

## THEMIS COMPETITION

INTERNATIONAL JUDICIAL COOPERATION  
IN CIVIL MATTERS - EUROPEAN FAMILY LAW  
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# MATRIMONIAL PROPERTY REGIMES AND PROPERTY CONSEQUENCES OF REGISTERED PARTNERSHIPS

## PARTICIPANT TEAM

Team members: KATERINA KARACHALIOU

OURANIA PANTELIADOU

CHRYSOULA-IFIGENIA SALAMANI

Institution of origin: National School of Judges

Accompanying Teacher: Mr. CHRISTODOULOS KYRTSIDIS

Country: Greece

## **A. INTRODUCTION**

### **A.1. General background**

The constitution of an area of freedom, security and justice with respect for fundamental rights, different legal systems and disparate traditions of the Member States, has long captured the attention of the European Union. It has, therefore, been explicitly provided as one of its main goals by Article 67 of the Treaty of the Functioning of the European Union. Within this framework and in order for both unfettered access to justice and effective settlement of the EU citizens' disputes to be facilitated, the European Union equally soon acknowledged the importance of the mutual recognition and enforcement of judgements and decisions between Member States in judicial cases, as well as the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction (Article 81 of the Treaty).

However, although a series of instruments with regard to matrimonial matters and matters of parental responsibility has already been adopted, Regulation (EC) No 2201/2003 being the principle, the issue of property rights arising out either of a matrimonial relationship or a registered partnership has not yet met an efficient solution. The Programme on mutual recognition of decisions in civil and commercial matters, adopted by the Council on 30 November 2000<sup>1</sup>, the Hague Programme, adopted by the European Council on 4 and 5 November 2004<sup>2</sup>, as well as the Stockholm Programme, adopted by the European Council on 11 December 2009, distinctly pointed out that there was an urgent need for a legislative initiative by the Commission on the conflict of laws, jurisdiction and mutual recognition of judgements and decisions regarding matrimonial property regimes and property consequences of unmarried couples.

The said need was primarily a result of the important differences that exist between the continental and common law jurisdictions in general, but as to certain concepts of matrimonial property as well. For example, the concept of "property in trust", which under English law is considered an asset, has been frequently disregarded by continental laws. Furthermore, the great disparities of the applicable rules, both in terms of private international law and substantive law, regarding the property effects of

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<sup>1</sup> OJ 12, 15.1.2001, p.1

<sup>2</sup> OJ 53, 3.3.2005, p. 1

marriage or registered partnerships, could lead to equally great difficulties being encountered by couples at an attempt of the division of their property. On the other hand, the lack of certain legislation with regard to the said matters, could result in the rise of the phenomenon of “forum shopping”, which allows the most financially influential party to bring the case in the court that in his/her consideration offers the best chance of realizing his/her objectives<sup>3</sup>. Last but not least, the lack of legislation with regard to the issues in question, could lead to a severe restriction to move from one country to another and thus to an impediment to the implementation of Article 3 par. 2 of the Treaty of the European Union.

Acknowledging, therefore, a potential international character of a case concerning matrimonial property rights or rights arising from a registered partnership and the need for legal certainty and predictability of result, especially regarding the immovable property of couples, the European Commission announced on 16 March 2011 two proposals for legislation on the issues of jurisdiction and applicable law regarding property rights of transnational married or registered partners. Specifically, due to the cross-border implications that such matters of family law present, the said requirement of Article 81 par.3 being thus fulfilled, and having regard to both the subsidiarity principle, according to which the proposals’ objectives could only be achieved through common rules at a Union level and of the proportionality principle, according to which the proposals are strictly limited to what is necessary to achieve their objectives, the European Commission presented its two proposals.

Matters of jurisdiction and applicable law, as defined by the two proposed Regulations mentioned above, constitute the main subject of the current paper.

## **A.2. Objectives of the proposed Regulations**

The objectives of the two proposed Regulations, as defined by the title and the content of the respective legal instruments, lie in determining jurisdiction and the law applicable to matters of matrimonial property regimes and property consequences of registered partnerships in addition to facilitating the recognition and enforcement of the relevant decisions among the Member States. Thus, the two proposals aim at establishing a consistent set of rules of Private International Law at a European level,

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<sup>3</sup> Practical Problems Resulting from the non-harmonization of choice of law rules in divorce matters, JAI/A3/2001/04, T.M.C. Asser Instituut, The Hague, The Netherlands, December 2002, p. 9

which will apply to cross-border cases regarding the property relations of international couples, either married or in a registered partnership. This attempted unification of rules of law will in turn enable the free movement of persons in the European Union.

Within the scope of the proposed legislative initiatives fall all civil matters related to the administration of the marital property and the property acquired by registered partners as well as the division and liquidation of such property as a result of death of one of the spouses or registered partners or in cases of divorce, judicial separation or marriage annulment or upon dissolution or annulment of a registered partnership. The importance of this provision derives from the fact that such issues concern not only spouses or registered partners but their relationships with third parties as well. Furthermore, the proposals comply with other policies pursued by the European Union, as they incorporate the Commission's effort to dismantle the obstacles faced by European Union citizens, international couples in particular, while exercising their property rights<sup>4</sup>. Besides, the adoption of the aforementioned proposals would also ensure the free movement of court decisions among Member States and eventually provide the necessary legal framework for judicial cooperation in civil matters, especially family law matters.

