

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

Aanbevolen citeerwijze bij dit artikel

LL.M. Jacqueline Gray en LL.M. Pablo Quinzá Redondo, 'Stress-Testing the EU Proposal on Matrimonial Property Regimes: Co-operation between EU private international law instruments on family matters and succession', *F&R* november 2013, DOI: 10.5553/FenR/.000011

1 Introduction

With an estimated 7 million EU nationals living in a Member State of which they are not a national, and some 2.5 million items of real property owned by spouses in Member States other than that of their residence, it is apparent that property relations between married couples now readily extend across borders.¹ In view of this, in March 2011, the European Commission presented Proposals for two regulations on property relations, one concerning married couples,² the other dealing with registered partners.³ The introduction of these proposals came in the midst of an ongoing process of Europeanisation of international family and succession law, during which the EU legislator has been extremely active.⁴ The proposed regulations will join a growing number of EU private international law instruments in this field concerning divorce and legal separation,⁵ parental responsibilities,⁶ maintenance,⁷ and succession and wills.⁸ The EU is only competent to take action in the field of private international law, as the harmonisation and unification of substantive family law lies outside its remit.⁹ Therefore, the proposals on matrimonial property regimes and the property consequences of registered partnerships, like the other EU instruments which have come before them in this field, take the form of rules on jurisdiction, applicable law, and the mutual recognition of foreign decisions. In terms of content, the two proposals diverge from one another most significantly in the level of party autonomy they allow. Whilst the proposal concerning married couples allows for choice of law agreements based on a list of fora with which a couple have a close connection,¹⁰ the parallel proposal on registered partners generally only allows for the imposition of the law of the state in which the partnership was registered.¹¹ Although both proposals provide interesting scope for analysis, this article will focus only on the proposal on matrimonial property regimes. Aside from a need for conciseness, this separation was made because the future of the proposal on registered partnerships is considerably less certain than the proposal on matrimonial property regimes (hereinafter known as 'the

Proposal’).

The reasoning behind the other delineations in the subject matter of this article ought also to be explained. First, the article will only focus upon the coordination of the Proposal with the established instruments on the jurisdiction and applicable law concerning divorce (the Brussels II bis Regulation and Rome III Regulation) and succession and wills (the Succession Regulation). Although the Proposal also encompasses proceedings which concern only matrimonial property, the interaction between the aforementioned instruments, which were not drafted simultaneously, provides a particular opportunity for critical analysis. Second, the decision to analyse only the interaction of the Proposal with the regulations concerning succession and divorce has been taken because these are the only instruments explicitly referred to in the Proposal.¹² Finally, this article will deal only with issues relating to the scope, jurisdiction and applicable law of the Proposal; although the Proposal itself also address mutual recognition of decisions, we would like to focus on assessing the success of the EU legislator’s aim of securing all related disputes in one Member State court, and the feasibility of applying a single law to such proceedings.¹³

In critically analysing the coordination between the respective EU instruments, we will employ a ‘stress-test’ approach, presenting real-life scenarios in which interaction between these instruments takes place, and varying the nationalities and compositions of the couples in order to fully illustrate the potential consequences of this interplay. Whilst the examples set out are not intended to be exhaustive, we aim to demonstrate how the Proposal may function in practice, and highlight the problematic areas which may arise with respect to coordination between the instruments.¹⁴ Interaction of the Proposal’s provisions *vis à vis* the related EU instruments concerning divorce and succession will be analysed and evaluated through a number of norms. The *practicality and convenience* (particularly with regard to applying one law to all related disputes), *flexibility, clarity*, and *legal certainty* upheld in the interaction between related provisions in the respective EU instruments will be assessed throughout. Furthermore, this article will particularly focus upon whether the legislator’s stated aim of *placing related disputes in one court* has been achieved or not.¹⁵

At the time of writing, it is over two and a half years since the Proposal was first published by the Commission in March 2011. Thus, although this analysis is primarily based on the official version of the Proposal, it will be indicated where the revised inter-institutional texts of the Proposal have partially resolved, or mitigated, problematic areas identified in the official text. In this regard, the Council’s sixth¹⁶ and seventh¹⁷ revised texts of the Proposal will be taken into account.

This analysis will first examine the background and scope of application of the Proposal, with particular regard to the definitions of a cross-border relationship, matrimonial property regime, and of marriage for the purposes of this legislation (2). It will then consider the interaction of the Proposal with the EU instruments on succession and divorce regarding jurisdiction in the absence of choice, and as determined by choice of court agreements (3). The interplay between these instruments concerning applicable law will be analysed next, with regard to the law applicable in the absence of choice, and as stipulated by choice of law agreements (4). We will then present a number of key conclusions regarding the effect that the interaction between the Proposal and the other EU instruments has upon different couple compositions and circumstances. In this light we will propose recommendations for ways in which problems arising the coordination of future Regulation on matrimonial property with related EU

instruments may be mitigated (5). Lastly, we will present an overall assessment of the coordination of the instruments based on the norms established in the paragraph above, and reflect on how a greater level of coordination could be achieved between related EU instruments concerning family matters and succession in order to better adhere to achieve a greater adherence (6).

2 General information

In the following section, the history and background of the Proposal will be outlined (2.1.), followed by an examination of the Proposal's scope of application (2.2.) with regard to the respective definitions of a cross-border situation (2.2.1.), a matrimonial property regime (2.2.2.), and of a marital relationship (2.2.3.).

2.1 Background

Steps to unify private international law rules in the area of matrimonial property regimes have previously been taken on an international level. In 1978, the Hague Conference on Private International Law drafted the Hague Convention on the law applicable to matrimonial property regimes. This Convention came into force in 1992, but was only ratified by France, Luxemburg, and the Netherlands. Although the impact of this convention is limited by a lack of state participation, reference will be made to it in this article. Whilst there are a number of striking similarities between the convention and the EU's Proposal, there are also differences: most notably, the fact that whilst the Convention only unifies conflict of laws rules, the Proposal also contains provisions on jurisdiction and the recognition and enforcement of foreign decisions.

The genesis of the Proposal can be traced back to the 1998 *Vienna Action Plan*, in which the Commission and Council established, as a priority, the adaption of the rules concerning matrimonial property regimes, citing, amongst other things, the need to address problems derived from the coexistence of different laws and jurisdictions in this area.¹⁸ Later, in 2000, the Council articulated the necessity of introducing an instrument regulating the international jurisdiction and the recognition and enforcement of decisions on the 'rights in property arising out of a matrimonial relationship'.¹⁹

This necessity was again acknowledged in the *Hague Programme* of 2004, which stated that, in order to improve justice efficiency, mutual recognition and civil access to justice, the drafting of a Green Paper concerning matrimonial property regimes was needed.²⁰ The resulting Green Paper, concerning conflict of laws rules on matrimonial property regimes, was published in 2006. Its content would ultimately prove very influential in drafting the current Proposal.²¹

The Stockholm Programme,²² which was adopted by the European Council in December 2009, also emphasised that the promotion of mutual recognition should be extended to matrimonial property regimes. The action plan implementing this programme was presented by the Commission in April 2010, setting out a concrete intention to draft a Proposal on the jurisdiction, law applicable, and recognition and enforcement of decisions on matrimonial property regime.²³ In the same year, the European Commission presented the *EU citizenship report 2010: Dismantling the obstacles to EU citizens' rights*, which sought to illustrate and address the problems faced by cross-border couples in their matrimonial property relations.²⁴

These actions culminated of these actions ultimately came in 2011, when the

Proposal for a Council Regulation on the jurisdiction, applicable law and the recognition and enforcement of decision in matters of matrimonial property regimes was presented by the European Commission, accompanied by the *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*²⁵ and a *Summary of the impact assessment*.²⁶

2.2 Scope of application

The scope of application of EU instruments can be defined in three ways: *territorial, personal and material*.

Regarding the territorial scope of application of the future Regulation on matrimonial property regimes, it is probable that it will apply only in 25 Member States. The United Kingdom and Ireland have already declared that they will not exercise their right to opt into the Regulation, and Denmark is not bound by legislation adopted under Art. 81 TFEU. Thus, future Regulation on matrimonial property will not be applied universally amongst the Member States.

Referring to the personal scope of application, Article 21 of Proposal establishes that the rules on applicable law are universal in scope. The law of a third country could therefore be applicable, subject to the overriding mandatory provisions and public policy of the forum²⁷.

The following subsections will address three issues surrounding the material scope of the Proposal. First, the definition of a cross-border situation in the context of matrimonial property regimes will be analysed (2.2.1.). Second, the concept of the matrimonial property regime within the meaning of the Proposal will be discussed (2.2.2). Finally, the definition of a marital relationship will be examined, particularly with regard to same-sex marriage (2.2.3).

2.2.1 The definition of a cross-border situation

Article 1(1) of the Proposal states that its provisions ‘shall apply to matrimonial property regimes’. This is qualified by the explanatory memorandum²⁸ and the preamble,²⁹ which establish that the provisions apply to proceedings involving ‘cross-border implications’. However, omission of reference to the cross-border situation in the text may be seen as a lack of clarity. The EU private international law instruments on applicable law, which establish at the beginning of their text that their scope is limited to circumstances involving a conflict of laws, implicitly refer to the cross-border situation.³⁰ In contrast to this, the instruments concerning either jurisdiction, or jurisdiction and applicable law, jointly,³¹ do not refer or allude to the cross-border situation in setting out their scope of application; they only mention the substantive law institution which is the target of their rules.³² In order to clarify the scope and the practicality of the Proposal, it is recommended that explicit reference be made to the cross-border situation in Article 1(1) of the text.³³

The question of what constitutes a cross-border situation for the purposes of EU private international law, concerning family matters and succession, has been the subject of debate for many years and the EU has not yet issued a clear, comprehensive definition. Concerning the meaning of a cross-border situation within the subject matter of this article, reference can be drawn from the European Commission’s Green Paper on Matrimonial Property Regimes, which described the target of its consultation:

...unions between nationals of different Member States or the presence of such couples in a Member State of which they do not have the nationality, often accompanied by the acquisition of property located on the territory of several Union countries.

However, the above statement was not intended as an official, or exhaustive, definition. The status of those in less straightforward cross-border situations, therefore, remains unclear. For example, would a married couple who share the same nationality and live in the Member State of that nationality, but with several bank accounts distributed in a number of Member States, come within the scope of the Proposal? Alternatively, what if such a couple held shares in a number of companies incorporated in several Member States? In both these instances, the foreign assets would be encompassed within the spouses' matrimonial property regime. In order to clarify and ascertain legality for those in such borderline situations, future Regulation should initially exemplify or elaborate on the definition of a cross-border situation in the context of matrimonial property.

