by a significant number of international instruments acknowledging their rights, among which are the ECHR, the 1959 UN Declaration of the Rights of the Child, and the UN Child Convention. The latter enumerates the rights of the child, the obligation to prioritize its best interests (Art. 3),[11] the shared responsibility of parents in regards to its development (Art. 18), as well as measures to fight against wrongful removals or retentions in foreign countries (Art. 11). Despite some criticism, all these international instruments represent a significant achievement in child protection and have inspired EU and State legislation.[12]

At the EU level, child protection is primarily ensured by the Brussels II bis Regulation that will be fully replaced on 1 August 2022 by the Brussels II ter Regulation. In addition to the latter, all or some EU Member States have ratified, among others, the 1980 Hague Child Abduction Convention, the 1996 Hague Child Protection Convention, the 2007 Hague Maintenance Convention, or the 2007 Hague Maintenance Protocol. Moreover, each EU Member State has domestic private international law rules in the field that add further layers of difficulty to establishing the applicable set of rules on child protection.

Each of the abovementioned instruments has its own limitations, deficiencies, and interpretative problems that are aggravated by the need for coordination with other instruments.[13] The fragmentation that is a feature of the international legal framework in family matters contrasts with the

11 See *Rodríguez Mateos,* REDI 44 (1992), 465–498.

12 *Moya Escudero,* Aspectos Internacionales del Derecho de Visita de los Menores, p. 4.

13 For the relationship between instruments in the context of the HCCH Judgments Project see *Noodt Taquela/Ruiz Abu-Nigm,* YPIL 19 (2017/2018), p. 449–474

domestic practice of family law, where issues such as marriage, divorce, maintenance, and parental responsibility tend to be intertwined in a single case scenario, meaning that they are all usually dealt with jointly in the same proceedings. At the international level, a different set of sources is applicable to each legal issue (jurisdiction, conflicts of laws, or recognition and enforcement of judgments), and to each matter (marriage, divorce, maintenance, or parental responsibility). Hence, in order to deal with international family litigation, including child protection, several issues should be clarified before addressing the merits of the case, such as: (1) the legal framework, either international, European, or national; (2) the status of the States involved, i.e. whether EU Member States are participating in the relevant regulation, as may be the case for the Rome III Regulation,[14] or whether third States are bound, for instance, by the 2007 Hague Maintenance Protocol; and (3) the scope of application of the relevant instruments, for example, to identify whether there are issues not covered by or excluded from the EU regulations which in turn makes necessary the application of the forum's national private international law rules.

Against this backdrop, it is not surprising to learn that legal practitioners do often not possess the necessary expertise and professionalism when facing complex cases.[15] It is essential for the best operation of all these instruments to have rules of coordination between private international law rules on matrimonial and parental responsibility issues as well as other family matters regulated by other instruments. Resorting to the expression coined by *Erik Jayme,* a "dialogue of sources" is a matter of necessity in order to increase the efficacy and effectiveness of the existing instruments.

14 The Rome III as well as the Property Regimes Regulations had to be adopted in the enhanced cooperation procedure provided for by Art. 20 TEU and Art. 326–334 TFEU. See in general *Boele-Woelki,* YPIL 12 (2010), p. 17 (21–25); *Espinosa Calabuig,* in: Queirolo/Benedetti/Carpaneto, Le nuove famiglie tra globalizzazione e identità statuali, p. 211; *Pocar,* RDIPP 2011, 297; *Fiorini,* in: Corneloup, Droit européen du divorce, p. 701; *Palao Moreno,* REDI 71 (2019), 89.

15 See *Espinosa Calabuig,* in: Ruiz Abu-Nigm/Noodt Taquela, Diversity and Integration in Private International Law, p. 65–82.

III. Relevant concepts

Child protection in the EU is based on a variety of family models that have been evolving across the world,[16] and pays primary attention to the child's basic rights in a number of situations.[17] In line with the UN Child Convention, both the Brussels II bis as well as the Brussels II ter Regulation take the best interest of the child as the cornerstone of their rules on parental responsibility, including international child abduction.[18] The principle requires some attention because of its trifold function, as a right, a principle, and a rule of procedure, and will be addressed in the following sections. The same applies for the child's right to be heard, closely related to the aforementioned principle. The concepts of parental responsibility and habitual residence are instrumental to both and will be considered due to their inter-sectoral application.

1. The best interest of the child

The Committee of the Rights of the Child highlights that the best interest of the child is a complex concept: first, it is a substantive right by which the child has the right that its best interest is considered primarily over other interests at stake; second, there is a fundamental legal principle that drives any interpretation towards the outcome that best serves the child's interest; and third, there exists a rule of procedure to the extent that the decision-making process has to include an assessment of the possible impact on the child, by explicitly considering the rights of the child, explaining the criteria upon which the decision has been taken, and explaining how its interest has been weighed against any other considerations.[19]

Accordingly, the best interest of the child is an axiological principle that guides both interpretation and application of private international law rules

16 The conservative tendency of the EU legislator in family law has been observed on several occasions. See for example *Ancel/Muir Watt,* Rev. crit. DIP 2001, 403 (408).

17 See *Peleg,* in: Kilkelly/Ton, International Human Rights of Children, p. 135; *Smyth,* in: Kilkelly/Ton, International Human Rights of Children, p. 421.

18 See *Bradley,* in: Boele-Woelki, Perspectives for the Unification and Harmonisation of Family Law in Europe, p. 65 (97); *Nelson,* J. Marriage Fam. 68 (2006), 781; *Sarkisian,* J. Marriage Fam. 68 (2006), 804.

19 *UN Committee on the Rights of the Child* (*CRC*), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1), 29. 05. 2013, CRC/C/GC/14, https://www.refworld.org/docid/51a84b5e4.html (last consulted 13. 10. 2020).

in child-related matters.[20] As indicated by Art. 24 (2) EU Charter, "[i]n all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration". While the mandate already applies to the Brussels II bis Regulation, the update made in the Brussels II ter Regulation has made clear the significance of this principle in parental responsibility matters.[21]

However, the principle itself is far from clear as can be learnt from the use that the judiciary has made of it, with decisions that can sometimes be labelled as arbitrary, in particular in cases of child removal or retention in a country other than the one of its habitual residence.[22] The reason for this contentious approach seems to lie in the fact that the meaning of the principle is dependent upon the legal tradition where it is applied.[23] An overview of academic theories and case law trends in different countries can serve the better understanding of the principle of the best interest of the child in the international and European framework.

a. The best interest of the child from a historical perspective

The best interest of the child has been preceded by other criteria. For example, common law countries have made use of doctrines, such as those of "tender years" or "gender wars", to allocate custody. In fact, they are still used along with the best interest of the child and other doctrines such as the best interest of the family, a welfare test, a harm test of the child, etc.[24]

As to the tender years doctrine, its origin is dependent on the historical context, where the father supported the family and was thus obliged to provide for the child's welfare. English courts – followed by US courts – reacted accordingly by establishing a rule that systematically allocated the child's custody to the father. After the industrial revolution and the democratization of societies, this doctrine raised strong criticism that led to the tender years doctrine, according to which it is the mother who can better represent the child interests in its tender years. This doctrine was nevertheless questioned

20 *Borrás Rodríguez*, El "interés del menor" como factor de progreso y unificación del Derecho internacional privado.

21 See Recital 19 Brussels II ter Regulation.

22 See *Sergio,* Dir. Fam. Pers. 2001, 637 (639–644).

23 *Durán Ayago,* in: Calvo-Caravaca/Castellanos Ruíz, El Derecho de Familia ante el Siglo XXI, p. 295 (307 et seq.).

24 See in general *Guralnick*, Interstate Child Custody Litigation, p. 4; *Bennett Woodhouse,* Fam. L. Quart. 33 (1999), 815 (817); *Boulanger,* Les Rapports juridiques entre parents et enfants, p. 14 et seq.; *Klaff*, Cal. L. Rev. 70 (1982), 335.

in the 1960s and 1970s,[25] especially in some parts of the US where egalitarian criteria are preferred. Others still apply the said doctrine as a default rule when the child is younger than seven years.

The abovementioned doctrines have in common that they focus on parents and not on children, but not as much as the gender wars doctrine. This heavily criticized doctrine gets its name from the fact that it focuses on the essential differences between men and women in relation to their role in the child's life.[26] In general, women are considered better suited than men to raise very young children, while men are preferred when the child grows older due to their social and economic power.[27] These doctrines have not survived as they infringe the equality principle and the prohibition of discrimination on grounds of sex. The next step is the acceptance of the best interest of the child which got traction at the beginning of the 20th century and ended up being considered first and foremost in every custody decision-making process.[28] Internationally promoted by the UN Child Convention, this principle has been considered a factor of progress and harmonization in the field of private international law.[29]

Despite its universal application, the content of the best interest of the child is not universally accepted, meaning that it is determined on a case-by-case basis.[30] The diverse criteria to be considered include: mental health, personality, and behavior of the parents; the child's wishes in relation to school, home, or community where it wants to live; and circumstances as a whole or primarily economic considerations, including those of third parties related to the chosen parent, and of those who may contribute to the child's maintenance.[31] In view of this divergence, some courts have chosen other criteria to support their custody decisions, such as the permanent welfare of the child, i.e. focusing on issues such as health, safety, welfare, or moral education.[32] All these factors are, nevertheless, very similar, confirming that the final

25 With paradigmatic cases such as United States Supreme Court, 22.11.1971 (*Reed/Reed*), 404 U.S. 71 (1971) and United States Supreme Court, 05.03.1979 (*Orr/Orr*), 440 U.S. 268 (1979).

26 *Siegel,* Harvard L. Rev. 115 (2002), 947 (948); *Espinosa Calabuig,* Custodia y visita de menores en el espacio judicial europeo, p. 30–40.

27 *Guralnick,* Interstate Child Custody Litigation, p. 4; *Bennett Woodhouse,* Fam. L. Quart. 33 (1999), 815 (816); *Gordon,* Canadian Fam. L. Quart. 2001, 88 et seq.

28 *Hayes,* Child & Fam. L. Quart. 18 (2006), 351–372; *Worwood,* Family Law 35 (2005), 621–627.

29 Definition proposed by *Borrás Rodríguez,* RJC, p. 17.

30 *Bennett Woodhouse,* Fam. L. Quart. 33 (1999), 815 (825 et seq.).

31 See in general *Espinosa Calabuig,* Custodia y visita de menores en el espacio judicial europeo, p. 20–30.

32 *Guralnick,* Interstate Child Custody Litigation, p. 4 et seq.

decision is usually taken on a case-by-case basis. For example, in cases of international child abduction, the best interest of the child is not being moved to another country but rather staying within its usual living environment.[33]

Criticism of the principle also comes from the fact that it places the interest of the child above the interests of other members of the family, thus not taking into account the collective interest of the family.[34] However, the main point is the legal uncertainty that surrounds it and that might be actually damaging for the child itself.[35] In the end, the child's fate depends on the case and the seized court, including its cultural views on the matter.

The abovementioned criticism lies at the core of the shared custody movement that had started by the end of the 1970s. The movement obviously seeks to put an end to the binary approach to custody and makes both parents responsible for the child's welfare.[36] By requiring cooperation, shared custody puts both parents on an equal footing. However, it is not exempt from criticism,[37] and difficulties in its application present courts with the challenge of deciding on a case-by-case basis. That applies to situations in which the custodian wants to change habitual residence and thus jurisdiction. The trend is for the seized court to assess factors such as the child's opinion and consequences for its private and family life with regard to each parent.[38] Against this backdrop, the court has to highlight the significance of the principle by providing the child with a genuine and effective opportunity to express its views, as foreseen by international and European instruments, including the Brussels II ter Regulation.

b. CJEU and ECtHR: Two different approaches

The discrepancies in relation to the best interest of the child have been reflected in case law of the CJEU and the ECtHR dealing with international child abduction cases that occurred between EU Member States almost

33 See *Álvarez González,* Derecho Privado y Constitución 16 (2002), 41 (45).

34 *Bennett Woodhouse,* Fam L. Quart. 33 (1999), 815 (821 et seq.).

35 *Mnookin,* L. and Contemp. Prob. 39 (1975), 226; *Chambers,* Mich. L. Rev. 83 (1984), 477.

36 *Sephard,* Tex. L. Rev. 64 (1985), 687.

37 Surprisingly, it has been argued that the problem of this shared custody approach is actually ensuring that the child is raised by both parents. See *Bennett Woodhouse,* Fam. L. Quart. 33 (1999), 815 (824 et seq.).

38 See *Hayes,* Child & Fam. L. Quart. 18 (2006), 351 (371); *Worwood,* Family Law 35 (2005), 621–627. About the works of the International Law Association (ILA) see *Bennett Woodhouse,* Fam. L. Quart. 33 (1999), 815 (829); *Schneider,* Mich. L. Rev. 89 (1991), 2215; *Ross,* Fordham L. Rev. 64 (1996), 1571.

simultaneously. While the ECtHR pays attention to the substance of the case in interpreting the best interest of the child, the CJEU has chosen a formal interpretation based on the mutual recognition principle. In fact, these different approaches show the tension between systems that favored the quasi-automatic return of the child and those that pay careful attention to the best interest of the child concerned.

This tension has been increased by the rules laid down in the Brussels II bis Regulation that allocate the ultimate jurisdiction to decide on the child's return to the country from where the child has been removed, even in those cases in which the State where the child is present has decided not to return it in accordance with the 1980 Hague Child Abduction Convention. Moreover, this jurisdiction rule is reinforced by making the return decision immediately enforceable in any EU Member State, without leaving any room for refusal of recognition and enforcement. However, the mutual recognition principle has not been welcomed by national courts who have refused to comply with this *modus operandi.*[39]

In contrast, the ECtHR examines whether return decisions have infringed the right to a personal and family life enshrined in Art. 8 ECHR,[40] i.e. whether the non-return of the child amounts to its best interest, regardless of compliance with the 1980 Hague Child Abduction Convention. *Neulinger and Shuruk/Switzerland*[41] is a landmark case in which the ECtHR highlighted that the seized court has to examine whether in this particular case the return can indeed be ordered because it is in the best interest of the child; otherwise, the decision constitutes an infringement of Art. 8 ECHR as later indicated in *Raban/Romania.*[42] The ECtHR thus chooses a substantive approach that prioritizes the interest of the child *in concreto* over the procedural approach taken by the 1980 Hague Child Abduction Convention and that attends to the interest of the child *in abstracto.*[43] The problem is, of course, that this case law pits the Convention against Art. 8 ECHR leading to difficult interpretation issues.[44] In view of the fact that the regulations seek to play a complementary role to the 1980 Hague Child Abduction Convention, the conflict seems to be inevitable.

39 *Beaumont/Walker/Holliday,* Int. Fam. L.J. 4 (2016), 307–318.

40 *Herranz Ballesteros,* REDE 44 (2012), 41 (42).

41 ECtHR, 06.07.2010, no. 41615/07 (*Neulinger and Shuruk/Suiza*).

42 ECtHR, 09.09.2010, no. 25437/08 (*Raban/Romania*).

43 See *López Guerra,* Teoría y Realidad Constitucional 39 (2017), 163 (185).

44 *González Marimón,* in: García Garnica/Marchal Escalona, Aproximación interdisciplinar a los retos actuales de protección de la infancia dentro y fuera de la familia, p. 637–658.

In *M.R and M.L/Estonia,*[45] the ECtHR aligned, however, its case law with the 1980 Hague Child Abduction Convention by not upholding the claim brought by the mother that removed the child, highlighting that the national authorities have simply complied with the said convention. Therefore, the return decision did not infringe Art. 8 ECHR. Remarkably, the ECtHR does not even consider that the mother and caregiver of the child cannot herself return to the country of the child's habitual residence. In the case *X/Latvia,*[46] the Grand Chamber of the ECtHR addressed the relationship between the ECHR and the 1980 Hague Child Abduction Convention by asserting that the doctrine in *Neulinger and Shuruk/Switzerland* is not an obligation directed towards national courts on how to apply the 1980 Hague Convention, but a reminder of their obligation to hear all admissible grounds for refusal of the child's return, in particular in cases of serious risk for its wellbeing.[47]

More specifically, the ECtHR indicates that the courts in the country of enforcement have to take into consideration all factors that may lead to an exception to a return and, once assessed, take a sufficiently motivated decision.[48] Such a decision cannot only be based on the general objection of a grave risk of psychological or physical harm to the child. In other words, an infringement of Art. 8 ECHR in these cases will arise not only out of disregarding grounds for refusal, but also from the lack of sufficient motivation.[49] If the return is found to be in the best interest of the child, there must be assurances that the country of the child's habitual residence will take appropriate protection measures.[50]

All in all, the ECtHR provides guidelines for the 1980 Hague Child Abduction Convention, which some authors perceive as an attempt to minimize its formalistic application.[51] In line with this approach, the Brussels II ter Regulation has also moved from an automatic application of the mutual recognition principle to a more nuanced approach.

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45 ECtHR, 15. 05. 2012, no. 13420/12 (*M.R. and M.L./Estonia*).

46 ECtHR, 26. 11. 2013, no. 27853/09 (*X/Latvia*).

47 See *López Guerra,* Teoría y Realidad Constitucional 39 (2017), 163 (186).

48 See ECtHR, 26. 11. 2013, no. 27853/09 (*X/Latvia*), note 106.

49 See Practice Guide for the application of the Brussels IIa Regulation, p. 73 et seq., https://op.europa.eu/en/publication-detail/-/publication/f7d39509-3f10-4ae2-b993-53ac6b9f93ed (last consulted 05. 10. 2020).

50 See *González Marimón,* in: Martín Rodríguez/García Alvarez, El mercado único en la Unión europea, p. 81 (86–90); *González Marimón,* in: García Garnica/Marchal Escalona, Aproximación interdisciplinar a los retos actuales de protección de la infancia dentro y fuera de la familia, p. 637 (642–648).

51 See *Forcada Miranda,* Bitácora Millennium DIPr 2016, 33.

2. The hearing of the child

By perceiving the child as a subject of rights, the UN Child Convention also provides the child with a voice. The child's right to be heard is enshrined in Art. 12 thereof and is also featured prominently in Art. 24 (1) EU Charter. The 1980 European Custody Convention refers to the practical impossibility of hearing the child depending on its age and incapacity of discernment,[52] and the 1980 Hague Child Abduction Convention gives a fundamental role to this right in children abduction cases, in particular by granting the child the possibility to object to a return to the country of origin (Art. 13).

The operation of the right is, nevertheless, a matter of procedure that is addressed in a divergent manner by domestic laws. Issues such as the minimum age for the child to be heard, whether the hearing should be conducted by a judge or another professional, the methods and means to hear the child in court, the form of representation of the child in court, whether to designate a guardian *ad litem,* and the role and powers of the latter are left open in the international instruments. Such legal divergence leads to conflicts regarding the understanding of the situations in which the child's right has been violated, including cases in which it has been clearly disregarded, as happened in the *Aguirre Zagarra* case.[53] While the child voiced her refusal to be returned to Spain (the country where she had had her habitual residence before being retained by the mother in Germany) before the German court competent for the 1980 Hague Child Abduction Convention proceedings, the Spanish court with competence to decide on the merits of the case in accordance with the Brussels II bis Regulation decided on her return despite not having granted her the opportunity to express her views in a genuine and effective manner. Remarkably, the Spanish court ordered the hearing of the child, but it did not permit it to be undertaken via video conference once the mother refused to bring the child to Spain. Finally, the conflict was settled by a formalistic approach to the rules on recognition and enforcement of return decisions provided by the Brussels II bis Regulation, which do not allow for any grounds of refusal on the side of the Member State of enforcement, including the breach of the child's fundamental rights.[54]

52 See Art. 15 (1) 1980 European Custody Convention.

53 CJEU, 22. 12. 2010, C-491/10 PPU (*Aguirre Zarraga/Pelz*), note 75.

54 According to the CJEU in CJEU, 22. 12. 2010, C-491/10 PPU (*Aguirre Zarraga/Pelz*), note 75, "the Court with jurisdiction in the Member State of enforcement cannot oppose the enforcement of a certified judgment ordering the return of a child who has been wrongfully removed on the ground that the Court of the Member State of origin which handed down that judgment may have infringed art. 42 of the Regulation, interpreted in accordance to

Nevertheless, the CJEU in the *Aguirre Zagarra* judgment did remind that "it is a requirement of Art. 24 (1) of the Charter that children should be able to express their views freely and that the views expressed should be taken into consideration on matters which concern the children, solely 'in accordance with their age and maturity', and of Art. 24 (2) of the Charter that, in all actions relating to children, account be taken of the best interests of the child, since those interests may then justify a decision not to hear the child".[55] In fact, the Brussels II bis Regulation has the merit of specifically requiring the hearing of the child in a number of situations (Art. 11 (2), 23 (b), 42 (2) (a) Brussels II bis Regulation), but it specifically indicates that "it is not intended to modify national procedures applicable".[56] Hence, it applies the mutual trust principle to accommodate legal divergence in these matters within the EU area of justice, leading to a scenario in which the child's rights are not sufficiently taken into account, eroding the legitimacy of the system and thus mutual trust.[57]

In order to adequately address the impact of legal divergence in this field, several comparative studies have been carried out.[58] These have found significant differences among countries when it comes to the issues indicated above. For example, while the main criteria for deciding whether a child should be heard are the child's age and maturity, as highlighted by the international framework, in practice, countries approach this issue in a different manner. Some, such as Croatia and Poland, do not establish a minimum

art. 24 of the Charter of fundamental Rights of the EU, since the assessment of whether there is such an infringement falls exclusively within the jurisdiction of the courts of the Member State of origin".

55 CJEU, 22. 12. 2010, C-491/10 PPU (*Aguirre Zarraga/Pelz*), note 63.

56 Recital 19 Brussels II bis Regulation.

57 See in particular the empirical study by *Beaumont/Walker/Holliday,* JPIL 12 (2016), 211–260. Building upon these findings, see *Ubertazzi,* JPIL 13 (2017), 568–601.

58 *Reich Sjögren,* Protection of Children in Proceedings. Other studies are: Academy of European Law on behalf of the European Commission, DG Justice, p. 51 et seq.; *European Commission,* Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment, https://op.europa.eu/en/publication-detail/-/publication/924728ec-9148-11e8-8bc1-01aa75ed71a1 (last consulted 15. 10. 2020); *Council of Baltic Sea States* (*CBSS*) *Children's Unit,* Protect Children on the Move, 4th Expert Meeting, Transnational child protection: The role of judges, social services and central authorities, 2014, p. 10 et seq., http://childcentre.info/public/PROTECT/4th_Expert_Meeting_Riga_November_2014_Full_Meeting_Report.pdf (last consulted 15. 10. 2020); *European Union Agency for Fundamental Rights,* Child-friendly justice. Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States, http://fra.europa.eu/sites/default/files/fra-2015-child-friendly-justice-professionals_en.pdf (last consulted: 15. 10. 2020); and *Heckendorn Urscheler/Pretelli,* Cross-border parental child abduction in the EU.

age while others do, but differ as regards minimum age, which is 10 years in Bulgaria and Romania, but 14 years in Spain and 15 years in Finland. Nevertheless, the court's discretion plays a role in the decision to hear the child in all States,[59] the main problem being the assessment of the child's maturity as it is not addressed in most national laws and will also have an impact on the consideration of the views provided by the child in the decision. In view of these difficulties, most legislations provide for the child to be accompanied by professionals other than the judge when being heard. However, the methods and means used to hear the child vary from one country to another, including whether they deliver their views to the judge or other professional, and whether training of these professionals is required or not.

The abovementioned case law triggered an alarm on the impact that the said divergence might have on the rights of the child within the EU area of justice. The recast of the Brussels II bis Regulation was intended to address this issue, among others, and Art. 21 Brussels II ter Regulation deals specifically with the right of the child to express its views in an effective and genuine manner, either directly or through a representative or an appropriate body, with the obligation of the court to give due weight to those views in accordance with the child's age and maturity.

However, the new Regulation does not seek to harmonize national substantive and procedural rules on this matter and only indicates in the recitals that the different national approaches are all acceptable, although "while remaining a right of the child, hearing the child cannot constitute an absolute obligation, but must be assessed taking into account the best interests of the child, for example, in cases involving agreements between the parties".[60] Recital 39 Brussels II ter Regulation also indicates that international cooperation should be put in motion to ensure the child's right to be heard through, in particular, the Taking of Evidence Regulation. In general, this implies that Member States cannot resort to public policy grounds when there is a divergence between laws of procedure, provided that the standards for the hearing of the child laid down in Art. 21 Brussels II ter Regulation have been respected.[61]

59 See the case law cited by *Espinosa Calabuig,* Custodia y visita de menores en el espacio judicial europeo, p. 120.

60 Recital 39 Brussels II ter Regulation.

61 As a result of the contrast between German law and others with a more lenient approach to the child's right to be heard. See *Espinosa Calabuig,* in: Ruiz Abou-Nigm/Noodt Taquela, Diversity and Integration in Private International Law, p. 65 (70); *González Beilfuss,* in: Álvarez González et al., Relaciones transfronterizas, globalización y derecho, p. 383 et seq. and p. 391 et seq.; *Völker,* in: Fulchiron/Nourissat, Le nouveau droit communautaire du divorce et de la responsabilité parentale, p. 293–302.

3. Parental responsibility

Parental responsibility only entered into EU law with the Brussels II Regulation, although it was already enshrined in other international instruments, in particular the 1996 Hague Child Protection Convention and national legislation, such as the English Children Act of 1989. A 1986 Resolution of the European Parliament on co-parental responsibility already mentioned the concept of shared parental responsibility. This concept would encompass a number of rights and obligations related to the care, education, legal representation, asset administration, and habitual residence determination of the child.[62] Parental responsibility in EU law encompasses "all rights and duties relating to the person or the property of a child which are given to a natural or legal person by a decision, by operation of law or by an agreement having legal effect, including rights of custody and rights of access" (Art. 2 (7) Brussels II bis Regulation and Art. 2 (2) no. 7 Brussels II ter Regulation).

As to the relevant authorities in these matters, EU law lays down a broad concept of court that refers to "any authority in any Member State with jurisdiction in the matters falling within the scope of this Regulation" (Art. 2 Brussels II bis Regulation and Art. 2 (2) no. 1 Brussels II ter Regulation.), i.e. with power either to adopt measures or to enforce them. The only requirement is that the domestic legislation allocates the jurisdiction to that court.[63]

All these provisions apply to children born out of the same or different marriages, of non-married couples, or raised by only one parent. Against this backdrop, the question is whether there is a concept of child, an issue that is not uniformly addressed by the international framework. While the Brussels II bis Regulation is silent on this issue, Art. 2 (2) no. 6 Brussels II ter Regulation lays down that a child is any person below the age of 18 years "even in cases where they have acquired capacity before that age under the law governing their personal status, for example through emancipation by reason of marriage".[64] In the case of children below the age of 16 years, the 1980 Hague Child Abduction Convention remains applicable along with Chapter III of the Brussels II ter Regulation specifically dealing with international

62 See Select Committee on The European Communities, Brussels II: The Draft Convention on Jurisdiction, Recognition and Enforcement of Judgments in Matrimonial Matters, Session 1997–1998, 5th Report, London, House of Lords, 22.06.1997, p. 6 (note 3). See also *Boulanger,* Les Rapports juridiques entre parents et enfants, p. 3 et seq.

63 Recital 14 Brussels II ter Regulation.

64 Recital 17 Brussels II ter Regulation.

child abduction. Hence, EU law supplements the 1980 Hague Convention in its application within EU Member States.[65]

Maintenance obligations are, however, excluded from the parental responsibility concept.[66] The patrimonial and diverse nature of child maintenance obligations as well as the notion of debtors and creditors seem to have justified a specific instrument, i.e. the Maintenance Regulation and their exclusion from the Brussels II ter Regulation,[67] as is already the case in the Brussels II bis Regulation. However, the Maintenance Regulation does not define the concept of maintenance obligations resulting in inconsistencies between the instruments, which are to the detriment of child protection.[68]

The possibility of reaching agreements between the parties on maintenance obligations has generally been regulated as a means of increasing legal certainty, predictability, and autonomy of the parties, as explained in the Preamble of the Maintenance Regulation. However, party autonomy has been excluded with respect to children under the age of 18 years "to protect the weaker party". Nevertheless, it has not been made apparent in which way party autonomy may jeopardize child protection and payment by the debtor. Furthermore, the Brussels II ter Regulation – like the Brussels II bis Regulation – already takes into consideration party autonomy in cases in which maintenance of a child below 16 years is related to parental responsibility litigation, to the extent that this regulation specifically included a head of jurisdiction for these cases. In particular, this would happen when the judge who decides custody and access rights according to the choice of court rule now embedded in Art. 10 Brussels II ter Regulation also resolves the child maintenance dispute in accordance with Art. 3 (d) Maintenance Regulation.

4. Habitual residence

The establishment of the child's habitual residence as the main connecting-factor in private international law can be traced back to the HCCH,[69] starting with the 1956 Hague Maintenance Convention. It has now been firmly

65 Recital 17 Brussels II ter Regulation.

66 Recital 13 Brussels II ter Regulation.

67 See Recital 13 Brussels II ter Regulation.

68 See in general *Espinosa Calabuig*, in: Baruffi/Caffari Panico, Le nuove competenze comunitarie, p. 51.

69 See *Espinosa Calabuig*, Custodia y visita de menores en el espacio judicial europeo, p. 125 et seq.; *Thorpe*, Int. Fam. L.J. (2018), 39 (40–44); *Azcárraga Monzonís/Quinzá Redondo,*

consolidated in all Hague conventions, including the 1996 Hague Child Protection Convention, where it is mainly used in jurisdiction rules. Both the Brussels II bis as well as the Brussels II ter Regulation also based their provisions on the child's habitual residence. The first and most important reason to support this choice is the proximity principle, in that this factor indicates the closest and most immediate jurisdiction to the child, also in terms of assessing the child's circumstances, gathering evidence and ensuring the child's right to be heard. The second reason relies on the fact that it provides the parents with a legal system that is neutral to their interests, but it is selected as catering to the child's best interests.[70]

Despite the significance of habitual residence, neither the Hague conventions nor the EU regulations attempt to define this factual concept. The opportunity of this definition was discussed during the 1996 Hague Child Protection Convention's negotiations, following a suggestion made by the International Union of Latin Notaries. However, it was against the Conference's tradition and rejected for fear that it could influence the interpretation of other conventions that use the same factor, as well as for problems in its construction. An alternative proposal put forward by the US seeking to define situations that do not imply a change of habitual residence was also rejected, but some elements found agreement. In particular, it was accepted that "the temporary absence of the child from the place of his or her habitual residence for reasons of vacation, of school attendance or of the exercise of access rights, for example, did not modify in principle the child's habitual residence".[71] Accordingly, this section does not seek to provide a definition of habitual residence, but to gather elements with which habitual residence of the child can be established.[72]

The child's habitual residence is meant to reveal a close and stable connection with the relevant State. In determining that country, all relevant factual elements should be considered, in particular duration and regularity of the child's presence, as well as the conditions and reasons for that presence

CDT 10 (2018), 795–801; *Pérez Martín,* CDT 12 (2020), 1119–1127; *Palao Moreno,* REDI 71 (2019), 89 (101–104). From a socio-historical perspective, see *Bucher,* Recueil des Cours 283 (2000), p. 9 (24–49).

70 See Recital 20 Brussels II ter Regulation, and *Pérez Martín,* in: Guzmán Zapater/Herranz Ballesteros, Crisis matrimoniales internacionales y sus efectos, p. 927 (930–940); *Palao Moreno,* REEI 2018, 9 (12–13).

71 See *Lagarde* report, note 40.

72 See with this approach *Carballo Piñeiro,* Rev. Mex. Der. int. pr. 30 (2012), 131–154. In this sense, there are interesting proposals for a concept of habitual residence. See *Pérez Martín,* AEDIPr 18 (2018), p. 469–494.

in the country.[73] Nevertheless, an exact duration is not required, meaning that a new habitual residence might be immediately acquired by the child, without the need for a certain lapse of time, provided that the change is not wrongful.[74] The relevant interpretative element is that the habitual residence indicates the child's effective vital center,[75] which is not only different from its domicile as a legal concept, but also from the mere physical presence. While regularity is important, as it seems necessary to highlight the child's integration within a social and familiar environment, the physical presence in a country for an important period of time does not suffice, however, to qualify it as the child's habitual residence if integration is missing.[76] In this vein, the conditions and reasons for the child's presence in the country are thus relevant, i.e. whether the child is on holiday,[77] or whether it is the country chosen by the mother following its birth.[78] By the same token, the process of establishing a habitual residence cannot occur in violation of fundamental rights.[79]

All in all, it is important to acknowledge that the social and family environment of the child depends on different elements that vary according to the age of the child, i.e. the elements to consider in the case of a child of school age differ from those of a child who has left school, but also differ from those relevant to an infant.[80] Be that as it may, the determination of the child's habitual residence is, in any instance, to be geared by its best interests.[81]

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73 See the enumeration in Recital 23 Succession Regulation. The CJEU has also recorded these elements. In its judgment CJEU, 02. 04. 2009, C-523/07 (*A*), note 44, it concludes that "the concept of 'habitual residence' under Article 8 (1) of the Regulation must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case". Also CJEU, 15. 02. 2017, C-499/15 (*W and V/X*).

74 See *Lagarde* report, note 41. The same can be learnt from Art. 8 Brussels II ter Regulation.

75 See *de Steiger* Report, p. 14.

76 See *Franchi,* Protezione dei minori e diritto internazionale privato, p. 23–27.

77 As it happened in Case C-523/07 (*A*).

78 CJEU, 22. 12. 2010, C-497/10 PPU (*Mercredi/Chaffe*).

79 See CJEU, 17. 10. 2018, C-393/18 PPU (*UD/XB*) and critical comments by *Pérez Martín,* La Ley UE 66 (2019), 1.

80 CJEU, 22. 12. 2010, C-497/10 PPU (*Mercredi/Chaffe*), note 53.

81 For example, the Spanish Constitutional Court has indicated the relevance of the integration of the child into its new environment. It has thus been understood that this is an essential factor in light of the 1980 Hague Child Abduction Convention. See Spanish Con-

IV. Rules on jurisdiction in parental responsibility matters

Cases involving children are problematic per se and reluctance to relinquish jurisdiction can be identified, e.g. in the *Purrucker* case[82], but also in cases involving third country jurisdictions, such as in the infamous *Carrascosa* case[83] and in other case law[84]. This reluctance may lead to a race to court, which in situations that should consider the best interest of the child should actually be avoided.

The EU regulations address this issue in line with the 1996 Hague Child Protection Convention and take the habitual residence of the child as the general rule of international jurisdiction in parental responsibility matters, provided that it is located in an EU Member State at the time the court is seized

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stitutional Court (Tribunal Constitucional), 01.02.2016, STC 16/2016. Against this backdrop, the judgment of the Spanish Supreme Court (Tribunal Supremo) 20.10.2014, STS 536/2014 has to be highlighted, establishing the criteria to be considered by the judiciary in deciding whether to authorize the transfer of the child's habitual residence in case of one parent's opposition. In the case at hand, the Spanish father did not authorize the transfer of the child to Brazil along with his Brazilian mother and the court of appeal did not authorize it, mainly on grounds of the Spanish nationality of both father and child. However, the Supreme Court did not uphold this judgment highlighting that it did not take into account the best interests of the child, it was against the best interests of the child, and failed to acknowledge a reality more and more common in Spain, i.e. that of mixed marriages.

82 CJEU, 15.07.2010, C-256/09 (*Purrucker/Vallés Pérez*); CJEU, 09.11.2010, C-296/10 (*Purrucker/Vallés Pérez*).

83 Superior Court of New Jersey, 03.04.2007, 391 N.J. Super. 453, 918 A.2d 686 (*Innes/Carrascosa*). After illegally relocating the child to Spain, the Spanish mother obtained full custody from a court in Valencia. Later on, she was held in contempt of court in the United States and spent several years in prison while the American father never got to see the child again. The Brussels II bis Regulation and 1996 Hague Child Protection Convention might have changed this approach.

84 See in general, case law in EUFams II, Comparative Report on third country nationals, 18.09.2019, http://www2.ipr.uni-heidelberg.de/eufams/index.php?site=entscheidungsdatenbank. For example, in Spain as to parental responsibility issues, the Audiencia Provincial of Girona was deemed not competent since the minor was residing in Peru (Audiencia Provincial Girona, 28.03.2019, 57/2019, ESS20190328). Also regarding a divorce of a Spanish couple with children, the judgment of the Audiencia Provincial de Barcelona 400/2018 of 31.05.2018, ESS20180531 can be mentioned. The mother went to India with the minors. In the divorce claim, the court did not resolve the rest of the measures requested in the application, namely custody of the two minor children. The plaintiff appealed. The Spanish courts had jurisdiction, but not according to Art. 8 Brussels II bis Regulation since the minors did not have their habitual residence in Spain but in India. Art. 12 was accordingly inapplicable. See the comments by *Pérez Martín,* CDT 12 (2020), 657–672. See also *Herranz Ballesteros,* RGDE 52 (2020), 1 (4–9).

(Art. 7 Brussels II ter Regulation).[85] Along with the best interest of child, the principle of proximity plays a significant role in this choice that, nevertheless, is subject to exceptions in specific circumstances. Cases that allow for departure from the habitual residence rule are: modification of access rights by the court of the previous habitual residence during a three-month period (Art. 8 Brussels II ter Regulation); jurisdiction in cases of wrongful removal or retention of the child (Art. 9 Brussels II ter Regulation); prorogation of jurisdiction (Art. 10 Brussels II ter Regulation); and transfer of jurisdiction (Art. 12 Brussels II ter Regulation).

The Brussels II ter Regulation has laid down the aforementioned rule and exceptions, although there are some adjustments, especially to better accommodate party autonomy. In this vein, it has reformulated the rule in Art. 12 Brussels II bis Regulation that established the possibility of a joinder in a parental responsibility claim and claims pertaining to marriage annulment, legal separation, and divorce. However, this prorogation of jurisdiction was only feasible under certain circumstances, namely that one of the spouses has parental responsibility over the child, or the child has a close connection to the Member State where the proceedings are started. In any case, jurisdiction has to have been accepted, expressly or otherwise, in an unequivocal manner by all the parties to the proceedings at that time and has to be in the best interest of the child. Framed in this vein, there are party autonomy elements in the rule, but with limitations that require the interpretation by the CJEU.[86]

According to the CJEU, the appearance in court of all the parties to the proceedings is enough to sustain jurisdiction on parental responsibility, provided that it is in the best interest of the child and there are no proceedings pending elsewhere. In the *Saponaro* case, the parents brought a request for court authorization to repudiate a succession in favor of the child before the courts where the main asset in the estate was located; the latter has jurisdiction on the basis that, "in the absence of such opposition, the agreement of that party may be regarded as implicit and the condition of the unequivocal acceptance of prorogation of jurisdiction by all the parties to the proceedings at the date on which that court was seized may be held to be satisfied".[87] By the same token, the condition of acceptance is not met in those cases in

85 In lack of a habitual residence, the criterion of the presence of the child will be applied. See Art. 11 Brussels II ter Regulation. In view of the increase of migrant and unaccompanied minors, the latter is becoming a relevant head of jurisdiction.

86 See *Quinzá Redondo,* in: Forner Delaygua/Santos, Coherence of the scope of application. EU Private International Legal instruments, p. 253 (254–259).

87 CJEU, 19. 04. 2018, C-565/16 (*Saponaro and Xylina*).

which the court is seized only by one of the parties to the proceedings and the defendant intervenes to plead the lack of jurisdiction of this court, even if he had instituted another set of proceedings before the same court.[88] In short, the CJEU's case law allows for an establishment of jurisdiction on the basis of tacit acceptance, i.e. in cases of appearance of all parties without challenging the jurisdiction.[89]

While the former Regulation did not expressly mention choice of court as an option to establish jurisdiction in parental responsibility matters, Art. 10 Brussels II ter Regulation allows for both express as well as tacit choices of court, provided that the child has a substantial connection with the chosen court, either because it is the habitual residence of one of the holders of parental responsibility or the country of the child's former habitual residence or that of its nationality. In any event, the exercise of jurisdiction has to be in the best interest of the child. In this vein, the provision manages to overcome the uncertain wording of Art. 12 Brussels II bis Regulation, where it was not clear in which cases the parties to the proceedings have accepted jurisdiction. This issue is now solved by requiring express acceptance during the proceedings according to the formalities indicated in the provision, and only after the court informs all the parties of the right not to accept jurisdiction. Tacit acceptance is also admitted as a basis for establishing jurisdiction if occurring "at the latest at the time the court is seised" (Art. 10 (1) (b) (i) Brussels II ter Regulation), being the abovementioned case law applicable to its understanding.

The *forum non conveniens* rule can now be found in Art. 12 Brussels II ter Regulation in similar terms as in the Brussels II bis Regulation. The transfer of the case from the court originally competent to another court will be done only exceptionally when the child has a "particular connection" to another Member State.[90] Under these exceptional circumstances, this new court will be considered as "better placed to assess the best interests of the child in the particular case". This rule corresponds to those included in the 1996 Hague Child Protection Convention dealing with *forum non conveniens* on the one hand, and with *forum conveniens* on the other. While with the first rule, a transfer of jurisdiction will take place from the court first seized to another court better placed, the second rule entails the situation where a claim is brought to the latter and leave is asked from the court that was originally

88 CJEU, 12. 11. 2014, C-656/13 (*L/M*).

89 See *Espinosa Calabuig/Quinzá Redondo,* Report on the Spanish Exchange Seminar, p. 12.

90 This connection guarantees that the court which will resolve the case actually is competent, avoiding the risk of fraudulent forum shopping.

competent.[91] Art. 12 (1) Brussels II ter Regulation seems to combine both concepts in just one provision.[92]

V. Rules on international child abduction

A brief perusal of the International Child Abduction Database (INCADAT)[93] is sufficient to confirm that child abduction[94] is a problem that is far from diminishing but rather increases worldwide. This factor, aggravated by the length of the proceedings and an outdated legal framework, especially in some Member States, along with sociological factors that have changed the background against which the international instruments operate,[95] has signaled the interest of the EU in amending the Brussels II bis Regulation on this matter. In this vein, the Brussels II ter Regulation includes a mechanism apparently better suited to protect the best interests of the child than its predecessor.[96] It also seeks to better align itself with the 1996 Hague Child

91 *Picone,* RDIPP (1996), 705 (715–718). The *forum non conveniens* doctrine would be reflected in Art. 8 of the 1996 Hague Child Protection Convention and the *forum conveniens* in its Art. 9, working only as an exception to the general rule based on the habitual residence of the child.

92 The CJEU has traditionally rejected the efficacy of the *forum non conveniens* doctrine, notwithstanding its defense by the English doctrine. See *Font i Segura,* REDI 56 (2004), 273. The debate was opened for example in the case CJEU, 13.07.2000, C-412/98 (*Group Josi Reinsurance Company SA/Universal General Insurance Company* (*UGIC*)).

93 International Child Abduction Database, available at: www.incadat.com (last consulted 13.10.2020).

94 The terminology used in this field differs depending on the countries. For example, in Latin America, the term *secuestro* is used, whereas in Spain, *sustracción* is preferred (*enlévement* and *abduction,* according to the official translations of the 1980 Hague Child Abduction Convention). This shows the habitual problems derived from the translation of the Conventions. See *Fernández Arroyo,* R. Inf. legisl. Brasília 1991, 139 (155, fn. 58). Art. 2 (10) Brussels II ter Regulation refers in particular to the appropriate concept of wrongful removal or retention.

95 In particular, there has been an increase in cases of wrongful removal of the child carried out by the holder of the custody rights, as well as for reasons of gender-based violence by the abused parent in order to distance the child from the abuser. See *Kaye,* Int. J.L. Pol. Fam. 13 (1999), 191.

96 See *van Loon,* in: Cross-border Activities in the EU, p. 178. See also the interesting proposals by *Beaumont/Walker/Holliday,* JPIL 12 (2016), 211–260. Some of these proposals for the future regulation focus on: (1) concentration of jurisdiction for child abduction cases; (2) limiting appeals and making the whole process timely; (3) reversal of CJEU, 01.07.2010, C-211/10 PPU (*Povse/Alpago*); (4) hearing the child; (5) protective measures and links to the 1996 Hague Child Protection Convention; and (6) Central Authorities. Very interesting are also the reflections made by *Rodríguez Pineau,* REDI 69 (2017), 139–166.

Protection Convention, with the aim of harmonizing child protection within the EU and in relation with third States that are parties to the Convention.

In line with the 1980 Hague Child Abduction Convention and the objective of ensuring the immediate return of the child after a wrongful removal or retention committed by one of the "holders of parental responsibility",[97] the Brussels II bis Regulation contains provisions on international child abduction that have been criticized for their formalistic approach to this complex topic.[98] These provisions do not aim at substituting the 1980 Hague Child Abduction Convention, but at supplementing it and thus enhancing its performance. One key feature that is retained by the Brussels II ter Regulation is that the country of the child's habitual residence prior to its removal or retention maintains jurisdiction to decide on parental responsibility matters and on the child's habitual residence. This jurisdiction rule is reinforced by a special recognition and enforcement regime for return decisions issued by the court where the child's habitual residence is located, that prevail over a non-return decision issued by the court in charge of the 1980 Hague Child Abduction Convention proceedings. This approach has received the unrestrained support of the CJEU, but it has put in jeopardy the best interests of the child as illustrated by the CJEU in *Povse/Alpago*[99] and in *Aguirre Zagarra*[100]. As mentioned above, the immediate return of the child does not always coincide with its best interests. Thus, the Brussels II ter Regulation seeks for a better balance between the interests at stake by amending Art. 11 (8) Brussels II bis Regulation.

The said case law has also served to highlight that the relationship between the 1980 Hague Child Abduction Convention and the Brussels II bis Regulation is far from clear. Art. 22 and 96 Brussels II ter Regulation clarify this issue by indicating that Chapters III and IV thereof are complementary to the 1980 Hague Child Abduction Convention. While the latter prevails,[101] return decisions pursuant to this Convention issued by an EU Member State that must be recognized and enforced in another EU Member State will be

97 Using the terminology of the Brussels II bis as well as of the Brussels II ter Regulation, the Hague Convention has focused on cases of wrongful removal by the holder of the access rights.

98 For a critical analysis of the Brussels II bis Regulation in this regard, in particular Art. 11 (8), see *Espinosa Calabuig,* in: Carbone/Queirolo, Diritto di familia e Unione Europea, p. 283; *Beaumont/Walker/Holliday,* JPIL 12 (2016), 211–260.

99 CJEU, 01.07.2010, C-211/10 PPU (*Povse/Alpago*). For detail see *Lazić,* in: Paulussen et al., Fundamental Rights in International and European Law, p. 161–183.

100 CJEU, 22.12.2010, C-491/10 PPU (*Aguirre Zarraga/Pelz*), note 75.

101 According to Art. 22 *in fine,* Art. 23 to 29, and Chapter VI Brussels II ter Regulation, the Regulation "shall apply and complement the 1980 Hague Convention".

covered by Chapter IV Brussels II ter Regulation. It is nevertheless worth noting that some participants in the EUFams II Spanish Exchange Seminar hosted in Valencia in May 2019 stated that this provision entails a step back, because Art. 11 and 42 Brussels II bis Regulation seemed to have preference over those in the Convention instead of merely having a complementary role as in the Brussels II ter Regulation.[102]

In general, the Brussels II ter Regulation seeks to strike a better balance than its predecessor between the protection of the best interest of the child and the mutual recognition and mutual trust principles used to strengthen the EU area of justice. Key features of the new Regulation are: return proceedings are better streamlined; the clarified possibility of resorting to mediation during the whole proceedings; the encouragement of judicial and administrative cooperation; and room for weighing the best interests of the child when it comes to recognizing and enforcing decisions.[103]

In line with the 1980 Hague Child Abduction Convention, Art. 11 (3) Brussels II bis Regulation requires courts seized to act expeditiously and solve the return proceedings no later than six weeks after the application is lodged. Being more realistic, the new provisions allocate six weeks to each stage of the proceedings, i.e. six weeks to decide on the return in the first instance, six weeks to decide appeals,[104] and presumably six weeks to enforce the decision. As to the duration of the pre-proceedings, the regulation is silent, although it also requires the expeditiousness of the central authorities involved.[105] Nevertheless, it has been suggested that the farewell to the maximum six-week period mentioned in the Convention should have been carefully considered to the extent that, although not realistic, in practice this period puts pressure on courts to finalize the proceeding as soon as possible,

102 See *Espinosa Calabuig/Quinzá Redondo,* Report on the Spanish Exchange Seminar, 19. 05. 2019, p. 12.

103 See in general *Baruffi,* Freedom, Security & Justice: European Legal Studies 2017, 2–25; *Honorati,* RDIPP 53 (2017), 247; *González Marimón,* in: Martín Rodríguez/García Alvarez, El mercado único en la Unión europea, p. 81 (86–90); *Kruger,* Nederlands internationaal privaatrecht 35 (2017), 462; *Kruger/Samyn,* JPIL 12 (2016), 132.

104 See Art. 24 Brussels II ter Regulation. According to COM (2016) 411 final, p. 13, the average duration of a 1980 Hague Child Abduction Convention proceeding was 165 days, i.e. around 23 weeks.

