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

## EUFams II and Beyond

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

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# Defining Marriage and Other Unions of Persons in European Family Law

*Ilaria Viarengo, Francesca Villata, Nicolò Nisi, and Lenka Valkova**
*Diletta Danieli and Cinzia Peraro***

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**Abstract** This contribution focuses on the notions of marriage and other unions of persons for the purposes of the application of the regulations in European family law concerning the personal status as well as the financial aspects of maintenance and property regimes. Prior to this analysis, a comparative overview of the national legal models available to couples and considerations on the broader framework of EU free movement law are also provided in order to set the background against which the subsequent private international law assessment is carried out.

**Keywords** marriages, partnerships, unions, personal status, maintenance, property regimes.

## I. Introduction

This contribution addresses a fundamental question in European family law: the definition of marriage and other unions of persons. It is indeed a preliminary aspect upon which the applicability of the relevant European regulations depends and which is heavily influenced by the Member States' legal traditions and the societal changes affecting the recognition of different family models.

After a brief comparative overview of the national substantive laws (section II.) and an analysis of the relations between the CJEU's case law on free movement rights and the recognition of legal situations (section III.), this contribution will be divided into two parts. The first part will address the aspects relating to personal status, focusing on the notion of marriage (and spouse) underlying the Brussels II bis and the Rome III Regulations and questioning the possibility of applying them to same-sex marriages as well as marriages involving a person of third/neutral gender (sections IV.1.–IV.3.). Non-marital unions will subsequently be taken into account and their possible inclusion within the material scopes of these Regulations will be discussed (section IV.4.). The second part of the contribution will focus on the financial aspect and will address the same topic with regard to the Maintenance Regulation (section V.1.) as well as the recent Property Regimes Regulations (section V.2.).

## II. A comparative perspective on the legal framework for couples in Europe*

National legal systems generally provide two different types of marriages: civil marriages and traditional or religious marriages. The former are contracted under State laws setting out the conditions that must be met for a marriage to be valid (e.g. minimum age, formal requirements, maintenance and parental obligations, and property regimes). In particular, civil marriages vary from one jurisdiction to another depending on the cultural, traditional, religious, and historical experiences of a country and can imply recognition of a diversity of marriages – including some (limited) effects of polygamous marriages celebrated abroad.[1] Traditional or religious marriages, on the contrary, are contracted in accordance with specific customary practices or religious rites, respectively, and their effects are recognized under State laws if civil law conditions are complied with.[2]

At the same time, legal alternatives to marriage, such as registered partnerships, have become more widespread and national legislation has changed to confer more rights on unmarried couples.[3] The first country to provide for registered partnerships was Denmark in 1989 in favor of same-sex couples. Since then, many other jurisdictions around the world have followed suit, with some countries also opening such registration schemes to different-sex couples.

Non-marital partnerships are generally created by formal acts of registration and have been categorized in many ways, depending on whether they result in marriage-like rights and obligations or, in contrast, whether they only give access to a limited selection thereof.[4] These evolutions are not only supported by the development on the EU level concerning the free movement of persons (including same-sex couples), which has a significant impact

* This section is to be attributed to *Nicolò Nisi.*

1 Despite the fact that polygamy is illegal in the EU, in some cases the status of "spouse" acquired in result of a polygamous marriage has been recognized in some Member States in line with the ECtHR's case law (for instance in matters of succession law or in matters of family reunifications under Council Directive 2003/86/EC, within the limits set forth by Art. 4 thereof). On this matter, see *Baruffi,* in: Cagnazzo/Preite, Il riconoscimento degli status familiari acquisiti all'estero, p. 73 et seq. with a focus on the evolution of the Italian case law.

2 See e.g. the concordat marriage (*matrimonio concordatario*) in Italy, first regulated by the Lateran Pacts (Patti Lateranensi) of 1929.

3 *Dethloff,* ERA Forum 12 (2011), 89.

4 In the literature, these statuses have been referred to as "quasi-marriage" and "semi-marriage". See *Waaldijk,* ELR 38 (2004), 569.

on priority issues such as family reunifications,[5] but they are also linked to the strong impact of the general human rights discourse in Europe (notably, the principles of equal treatment, non-discrimination, and respect for private and family life).[6]

In addition to marriages and registered partnerships, some countries also recognize informal or *de facto* unions, i.e. arrangements between two persons cohabiting over a period of time without formalizing their relationship, which are increasing in popularity in all European countries.[7] Such unions may be useful to settle certain practical or legal aspects, such as social security, maintenance, or taxes and housing, especially for same-sex couples living in a country that does not allow them to get married or register their partnership in any way.[8]

In general terms, as a consequence of the profound change to the landscape of family law over the last decades, what can be observed today is the development of a variety of options for the recognition of family relationships in the wake of a truly pluralistic approach.[9]

## 1. Marriage: from tradition to same-sex couples

The traditional conception of marriage dates back to Roman-Canonical sources. The jurist *Modestinus* provided the following definition of marriage, which was contained in the Digest: "the union of man and woman, a lifelong community, a communion of human and divine law"[10]. This definition, albeit elementary, makes it evident that marriage has been long considered as the typical social framework for procreation and nurturing children as

5 See recently CJEU, 05. 06. 2018, C-673/16 (*Coman*), where the CJEU ruled that that the term "spouse" for the purpose of family reunification rights under EU free movement law includes the same-sex spouse of a Union citizen who has moved between Member States. On the evolution of the discussion in this matter, see section III.1.

6 *Sörgjerd,* in: Scherpe, European Family Law Vol. III, p. 3 et seq. An in-depth illustration of ECtHR case law in this regard may be found in the Guide on Art. 8 of the European Convention on Human Rights – Right to respect for private and family life, 31. 08. 2020, https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf (last consulted 07. 10. 2020).

7 See *Boele-Woelki/Mol/van Gelder,* European Family Law in Action. Volume V: Informal Relationships.

8 Homosexuality is still controversial in some Member States, which do not provide any institution for same-sex couples (e.g. Poland, Latvia, Lithuania, Romania, Slovakia, Bulgaria).

9 Such pluralism is inextricably linked to the increasing privatization of family law. See *Fulli-Lemaire,* MPI Research Paper No. 16/28.

10 Digest 23, 2, 1: "Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio".

well as the typical legal framework for the relationship between a man and a woman. In numerous countries, family, children, and parenting are all linked together in the Constitution.[11]

Things have radically changed in the last decades and the idea that marriage is more about a couple's affair rather than the founding act of a family gained momentum.[12] The traditional institutional marriage based on fixed gender-biased roles has given way to marriage based on companionship or even personal fulfilment. While some requirements, such as the prohibition of incest or the aim for unlimited duration, have essentially remained, the relationship between marriage and procreation changed significantly so that nowadays, non-marital and same-sex relationships are also viewed positively in society.[13] The equivalence between children born in and out of wedlock represents a clear sign of the dissociation between marriage and filiation.[14]

11 In a landmark decision dated 15. 04. 2010, No 138, https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2010&numero=138 (last consulted 02. 11. 2020), the Italian Constitutional Court (Corte costituzionale della Repubblica Italiana) stated that «la giusta e doverosa tutela, garantita ai figli naturali, nulla toglie al rilievo costituzionale attribuito alla famiglia legittima ed alla (potenziale) finalità procreativa del matrimonio che vale a differenziarlo dall'unione omosessuale» (translation by the author: the necessary and fair protection guaranteed to biological children does not undermine the constitutional significance attributed to the legitimate family and the (potential) creative purpose of marriage which distinguishes it from homosexual unions). Moreover, the court explained that «la normativa medesima non dà luogo ad una irragionevole discriminazione, in quanto le unioni omosessuali non possono essere ritenute omogenee al matrimonio» (translation by the author: the legislation itself does not result in unreasonable discrimination, since homosexual unions cannot be regarded as homogenous with marriage). Similarly, the French Constitutional Council (Conseil Constitutionnel 28. 01. 2011, no. 2010–92 QPC, https://www.conseil-constitutionnel.fr/decision/2011/201092QPC.htm (last consulted 02. 11. 2020)) held that « la différence de situation entre les couples de même sexe et les couples composés d'un homme et d'une femme peut justifier une différence de traitement quant aux règles du droit de la famille » (translation by the author: the difference in situation between couples of the same sex and couples composed of a man and a woman can warrant a difference in treatment in regards to the rule of family law). The lack of any positive obligation of full equivalence of rules provided for opposite-sex marriage to same-sex unions was also upheld by the ECtHR in case 30141/04 (*Schalk and Kopf/Austria*), 24. 06. 2010, note 108.

12 *Schwenzer,* EJLR 3 (2001), 199 (200). This evolution is well-illustrated by *Fulli-Lemaire,* in: Laurent-Bonne/Pose/Simon, Les piliers du droit civil, p. 61 et seq.

13 A recent analysis among the population of 24 Member States shows that institutional marriage, although considered by many to be already obsolete in the 1970s, is still the prevailing ideal regarding marriage or long-term relationships in Europe: *Camarero,* European Societies 16 (2014), 443.

14 The case of Sweden is illustrative: The 2009 reform that opened marriage to same-sex couples removed all references to procreation from the secular marriage ceremony. See *Sörgjerd,* Reconstructing Marriage, p. 323.

This shift of paradigm was also due to the growing disaffection for marriage among heterosexual persons (called by an author "demarriage"[15]). The first signs of this development emerged in the 1960s in Scandinavia with a decline in the number of marriages among young couples, before becoming more widespread in all of Europe, until the present situation where marriages are considerably less frequent (with an ever-increasing number of births occurring outside marriage), occur at later ages and are more likely to end in divorce.[16]

Irrespective of the evolution of marriage in response to the changing dynamics of heterosexual couples, the rules for legal recognition of same-sex couples have been modeled on marriage. Currently, 15 of the 27 Member States regulate same-sex marriages,[17] along with many non-EU countries around the world.[18] However, same-sex spouses have not automatically been granted all rights attached to heterosexual marriage, with differential treatments especially in matters of adoption and presumption of paternity, which in general does not apply to the female spouse of a woman who gives birth to a child.[19]

It is, however, worth mentioning that, even today, a vast number of countries expressly limit marriage to opposite-sex couples, with the consequence that difficulties may arise in the recognition of same-sex marriages celebrated abroad. Indeed, characterization of the couple's relationship may prove difficult when recognition is sought in a country which allows same-sex couples only to establish civil unions.[20]

15 *Théry,* Le démariage.

16 *Festy,* Population 61 (2006), 493 (517).

17 In 2001, the Netherlands was the first country in the world to open up civil marriage to same-sex couples, followed by Belgium (2003), Spain (2005), Sweden (2009), Portugal (2010), Denmark (2012), France (2013), Ireland (2015), Luxembourg (2015), Malta (2017), Germany (2017), Finland (2017), and Austria (2019).

18 Outside the EU, countries like Canada, South Africa, Norway, Argentina, Brazil, Uruguay, New Zealand, the great majority of states of the United States, and some states of Mexico also recognize same-sex marriages.

19 *Saez,* JGSPL 19 (2011), 1.

20 *Biagioni,* in: Gallo/Paladini/Pustorino, Same-Sex Couples before National, Supranational and International Jurisdictions, p. 359 et seq. In this regard, see the discussion in section III.2 of this contribution.

## 2. Registered partnerships: monistic versus dualistic versus pluralistic models

As mentioned above, the first country to introduce the institution of a registered partnership was Denmark in 1989, whose example was followed by Sweden in 1994.[21] In most respects, both countries modeled the legal consequences of a registered partnership on those of a marriage, whose substantive rules are repeatedly referred to. Differing from the Scandinavian model, other countries, such as the Netherlands in 1998, opened up the possibility of entering into a registered partnership for both same-sex and opposite-sex couples.[22]

This distinction reveals the adoption of different approaches by national legislators with regard to partnerships: the first approach, the so-called dualistic model, permits only same-sex couples to register their non-marital registered relationship, while different-sex couples are only able to get married (e.g. Italy, Slovenia, Czech Republic); the second approach, the so-called pluralistic model, opens registered relationship schemes to both different-sex and same-sex couples (e.g. Cyprus, Estonia, Greece), a step that is generally followed by the opening-up of civil marriage to couples of the same sex (e.g. Belgium, France, the Netherlands, Austria, Spain).[23] A third possible approach is adopted by Ireland, Germany, Sweden, and Finland and could be classified as monistic, whereby only a single, formalized institution, i.e. marriage, is open both to same-sex and opposite-sex couples.[24]

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21 As of June 2020, the following countries have regulated registered partnerships for same-sex couples: Austria (2018), Belgium (1998), Croatia (2014), Cyprus (2015), Czech Republic (2006), Denmark (1989), Estonia (2014), Finland (2001, but expired in 2017), France (1999) Germany (2001, but expired in 2017), Greece (2015), Hungary (2015), Ireland (2010), Italy (2016), Luxembourg (2004), Malta (2016), the Netherlands (1997), Slovenia (2017), Spain (2005), and Sweden (1994, but expired in 2009).

22 Abundantly referring to the substantive rules applicable to civil marriage: Art. 1:31–42 of the Dutch Civil Code (Burgerlijk Wetboek), which are analogously applicable by virtue of Art. 1:80a (6) of the Dutch Civil Code.

23 *Curry-Sumner,* Uniform Trends in Non-Marital Registered Relationships. This latter classification is based on a core element, which, however, does not overshadow other significant differences; it is indeed possible to individuate a sub-distinction of systems where marriage and registered partnership have virtually identical regimes (e.g. the Netherlands) and systems where the registered partnership is endowed with only a fraction of the effects of marriage (e.g. France and Belgium).

24 In 2015, Ireland was the first country to legalize same-sex marriage by popular vote, at the same time closing civil partnerships to new entrants while leaving partnerships entered into beforehand unaffected. See *Tobin,* Int. J.L. Pol. Fam. 30 (2016), 115. This is the current framework also in Sweden and Finland, after same-sex couples gained access to mar-

Despite the differences among EU national systems, some common patterns have been identified from a comparative perspective, in particular concerning exclusivity[25] and consent[26]. However, the legal effects stemming from such registered partnerships still reveal the existence of substantial differences between national systems. Some countries have extended all the rights and duties granted to married couples to those involved in same-sex equivalents, while others have chosen to use an enumeration method to extend rights and benefits, explicitly stating each right, benefit, duty, and responsibility that is granted to same-sex registered couples. Key differences, always to the detriment of registered partners, generally relate to the protection they are afforded upon dissolution of the partnerships, the possibility to adopt as a couple, and inheritance rights.

In this regard, one may also see that countries which initially adopted weak forms of registered partnerships have then witnessed an evolution where the two institutions are growing closer, as the weight of public interests in marriage is slowly being reduced while the partnerships are increasingly becoming more "matrimonial".[27] In some cases, countries decided at a later stage to move towards marriage. An example is provided by France, which in 1999 enacted a model of partnership with much more limited effects than marriage (the so-called PACS – *pact civil de solidarité*)[28], while in 2013 – after two legislative developments – it legalized same-sex marriage with the law *mariage pour tous.*

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riage in 2009 and 2017 respectively. In Germany, since 2017, same-sex couples only have access to marriage.

25 In the sense that partnerships are restricted to two people and that there is not any recognition of polygamous non-marital registered relationships. The other facet is that the existence of a marriage prohibits either of the parties from celebrating a non-marital registered relationship, while the existence of a non-marital registered relationship prevents either of the parties from celebrating a marriage. In some countries (e.g. Belgium and France), however, the existence of a non-marital registered relationship does not form a prohibition to celebrating a marriage, but if a non-marital relationship has already been registered, it will be automatically terminated upon the celebration of a marriage. See Art. 1476 (2) of the Belgian Civil Code (Burgerlijk Wetboek) and Art. 515–7 of the French Civil Code (Code Civil).

26 Also in the case of partnerships, both parties must validly consent to the registration and must be eligible according to domestic substantive law. Generally, the same rules on marriage are applicable.

27 See e.g. the evolution in Luxembourg, which introduced partnerships in 2004 and enhanced its effects in 2010. See *Swennen,* in: Scherpe, European Family Law Vol. II, p. 5 et seq.

28 For instance, PACS did not create reciprocal rights of inheritance between partners or the legal right to take the name of one's partner.

## 3. Informal relationships

Beside marriage and registered partnerships, Europe is witnessing an increasing number of informal relationships, with or without cohabitation (thus also including couples living apart together),[29] with a significant number of countries that did not regulate such relationships as *lex specialis* in family law, but did confer some rights and duties in various areas of the law (e.g. property, maintenance, shared household, inheritance), usually subject to the certain minimum duration requirements.[30]

Such informal relationships generally encompass same-sex couples also in absence of a general definition of couples (e.g. Germany, Belgium, the Netherlands). In some cases, this inclusion is required by a legislative definition thereof (e.g. France)[31], while in other cases it is the result of judicial interpretation (e.g. Austria)[32].

