ISSN 2384-9169
Fascicolo n. 2 - 2020
rivista.eurojus.it

EU private international law and agreements as to succession in married and unmarried couples

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SUMMARY: 1. Introduction: Harmonisation of Private International Law in the respective fields of Family and Succession Law. – 2. Relationship between different instruments of EU Law and characterisation problems. – 3. Succession regulation and regulations on matrimonial property relations and the patrimonial consequences of registered partnerships: a brief introduction to the main relevant rules – 4. Agreement as to succession and agreements between spouses or registered partners in the EU regulations: definitions and delimitations – 5. Agreements between spouses and partners and their effects on succession: national problematic cases and possible solutions. – 6. Final remarks.

1. Introduction: Harmonisation of Private International Law in the respective fields of Family and Succession Law

European Union law is dedicating more and more efforts to the harmonization of the internal rules of the Member States on family-related issues. In particular, in private and procedural international law, the theme of the family is of the uppermost importance due to the effects of free movement, which has led to an increase in "international families" made up of subjects with different nationalities, or in any case having connections with more than one legal system (as for the case of spouses, having the same citizenship but residing in a different Member State).

This growing internationalization of families makes it increasingly appropriate, if not absolutely necessary, to harmonize the rules on jurisdiction and conflict of law. Firstly, this would allow mutual recognition and therefore the circulation among the Member States of

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judicial measures affecting the family; secondly, this also prevents that the divergence of the conflict of law rules and even more of the internal rules (which cannot currently be subject to harmonization as excluded from the competence of the European Union) from leading to forum shopping and forum running, thus encouraging litigation in such a delicate sector as that of the family.

This process of harmonization of Private International Law (from now on PIL) at European Union level is still ongoing, although some results have already been achieved[1], and it is showing to be much harder in the field of family law, due to the existing divergences within the internal civil law systems[2]. Despite this, it certainly represents a challenge that the European Union cannot abandon, even at the cost of choosing the option of enhanced cooperation to open the way to new forms of harmonization on relevant topics[3], a path that was followed when the agreement between Member States was impossible to reach as was the case for regulation 1259/2010[4] on law applicable to divorce and separation proceedings and, more recently, for regulations 2016/1103 and 2016/1104 on private international law rules related to matrimonial property regimes and on the property consequences of registered partnership[5].

[1] In recent years, many contributions have been written on the general issue of harmonisation of family international private law by the European Union. In order to deepen the subject see A. DAVÌ, *Il diritto internazionale privato italiano della famiglia e le fonti di origine internazionale o comunitaria, Riv.dir.int.,* 2002, p. 861 ff.; M. HARDING, *The Harmonisation of Private International Law in Europe: Taking the Character out of Family Law?, J.Priv.Inter.L.* 2011, I, , p. 203 ff;. A. DEVERS, *La matiére matrimoniale en quete de cohérence (du règlement Bruxelles II bis au règlement Rome III), R.affair.eur.*, 2014, p. 319 ff.; H. FULCHIRON, *La construction d'un droit "européen" de le famille: entre coordination, harmonisation et uniformisation*, *ivi*, 2014, p. 309 ff.; I. QUEIROLO, *Integrazione europea e diritto di famiglia*, in N. PARISI, M. FUMAGALLI MERAVIGLIA, A. SANTINI, D. RINOLDI (a cura di) *Scritti in onore di Ugo Draetta*, Napoli, 2011, p. 585 ff. On the external dimension see the contributions in A. MALATESTA, S. BARIATTI, F. POCAR (eds), *The External Dimension of EC Private International Law in Family and Succession Matters.* Padova, 2008 and in particular the remarks in A. MALATESTA, *Final Report*, p. 385 ff..

[2] Differences that in some cases already existed at the beginning of the European integration process due to the traditional national legal backgrounds as is the case for agreements as to succession or have been introduced later on as was the case with same-sex marriages and with the different models of registered partnerships.