The proposed legal instruments do not aim at affecting the Member States' substantive law on matrimonial property regimes and the property consequences of registered partnerships, which - under the provisions of the Treaties - remains a matter of national competence.

The choice of the legal form of the proposals, namely the form of Regulations, is based on their fundamental attribute of direct force, which means that they do not require transposition into the Member States' national laws. The Commission's initiative consists of two separate proposals, the proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and the proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, due to the distinctive features of marriage and registered partnership, in addition to the different legal consequences deriving from

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<sup>4</sup> European Commission, EU CITIZENSHIP REPORT 2010, Dismantling the obstacles to EU citizens' rights, COM(2010) 603 final, Brussels, 27.10.2010, page 5

these two forms of union, as it is clearly stated in the explanatory memorandum of the proposals<sup>5</sup>.

Finally, because of the disparities which exist among the national laws of Member States concerning the recognition of same-sex marriage and registered partnership, the two proposals are presented as ‘gender neutral’<sup>6</sup>, allowing each Member State to decide whether the relative provisions will cover apart from opposite-sex couples, couples of the same sex as well, either married or in a registered partnership.

### **B.1. Definitions and scope of the proposed Regulations**

The proposed Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes refers to the property relations of spouses, encompassing both the daily management of marital property, namely the property acquired during marriage, and the liquidation of this property upon death of one of the spouses or in cases of divorce, judicial separation or marriage annulment<sup>7</sup> as well as the property consequences arising from relations and transactions between spouses and third parties. Within this framework, ‘matrimonial property regime’ is defined, under the provision of Article 2 (a) of the proposal, as a set of rules concerning the property relationships of spouses, between the spouses and in respect of third parties.

The second proposal for a Council Regulation consists of provisions on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships. According to Article 2 (b) of the relevant proposal, ‘registered partnership’ is a regime governing the shared life of two people which is provided for in law and is registered by an official authority. Registered partnership appears to be a new potential form of a couple’s union, other than the well-known and long-established legal institution of marriage, which becomes official as a result of this formal registration with a public authority and is therefore distinguished from de facto cohabitation. It should be, however, noted that the above mentioned

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<sup>5</sup> COM (2011) 126 final, 2011/0059 (CNS), page 3, COM (2011) 127 final, 2011/0060 (CNS), page 3

<sup>6</sup> European Commission, 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, Brussels, 16.03.2011, page 6

<sup>7</sup> COM (2011) 126 final, 2011/0059 (CNS), page 6, 12

definition of registered partnership is intended to fulfil the proposed Regulation's requirements only, since the actual substance of the concept is analysed by the Member States' national laws<sup>8</sup>. Furthermore, the term 'property consequences' refers to the set of rules concerning the property relationships of the partners, between themselves and in respect of third parties, resulting from the link created by the registration of the partnership, as it is provided for in Article 2 (a) of the proposal. Thus, the property relationships between registered partners and between the partners and third parties require the prior existence of registered partnership and last until the dissolution of the aforementioned union occurs, either in the event of death of one of the partners or in cases of separation of the partners or annulment of the officially recognised partnership.

As far as the scope of the proposed Regulations is concerned, it is defined in a negative way, as Article 1 provides for matters excluded from it on the basis of already being covered by other legal instruments, such as the capacity of spouses or partners, the personal effects of registered partnerships when the union constitutes a registered partnership, maintenance obligations, gifts between spouses or partners, the succession rights of a surviving spouse or partner, companies set up between spouses or registered partners and finally the nature of rights in rem relating to property and the disclosure of such rights.

## **B.2. JURISDICTION**

Chapter II of the proposal concerning jurisdiction in matters of matrimonial property regimes comprises articles 3 to 14 and provides for jurisdiction in the event of the death of one of the spouses, in cases of divorce, legal separation or marriage annulment, in cases other than the aforementioned above, subsidiary jurisdiction, a forum necessitatis case, jurisdiction over counterclaims and related pending actions and finally provisional measures.

In particular, in a succession of a deceased spouse case (Article 3), courts competent under (EC) 650/2012 Succession Regulation to judge on a related application, shall also have jurisdiction on matrimonial property regime matters associated with this application pursuant to articles 4 and 5 of the Regulation. These two articles determine jurisdiction in case where the deceased made no choice of law under

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<sup>8</sup> COM (2011) 127 final, 2011/0060 (CNS), page 13

Article 22 of the Succession Regulation and in case where the law of the Member State of his or her nationality is chosen to be applied to a future succession, respectively. Specifically, Article 3 of the Proposal extends the jurisdiction of the last habitual residence Courts of a Member State at the time of death on matters of succession relating to the deceased's estate along with dissolution of the spouse's matrimonial property regime in a way that both procedures are heard before the same court securing the legislators' aim for practicality, convenience and legal certainty. Furthermore, Articles 5, 6, and 22 of the Succession Regulation and Article 3 of the proposal also establish a jurisdiction by extension, according to which a deceased can attribute competence to the Member State Courts of his or her nationality by designating its law as the law applicable to succession and the arisen matters of the matrimonial property relations, provided that the parties concerned agree. Interested parties are given therefore the potential to confer jurisdiction upon the courts of a Member State other than the deceased's last habitual residence judging by their actual links to that Member State or one of the parties concerned, according to Article 6(a) of the Succession Regulation, can successfully petition for the court of the chosen national law to hold the proceedings for both succession and property relations. In the definition of 'concerned parties', heirs, such as the surviving spouse and their children, legatees and creditors are encompassed. In accordance with Article 3 of the proposal, the Courts of a member state seized by an application concerning the succession of a spouse under the Succession Regulation shall also have jurisdiction on matters of the matrimonial property regime. Subsequently, agreement or initiative of the concerned parties plays a determinant role in the establishment of the deceased's national court jurisdiction or of that of last habitual residence taking into account practical matters, especially the location of the assets. Where this agreement does not exist, Article 5 of the proposal referring to jurisdiction in other cases, claims implementation in accordance with Article 3.