In some jurisdictions, however, a legal framework exists, not only defining the recognized informal relationship but also attaching legal consequences to the relationships concerning family law.[33] The reasons for such legislation are essentially the acknowledgement of a new social reality, the financial protection of a vulnerable party after dissolution of the shared household upon the death of the partner (e.g. property of cohabitants, use of common dwelling), and the protection of the common children, in some cases also providing extensive rights and duties in matters of guardianship and adoption.[34]

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29 Generally, the expressions "*de facto* relationships", "informal relationships", and "unregistered relationships" are used interchangeably to characterize couples that have not registered their union, so as to include both couples that live together and couples that do not. On the challenges posed by the latter category, see *Navas Navarro,* RIDC 68 (2016), 425.

30 Austria, Belgium, Bulgaria, the Czech Republic, Denmark, France, Germany, Italy, Latvia, Lithuania, and the Netherlands. In this regard, see the comparative report in *Boele-Woelki/Mol/van Gelder,* Informal Relationships, p. 461 et seq.

31 See for instance the definition of "concubinage" provided by Art. 515–8 of the French Civil Code: « Le concubinage est une union de fait, caractérisée par une vie commune présentant un caractère de stabilité et de continuité, entre deux personnes, de sexe différent ou de même sexe, qui vivent en couple » (translation by the author: a union in fact, characterized by a life in common offering a character of stability and continuity, between two persons, of different sexes or of the same sex, who live as a couple).

32 In Austria, for instance, the courts' refusal to extend to same-sex cohabitants the benefit of the right to succeed to a tenancy was challenged before the ECtHR and deemed a violation of Art. 8 and 14 ECHR. See ECtHR, 24. 07. 2003, no. 40016/98 (*Karner/Austria*).

33 Sweden, Hungary, Slovenia, Croatia, Catalonia, Portugal, Scotland, Ireland, and Finland. In these nine jurisdictions, with the exception of Slovenia, the regulation of informal relationship includes both opposite-sex and same-sex couples.

34 *Mol,* ULR 12 (2016), 98 (105–112).

## III. The EU free movement framework and the mutual recognition of personal and family status*

The sectoral character of the harmonized rules laid down in European family law, reflected in the boundaries construed in their scopes of application, as well as the absence of any EU competence in civil status matters, clearly affect the realization of one of the fundamental goals of European integration, namely the free movement of persons. Indeed, it is only natural that EU citizens are willing to fully exercise their free movement rights when they are able to retain the personal status or family relationship obtained in the Member State of origin. Consequently, free movement – a right deriving from EU citizenship that constitutes the "fundamental status of nationals of Member States"[35] – is interpreted as giving rise to a right to cross-border continuity (or portability) of personal and family status.

Such a right, which would impose on Member States an obligation of mutual recognition of a legal situation lawfully established in the Member State of origin[36], has been deemed to rest upon a number of fundamental provisions of the Treaties: not only the rules on Union citizenship and the corollary freedom of movement (Art. 20 and 21 TFEU), of which the right in question is a condition for effectiveness, but also the prohibition of discrimination on the grounds of nationality (Art. 18 TFEU) and the principle of sincere cooperation between Member States (Art. 4 (3) TEU)[37]. Being created by derivation of the home State principle and the mechanism of mutual recognition in EU internal market law, the subject of recognition in the case of personal and family status would, however, be the national private laws governing the establishment, modification, and termination of that status. More precisely, the host Member State (which, from a private international law perspective, is the State of the forum) would be required to accept the status as established in the Member State of origin, in application of the so-called method of referring to the competent foreign legal order (which is the State of nationality of the person) and even in waiver of the relevant conflict of laws rules.

* This section is to be attributed to *Diletta Danieli.*

35 According to the well-known wording first used in CJEU, 20. 09. 2001, C-184/99 (*Grzelczyk/Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*), note 31, and consistently reiterated in the subsequent case law on EU citizenship rights.

36 For a theoretical framework, see further e.g. *Baratta,* IPRax 2007, 4; *Fallon,* in: Meeusen et al., International Family Law for the European Union, p. 149; *Tomasi,* La tutela degli *status* familiari nel diritto dell'Unione europea, p. 95 et seq.; even earlier, it was identified by *Cafari Panico,* RDIPP 38 (2002), 5 (16–18). More recently, *Deana,* DPCE Online 40 (2019), 1979.

37 In this latter regard, see especially *Baratta,* IPRax 2007, 4 (8 et seq.).

## 1. The evolution of the CJEU's case law on the continuity of personal and family status*

The existence of the right to cross-border continuity of personal and family status has been developed by the CJEU in a string of cases that first dealt with aspects of personal identity, namely civil status records and the determination of names. As regards the former, the CJEU has ruled that the administrative and judicial authorities of the host Member State "must accept certificates and analogous documents relative to personal status"[38] issued by the State of nationality of the person in question, otherwise the exercise of the rights deriving from the freedom of movement, for which the production of those document is a condition, would be hindered.[39] In subsequent case law on the freedom of movement of a name, in turn, the duty of recognition upon the host Member State inherently regarded the personal status of Union citizens, namely the surname as attributed in the Member State of origin, and was derived from the right to non-discrimination on the ground of nationality that was applied to the rules governing the surname.[40] The authorities of the host Member State in any case retained the possibility to justify their refusal to recognize the name of an EU citizen by invoking fundamental constitutional objectives that were interpreted as a reliance on public policy considerations, but only insofar as "there [was] a genuine and sufficiently serious threat to a fundamental interest of society"[41]. This jus-

* This section is to be attributed to *Diletta Danieli.*

38 CJEU, 02. 12. 1997, C-336/94 (*Dafeki/Landesversicherungsanstalt Württemberg*), note 19. The opinion of Advocate General *La Pergola* was actually more explicit in drawing broader conclusions from the case at hand by identifying the aforementioned principle of continuity of status as follows: "the immutability of status – whenever, of course, it constitutes an element of or prerequisite for a right of the individual – derives from the necessity to guarantee in a uniform manner the actual form of subjective legal positions under Community law and their protection" (Advocate General *La Pergola* 03. 12. 1996, C-336/94 (*Dafeki/Landesversicherungsanstalt Württemberg*), note 6).

39 In the literature on civil status in the EU, also with regard to the initiatives of the EU institutions, see *Lagarde,* YPIL 15 (2013/2014), p. 1; *Kohler,* YPIL 15 (2013/2014), p. 13.

40 In this regard CJEU, 30. 03. 1993, C-168/91 (*Konstantinidis/Stadt Altensteig and Landratsamt Calw*); CJEU, 02. 10. 2003, C-148/02 (*Garcia Avello/Belgian State*); CJEU, 14. 10. 2008, C-353/06 (*Grunkin and Paul*); CJEU, 12. 05. 2011, C-391/09 (*Runevič-Vardyn and Wardyn*); CJEU, 08. 06. 2017, C-541/15 (*Freitag*). On the first judgments in this line of cases, see *Honorati,* DUE 14 (2009), 379.

41 As further clarified in CJEU, 22. 12. 2010, C-208/09 (*Sayn-Wittgenstein/Landeshauptmann von Wien*), note 86; CJEU, 02. 06. 2016, C-438/14 (*Bogendorff von Wolffersdorff*), note 67. This approach has been criticized in the literature not only because it tends to conflate the justifications of national identity (enshrined in the constitutional principles) and of public policy, but also because it does not adequately consider the safeguard of national diver-

tification follows the typical reasoning adopted in relation to obstacles to free movement rights, but it seems to leave open the more general question as to whether the protection of fundamental rights, deriving from domestic constitutional principles and respected at the EU level through the national identities clause (Art. 4 (2) TEU), may prevail on the free movement provisions and, from a private international law perspective, amount to a ground for non-recognition of the status lawfully established in the home Member State.[42]

Most recently, the CJEU has addressed the right to continuity of personal and family status in a case directly relevant to the topic of this contribution, namely that of a same-sex marriage between a third country national and an EU citizen lawfully contracted under the law of another Member State.[43] According to the court, it follows from Art. 21 (1) TFEU that the authorities of the Member State of which the Union citizen is a national cannot refuse to grant a derived right of residence to that third country national on the ground that same-sex marriages are not recognized in the domestic legal order[44]. The court first pointed out that the interpretation to be given to the notion of spouse as a family member for the purposes of Art. 2 (2) (a) Citizens' Rights Directive should be "gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned"[45]. The relevance of the judgment, however, does not lie so much in this statement, but rather in the considerations with regard to the obligation to recognize family status

sities laid down in Art. 4 (2) TEU. See *Cafari Panico,* in: Di Stasi, Cittadinanza, cittadinanze e nuovi *status:* profili internazionalprivatistici ed europei e sviluppi nazionali, p. 215 (227).

42 See further *Cafari Panico,* in: Di Stasi, Cittadinanza, cittadinanze e nuovi *status:* profili internazionalprivatistici ed europei e sviluppi nazionali, p. 215 (229 et seq.), citing the example of surrogacy as particularly illustrative in this regard due to lack of consensus among EU Member States on the regulation of the issue that necessarily affects the recognition of the underlying family status.

43 CJEU, 05.06.2018, C-673/16 (*Coman*). The judgment has attracted the attention of many commentators. See e.g. *Lang,* GenIUS 2/2018, 138; *Rossolillo,* Quaderni di SIDIBlog 4/5 (2017/2018), 430; *Kochenov/Belavusau,* EUI Working Papers 3/2019, 1; *Tryfonidou,* ELR 44 (2019), 663; *Werner,* ZEuP 2019, 802.

44 The CJEU preliminarily clarified that under the Citizens' Rights Directive, the derived right of residence could not be granted to the third country national spouse in his capacity as family member of the Union citizen in the Member State of which that citizen is a national, but this could be conferred on the basis of Art. 21 (1) TFEU. The questions referred for preliminary ruling were accordingly assessed from this perspective.

45 CJEU, 05.06.2018, C-673/16 (*Coman*), note 35. In this regard, the approach taken by the CJEU appears to move away from the opinion of Advocate General *Wathelet,* in which the concept of spouse was given "an autonomous definition independent of sexual orientation", thus embracing the all-inclusive EU-autonomous interpretation that will be discussed in section IV.1 (Advocate General *Wathelet* 11.01.2018, C-673/16 (*Coman*), note 77).

(i.e., the status of spouse acquired in accordance with the law of another Member State) whenever that status is a condition for the exercise of the rights conferred by EU law (i.e., a derived right of residence to a third country national married to a Union citizen of the same sex).[46] This indeed confirms the possibility of non-application of the relevant private international law rules of the host Member State on the ground that they would "lead to a non-recognition result"[47] and, thus, amount to an obstacle to free movement guaranteed by the Treaties.

Also, in this case, the CJEU acknowledged the existence of possible justifications to the restriction of the freedom of movement for persons, reiterating that it must be based on objective public interest considerations and proportional to a legitimate objective pursued by national law. However, the obligation to recognize a same-sex marriage for the sole purpose of the enjoyment of a derived right of residence was meant not to "undermine the national identity or pose a threat to the public policy"[48] of the host Member State, because in no way did it require that Member State to provide for same-sex marriages in its legal order. As a result, it should be noted that the institution of marriage as a union between man and woman, despite having constitutional status in a given Member State, cannot be afforded protection at the EU level under the national identities clause of Art. 4 (2) TEU and, accordingly, be given priority over the application of the free movement provisions.[49] This judgment thus seems to provide an answer, at least with regard to the case at hand, to the general question concerning possible justifications for restrictions to free movement based on domestic constitutional principles that were left unresolved in earlier case law.

46 The family status not falling within the list provided in Art. 2 of the Citizens's Rights Directive may nonetheless be covered by Art. 3 of the same Directive, but the host Member State would only be obliged to "facilitate entry and residence" of those family members of the Union citizen.

47 As already clarified by *Baratta,* IPRax 2007, 4 (9).

48 CJEU, 05. 06. 2018, C-673/16 (*Coman*), note 46.

49 Even before the *Coman* case, this conclusion was already proposed in the literature. See *Rijpma/Koffeman,* in: Gallo/Paladini/Pustorino, Same-Sex Couples before National, Supranational and International Jurisdictions, p. 455 (482), holding that "the definition of marriage as a union between two people from the opposite sex in a Member State's constitution would not per se qualify as part of the constitutional core making up national identity"; also *Tryfonidou,* Colum. J. Eur. L. 21 (2015), 195.

## 2. The method of recognition of legal situations: the case of downgrade recognition*

The principle of cross-border continuity of personal and family status seems to possess a close resemblance to the method of recognition of legal situations established abroad[50], as both refer to the law of the State of origin in order to allow such recognition. The latter, however, operates as a private international law rule of coordination between legal orders based on unilateral conflict of law provisions, whereas the mutual recognition at the EU level, as clarified in CJEU case law analyzed above, is subject to the following conditions: the application of rules other than those of the Member State of origin, as determined by the domestic private international law, which lead to the non-recognition of status, and the ensuing restriction on the free movement rights granted to Union citizens.[51]

As a further step, it has been proposed to introduce at the EU level a more general "principle of origin", inspired by the method of recognition of legal situations, in certain status matters, such as the celebration of marriage and the establishment of registered partnerships, in order to allow simplification, also when they are dealt with as preliminary questions for the application of European private international law instruments.[52] In this regard, it should be noted that this private international law technique has already been adopted in the legislation of certain Member States,[53] for example in Italy by means of Art. 32-bis of the Italian PIL Act[54]. This provision, which pursues an anti-elusive rationale, stipulates that a marriage celebrated abroad between an Italian national and a person of the same sex has the effects (in Italy) of a registered partnership (*unione civile*) governed by the Italian substantive law[55]. As

* This section is to be attributed to *Cinzia Peraro.*

50 On the theoretical aspects of this method, see amplius e.g. *Baratta,* Recueil des Cours 348 (2011), p. 253; *Lagarde,* La Reconnaissance de situations en droit international privé; *Lagarde,* Recueil des Cours 371 (2015), p. 9; *Davì,* in: Campiglio, Un nuovo diritto internazionale privato, p. 29; *Salerno,* Recueil des Cours 395 (2019), p. 21.

51 See amplius the clear comparison carried out by *Grassi,* RDIPP 55 (2019), 739 (761–764).

52 *Martiny,* in: Meeusen et al., International Family Law for the European Union, p. 69 (72).

53 *Davì,* in: Campiglio, Un nuovo diritto internazionale privato, p. 29 (37).

54 Law No. 218 of 31.05.1995 (Legge 31 maggio 1995, n. 218, Riforma del sistema italiano di diritto internazionale privato, Gazzetta Ufficiale della Repubblica italiana n. 128 del 3 giugno 1995, suppl. ord.). The mentioned Art. 32-bis was introduced in the Italian PIL Act by the Legislative Decree No. 7 of 19.01.2017 (decreto legislativo 19 gennaio 2017, n. 7, Modifiche e riordino delle norme di diritto internazionale privato per la regolamentazione delle unioni civili, ai sensi dell'articolo 1, comma 28, lettera b), della legge 20 maggio 2016, n. 76, Gazzetta Ufficiale della Repubblica italiana n. 22 del 27 gennaio 2017).

55 In particular, by the Law No. 76 of 20.05.2016 (Legge 20 maggio 2016 n. 76, Regolamenta-

a result, it allows for the recognition in the Italian legal order of the status acquired abroad without referring to any conflict of laws rule, but it establishes a re-characterization of that status by downgrading its effects to those associated with the domestic institution of registered partnership.

The personal scope of application of Art. 32-bis of the Italian PIL Act has been subject to extensive debate in the literature, given that its wording does not take into account the case of same-sex marriages celebrated abroad between foreign nationals, either Union citizens or third country nationals. The leading opinion seems to consider these foreign marriages as falling outside the downgrade recognition imposed by Art. 32-bis[56], with the consequence that they would retain their characterization as marriages and be subject to the relevant private international law rules, in particular Art. 26–30 of the Italian PIL Act as well as the Brussels II bis and the Rome III Regulations, according to the respective scopes of application. However, it has also been held that different considerations may lead to an opposite view,[57] which includes same-sex marriages in the category of legal institutions unknown to the domestic legal order[58] and equally requires the re-characterization as registered partnerships of those unions between foreign nationals. In particular, this should be based on the explicit choice made by the Italian legislator providing for the regulation of (only) same-sex registered partnerships and may avoid the reverse discrimination that would otherwise arise between foreign couples and couples in which one of the spouses is an Italian national, also in relation to other aspects of family life such as the adoption of children. Additionally, the characterization of foreign same-sex marriages would re-

zione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze, Gazzetta Ufficiale della Repubblica italiana n. 218 del 20 maggio 2016).

56 See e.g. *Viarengo,* RDIPP 54 (2018), 33 (38); *Biagioni,* Riv. dir. int. 100 (2017), 496 (497–500); *Feraci,* Osservatorio sulle fonti 2/2017, 1 (13); *Lopes Pegna,* Riv. dir. int. 100 (2017), 527 (536). This position has found support also in the case law of the Italian Supreme Court: Corte di cassazione, 14. 05. 2018, no. 11696, www.articolo29.it/wp-content/uploads/2018/06/cass-11696-18.pdf (last consulted 02. 11. 2020; for a commentary, see *Winkler,* ItalJ 4 (2018), 273). Along the same lines, even before the legislative reform of the Italian PIL Act, see Corte d'appello di Napoli, 13. 03. 2015, www.articolo29.it/corte-appello-napoli-sentenza-13-marzo-2015 (last consulted 02. 11. 2020).