105 See Art. 23 Brussels II ter Regulation. Art. 63 of the Proposal for a Brussels IIa Recast did establish a six-week period for the Central Authorities to receive and process the return application. About the benefits of this time limitation, see *González Beilfuss,* in: Álvarez González et al., Relaciones transfronterizas, globalización y derecho, p. 383 (393); *de Sousa Gonçalves,* AEDIPr 18 (2018), p. 351 (364); *Herranz Ballesteros,* in: Cebrián Salvat/Lorente Martínez, Protección de menores y Derecho Internacional Privado, p. 171 (185–189).

and the new time limits risk putting an end to that pressure.[106] Be that as it may, the adherence to deadlines for the return of the child seems to depend heavily on a strong inter-State cooperation framework, including direct communications among authorities and courts of different countries.[107]

More specifically, the speeding up of such proceedings requires the assistance of the Central Authorities to the court seized,[108] reliance on existing networks of judicial cooperation, and possibly involvement of members of the International Hague Network of Judges and liaison judges. This would probably be enhanced by the concentration of jurisdiction upon a few judges, as suggested in Recital 41 Brussels II ter Regulation. This cooperation is the only way to reduce the manipulation inherent in time limits in cases of child abduction, as happened with the 1980 Hague Child Abduction Convention and the interpretation of its Art. 12.[109] Nevertheless, the enhancement of cooperation among authorities is very challenging, even within the EU area of justice. In this vein, court concentration and time limits may help to achieve the objectives of return proceedings. By the same token, it would have been desirable to also set up a time limit for the proceedings deciding on the child's custody, as this decision might imply its return and be taken extemporarily in respect of the 1980 Hague Child Abduction Convention proceedings.[110]

Invited by the court and, where appropriate, with the assistance of Central Authorities, the parties are encouraged to resort to mediation or other alternative dispute resolution (ADR) methods as soon as possible and at any stage of the proceedings, "unless this is contrary to the best interests of the child, it is not appropriate in the particular case or would unduly delay the proceedings" (Art. 25 Brussels II ter Regulation). This provision takes into consideration the role that mediation already has in the 1980 Hague Child Abduction Convention, that has been enhanced by the issuance of a Guide to

106 These opinions were manifested by some judges and lawyers during the EuFams Spanish Exchange Seminar in Valencia in October 2016. See these comments in *Espinosa Calabuig/Carballo Piñeiro,* Report on the Spanish Good Practices, p. 13

107 On the importance of direct communications and the role of judges see *Goicoechea/van Loon,* in: Ruiz Abou-Nigm/Noodt Taquela, Diversity and Integration in Private International Law, p. 295.

108 The essential function of the Central Authorities has been highlighted for a long time in relation to The Hague Conventions. See *Bonomi,* RDIPP 1995, 607 (654) and *Franchi,* Protezione dei minori e Diritto internazionale privato, p. 19, who refer to the role of the Central Authorities in the framework of the 1996 Hague Child Protection Convention as a way of promoting cooperation between Member States. In the same way *Picone,* RDIPP 1996, 705; *Borrás Rodríguez,* REDI 45 (1993), 63.

109 *Espinosa Calabuig,* REDI 68 (2018), 347.

110 See *González Beilfuss,* in: Álvarez González et al., Relaciones transfronterizas, globalización y derecho, p. 383 (395).

Good Practice whose Part V is devoted to mediation.[111] Yet, and linked to the fact that the pre-proceedings stage before the Central Authorities does not have a time limit, ADR methods might be used to delay a quick solution.[112] For that reason, emphasis should be put on authorities' adequate training, including the ability to detect delaying tactics. If an agreement is reached via ADR methods, the parties should also be able to agree on submitting their approval to the court seized under the Convention by removing the jurisdiction from the natural judge of the child, that of its habitual residence.[113]

The abovementioned Guide to Good Practice to the 1980 Hague Child Abduction Convention provides in Part VI guidelines for applying Art. 13 (1) (b) of the Convention, which allows for refusal of the child's return in the event that this would expose the child to a grave risk of physical or psychological harm, or otherwise place the child in an intolerable situation. Framed in these terms, this exception (or any other in the Convention, including the provision on infringement of fundamental rights in Art. 20) does not specifically account for domestic violence that the abducting parent might be suffering, because the focus is on the child. However, socio-legal studies illustrate that the child is also a victim in these cases, which account for a significant number of the totality of international child abduction cases.[114] The main issue is how to address these cases in the framework of a Convention that does not provide any mechanism for accommodating the interests at stake, including those of the abused parent. The Brussels II ter Regulation does not address this conflict either, but it does mention that mediation might not be appropriate in these situations.[115]

Regarding the return proceedings, Art. 27 Brussels II ter Regulation follows the lines of Art. 11 Brussels II bis Regulation, including the limitation to refuse return based on Art. 13 (1) (b) of the 1980 Hague Child Abduction Convention, provided that sufficient evidence or adequate arrangements have been made to secure the protection of the child after its return. There

111 The Guide to Good Practice Child Abduction Convention: Part V – Mediation.

112 See *Gandía Sellens,* AEDIPr 17 (2017), p. 799 (812); *Azcárraga Monzonís,* in: Azcárraga Monzonís/Quinzá Redondo, Tratado de mediación, Vol. 3, p. 17 (20–38).

113 See Recital 43 Brussels II ter Regulation.

114 See *Lowe/Stephens,* A statistical analysis of applications made in 2015 under the Hague Convention 1980 on the civil aspects of international child abduction – Global report. See also the analysis made by *Bruch,* Fam. L. Quart. 38 (2004), 529–545; *Hale,* Current Legal Problems 70 (2017), 3–16; *Kaye,* Int. J.L. Pol. Fam. 13 (1999), 191–212; *Requejo Isidro,* AEDIPr 6 (2006), p. 179–194; *Rodríguez Pineau,* REEI 35 (2018), 1–31; *Weiner,* Fordham L. Rev. 69 (2000), 593–706; *Pérez Martín,* in: Bastante Granell/López San Luis, La protección del menor. Situación y cuestiones actuales, p. 73–88.

115 See Recital 43 Brussels II ter Regulation.

are, nevertheless, significant developments in terms of: first, prominently placing the child's right to be heard;[116] second, encouraging contact between the child and the person seeking its return, provided that it is in its best interests; and third, entitling the seized court in the 1980 Hague Convention proceedings to adopt protective measures that can be recognized and enforced in the country of the child's habitual residence. This was already advanced by a judgment of the CJEU in 2018,[117] changing former case law that territorially restricted provisional measures adopted by a court other than the one with jurisdiction on the merits. This entitlement may also serve to tackle domestic violence situations by, for example, requiring the abducting parent and the child to be placed in a secured home in the country from where it was removed. To this end, direct communications between courts as well as the resort to Central Authorities are encouraged. The extent to which these measures may help to adequately consider the grave risk that domestic violence situations imply for the child is, nevertheless, subject to great controversy if the child's best interest is to be given proper weight.[118]

In general, the measures laid down in the Brussels II ter Regulation could improve the effectiveness of the return mechanism. Several features could contribute to that effectiveness, namely: the establishment of additional deadlines; the clarification of the subject of each deadline; the extension of the deadline; the limitation of appeals, and the unification of this issue in all Member States. Together with these items, the requirement of cooperation between authorities of EU Member States and the specialization of jurisdiction will probably advance the rules on the return of child.[119]

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116 See Art. 26 Brussels II ter Regulation.

117 CJEU, 19.09.2018, C-325/18 PPU and C-375/18 PPU (*Hampshire County Council/C.E. and N.E.*), that concludes that the Regulation must be "interpreted as not precluding a court of one Member State from adopting protective measures in the form of an injunction directed at a public body of another Member State, preventing that body from commencing or continuing, before the courts of that other Member State, proceedings for the adoption of children who are residing there".

118 See an overview of criticism regarding the Guide to Good Practice Child Abduction Convention: Part VI – Article 13(1)(b) in this respect, that also applies to the Brussels II ter Regulation in *Rodríguez Pineau,* REEI 35 (2018), 1 (23–31).

119 *Baruffi,* JPIL 14 (2018), 385–420. The author makes a reference to the works of the HCCH Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Child Protection Convention. In this regard, see Int. Fam. Law (2018), 39–44. Also interesting are the proposals of the HCCH Experts Group on cross-border recognition and enforcement of agreements in family matters involving children. See also *de Sousa Gonçalves,* AEDIPr 18 (2018), p. 351.

VI. Rules of recognition and enforcement

In line with the Brussels II bis Regulation, the Brussels II ter Regulation provides two different regimes in order to enforce a decision on parental responsibility matters, namely, a generally applicable recognition and enforcement regime and a regime only suitable for certain privileged decisions that benefit from a further limitation on the grounds for refusal of enforceability. In addition to a better procedural alignment of both regimes, with some concessions on the application of the country of origin principle, the main development in the new Regulation is the recognition and enforcement of authentic instruments and agreements, now with a dedicated Section in Chapter IV.

Art. 2 (1) Brussels II ter Regulation provides a definition of "decision" for the purposes of Chapter IV. This definition specifically includes a return decision pursuant to the 1980 Hague Convention and provisional measures as long as the defendant had been summoned in the proceeding adopting them. Remarkably, provisional measures issued by a court other than the one with jurisdiction on the merits can be also recognized, provided that the measure is taken to protect the child from a grave risk as defined by Art. 13 (1) of the 1980 Hague Convention.[120] The latter marks a sharp contrast with its predecessor where there was no room for recognition of provisional, including protective, measures taken by courts other than the competent court for the substance of the matter, which is a principle that was asserted by the CJEU.[121] The same provision lays down the definitions of "authentic instrument" and "agreement", both requiring the intervention of a public authority for the applicability of the recognition and enforcement rules in Chapter IV.

The new Regulation provides for three types of recognition and enforcement proceedings, namely: recognition without a formal proceeding; via incidental question; and a formal proceeding to apply for a decision that there are no grounds for refusal of recognition. However, the major development is the abolition of exequatur by granting immediate effects, including enforceability, to the decision taken in the Member State of origin in the Member

120 The principle is kept that these protective measures adopted by a court other than the one with jurisdiction on the substance of the matter remain in force only until the latter takes the measures it considers appropriate. The reminder that the court adopting the measure should inform the court of the child's habitual residence, directly or through the Central Authorities, laid down in Recital 30, is in line with the gap identified by CJEU, 27. 11. 2007, C-435/06 (*C*).

121 See Recital 59 Brussels II ter Regulation.

State of destination, whose recognition and enforcement might nevertheless be challenged before the courts of the latter following a proceeding laid down in Art. 59–62, Section 5 of Chapter IV and Chapter VI thereof.

As to the grounds for refusal of recognition and enforcement, Art. 39 Brussels II ter Regulation is in line with Art. 23 Brussels II bis Regulation, although the child's right to be heard in parental responsibility proceedings is protected better in the new instrument, in accordance with the principle set up in its Art. 21.[122] While the former was formulated in such terms that the examination requires focus on whether there had been a violation of fundamental principles of procedure in the Member State in which recognition is sought due to the failure to provide for a hearing of the child, the latter rightly examines whether there has been a violation of the child's right to be heard.[123] However, two exceptions for compliance with this right are established. The first is parallel to the previous Regulation and considers concurrent serious grounds that prevented the hearing, including the urgency of the case. The second is restricted to proceedings concerning the property of the child, where the opportunity to be heard is not given in view of the subject-matter of the proceeding. These specifications are welcome and in line with the CJEU's case law.[124] The use of open concepts in both exceptions will nevertheless call for the CJEU's interpretation, although some clarifications are made in Recital 57, at least as to the meaning of "serious grounds" preventing the hearing in case of "imminent danger for the child's physical and psychological integrity or life and any further delay might bear the risk that this risk materialises".

Decisions granting access to a child and its return benefit from a special regime, as they do in the Brussels II bis Regulation. While they can be recognized and enforced following the abovementioned general regime, the special regime simplifies the proceeding in situations where the rights of the child as stated in Art. 9 of the 1959 UN Declaration of the Rights of the Child, are, or might be, compromised. Art. 42 Brussels II ter Regulation refers to decisions that ensure the right of the child who is separated from one or both parents to maintain personal relations and direct contact with them

122 The same applies to the ECtHR that has already provided some guidance on the application of the child's right to be heard in ECtHR, 08. 07. 2003, no. 30943/96 (*Sahin/Germany*), note 73 et seq.; ECtHR, 22. 06. 2004, no. 78028/01 and 78030/01 (*Pini et al./Romania*), note 164; ECtHR, 13. 07. 2000, no. 25735/94 (*Elsholz/Germany*); ECtHR, 02. 02. 2016, no. 71776/12 (*N.TS. et al./Georgia*), note 73 et seq. and ECtHR, 11. 10. 2016 no. 23298/12 (*Iglesias Casarrubios and Cantalapiedra Iglesias/Spain*), note 42. See *Ubertazzi,* JPIL 13 (2017), 568–601.

123 See *Ubertazzi,* JPIL 13 (2017), 568 (585).

124 CJEU, 22. 12. 2010, C-491/10 PPU (*Aguirre Zarraga/Pelz*).

on a regular basis. That is the case for judgments granting rights of access, but in particular for those decisions that order the return of the child within the framework of the proceeding set up in the 1980 Hague Child Abduction Convention as supplemented by Chapter III of the Brussels II ter Regulation. The latter follows the path already initiated by the Brussels II bis Regulation and rules the case where the country of the child's physical presence denies the return on grounds of Art. 13 (1) and (2) of the Hague Convention, i.e. because whoever was exercising the custody of the child at the time of removal was not effectively doing it or have consented or acquiesced in the removal, or because of grave risk for the child in physical or psychological terms if returned, respectively. While the country of the child's habitual residence needs to adequately ponder this non-return decision in addressing custody matters, Art. 29 (6) Brussels II ter Regulation lays down that its judgment finally ordering the return prevails over that of the non-return judgment. In this vein, these decisions become enforceable in another Member State once they are certified in accordance with the requirements laid down in Art. 47 of the Regulation.

Unlike in the Brussels II bis Regulation, the certificate is only issued upon request of a party by the court that has rendered the judgment granting access rights to the child or its return, provided that all parties, including the child, where appropriate, were given an opportunity to be heard and service of notice was provided or parties in default have otherwise unequivocally accepted the decision. Based on the principle of mutual trust, the abolition of exequatur relies on the Member State of origin attesting that these basic rights have been respected during the proceeding and denying jurisdiction to undertake this examination to the courts of the Member State of destination. However, the *Aguirre Zagarra* case has signaled the difficulties of this approach, since the courts of the Member State of origin certify compliance with the child's right to be heard even when that hearing has not taken place.[125] This has prompted close attention to the circumstances upon which the hearing of the child should take place, and it has been found that there are significant divergences across the Member States. In view of this situation, the development of an autonomous approach to this right during the recast of Brussels II bis Regulation has been strongly suggested to avoid the erosion of the mutual trust principle, but in particular to ensure the child's rights.[126] As already indicated, the new Regulation has acknowledged in Art. 21 the substance of the right, but has refused to harmonize the

125 CJEU, 22. 12. 2010, C-491/10 PPU (*Aguirre Zarraga/Pelz*), note 72.
126 *Ubertazzi,* JPIL 13 (2017), 586–601.

substantive and procedural aspects, such as the minimum age to hear the child or who should be conducting the hearing, either the judge or another professional.

Nevertheless, and with respect to the *Aguirre Zagarra* case and similar, on the one hand, all relevant forms of certificates contained in the Annexes to the Brussels II ter Regulation require the authority issuing it to attest whether the child has been given a "genuine and effective" opportunity to express his or her views in accordance with Art. 21 of the Regulation. The latter is intended to raise the already low figure of cases in which the child has been effectively heard.[127] On the other hand, Art. 21 (1) indicates that the hearing can take place either before the court seized or through a representative or an appropriate body. More specifically, Recital 53 presents a reminder that a hearing through video conference or by means of any other communication technology might be considered unless it would infringe the fair conduct of the proceedings on account of the particular circumstances of the case, if it is not possible to hear a child in person.[128]

In addition to the abovementioned requirements and in the case of a return decision, the court seized will only issue the certificate if "in giving its decision, the court has taken into account the reasons for and the facts underlying the prior decision given in another Member State pursuant to point (b) of Art. 13 (1), or Art. 13 (2), of the 1980 Hague Convention" (Art. 47 (4) Brussels II ter Regulation). In line with the amendments made to Art. 11 (8) Brussels II bis Regulation, the new Regulation partially overturns the *Povse/Alpago* case where the CJEU held that interim return orders could be enforced via the special regime for privileged decisions.[129] Hence, only final return decisions made in the best interests of the child can now benefit from this regime. In this vein, the Regulation would be in alignment with the ECtHR case law, in particular *Neulinger*[130] and *Kampanella.*[131]

127 *Beaumont/Walker/Holliday,* Int. Fam. L.J. 4 (2016) 310 (318), found that only 20% of children involved in Art. 11 (8) Brussels II bis Regulation have been heard.

128 These methods and means available to judges to hear the child were already indicated in the EU Commission's Practice Guide for the Application of the Brussels IIa Regulation (2014), 76–80, https://op.europa.eu/en/publication-detail/-/publication/f7d39509-3f10-4ae2-b993-53ac6b9f93ed (last consulted 02. 10. 2020). This guidance in the regulation is still an advancement compared to the previous situation as indicated by *Carpaneto,* RDIPP 2018, 944 (969).

129 CJEU, 01. 07. 2010, C-211/10 PPU (*Povse/Alpago*).

130 ECtHR, 06. 07. 2010, no. 41615/07 (*Neulinger and Shuruk/Switzerland*). See with this remark *Carpaneto,* RDIPP 2018, 944 (973 et seq.); *Honorati,* RDIPP 53 (2017), 247 (264 et seq.).

131 ECtHR, 12. 07. 2011, no. 14737/09 (*Šneersone and Kampanella/Italy*).

The abovementioned requirements differentiate between the certificates pursuant to Art. 47 and 36 Brussels II ter Regulation. The reason for this divergence lies in the fact that the former cannot be challenged on the grounds laid down in Art. 39, but only by those set out in Art. 50, along with the situation described in Art. 56 (6), because it applies to all instances of enforcement. In other words, in addition to the abolition of exequatur, the special regime for privileged decisions shifts the examination of grounds for refusal of recognition and enforcement from the country of destination to the country of origin. The exceptions are: (1) those cases where the certified decision is irreconcilable with a later decision in the Member State of recognition, or in another Member State or the non-Member State of the child's habitual residence provided that they comply with the requirements for recognition and enforcement in the latter State (Art. 50); and (2) the certificate pursuant to Art. 47 is rectified because there is a material discrepancy between the decision and the certificate (Art. 48 and 49). The *Aguirre Zagarra* case also accounts for the latter ground for refusal of enforcement to the extent that it permits to correct assertions, such as the one that the child has been heard, if necessary.

Regardless of the chosen regime to recognize and enforce a decision, the new Regulation also sets up grounds for suspension and refusal of enforcement. Art. 56 lists the cases in which the court seized can stay the enforcement of a decision, either on its own motion or upon application of the person against whom enforcement is sought or the child concerned. Those situations include the case in which the "enforcement would expose the child to a grave risk of physical or psychological harm due to temporary impediments which have arisen after the decision was given, or by virtue of any other significant change of circumstances" (Art 56 (4) Brussels II ter Regulation), that can lead to a refusal of enforcement if those impediments or circumstances are of a lasting nature (Art. 56 (6) Brussels II ter Regulation). Recital 69 sheds light on this ground which was addressed in the *Povse and Povse/Austria* case,[132] where the father visited the child in the country of abduction but stopped doing so shortly afterwards. By the time of enforcement, four years had already passed and the child had forgotten the common language with the father and become a stranger. Nonetheless, the return was insisted upon by the Italian side without undertaking any previous measure to re-establish the contact between the child and the father. Nevertheless, the *Deticek* case sends a different message by reminding us that this type of assessment corresponds to the court of the child's habitual residence, for which

132 ECtHR, 18. 06. 2013, no. 3890/11 (*Povse and Povse/Austria*).

reason the child's integration in the country of destination might lead to stay of enforcement, but not to refusal.[133]

Recital 69 of the Brussels II ter Regulation presents as an example of an impediment of the abovementioned sort, the "manifest objection of the child voiced only after the decision was given which is so strong that, if disregarded, it would amount to a grave risk of physical or psychological harm for the child". Although the same Recital insists on the resumption of enforcement as soon as the said grave risk ceases to exist, adopting measures in accordance with national law and procedure, such as seeking the assistance of professionals, such as social workers or child psychologists, to try to overcome those objections, the concern has also been raised that this provision will only serve to prolong the dispute.[134] Other examples might be circumstances that concern one of the parents, such as a new child, a serious illness that renders the custodian unable to take care, detention, or expulsion to another country.[135]

In general, and as stated in Recital 67, a relevant change of circumstances, such as challenges against the decision in the country of origin or its loss of enforceability, as well as obstacles or emergency situations, including the ones mentioned in Art. 56 (4) and (6) Brussels II ter Regulation that have arisen out at the enforcement stage, should be immediately addressed by the authorities competent for enforcement. Hence, Art. 56 and 57 deal with suspension and refusal of enforcement, including on the grounds laid down in national legislation that are not incompatible with Art. 41, 50 and 56. In this vein, Recital 63 provides for clarification on these grounds that "could include, for example, challenges based on formal errors under national law in an act of enforcement or on the assertion that the action required by the decision has already been performed or has become impossible, for instance, in case of force majeure, serious illness of the person to whom the child is to be handed over, the imprisonment or death of that person, the fact that the Member State to which the child is to be returned has turned into a war zone after the decision was given, or the refusal of enforcement of a decision which under the law of the Member State where enforcement is sought does not have any enforceable content and cannot be adjusted to this effect".

Section 4 of Chapter IV is devoted to recognition and enforcement of authentic documents and includes a more exhaustive regulation than the

133 CJEU, 23. 12. 2009, C-403/09 PPU (*Deticek/Sgueglia*).

134 See *González Beilfuss,* in: Álvarez González et al., Relaciones transfronterizas, globalización y derecho, p. 383 (397 et seq.); *Rodríguez Pineau,* REEI 35 (2018), 1 (30).

135 See *Honorati,* RDIPP 53 (2017), 247 (267 et seq.).

one in the succinct Art. 46 Brussels II bis Regulation. Like its predecessor, the Brussels II ter Regulation provides for the circulation of authentic instruments and agreements in matters of parental responsibility which have binding legal effect and are enforceable in the Member State of origin. To this end, not only the general provisions provided for in the previous sections of Chapter IV apply, but a specific certificate is issued in order to facilitate such circulation, that it is also subject to the abolition of exequatur. In this vein, the certificate can only be issued if: (1) the authentic instrument has been formally drawn up or registered, and the agreement has been registered, in a Member State assuming jurisdiction under Chapter II; (2) either of them has binding legal effect in that State; and (3) their content is not contrary to the best interest of the child (Art. 66 Brussels II ter Regulation.).

Although the proceedings are laid down in Art. 59 to 62, Section 5 of Chapter IV and Chapter VI, this Section provides for the grounds for refusal of recognition and enforcement that follow the path of Art. 39. However, these grounds have been adjusted to the elaboration of authentic instruments and agreements in this matter. In a similar vein, and in a manner highlighting its significance, the mandatory hearing of the child's views, where appropriate, has been laid down in a separate paragraph (3), from the other grounds established in Art. 68 (2).

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Judicial Training in European Private International Law in Family and Succession Matters

Mirela Župan, Ivana Kunda, and Paula Poretti

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Abstract The reality of the administration of justice has changed over the last few decades through massive intervention of international and supranational actors within national judicial systems. Though state-centrism has progressively been eroded, the national State remains the "master of the game" in adjudication. A proper application of European private international law is the cornerstone of civil justice. It goes without saying that judicial training (in a wider sense, including the training of judges, practitioners, and other stakeholders) is important in order to achieve an adequate and unified application of European private international family and succession law. The EUFams II findings further highlight that education and training of professionals in this area of law are of paramount importance when it comes to fostering predictability and legal certainty.

This contribution commences by explaining EU policy on judicial training and presenting the main training facilities and their features. The contribution then turns to methodological aspects of the transfer of knowledge in legal discourse. The second part of the contribution presents the EUFams II project results relevant to judicial training. It seeks to establish a direct link with EU justice policy objectives, methodologies, performance of judicial training at European training centers and national training academies that serve the system of justice in European family and succession law. Quantitative and qualitative analyses lead to conclusions and proposals in respect of future training policy and its desired performance in cross-border family and succession matters. Several methodological approaches are combined and presented in the contribution. The attempt to conceptualize *pro futuro* the judicial and legal professionals' training in European family and succession law relies on all case law and legal instruments researched within the EUFams II Project, different questionnaires, published studies, evaluations and communications, and various scholarly contributions primarily in the fields of law and education. It has yielded the following ten practice-oriented and hands-on recommendations (rather than commandments) addressed to the EU and Member States alike.

Summary of theses: **1.** Training needs to continue being guided at the EU level. **2.** Judicial training should be made a priority. **3.** A study of training needs should be conducted in general, for each Member State, and for each legal instrument. **4.** A model curriculum should be adopted at the EU level. **5.** The training curriculum should be designed on several levels and ranked based on EU criteria. **6.** Training should be based on modern teaching methodology. **7.** EU funded material should follow an open access policy and remain available on a single webpage administered by the EU, even after the expiry of the respective project. **8.** Training should be delivered to specific

target groups. **9.** Access to high quality training should be made available to all eligible judges. **10.** International and national training should be kept in balance.

Keywords judicial training, European family and succession law, EJTN, ERA, EIPA, IHNJ.

I. Introduction

Transnationalization of life leads to an ever increasing transnationalization of law-making and law enforcement. Mobility of individuals and families within the EU has comparable effects; intensive Europeanization of life leads to Europeanization of law. European family and succession law have developed at a considerable pace and its complexity is constantly increasing.[1] Normative pluralism is expanding as the creation, implementation, application, and monitoring of laws are no longer confined to territorial and functional boundaries. These trends are accordingly reflected in European family and succession law. A mosaic of interconnected legal sources deriving from different origins results in a multi-layered and fragmented framework.[2] The reality of the administration of justice has changed over the last few decades through massive intervention of international and supranational actors within national judicial systems.[3] The interpretation and application of this legal corpus equally gets lifted to a higher level, with the uniform interpretation of law placed at the forefront. A proper application of European private international law is the cornerstone of civil justice. Though state-centrism has progressively been eroded, the national State remains the "master of the game" in adjudication.[4]

The EUFams II project combines different methodological approaches to address the issues of application and interpretation of European and international instruments on family and succession matters before national courts of various Member States. Against that background, a number of project

1 *van Calster,* European Private International Law, p. 3 et seq.; *Corneloup et al.,* Children on the Move, p. 9; *Rass-Masson,* YPIL 20 (2018/2019), p. 521–536; *Franzina/Viarengo,* in: Viarengo/Franzina, The EU Regulations on the Property Regimes of International Couples, p. 1–13; *Mansel/Thorn/Wagner,* IPRax 2020, 97–126.

2 *Župan,* in: Honorati, Jurisdiction in matrimonial matters, p. 1 (5).

3 *Piana,* Judicial Accountabilities in New Europe, p. 1.

4 *Arroyo,* YPIL 20 (2018/2019), p. 31–46.

activities were implemented: Relevant national case law was collected, elaborated and uploaded to the EUFams II database;[5] national reports were delivered highlighting specific aspects of the application of EUFams II subject matter regulations and Hague conventions in the project partners' Member States (Croatia, Germany, Italy, Spain, and Sweden). The thematic EUFams II consortium reports were drafted to provide an account of national implementation legislation,[6] as well as specific aspects relating to third country nationals.[7]

Data collected by the EUFams II consortium as part of the project allows for several important conclusions. When comparing case law of different Member States, the research revealed a lack of uniformity and consistency in the interpretation and application of the relevant *acquis.* When case law related to a specific legal instrument is compared horizontally throughout the EU, project findings show that the scrutinized regulations and conventions have been correctly applied only to a limited extent. As a consequence, there is a risk that citizens in the EU may be deprived of the full enjoyment of the benefits within the EU judicial area. The purpose of this contribution is to use these analyses and results as a basis for designing feasible pathways for system improvements with a focus on judicial training.

It goes without saying that judicial training is important in order to achieve an adequate and unified application of European family and succession law. The EUFams II findings further highlight the fact that the education and training of professionals in this area of law are of paramount importance when it comes to fostering predictability and legal certainty. Judicial training does not only include the judiciary, but also other authorities that serve the system of justice in respect of these matters in Member States, in particular notaries. In a wider sense, it encompasses the training of practitioners and other stakeholders involved in the system.

This contribution commences by explaining EU policy on judicial training and presenting the main training facilities and their features. It then turns to methodological aspects of the transfer of knowledge in legal discourse. The second part of the contribution presents the EUFams II project results relevant to judicial training. It seeks to establish a direct link with EU justice policy objectives, methodologies, performance of judicial training at European training centers and national training academies that serve the

5 See http://www2.ipr.uni-heidelberg.de/eufams/index.php?site=entscheidungsdatenbank (last consulted 16. 10. 2020).

6 See http://www2.ipr.uni-heidelberg.de/eufams/index.php?site=projektberichte (last consulted 16. 10. 2020).

7 See *Brosch/Mariottini* and *Zühlsdorff*, in this volume.

system of justice in European family and succession law. Quantitative and qualitative analyses lead to conclusions and proposals in respect of future training policy and its desired performance in cross-border family and succession matters.

Several methodological approaches are combined and presented in the contribution. The authors opted for desk research on relevant writings and analyses of reports, journals, and other legal publications, as well as policy papers available online. Additionally, the authors took advantage of the previous assessment conducted within the EUFams II Project. In addition to the online judicial training survey conducted among training participants (hereinafter: the online judicial training survey),[8] training networks and academies have been addressed with an additional questionnaire (hereinafter: the online questionnaire).[9] The survey and the questionnaire have allowed for a content analysis as well as a quantitative analysis of the data collected.

II. European judicial training – policy considerations

1. Development of the European judicial training strategy

The year 2020 marks the end of the first period of strategic training of legal practitioners on European law. A systematic training policy was introduced in the "2011–2020 European judicial training strategy", titled "Building Trust in EU-wide Justice – A new dimension to European judicial training"[10] (hereinafter: the 2011–2020 European judicial strategy), which set very specific objectives for the training of justice professionals. However, the first steps towards creating training policy at the European level were actually taken as early as 2006.

8 The online judicial training survey addressed experts in cross-border family and succession matters. It targeted the EUFams Network of practitioners and was accessible via a link to an anonymous Google survey. In total, 129 responses were recorded, mainly from lawyers (39.5%), judges (25.6%), state officers (11.6%), public notaries (7.8%), and others actively working with the relevant regulations and conventions from 17 Member States and 4 other countries.

9 Responses to the online judicial training survey questionnaire were delivered by ERA, EIPA, and the German, Swedish and Croatian judicial academies.

10 Communication from the Commission to the European Parliament, the council, the European Economic and Social Committee and the Committee of the Regions – Building Trust in EU-Wide Justice – A New Dimension to European Judicial Training, COM (2011) 551 final.

In 2006, in its "Communication from the Commission to the European Parliament and the Council on judicial training in the European Union"[11] (hereinafter: the EC Communication on judicial training in the EU 2006), the European Commission identified judicial training as a major issue in the light of two developments: First, the adoption of a corpus of legislation that has become substantial and must be implemented by justice practitioners in the Member States; and second, the development of the mutual recognition principle which rests primarily on a high degree of mutual confidence between the Member States' judicial systems.[12] At that point, the operation of legal training in Member States was only considered in the context of the training of judges and prosecutors.[13] However, the training of lawyers who are not part of the respective Member States' judiciaries was also included in the analysis provided in the document.[14]

The EC Communication on judicial training in the EU 2006 revealed that the duration of the training varied in the Member States. Furthermore, it exposed major inequalities among judges, prosecutors and lawyers in terms of access to training. In budgetary terms, the training of judges and prosecutors is usually publicly financed, whereas the training of lawyers is financed by professional organizations. Interestingly, in 2006, the European Commission seems to have been inclined towards a centralized approach to judicial training by devoting an important part of its resources to finance a fully-fledged "European" offer of training for judges and prosecutors.[15] According to the EC Communication on judicial training in the EU 2006, there are three key areas for improvement in the judicial profession: language skills, familiarity with EU law, and familiarity with law in other Member States.[16] These findings were supported by additional evaluation reports, and they encouraged the introduction of further measures by way of the "Resolution of the Council and of the Representatives of the Governments of the Member

11 Communication from the Commission to the European Parliament and the Council, COM (2006) 356 final.

12 COM (2006) 356 final, note 2.

13 As regards judges and prosecutors, depending on the Member State, judicial training is organized by the Ministry of Justice, the Higher Council of the Judiciary or Justice, or, where appropriate, by the Prosecutor-General (where there is strict separation between judges and prosecutors), or by specialized establishments. In several Member States, a single institution is responsible for the training of judges and prosecutors. See COM (2006) 356 final, note 8.

14 Training of lawyers is often organized by bar associations, in many cases in cooperation with universities. See COM (2006) 356 final, note 8.

15 *Piana,* Journal of Law and Conflict Resolution 1 (2009), 30 (39).

16 COM (2006) 356 final, note 24–27.

States meeting within the Council on the training of judges, prosecutors and judicial staff in the European Union".[17] However, the training of lawyers was not within the scope of the said document because in the majority of Member States, these professions are responsible themselves for organizing their training.[18]

With the measures aimed at organizing the training of judges, prosecutors and judicial staff at the national level, Member States were to a certain extent prepared for the developments which followed the entry into force of the Lisbon Treaty in 2009, and provided a legal basis for an EU competence to create a European strategy for judicial training.[19] In line with the Stockholm Programme,[20] European judicial training is both a priority in terms of enhancing judicial cooperation in civil and commercial matters, as well as a prerequisite for improving the operation of the internal market[21] and making it easier for citizens to exercise their rights. A pursuit towards a joint European judicial culture[22] was reflected in the aforementioned 2011–2020 European judicial training strategy, which emphasized the importance of training for all legal practitioners, primarily judges and prosecutors, but also for court staff. The inclusion of legal practitioners in private professions, such as lawyers, was also considered important in order to provide legal certainty as well as legal assistance, service, and expert knowledge in European law to EU citizens taking advantage of the right to free movement. In order to reach the designated goals, several recommendations were made based on research findings and stakeholder consultations.[23] The start-

17 Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council on the training of judges, prosecutors and judicial staff in the European Union (2008/C 299/01), OJ C 299, 22.11.2008.

18 Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council on the training of judges, prosecutors and judicial staff in the European Union (2008/C 299/01), OJ C 299, 22.11.2008, recital 18.

19 Evaluation of the 2011–2020 European judicial training strategy, SWD (2019) 380 final, https://ec.europa.eu/info/sites/info/files/5_en_document_travail_service_part1_v2.pdf (last consulted 27.10.2020), para 2.

20 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Delivering an area of freedom, security and justice for Europe's citizens – Action Plan Implementing the Stockholm Programme, COM (2010) 171 final.

21 See *Monti,* A new strategy for the Single Market.

22 COM (2011) 551 final, para 1: "The creation of a European judicial culture that fully respects subsidiarity and judicial independence is central to the efficient functioning of a European judicial area. Judicial training is a crucial element of this process as it enhances mutual confidence between Member States, practitioners and citizens.".

23 Preliminary statistical data; European Parliament study "Judicial training in the EU Member States", COM (2011) 551 final, p. 4.

ing point was to support both initial as well as continuous training in environmental law, civil, contract, family and commercial law, competition law, intellectual property rights, fundamental rights, and data protection. Short-term exchanges should be available for judges and prosecutors, especially newly appointed ones during the initial training.[24]

Since European judicial training is a shared competence that requires action by justice professionals, Member States and the EU,[25] reaching the 2011–2020 European judicial training strategy goals is not going to be an easy task. The goals set were to be accomplished by focusing on the following objectives: a) legal practitioners should have a good knowledge of EU law, of EU judicial cooperation instruments and of the laws of other Member States; b) legal practitioners should trust each other in cross-border judicial proceedings; and c) citizens and businesses across the EU should benefit from their rights deriving from EU law.[26]

In quantitative terms, these objectives would translate to the following goals: a) half of all EU legal practitioners should have taken part in training on EU law; b) EU financing should support training on EU law for at least 20,000 legal practitioners annually; c) the EJTN should organize no less than 1,200 exchanges for (experienced) judges and prosecutors; d) all new judges and prosecutors should have taken part in an exchange program; and e) all legal practitioners should have had at least one week of training on EU law during their career.[27]

The implementation of the pilot project on European judicial training[28] in 2012 revealed a change in the European Parliament's approach towards European judicial training and a sharp turn towards more respect for the principle of subsidiarity and judicial independence within the Member States.[29] The aims of the project were: a) to identify best practices in the training of judges, prosecutors and justice professionals on national legal systems and traditions as well as on European law; b) to identify the most effective ways of delivering training in EU law and national legal systems to

24 COM (2011) 551 final, p. 5.

25 Evaluation of the 2011 European Judicial Training Strategy and preparation of the future strategy Analysis of the responses received to the targeted consultation, 2018, https://ec.europa.eu/info/sites/info/files/2018_targeted_consultation-european_judicial_training-analysis_of_replies.pdf (last consulted 07. 08. 2020), p. 3.

26 Evaluation of the 2011 European Judicial Training Strategy, p. 5.

27 Evaluation of the 2011 European Judicial Training Strategy, p. 7.

28 European Parliament resolution on judicial training, 14. 03. 2012, 2012/2575(RSP), https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2012-0079+0+DOC+PDF+V0//EN (last consulted 22. 10. 2020).

29 *Benvenuti,* International Journal for Court Administration 7 (2015), 59–67.

judges, prosecutors and justice professionals at the local level, and to promote dialogue and coordination between European judges and prosecutors; c) to encourage EU judicial training providers to share ideas on best practice and disseminate them across the EU; and d) to improve cooperation between the EJTN and national judicial training institutions.[30]

The final important development in the period was the adoption of nine judicial training principles of the EJTN. They serve as a foundation for the judiciary to manage their training needs and as a framework for the training providers to plan and deliver training to judges and prosecutors. The principles address issues such as a right to judicial training during working time, a responsibility to provide the necessary resources, compulsory initial training at the beginning of one's career, the use of modern training methods and techniques, and non-legal issues among the training topics.[31]

2. Evaluation of the European judicial strategy

As part of the commitment to support the training of legal practitioners in EU law, each year (2011–2018), the European Commission reports on the participation of legal practitioners in training on European law in the EU.[32] In addition, in 2013–2014, the "Implementation of the Pilot Project – European Judicial Training – Lot 1 – Study on Best Practices in training of judges and prosecutors", was undertaken, which helped to identify best practices in training legal practitioners in EU law.[33]

The implementation of the judicial training strategy has recently been assessed and the results were published in the Evaluation of the 2011–2020 European judicial training strategy, which covers the period from 2011 to 2017. The overall impression in the Evaluation of 2011–2020 is that the European judicial training strategy was successful in reaching its goals. The

30 The European judicial training policy: Working together to improve European judicial training, available at the European e-Justice Portal: https://e-justice.europa.eu/content_the_european_judicial_training_policy-121-en.do (last consulted: 21. 10. 2020).

31 https://e-justice.europa.eu/content_the_european_judicial_training_policy-121-en.do (last consulted: 21. 10. 2020).

32 See the reports on European judicial training (2011–2018), available at https://e-justice.europa.eu/content_the_european_judicial_training_policy-121-en.do (last consulted: 21. 10. 2020).

33 European Commission, Tender JUST/2012/JUTR/PR/0064/A4 – Implementation of the Pilot Project – European Judicial Training, Lot 1: "Study on Best Practices in training of judges and prosecutors", Final report, 2014, https://op.europa.eu/en/publication-detail/-/publication/37e40065-e0bc-4f53-9ea2-983fc1a17f8e (last consulted 22. 10. 2020).

contribution of the EU to increasing the commitment of both the EU as well as national bodies, by providing necessary financial support and creating a policy framework was deemed crucial to its success.

The target of training half of all legal practitioners on EU law, i.e. 1,200 judicial exchanges per year, and almost doubling the total funds made available to train legal practitioners through EU programs and improve the capacity of networks, was reached ahead of time.[34] In contrast, the targets of improving the national regulatory frameworks and increasing support for training on legal terminology in foreign languages were only partly reached.[35] Several aspects of these programs will need to be addressed better in the future. One area identified as in need of improvement was the training section of the European e-Justice Portal. In addition, it was noted that training legal practitioners, such as lawyers and court staff as well as bailiffs, should be given more attention. Increased training of staff at the end of the judicial chain, i.e. prison and probation officers, on EU-specific issues such as anti-radicalization and the EU Charter should be included in the future working plans.[36] Even prior to the coronavirus-related crisis, the European Commission noticed the underused potential of e-learning and the limited awareness of the European e-Justice Portal.[37] During the period of specific circumstances caused by the pandemic, these needs became even more apparent, inducing the appreciation of e-learning.

In the period from 2011 to 2017, the 2011–2020 European judicial training strategy enabled the EJTN to establish itself as a leading provider of high-quality, cross-border training offered to judges and prosecutors in the EU. The EJTN's nine "judicial training principles" became a reference point in the judicial world for creating a joint European judicial training culture. Important work of other EU-level training providers (e.g. ERA, EIPA-Luxembourg) and networks, such as the CNUE (notaries public) and the CCBE (lawyers), was also acknowledged.[38]

34 SWD (2019) 380 final, p. 73.
35 SWD (2019) 380 final, p. 73.
36 SWD (2019) 380 final, p. 73.
37 SWD (2019) 380 final, p. 73.
38 SWD (2019) 380 final, p. 73.

III. Judicial training networks and institutions in the EU

Around the globe, continuous judicial education emerged in the early 1960s.[39] Since the early 1990s there has been a growing appreciation of the value of judicial education in both developed and developing countries.[40] However, judicial training has been perceived for a long time as a matter for the national judiciary.[41] Reshaping the balance of powers between international, EU and national competences has enhanced a new path for judicial training aims, methods and practices. Europeanisation of law fosters cross-border judicial cooperation. As a cornerstone of the area of freedom, security and justice, the free movement of judgments relies to a high degree on mutual trust among authorities of the Member States.[42] The fact that the EU lacks hard power in the field of judicial policies was addressed earlier. Due to this limitation, the EU has adopted soft leverage methods, exerting influence based on socialization and training. Judicial and practitioners' networks have become "a sustainable operational tool"[43] whose function is to "ensure better coordination beyond and besides harmonization".[44]

"Judicial networks can be described as groups, conferences, commissions or organizations of legal experts, judges and academics (coming from different countries) established at transnational level in an autonomous way or under the wing of international organizations".[45] Judicial networks support the diffusion of best practices in the administration of justice in an advanced democracy. Socialization by transnational networks triggers a cultural change in judicial behavior. Networking contributes to mobility and social learning in the international arena, leading to self-awareness of a judge in becoming a multinational judge.[46] In the end, although formal rules that govern the judiciary remain untouched, institutional change occurs.

Networks are established in global and European legal milieus by means of several pathways. They may be founded merely by EU rules, the most prominent example being the supranational EJN in civil and commercial matters, which aims to ensure the functioning of the judicial system created

39 *Armytage,* Educating Judges, p. 1.
40 *Goodman/Louw-Potgieter,* African Journal of Legal Studies 5 (2012), 181 (182).
41 For a global overview, see *Armytage,* Educating Judges, p. XVI et seq.
42 See further *Lenaerts,* International & Comparative Law Quarterly 59 (2010), 255.
43 *Toniatti/Magrassi,* Magistratura, giurisdizione ed equilibri istituzionali, p. 10.
44 *Cafaggi/Muir Watt,* Making European Private Law, p. 338.
45 *Dallara/Piana,* Networking the Rule of Law, p. 41.
46 *Dallara/Piana,* Networking the Rule of Law, p. 110.

by EU rules.[47] Another pathway is the creation of a network at the initiative of national institutions or judicial authorities, aimed at increasing horizontal collaboration with their counterparts in other Member States. Membership in such "bottom-up networks" is nationally based.[48] In respect of the latter, the EJTN is of particular importance for networking and training in regulations and conventions in cross-border family and succession matters. At the global level, the International Hague Network of Judges (IHNJ) is equally relevant to the EUFams II Project's subject matter. Created by the HCCH, it brings together nominated judges specialized in cross-border child protection.[49] A dialogue between the EU and the IHNJ is developing as the cross-border family rules are consolidated,[50] though not fully employed in practice.[51]

IV. EU and national training facilities

Continuous education of professionals is set as a policy at the European and national level alike. Judicial training in the EU follows several pathways. It is by default performed by specialized training institutions, i.e. major European judicial schools and national training centers (for judges, notaries public, and attorneys). In addition, training is also organized by various initiatives funded by the EU. Most frequently, these are consortiums of law faculties, law institutes, and/or NGOs.

The EJTN is a bottom-up network established by the 2000 Bordeaux Charter.[52] This non-profit international association was set up to promote "a training programme with a genuine European dimension for members of the European judiciary". The EJTN's participating institutions are 40 national judicial training bodies, with the European Commission as a partner. The main activities of the EJTN are coordinating actions among network members, sharing best practices, and developing common curricula and training sessions. There are several EJTN working groups as well as a "Programs"

47 Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters (2001/470/EC), OJ L 174, 27. 06. 2001, p. 25–31.

48 *Dallara/Piana,* Networking the Rule of Law, p. 47.

49 See https://assets.hcch.net/docs/665b2d56-6236-4125-9352-c22bb65bc375.pdf (last consulted 21. 10. 2020).

50 *Scherpe,* European Family Law, p. 158–160.

51 *Viarengo/Marchetti,* in: Viarengo/Villata, Planning the Future of Cross Border Families, p. 799 (810).

52 *Benvenuti,* International Journal for Court Administration 7 (2015), 59 (60).

working group, which deals with all training activities in addition to exchange.[53] It includes five sub-working groups of experts and trainers from different Member States, focusing on civil, criminal, and administrative law, the training of trainers and linguistics. The "Catalogue+ programme" entails courses organized autonomously by network members, which are open to foreign magistrates, and additional training activities, such as the training of trainers, THEMIS competitions, e-learning programs, elaboration of training curricula and modules, and the selection of best practices for training institutions. The AIAKOS Exchange Programme for judges and magistrates has been in operation since 2014.[54] The central role or, so to speak, the "monopoly position" of the EJTN in judicial training was confirmed by the 2013 operational grant for the period from 2014 to 2020.[55] As one of the most relevant training institution in EU law, the EJTN does not generally focus solely on family and successions matters, although its training sessions are regularly dedicated to these topics as well. Out of all the events hosted by the EJTN in 2015,[56] five were devoted to these topics. In 2016,[57] 2017[58] and 2018,[59] there were seven events each year, while in 2019,[60] the number of training sessions related to European family and succession law reached 13. In comparison with the total number of events organized by the EJTN, European family and succession law related training has been on the rise. Within the Linguistics Programme and Civil Law Seminars, the proportion of these training events has increased from approximately a fifth in the period from 2015 to 2018 to a third in 2019.

The ERA was established in 1992, following the 1990 recommendation from the European Parliament to the Commission to invest in a center dedicated to training lawyers. The foundation is headquartered in Trier, Germany, with a transparent governing body structure consisting of representatives of each Member State, the CJEU, and the European Parliament.[61] Regulations and conventions on family and succession law are regularly put on the agenda of ERA events. In 2015, 2016, 2018 and 2019, the instruments

53 See http://www.ejtn.eu/ (last consulted 21. 10. 2020).

54 *Benvenuti,* International Journal for Court Administration 7 (2015), 59 (62 et seq.).

55 Regulation (EU) No 1382/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Justice Programme for the period 2014 to 2020, OJ L 354, 28. 12. 2013, p. 73–83.

56 *EJTN,* Annual Report 2015.

57 *EJTN,* Annual Report 2016.

58 *EJTN,* Annual Report 2017.

59 *EJTN,* Annual Report 2018.

60 *EJTN,* Annual Report 2019.

61 See https://www.era.int (last consulted 21. 10. 2020).

covered by the EUFams II project were addressed in at least one ERA event per year, with the exception of the Brussels II bis Regulation, which was taught on average four times each year.[62] A significantly higher number was registered in 2017, when the relevant regulations (Brussels II bis Regulation, Maintenance Regulation, Succession Regulation and Rome III Regulation) were taught on average 13.5 times. Among the Hague conventions, the 1980 and the 1996 conventions were taught on average 3 times annually in 2015, 2016, 2018 and 2019, while the 2007 Maintenance Convention and the Protocol were covered only once in 2018. An exception is again the training practice of 2017, when each of the conventions (1980, 1996, 2007) and the 2007 Protocol was presented 15 times.