Although the Council's seventh revised text of the Proposal does not elaborate further as to the requirements of a cross-border situation, the sixth revised text did explicitly recognise the need for greater specification in this regard.³⁴ Possibly this will be taken into account in future revisions of the Proposal.

2.2.2 The definition of a matrimonial property regime

Article 2(a) of the Proposal succinctly describes a matrimonial property regime as 'a set of rules concerning the property relationships of spouses, between the spouses and in respect of third parties'. Recital 11 adds to this definition by stating:

The scope of this Regulation should extend to all civil matters in relation to matrimonial property regimes, both the daily management of marital 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.

The provisions above are further supplemented by Article 1(3), which sets out the areas of substantive law excluded from the Proposal's scope of application:

- (a) the capacity of spouses;
- (b) maintenance obligations;
- (c) gifts between spouses;
- (d) the succession rights of a surviving spouse;
- (e) companies set up between spouses;
- (f) the nature of rights in rem relating to a property and the disclosure of such rights.

However, despite this elaboration, the Proposal's current definition of a matrimonial property regime could still be viewed as somewhat sparse and their delineation of the scope of the application is not fully established. In this regard, the European Parliament provided for a broader list of exclusions in its

legislative resolution on the Proposal.³⁵ Suggested exclusions included the existence, validity or recognition of a marriage,³⁶ the registering of rights in immovable or moveable property,³⁷ and the entitlement of the spouses, upon divorce, to transfer or adjust the rights to retirement or disability pensions accrued during marriage.³⁸ These amendments have been adopted in Article 1(3) of the Council's seventh revised text of the Proposal.

Despite this further delineation, areas of uncertainty nevertheless persist. For example, the current documentation leaves open the question of whether the personal effects of marriage fall within the Proposal's scope of application. Whilst it can be inferred from the wording of Article 2(a) that the Proposal only concerns property relations between spouses (and thus does not encompass the personal effects of the marital relationship),³⁹ it has been suggested that, for the sake of clarity and legal certainty, such effects should be explicitly excluded under Article 1(3).⁴⁰ This would reflect the inclusion of this exception in Article 1(3)(a) of the Proposal on the property relations between registered partners. The inclusion of a positive list establishing the areas of substantive law to which the applicable law should apply would enhance legal certainty. The European Parliament Committee on Legal Affairs made a recommendation to this effect in its legislative resolution on the Proposal: ⁴¹

Amendment 58

Article 15 – Paragraph 1 a (new)

1a. The law applicable to a matrimonial property regime shall determine, without prejudice to points (f) and (fa) of Article 1(3), *inter alia*:

- (a) the division of the spouses' property into different categories before and after the marriage;
- (b) the transfer of property from one category to another;
- (c) liability for the other spouse's debts, where necessary;
- (d) the spouses' rights of disposal during the marriage;
- (e) dissolution and liquidation of the matrimonial property regime and division of property in the event of dissolution of the marriage;
- (f) the impact of the matrimonial property regime on a legal relationship between one of the spouses and a third party on the basis of Article 35;
- (g) the material validity of a matrimonial property agreement.

This additional list emulates that set out in Article 23(2) of the Succession Regulation. Its presence could be seen as completing the necessary definition of matrimonial property regimes, supplementing Article 2(a) and Recital 11, and including the list of exceptions set out in Article 1(3). The Council's seventh revised text of the Proposal follows the Parliament's recommendations in this regard. A new provision (Article 20 *aa*) has been inserted which establishes the same positive list of inclusions (in terms of content, not wording) as that set out by the Parliament.

2.2.3 The definition of a marital relationship

In applying the various EU private international law instruments which concern the institution of marriage, a Member State court must first decide whether it recognises the relationship in question as a ‘marriage’.

Current EU private international law instruments addressing family matters and succession do not explicitly define marriage for the purposes of their application.⁴² However, especially with regard to the more recent instruments, there is a growing consensus that these regulations are gender-neutral in application⁴³ and it is left to each Member State to decide whether the provisions of an EU instrument apply to same-sex marriage.⁴⁴

Those Member States which do not recognise same-sex marriage in their national law are, presumably, not obliged to apply EU instruments concerning the institution of marriage to such relationships.⁴⁵ In such instances, three outcomes can be envisaged. First, a jurisdiction which does not recognise same-sex marriage in its substantive law could deny all effects of that marriage and, therefore all property consequences relating to this relationship. Second, a jurisdiction which does recognise same-sex marriage in its substantive law could give partial, or complete, recognition to the property consequences of a same-sex marriage celebrated abroad. Third, a jurisdiction which does not recognise same-sex marriage in its substantive law, but whose law provides for same-sex registered partnership, could ‘downgrade’ the relationship to this latter status.⁴⁶ Conversely, it would be expected that those Member States which have opened up the institution of marriage to same-sex couples would be willing to apply such EU instruments to same-sex spouses.⁴⁷ Essentially, consistency is required from the Member States in their interpretation of the term ‘marriage’; differing definitions of marriage should not be applied by the same Member State to different EU instruments.⁴⁸

In line with the aforementioned, the Commission’s Communication accompanying the Proposal explicitly states that the text is gender neutral,⁴⁹ whilst Recital 10 of the Proposal establishes that the concept of ‘marriage’ should be defined by each Member State according to their own national law. Thus, it would appear that a same-sex married couple would come within the scope of the Proposal if their case were heard in a jurisdiction whose national law recognised same-sex marriage.

For the purposes of this article, it is important to consider the impact that refusal by a Member States to hear a related proceeding may have upon the dissolution of a matrimonial property regime. For example, where the only jurisdiction which is competent to rule on the divorce of same-sex couples, according to Brussels II bis, does not recognise same-sex marriage, no proceedings to dissolve the couple’s matrimonial property regime can take place. Similarly, no proceedings concerning succession can take place before a matrimonial property regime is assessed and dissolved.

In light of the above, the importance of a *forum necessitatis* is highlighted. Whilst Article 7 of the Proposal established such a provision (it is presumed that it applies in cases involving the refusal to recognise same-sex marriage), Brussels II bis does not currently include this provision. An amendment of the latter instrument allowing *forum necessitatis* is urgently required to ensure access to justice for those in same-sex marriages.⁵⁰

3 Jurisdiction

The Proposal addresses matrimonial property disputes arising in connection with the death of one of the spouses (Article 3), divorce (Article 4 and 5(1)), or in

other cases concerning the spouses' matrimonial property regime (Articles 5(1) and (2)).⁵¹ Where no Member State has jurisdiction by way of Articles 3, 4 and 5, the Proposal also contains provisions on subsidiary jurisdiction (Article 6) and *forum necessitatis* (Article 7). It is the intention of the Proposal's legislators that the same court hears related disputes connected with succession and divorce respectively.⁵² Thus, it links jurisdiction in these instances to that determined by the Succession Regulation and to the Brussels II bis Regulation.⁵³

Accordingly, this analysis of the Proposal's coordination with other related EU instruments will examine matrimonial property proceedings arising in conjunction with Succession (3.1.) and those arising subsequently to divorce (3.2.). Within these sections, the impact of the respective provisions on subsidiary jurisdiction and *forum necessitatis* will also be discussed.

3.1 Jurisdiction upon Succession

Article 3 of the Proposal aligns the Member State jurisdiction which deals with matters arising from a married couple's matrimonial property regime in the event of the death of one of the spouses with that seized for proceedings under the Succession Regulation:

The courts of a Member State seized by an application concerning the succession of a spouse under Regulation (EU) No 650/2012 shall also have jurisdiction to rule on matters of the matrimonial property regime arising in connection with the application.

Four separate situations arise from this interaction. The first concerns jurisdiction in the absence of choice, in which one of the spouses dies in a Member State without having chosen the law of his or her nationality (Article 4 of the Succession Regulation) (3.1.1.). The second regards the prorogation of court upon succession (Articles 5 and 6 in conjunction with 22 of the Succession Regulation), in which the deceased spouse has chosen the law of his or her nationality to govern their succession (3.1.2.). The two final situations concern subsidiary jurisdiction (Article 10 of the Succession Regulation) (3.1.3), and *forum necessitatis* (Article 11 of the Succession Regulation) (3.1.4.) upon succession.

3.1.1 Jurisdiction in the absence of choice upon succession

Article 3 of the Proposal aligns the jurisdiction for matrimonial property proceedings arising in connection with a succession with the jurisdiction as determined by, *inter alia*, Articles 4 and 5 of the Succession Regulation. Article 4 determines jurisdiction in instances in which the deceased has made no choice of law under Article 22 of the Regulation:

Article 4

General jurisdiction

The courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole.

Where no *optio iuris* has been made by the deceased in favour of the law of the

Member State of their nationality under Article 5 of the Succession Regulation, the court of the deceased's habitual residence at the time of their death shall have jurisdiction to decide on matters relating to their succession. This competence is extended by Article 3 of the Proposal to matters arising in connection with the deceased and their spouse's matrimonial property regime. The below scenario exemplifies this process:

Monique and Javier, a French woman and a Spanish man, are married and living in Spain. After a number of years, Monique passes away in Spain. She has made no designation of applicable law under Article 22 of the Succession Regulation.

In this instance, the courts of Spain, Monique's last habitual residence, will have competence to decide on matters of succession relating to her estate and, by extension through Article 3 of the Proposal, on dissolution of the couple's matrimonial property regime. Thus, both procedures are seen to be concentrated in the same court, and the aim of the legislators is secured.

3.1.2 Prorogation of court upon succession

Articles 5 and 6 of the Succession Regulation establish the opportunity for prorogation of the court of the Member State whose law has been chosen by the deceased (the law of their nationality) in accordance with Article 22 of the same Regulation:

Article 5

Choice-of-court agreement

1. Where the law chosen by the deceased to govern his succession pursuant to Article 22 is the law of a Member State, the parties concerned may agree that a court or the courts of that Member State are to have exclusive jurisdiction to rule on any succession matter.

2. Such a choice-of-court agreement shall be expressed in writing, dated and signed by the parties concerned. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.

Article 6

Declining of jurisdiction in the event of a choice of law

Where the law chosen by the deceased to govern his succession pursuant to Article 22 is the law of a Member State, the court seized pursuant to Article 4 or Article 10:

(a) may, at the request of one of the parties to the proceedings, decline jurisdiction if it considers that the courts of the Member State of the chosen law are better placed to rule on the succession, taking into account the practical circumstances of the succession, such as the habitual residence of the parties and the location of the assets; or

(b) shall decline jurisdiction if the parties to the proceedings have agreed, in

accordance with Article 5, to confer jurisdiction on a court or the courts of the Member State of the chosen law.