Moreover, the Succession Regulation provides for circumstances of subsidiary jurisdiction under Article 10, when the deceased was not habitually resident in a Member State at the time of his or her death, the implementation of which in accordance with Article 3 of the Proposal may also determine jurisdiction for the dissolution of a matrimonial property regime. The above case can be dealt with, when the deceased died in a third country but being both owner of immoveable property in a member state and a

national of that member state at the time of death. The courts of the location of the assets would thereof be competent to judge on matters related to the shared spousal assets, regardless any inconvenience for the surviving spouse a foreign jurisdiction may entail. Article 3 of the Proposal seems to ignore the fact that even if the deceased's one individual asset lies in a state other than that of the spousal habitual residence, then the Courts of that Member State will have a general jurisdiction over succession in its entirety. When the spouse does not agree with this extension, Article 5 (1) of the proposal can be applied for the determination of jurisdiction. Article 10 of the Succession Regulation provides for jurisdiction on certain assets by the member state Courts in which these assets are located, so that two parallel proceedings may be brought before the Courts of the spousal habitual residence and the location of the assets as well. It is not being clarified by Article 3 of the Proposal which of the above two Courts will eventually rule on matrimonial property regime matters by extension of its jurisdiction.

There is a final exceptional provision for jurisdiction in the Succession Regulation, when none of the above mentioned can initiate proceedings on succession, that is a *forum necessitatis*, based on the existence of a sufficient connection with the Member State of the Court seized. It is being applied for finding the competent Court mostly when the deceased had no immovable property neither in any member state nor in another third country. Since there is no clear definition for sufficient connection and an assumption can be drawn, that courts of the spouses' former habitual residence may rule on such a succession. Article 3 of the Proposal seems to extend the existing legal uncertainty in succession to the matrimonial property regime as well.

In Article 4 of the proposal there is a direct reference to (EC) No 2201/2003 Council Regulation Brussels II bis and enacts the same jurisdiction over applications for divorce, judicial separation or marriage annulment with matters of matrimonial property regime related to and following these applications according to the above Regulation, on condition of the spouses' agreement. In Article 5 (1) of the Proposal jurisdiction is established due to lack of a Court agreement between the spouses, which sets out a list of linking factors in order of precedence for determination of jurisdiction, independently of any succession or separation proceedings (e.g. a change of matrimonial regime at the initiative of the spouses). May this be the case, the spouses are entitled to submit



questions related to their matrimonial property regime to the Courts of the Member State of the law they choose as the law applicable to this regime after the conclusion of an agreement at any moment even during the proceedings. Under Article 5 (1) of the Proposal, the proposed criteria include in a hierarchical order the spouses' common habitual residence, their last common habitual residence, if one of them still resides there, the defendant's habitual residence, the nationality of both spouses, or their common 'domicile' for the United Kingdom and Ireland. The first three widely used criteria frequently coincide with the location of the spouses' property, as explicitly stated in section for comments on the Articles of the Proposal itself.

As it is easily conceivable, the first three criteria are identical with the first three indents of Article 3(1)(a) and the last 3(1)(b) indent of Brussels II bis Regulation, as far as their content is concerned. There is a differentiation between the Proposal and Brussels II with indents 4, 5 and 6 under this Article of the latter Regulation. The exemption from the Proposal of the event of a joint application, when either of the spouses is habitually resident in the Member State whose Courts have established jurisdiction [Art. 3(1)(a) indent 4] can be balanced by the agreement may be concluded by the spouses, under Article 4 of the Proposal, through which they have the potential to extend the Court's jurisdiction for divorce proceedings to the liquidation of their matrimonial property. Perhaps the most crucial difference between the respective provisions lies in the nature of lists, the hierarchy which Article 5(1) of the Proposal forms, while Article 3 of Brussels provides an alternative of fora. With both Brussels II and the Proposal entering into force there will be a possibility, matters of dissolution or liquidation of the marital property will be judged by the defendant's habitual residence Court in accordance with the third connecting factor of the Proposal (when the prior two are excluded), whereas couple's divorce will be pronounced by the Court in which the applicant currently resides and petitions for divorce. Such a case might occur, when the spouses have not reached an agreement concerning their divorce and the resulting property implications and can be, indicative of the non concentration in one Court of all the related procedures. This constitutes a divergence from the EU legislator's aim and incurs greater expense, longer procedure, loss of time and a difficulty to easy access to justice for the parties involved. To obviate the problem, there are certain recommendations being made, such as to set out the grounds provided in Article 5(1) as

alternatives to Article 3(1)(a) of Brussels II bis, either all the grounds provided for in Article 3(1) to be reproduced in the Proposal or of Brussels II bis to be amended to exclude the last three indents of Article 3(1)<sup>9</sup>.