The European Institute of Public Administration (EIPA) was founded in 1981 on the occasion of the first European Council held in Maastricht. Its main objective is to serve officials in national and regional public administrations in Member States, in the European Commission itself, and in other EU institutions.[63] Hence, in addition to judges, EIPA focuses on the training of other professionals in European private international law. The relevant instruments in European family and succession law were taught systematically in the period from 2015 to 2019. The Brussels II bis Regulation, Maintenance Regulation, Rome III Regulation, and Succession Regulation were annually taught on average 8, 7, 4, and 2 times, respectively. Matrimonial property instruments were taught only twice a year in 2018 and 2019. Other regulations and conventions were not covered at all.[64]

Due to a national specific division of tasks within each respective judicial system, European family and succession law is in some Member States adjudicated by a notary public. In that respect, as an official body representing the notarial profession in dealings with the European institutions, the Council of the Notariats of the European Union (CNUE) may also be relevant when it comes to supporting training activities.[65]

At the national level, training sessions are offered by national training schools. Available data for judicial training indicates differences in performance among national judicial academies. For the purpose of comparison, in the period from 2015 to 2019, the Brussels II bis, Rome III and Succession Regulation were taught at the Croatian Judicial Academy 5, 3, and 2 times a year, respectively. The Property Regimes Regulations were covered only in 2019

62 Responses to the online judicial training questionnaire by the ERA.
63 See https://www.eipa.eu/ (last consulted 21. 10. 2020).
64 Responses to the online judicial training questionnaire by the EIPA.
65 See http://www.notaries-of-europe.eu/ (last consulted 21. 10. 2020).

on 5 occasions. When it comes to the relevant Hague conventions, the 1980 Child Abduction Convention was taught on average 3 times a year, while the 1996 Child Protection Convention was taught only in 2018 and 2019, on average 4 times each year. The 2007 Maintenance Convention and the 2007 Protocol were not covered at all. The Swedish Judicial Academy organized training on private international law on family and succession matters once a year in the period from 2015 to 2017. In 2018 and 2019, no event related to the pertinent instruments was hosted.

Since in the legal orders of some Member States certain judicial functions are *ex lege* performed by a notary public or a lawyer, training is equally performed by a notary public academy or a bar association/chamber academy. National academies give their contribution to judicial training either by organizing training on the basis of an annual plan, or by working in collaboration with other actors such as large training schools and universities. Without a doubt, academia plays a significant role in the organization and performance of judicial training.[66]

V. Importance of training in European family and succession matters

Judicial training is inseparably connected with the rise of professionalism and rule of law promotion through education, exchange of good practice, and skill development. In general terms, it assumes different qualities and skills besides intellectual capacity to become a judge.[67] The quality of justice is assured by universally valued principles, such as fair trial and impartiality. An institutional mechanism has to be set to assure competence and the accountability of judges to a legal norm, entailing high standards of effectiveness and efficiency in management of courts and judicial procedures.[68]

A well-functioning judicial system in the EU entails justice based on professionals capable of performing sophisticated tasks, court management ensuring the high quality of appointed judges, lifelong learning, and advanced judicial training schemes.[69] Judicial training in the European judicial arena

66 Within the framework of projects developed under the DG Justice Grants, some are specialized in family matters, see e.g. http://www.brussels2family.eu/the-project/ (last consulted 21. 10. 2020); https://sites.les.univr.it/class4eu/ (last consulted 21. 10. 2020).

67 *Turenne,* in: Schauer/Verschraegen, General Reports of the XIXth Congress of the International Academy of Comparative Law, p. 1 (7).

68 *Piana,* Judicial Accountabilities in New Europe, p. 5.

69 *Corkin,* Europeanization of Judicial Review, p. 175 et seq.

plays a particularly important role and has added value in terms of enhanced effectiveness and legal certainty. Training aims at advancing legal expertise beyond mere application of law. Absorption, implementation and interpretation of supranational EU principles and fundamental rights, as well as uniform interpretation and conformity with developed supranational courts jurisprudence, are targeted.[70] Hence, the procedure-oriented legitimacy of a judicial decision is superseded by its performance-oriented legitimacy. This entails judicial decisions having legitimacy if they comply with standards of efficiency and effectiveness. The founder of performative theory, *John Langshaw Austin,* advocates that a verbal act is transformed into reality with substantial consequences. Speech, performance, and deliverables (here meaning a judgement, and its reasoning also containing the interpretation) define the world instead of merely reflecting it.[71] In a performative approach, setting judicial training gives legitimacy to a judicial decision.[72]

High demands for serving the system of justice in European private international law have to be looked at in the context of competences of the EU in terms of judicial policy. However, management of the judiciary remains a national competence. It has no bearing that the system of justice in European family and succession law is performed at the national level by the same national authorities that adjudicate domestic cases. Consequently, every national judge is equally a European judge. In most Member States, jurisdiction is neither concentrated, nor are the judges specialized.[73] On the practical side, cross-border cases do not occur equally often in each jurisdiction and they are unequally distributed within certain jurisdictions (concentrated in urban areas, with significantly less number of such cases in rural areas).

Management of the judiciary and specialization or concentration of jurisdiction, are not part of an EU-driven policy, nor is the nomination of national judges and other authorities. This remains a competence of the Member States. Criteria for appointing a judge reflect what society expects them to do, with a number of models employed.[74] A variety of criteria in the EU may explain a variety of approaches and the application of European private international law by different judicial systems of Member States.[75] In many Member States the judge is still perceived as a *bouche de la loi,* hence their

70 *Dallara/Piana,* Networking the Rule of Law, p. 87.
71 *Peternai,* Učinci književnosti, p. 17.
72 *Dallara/Piana,* Networking the Rule of Law, p. 4.
73 *Župan/Poretti,* in: Duić/Petrašević, EU and Member States – Legal and Economic Issues, p. 297–323.
74 *Armytage,* Educating Judges, p. 60.
75 *Turenne,* in: Turenne, Fair Reflection of Society in Judicial Systems, p. 1 (14).

independence is not sufficiently promoted.[76] In many Central and Eastern European Member States, judicial appointment was traditionally based on "the myth that deciding and judging cases is a clear-cut analytical exercise of mechanical matching of facts with the applicable law".[77] Consequently, the recruitment of quality judges, the promotion of standards for higher judicial instances, and the models of teaching professional and generic skills in primary and lifelong education are determining factors when it comes to serving the system of justice in the cross-border arena.[78]

Judicial activity has been changing under the pressure of an increasing number of cases with a cross-border element. Established case law, practice and interpretation represent a departure from the traditional service of justice.[79] This is even more apparent in Members States of the major 2004 and subsequent 2008 and 2013 enlargements. Judges may face constraints pertaining to the legal culture in which they were brought up. In Member States which joined the EU more recently, a majority of acting judges have gained their legal education before the general course in EU law was taught as a part of a mandatory curriculum,[80] let alone specific courses on European private international law. This is especially true for senior judges, even though with the passing of time, the ratio between judges who had and those who did not have university training in European private international law gradually changes in favor of those who had. This is important because European private international law is characterized by a high level of flexibility for the national judge and thus requires profound understanding of its concepts, techniques, and background in European law in general. In comparison to dealing with descriptive legal rules and their mechanical application in pre-accession regimes, this entails different approaches to teaching law.[81] Just as the lack of knowledge and experience of national judges may impact the access to remedies of those involved, lawyers experienced in EU law may instigate different concerns due to their ability to employ litigation tactics to circumvent undesired results and turn legal nuances into advantages for their clients.[82]

These developments are reflected in an EU long-term policy towards judicial training in general, and more specifically, its significance in institutional

76 *Bell,* Judiciaries within Europe, p. 13 et seq.
77 *Bobek,* in: Turenne, Fair Reflection of Society in Judicial Systems, p. 121 (122).
78 See *Posner,* Economic Analysis of Law, p. 709.
79 *Dallara/Piana,* Networking the Rule of Law, p. 40.
80 *Župan et al.,* Report on the Croatian Exchange Seminar, p. 6.
81 See section VII.
82 *Danov,* in: Beaumont et al., Cross-Border Litigation in Europe, p. 475 (489).

and legal adaptation of candidate countries for full EU membership. The European Commission's pre-accession judicial training strategy was established in 1997, initially for the re-socialization of the Eastern enlargement. EU enlargement policy retains this focus on candidate countries, as may be confirmed, inter alia by a study on judicial training in the Western Balkans[83], as well as recent open calls for judicial training, where funding is open for partnerships with Montenegro or Albania.

A European judicial culture is not yet fully embedded in new Member States and may have to be strengthened and enhanced if it has been forgotten in old Member States.[84] References for preliminary rulings reveal that judges may struggle when called upon to interpret basic notions and rules of European family and succession law.[85] While the questions mostly point to details and sophisticated issues, they also concern issues already dealt with in CJEU rulings, and straightforward issues or issues of a technical nature. The CJEU rather often renders an "order" upon preliminary questions of the Member States. Pursuant to Art. 99 of the Rules of Procedure of the CJEU, a question referred to the court for a preliminary ruling may be answered in a simplified procedure in the following three cases: a) if the reply to such question may be clearly deduced from existing case-law; b) where a question is identical to a question on which the court has already ruled; and c) where the answer to the question admits no reasonable doubt.[86] Several CJEU cases are illustrative. Although law in the books is straightforward when it comes to the interpretation of habitual residence in child abduction cases, it does not seem to be transferred into "law in action" before many national courts of Member States.[87] It is notable that though foreign law is applied *ex officio* in Romania, its courts doubted if Italian rules on legal separation are applicable to a divorce of two Romanian nationals living in Italy, in particular since the law of the forum does not lay down any procedural rules in relation to legal separation. The CJEU clearly indicates that despite the inconsistency between foreign substantive law and procedural law of the forum, the Romanian court has to find a way to fully obey the Rome III Regulation.[88]

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83 *Regional Cooperation Council* (*RCC*), Study on the existing systems of judicial training in the Western Balkans, 2017, http://www.rcc.int/ (last consulted 22. 10. 2020).

84 *Dallara/Piana,* Networking the Rule of Law, p. 87–89.

85 See e.g. CJEU, 03. 10. 2019, C-759/18 (*OF/PG*); CJEU, 16. 01. 2018, C-604/17 (*PM/AH*); CJEU, 14. 06. 2017, C-67/17 (*Iliev/Ilieva*).

86 *Petrašević,* Prethodni postupak pred Sudom EU, p. 40 et seq.

87 *Viarengo/Villata,* Planning the Future of Cross Border Families: A Path Through Coordination, Final Study, p. 82, 85 et seq.; CJEU, 10. 04. 2018, C-85/18 PPU (*CV/DU*).

88 See CJEU, 16. 07. 2020, C-249/19 (*JE/KF*).

The above analysis confirms that legal professionals in cross-border family and succession matters are under constant pressure to remain up to date. Against this background, European judicial training in family and succession matters requires further attention and a planned and detailed approach.

VI. Servicing the system of justice in EU cross-border family and succession matters – what training is needed?

Potential obstacles to an adequate completion of adjudication tasks in the EU cross-border arena in general, and in family and succession matters in particular, are frequently noted in scholarly writings.[89] Many such issues are addressed, identified and confirmed by the EUFams I and its successor, the EUFams II project. The EUFams II project started with the hypothesis that there is a lack of familiarity with private international law in general, and with many EU regulations in the field of family and succession law in particular. This may often result in no, false or improper application of the legal regime and/or a non-unified interpretation throughout Member States.

Familiarity with the European family and succession law has been made part of the major EUFams II 2019 survey. Although the questionnaire was distributed to professionals active in the field of family and succession law, the *Lobach/Rapp*-report found a fairly poor overall familiarity with the pertinent instruments.[90] A striking disparity in the understanding of relevant regulations has also been established by the *Lobach/Rapp*-report.[91] Case law collected within the EUFams II database shows this uneven familiarity with, and understanding of, the relevant regulations, but also identifies concrete misapplications. EUFams II database cases from different jurisdictions illustrate effectively the magnitude of the problem.

89 *Viarengo/Villata,* Planning the Future of Cross Border Families; *Beaumont et al.,* Cross-Border Litigation in Europe.

90 The report was based on a survey conducted among 1394 respondents (699 of whom completed the questionnaire), who are professionals in EU family and succession matters. See *Lobach/Rapp*-report, p. 33.

91 Respondents themselves indicated the field(s) of their professional activities. Hence, they only answered questions on their familiarity with the pertinent regulation(s). Notably, on a four-increment scale, the first two answer options (i.e. not acquainted and basic understanding) are indicative of non-existing or merely rudimentary familiarity, *Lobach/Rapp*-report, p. 6.

The relationship between the CJEU and national courts as well as national judges and EU law "is not per se smooth and bright".[92] It appears that national courts have difficulties to keep up to date, in particular with the development of the CJEU practice.[93] The principle of continuous interpretation of the regime becomes particularly relevant with changes brought by the Brussels II ter Regulation in comparison to its predecessor, the Brussels II bis Regulation.

The "evolutive" or "dynamic" interpretation applied by the ECtHR may become relevant for reading European private international law instruments.[94] The practice of the ECtHR may equally cause hardship as, by subject matter, European private international law in family and succession matters intersects with the protection of fundamental rights, most directly with gender issues. A combined interpretation of these legal sources is not an easy task, as the EUFams II database may well confirm.[95] Hence, the intersection of these topics has to be made a regular part of the training,[96] as has been recently acknowledged by the Council of Europe[97] and the EJTN[98].

Further difficulty with the application of European private international law in family and succession matters is attributed to the fact that they are inseparably linked to national substantive and procedural law.[99] EUFams I findings show that a national concept of examining jurisdiction may affect

92 *Jaremba,* in: Goudappel/Hirsch Ballin, Democracy and Rule of Law in the European Union, p. 49 (58 et seq.).

93 *EUFams II Consortium,* Comparative Report on National Case Law, p. 48.

94 *Brosch/Mariottini,* Report on the International Exchange Seminar, p. 9.

95 The Constitutional Court (Ustavni sud Republike Hrvatske, 29. 03. 2018, U-III-5232/2017, HRC20180329) took into consideration relevant practice of the ECtHR considering the notion of the best interest of the child (ECtHR, 26. 11. 2013, no. 27853/09 (*X/Latvia*); ECtHR, 06. 12. 2007, no. 39388/05 (*Maumousseau and Washington/France*)), but in the explanation of the decision it did not refer to the Brussels II bis Regulation, which was applied in lower instance proceedings.

96 *Schultz,* in: Schultz/Dawson/Shaw, Gender and Judicial Education, p. 91 (102).

97 Kyiv Recommendations on the Content and Methodology of Judicial Training on the Implementation of the European Convention on Human Rights, case-law and execution of judgments of the European Court of Human Rights have been informally adopted on international conference: Protection of human rights through Judicial education: best practices and improvement of standards, 9–10 December 2019 Kyiv.

98 EJTN-ECtHR Training on Human Rights for EU Judicial Trainers (HFR/2019/05), http://www.ejtn.eu/Catalogue/EJTN-funded-activities-2019/EJTN-ECtHR-Training-on-Human-Rights-for-EU-Judicial-Trainers-HFR201905/ (last consulted 22. 10. 2020).

99 *Hess/Kramer,* From common rules to best practices in European Civil Procedure; *Poretti,* LeXonomica, 8 (2016), 13–28; *Fitchen,* in: Beaumont et al., Cross-Border Litigation in Europe, p. 55–75.

the perception of the *lis pendens* rule of the regulations.[100] A legal framework of Member States contains procedural obstacles that may impede proper application of EU law.[101]

The legal environment, in which operations management is constantly struggling with an overflow of cases, forces national judges to work on a daily basis with mainly national cases. Hence, the homeward trend appears to be the most convenient way to deal with work overload.[102] Judges do not have enough time to examine and apply all the fine elements of European private international law properly. While the CJEU is pushing for a uniform interpretation that departs from national legal cultures, judges are not always keen on interpreting law proactively.

The major problem is that judges may not be fully aware of the implications of improper application of European private international law in family and succession matters,[103] as can also be deduced from CJEU case law.[104] Free circulation of judgements is at the forefront of EU civil justice. Hence, if a judge wrongfully assumed jurisdiction and rendered an order, that order would be very likely inspected by a judge of a Member State that actually had jurisdiction. Although such a ruling would in principle retain every effect, it raises concern and hinders mutual trust.[105] As has been wisely pointed out, the mutual trust is not a blind trust.[106] To make and keep the fragile fabric of mutual trust, a lot of effort has to be invested in improving professional competences of national judges and building a true European judicial culture.

The need for the networking and training of professionals was stressed in EUFams II deliverables as well. National reports address the issues of building the capacities of professionals, particularly the ones from Spain[107] and Croatia[108]. The German report highlights that functioning of the system should be fostered further by judicial networks, whereas work and the

100 *Župan/Drventić,* in: Viarengo/Villata, Planning the Future of Cross Border Families, p. 203 (210–216).

101 *Hess et al.,* An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law.

102 The homeward trend has been highlighted by academics and confirmed by data. See *Lobach/Rapp*-report, p. 19.

103 *Beaumont et al.,* in: Beaumont et al., Cross-Border Litigation in Europe, p. 819 (826).

104 CJEU, 06. 10. 2015, C-489/14 (*A/B*); CJEU, 15. 02. 2017, C-499/15 (*W and V/X*).

105 Re S (A Child) [2014] EWHC 4643 (Fam); CJEU, 19. 11. 2015, C 455/15 PPU (*P/Q*).

106 *Prechal,* European Papers 2 (2017), 75 (85).

107 *Espinosa Calabuig/Quinzá Redondo,* Report on the Spanish Exchange Seminar, p. 4.

108 *Župan et al.,* Report on the Croatian Exchange Seminar, p. 23.

position of *liaison* judges must be elaborated upon.[109] EUFams II deliverables advocate that in parallel to the training of professionals, information campaigns should address general public awareness, to enable citizens to make informed decisions in a timely manner and with respect to their property regimes.[110]

The EUFams findings expose the complexity of adjudication in cross-border family and succession matters, highlight the most problematic areas, and confirm the need for judicial training. Thus, the judicial training on Europe private international law has to be tailored, both to the recipients (judges and other legal professionals), and to the specific nature of the legal instruments at stake. To do so, it is necessary to evaluate an appropriate methodology for lifelong legal education.

VII. Lifelong legal education

1. Legal education in the EU

After gaining insight into EU policy considerations regarding legal training in European private international law, especially in the field of family and succession law, in the area of cooperation in civil matters, this section focuses on some of the essential traits of legal education in the EU. As post-academic legal training has to build efficiently on the previously obtained law degrees, it is important to consider to what extent legal education has prepared judges for lifelong learning. Understanding which knowledge, skills and competences have been transferred to law students is a prerequisite for designing appropriate and useful training programs.

a. Contemporary legal education put into context

Legal education today is inextricably linked to universities. This is true not only for Europe, but also for most parts of the world. Appearing originally at the end of the High Medieval Period, universities were certainly not the first format in which law was thought of. Various forms of higher education which left their imprint on today's legal teaching and research owed much

109 *Zühlsdorff,* Report on the German Exchange Seminar, p. 2, 22.

110 *Espinosa Calabuig/Quinzá Redondo:* Report on the Spanish Exchange Seminar, p. 14; *Brosch/Mariottini,* Report on the International Exchange Seminar, p. 36.

to the intellectual momentum of ancient civilizations. Important milestones in the development of the universities were the rise of the French Napoleonic model and the German Humboldtian model[111] in the 19th century, the latter lying at the heart of the development of modern European universities.

The essential properties of the Humboldtian model, i.e. the unity of research and teaching, academic freedoms to learn and teach (*Lernfreiheit* and *Lehrfreiheit*), education (*Bildung*) rather than training, the community of students and academic staff (*universitas magistrorum et scholarium*)[112], still pertain to the universities of today. However, their philosophies and structures have become permeable to ideas from other higher education traditions. One such idea is that the educational function of a university is primarily aimed at responding to the needs of the ever-specializing labor market, not merely by taking account of the economic development and demand for certain professions, but also by tailoring its curriculum to transform students into trained professionals. Using commercial language,[113] the universities are to manufacture educational products which are ready-to-use by the employers from the moment students enter the labor market onwards. While "[t]he Industrial era thus built a massive education super highway",[114] the Information Age is tending to take us even further.

On a more general level, under the pressure of the global competition phenomenon, the architecture of higher education is currently being redesigned.[115] In a rapidly changing world, the universities are competing globally to take their place in the "audit society"[116] based on university rankings, quantitative bibliometric and bibliographic indicators, funds generated from public-funded projects or business partnerships, quantitative measuring of internationalization, etc. Many of these indicators have been advanced and depend on the criteria set by autonomous globally operating entities, often with an economic interest in its furtherance. Against this quantitative background, the quality of genuine (Humboldtian) freedoms and independence of academic activities should be questioned. While *Rüegg* astutely observed that "[n]o other European institution has spread over the entire world

111 The Humboldtian model owes a lot to developments both before and after the period of *Humboldt's* influence. For more details see *Anderson,* European Universities from the Enlightenment to 1914.

112 *Östling,* Humboldt and the Modern German University, p. xiii.

113 The use of such metaphorical expressions is common among critics of the market model universities. See *Liessmann,* Theorie der Unbildung, p. 42 et seq.

114 *Waks,* The Evolution and Evaluation of Massive Open Online Courses, p. 17.

115 *Rust/Kim,* WSE 13 (2012), 5 et seq.

116 For more details on the concept see *Power,* The Audit Society.

in the way in which the traditional form of the European university has done",[117] *Liessmann* has professed that the true European idea of the university has been forsaken for economic efficiency.[118] Whereas detailed aspects of the tension between the Humboldtian model and the market model are beyond the scope of this paper, the above observations have sufficiently contextualised further investigation into the basic elements of contemporary legal education.

b. Legal education today

Since the inception of universities at the end of the eleventh century, law has been one of the fundamental areas of study.[119] Thus, the history of legal education may indeed be our *magistra vitae academicae.* It has provided us with many useful methods and tools which we still employ today, for instance, the rules of logic and argumentation, the Socratic method, and rhetoric skills.

Different methodologies and approaches are used nowadays at different levels of legal education. The core legal education is the one which results in a degree that qualifies a person for a legal profession, such as the one of judge, attorney, public prosecutor, and notary, usually with a further requirement of a general and/or specialized professional exam. Under the Bologna system, a Bachelor of Laws (LL.B.) degree usually takes three to four years to earn, while another one or two years are necessary for a Master of Laws (LL.M.) degree. A postgraduate doctoral degree (Ph.D. or S.J.D.) requires another three or four years of mentored individual research. One academic year typically carries 60 ECTS credits, which corresponds to 1,500 to 1,800 hours of study. Although all EU Member States are signatories to the 1999 Bologna Declaration[120], the implementation varies among them because it envisages voluntary rather than mandatory harmonization.

Law curricula may also differ among universities, yet given the highly regulated character of legal professions, they tend to be generally aligned at least within a particular Member State. Law curricula in different Member States are comparable when it comes to core courses with an international

117 *Rüegg*, in: Rüegg/de Ridder-Symoens, A History of the University in Europe, p. xix.

118 *Liessmann,* Theorie der Unbildung, p. 104.

119 This does not mean that legal professionals have always necessarily earned legal qualifications. See e.g. *Gower,* MLR 13 (1950), 137 (139 et seq.).

120 Joint Declaration of the European Ministers of Education convened in Bologna on 19 June 1999, http://www.ehea.info/media.ehea.info/file/Ministerial_conferences/02/8/1999_Bologna_Declaration_English_553028.pdf (last consulted 27. 10. 2020).

and a European content. However, they may vary considerably in their national contents. This being said, they expose a common trait in the growing share of the curricula dedicated to practical training in addition to classical teaching.[121] The integration of the training component into the curricula takes both vertical as well as horizontal routes. It is manifested not only in the insertion of practice-oriented formats of education as new courses, such as moot courts and legal clinics,[122] but also in adding a stronger methodological reliance on hypothetical or real-life case studies and project-solving assignments in traditionally organized courses. Regardless of this tendency, legal education in EU Member States is still focused to a lesser degree on training and more on a classical idea of learning theoretical aspects of law. This being said, the educational culture of Member States are also different and they leave an imprint on students affecting their openness towards interactive and engaged training later in their lives. These are sources of additional challenges when conceiving learner-centered training for judges.

2. Lifelong learning for judges

Nearly in parallel with an increase in the training-based courses which are part of the core legal education, lifelong learning programs have developed to support legal practitioners in updating their knowledge. Initial national attempts to introduce continuous legal training for judges were rejected with the argument that it might undermine judicial independence. This argument is nonetheless easily discarded if judicial training is regarded as part of their function of providing a public service and is seen as a means of receiving instructions on the methods of reaching decisions, without interfering with their decision-making in concreto.[123] Moreover, judges may be reassured as to the independence of their function by being involved in the system of continuous training as (co-)creators of the training plans, or as (co-)trainers.[124]

121 See e.g. *Wilson,* in: Halvorsen Rønning/Hammerslev, Outsourcing Legal Aid in the Nordic Welfare States, p. 263 (275 et seq.).

122 See e.g. *Bartoli,* Legal clinics in Europe; *Blengino/Gascón-Cuenca,* Epistemic Communities at the Boundaries of Law.

123 *Malleson,* MLR 60 (1997), 655 (657, 667).

124 This is occasionally the rule employed by the Croatian Judicial Academy, for instance, in the case of the 2019 training on the Property Regimes Regulations, the training material prepared by a judge and two academics: *Kokić/Kunda/Župan,* Prekogranična pitanja bračnoimovinskih režima i režima imovine registriranih partnera, where the training was conducted in the two-member teams, each consisting of one judge and one academic. The

Additional benefits of such involvement are focused on the actual problems experienced by judges and the easing of communication with trainees.

At the EU level, there are currently several initiatives related to continuous training in European private international law, the most prominent ones being the pan-European programs under the umbrella of the EJTN discussed above in more detail.[125] Other lines of financing include different training formats, such as the EU Justice Programme. Large funds are allocated for these purposes,[126] given that attaining freedom, security and justice is highly dependent on mutual trust among Member States and their judiciaries in the proper application of EU law.[127] The national judges standing at the forefront in terms of applying EU law are capable of assuring its correct application, provided they have a good understanding of its concepts and underlying policies, as well as any interaction with other legal sources. They also have to be able to identify and find relevant resources, in particular, legal instruments and CJEU and national courts' case law, which may guide them in applying European private international law. The European Commission is, however, confident that its strategies have been effective and that mutual trust has in fact increased partially due to intensive training with cross-border implications, consequent knowledge increase, networking, and the sharing of experience and best practice.[128] As much as this might in fact be true, there is still room for improvement, as is apparent from the abovementioned recent examples of a lack of application or misapplication of the pertinent instruments.[129]

Besides knowledge of European private international law, the emphasis in these training events has also been recently placed on building the legal vocabulary and knowledge of the English language in general.[130] This is done "with a view to fostering a common legal and judicial culture",[131] fostering the understanding of foreign law, legal reasoning and arguments,[132] and be-

evaluations from the attendees were excellent, which may also be attributed to the combined judge-academic approach.

125 See section IV.

126 SWD (2019) 380 final, p. 42.

127 CJEU, 18. 12. 2014, Opinion 2/13, note 168, 191.

128 SWD (2019) 380 final, p. 38 et seq.

129 See section VI.

130 See *Holmsten,* ERA Forum 17 (2016), 141 (142).

131 Annex to Regulation (EU) No 1382/2014 of the European Parliament and of the Council of 17 December 2013 establishing a Justice Programme for the period 2014 to 2020, OJ L 354, 28. 12. 2013, p. 83.

132 *Pretelli,* in: Schauer/Verschraegen, General Reports of the XIXth Congress of the International Academy of Comparative Law, p. 607 (609).

cause the efficient use of the English language is seen as a "precondition to effective contacts across Member States, which are in turn the cornerstone for judicial cooperation".[133] Such communication is envisaged by several legal instruments.[134]

The aforementioned notes lead to the following chain of connections that the European Commission is convinced connects the functioning of the internal market on the one hand and its strategy in terms of judicial training on the other: the first connection entails that the functioning of the EU internal market, and especially the creation of the area of freedom, security and justice, to a large extent depends on the existence of mutual trust among the Member States, including their judges; the second connection links mutual trust among the national judges from different Member States to their twofold capacity: the judges have to demonstrate that they are able to correctly apply EU law, including European private international law, and they have to possess the ability to directly communicate to each other in the spirit of close judicial cooperation; the third connection reveals that legal and language capacities of national judges are critically dependent on their continuous education aimed at strengthening and updating their knowledge and competences related to EU law and the English language.

3. Learning theories and teaching methods for European private international law

Irrespective of the type of training program, the question of the methodology to be used in teaching has many possible answers. Relying on educational psychology, prevalent modern pedagogy states that teaching methods are necessarily grounded in learning theories, because the latter explains the ways learners receive, process, and integrate knowledge and information intended to be transferred in the course of learning.[135] Among various learning theories, constructivism and developmental theory might be of special importance for the designers of judicial training programs. The former learning theory emphasizes previous knowledge and understanding as the basis for the future ability to learn, while the latter focuses on the way one's learning skills and abilities change as one gets older. In order to choose and apply the methods effectively, it is important to understand the principles behind

133 COM (2011) 551 final, p. 5 et seq.
134 See e.g. Art. 29 Brussels I bis Regulation; Recital 2 and 8 Taking of Evidence Regulation.
135 *Friedland,* Seattle U.L. Rev. 20 (1996), 1 (4).

those methods[136] as well as to have a clear idea of the overall goals and the intended learning outcomes that judicial training should achieve.

Furthermore, when contemplating a teaching methodology to be applied in judicial training, it is necessary to take account of the typical properties a judge has owing to his or her profession: They are adult persons, with a strong sense of professional independence, certain life and professional experience, a developed ability to make up their own mind, and a professional predisposition to take the role of authority in a given situation. For these reasons it seems particularly apposite to pay heed to adult learning theory, the foundations of which are as follows: Adults need to know the reasons why they learn something; they will be motivated to learn if there is an instant opportunity to use what is learnt;[137] they take the perspective of a real-life situation, so learning should be functionally organized to respond to the situation, not by the subject matter; they enter the learning process rich in experience which they need to analyze in the process; they are self-directed and accept collaborative two-way learning models much better than a trainer-to-trainee one; and they are motivated by internal rather than external incentives.[138] Due to these reasons, adult learners, such as judges, are not likely to benefit from conventional learning methods, such as an old-style textbook lecture. What learning methods should be used instead? Theories of learning, coupled with the basic principles of andragogy, ought to inform methodological choices as to judicial training of national judges in the EU. Some of the preferred learning methods include case studies, experimental methods, and discussions.

It is beyond doubt that the European Commission, which sets the stage for efficient training of national judges,[139] is interested in developing a deep understanding of EU law in order to assure its correct and uniform application throughout the EU.[140] However, when compared to the past and existing national codifications, the EU rules in the area of family and succession law with cross-border implications are much more extensive and complex. The complexity arises due to the variety of legal instruments in the field and

136 Art. 10 Declaration of Judicial Training Principles, International Organisation for Judicial Training, 08.11.2017, https://www.unodc.org/res/ji/import/international_standards/declaration_of_judicial_training_principles/declaration_of_judicial_training_principles.pdf (last consulted 22.10.2020).

137 This is confirmed by the above presented data on no inclination of judges to proactively take on lifelong learning. See section IV.

138 For more details, see *Knowles/Holton III/Swanson,* The Adult Learner.

139 See section VII.2.

140 SWD (2019) 380 final, p. 38 et seq.

absence of their synchronization.[141] As such, their understanding requires a certain level of awareness of the differences in the Member States' national laws, profound appreciation of the general structure and logic inherent in private international law, and a firm grasp of hierarchy and overall relations between international, European and national layers of legal instruments. In addition, when applying EU law, national judges need to be well versed in the discipline of fundamental rights, as it may be necessary to apply them directly to the case at hand.[142] Fundamental rights have to be constantly on the judges' mind, because they make up part of the European constitutional identity.[143] Only then may national judges be expected to swim well in the vast, deep, and wavy waters of European private international law. An effective way to achieve this is through case studies combined with comparative legal methodology, because "[o]nly through comparison do we become aware of certain features of whatever we are studying."[144] On the basis of a hypothetical or actual case, judges may be asked to compare the outcomes under their national law and EU law. If this process is structured as group learning in a transitional training program which is considered advantageous in the EU context,[145] the comparison could be made among several national laws and EU law. By doing so, judges can learn about different national laws of the Member States, notice both sharp contrasts as well as fine nuances between the compared laws, discern points of convergence, and, most importantly, get an insight into the rationale underlying different rules. This will help them realize which elements of their previously acquired legal knowledge and competences related to national law may be directly useful, and which elements should be set aside in terms of applying EU law.

With the understanding of law there comes the development of hands-on skills and competences employable in practice. This entails the ability of judges to grasp and recognize deeper patterns, even when they are concealed under different layers and surfaces. Such a transfer of learning explains how previous experience may help in resolving new problems, provided there is a deep understanding of the underlying pattern. The best way to gain these

141 *Hellner,* in: von Hein/Kieninger/Rühl, How European is European Private International Law?, p. 205 (208); *Župan,* in: Honorati, Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction, p. 1 (5 et seq.).

142 *Frąckowiak-Adamska,* in: von Hein/Kieninger/Rühl, How European is European Private International Law?, p. 185 (195 et seq.).

143 This has been confirmed in the rebuttable presumption created by the ECtHR in *Bosphorus:* It is presumed that the application of EU law implies protection of fundamental rights, see ECtHR, 30. 06. 2005, no. 45036/98 (*Bosphorus Airways/Ireland*).

144 *Sacco,* AJCL 39 (1991), 1 (5).

145 Implementation of the Pilot Project, p. 116.

abilities is by actually doing something, rather than simply listening to it or watching others do it. Learning by doing thus helps to close the undesirable gaps between the law in the books and the law in action.[146] Methods that may support this aim are the case study method and experimental method. The case study method seems to be particularly apt to study EU law, given the authority of the interpretations by the CJEU. Its rulings are often phrased in terms of the actual facts of the case, where the applicability of the earlier decision may be confirmed or denied based on the presence or absence of distinguishing facts. Thus, stimulating and resourceful case studies may consist of the basic description and as many variations thereof as needed to demonstrate the elements which bring about different outcomes. Additionally, through simulation exercises, such as a small-scale moot court and a mock trial or interview, judges also learn by solving the problem, improving at the same time the argumentation skills of the opposing sides in the dispute, and improving their oral or written expression in their mother tongue or in another language. Experimental methodologies need not necessarily be simulation-based, but may also occasionally involve real-life cases and situations which judges may observe and train for. Because the physical presence of judges who are trainees in a given training event is not usually possible in such situations and cases due to various reasons, such as a hearing from which the public is excluded, or simply because the hearing is taking place during working hours when judges are dealing with their own cases, audio-video recording technology can be used to enable subsequent and repeated viewing, for instance by recording an actual interview or a court hearing. Problem-based learning is very beneficial in terms of, inter alia, retention of learned material, interest in the subject matter and building self-confidence.

Another important goal intended to be achieved by EU law training is critical thinking,[147] which comes on top of the abilities aimed at gaining a deep understanding and solving practical problems. In developing such thinking, judges have to feel confident in their knowledge and understanding of the subject matter as well as the underlying policies. On this premise, they will be able to act as socially conscious persons and engage in discussions by asking the right questions, commenting, agreeing with or criticizing not only the positions of others, but also certain legislation and court ruling or reasoning. To increase the level of trainees' engagement and position them as stakeholders in the learning process, trainers can use a Socratic dialogue and class or small group discussions. Discussions may be organized

146 *Perelman,* RIEJ 72 (2014), 133 (136).

147 See *Grimes,* in: *Strevens/Grimes/Phillips,* Legal education, p. 1 (3).

as an independent method or may be combined with some of the above, but judges who are trainees need to be kept in a safe environment where they can open up and speak freely without fear of being called out for the opinion they express.[148] Discussions often develop in the course of a case study. In such situations, judges may talk about their previous experience in handling similar cases, which opens up the opportunity for a trainer to integrate effectively these real-life cases into the discussion and provide feedback to the judges.

The methods of training should also accommodate the need of judges to obtain competences other than in law. For the national judges in EU Member States, this is primarily a command of the English language, which serves multiple purposes, including direct communication with judges in other Member States and keeping up-to-date with legal developments in legislation, case law and the literature.[149] Furthermore, judges need to be fully appreciative of the contemporary social environment, thus training should also involve non-legal knowledge, skills, the social and economic context, and values and ethics in today's society.[150]

Regardless of the method used, the learning process of an adult trainee will benefit him or her by being an active participant rather than a passive recipient.[151] Nevertheless, it is not always easy or possible to achieve active participation, because the educational culture in different Member States may range from open, student-centered and intensely engaging, to conservative one-way, teacher-to-student learning. The educational pattern learnt as a law student is transmitted to later stages of life and may hinder judges from taking a more active role in judicial training and the judicial profession in general. Furthermore, psychological pressure caused by the fear of making a mistake may work towards the same end and is likely to increase with age. Hence, geographically and generationally based asymmetries are realities and might require adjustments to the methodologies depending on the profile of trainees. As much as this is true regarding the teaching methods, it is also true with respect to the use of technology.

148 See Art. 10 Declaration of Judicial Training Principles.

149 The scarcity of legal literature on EU private international law in official languages of some Member States has been noted by *Hellner*, in: von Hein/Kieninger/Rühl, How European is European Private International Law?, p. 205 (206).

150 Art. 8 Declaration of Judicial Training Principles; Implementation of the Pilot Project, p. 112 et seq.

151 Implementation of the Pilot Project, p. 5.

4. Use of new technologies

Considerable challenges in designing judicial training may be overcome by an informed and tailored use of available methodologies and training formats, while electronic tools and new technologies may provide additional support in attaining efficiency and/or accessibility of training. Stakeholders have declared that judicial training should make optimal use of new technologies, distance/online learning (complementary when appropriate), and electronic media.[152] What are these technologies and how to assess what constitutes their optimal use?

The technologies used for this purpose are primarily information and communication technologies (ICT), which are characterized by integration of telecommunications, computing, and audio-visual systems that enable information processing, such as access, storage or transmission. The use of state-of-the-art ICT is not always possible, but over time it has become more available, affordable and known to a wider audience. Ever since the internet and ICT in general entered our private and professional spheres in the 1990s, and the Web 2.0 made its appearance in 2004, technological options have been expanding. There now exist various distance training formats, such as online training or e-learning (extranet or open), in the form of video conferencing, "live case" online teaching, online podcasting, online texts, exercises and materials, discussion forums, social networks, etc., and any combinations thereof.[153]

ICT-supported training is attractive from the perspective of all parties involved, i.e. funding institutions, organizing entities, trainers and trainees, since it is time-saving and cost-effective, flexible, and allows for expanded participation. Those are the reasons for its intensified use in a certain number of Member States,[154] while others are catching up at a slower pace, often owing to the lack of skills on the part of either trainees or trainers or both. The use of technology does not necessarily involve communication at a dis-

152 Art. 10 Declaration of Judicial Training Principles; Implementation of the Pilot Project, 114. At the same time, the EU legal instruments provide for the use of ICT in particular circumstances, such as in direct communication between judges (see VII.3.), service of documents or taking of evidence. See Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, OJ L 324, 10.12.2007, p. 79–120; Taking of Evidence Regulation.

153 Implementation of the Pilot Project, p. 67–68.

154 See the experience from Bulgaria, the Netherlands, Spain, Portugal and Romania, and the respective different tools. Implementation of the Pilot Project, p. 67–74.

tance, but also includes various ways in which information technology is employed in the context of face-to-face learning, particularly in designing the learning modules. A case in point is filming the performance of judges to provide feedback.[155] Showing textual and photographic material, playing audio and/or video material or engaging judges in interactive e-learning modules may also be useful tools in judicial training.

The second question relates to the test of "optimal use". It is argued here that the use of ICT and its potential and advantages should be considered in each training design when it comes to the achievement of set learning outcomes. If the learning outcomes may be achieved better, equally well or with only minor concessions by means of technology rather than by analogue means, the test is passed and technology may replace its alternative. If technology would compromise the attainment of the learning outcomes, for whatever reason, it should be avoided as non-optimal. In applying the "optimal use" test, factors that need to enter into the equation include in particular the learning outcomes deriving from the previous needs assessment, the potential of the chosen ICT tool to sufficiently contribute to the attainment of the learning outcomes, and a target group profile, especially in regard to their ability and willingness to use ICT tools.

In this assessment of likelihood to complete the learning outcomes, learning theories may be helpful, e.g. online learning seems to fit squarely the andragogy perspective because it supports individualized and self-directed learning, as trainees normally receive less supervision in an online environment. It is expected that over time, more and more situations will provide an optimal use of technology. Other circumstances may also play an important role in determining optimal use of ICT in a given situation, such as excessive funds which could be saved and the practical impossibility for the target group to physically attend an event. The latter became particularly evident in the outbreak of the COVID-19 pandemic, when, due to movement restrictions, it became impossible to travel and physically attend the scheduled training sessions. This resulted in the massive postponement or cancellation of the planned face-to-face training events. However, an uncertain duration of these restrictive measures may facilitate conversion of the planned face-to-face sessions into highly ICT-supported events, and rightly so under the optimal test.

To optimize the use of technology in particular circumstances, either for the purpose of compensating for the disadvantages of its use or availing oneself of the advantages of its use, the option of hybrid training may be an

155 Implementation of the Pilot Project, p. 113.

opportune choice. Such hybrid training models include distance learning and face-to-face learning in whatever combination. Although for the time being, face-to-face training remains the principal method of judicial training due to its general benefits or those related to particular situations (special or confidential expertise related to the right of the child to present its opinion, training-the-trainers events, networking effects, conversational language competences),[156] distant learning will, in view of its potential to save time and financial resources, increasingly become the sole or hybrid choice of various training institutions and will gradually be more welcomed by judges who are trainees.

Modalities of training in European private international law, and more specifically in European family and succession law, are further elaborated below to establish a clear link between practical needs and desirable practices *pro futuro.*

VIII. Training in European family and succession law – selected figures

1. Organization and types of training

Data collected by the questionnaire addressing the training networks and schools indicate that multiple actors cooperate in the organization of judicial training, confirming that networking is *en vogue* in European governance.[157] In the period from 2014 to 2020, approximately half of the training events have been organized by only one institution, while the other half have been organized in cooperation with multiple judicial centers, national academies, ministries or law schools.[158] Training types range from conferences and lectures to interactive workshops and seminars involving the solving of practical case studies. The EJTN strives to achieve training at all stages of professional activity, distinguishing between initial training (before or upon appointment) and continuous training in a subspecialized group.[159] The ERA has organized most training events by topic, offering additional high-level conferences on European family law on an annual basis. Within the

156 Implementation of the Pilot Project, p. 67.

157 *Visser/Claes,* in: Vauchez/De Witte, Lawyering Europe, p. 75.

158 ERA organized 40% of events by itself and 60% in cooperation with other institutions; at EIPA, this ratio is 50:50 (Responses to the online judicial training survey questionnaire).

159 *EJTN,* Annual Report 2015, 2016, 2017, 2018, 2019 http://www.ejtn.eu/Documents/About%20EJTN/EJTN%20Documentation/EJTN-Annual-Report2018_Web.pdf.

framework of this project, events are also offered at different levels (basic and advanced), thus targeting legal practitioners with different levels of knowledge/experience in the area of law at hand. Different levels of courses are fully justified and necessary, as cognitive psychology establishes that in education, prior level of knowledge would be determinative for the proper understanding of the given course.[160]

Although most training events were previously organized in the facilities of institutions, distance learning has also become a more established mode of judicial training. The most frequently employed online training methods are online courses taught in real time, lectures or seminars recorded in advance, interactive exercises on a platform, materials distributed on a platform, and others.[161]

A majority of 65% of online judicial training survey respondents find modern technology advantageous for training (interactive books, recorded lectures, learning tools requiring active participation and action, webinars, etc.). Although respondents advocate modern technologies and training institutions indicate they offer such programs, the majority of online judicial training survey respondents never took part in webinars. In comparison to US models, European training institutions do not fully practice synchronous (real-time) or asynchronous (on-demand) webinars or webcasts as a matter of routine. Modern technologies imply peer-based learning with "electronic white boards, virtual chat rooms, blended learning applications that integrate distance with in-person learning."[162]

The rise of distance training facilities may be attributed to the recent COVID-19 crisis. An inspection of offers available online indicates that, unfortunately, topics in the field of European family and succession law are currently scarcely represented.[163]

160 *Shuell,* Review of Educational Research 56 (1986), 411–436.

161 Regularly employed by EJTN and EIPA, as of 2020 by ERA, also used by Croatian, German and Swedish national judicial academies (Responses to the online judicial training survey questionnaire).

162 *Armytage,* Educating Judges, p. LIII.

163 http://www.ejtn.eu/Methodologies--Resources/; https://era-comm.eu/moodle/ (both last consulted 22. 10. 2020).

2. Methodology, curricula and teaching materials

Regardless of the type of training, participants most frequently approve of interactive learning methods and exchanges between practitioners.[164] Teamwork is supported by online judicial training survey participants and almost 80% actively participate in such a training. Other participants in teamwork exercises remain passive, either due to a language barrier or because they prefer individual over interactive work.

Training curricula are developed on the basis of individual assessment of each institution offering training. For example, at the ERA, lawyers or project teams are responsible for this, whereas at the EIPA, faculty members (in the case of internal projects), and scientific committees (in the case of collaborative training) are responsible. In joint projects funded by EU grants, curricula are obviously determined by the nature of the grant in question. Grants are most frequently awarded by DG Justice. In national judicial academies, curricula may be determined either exclusively by the judicial training academy, as is the case in Croatia and Sweden, or by the State and the federal government(s), as in Sweden. However, designing curricula is surely affected by the EU funding policy and topics targeted by such calls.

The vast majority of training events organized by institutions inspected here were purely law-oriented. Judicial training theory, however, emphasizes that besides building competence in law, training should improve the overall level of general knowledge and skills. The online judicial training survey respondents endorse this attitude, as 85% of them advocate specialized holistic education, in which training in law will be carried out in combination with other relevant social sciences and humanities. Psychology, ethics, sociology and social work are indicated by the respondents as fields to be included in legal training. Approximately 40% of the respondents find content-oriented

164 The European Commission launched a public consultation and a targeted consultation from 02. 02. 2018 to 26. 04. 2018 to re-examine the findings of the 2011 Study and set a future strategy. Responses to the European Commission's 2018 judicial training evaluation had to address the needs of justice professionals in EU law. These findings correspond to a large extent to the judicial training survey, where participants expressed the wish to take part in the design of future training topics. They want to be able to actively affect the chosen training topic indicating their wish to ensure that training meets their needs. This corresponds to the 2018 responses, where a large majority amounting to more than 70% of respondents considered that the objectives of the future European judicial training strategy should differentiate between judicial professions. Responses to the 2018 strategy indicated that the needs and capacities of different Member States should be differentiated. Other respondents suggested broadening the geographic scope e.g. by including relevant third countries.

training in law accompanied with training on ICT useful (e.g. e-tools for cross-border civil cooperation). The survey indicates that training participants have a preference for the approach which enables them to influence the future training curricula. Hence, they should be given a more active role in the process of designing future training curricula.

There are basically two models for the development of training materials. They are in most cases developed in training centers by the trainer of each course. More than 80% of the online judicial training survey participants indicate a preference for that model. The other model is to have renowned (legal) experts develop standardized training materials (case studies, language manuals), which will be used later by other trainers as well. Such a model is particularly common within the framework of projects.[165] The Croatian Judicial Academy tends to use this model by default.[166] Materials are in general distributed to participants electronically, in paperback, or as a combination of the two. Importantly, 80% of the online judicial training survey participants opted for an electronic copy.

Depending on the type of funding, materials are only distributed to the participants, in some instances also to the general public. At ERA, if training is conducted within the framework of a project, materials are uploaded to websites and made publicly available and downloadable for free. In some national training centers, materials are also downloadable without access restrictions.[167] Some national training academies make them available when requested by email. However, as many as 80% of the survey participants experienced materials reaching only participants in training events rather than other practitioners.

3. Trainers and participants

Trainers are, as a rule, academics, judges or practitioners. All three categories are rated very highly ("very good") by the training participants.[168] The online judicial training survey reveals that a judge is the preferred trainer in Sweden.

165 Responses to the judicial training questionnaire by ERA.

166 Responses to the judicial training questionnaire by the Croatian Judicial Academy.

167 Responses to the judicial training questionnaire by the Croatian Judicial Academy; the materials are available at https://www.pak.hr/clanak/obrazovni-materijali-41554.html (last consulted 22. 10. 2020).

168 Responses to the judicial training questionnaire by ERA, EIPA, and national judicial training schools.

Participants in judicial training activities receive information on the available training mainly from their superiors and to a lesser extent by following social networks or communicating with their colleagues.[169] Major training institutions use ICT to foster training promotion, i.e. websites, social media profiles (LinkedIn, Facebook, Twitter) or direct emails.[170] None of the major training centers employs a virtual assistant or testimonials to attract trainees.

The willingness of participants to take part in the training depends on various factors. Training is perceived as the most efficient way of knowledge transfer by the majority of the online judicial training survey participants. Some of the participants would rather read the relevant literature or would prefer to enroll in a specialist/master study program. The Evaluation of the 2011 European Judicial Training Strategy indicates that participation of justice professionals in training activities depends on the quality and relevance of the training offered. Particularly valued are practice-oriented training and the connection with the reality of the participants' professional focus. This entails not only training on EU law developments, but also on "the reality of the participants: interplay of legal orders".[171] Accessibility in terms of time and budget should be ensured, especially with respect to an uncomplicated and transparent mechanism for cost reimbursement. It is important to ensure that there is an EU added value, for example by ensuring that trainers and participants come from different Member States.[172]

Approximately 50% of the survey participants stated that there is a regulated obligation to take part in training, whereas for almost 30% of them it was relevant for their careers and potential promotions.

In respect of participation in national or international training, figures reveal different habits and needs of survey respondents. Most online judicial training survey participants (21 respondents) had attended ten national training events in the last five years. Turning to international training, most survey participants (25 respondents) had attended two international training events in the last five years.