57 In this regard, see *Campiglio,* RDIPP 53 (2017), 33 (45 et seq.); *Grassi,* RDIPP 55 (2019), 739 (772–774); *Pesce,* RDIPP 55 (2019), 777 (810–815).

58 Over the years, several views were proposed about the consequences for the Italian legal order of same-sex marriages celebrated abroad: first referring to the categories of the incompatibility with public policy and the inexistence, then to the impossibility of producing legal effects. See Corte di cassazione, 15. 03. 2012, no. 4184, www.articolo29.it/decisioni/corte-di-cassazione-sentenza-del-15-marzo-2012-n-4184 (last consulted 02. 11. 2020); in the literature amplius *Marchei,* Quaderni di diritto e politica ecclesiatica 15 (2012), 807.

sult in the application of Art. 27 of the Italian PIL Act on the requirements for contracting marriages, which are determined according to the national law of each member of the couple at the time of marriage. Hence, problems of recognition of those unions would arise whenever the law thereby determined does not provide for same-sex marriage. Similarly, the EU principle of cross-border continuity of personal and family status could nonetheless impose the recognition of the status only insofar as an obstacle to the rights deriving from EU free movement law would exist, for example the right to family reunification. On the contrary, the re-characterization of those unions as registered partnerships would imply the reference to the relevant conflict of laws provisions (Art. 32-ter (1) of the Italian PIL Act), which allow for the application of Italian law whenever the applicable law does not provide for registered partnerships between same-sex adults[59], and thus the status would be directly recognized on the basis of the Italian private international law regime.[60]

The Italian legal order thus provides an illustrative example of the different recognition regimes that may apply according to the characterization of the relationship at stake, which have an impact not only on the personal status itself but also on the further consequences related thereto (e.g. financial and succession matters, parenthood).

## IV. The EU private international law framework for personal status*

The Brussels II bis[61] and the Rome III Regulations[62] are the two pieces of EU secondary legislation that govern the whole range of private international law aspects related to the dissolution and loosening of matrimonial ties,

* This section is to be attributed to *Diletta Danieli.*

59 Indeed, this provision is interpreted as a principle of "positive" public policy. See *Biagioni,* Riv. dir. int. 100 (2017), 496 (509 et seq.); *Lopes Pegna,* Riv. dir. int. 100 (2017), 527 (539), who has nonetheless proposed to extend this legislative solution by way of interpretation also to the recognition of foreign same-sex marriages as such in order to preserve the status lawfully established abroad.

60 *Grassi,* RDIPP 55 (2019), 739 (774).

61 From the extensive scholarly writings on this Regulation, see in general e.g. *McEleavy,* ICLQ 53 (2004), 503; *Lowe/Everall/Nicholls,* The New Brussels II Regulation; *Magnus/Mankowski,* Brussels IIbis Regulation.

62 For a general overview of this Regulation, see e.g. *Boele-Woelki,* YPIL 12 (2010), p. 1; *Baruffi,* DUE 16 (2011), 867; *Franzina,* CDT 3 (2011), 85; *Viarengo,* RDIPP 47 (2011), 601; *Corneloup,* The Rome III Regulation. As of July 2020, the Member States participating in

insofar as consequences for personal status are concerned.[63] On the one hand, the Brussels II bis Regulation lays down rules on jurisdiction and recognition and enforcement of decisions regarding "divorce, legal separation or marriage annulment" (Art. 1 (1) (a))[64]; on the other hand, the Rome III Regulation is applicable, "in situations involving a conflict of laws, to divorce and legal separation" (Art. 1 (1)). Hence a partial misalignment between the respective material scopes of application emerges in relation to marriage annulment, for which the applicable conflict of laws regime is not provided for by the Rome III Regulation and must be found in the relevant domestic private international law.

While the functioning of both Regulations in relation to matrimonial matters has proven relatively smooth[65] and only few concerns seem to have arisen in practice[66], a great deal of debate has nonetheless revolved around the types of personal relationships to which these instruments apply in order to regulate the private international law aspects of their dissolution. Because neither of them defines the legal concept of marriage for the purposes of their applicability, the subsequent delimitation of the scope of "matrimonial matters" remains open and is further explored in the following sections.

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the enhanced cooperation established by the Rome III Regulation are Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania, Slovenia and the three that have joined at a later stage, i.e., Lithuania, Greece, and Estonia.

63 Regarding the financial consequences deriving from the dissolution/loosening of a marriage which are governed by other EU Regulations, see section V.

64 As is well known, the Brussels II bis Regulation also governs jurisdiction, and recognition and enforcement of decisions in matters of parental responsibility and sets out specific procedural rules for intra-EU child abduction cases that supplement the 1980 Hague Child Abduction Convention. However, these provisions will not be discussed in this contribution given its focus on cross-border matrimonial matters.

65 With regard to the Brussels II bis Regulation, this is further confirmed by the fact that its provisions devoted to matrimonial matters were substantially unchanged following the recast process that led to the adoption of the Brussels II ter Regulation. Nevertheless, amendments introduced to other provisions may have an impact on the operation of the Regulation in this regard, for example, those in the new Chapter IV Section 4 on the circulation of authentic instruments and agreements that are relevant for the recognition of out of court divorce agreements (on this topic, see the outcomes of the discussions held at the EUFams II International Exchange Seminar collected in *Brosch/Mariottini,* Report on the International Exchange Seminar, p. 4–6). On the recast of the Brussels II bis Regulation, see generally e.g. *Baruffi,* in: Triggiani et al., Dialoghi con Ugo Villani, Vol. II, p. 1087; *Honorati,* RDIPP 53 (2017), 247; *Kruger,* NIPR 35 (2017), 462; *Carpaneto,* RDIPP 54 (2018), 944.

66 For a comprehensive analysis of the issues stemming from the national cases collected in the EUFams II database, see *EUFams II Consortium,* Comparative Report on National Case Law.

## 1. The notion of marriage for the purposes of the Brussels II bis Regulation*

As mentioned above, the Brussels II bis Regulation does not clarify how to interpret the legal concept of marriage in order for its rules to apply in a cross-border case of divorce, legal separation or marriage annulment. The answer to this question clearly bears consequences for the range of marital relationships to which the Brussels II bis Regulation applies, particularly with regard to same-sex marriages. Indeed, at the time of drafting of the Regulation, its possible application to these cases did not even come into question, given the handful of legal orders that provided for this institution also for same-sex couples[67]; since then, a significant number of EU Member States have adopted same-sex marriages[68] and therefore, the interpretative issue is not merely speculative. Also, marriages involving a person of the third sex (or "intersex") may raise similar issues in this context. However, rules governing cross-border aspects of a person's gender are limited and mostly confined to the regime of recognition of decisions recording a gender reassignment undergone abroad.[69] Moreover, the consequences of intersexuality on the aspects of civil status such as marriage and parenthood are generally not subject to specific provisions and would primarily require an extensive reform of substantive family law, especially regarding those binary systems that are based on the strict alternatives between the male and female gender.[70] For these reasons, the applicability of the Brussels II bis Regulation (as well as other EU family law instruments) in relation to marriages involving intersex individuals is still underexplored and only brief remarks will be made here.

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* This section is to be attributed to *Diletta Danieli.*

67 More precisely, before the adoption of the Brussels II bis Regulation, same-sex marriage was first introduced in the Netherlands in 2001, followed by Belgium in 2003. For an updated list of countries, see fn. 24.

68 For a comparative overview, see section II.

69 In this regard, reference can be made to the Convention on the recognition of decisions recording a sex reassignment, drafted in the framework of the International Commission on Civil Status (ICCS) and signed on 12. 09. 2000. The full text of the Convention (in French and English) and the status table are available at www.ciec1.org/SITECIEC (last consulted 09. 10. 2020).

70 For more comprehensive studies on the legal recognition of intersexuality, see e.g. *Gössl,* JPIL 12 (2016), 261; *Scherpe/Dutta/Helms,* The Legal Status of Intersex Persons; *Gössl/Völzmann,* Int. J.L. Pol. Fam. 33 (2019), 403, all with further references. See also *European Union Agency for Fundamental Rights* (*FRA*), The fundamental rights situation of intersex people.

Against this uncertain background, an activity of characterization (or classification)[71] is required and it should be determined whether the definition of marriage for the purposes of the Brussels II bis Regulation is to be carried out according to the domestic legislation of the Member States, or whether an EU-autonomous interpretation could be identified so as to avoid the reference to national laws.[72] Whereas the former view would lead to the Regulation having a flexible scope of application *ratione materiae,* the latter would ultimately imply a choice between a narrow interpretation encompassing only opposite-sex marriages and a more open and evolutive reading in the light of the societal and legislative changes occurring in the field of family law throughout the EU Member States.

The method of EU-autonomous interpretation relies on the approach traditionally adopted by the CJEU in various fields of law, whereby the legal concepts contained in a provision of EU law that does not expressly refer to the law of the Member States for the purposes of their definition must be given an "autonomous and uniform interpretation" throughout the EU, having regard to the context of the provision and the objective of the legislation in question.[73] In this context, the relevant substantive provisions found in national laws serve as a comparative reference in order to point to "a common core among [them], or at least a strong tendency in a certain direction"[74], which currently seems difficult to identify towards a broader interpretation of marriage that includes same-sex unions. It is thus generally accepted that, at least for the time being, the EU interpretation should still be limited to heterosexual marriage (including marriage between persons of the same biological gender, one of whom has undergone gender reassignment surgery), albeit that a dynamic reading in the light of further developments in the

71 More generally on this technique in private international law see e.g. *Boschiero,* in: Preite/Gazzanti Pugliese di Cotrone, Atti notarili nel diritto comunitario e internazionale, Vol. 1: Diritto internazionale privato, p. 61; *Bariatti,* in: Encyclopedia of Private International Law, p. 357; in the specific field of family law *Tomasi/Ricci/Bariatti,* in: Meeusen et al., International Family Law for the European Union, p. 341; *Parra Rodríguez,* in: Malatesta/Bariatti/Pocar, The External Dimension of EU Private International Law in Family and Succession Matters, p. 337; *Armellini,* in: Cagnazzo/Preite/Tagliaferri, Il nuovo diritto di famiglia, Vol. 4: Tematiche di interesse notarile. Profili internazionalprivatistici, p. 743.

72 On this issue, see recently *Pesce,* RDIPP 55 (2019), 777 (779–791).

73 According to the well-established wording employed by the CJEU in recent judgments, see e.g. CJEU, 21. 03. 2019, C-465/17 (*Falck Rettungsdienste and Falck/Stadt Solingen*), note 28; CJEU, 04. 06. 2020, C-429/19 (*Remondis/Abfallzweckverband Rhein-Mosel-Eifel*), note 24; in the specific field of family law, see e.g. CJEU, 02. 04. 2009, C-523/07 (*A*), note 34; CJEU, 22. 12. 2010, C-497/10 PPU (*Mercredi/Chaffe*), note 45 (both regarding the notion of "habitual residence" of a child for the purposes of Art. 8 Brussels II bis Regulation).

74 *Pintens,* in: Magnus/Mankowski, Art. 1 Brussels II bis Regulation note 21.

legislations of the Member States cannot be ruled out.[75] This line of argument finds support in the position of the CJEU, which has addressed the concepts of marriage and spouse in a number of judgments concerning EU legislation on free movement and equal treatment of workers[76] as well as the Staff Regulations[77], yet not in relation to the EU private international law instruments. Furthermore, a broad notion of family member that included the "spouse, irrespective of sex" was expressly rejected in the context of the preparatory works for the adoption of the Citizens' Rights Directive[78].

Notwithstanding this mainstream opinion, it has also been argued that a broad definition of matrimonial matters (i.e. encompassing all forms of marriage/partnership dissolution) should be preferred from an EU policy perspective.[79] An indication of this may be inferred from the changes introduced by the Brussels II ter Regulation in the wording of Annex II laying down the template of a certificate concerning decisions in matrimonial matters, in which the references to "wife" and "husband" have been modified to

75 *Pintens,* in: Magnus/Mankowski, Art. 1 Brussels II bis Regulation note 21 et seq. Similarly, *Tomasi/Ricci/Bariatti,* in: Meeusen et al., International Family Law for the European Union, p. 341 (342 et seq.; 359–363); *Wautelet,* in: Boele-Woelki/Fuchs, Legal Recognition of Same-Sex Relationships in Europe, p. 143 (160 et seq.); *Pintens/Scherpe,* in: Encyclopedia of Private International Law, p. 1604 (1606).

76 See CJEU, 17.04.1986, 59/85 (*Netherlands/Reed*), note 15 et seq., regarding Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community, OJ L 257, 19.10.1968, p. 2–12; CJEU, 07.01.2004, C-117/01 (*K.B./National Health Service Pensions Agency and Secretary of State for Health*), note 31–35, in relation to Art. 141 of the EC Treaty and Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ L 45, 19.02.1975, p. 19 et seq.

77 See CJEU GC, 17.06.1993, T-65/92 (*Arauxo-Dumay/Commission*), note 30 et seq.; CJEU, 31.05.2001, C-122/99 P and C-125/99 P (*D and Sweden/Council*), note 35–39, both regarding Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968, laying down the Staff Regulations of officials and the conditions of employment of other servants of the European Communities, OJ L 56, 04.03.1958, p. 30–36.

78 More precisely, the European Parliament in its Report on the proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (23.01.2003, A5-0009/2003) proposed the abovementioned amendment to Art. 2 (2) (a) of the Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM (2001) 257 final, which was not subsequently incorporated in the amended proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM (2003) 199 final), on the ground that it would have resulted "in the imposition on certain Member States of amendments to family law legislation, an area which does not fall within the Community's legislative jurisdiction" (p. 3).

79 *Ní Shúilleabháin,* Cross-Border Divorce Law – Brussels II bis, p. 110 et seq.

"spouses", thus employing a gender-neutral term[80]. Nonetheless, given that the Brussels II bis/II ter Regulation applies to proceedings concerning personal status, an all-inclusive notion of marriage would imply that Member States' judicial authorities must answer in the positive the preliminary question about the existence of a marriage and, therefore, be obliged to exercise jurisdiction or recognize a foreign decision on the dissolution of marital ties. Such an outcome would clearly impact the States' sovereignty in the area of family law, upon which the EU competence conferred under Art. 81 (3) TFEU should not impinge, with the consequence that it seems difficult to share such a comprehensive reading of the EU autonomous interpretation.[81]

The option of leaving the definition of marriage to the national laws of the Member States[82] would in turn result in the Brussels II bis Regulation being afforded a wider applicability,[83] which includes same-sex marriages in those legal orders where they are recognized. This seems indeed to be the status quo, taking into account the practice of Member States such as Belgium[84] and the Netherlands[85], according to which the Brussels II bis Regulation is given full application in cases of divorce of same-sex spouses, seemingly without even questioning whether its scope covers these kind of marriages. On the contrary, Member States that do not allow same-sex marriages to be celebrated would continue to enjoy discretion insofar as their judicial authorities, when seized with cross-border proceedings regarding

80 Without inferring to much from this textual change, it could also be possible that the EU legislature preferred the term "spouses" in order to adjust the possible application of the Brussels II ter Regulation in those Member States that currently apply the predecessor Brussels II bis Regulation in cases of divorce of same-sex spouses, but still by means of a definition of the concept of marriage by reference to their own national law rather than an EU autonomous interpretation (as explained further in this section).

81 Indeed, other commentators who theoretically argue in favor of this broad reading underline that "such a solution will be almost impossible to reach on a European Union level", *Kruger/Samyn,* JPIL 12 (2016), 132 (138).

82 It is worth mentioning that such an option is explicitly chosen in another and more recent EU private international law instrument, namely the Matrimonial Property Regulation (Recital 17), and this could lend indirect support to follow the interpretative option in the context of the Brussels II bis Regulation. On the Matrimonial Property Regulation, see further section V.2.a).

83 *Pesce,* RDIPP 55 (2019), 777 (791). Also according to *Swennen,* in: Meeusen et al., International Family Law for the European Union, p. 389 (405), the concept of marriage has to be defined in the light of national law, but "the primary point of reference" should be the law of the Member State of origin (on this aspect, see also section III).

84 As reported in *European Commission,* Study on the assessment of Regulation (EC) No 2201/2003, p. 115. The Belgian practice is discussed also in *Gössl/Verhellen,* Int. J.L. Pol. Fam. 31 (2017), 174 (181).