[3] On enhanced cooperation and the first attempts of its application in the field of family law see K.BOELE-WOELKI, *To be, or not to be: enhanced cooperation in international divorce law within the European Union, Victoria University of Wellington L.R.*, 2008, p. 789. Further on the issue see also P. HAMMJE, *Le nouveau règlement (UE) n° 1259/2010 du Conseil du 20 décembre 2010 mettant en oeuvre une coopération renforcée dans le domaine de la loi applicable au divorce et à la séparation de corps, Rev.crit.dr.int. privé*, 2011, II, p. 291 ff.; J. JAAP KUIPERS, *The Law Applicable to Divorce as Test Ground for Enhanced Cooperation, Eur.L.J.*, 2012, II, p. 201 ff. A. FIORINI, *Harmonizing the law applicable to divorce and legal separation - enhanced cooperation as the way forward? Int.Comp.L.Q.*, 2010, p. 1143 ff.

[4] *Council Regulation (EU) no. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation*, OJ L 343 of 29 December 2010, p. 10 ff. For some remarks see I. VIARENGO, *Il Regolamento UE sulla legge applicabile alla separazione e al divorzio e il ruolo della volontà delle parti, Riv.dir.int. priv.proc.* 2011, p. 601 ff.; A. ZANOBETTI, *Divorzio all'europea. Il regolamento UE n. 1259/2010 sulla legge applicabile allo scioglimento del matrimonio e alla separazione personale, La nuova giur.civ.commentata*, 2012, p.250 ff; M.C. BARUFFI, *Il regolamento sulla legge applicabile ai ″divorzi europei″, Il dir.Un.Eur.* 2011, p. 837 ff.

[5] *Council Regulation (EU) no. 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes*, OJ L 183 of 8 July 2016, p. 1 ff. and *Council Regulation no. 2016/1104 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships*, OJ L 183 of 8 July 2016, p. 30 ff. For some first remarks see B. NASCIMBENE, *Compétence juridictionnelle et loi applicable en matière matrimoniale: un règlement Rome III? Droits patrimoniaux des couples mariés et non mariés: vers des règles européennes sur les régimes matrimoniaux?, R.affair.eur.*, 2007-2008, 3, p. 601 ff.

On the other hand, if the Lisbon Treaty did not introduce substantial changes on this point[6], secondary legislation seems to be increasingly leading towards further developments in the matter, as well as in sectors closely connected to family law such as that of succession and inheritance, which are the subjects of the EU Succession regulation (650/2012 /EU)[7].

The aim of this contribution is to evaluate the difficult relationship between these two sectors (family and successions) as regulated by European Union PIL which, despite the deserving intention of harmonizing the conflict of law criteria within the States, sometimes still proves to be lacking from the point of view of the interrelationship between the individual regulations, made more and more complex by the extreme differences that still exist relatively to legal categories of a civil law matrix in the various Member States, and by the need to proceed to a correct and satisfactory characterisation ("*qualification*" in French)[8] to avoid any overlapping of the scope of the single, different, conflict-of-law regulations.

In particular, the starting point for this analysis is given by the relationship between the succession regulation and the regulations regarding matrimonial property relations and the patrimonial consequences of registered partnerships[9]. In this field, the application of European Union law needs to take into account the existence of differentiated regulatory situations, with some Member States having property regimes that also affect the assignments *mortis causa* and others that clearly distinguish the two matters.