Survey participants indicated that the benefits of training conducted in an international environment are excellent lecturers, learning from other Member States' practices and experiences, and networking with peers from other Member States. However, a high number of participants point out as

169 Online judicial training survey.

170 Responses to the judicial training questionnaire by ERA, EIPA, and national judicial training schools.

171 Evaluation of the 2011 European Judicial Training Strategy, p. 7.

172 Evaluation of the 2011 European Judicial Training Strategy, p. 8.

disadvantages of international training events that their content is too general, because either they are not tailor-made for their jurisdiction, or they are difficult to follow because participants' language proficiency is too poor, and that they are overly intensive. These findings correspond to responses received by training networks and national academies. In addition, ERA participants endorse the opportunity to meet colleagues from all over Europe, the exchange of experiences and knowledge, the high level of organization, trainer/speaker profiles, interactivity of events, and case studies. Shortcomings of training addressed by participants in training centers relate to limited time of training events (ERA/EIPA), and the venue which is difficult to reach (ERA, which apparently relates to Trier, Germany; being aware of that, the ERA tries to respond by offering project-funded training in other Member States in co-organization usually with national judicial academies).

Participation in training is to a certain extent dependent on the costs. Participants in national training events have no costs or organizational burden as they are entirely organized and funded by the national training institution. In the case of ERA, costs depend on the type of training. If an event is offered solely by ERA, the costs are usually borne by the participants. If an event is held within the framework of a fully or co-financed project, the costs are usually covered by various actors (European Commission, ERA or partners).

The EJTN generally carries out two types of training activities, i.e. EJTN-funded activities, where participating costs are borne by the Network, and the Catalogue of Members' Activities with varying funding arrangements.[173] The EJTN events are free of charge for the judges, but very often they have to organize their travel and accommodation and cover all these costs themselves which are later reimbursed. Participants in ERA- or EJTN-funded training are usually recruited through national judicial schools. In Germany and Sweden, there is no particular participation schedule for individual judges, as any judge can apply and participate irrespective of their previous training. The Croatian Judicial Academy keeps records of the participation of Croatian judges in international training activities, including the activities offered by ERA and the EJTN. When they apply for international training, the Academy checks the relevance of the training for the participants' work and prior participations. For instance, if a criminal law judge applies for a civil law seminar, he/she is not selected. Applicants with no or with a smaller number of international participations are given priority in the selection process. When

173 EJTN annual reports.

asked about their willingness to share training costs, more than 60% of the online judicial training survey respondents declined a cost-sharing system.

The selection of trainee candidates has also been addressed by the online judicial training survey. Approximately half of the survey participants indicate that no selection criteria were employed for participation in national training. Nonetheless, previous training on the same topic might put them low on the priority list. In addition, only candidates assigned to adjudicate on the training subject matter may be accepted. However, almost 35% of the respondents have experienced acceptance to the same training multiple times, though they might not have been a priority. In respect of the possible selection of participants on the basis of prior knowledge, half of the online judicial training survey participants said that prior knowledge was not mentioned as an application condition. Only 31% experienced that attendance at introductory level is a condition for advanced level training.

Focusing only on training of judges at the EJTN, 63% of the online judicial training survey participants experienced that some selection criteria were employed, relating to either professional occupation or previous participation in training on the same topic.

4. Language

The working language at training centers is primarily English, but French and German are also used. Simultaneous translation of training sessions is rarely provided. However, if the training partner is a national institution, they often use their national language for such an event. Researchers have already indicated that despite the fact that most judges speak foreign languages, only a small proportion would be keen to take part in a training in a foreign language.[174] This corresponds to our research findings, where a majority of 63% of the online judicial training survey participants prefer training to be conducted in their national language. Only 18% would prefer training to be conducted in a foreign language while 19% prefer both. Despite these personal preferences, training in a foreign language should be promoted for many professional reasons. Language skills facilitate direct contact with judicial authorities, create possibilities to learn about legal traditions and practice of other Member States, and enable participation in exchange programs abroad.

174 *Coughlan et al.*, Judicial training in the European Union Member States, p. 6.

5. Miscellaneous

The data collected reveal great overall satisfaction of the participants with training on European family and succession law.[175] There is generally positive feedback of participants in ERA events, where the highest grades are given to the content and selected training methodology, knowledge, and speaker profiles. Over 95% of the participants would recommend ERA events to their colleagues.

A large part of the 2018 EU survey on judicial training indicates that the appreciation for the training activity depends on the quality of speakers (79.3%), interaction with speakers (69%), interaction among participants (66.7%), the material distributed (58.6%), and the size of the group (50.6%). Training quality may additionally depend on the participation of peers from other Member States, the language, and the duration of the training.[176]

The motivation of participants to take part in training has already been addressed. General willingness to take part in training indicates that professionals are aware of the need to enhance their competences. Adults have goal-oriented reasons for learning, such as improving their track record, promotion, career change, or a change in employment. The "learning styles inventory" theory by *Kolb* emphasizes that learning is a lifestyle, a continuous process of developing experience rather than its outcome.[177]

As to the knowledge assessment of the training participants, training providers adopt different approaches.[178] The figures of the online judicial training survey indicate that professionals are not actually keen on knowledge assessment. As indicated by the survey, only a third of trainees prefer knowledge assessment at both the beginning as well as the end of the training. It is slightly worrying that less than a third of the participants sees the benefit of knowledge assessment at training events, while a fifth would completely abolish any knowledge assessment. This may indicate that the training participants are unwilling to reveal their potential lack of specific (or even general) knowledge. This probably correlates with the perception of their position as professionals (judges, notaries, attorneys, etc.) with a high level of competence and with their role and reputation in society. Nevertheless, they

175 Responses to the online judicial training questionnaire by ERA and EIPA.

176 Evaluation of the 2011 European Judicial Training Strategy, p. 6 et seq.

177 *Kolb*, Experiential Learning, p. 28.

178 Participants' knowledge is not assessed in the majority of ERA training events. For events organized by the EJTN, assessment is conducted both at the beginning and at the end of the training. EIPA assesses the participants' knowledge only at the beginning of the training.

need to be made aware of the value of self-assessment for purposeful and successful training. Besides, participants need to be aware of the objective level of their knowledge, so as to be able to apply for training programs at the corresponding level. Bearing in mind the cognitive theory that learning is cumulative and relies on prior knowledge, as well as the number of considerations warranting self-assessment,[179] the assessment should be done before each training. Training providers should attach equal importance to this aspect.

The competence of a judge is a highly debated notion. A humanistic concept of competence is globally accepted, as it promotes high-level values of judicial excellence that contribute to public trust and improve the quality of justice.[180] The accountability imperative is reflected in European family and succession law by the fact that a judge is concerned with the effective administration of justice. Socialization improves the judge's understanding of community needs, which is particularly relevant in sensitive family cases involving children.

IX. The way forward in judicial training in European family and succession law

1. EU judicial training policy 2020–2027 – Thoughts and remarks on future action

Going back to the initial stage of training policy development, which identified language skills, familiarity with EU law, and familiarity with the law in other Member States as areas in need of improvement in the judicial profession, makes it obvious that in their universality, these are areas still equally relevant today. The Roadmap to the European Judicial Training Strategy 2019–2025[181], that builds on the results of the Evaluation of the 2011–2020 European judicial training strategy, draws attention to the lack of knowledge of EU law and of EU judicial cooperation instruments, such as the European Arrest Warrant. It also stresses the need for improvement of mutual trust in cross-border proceedings. Legal foreign language proficiency, which is key

179 *Armytage,* Educating Judges, p. 28, 128.

180 *Armytage,* Educating Judges, p. 7–10.

181 The Roadmap to the European Judicial Training Strategy 2019–2025, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1176-European-Judicial-Training-Strategy-2019-2025 (last consulted 22. 10. 2020).

to participation in cross-border activities, and smooth cross-border judicial proceedings and cooperation are also emphasized.[182]

With this in mind, one has to wonder about the true impact and reach of the implemented 2011–2020 European judicial training strategy. Which results stand out? According to the Evaluation of the 2011–2020 European judicial training strategy, the strategy achieved its objectives efficiently and at reasonable cost. It complemented national policies in a relevant and coherent manner in full respect of the subsidiarity principle and added lasting value that Member States would not otherwise have been able to achieve.[183] This should be understood as a clear statement that the European judicial training policy is only a supplement to the national judicial training policies and it does not serve as its replacement. However, the EU is a crucial provider of support to training justice professionals on EU law. How realistic and accurate is this interpretation?

The discussion about the division of competences between the EU and Member States to provide judicial training is still topical in the legal literature. The European Commission refers to the Lisbon Treaty[184] as the legal basis for the EU's competence to "support the training of the judiciary and of judicial staff" in matters related to judicial cooperation in civil and criminal law. It also invokes the Europe 2020 Strategy[185], the Stockholm Programme Action Plan[186], and the EU citizenship report 2010[187]. Referring to these documents, the European Commission announced the creation of a strong and legitimate framework for training on the EU *acquis,* since there is a need for a step change in the way European judicial training is organized in the EU in terms of both concept and scale.[188] However, it seems that the action necessary to achieve these goals would require a far more engaged involvement of the European Commission. The announcement of a "strong framework" could be interpreted as a clear sign of the European Commission's growing influence, which could be expected to gradually result in uniformity of European judicial training. By what means is this uniformity to be attained? The chosen approach seems to be a top-down process, which is typical for the EU strategy of applying political pressure in order to achieve harmonious development in certain areas.

182 The Roadmap to the European Judicial Training Strategy 2019–2025, p. 1.
183 SWD (2019) 380 final, p. 72.
184 Art. 81 (2) (h) and 82 (1) (c) TFEU.
185 COM (2010) 2020 final.
186 COM (2010) 171 final.
187 COM (2010) 603 final.
188 The 2011–2020 European judicial training strategy, p. 3.

Since 2011, the EU has systematically planned, monitored, and directed the implementation of the European judicial training strategy at the EU level. At the same time, it has generously financed training providers of its own preference, which it helped to establish in the first place. As has been criticized in the legal literature, the establishment of the EJTN reflects a top-down attempt by the European Parliament to institutionalize a training structure within the EU institutional framework.[189] It is also argued that the European Commission uses EU judicial networks as tools for soft harmonization of judicial training in the EU.[190] The EU helps the EJTN formulate aims and goals for the training provided, which are not necessarily coordinated with those of particular Member States. This is obvious, since the views and positions on how the training policy on EU law should be developed differs between Member States, often reflecting the specific features of their own legal systems, traditions of judicial training, and understanding of EU law. Not all Member States have requirements for "initial" training. Even where training activities are foreseen, there are differences in their organization.[191]

Who will take the leading role in providing training? Although the relevant framework suggests this should continue to be the Member States, it is nevertheless uncertain to what extent Member States can remain independent. First, with the European Commission's funding and the main training providers operating on a large scale, is there still an incentive for Member States to organize and provide (any) additional training on EU law? The cost of training is significant. As experienced, due to a lack of national budget allocations for training activities, Member States were unable to provide certain training activities (especially transnational ones) without EU funding.[192] Moreover, in the past, additional national seminars on EU topics were organized mainly with the aid of EU financial assistance.[193]

189 *Benvenuti,* International Journal for Court Administration 7 (2015), 59 (61).

190 *van Harten,* Review of European Administrative Law 5 (2012), 131 (149).

191 SWD (2019) 380 final, p. 11.

192 Practical limitations refer to a large-scale and centralized approach. They are not just of a financial nature (training is indeed very expensive and only a minority of magistrates would be able to participate in truly European training activities). Other problems concern time and workload, as well as language (many magistrates do not speak any foreign language in the context of judicial work) and cultural constraints of the authorizing bodies. The 2014–2020 Justice Programme partially addresses these problems, see *Benvenuti,* International Journal for Court Administration 7 (2015), 59 (65).

193 SWD (2019) 380 final, p. 26; Minutes of the Expert Group held on 18 December 2017, p. 3, http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=10448.

Supportive of the EU organized training is the equivalent level of training provided to judges and legal professionals. Under the present conditions, equal development of training in all Member States cannot be guaranteed, not only in terms of older and newer, bigger and smaller, more and less developed Member States, but also in terms of different national legal cultures and pre-existing training traditions.

In 2011, participation in EU law training activities by judges and prosecutors depended on the age of practitioners: younger practitioners attended more training activities on EU law than senior ones. The level of participation differed among Member States and newer Member States offered more training on EU law. However, training in other fields of law was generally more common than training on EU law.[194] These results need to be contextualized. Namely, institutionalized initial and continuous judicial training is traditionally offered in some Member States (France, Spain, and Germany). The tradition of new Central and Eastern European Member States regarding judicial independence and judicial education and training was different, but some authors suggest that a shift has become evident in the past years.[195] There is also the issue of systematic differences stemming from the organization of the judiciary and the relevance given to acquiring legal knowledge for legal practitioners in Member States. A potential for inequality in the level of participation also lies in the different types of motivation of judges for participating in the training, i.e. merely advancing their careers or actually improving their legal knowledge and skills.

Against this background, not all Member States approached the implementation of the EU judicial training strategy in the same way. In Belgium, France, and Germany, concrete action was taken to ensure that the national strategy was aligned with the European strategy (either top-down as an initiative from the government or a bottom-up initiative by stakeholders active in the field). The Netherlands and Sweden have carried out activities which have contributed to the implementation, but these were not necessarily arranged for that particular purpose. The UK and Ireland considered the existing level of training on EU law offered under national training to be sufficient and have not undertaken any additional action.[196]

Upon close examination, this overview reveals that, whether justified or not,[197] the European Commission's action is changing judicial training

194 SWD (2019) 380 final, p. 11 et seq.

195 *Knežević Bojović/Purić*, Strani pravni život 62/4 (2018), 73 (76).

196 SWD (2019) 380 final, p. 29 et seq.

197 With respect to all the noble efforts of the Commission in this field, the question arises as to whether a new specific competence in Art. 81 (2) (h) and 82 (1) (c) TFEU in support of

and legal education in Member States by using it as leverage to make legal cultures converge toward a common standard.[198] By offering a standardized model of legal training, the European Commission is suggesting what the required knowledge and skills of a preferred model of a legal practitioner should be.[199]

As to the substance of training, according to the roadmap document, European judicial training should promote the rule of law and the independence of the judiciary and ensure more respect for the basic principles that the EU is founded on.[200] Being intertwined with both international and national law, EU law is not simply supranational law. In relation to the national law of Members States, its nature should be seen as more integrative. The application of EU law does not consist in the mere interpretation of Europeanized national legal sources and EU documents which apply directly, but also in the interpretation of national law to the extent necessary for the effectiveness of EU law. It also requires compliance with the doctrines of primacy and direct effect of EU law, harmonious interpretation and effectiveness as well as ensuring access to justice according to the procedural standards of EU law.[201]

Some authors argue that a fully-fledged approach, a new dimension to European judicial training, suggests that the European Commission will exert (further) influence on the Europeanization of national judiciaries and their organization step by step.[202] Slow infiltration of specific (EJTN's) common principles into training practices in Member States[203] could be seen as a step in that direction.

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the training of the judiciary and judicial staff in civil and criminal matters provides a proper legal basis for such an objective. It is at least questionable. It seems that this newly gained EU competence is very broadly used. See *van Harten,* Review of European Administrative Law 5 (2012), 113 (143).

198 *Piana,* Judicial Accountabilities in New Europe, p. 176.

199 *Knežević Bojović/Purić*, Strani pravni život 62/4 (2018), 73 (74).

200 The Roadmap to the European Judicial Training Strategy 2019–2025.

201 *Mišćenić,* in: Meškić, Balkan Yearbook of European and International Law, p. 129 (131 et seq.); *Knežević Bojović/Purić*, Strani pravni život 62/4 (2018), 73 (77).

202 *van Harten,* Review of European Administrative Law 5 (2012), 131 (148).

203 On 28. 06. 2016, the General Assembly of the European Judicial Training Network adopted nine principles of judicial training. The principles establish key statements relating to the nature of judicial training, the importance of initial training, the right to regular continuous training and the integral nature of training in daily work. The principles also address the scope of competences of national training institutions regarding the content and delivery of training, clarify who should deliver training and stress the need for modern training techniques. Moreover, the principles underscore the need for funding of judicial train-

As the Evaluation of the EU judicial training strategy shows, the number of Member States and types of legal professions participating in the training is changing in structure and volume over time. Whether this entails a coherent level of knowledge among legal practitioners about EU law is not clear. The Evaluation of the 2011–2020 European judicial training strategy considers only quantitative results on judicial training when evaluating its success. This is connected to the main goals set in the 2011–2020 European judicial strategy, which are also quantitative in nature (including to train half of all legal practitioners on EU law between 2011 and 2020; double the total funding; annual 5% target of trained practitioners per profession; the objective of 1,200 judicial exchanges per year, etc.). Such an approach, typical for the bureaucratic accountable structures subject to regular reviews, fails to consider the different needs of judicial training in Member States, lacks flexibility to offer training tailored according to specific characteristics of national legal systems and is unable to respond to the systematic gaps created in the course of its own implementation. Consequently, far more important than being fit for purpose is the question whether the chosen approach has the capacity to bring about substantial change, which will be decisive for the future of training policy at the EU level.

2. Recommendations for training in European family and succession law

The attempt to conceptualize *pro futuro* the judicial and legal professionals' training in European family and succession law relies on all abovementioned case law and legal instruments researched within the EUFams II Project, different questionnaires, published studies, evaluations and communications, and various scholarly contributions primarily in the fields of law and education.[204] It has yielded the following ten practice-oriented and hands-on recommendations (rather than commandments) addressed to the EU and Member States alike.

ing and support commitments from authorities. See *Knežević Bojović/Purić,* Strani pravni život 62/4 (2018), 73 (76).

204 This contribution and its conclusions and recommendations cannot address the possibly required reforms related to issues other than training, such as the organizational management of the judiciary and individual courts or the concentration of jurisdiction.

1. Training needs to continue being guided at the EU level.
The harmonized and uniform application of European family and succession law is a cornerstone of the free circulation of judgments. It is a continuous challenge to maintain a level of uniformity in the EU. The *Lobach/Rapp*-report identifies in particular a lack of familiarity with the legal framework of European family and succession law.[205] Insufficient primary legal education on the topics and/or inadequate lifelong learning are potentially some of the reasons for this situation.

A shift of powers to enact legal rules at the supranational level blurred the physical and cultural borders of legal systems, strengthened the rule of law, and emphasized the significance of uniform application throughout the EU. The promotion and development of specific methodological approaches and the overall advancement of judicial training quality are recognized among practitioners and academics in EU judicial policy to be of crucial importance for efficiency in the application of EU law. Europeanized judicial training has equally expanded, as expertise in judicial training has been consolidated within the EU in the last two decades.

Since the EU lacks hard power in the field of judicial policies, it has adopted soft leverage of influence based on socialization and training. It has complemented national training programs with supranational networks, aiming at standardized curricula, socialization and skills development. Policy instruments are used to improve judicial training, to Europeanize its content and encourage extensive programs of EU law lifelong learning. Judicial training enhances mutual trust, as it builds the capacity of judges to apply EU law[206] and together with networking overcomes cultural and institutional differences. Cooperation among professionals is indeed fostered by training. Nonetheless, other additional activities should be envisaged, such as publications by trainers who are judges. The Judges' Newsletter on International Child Protection of the HCCH[207] presents an excellent model of dissemination of best practice and promotion of mutual trust.

We are currently facing the emergence of various patterns of judicial cooperation among judicial schools. Figures referring to specific training needs of judges from recent Member States have been presented. A shift from "mechanical" application of law towards an open-concept, wide interpretation, and uniform application is advocated in Europeanized training. Training promotes competence development and a reform of the methodology

205 *Lobach/Rapp*-report, p. 38 et seq.
206 *Piana,* Judicial Accountabilities in New Europe, p. 176.
207 https://www.hcch.net/en/publications-and-studies/publications2/judges-newsletter (last consulted 22. 10. 2020).

of adjudicating cross-border family and succession disputes by "judge-led change".[208] All this can only be sufficiently taken into account and assured as an outcome if guided at the EU level.

2. Judicial training should be made a priority.
Judicial training in European family and succession law should be made a priority, as the number of cross-border cases is increasing and therefore involves most courts. This is further corroborated by the data collected for this contribution which indicate that the number of training events in the field of European family and succession law has been rising in recent years.[209] Despite the importance of training, judges addressed by the 2018 European Commission survey indicated that they did not have time to take part in training (65.8%) or that there were no substitutes for them when they took part in training (39.2%).[210] As long as the competence for court management is retained by Member States, specific tools have to be employed to target judicial training groups and achieve training results. One such specific tool may be mandatory training. As every national judge is equally a European judge, training has to empower each judge to deal with cross-border family and succession cases on an equal footing with his/her peers in other Member States.

3. A study of training needs should be conducted in general, for each Member State, and for each legal instrument.
Figures presented earlier indicate that professionals are not fully familiar with instruments, particularly ones that have only recently become applicable. They are likely neither to proactively prepare themselves for new instruments, nor do they receive the necessary support for training in advance. The EU should perform an overall study on training needs to develop a tailored approach to training in the field.[211] The study should follow both horizontal and vertical approaches to determine the training needs in each Member State and with respect to individual legal instruments. The results could be used to group the Member States in training categories, provided, that would provide necessary efficiency in the training performance. The re-

208 *Armytage,* Educating Judges, p. 10.
209 See section IV.
210 Evaluation of the 2011 European Judicial Training Strategy, p. 17.
211 It could be based on the model of the Study on judges' training needs in the field of European competition law by ERA – Academy of European Law/EJTN – European Judicial Training Network/Ecorys, 2016, http://www.ejtn.eu/PageFiles/15046/Study_Judges_Training_Needs_summary_EN.pdf (last consulted 22. 10. 2020).

sults should also indicate which topics could be dealt with for all Member States together, so that networking is also facilitated.

4. A model curriculum should be adopted at the EU level.
In order to attain uniformity throughout the EU, part of the guidance at the EU level could be manifested in a model curriculum for EU lifelong education in European family and succession law (and possibly for other areas of European private international law as well), which would be designed at the EU level. Drafters of the curriculum should be both judges as well as academics. While training is perceived much better by the trainees if they themselves (or their peers) have been involved in its design, academics may provide necessary emphasis on and understanding of particular ("technical") concepts. Such model curricula would also follow the soft law approach, but could be a useful tool in the hands of different training providers. Amendments and improvements to the basic structure thereof could be promoted and encouraged through additional funding provided to training institutions when organizing training.

5. The training curriculum should be designed on several levels and ranked based on EU criteria.
The level of knowledge among judges and legal practitioners may vary among and within Member States, among different legal professions, and between generations. For this purpose, the abovementioned model curricula and all other curricula developed by the training providers or other institutions should consist of several levels. The levels would depend on the results of the study on the training needs. For instance, the levels could be basic, intermediary, and advanced. Levels would be distinguished and recognized based on the accompanying list of learning outcomes. In addition, levels would be identified by some sort of letter and/or number scheme,[212] which should also be aligned with the ECTS in case the training provider is a higher education institution.

6. Training should be based on modern teaching methodology.
Conventional methods of teaching law and teaching without taking into account that trainees are self-directed adults, are both outdated and not beneficial. Teaching methods for lifelong education in European family and succession law should be based on the nature of the legal sources and legal

212 This could be modelled upon the very successful EU language classification scheme which ranges from A1 to C2.

issues concerned, and adult learning theories which explain the ways adult trainees receive, process, and integrate knowledge. The framework of European family and succession law is characterized by multi-layered, intertwined, complex, and extensive legislation accompanied by equally characterized CJEU and national case law, and sometimes also the case law of the ECtHR. Thus, the teaching methods should refocus from substance-based "hard topics" to skills, values, and "soft topics". The judge is not merely perceived as a professional, but also as a person with a need for a holistic lifelong learning approach.[213] Content-based methods of transferring legal theoretical and practical knowledge improve technical competence.[214] However, in the EU, professional excellence in cross-border dispute resolution process should equally be advanced by training. To be able to establish cross-border cooperation, a holistic approach to professional excellence should address ICT and language skills. Besides legal knowledge, a basic understanding of psychology and sociology should empower judges to better understand the cross-border lifestyles of society. Advanced knowledge of ethics should not be omitted either.[215]

On the other hand, adults need to know the reasons for learning something; they are motivated by the immediate chance to use what they have learnt; they learn better when the focus is on situations (real-life or hypothetical cases) rather than the subject matter (legal instruments), and when the focus is on collaborative two-way learning rather than the trainer-to-trainee model; their previous experience may also affect the learning process. Due to these reasons, adult learners are not likely to benefit from conventional learning methods, such as an old-style textbook lecture. Instead, training should be developed along the lines of case studies, experimental methods, discussions, and be designed on the problem-based learning model with optimal use of ICT.[216] Thus, it would encourage critical thinking and promote the active participation of trainees.

Despite an evident development of distance training tools, the instruments covered by the EUFams II project remain underrepresented. Training institutions could solve that by introducing special online modules dealing with European family and succession law. This could be supported by directing more funds towards the development of distance learning courses, interactive materials designed for adult learning, and tailor-made ICT tools.

213 *Armytage,* Educating Judges, p. XXXIV.

214 *Armytage,* Educating Judges, p. 230.

215 *Gromek-Broc,* in: Grimes, Re-thinking Legal Education under the Civil and Common Law, p. 245.

216 See more in section VII.3. and VII.4.

7. EU funded material should follow an open access policy and remain available on a single webpage administered by the EU even after the expiry of the respective project.
Instead of being limited to the selected course participants by restricting online access, as is often the case, EU funding policy should ensure that any tool or course developed with EU support should be openly accessible and usable free of charge. Due to the number of EU-funded projects which have created online learning tools, with few of these tools remaining available after the conclusion and assessment of the project (perhaps because the domain name for the project or the hosting of the project webpage are no longer funded), a lot of effort and funding is lost and cannot be used for educational purposes. There should be a common openly accessible repository for all project deliverables administered by the EU.[217]

8. Training should be delivered to specific target groups.
An important concern is whether the selection of training participants has been conducted carefully enough to reach the target group.[218] Online judicial training survey participants indicate that they could often apply for and attend training irrespective of their previous knowledge level. It is of the utmost importance to assure that the "right people" (who deal with the training subject matter in everyday practice) are trained at appropriate levels and use adequate methods at a few central training events that are organized annually. Trainees are more likely to accumulate knowledge in areas they deal with in practice on a regular basis. Training should thus respond to such needs and improve the understanding and awareness of European private international law for daily practice. Because training should be organized at different levels of competence, the knowledge of the participants should be self-evaluated by an anonymous method prior to training. The aims of targeted training could be attained by mandatory training for certain levels.

9. Access to high quality training should be made available to all eligible judges.
The online judicial training survey results indicate that judges and practitioners are generally aware of the need to be trained and accept it, though they may be driven by a wide range of motives. However, approximately half of the professionals dealing specifically with European family and succession

217 Some might be problematic if outdated or alike, while others might be subject to copyright or other rights.

218 Setting the target groups is crucial because the data reveal discrepancies in the level of trainees' competences. See section VII.

matters would be willing to contribute to the training costs only if they are sure that the best trainers are involved. This can be understood in different ways. First of all, it probably indicates that participants appreciate the difference between low- and high-level trainers and that in fact there is high- and low-quality training on offer. Therefore, training providers need to be encouraged to provide for higher levels of training, such as by exchanging data on the excellently rated trainers for specific topics or at least by making the future engagement of a trainer dependent on previous evaluations by training participants. There could also be an evaluation system for training institutions and/or recognition systems for the best individual trainers and the best training institutions. Furthermore, the unwillingness to participate in training may also point to the problems with self-funding for training, especially when it comes to the judiciary. In some Member States, judges believe that it is the duty of the State to provide for optimal training and cover all the costs. This may be connected to the judicial culture or the fact that earnings in some Member States are not high enough. Only to a minor extent could the unwillingness to attend training be understood as an indication of the low importance they attribute to professional training.[219]

10. International and national training should be kept in balance.
International training has all the benefits of networking and building mutual trust among peers, advancing language competence, and learning about foreign laws and practices. On the other hand, national training should also be linked to EU actions and further developed. The fact that the application of European family and succession law relies on national procedural law and consequently creates discrepancies, leads to the conclusion that national training should be combined with national substantive and procedural law. EU law does not operate in a vacuum, and hence it should also be taught based on a functional approach in combination with the national laws which complement or intersect with it.

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219 See discussion on knowledge assessment in section VIII.5.

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Defining Marriage and Other Unions of Persons in European Family Law

*Ilaria Viarengo, Francesca Villata, Nicolò Nisi, and Lenka Valkova**
*Diletta Danieli and Cinzia Peraro***

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* University of Milan drafted sections II and V of this contribution.
** University of Verona drafted sections III and IV of this contribution.

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Abstract This contribution focuses on the notions of marriage and other unions of persons for the purposes of the application of the regulations in European family law concerning the personal status as well as the financial aspects of maintenance and property regimes. Prior to this analysis, a comparative overview of the national legal models available to couples and considerations on the broader framework of EU free movement law are also provided in order to set the background against which the subsequent private international law assessment is carried out.

Keywords marriages, partnerships, unions, personal status, maintenance, property regimes.

I. Introduction

This contribution addresses a fundamental question in European family law: the definition of marriage and other unions of persons. It is indeed a preliminary aspect upon which the applicability of the relevant European regulations depends and which is heavily influenced by the Member States' legal traditions and the societal changes affecting the recognition of different family models.

After a brief comparative overview of the national substantive laws (section II.) and an analysis of the relations between the CJEU's case law on free movement rights and the recognition of legal situations (section III.), this contribution will be divided into two parts. The first part will address the aspects relating to personal status, focusing on the notion of marriage (and spouse) underlying the Brussels II bis and the Rome III Regulations and questioning the possibility of applying them to same-sex marriages as well as marriages involving a person of third/neutral gender (sections IV.1.–IV.3.). Non-marital unions will subsequently be taken into account and their possible inclusion within the material scopes of these Regulations will be discussed (section IV.4.). The second part of the contribution will focus on the financial aspect and will address the same topic with regard to the Maintenance Regulation (section V.1.) as well as the recent Property Regimes Regulations (section V.2.).

II. A comparative perspective on the legal framework for couples in Europe*

National legal systems generally provide two different types of marriages: civil marriages and traditional or religious marriages. The former are contracted under State laws setting out the conditions that must be met for a marriage to be valid (e.g. minimum age, formal requirements, maintenance and parental obligations, and property regimes). In particular, civil marriages vary from one jurisdiction to another depending on the cultural, traditional, religious, and historical experiences of a country and can imply recognition of a diversity of marriages – including some (limited) effects of polygamous marriages celebrated abroad.[1] Traditional or religious marriages, on the contrary, are contracted in accordance with specific customary practices or religious rites, respectively, and their effects are recognized under State laws if civil law conditions are complied with.[2]

At the same time, legal alternatives to marriage, such as registered partnerships, have become more widespread and national legislation has changed to confer more rights on unmarried couples.[3] The first country to provide for registered partnerships was Denmark in 1989 in favor of same-sex couples. Since then, many other jurisdictions around the world have followed suit, with some countries also opening such registration schemes to different-sex couples.

Non-marital partnerships are generally created by formal acts of registration and have been categorized in many ways, depending on whether they result in marriage-like rights and obligations or, in contrast, whether they only give access to a limited selection thereof.[4] These evolutions are not only supported by the development on the EU level concerning the free movement of persons (including same-sex couples), which has a significant impact

* This section is to be attributed to *Nicolò Nisi.*

1 Despite the fact that polygamy is illegal in the EU, in some cases the status of "spouse" acquired in result of a polygamous marriage has been recognized in some Member States in line with the ECtHR's case law (for instance in matters of succession law or in matters of family reunifications under Council Directive 2003/86/EC, within the limits set forth by Art. 4 thereof). On this matter, see *Baruffi,* in: Cagnazzo/Preite, Il riconoscimento degli status familiari acquisiti all'estero, p. 73 et seq. with a focus on the evolution of the Italian case law.

2 See e.g. the concordat marriage (*matrimonio concordatario*) in Italy, first regulated by the Lateran Pacts (Patti Lateranensi) of 1929.

3 *Dethloff,* ERA Forum 12 (2011), 89.

4 In the literature, these statuses have been referred to as "quasi-marriage" and "semi-marriage". See *Waaldijk,* ELR 38 (2004), 569.

on priority issues such as family reunifications,[5] but they are also linked to the strong impact of the general human rights discourse in Europe (notably, the principles of equal treatment, non-discrimination, and respect for private and family life).[6]

In addition to marriages and registered partnerships, some countries also recognize informal or *de facto* unions, i.e. arrangements between two persons cohabiting over a period of time without formalizing their relationship, which are increasing in popularity in all European countries.[7] Such unions may be useful to settle certain practical or legal aspects, such as social security, maintenance, or taxes and housing, especially for same-sex couples living in a country that does not allow them to get married or register their partnership in any way.[8]

In general terms, as a consequence of the profound change to the landscape of family law over the last decades, what can be observed today is the development of a variety of options for the recognition of family relationships in the wake of a truly pluralistic approach.[9]

1. Marriage: from tradition to same-sex couples

The traditional conception of marriage dates back to Roman-Canonical sources. The jurist *Modestinus* provided the following definition of marriage, which was contained in the Digest: "the union of man and woman, a lifelong community, a communion of human and divine law"[10]. This definition, albeit elementary, makes it evident that marriage has been long considered as the typical social framework for procreation and nurturing children as

5 See recently CJEU, 05. 06. 2018, C-673/16 (*Coman*), where the CJEU ruled that that the term "spouse" for the purpose of family reunification rights under EU free movement law includes the same-sex spouse of a Union citizen who has moved between Member States. On the evolution of the discussion in this matter, see section III.1.

6 *Sörgjerd,* in: Scherpe, European Family Law Vol. III, p. 3 et seq. An in-depth illustration of ECtHR case law in this regard may be found in the Guide on Art. 8 of the European Convention on Human Rights – Right to respect for private and family life, 31. 08. 2020, https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf (last consulted 07. 10. 2020).

7 See *Boele-Woelki/Mol/van Gelder,* European Family Law in Action. Volume V: Informal Relationships.

8 Homosexuality is still controversial in some Member States, which do not provide any institution for same-sex couples (e.g. Poland, Latvia, Lithuania, Romania, Slovakia, Bulgaria).

9 Such pluralism is inextricably linked to the increasing privatization of family law. See *Fulli-Lemaire,* MPI Research Paper No. 16/28.

10 Digest 23, 2, 1: "Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio".

well as the typical legal framework for the relationship between a man and a woman. In numerous countries, family, children, and parenting are all linked together in the Constitution.[11]

Things have radically changed in the last decades and the idea that marriage is more about a couple's affair rather than the founding act of a family gained momentum.[12] The traditional institutional marriage based on fixed gender-biased roles has given way to marriage based on companionship or even personal fulfilment. While some requirements, such as the prohibition of incest or the aim for unlimited duration, have essentially remained, the relationship between marriage and procreation changed significantly so that nowadays, non-marital and same-sex relationships are also viewed positively in society.[13] The equivalence between children born in and out of wedlock represents a clear sign of the dissociation between marriage and filiation.[14]

11 In a landmark decision dated 15. 04. 2010, No 138, https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2010&numero=138 (last consulted 02. 11. 2020), the Italian Constitutional Court (Corte costituzionale della Repubblica Italiana) stated that «la giusta e doverosa tutela, garantita ai figli naturali, nulla toglie al rilievo costituzionale attribuito alla famiglia legittima ed alla (potenziale) finalità procreativa del matrimonio che vale a differenziarlo dall'unione omosessuale» (translation by the author: the necessary and fair protection guaranteed to biological children does not undermine the constitutional significance attributed to the legitimate family and the (potential) creative purpose of marriage which distinguishes it from homosexual unions). Moreover, the court explained that «la normativa medesima non dà luogo ad una irragionevole discriminazione, in quanto le unioni omosessuali non possono essere ritenute omogenee al matrimonio» (translation by the author: the legislation itself does not result in unreasonable discrimination, since homosexual unions cannot be regarded as homogenous with marriage). Similarly, the French Constitutional Council (Conseil Constitutionnel 28. 01. 2011, no. 2010–92 QPC, https://www.conseil-constitutionnel.fr/decision/2011/201092QPC.htm (last consulted 02. 11. 2020)) held that « la différence de situation entre les couples de même sexe et les couples composés d'un homme et d'une femme peut justifier une différence de traitement quant aux règles du droit de la famille » (translation by the author: the difference in situation between couples of the same sex and couples composed of a man and a woman can warrant a difference in treatment in regards to the rule of family law). The lack of any positive obligation of full equivalence of rules provided for opposite-sex marriage to same-sex unions was also upheld by the ECtHR in case 30141/04 (*Schalk and Kopf/Austria*), 24. 06. 2010, note 108.

12 *Schwenzer,* EJLR 3 (2001), 199 (200). This evolution is well-illustrated by *Fulli-Lemaire,* in: Laurent-Bonne/Pose/Simon, Les piliers du droit civil, p. 61 et seq.

13 A recent analysis among the population of 24 Member States shows that institutional marriage, although considered by many to be already obsolete in the 1970s, is still the prevailing ideal regarding marriage or long-term relationships in Europe: *Camarero,* European Societies 16 (2014), 443.

14 The case of Sweden is illustrative: The 2009 reform that opened marriage to same-sex couples removed all references to procreation from the secular marriage ceremony. See *Sörgjerd,* Reconstructing Marriage, p. 323.

This shift of paradigm was also due to the growing disaffection for marriage among heterosexual persons (called by an author "demarriage"[15]). The first signs of this development emerged in the 1960s in Scandinavia with a decline in the number of marriages among young couples, before becoming more widespread in all of Europe, until the present situation where marriages are considerably less frequent (with an ever-increasing number of births occurring outside marriage), occur at later ages and are more likely to end in divorce.[16]

Irrespective of the evolution of marriage in response to the changing dynamics of heterosexual couples, the rules for legal recognition of same-sex couples have been modeled on marriage. Currently, 15 of the 27 Member States regulate same-sex marriages,[17] along with many non-EU countries around the world.[18] However, same-sex spouses have not automatically been granted all rights attached to heterosexual marriage, with differential treatments especially in matters of adoption and presumption of paternity, which in general does not apply to the female spouse of a woman who gives birth to a child.[19]

It is, however, worth mentioning that, even today, a vast number of countries expressly limit marriage to opposite-sex couples, with the consequence that difficulties may arise in the recognition of same-sex marriages celebrated abroad. Indeed, characterization of the couple's relationship may prove difficult when recognition is sought in a country which allows same-sex couples only to establish civil unions.[20]

15 *Théry,* Le démariage.

16 *Festy,* Population 61 (2006), 493 (517).

17 In 2001, the Netherlands was the first country in the world to open up civil marriage to same-sex couples, followed by Belgium (2003), Spain (2005), Sweden (2009), Portugal (2010), Denmark (2012), France (2013), Ireland (2015), Luxembourg (2015), Malta (2017), Germany (2017), Finland (2017), and Austria (2019).

18 Outside the EU, countries like Canada, South Africa, Norway, Argentina, Brazil, Uruguay, New Zealand, the great majority of states of the United States, and some states of Mexico also recognize same-sex marriages.

19 *Saez,* JGSPL 19 (2011), 1.

20 *Biagioni,* in: Gallo/Paladini/Pustorino, Same-Sex Couples before National, Supranational and International Jurisdictions, p. 359 et seq. In this regard, see the discussion in section III.2 of this contribution.

2. Registered partnerships: monistic versus dualistic versus pluralistic models

As mentioned above, the first country to introduce the institution of a registered partnership was Denmark in 1989, whose example was followed by Sweden in 1994.[21] In most respects, both countries modeled the legal consequences of a registered partnership on those of a marriage, whose substantive rules are repeatedly referred to. Differing from the Scandinavian model, other countries, such as the Netherlands in 1998, opened up the possibility of entering into a registered partnership for both same-sex and opposite-sex couples.[22]

This distinction reveals the adoption of different approaches by national legislators with regard to partnerships: the first approach, the so-called dualistic model, permits only same-sex couples to register their non-marital registered relationship, while different-sex couples are only able to get married (e.g. Italy, Slovenia, Czech Republic); the second approach, the so-called pluralistic model, opens registered relationship schemes to both different-sex and same-sex couples (e.g. Cyprus, Estonia, Greece), a step that is generally followed by the opening-up of civil marriage to couples of the same sex (e.g. Belgium, France, the Netherlands, Austria, Spain).[23] A third possible approach is adopted by Ireland, Germany, Sweden, and Finland and could be classified as monistic, whereby only a single, formalized institution, i.e. marriage, is open both to same-sex and opposite-sex couples.[24]

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21 As of June 2020, the following countries have regulated registered partnerships for same-sex couples: Austria (2018), Belgium (1998), Croatia (2014), Cyprus (2015), Czech Republic (2006), Denmark (1989), Estonia (2014), Finland (2001, but expired in 2017), France (1999) Germany (2001, but expired in 2017), Greece (2015), Hungary (2015), Ireland (2010), Italy (2016), Luxembourg (2004), Malta (2016), the Netherlands (1997), Slovenia (2017), Spain (2005), and Sweden (1994, but expired in 2009).

22 Abundantly referring to the substantive rules applicable to civil marriage: Art. 1:31–42 of the Dutch Civil Code (Burgerlijk Wetboek), which are analogously applicable by virtue of Art. 1:80a (6) of the Dutch Civil Code.

23 *Curry-Sumner,* Uniform Trends in Non-Marital Registered Relationships. This latter classification is based on a core element, which, however, does not overshadow other significant differences; it is indeed possible to individuate a sub-distinction of systems where marriage and registered partnership have virtually identical regimes (e.g. the Netherlands) and systems where the registered partnership is endowed with only a fraction of the effects of marriage (e.g. France and Belgium).

24 In 2015, Ireland was the first country to legalize same-sex marriage by popular vote, at the same time closing civil partnerships to new entrants while leaving partnerships entered into beforehand unaffected. See *Tobin,* Int. J.L. Pol. Fam. 30 (2016), 115. This is the current framework also in Sweden and Finland, after same-sex couples gained access to mar-

Despite the differences among EU national systems, some common patterns have been identified from a comparative perspective, in particular concerning exclusivity[25] and consent[26]. However, the legal effects stemming from such registered partnerships still reveal the existence of substantial differences between national systems. Some countries have extended all the rights and duties granted to married couples to those involved in same-sex equivalents, while others have chosen to use an enumeration method to extend rights and benefits, explicitly stating each right, benefit, duty, and responsibility that is granted to same-sex registered couples. Key differences, always to the detriment of registered partners, generally relate to the protection they are afforded upon dissolution of the partnerships, the possibility to adopt as a couple, and inheritance rights.

In this regard, one may also see that countries which initially adopted weak forms of registered partnerships have then witnessed an evolution where the two institutions are growing closer, as the weight of public interests in marriage is slowly being reduced while the partnerships are increasingly becoming more "matrimonial".[27] In some cases, countries decided at a later stage to move towards marriage. An example is provided by France, which in 1999 enacted a model of partnership with much more limited effects than marriage (the so-called PACS – *pact civil de solidarité*)[28], while in 2013 – after two legislative developments – it legalized same-sex marriage with the law *mariage pour tous.*

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riage in 2009 and 2017 respectively. In Germany, since 2017, same-sex couples only have access to marriage.

25 In the sense that partnerships are restricted to two people and that there is not any recognition of polygamous non-marital registered relationships. The other facet is that the existence of a marriage prohibits either of the parties from celebrating a non-marital registered relationship, while the existence of a non-marital registered relationship prevents either of the parties from celebrating a marriage. In some countries (e.g. Belgium and France), however, the existence of a non-marital registered relationship does not form a prohibition to celebrating a marriage, but if a non-marital relationship has already been registered, it will be automatically terminated upon the celebration of a marriage. See Art. 1476 (2) of the Belgian Civil Code (Burgerlijk Wetboek) and Art. 515–7 of the French Civil Code (Code Civil).

26 Also in the case of partnerships, both parties must validly consent to the registration and must be eligible according to domestic substantive law. Generally, the same rules on marriage are applicable.

27 See e.g. the evolution in Luxembourg, which introduced partnerships in 2004 and enhanced its effects in 2010. See *Swennen,* in: Scherpe, European Family Law Vol. II, p. 5 et seq.

28 For instance, PACS did not create reciprocal rights of inheritance between partners or the legal right to take the name of one's partner.

3. Informal relationships

Beside marriage and registered partnerships, Europe is witnessing an increasing number of informal relationships, with or without cohabitation (thus also including couples living apart together),[29] with a significant number of countries that did not regulate such relationships as *lex specialis* in family law, but did confer some rights and duties in various areas of the law (e.g. property, maintenance, shared household, inheritance), usually subject to the certain minimum duration requirements.[30]

Such informal relationships generally encompass same-sex couples also in absence of a general definition of couples (e.g. Germany, Belgium, the Netherlands). In some cases, this inclusion is required by a legislative definition thereof (e.g. France)[31], while in other cases it is the result of judicial interpretation (e.g. Austria)[32].

In some jurisdictions, however, a legal framework exists, not only defining the recognized informal relationship but also attaching legal consequences to the relationships concerning family law.[33] The reasons for such legislation are essentially the acknowledgement of a new social reality, the financial protection of a vulnerable party after dissolution of the shared household upon the death of the partner (e.g. property of cohabitants, use of common dwelling), and the protection of the common children, in some cases also providing extensive rights and duties in matters of guardianship and adoption.[34]

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29 Generally, the expressions "*de facto* relationships", "informal relationships", and "unregistered relationships" are used interchangeably to characterize couples that have not registered their union, so as to include both couples that live together and couples that do not. On the challenges posed by the latter category, see *Navas Navarro,* RIDC 68 (2016), 425.

30 Austria, Belgium, Bulgaria, the Czech Republic, Denmark, France, Germany, Italy, Latvia, Lithuania, and the Netherlands. In this regard, see the comparative report in *Boele-Woelki/Mol/van Gelder,* Informal Relationships, p. 461 et seq.

31 See for instance the definition of "concubinage" provided by Art. 515–8 of the French Civil Code: « Le concubinage est une union de fait, caractérisée par une vie commune présentant un caractère de stabilité et de continuité, entre deux personnes, de sexe différent ou de même sexe, qui vivent en couple » (translation by the author: a union in fact, characterized by a life in common offering a character of stability and continuity, between two persons, of different sexes or of the same sex, who live as a couple).

32 In Austria, for instance, the courts' refusal to extend to same-sex cohabitants the benefit of the right to succeed to a tenancy was challenged before the ECtHR and deemed a violation of Art. 8 and 14 ECHR. See ECtHR, 24. 07. 2003, no. 40016/98 (*Karner/Austria*).

33 Sweden, Hungary, Slovenia, Croatia, Catalonia, Portugal, Scotland, Ireland, and Finland. In these nine jurisdictions, with the exception of Slovenia, the regulation of informal relationship includes both opposite-sex and same-sex couples.

34 *Mol,* ULR 12 (2016), 98 (105–112).

III. The EU free movement framework and the mutual recognition of personal and family status*

The sectoral character of the harmonized rules laid down in European family law, reflected in the boundaries construed in their scopes of application, as well as the absence of any EU competence in civil status matters, clearly affect the realization of one of the fundamental goals of European integration, namely the free movement of persons. Indeed, it is only natural that EU citizens are willing to fully exercise their free movement rights when they are able to retain the personal status or family relationship obtained in the Member State of origin. Consequently, free movement – a right deriving from EU citizenship that constitutes the "fundamental status of nationals of Member States"[35] – is interpreted as giving rise to a right to cross-border continuity (or portability) of personal and family status.

Such a right, which would impose on Member States an obligation of mutual recognition of a legal situation lawfully established in the Member State of origin[36], has been deemed to rest upon a number of fundamental provisions of the Treaties: not only the rules on Union citizenship and the corollary freedom of movement (Art. 20 and 21 TFEU), of which the right in question is a condition for effectiveness, but also the prohibition of discrimination on the grounds of nationality (Art. 18 TFEU) and the principle of sincere cooperation between Member States (Art. 4 (3) TEU)[37]. Being created by derivation of the home State principle and the mechanism of mutual recognition in EU internal market law, the subject of recognition in the case of personal and family status would, however, be the national private laws governing the establishment, modification, and termination of that status. More precisely, the host Member State (which, from a private international law perspective, is the State of the forum) would be required to accept the status as established in the Member State of origin, in application of the so-called method of referring to the competent foreign legal order (which is the State of nationality of the person) and even in waiver of the relevant conflict of laws rules.

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* This section is to be attributed to *Diletta Danieli.*

35 According to the well-known wording first used in CJEU, 20. 09. 2001, C-184/99 (*Grzelczyk/Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*), note 31, and consistently reiterated in the subsequent case law on EU citizenship rights.

36 For a theoretical framework, see further e.g. *Baratta,* IPRax 2007, 4; *Fallon,* in: Meeusen et al., International Family Law for the European Union, p. 149; *Tomasi,* La tutela degli *status* familiari nel diritto dell'Unione europea, p. 95 et seq.; even earlier, it was identified by *Cafari Panico,* RDIPP 38 (2002), 5 (16–18). More recently, *Deana,* DPCE Online 40 (2019), 1979.