Article 22

Choice of law

1. A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death.

A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death.

2. The choice shall be made expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition.

3. The substantive validity of the act whereby the choice of law was made shall be governed by the chosen law.

4. Any modification or revocation of the choice of law shall meet the requirements as to form for the modification or revocation of a disposition of property upon death.

The above provisions, taken in conjunction with Article 3 of the Proposal, allow the deceased's choice of law under the Succession Regulation to determine (subject to certain conditions) not only the Member State court which will decide on the succession, but also, by extension, the court which will deal with matters relating to the deceased and their spouse's matrimonial property regime. The following example demonstrates a situation in which the usage of these provisions may be invoked:

Barbara and Lukas, a German woman and an Austrian man, are married and living in Germany. After 20 years of living together with their three children in the Germany, Lukas dies there. He has designated the law of his Austrian nationality to be applied to his succession under Article 22 of the Succession Regulation.

According to Article 5(1) of the Succession Regulation, where the deceased has chosen the law of his or her nationality to be applied to a future succession, the courts of the state of the designated law will also have jurisdiction to rule on the succession, subject to the agreement of 'the parties concerned'. Accordingly, the Explanatory Memorandum accompanying the Proposal for the Succession Regulation,⁵⁴ in allowing for prorogation of the court of the chosen law, the interests of 'the heirs, legatees and creditors' should be taken into account. From this it can be inferred that the 'the parties concerned' as stated in Article 5(1) also fall under this definition.

In the present case, it can therefore be assumed that the agreement of their three children, as well as other concerned parties (e.g. creditors), will be required in order to attribute jurisdiction to the Austrian courts. In the absence of agreement by the parties, the jurisdiction will remain with the courts of the

habitual residence of the deceased. In the present instance, it is conceivable that the interested parties may not see a need to confer jurisdiction upon the Austrian courts, given their own factual ties with Germany, the last habitual residence of the deceased. Holding succession and matrimonial property proceedings in Austria may be highly impractical for the next of kin.

However, according to Article 6(a) of the Succession Regulation, one of the parties concerned can nevertheless request that this court decline jurisdiction in favour of the court of the chosen law of the nationality of the deceased. The court of deceased's habitual residence may decline jurisdiction if it considers that the other court is better placed to rule on the succession, taking into consideration the practical circumstances of the case (e.g. the location of the assets). In accordance with Article 3 of the Proposal, the courts of the 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. Thus, in the event of the agreement of the parties in accordance with Article 5(1) of the Succession Regulation, or the successful petition to decline jurisdiction by one of the parties pursuant to Article 6(a) of the Regulation, the Austrian courts would therefore also have jurisdiction to dissolve the couple's matrimonial property regime.

The above scenario demonstrates how the deceased's choice of law may have the potential to change the competent court which decides upon matters arising from the dissolution of the couple's matrimonial property regime. The influence of the heirs is striking: in agreeing on the designation of the competent court in matters of succession, they can, by extension, choose the court that will rule on the dissolution the couple's matrimonial property regime. The indirect involvement of heirs (other than the surviving spouse) in the designation of the competent court that will decide on matters relating to matrimonial property would appear inappropriate, and may result in impractical and unforeseen consequences for the deceased's spouse.

An alternative interpretational possibility would be to consider only the surviving spouse as a concerned party under Article 5(1) of the Succession Regulation in cases involving the dissolution of a matrimonial property regime. However, this solution has the potential to be inequitable in circumstances in which there are numerous parties with an interest in the deceased's estate (e.g. the creditors).

Another possible solution would be to redraft Article 3 of the Proposal in order to require the agreement of the surviving spouse to extend the jurisdiction for succession to the dissolution of the matrimonial property regime. Where agreement is not given, Article 5(1) of the Proposal could be used to determine the jurisdiction which will hear proceedings concerning the dissolution of the matrimonial property regime. However, such a provision could frustrate the legislator's aim of securing all related disputes in one court.

3.1.3 Subsidiary jurisdiction upon succession

The Succession Regulation also makes provision for circumstances in which the jurisdiction cannot be determined through Articles 4-6. To this effect, Article 10 establishes the following subsidiary jurisdiction with regard to circumstances in which the deceased was not habitually resident in a Member State at the time of their death:

1. Where the habitual residence of the deceased at the time of death is not located in a Member State, the courts of a Member State in which assets of the estate are located shall nevertheless have jurisdiction to rule on the

succession as a whole in so far as:

(a) the deceased had the nationality of that Member State at the time of death;
or, failing that,

(b) the deceased had his previous habitual residence in that Member State,
provided that, at the time the court is seized, a period of not more than five
years has elapsed since that habitual residence changed.

2. Where no court in a Member State has jurisdiction pursuant to paragraph 1,
the courts of the Member State in which assets of the estate are located shall
nevertheless have jurisdiction to rule on those assets.

The function of subsidiary jurisdiction as determined by the above article in
circumstances also involving the dissolution of a matrimonial property regime is
elaborated upon below. The following scenario concerns a situation in which the
deceased has passed away in a third country whilst owning property in the
European Union:

Olli and Paola, a Finnish man and an Italian woman, are married and living in
the Netherlands. After a number of years, they decide to buy a holiday
apartment in Paola's home country of Italy. Following this, Paola moves to the
USA to pursue her career further, leaving Olli behind to look after the family
home owned by the couple in the Netherlands. Six years later, Paola dies in
the USA.

According to Article 10(1)(a) of the Succession Regulation, in situations where
the deceased does not have his or her habitual residence in a Member State, the
courts of the Member State where assets of the deceased are located will have
jurisdiction to rule on the entire succession if the deceased was a national of that
Member State at the time of their death. In this instance, since the couple own a
holiday apartment in Italy, the Italian courts would appear to have jurisdiction
to rule over the whole of Paola's succession. It does not appear to matter for the
purposes of this article what proportion of the deceased's estate lies in the
Member State of their nationality. Article 3 of the Proposal will apply in this
instance, directing jurisdiction on matters relating to the couple's matrimonial
property regime to the Italian courts. This could equate to an unforeseen, and
perhaps undesired, outcome for Olli, the surviving spouse, who continues to
reside in the Netherlands. Matters relating to the shared assets of the couple will
be decided by courts, un-connected to either partner by the factual
circumstances of their marriage. This could result in inconvenience (e.g. having
to travel to another jurisdiction to attend proceedings) and lack of legal certainty
for the surviving spouse. As proposed in the previous subsection, in order to
promote practicality and legal certainty for the surviving spouse, it is
recommended that the future Regulations require their agreement to extend
jurisdiction pursuant to Article 3 of the Proposal. Where the surviving spouse
does not agree to this extension, Article 5(1) of the Proposal could be used to
determine the jurisdiction which will rule on the dissolution of the matrimonial
property regime.

An interesting variation of the above scenario would arise if the couple had bought
their holiday apartment in France instead of Italy. In this instance, Article 10(2)
would be applicable, which states that the courts of the Member State in which
assets of the deceased are located will have jurisdiction to rule on *those assets*.

The stipulation that a Member State may only rule on the assets located within it could appear to be at odds with the legislators' apparent aim that a single competent authority should deal with the entirety of the succession.⁵⁵ In this instance, this stipulation would lead to a situation in which parallel proceedings take place in both France and the Netherlands. It is unclear which jurisdiction(s) would be extended by way of Article 3 of the Proposal to rule on the couple's matrimonial property regime. This dispersion would have the effect of not only negating the legislator's aim of securing all related disputes in one court, but also compromising clarity and legal certainty for the parties involved. Again, the required agreement of the surviving spouse could be used in order to avoid default extension of this dispersed approach to the couple's matrimonial property regime.

3.1.4 Forum necessitatis upon succession

Where jurisdiction in succession proceedings cannot be determined through the provisions discussed above, the Succession Regulation allows for a *forum necessitatis* to be seized:

Where no court of a Member State has jurisdiction pursuant to other provisions of this Regulation, the courts of a Member State may, on an exceptional basis, rule on the succession if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the case is closely connected.

The case must have a sufficient connection with the Member State of the court seized.

In order to exemplify the potential impact that this provision may have upon the coordination of jurisdiction in succession and matrimonial property proceedings, we can draw upon the scenario above concerning subsidiary jurisdiction (3.1.3.). Altering the scenario of Olli and Paola slightly, let us assume that the couple do not own any property (either in the Netherlands or in Italy), instead preferring to rent their accommodation and save their money in a bank account. This being the case, subsidiary jurisdiction as determined by Article 10 of the Succession Regulation can no longer be relied upon.

In this scenario, if it is assumed that proceedings concerning Paola's succession cannot reasonably be conducted or brought in the USA,⁵⁶ a court which is seen to have 'sufficient connection' may be seized. However, it is unclear what constitutes such a connection within the meaning of this Proposal. Given the linkage in jurisdiction between the couple's matrimonial property regime and Paola's succession, the couple's former common habitual residence, the Netherlands, could be seen as an equitable choice. However, this is merely speculation, and there remains considerable legal uncertainty in this regard. Through Article 3 of the Proposal, this lack of certainty is also seen to impact upon the dissolution of the couple's matrimonial property regime.

3.2 Jurisdiction upon divorce

The rules determining the jurisdiction which will decide on matters concerning matrimonial property arising in connection with divorce proceedings are set out in Article 4 and Article 5(1) of the Proposal. This section will first address coordination of jurisdiction between the Proposal and Brussels II bis in the

absence of agreement (Article 5(1)) (3.2.1.), and then examine this in cases in which jurisdiction is determined by choice of court agreements (Article 4) (3.2.2.). Subsequently, it will consider this interaction in instances in which subsidiary jurisdiction (Article 6) (3.2.3.), and *forum necessitatis* (Article 7) (3.2.4.), are relied upon.

3.2.1 Jurisdiction in the absence of choice of court agreement upon divorce

In the absence of agreement between the spouses pursuant to Article 4 of the Proposal, the hierarchical list of fora set out in Article 5(1) will determine the ruling court for matters arising from the dissolution of the matrimonial property regime in connection with the divorce:

1. In cases other than those provided for in Articles 3 and 4 jurisdiction to rule on proceedings in a matter of the spouses' matrimonial property regime shall lie with the courts of the Member State:

(a) of the spouses' common habitual residence, or failing that,

(b) of the last common habitual residence if one of them still resides there, or, failing that,

(c) of the defendant's habitual residence, or failing that,

(d) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of their common 'domicile'.