2. Relationship between different instruments of EU Law and characterisation problems

In order to better understand the difficult relationship between the two different sets of PIL rules, it is possible to take a cue from the reasoning dating back to case *De Cavel I*[10], decided by the Court of Justice with reference to the Brussels Convention of 1968 with a

[6] The choice to differentiate the "family" matter from the others contained in civil judicial cooperation is confirmed by article 81 of the Treaty on the functioning of the European Union, which in dealing with judicial cooperation in civil matters provides for specific rules in case of measures concerning family law with cross-border implications, declaring at paragraph 3 that they "shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament". In this subject the proposal shall be notified to the national Parliaments and if a national Parliament makes its opposition known (within six months) the decision shall not be adopted. Upon this article see S.M. CARBONE, C. TUO, *Gli strumenti di diritto dell'Unione europea in materia di famiglia e il Trattato di Lisbona*, *Studi int.eur.*, 2010, p. 301 ff; R. BARATTA, *Réflexions sur la coopération judiciaire civile suite au traité de Lisbonne*, G. VENTURNI E S. BARIATTI (a cura di), *Nuovi strumenti del diritto internazionale privato, Liber Fausto Pocar*, Milano, 2009, p. 3 ff.

[7] *Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession*, OJ L 201 of 27 July 2012, p. 107 ff. On the first introductory phase to EU harmonization of PIL in the field of succession law see. *ex multis* A. DAVÌ, *Riflessioni sul futuro diritto internazionale privato europeo delle successioni*, *Riv. dir. int.,* 2005, p. 297 ff; S. MARINO, *La proposta di regolamento sulla cooperazione giudiziaria in materia di successioni*, *Riv. dir. int.*, 2010, p. 463; P. LAGARDE, *Les principes de base du nouveau règlement européen sur les successions*, *Rev. crit. dr. int. privé*, 2012, p. 717 ff. On the relationship with the previous instruments see E. BERGAMINI, C. DEREATTI, *L'uniformazione (parziale) della legge applicabile nel diritto dell'UE. Dal nuovo Reg. n. 1259/2010 al Reg. sulle successioni: il focus sulla volontà delle parti per contenere il forum running*, *Int'l Lis,* 2012, p. 10 ff.

[8] On characterization in the application of EU PIL rules see R. BARATTA *Process of Characterization in the EC Conflict of Laws*, *Yearbook of Private International Law*, Volume 6 (2004), p. 161.

[9] On the necessity to coordinate the two fields see, for some first remarks, A. BONOMI *The Interaction Among the Future EU Instruments on Matrimonial Property, Registered Partnerships and Successions*, *Yearbook of Priv. Int. Law*, 2011, p. 217 ff.

[10] Judgment of the Court, 27 March 1979, 143/78, *Jacques de Cavel v Louise de Cavel*, ECLI identifier: ECLI:EU:C:1979:83.

judgement that shows how problems related to the characterization of patrimonial disputes between members of a couple have been grounds for doubt in national judges for a long time (and still are, as we will see).

In that judgement, the Court pointed out that, in order to verify the applicability of the Convention, it was necessary to enter into the substance of the dispute, verifying whether it concerned legal relations in place between spouses but independent of marriage (and therefore attracted to the scope of the Convention) or marriage-related issues and therefore part of exclusion from its scope[11]. In that period no harmonisation existed in PIL except for the field of jurisdiction in civil and commercial matters that did not include neither family law nor other related areas as successions. However, it became blatant that disputes for economic reasons involving property rights may also arise between spouses, and that there was a strong need for harmonised solutions in that field.

In the *De Cavel* judgement the court declares that « the term "rights in property arising out of a matrimonial relationship" » – not falling under the scope of the Convention - «included not only property arrangements specifically and exclusively envisaged by certain national legal systems in the case of marriage but also any proprietary relationships resulting directly from the matrimonial relationship or the dissolution thereof», [12] and it was established that the disputes over any relationship arising from divorce proceedings were excluded from the scope of the (at the time) Brussels Convention of 1968 and were therefore subject to national jurisdiction rules.