37 In this latter regard, see especially *Baratta,* IPRax 2007, 4 (8 et seq.).

1. The evolution of the CJEU's case law on the continuity of personal and family status*

The existence of the right to cross-border continuity of personal and family status has been developed by the CJEU in a string of cases that first dealt with aspects of personal identity, namely civil status records and the determination of names. As regards the former, the CJEU has ruled that the administrative and judicial authorities of the host Member State "must accept certificates and analogous documents relative to personal status"[38] issued by the State of nationality of the person in question, otherwise the exercise of the rights deriving from the freedom of movement, for which the production of those document is a condition, would be hindered.[39] In subsequent case law on the freedom of movement of a name, in turn, the duty of recognition upon the host Member State inherently regarded the personal status of Union citizens, namely the surname as attributed in the Member State of origin, and was derived from the right to non-discrimination on the ground of nationality that was applied to the rules governing the surname.[40] The authorities of the host Member State in any case retained the possibility to justify their refusal to recognize the name of an EU citizen by invoking fundamental constitutional objectives that were interpreted as a reliance on public policy considerations, but only insofar as "there [was] a genuine and sufficiently serious threat to a fundamental interest of society"[41]. This jus-

* This section is to be attributed to *Diletta Danieli.*

38 CJEU, 02. 12. 1997, C-336/94 (*Dafeki/Landesversicherungsanstalt Württemberg*), note 19. The opinion of Advocate General *La Pergola* was actually more explicit in drawing broader conclusions from the case at hand by identifying the aforementioned principle of continuity of status as follows: "the immutability of status – whenever, of course, it constitutes an element of or prerequisite for a right of the individual – derives from the necessity to guarantee in a uniform manner the actual form of subjective legal positions under Community law and their protection" (Advocate General *La Pergola* 03. 12. 1996, C-336/94 (*Dafeki/Landesversicherungsanstalt Württemberg*), note 6).

39 In the literature on civil status in the EU, also with regard to the initiatives of the EU institutions, see *Lagarde,* YPIL 15 (2013/2014), p. 1; *Kohler,* YPIL 15 (2013/2014), p. 13.

40 In this regard CJEU, 30. 03. 1993, C-168/91 (*Konstantinidis/Stadt Altensteig and Landratsamt Calw*); CJEU, 02. 10. 2003, C-148/02 (*Garcia Avello/Belgian State*); CJEU, 14. 10. 2008, C-353/06 (*Grunkin and Paul*); CJEU, 12. 05. 2011, C-391/09 (*Runevič-Vardyn and Wardyn*); CJEU, 08. 06. 2017, C-541/15 (*Freitag*). On the first judgments in this line of cases, see *Honorati,* DUE 14 (2009), 379.

41 As further clarified in CJEU, 22. 12. 2010, C-208/09 (*Sayn-Wittgenstein/Landeshauptmann von Wien*), note 86; CJEU, 02. 06. 2016, C-438/14 (*Bogendorff von Wolffersdorff*), note 67. This approach has been criticized in the literature not only because it tends to conflate the justifications of national identity (enshrined in the constitutional principles) and of public policy, but also because it does not adequately consider the safeguard of national diver-

tification follows the typical reasoning adopted in relation to obstacles to free movement rights, but it seems to leave open the more general question as to whether the protection of fundamental rights, deriving from domestic constitutional principles and respected at the EU level through the national identities clause (Art. 4 (2) TEU), may prevail on the free movement provisions and, from a private international law perspective, amount to a ground for non-recognition of the status lawfully established in the home Member State.[42]

Most recently, the CJEU has addressed the right to continuity of personal and family status in a case directly relevant to the topic of this contribution, namely that of a same-sex marriage between a third country national and an EU citizen lawfully contracted under the law of another Member State.[43] According to the court, it follows from Art. 21 (1) TFEU that the authorities of the Member State of which the Union citizen is a national cannot refuse to grant a derived right of residence to that third country national on the ground that same-sex marriages are not recognized in the domestic legal order[44]. The court first pointed out that the interpretation to be given to the notion of spouse as a family member for the purposes of Art. 2 (2) (a) Citizens' Rights Directive should be "gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned"[45]. The relevance of the judgment, however, does not lie so much in this statement, but rather in the considerations with regard to the obligation to recognize family status

sities laid down in Art. 4 (2) TEU. See *Cafari Panico,* in: Di Stasi, Cittadinanza, cittadinanze e nuovi *status:* profili internazionalprivatistici ed europei e sviluppi nazionali, p. 215 (227).

42 See further *Cafari Panico,* in: Di Stasi, Cittadinanza, cittadinanze e nuovi *status:* profili internazionalprivatistici ed europei e sviluppi nazionali, p. 215 (229 et seq.), citing the example of surrogacy as particularly illustrative in this regard due to lack of consensus among EU Member States on the regulation of the issue that necessarily affects the recognition of the underlying family status.

43 CJEU, 05.06.2018, C-673/16 (*Coman*). The judgment has attracted the attention of many commentators. See e.g. *Lang,* GenIUS 2/2018, 138; *Rossolillo,* Quaderni di SIDIBlog 4/5 (2017/2018), 430; *Kochenov/Belavusau,* EUI Working Papers 3/2019, 1; *Tryfonidou,* ELR 44 (2019), 663; *Werner,* ZEuP 2019, 802.

44 The CJEU preliminarily clarified that under the Citizens' Rights Directive, the derived right of residence could not be granted to the third country national spouse in his capacity as family member of the Union citizen in the Member State of which that citizen is a national, but this could be conferred on the basis of Art. 21 (1) TFEU. The questions referred for preliminary ruling were accordingly assessed from this perspective.

45 CJEU, 05.06.2018, C-673/16 (*Coman*), note 35. In this regard, the approach taken by the CJEU appears to move away from the opinion of Advocate General *Wathelet,* in which the concept of spouse was given "an autonomous definition independent of sexual orientation", thus embracing the all-inclusive EU-autonomous interpretation that will be discussed in section IV.1 (Advocate General *Wathelet* 11.01.2018, C-673/16 (*Coman*), note 77).

(i.e., the status of spouse acquired in accordance with the law of another Member State) whenever that status is a condition for the exercise of the rights conferred by EU law (i.e., a derived right of residence to a third country national married to a Union citizen of the same sex).[46] This indeed confirms the possibility of non-application of the relevant private international law rules of the host Member State on the ground that they would "lead to a non-recognition result"[47] and, thus, amount to an obstacle to free movement guaranteed by the Treaties.

Also, in this case, the CJEU acknowledged the existence of possible justifications to the restriction of the freedom of movement for persons, reiterating that it must be based on objective public interest considerations and proportional to a legitimate objective pursued by national law. However, the obligation to recognize a same-sex marriage for the sole purpose of the enjoyment of a derived right of residence was meant not to "undermine the national identity or pose a threat to the public policy"[48] of the host Member State, because in no way did it require that Member State to provide for same-sex marriages in its legal order. As a result, it should be noted that the institution of marriage as a union between man and woman, despite having constitutional status in a given Member State, cannot be afforded protection at the EU level under the national identities clause of Art. 4 (2) TEU and, accordingly, be given priority over the application of the free movement provisions.[49] This judgment thus seems to provide an answer, at least with regard to the case at hand, to the general question concerning possible justifications for restrictions to free movement based on domestic constitutional principles that were left unresolved in earlier case law.

46 The family status not falling within the list provided in Art. 2 of the Citizens's Rights Directive may nonetheless be covered by Art. 3 of the same Directive, but the host Member State would only be obliged to "facilitate entry and residence" of those family members of the Union citizen.

47 As already clarified by *Baratta,* IPRax 2007, 4 (9).

48 CJEU, 05. 06. 2018, C-673/16 (*Coman*), note 46.

49 Even before the *Coman* case, this conclusion was already proposed in the literature. See *Rijpma/Koffeman,* in: Gallo/Paladini/Pustorino, Same-Sex Couples before National, Supranational and International Jurisdictions, p. 455 (482), holding that "the definition of marriage as a union between two people from the opposite sex in a Member State's constitution would not per se qualify as part of the constitutional core making up national identity"; also *Tryfonidou,* Colum. J. Eur. L. 21 (2015), 195.

2. The method of recognition of legal situations: the case of downgrade recognition*

The principle of cross-border continuity of personal and family status seems to possess a close resemblance to the method of recognition of legal situations established abroad[50], as both refer to the law of the State of origin in order to allow such recognition. The latter, however, operates as a private international law rule of coordination between legal orders based on unilateral conflict of law provisions, whereas the mutual recognition at the EU level, as clarified in CJEU case law analyzed above, is subject to the following conditions: the application of rules other than those of the Member State of origin, as determined by the domestic private international law, which lead to the non-recognition of status, and the ensuing restriction on the free movement rights granted to Union citizens.[51]

As a further step, it has been proposed to introduce at the EU level a more general "principle of origin", inspired by the method of recognition of legal situations, in certain status matters, such as the celebration of marriage and the establishment of registered partnerships, in order to allow simplification, also when they are dealt with as preliminary questions for the application of European private international law instruments.[52] In this regard, it should be noted that this private international law technique has already been adopted in the legislation of certain Member States,[53] for example in Italy by means of Art. 32-bis of the Italian PIL Act[54]. This provision, which pursues an anti-elusive rationale, stipulates that a marriage celebrated abroad between an Italian national and a person of the same sex has the effects (in Italy) of a registered partnership (*unione civile*) governed by the Italian substantive law[55]. As

* This section is to be attributed to *Cinzia Peraro.*

50 On the theoretical aspects of this method, see amplius e.g. *Baratta,* Recueil des Cours 348 (2011), p. 253; *Lagarde,* La Reconnaissance de situations en droit international privé; *Lagarde,* Recueil des Cours 371 (2015), p. 9; *Davì,* in: Campiglio, Un nuovo diritto internazionale privato, p. 29; *Salerno,* Recueil des Cours 395 (2019), p. 21.

51 See amplius the clear comparison carried out by *Grassi,* RDIPP 55 (2019), 739 (761–764).

52 *Martiny,* in: Meeusen et al., International Family Law for the European Union, p. 69 (72).

53 *Davì,* in: Campiglio, Un nuovo diritto internazionale privato, p. 29 (37).

54 Law No. 218 of 31.05.1995 (Legge 31 maggio 1995, n. 218, Riforma del sistema italiano di diritto internazionale privato, Gazzetta Ufficiale della Repubblica italiana n. 128 del 3 giugno 1995, suppl. ord.). The mentioned Art. 32-bis was introduced in the Italian PIL Act by the Legislative Decree No. 7 of 19.01.2017 (decreto legislativo 19 gennaio 2017, n. 7, Modifiche e riordino delle norme di diritto internazionale privato per la regolamentazione delle unioni civili, ai sensi dell'articolo 1, comma 28, lettera b), della legge 20 maggio 2016, n. 76, Gazzetta Ufficiale della Repubblica italiana n. 22 del 27 gennaio 2017).

55 In particular, by the Law No. 76 of 20.05.2016 (Legge 20 maggio 2016 n. 76, Regolamenta-

a result, it allows for the recognition in the Italian legal order of the status acquired abroad without referring to any conflict of laws rule, but it establishes a re-characterization of that status by downgrading its effects to those associated with the domestic institution of registered partnership.

The personal scope of application of Art. 32-bis of the Italian PIL Act has been subject to extensive debate in the literature, given that its wording does not take into account the case of same-sex marriages celebrated abroad between foreign nationals, either Union citizens or third country nationals. The leading opinion seems to consider these foreign marriages as falling outside the downgrade recognition imposed by Art. 32-bis[56], with the consequence that they would retain their characterization as marriages and be subject to the relevant private international law rules, in particular Art. 26–30 of the Italian PIL Act as well as the Brussels II bis and the Rome III Regulations, according to the respective scopes of application. However, it has also been held that different considerations may lead to an opposite view,[57] which includes same-sex marriages in the category of legal institutions unknown to the domestic legal order[58] and equally requires the re-characterization as registered partnerships of those unions between foreign nationals. In particular, this should be based on the explicit choice made by the Italian legislator providing for the regulation of (only) same-sex registered partnerships and may avoid the reverse discrimination that would otherwise arise between foreign couples and couples in which one of the spouses is an Italian national, also in relation to other aspects of family life such as the adoption of children. Additionally, the characterization of foreign same-sex marriages would re-

zione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze, Gazzetta Ufficiale della Repubblica italiana n. 218 del 20 maggio 2016).

56 See e.g. *Viarengo,* RDIPP 54 (2018), 33 (38); *Biagioni,* Riv. dir. int. 100 (2017), 496 (497–500); *Feraci,* Osservatorio sulle fonti 2/2017, 1 (13); *Lopes Pegna,* Riv. dir. int. 100 (2017), 527 (536). This position has found support also in the case law of the Italian Supreme Court: Corte di cassazione, 14. 05. 2018, no. 11696, www.articolo29.it/wp-content/uploads/2018/06/cass-11696-18.pdf (last consulted 02. 11. 2020; for a commentary, see *Winkler,* ItalJ 4 (2018), 273). Along the same lines, even before the legislative reform of the Italian PIL Act, see Corte d'appello di Napoli, 13. 03. 2015, www.articolo29.it/corte-appello-napoli-sentenza-13-marzo-2015 (last consulted 02. 11. 2020).

57 In this regard, see *Campiglio,* RDIPP 53 (2017), 33 (45 et seq.); *Grassi,* RDIPP 55 (2019), 739 (772–774); *Pesce,* RDIPP 55 (2019), 777 (810–815).

58 Over the years, several views were proposed about the consequences for the Italian legal order of same-sex marriages celebrated abroad: first referring to the categories of the incompatibility with public policy and the inexistence, then to the impossibility of producing legal effects. See Corte di cassazione, 15. 03. 2012, no. 4184, www.articolo29.it/decisioni/corte-di-cassazione-sentenza-del-15-marzo-2012-n-4184 (last consulted 02. 11. 2020); in the literature amplius *Marchei,* Quaderni di diritto e politica ecclesiatica 15 (2012), 807.

sult in the application of Art. 27 of the Italian PIL Act on the requirements for contracting marriages, which are determined according to the national law of each member of the couple at the time of marriage. Hence, problems of recognition of those unions would arise whenever the law thereby determined does not provide for same-sex marriage. Similarly, the EU principle of cross-border continuity of personal and family status could nonetheless impose the recognition of the status only insofar as an obstacle to the rights deriving from EU free movement law would exist, for example the right to family reunification. On the contrary, the re-characterization of those unions as registered partnerships would imply the reference to the relevant conflict of laws provisions (Art. 32-ter (1) of the Italian PIL Act), which allow for the application of Italian law whenever the applicable law does not provide for registered partnerships between same-sex adults[59], and thus the status would be directly recognized on the basis of the Italian private international law regime.[60]

The Italian legal order thus provides an illustrative example of the different recognition regimes that may apply according to the characterization of the relationship at stake, which have an impact not only on the personal status itself but also on the further consequences related thereto (e.g. financial and succession matters, parenthood).

IV. The EU private international law framework for personal status*

The Brussels II bis[61] and the Rome III Regulations[62] are the two pieces of EU secondary legislation that govern the whole range of private international law aspects related to the dissolution and loosening of matrimonial ties,

* This section is to be attributed to *Diletta Danieli.*

59 Indeed, this provision is interpreted as a principle of "positive" public policy. See *Biagioni,* Riv. dir. int. 100 (2017), 496 (509 et seq.); *Lopes Pegna,* Riv. dir. int. 100 (2017), 527 (539), who has nonetheless proposed to extend this legislative solution by way of interpretation also to the recognition of foreign same-sex marriages as such in order to preserve the status lawfully established abroad.

60 *Grassi,* RDIPP 55 (2019), 739 (774).

61 From the extensive scholarly writings on this Regulation, see in general e.g. *McEleavy,* ICLQ 53 (2004), 503; *Lowe/Everall/Nicholls,* The New Brussels II Regulation; *Magnus/Mankowski,* Brussels IIbis Regulation.

62 For a general overview of this Regulation, see e.g. *Boele-Woelki,* YPIL 12 (2010), p. 1; *Baruffi,* DUE 16 (2011), 867; *Franzina,* CDT 3 (2011), 85; *Viarengo,* RDIPP 47 (2011), 601; *Corneloup,* The Rome III Regulation. As of July 2020, the Member States participating in

insofar as consequences for personal status are concerned.[63] On the one hand, the Brussels II bis Regulation lays down rules on jurisdiction and recognition and enforcement of decisions regarding "divorce, legal separation or marriage annulment" (Art. 1 (1) (a))[64]; on the other hand, the Rome III Regulation is applicable, "in situations involving a conflict of laws, to divorce and legal separation" (Art. 1 (1)). Hence a partial misalignment between the respective material scopes of application emerges in relation to marriage annulment, for which the applicable conflict of laws regime is not provided for by the Rome III Regulation and must be found in the relevant domestic private international law.

While the functioning of both Regulations in relation to matrimonial matters has proven relatively smooth[65] and only few concerns seem to have arisen in practice[66], a great deal of debate has nonetheless revolved around the types of personal relationships to which these instruments apply in order to regulate the private international law aspects of their dissolution. Because neither of them defines the legal concept of marriage for the purposes of their applicability, the subsequent delimitation of the scope of "matrimonial matters" remains open and is further explored in the following sections.

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the enhanced cooperation established by the Rome III Regulation are Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania, Slovenia and the three that have joined at a later stage, i.e., Lithuania, Greece, and Estonia.

63 Regarding the financial consequences deriving from the dissolution/loosening of a marriage which are governed by other EU Regulations, see section V.

64 As is well known, the Brussels II bis Regulation also governs jurisdiction, and recognition and enforcement of decisions in matters of parental responsibility and sets out specific procedural rules for intra-EU child abduction cases that supplement the 1980 Hague Child Abduction Convention. However, these provisions will not be discussed in this contribution given its focus on cross-border matrimonial matters.

65 With regard to the Brussels II bis Regulation, this is further confirmed by the fact that its provisions devoted to matrimonial matters were substantially unchanged following the recast process that led to the adoption of the Brussels II ter Regulation. Nevertheless, amendments introduced to other provisions may have an impact on the operation of the Regulation in this regard, for example, those in the new Chapter IV Section 4 on the circulation of authentic instruments and agreements that are relevant for the recognition of out of court divorce agreements (on this topic, see the outcomes of the discussions held at the EUFams II International Exchange Seminar collected in *Brosch/Mariottini,* Report on the International Exchange Seminar, p. 4–6). On the recast of the Brussels II bis Regulation, see generally e.g. *Baruffi,* in: Triggiani et al., Dialoghi con Ugo Villani, Vol. II, p. 1087; *Honorati,* RDIPP 53 (2017), 247; *Kruger,* NIPR 35 (2017), 462; *Carpaneto,* RDIPP 54 (2018), 944.

66 For a comprehensive analysis of the issues stemming from the national cases collected in the EUFams II database, see *EUFams II Consortium,* Comparative Report on National Case Law.

1. The notion of marriage for the purposes of the Brussels II bis Regulation*

As mentioned above, the Brussels II bis Regulation does not clarify how to interpret the legal concept of marriage in order for its rules to apply in a cross-border case of divorce, legal separation or marriage annulment. The answer to this question clearly bears consequences for the range of marital relationships to which the Brussels II bis Regulation applies, particularly with regard to same-sex marriages. Indeed, at the time of drafting of the Regulation, its possible application to these cases did not even come into question, given the handful of legal orders that provided for this institution also for same-sex couples[67]; since then, a significant number of EU Member States have adopted same-sex marriages[68] and therefore, the interpretative issue is not merely speculative. Also, marriages involving a person of the third sex (or "intersex") may raise similar issues in this context. However, rules governing cross-border aspects of a person's gender are limited and mostly confined to the regime of recognition of decisions recording a gender reassignment undergone abroad.[69] Moreover, the consequences of intersexuality on the aspects of civil status such as marriage and parenthood are generally not subject to specific provisions and would primarily require an extensive reform of substantive family law, especially regarding those binary systems that are based on the strict alternatives between the male and female gender.[70] For these reasons, the applicability of the Brussels II bis Regulation (as well as other EU family law instruments) in relation to marriages involving intersex individuals is still underexplored and only brief remarks will be made here.

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* This section is to be attributed to *Diletta Danieli.*

67 More precisely, before the adoption of the Brussels II bis Regulation, same-sex marriage was first introduced in the Netherlands in 2001, followed by Belgium in 2003. For an updated list of countries, see fn. 24.

68 For a comparative overview, see section II.

69 In this regard, reference can be made to the Convention on the recognition of decisions recording a sex reassignment, drafted in the framework of the International Commission on Civil Status (ICCS) and signed on 12. 09. 2000. The full text of the Convention (in French and English) and the status table are available at www.ciec1.org/SITECIEC (last consulted 09. 10. 2020).

70 For more comprehensive studies on the legal recognition of intersexuality, see e.g. *Gössl,* JPIL 12 (2016), 261; *Scherpe/Dutta/Helms,* The Legal Status of Intersex Persons; *Gössl/Völzmann,* Int. J.L. Pol. Fam. 33 (2019), 403, all with further references. See also *European Union Agency for Fundamental Rights* (*FRA*), The fundamental rights situation of intersex people.

Against this uncertain background, an activity of characterization (or classification)[71] is required and it should be determined whether the definition of marriage for the purposes of the Brussels II bis Regulation is to be carried out according to the domestic legislation of the Member States, or whether an EU-autonomous interpretation could be identified so as to avoid the reference to national laws.[72] Whereas the former view would lead to the Regulation having a flexible scope of application *ratione materiae,* the latter would ultimately imply a choice between a narrow interpretation encompassing only opposite-sex marriages and a more open and evolutive reading in the light of the societal and legislative changes occurring in the field of family law throughout the EU Member States.

The method of EU-autonomous interpretation relies on the approach traditionally adopted by the CJEU in various fields of law, whereby the legal concepts contained in a provision of EU law that does not expressly refer to the law of the Member States for the purposes of their definition must be given an "autonomous and uniform interpretation" throughout the EU, having regard to the context of the provision and the objective of the legislation in question.[73] In this context, the relevant substantive provisions found in national laws serve as a comparative reference in order to point to "a common core among [them], or at least a strong tendency in a certain direction"[74], which currently seems difficult to identify towards a broader interpretation of marriage that includes same-sex unions. It is thus generally accepted that, at least for the time being, the EU interpretation should still be limited to heterosexual marriage (including marriage between persons of the same biological gender, one of whom has undergone gender reassignment surgery), albeit that a dynamic reading in the light of further developments in the

71 More generally on this technique in private international law see e.g. *Boschiero,* in: Preite/Gazzanti Pugliese di Cotrone, Atti notarili nel diritto comunitario e internazionale, Vol. 1: Diritto internazionale privato, p. 61; *Bariatti,* in: Encyclopedia of Private International Law, p. 357; in the specific field of family law *Tomasi/Ricci/Bariatti,* in: Meeusen et al., International Family Law for the European Union, p. 341; *Parra Rodríguez,* in: Malatesta/Bariatti/Pocar, The External Dimension of EU Private International Law in Family and Succession Matters, p. 337; *Armellini,* in: Cagnazzo/Preite/Tagliaferri, Il nuovo diritto di famiglia, Vol. 4: Tematiche di interesse notarile. Profili internazionalprivatistici, p. 743.

72 On this issue, see recently *Pesce,* RDIPP 55 (2019), 777 (779–791).

73 According to the well-established wording employed by the CJEU in recent judgments, see e.g. CJEU, 21. 03. 2019, C-465/17 (*Falck Rettungsdienste and Falck/Stadt Solingen*), note 28; CJEU, 04. 06. 2020, C-429/19 (*Remondis/Abfallzweckverband Rhein-Mosel-Eifel*), note 24; in the specific field of family law, see e.g. CJEU, 02. 04. 2009, C-523/07 (*A*), note 34; CJEU, 22. 12. 2010, C-497/10 PPU (*Mercredi/Chaffe*), note 45 (both regarding the notion of "habitual residence" of a child for the purposes of Art. 8 Brussels II bis Regulation).

74 *Pintens,* in: Magnus/Mankowski, Art. 1 Brussels II bis Regulation note 21.

legislations of the Member States cannot be ruled out.[75] This line of argument finds support in the position of the CJEU, which has addressed the concepts of marriage and spouse in a number of judgments concerning EU legislation on free movement and equal treatment of workers[76] as well as the Staff Regulations[77], yet not in relation to the EU private international law instruments. Furthermore, a broad notion of family member that included the "spouse, irrespective of sex" was expressly rejected in the context of the preparatory works for the adoption of the Citizens' Rights Directive[78].

Notwithstanding this mainstream opinion, it has also been argued that a broad definition of matrimonial matters (i.e. encompassing all forms of marriage/partnership dissolution) should be preferred from an EU policy perspective.[79] An indication of this may be inferred from the changes introduced by the Brussels II ter Regulation in the wording of Annex II laying down the template of a certificate concerning decisions in matrimonial matters, in which the references to "wife" and "husband" have been modified to

75 *Pintens,* in: Magnus/Mankowski, Art. 1 Brussels II bis Regulation note 21 et seq. Similarly, *Tomasi/Ricci/Bariatti,* in: Meeusen et al., International Family Law for the European Union, p. 341 (342 et seq.; 359–363); *Wautelet,* in: Boele-Woelki/Fuchs, Legal Recognition of Same-Sex Relationships in Europe, p. 143 (160 et seq.); *Pintens/Scherpe,* in: Encyclopedia of Private International Law, p. 1604 (1606).

76 See CJEU, 17.04.1986, 59/85 (*Netherlands/Reed*), note 15 et seq., regarding Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community, OJ L 257, 19.10.1968, p. 2–12; CJEU, 07.01.2004, C-117/01 (*K.B./National Health Service Pensions Agency and Secretary of State for Health*), note 31–35, in relation to Art. 141 of the EC Treaty and Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ L 45, 19.02.1975, p. 19 et seq.

77 See CJEU GC, 17.06.1993, T-65/92 (*Arauxo-Dumay/Commission*), note 30 et seq.; CJEU, 31.05.2001, C-122/99 P and C-125/99 P (*D and Sweden/Council*), note 35–39, both regarding Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968, laying down the Staff Regulations of officials and the conditions of employment of other servants of the European Communities, OJ L 56, 04.03.1958, p. 30–36.

78 More precisely, the European Parliament in its Report on the proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (23.01.2003, A5-0009/2003) proposed the abovementioned amendment to Art. 2 (2) (a) of the Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM (2001) 257 final, which was not subsequently incorporated in the amended proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM (2003) 199 final), on the ground that it would have resulted "in the imposition on certain Member States of amendments to family law legislation, an area which does not fall within the Community's legislative jurisdiction" (p. 3).

79 *Ní Shúilleabháin,* Cross-Border Divorce Law – Brussels II bis, p. 110 et seq.

"spouses", thus employing a gender-neutral term[80]. Nonetheless, given that the Brussels II bis/II ter Regulation applies to proceedings concerning personal status, an all-inclusive notion of marriage would imply that Member States' judicial authorities must answer in the positive the preliminary question about the existence of a marriage and, therefore, be obliged to exercise jurisdiction or recognize a foreign decision on the dissolution of marital ties. Such an outcome would clearly impact the States' sovereignty in the area of family law, upon which the EU competence conferred under Art. 81 (3) TFEU should not impinge, with the consequence that it seems difficult to share such a comprehensive reading of the EU autonomous interpretation.[81]

The option of leaving the definition of marriage to the national laws of the Member States[82] would in turn result in the Brussels II bis Regulation being afforded a wider applicability,[83] which includes same-sex marriages in those legal orders where they are recognized. This seems indeed to be the status quo, taking into account the practice of Member States such as Belgium[84] and the Netherlands[85], according to which the Brussels II bis Regulation is given full application in cases of divorce of same-sex spouses, seemingly without even questioning whether its scope covers these kind of marriages. On the contrary, Member States that do not allow same-sex marriages to be celebrated would continue to enjoy discretion insofar as their judicial authorities, when seized with cross-border proceedings regarding

80 Without inferring to much from this textual change, it could also be possible that the EU legislature preferred the term "spouses" in order to adjust the possible application of the Brussels II ter Regulation in those Member States that currently apply the predecessor Brussels II bis Regulation in cases of divorce of same-sex spouses, but still by means of a definition of the concept of marriage by reference to their own national law rather than an EU autonomous interpretation (as explained further in this section).

81 Indeed, other commentators who theoretically argue in favor of this broad reading underline that "such a solution will be almost impossible to reach on a European Union level", *Kruger/Samyn,* JPIL 12 (2016), 132 (138).

82 It is worth mentioning that such an option is explicitly chosen in another and more recent EU private international law instrument, namely the Matrimonial Property Regulation (Recital 17), and this could lend indirect support to follow the interpretative option in the context of the Brussels II bis Regulation. On the Matrimonial Property Regulation, see further section V.2.a).

83 *Pesce,* RDIPP 55 (2019), 777 (791). Also according to *Swennen,* in: Meeusen et al., International Family Law for the European Union, p. 389 (405), the concept of marriage has to be defined in the light of national law, but "the primary point of reference" should be the law of the Member State of origin (on this aspect, see also section III).

84 As reported in *European Commission,* Study on the assessment of Regulation (EC) No 2201/2003, p. 115. The Belgian practice is discussed also in *Gössl/Verhellen,* Int. J.L. Pol. Fam. 31 (2017), 174 (181).

85 As confirmed by *Curry-Sumner,* EJCL 11.1 (2007), 1 (11).

the dissolution of a same-sex marriage, are neither required to hear the case nor to recognize the marital relationship pursuant to the provisions of the Brussels II bis Regulation. Indeed, this was the substance of the answer already given in 2003 by EU Commissioner *Vitorino* to a parliamentary question concerning the previous Brussels II Regulation and same-sex marriages contracted under Dutch civil law.[86]

Defining the concept of marriage according to national law may result in different approaches being taken in the Member States that do not provide for same-sex marriage in their legislation. Again, it is a question of characterization, namely determining which (national) legal category should be applied to an institution that is unknown to the legal order of the forum. The narrowest stance would be to deny the existence of the relationship as such and consequently its effects, as it is the case, for example, in Hungary and the Czech Republic.[87] In contrast to this radical solution, which also appears to be in breach of human rights guaranteed in the EU Charter and the ECHR[88], in those Member States that afford legal recognition to same-sex relationships in the form of registered partnerships (e.g. Italy and Croatia), the foreign same-sex marriage is re-characterized and "downgraded" accordingly. The regime applicable to a divorce of same-sex spouses is thus found in the domestic private international law provisions relating to the dissolution of a registered partnership and, consequently, a divorce decision would not be issued in such a case. This may result in persisting difficulties in the subsequent circulation of the decision terminating the partnership in the Member

86 Written question E-3261/01 by *Swiebel* (PSE) to the Commission, 23. 11. 2001, and answer given by *Vitorino* on behalf of the Commission, 12. 03. 2002, both in OJ C 28E, 06. 02. 2002, p. 2 et seq. (in the answer, this excerpt is particularly illustrative: "[e]ven if it cannot be excluded that the regulation applies to procedures concerning the divorce of a same sex couple, this does not translate into an obligation on the courts neither to pronounce or recognise the divorce nor to recognise the marriage").

87 *Noto La Diega*, in: Hamilton/Noto La Diega, Same-Sex Relationship, Law and Social Change, p. 33 (39 et seq.), refers to this approach as the "erasure" model.

88 Indeed, it is settled case law of the ECtHR that same-sex couples are in need of legal recognition and protection of their relationship and Contracting States have to fulfil the positive obligation to set out a specific legal framework to this end, albeit not necessarily through the extension of the institution of marriage. See the judgments ECtHR, 24. 06. 2010, no. 30141/04 (*Schalk and Kopf/Austria*); ECtHR, 16. 07. 2014, no. 37359/09 (*Hämäläinen/Finland*); ECtHR, 21. 07. 2015, no. 18766/11 and 36030/11 (*Oliari et al./Italy*). A different perspective may be inferred from the wording used in Art. 9 EU Charter, which does not contain any reference to the gender of the spouses in establishing the right to marriage. However, as underlined in the literature, this provision could not be stretched as far as imposing a duty on the Member States to provide for same-sex marriage in their legal orders. See *Pesce*, DUDI 10 (2016), 5 (28).

States that recognize the original relationship as a marriage and a so-called "limping" personal status would exist.[89] In addition, the same downgrade model may be differentiated according to the nationality of the same-sex spouses, in particular when one or both of them are nationals of the Member State that does not allow for this kind of marriages, or they are foreign nationals. Therefore, also the uncertainties stemming from this approach seem likely to be problematic from a human rights perspective as well as from an EU free movement law perspective, as discussed in section III.

2. The notion of marriage for the purposes of the Rome III Regulation*

Considering the notion of marriage underlying the applicability of the Rome III Regulation, it should be noted that the EU legislator has not left the issue completely untouched, as is the case in the Brussels II bis Regulation. Indeed, Art. 1 (2) (b) Rome III Regulation clarifies at the outset that the matters concerning "the existence, validity and recognition of the marriage" shall fall outside its scope of application, "even if they arise merely as a preliminary question in the context of divorce or legal separation proceedings". In order to address these issues, reference should be made to the national law of the forum, in particular its conflict of laws rules, thus excluding an EU autonomous interpretation.[90]

Furthermore, a one-of-a-kind rule in the context of civil judicial cooperation in family matters allows a participating Member State to essentially disregard the application of the Rome III Regulation (Art. 13) whenever the domestic legal order "does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings". The two instances in which the provision may come into play are further explained in Recital 26. The former refers to a legal order that does not regulate the institution of divorce and was drafted in order to take into account the position of Malta at the time of the negotiation of the instrument. Since then, however, divorce was introduced also in the Maltese legal order[91], with the consequence that this provision is no longer of relevance on a practical level. Nevertheless, it is worth mentioning that the CJEU has recently referred to

* This section is to be attributed to *Diletta Danieli.*

89 In this regard, see *Gössl/Verhellen,* Int. J.L. Pol. Fam. 31 (2017), 174 (180).

90 As underlined by *Gössl/Verhellen,* in: Corneloup, Art. 1 Rome III Regulation note 1.22.

91 More precisely, following a successful referendum, a Maltese divorce law was approved by the parliament on 25.07.2011 and entered into force on 01.10.2011 (Civil Code (Amend-

the wording "does not provide for divorce" used in Art. 13 and the related explanation in Recital 26, in order to interpret systematically the situation referred to in Art. 10 Rome III Regulation, according to which "the law applicable pursuant to Art. 5 or Art. 8 makes no provision for divorce"[92]. Although the two provisions refer to different laws in this respect[93], the CJEU found Art. 10 applicable only to cases in which the applicable law does not provide for divorce in any form, and not whenever that law makes divorce subject to more restrictive conditions than those laid down by the law of the forum.[94] The second instance laid down in Art. 13 regarding the invalidity of the marriage is instead drafted in broad terms and Recital 26 specifies that it could be intended, "inter alia", that the marriage in question does not exist[95] in the legal order of the participating Member State. Despite the general scope of the provision, it was actually inserted with a view to preserving national diversities in relation to same-sex marriages.

Art. 13 Rome III Regulation does not further regulate the functioning of this safeguard clause and a number of issues remain open, also in the absence of guidance from case law. Firstly, the reference in order to establish the invalidity of the marriage seems to be placed in the law of the participating Member State of the court seized, while any differences between the domestic notion of marriage and the foreign marriage in question would allow the court to refuse to declare the divorce. Nonetheless, the wording "inter alia" in Recital 26 may give room for other sources of invalidity, for example the law applicable to the validity of the marriage as determined by the conflict of laws rules of the forum. In this case, commentators suggest that the correct

ment) Act, 2011 (Act No. XIV of 2011), https://legislation.mt/eli/ln/2012/218/eng/pdf (last consulted 02. 11. 2020)). Therefore, the *ad hoc* provision contained in Art. 13 Rome III Regulation had lost its practical relevance even prior to being applicable as of 21. 06. 2012.

92 CJEU, 16. 07. 2020, C-249/19 (*JE/KF*).

93 Art. 13 and Recital 26 Rome III Regulation refer to the law of the participating Member State of which a court is seized, while Art. 10 Rome III Regulation refers to the applicable law as determined on the basis of the Regulation.

94 More precisely, in the case at hand, the law applicable to the divorce in accordance with Art. 8 (a) Rome III Regulation was Italian law, under which a period of legal separation is required before a divorce can be declared, whereas the law of the forum, i.e. Romanian law, did not provide for a similar condition.

95 This assimilation of the legal categories of invalidity and non-existence of the marriage according to the explanation of Recital 26 has been criticized in the literature because it "creates confusion" and also due to the elusiveness of the concept of non-existent marriage, *Chalas,* in: Corneloup, Art. 13 Rome III Regulation note 13.15. Indeed, in those Member States that do not recognize same-sex marriages, the legal consequences of these unions are interpreted according to different views. On this issue with regard to the Italian legal order, see section III.2.

remedy would be a declaration of nullity of the marriage according to the law governing its validity, rather than a refusal to declare the divorce pursuant to Art. 13[96]. Secondly, neither Art. 13 nor Recital 26 clarify any procedural aspects. In any case, from the wording of Art. 13 one can infer that the refusal to grant the divorce is not an obligation upon the court of the participating Member State, which may ultimately rule to declare the dissolution of the marriage. Accordingly, it seems reasonable that the possible application of Art. 13 should be assessed *ex officio* by the court seized.

3. Conclusions on the concept of marriage in the Brussels II bis and the Rome III Regulations*

From this combined analysis of the Brussels II bis and the Rome III Regulations, it can be concluded that the objective of their consistent application, as required by Recital 10 of the latter Regulation, would call for a definition of the concept of marriage to be left to the domestic legislation of the Member States, albeit that under the former instrument this solution is reached only by way of interpretation. This seems to allow their applicability to be extended to cases of dissolution of same-sex marriages depending on their recognition in the domestic legal order of the forum. This line of argument may also be applied to other unions that were characterized as marriages according to national laws, for example those involving intersex persons, but this currently seems more of a theoretical possibility given that their legal recognition has only recently begun to surface in some Member States' legislation and to limited purposes (mainly gender allocation in civil status records).

However, the Rome III Regulation has introduced an explicit provision that prevents the court of a participating Member State from being obliged to declare a divorce whenever the marriage is not deemed valid according to its law. Conversely, under the interpretative solution proposed for the Brussels II bis Regulation, there is no such safeguard and it cannot be excluded that a refusal to recognize foreign unions qualified as marriages may be found to infringe EU law.[97]

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* This section is to be attributed to *Diletta Danieli.*

96 *Chalas,* in: Corneloup, Art. 13 Rome III Regulation note 13.27.

97 Indeed, some commentators have identified the approach followed under the Brussels II bis Regulation as the "second best" option, given the impossibility of reaching a consensus in favor of an all-inclusive notion of marriage. See *Kruger/Samyn,* JPIL 12 (2016), 132 (138).

4. The applicability of the Brussels II bis and the Rome III Regulations to other unions of persons*

The model of the family has long been moving away from the traditional concept of opposite-sex individuals being married and living together: different forms of adult relationships (non-marital unions, also open to same-sex couples, and even solely based on a *de facto* cohabitation) have increasingly become socially acceptable and, consequently, in need of a formal recognition.[98] The responses in the domestic legal orders vary significantly from jurisdiction to jurisdiction as to which relationships were to be recognized and under which legal institution (e.g. partnership, either registered or contractual, cohabitation agreement, or concubinage).[99] For the purposes of the assessment carried out in this section, the main focus is on registered partnerships (broadly understood, irrespective of the type of formal registration required by national legislation) with a view to addressing the issues arising from the cross-border effects of these unions.

When considering the applicability of EU private international law instruments to registered partnerships, there is a consensus that the Brussels II bis Regulation does not apply to their dissolution.[100] It does, however, regulate parental responsibility matters concerning children born to unmarried parents, and this was an extension of the material scope of application when compared to the predecessor Brussels II Regulation.[101] Along the same lines, the Rome III Regulation is generally interpreted as excluding registered

* This section is to be attributed to *Cinzia Peraro.*

98 For a comprehensive discussion of these different family models and their recognition in different jurisdictions see e.g. *Scherpe/Yassari,* Die Rechtsstellung nichtehelicher Lebensgemeinschaften – The Legal Status of Cohabitants; *Miles,* in: Scherpe, European Family Law Vol. III, p. 82; *Scherpe/Hayward,* The Future of Registered Partnerships.

99 For a comparative overview, see section II.

100 See e.g. *Swennen,* in: Meeusen et al, International Family Law for the European Union, p. 389 (407 et seq.); *Martiny,* in: Boele-Woelki/Fuchs, Legal Recognition of Same-Sex Relationships in Europe, p. 225 (236); *Pintens,* in: Magnus/Mankowski, Art. 1 Brussels II bis Regulation note 31–33; *Lamont,* in: Scherpe/Hayward, The Future of Registered Partnerships, p. 497 (517); *Wautelet,* in: Encyclopedia of Private International Law, p. 1505 (1508); *Pesce,* RDIPP 55 (2019), 777 (783).

101 More precisely, in the Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, OJ C 12, 15.01.2001, p. 1–9, the Council underlined that in order to take into consideration, as a social reality, the increasing figures of relationships other than marriage and children born out of wedlock, the scope of the Brussels II Regulation should have been extended "to judgments concerning the exercise of parental responsibility with regard to children of unmarried couples" (p. 3).

partnerships from its scope given the exclusive reference to "spouses" made in its provisions.[102] These EU instruments thus seem to maintain a strict distinction between marriages and registered partnerships, and this position has been confirmed through the enactment of subsequent acts of judicial cooperation in family matters, namely the Property Regimes Regulations adopted in 2016. It is also consistent with the CJEU case law that narrowly interpreted the notion of spouse for the purposes of the Staff Regulations.[103] As a consequence, rules governing the termination of registered partnerships must be found in domestic private international law.

Contrary to this common approach, one may contend that such a distinction seems to possess an artificial character, especially considering that registered partnerships create stable and formalized family relationships, the effects of which can be assimilated to those of marital unions, and that national legislation governing them is often modeled on the regime provided for marriages.[104] These considerations could have been the underlying reasons for a decision rendered by an Italian court of first instance, in which the *lis pendens* rule provided in Art. 19 Brussels II bis Regulation was applied in the context of a dissolution of a same-sex registered partnership concluded in Malta and entered into the Italian civil status records.[105] Nevertheless, this was an isolated case from which it is difficult to infer a generalized trend that could cast doubt on the aforementioned exclusion of registered partnerships from the scope of application of the Brussels II bis Regulation.

In the light of the current EU legal framework,[106] it follows that the private international law aspects concerning the dissolution of registered partnerships and its consequences for the civil status of registered partners should be considered *de iure condendo,* requiring that either the scope of the Brussels II bis and the Rome III Regulations be widened or a further EU instrument be adopted. The former option seems likely to be ruled out given the recent adoption of the Brussels II ter Regulation, which has not

102 See e.g. *Boele-Woelki,* YPIL 12 (2010), p. 1 (13); *Franzina,* CDT 3 (2011), 85 (102); *Gössl/Verhellen,* in: Corneloup, Art. 1 Rome III Regulation note 1.06. *Coester-Waltjen,* in: Encyclopedia of Private International Law, p. 543 (549), however, seems to take a more doubtful view.

103 In the judgment cited already CJEU, 31. 05. 2001, C-122/99 P and C-125/99 P (*D and Sweden/Council*), note 35–39.

104 Arguing in favour of the abolition of the distinction between marriages and non-marital unions from a private international law perspective, *Gössl/Verhellen,* Int. J.L. Pol. Fam. 31 (2017), 174 (183 et seq.). In this regard, see section II.2.

105 Tribunale di Bologna, order of 18. 10. 2018 (unpublished).

106 It should be mentioned that also at the international level, registered partnerships are not subject to a specific private international law regime. The only relevant instrument in this regard is the ICCS Convention, which has not yet entered into force.

introduced any substantial changes to the existing regime governing matrimonial matters, and the lack of any prospect of a recast of the Rome III Regulation, at least in the near future. There would be room, in turn, to argue for the enactment of a separate instrument[107] (possibly a regulation, even by means of an enhanced cooperation), inspired by the recent Partnership Property Regulation. One of the most pressing issues would be the characterization of a registered partnership for the purposes of the application of this hypothetical EU instrument, which could reiterate, for reasons of consistency, the definition laid down in Art. 3 (1) (a) Partnership Property Regulation[108]. As to its material scope, in order to reflect the existing regime on the dissolution of marital ties deriving from the combined application of the Brussels II bis and the Rome III Regulations, it would seem reasonable to provide rules governing jurisdiction, applicable law, and recognition and enforcement of decisions in relation to the termination of registered partnerships, while their existence, validity or recognition would probably still be left to Member States' laws. The design of the appropriate connecting-factors may also draw on the example of the Partnership Property Regulation, but taking into account that specific legislation on registered partnerships has not been uniformly enacted in all Member States and that the law of the place of registration of the partnership (*lex loci registrationis*) may in any case ensure that substantive rules be found to set out the conditions for its termination.[109] In addition, due to the diverging domestic provisions governing the institution in question[110], the preference for connecting-factors that favor the integration of the partnership into the legal order, such as the place of the common habitual residence of the partners, may entail significant changes in the regime on the termination of the partnership that could also affect, from a long-term perspective, the cross-border mobility of the couple.

107 In this regard, see *Melcher,* JPIL 9 (2013), 149. For an overview of the private international law solutions adopted in the domestic legal orders, see *Wautelet,* in: Encyclopedia of Private International Law, p. 1505 (1509–1514).

108 However, as further clarified also in Recital 17 Partnership Property Regulation (and similar to the aforementioned Art. 13 Rome III Regulation), this should not oblige a Member State that does not regulate the institution of registered partnership to provide for it in its national law. Such a safeguard clause could be equally provided in a hypothetical EU regulation on the dissolution of registered partnerships.

109 As underlined by *Melcher,* JPIL 9 (2013), 149 (165).

110 According to *Wautelet,* in: Encyclopedia of Private International Law, p. 1505 (1514), the preference given to the *lex loci registrationis* "expresses the idea that partnerships as institutions may differ too widely between countries to allow for the severing of the termination from the country where the partnership was registered".

Currently, however, it should be noted that these considerations are mostly theoretical, as no legislative action has been undertaken towards the proposal of a new EU instrument on the termination of registered partnerships. Nonetheless, given their growing recognition at the national level, the harmonization of the EU private international law regime also in this area of law would seem desirable, with a view to furthering the free movement of cross-border families in the EU. Conversely, at this stage, it seems an even more remote possibility to afford greater recognition at the supranational level to relationships based on a mere *de facto* cohabitation, due to their informal nature and the resulting difficulties in providing an appropriate legal framework.

V. The EU private international law framework for financial aspects

1. The concept of marriage and other unions of persons in the Maintenance Regulation*

EU private international law rules concerning maintenance matters deal with certain economic consequences of a family relationship, parentage, marriage or affinity, and it was not by coincidence that maintenance obligations were included in the scope of both the 1968 Brussels Convention as well as the European Enforcement Order Regulation, while the same matters are excluded from the Brussels II bis Regulation.[111] Although the Maintenance Regulation was adopted according to the procedure provided for in Art. 67 (2) TEU establishing the European Community, under the terms of which the Council acts unanimously after consulting the European Parliament, due to the connection between maintenance matters and "family law" in accordance with Art. 67 (5) indent 2 TEU, for a while it was also contemplated transferring maintenance obligations from unanimous to co-decision procedure.[112] In fact, according to the Commission Communication calling on the Council to provide for measures relating to maintenance obligations,

* This section is to be attributed to *Francesca Villata* and *Lenka Valkova.*

111 The exclusion is expressly provided for by Art. 1 (3) (e) and Recital 11 Brussels II bis Regulation.

112 Communication from the Commission to the Council calling on the Council to provide for measures relating to maintenance obligations taken under Art. 65 of the Treaty establishing the European Community to be governed by the procedure laid down in Art. 251 of that Treaty, COM (2005) 648 final, p. 3.

maintenance matters are of a hybrid nature *sui generis,* i.e. they are family matters as to their origin but a pecuniary issue in their implementation, representing a sum of money to be paid or recovered. Although a close link between maintenance and family relationships cannot be denied, since the former presupposes the existence of the latter, claims for maintenance recovery nevertheless do not go to the core of those relationships, nor do they affect their existence: Therefore, the two aspects must be distinguished. However, it is often hard to isolate maintenance questions from questions relating to personal status: A maintenance obligation is (one of) the consequence(s) of a specific status and the obligation to pay maintenance occurs on the basis and in the context of that personal status.[113]

The interconnection between the matters concerning status and maintenance is unequivocal and, accordingly, it is likely to raise intricate questions, especially with regard to maintenance claimed in connection with certain forms of (same-sex) marriages and other unions. This is likely to occur in at least three situations. First, it is necessary to apply the terms of family relationships for the purpose of delimitating the scope of the Maintenance Regulation. Once the scope has been determined, the status question may become relevant when it represents the principal claim, and the maintenance claim is accessorial to that claim, or when it represents a mere preliminary question, often raised by the alleged debtor to deny his or her maintenance obligations. It is, therefore, necessary to analyze all these three situations.

a. Relevance of the notion of "family relationship, parentage, marriage or affinity" for the scope of the Maintenance Regulation

Art. 1 (1) Maintenance Regulation determines its scope of application and clarifies that it "shall apply to maintenance obligations arising from a family relationship, parentage, marriage or affinity". No definition, however, of the notions of "family relationship, parentage, marriage or affinity" is given in the Maintenance Regulation and scholars have not agreed on a single approach as to whether these legal concepts should be interpreted autonomously or are referring to national law.

113 *Martiny,* Recueil des Cours 247 (1994), p. 131 (151). On the questions concerning personal status, see section IV addressing the notion of marriage (and spouse) under the Brussels II bis and Rome III Regulation, the notion of marriage and registered partnership under the Property Regimes Regulations see section V.2.