The above can be contrasted with Article 3(1) of Brussels II bis, which establishes the following options for determining the forum of divorce:

1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State

(a) in whose territory:

- the spouses are habitually resident, or
- the spouses were last habitually resident, insofar as one of them still resides there, or
- the respondent is habitually resident, or
- in the event of a joint application, either of the spouses is habitually resident, or
- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her 'domicile' there;

(b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the 'domicile' of both spouses.

As can be seen, Article 5(1) of the Proposal mirrors the first three indents of Article 3(1)(a) and the content of Article 3(1)(b) of the Brussels II bis Regulation (with the exception of the replacement 'respondent' with 'defendant' in the Article 5(1)(c) of the Proposal). However, the Proposal does not include the last three indents of Article 3(1)(a) of Brussels II bis: inclusion of the fourth indent would be futile given the agreement facilitated by Article 4 of the Proposal, and the fifth and sixth indents have previously been criticised for only reflecting the interests of the applicant.⁵⁷ Notwithstanding such differences, perhaps the most crucial difference between the respective provisions lies in the nature of the lists; whilst Article 5(1) of the Proposal forms a hierarchy, Article 3 provides a choice of alternative fora.

By largely recreating the list of fora established in Article 3(1), the EU legislator has sought to ensure that, in most instances (e.g. those in which the spouses share a habitual residence), the jurisdiction of proceedings concerning matrimonial property will coincide with that of divorce. The achievement of the aim of having 'related procedures handled by the courts of the same Member State' can be seen to enhance practicality and convenience.⁵⁸ However, there remains a possibility that, in the absence of agreement between the spouses, circumstances may dictate that a divorce and the related matrimonial property proceedings will not be concentrated in the same jurisdiction.

Florian and Marija, an Austrian man and a Croatian woman, meet and marry in France. After a number of years, the couple move apart in order to find work; Marija relocates to Italy, whilst Florian moves to Belgium. Unfortunately, their marriage does not withstand the distance and, after three years, Marija applies to the Italian courts for a divorce under the fifth indent of Article 3(1)(a) of Brussels II bis. Florian does not agree with the extension of the jurisdiction of the Italian court to matters of the couple's matrimonial property regime. What court would be competent for this dissolution?

In this instance, the first connecting factor available under Article 5(1) of the Proposal, would be (c) the defendant's (Florian's) habitual residence. This means that the Belgian courts would have jurisdiction to rule on the couple's estate, whilst the Italian courts would pronounce the divorce. Thus, in these circumstances, the EU legislator's aim of concentrating all disputes concerning a familial relationship within a single jurisdiction would not be achieved, and additional time and financial costs could therefore arise for both parties (e.g. a longer procedure overall, each spouse having to employ a lawyer in both jurisdictions etc.).

One way of mitigating this dispersion would be to set out the grounds provided in Article 5(1) as alternatives (akin to Article 3(1)(a) of Brussels II bis), as opposed to a hierarchy.⁵⁹ This would allow for greater flexibility, whereby the spouse applying for divorce in a jurisdiction provided for in Article 3(1) of Brussels II bis would have a greater chance of being able to seize the same court for the purposes of deciding matters relating to matrimonial property.⁶⁰ However, in order to ensure complete consistency, either all the grounds provided for in Article 3(1) of Brussels II bis would have to be reproduced in the Proposal or, conversely, Brussels II bis would have to be amended to exclude the last three indents of Article 3(1). Furthermore, the advantages of introducing alternative fora would have to be balanced against its potential to aggravate the

‘race to court’ phenomenon.

In the Council’s seventh revised text of the Proposal, the jurisdiction seized for divorce under the first four indents of Article 3(1)(a) of Brussels II bis automatically extends to matrimonial property proceedings (Article 4(1) of the seventh revised text). However, agreement between the spouses is still required to extend such jurisdiction where the court of divorce is seized under fifth and sixth indents of Brussels II bis (Article 4(2) of the seventh revised text). Thus, in the present instance, the two proceedings would not be automatically linked. Furthermore, the present version of Article 5 continues to list the grounds of jurisdiction as a hierarchy. This means that the jurisdictions for Florian and Marija’s divorce and subsequent matrimonial property proceedings would continue to be dispersed.

3.2.2 Choice of court agreements upon divorce

The formation of choice of court agreements in matrimonial property proceedings arising from divorce is provided for in Article 4 by the Proposal:

The courts of a Member State called upon to rule on an application for divorce, judicial separation or marriage annulment under Regulation (EC) No 2201/2003, shall also have jurisdiction, where the spouses so agree, to rule on matters of the matrimonial property regime arising in connection with the application.

Such an agreement may be concluded at any time, even during the proceedings. If it is concluded before the proceedings, it must be drawn up in writing and dated and signed by both parties.

Failing agreement between the spouses, jurisdiction is governed by Articles 5 et seq.

Upon the agreement of both spouses, the Member State jurisdiction which will rule on matters arising from the dissolution through divorce of the matrimonial property regime can be aligned with the jurisdiction seized in accordance with Article 3(1) of the Brussels II bis Regulation. The interaction between these two articles in the formation of choice of court agreements for proceedings concerning matrimonial property in the event of divorce is exemplified below:

Zuzana and Tomek, a Czech woman and a Polish man, are married and living in Spain. Cognisant of the problems faced by cross-border couples, they would like to make a marital contract which, inter alia, stipulates their choice of court in matters arising from their matrimonial property regime in the event of their divorce. They ask a legal professional for advice on the options available.

In the above set of circumstances, the couple ought to be advised that the only jurisdictional choice available would be that of Spain (Brussels II bis, Article 3(1) (a), first indent – the jurisdiction in which the spouses are both currently habitually resident). However, they should also be informed that they cannot currently designate a particular Member State court in advance of instigating divorce proceedings under Brussels II bis (since this Regulation does not presently allow propagation of court). Should one or both of the spouses subsequently become habitually resident in another Member State, a different court may be seized for the purposes of divorce in accordance with Article 3 of

Brussels II bis. In such circumstances, and given the advance agreement made under Article 4 of the Proposal, the jurisdiction which will rule on matters arising from the matrimonial estate will automatically align with the court of the new habitual residence which has been seized for the purposes of divorce. Thus, a choice of court made under Article 4 of the Proposal would not presently be immutable; it could change depending on the future circumstances of the spouses.

The current wording of Article 4 of the Proposal could give rise to problems in interpretation. Whilst the designation of a particular jurisdiction would appear to be dependent on a court having already been seized for the purposes of the divorce under Article 3 of the Brussels II bis Regulation, the second paragraph of the article states that an agreement can be concluded between the spouses ‘*at any time, even during the proceedings*’ [*emphasis added*]. Any agreement made prior to a court being seized for divorce would essentially be general in nature: its only certain function is to ensure the concentration of proceedings concerning divorce and matrimonial property within a single jurisdiction. Should the EU legislator wish to enhance the autonomy of couples by allowing them to choose the particular Member State court which will decide on matters relating to their matrimonial property regime in cases of divorce, they would first have to revise Brussels II bis in order to allow for choice of court agreements in divorce proceedings instituted under this Regulation.⁶¹

Article 4(1) of the Council’s seventh revised text of the Proposal ensures a greater chance of unity for related proceedings, since it automatically links the jurisdiction to rule 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. Thus, Zuzana and Tomek could be assured that a single jurisdiction would rule on both proceedings if they ensure seizure on of the first four grounds of Article 3(1)(a) of Brussels II bis upon divorce. However, under this provision, they cannot make an agreement designating the competent court for either proceedings in advance of the seizing of jurisdiction for divorce.

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 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.⁶² However, whilst 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.

3.2.3 Subsidiary jurisdiction upon divorce

Where no EU Member State court has jurisdiction for matrimonial property proceedings pursuant to Articles 3, 4 or 5 of the Proposal, Article 6 will be applied. This article provides:

Where no court has jurisdiction according to Articles 3, 4 and 5, the courts of a Member State shall have jurisdiction in so far as property or properties of one

or both spouses are located in the territory of that Member State, but in that event the court seized shall have jurisdiction to rule only in respect of the property or properties in question.

This provision mirrors the content of Article 10(2) of the Succession Regulation. The following scenario sets out a situation in which Article 5 comes into play in the context of divorce:

Juan-Carlos, a Spanish man, and Sofia, a Greek woman, marry and are living in a house, purchased together, in Portugal. They work as property developers, and own an international portfolio of properties in Greece, France and Cyprus. Due to marital problems, they decide to separate for a trial period. Whereas Juan-Carlos moves back to Spain, Sofia decides to relocate to the USA, in order to live with her sister. Eventually, the couple realise that they cannot reconcile their differences, and Juan Carlos applies to the Spanish courts, that of his habitual residence, for divorce. Unfamiliar with the Spanish legal system, Sofia does not agree to extend the jurisdiction of the Spanish courts to rule on matters concerning the dissolution of their matrimonial property regime. What are the consequences of this?

In the absence of spousal agreement pursuant to Article 4 of the Proposal, the hierarchy of fora listed in Article 5(1) would be referred to. However, in this instance, none of these fora would be applicable: the estranged couple do not share a habitual residence, neither of them is still living in the couple's last common habitual residence, the defendant (Sofia) is no longer living in a Member State, and the couple do not share a nationality. Thus, it would be necessary to seek subsidiary jurisdiction under Article 6 of the Proposal. Article 6 states that a court will have jurisdiction if property owned by one or both of the spouses is located within a Member State, but this court can only rule in respect of a property which is located within it. Thus, given the fact that this couple owns property in Portugal, Greece, France and Cyprus, the courts of each of these four states would have competence to rule on the property located within its boundaries. Since divorce proceedings have been instigated in Spain, the spouses will potentially be faced with related proceedings taking place in five separate Member State jurisdictions. This outcome not only runs contra the EU legislator's 'one court' aim, but is also likely to generate considerable practical and financial inconvenience for the spouses (for example, they may have to hire legal representation in each of these jurisdictions). This scenario therefore highlights the crucial simplifying effect that spousal agreement under Article 4 of the Proposal may often confer.

3.2.4 Forum necessitatis upon divorce

In circumstances in which all other avenues to determining jurisdiction have been exhausted, Article 7 of the Proposal allows for *forum necessitatis*:

Where no court of a Member State has jurisdiction under Articles 3, 4, 5 and 6, the courts of a Member State may, exceptionally and if the case has a sufficient connection with that Member State, rule on a matrimonial property regime case if proceedings would be impossible or cannot reasonably be brought or conducted in a third State.