The Court of justice recently confirmed such orientation in case *Ágnes Weil v Géza Gulácsi,* in which a couple was discussing in front of a Hungarian judge a case of debt stemming from the settlement of rights in property arising from the dissolution of an unregistered non-marital partnership. In the judgement (still interpreting regulation 44/01 as regulation 1215/2012 was not applicable yet[13]) the court considered that the national case fell within the concept of 'civil and commercial matters' as defined by article 1 on the scope of the regulation. Therefore, it did not recognise any relevance to the similarities in the material treatment of married and unmarried couples and gave a narrow interpretation to the exclusion from the scope of Brussels I, that in the Recast version of article 1.2 a) has extended this exclusion but only to relationships deemed comparable to marriage and not to unregistered partnerships[14].

[11] According to the first paragraph of article 1 of the 1968 Brussels convention its scope does not extend to rights in property arising out of a matrimonial relationship.

[12] See para 7 of the judgement. Only property disputes between the spouses but unconnected with the marriage could be included in the scope of the Convention. For this reasoning see D. MARTINY, *Maintenance Obligations in the conflict of laws, Hague Academy of International Law, Recueil de cours,* 1994, vol. 247, p. 215.

[13] *European Parliament and Council* Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351 of 20 December 2012, p. 1 ff. Known as Recast Brussels Regulation, it applies to proceedings instituted after the 10th January 2015 so substituting from that moment the *Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, OJ 16 January 2001 L 12, p. 1 ff. On regulation 121572012 see A. MALATESTA, , *Origini, obiettivi e caratteri del regolamento (UE) n. 1215/2012 (RECAST),* in A. MALATESTA, G. VITELLINO, N. NISI, (eds) , *La riforma del regolamento Bruxelles I: il regolamento (UE) n. 1215/2012 sulla giurisdizione e l'efficacia delle decisioni in materia civile e commerciale*. Milano, 2016, p. 1 ff.

[14] Judgment of the Court, 6 June 2019, c. C-361/18, Ágnes Weil v Géza Gulácsi, ECLI identifier: ECLI:EU:C:2019:473. For a comment see L. IDOT, *Matière civile et commerciale et exclusion des régimes matrimoniaux,* in *Europe. Actualité du droit de l'Union européenne*, 2019, 8-9/p. 47 and T. SZABADOS, *EU Private International Law in Hungary. An Overview on the Occasion of the 15th Anniversary of Hungary's Accession to the EUELTE Law Journal*, 2018, p. 50.

3. Succession regulation and regulations on matrimonial property relations and the patrimonial consequences of registered partnerships: a brief introduction to the main relevant rules

As our focus will be to deepen the issues arising from the application of the EU Succession Regulation and the twin EU Regulations on matrimonial property relations and the patrimonial consequences of registered partnerships, taking into consideration only the strictly PIL issues and not the jurisdiction profile, we need to start by delineating the main principles they introduced, merely focusing on what is relevant for the case of agreements involving married couples or registered partners.

The EU Succession Regulation entered into force for 25 member States on the 17 August 2015[15] and introduced habitual residence of the deceased at the time of death as a main connecting factor, thus harmonising the Member States' rules that mostly referred to nationality or domicile[16]. However, the regulation allows any person to choose the law of the Country whose nationality he/she possesses (at the time of making the choice or at the time of death) to govern the succession as a whole.

Within this framework, specific rules were introduced for the disposition of property upon death (i.e. unilateral last wills and testaments that could not qualify as agreements as to succession), and for "agreements as to successions"[17], as we will see in the following paragraphs. Both these rules clearly apply as long as the cases fall under the scope of the regulation. It is therefore relevant to remember that the regulation expressly excludes under article 1.2 d) "questions relating to matrimonial property regimes and property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage" and under g) "property rights, interests and assets created or transferred otherwise than by succession, for instance by way of gifts" or in the case of "joint ownership with a right of survivorship"[18].