85 As confirmed by *Curry-Sumner,* EJCL 11.1 (2007), 1 (11).

the dissolution of a same-sex marriage, are neither required to hear the case nor to recognize the marital relationship pursuant to the provisions of the Brussels II bis Regulation. Indeed, this was the substance of the answer already given in 2003 by EU Commissioner *Vitorino* to a parliamentary question concerning the previous Brussels II Regulation and same-sex marriages contracted under Dutch civil law.[86]

Defining the concept of marriage according to national law may result in different approaches being taken in the Member States that do not provide for same-sex marriage in their legislation. Again, it is a question of characterization, namely determining which (national) legal category should be applied to an institution that is unknown to the legal order of the forum. The narrowest stance would be to deny the existence of the relationship as such and consequently its effects, as it is the case, for example, in Hungary and the Czech Republic.[87] In contrast to this radical solution, which also appears to be in breach of human rights guaranteed in the EU Charter and the ECHR[88], in those Member States that afford legal recognition to same-sex relationships in the form of registered partnerships (e.g. Italy and Croatia), the foreign same-sex marriage is re-characterized and "downgraded" accordingly. The regime applicable to a divorce of same-sex spouses is thus found in the domestic private international law provisions relating to the dissolution of a registered partnership and, consequently, a divorce decision would not be issued in such a case. This may result in persisting difficulties in the subsequent circulation of the decision terminating the partnership in the Member

86 Written question E-3261/01 by *Swiebel* (PSE) to the Commission, 23. 11. 2001, and answer given by *Vitorino* on behalf of the Commission, 12. 03. 2002, both in OJ C 28E, 06. 02. 2002, p. 2 et seq. (in the answer, this excerpt is particularly illustrative: "[e]ven if it cannot be excluded that the regulation applies to procedures concerning the divorce of a same sex couple, this does not translate into an obligation on the courts neither to pronounce or recognise the divorce nor to recognise the marriage").

87 *Noto La Diega*, in: Hamilton/Noto La Diega, Same-Sex Relationship, Law and Social Change, p. 33 (39 et seq.), refers to this approach as the "erasure" model.

88 Indeed, it is settled case law of the ECtHR that same-sex couples are in need of legal recognition and protection of their relationship and Contracting States have to fulfil the positive obligation to set out a specific legal framework to this end, albeit not necessarily through the extension of the institution of marriage. See the judgments ECtHR, 24. 06. 2010, no. 30141/04 (*Schalk and Kopf/Austria*); ECtHR, 16. 07. 2014, no. 37359/09 (*Hämäläinen/Finland*); ECtHR, 21. 07. 2015, no. 18766/11 and 36030/11 (*Oliari et al./Italy*). A different perspective may be inferred from the wording used in Art. 9 EU Charter, which does not contain any reference to the gender of the spouses in establishing the right to marriage. However, as underlined in the literature, this provision could not be stretched as far as imposing a duty on the Member States to provide for same-sex marriage in their legal orders. See *Pesce*, DUDI 10 (2016), 5 (28).

States that recognize the original relationship as a marriage and a so-called "limping" personal status would exist.[89] In addition, the same downgrade model may be differentiated according to the nationality of the same-sex spouses, in particular when one or both of them are nationals of the Member State that does not allow for this kind of marriages, or they are foreign nationals. Therefore, also the uncertainties stemming from this approach seem likely to be problematic from a human rights perspective as well as from an EU free movement law perspective, as discussed in section III.

## 2. The notion of marriage for the purposes of the Rome III Regulation*

Considering the notion of marriage underlying the applicability of the Rome III Regulation, it should be noted that the EU legislator has not left the issue completely untouched, as is the case in the Brussels II bis Regulation. Indeed, Art. 1 (2) (b) Rome III Regulation clarifies at the outset that the matters concerning "the existence, validity and recognition of the marriage" shall fall outside its scope of application, "even if they arise merely as a preliminary question in the context of divorce or legal separation proceedings". In order to address these issues, reference should be made to the national law of the forum, in particular its conflict of laws rules, thus excluding an EU autonomous interpretation.[90]

Furthermore, a one-of-a-kind rule in the context of civil judicial cooperation in family matters allows a participating Member State to essentially disregard the application of the Rome III Regulation (Art. 13) whenever the domestic legal order "does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings". The two instances in which the provision may come into play are further explained in Recital 26. The former refers to a legal order that does not regulate the institution of divorce and was drafted in order to take into account the position of Malta at the time of the negotiation of the instrument. Since then, however, divorce was introduced also in the Maltese legal order[91], with the consequence that this provision is no longer of relevance on a practical level. Nevertheless, it is worth mentioning that the CJEU has recently referred to

* This section is to be attributed to *Diletta Danieli.*

89 In this regard, see *Gössl/Verhellen,* Int. J.L. Pol. Fam. 31 (2017), 174 (180).

90 As underlined by *Gössl/Verhellen,* in: Corneloup, Art. 1 Rome III Regulation note 1.22.

91 More precisely, following a successful referendum, a Maltese divorce law was approved by the parliament on 25.07.2011 and entered into force on 01.10.2011 (Civil Code (Amend-

the wording "does not provide for divorce" used in Art. 13 and the related explanation in Recital 26, in order to interpret systematically the situation referred to in Art. 10 Rome III Regulation, according to which "the law applicable pursuant to Art. 5 or Art. 8 makes no provision for divorce"[92]. Although the two provisions refer to different laws in this respect[93], the CJEU found Art. 10 applicable only to cases in which the applicable law does not provide for divorce in any form, and not whenever that law makes divorce subject to more restrictive conditions than those laid down by the law of the forum.[94] The second instance laid down in Art. 13 regarding the invalidity of the marriage is instead drafted in broad terms and Recital 26 specifies that it could be intended, "inter alia", that the marriage in question does not exist[95] in the legal order of the participating Member State. Despite the general scope of the provision, it was actually inserted with a view to preserving national diversities in relation to same-sex marriages.

Art. 13 Rome III Regulation does not further regulate the functioning of this safeguard clause and a number of issues remain open, also in the absence of guidance from case law. Firstly, the reference in order to establish the invalidity of the marriage seems to be placed in the law of the participating Member State of the court seized, while any differences between the domestic notion of marriage and the foreign marriage in question would allow the court to refuse to declare the divorce. Nonetheless, the wording "inter alia" in Recital 26 may give room for other sources of invalidity, for example the law applicable to the validity of the marriage as determined by the conflict of laws rules of the forum. In this case, commentators suggest that the correct

ment) Act, 2011 (Act No. XIV of 2011), https://legislation.mt/eli/ln/2012/218/eng/pdf (last consulted 02. 11. 2020)). Therefore, the *ad hoc* provision contained in Art. 13 Rome III Regulation had lost its practical relevance even prior to being applicable as of 21. 06. 2012.

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

93 Art. 13 and Recital 26 Rome III Regulation refer to the law of the participating Member State of which a court is seized, while Art. 10 Rome III Regulation refers to the applicable law as determined on the basis of the Regulation.

94 More precisely, in the case at hand, the law applicable to the divorce in accordance with Art. 8 (a) Rome III Regulation was Italian law, under which a period of legal separation is required before a divorce can be declared, whereas the law of the forum, i.e. Romanian law, did not provide for a similar condition.

95 This assimilation of the legal categories of invalidity and non-existence of the marriage according to the explanation of Recital 26 has been criticized in the literature because it "creates confusion" and also due to the elusiveness of the concept of non-existent marriage, *Chalas,* in: Corneloup, Art. 13 Rome III Regulation note 13.15. Indeed, in those Member States that do not recognize same-sex marriages, the legal consequences of these unions are interpreted according to different views. On this issue with regard to the Italian legal order, see section III.2.

remedy would be a declaration of nullity of the marriage according to the law governing its validity, rather than a refusal to declare the divorce pursuant to Art. 13[96]. Secondly, neither Art. 13 nor Recital 26 clarify any procedural aspects. In any case, from the wording of Art. 13 one can infer that the refusal to grant the divorce is not an obligation upon the court of the participating Member State, which may ultimately rule to declare the dissolution of the marriage. Accordingly, it seems reasonable that the possible application of Art. 13 should be assessed *ex officio* by the court seized.

## 3. Conclusions on the concept of marriage in the Brussels II bis and the Rome III Regulations*

From this combined analysis of the Brussels II bis and the Rome III Regulations, it can be concluded that the objective of their consistent application, as required by Recital 10 of the latter Regulation, would call for a definition of the concept of marriage to be left to the domestic legislation of the Member States, albeit that under the former instrument this solution is reached only by way of interpretation. This seems to allow their applicability to be extended to cases of dissolution of same-sex marriages depending on their recognition in the domestic legal order of the forum. This line of argument may also be applied to other unions that were characterized as marriages according to national laws, for example those involving intersex persons, but this currently seems more of a theoretical possibility given that their legal recognition has only recently begun to surface in some Member States' legislation and to limited purposes (mainly gender allocation in civil status records).

However, the Rome III Regulation has introduced an explicit provision that prevents the court of a participating Member State from being obliged to declare a divorce whenever the marriage is not deemed valid according to its law. Conversely, under the interpretative solution proposed for the Brussels II bis Regulation, there is no such safeguard and it cannot be excluded that a refusal to recognize foreign unions qualified as marriages may be found to infringe EU law.[97]

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* This section is to be attributed to *Diletta Danieli.*

96 *Chalas,* in: Corneloup, Art. 13 Rome III Regulation note 13.27.

97 Indeed, some commentators have identified the approach followed under the Brussels II bis Regulation as the "second best" option, given the impossibility of reaching a consensus in favor of an all-inclusive notion of marriage. See *Kruger/Samyn,* JPIL 12 (2016), 132 (138).

## 4. The applicability of the Brussels II bis and the Rome III Regulations to other unions of persons*

The model of the family has long been moving away from the traditional concept of opposite-sex individuals being married and living together: different forms of adult relationships (non-marital unions, also open to same-sex couples, and even solely based on a *de facto* cohabitation) have increasingly become socially acceptable and, consequently, in need of a formal recognition.[98] The responses in the domestic legal orders vary significantly from jurisdiction to jurisdiction as to which relationships were to be recognized and under which legal institution (e.g. partnership, either registered or contractual, cohabitation agreement, or concubinage).[99] For the purposes of the assessment carried out in this section, the main focus is on registered partnerships (broadly understood, irrespective of the type of formal registration required by national legislation) with a view to addressing the issues arising from the cross-border effects of these unions.

When considering the applicability of EU private international law instruments to registered partnerships, there is a consensus that the Brussels II bis Regulation does not apply to their dissolution.[100] It does, however, regulate parental responsibility matters concerning children born to unmarried parents, and this was an extension of the material scope of application when compared to the predecessor Brussels II Regulation.[101] Along the same lines, the Rome III Regulation is generally interpreted as excluding registered

* This section is to be attributed to *Cinzia Peraro.*

98 For a comprehensive discussion of these different family models and their recognition in different jurisdictions see e.g. *Scherpe/Yassari,* Die Rechtsstellung nichtehelicher Lebensgemeinschaften – The Legal Status of Cohabitants; *Miles,* in: Scherpe, European Family Law Vol. III, p. 82; *Scherpe/Hayward,* The Future of Registered Partnerships.

99 For a comparative overview, see section II.

100 See e.g. *Swennen,* in: Meeusen et al, International Family Law for the European Union, p. 389 (407 et seq.); *Martiny,* in: Boele-Woelki/Fuchs, Legal Recognition of Same-Sex Relationships in Europe, p. 225 (236); *Pintens,* in: Magnus/Mankowski, Art. 1 Brussels II bis Regulation note 31–33; *Lamont,* in: Scherpe/Hayward, The Future of Registered Partnerships, p. 497 (517); *Wautelet,* in: Encyclopedia of Private International Law, p. 1505 (1508); *Pesce,* RDIPP 55 (2019), 777 (783).

101 More precisely, in the Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, OJ C 12, 15.01.2001, p. 1–9, the Council underlined that in order to take into consideration, as a social reality, the increasing figures of relationships other than marriage and children born out of wedlock, the scope of the Brussels II Regulation should have been extended "to judgments concerning the exercise of parental responsibility with regard to children of unmarried couples" (p. 3).

partnerships from its scope given the exclusive reference to "spouses" made in its provisions.[102] These EU instruments thus seem to maintain a strict distinction between marriages and registered partnerships, and this position has been confirmed through the enactment of subsequent acts of judicial cooperation in family matters, namely the Property Regimes Regulations adopted in 2016. It is also consistent with the CJEU case law that narrowly interpreted the notion of spouse for the purposes of the Staff Regulations.[103] As a consequence, rules governing the termination of registered partnerships must be found in domestic private international law.

Contrary to this common approach, one may contend that such a distinction seems to possess an artificial character, especially considering that registered partnerships create stable and formalized family relationships, the effects of which can be assimilated to those of marital unions, and that national legislation governing them is often modeled on the regime provided for marriages.[104] These considerations could have been the underlying reasons for a decision rendered by an Italian court of first instance, in which the *lis pendens* rule provided in Art. 19 Brussels II bis Regulation was applied in the context of a dissolution of a same-sex registered partnership concluded in Malta and entered into the Italian civil status records.[105] Nevertheless, this was an isolated case from which it is difficult to infer a generalized trend that could cast doubt on the aforementioned exclusion of registered partnerships from the scope of application of the Brussels II bis Regulation.

In the light of the current EU legal framework,[106] it follows that the private international law aspects concerning the dissolution of registered partnerships and its consequences for the civil status of registered partners should be considered *de iure condendo,* requiring that either the scope of the Brussels II bis and the Rome III Regulations be widened or a further EU instrument be adopted. The former option seems likely to be ruled out given the recent adoption of the Brussels II ter Regulation, which has not

102 See e.g. *Boele-Woelki,* YPIL 12 (2010), p. 1 (13); *Franzina,* CDT 3 (2011), 85 (102); *Gössl/Verhellen,* in: Corneloup, Art. 1 Rome III Regulation note 1.06. *Coester-Waltjen,* in: Encyclopedia of Private International Law, p. 543 (549), however, seems to take a more doubtful view.

103 In the judgment cited already CJEU, 31. 05. 2001, C-122/99 P and C-125/99 P (*D and Sweden/Council*), note 35–39.

104 Arguing in favour of the abolition of the distinction between marriages and non-marital unions from a private international law perspective, *Gössl/Verhellen,* Int. J.L. Pol. Fam. 31 (2017), 174 (183 et seq.). In this regard, see section II.2.

105 Tribunale di Bologna, order of 18. 10. 2018 (unpublished).

106 It should be mentioned that also at the international level, registered partnerships are not subject to a specific private international law regime. The only relevant instrument in this regard is the ICCS Convention, which has not yet entered into force.

introduced any substantial changes to the existing regime governing matrimonial matters, and the lack of any prospect of a recast of the Rome III Regulation, at least in the near future. There would be room, in turn, to argue for the enactment of a separate instrument[107] (possibly a regulation, even by means of an enhanced cooperation), inspired by the recent Partnership Property Regulation. One of the most pressing issues would be the characterization of a registered partnership for the purposes of the application of this hypothetical EU instrument, which could reiterate, for reasons of consistency, the definition laid down in Art. 3 (1) (a) Partnership Property Regulation[108]. As to its material scope, in order to reflect the existing regime on the dissolution of marital ties deriving from the combined application of the Brussels II bis and the Rome III Regulations, it would seem reasonable to provide rules governing jurisdiction, applicable law, and recognition and enforcement of decisions in relation to the termination of registered partnerships, while their existence, validity or recognition would probably still be left to Member States' laws. The design of the appropriate connecting-factors may also draw on the example of the Partnership Property Regulation, but taking into account that specific legislation on registered partnerships has not been uniformly enacted in all Member States and that the law of the place of registration of the partnership (*lex loci registrationis*) may in any case ensure that substantive rules be found to set out the conditions for its termination.[109] In addition, due to the diverging domestic provisions governing the institution in question[110], the preference for connecting-factors that favor the integration of the partnership into the legal order, such as the place of the common habitual residence of the partners, may entail significant changes in the regime on the termination of the partnership that could also affect, from a long-term perspective, the cross-border mobility of the couple.

107 In this regard, see *Melcher,* JPIL 9 (2013), 149. For an overview of the private international law solutions adopted in the domestic legal orders, see *Wautelet,* in: Encyclopedia of Private International Law, p. 1505 (1509–1514).

108 However, as further clarified also in Recital 17 Partnership Property Regulation (and similar to the aforementioned Art. 13 Rome III Regulation), this should not oblige a Member State that does not regulate the institution of registered partnership to provide for it in its national law. Such a safeguard clause could be equally provided in a hypothetical EU regulation on the dissolution of registered partnerships.

109 As underlined by *Melcher,* JPIL 9 (2013), 149 (165).

110 According to *Wautelet,* in: Encyclopedia of Private International Law, p. 1505 (1514), the preference given to the *lex loci registrationis* "expresses the idea that partnerships as institutions may differ too widely between countries to allow for the severing of the termination from the country where the partnership was registered".

Currently, however, it should be noted that these considerations are mostly theoretical, as no legislative action has been undertaken towards the proposal of a new EU instrument on the termination of registered partnerships. Nonetheless, given their growing recognition at the national level, the harmonization of the EU private international law regime also in this area of law would seem desirable, with a view to furthering the free movement of cross-border families in the EU. Conversely, at this stage, it seems an even more remote possibility to afford greater recognition at the supranational level to relationships based on a mere *de facto* cohabitation, due to their informal nature and the resulting difficulties in providing an appropriate legal framework.