This provision is almost identical to that contained in Article 11 of the Succession Regulation (3.1.4.). An example of a situation in which *forum necessitatis* would

be relied upon in the present context can be demonstrated by altering the previous scenario on subsidiary jurisdiction (3.2.3. above). Imagine that, instead of owning property within the European Union, Juan-Carlos and Sofia actually own a property portfolio of beach houses located on several Caribbean islands. For tax reasons, they have only ever lived in rented accommodation in Portugal. In this case, and if the matrimonial property proceedings could not reasonably be brought or conducted in the courts of the respective Caribbean islands, the courts of the Member State with which the case has a 'sufficient connection' will have jurisdiction to decide on matters arising from the dissolution of the couple's matrimonial property regime.

As discussed in 3.1.4., it is not entirely clear how adequate this connection would be adjudged. Perhaps, for example, the Spanish jurisdiction seized to rule on the divorce would be seen to have sufficient connection as a result of ruling on this related proceeding. Selecting this jurisdiction would have the positive outcome of concentrating these two related disputes in a single Member State court. However, this is merely speculation, and it can be said that the general wording of Article 7 leads to considerable legal uncertainty for those couples forced to rely on *forum necessitatis*.

4 The applicable law

As the EU legislator seeks to concentrate all related disputes in the same court, applying the same national law to related proceedings also optimises practicality for all involved (spouse(s), legal professionals, judges and other interested parties). Matrimonial property regimes are often intimately connected with the respective institutions of succession and divorce within Member States' substantive laws. Every legal system regulates the rights of the surviving spouse *vis à vis* succession and matrimonial property in their own manner.⁶³ In this way, substantive laws in these fields can be seen to complement one another. Different laws originating from the same state tend to be complementary. Thus, it can be seen as more practical to align the law which is applied to matrimonial regimes with that which is applicable under the respective EU instruments concerning succession and divorce.

This analysis of the Proposal's provisions on applicable law will look first at its coordination with respective instruments on divorce and succession in the absence of choice of applicable law (4.1.), followed by an examination of this interaction where a choice of law has been made (4.2.).⁶⁴

4.1 Law applicable in the absence of choice

In instances in which the spouses have not chosen an applicable law, the hierarchical list of laws contained in Article 17 of the Proposal is used to determine the law which will be applied to proceedings concerning their matrimonial property.

1. If the spouses do not make a choice, the law applicable to the matrimonial property regime shall be:

(a) the law of the State of the spouses' first common habitual residence after their marriage or, failing that,

(b) the law of the State of the spouses' common nationality at the time of their marriage

or, failing that,

(c) the law of the State with which the spouses jointly have the closest links, taking into account all the circumstances, in particular the place where the marriage was celebrated.

2. Paragraph 1(b) shall not apply if the spouses have more than one common nationality.

With regard to the Proposal and other recent related legislation, it is clear that the EU legislator considers 'habitual residence' to be the primary connecting criterion for international couples, given that this is likely to be the state in which they work and establish a family. *Social criteria* is seen to be preferred above *cultural criteria*.⁶⁵ The content and order of this hierarchy aims to take into account 'the life actually lived by the couple'.⁶⁶ It presupposes that both spouses are well integrated within the Member State of their habitual residence.⁶⁷ Although there will be instances in which this is not, in fact, the case, it should be kept in mind that spouses retain the possibility of designating the law of their nationality in circumstances in which they do not feel a close connection with their habitual residence (see 4.2. 'Choice of law agreements'). In the absence of common habitual residence immediately after marriage, the Proposal stipulates that the law of the common nationality of the spouses at the time of marriage should govern their matrimonial property relations (Article 17(1)(b)). This connection with common nationality is a verifiable, stable criterion, which allows individuals to keep their own legal traditions (an important consideration in a sensitive area such as family law).⁶⁸ In circumstances in which the couple do not share a nationality, the Proposal designates the law of the state with which the spouses have the 'closest links' giving regard to 'all the circumstances', and taking into particular consideration the place where the marriage took place (Article 17(1)(c)). This final criterion is vague and lacking in legal certainty; it is somewhat perplexing why the legislators did not instead opt to impose the *lex fori* (as is done in the Rome III Regulation).⁶⁹

The Proposal's provision establishing the applicable law in the absence of choice can be contrasted with the parallel provision set out in Article 8 of Rome III:

in the absence of a choice pursuant to Article 5, divorce and legal separation shall be subject to the law of the State:

(a) where the spouses are habitually resident at the time the court is seized; or, failing that

(b) where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seized, in so far as one of the spouses still resides in that State at the time the court is seized; or, failing that

(c) of which both spouses are nationals at the time the court is seized; or, failing that

(d) where the court is seized.

As can be seen, the two respective instruments diverge with regard to the time at

which the applicable law is ‘frozen’. Article 17 of the Proposal largely makes its assessment based on the circumstances at the time of marriage, whilst Article 8 of Rome III captures the moment at which the court is seized for divorce proceedings. The scenario below illustrates the potential consequences of this difference:

Oana and Tiago, a Romanian woman and Portuguese man, marry and live in Portugal. After a number of years, they move to Luxembourg. The spouses live there for several years before applying to the Luxembourgish courts for divorce. They have not made an agreement on the law to be applied to their divorce or matrimonial property regime. Which law(s) will be applicable?

Under Article 8(a) of the Rome III Regulation, the law to be applied in this instance would be that of Luxembourg, the law of the Member State of the spouses’ common habitual residence at the time that the court is seized for the purposes of divorce. However, matters arising from the dissolution of the couple’s matrimonial estate would be governed, under Article 17(a) of the Proposal, by the law of the couple’s first common habitual residence after their marriage (that of Portugal). Thus, if a couple change their habitual residence during the course of their marriage and have not agreed on the law which will be applied to their divorce and matrimonial estate, different laws will be applied to the two processes.

A difference can also be seen between the Proposal and the Succession Regulation in terms of the time at which the applicable law is captured in the absence of choice. Article 21(1) of the latter instrument stipulates that the law of the habitual residence of the deceased at the time of their death shall be applicable to their succession. This discrepancy in timing causes coordination problems similar to those discussed above, as the following scenario demonstrates:

Andreas and Petya, a Cypriot man and a Bulgarian woman, are married and living together in Cyprus. They subsequently move to Bulgaria where, a number of years later, Petya dies. They have neither agreed on the applicable law under the Proposal, nor made an *optio iuris* under the Succession Regulation. Which law(s) will be applicable?

According to Article 21(1) of the Succession Regulation, in the absence of a designation to the contrary, the law of the deceased’s habitual residence at the time of her death, namely that of Bulgaria, will apply to issues relating to her succession. Under Article 17(1)(a) of the Proposal, the law of the first common habitual residence after the marriage, namely that of Cyprus, has to be applied. Thus, similarly to the first scenario in this section, in instances where spouses have changed their habitual residence during their marriage, and have not designated a law to be applied to their successions or matrimonial property regime, divergent laws will apply to these aforementioned processes. The examples highlight the problems which can arise from the imposition of objective criteria upon those who routinely exercise their right to free movement. A possible way of improving coordination between these related EU instruments would be to change the time period stipulated in Articles 17(1)(a) and (b) from the time of marriage to the time the court is seized for matters concerning matrimonial property, since Rome III and the Succession Regulation both take this latter ‘proceedings-focused’ approach.

However, it is ambiguous whether the above solution is, in fact, desirable. The

problems demonstrated by the scenarios are symptomatic of the different natures of the areas of law dealt with. Whereas proceedings concerning divorce and succession usually occur at the end of a marriage, the arrangement of the matrimonial property regime can occur throughout a marriage. It is for this reason that the moment in which the respective laws are frozen is different. In order to tackle the coordination problems which arise from such discrepancy, the exercise of party autonomy could be seen as the most realistic option.

4.2 Choice of law agreements

The Proposal embraces the principle of party autonomy by allowing spouses to choose the law which will be applied to their matrimonial property regime. This freedom is attributed within the parameters of close connection, namely, the habitual residence or nationality of one, or both of the spouses. Article 16 establishes the opportunity to make a choice of law at the time of marriage, whilst Article 18 allows for the creation or amendment of a choice of law agreement subsequent to the marriage taking place:⁷⁰

Article 16 Choice of applicable law

The spouses or future spouses may choose the law applicable to their matrimonial property regime, as long as it is one of the following laws:

- (a) the law of the State of the habitual common residence of the spouses or future spouses, or
- (b) the law of the State of habitual residence of one of the spouses at the time this choice is made, or
- (c) the law of the State of which one of the spouses or future spouses is a national at the time this choice is made.

Article 18 Change of applicable law

The spouses may, at any time during the marriage, make their matrimonial property regime subject to a law other than the one hitherto applicable. They may designate only one of the following laws:

- (a) the law of the State of habitual residence of one of the spouses at the time this choice is made;
- (b) the law of a State of which one of the spouses is a national at the time this choice is made.

Unless the spouses desire otherwise, a change of the law applicable to the matrimonial property regime made during the marriage shall be effective only in the future.

If the spouses choose to make this change of applicable law retrospective, the retrospective effect may not affect the validity of previous transactions entered into under the law applicable hitherto or the rights of third parties deriving from the law previously applicable.

In analysing the above provisions, the option of the law of the habitual residence of either spouse (Article 16(b)) or the nationality of either spouse (Article 16(c)), at the time the choice is made, appears straightforward. However, the content of Article 16(a) is more controversial. It is surprising that, unlike the other two connecting factors, the choice is not frozen at any particular time. This open provision means that the spouses could select their shared habitual residence at any moment, not only at the time the choice is made. Spouses could stipulate any previous shared habitual residence, or even an indefinite future residence (e.g. the shared habitual residence at the time the court is seized). This lack of specification is out of line with the form of Article 5 of Rome III (see 4.2.2.1. below) and, in the opinion of the authors, ought to be removed in order to optimise interaction between the two instruments. Article 16(a) has indeed been excluded from Council's seventh revised text of the Proposal. It is hoped that this deletion is maintained in the future regulation.

The interaction of choice of law agreements under Article 16 of the Proposal with the respective rules providing for choice of applicable law upon succession (4.2.1.) and divorce (4.2.2.) provides a particularly interesting analysis. This level of coordination can also be examined through the respective formal requirements (4.2.3.). The following sections will address the interplay between the Proposal and these rules in this regard. Whilst the attribution of the freedom to choose the applicable law could be seen as facilitating coordination between the instruments⁷¹ it should be noted that, in some instances, circumstances may dictate that 'fixing' the law which will be applied to related disputes is not possible.