The autonomous interpretation of the relevant family relationship is generally recommended as the option that ensures the uniform application of the Maintenance Regulation, aiming at guaranteeing "equal treatment of all maintenance creditors" in the Member States.[114] By contrast, leaving the definition of marriage to Member States' national law may have the consequence that only in the Member States where same-sex marriages, registered partnerships and other types of unions may be validly constituted, maintenance obligations arising in the context of these relationships are actually included under the Regulation's scope.[115] The drawback of applying national law lies in the fact that the uniformity in the application of the Regulation may be affected if the forum does not contemplate specific categories of persons under Art. 1 (1) Maintenance Regulation, while another Member State includes such categories of persons within the scope of the Regulation.[116] The solution based on the application of national law is not regarded as interfering with Member States' legislative sovereignty, as it is respectful of Member States' cultural diversity.[117] On the other hand, it may be argued that the determination of maintenance obligations within certain relationships, such as same-sex unions, must be distinguished from questions of status and so the States' sovereignty would not be undermined whatsoever.[118] It is therefore necessary in the first place to analyze whether these

114 On the conclusion of autonomous interpretation, see *Davì/Zanobetti,* Riv. trim. dir. proc. civ. 71 (2017), 197 (205); *Bremner,* KSLR 2 (2010), 5 (22); *Corrao,* CDT 3 (2011), 118 (125).

115 On the conclusion of interpretation under national law, see *Pesce,* Le obbligazioni alimentari tra diritto internazionale e diritto dell'Unione europea, p. 60; *Queirolo/Schiano di Pepe,* Lezioni di diritto dell'Unione europea e relazioni familiari, p. 374; *Castellaneta/Leandro,* Nuove leg. civ. comm. 2009, 1051 (1062). See also *Pocar/Viarengo,* RDIPP 45 (2009), 805 (810), who do not take any clear approach and retain that the CJEU should provide the interpretation in this regard.

116 Similarly, see *Castellaneta/Leandro,* Nuove leg. civ. comm. 2009, 1051 (1062). Defining family relationships under national law may create slightly different application problems, for example, connected to Art. 4 (c) Maintenance Regulation which might catalyze a significant degree of uncertainty for same-sex spouses. It is possible to imagine a scenario, in which same-sex spouses generally agree on the court "of their last common habitual residence for a period of at least one year" to settle any disputes in matters relating to a maintenance obligation under Art. 4 (c) (ii) Maintenance Regulation, without referring to any specific State or court. In such a case, it is questionable whether in the Member States, where the same-sex marriage is "downgraded" into a registered partnership, but where the registered partnerships are regarded as falling into the scope of the Maintenance Regulation, for example by virtue of "family relationships" according to Art. 1, the choice of court agreement concluded under Art. 4 (c) (ii) Maintenance Regulation would be considered valid.

117 See section IV.1.

118 See considerations on Art. 22 and Recital 25 Maintenance Regulation in this section.

notions should be interpreted autonomously or if they must be read as referring to national rules, and, namely, if same-sex marriages and other unions of persons can be considered "family relationship, parentage, marriage or affinity", thus falling into the scope of application by virtue of Art. 1 (1) Maintenance Regulation.

The legislative *iter* of the legal concepts "family relationship, parentage, marriage or affinity" cannot directly be traced back to the initial Commission Proposal, since the current wording of Art. 1 (1) does not correspond to the provision originally suggested in that Proposal, which, instead, generally referred to all "family relationships or relationships deemed by the law applicable to such relationships as having comparable effects"[119]. According to the Commission, rather than listing the types of relationships covered by the Maintenance Regulation, it was preferable to refer to a generic concept of family maintenance obligations without seeking to impose a limited concept of "family".[120] At a later stage, however, the Council decided that the final Regulation for the purpose of determining the law applicable to maintenance within the EU[121] should refer to the 2007 Hague Maintenance Protocol, and the scope of the Maintenance Regulation had to be aligned with Art. 1 of the 2007 Hague Maintenance Protocol, which in the end must be "taken into account" in the Regulation.[122] It follows that the European legislator ended up narrowing the material scope of the Maintenance Regulation,[123] as a price to be paid for coordination of the scope of these two legal instruments called upon to operate together, to the extent that the desired coordination should prevent delimitation problems.[124]

It must be highlighted, however, that during the legislative process, the Committee on Legal Affairs clarified that among "relationships deemed by the law applicable to such relationships as having comparable effects", relationships between same-sex couples, such as civil partnerships, can be

119 Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, COM (2005) 649 final. On the comments of the proposal of this provision, see e.g. *Pastina*, Studi sull'integrazione europea 2 (2007), 663 (669).

120 Communication from the Commission to the Council and the European Parliament – Commentary on the articles of the proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, COM (2006) 206 final.

121 *Bremner,* KSLR 2 (2010), 5 (18, 20)

122 Recital 8 Maintenance Regulation. See Art. 1 (1) of the 2007 Hague Maintenance Protocol, which is also in conformity with Art. 1 of the 1973 Hague Maintenance Convention.

123 *Villata,* Riv. dir. int. 94 (2011), 731 (739).

124 *Davì/Zanobetti,* Riv. trim. dir. proc. civ. 71 (2017), 197 (204).

considered.[125] It is evident that the Committee on Legal Affairs did not overlook same-sex couples and intended to include such terms into the scope of the proposed Regulation (although by reference to national legislation). Therefore, the subsequent omission of the wording "deemed by the law applicable to such relationships as having comparable effects" and its simple replacement by specific legal concepts of "family relationship, parentage, marriage or affinity", without any reference to the applicable law, may clearly show, on the one hand, the necessity to interpret those terms autonomously, without the possibility to refer back to diverging national laws and, on the other hand, the *ratio* of the preparatory works, i.e. the tendency to broaden the scope of application by including same-sex couples.[126]

Recital 11 simply states that the scope of the Maintenance Regulation should cover all maintenance obligations arising from the aforesaid relationships in order to guarantee equal treatment of all maintenance creditors. The same Recital then requires an autonomous interpretation of the term "maintenance obligation", while it does not provide any guidance on the interpretation of the terms "family relationship, parentage, marriage or affinity". Therefore, one could assume that the obligation to autonomously interpret certain notions applies only to "maintenance obligations", while, conversely, a reference to the terms "family relationship", "parentage", "marriage" or "affinity" is deliberately omitted and might fall outside the scope of the rule on autonomous interpretation. However, although this provision is silent as to the interpretation of these four concepts, the CJEU's case law must be considered. The CJEU established the general rule of autonomous interpretation by taking into account not only the wording of the provision in question, but also its context and the objective pursued by the rules of which it forms a part,[127] in cases where an EU act makes no reference to the law of the Member States for the definition of a particular concept,[128] as applies in our case. In fact, the terms "family relationship", "parentage", "marriage" or "affinity" are employed in a provision of EU law and no reference to national

125 Amendment 4 and 15 of the Draft Opinion of the Committee on Legal Affairs for the Committee on Civil Liberties, Justice and Home Affairs on the proposal for a Council regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, 2005/0259(CNS).

126 Similarly, see *Corrao,* CDT 3 (2011), 118 (125).

127 In family law, see CJEU, 02. 04. 2009, C-523/07 (*A*); see also CJEU, 18. 01. 1984, 327/82 (*Ekro*); CJEU, 19. 09. 2000, C-287/98 (*Linster*); CJEU, 16. 07. 2009, C-5/08 (*Infopaq International*); CJEU, 18. 10. 2011 C-34/10 (*Brüstle*); CJEU, 06. 03. 2008, C-98/07 (*Nordania Finans and BG Factoring*).

128 See e.g. CJEU, 11. 04. 2019, C-254/18 (*Syndicat des cadres de la sécurité intérieure*).

law is made under said provision, as it is instead the case, for instance, for the Matrimonial Property Regime Regulation for the purpose of defining the legal concept of "marriage".[129] Applying the general rule of autonomous interpretation would then allow for a uniform application of the legal concepts, the content of which cannot vary according to the Member State in which the Maintenance Regulation applies.[130] Moreover, the primary goal of the independent and uniform interpretation throughout the EU is often accompanied by the principle of equality, which requires the Regulations to be applied in such a way as to ensure, as far as possible, that the rights and obligations which derive from it for the Member States and the persons to whom it applies are equal.[131] Therefore, the autonomous and independent interpretation can pursue effectively the most important objective of the Maintenance Regulation, i.e. to guarantee equal treatment of all maintenance creditors through the uniform application of the rules provided in the Maintenance Regulation.

(i) Autonomous interpretation of the relevant family relationships under the Maintenance Regulation

The autonomous interpretation rule does not per se automatically guarantee that same-sex marriages and registered partnerships fall within the scope of the Maintenance Regulation; it is necessary to investigate whether the legal concepts employed in the Maintenance Regulation may, for example, include only a traditional connotation of marriage.[132] The width of the notions determined in Art. 1 (1) Maintenance Regulation, on the one hand, and the list of specific categories of family relationships, such as affinity, even though not all States recognize those relationships,[133] on the other hand, might be conceived so as to enable same-sex marriages or other types of unions to fall within the scope of the Maintenance Regulation.[134] This may also be the case for registered partnerships or other types of unions, which, although

129 See section V.2.a).

130 *Pesce,* RDIPP 55 (2019), 777 (789).

131 See e.g. CJEU, 16. 12. 1980, 814/79 (*Netherlands/Rüffer*), note 14; CJEU, 28. 09. 1999, C-440/97 (*GIE Groupe Concorde and others*), note 15.

132 On the similar considerations on the Brussels II bis Regulation, see *Pesce,* RDIPP 55 (2019), 777 (789).

133 *Bonomi* Report, note 29.

134 *Bremner,* KSLR 2 (2010), 5 (22). On the broad interpretation of the terms, but under national law, see *Castellaneta/Leandro,* Nuove leg. civ. comm. 2009, 1051 (1062).

not falling under the notion of "marriage", may be considered "family relationship" within the meaning of Art. 1 (1) Maintenance Regulation. Consequently, the risk of discrimination based on sex or gender in national legal orders could be limited.[135] The aforementioned notions are capable of including all maintenance obligations relating to family relationships *lato sensu,* which are ascertained by national judicial authorities, regardless of the different nomenclature assigned in each country.

It cannot be forgotten that the CJEU also held that the provisions of EU law must be interpreted in the light of EU law as a whole, with regard to its objectives and to its state of evolution on the date at which the provision in question is to be applied.[136] It must be borne in mind that European family law is still evolving and that the EU notion of "family" is beginning to take shape more clearly. Such an evolution of "European families" may be attributed not only to the development of Member States' national legislation regarding same-sex unions,[137] but also to the CJEU's case-law recognizing family status[138], for example in the form of same-sex marriages, for the purpose of free movement of persons[139], or to the judgments of the ECtHR (some of them expressly referred to by the CJEU), which characterized the relationships of same-sex couples as falling within the notions of "private life" and "family life"[140]. Although one might question whether the legislator of the

135 *Castellaneta/Leandro,* Nuove leg. civ. comm. 2009, 1051 (1062).

136 CJEU, 06.10.1982, 283/81 (*CILFIT/Ministero della Sanità*), note 20.

137 See section II. The development of the national law is also considered in the CJEU case law and represents one of the interpretation methods used by the CJEU, see among others *Lenaerts/Gutiérrez-Fons,* Colum. J. Eur. L. 20 (2013), 3; *Titshaw,* BU Int'l L.J. 34 (2016), 45, or CJEU, 17.04.1986, C-59/85 (*Netherlands/Reed*), note 13, where the CJEU stated for the purpose of the interpretation of the term "spouse" that "in all of the Member States, […] any interpretation of a legal term on the basis of social developments must take into account the situation in the whole Community, not merely in one Member State".

138 For example, the development of the CJEU's interpretation might be demonstrated with case 31.05.2001, C-122/99 P and C-125/99 (*P D and Sweden/Council*), where the CJEU refused to recognize a same-sex partnership as a "marriage" under the EU's Staff Regulations, since according to the majority of the Member States, the term "marriage" means a union between two persons of the opposite sex. However, seven years later, see e.g. CJEU, 01.04.2008 C-267/06 (*Maruko/Versorgungsanstalt der deutschen Bühnen*), the CJEU held that a national measure providing for a registered partnership with rights comparable to marriage, which treats a surviving life partner less favourably than a surviving spouse by denying him benefits deriving from an employment relationship, is contrary to the principle of non-discrimination on grounds of sexual orientation.

139 See CJEU, 05.06.2018, C-673/16 (*Coman*). On the discussion, see section III.1.

140 On the violation of Art. 8 and 14 ECHR, see the ECtHR's case law, for example ECtHR, 21.07.2015, no. 18766/11 and 36030/11 (*Oliari et al./Italy*); ECtHR, 07.11.2013, no. 29381/

Maintenance Regulation intended to cover the maintenance matters between same-sex couples under the scope of the Regulation in 2009,[141] the evolvement of "EU family law" seems to confirm that "non-traditional" couples do fall within the scope of the Maintenance Regulation.[142]

It is worth mentioning that the obligation of autonomous interpretation can also be indirectly inferred from the Partnership Property Regulation, which expressly specifies that maintenance matters should be excluded from its scope as far as they are governed by the Maintenance Regulation,[143] thereby clarifying that the two Regulations are mutually complementary with regard to the economic aspects of registered partnerships. This express reference in the Partnership Property Regulation may be read as an acknowledgement by the European legislator that registered unions fall within the scope of the Maintenance Regulation.[144]

(ii) Relevance of the scope for the purpose of applicable law

It must also be remembered in this context that while the Maintenance Regulation directly establishes rules on jurisdiction, and recognition and enforcement of judgments, as to the applicable law, Art. 15 Maintenance Regulation refers to the 2007 Hague Maintenance Protocol. Therefore, it is essential to address the question of scope of the 2007 Hague Maintenance Protocol as well as the 1973 Hague Maintenance Convention, on which the 2007 Hague

09 and 32684/09 (*Vallianatos and Others/Greece*); ECtHR, 14. 12. 2017, no. 26431/12 (*Orlandi and Others/Italy*); ECtHR, 24. 06. 2010, no. 30141/04 (*Schalk and Kopf/Austria*). See also *Mosconi,* RDI 91 (2008), 347. With a similar conclusion concerning the formulation of "European families" in the context of the Maintenance Regulation, see *Castellaneta/Leandro,* Nuove leg. civ. comm. 2009, 1051 (1062). On the cultural issues, national identity, and private international law see *Kohler,* in: Viarengo/Villata, Planning the future of cross-border families: a path through coordination, p. 3 et seq.

141 See above cited Amendment 4 and 15 of the Draft Opinion of the Committee on Legal Affairs for the Committee on Civil Liberties, Justice and Home Affairs on the proposal for a Council regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, 2005/0259(CNS) or see section V.1.a)(1) on Art. 22 and Recital 25 Maintenance Regulation. On the opinion that the Maintenance Regulation also covers same-sex partners and that Art. 22 and Recital 25 were necessary to propose in order to allay fears that the Regulation would have an unnecessary effect on domestic family law, see *Bremner,* KSPR 2010, 5 (22).

142 See in this regard also *Oberto,* Dir. fam. 39 (2010), 802 (832 et seq.).

143 Recital 22 of the Maintenance Regulation.

144 *Davì/Zanobetti,* Riv. trim. dir. proc. civ. 71 (2017), 197 (204).

Maintenance Protocol was modeled[145], since, as mentioned above, the two should be identical in scope in order to prevent delimitation problems.[146] In the Report to the 1973 Hague Maintenance Conventions,[147] *Verwilghen* specifies which relationships fall under the terms "family relationship", "parentage", "marriage" or "affinity" provided in Art. 1, while pointing to Art. 14 of the 1973 Hague Maintenance Convention, which contains the list of possible restrictions to the scope of the Convention.[148] In fact, it seems that the notion "arising of marriage" is defined in the Report as including maintenance obligations between spouses who are or were married, i.e. between spouses living together, or merely living apart, or separated as a result of a decision, who are getting legally separated or divorced, who have been divorced or whose marriage was declared void or annulled.[149] Moreover, although Art. 2 of the Convention tackles the issue of the preliminary and incidental questions[150], which are analyzed below, this provision must be considered also for the purpose of delimitating the scope of legal instruments concerning maintenance obligations.[151] As stressed by *Verwilghen,* it had been absolutely necessary to delimitate the status and maintenance questions, in order to avoid that some countries could refuse to ratify the 1973 Hague Maintenance Convention due to the fact that it would entail an indirect obligation to recognize the "pseudo-family" relationships at the heart of the maintenance obligations.[152] That safeguard simply enables the separation of maintenance payment from any assessment of the family status on which it is based for the States which do not recognize that relationship in their legal systems. On the other hand, it follows indirectly from the reading of this provision that the same States shall apply the Convention for the determination of mainte-

145 According to the *Bonomi* Report, note 23, this wording was not reproduced in the Protocol, probably because it was considered superfluous.

146 *Davì/Zanobetti,* Riv. trim. dir. proc. civ. 71 (2017), 197 (204).

147 *Verwilghen* Report, note 125 et seq.

148 *Verwilghen* Report, note 121 and 185. Any Contracting State may reserve the right not to apply the Convention to maintenance obligations between persons related collaterally; between persons related by affinity and between divorced or legally separated spouses or spouses whose marriage has been declared void or annulled if the decree of divorce, legal separation, nullity or annulment has been rendered by default in a State in which the defaulting party did not have his habitual residence.

149 *Verwilghen* Report, note 21.

150 This paragraph provides that decisions rendered in application of the 1973 Hague Maintenance Convention shall be without prejudice to the existence of any of the relationships provided in Art. 1.

151 The same wording can be found in Art. 1 (2) of the 2007 Hague Maintenance Protocol.

152 *Verwilghen* Report, note 130

nance obligations arising out of these relationships, leaving the status questions untouched.[153]

The provisions of the 2007 Hague Maintenance Protocol are analogous, as the Protocol covers the same relationships as the 1973 Hague Maintenance Convention, i.e. family relationships, parentage, marriage or affinity.[154] Moreover, the Protocol provides for the same safeguard of the separation of the maintenance payment from any assessment of the family status as the 1973 Hague Maintenance Convention, by providing that decisions rendered in application of the Protocol shall be without prejudice to the existence of any such relationships.[155] The *Bonomi* Report, which takes up conclusions illustrated in the *Verwilghen* Report, also does not clearly solve the question concerning the scope of the Protocol, in particular whether same-sex marriages and other unions fall within its scope. In the past, attention was drawn to one part of the *Bonomi* Report which states: "the Protocol does not specify whether maintenance obligations arising out of such relationships are included within its scope; this omission is intentional, in order to avoid the Protocol running up against the fundamental opposition existing between States on these issues"[156]. Although this wording shows the tendency to refer to national law for the definition of the legal concepts provided in Art. 1 (1) of the Protocol, the further considerations made by *Bonomi* should be analyzed more deeply and the opposite approach could be supported. According to the *Bonomi* Report, there is nothing that precludes the Contracting States from recognizing same-sex marriages or registered partnerships and from subjecting them to the rule of "closer connection" provided in Art. 5 of the 2007 Hague Maintenance Protocol (i.e. the special rule with regard to spouses and ex-spouses), which represents an implied admission that the Protocol may be applied to them.[157] Although nothing was decided as regards Contracting States not recognizing institutions such as

153 On the extensive interpretation of the "family relationships" covering same-sex marriages in the context of the 1973 Hague Maintenance Convention, see *Badiali,* La disciplina convenzionale, p. 120 et seq.

154 Art. 1 (1) of the 2007 Hague Maintenance Protocol and Art. 1 of the 1973 Hague Maintenance Convention.

155 Art. 1 (2) of the 2007 Hague Maintenance Protocol and Art. 2 of the 1973 Hague Maintenance Convention.

156 *Bonomi* Report, note 31. See e.g. *Davì/Zanobetti,* Riv. trim. dir. proc. civ. 71 (2017), 197 (205), who refer to this part of the Report.

157 *Bonomi* Report, note 31 and 92 referring to Hague Conference on Private International Law, Commission II of the Diplomatic Session, Minutes No 6, note 59 et seq. Although this rule does not explicitly refer to registered partnerships but only to marriages, according to the Report, the Member States recognizing such institutions in their legal systems may apply Art. 5.

same-sex marriage, *Bonomi* offers them a solution in the form of the application of the "basic" rules provided in Art. 3 and 6 of the 2007 Hague Maintenance Protocol.[158] Finally, the *Bonomi* Report specifies that "a court or authority in a State which does not recognize any effect of such a relationship (including in maintenance matters) could refuse the application of the foreign law to the extent that its effects would be manifestly contrary to the public policy of the forum".[159] Given these suggestions in the *Bonomi* Report, it may be admitted that the States in which same-sex marriages and registered partnerships are not recognized, should also apply the Protocol for the purpose of the maintenance proceedings. As recommended by *Bonomi,* such States may omit to apply Art. 5 of the Protocol and consider applying Art. 3 and 6, according to which the rule on public policy may represent an additional safeguard for such States. Therefore, the proposed solution would lose any relevance, if same-sex marriages and registered partnerships did not fall within the scope of application of the Protocol in respect of the Member States not recognizing such relationships.[160] On the other hand, this solution does not seem convincing due to the impact on the uniformity of application of the Protocol in the Contracting States. In fact, the purported option of the Contracting State to apply or not apply Art. 5 would cause differentiation in the application of the Protocol,[161] which goes against the goal of promoting uniformity in its application as expressed by Art. 20.[162] Although this solution could be accepted between the Contracting States as a tool to prevent the refusal of ratification by the countries recognizing only "traditional"

158 *Bonomi* Report, note 31 and 92.

159 *Bonomi* Report, note 92.

160 On the doubts regarding this solution see also *Villata,* Riv. dir. int. 94 (2011), 731 (739), according to whom it remains unlikely that such a Contracting State, which does not recognize same-sex unions, would qualify them as family relationships under the 2007 Hague Maintenance Protocol and simply disapply Art. 5 of the 2007 Hague Maintenance Protocol.

161 *Bonomi* holds that the consequence of non-uniform application of the Protocol is not too serious, considering there exists the possibility to refuse the application of the law determined under the Protocol under Article 13 in case its effects would be manifestly contrary to the public policy of the forum, see *Bonomi* Report, note 31.

162 However, see *Beaumont,* RabelsZ 73 (2009), 510 (528), where the author in the context of delimitation of the scope of the 2007 Hague Maintenance Convention indicates this as the "usual" clause, presuming that there might be some diversity in the interpretation of the terms of the Convention due to political concerns of some States not to accept same-sex relationships or unmarried couples within the core scope. On the reaction to *Beaumont,* see *Bremner,* KSLR 2 (2010), 5 (22), who specifies that the Maintenance Regulation covers a wider range of relationships than the 2007 Hague Maintenance Convention since the closer regional integration resulted in a more progressive and comprehensive coverage of this area.

marriages, or as an "escape tool" for the same Contracting States allowing the application of the *lex fori* (i.e. when the creditor is habitually resident in such a Contracting State), this proposal should not result in a legitimate and non-binding option for the Member States of the EU, which are called upon to apply all provisions of the Protocol by the reference of Art. 15 Maintenance Regulation in a uniform way.

All these considerations suggest that the Protocol does not need to refer to national law in order to determine if same-sex sex marriages and registered partnerships fall within its scope of application. The Contracting States more reluctant to recognize "new families" may apply the Protocol with the various safeguards contained therein. There are many reasons why it is difficult to imagine that such a conclusion should not be extended to the Maintenance Regulation. As mentioned above, Art. 15 Maintenance Regulation incorporates the 2007 Hague Maintenance Protocol and it would hardly be conceivable to accept the aforementioned interpretative approach only with regard to conflict of laws rules, but not to the Maintenance Regulation *in toto.* Moreover, the scope of the Maintenance Regulation was purposely aligned with Art. 1 of the 2007 Hague Maintenance Protocol, which is "taken into account" in the Regulation.[163] Therefore, the *Bonomi* Report is used also by the CJEU as an authoritative tool for the interpretation of the Maintenance Regulation in conjunction with the 2007 Hague Maintenance Protocol.[164] Finally, even if a different reading of the material scope of the 2007 Hague Maintenance Protocol is chosen and opinions favorable to the necessity to refer to national law would prevail, the same reasoning should not be extended to the interpretation of the Maintenance Regulation, which, as part of EU law, must be interpreted autonomously in all Member States.[165]

The main consequence of an interpretation of the notions of "family relationship", "parentage", "marriage" or "affinity" as capable of including same-sex marriages and registered partnerships would be the creation of a situation in which Member States called upon to decide on maintenance obligations arising out of same-sex unions, would be obliged to determine jurisdiction and applicable law under the Maintenance Regulation and the subsequent decisions would circulate in the other Member States.

As mentioned above, although the Maintenance Regulation aims at guaranteeing "equal treatment of all maintenance creditors", where autonomous

163 Recital 8 Maintenance Regulation. See Art. 1 (1) of the 2007 Hague Maintenance Protocol, which is also in conformity with Art. 1 of the 1973 Hague Maintenance Convention.

164 CJEU, 20.09.2018, C-214/17 (*Mölk/Mölk*); CJEU, 07.06.2018, C-83/17 (*KP/LO*).

165 *Davì/Zanobetti,* Riv. trim. dir. proc. civ. 71 (2017), 197 (205).

interpretation of the notions of the relevant family relationships should be recommended as the option ensuring the uniform application of the Maintenance Regulation in the Member States, some concerns as to the intervention in the States' sovereignty and its cultural diversity might arise. In this regard, it may be argued that other regulations in the field of European family law containing autonomous definitions of "sensitive" legal concepts provide for different safeguards, which are not foreseen in the Maintenance Regulation. This may be the case with, for example, Art. 9 Partnership Property Regulation, which does not force Member States to accept their jurisdiction under the Regulation if their law does not provide for the institution of registered partnership. However, although the Maintenance Regulation does not provide a similar jurisdictional rule, the safeguards have been shifted to the sphere of the applicable law. It is true that Member States not recognizing same-sex marriages or other unions shall apply the Maintenance Regulation and accept jurisdiction pursuant to its Art. 3–8, though they may still decide that the maintenance obligation in that particular relationship does not exist under Art. 3 (in the case of creditor's habitual residence in such a Member State) in conjunction with Art. 11 (a) of the 2007 Hague Maintenance Protocol,[166] or they may invoke public policy.[167]

The public policy exception might become relevant in a situation where the court of Member State A, not acknowledging the status of married or registered same-sex couples and connected support under its legislation, is called to apply the law of Member State B which recognizes such a status (e.g. when the creditor has his or her habitual residence in Member State B and claims support under Art. 3 (a) Maintenance Regulation in the debtor's forum, i.e. Member State A). Although such a Member State would have the possibility to invoke Art. 13 of the 2007 Hague Maintenance Protocol, it must

166 See Art. 11 (a) of the 2007 Hague Maintenance Protocol, which determines the scope of applicable law and provides that the law applicable to the maintenance obligation shall determine "whether, to what extent and from whom the creditor may claim maintenance". See also Actes et Documents de la Douzième session de la Conférence de la Haye de Droit International Privé (1972), Vol. II, p. 124, where in the preliminary Report to 1972 Hague Conventions written by *Verwilghen,* it is provided: "the article first makes it clear that the applicable law will determine the existence of the right to maintenance. One will therefore have to refer to the applicable law to ascertain whether the principle of the maintenance obligation is sanctioned in the particular relationship." This may be a case where the law of such Member States does not regulate the maintenance obligations, for example arising out of registered partnerships, in their legal systems. It is questionable on the basis of the considerations above, whether such Member States would apply Art. 5 of the 2007 Hague Maintenance Protocol and would refer to the rule of "closure connection".

167 Art. 13 of the 2007 Hague Maintenance Protocol.

be borne in mind that the effects of the applicable law must be manifestly contrary to the public policy of the forum *in concreto*. The *Bonomi* Report stressed the use of public policy only in cases in which the payment of maintenance is seen as improper, so it will not be sufficient to invoke public policy for the family relationship on which the maintenance claim is based when contrary to the public policy of the forum State.[168] It follows that it would not be simple to justify the application of the public policy provision in a case of maintenance claims arising out of same-sex unions, since Art. 13 should be applied with some caution. However, nothing precludes Member States from its application, insofar as the practical effects of the applicable foreign law would be manifestly contrary to the forum's public policy.[169] On the other hand, although the non-uniform application of Art. 5 of the 2007 Hague Maintenance Protocol should not be supported, for the reasons mentioned above, in the same situation this provision could also operate to a certain extent as a safeguard for Member State A, as far as such a Member State would represent the closer connection pursuant to the provision. In practice, this would lead to the application of the *lex fori* of Member State A, under the law of which no maintenance obligation exists in that particular relationship, without the need to refer to public policy.

(iii) Relevance of scope with regard to the recognition and enforcement of decisions

In order to analyze what will happen once a court in Member State A or B delivers its decision in the situation described above, the recognition and enforcement regime under the Maintenance Regulation must first be summarized. The Maintenance Regulation distinguishes between decisions given by a Member State bound by the Hague Maintenance Protocol (Chapter 4 Section 1) and decisions given by a Member State not bound by the Hague Maintenance Protocol (Chapter 4 Section 2).[170]

Recognition of the latter decisions can be refused on the grounds of non-recognition established in the Maintenance Regulation, including the public

168 *Bonomi* Report, note 178.

169 See *Badiali,* La disciplina convenzionale, p. 122, who in the context of 1973 Hague Maintenance Regulation does not exclude such an option.

170 After Brexit, Section 2 will be applicable to Denmark only. On the general aspects concerning recognition of judgments under the Maintenance Regulation, see *Siehr,* in: Essays in honour of Hans van Loon, p. 529–535.

policy exception (Art. 24 Maintenance Regulation). Therefore, one may imagine that in a case in which, for example, a Danish court (not bound by the 2007 Hague Maintenance Protocol) establishes maintenance obligations between a same-sex couple in its judgment under the Maintenance Regulation, theoretically, the court of another Member State, in which the recognition is sought, could deny it on the basis of its public policy under Art. 24 (a) Maintenance Regulation.[171]

The *ordre public* exception, however, no longer represents a ground for non-recognition of foreign judgments in *exequatur* procedures among the Member States bound by the 2007 Hague Maintenance Protocol, due to the guarantee provided by the application of the uniform conflict of laws rules under the 2007 Hague Maintenance Protocol.[172] It seems that the EU legislator was well aware of the problem connected with the non-recognition of specific types of unions in several Member States and subsequent maintenance obligations based on such relationships,[173] as long as Art. 22 and Recital 25 Maintenance Regulation, on the one hand, force the Member States bound by the Protocol to recognize and enforce a decision on maintenance given in another Member State, and on the other hand, clarify that the recognition of said decision "has as its only object to allow the recovery of the maintenance claim determined in the decision", while it "shall not in any way imply the recognition of the family relationship, parentage, marriage or affinity underlying the maintenance obligation which gave rise to the decision". The same rationale of those provisions can be found in Art. 2 (2) of the 1973 Hague Maintenance Convention, in Art. 1 (2) of the 2007 Hague Maintenance Protocol and also in Art. 19 (2) of the 2007 Hague Maintenance Convention, which provides an important safeguard in relation to preliminary or ancillary questions.[174] In other words, the Maintenance Regulation requires Member States to recognize and enforce only the part of the decision that deals with the maintenance payments, whereas the question of recognition or non-recognition of the underlying family status in that Member States is not relevant. The existence or non-existence of a family relationship determined for the purpose of the claim on maintenance, either as the main

171 For general information concerning same-sex marriages, see the official website of the European Commission at https://europa.eu/youreurope/citizens/family/couple/marriage/index_en.htm (last consulted 11.06.2020).

172 Recital 24 Maintenance Regulation.

173 *Pesce,* Le obbligazioni alimentari tra diritto internazionale e diritto dell'Unione europea, p. 62.

174 *Borrás/Degeling* Report, note 438.

question or as an incidental question, does not bear any relevance for the purpose of the maintenance proceedings.[175] Such a "disconnection clause" was included in the Regulation in order to achieve consensus on the (absence of) effects of the decisions on maintenance with regard to the underlying family relationship and to allay fears that the Regulation would have an unnecessary effect on domestic family law.[176] This provision, although inserted in the section of the Maintenance Regulation concerning decisions given in a Member State bound by the 2007 Hague Maintenance Protocol, should be taken into account also by the Member States where the *exequatur* procedure is applicable when considering the public policy exception under Art. 24 (a).[177]

Therefore, going back to our example above, two scenarios are possible: A court in Member State A not recognizing same-sex unions may render a judgment declaring the non-existence of the maintenance obligations, and a court in Member State B recognizing same-sex unions may order the maintenance payment. On the basis of the considerations above, in the absence of an *exequatur* procedure and without the possibility to invoke the public policy exception, it must be assumed that both judgments will automatically be recognized in the other Member State. In this regard, two concerns may arise: the protection of the maintenance creditor may be limited due to the decision rendered in State A, while the sovereignty of Member State A might be affected by the judgment issued in Member State B.[178] As to the latter concern, it is worth mentioning that this situation would not change, even if an interpretation based on national law was admitted, as the Member States bound by the Maintenance Regulation, including Member State A, shall recognize such a judgment, as provided in Art. 22 Maintenance Regulation, pursuant to which this "shall not in any way imply the recognition of the family relationship, parentage, marriage or affinity underlying the maintenance obligation which gave rise to the decision". As to the first concern,

175 *Villata,* Riv. dir. int. 94 (2011), 731 (769).

176 *Bremner,* KSLR 2 (2010), 5 (23).

177 See *Villata,* Riv. dir. int. 94 (2011), 731 (769); *Pesce,* Le obbligazioni alimentari tra diritto internazionale e diritto dell'Unione europea, p. 314 and *Castellaneta/Leandro,* Nuove leg. civ. comm. 2009, 1051 (1062). On the similar conclusions concerning the use of the public policy exception under the 2007 Hague Maintenance Convention, see the *Borrás/Degeling* Report, note 438 and 479 contra *Oberto,* Dir. fam. 39 (2010), 802 (832 et seq.), who does not consider this issue to be so unambiguous. However, as stated above, this problem should not come into play, as Denmark and (pre-Brexit) UK regulate same-sex marriages.

178 However, as mentioned above, it is questionable whether the obligation to pay maintenance could lead to an intolerable result in the Member States not recognizing only status.

the maintenance creditor could rely, for example, on certain conditions as mentioned in Art. 8 Maintenance Regulation.[179]

b. Relevance of the notion of "family relationship, parentage, marriage or affinity" for status matters

(i) Principal questions

As specified at the beginning of this section, the status question is also relevant when the status represents the principal claim. Recital 21 Maintenance Regulation clarifies that the conflict of laws rules under the Maintenance Regulation do not govern the law applicable to the establishment of the family relationships on which the maintenance obligations are based, which continues to be covered by Member States' national law, including their rules on private international law. It was initially proposed by the Commission to include a full set of conflict of laws rules into the Regulation, covering the determination of the relationships that could form the basis of those claims.[180] Although it was admitted that this option would have reduced discrepancies between Member States as to what and to whom maintenance obligations actually apply, it was rejected.[181] Thus, it comes as no surprise that Recital 21 expressly excludes the establishment of family relationships from the Maintenance Regulation, thereby leaving the notions

179 The same formulation can be traced in Art. 18 of the 2007 Hague Maintenance Convention. Since this Convention should be "taken into account" by the Maintenance Regulation (as provided in Recital 8), the *Borrás/Degeling* Report as to Art. 18 of the 2007 Hague Maintenance Convention provides for valuable interpretation. This Article operates as a rule of negative jurisdiction, which prohibits the debtor from seizing another jurisdiction to modify a decision or obtain a new decision where the original decision has been made in a Contracting State in which the creditor is habitually resident. However, this limitation is not applicable to the maintenance creditor. See in this regard also *Pesce,* Le obbligazioni alimentari tra diritto internazionale e diritto dell'Unione europea, p. 156 et seq.

180 Commission staff working document – Annex to the Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations – Impact assessment, SEC (2005) 1629, note 4.3, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52005SC1629&from=EN (last consulted 03. 11. 2020).

181 Commission staff working document – Annex to the Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations – Impact assessment, SEC (2005) 1629, note 4.3, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52005SC1629&from=EN (last consulted 03. 11. 2020).

of "family relationship, parentage, marriage or affinity" untouched by the Maintenance Regulation.[182] The law applicable to what constitutes a family relationship and the establishment of such relationships is governed by neither the 2007 Hague Maintenance Protocol nor the 1973 Hague Maintenance Convention.[183] However, as highlighted on several occasions, Art. 1 (2) of the Protocol (based on Art. 2 (2) of the 1973 Hague Maintenance Convention) specifies that "[d]ecisions rendered in application of this Protocol shall be without prejudice to the existence of any of the relationships referred to in paragraph 1". Therefore, the Protocol keeps this issue out, and thus, the law applicable to the family relationships to which Art. 1 (1) refers (e.g. marriage) is not directly governed by the Protocol.[184] As the *Bonomi* Report and Recital 21 of the Regulation confirm, when the existence of the family relationship represents the principal claim, covering the case where the maintenance claim is only accessorial to the dispute over the family status, the *lex fori,* including its conflict of laws rules, is to be applied.[185] As a consequence, in Member States, the Rome III Regulation or the Member States' conflicts of law rules will govern the status question.

(ii) Preliminary or incidental questions

The distinction between maintenance and personal status and the subsequent provision of different conflict of laws rules may often be the origin of preliminary or incidental questions.[186] In this regard, four alternative methods for solving the preliminary questions have been considered by scholars:[187] (1) applying the same law applicable to the main cause of action; (2) applying the conflict of law rules of the *lex fori* (so-called "independent reference")[188]; (3) applying the conflict of law rules of the *lex causae* (so-called "dependent reference")[189]; or (4) directly applying the *lex fori* (substantive law) as a

182 *Castellaneta/Leandro,* Nuove leg. civ. comm. 2009, 1051 (1062).

183 According to the *Bonomi* Report, note 23, this phrasing was not reproduced in the Protocol, probably because it was considered superfluous.

184 *Bonomi* Report, note 23.

185 *Bonomi* Report, note 31.

186 *Martiny,* Recueil des Cours 247 (1994), p. 131 (225).

187 A thorough review of the four methods was carried out by *Gotlieb,* Can. B. Rev. 33 (1955), 523 (529) and again *Gotlieb*, ICLQ 26 (1977), 734.

188 *Pfeiffer/Wittmann,* in: Viarengo/Villata, Planning the Future of Cross Border Families. A Path Through Coordination, p. 47 (51); *Gössl,* JPIL 8 (2012), 63.

189 *Torremans/Fawcett,* in: Cheshire, North & Fawcett: Private International Law, p. 54.

consequence of the alleged procedural nature of the incidental question[190]. As highlighted above, no difficulties arise when the existence of the family relationship represents the principal claim, the *lex fori,* including its conflict of laws rules, is to be applied. However, the same approach was not preferred by the *Bonomi* Report for the determination of the preliminary or incidental questions. That is the same solution proposed in the *Verwilghen* Report[191] for the 1956 and 1973 Hague Maintenance Conventions – i.e. applying the law designated to govern maintenance obligations also to the existence of a family relationship – when the main object of the claim is maintenance and the existence of the family relationship arises only on a preliminary basis.[192]

Although this approach could lead to the application of a law to family status other than the law applicable to the same issue when it is raised as the principal claim, to the detriment of internal harmony of solutions within the seized Member State, it should not be regarded as a major drawback in the absence of any *res iudicata* effect over the relevant family status. On the other hand, the proposed approach would foster predictability[193] and a uniform application,[194] which are the most relevant goals pursued by EU regulations containing conflict of laws rules.[195]

However, as highlighted by *Bonomi,* this preferable approach is not binding for the EU Member States insofar as they may resolve the preliminary questions through, for example, an application of the "independent reference" method.[196] In such a case, the conflict of law rules of the *lex fori* would operate, including the Rome III Regulation in the Member States which established enhanced cooperation in that area.

190 *Martiny,* Recueil des Cours 247 (1994), p. 131 (225) On the advantages and disadvantages of these methods see *Gössl,* JPIL 8 (2012), 63–76; *Wengler,* in: International Encyclopedia of Comparative Law, p. 3–34; *Mosconi/Campiglio,* Diritto internazionale privato e processuale, Vol. I, p. 255 et seq.

191 *Verwilghen* Report, note 125 et seq.

192 *Bonomi* Report, note 24. See Oberlandesgericht Frankfurt am Main, 12. 04. 2012, 5 UF 66/11, DES20120412, which resolved the preliminary question of paternity by reference to the same law governing the main maintenance issue.

193 Recital 19 Maintenance Regulation.

194 *Pfeiffer/Wittmann,* in: Viarengo/Villata, Planning the Future of Cross Border Families. A Path Through Coordination, p. 47 (51).

195 *Villata,* RDIPP 55 (2019), 714 et seq.

196 *Bonomi* Report, note 24. See also *Mosconi/Campiglio,* Diritto internazionale privato e processuale, Vol. II, p. 248, who in the context of Maintenance Regulation mainly suggest the application of the same law applicable to the main cause of action, or of the conflict of law rules of the *lex fori.*

2. The concept of marriage and registered partnership in the Property Regimes Regulations*

The Property Regimes Regulations set forth a comprehensive body of rules of private international law bringing together rules on jurisdiction, conflict of laws, and recognition and enforcement of court decisions, authentic instruments, and court settlements.[197]

They deal with the whole range of issues which may arise in connection with the property relationships of spouses or partners, both between themselves and in relation to third parties. During a lengthy and complex legislative process, it appeared that it would not have been possible to reach a unanimous vote in the Council as required by Art. 81 (3) TEU for the adoption of measures concerning family law with cross-border implications. Eventually, the Regulations represent the outcome of enhanced cooperation pursuant to Art. 20 TEU.[198] Therefore, they only bind the Member States that decided to participate in the enhanced cooperation, which implies being bound by both Regulations since Member States are not permitted to become bound by only one Regulation.

The Regulations, apart from obvious adaptations and save some exceptions, contain almost the same wording and numbering.

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* This section is to be attributed to *Ilaria Viarengo* and *Nicolò Nisi.*

197 Pursuant to Art. 70, the Property Regimes Regulations became applicable on 29. 01. 2019. According to Art. 69, they apply to legal proceedings instituted on or after 29. 01. 2019, as well as to authentic instruments formally drawn up or registered, and to court settlements approved or concluded, on or after that date. For their part, the Regulations' rules on the recognition and enforcement of decisions apply to judgments predating 29. 01. 2019 as long as the rules of jurisdiction applied comply with those set out in the Regulations themselves. The conflict of laws rules of the Regulations apply to couples whose marriage or partnership was established after 29. 01. 2019. The Regulations' provisions apply to couples that were already formed at that date, provided that the spouses or partners specify the law applicable to their property relations after the above date.

198 Council Decision (EU) 2016/954 of 09. 06. 2016 authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, OJ L 159/16, 16. 06. 2016, p. 16–18.

a. The notion of "marriage" in the Matrimonial Property Regulation*

The Matrimonial Property Regulation applies to matrimonial property regimes with cross-border implications. It establishes harmonized connecting-factors to determine jurisdiction and applicable law to matrimonial property regimes, in addition to unified recognition and enforcement rules of foreign judgments and authentic instruments, and is aimed at overcoming the hurdles faced by international couples due to the fragmentation among the national systems in the field of matrimonial property regimes.[199]

The Regulation provides for an autonomous notion of "matrimonial property regimes" which encompasses all civil law aspects related to "both the daily management of matrimonial property and the liquidation of the regime, in particular as a result of the couple's separation or the death of one of the spouses"[200]. In contrast, due to social, cultural, political, and legal differences among Member States, no definition is provided with reference to the meaning of marriage, for which Recital 17 of the Regulation refers back to the national laws of the Member States, in line with other instruments in European family and succession matters that do not explicitly define marriage for the purpose of their application. More clearly, Recital 21 adds that the Regulation "should not apply to other preliminary questions such as the existence, validity or recognition of a marriage, which continue to be covered by the national law of the Member States, including their rules of private international law"[201].

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* This section is to be attributed to *Nicolò Nisi.*

199 As Recital 11 indicates, only 18 Member States are bound by the Regulation, namely Belgium, Bulgaria, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland, Sweden, and Cyprus. Among the countries not participating, two groups of countries may be identified: the first group (Ireland and Denmark, in addition to the UK which is no longer a Member State), enjoys a special treatment in the Area of Freedom, Security, and Justice; the second group, on the contrary, consists of countries which have retained a "conservative" approach towards same-sex marriages and/or registered partnerships (Estonia, Latvia, Lithuania, Poland, Slovakia, Hungary and Romania). Interestingly, five of the seven non-participating countries of this second group provide neither marriage nor registered partnerships to same-sex couples. These "conservative" Member States feared that obligatory recognition and enforcement under the regulation would in fact lead to the transfer to their territories of the effects of foreign same-sex marriages and registered partnerships. This point is particularly stressed by *Wysocka-Bar,* ERA Forum 20 (2019), 187.

200 See Recital 18 Matrimonial Property Regulation. On such a notion, see also CJEU, 14.06.2017, C-67/17 (*Iliev/Ilieva*); CJEU, 27.03.1979, C-143/78 (*de Cavel/de Cavel*). In the literature, see *Las Casas,* Nuove leggi civ. comm. 42 (2019), 1529.

201 This is confirmed by Art. 1 (2) (b) of the Regulation. It follows that the outcome of such an assessment may vary from Member State to Member State. See *Rodríguez Benot,* in:

The same principle also impacts the functioning of the jurisdictional rules of the Regulation. Under Art. 9 (1), as also acknowledged in Recital 38, the courts of a Member State may exceptionally decline their jurisdiction under the Regulation, should they hold that, under their private international law, the marriage in question cannot be recognized for the purposes of matrimonial property regime proceedings, including the case where the marriage is converted by the legal system of the forum into a registered partnership.[202] In such cases, in order to avoid the risk of denial of justice, the courts indicated in Art. 9 (2) would have jurisdiction.

The "gender-neutral"[203] application of the Matrimonial Property Regulation reflects the different attitudes of the Member States towards the institution of marriage and – despite the objective of facilitating the free movement of the persons in the EU, as provided by Recitals 1, 8, and 72 – makes it clear that the latter is not supposed to ensure the free circulation of marital status throughout the EU.

This was certainly an attempt to convince the greatest number of Member States to adopt the Regulation, thus avoiding the necessity to resort to enhanced cooperation,[204] even for those countries that were interested in remaining in control of such a sensitive notion and therefore reluctant to

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Viarengo/Franzina, The EU Regulations on the Property Regimes of international Couples, Art. 1 note 1.16.

202 On this provision, see the critical remarks by *Franzina,* in: Viarengo/Franzina, The EU Regulations on the Property Regimes of international Couples, Art. 9 note 9.06, who claims that this provision serves an essentially political rather than a legal purpose. The same concern had already been discussed in the field of family law concerning the law applicable to divorce and legal separation. Art. 13 Rome III Regulation states that "nothing in this Regulation shall oblige the courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation". As recalled by *Chalas,* in: Corneloup, Art. 13 Rome III Regulation note 13.05, this provision was introduced for Malta, which did not provide for divorce at that time and did not want to force domestic courts to pronounce a divorce on the basis of a foreign law.

203 This definition was used by the Commission's Communication accompanying the proposal, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Bringing legal clarity to property rights for international couples, COM (2011) 125 final, note 4.

204 See the outcome of the meeting no. 3433 of the Justice and Home Affairs Council of the European Union held on 3rd–4th December 2015, where the Council did not reach a political agreement by unanimity and acknowledged the will of many delegations to consider the establishment of an enhanced cooperation. Cf. https://www.consilium.europa.eu/en/meetings/jha/2015/12/03-04 (last consulted 26. 10. 2020).

accept any obligation to acknowledge foreign legal relationships of the same kind, which domestically do not find any (or only partial) recognition.[205]

Although Recital 17 is explained by the political will to temper the effects of the Regulation, it is in any case evident that, irrespective of the non-binding nature of recitals,[206] the lack of a definition of "marriage" is of the utmost importance and might have serious consequences for the practical application of the Regulation in the participating Member States, with particular regard to those institutions – such as same-sex marriages – where an equivalence is actually rather difficult to attain[207]. Indeed, among the latter, there is one State that does not provide internally any legal status for same-sex couples (Bulgaria), while five other countries only allow same-sex couples to enter into registered partnerships (Czech Republic, Greece, Croatia, Italy, and Cyprus)[208]. As a result, in cases connected with those Member States, as may happen worldwide, the spouses are left in great uncertainty, without the comfort of knowing in advance what part, if any, of their relationship will be recognized.

The characterization of a relationship as marriage for the purpose of the Regulation under the *lex fori* entails the risk for the spouses that their marriage is not recognized or that the seized court declines its jurisdiction for the matrimonial property regime. Despite recent CJEU case law[209], plain

205 *Ancel,* in: Corneloup et al., Le droit européen des régimes patrimoniaux des couples, p. 41. See also *Twardoch,* Rev. crit. DIP 105 (2016), 465, explaining the hostility toward the Regulation from a Polish law perspective.

206 On the role of preambles in the European legal instruments, see *Klimas/Vaiciukaite,* ILSA JICL 15 (2008), 61; *Lemaire,* Recueil Dalloz 2008, 2157. For some remarks on the extensive use of recitals in the field of European private international law, see *Davì/Zanobetti,* Il nuovo diritto internazionale privato europeo delle successioni, p. 23 fn. 74.

207 *Marino,* CDT 9 (2017), 265 (267), who also mentioned the example of marriages with or between minors, which might not be accepted under public policy grounds according to the ECtHR's case law (reference is made to the judgment of 07.07.1986, no. 11579/85 (*Khan/the United Kingdom*)).