However, in the part devoted to the European Certificate of Succession (ECS), Regulation 650/2012 recognises the relevance of property relationships stemming from marriages or partnerships by providing for information relating to marriage contracts or to contracts regarding relationships "which may have comparable effect to marriage" to be included into the request for an ECS. It is interesting to stress that in the application for a certificate, under article 65 n.3 j), among the elements that the applicant must enter, the Italian language version refers to mortis causa dispositions "made by the deceased to a relationship likely to have similar effects to marriage"[19]. This is probably an incorrect and misleading translation (as can be seen from the difficulties in interpreting it in its literal tenor) maybe due to the fact that Italian Law contains no possibility for a couple to enter a marriage contract except in order to deal with the matrimonial property regime.

If we compare the English and the French version, however, it becomes clear that what the law-maker wanted to ask was an indication regarding the possible conclusion by the

[15] The Regulation does not apply to Denmark, due to its special status for judicial cooperation, while the UK and Ireland decided not to participate.

[16] Italian PIL, for instance, used nationality as the main connecting factor (article 46 of 218/95 Law). The same happened under the German PIL (Art. 25 I *Einführungsgesetz* BGB) while France had a more open system. For details on the previous PIL national rules see A. BONOMI, *Testamentary Freedom or Forced Heirship? Balancing Party Autonomy and the protection of Family Members*, in M. ANDERSON, E. ARROYO I AMAYUELAS (eds). *The Law of Succession: Testamentary Freedom: European Perspectives*, Groningen/Amsterdam, 2011, p. 30.

[17] See respectively articles 24 and 25 of the regulation.

[18] On the scope of the regulation and its exclusions see A. DAVÌ, A. ZANOBETTI *Il nuovo diritto internazionale privato delle successioni nell'Unione europea*, *Cuadernos de der.trans.*, 2013, II, p. 18 ff.

[19] The Italian version reads «eventuali disposizioni a causa di morte fatte dal defunto a un rapporto suscettibile di avere effetti comparabili al matrimonio».

deceased of a marriage contract (*contrat de mariage*) or a contract regarding a relationship with comparable effects.[20] The question is clarified in the light of what is specified by article 68 on the content of the ECS, which includes information relating to any marriage agreements or agreements made "in the context of a relationship deemed by the law applicable to such a relationship to have comparable effects to marriage" as well as "information concerning the matrimonial property regime or equivalent property regime"[21]. The provision could also raise doubts from the PIL point of view as it does not indicate on the basis of which criteria one ought to establish the law in the light of which one should verify whether the relationship itself has effects comparable to marriage. Therefore, at the time regulation 650/2012 entered into force, that law was determined in application of PIL rules of the issuing authority, which could lead to the non-recognition of such effects to the partnership.

Some of these issues were overcome with the approval of the twin Regulations (2016/1104 and 2016/1105) that currently apply in eighteen participating Countries[22] and address the property relations of married and also of unmarried couples[23] but only in case they entered into a registered partnership. In fact, the European Commission decided not to extend the regulations to *de facto* couples, in the light of the results of the "EU Citizenship Report 2010: Dismantling the obstacles to EU citizens' rights"[24].

Regarding their scope, they include all civil-law aspects of matrimonial property regimes, and of the property consequences of registered partnerships, including their liquidation in case of death of one of the spouses or partners[25]. However, succession to the estate of the deceased spouse/partner is excluded pursuant to Article 1(2)(d) thereof, as confirmed by recitals 22 that contain an express reference to the need to apply regulation 650/2012 to those cases.

From the point of view of the applicable law, these two regulations present radically different solutions: if the one on spouses leaves room for the autonomy of the party, giving them the opportunity to choose, at any time, the law of habitual residence or citizenship of one

[20] The English linguistic version states that «indication of whether the deceased had entered into a marriage contract or into a contract regarding a relationship which may have comparable effects to marriage ». A similar conclusion derives from the words of the French linguistic version «*une indication concernant la conclusion ou non, par le défunt, d'un contrat de mariage ou d'un contrat relatif à une relation pouvant avoir des effets comparables au mariage*». For some critical remarks on this difference in linguistic versions see E. BERGAMINI, *Evoluzione nel diritto di famiglia dell'Unione europea: il nuovo regolamento 1259/2010 sulla legge applicabile al divorzio e alla separazione personale*, *Studi integr.eur.*, 2012, p. 181 ff.