In the seventh revised text of the Proposal, the jurisdiction seized for divorce under the first 4 indents of Article 3(1)(a) Brussels II bis automatically extends to matrimonial property proceedings (Article 4(1) of the seventh revised text) and when the Court of divorce is seized under fifth and sixth indents of Brussels II bis, an agreement between the spouses is still required (Article 4(2) of the Council's seventh revised text) to avoid two parallel proceedings take place in Courts of different Member States.

Article 4 of the Proposal in conjunction with Article 3(1)(a) of Brussels II bis provides couples with the ability to designate the Court of their common habitual resident as the competent Court to rule on matters of their matrimonial property regime following a previous divorce by way of a concluded agreement. There is not any contradiction between the first three indents of Article 3(1) Brussels II bis and the practice of agreements established by Article 4 of the Proposal, although there is not a provision for choice of court agreements in divorce proceedings under Brussels II Regulation. The latter does not permit couples to jointly determine in advance the Court that would declare a possible future divorce, but a following change in the actual circumstances in the future, that is the habitual residence either of the spouses, would render the Court of another Member State competent to handle both the divorce and the liquidation of the matrimonial property under Brussels II Regulation and the agreement of Article 4 of the Proposal. Article 4(1) of the Council's seventh revised text of the Proposal automatically links the jurisdiction on matrimonial property matters arising from divorce with the jurisdiction seized under the first four indents of Article 3(1)(a) of Brussels II bis. Article 4(2) of the Council's seventh revised text of the Proposal provides the opportunity for the parties to make an agreement linking the jurisdiction of divorce with that of the related dissolution of the matrimonial property estate only in situations in which the court is seized for divorce under the fifth or sixth indents of Article 3(1)(a) of Brussels II bis. However, under Article 5a of this same revised text, the spouses can also make an agreement designating the Member State court of the law

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<sup>9</sup> Stress-Testing the EU Proposal on Matrimonial Property Regimes: Co-operation between EU private international law instruments on family matters and succession, LL.M., Jacqueline Gray en LL.M. Pablo Quinzá Redondo

chosen to apply to their matrimonial property relations in general. It is implied that this court would then be responsible for matrimonial property proceedings connected with divorce. However, while this latter provision supplements Article 4(2) in terms the choice of jurisdictions upon which an agreement can be made, in the absence of the opportunity to make a choice of court agreement under Brussels II bis, neither of these provisions offers spouses the opportunity to make a definitive agreement which secures the same jurisdiction for both divorce and the related matrimonial property proceedings in advance<sup>10</sup>.

Where Articles 4 and 5 cannot be applied, Article 6 of the Proposal about subsidiary jurisdiction will be applied on condition that one or both spouses afford property located in the territory of a Member State, whose Courts will have jurisdiction but to rule only in respect of the property or properties in question, as the Article states itself. The provision is equivalent of Article 10 (2) of the Succession Regulation. The practicality of subsidiary jurisdiction upon divorce may well be understood in the exemplary case, where two different nationals have gotten married, they own property estate in different Member States and they eventually decide to separate, with one of the spouses having moved to a third country, when the other has filed for divorce in the Member State of his or her nationality or habitual residence within the EU's territory. Additionally, in the above mentioned case there is a lack of agreement between the spouses, pursuant to Article 4 of the proposal and the hierarchical fora of Article 5(1) are not applicable, because the couple do not have a common habitual residence, neither of them is still residing at the couple's last common habitual residence, the defendant is no longer living in a Member State and the couple do not share the same nationality. Under subsidiary jurisdiction of Article 6, there is the possibility that more than one parallel proceedings could be instituted, each one to rule on the property located within a Member State's territory, a fact that deconstructs the legislator's aim for consistency, legal certainty and non dispersion over legal proceedings.

A last form of exceptional jurisdiction, establishes Article 7 of the Proposal, which dictates a forum necessitatis, when Articles 3, 4, 5 and 6 are not applicable, so that ruling on a matrimonial property regime case would be impossible for a Member State Court. The only requirement set out by the Article is that of 'a sufficient

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<sup>10</sup> Ibid 9

connection' with the Member State called on to judge. For the realization of forum necessitatis, a couple shouldn't afford immovable property in any EU member state, but in a third country and all the other legal requirements of subsidiary jurisdiction of Article 6 to coincide. As a sufficient connection could be interpreted a previous Court's seizure on divorce proceedings, so that it would subsequently establish its jurisdiction for the related matrimonial relations. Jurisdictional competence to hold the divorce proceedings would probably arise from the current new habitual residence of the applicant spouse.

The Proposal also includes a provision for counterclaims in Article 8, the judgment of which properly falls within the pending proceedings of the Court seized and for related actions in Article 13, which dictates the court other than the court first seized to stay its proceedings. Both provisions reflect the legislator's aim for legal certainty, uniformity of implementation and ruling on all related disputes by the same court only.