208 In contrast, we can assume that countries having same-sex marriage in their own law will normally recognize foreign same-sex marriages as regular marriages, subject to the same recognition rules as any other marriage. See *Wautelet,* in: Boele-Woelki/Fuchs, Legal Recognition of Same-Sex Relationships in Europe, p. 143.

209 See section III. While the ECtHR has affirmed the obligation for Contracting States to provide legal protection to same-sex unions, individuating civil partnerships as a solution to this problem (ECtHR, 21.07.2015, no. 18766/11 and 36030/11, (*Oliari/Italy*)), on the other hand, it has repeatedly affirmed that there is no positive obligation – neither under Art. 8 nor under Art. 12 – for the States to ensure effective respect for the private and family life by recognizing same-sex marriage or any other legal status for the same-sex couples (ECtHR, 16.07.2014, no. 37359/09 (*Hämäläinen/Finland*)).

recognition of marital status is in fact not always possible in countries which do not allow same-sex marriages, especially in those countries where the sexual difference of the spouses is enshrined in the constitution[210].

In general terms, three different approaches have been identified to overcome this practical problem: denial of effects of the marriage, partial or incidental recognition of the marriage, downgrade recognition of the marriage as a registered partnership[211].

The first approach consists of the denial of effects of the marriage and therefore all property consequences relating to this relationship[212]. Such a denial – albeit not necessarily in line with the EU law principle of non-discrimination – would touch the very essence of the relationship, which would not even be downgraded and treated as a partnership. The question of what law applies to the consequences of marriage would therefore become irrelevant.

The second approach consists of the partial or incidental recognition of the marriage. As for other forms of family relationships unknown under national law,[213] some countries may be prepared to recognize some of the consequences of a same-sex marriage (or a different, in principle unrecognizable marriage) validly concluded abroad. This was, for instance, the situation in France before the introduction of same-sex marriage in 2013, where the Minister of Justice stated that, provided none of the spouses were French nationals, a foreign same-sex marriage could produce effects in relation to the assets of the spouse, i.e. matrimonial property and succession.[214] More generally, it could be possible to leave aside the problem of the recognition

210 Arguing *per analogiam* from the Rome III Regulation, it has been argued that the reference in Recital 54 EU Charter and in particular Art. 21 thereof on the principle of non-discrimination, could be interpreted in the sense that judgments concerning same-sex marriage should be recognized in the "conservative" Member States without the possibility of any recourse to public policy, as this recourse would be contradictory to the principle of non-discrimination.

211 *Gray/Quinza Redondo,* Familie & Recht 2013.

212 See section IV.1.

213 See for instance the approach of national courts regarding the recognition and enforcement of foreign repudiation or the effects of *kafala.* In the Italian case law, see Corte di cassazione, 01.03.2019, no. 6161, http://www.marinacastellaneta.it/blog/wp-content/uploads/2019/03/6161.pdf (last consulted 02.11.2020); Corte di cassazione, 24.11.2017, no. 28154, http://www.marinacastellaneta.it/blog/wp-content/uploads/2017/12/kafala.pdf (last consulted 02.11.2020).

214 See the answer by the French Minister of Justice to question N° 16294, dated 09.03.2006, available in Revue critique de droit international privé 2006, 440. In the sense that some effects to foreign same-sex marriage could be recognized using the doctrine of the « *effet atténué* » of the public policy, see *Revillard,* Defrénois (2005), 461.

of civil status abroad and to incidentally consider the marriage as a fact that causes the legal consequence of a patrimonial regime.[215] The outcome would be that the State would be free not to accept the foreign marriage as a status acquired abroad, at the same time complying with the principle of non-discrimination as envisaged in the EU Charter.[216]

The third approach consists of the so-called downgrade recognition, i.e. treating foreign same-sex marriages as if they were civil partnerships, regulated either by foreign law or by domestic law. This model – albeit generally criticized for being in breach of fundamental human rights, for limiting the free movement of persons, and for the disregard of the legitimate expectations of the spouses – is already adopted by several States, including Italy, Switzerland, Croatia, Greece, and Cyprus.[217]

Italian legislation is a very interesting example to understand the functioning of this approach, as the topic (i.e. the recently introduced Art. 32-bis of the Italian PIL Act) has been highly debated among scholars.[218] As already recalled, while such a provision expressly mentions only marriages concluded by at least one Italian, the PIL Act does not say anything concerning same-sex marriages concluded abroad among foreigners. This lack of regulation has been interpreted by the prevailing scholarships as meaning that same-sex marriages among foreigners should be treated domestically as marriages,[219] while some authors have retained a conservative approach and still believe that, in absence of a legislative development deleting the diversity of sex as a requirement of substantive validity, it is not possible to infer any tacit modification of the notion of "marriage" as to include same-sex couples[220].

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215 In the same spirit, Recital 64 states that "the recognition and enforcement of a decision on matrimonial property regime under this Regulation should not in any way imply the recognition of the marriage underlying the matrimonial property regime which gave rise to the decision". This principle is not new and applies also with regard to maintenance obligation under the Maintenance Regulation, which focuses only on the pecuniary and patrimonial content of the maintenance obligations and, at the stage of recognition of decisions, takes into account the binding nature of the performance separating it from any assessment of the family status on which it is based, see *Pesce,* Le obbligazioni alimentari tra diritto internazionale e diritto dell'Unione europea, p. 85 et seq.

216 *Marino,* CDT 9 (2017), 265 (268).

217 *Noto La Diega*, in: Hamilton/Noto La Diega, Same-Sex Relationship, Law and Social Change, p. 33 et seq.

218 See section III.2. See, in particular, the criticism by *Lopes Pegna,* DUDI 10 (2016), 89 (112 et seq.).

219 See the authors mentioned in fn. 56.

220 See in particular *Pesce,* RDIPP 55 (2019), 777 (810–813); *Campiglio,* RDIPP 53 (2017), 33 (45 et seq.), also focusing on the risk of reverse discrimination to the detriment of Italian na-

b. The notion of "registered partnership" in the Partnership Property Regulation*

While a definition of marriage is missing, Art. 3 (1) (a) Partnership Property Regulation provides for an autonomous definition of registered partnership. It defines registered partnership as the regime of "shared life of two people which is provided for in law, the registration of which is mandatory under that law and which fulfils the legal formalities required by that law for its creation".[221] However, Recital 17 points out that such a concept is solely functional for the purposes of this Regulation and that the actual substance of the concept should remain defined in the national laws of the Member States. Therefore, the Regulation does not oblige a Member State whose law does not have the institution of registered partnership to provide for it in its national law.

The existence, validity, or recognition of a registered partnership are excluded from the material scope of the Regulation.[222] This is stressed in Recital 21 and Art. 1 (2) (b) Property Regimes Regulations which state that such preliminary matters continue to be "covered by the national law of the Member States, including their rules of private international law". Therefore, the authority of the relevant Member State should verify the existence of any marriage or registered partnership, their validity, and recognition. Finally, the Regulation specifies that the recognition and enforcement of a decision on a property regime should not in any way imply the recognition of the registered partnership which gave rise to the decision.[223]

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tionals in cases of equivalence of foreign same-sex marriages as domestic marriages. This strict interpretation also builds on the relevant case law which – despite recent openings expressed *obiter* (e.g. Corte di cassazione, 14. 05. 2018, no. 11696, http://www.ilcaso.it/giurisprudenza/archivio/19799.pdf (last consulted 02. 11. 2020)) – has so far excluded recognition of same-sex marriages. See from the many decisions Corte di cassazione, 15. 03. 2012, no. 4184, http://www.giurcost.org/casi_scelti/Cassazione/Cass.sent.4184-2012.htm (last consulted 02. 11. 2020); Corte di cassazione, 09. 02. 2015, no. 2400, http://www.europeanrights.eu/public/sentenze/Cassazione-Civile-Sez.-I-9-febbraio-2015-n.-2400.pdf (last consulted 02. 11. 2020).

* This section is to be attributed to *Ilaria Viarengo*.

221 A definition of the property consequences accompanying registered partnerships is also provided for. According to Art. 3 (b) Partnership Property Regulation they are "the set of rules concerning the property relationships of the partners, between themselves and in their relations with third parties, as a result of the legal relationship created by the registration of the partnership or its dissolution".

222 Art. 1 (2) (b) Partnership Property Regulation.

223 Recital 64 Partnership Property Regulation.

Notwithstanding this autonomous definition, the Partnership Property Regulation confirms the usual, rather cautious attitude of the European legislator in all European regulations when family status is important as a preliminary question.[224]

The countries regulating registered partnerships show remarkable differences as to what is being regulated. This form of partnership has been or is being regulated in an increasing number of States (often but not necessarily restricted to same-sex individuals), and it covers a wide and diverse reality. In order to respect the peculiarities of all Member States as well as their legislative powers, the Regulation makes clear the boundaries of the definition of registered partnerships. However, an autonomous definition in the Partnership Property Regulation is provided and it is meant to prevent discrepancies which may arise between Member States when it comes to the interpretation and application of the Regulation.

224 See, albeit with different wording and subject to different interpretations, Art. 1 (3) (a) Brussels II bis Regulation, Art. 2 (b) Rome III Regulation, and Art. 1 (2) (a) Succession Regulation, which expressly exclude family status from their scope. Art. 22 Maintenance Regulation provides that the recognition and enforcement of a decision on maintenance shall not in any way imply the recognition of the family relationship, parentage, marriage or affinity underlying the maintenance obligation which gave rise to the decision. The issue of the preliminary question has been treated in particular in the German legal doctrine of private international law. It is disputed between the independent solution (*selbständige Anknüpfung*), which furthers international harmony of decisions, and dependant solution (*unselbständige Anknüpfung*), which serves the purpose of internal harmony of decisions. See *Siehr,* YPIL 7 (2005), p. 17 (50); *Bernitt,* Die Anknüpfung von Vorfragen im europäischen Kollisionsrecht; *Henrich,* in: Liber amicorum Klaus Schurig, p. 63; *Gössl,* JPIL 8 (2012), 63; *Dutta,* IPRax 2015, 32; *Pfeiffer/Wittmann,* in: Viarengo/Villata, Planning the future of cross-border families: a path through coordination, p. 47. In recent years, a growing number of contributions have devoted attention to how legal concepts traditionally categorized as general are designed in the Regulations thus far enacted by the European legislator. Cf. *Hausmann,* RDIPP 51 (2015), 499 et seq.; *Rühl/von Hein,* RabelsZ 79 (2015), 701 et seq.; *Leible,* General Principles of European Private International Law. With regard to the Property Regimes Regulations, see *Bonomi,* in: Dutta/Weber, Die Europäischen Güterrechtsverordnungen, p. 140. Actually, the preliminary question does not seem to be an issue for the courts. See also *Mäsch,* in: Leible, General Principles of European Private International Law, p. 101 et seq. In the EUFams II database, a case of the Oberlandesgericht Frankfurt am Main, 12. 04. 2012, 5 UF 66/11, DES20120412, is reported, in which the German Court of Appeal, applying the Maintenance Regulation, resolved the preliminary question of paternity by reference to the same law governing the main maintenance issue.

(i) Requirements for registered partnerships

Two conditions are required for the property consequences of a registered partnership to be included in the scope of the Regulation.

First, the Regulation establishes formal requirements for registered partnerships. A "mandatory" registration of the partnership is required. The Regulation draws a distinction between couples whose union is institutionally sanctioned by the registration of their partnership with a public authority and couples in *de facto* cohabitation, regardless of whether the relevant Member State, such as Italy,[225] makes provisions for such *de facto* unions. In that respect, the wording of Recital 16 is clear. Therefore, "registered" means that the partnership has been included in a public register by a public authority and, consequently, can be consulted by third parties. Excluded are not only free, unregistered partnerships, but also partnerships which require a formal partnership agreement, drawn up by a notary or other public official, but not necessarily a registration. The latter seem to fall in the scope of application of the Brussels I bis Regulation. In a recent judgment, the CJEU held that an action concerning an application for dissolution of the property relationships arising out of a *de facto* (unregistered) partnership falls within the concept of "civil and commercial matters" within the meaning of Art. 1 (1) Brussels I Regulation, now superseded by the Brussels I bis Regulation, and therefore falls within the scope of that instrument.[226]

The partnership can be registered in any country of the world. In fact, no reference to the place of the recording of the partnership is made in the Regulation. Actually, the irrelevance of the place of registration to this extent seems rather obvious since the law designated pursuant to the Regulation, given its universal character according to Art. 20, shall apply regardless of whether it is the law of a Member State.[227]

Second, the couple must not be deemed to be married. The partnership may have similar or even identical effects to marriage, but cannot formally be defined as marriage, which is governed by the Matrimonial Property Regulation.

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225 Legge 20 maggio 2016 n. 76, Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze, Gazzetta Ufficiale della Repubblica italiana n. 218 del 20 maggio 2016.

226 CJEU, 06.06.2019, C-361/18 (*Weil/Gulácsi*), note 45. Art. 1 (2) (a) Brussels I bis Regulation excludes rights in property arising out of a matrimonial relationship from the scope of that Regulation. The Brussels I bis Regulation extends that exclusion to rights in property arising out of a relationship deemed by the law applicable to such a relationship to have comparable effects to marriage.

227 *Rodríguez Benot,* in: Viarengo/Franzina, The EU Regulations on the Property Regimes of international Couples, Art. 3 note 3.06.

(ii) Same-sex couples

Notwithstanding the autonomous notion in the Partnership Property Regulation, the definition of the concept of registered partnership, including as regards their availability both to same-sex and opposite-sex couples or to same-sex couples only, involves a referral to national law. Given the great and growing variety of couple regimes within the EU, it is beyond doubt that this approach may jeopardize one of the main goals of the Regulation, i.e. the harmony of decisions among participating Member States.[228]

Member States that do not allow same-sex marriages are not obliged to apply the Matrimonial Property Regulation to such couples. Those Member States could, however, subject same-sex marriages at least to the Partnership Property Regulation. This may occur in particular in those States where same-sex marriages established abroad have to be characterized as registered partnerships rather than marriages. For example, the "downgrade recognition" provided in Art. 32-bis of the Italian PIL Act affects also the application of the relevant private international law. Hence, the marriage at stake will fall in the scope of the Partnership Property Regulation instead of the Matrimonial Property Regulation.

As a matter of fact, the very same marriage concluded between spouses of the same sex can fall, depending on the forum, under either of the Property Regimes Regulations. This depends on whether or not the *lex fori* recognizes same-sex marriages.

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228 See also *Ancel,* in: Corneloup et al., Le droit européen des régimes patrimoniaux des couples, p. 41. In order to avoid such an unsatisfactory result, *Dutta,* YPIL 19 (2017/2018), p. 145 et seq., proposes to interpret the reference in Recital 17 as a conflict rule referring for the characterization of a couple regime as a marriage to the law under which the couple regime was created or first registered.

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Third Country Nationals and the Procedural Role of EU Family and Succession Law

Marlene Brosch and Cristina M. Mariottini***

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Abstract Analyzing the interface of private international and procedural law with situations that involve third country nationals is of the essence to promote a uniform and effective regulation of family and succession matters in pursuance of the free circulation of persons in the EU. The importance of this analysis is reaffirmed by the increasing migration flows from third States and by the refugee crisis that the EU Member States are experiencing to date.

* This contribution represents the opinion of the author only and does not represent the views of the Court of Justice of the European Union.

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In particular, the variety of pertinent instruments, together with their possible different application at the national level, may prove to be a source of significant uncertainty. Against this background, this contribution examines the impact of procedural aspects in cases involving third country nationals on the objectives of predictability, effectiveness, and harmonized solutions in EU family and succession law.

Keywords jurisdiction, recognition of status, *lis alibi pendens,* third country nationals, habitual residence, Brussels II bis Regulation, Brussels II ter Regulation

I. Introduction

With regard to third country nationals and, in particular, refugees, there does not appear to be uniformity in the number or the setting of the cross-border cases analyzed within the EUFams II Project. As will be further illustrated throughout this contribution, the number of cases collected and analyzed do not seem to be proportional to the dimension of the Member States of origin or the size of their population. On the other hand, this lack of consistency may be traced back to the geographical, historical, and socio-cultural background of the Member States examined within the Project.

For instance, Luxembourg is a landlocked country traditionally attracting foreigners from the surrounding EU Member States,[1] as reflected in many cross-border family cases involving nationals from Belgium, France, and Germany. Germany, on the other hand, has many historical relations to non-Member States due to its long history of migrant labor, attracting workers in particular from Turkey and the successor States of former Yugoslavia, but also due to the international relations with the occupying powers after World War II, some of whose nationals decided to stay in Germany.[2]

Significant migration flows from numerous countries also occur in Spain, in particular stemming from Spain's longstanding historical relations with Latin-American countries and its geographical proximity to Northern

1 According to the annual census of 2020, approximately 88% of foreigners living in Luxembourg are EU citizens, cf. *Institut national de la statistique et des études économiques du Grand-Duché de Luxembourg,* Population par nationalités détaillées 2011–2020.

2 According to statistics from 2019, around 3.5 million out of 11.2 million foreigners living in Germany are third country nationals; cf. *Destatis – Statistisches Bundesamt,* Foreign population by place of birth and selected citizenships on 31 December 2019.

African countries.[3] Furthermore, the presence of other foreigners, such as UK nationals,[4] is likely a result of Spain being a renowned retirement destination. However, compared to the notable presence of third country nationals in Spain, the number of disputes involving third country nationals is far from voluminous.

Italy, on the other hand, has only in recent decades been increasingly receiving immigrants, primarily from third States.[5] The cases collected in the EUFams II database do not pinpoint specific non-Member States involved more frequently than others in cross-border family cases. However, it is of note that a high incidence of proceedings includes third country nationals from South Eastern and Eastern Europe, North Africa, as well as from China and Switzerland, the common border likely being the primary factor contributing to the number of disputes between Italy and Switzerland.

The shared border is also at the origin of the cases brought before Greek courts and connected to Albania, from which a significant portion of the immigration flows into Greece originated in the last decades.[6] Similarly, while the vast majority of the Croatian jurisprudence collected within the project is related to intra-EU cases,[7] Croatian third State-related cases are most frequently connected to neighboring countries and, in particular, Serbia and Bosnia and Herzegovina.

Furthermore, with regard to France, many cases involving nationals from third States formerly under French colonial control show that the parties either had double citizenship or had exclusively kept their third State nationality.[8] Finally, while no prevailing trends can be identified at present as concerns Sweden, it is expected that the 2015 refugee crisis may successively

3 *King/Lulle,* Research on Migration, especially p. 16–18.

4 Following the United Kingdom's departure from the EU on 31.01.2020, for the purposes of this contribution the United Kingdom is considered as a third State, regardless of the transition period currently running and expiring on 31.12.2020; cf. Art. 126 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ C 384I, 12.11.2019, p. 1 (59).

5 As of 2019, nearly half of the over 5 million foreigners legally residing in Italy are third country nationals; cf. *Istituto Nazionale di Statistica,* Stranieri residenti al 1° gennaio – Cittadinanza.

6 According to a report of the Greek statistical authority based on the last census in 2011, of all foreign persons that settled in Greece during the last five years before the census, almost a third originated from Albania; cf. *Hellenic Statistical Authority,* Press Release on 2011 Population and Housing Census – Migration.

7 Of the 61 Croatian cases collected in the project database, only 18 relate to third States.

8 See p. 224.

lead to an increased number of cases in this Member State involving, e.g., Syrian nationals.

Despite these historical and geographical differences at the outset, prevailing trends and common difficulties in applying the European and international legal framework in cross-border family matters can be identified. Notably, based on the case law collected within the EUFams II Project, this contribution sheds light on the peculiarities of cases involving third country nationals with regard to jurisdiction, the coordination of parallel proceedings, the recognition of statuses abroad and, to some extent, the circulation of foreign judgments. In this context, particular consideration is given to procedural aspects of cross-border family cases before Member States' courts involving refugees and migrants.

II. The jurisdiction of Member States' courts vis-à-vis third country nationals

1. General tendencies

According to the analysis of the case law collected in the EUFams II database, legal separation and divorce, parental responsibility, maintenance, and child abduction are the areas in cross-border family disputes where third country nationals are most frequently involved. In contrast, few disputes involving third country nationals were reported in succession matters.

a. Assessment of jurisdictional grounds

As a general tendency, the analysis of collected case law shows that Member State courts do not always assess their jurisdiction *ex officio* or only do so implicitly, in particular if the defendant does not contest jurisdiction. This approach can be observed both in cases concerning EU nationals[9] and in cases involving third country nationals. For instance, in a case involving an Egyptian-Luxembourgish couple, the Luxembourgish wife filed a petition for divorce before a Luxembourgish court only one month after she had moved to Luxembourg from the United Arab Emirates, where she had lived with her

9 See for instance Cour d'appel de Lyon, 09.05.2017, no. 15/07268, FRS20170509; Tribunal d'arrondissement de Luxembourg, 20.12.2018, no. 506/2018, LUF20181220.

husband, an Egyptian national.[10] The court correctly held that none of the jurisdiction grounds of Art. 3 Brussels II bis Regulation were applicable, as the husband (the defendant) was domiciled in a third State, and the spouses never had their common habitual residence in an EU Member State. As the husband did not challenge the jurisdiction, the court did not assess its jurisdiction any further, even though Art. 6 Brussels II bis Regulation leads to the application of national jurisdiction rules in such a case. Arguably, the court proceeded to implicitly assess the establishment of its jurisdiction under domestic law.[11]

Similar occurrences are reported in Italy, in cases involving both nationals from Member States and third States, especially with respect to applications for maintenance both in divorce and parental responsibility cases[12], as well as to specific claims such as the award of the family home.[13] Possibly because the circumstances of the cases were rather linear and undisputed and the decision on the substance of the case remained unaffected, in these cases, the question of jurisdiction was not addressed explicitly by the court.

b. The concept of "habitual residence"

As the jurisdiction grounds in the EU regulations on family matters are predominantly based on the parties' habitual residence in the EU, the practical relevance of nationality and, in particular, of a third State nationality is limited. This result is particularly evident in Art. 3 Brussels II bis Regulation, where the parties' nationality only plays a minor role with a view to establishing jurisdiction in divorce and legal separation proceedings.[14] In addition, as the respective jurisdiction ground based on nationality (Art. 3 (b)

10 Tribunal d'arrondissement de Luxembourg, 07.01.2016, no. 3/2016, LUF20160107.

11 The court might have implicitly accepted its jurisdiction under the exorbitant jurisdiction rule of Art. 14 of the Luxembourgish Civil Code, which grants a forum to Luxembourgish citizens vis-à-vis foreigners who do not reside in Luxembourgish territory; cf. on this provision *Kinsch,* in: Encyclopedia of Private International Law, p. 2296 (2301); *Wiwinius,* Le droit international privé au Grand-Duché de Luxembourg, p. 241 et seq.

12 Tribunale di Cuneo, 19.02.2018, ITF20180219; Tribunale di Monza, 21.03.2019, ITF20190321; Tribunale di Monza, 03.07.2019, ITF20190703; Tribunale di Milano, 11.12.2018, ITF20181211; Tribunale di Rimini, 12.06.2018, ITF20180612; Tribunale di Vicenza, 30.10.2018, ITF20181030; Tribunale di Treviso, 08.01.2019, ITF20190108.

13 Tribunale di Parma, 06.05.2019, ITF20190506.

14 The longstanding debate on the adequateness of nationality or habitual residence as connecting-factors in private international law shall not be repeated here; cf. *Bogdan,* in: Meeusen et al., International family law for the European Union, p. 303 et seq.; *Nishitani,* Recueil des Cours 401 (2019), p. 135 (251 et seq.).

Brussels II bis Regulation) only refers to the spouses' common nationality of a Member State; a third State citizenship remains irrelevant.

In line with this, several court decisions omit any references to the parties' third State nationalities, as their habitual residence in the forum suffices for the purposes of establishing jurisdiction under the applicable EU instrument. For instance, in a divorce case concerning a couple that had married in Albania and filed for divorce in Greece, the parties' nationality was not mentioned in the judgment. Instead, the court only referred to the residence of the parties in Greece.[15] In a similar fashion, Croatian judgments are not descriptive as regards the method applied to establish the parties' habitual residence. In cases where the habitual residence is located in a third State, this is merely declared by the court in its judgment.[16] Similarly, the general jurisdiction rule in matters of parental responsibility (Art. 8 Brussels II bis Regulation) only refers to the child's habitual residence. It is, therefore, irrelevant whether a third country national or an EU national is involved as a parent.[17]

However, it does not appear from the collected case law that courts of the Member States examined in the project systemically differentiate based on EU citizenship or non-EU citizenship when assessing habitual residence, or that they "over-"confirm the establishment of habitual residence in their respective territory with regard to third country nationals. Notably, courts have indeed dismissed actions on the grounds that the parties' habitual residence was located in non-EU countries.[18]

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15 Cf. Kos Single-Member Court of First Instance (Monomeles Protodikeio Ko), 07. 12. 2017, no. 125/2017, ELF20171207. In another case, a couple who had married in Pakistan, divorced in Germany and then sought recognition of the divorce in Greece, whereby the Greek court did not refer to the parties' nationality; cf. Ioannina Single-Member Court of First Instance (Monomeles Protodikeio Ioanninon), 01. 01. 2008, no. 84/2008, ELF20080084.

16 Županijski sud u Zagrebu, 05. 03. 2019, Gž Ob-82/2019, HRS20190305; Županijski sud u Splitu, 24. 08. 2018, Gž Ob-474/2017-2, HRS20180824.

17 For instance, in one parental responsibility case where the Albanian applicant did not possess a residence permit in Greece, the case was adjudicated nonetheless because the court based its jurisdiction on the habitual residence of the child under the Brussels II bis Regulation; cf. Grevena Single-Member Court of First Instance (Monomeles Protodikeio Grevenon), 09. 09. 2013, no. 96/2013, ELF20130909. Similarly, a court in Spain ruled that, in accordance with Art. 3 (d) Maintenance Regulation, it did not have jurisdiction to issue provisional measures concerning a child habitually residing in Ecuador with his mother. The father had applied for such measures taking advantage of the fact that the child was spending his summer vacation in Spain; see Audiencia Provincial de Baleares, 29. 10. 2018, no. 178/2018, ESS20181029.

18 In particular, the French Court of Cassation has repeatedly ruled on the "close connection" in French-American succession cases, in which the last habitual residence of the testator was ultimately denied; see Cour de cassation, 27. 09. 2017, 16-17198, FRT20170927; Cour de cassation, 27. 09. 2017, no. 16-13151, FRT20170927a. For matters of parental responsibil-

Against this backdrop, it is noteworthy that, in a recent Luxembourgish case[19] concerning the recognition of a Chinese divorce decree, the Luxembourgish court gave particular weight to the parties' habitual residence when reviewing the issuing authority's jurisdiction under national recognition rules.[20] Notably, the court held that the habitual residence, and not the parties' (in this case, Chinese) nationality, is to be considered as the predominant connecting-factor under the general principle of "proximity". Thus, the non-EU citizenship was given less weight compared to the connection to Luxembourg as the place of the spouses' common habitual residence.[21] This case shows how the predominant role of habitual residence as the primary jurisdictional ground in the EU regulations on cross-border family cases may influence the assessment of jurisdiction also in cases that fall under national procedural law. This prevalence of the "habitual residence" as a connecting-factor to assess the courts' jurisdiction may be linked to its dynamic nature and its aptitude to prove the settlement of an individual into a specific country. Thus, the underlying EU policy[22] connected to the concept of "habitual residence" aimed at fostering the integration of both EU citizens and third country nationals in the internal market appears to potentially influence the assessment of jurisdiction vis-à-vis third country nationals outside the scope of application of the EU regulations.

c. Forum shopping, access to justice and interest-based deviations from default jurisdiction rules

From the collected case law, it appears that courts rarely deviate from general jurisdiction rules under the EU regulations. As the habitual residence is usually the decisive connecting-factor for the purposes of jurisdiction, the

ity see for instance Audiencia Provincial de Girona, 28.03.2019, no. 57/2019, ESS20190328, in which the Spanish court found that the child's habitual residence was established in Peru, and thus denied its jurisdiction under the Brussels II bis Regulation.

19 Tribunal d'arrondissement de Luxembourg, 09.01.2019, no. 7/2019, LUF20190109; see p. 233.

20 On national procedures for the recognition of foreign judgments, see p. 232 et seq.

21 See also Cour d'appel de Paris, 30.05.2017, no. 16/24111, FRS20170530. In this case concerning parallel proceedings, the Court of Appeal held that the parties' Algerian nationality established only little connection to Algeria, as they had been residing in France for several years before the French courts were seized.

22 On the underlying rationale of the "habitual residence" as connecting-factor in EU private international law see for instance *Lurger,* in: von Hein/Rühl, Kohärenz im Europäischen Internationalen Privat- und Verfahrensrecht, p. 202 (215 et seq.); *Rentsch,* Der gewöhnliche Aufenthalt im System des Europäischen Kollisionsrechts, p. 68 et seq., 77 et seq.

jurisdiction of the forum is easily established. Consequently, courts do not have a particular incentive to adopt a discretionary or flexible approach to deviate from these objective results. [23] Also, for reasons of legal certainty, the hard-and-fast jurisdiction rules of the EU regulations on family law rarely allow courts to deny their jurisdiction on a discretionary basis, i.e., on the grounds that the courts of another State would be better suited to hear the case.[24]

However, parties themselves might try to circumvent the objective jurisdiction rules put forth in the EU regulations. Notably, some divorce cases before French courts involving third country nationals from countries that were formerly under French colonial control highlight a particular tendency of forum shopping. In a divorce case involving French-Algerian dual citizens,[25] the wife started divorce proceedings in France based on the spouses' habitual residence under Art. 3 (1) (a) indent 1 Brussels II bis Regulation. The husband had previously seized a civil court in Algeria, whose jurisdiction was contested by the wife. Subsequently, the French court declined the recognition of the Algerian divorce decision on the grounds of public policy,[26] as the Algerian court had granted the divorce in favor of the husband based on his unilateral action (repudiation). In this regard, the tactic to seek the divorce decree before the Algerian court and subsequently its incidental recognition before the French court circumvented the jurisdiction grounds under the Brussels II bis Regulation.[27] Other cases highlight a tendency of courts to deviate from jurisdiction rules based on considerations of the parties' interests, in particular access to justice within the EU.[28] For instance, in a Luxembourgish divorce case concerning an Egyptian-Luxembourgish couple,[29] it remains unclear on which grounds the Luxembourgish court seized by the

23 However, on the modulations of the criterion of habitual residence in EU family law instruments and its features especially with regard to child abduction cases see *Beaumont/Holliday,* in: Zupan, Private International Law in the Jurisprudence of European Courts – Family at Focus, p. 37–56, highlighting how, in the United Kingdom, the concept of habitual residence of the child has developed from one which used to put weight on parental intention to a mixed model, which takes a more child-centered and fact-based approach.

24 On Art. 15 Brussels II bis Regulation (Art. 12 and 13 Brussels II ter Regulation), which establishes a limited *forum conveniens*-rule according to the best interests of the child, see *Pataut,* in: Malatesta/Bariatti/Pocar, The External Dimension of EC Private International Law in Family and Succession Matters, p. 123 (145 et seq.).

25 Cour d'appel de Paris, 30.05.2017, no. 16/24111, FRS20170530.

26 On this refusal ground, see p. 234.

27 For the development of French jurisprudence on the evasion of law in cross-border divorce cases cf. *Ancel,* in: YPIL 7 (2005), p. 261 et seq.

28 Concerning refugees, see p. 237 et seq.

29 Tribunal d'arrondissement de Luxembourg, 07.01.2016, no. 3/2016, LUF20160107.

wife affirmed its jurisdiction.[30] The underlying motive for the court's approach could have been to grant the wife access to divorce in Luxembourg, as she might not have had equal access to divorce in the United Arab Emirates, where the couple had its last habitual residence.

An area of law in which Member State courts are granted a certain discretionary approach in intra-EU cases is the jurisdiction for parental responsibility cases under the Brussels II bis Regulation. This instrument attributes a significant role to the best interests of the child, which may also impact the determination of, inter alia, jurisdiction.[31] For instance, an Italian court initially and provisionally established its jurisdiction pursuant to Art. 12 Brussels II bis Regulation over a parental responsibility case lodged (together with an action for legal separation) by the husband against the mother, who was habitually resident in Spain with the children. However, in a subsequent judgment, the court ruled that, although its jurisdiction over the case was properly established in accordance with Art. 12 Brussels II bis Regulation, in the case at hand the establishment of its jurisdiction did not satisfy the children's best interest as a result of the highly conflictual relationship between the parents in relation to the children's living arrangements.[32] This conclusion is also reinforced by the fact that the residence of the children would make it difficult – despite the coordination mechanism provided by the Taking of Evidence Regulation – to adopt fast and efficacious decisions. Therefore, the court declined jurisdiction over the application on parental responsibility.

Interestingly, jurisdiction was declined irrespective of the parties' will – at the time of the institution of the proceeding – to let the Italian court decide on parental responsibility. Thus, the ultimately decisive court's assessment of the compatibility of the chosen forum with the child's best interests prevailed over party autonomy. To what extent similar interest-based jurisdictional assessments may be adopted in cases with connections to third States is left to domestic procedural law by the Brussels II bis Regulation and the Brussels II ter Regulation.[33]

30 See p. 221.

31 See e.g. Corte di Cassazione, 30.09.2016, no. 19599, IT:CASS:2016:19599CIV, and 15.06.2017, no. 14878, CASS:2017:14878CIV. The decisions of the Corte di Cassazione, rendered as of 2015, are available at http://www.italgiure.giustizia.it/sncass/ (last consulted 03.06.2020).

32 Tribunale di Roma, 14.06.2019, ITF20190614a.

33 See p. 227 et seq. and 235.

2. The interrelation between EU regulations, domestic procedural law, and international instruments

a. The residual scope of application of national jurisdiction grounds

The interplay of EU and national jurisdiction grounds gives rise to uncertainties in particular with regard to the Brussels II bis Regulation, which grants a residual role to national jurisdiction rules when no court of a Member State has jurisdiction under the Regulation (Art. 6 et seq. and Art. 14 Brussels II bis Regulation). For instance, in a parental responsibility case involving Greek nationals,[34] the grandmother seized a Greek court to have her access rights regulated with regard to her grandchild, who was living in California with the child's mother. The court applied national jurisdiction rules and accepted its jurisdiction on the basis of the parties' Greek nationality. It denied the applicability of the Brussels II Regulation, arguing that there was no international element for the purposes of the Regulation. However, the international element is not restricted to purely intra-EU cases in order for the Regulation to apply.[35] Thus, the court erroneously denied the territorial applicability of the Brussels II bis Regulation.[36]

In the same vein, in third country national-related cases, Croatian courts have applied standards set by the former domestic private international law rules, instead of an EU regulation, on the erroneous assumption that issues related to third country nationals fall outside the scope of application of the Brussels II bis regime.[37] However, in a case relating to Russian citizens who clearly had their habitual residence in Croatia, such a practice of the court of first instance was corrected by the appellate court.[38] In this respect, it should also be borne in mind that third country national cases in Croatia often relate to former Yugoslav countries. Notwithstanding the lack of linguistic barriers, courts still fail to apply private international law standards to such "foreign domestic cases".[39]

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34 Patras Single-Member Court of First Instance (Monomeles Protodikeio Patron), 25.07.2018, no. 526/2018, ELF20180725.

35 *Pataut/Gallant,* in: Magnus/Mankowski, Art. 14 Brussels II bis Regulation note 3; *Pataut,* in: Malatesta/Bariatti/Pocar, The External Dimension of EC Private International Law in Family and Succession Matters, p. 123 (129 et seq.).

36 However, as the child had its habitual residence in the US, Art. 14 Brussels II bis Regulation would have allowed the Greek court in any event to apply national jurisdiction rules.

37 Županijski sud u Splitu, 01.08.2019, Gž Ob-383/2019-2, HRS20190801; Županijski sud u Splitu, 24.08.2018, Gž Ob-474/2017-2, HRS20180824.

38 Županijski sud u Zagrebu, 10.06.2019, Gž Ob-623/19-2, HRS20190610.

39 Općinski sud u Osijeku, 29.11.2018, P Ob-321/2018-6, HRF20181129.

Similarly, the determination of residual jurisdiction in cross-border divorce cases with a connection to third States has given rise to debatable views. In a remarkable judgment, the French Court of Cassation[40] adopted a strict, literal application of the exclusive nature of Art. 6 et seq. Brussels II bis Regulation. The underlying case involved a Belgian-French couple who moved to India in 2012. It was uncontested that the spouses had their first habitual residence in Belgium and afterwards established a new habitual residence in India. In 2013, the wife filed an action for divorce in France during a short stay there, based on the exorbitant jurisdiction rule of the claimant's French nationality.[41] The Court of Cassation denied access to divorce before the French courts based on this exorbitant jurisdiction rule, arguing that the husband's Belgian nationality would "block" this jurisdiction under Art. 6 (b) Brussels II bis Regulation. However, as the jurisdiction grounds of Art. 3 et seq. Brussels II bis Regulation did not establish the competence of the courts of *any* Member State, Art. 7 Brussels II bis Regulation should have been applied to determine the French courts' jurisdiction on the basis of domestic jurisdiction grounds. In fact, the CJEU itself has only ruled that domestic jurisdiction grounds cannot apply if the courts of another Member State have jurisdiction under Art. 3 et seq. Brussels II bis Regulation.[42] With the strict exclusivity as interpreted by the Court of Cassation, the latter oversees the impact of its ruling *in concreto:* It denies access to justice within the EU to nationals of EU Member States who otherwise may only seize a court in their third State of residence (in this case, India).

In order to overcome this denial of justice, scholars have discussed the introduction of a *forum necessitatis,*[43] which, contrary to the Brussels II bis Regulation, has been regulated uniformly in cross-border succession matters (Art. 11 Succession Regulation). Unfortunately, the recast of the Brussels II bis Regulation (Brussels II ter Regulation) will not bring any significant changes

40 Cour de Cassation, 15. 11. 2017, no. 15-16.265, FRT20171115.

41 According to Art. 14 of the French Civil Code (Code Civil), French courts have jurisdiction for actions lodged by a French national against a foreigner, even if the defendant is residing abroad, concerning obligations that the foreign defendant has concluded in France with the French applicant; cf. *Cachard,* Droit international privé, note 59 et seq.

42 CJEU, 29. 11. 2007, C-68/07 (*Sundelind Lopez/Lopez Lizazo*). Similarly, the England and Wales Court of Appeal (Civil Division) had requested a preliminary ruling on whether Art. 4 (1) Brussels I bis Regulation confers a "right to be sued" only at the place of domicile in a Member State and thus permits an anti-suit injunction against a claimant conducting a proceeding in a third State, see CJEU, C-946/19 (*MG*) (the request has meanwhile been withdrawn); *Mandy Gray v. Hamish Hurley* [2019] EWCA Civ 2222.

43 See among others *Antomo,* in: Pfeiffer/Lobach/Rapp, Europäisches Familien- und Erbrecht, p. 13 (24 et seq.); *Kruger/Samyn,* JPIL 12 (2016), 132 (139 et seq.).

to this shortcoming. According to Art. 6 Brussels II ter Regulation, which formally merges Art. 6 and Art. 7 Brussels II bis Regulation, the residual jurisdiction in matters of divorce is still governed by national procedural law to the same extent as under the current legal framework.[44]

Furthermore, the application of national *lis pendens* rules in cases connected to third States may lead to contradictory results, as a court could decline its jurisdiction, even though such jurisdiction was adequately established in accordance with an EU regulation. In a parental responsibility case connected with the United States, an Italian court first concluded that it would be competent under both the Brussels II bis and Maintenance Regulation as the daughter was habitually resident in Italy at the time of the application.[45] However, the court declined jurisdiction by referring to Art. 7 of the Italian PIL Act.[46] As it is known, the EU regulations do not contain rules on *lis pendens* with third States, and the question is still open as to what extent such decline of jurisdiction is permitted in accordance with these instruments.[47] In this framework, it should also be noted that, while commonly sound from an objective and logical standpoint, the criterion of priority that is the foundation of the jurisdictional rule on *lis pendens* may not always be appropriate with respect to cases concerning family matters. This is especially the case with disputes involving minors, where the child's best interest may reasonably justify overriding the criterion of priority in properly establishing jurisdiction over the case.[48]

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44 Cf. *Antomo,* in: Pfeiffer/Lobach/Rapp, Europäisches Familien- und Erbrecht, p. 13 (24 et seq.); *Brosch,* GPR 2020, 179 (181).

45 Tribunale di Milano, 02. 07. 2018, ITF20180702.

46 Legge 31 maggio 1995, n. 218, Riforma del sistema italiano di diritto internazionale privato, Gazzetta Ufficiale della Repubblica italiana n. 128 del 3 giugno 1995, suppl. ord. (Law 31 May 1995 No 218 reforming the Italian System of Private International Law, Italian OJ (suppl.) No 128 of 03. 06. 1995); translation in English available in [1996] 35 ILM 760.

47 The question of ruling on whether jurisdiction grounded on Art. 3 of the Brussels II bis Regulation was exclusive, and thus prevailed over the domestic rule on international *lis pendens* (Art. 7 of the Italian PIL Act) was requested to the Supreme Court, which actually decided the case without directly tackling the merit of the question. See Corte di Cassazione, 22. 12. 2017, no. 30877, ITT20171222. See also p. 240.

48 *Corneloup et al.,* Children on the Move: A Private International Law Perspective, Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, PE 583.158, especially para. 1.3.1. On the interface between private international law rules and best interests of the child see especially *Fiorini,* in: Biagioni et al., Migrant Children: Challenges for Public and Private International Law, p. 379 et seq.

b. Delimitating the scope of application of, respectively, EU and international instruments

The framework applicable in the EU for cross-border family and succession cases is marked by a high degree of fragmentation and complexity. Notably, the application of the Brussels II bis Regulation is supplemented by the 1996 Hague Child Abduction Convention and the 1980 Hague Child Abduction Convention. The procedural provisions regulating the order of application and coordination of these instruments are laid down in Art. 60 et seq. Brussels II bis Regulation. National case-law collected within the EUFams II project highlights that the Member States' courts sometimes struggle to correctly identify the scope of application of these instruments.

For instance, in a case concerning the abduction of siblings from a third State to France, the lower courts misinterpreted the geographical scope of the 1980 Hague Child Abduction Convention in combination with the Brussels II bis Regulation. The mother had taken the children from the Democratic Republic of Congo (RDC) to France. She seized the French courts to establish the children's residence at her home in France, claiming that the children had suffered mistreatment in the RDC by their father. The French court of first instance declared itself competent to hear the case and applied French substantive law "given the urgent circumstances". Similarly, the court of appeal applied Art. 3 et seq. 1980 Hague Convention and Art. 11 Brussels II bis Regulation to affirm the violation of the father's custody right. Both courts applied the 1980 Hague Convention, although the State of the child's habitual residence (RDC) is not a party to the Convention. Finally, in its illustrative judgment, the French Court of Cassation[49] held that the lower courts had wrongly applied the Convention and the Brussels II bis Regulation, as the latter can be implemented only in intra-EU child abduction cases. Consequently, neither were French courts competent to hear the case, nor was French law applicable.

In particular, the Court of Cassation addressed the underlying motives of the lower courts to manifestly ignore the geographical scope of the Regulation and the Convention, namely, the urgency of the child abduction case at hand. The lower courts arguably wanted to abide by the "need for speed" in child-abduction cases and to render a judgment as quickly as possible, which is, in principle, in line with the best interests of the child. In addition, as there were no other international rules to exercise jurisdiction, the "urgent" solution adopted by the lower courts may have aimed to close a legal gap by

49 See Cour de cassation, 17.01.2019, no. 18-23.849, FRT20190117.

reverting to a *forum necessitatis*. However, the Court of Cassation clarified that even urgent circumstances do not justify circumventing the correct application of the mentioned instruments.

In a similar vein, the Italian case law collected in the EUFams II database shows that international instruments on private international law are frequently applied without ascertaining whether the other State involved in the case at issue is a contracting party thereto.[50] This may sometimes result in a misapplication of those instruments and suggests a persistent lack of familiarity with the instruments' respective functioning. Furthermore, the current lack of implementation laws after the entry into force (as of 1 January 2016) in Italy of the 1996 Hague Child Protection Convention still gives rise to uncertainties stemming from the reference made in Art. 42 of the Italian PIL Act to the previous 1961 Hague Minors Protection Convention.[51] In particular, the application of Art. 42 of the Italian PIL Act (and, consequently, of the 1961 Hague Convention) does not seem correct in those cases where the other State involved is a contracting State of the 1996 Hague Convention, whose application would have been possible on a direct basis, i.e., without relying on the domestic provision.[52]

The interface between EU and international instruments has also proven wavering for Croatian courts. However, cases of erroneous applications of the Brussels II bis Regulation in relation to parental responsibility for a child residing in Bosnia and Herzegovina, originally reported in the framework of the EUFams I Project,[53] were not reported in the context of the EUFams II Project. Furthermore, evidence shows that Croatian courts have correctly applied the regime of the 2007 Lugano Convention to maintenance issues in a case related to Switzerland, declining their jurisdiction since both spouses and their child, all Croatian nationals, were domiciled in Switzerland.[54]

50 For example, with regard to the application of the 1996 Hague Child Protection Convention in order to determine the law applicable to parental responsibility claims, see e.g. Tribunale di Roma (I civ. div.), 19.05.2017, ITF20170519a; Tribunale di Roma, 07.07.2017, ITF20170707; Tribunale di Aosta, 10.07.2017, ITF20170710; Tribunale di Roma, ITF20170721a; Tribunale di Padova, 14.09.2017, ITF20170914.

51 On this issue, see further *Baruffi,* RDIPP 2016, 977 (980 footnote 10).

52 For an example of this approach see Tribunale di Alessandria, 11.12.2017, ITF20171211.

53 Općinski sud u Dubrovniku, 15.10.2014, Gž 1366/14, CRF20141015.

54 Županijski sud u Splitu, 04.04.2017, Gž ob 703/2016, HRS20170404 (on appeal from Općinski sud u Vukovaru, 04.11.2016, P Ob 393/15, HRF20161104).

III. Recognition of status of third country nationals established abroad

1. General remarks

Problems in accessing information on the personal status of third country nationals are often experienced by courts seized with a cross-border family dispute, as well as by civil status registrars and lawyers dealing with non-judicial applications for separation/divorce in accordance with the national law of some Member States.[55] This issue is all the more crucial since the relevance of statuses validly acquired abroad touches upon core values of legal systems in general, as illustrated by the rich jurisprudence of the ECtHR in this area of the law, in particular with respect to the right to protection of family life.[56] While it is to some degree difficult to elaborate on the actual issues faced by legal practitioners, as these rarely emerge in the reported cases,[57] both formal and informal exchanges with practitioners throughout the Project, and notably by means of the Nationals and the International Exchange Seminars, have proven a valuable source in this regard.

The EU regulations on family matters do not regulate the ascertainment and proving of facts necessary for the establishment of jurisdiction. Thus, it is left to the *lex fori* to decide how and by whom these facts have to be proven, or if courts have to investigate these facts *ex officio.*[58]

In this vein, Luxembourgish courts only take into account the evidence submitted by parties for alleged facts, such as the existence of a habitual residence or the conferral of a particular nationality.[59]

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55 See for instance the Italian Decree Law No. 132 of 12.09.2014, converted into law and amended by Law No. 162 of 10.11.2014.

56 Cf., among others, ECtHR, 06.05.2004, no. 70807/01 (*Hussin/Belgium*); ECtHR, 28.06.2007, no. 76240/01 (*Wagner and J.M.W.L/Luxembourg*); ECtHR, 29.04.2008, no. 18648/04 (*McDonald/France*). See *Kinsch,* in: Liber Amicorum Siehr, p. 259 et seq. See also *Lagarde,* in: Mélanges Mayer, p. 441 et seq.

57 It is of note that courts sometimes also rely on the parties' counsel in order to retrieve information with respect to a person's civil status and the relevant provisions governing these aspects, for instance in Italy; cf. *Baruffi/Fratea/Peraro,* Report on the Italian good practices – EUFam's Project, p. 8.

58 *Mankowski,* in: Magnus/Mankowski, Art. 17 Brussels II bis Regulation note 24, with references.

59 The nationality is, however, primarily relevant for the assessment of the applicable law; cf. Tribunal d'arrondissement de Diekirch, 30.05.2018, no. 131/2018, LUF20180530: Lack of evidence for the husband's Congolese citizenship for the purposes of applying Congolese divorce law under Art. 8 (c) Rome III Regulation, on which the wife's claims were based; Tribunal d'arrondissement de Luxembourg, 09.11.2017, no. 414/2017, LUF20171109: The

Similarly, mindful of the difficulties that may surround proving one's status, some Member States adopt a rather flexible approach when it comes to recognizing status acquired abroad. For instance, Swedish procedural law is based on the principle of free admission and free evaluation of evidence, so that family status can be proved, inter alia, by means of documents that, while per se unreliable, are nevertheless corroborated by witness testimonies. Likewise, in cases in which a previous status change had occurred in a third State, Greek courts have referred to the relevant administrative documents or legal instruments (such as court judgments) without indicating any difficulties of proof, in particular with regard to the incidental question of the validity of marriage in divorce cases.[60] Also manifesting a certain degree of flexibility, amendments were introduced to the Croatian Family Act, providing that a statement given under civil and criminal liability before a notary public or before the registrar is considered an appropriate substitute for the original birth certificate, such a document being a necessary requirement to validly contract marriage in Croatia.[61]

Therefore, it appears that, with regard to proving certain legal status changes formed abroad at the stage of incidental recognition, some courts do not apply the established formal procedures, i.e., the assessment of a substantive fact via the applicable conflict of laws rules or the recognition of judgments. On the other hand, the latter procedure shows noteworthy particularities with respect to third State judgments, as will be discussed in the following section.