## V. The EU private international law framework for financial aspects

### 1. The concept of marriage and other unions of persons in the Maintenance Regulation*

EU private international law rules concerning maintenance matters deal with certain economic consequences of a family relationship, parentage, marriage or affinity, and it was not by coincidence that maintenance obligations were included in the scope of both the 1968 Brussels Convention as well as the European Enforcement Order Regulation, while the same matters are excluded from the Brussels II bis Regulation.[111] Although the Maintenance Regulation was adopted according to the procedure provided for in Art. 67 (2) TEU establishing the European Community, under the terms of which the Council acts unanimously after consulting the European Parliament, due to the connection between maintenance matters and "family law" in accordance with Art. 67 (5) indent 2 TEU, for a while it was also contemplated transferring maintenance obligations from unanimous to co-decision procedure.[112] In fact, according to the Commission Communication calling on the Council to provide for measures relating to maintenance obligations,

* This section is to be attributed to *Francesca Villata* and *Lenka Valkova.*

111 The exclusion is expressly provided for by Art. 1 (3) (e) and Recital 11 Brussels II bis Regulation.

112 Communication from the Commission to the Council calling on the Council to provide for measures relating to maintenance obligations taken under Art. 65 of the Treaty establishing the European Community to be governed by the procedure laid down in Art. 251 of that Treaty, COM (2005) 648 final, p. 3.

maintenance matters are of a hybrid nature *sui generis,* i.e. they are family matters as to their origin but a pecuniary issue in their implementation, representing a sum of money to be paid or recovered. Although a close link between maintenance and family relationships cannot be denied, since the former presupposes the existence of the latter, claims for maintenance recovery nevertheless do not go to the core of those relationships, nor do they affect their existence: Therefore, the two aspects must be distinguished. However, it is often hard to isolate maintenance questions from questions relating to personal status: A maintenance obligation is (one of) the consequence(s) of a specific status and the obligation to pay maintenance occurs on the basis and in the context of that personal status.[113]

The interconnection between the matters concerning status and maintenance is unequivocal and, accordingly, it is likely to raise intricate questions, especially with regard to maintenance claimed in connection with certain forms of (same-sex) marriages and other unions. This is likely to occur in at least three situations. First, it is necessary to apply the terms of family relationships for the purpose of delimitating the scope of the Maintenance Regulation. Once the scope has been determined, the status question may become relevant when it represents the principal claim, and the maintenance claim is accessorial to that claim, or when it represents a mere preliminary question, often raised by the alleged debtor to deny his or her maintenance obligations. It is, therefore, necessary to analyze all these three situations.

### a. Relevance of the notion of "family relationship, parentage, marriage or affinity" for the scope of the Maintenance Regulation

Art. 1 (1) Maintenance Regulation determines its scope of application and clarifies that it "shall apply to maintenance obligations arising from a family relationship, parentage, marriage or affinity". No definition, however, of the notions of "family relationship, parentage, marriage or affinity" is given in the Maintenance Regulation and scholars have not agreed on a single approach as to whether these legal concepts should be interpreted autonomously or are referring to national law.

113 *Martiny,* Recueil des Cours 247 (1994), p. 131 (151). On the questions concerning personal status, see section IV addressing the notion of marriage (and spouse) under the Brussels II bis and Rome III Regulation, the notion of marriage and registered partnership under the Property Regimes Regulations see section V.2.

The autonomous interpretation of the relevant family relationship is generally recommended as the option that ensures the uniform application of the Maintenance Regulation, aiming at guaranteeing "equal treatment of all maintenance creditors" in the Member States.[114] By contrast, leaving the definition of marriage to Member States' national law may have the consequence that only in the Member States where same-sex marriages, registered partnerships and other types of unions may be validly constituted, maintenance obligations arising in the context of these relationships are actually included under the Regulation's scope.[115] The drawback of applying national law lies in the fact that the uniformity in the application of the Regulation may be affected if the forum does not contemplate specific categories of persons under Art. 1 (1) Maintenance Regulation, while another Member State includes such categories of persons within the scope of the Regulation.[116] The solution based on the application of national law is not regarded as interfering with Member States' legislative sovereignty, as it is respectful of Member States' cultural diversity.[117] On the other hand, it may be argued that the determination of maintenance obligations within certain relationships, such as same-sex unions, must be distinguished from questions of status and so the States' sovereignty would not be undermined whatsoever.[118] It is therefore necessary in the first place to analyze whether these

114 On the conclusion of autonomous interpretation, see *Davì/Zanobetti,* Riv. trim. dir. proc. civ. 71 (2017), 197 (205); *Bremner,* KSLR 2 (2010), 5 (22); *Corrao,* CDT 3 (2011), 118 (125).

115 On the conclusion of interpretation under national law, see *Pesce,* Le obbligazioni alimentari tra diritto internazionale e diritto dell'Unione europea, p. 60; *Queirolo/Schiano di Pepe,* Lezioni di diritto dell'Unione europea e relazioni familiari, p. 374; *Castellaneta/Leandro,* Nuove leg. civ. comm. 2009, 1051 (1062). See also *Pocar/Viarengo,* RDIPP 45 (2009), 805 (810), who do not take any clear approach and retain that the CJEU should provide the interpretation in this regard.

116 Similarly, see *Castellaneta/Leandro,* Nuove leg. civ. comm. 2009, 1051 (1062). Defining family relationships under national law may create slightly different application problems, for example, connected to Art. 4 (c) Maintenance Regulation which might catalyze a significant degree of uncertainty for same-sex spouses. It is possible to imagine a scenario, in which same-sex spouses generally agree on the court "of their last common habitual residence for a period of at least one year" to settle any disputes in matters relating to a maintenance obligation under Art. 4 (c) (ii) Maintenance Regulation, without referring to any specific State or court. In such a case, it is questionable whether in the Member States, where the same-sex marriage is "downgraded" into a registered partnership, but where the registered partnerships are regarded as falling into the scope of the Maintenance Regulation, for example by virtue of "family relationships" according to Art. 1, the choice of court agreement concluded under Art. 4 (c) (ii) Maintenance Regulation would be considered valid.

117 See section IV.1.

118 See considerations on Art. 22 and Recital 25 Maintenance Regulation in this section.

notions should be interpreted autonomously or if they must be read as referring to national rules, and, namely, if same-sex marriages and other unions of persons can be considered "family relationship, parentage, marriage or affinity", thus falling into the scope of application by virtue of Art. 1 (1) Maintenance Regulation.

The legislative *iter* of the legal concepts "family relationship, parentage, marriage or affinity" cannot directly be traced back to the initial Commission Proposal, since the current wording of Art. 1 (1) does not correspond to the provision originally suggested in that Proposal, which, instead, generally referred to all "family relationships or relationships deemed by the law applicable to such relationships as having comparable effects"[119]. According to the Commission, rather than listing the types of relationships covered by the Maintenance Regulation, it was preferable to refer to a generic concept of family maintenance obligations without seeking to impose a limited concept of "family".[120] At a later stage, however, the Council decided that the final Regulation for the purpose of determining the law applicable to maintenance within the EU[121] should refer to the 2007 Hague Maintenance Protocol, and the scope of the Maintenance Regulation had to be aligned with Art. 1 of the 2007 Hague Maintenance Protocol, which in the end must be "taken into account" in the Regulation.[122] It follows that the European legislator ended up narrowing the material scope of the Maintenance Regulation,[123] as a price to be paid for coordination of the scope of these two legal instruments called upon to operate together, to the extent that the desired coordination should prevent delimitation problems.[124]

It must be highlighted, however, that during the legislative process, the Committee on Legal Affairs clarified that among "relationships deemed by the law applicable to such relationships as having comparable effects", relationships between same-sex couples, such as civil partnerships, can be

119 Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, COM (2005) 649 final. On the comments of the proposal of this provision, see e.g. *Pastina*, Studi sull'integrazione europea 2 (2007), 663 (669).

120 Communication from the Commission to the Council and the European Parliament – Commentary on the articles of the proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, COM (2006) 206 final.

121 *Bremner,* KSLR 2 (2010), 5 (18, 20)

122 Recital 8 Maintenance Regulation. See Art. 1 (1) of the 2007 Hague Maintenance Protocol, which is also in conformity with Art. 1 of the 1973 Hague Maintenance Convention.

123 *Villata,* Riv. dir. int. 94 (2011), 731 (739).

124 *Davì/Zanobetti,* Riv. trim. dir. proc. civ. 71 (2017), 197 (204).

considered.[125] It is evident that the Committee on Legal Affairs did not overlook same-sex couples and intended to include such terms into the scope of the proposed Regulation (although by reference to national legislation). Therefore, the subsequent omission of the wording "deemed by the law applicable to such relationships as having comparable effects" and its simple replacement by specific legal concepts of "family relationship, parentage, marriage or affinity", without any reference to the applicable law, may clearly show, on the one hand, the necessity to interpret those terms autonomously, without the possibility to refer back to diverging national laws and, on the other hand, the *ratio* of the preparatory works, i.e. the tendency to broaden the scope of application by including same-sex couples.[126]

Recital 11 simply states that the scope of the Maintenance Regulation should cover all maintenance obligations arising from the aforesaid relationships in order to guarantee equal treatment of all maintenance creditors. The same Recital then requires an autonomous interpretation of the term "maintenance obligation", while it does not provide any guidance on the interpretation of the terms "family relationship, parentage, marriage or affinity". Therefore, one could assume that the obligation to autonomously interpret certain notions applies only to "maintenance obligations", while, conversely, a reference to the terms "family relationship", "parentage", "marriage" or "affinity" is deliberately omitted and might fall outside the scope of the rule on autonomous interpretation. However, although this provision is silent as to the interpretation of these four concepts, the CJEU's case law must be considered. The CJEU established the general rule of autonomous interpretation by taking into account not only the wording of the provision in question, but also its context and the objective pursued by the rules of which it forms a part,[127] in cases where an EU act makes no reference to the law of the Member States for the definition of a particular concept,[128] as applies in our case. In fact, the terms "family relationship", "parentage", "marriage" or "affinity" are employed in a provision of EU law and no reference to national

125 Amendment 4 and 15 of the Draft Opinion of the Committee on Legal Affairs for the Committee on Civil Liberties, Justice and Home Affairs on the proposal for a Council regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, 2005/0259(CNS).

126 Similarly, see *Corrao,* CDT 3 (2011), 118 (125).

127 In family law, see CJEU, 02. 04. 2009, C-523/07 (*A*); see also CJEU, 18. 01. 1984, 327/82 (*Ekro*); CJEU, 19. 09. 2000, C-287/98 (*Linster*); CJEU, 16. 07. 2009, C-5/08 (*Infopaq International*); CJEU, 18. 10. 2011 C-34/10 (*Brüstle*); CJEU, 06. 03. 2008, C-98/07 (*Nordania Finans and BG Factoring*).

128 See e.g. CJEU, 11. 04. 2019, C-254/18 (*Syndicat des cadres de la sécurité intérieure*).

law is made under said provision, as it is instead the case, for instance, for the Matrimonial Property Regime Regulation for the purpose of defining the legal concept of "marriage".[129] Applying the general rule of autonomous interpretation would then allow for a uniform application of the legal concepts, the content of which cannot vary according to the Member State in which the Maintenance Regulation applies.[130] Moreover, the primary goal of the independent and uniform interpretation throughout the EU is often accompanied by the principle of equality, which requires the Regulations to be applied in such a way as to ensure, as far as possible, that the rights and obligations which derive from it for the Member States and the persons to whom it applies are equal.[131] Therefore, the autonomous and independent interpretation can pursue effectively the most important objective of the Maintenance Regulation, i.e. to guarantee equal treatment of all maintenance creditors through the uniform application of the rules provided in the Maintenance Regulation.

### (i) Autonomous interpretation of the relevant family relationships under the Maintenance Regulation

The autonomous interpretation rule does not per se automatically guarantee that same-sex marriages and registered partnerships fall within the scope of the Maintenance Regulation; it is necessary to investigate whether the legal concepts employed in the Maintenance Regulation may, for example, include only a traditional connotation of marriage.[132] The width of the notions determined in Art. 1 (1) Maintenance Regulation, on the one hand, and the list of specific categories of family relationships, such as affinity, even though not all States recognize those relationships,[133] on the other hand, might be conceived so as to enable same-sex marriages or other types of unions to fall within the scope of the Maintenance Regulation.[134] This may also be the case for registered partnerships or other types of unions, which, although

129 See section V.2.a).

130 *Pesce,* RDIPP 55 (2019), 777 (789).

131 See e.g. CJEU, 16. 12. 1980, 814/79 (*Netherlands/Rüffer*), note 14; CJEU, 28. 09. 1999, C-440/97 (*GIE Groupe Concorde and others*), note 15.

132 On the similar considerations on the Brussels II bis Regulation, see *Pesce,* RDIPP 55 (2019), 777 (789).

133 *Bonomi* Report, note 29.

134 *Bremner,* KSLR 2 (2010), 5 (22). On the broad interpretation of the terms, but under national law, see *Castellaneta/Leandro,* Nuove leg. civ. comm. 2009, 1051 (1062).

not falling under the notion of "marriage", may be considered "family relationship" within the meaning of Art. 1 (1) Maintenance Regulation. Consequently, the risk of discrimination based on sex or gender in national legal orders could be limited.[135] The aforementioned notions are capable of including all maintenance obligations relating to family relationships *lato sensu,* which are ascertained by national judicial authorities, regardless of the different nomenclature assigned in each country.

It cannot be forgotten that the CJEU also held that the provisions of EU law must be interpreted in the light of EU law as a whole, with regard to its objectives and to its state of evolution on the date at which the provision in question is to be applied.[136] It must be borne in mind that European family law is still evolving and that the EU notion of "family" is beginning to take shape more clearly. Such an evolution of "European families" may be attributed not only to the development of Member States' national legislation regarding same-sex unions,[137] but also to the CJEU's case-law recognizing family status[138], for example in the form of same-sex marriages, for the purpose of free movement of persons[139], or to the judgments of the ECtHR (some of them expressly referred to by the CJEU), which characterized the relationships of same-sex couples as falling within the notions of "private life" and "family life"[140]. Although one might question whether the legislator of the

135 *Castellaneta/Leandro,* Nuove leg. civ. comm. 2009, 1051 (1062).

136 CJEU, 06.10.1982, 283/81 (*CILFIT/Ministero della Sanità*), note 20.

137 See section II. The development of the national law is also considered in the CJEU case law and represents one of the interpretation methods used by the CJEU, see among others *Lenaerts/Gutiérrez-Fons,* Colum. J. Eur. L. 20 (2013), 3; *Titshaw,* BU Int'l L.J. 34 (2016), 45, or CJEU, 17.04.1986, C-59/85 (*Netherlands/Reed*), note 13, where the CJEU stated for the purpose of the interpretation of the term "spouse" that "in all of the Member States, […] any interpretation of a legal term on the basis of social developments must take into account the situation in the whole Community, not merely in one Member State".

138 For example, the development of the CJEU's interpretation might be demonstrated with case 31.05.2001, C-122/99 P and C-125/99 (*P D and Sweden/Council*), where the CJEU refused to recognize a same-sex partnership as a "marriage" under the EU's Staff Regulations, since according to the majority of the Member States, the term "marriage" means a union between two persons of the opposite sex. However, seven years later, see e.g. CJEU, 01.04.2008 C-267/06 (*Maruko/Versorgungsanstalt der deutschen Bühnen*), the CJEU held that a national measure providing for a registered partnership with rights comparable to marriage, which treats a surviving life partner less favourably than a surviving spouse by denying him benefits deriving from an employment relationship, is contrary to the principle of non-discrimination on grounds of sexual orientation.

139 See CJEU, 05.06.2018, C-673/16 (*Coman*). On the discussion, see section III.1.

140 On the violation of Art. 8 and 14 ECHR, see the ECtHR's case law, for example ECtHR, 21.07.2015, no. 18766/11 and 36030/11 (*Oliari et al./Italy*); ECtHR, 07.11.2013, no. 29381/

Maintenance Regulation intended to cover the maintenance matters between same-sex couples under the scope of the Regulation in 2009,[141] the evolvement of "EU family law" seems to confirm that "non-traditional" couples do fall within the scope of the Maintenance Regulation.[142]

It is worth mentioning that the obligation of autonomous interpretation can also be indirectly inferred from the Partnership Property Regulation, which expressly specifies that maintenance matters should be excluded from its scope as far as they are governed by the Maintenance Regulation,[143] thereby clarifying that the two Regulations are mutually complementary with regard to the economic aspects of registered partnerships. This express reference in the Partnership Property Regulation may be read as an acknowledgement by the European legislator that registered unions fall within the scope of the Maintenance Regulation.[144]

### (ii) Relevance of the scope for the purpose of applicable law

It must also be remembered in this context that while the Maintenance Regulation directly establishes rules on jurisdiction, and recognition and enforcement of judgments, as to the applicable law, Art. 15 Maintenance Regulation refers to the 2007 Hague Maintenance Protocol. Therefore, it is essential to address the question of scope of the 2007 Hague Maintenance Protocol as well as the 1973 Hague Maintenance Convention, on which the 2007 Hague

09 and 32684/09 (*Vallianatos and Others/Greece*); ECtHR, 14. 12. 2017, no. 26431/12 (*Orlandi and Others/Italy*); ECtHR, 24. 06. 2010, no. 30141/04 (*Schalk and Kopf/Austria*). See also *Mosconi,* RDI 91 (2008), 347. With a similar conclusion concerning the formulation of "European families" in the context of the Maintenance Regulation, see *Castellaneta/Leandro,* Nuove leg. civ. comm. 2009, 1051 (1062). On the cultural issues, national identity, and private international law see *Kohler,* in: Viarengo/Villata, Planning the future of cross-border families: a path through coordination, p. 3 et seq.