The legislative framework for the property assets acquired in all forms of family relations is being supplemented by the Council's Proposal regarding the property consequences of registered partnerships. The structure of the text is very similar to that of matrimonial property regime, adjusted to the different legal consequences resulting from these forms of unions, as most member states with legal provision for partnerships make the rules as similar as possible to those of marriage. The proposal's rules on jurisdiction are concerned only with cross-border cases, such as in the Proposal for matrimonial property regime and by setting out objective criteria for determining the court having jurisdiction, parallel proceedings and appeals precipitated by the most active party can be avoided. The proposal's second chapter on jurisdiction also consists of Articles 3 to 14, which have the same titles, provisions for identical cases but with some minor variations in their legal treatment because of the different form of legal unions and serve the common purpose of having the related procedures handled by the courts of the same Member State at citizens' convenience. Specifically, Article 3 establishes the extension of jurisdiction to include the liquidation and other consequences of the property relationship of a registered partnership resulting from a succession, provided that the domestic substantive law of the court having its jurisdiction extended provides for the institution of registered partnership. Otherwise, it may decline its jurisdiction. Given the recognition of registered partnership, to establish

a Member State Court jurisdiction there would be a list of connecting factors, in order of precedence, such as the partners' common habitual residence, their last common habitual residence, if one of the partners still resides there, the defendant's habitual residence and lastly the Member State where the partnership was registered. These proposed criteria are set out in Article 5 (1) and fully align with the three first indents of Brussels II bis Regulation.

Furthermore, Article 4 of the Proposal clearly states that partners, with an expressly concluded agreement, may confer jurisdiction upon the Court seized of their previous application for dissolution or annulment of a registered partnership to include matters relating to its property consequences and by lack of a relevant agreement, the hierarchical criteria of Article 5 will determine the Courts having jurisdiction to rule on both matters of dissolution of partnership and property. The importance of the latter is highlighted in cases the partners have not foreseen to choose from the various legal versions offered to them by the interaction of internal law and EU legislation. The proposed criteria are classified in such an order, so as to ensure the closest link between the partners and the Member States Courts' territorial jurisdiction concerning mostly immovable properties within. When a Court has established jurisdiction based either on the criterion of the common habitual residence or of the last common habitual residence or of the defendant's habitual residence, has always the power to decline jurisdiction if the domestic law does not provide for registered partnership (Article 5 (2)).

Finally, this proposal to avoid any risk of denial of justice, establishes a subsidiary jurisdiction in Article 6, as an alternative jurisdiction, when the aforementioned provisions fail to apply, based on the location of property and limited only to the property in question and a *forum necessitatis*, as an exceptional jurisdiction based on the linkage of the 'sufficient connection'. The two provisions are identical in terms of content except that the subsidiary jurisdiction for registered partners adds an alternative forum, that of the nationality of both partners or 'common domicile' for the UK and Ireland, a legal basis also included in Article 3 (1) of Brussels II bis Regulation.

### **B.3. APPLICABLE LAW**

The attempt of creating an international legal framework for determining the law

applicable to matrimonial property regimes dates back to 1978, when the Convention on the law applicable to matrimonial property regimes was concluded within the action taken by the Hague Conference on Private International Law. Although the Convention entered into force in 1992, the fact that only three Member States have ratified it unavoidably limited its contribution to an effective solution to the issue studied.

In accordance with the general perspective of the two proposed Regulations, namely the unification of rules of Private International Law, Article 15 of the proposal regarding matrimonial property regimes, under the title ‘Unity of the applicable law’, provides that the law applicable to a matrimonial property regime, either chosen by the spouses according to the provisions of Article 16 or established on the criteria set by Article 17, when no choice is made, or even designated after a change decided by the spouses, allowed by Article 18, will apply to all the couple’s property, both movable and immovable, irrespective of its location<sup>11</sup>. Moreover, Article 21 of the same proposal and Article 16 of the proposal regarding the property consequences of registered partnerships render the nature of the conflict-of-law rule ‘universal’, providing that any law determined as the applicable law based on the relevant provisions of the proposals shall apply even if it is not the law of a Member State. Before continuing, it should be noted that every reference made by the aforementioned proposals to the application of the law of a State indicates the application of the rules of substantive law in force in that State (Article 24 of the proposal for a Regulation concerning matrimonial property regimes and Article 19 of the proposal for a Regulation on the property consequences of registered partnerships)<sup>12</sup>.

Under the provision of Article 16 of the proposal related to matrimonial property regimes, the spouses or future spouses are granted the right to choose the law applicable to their matrimonial property regime as long as their choice fulfils the requirement of a close connection to the marital status on the grounds of habitual residence or nationality of the couple. In detail, the spouses or future spouses can choose between the law of their habitual common residence or the law of the habitual residence of one of the spouses at the time this choice is made or the law of nationality of one of the spouses or future spouses at the time this choice is made. The choice of applicable law can be made

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<sup>11</sup> COM (2011) 126 final, 2011/0059 (CNS), Explanatory memorandum, pages 7, 8

<sup>12</sup> Also see website : [ec.europa.eu/justice/civil/glossary/index\\_en.htm](http://ec.europa.eu/justice/civil/glossary/index_en.htm)

at any moment, at the time of the marriage or during the course of the marriage<sup>13</sup>, however ensuring legal certainty requires that the connecting factors mentioned above are linked with a specification of time. This link is provided for in cases (b) and (c) of Article 16, but it doesn't cover case (a), allowing this way the spouses to define their common habitual residence without any limitation, stipulating any previous shared habitual residence or even an indefinite future residence<sup>14</sup>. That is why, the latter is not included in the Council's seventh revised text of the Proposal. Apart from that, issues of controversy are likely to emerge during the implementation of the principle of party autonomy between Article 16 of the proposal and Articles 21 and 22 of Succession Regulation No 650/2012, in cases of choice of the applicable law upon succession. Imagine, for example, an international couple of a Greek man and a Spanish woman choosing the law of their common habitual residence, namely Greece, to govern their matrimonial property under Article 16(a) of the Proposal. The Spanish woman, yet, moves to Spain due to a fatal illness, where she eventually dies. Under Article 21(1) of the Succession Regulation, the law of the habitual residence of the deceased at the time of their death will generally apply to their succession. In this sense, it becomes more than obvious that there are more than one law qualifying for application. Similar is the case with regard to Article 16 and Article 5 par. 1 of the Council Regulation No 1259/2010, implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III), when the choice of applicable law is made upon divorce<sup>15</sup>. Lack of coordination between the above mentioned legal instruments consequently incurs lack of legal certainty.