[21]In this case the Italian version is correctly translated as "*i dati relativi a eventuali convenzioni matrimoniali stipulate dal defunto o, se del caso, eventuali convenzioni stipulate dal defunto nel contesto di un rapporto che secondo la legge applicabile a quest'ultimo ha effetti comparabili al matrimonio e i dati relativi al regime patrimoniale tra coniugi o a un regime patrimoniale equivalente*".(article 68, 1 h)

[22] The regulation is entirely applicable from 29 January 2019. Nine Member States are still outside the enhanced cooperation: Ireland, Denmark (who enjoy a special status in all judicial cooperation instruments), Estonia, Latvia, Lithuania, Poland, Slovakia, Hungary and Romania. On the situation of these States see A. WYSOCKA-BAR, *Enhanced cooperation in property matters in the EU and non-participating Member States*, *ERA Forum*, 2019, 20, p. 187 ff.

[23] The two regulations came out after a study carried out by the Consortium Asser-UCL *Etude sur les régimes matrimoniaux des couples mariés et sur le patrimoine des couples non mariés dans le droit international privé et le droit interne des Etats membres de l'Union*, 30 April 2003, and after the *Green paper on the conflict of laws on matrimonial property regimes including the issue of jurisdiction and mutual recognition* COM (2006) 400 def. of 17 July 2006. On the evolution see S. BARIATTI, I. VIARENGO *I rapporti patrimoniali tra coniugi nel diritto internazionale privato comunitario*, *Riv. dir. int. priv. proc.*, 2007, p. 603 ff. and on the subsequent two proposals see. B. NASCIMBENE, *Divorzio, diritto internazionale privato e dell'Unione europea*, Milano, 2011, p. 54 ff.. Upon this and with reference to Italian Private International Law see E. BERGAMINI, *Contratti di convivenza e unioni civili: la nuova sfida per il diritto internazionale privato italiano e dell'Unione europea*, eurojus.it, 28 June 2016.

[24] European Commission, COM(2010) 603 final. On the previous steps see also the *Summary of replies to the Green Paper on the conflict of laws in matters concerning matrimonial property regimes, including the questions of jurisdictions and mutual recognition (5 February 2008)*, European Commission.

[25] See Recital 18 of both regulations 2016/1103 and 2016/1104.

of the two, members of a registered partnership are given a more limited possibility of choice for the property consequences of their non-marital union (habitual residence or nationality or law of the State under which the registered partnership was created but only as long as these legal systems attach "property consequences to the institution of the registered partnership")[26]. This happens because before the entry into force of the regulation, according to the provision of the majority of the Member States of the European Union, registered partnerships were necessarily subject to the law of the State of Registration as the law best suited to assess and regulate the relationship due to the difference that existed at the time, and still exist now, in the national legal systems.

Both twin regulations also provide for connecting factors in case of absence of choice that are usually linked to the same principles: State under whose law the partnership was created (with some exceptions), or first common habitual residence of the spouses after the conclusion of the marriage, or failing that, common nationality or the closest connection.

It is therefore clear that any agreement or disposition of property that may take place between spouses or partners could be regulated by different connecting factors (and therefore by different sets of rules) depending on its qualification under these two different sets of PIL Regulations.

4. Agreement as to succession and agreements between spouses or registered partners in the EU regulations: definitions and delimitations

In order to discuss the relationship between agreements as to succession and agreements between spouses and registered partners dealing with property rights, we now need to give a definition of the former as the latter seems more clearly defined by the text of the two 2016 regulations that clearly cover all agreements, unrelated to the succession of the estate of a deceased partner or spouse, and simply meant to organise their matrimonial property regime or the property consequences of their registered partnership[27].