4.2.1 Choice of law agreements upon succession

Spouses can align their choice of applicable law under the Proposal with the law which will govern their successions in accordance with Article 16 of the Succession Regulation. However, couples ought to be aware of the differences between the respective instruments and the impact which changes in their habitual residences may have upon the applicable law:

Ioanna and Mihail, a Greek woman and a Bulgarian man, are married and living in Austria. They choose Austrian law, the law of their common habitual residence, to govern their matrimonial property administration under Article 16(b) of the Proposal. They would like to ensure that Austrian law also applies to both of their successions.

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. Thus, if the couple continue to live in Austria until the death of one of them, Austrian law will apply to both the succession and the dissolution of their matrimonial property regime.

However, if they choose to relocate to another Member State, Austrian law would no longer apply to either of their successions. In contrast, since the law which applies to the matrimonial property regime is established at the time the agreement is made; Austrian law will continue to apply in this regard. The two applicable laws are therefore no longer aligned. The only way to ensure that the same law continues to apply to both proceedings would be to make a new matrimonial property agreement designating the law of their new common habitual residence as applicable.

The current interaction between the Proposal and the Succession Regulation would appear to favour certain couple formations above others. For example, if

the above couple were both Greek, they could both make an *optio iuris* in favour of the law of their nationality under Article 22(1) of the Succession Regulation, and designate the law of their nationality under Article 16(c) of the Proposal. In this way, they could secure the application of Greek law to all proceedings, without the need for further amendments, and regardless of their subsequent movements within the European Union. Thus, it can be seen that couples who share a common nationality secure greater legal certainty in organising their property relations than couples of different nationalities. Such 'mixed' couples may also face problems in aligning the law which applies to their successions and matrimonial property regime in instances where the couple move apart from one another:

Henrik and Ania, a Swedish man and a Polish woman, are married and living in Sweden. They designate Swedish law, that of their common habitual residence, as applicable to their matrimonial property regime under Article 16(a) of the Proposal. Ania, suffering from ill-health, subsequently returns to Poland to be looked after by relatives, whilst Henrik stays behind in Sweden to continue working. After a year of living in Poland, in light of her worsening health, Ania decides to make a disposition of her property. For the sake of convenience, she would also like Swedish law to be applied to her succession.

Articles 21 and 22 of the Succession Regulation offer two options with regard to applicable law: the law of the deceased's habitual residence at the time of death, or that of their nationality at the time of their death. Assuming that Ania passes away in Poland, the Member State of her nationality and present habitual residence, only Polish law is applicable to her succession. In this set of circumstances, it would, therefore, unfortunately not be possible to align the law which applies to the wife's succession with the potential laws which can be applied to the couple's matrimonial property regime.

One solution would be to change the law applicable to the couple's matrimonial property regime to that of Ania's Polish nationality (Article 16(c) of the Proposal). However, this would mean that, in the event of the Ania's death, Henrik would have an unconnected (and unfamiliar) law applied to his personal circumstances. Another solution would be for Ania to move back to Sweden, and once again become habitually resident there. However, this could be very inconvenient in this particular situation, especially in light of the reasons why she moved to Poland in the first instance.

It has been suggested that a provision should be inserted into the Succession Regulation allowing for extension of the law of the matrimonial property regime to govern the estate of the deceased.⁷² This would provide all formations of cross-border couples with the chance to align both laws, thus improving practicality in all matters involving international successions.

4.2.2 Choice of Law agreements upon divorce

As stated previously, the application of the same law to related proceedings, such as those concerning matrimonial property and divorce, could simplify matters for judges and spouses alike.⁷³ The following sections deal with coordination in forming choice of law agreements in cases involving Member States who participate in the enhanced cooperation of Rome III (4.2.2.1.), and those who have opted not to participate (4.2.2.2.). This will provide an interesting analysis, since as Rome III is not applied in all Member States, the level of coordination between the respective EU instruments will vary from state to state.⁷⁴

4.2.2.1 Participation in Rome III

Article 5(1) of the Rome III Regulation provides that a choice of law agreement may be made based on one of the grounds which it establishes:

Article 5

Choice of applicable law by the parties

1. The spouses may agree to designate the law applicable to divorce and legal separation provided that it is one of the following laws:

(a) the law of the State where the spouses are habitually resident at the time the agreement is concluded; or

(b) the law of the State where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded; or

(c) the law of the State of nationality of either spouse at the time the agreement is concluded; or

(d) the law of the forum.

Upon comparison with Article 16 of the Proposal (see 4.2. above), it is clear that legislators have not, however, sought to entirely replicate the choice of applicable law provisions contained in Rome III. The opportunity to choose the law of the forum is noticeably absent from the Proposal's provisions. Furthermore, Article 5(1) of Rome III only allows the spouses to select the law of their common habitual residence, or the law of their last common habitual residence. The Proposal takes a more flexible approach, providing the spouses with the opportunity to select the law of either of their habitual residences. This disparity has consequences for the freedom of choice of those married couples who, for whatever reason, live apart from one another, as the below scenario illustrates:

Claudia and Diogo, a German woman and a Portuguese man, are married but, for work reasons, are in a longdistance relationship. Claudia lives in her native Germany, whilst Diogo lives in Belgium. They would like to make an agreement stipulating the law to be applied in the event of their divorce and to matters arising from the dissolution of their matrimonial estate. Which applicable laws are available to them?

According to Article 5(1) of Rome III, in the absence of a common habitual residence, the couple can choose only the law of either of their nationalities, German or Portuguese, to be applied in the instance of divorce (Article 5(1)(c)). In contrast, under Article 16 of the Proposal, greater flexibility is offered: in addition to the law of either of their nationalities, a married couple can also opt for the law of the habitual residence of either spouse. Thus, in addition to German or Portuguese law, Belgian law can also be chosen to be applied to matters concerning the couple's matrimonial property regime. The lack of coordination between the two texts in this regard means that if the couple were to choose Belgian law under the Proposal, the same law could not be applied to their divorce proceedings. Thus, should the spouses wish the same law to be

applied to proceedings concerning their matrimonial estate and their divorce; they cannot make full use of the options that the Proposal offers. In order to remedy this lack of symmetry between the fora offered in the two instruments, Rome III would have to be amended in order to allow for the choice of the habitual residence of either spouse.

4.2.2.2 Non-participation in Rome III

Whilst it is hoped that the future Regulation on matrimonial property will be adopted using the special legislative procedure set out in Article 81(3) TFEU, Rome III ultimately had to be passed through enhanced cooperation. This means that the latter instrument is in force only in 16 Member States. Assuming that the Proposal is finally implemented in most Member States, an inconsistency in coverage would emerge between these two instruments. Member States who are part of the enhanced cooperation of Rome III would recognise choice of law agreements made under both this instrument and the future Regulation on matrimonial property regimes. In contrast, those Member States which are not party to Rome III have no obligation to take such agreements into consideration.

A choice of law agreement made under Rome III can only be definitively enforced in jurisdictions which are part of the enhanced cooperation. This may cause difficulties for couples who have aligned the applicable law to their divorce and matrimonial property under Rome III and the Proposal respectively, and who subsequently move to a Member State which does not participate in Rome III:

Shane and Colleen, a married Irish couple, reside in Spain for a number of years. During this time, they decide to make an agreement designating Spanish law (the law of their habitual residence) as applicable to any future divorce (Article 5(1)(a) of the Rome III Regulation) and the matters arising from the dissolution of their matrimonial property regime in connection with this (Article 16(b) of the Proposal). They prefer Spanish law to the law of their common nationality; Irish divorce proceedings last for many years, and its law does not provide for a choice between different types of matrimonial property regimes. The couple subsequently relocate to the Netherlands where, after a few years, they decide to apply for divorce.

The Netherlands has chosen not to participate in the enhanced cooperation of the Rome III Regulation. Therefore, if the Dutch court is seized for the purposes of divorce, the agreement designating Spanish law as applicable to divorce under Rome III would not be enforceable. The spouses would therefore have to rely on the Dutch choice of law rules. Under Article 56 of the Dutch Private International Law Code,⁷⁵ *lex fori* will be applied to the divorce unless the parties agree to designate the law of their common nationality.⁷⁶ This would mean that only Irish law or Dutch law could be applied to their divorce; there is no way to align the law which would be applied to the divorce proceedings with that which governs the couple's matrimonial estate (Spanish law).

As stated previously, it is often seen as considerably more practical for the national law which is applied to the divorce to be the same as that which is applied to matters arising from the dissolution of the matrimonial estate. The two processes are often intricately linked. Laws concerning divorce and matrimonial property regimes emanating from the same Member State are, given their shared historical and cultural backgrounds, likely to be drafted to fit together. Conversely, laws originating from different Member States, when

applied to the same factual proceedings, may hinder one another. For example, in this instance, if the spouses were to select Irish law, this would lead to a lengthy divorce procedure,⁷⁷ which would, in turn, delay proceedings relating to the dissolution of their estate.

The problems arising from this interaction are a consequence of the lack of uniformity in the application of Rome III. There is, therefore, no simple solution to solving this lack of coordination. In any case, it would appear that the Commission is not overly concerned about the effect that this asymmetric participation may have on coordination of the choice of law agreements upon divorce; Member States which have chosen not to participate in Rome III are expected to deal with the consequences of their decision.

4.2.3 Formal requirements

The rules determining the formal requirements imposed on the process of making a choice of applicable law and forming a marriage contract are established in Articles 19 and 20 of the Proposal. Whilst the former refers to the conflict of laws practice of selecting the applicable law, the latter relates to the establishment of a marriage contract as prescribed by Member States' substantive law.

Article 19

1. The choice of applicable law shall be made in the way specified for the marriage contract, either by the law of the State chosen or by the law of the State in which the document is drawn up.
2. Notwithstanding paragraph 1, the choice must at least be made expressly in a document dated and signed by both spouses.
3. If the law of the Member State in which the spouses have their common habitual residence at the time of the choice referred to in paragraph 1 provides for additional formal requirements for the marriage contract, these requirements must be complied with.

Article 20

1. The form of the marriage contract shall be that prescribed by the law applicable to the matrimonial property regime or by the law of the State where the contract is drawn up.
2. Notwithstanding paragraph 1, the marriage contract must at least be set out in a document dated and signed by both spouses.
3. If the law of the Member State in which the spouses have their common habitual residence at the time the marriage contract is concluded provides for additional formal requirements for that contract, these requirements must be complied with.