When no choice is made, the applicable law governing the property effects of marriage is established based on a scale of connecting factors provided for in Article 17 of the respective proposal with a view to the mobility of couples and the respect of the spouses' free will in addition to the need for predictability and legal certainty<sup>16</sup>. The first common habitual residence of the spouses after their marriage constitutes the first

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<sup>13</sup> COM (2011) 126 final, 2011/0059 (CNS), page 14

<sup>14</sup> Jacqueline Gray, Stress-Testing the EU Proposal on Matrimonial Property Regimes: Co-operation between EU private international law instruments on family matters and succession, Article published in website : [www.bjutijdschriften.nl](http://www.bjutijdschriften.nl), page 19

<sup>15</sup> See Jacqueline Gray, *ibid* 14, pages 19, 20, 21

<sup>16</sup> COM (2011) 125 final, Brussels, 16.03.2011, page 8, COM (2011) 126 final, 2011/0059 (CNS), page 14

criterion of choice, reflecting the attention paid to the social life of a married couple- Article 17 (a). Failing that, the spouses' common nationality at the time of their marriage is presented under Article 17 (b) as the second connecting factor. Finally, if none of the previous criteria applies, Article 17 (c) designates the law of the State with which the spouses jointly have the closest links, taking into account all the circumstances, in particular the place where the marriage was celebrated (*lex loci celebrationis*), as the law applicable to the matrimonial property regime. Unlike the other criteria which appear to be objective, the last one seems vague, incurring problems upon implementation. Problems of coordination between EU instruments, like the ones mentioned in the previous paragraph, exist in respect of the law applicable in the absence of the spouses' choice as well<sup>17</sup>.

Furthermore, the spouses are entitled under the provision of Article 18 of the proposal concerning matrimonial property regimes to change the law applicable to their matrimonial property regime at any time during the marriage, designating as applicable either the law of the State of habitual residence of one of the spouses at the time this choice is made or the law of a State of which one of the spouses is a national at the time of this choice. Only a voluntary change of applicable law is provided for in the proposal. Moreover, such a change shall be effective only in the future, unless the spouses desire otherwise. However, if the spouses opt for retroactive effect of the change of applicable law, this should not affect the validity of previous transactions or violate the rights of third parties.

In order to ensure legal certainty and with the purpose of protecting the vulnerable party in a marriage as well as third parties, Articles 19 and 20 of the above mentioned proposal provide for formal requirements in relation to the process of making a choice of applicable law as well as the formation of a marriage contract. A document dated and signed by both spouses is demanded in any case.

On the contrary, no right of choosing is given to registered partners, as Article 15 of the proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships identifies as the law applicable to the property consequences of the above mentioned union the law of the State in which the partnership was registered.

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<sup>17</sup> See Jacqueline Gray, *ibid* 14, pages 17, 18



Although not explicitly stated, the application of the law of registration covers all the property acquired by registered partners<sup>18</sup>. Given the differences between the national laws of Member States which recognize registered partnerships, the rule adopted in Article 15 leads to a clear legal framework for determining the law applicable to the property relations deriving from registered partnership and the property effects produced in cases of dissolution of this form of union<sup>19</sup>, which additionally appears to be in line with the provisions of the Member States' national laws concerning registered partnerships.

The implementation of the provisions of the two proposed Regulations in respect of determining the law applicable to matrimonial property regimes and property consequences of registered partnership is subject to a limitation, described with the terms 'overriding mandatory provisions' and 'public policy'. According to Article 22 of the proposal mentioned first and Article 17 of the second one, the provisions of the Regulations under negotiation shall be set aside in exceptional circumstances, if they are opposed to overriding mandatory provisions, allowing the courts of a Member State to apply the latter in order to serve the need of protecting its public interests, notably its political, social or economic organisation. National rules concerning the protection of family home are mentioned as a prominent example in the explanatory memorandum of the proposals<sup>20</sup>. Similarly, Article 23 of the first of the proposals mentioned above provides that the application of a rule of the law determined by the proposed Regulation may be refused if such application is manifestly incompatible with the public policy of the forum. For instance, the conclusion of a prenuptial contract, which is prohibited under English domestic law, would be considered as contrary to public policy in England and yet valid under the law of another Member State. Furthermore, reservations of public order could arise in regard of unions of the same sex, given that the national laws of some Member States recognise same-sex marriages and registered partnerships whereas others are opposed to them<sup>21</sup>. Article 18 of the second proposal has the same

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<sup>18</sup> COM (2011) 127 final, 2011/0060 (CNS), pages 8, 14

<sup>19</sup> COM (2011) 125 final, Brussels, 16.03.2011, page 8

<sup>20</sup> COM (2011) 126 final, 2011/0059 (CNS), page 9, COM (2011) 127 final, 2011/0060 (CNS), page 8

<sup>21</sup> Practical problems resulting from the non-harmonization of choice of law rules in divorce matters, *ibid* 3, pages 47, 48

content, only adding that the application of a rule of the law determined by the proposed Regulation may not be regarded as contrary to the public policy of the forum merely on the grounds that the law of the forum does not recognise registered partnerships. However, the application of the imperative provisions or the public policy exception requires that it complies with the rights protected in the Charter of the European Union, which has obtained a legally binding effect after the Treaty of Lisbon, particularly Article 21 that prohibits all forms of discrimination<sup>22</sup>.