141 See above cited Amendment 4 and 15 of the Draft Opinion of the Committee on Legal Affairs for the Committee on Civil Liberties, Justice and Home Affairs on the proposal for a Council regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, 2005/0259(CNS) or see section V.1.a)(1) on Art. 22 and Recital 25 Maintenance Regulation. On the opinion that the Maintenance Regulation also covers same-sex partners and that Art. 22 and Recital 25 were necessary to propose in order to allay fears that the Regulation would have an unnecessary effect on domestic family law, see *Bremner,* KSPR 2010, 5 (22).

142 See in this regard also *Oberto,* Dir. fam. 39 (2010), 802 (832 et seq.).

143 Recital 22 of the Maintenance Regulation.

144 *Davì/Zanobetti,* Riv. trim. dir. proc. civ. 71 (2017), 197 (204).

Maintenance Protocol was modeled[145], since, as mentioned above, the two should be identical in scope in order to prevent delimitation problems.[146] In the Report to the 1973 Hague Maintenance Conventions,[147] *Verwilghen* specifies which relationships fall under the terms "family relationship", "parentage", "marriage" or "affinity" provided in Art. 1, while pointing to Art. 14 of the 1973 Hague Maintenance Convention, which contains the list of possible restrictions to the scope of the Convention.[148] In fact, it seems that the notion "arising of marriage" is defined in the Report as including maintenance obligations between spouses who are or were married, i.e. between spouses living together, or merely living apart, or separated as a result of a decision, who are getting legally separated or divorced, who have been divorced or whose marriage was declared void or annulled.[149] Moreover, although Art. 2 of the Convention tackles the issue of the preliminary and incidental questions[150], which are analyzed below, this provision must be considered also for the purpose of delimitating the scope of legal instruments concerning maintenance obligations.[151] As stressed by *Verwilghen,* it had been absolutely necessary to delimitate the status and maintenance questions, in order to avoid that some countries could refuse to ratify the 1973 Hague Maintenance Convention due to the fact that it would entail an indirect obligation to recognize the "pseudo-family" relationships at the heart of the maintenance obligations.[152] That safeguard simply enables the separation of maintenance payment from any assessment of the family status on which it is based for the States which do not recognize that relationship in their legal systems. On the other hand, it follows indirectly from the reading of this provision that the same States shall apply the Convention for the determination of mainte-

145 According to the *Bonomi* Report, note 23, this wording was not reproduced in the Protocol, probably because it was considered superfluous.

146 *Davì/Zanobetti,* Riv. trim. dir. proc. civ. 71 (2017), 197 (204).

147 *Verwilghen* Report, note 125 et seq.

148 *Verwilghen* Report, note 121 and 185. Any Contracting State may reserve the right not to apply the Convention to maintenance obligations between persons related collaterally; between persons related by affinity and between divorced or legally separated spouses or spouses whose marriage has been declared void or annulled if the decree of divorce, legal separation, nullity or annulment has been rendered by default in a State in which the defaulting party did not have his habitual residence.

149 *Verwilghen* Report, note 21.

150 This paragraph provides that decisions rendered in application of the 1973 Hague Maintenance Convention shall be without prejudice to the existence of any of the relationships provided in Art. 1.

151 The same wording can be found in Art. 1 (2) of the 2007 Hague Maintenance Protocol.

152 *Verwilghen* Report, note 130

nance obligations arising out of these relationships, leaving the status questions untouched.[153]

The provisions of the 2007 Hague Maintenance Protocol are analogous, as the Protocol covers the same relationships as the 1973 Hague Maintenance Convention, i.e. family relationships, parentage, marriage or affinity.[154] Moreover, the Protocol provides for the same safeguard of the separation of the maintenance payment from any assessment of the family status as the 1973 Hague Maintenance Convention, by providing that decisions rendered in application of the Protocol shall be without prejudice to the existence of any such relationships.[155] The *Bonomi* Report, which takes up conclusions illustrated in the *Verwilghen* Report, also does not clearly solve the question concerning the scope of the Protocol, in particular whether same-sex marriages and other unions fall within its scope. In the past, attention was drawn to one part of the *Bonomi* Report which states: "the Protocol does not specify whether maintenance obligations arising out of such relationships are included within its scope; this omission is intentional, in order to avoid the Protocol running up against the fundamental opposition existing between States on these issues"[156]. Although this wording shows the tendency to refer to national law for the definition of the legal concepts provided in Art. 1 (1) of the Protocol, the further considerations made by *Bonomi* should be analyzed more deeply and the opposite approach could be supported. According to the *Bonomi* Report, there is nothing that precludes the Contracting States from recognizing same-sex marriages or registered partnerships and from subjecting them to the rule of "closer connection" provided in Art. 5 of the 2007 Hague Maintenance Protocol (i.e. the special rule with regard to spouses and ex-spouses), which represents an implied admission that the Protocol may be applied to them.[157] Although nothing was decided as regards Contracting States not recognizing institutions such as

153 On the extensive interpretation of the "family relationships" covering same-sex marriages in the context of the 1973 Hague Maintenance Convention, see *Badiali,* La disciplina convenzionale, p. 120 et seq.

154 Art. 1 (1) of the 2007 Hague Maintenance Protocol and Art. 1 of the 1973 Hague Maintenance Convention.

155 Art. 1 (2) of the 2007 Hague Maintenance Protocol and Art. 2 of the 1973 Hague Maintenance Convention.

156 *Bonomi* Report, note 31. See e.g. *Davì/Zanobetti,* Riv. trim. dir. proc. civ. 71 (2017), 197 (205), who refer to this part of the Report.

157 *Bonomi* Report, note 31 and 92 referring to Hague Conference on Private International Law, Commission II of the Diplomatic Session, Minutes No 6, note 59 et seq. Although this rule does not explicitly refer to registered partnerships but only to marriages, according to the Report, the Member States recognizing such institutions in their legal systems may apply Art. 5.

same-sex marriage, *Bonomi* offers them a solution in the form of the application of the "basic" rules provided in Art. 3 and 6 of the 2007 Hague Maintenance Protocol.[158] Finally, the *Bonomi* Report specifies that "a court or authority in a State which does not recognize any effect of such a relationship (including in maintenance matters) could refuse the application of the foreign law to the extent that its effects would be manifestly contrary to the public policy of the forum".[159] Given these suggestions in the *Bonomi* Report, it may be admitted that the States in which same-sex marriages and registered partnerships are not recognized, should also apply the Protocol for the purpose of the maintenance proceedings. As recommended by *Bonomi,* such States may omit to apply Art. 5 of the Protocol and consider applying Art. 3 and 6, according to which the rule on public policy may represent an additional safeguard for such States. Therefore, the proposed solution would lose any relevance, if same-sex marriages and registered partnerships did not fall within the scope of application of the Protocol in respect of the Member States not recognizing such relationships.[160] On the other hand, this solution does not seem convincing due to the impact on the uniformity of application of the Protocol in the Contracting States. In fact, the purported option of the Contracting State to apply or not apply Art. 5 would cause differentiation in the application of the Protocol,[161] which goes against the goal of promoting uniformity in its application as expressed by Art. 20.[162] Although this solution could be accepted between the Contracting States as a tool to prevent the refusal of ratification by the countries recognizing only "traditional"

158 *Bonomi* Report, note 31 and 92.

159 *Bonomi* Report, note 92.

160 On the doubts regarding this solution see also *Villata,* Riv. dir. int. 94 (2011), 731 (739), according to whom it remains unlikely that such a Contracting State, which does not recognize same-sex unions, would qualify them as family relationships under the 2007 Hague Maintenance Protocol and simply disapply Art. 5 of the 2007 Hague Maintenance Protocol.

161 *Bonomi* holds that the consequence of non-uniform application of the Protocol is not too serious, considering there exists the possibility to refuse the application of the law determined under the Protocol under Article 13 in case its effects would be manifestly contrary to the public policy of the forum, see *Bonomi* Report, note 31.

162 However, see *Beaumont,* RabelsZ 73 (2009), 510 (528), where the author in the context of delimitation of the scope of the 2007 Hague Maintenance Convention indicates this as the "usual" clause, presuming that there might be some diversity in the interpretation of the terms of the Convention due to political concerns of some States not to accept same-sex relationships or unmarried couples within the core scope. On the reaction to *Beaumont,* see *Bremner,* KSLR 2 (2010), 5 (22), who specifies that the Maintenance Regulation covers a wider range of relationships than the 2007 Hague Maintenance Convention since the closer regional integration resulted in a more progressive and comprehensive coverage of this area.

marriages, or as an "escape tool" for the same Contracting States allowing the application of the *lex fori* (i.e. when the creditor is habitually resident in such a Contracting State), this proposal should not result in a legitimate and non-binding option for the Member States of the EU, which are called upon to apply all provisions of the Protocol by the reference of Art. 15 Maintenance Regulation in a uniform way.

All these considerations suggest that the Protocol does not need to refer to national law in order to determine if same-sex sex marriages and registered partnerships fall within its scope of application. The Contracting States more reluctant to recognize "new families" may apply the Protocol with the various safeguards contained therein. There are many reasons why it is difficult to imagine that such a conclusion should not be extended to the Maintenance Regulation. As mentioned above, Art. 15 Maintenance Regulation incorporates the 2007 Hague Maintenance Protocol and it would hardly be conceivable to accept the aforementioned interpretative approach only with regard to conflict of laws rules, but not to the Maintenance Regulation *in toto*. Moreover, the scope of the Maintenance Regulation was purposely aligned with Art. 1 of the 2007 Hague Maintenance Protocol, which is "taken into account" in the Regulation.[163] Therefore, the *Bonomi* Report is used also by the CJEU as an authoritative tool for the interpretation of the Maintenance Regulation in conjunction with the 2007 Hague Maintenance Protocol.[164] Finally, even if a different reading of the material scope of the 2007 Hague Maintenance Protocol is chosen and opinions favorable to the necessity to refer to national law would prevail, the same reasoning should not be extended to the interpretation of the Maintenance Regulation, which, as part of EU law, must be interpreted autonomously in all Member States.[165]

The main consequence of an interpretation of the notions of "family relationship", "parentage", "marriage" or "affinity" as capable of including same-sex marriages and registered partnerships would be the creation of a situation in which Member States called upon to decide on maintenance obligations arising out of same-sex unions, would be obliged to determine jurisdiction and applicable law under the Maintenance Regulation and the subsequent decisions would circulate in the other Member States.

As mentioned above, although the Maintenance Regulation aims at guaranteeing "equal treatment of all maintenance creditors", where autonomous

163 Recital 8 Maintenance Regulation. See Art. 1 (1) of the 2007 Hague Maintenance Protocol, which is also in conformity with Art. 1 of the 1973 Hague Maintenance Convention.

164 CJEU, 20.09.2018, C-214/17 (*Mölk/Mölk*); CJEU, 07.06.2018, C-83/17 (*KP/LO*).

165 *Davì/Zanobetti,* Riv. trim. dir. proc. civ. 71 (2017), 197 (205).

interpretation of the notions of the relevant family relationships should be recommended as the option ensuring the uniform application of the Maintenance Regulation in the Member States, some concerns as to the intervention in the States' sovereignty and its cultural diversity might arise. In this regard, it may be argued that other regulations in the field of European family law containing autonomous definitions of "sensitive" legal concepts provide for different safeguards, which are not foreseen in the Maintenance Regulation. This may be the case with, for example, Art. 9 Partnership Property Regulation, which does not force Member States to accept their jurisdiction under the Regulation if their law does not provide for the institution of registered partnership. However, although the Maintenance Regulation does not provide a similar jurisdictional rule, the safeguards have been shifted to the sphere of the applicable law. It is true that Member States not recognizing same-sex marriages or other unions shall apply the Maintenance Regulation and accept jurisdiction pursuant to its Art. 3–8, though they may still decide that the maintenance obligation in that particular relationship does not exist under Art. 3 (in the case of creditor's habitual residence in such a Member State) in conjunction with Art. 11 (a) of the 2007 Hague Maintenance Protocol,[166] or they may invoke public policy.[167]

The public policy exception might become relevant in a situation where the court of Member State A, not acknowledging the status of married or registered same-sex couples and connected support under its legislation, is called to apply the law of Member State B which recognizes such a status (e.g. when the creditor has his or her habitual residence in Member State B and claims support under Art. 3 (a) Maintenance Regulation in the debtor's forum, i.e. Member State A). Although such a Member State would have the possibility to invoke Art. 13 of the 2007 Hague Maintenance Protocol, it must

166 See Art. 11 (a) of the 2007 Hague Maintenance Protocol, which determines the scope of applicable law and provides that the law applicable to the maintenance obligation shall determine "whether, to what extent and from whom the creditor may claim maintenance". See also Actes et Documents de la Douzième session de la Conférence de la Haye de Droit International Privé (1972), Vol. II, p. 124, where in the preliminary Report to 1972 Hague Conventions written by *Verwilghen,* it is provided: "the article first makes it clear that the applicable law will determine the existence of the right to maintenance. One will therefore have to refer to the applicable law to ascertain whether the principle of the maintenance obligation is sanctioned in the particular relationship." This may be a case where the law of such Member States does not regulate the maintenance obligations, for example arising out of registered partnerships, in their legal systems. It is questionable on the basis of the considerations above, whether such Member States would apply Art. 5 of the 2007 Hague Maintenance Protocol and would refer to the rule of "closure connection".

167 Art. 13 of the 2007 Hague Maintenance Protocol.

be borne in mind that the effects of the applicable law must be manifestly contrary to the public policy of the forum *in concreto*. The *Bonomi* Report stressed the use of public policy only in cases in which the payment of maintenance is seen as improper, so it will not be sufficient to invoke public policy for the family relationship on which the maintenance claim is based when contrary to the public policy of the forum State.[168] It follows that it would not be simple to justify the application of the public policy provision in a case of maintenance claims arising out of same-sex unions, since Art. 13 should be applied with some caution. However, nothing precludes Member States from its application, insofar as the practical effects of the applicable foreign law would be manifestly contrary to the forum's public policy.[169] On the other hand, although the non-uniform application of Art. 5 of the 2007 Hague Maintenance Protocol should not be supported, for the reasons mentioned above, in the same situation this provision could also operate to a certain extent as a safeguard for Member State A, as far as such a Member State would represent the closer connection pursuant to the provision. In practice, this would lead to the application of the *lex fori* of Member State A, under the law of which no maintenance obligation exists in that particular relationship, without the need to refer to public policy.

### (iii) Relevance of scope with regard to the recognition and enforcement of decisions

In order to analyze what will happen once a court in Member State A or B delivers its decision in the situation described above, the recognition and enforcement regime under the Maintenance Regulation must first be summarized. The Maintenance Regulation distinguishes between decisions given by a Member State bound by the Hague Maintenance Protocol (Chapter 4 Section 1) and decisions given by a Member State not bound by the Hague Maintenance Protocol (Chapter 4 Section 2).[170]

Recognition of the latter decisions can be refused on the grounds of non-recognition established in the Maintenance Regulation, including the public

168 *Bonomi* Report, note 178.

169 See *Badiali,* La disciplina convenzionale, p. 122, who in the context of 1973 Hague Maintenance Regulation does not exclude such an option.

170 After Brexit, Section 2 will be applicable to Denmark only. On the general aspects concerning recognition of judgments under the Maintenance Regulation, see *Siehr,* in: Essays in honour of Hans van Loon, p. 529–535.

policy exception (Art. 24 Maintenance Regulation). Therefore, one may imagine that in a case in which, for example, a Danish court (not bound by the 2007 Hague Maintenance Protocol) establishes maintenance obligations between a same-sex couple in its judgment under the Maintenance Regulation, theoretically, the court of another Member State, in which the recognition is sought, could deny it on the basis of its public policy under Art. 24 (a) Maintenance Regulation.[171]

The *ordre public* exception, however, no longer represents a ground for non-recognition of foreign judgments in *exequatur* procedures among the Member States bound by the 2007 Hague Maintenance Protocol, due to the guarantee provided by the application of the uniform conflict of laws rules under the 2007 Hague Maintenance Protocol.[172] It seems that the EU legislator was well aware of the problem connected with the non-recognition of specific types of unions in several Member States and subsequent maintenance obligations based on such relationships,[173] as long as Art. 22 and Recital 25 Maintenance Regulation, on the one hand, force the Member States bound by the Protocol to recognize and enforce a decision on maintenance given in another Member State, and on the other hand, clarify that the recognition of said decision "has as its only object to allow the recovery of the maintenance claim determined in the decision", while it "shall not in any way imply the recognition of the family relationship, parentage, marriage or affinity underlying the maintenance obligation which gave rise to the decision". The same rationale of those provisions can be found in Art. 2 (2) of the 1973 Hague Maintenance Convention, in Art. 1 (2) of the 2007 Hague Maintenance Protocol and also in Art. 19 (2) of the 2007 Hague Maintenance Convention, which provides an important safeguard in relation to preliminary or ancillary questions.[174] In other words, the Maintenance Regulation requires Member States to recognize and enforce only the part of the decision that deals with the maintenance payments, whereas the question of recognition or non-recognition of the underlying family status in that Member States is not relevant. The existence or non-existence of a family relationship determined for the purpose of the claim on maintenance, either as the main

171 For general information concerning same-sex marriages, see the official website of the European Commission at https://europa.eu/youreurope/citizens/family/couple/marriage/index_en.htm (last consulted 11.06.2020).