Both articles can be seen to follow the same structure. They set out minimum requirements in the first and second paragraphs, and establish the possibility of imposing additional formal requirements in their third paragraphs. It is interesting to compare these provisions with the parallel requirements contained in Rome III. Article 7 of Rome III establishes the formal validity requirements

for choice of applicable law agreements made pursuant to the Regulation:

1. The agreement referred to in Article 5(1) and (2), shall be expressed in writing, dated and signed by both spouses. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.
2. However, if the law of the participating Member State in which the two spouses have their habitual residence at the time the agreement is concluded lays down additional formal requirements for this type of agreement, those requirements shall apply.
3. If the spouses are habitually resident in different participating Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements, the agreement shall be formally valid if it satisfies the requirements of either of those laws.
4. If only one of the spouses is habitually resident in a participating Member State at the time the agreement is concluded and that State lays down additional formal requirements for this type of agreement, those requirements shall apply.

Given the close link between matrimonial property and divorce, consistency between the formal requirements in the two instruments is essential to the formation of a comprehensive agreement covering both areas, as the following scenario attests:

Pierre and Louise, a French man and Belgian woman, are married, but live separately, in France and Belgium respectively, for work reasons. They make an agreement under Article 5(1)(c), designating Belgian law (the law of Louise's nationality) to apply to a future divorce. In addition, they also agree, under Article 16(c) of the Proposal, to designate Belgian law as applicable to their matrimonial property regime. They would like to encompass both of these choices of law agreements in the same marriage contract.

Since the couple are habitually resident in different participating Member States, under Article 7(3) of Rome III, the divorce agreement made by them would be subject to any additional minimum requirements set by either Belgian or French law. In contrast, under Article 19(3) of the Proposal, no provision is made for the imposition of an additional minimum requirement in the event that the spouses are habitually resident in different Member States. Thus, the spouses' agreement designating the law to be applied to their matrimonial property regime would have no further requirements imposed upon it other than those set out in the Proposal itself. A disparity can therefore be seen to emerge between the Proposal and the Rome III Regulation in terms of the formal requirements established for choice of law agreements, in the sense that additional requirements may need to be met in forming agreements under Rome III.

Practically these differences mean that, depending on the requirements of the laws of the respective habitual residences of the spouses, creating a single contract which designates the law to be applied to both the divorce and matrimonial property may be unfeasible. The creation of two separate

agreements would cost extra time and money for the spouses. Furthermore, the existence of such disparities gives rise to further confusion and difficulties for legal practitioners who seek to navigate this already complicated framework. Given the linkage of Rome III and the Proposal, it is surprising that Articles 19(3) and 20(3) of the latter do not appear to consider the case in which the spouses have habitual residences in different Member States.⁷⁸ The authors suggest that, given the factual intertwining of divorce and matrimonial property regimes, the future Matrimonial Property Regulation should align the formal requirements imposed on choice of law agreements with those found in Article 7(3) of the Rome III Regulation.

The Council's seventh revised text of the Proposal can be seen to have brought its formal requirements into line with those contained in Rome III. Under Article 19(3) of the revised version, spouses who are habitually resident in different Member States at the time an agreement is concluded will have to comply with the formal requirements of at least one of these states.

5 Recommendations

During the course of this critical analysis, we have sought to examine the coordination of the current EU Proposal on the property relations between married couples with the related EU instruments concerning succession and divorce. We have examined this interaction in the fields of jurisdiction and applicable law.

It should be acknowledged that some situations cannot be remedied through redrafting or amendment. For example, the coordination problems which arise from the limited Member State participation in Rome III are political. Moreover, the differing natures of matrimonial property relations and succession mean that it is unfeasible to fully coordinate the respective instruments.

Notwithstanding this, the following key recommendations can be proposed in light of the coordination of the current version of the Proposal with the related EU instruments:

1. In matrimonial property proceedings arising in conjunction with succession, the interests of the surviving spouse may be compromised through the default extension of jurisdiction through Article 3 of the Proposal (e.g. where jurisdiction for succession is prorogued with the involvement of multiple 'concerned' parties). A possible solution to this would be to require the agreement of the surviving spouse to extend jurisdiction under Article 3 of the Proposal. Allowing greater party autonomy in this regard would increase legal certainty and practicality for the surviving spouse.
2. In the determination of jurisdiction for proceedings concerning matrimonial property upon divorce, it would be desirable if the final Regulation omitted the hierarchy of fora in Article 5(1) of the present Proposal, and replaced it with a list of alternative jurisdictions. This would bring the Proposal into line with the format provided by Article 3(1) of Brussels II bis, and would ensure cross-border couples have the possibility of securing related proceedings concerning divorce and matrimonial property in the same court.
3. Although Article 4 of the Proposal allows couples to make a choice of court agreements aligning the jurisdiction for matrimonial property proceedings with that seized for divorce under Brussels II bis, any agreement made prior to the court being seized for such purposes under this latter instrument would essentially be general in nature. Since the opportunity to make choice of court agreements is not currently provided by Brussels II bis, the selected jurisdiction could shift depending on changes in a married couple's circumstances (e.g. a

change in their Member State of habitual residence). Despite the fact that significant changes in Article 4 have been brought forth by more recent revisions of the Proposal, in the absence of amendment of Brussels II bis, agreements remain essentially general in nature. In order to maximise legal certainty for international couples, it is opined that the need to allow choice of court agreements under Brussels II bis is now more pressing than ever.

4. Couples who, having common nationality, choose the law of that nationality for both the matrimonial property regime and the succession, not only have the advantage of being able to apply the same law to all related proceedings, but are also able to fix the applicable law at the time of choice, regardless of changes in personal circumstances. It is therefore recommended that, in order to ensure equality, legal certainty and practicality for those couples of mixed compositions, the Succession Regulation should be amended to allow such spouses to agree to extend the law of their matrimonial property regime to their successions.

5. Contrasting the choice of applicable law provisions contained in Articles 16 and 18 of the Proposal with those of Article 5(1) of Rome III, it is clear that the former contains greater scope of choice than the latter. Whilst Rome III only allows for selection of the common habitual residence of the spouses, the Proposal allows for selection of the law of either of their habitual residences. It is recommended that Rome III is redrafted to include the possibility of choosing the law of the habitual residence of either spouse. This would remove the discrepancy which currently exists between the instruments in this regard, as well as upholding greater party autonomy and flexibility.

6. Compared with the Proposal, Rome III contains additional formal requirements for choice of law agreements between couples who do not share the same habitual residence. This means that forming a marriage contract that covers both matrimonial property and divorce could be impractical for such couples. It is therefore recommended that, in line with the Council's seventh revised version of the text, the future Regulation incorporates the additional formal requirements as established by Rome III.

6 Final remarks

Overall, the Proposal can be seen to enhance legal certainty and practicality for cross-border couples in their property relations. In particular, it generally coordinates successfully with other EU instruments in order to concentrate related disputes in the same court. However, as has been demonstrated, alignment of the jurisdictions which hear related disputes is not always achieved. Likewise, it is not always possible to maximise practicality by applying the same law to connected proceedings. It would appear that the more 'fragmented' the relationship (e.g. a couple with different nationalities living in different Member States to one another), the harder it is to coordinate one's family and succession relations. In view of this, a more flexible approach ought to be adopted in the final text. It should be noted that, with a few exceptions, little change has been made so far in this regard in the current revised texts. Nevertheless, it should be recalled that we are 'stress-testing' the draft using exceptional cases; in general, the Proposal serves the couples that it seeks to address.

As the EU continues to legislate in the field of cross-border familial relationships, inconsistencies will inevitably emerge within the legal framework. The legislative process, which involves the making of political compromises in order to achieve unanimity, impacts upon the ability of legislators to achieve coordination between the instruments. This fragmentation could ultimately be addressed in a future instrument which would consolidate the existing EU

legislation in the fields of cross-border family law and succession.

Noten

1 European Commission, Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition (COM (2006) 400 final).

2 Proposal for a Council Regulation on jurisdiction, applicable law and recognition and enforcement of decisions in matters of matrimonial property regimes (COM (2011) 126).

3 Proposal for a Council Regulation on jurisdiction, applicable law and recognition and enforcement of decisions regarding the property consequences of registered partnerships (COM (2011) 127).

4 See K. Boele-Woelki, 'Cross-border family relations in Europe: towards a common European matrimonial property law based upon cooperation between private international law and substantive law', in: A.L.M. Keirse and M.B.M. Loos (eds.), *Alternative Ways to Ius Commune. The Europeanisation of Private Law* (Intersentia, Antwerp/Cambridge, 2012), at p.34.

5 Brussels II bis (Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, OJ EU 23.12.2003 L 338/1) and Rome III (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, OJ EU 29.12.2010 L 343/10).

6 The Brussels II bis Regulation, see Ibid.

7 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, OJ EU 10.01.2009 L 7/1.

8 Regulation (EU) No. 650/2012 of 14 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, OJ EU 27.07.2012 L 201/107.

9 Substantive family law falls within the exclusive competence of Member States. See the 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) 0125); M. Jäntera Jareborg, 'Unification of international family law in Europe. A critical perspective', in K. Boele-Woelki (ed.), *Perspectives for the unification and harmonization of family law in Europe* (Intersentia, Antwerp/Cambridge, 2003), at p. 195; W. Pintens, 'Europeanisation of family law', Ibid., at p. 22 ; K. Boele-Woelki, *Unifying and harmonizing substantive law and the role of conflicts of laws* (Brill, Leiden, 2010), at p. 51; L. Tomasi, C. Ricci and S. Bariatti, 'Characterization in family matters for purposes of European private international law', in J. Meeusen et al. (eds.), *International family law for the European Union* (Intersentia,

Antwerp/Cambridge, 2007), at p. 341.

10 Articles 16 and 18 of the Proposal.

11 Article 15 of the Property Consequences of Registered Partnerships Proposal.

12 However, reference may occasionally be made in this article to Member States' private international law rules as a means of illustrating a scenario concerning the interaction between the respective EU instruments (see, with regard to Member States that have not opted into Rome III, 4.2.2.2.).

13 Explanatory Memorandum, Proposal for a Council Regulation on jurisdiction, applicable law and recognition and enforcement of decisions in matters of matrimonial property regimes (COM (2011) 126), paragraph 5.2. See also: See: I. Viarengo, 'The EU Proposal on Matrimonial Property Regimes', *13 Yearbook of private international law*, at p.201 (2012), A. Bonomi, 'The Interaction among the future EU Instruments', *13 Yearbook of Private International Law*, at p.218 (2011).