Lastly, Articles 25 and 20 of the two proposals provide solutions for cases of States which comprise two or more legal systems governing the matters under regulation, namely cases of territorial conflicts of laws.

### C. CONCLUSION

Overall, the Proposed Regulation can actually be seen as a legislative initiative that enhances legal certainty and predictability of result for cross-border couples in their property relations. Specifically, it effectively coordinates with other EU instruments in order to lead all related disputes in the same court and takes a significant step to unify private international law rules in the area of matrimonial property regimes. However, there are still issues relating to the said initiative that seem not to have met an effective solution yet.

Acknowledging the ambiguity of the proposed Regulation as to the scope of its application, the European Parliament formulated to this effect a series of amendments, which have been adopted in Article 1(3) of the Council's seventh revised text of the Proposal. The said amendments provided, for example, for a broader list of exclusions of the scope of the proposed Regulation, which included the existence, validity or recognition of a marriage, the registering of rights in immovable or moveable property and the entitlement of the spouses, upon divorce, to transfer the rights to retirement or disability pensions accrued during marriage. At the same time, the European Parliament Committee on Legal Affairs went even further to make a recommendation in its legislative resolution on the Proposal according to which *'The law applicable to a matrimonial property regime shall determine, without prejudice inter alia... the dissolution and liquidation of the matrimonial property regime and division of property*

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<sup>22</sup> COM (2011) 126 final, 2011/0059 (CNS), page 15, COM (2011) 127 final, 2011/0060 (CNS), page 14

*in the event of dissolution of the marriage*<sup>23</sup>.

Nevertheless, it is still obvious that it is not easy to draw a distinction between the spousal maintenance questions, which would be covered by the Maintenance Regulation and the matrimonial property issues, which would fall under the scope of the proposed Regulation on matrimonial property regimes. For example, it is still not determined what the case would be in the event the liquidation of the matrimonial property, as provided by the amendments formulated by the European Parliament, would take place in order for one's matrimonial maintenance obligation to be fulfilled.

The said problem, besides, becomes even greater due to the fact that in some member states (e.g. England and Ireland) a formal distinction between property division and maintenance does not exist, as these questions are dealt as part of the same claim<sup>24</sup>. Specifically, the matrimonial property regime is an institution unknown to English law<sup>25</sup>, while at the same time English law is remarkable in the extent of the court's statutory powers to make financial provision orders, property adjustment orders or sale orders in divorce proceedings<sup>26</sup>. That in turn means that, if the United Kingdom decides not to take part in the application of the proposed regulation, the recognition and enforcement of English decisions on financial relief concerning matrimonial property might be substantially more complicated in other member states than the enforcement of English maintenance decisions<sup>27</sup>. As a result, the currently proposed amendments to the proposal do not seem to clear the matter<sup>28</sup>. Similarly to the proposal on matrimonial property regimes, the proposal on the registered partnerships also excludes maintenance

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<sup>23</sup> The European Parliament Committee on Legal Affairs, European Parliament legislative resolution of 10 September 2013 on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (COM(2011)0126 – C7-0093/2011 – 2011/0059(CNS), Draft Report on the proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, JURI\_PR(2012)494578, Amendment 58, Article 15 – Paragraph 1 a (new)

<sup>24</sup> Tone Sverdrup, 'Maintenance as a Separate Issue – the Relationship between Maintenance and Matrimonial Property' in Katharina Boele-Woelki (ed), *Common Core and Better Family Law in European Family Law* (Intersentia 2005), 119

<sup>25</sup> CRETNEY, S., MASSON, J.M. and BAILEY-HARRIS, R., *Principles of Family Law*, Sweet & Maxwell, London 2003, p. 89

<sup>26</sup> Branka Rešetar, *Matrimonial Property in Europe: A Link between Sociology and Family Law*

<sup>27</sup> Maarja Torga, *Characterization of 'spousal maintenance obligations' in European private international law*

<sup>28</sup> Trevor C Hartley, 'Matrimonial (Marital) Property Rights in Conflict of Laws: A Reconsideration' in James Fawcett (ed), *Reform and Development of Private International Law Essays in Honour of sir Peter North* (Oxford University Press 2006), 231

obligations from its scope and may thus produce similar problems in the future in property and maintenance disputes between the registered partners.

To go even further, in the event of a case that seems to be able to be characterized both as a “matrimonial property case” and a “matrimonial maintenance case”, the implementation of the Maintenance Regulation seems to qualify. That is because, firstly, the proposed regulation on matrimonial property regimes does not foresee any abolition of *exequatur*, which is considered to be a drawback, and secondly, because such decisions are enforced in the other Member States without the need for a declaration of enforceability as opposed to the previous regime found in the Brussels I Regulation<sup>29</sup>. That in turn leads in the rules on recognition and enforcement of decisions being less beneficial for the creditors than the relevant rules contained in the Maintenance Regulation, while at the same time one could allege that it would be more beneficial to treat the borderline cases as ‘matters of maintenance’.