172 Recital 24 Maintenance Regulation.

173 *Pesce,* Le obbligazioni alimentari tra diritto internazionale e diritto dell'Unione europea, p. 62.

174 *Borrás/Degeling* Report, note 438.

question or as an incidental question, does not bear any relevance for the purpose of the maintenance proceedings.[175] Such a "disconnection clause" was included in the Regulation in order to achieve consensus on the (absence of) effects of the decisions on maintenance with regard to the underlying family relationship and to allay fears that the Regulation would have an unnecessary effect on domestic family law.[176] This provision, although inserted in the section of the Maintenance Regulation concerning decisions given in a Member State bound by the 2007 Hague Maintenance Protocol, should be taken into account also by the Member States where the *exequatur* procedure is applicable when considering the public policy exception under Art. 24 (a).[177]

Therefore, going back to our example above, two scenarios are possible: A court in Member State A not recognizing same-sex unions may render a judgment declaring the non-existence of the maintenance obligations, and a court in Member State B recognizing same-sex unions may order the maintenance payment. On the basis of the considerations above, in the absence of an *exequatur* procedure and without the possibility to invoke the public policy exception, it must be assumed that both judgments will automatically be recognized in the other Member State. In this regard, two concerns may arise: the protection of the maintenance creditor may be limited due to the decision rendered in State A, while the sovereignty of Member State A might be affected by the judgment issued in Member State B.[178] As to the latter concern, it is worth mentioning that this situation would not change, even if an interpretation based on national law was admitted, as the Member States bound by the Maintenance Regulation, including Member State A, shall recognize such a judgment, as provided in Art. 22 Maintenance Regulation, pursuant to which this "shall not in any way imply the recognition of the family relationship, parentage, marriage or affinity underlying the maintenance obligation which gave rise to the decision". As to the first concern,

175 *Villata,* Riv. dir. int. 94 (2011), 731 (769).

176 *Bremner,* KSLR 2 (2010), 5 (23).

177 See *Villata,* Riv. dir. int. 94 (2011), 731 (769); *Pesce,* Le obbligazioni alimentari tra diritto internazionale e diritto dell'Unione europea, p. 314 and *Castellaneta/Leandro,* Nuove leg. civ. comm. 2009, 1051 (1062). On the similar conclusions concerning the use of the public policy exception under the 2007 Hague Maintenance Convention, see the *Borrás/Degeling* Report, note 438 and 479 contra *Oberto,* Dir. fam. 39 (2010), 802 (832 et seq.), who does not consider this issue to be so unambiguous. However, as stated above, this problem should not come into play, as Denmark and (pre-Brexit) UK regulate same-sex marriages.

178 However, as mentioned above, it is questionable whether the obligation to pay maintenance could lead to an intolerable result in the Member States not recognizing only status.

the maintenance creditor could rely, for example, on certain conditions as mentioned in Art. 8 Maintenance Regulation.[179]

### b. Relevance of the notion of "family relationship, parentage, marriage or affinity" for status matters

#### (i) Principal questions

As specified at the beginning of this section, the status question is also relevant when the status represents the principal claim. Recital 21 Maintenance Regulation clarifies that the conflict of laws rules under the Maintenance Regulation do not govern the law applicable to the establishment of the family relationships on which the maintenance obligations are based, which continues to be covered by Member States' national law, including their rules on private international law. It was initially proposed by the Commission to include a full set of conflict of laws rules into the Regulation, covering the determination of the relationships that could form the basis of those claims.[180] Although it was admitted that this option would have reduced discrepancies between Member States as to what and to whom maintenance obligations actually apply, it was rejected.[181] Thus, it comes as no surprise that Recital 21 expressly excludes the establishment of family relationships from the Maintenance Regulation, thereby leaving the notions

179 The same formulation can be traced in Art. 18 of the 2007 Hague Maintenance Convention. Since this Convention should be "taken into account" by the Maintenance Regulation (as provided in Recital 8), the *Borrás/Degeling* Report as to Art. 18 of the 2007 Hague Maintenance Convention provides for valuable interpretation. This Article operates as a rule of negative jurisdiction, which prohibits the debtor from seizing another jurisdiction to modify a decision or obtain a new decision where the original decision has been made in a Contracting State in which the creditor is habitually resident. However, this limitation is not applicable to the maintenance creditor. See in this regard also *Pesce,* Le obbligazioni alimentari tra diritto internazionale e diritto dell'Unione europea, p. 156 et seq.

180 Commission staff working document – Annex to the Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations – Impact assessment, SEC (2005) 1629, note 4.3, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52005SC1629&from=EN (last consulted 03. 11. 2020).

181 Commission staff working document – Annex to the Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations – Impact assessment, SEC (2005) 1629, note 4.3, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52005SC1629&from=EN (last consulted 03. 11. 2020).

of "family relationship, parentage, marriage or affinity" untouched by the Maintenance Regulation.[182] The law applicable to what constitutes a family relationship and the establishment of such relationships is governed by neither the 2007 Hague Maintenance Protocol nor the 1973 Hague Maintenance Convention.[183] However, as highlighted on several occasions, Art. 1 (2) of the Protocol (based on Art. 2 (2) of the 1973 Hague Maintenance Convention) specifies that "[d]ecisions rendered in application of this Protocol shall be without prejudice to the existence of any of the relationships referred to in paragraph 1". Therefore, the Protocol keeps this issue out, and thus, the law applicable to the family relationships to which Art. 1 (1) refers (e.g. marriage) is not directly governed by the Protocol.[184] As the *Bonomi* Report and Recital 21 of the Regulation confirm, when the existence of the family relationship represents the principal claim, covering the case where the maintenance claim is only accessorial to the dispute over the family status, the *lex fori,* including its conflict of laws rules, is to be applied.[185] As a consequence, in Member States, the Rome III Regulation or the Member States' conflicts of law rules will govern the status question.

### (ii) Preliminary or incidental questions

The distinction between maintenance and personal status and the subsequent provision of different conflict of laws rules may often be the origin of preliminary or incidental questions.[186] In this regard, four alternative methods for solving the preliminary questions have been considered by scholars:[187] (1) applying the same law applicable to the main cause of action; (2) applying the conflict of law rules of the *lex fori* (so-called "independent reference")[188]; (3) applying the conflict of law rules of the *lex causae* (so-called "dependent reference")[189]; or (4) directly applying the *lex fori* (substantive law) as a

182 *Castellaneta/Leandro,* Nuove leg. civ. comm. 2009, 1051 (1062).

183 According to the *Bonomi* Report, note 23, this phrasing was not reproduced in the Protocol, probably because it was considered superfluous.

184 *Bonomi* Report, note 23.

185 *Bonomi* Report, note 31.

186 *Martiny,* Recueil des Cours 247 (1994), p. 131 (225).

187 A thorough review of the four methods was carried out by *Gotlieb,* Can. B. Rev. 33 (1955), 523 (529) and again *Gotlieb*, ICLQ 26 (1977), 734.

188 *Pfeiffer/Wittmann,* in: Viarengo/Villata, Planning the Future of Cross Border Families. A Path Through Coordination, p. 47 (51); *Gössl,* JPIL 8 (2012), 63.

189 *Torremans/Fawcett,* in: Cheshire, North & Fawcett: Private International Law, p. 54.

consequence of the alleged procedural nature of the incidental question[190]. As highlighted above, no difficulties arise when the existence of the family relationship represents the principal claim, the *lex fori,* including its conflict of laws rules, is to be applied. However, the same approach was not preferred by the *Bonomi* Report for the determination of the preliminary or incidental questions. That is the same solution proposed in the *Verwilghen* Report[191] for the 1956 and 1973 Hague Maintenance Conventions – i.e. applying the law designated to govern maintenance obligations also to the existence of a family relationship – when the main object of the claim is maintenance and the existence of the family relationship arises only on a preliminary basis.[192]

Although this approach could lead to the application of a law to family status other than the law applicable to the same issue when it is raised as the principal claim, to the detriment of internal harmony of solutions within the seized Member State, it should not be regarded as a major drawback in the absence of any *res iudicata* effect over the relevant family status. On the other hand, the proposed approach would foster predictability[193] and a uniform application,[194] which are the most relevant goals pursued by EU regulations containing conflict of laws rules.[195]

However, as highlighted by *Bonomi,* this preferable approach is not binding for the EU Member States insofar as they may resolve the preliminary questions through, for example, an application of the "independent reference" method.[196] In such a case, the conflict of law rules of the *lex fori* would operate, including the Rome III Regulation in the Member States which established enhanced cooperation in that area.

190 *Martiny,* Recueil des Cours 247 (1994), p. 131 (225) On the advantages and disadvantages of these methods see *Gössl,* JPIL 8 (2012), 63–76; *Wengler,* in: International Encyclopedia of Comparative Law, p. 3–34; *Mosconi/Campiglio,* Diritto internazionale privato e processuale, Vol. I, p. 255 et seq.

191 *Verwilghen* Report, note 125 et seq.

192 *Bonomi* Report, note 24. See Oberlandesgericht Frankfurt am Main, 12. 04. 2012, 5 UF 66/11, DES20120412, which resolved the preliminary question of paternity by reference to the same law governing the main maintenance issue.

193 Recital 19 Maintenance Regulation.

194 *Pfeiffer/Wittmann,* in: Viarengo/Villata, Planning the Future of Cross Border Families. A Path Through Coordination, p. 47 (51).

195 *Villata,* RDIPP 55 (2019), 714 et seq.

196 *Bonomi* Report, note 24. See also *Mosconi/Campiglio,* Diritto internazionale privato e processuale, Vol. II, p. 248, who in the context of Maintenance Regulation mainly suggest the application of the same law applicable to the main cause of action, or of the conflict of law rules of the *lex fori.*

## 2. The concept of marriage and registered partnership in the Property Regimes Regulations*

The Property Regimes Regulations set forth a comprehensive body of rules of private international law bringing together rules on jurisdiction, conflict of laws, and recognition and enforcement of court decisions, authentic instruments, and court settlements.[197]

They deal with the whole range of issues which may arise in connection with the property relationships of spouses or partners, both between themselves and in relation to third parties. During a lengthy and complex legislative process, it appeared that it would not have been possible to reach a unanimous vote in the Council as required by Art. 81 (3) TEU for the adoption of measures concerning family law with cross-border implications. Eventually, the Regulations represent the outcome of enhanced cooperation pursuant to Art. 20 TEU.[198] Therefore, they only bind the Member States that decided to participate in the enhanced cooperation, which implies being bound by both Regulations since Member States are not permitted to become bound by only one Regulation.

The Regulations, apart from obvious adaptations and save some exceptions, contain almost the same wording and numbering.

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* This section is to be attributed to *Ilaria Viarengo* and *Nicolò Nisi.*

197 Pursuant to Art. 70, the Property Regimes Regulations became applicable on 29. 01. 2019. According to Art. 69, they apply to legal proceedings instituted on or after 29. 01. 2019, as well as to authentic instruments formally drawn up or registered, and to court settlements approved or concluded, on or after that date. For their part, the Regulations' rules on the recognition and enforcement of decisions apply to judgments predating 29. 01. 2019 as long as the rules of jurisdiction applied comply with those set out in the Regulations themselves. The conflict of laws rules of the Regulations apply to couples whose marriage or partnership was established after 29. 01. 2019. The Regulations' provisions apply to couples that were already formed at that date, provided that the spouses or partners specify the law applicable to their property relations after the above date.

198 Council Decision (EU) 2016/954 of 09. 06. 2016 authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, OJ L 159/16, 16. 06. 2016, p. 16–18.

## a. The notion of "marriage" in the Matrimonial Property Regulation*

The Matrimonial Property Regulation applies to matrimonial property regimes with cross-border implications. It establishes harmonized connecting-factors to determine jurisdiction and applicable law to matrimonial property regimes, in addition to unified recognition and enforcement rules of foreign judgments and authentic instruments, and is aimed at overcoming the hurdles faced by international couples due to the fragmentation among the national systems in the field of matrimonial property regimes.[199]

The Regulation provides for an autonomous notion of "matrimonial property regimes" which encompasses all civil law aspects related to "both the daily management of matrimonial property and the liquidation of the regime, in particular as a result of the couple's separation or the death of one of the spouses"[200]. In contrast, due to social, cultural, political, and legal differences among Member States, no definition is provided with reference to the meaning of marriage, for which Recital 17 of the Regulation refers back to the national laws of the Member States, in line with other instruments in European family and succession matters that do not explicitly define marriage for the purpose of their application. More clearly, Recital 21 adds that the Regulation "should not apply to other preliminary questions such as the existence, validity or recognition of a marriage, which continue to be covered by the national law of the Member States, including their rules of private international law"[201].

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* This section is to be attributed to *Nicolò Nisi.*

199 As Recital 11 indicates, only 18 Member States are bound by the Regulation, namely Belgium, Bulgaria, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland, Sweden, and Cyprus. Among the countries not participating, two groups of countries may be identified: the first group (Ireland and Denmark, in addition to the UK which is no longer a Member State), enjoys a special treatment in the Area of Freedom, Security, and Justice; the second group, on the contrary, consists of countries which have retained a "conservative" approach towards same-sex marriages and/or registered partnerships (Estonia, Latvia, Lithuania, Poland, Slovakia, Hungary and Romania). Interestingly, five of the seven non-participating countries of this second group provide neither marriage nor registered partnerships to same-sex couples. These "conservative" Member States feared that obligatory recognition and enforcement under the regulation would in fact lead to the transfer to their territories of the effects of foreign same-sex marriages and registered partnerships. This point is particularly stressed by *Wysocka-Bar,* ERA Forum 20 (2019), 187.

200 See Recital 18 Matrimonial Property Regulation. On such a notion, see also CJEU, 14.06.2017, C-67/17 (*Iliev/Ilieva*); CJEU, 27.03.1979, C-143/78 (*de Cavel/de Cavel*). In the literature, see *Las Casas,* Nuove leggi civ. comm. 42 (2019), 1529.

201 This is confirmed by Art. 1 (2) (b) of the Regulation. It follows that the outcome of such an assessment may vary from Member State to Member State. See *Rodríguez Benot,* in:

The same principle also impacts the functioning of the jurisdictional rules of the Regulation. Under Art. 9 (1), as also acknowledged in Recital 38, the courts of a Member State may exceptionally decline their jurisdiction under the Regulation, should they hold that, under their private international law, the marriage in question cannot be recognized for the purposes of matrimonial property regime proceedings, including the case where the marriage is converted by the legal system of the forum into a registered partnership.[202] In such cases, in order to avoid the risk of denial of justice, the courts indicated in Art. 9 (2) would have jurisdiction.

The "gender-neutral"[203] application of the Matrimonial Property Regulation reflects the different attitudes of the Member States towards the institution of marriage and – despite the objective of facilitating the free movement of the persons in the EU, as provided by Recitals 1, 8, and 72 – makes it clear that the latter is not supposed to ensure the free circulation of marital status throughout the EU.

This was certainly an attempt to convince the greatest number of Member States to adopt the Regulation, thus avoiding the necessity to resort to enhanced cooperation,[204] even for those countries that were interested in remaining in control of such a sensitive notion and therefore reluctant to

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Viarengo/Franzina, The EU Regulations on the Property Regimes of international Couples, Art. 1 note 1.16.

202 On this provision, see the critical remarks by *Franzina,* in: Viarengo/Franzina, The EU Regulations on the Property Regimes of international Couples, Art. 9 note 9.06, who claims that this provision serves an essentially political rather than a legal purpose. The same concern had already been discussed in the field of family law concerning the law applicable to divorce and legal separation. Art. 13 Rome III Regulation states that "nothing in this Regulation shall oblige the courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation". As recalled by *Chalas,* in: Corneloup, Art. 13 Rome III Regulation note 13.05, this provision was introduced for Malta, which did not provide for divorce at that time and did not want to force domestic courts to pronounce a divorce on the basis of a foreign law.

203 This definition was used by the Commission's Communication accompanying the proposal, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Bringing legal clarity to property rights for international couples, COM (2011) 125 final, note 4.