2. Examples of domestic recognition procedures and national refusal grounds

The recognition and enforcement of judgments from third States do not fall within the scope of the EU regulations on family and succession matters; thus, they remain a matter of domestic procedural law or bilateral and

applicant (the wife) could not bring evidence for the husband's Iranian nationality, so that the *lex fori* was applied pursuant to Art. 8 (d) Rome III Regulation.

60 See for instance Athens Single-Member Court of First Instance (Monomeles Protodikeio Athinon), 01.01.2017, No. 2362/2017, ELF20172362 (marriage concluded in Egypt); Larissa Single-Member Court of First Instance (Monomeles Protodikeio Larissis), 01.01.2018, No. 229/2018, ELF20180101 (marriage concluded in California); Lamia Single-Member Court of First Instance (Monomeles Protodikeio Lamias), 06.05.2019, No. 79/2019, ELF20190506, and Grevena Single-Member Court of First Instance (Monomeles Protodikeio Grevenon), 09.09.2013, No. 96/2013, ELF20130909 (marriage concluded in Albania).

61 See the Croatian Family Act (Official Gazette, 103/15).

multilateral treaties. Even though the uniform rules on recognition and enforcement of the EU regulations explicitly, yet limitedly, take into consideration third State judgments insofar as the irreconcilability with an earlier third State judgment represents a common ground for non-recognition of a later judgment issued by a Member State court,[62] the application of these refusal grounds does not emerge in the collected case-law.

As will be shown below, national recognition rules often imply a review of the court of origin's jurisdiction or the application of the substantive public policy exception. The application of these provisions is a distinctive feature compared to the recognition of intra-EU judgments. These latter judgments are subject to the restrictive use of refusal grounds under the EU regulations,[63] which exclude the review of the court of origin's jurisdiction in light of mutual trust and the principle of the free circulation of judgments within the EU. The consequence of these diverse recognition systems is that the validity of a non-EU judgment is not uniformly secured in the Member States. Consequently, status changes established in a third State might lead to "limping" situations, thus creating avenues of legal uncertainty.[64]

In a case concerning a Chinese-Luxembourgish couple living in Luxembourg, one of the spouses sought the recognition of a divorce declaration issued by a Chinese notary.[65] The Luxembourgish court implicitly considered the divorce declaration to be a judgment, as it applied the standard test foreseen by the French-inspired Luxembourgish jurisprudence for the recognition of judgments from third States; notably, it examined the Chinese notary's competence in light of the principle of "proximity". [66] The court refused to grant recognition to the Chinese divorce declaration, stating that the connection (*lien de rattachement*) to Luxembourg was more substantial compared to the connection to the forum in China following the husband's Chinese nationality. The latter was the only connecting-factor that could have

62 See Art. 22 (d), 23 (f) Brussels II bis Regulation, Art. 24 (d) Maintenance Regulation, Art. 37 (d) Matrimonial Property Regimes Regulation, Art. 37 (d) Registered Partnerships Regulation, Art. 40 (d) Succession Regulation.

63 For instance, several cases highlight the strict application of refusal grounds under the Maintenance Regulation in Luxembourg and France; cf. Tribunal de paix de Luxembourg, 19.10.2017, no. 3427/2017, LUF20171019; Cour d'appel de Toulouse, 10.01.2017, no. 15/06267, FRS20170110; Cour d'appel de Paris, 14.05.2019, no. 17/06490, FRS20190514.

64 Cf. *Antomo,* in: Pfeiffer/Lobach/Rapp, Europäisches Familien- und Erbrecht, p. 13 (56).

65 Tribunal d'arrondissement de Luxembourg, 09.01.2019, no. 7/2019, LUF20190109.

66 Next to this review of the court of origin's jurisdiction, Luxembourgish courts review the third country judgment's compliance with both substantive and procedural public policy, the absence of a fraudulent evasion of law, and the absence of irreconcilability with a Luxembourgish judgement; cf. Tribunal d'arrondissement de Luxembourg, 27.03.2019, no. 177266, Journal des tribunaux Luxembourg, 2019/64, 84 et seq.

testified a close link to China and, therefore, could have established the notary's competence.

Given the historical link between France and Northern African countries, the recognition of judgments between these jurisdictions is a regular pattern in cross-border divorce cases before French courts. In particular, the recognition of third State divorce orders is often discussed in light of the public policy exception.[67] This refusal ground is usually laid down in bilateral conventions, for instance, in Art. 1 (d) of the French-Algerian Convention on Exequatur and Extradition of 1964,[68] which regulates the continuity of personal status between the two countries. French courts have refused the recognition of Algerian divorce orders based on the unilateral repudiation by the husband, arguing that it discriminates against the wife and thus violates public policy.[69]

In keeping with the above, a Spanish court refused recognition of a Moroccan divorce decree on the grounds that it conflicted with the Spanish substantive *ordre public,* to the extent that it denied particular economic rights to the wife merely because she was the applicant in the divorce proceedings. The recognition was denied in accordance with the Convention between Spain and Morocco on judicial assistance in civil, commercial and administrative matters of 1997, whose Art. 23 (4) includes a public policy exception to the mutual recognition of judgments.[70] In addition, the Moroccan court had based its jurisdiction on the presumption that both spouses were still living in Morocco, although they had been living in Spain with their children for more than 15 years. Conversely, the Spanish court exercised its jurisdiction, in accordance with the relevant EU regulations, based on the parties' habitual residence in Spain.[71]

The recognition of divorce judgments issued in third States is usually sought incidentally before the court of a Member State where divorce

67 Cf. on the respective case law of the French Court of Cassation *Ancel*, in: YPIL 7 (2005), p. 261 et seq.

68 Convention entre la France et l'Algérie relative à l'exequatur et à l'extradition et de l'échange de lettres complétant le protocole judiciaire signés le 27 août 1964, French OJ, 17.08.1965, p. 7269.

69 See for instance Cour d'appel de Paris, 30.05.2017, no. 16/24111, FRS20170530. However, the court did not clearly state whether this assessment has to be done *in concreto* or *in abstracto,* a distinction that is also highly debated within the Rome III Regulation; cf. on Art. 10 Rome III Regulation *Sonnentag,* in: Pfeiffer/Lobach/Rapp, Europäisches Familien- und Erbrecht, p. 61 (64 et seq.).

70 Convenio de cooperación judicial en materia civil, mercantil y administrativa entre España y Marruecos, Boletín Oficial del Estado 151, 25.06.1999.

71 See Audiencia Provincial de Barcelona, 26.02.2019, no. 135/2019, ESS20190226.

proceedings are pending. This situation is often the result of formerly having parallel proceedings in the Member State and the third State in question.[72] The coordination of such parallel proceedings is a significant point of concern in the current EU framework. Unlike Art. 33 Brussels I bis Regulation, the Brussels II bis Regulation does not put forth any particular provision for this situation. If both proceedings are being conducted, the typical approach of the party who seized the third State court is to obtain a judgment quickly and to seek its incidental recognition in the Member State. If the recognition is denied, conflicting decisions may follow, thus creating limping legal situations. In this regard, even if Art. 22 (d) Brussels II bis Regulation puts forth a ground for "blocking" the recognition of a judgment from a Member State if it is irreconcilable with an earlier judgment from a third State, incompatible judgments resulting from *lis alibi pendens* with regard to third States cannot be consistently avoided, as this refusal ground only applies in particular circumstances. It is therefore regrettable that the European legislator has not taken the recast of the Brussels II bis Regulation as an occasion to provide uniform guidance for coordinating *lis alibi pendens* with regard to third States in the Brussels II ter Regulation.[73]

IV. Procedural aspects of cross-border family cases involving refugees

1. General remarks

The application of the EU regulations in family matters, and in particular of the Brussels II bis Regulation, is not limited to relations that find their origin and development within the family. On the contrary, it encompasses any measures taken to protect minors, including with respect to minors that

72 See Cour d'appel de Paris, 30.05.2017, no. 16/24111, FRS20170530: The husband obtained a divorce order before the Algerian court, which was seized second, and requested its incidental recognition before the French court; Tribunal d'arrondissement de Luxembourg, 22.01.2015, no. 49/2015, LUF20150122: The Serbian court, which was seized second, was first to render a judgment. The husband then sought the incidental recognition of the divorce judgment in Luxembourg.

73 Cf. on this criticism *Antomo,* in: Pfeiffer/Lobach/Rapp, Europäisches Familien- und Erbrecht, p. 13 (55); with regard to the Brussels II bis Regulation, see *Borrás,* in: Malatesta/Bariatti/Pocar, The External Dimension of EC Private International Law in Family and Succession Matters, p. 99 (106, 109); *Vitellino,* in: Malatesta/Bariatti/Pocar, The External Dimension of EC Private International Law in Family and Succession Matters, p. 221 (246 et seq).

were forced to leave their country of origin, such as asylum-seekers and refugees.[74]

The refugee crisis of 2015 and the interconnected migration flows do not appear to have majorly affected the application of the EU regulations in family matters with regard to procedural aspects in the selected jurisdictions. However, from the case law research conducted within the EUFams II Project, some conclusions can be drawn. For instance, it appears that family and succession law cases involving parties from third States such as Syria and Afghanistan have slightly increased in France and Germany since the beginning of the refugee crisis in the last decade. This increase mainly concerns divorce cases and matters of parental responsibility involving nationals from the abovementioned third States.[75]

The legal environment surrounding the refugee crisis is at times characterized by a degree of flexibility, stemming from the fact that especially for an individual who is seeking or was granted refugee status, proving one's status abroad can be particularly cumbersome. Being aware of this, some Member States have adopted a more flexible regime in this area of the law. For instance, the Swedish Supreme Administrative Court has further increased the ductility of Swedish laws in this area by ruling that, with regard to applications for refugee status, authorities are not expected to carry out a close examination of the information to be entered into the civil register.[76] Rather, they should begin their inquiry from the facts that are easily established and, only when the information is deficient or unclear, registration of the fact should not take place. In this context, however, it must be pointed out that the registration or refusal of registration in the population register is not binding on the general courts dealing with civil disputes, such as those concerning inheritance or maintenance. However, such administrative documents may be submitted as evidence in family proceedings before civil courts.[77]

74 *Honorati,* RDIPP 2019, 691 (698).

75 See for instance Tribunal de grande instance de Paris, 24.02.2017, no. 16/40145, FRF20170224; Tribunal de grande instance de Paris, 03.03.2017, no. 16/43580, FRF20170303; Amtsgericht Hameln, 27.02.2017, 31 F 34/17 EASO, DEF20170227.

76 Supreme Administrative Court, 03.07.2000, RÅ 2000 N 122, SES20000703.

77 See p. 231 et seq.

2. Assessment of the habitual residence of refugees

In general, no systemic difficulties concerning the establishment of jurisdiction in a Member State in proceedings involving refugees have been identified in the collected case law. Arguably, migrants or refugees bring their legal disputes to court after they have factually stayed in a particular Member State for a certain period. As a result, their habitual residence will likely be established in the forum at the time the court is seized. Once the habitual residence of refugees and migrants is established in a certain Member State, their third State nationality or their statelessness is only of secondary relevance for the purposes of international jurisdiction under the EU regulations in family matters, as the primary connecting-factor therein is the parties' habitual residence in the EU.[78]

However, pending or closed asylum proceedings may be relevant for the assessment of the habitual residence of migrants and refugees. For instance, in a case concerning Iraqi spouses who first lived in Iraq after their marriage and then filed a request for international protection in Luxembourg in 2016, the wife filed a petition for divorce only three months after their arrival in Luxembourg.[79] The husband challenged the jurisdiction of the Luxembourgish court, arguing that the couple was not habitually resident in Luxembourg. The court held that the spouses' request for international protection expressed their intention to stay in Luxembourg on a regular or permanent basis. In this regard, the court primarily applied a subjective element, i.e., the *animus manendi.*[80] It did not give further attention to the (objective) elements that the asylum proceedings were still ongoing at the time the wife seized the court, or to the short amount of time spent in the forum. Also, it did not consider to what extent the parties were already integrated or would become integrated in Luxembourg in the future. Given that the notion of "habitual residence" implies a certain stability or regular presence in a specific place, it is doubtful whether such a rash evaluation of the claimant's habitual residence can suffice.[81] The reason for such a brief, arguably result-oriented assessment

78 See p. 221 et seq.

79 Tribunal d'arrondissement de Luxembourg, 13. 10. 2016, no. 397/2016, LUF20161013.

80 The court referred to *Borrás,* Explanatory Report on the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, p. 38, which explicitly refers to the "intention" of a person to establish "the permanent or habitual centre of his interests". On the consideration of the *animus manendi,* see further *Weller,* in: Leible/Unberath, Brauchen wir eine Rom 0-Verordnung?, p. 293 (314 et seq.).

81 While it may be possible that a person acquires a new habitual residence in a short period of time, all other circumstances of the case should be assessed as well, cf. *Limante,* JPIL 14 (2018), 160 (171 et seq.).

might have been to protect the wife by granting her straightforward access to justice in Luxembourg.[82]

Similarly, in a case adjudicated in 1995 the Swedish Supreme Court already exhibited remarkable flexibility in a case involving a Croatian asylum seeker's application for divorce in Sweden. Notably, the Supreme Court found that the applicant had her habitual residence in Sweden due, inter alia, to her "strong legal interest" to have her action adjudicated in Sweden. This allowed Swedish courts to have jurisdiction over her action for divorce, in accordance with the Swedish private international law rules at that time.[83]

Contrary to the jurisprudence mentioned above, case law from other jurisdictions supports the argument that the "habitual" nature of the residence of an asylum seeker cannot usually be established until asylum is granted. Such a more "objective" approach has been observed with regard to German courts and, in particular, to the weight given to asylum proceedings for the assessment of the habitual residence of refugees. For instance, in a parental responsibility case concerning Syrian nationals,[84] the German court argued rather broadly that refugee status does not imply that the parties actually intended to stay in Germany indefinitely, since refugees usually aim to return to their home country, once the reasons that led them to flee their country of origin were resolved. The court also referred to the temporal limitation of the residence permit to indicate that their stay would only be temporary.[85] This assessment appears to be too abstract for conclusively proving or denying the parties' habitual residence in this specific case.

These examples show that Member States' courts do not appear to follow a consistent approach of granting access to a court to refugees and migrants under the EU regulations in family matters. This finding is in line with the longstanding debate on the exact content and interpretation of the concept of "habitual residence", notably with regard to the role to be attached (if any) to the intent of the parties to establish their habitual residence in a particular

82 If the habitual residence in Luxembourg were denied, none of the Regulation's jurisdictional grounds would have applied, thus leaving the establishment of the courts' jurisdiction to national jurisdiction rules via Art. 7 Brussels II bis Regulation.

83 Swedish Supreme Court (Högsta domstolen), 11.04.1995, SET19950411. While this judgment is quite dated, it is nevertheless understood to reflect the law to date, as inferred from the Comparative Report on Third Country Nationals prepared by the Swedish partners (unpublished), especially p. 3.

84 Amtsgericht Hameln, 27.02.2017, 31 F 34/17 EASO, DEF20170227.

85 Similarly, in a case concerning a Gambian national, the court denied the need for appointing a legal guardian, arguing that the person concerned would not have any apparent reason to be granted asylum in Germany and would thus not be permitted to stay long-term in Germany, see Oberlandesgericht Koblenz, 14.02.2017, 13 UF 32/17, DES20170214.

Member State. In order to achieve a more uniform and consistent assessment of the habitual residence of such individuals across the EU, the comparative review of national case-law of Member State courts provides a valuable starting point for identifying common trends and best practices, and should thus be conducted further.[86]

V. Conclusions

Analyzing the interface of private international and procedural law with situations that involve connections with third States is of the essence to promote a uniform and effective regulation of family and succession matters in pursuance of the free movement of persons in the EU. The importance of this analysis is reaffirmed by the increasing migration flows from third countries and by the refugee crisis that the EU Member States are experiencing to date.

In examining the impact of procedural aspects in cases involving third country nationals on the objectives of predictability, effectiveness and harmonized solutions in EU family and succession law, this contribution has identified areas that may prove to be a source of inconsistency and uncertainty. These shortcomings may be traced back to the high degree of fragmentation and complexity that arises from the variety of the existing instruments and the inherent nuances in the legislation that these instruments put forth. However, this contribution has concurrently identified aspects that are worthy of appreciation.

Against this background, common trends and specific issues in the treatment of disputes having connections with third States were identified, in particular with regard to jurisdiction, including the coordination of parallel proceedings, as well as the recognition of statuses abroad.

In the context of jurisdiction, the concept of habitual residence appears to efficiently symbolize the integration of individuals in the social and legal fabric of the Member States, in pursuance of legal predictability and flexibility. This seems to operate successfully, and without any particular discriminations, also with regard to the assessment of jurisdiction vis-à-vis third country nationals.[87] However, a degree of uncertainty arises pertaining to the correct understanding of the scope of application of the EU and interna-

86 See for instance on the establishment of the habitual residence of adults under the Brussels II bis Regulation *Limante,* JPIL 14 (2018), 160 (168 et seq.) and in particular on the habitual residence of refugees *Budzikiewicz*, in: Budzikiewicz et al., Migration und IPR, p. 95 (110 et seq.).

87 See p. 222.

tional instruments in family law matters, namely the proper interpretation of what constitutes an international element to establish the territorial and personal scope of application of such instruments. Especially with regard to cases connected with third States, the delicate nature of the matters adjudicated in family law disputes suggests the need to reconsider some legislative choices on jurisdiction (as is the case of a *forum necessitatis* in matters of legal separation and divorce) to ensure proper access to justice.[88]

The lack of clarity and harmonization with regard to cases of *lis pendens* with third States is also a potential source of unpredictability that is worthy of attention. On the one hand, it leaves open the question to what extent Member State courts may decline jurisdiction. On the other hand, it creates the premises for inconsistent treatments of the same matter in different States, to the detriment of legal certainty. Finally, it bears an impact on the circulation of judgments in the Member States. As this contribution suggests, this issue is all the more crucial and should be specifically addressed, in light of how inconsistent judgments, especially in family matters, can concretely and negatively affect an individual's life.

Yet, the flexible approach that Member States seem to have adopted with regard to the recognition of statuses formed abroad, especially in a context as difficult and challenging as that faced by refugees, appears to be indicative of adaptation skills and awareness. As such, it should be welcomed as a means to pursue legal fairness and to enhance access to justice.

Overall, the existing lacunae and open questions that were identified with respect to cases connected with third States, and especially the questions arising from the dubious understanding and interpretation of courts of the scope of application of the relevant instruments in family law matters, highlights the core importance of legal education and judicial training. In this area, efforts should be ensured and increased to foster predictability and legal certainty, and education and training should be made available to legal practitioners and the judiciary alike.[89]

88 See p. 227 et seq.

89 In this regard, see also *Župan et al.,* in this volume. With respect to the recently established enhanced cooperation in matrimonial property regimes and property regimes for registered partnerships, see *Mariottini,* in: Brosch/Mariottini, EUFams II – Report on the International Exchange Seminar, especially D.II.4.

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Matters Involving Third Country Nationals: A Comparative Analysis Concerning Personal Status Changes of Third Country Nationals

*Marcel Zühlsdorff**

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Abstract Migration across the EU borders, relationships involving third country nationals and recent trends, such as the so-called "refugee crisis", have emphasized the need for a predictable legal framework providing practicable solutions in matters involving third country nationals. In conjunction with the corresponding contribution by *Marlene Brosch* and *Cristina M. Mariottini* in this volume, this contribution is intended to assess these developments and to compare the approaches in different Member States. The focus of this contribution is placed on matters concerning the personal status

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of third country nationals and on the recognition of status changes having occurred in non-Member States.

Keywords third country nationals, personal status, recognition, public policy

I. Introduction

In addition to the contribution on the procedural aspects of matters involving third country nationals[1], this contribution will address the most important questions concerning the treatment of changes in personal status of third country nationals that have occurred in non-Member States.

II. General remarks

In our modern globalized society, cross-border family life has become a more or less common phenomenon. Due to the creation of an internal market as an "area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties" in Art. 26 (2) TFEU in combination with the corresponding fundamental freedoms, and due to the establishment of a "Citizenship of the Union" in Art. 20 TFEU, granting, inter alia, "the right to move and reside freely within the territory of the Member States", travel amongst the Member States has been significantly simplified and actively encouraged, resulting in an increasing number of cases concerning cross-border family life.

In order to create a legal framework in which these rights and freedoms may be exercised without hindrance by inconsistent national legislation, the TEU and TFEU have established certain principles that ensure a closer degree of judicial cooperation. This development culminated in the creation of an "area of freedom, security and justice" (Art. 67 TFEU), characterized by, inter alia, respect for fundamental rights and the different legal systems and traditions of the Member States (Art. 67 (1) TFEU), the absence of internal border controls for persons, a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair

1 See *Brosch/Mariottini*, in this volume.

towards third country nationals (Art. 67 (2) TFEU) and judicial cooperation in criminal and in civil matters (Art. 67 (3) and (4) TFEU).

Cornerstones of this close judicial cooperation are the underlying principles of mutual trust and recognition[2] which, in the terms of CJEU case law, "are based on the fundamental premise that each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the European Union is founded".[3] These shared core values the Member States have agreed upon in Art. 2 TEU, as well as the mutual trust derived from this common understanding, are the common ground upon which a judicial cooperation may be based that forgoes the need to scrutinize the compatibility of each other's legal orders on a case to case basis. In the terms of CJEU case law, "the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU"[4]. Due to this general principle, the courts of a Member State may only in very extraordinary cases actually asses the conformity of particular legal institutes of other Member States and their application in a particular case with their substantive public policy.[5] This significantly increases the assuredness of individuals living in the EU that crossing an internal border will not significantly affect their personal status, especially in regard to delicate questions that otherwise might be subject to a manifestly different evaluation in other Member States.[6] Since these principles concern the relationship between Member States irrespective of the

2 Cf. Presidency Conclusions of the Tampere European Council (October 1999), note 1 and 33, https://www.europarl.europa.eu/summits/tam_en.htm (last consulted 06. 10. 2020), and The Stockholm Programme (2010/C 115/01), p. 5; see also *Kaufhold,* EuR 2012, 408 (430 et seq.); *von Danwitz*, EuR 2020, 61 (76).

3 CJEU, 18. 12. 2014, Opinion 2/13, note 168; cf. also CJEU, 15. 10. 2019, C-128/18 (*Dumitru-Tudor Dorobantu*), note 45.

4 CJEU, 18. 12. 2014, Opinion 2/13, note 192; critically *Meeusen et al.,* in: Meeusen et al., International Family Law for the European Union, p. 1 (19), concerning topics without a common European substantive approach.

5 Cf. *Vlas,* in: Essays in honour of Hans van Loon, p. 621 (625) with reference to the prohibition of *révision au fond* under Brussels I; *Kaufhold,* EuR 2012, 408 (415) in this regard speaks of „Pflicht zum Kontrollverzicht" (a duty to relinquish control).

6 Cf. *Meeusen et al.,* in: Meeusen et al., International Family Law for the European Union, p. 239 (275) with critical remarks regarding the lack of common substantive principles and rules of family law.

nationality of the persons in question, they also apply to status changes of third country nationals that have taken place in a Member State according to that Member State's law.

Further continuity in cross-border family relations involving citizens of the EU is provided by the abovementioned rights and fundamental freedoms that, in principle, prevent Member States from placing nationals of other Member States at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State.[7] In modern CJEU case law, the rights which nationals of Member States enjoy under these provisions, have been deemed to "include the right to lead a normal family life, together with their family members, both in the host Member State and in the Member State of which they are nationals when they return to that Member State".[8] This being the case, any serious disadvantage with an impact on normal family life resulting from the non-recognition of a Member State national's personal status may, unless justified by objective public interest considerations, be deemed to violate the freedoms granted by EU citizenship. Since the right of citizens of the EU to lead a normal family life includes the right to lead such a family life irrespective of the nationality of the other persons involved[9], other Member States may be required to recognize (at least to a certain degree) the material effects of status changes[10] which have occurred during the period of genuine residence in another Member State in accordance with the law of that State, even if some of the persons concerned are third country nationals.[11]

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7 Cf. CJEU, 18.07.2006, C-406/04 (*De Cuyper/Office national de l'emploi*), note 39; CJEU, 14.10.2008, C-353/06 (*Grunkin/Paul*), note 21; for an extensive analysis on the effects of fundamental freedoms on national conflict of laws rules see also *Fallon,* in: Meeusen et al., International Family Law for the European Union, p. 149 and *Schilling,* Binnenmarktkollisionsrecht, p. 159.

8 CJEU, 05.06.2018, C-673/16 (*Coman*), note 32 and the case law cited there.

9 Cf. *Fallon,* in: Meeusen et al., International Family Law for the European Union, p. 149 (153).

10 For a comprehensive overview of the method of recognition of legal status in European private international law see *Jayme,* IPRax 2001, 501; *Coester-Waltjen,* IPRax 2006, 392; for the application in matters of family law see also *Gärtner,* Die Privatscheidung im deutschen und gemeinschaftsrechtlichen Internationalen Privat- und Verfahrensrecht, p. 364–426.

11 Cf. CJEU, 05.06.2018, C-673/16 (*Coman*), note 40 in which "the refusal by the authorities of a Member State to recognize, for the sole purpose of granting a derived right of residence to a third country national, the marriage of that national to an EU citizen of the same sex concluded during the period of their genuine residence in another Member State, in accordance with the law of that State", was deemed to "interfere with the exercise of the right conferred on that citizen by Art. 21(1) TFEU to move and reside freely in the territory of the Member States".

In addition to these principles, the instruments created on the basis of Art. 81 (2) TFEU in order to ensure, inter alia, the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases, the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction, the effective access to justice, and the elimination of obstacles to the proper functioning of civil proceedings, ensure further judicial cooperation in civil matters amongst the Member States insofar as they are applicable.

Most noteworthy amongst these instruments in regard to the assessment of one's personal status is the Public Documents Regulation, which significantly simplifies the administrative formalities for the circulation of certain public documents and their certified copies, where those public documents and the certified copies thereof are issued by a Member State authority for presentation in another Member State.[12] This instrument further reduces possible hindrances to the recognition of certain status changes documented by another Member State regardless of the nationality of the person concerned, but does not apply to public documents issued by the authorities of a third country (Art. 2 (3) (a) Public Documents Regulation).

Since the particular problems of matters concerning the personal status of third country nationals surface most clearly where none of these special regimes are applicable, the following observations concern cases in which the personal status of a third country national needs to be assessed by the authorities of a Member State in regard to changes that have neither occurred in another Member State, nor have previously been publicly documented by the authorities of another Member State.

III. The Assessment of Personal Status before Member State authorities

Nearly all partner countries have reported that the problems in determining the personal status of third country nationals are most often experienced before the actual proceedings take place. In the most problematic scenario, in which a third country national has entered the EU for the first time without being able to provide any reliable public documents, the initial assessment of their personal status already takes place during the administrative proceedings before the immigration or public registration authorities.[13] In civil

12 Cf. Public Documents Regulation, recital 3.

13 For an overview of the general proceedings under the Dublin III Regulation and accord-

proceedings taking place at a later stage, the court often relies on the assessment made during these administrative proceedings, unless one of the parties contests the respective facts.[14] Due to this *de facto* presumption of the recorded information being correct, there are only a few decisions in which the difficulties in assessing the respective information are expressly addressed. The Swedish Supreme Court, for example, has expressly confirmed that the information recorded in the public records, though presumed to be correct, may be refuted during the civil proceedings based on other evidence.[15] The Croatian Constitutional Court addressed further problems resulting from the inability to provide reliable documents in a case where a third country national could not provide the birth certificate required for marriage under Croatian law.[16] These difficulties ultimately resulted in the amendment of the respective national provisions in order to allow other means of proof that no other marriages existed (namely a statement given under civil and criminal liability before a notary public).

1. Access to information

The reported difficulties concerning the access to information on a third country national's personal status range from missing, unintelligible, and unreliable documents to unclear legal sources in the State concerned. Particular problems arise when assessing the age of unaccompanied minors in order to determine whether or not they need to be taken charge of by the youth welfare authorities and be granted special protection.[17] This concerns both the determination of the actual age of the person concerned and the question of whether or not the respective legal system considers a person of that age to be still a child. German private international law, for example, refers both the creation, modification, and termination of guardianship, as well as the legal capacity and the capacity to contract to the law of the State the person concerned is a national of, cf. Art. 7 (1) and 24 (1) of the German

ing to the corresponding instruments see *Bergmann,* in: Bergmann/Dienelt, Ausländerrecht, § 29 Asylgesetz note 23.

14 This was explicitly reported for France, Luxembourg, and Sweden.

15 Swedish Supreme Court (Högsta domstolen), 08. 06. 2017, NJA 2017, 430, SET20170608.

16 Ustavni sud, 18. 10. 2016, RH U-III-5172/2013, HRC20161018.

17 For a detailed overview about the corresponding proceedings in Germany and the practical problems they entail see *Dürbeck,* in: Budzikiewicz et al., Migration und IPR, p. 65 (68 et seq.).

Introductory Act to the Civil Code[18]. Therefore, there have been many cases in which the German courts needed to determine whether or not children come of age under Gambian, Guinean or Liberian law at the age of 18 or of 21. Due to conflicting statements of the respective authorities and unclear legal sources, different courts have come to conflicting results in this regard.[19]

There does not seem to be a common principle of how to deal with such difficulties during civil proceedings. Practitioners in Italy, for example, have reported that the judges sometimes rely primarily on the respective counsels to gather the required information, while German courts are explicitly authorized by § 293 of the German Code of Civil Procedure[20] to use other sources of reference, such as expert opinion, in addition to the proof produced by the parties when making inquiries as regards the laws applicable in another state.[21]

2. Legal concepts unknown to the applicable law

Most partner countries have encountered cases in which preliminary questions concerning the personal status were governed by a foreign law, which contained legal concepts not known to the respective Member State law governing the rest of the case. Under these circumstances, the respective authority needs to assess to what extent the status created under the foreign provisions may be given effect under the applicable Member State law without risking the non-recognition of that decision in the State concerned.[22]

One of the more problematic concepts, often encountered in Spain and sometimes in Italy, is the so-called *kafāla* under certain Islamic laws, such as Moroccan law, in the course of which a so-called *kāfil* is entrusted with the protection and care for a child (*makfūl*) without establishing any actual

18 Einführungsgesetz zum Bürgerlichen Gesetzbuche (EGBGB).

19 See OLG Karlsruhe, 07. 09. 2017, 18 WF 62/17, DES20170907; OLG Hamm, 03. 05. 2017, II-10 UF 6/17, DES20170503; OLG Koblenz, 14. 02. 2017, 13 UF 32/17, DES20170214; OLG Bremen, 07. 02. 2017, 5 UF 99/16, DES20170207.

20 Zivilprozessordnung (ZPO).

21 For more information about the proceedings under § 293 of the German Code of Civil Procedure and possible sources of reference see *Pfeiffer,* in: Festschrift Leipold, p. 283; *Becker,* in: Festschrift Martiny, p. 619.

22 *Heiderhoff,* in: Budzikiewicz et al., Migration und IPR, p. 9 (20) explicitly warns that too strict limitations to recognition conflict with the general goal of private international law to prevent limping legal relationships.

kinship and without affecting the child's bond with the family of origin.[23] In previous years, this concept has often been interpreted by authorities of Member States as being similar to the national concept of adoption, although many Islamic laws have expressly forbidden or restricted any or certain forms of actual adoption (*tabannī*).[24] The previous practice of Spanish courts to authorize the adoption of Moroccan children by their respective Spanish *kāfil*[25] has intermittently resulted in a diplomatic conflict with Morocco that was ultimately resolved, after the Spanish Law on Adoption was amended in 2015 in order to end this practice.

Most often, partner countries have encountered other concepts based on Islamic law, such as unilateral divorces by repudiation (*talaq*)[26] or corresponding agreements in marriage contracts[27], such as the Lebanese *mahr*[28].

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23 In regard to different concepts of *kafāla* and their corresponding legal effects see *Yassari,* AJCL 63 (2015), 927 (950) who lists Morocco, Algeria and Tunisia as the only Muslim countries using this term in the context of the placement of children; cf. also *Menhofer,* IPRax 1997, 252 (253).

24 *Yassari,* AJCL 63 (2015), 927 (943 et seq.) distinguishes between three categories of legislation in regard to *tabannī:* (1) Muslim countries expressly allowing *tabannī* in general (Tunisia; Somalia) or depending on the faith of the persons involved (India; Sri Lanka; Indonesia; Malaysia), (2) Muslim countries expressly prohibiting *tabannī* (Morocco; Algeria; Egypt; Yemen; Kuwait; Jordan; Bahrain), (3) Muslim countries without explicit legislation on *tabannī* (Qatar; Oman; United Arab Emirates; Iran; Iraq; Syria; Pakistan; Afghanistan); cf. *Borrás,* in: Essays in honour of Hans van Loon, p. 77 (78, 83–86).

25 Cf. *Borrás,* in: Essays in honour of Hans van Loon, p. 77 (83–86).

26 Cf. the collected case law in the EUFams II database, namely: OLG Düsseldorf, 15. 02. 2018, I 13 VA 6/16, DES20180215; OLG München, 14. 03. 2018, 34 Wx 146/14, DES20180314; Cour d'appel de Paris, 20. 11. 2008, 04/05258, FRS20081120a; Cour d'appel de Paris, 17. 12. 2009, 09/19369, FRS20091217; Cour de cassation, 23. 02. 2011, 10-14101, FRT20110223; Tribunal d'arrondissement de Luxembourg, 06. 12. 2007, 359/2007, LUF20071206; Swedish Supreme Court (Högsta domstolen), 05. 03. 2013, NJA 2013 N 9, SET20130305; further cases without reference to instruments of European private international law were reported for France, Germany, Italy, Luxembourg, and Spain.

27 E.g. in OLG Hamm, 22. 04. 2016, II 3 UF 262/15, DES20160422, a provision in a marriage contract only referring to the event of a unilateral divorce by repudiation was applied during judicial divorce proceedings initiated by the wife, since the husband had brought about the conditions for the divorce and since the limitation of the right to repudiate was deemed to be in breach of German public policy.

28 The *mahr* under Lebanese Sunni-islamic law consists of both a morning gift and an evening gift, of which the former is to be paid at the beginning of the marriage and the latter in case of divorce; in Germany, the former is considered as belonging to the law of engagement or to the general effects of the marriage, while the latter is considered to be an agreement about postmarital maintenance, cf. OLG Hamm, 22. 04. 2016, II 3 UF 262/15, DES20160422; in Sweden, it is deemed to be part of the marital property regime, cf. Swedish Supreme Court (Högsta domstolen), 29. 03. 2017, NJA 2017, 168, SET 20170329.

As regards the methods for the proper characterization of these unknown concepts and their treatment under Member State law, there still appear to be some uncertainties[29], especially in Member States that have only recently started to encounter these concepts.

3. Recognition of foreign status changes and substantive public policy

Since the relationship between the Member States and most third States is not based on mutually assured core values, there is, in principle, no sufficient basis for mutual trust. Where no other international instruments apply, the Member States are usually at liberty to decide whether or not, and according to which criteria, they allow the recognition of foreign status changes that have occurred in non-Member States under non-Member State law.

The reports of the project partners have confirmed the general assumption that the national concepts being applied in this regard vary immensely among the different Member States. Some partner countries, such as Germany and Spain, deny the recognition of the respective status changes based on a violation of substantive public policy only if the recognition in the particular case[30] would lead to a result which is manifestly incompatible with the fundamental principles of the respective legal system (e.g. fundamental rights). The underlying reason for this more liberal approach is the notion that even the application of provisions containing discriminating elements may in particular cases benefit the affected person.[31] Since the public policy exception is understood as a corrective of last resort, there is no need to reject the application of the foreign law, unless this application in the particular case would actually lead to unbearable consequences. In particular, in regard to unilateral divorces by repudiation under Islamic law, the respective

29 For a list of possible solutions see *Meeusen et. al.,* in: Meeusen et al., International Family Law for the European Union, p. 1 (21 et seq.).

30 Cf. *Koch,* Die Anwendung islamischen Scheidungs- und Scheidungsfolgenrechts, p. 80 (for Germany), p. 101 et seq. (for Spain); *González Beilfuss,* in: Meeusen et al., International Family Law for the European Union, p. 425 (432 et seq.); cf. also *Heiderhoff,* in: Budzikiewicz et al., Migration und IPR, p. 9 (13 et seq.), who argues that the primary purpose of the family law provisions concerned is the protection of the individual persons affected by such relationships, thus requiring a more concrete assessment when determining whether or not the *ordre public* needs to be invoked in order to grant this protection.

31 Cf. *Heiderhoff,* in: Budzikiewicz et al., Migration und IPR, p. 9 (18 et seq.) regarding unilateral divorces by repudiation, polygamous, and under-age marriages.

court has to inquire whether the affected wife may have actually wanted to be divorced in such manner and whether or not the requirements for a divorce according to the *lex fori* would have been met as well.[32]

Italy, having previously rejected the recognition of divorces by repudiation in general, has in recent years adopted a more lenient approach according to which the divorce may be recognized depending on whether or not certain requirements were met.[33]

France and Luxembourg, on the contrary, seem to apply their respective public policy exception strictly by referring to discrimination on an abstract level.[34]

Cases in which the substantive *ordre public* was discussed, apart from unilateral divorces under Islamic law, involve surrogacy and surrogate motherhood[35], under-age marriage[36], and polygamy[37].[38]

Each of these topics is still subject to ongoing discussions, both in regard to substantive public policy as well as in regard to the creation of mandatory requirements that need to be abided by, if there are certain connecting-factors to the respective State. Even in Member States which had more liberal

32 Cf. *Koch,* Die Anwendung islamischen Scheidungs- und Scheidungsfolgenrechts, p. 83 et seq. (for Germany), p. 101 et seq. (for Spain); for an extensive list of German case law see *Hausmann,* Internationales und Europäisches Familienrecht, Chapter A, note 490 et seq.

33 Cf. Cass., 01.03.2019, No. 6161; App Cagliari, 16.05.2008, No. 198.

34 Cf. for France: Cour d'appel de Paris, 20.11.2008, 04/05258, FRS20081120a; Cour d'appel de Paris, 17.12.2009, 09/19369, FRS20091217; for Luxembourg, Tribunal d'arrondissement de Luxembourg, 06.12.2007, 359/2007, LUF20071206.

35 For an extensive list of German and French judgments see *Duden,* Leihmutterschaft im Internationalen Privat- und Verfahrensrecht, p. 133 et seq.; see also for Germany Bundesgerichtshof, 10.12.2014, XII ZB 463/13, Neue Juristische Wochenschrift 2015, 479 note 33 et seq.; for case studies of prominent surrogacy cases and the practical problems they entail see *Boele-Woelki,* in: Essays in honour of Hans van Loon, p. 47–58.

36 Cf. *González Beilfuss,* in: Meeusen et al., International Family Law for the European Union, p. 425 (433 et seq.) with reference to the situation in Spain (recognition is possible, if both spouses have been at least 14 years of age) and Sweden (new legislation resulting in the non-recognition of under-age marriages, if at least one of the spouses was either of Swedish nationality or habitually resident in Sweden when the marriage took place); for the situation in Germany see *Antomo,* NZFam 2016, 1155.

37 For an extensive comparative analysis of polygamous marriages and their treatment under German private international law see *Coester/Coester-Waltjen,* FamRZ 2016, 1618; see also *Coester-Waltjen,* in: Budzikiewicz et al., Migration und IPR, p. 131; for the treatment of polygamous marriages in France and Spain (non-recognition of the marriage itself, but recognition of certain effects of the marriage), cf. *González Beilfuss,* in: Meeusen et al., International Family Law for the European Union, p. 425 (431 et seq.).

38 Cf. *González Beilfuss,* in: Meeusen et al., International Family Law for the European Union, p. 425.

approaches, new legislation tends to restrict the recognition of such relationships on an abstract level.[39]

In Germany, a special provision in Art. 13 (3) of the German Introductory Act to the Civil Code was adopted, which declares all marriages concluded with a minor of less than 16 years of age void and marriages with minors having already reached 16 years of age at the time of the wedding voidable.[40] This provision is currently subject to proceedings before the German Federal Constitutional Court, since it does not contain any restrictions that would allow its application to be limited to cases in which the minor was actually unable to make an autonomous decision.[41] Since declaring a marriage void interferes with the right to marry, the German Federal Supreme Court in its reference expresses the opinion that interference may only be justified in each individual case under the condition that it is indeed necessary to protect the minor concerned.[42]

Similar discussions are currently ongoing in Germany in regard to the fight against polygamy.[43]

These differences amongst the Member States are not limited to the specific goals and requirements of the public policy exception but also concern the question of which frame of reference is to be applied in order to assess whether or not the application of the provision in question is compatible with public policy.[44] While certain decisions suggest that this question is to be determined from a national perspective[45], others indicate a more inter-

39 Cf. *Bogdan,* IPRax 2004, 546 on the Swedish law on measures against child marriages and against forced marriages, and the previous practice of general recognition.

40 Cf. Art. 2 of the German Law against Child Marriages (Gesetz zur Bekämpfung von Kinderehen) of 17. 07. 2017, BGBl. I No. 48, p. 2429.

41 Bundesgerichtshof, 14. 11. 2018, XII ZB 292/16, DET20181114.

42 Cf. Bundesgerichtshof, 14. 11. 2018, XII ZB 292/16, DET20181114, note 45 et seq. with reference to the autonomy and best interests of the individual child concerned and to Art. 3 and 12 UN Child Convention.

43 Cf. the pending proposal of the Bavarian government for a Law against Polygamy, Bundesrats-Drucksache (legislative proposal) 249/18, which seeks to declare all additional marriages voidable according to German law, regardless of the law applicable to the marriage in question, provided that both spouses concerned are habitually resident in Germany; see also *Heiderhoff,* in: Budzikiewicz et al., Migration und IPR, p. 9 (18 et seq.) who criticizes that such an approach might have detrimental effects for the persons concerned and their kin.

44 Cf. the findings of *Hess/Pfeiffer,* Study on the Interpretation of the Public Policy Exception, p. 155 et seq. who analyzed to which extent the courts of different Member States refer to concepts of national or European law when dealing with public policy.

45 E.g. Art. 6 of the German Introductory Act to the Civil Code explicitly refers only to "the fundamental principles of German law", while including fundamental rights acknowledged in international conventions, common principles of European law, and other inter-

national approach, in which only certain core principles that require international protection are to be considered.[46]

These diverging approaches and the corresponding national legislation may result in conflicting assessments of these relationships in different Member States. Since third country nationals who are part of such relationships may very well subsequently obtain EU citizenship or the right to move to another Member State as long-term third State residents under Art. 14 of the Directive 2003/109/EC of 25. 11. 2003[47], these conflicting views may result in significant obstacles to exercising these freedoms granted by European law.[48]

An international perspective focusing on the common core values that the principle of mutual trust is based upon, would seem to be the best solution for preventing conflicting decisions in different Member States.[49] However, due to the lack of consistency in regard to the general nature of the public policy exception and the substantive family laws, the risk of conflicting decisions would either way remain to some degree.[50]

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national standards as being part of German law; cf. Bundestags-Drucksache (legislative proposal) 10/504, p. 43 et seq.; *Kropholler,* Internationales Privatrecht, p. 248–250; correspondingly, German courts have traditionally argued that the CJEU had no competence to determine the concept of public policy for the Member States, since it was deemed a question of national law, cf. Bundesgerichtshof, 26. 09. 1979, VIII ZB 10/79, Neue Juristische Wochenschrift 1980, 527.

46 The French "*ordre public international*" seems to tend in this direction; cf. *Loussouarm/Bourel/Vareilles-Sommières,* Droit international privé, note 249; *Colombi Ciacchi,* Internationales Privatrecht, *ordre public européen* und Europäische Grundrechte, p. 31–34.

47 Council Directive 2003/109/EC of 25. 11. 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23. 01. 2004, p. 44–53.

48 For examples of such problematic cases see *González Beilfuss,* in: Meeusen et al., International Family Law for the European Union, p. 425 (434 et seq.).

49 Cf. *Lenaerts,* The Principle of Mutual Recognition in the Area of Freedom, Security and Justice, p. 25 ("European public policy"); see also *von Danwitz*, EuR 2020, 61 (70), who refers to a „gemeineuropäischen *ordre public*" (common European *ordre public*) as a common frame of reference for all Member States under the principle of mutual trust; also in favor of creating a common European approach *Meeusen et. al.,* in: Meeusen et al., International Family Law for the European Union, p. 1 (20) and *Peruzetto,* in: Meeusen et al., International Family Law for the European Union, p. 279 (294 et seq.); cf. also *Antokolskaia,* in: Meeusen et al., International Family Law for the European Union, p. 49 (63 et seq.) with critical remarks regarding the level of shared values with regard to the subject of divorce.

50 Cf. *Meeusen,* in: International Family Law for the European Union, p. 239 (275); cf. also *Vlas,* in: Essays in honour of Hans van Loon, p. 621 (624), highlighting the interdependence between the differences amongst the legal orders of the Member States and the importance of their respective national public policy.

IV. Concluding remarks

Matters involving third country nationals and concerning changes in personal status that occurred in a third State not only provide many factual difficulties concerning the access to information, but also entail the risk of producing deviating results in different Member States due to different legal traditions involved.

Insofar as European law does not determine the recognition of status changes of third country nationals, these problems significantly complicate the matters at hand and require particular caution when more than one Member State is involved.

Especially in cases where status changes are based on concepts of Islamic law, such as the unilateral divorce by repudiation, the different goals of the respective public policy clauses may lead to inconsistent results depending on which Member State will exercise their jurisdiction in this regard.

Most of these inconsistencies could be avoided, if European law contained a general provision harmonizing the application of substantive public policy. Due to the shared core values all Member States recognize, such a common frame of reference serving as basis for the determination of the international *ordre public* could be seen in human rights of the ECHR and the Charta of Fundamental Rights of the EU in combination with the respective provisions in the Treaties (e.g. Art. 3 (5) and Art. 6 (3) TEU).

The factual difficulties arising from the need to assess status changes that have occurred under the law of a third State may be mitigated by making use of the current instruments of judicial cooperation in order to provide each Member State with shared information on the particular third State they need to deal with. Especially databases on foreign documents, such as those created for the Public Documents Regulation may be helpful in this regard.

Informal means, such as networks of liaison judges, may be used as well in order to provide the necessary information and to benefit from the experiences of other Member States.

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Authors

Marlene Brosch
Research and Documentation Service, Court of Justice of the European Union, Luxembourg

Laura Carballo Piñeiro
Professor, Nippon Foundation Chair, Head of Maritime Law & Policy Specialization, World Maritime University, Malmö; Associate Professor, University of Santiago de Compostela (on leave)

Diletta Danieli
Senior Research Fellow in EU Law, University of Verona

Rosario Espinosa Calabuig
Full Professor of Private International Law, University of Valencia

Ivana Kunda
Head of the Chair of International and European Private Law and Full Professor, University of Rijeka, Faculty of Law

Quincy C. Lobach
Research Fellow, Institute for Comparative Law, Conflict of Laws and International Business Law, Heidelberg University

Cristina M. Mariottini
Senior Research Fellow, Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law

Ulf Maunsbach
Associate Professor, Lund University

Nicolò Nisi
Senior Research Fellow in Private International Law, Department of International, Legal, Historical and Political Studies, University of Milan

Cinzia Peraro
Senior Research Fellow in EU Law, University of Verona

Thomas Pfeiffer
Director of the Institute for Comparative Law, Conflict of Laws and International Business Law and Full Professor of Private Law, Private International Law, Comparative Law and International Dispute Resolution, Heidelberg University

Paula Poretti
Assistant Professor, Chair for Civil and Family Law, J.J. Strossmayer University of Osijek

Tobias Rapp
Doctoral Candidate, Institute for Comparative Law, Conflict of Laws and International Business Law, Heidelberg University

Lenka Válková
Senior Research Fellow in Private International Law, Department of International, Legal, Historical and Political Studies, University of Milan

Ilaria Viarengo
Full Professor of Private International Law, Department of International, Legal, Historical and Political Studies, University of Milan

Francesca Villata
Full Professor of Private International Law, Department of International, Legal, Historical and Political Studies, University of Milan

Marcel Zühlsdorff
Research Fellow, Institute for Comparative Law, Conflict of Laws and International Business Law, Heidelberg University

Mirela Župan
Full Professor, Chair for International Public and Private International Law, Legal Theory and Methodology, J.J. Strossmayer University of Osijek

This volume constitutes the final study of EUFams II, a research project on European family and succession law funded by the European Commission. Its contributors present historical developments, discuss the status quo, and draw the lines along which European family and succession law may develop in the near future. The volume endeavors to inspire its readership and the scientific community at large to engage in further research along and across these lines.

Thomas Pfeiffer, Director of the Institute for Comparative Law, Conflict of Laws and International Business Law and Full Professor of Private Law, Private International Law, Comparative Law and International Dispute Resolution, Heidelberg University

Quincy C. Lobach, Research Fellow, Institute for Comparative Law, Conflict of Laws and International Business Law, Heidelberg University

Tobias Rapp, Doctoral Candidate, Institute for Comparative Law, Conflict of Laws and International Business Law, Heidelberg University

UNIVERSITÄT
HEIDELBERG
ZUKUNFT
SEIT 1386

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