On the other hand, the proposed Regulation fails to solve another issue as well. The member states’ disparate legal regimes with regard to the definition and recognition of same-sex marriage as valid, could cause severe problems regarding issues of jurisdiction in the event a member state would not recognise same-sex marriage in its substantive law and could thus deny all effects of that marriage and, therefore all property consequences relating to this relationship. The important differences, besides, that exist between the continental and common law jurisdictions in general, but as to concepts such as “property in trust” and “ante nuptial contracts” could equally trigger questions regarding the application of the law chosen.

For all the above reasons, it has already been alleged that the creation of a supranational court, namely a “European Court of Family Law” might lead to the solution of the aforesaid problems<sup>30</sup>. Such a Court could be in the position of initially characterizing the nature of the case, apply the law chosen by the parts and leave no space for the contradiction of jurisdiction or the enforcement of its adjudications.

Furthermore, it is also considered that the introducing of a central registration system which could be accessed throughout the European Union would minimize specific problems. That is because such a system would enable all interested parties to

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<sup>29</sup> Maarja Torga, *ibid* 27

<sup>30</sup> Practical Problems Resulting from the non-harmonization of choice of law rules in divorce matters, *ibid* 3

be apprised of the existence of matrimonial property regimes and contribute towards a degree of certainty relating to possible legal repercussions. At the same time, besides, legal professionals would be able to make searches into the legal position of individuals across the entire twenty eight Member States and parties would therefore be in a better position to enter into transactions based on this knowledge<sup>31</sup>.

Last but not least, given the fact that in most member states the organization of the courts is such that international cases are only few, the specialization of judges in international cases is considered crucial. In that sense, the competent judge will be able not only to know well the statutory foreign law and its interpretation, but he/she will be able to understand well, through the said specialization, the cultural differences of the member state that led to the enactment of the said family law rule. And that in turn will allow him/her to apply it correctly and bring about a right legal judgement<sup>32</sup>.

Within this framework the aim of the proposed Regulations could be best achieved: Legal certainty, practicality and predictability of result will be ensured for millions of EU nationals that both live in a Member State of which they are not a national or own real property in Member States other than that of their residence.

#### **D. BIBLIOGRAPHY - SOURCES:**

1. Practical Problems Resulting from the non-harmonization of choice of law rules in divorce matters, Final Report, JAI/A3/2001/04, T.M.C. Asser Instituut, The Hague, The Netherlands, December 2002
2. European Commission, EU CITIZENSHIP REPORT 2010, Dismantling the obstacles to EU citizens' rights, COM (2010) 603 final, Brussels, 27.10.2010
3. European Commission, 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, Brussels, 16.03.2011

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<sup>31</sup> The Future EU Regulation Concerning Matrimonial Property Regimes, Ruth Farrugia, Advocate and Senior Lecturer, Faculty of Laws, University of Malta The Future EU Regulation Concerning Matrimonial Property Regimes, Ruth Farrugia, Advocate and Senior Lecturer, Faculty of Laws, University of Malta

<sup>32</sup> Practical Problems Resulting from the non-harmonization of choice of law rules in divorce matters, *ibid* 3, p.38

4. Explanatory memorandum, Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM (2011) 126 final, 2011/0059 (CNS)
5. Explanatory memorandum, Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM (2011) 127 final, 2011/0060 (CNS)
6. The European Parliament Committee on Legal Affairs, European Parliament legislative resolution of 10 September 2013 on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011)0126 – C7-0093/2011 – 2011/0059(CNS)
7. Jacqueline Gray, Stress-Testing the EU Proposal on Matrimonial Property Regimes: Co-operation between EU private international law instruments on family matters and succession, Article published in website : [www.bjutijdschriften.nl](http://www.bjutijdschriften.nl)
8. Tone Sverdrup, 'Maintenance as a Separate Issue – the Relationship between Maintenance and Matrimonial Property' in Katharina Boele-Woelki (ed), *Common Core and Better Family Law in European Family Law* (Intersentia 2005)
9. CRETNEY, S., MASSON, J.M. and BAILEY-HARRIS, R., *Principles of Family Law*, Sweet&Maxwell, London 2003
10. Branka Rešetar, Matrimonial Property in Europe: A Link between Sociology and Family Law, Article published in website : <http://www.ejcl.org/123/art123-4.pdf>
11. Trevor C Hartley, 'Matrimonial (Marital) Property Rights in Conflict of Laws: A Reconsideration' in James Fawcett (ed), *Reform and Development of Private International Law Essays in Honour of sir Peter North* (Oxford University Press 2006)

- 12.**Ruth Farrugia, The Future EU Regulation Concerning Matrimonial Property Regimes, Advocate and Senior Lecturer, Faculty of Laws, University of Malta
- 13.**Maarja Torga, Characterization of ‘spousal maintenance obligations’ in European private international law, Article published in website: [http://www.heidelberg-conference2013.de/tl\\_files/downloads-abstracts/abstracts-ab-3-3-2013/Abstract\\_Torga.pdf](http://www.heidelberg-conference2013.de/tl_files/downloads-abstracts/abstracts-ab-3-3-2013/Abstract_Torga.pdf)
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