204 See the outcome of the meeting no. 3433 of the Justice and Home Affairs Council of the European Union held on 3rd–4th December 2015, where the Council did not reach a political agreement by unanimity and acknowledged the will of many delegations to consider the establishment of an enhanced cooperation. Cf. https://www.consilium.europa.eu/en/meetings/jha/2015/12/03-04 (last consulted 26. 10. 2020).

accept any obligation to acknowledge foreign legal relationships of the same kind, which domestically do not find any (or only partial) recognition.[205]

Although Recital 17 is explained by the political will to temper the effects of the Regulation, it is in any case evident that, irrespective of the non-binding nature of recitals,[206] the lack of a definition of "marriage" is of the utmost importance and might have serious consequences for the practical application of the Regulation in the participating Member States, with particular regard to those institutions – such as same-sex marriages – where an equivalence is actually rather difficult to attain[207]. Indeed, among the latter, there is one State that does not provide internally any legal status for same-sex couples (Bulgaria), while five other countries only allow same-sex couples to enter into registered partnerships (Czech Republic, Greece, Croatia, Italy, and Cyprus)[208]. As a result, in cases connected with those Member States, as may happen worldwide, the spouses are left in great uncertainty, without the comfort of knowing in advance what part, if any, of their relationship will be recognized.

The characterization of a relationship as marriage for the purpose of the Regulation under the *lex fori* entails the risk for the spouses that their marriage is not recognized or that the seized court declines its jurisdiction for the matrimonial property regime. Despite recent CJEU case law[209], plain

205 *Ancel,* in: Corneloup et al., Le droit européen des régimes patrimoniaux des couples, p. 41. See also *Twardoch,* Rev. crit. DIP 105 (2016), 465, explaining the hostility toward the Regulation from a Polish law perspective.

206 On the role of preambles in the European legal instruments, see *Klimas/Vaiciukaite,* ILSA JICL 15 (2008), 61; *Lemaire,* Recueil Dalloz 2008, 2157. For some remarks on the extensive use of recitals in the field of European private international law, see *Davì/Zanobetti,* Il nuovo diritto internazionale privato europeo delle successioni, p. 23 fn. 74.

207 *Marino,* CDT 9 (2017), 265 (267), who also mentioned the example of marriages with or between minors, which might not be accepted under public policy grounds according to the ECtHR's case law (reference is made to the judgment of 07.07.1986, no. 11579/85 (*Khan/the United Kingdom*)).

208 In contrast, we can assume that countries having same-sex marriage in their own law will normally recognize foreign same-sex marriages as regular marriages, subject to the same recognition rules as any other marriage. See *Wautelet,* in: Boele-Woelki/Fuchs, Legal Recognition of Same-Sex Relationships in Europe, p. 143.

209 See section III. While the ECtHR has affirmed the obligation for Contracting States to provide legal protection to same-sex unions, individuating civil partnerships as a solution to this problem (ECtHR, 21.07.2015, no. 18766/11 and 36030/11, (*Oliari/Italy*)), on the other hand, it has repeatedly affirmed that there is no positive obligation – neither under Art. 8 nor under Art. 12 – for the States to ensure effective respect for the private and family life by recognizing same-sex marriage or any other legal status for the same-sex couples (ECtHR, 16.07.2014, no. 37359/09 (*Hämäläinen/Finland*)).

recognition of marital status is in fact not always possible in countries which do not allow same-sex marriages, especially in those countries where the sexual difference of the spouses is enshrined in the constitution[210].

In general terms, three different approaches have been identified to overcome this practical problem: denial of effects of the marriage, partial or incidental recognition of the marriage, downgrade recognition of the marriage as a registered partnership[211].

The first approach consists of the denial of effects of the marriage and therefore all property consequences relating to this relationship[212]. Such a denial – albeit not necessarily in line with the EU law principle of non-discrimination – would touch the very essence of the relationship, which would not even be downgraded and treated as a partnership. The question of what law applies to the consequences of marriage would therefore become irrelevant.

The second approach consists of the partial or incidental recognition of the marriage. As for other forms of family relationships unknown under national law,[213] some countries may be prepared to recognize some of the consequences of a same-sex marriage (or a different, in principle unrecognizable marriage) validly concluded abroad. This was, for instance, the situation in France before the introduction of same-sex marriage in 2013, where the Minister of Justice stated that, provided none of the spouses were French nationals, a foreign same-sex marriage could produce effects in relation to the assets of the spouse, i.e. matrimonial property and succession.[214] More generally, it could be possible to leave aside the problem of the recognition

210 Arguing *per analogiam* from the Rome III Regulation, it has been argued that the reference in Recital 54 EU Charter and in particular Art. 21 thereof on the principle of non-discrimination, could be interpreted in the sense that judgments concerning same-sex marriage should be recognized in the "conservative" Member States without the possibility of any recourse to public policy, as this recourse would be contradictory to the principle of non-discrimination.

211 *Gray/Quinza Redondo,* Familie & Recht 2013.

212 See section IV.1.

213 See for instance the approach of national courts regarding the recognition and enforcement of foreign repudiation or the effects of *kafala.* In the Italian case law, see Corte di cassazione, 01.03.2019, no. 6161, http://www.marinacastellaneta.it/blog/wp-content/uploads/2019/03/6161.pdf (last consulted 02.11.2020); Corte di cassazione, 24.11.2017, no. 28154, http://www.marinacastellaneta.it/blog/wp-content/uploads/2017/12/kafala.pdf (last consulted 02.11.2020).

214 See the answer by the French Minister of Justice to question N° 16294, dated 09.03.2006, available in Revue critique de droit international privé 2006, 440. In the sense that some effects to foreign same-sex marriage could be recognized using the doctrine of the « *effet atténué* » of the public policy, see *Revillard,* Defrénois (2005), 461.

of civil status abroad and to incidentally consider the marriage as a fact that causes the legal consequence of a patrimonial regime.[215] The outcome would be that the State would be free not to accept the foreign marriage as a status acquired abroad, at the same time complying with the principle of non-discrimination as envisaged in the EU Charter.[216]

The third approach consists of the so-called downgrade recognition, i.e. treating foreign same-sex marriages as if they were civil partnerships, regulated either by foreign law or by domestic law. This model – albeit generally criticized for being in breach of fundamental human rights, for limiting the free movement of persons, and for the disregard of the legitimate expectations of the spouses – is already adopted by several States, including Italy, Switzerland, Croatia, Greece, and Cyprus.[217]

Italian legislation is a very interesting example to understand the functioning of this approach, as the topic (i.e. the recently introduced Art. 32-bis of the Italian PIL Act) has been highly debated among scholars.[218] As already recalled, while such a provision expressly mentions only marriages concluded by at least one Italian, the PIL Act does not say anything concerning same-sex marriages concluded abroad among foreigners. This lack of regulation has been interpreted by the prevailing scholarships as meaning that same-sex marriages among foreigners should be treated domestically as marriages,[219] while some authors have retained a conservative approach and still believe that, in absence of a legislative development deleting the diversity of sex as a requirement of substantive validity, it is not possible to infer any tacit modification of the notion of "marriage" as to include same-sex couples[220].

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215 In the same spirit, Recital 64 states that "the recognition and enforcement of a decision on matrimonial property regime under this Regulation should not in any way imply the recognition of the marriage underlying the matrimonial property regime which gave rise to the decision". This principle is not new and applies also with regard to maintenance obligation under the Maintenance Regulation, which focuses only on the pecuniary and patrimonial content of the maintenance obligations and, at the stage of recognition of decisions, takes into account the binding nature of the performance separating it from any assessment of the family status on which it is based, see *Pesce,* Le obbligazioni alimentari tra diritto internazionale e diritto dell'Unione europea, p. 85 et seq.

216 *Marino,* CDT 9 (2017), 265 (268).

217 *Noto La Diega*, in: Hamilton/Noto La Diega, Same-Sex Relationship, Law and Social Change, p. 33 et seq.

218 See section III.2. See, in particular, the criticism by *Lopes Pegna,* DUDI 10 (2016), 89 (112 et seq.).

219 See the authors mentioned in fn. 56.

220 See in particular *Pesce,* RDIPP 55 (2019), 777 (810–813); *Campiglio,* RDIPP 53 (2017), 33 (45 et seq.), also focusing on the risk of reverse discrimination to the detriment of Italian na-

### b. The notion of "registered partnership" in the Partnership Property Regulation*

While a definition of marriage is missing, Art. 3 (1) (a) Partnership Property Regulation provides for an autonomous definition of registered partnership. It defines registered partnership as the regime of "shared life of two people which is provided for in law, the registration of which is mandatory under that law and which fulfils the legal formalities required by that law for its creation".[221] However, Recital 17 points out that such a concept is solely functional for the purposes of this Regulation and that the actual substance of the concept should remain defined in the national laws of the Member States. Therefore, the Regulation does not oblige a Member State whose law does not have the institution of registered partnership to provide for it in its national law.

The existence, validity, or recognition of a registered partnership are excluded from the material scope of the Regulation.[222] This is stressed in Recital 21 and Art. 1 (2) (b) Property Regimes Regulations which state that such preliminary matters continue to be "covered by the national law of the Member States, including their rules of private international law". Therefore, the authority of the relevant Member State should verify the existence of any marriage or registered partnership, their validity, and recognition. Finally, the Regulation specifies that the recognition and enforcement of a decision on a property regime should not in any way imply the recognition of the registered partnership which gave rise to the decision.[223]

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tionals in cases of equivalence of foreign same-sex marriages as domestic marriages. This strict interpretation also builds on the relevant case law which – despite recent openings expressed *obiter* (e.g. Corte di cassazione, 14. 05. 2018, no. 11696, http://www.ilcaso.it/giurisprudenza/archivio/19799.pdf (last consulted 02. 11. 2020)) – has so far excluded recognition of same-sex marriages. See from the many decisions Corte di cassazione, 15. 03. 2012, no. 4184, http://www.giurcost.org/casi_scelti/Cassazione/Cass.sent.4184-2012.htm (last consulted 02. 11. 2020); Corte di cassazione, 09. 02. 2015, no. 2400, http://www.europeanrights.eu/public/sentenze/Cassazione-Civile-Sez.-I-9-febbraio-2015-n.-2400.pdf (last consulted 02. 11. 2020).

* This section is to be attributed to *Ilaria Viarengo*.

221 A definition of the property consequences accompanying registered partnerships is also provided for. According to Art. 3 (b) Partnership Property Regulation they are "the set of rules concerning the property relationships of the partners, between themselves and in their relations with third parties, as a result of the legal relationship created by the registration of the partnership or its dissolution".

222 Art. 1 (2) (b) Partnership Property Regulation.

223 Recital 64 Partnership Property Regulation.

Notwithstanding this autonomous definition, the Partnership Property Regulation confirms the usual, rather cautious attitude of the European legislator in all European regulations when family status is important as a preliminary question.[224]

The countries regulating registered partnerships show remarkable differences as to what is being regulated. This form of partnership has been or is being regulated in an increasing number of States (often but not necessarily restricted to same-sex individuals), and it covers a wide and diverse reality. In order to respect the peculiarities of all Member States as well as their legislative powers, the Regulation makes clear the boundaries of the definition of registered partnerships. However, an autonomous definition in the Partnership Property Regulation is provided and it is meant to prevent discrepancies which may arise between Member States when it comes to the interpretation and application of the Regulation.

224 See, albeit with different wording and subject to different interpretations, Art. 1 (3) (a) Brussels II bis Regulation, Art. 2 (b) Rome III Regulation, and Art. 1 (2) (a) Succession Regulation, which expressly exclude family status from their scope. Art. 22 Maintenance Regulation provides that the recognition and enforcement of a decision on maintenance shall not in any way imply the recognition of the family relationship, parentage, marriage or affinity underlying the maintenance obligation which gave rise to the decision. The issue of the preliminary question has been treated in particular in the German legal doctrine of private international law. It is disputed between the independent solution (*selbständige Anknüpfung*), which furthers international harmony of decisions, and dependant solution (*unselbständige Anknüpfung*), which serves the purpose of internal harmony of decisions. See *Siehr,* YPIL 7 (2005), p. 17 (50); *Bernitt,* Die Anknüpfung von Vorfragen im europäischen Kollisionsrecht; *Henrich,* in: Liber amicorum Klaus Schurig, p. 63; *Gössl,* JPIL 8 (2012), 63; *Dutta,* IPRax 2015, 32; *Pfeiffer/Wittmann,* in: Viarengo/Villata, Planning the future of cross-border families: a path through coordination, p. 47. In recent years, a growing number of contributions have devoted attention to how legal concepts traditionally categorized as general are designed in the Regulations thus far enacted by the European legislator. Cf. *Hausmann,* RDIPP 51 (2015), 499 et seq.; *Rühl/von Hein,* RabelsZ 79 (2015), 701 et seq.; *Leible,* General Principles of European Private International Law. With regard to the Property Regimes Regulations, see *Bonomi,* in: Dutta/Weber, Die Europäischen Güterrechtsverordnungen, p. 140. Actually, the preliminary question does not seem to be an issue for the courts. See also *Mäsch,* in: Leible, General Principles of European Private International Law, p. 101 et seq. In the EUFams II database, a case of the Oberlandesgericht Frankfurt am Main, 12. 04. 2012, 5 UF 66/11, DES20120412, is reported, in which the German Court of Appeal, applying the Maintenance Regulation, resolved the preliminary question of paternity by reference to the same law governing the main maintenance issue.

### (i) Requirements for registered partnerships

Two conditions are required for the property consequences of a registered partnership to be included in the scope of the Regulation.

First, the Regulation establishes formal requirements for registered partnerships. A "mandatory" registration of the partnership is required. The Regulation draws a distinction between couples whose union is institutionally sanctioned by the registration of their partnership with a public authority and couples in *de facto* cohabitation, regardless of whether the relevant Member State, such as Italy,[225] makes provisions for such *de facto* unions. In that respect, the wording of Recital 16 is clear. Therefore, "registered" means that the partnership has been included in a public register by a public authority and, consequently, can be consulted by third parties. Excluded are not only free, unregistered partnerships, but also partnerships which require a formal partnership agreement, drawn up by a notary or other public official, but not necessarily a registration. The latter seem to fall in the scope of application of the Brussels I bis Regulation. In a recent judgment, the CJEU held that an action concerning an application for dissolution of the property relationships arising out of a *de facto* (unregistered) partnership falls within the concept of "civil and commercial matters" within the meaning of Art. 1 (1) Brussels I Regulation, now superseded by the Brussels I bis Regulation, and therefore falls within the scope of that instrument.[226]

The partnership can be registered in any country of the world. In fact, no reference to the place of the recording of the partnership is made in the Regulation. Actually, the irrelevance of the place of registration to this extent seems rather obvious since the law designated pursuant to the Regulation, given its universal character according to Art. 20, shall apply regardless of whether it is the law of a Member State.[227]

Second, the couple must not be deemed to be married. The partnership may have similar or even identical effects to marriage, but cannot formally be defined as marriage, which is governed by the Matrimonial Property Regulation.

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225 Legge 20 maggio 2016 n. 76, Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze, Gazzetta Ufficiale della Repubblica italiana n. 218 del 20 maggio 2016.

226 CJEU, 06.06.2019, C-361/18 (*Weil/Gulácsi*), note 45. Art. 1 (2) (a) Brussels I bis Regulation excludes rights in property arising out of a matrimonial relationship from the scope of that Regulation. The Brussels I bis Regulation extends that exclusion to rights in property arising out of a relationship deemed by the law applicable to such a relationship to have comparable effects to marriage.

227 *Rodríguez Benot,* in: Viarengo/Franzina, The EU Regulations on the Property Regimes of international Couples, Art. 3 note 3.06.

### (ii) Same-sex couples

Notwithstanding the autonomous notion in the Partnership Property Regulation, the definition of the concept of registered partnership, including as regards their availability both to same-sex and opposite-sex couples or to same-sex couples only, involves a referral to national law. Given the great and growing variety of couple regimes within the EU, it is beyond doubt that this approach may jeopardize one of the main goals of the Regulation, i.e. the harmony of decisions among participating Member States.[228]

Member States that do not allow same-sex marriages are not obliged to apply the Matrimonial Property Regulation to such couples. Those Member States could, however, subject same-sex marriages at least to the Partnership Property Regulation. This may occur in particular in those States where same-sex marriages established abroad have to be characterized as registered partnerships rather than marriages. For example, the "downgrade recognition" provided in Art. 32-bis of the Italian PIL Act affects also the application of the relevant private international law. Hence, the marriage at stake will fall in the scope of the Partnership Property Regulation instead of the Matrimonial Property Regulation.

As a matter of fact, the very same marriage concluded between spouses of the same sex can fall, depending on the forum, under either of the Property Regimes Regulations. This depends on whether or not the *lex fori* recognizes same-sex marriages.

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228 See also *Ancel,* in: Corneloup et al., Le droit européen des régimes patrimoniaux des couples, p. 41. In order to avoid such an unsatisfactory result, *Dutta,* YPIL 19 (2017/2018), p. 145 et seq., proposes to interpret the reference in Recital 17 as a conflict rule referring for the characterization of a couple regime as a marriage to the law under which the couple regime was created or first registered.

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