14 It should be noted that since we use a stress-testing approach, we will tend towards identifying the problematic areas of the Proposal. Whilst there are many successful examples of coordination in the Proposal, for the sake of conciseness, these will largely be implied rather than discussed.

15 See Explanatory Memorandum, supra n.13.

16 Council of the European Union, Proposal for a Council Regulation on jurisdiction, applicable law and recognition and enforcement of decisions in matters of matrimonial property regimes (sixth revised text of the regulation) of the 28 June 2013, 11699/13 JUSTCIV 154.

17 Council of the European Union, Proposal for a Council Regulation on jurisdiction, applicable law and recognition and enforcement of decisions in matters of matrimonial property regimes (seventh revised text of the regulation) of the 11 October 2013, 14746/12 JUSTCIV 215.

18 Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice - text adopted by the justice and home affairs council of 3 December 1998, OJ EU 23.01.1999 C 19/1.

19 Draft Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, OJ EU 15.01.2001 C 12/1.

20 Communication from the Commission to the Council and the European Parliament of 10 May 2005 – The Hague Programme: ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice (COM (2005) 184 final)

21 Supra n.1. It should be noted that the comparative study on the conflict of jurisdiction and laws on matrimonial property regimes, which was carried out by the Asser Institute and the Catholic University of Louvain-la-Neuve between

2001 and 2003 on behalf of the European Commission, was also influential in the drafting of the Proposal. See, in this regard, Asser-UCL Consortium, Study on comparative law on the rules governing conflicts of jurisdiction and laws on matrimonial property regimes and the implications for property issues of the separation of unmarried couples in the Member States, 30 April 2003, Offre n^o JAI/A3/2001/03.

22 The Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ EU 4.05.2010 C 115/1.

23 COM (2010) 171 final.

24 COM (2010) 603 final.

25 COM (2011) 125 final.

26 COM (2011) 328 final.

27 Article 22 and 23 of the Proposal

28 See Explanatory Memorandum, paragraph 3.1, supra n.13.

29 Recital 1 of the Preamble.

30 See Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ EU 4.07.2008 L 777/6; Regulation (EC) No. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ EU 31.07.2009 L 199/40 and Rome III.

31 See, for example, Article 1 of the Brussels I Regulation, Article 1 of the Brussels II bis Regulation, Article 1 of the Maintenance Regulation, and Article 1 of the Succession Regulation.

32 I. Viarengo, supra n.13, at p. 203.

33 This recommendation could also be seen to apply to the other EU private international law instruments concerning either jurisdiction, or jurisdiction and applicable law jointly.

34 See the point made in the sixth revised text of the Proposal (at p.3, footnote 1): ‘The Regulation will only apply in cases with cross-border implications. A recital could make this clear’.

35 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.

36 Ibid., at Amendment 27.

37 Ibid., at Amendment 32.

38 Ibid., at Amendment 33.

39 P. Lagarde, 'Clearer patrimonial regimes for Europe's' international couples', Panel discussion: Session 1-The applicable law, paper presented at the conference organised by Notaries of Europe in Brussels on the 17th October 2011, available at: <www.notaries-of-europe.eu>. See also: J.M. Fontanellas Morell, 'Nuevos Reglamentos comunitarios y su impacto en el derecho catalán', in: C. Parra (ed.), *Nuevos Reglamentos comunitarios y su impacto en el derecho catalán* (J.M. Bosch Editor, Barcelona, 2012), at p.261.

40 I. Viarengo, supra n.13, at p.203.

41 Supra n.35, at Amendment 58.

42 Regulation Brussels II bis does not provide any definition of marriage or spouse. In addition, Regulation Rome III states explicitly that the definition of a marriage is excluded from its scope of application (Article 1(2)(b)).

43 E.g. M. Soto Moya, *Uniones transfronterizas entre personas del mismo sexo* (Tirant, Valencia, 2013), at pp. 87-95 and, with specific regard to Brussels II bis: M. Bodgan, *Concise Introduction to EU Private International Law* (Second Edition, Europa Law Publishing, Groningen, 2012), at p.93. However, there is still opposition to the view that the instruments encompass same-sex marriage: e.g. E. Urso, 'Il Diritto di famiglia nella prospettiva europea', in: F. Brunetta D'Usseaux (ed.), *Il diritto di famiglia nell'Unione Europea* (Cedam, Padova, 2005), at pp.515-611.

44 In regards to Regulation Brussels II bis, see the answer given by Mr Vitorino on behalf of the Commission on 12 March 2002: 'As regards the relations between 'spouses', its purpose is to establish rules on jurisdiction and to allow recognition in a Member State of a divorce, a separation or an annulment of marriage given in another Member State in accordance with the law which is applicable according to its private international law. Even 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' (OJ 2003/C 28 E/002).

45 See, for example, Article 13 of the Rome III Regulation.

46 P. Wautelet, 'Private International Law Aspects of Same-Sex Marriage and Partnerships in Europe', in: K. Boele-Woelki and Angelika Fuchs (eds.), *Legal recognition of same-sex relationships in Europe* (Intersentia, Antwerp/Cambridge, 2012), at pp.164-165

47 Ibid. at p.145 and M. Soto Moya, supra n.43, at p. 91.

48 See Recital 10 Regulation Rome III.

49 See Communication, supra n.9, at p.6.

50 See: K. Boele-Woelki, 'For better or for worse: the europeanisation of divorce law', 12 *Yearbook of private international law*, at p. 22 (2010).

51 We have chosen not to address proceedings concerning the general arrangement of matrimonial property (Article 5(1) and (2)), because coordination with other related EU instruments is not essential in this regard.

52 See Explanatory Memorandum, paragraph 5.2, supra n.13. See also: I. Viarengo, supra n.13, at p. 201 and A. Bonomi, supra n.13, at p.218.

53 Articles 3 and 4 of the Proposal.

54 Explanatory Memorandum, Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (COM (2009) 154 final).

55 A. Rodríguez Benot, 'Approach to the Proposal for a Regulation of the European Union on Succession', in: B. Campuzano Diaz et al. (eds.), *Latest Developments in EU Private International Law* (Intersentia, Antwerp/Cambridge, 2011), at p.144

56 This stipulation may give rise to legal uncertainty, since it is not entirely clear what is the threshold for reasonableness in this context.

57 B. Campuzano Díaz, 'The Coordination of the EU Regulations on Divorce and Matrimonial Property', 13 *Yearbook of Private International Law*, at p.242 (2011). See also: C. González Beilfuss 'Relaciones e interacciones entre derecho comunitario, derecho internacional privado y derecho de familia europeo en la construcción de un espacio judicial común', 4 *Anuario español de Derecho internacional privado*, at p.127 (2004).

58 See Explanatory Memorandum, paragraph 5.2., supra n.13.

59 B. Campuzano Díaz, supra n.57, at p.242.

60 However it should be kept in mind that the alternative grounds as set out in Article 3 of Brussels II bis give rise to 'races to the starting block'. See C.V.M Clarkson, 'Matrimonial property: the proposed EU Regulation', 17 *Trusts & Trustees* 9, at pp. 847-848 (2011).

61 B. Campuzano Díaz, supra n.57, at p.240.

62 See the seventh revised text of the Proposal, at p.29, footnote 1: 'Article 4a on the choice of courts has been moved to Article 5a'.

63 K. Boele-Woelki et al. (eds.), *European Family Law in Action 24: Volume IV: Property Relations between Spouses* (Intersentia, Antwerp/Cambridge, 2009), at pp. 115-128 (Question 6).

64 This section will not analyse change of applicable law and the impact of this upon third parties, as such issues do not directly concern the interaction between the respective EU instruments.

65 J. Carrascosa González, 'La ley aplicable a la separación judicial y al divorcio en defecto de elección de ley por los cónyuges. Análisis del artículo 8 del Reglamento 1259/2010 de 20 de diciembre de 2010', 4 *Cuadernos de derecho transnacional* 1, at p.69 (2011).

66 See Recital 21 Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes COM(2011) 125 final} {COM(2011) 127 final}{SEC(2011) 327 final}{SEC(2011) 328 final}.

67 D. Martiny, 'Objectives and values of (private) international law in family law', in: J. Meeusen et al. (eds.), supra n.9, at p.89, K. Kroll, 'Unifications of conflicts of law in Europe. Matrimonial property regimes', in: K. Boele-Woelki and T. Sverdrup (eds.), *European challenges in contemporary family law* (Intersentia, Antwerp/Cambridge, 2008), at p. 388; A. Rodríguez Benot 'El criterio de conexión para determinar la ley personal: un renovado debate en Derecho internacional privado', 2 *Cuadernos de derecho transnacional* 1, at p.201 (2010).

68 With regard to nationality criteria in EU private international law, see: J. Basedow, 'Le rattachement à la nationalité et les conflits de nationalité en droit e l'Union européenne', 99 *Revue critique de droit international privé* 3, at pp.427-456 (2010) and A.L. Calvo Caravaca, 'El "derecho internacional privado multicultural" y el revival de la ley personal', *Diario la ley* 7847, at pp. 5-6 (2012).

69 B. Campuzano Diaz, supra n.57, at p.252; A. Rodríguez Benot, 'La armonización del régimen económico matrimonial en la UE: La propuesta de Reglamento de 2011', in: C. Esplugues Mota and G. Palao Moreno (eds), *Nuevas fronteras del derecho de la Unión Europea. Liber amicorum José Luis Iglesias Buhigues* (Tirant Lo Blanch, Valencia, 2012), at p.566.

70 See Explanatory Memorandum, paragraph 5.3., supra n.13.

71 A. Bonomi, supra n.13, at p.229.

72 A. Bonomi, supra n.13, at p.230.

73 B. Campuzano Díaz, supra n.57, at p.245.

74 The goal of integration (e.g. through enhanced cooperation) may actually lead to disintegration amongst the Member States: K. Boele-Woelki, supra n.50, at p. 6.

75 New Dutch Civil Code, Book 10.

76 Article 56(2): a request by one of the parties to use the law of the couple's common nationality will be accepted if the other party does not express their disagreement, or if the couple have real social ties with the state of their common nationality.

77 e.g. In order to obtain a divorce under Irish law, a couple has to meet the requirement of having lived apart for four years during a five year period

previously to starting proceedings: Family Law (Divorce) Act 1996, Section 5(1) (a).

78 See also Article 7(4) of the Rome III Regulation, which provides that additional formal requirements should also apply even where only one spouse is habitually resident in a Member State.