The general definition of agreements as to succession is obviously wider than the one we are interested in in this paper, as it may involve different subjects: not only spouses or registered partners but also other family members or even subjects who are not linked by a family relationship.

For our reasoning we will clearly focus on the definition that can be found in the final version of regulation 650/2012/EU, which is the result of a long and problematic debate that permeated the negotiation phase[28] and lead to the approval of the existent article 3, § 1, lett. b),

[26] On the connecting factors of the two regulations see D. DAMASCELLI, *La legge applicabile ai rapporti patrimoniali tra coniugi, uniti civilmente e conviventi di fatto nel diritto internazionale privato italiano ed europeo, Riv.dir.int.,* 2017, IV, p. 1103 ff. P. LAGARDE, *Réglements 2016/1103 et 1104 du 24 jun 2016 sur les regimes matrimoniaux et sur le régime patrimonial des partenariato enregistrés, Riv. it. dir. pubbl. com*., 2016, V, p. 676 ff. On the choice of law in these regulations see C. GRIECO, *The role of party autonomy under the regulations on matrimonial property regimes and property consequences of registered partnerships. some remarks on the coordination between the legal regime established by the new regulations and other relevant instruments of European private international law, Cuadernos de der.trans*., 2018, II, 9. 457.

[27] The reference is to the definition of "Matrimonial property agreement" in article 3b) of regulation 2016/1103 and to the definition of "partnership property agreement" in article 3 c) of regulation 2016/1104. On the first one see G.V.COLONNA, *Il regolamento europeo sui regimi patrimoniali tra coniugi*, in *Notariato,* 2019, III, p. 300. On the second one see I. VIARENGO, *Effetti patrimoniali delle unioni civili transfrontaliere: la nuova disciplina europea, Riv.dir.int.priv.proc.*, 2018, I, p. 33.

[28] M. CASTELLANETA, *Réponses au questionnaire en matière de successions et testaments. - Livre Vert de la Commission européenne [COM (2005) 65 final du 1 mars 2005] avec un avant-projet de règlement communautaire concernant les conflits de lois et de juridictions, et l'institution du certificat successoral européen*, *Quaderni della Rivista del Notariato*, Milano, 2005, p. 34; R. HAUSMANN, *Community Instrument on International*

defining it "as an agreement, including an agreement resulting from mutual wills, which, with or without consideration, creates, modifies or terminates rights to the future estate or estates of one or more persons party to the agreement."[29]. Such a broad definition was necessary to avoid the risk for some Member States, who did not accept such agreements in their national law, to use the public policy exception to prevent, for public policy reasons, the application of a foreign legal system allowing similar agreements[30].

Obviously, this is a broad but not perfectly superimposable notion to that provided by our internal system, so much so that the Italian legal doctrine is divided on the possibility of including in this definition all renunciation agreements[31] or to exclude at least those in which the subject whose inheritance is at stake is not involved. In the Countries which allow and regulate such agreements they are mostly concluded among family members in order to deal with the succession of someone and his/her spouse/partner and/or descendants: in this paper we will clearly only focus on cases involving spouses or partners, as the case of descendants is not relevant in connection with the twin regulations we are examining.

Agreements as to succession falling within the scope of regulation 650/2012 are governed by anticipated or hypothetical inheritance law, that is, the law that would have governed the succession if the succession itself had opened at that time. Various consequences result from this principle. It may therefore be questioned whether a succession agreement is now admissible in countries (such as Italy) that currently prohibit them[32] on the basis of a foreign law hypothetically regulating the succession and what would happen to the validity of such an agreement if the law regulating the succession were to change afterwards.

On the other hand, the rule that the validity of agreements as to succession could be remedied (so-called rule of validation or curing-rule) on the basis of the law that would have been applicable at the time of the effective succession was instead deleted from the definitive text of the regulation.[33]

Successions and Wills, in M. C. BARUFFI, R. CAFARI PANICO (a cura di), *Le nuove competenze comunitarie – Obbligazioni alimentari e successioni*, Padova, 2009, p. 158.

[29] On the definition see L.E. PERRIELLO, *Succession agreement and public policy within EU Regulation 650/2012*, S. LANDINI (a cura di) *Insights and proposals related to the application of the European Succession Regulation 650/2012*, Varese, 2019, p. 392 ff. V. PUTORTÌ, *Il divieto dei patti successori istitutivi alla luce del Regolamento UE 650/2012*, *Diritto delle successioni e della famiglia*, 2016, p. 864. On the relationship with Italian inheritance law see F. VISMARA, *Patti successori nel regolamento UE n. 650/2012 e patti di famiglia: un'interferenza possibile?*, *Riv. dir. int. priv. proc*., 2014, p. 805. On the transfer of the assets forming part of the succession estate and the scope of the regulation see Z. CRESPI REGHIZZI, *Succession and property rights in EU Regulation No. 650/2012*, *Riv. dir. int. priv. proc.*, 2017, p. 633

[30] On the public policy clause see G. CONTALDI, C. GRIECO, *Article 35*, A.L. CALVO CARAVACA, A.DAVÌ, H.P. MMANSEL (eds), *The EU Succession Regulation*, Cambridge, 2016, p. 505. Most authors consider that the intention of the EU legislator was not to allow application of the public policy exception to agreements as to succession even in case the *lex fori* does not allow them. On this issue see L.E. PERRIELLO, *Succession agreement and public policy*, *cit.*, p. 400.

[31] Against this possibility see D. Damascelli, *Diritto internazionale privato delle successioni a causa di morte*, Varese, 2013, p. 92 and B. BAREL, *La disciplina dei patti successori*, P. FRANZINA, A.LEANDRO (a cura di), *Il diritto internazionale privato europeo delle successioni mortis causa*, Milano, 2013, p. 105 ff. In favour see A. DAVÌ, A. ZANOBETTI *Il nuovo diritto internazionale* cit. On this issue see also G. BIAGIONI, *L'ambito di applicazione del regolamento sulle successioni*, in P. FRANZINA, A. LEANDRO (a cura di), *Il diritto internazionale privato europeo delle successioni mortis causa*, Milano, 2013, p. 25 ff. and. A. BONOMI, *Il regolamento europeo sulle successioni*, *Riv. dir. int. priv. proc*., 2013, p. 293.

[32] See V. BARBA, *I patti successori e il divieto di disposizione della delazione. Tra storie e funzioni,* Napoli, 2015, p. 11 ff.

[33] On the rule of validation in article 9 of the Hague Convention see P. LAGARDE, *La nouvelle Convention de La Haye sur la loi applicable aux successions*, *Rev. crit. dr. int. privé,* 1989, p. 271 ff. On this rule in the regulation proposal see S. ÁLVAREZ GONZÁLEZ E I. RODRÍGUEZ-URÍA SUÁREZ, *La ley aplicable a los pactos sucesorios en la Propuesta de Reglamento sobre sucesiones*, *Diario La Ley*, 2011, n.7726, p. 4, par. 13 ff. The final version contains

In case of a multilateral agreement as to succession involving inheritance rights of more than one person (i.e. both spouses or partners for our reasoning), under article 25 § 2 of regulation 650/2012, the agreement, in order to be admissible, shall respect all laws that would have governed the succession of all the persons involved if they had died on the day on which the agreement was concluded.[34] However the agreement shall be governed, by the law, from among the hypothetical ones, with which it has the closest connection.[35]

The limited possibility to choose the law governing similar agreements as to succession (being limited to the national law of one of the parties to avoid applications of the national law with which the agreement is more closely connected) makes defining the subtle distinction with matrimonial (or more generally "couples-related') property agreements even more relevant, as for the latter the possibility to choose the applicable law under the EU regulations is wider. In fact, as we have seen above, articles 22 of both regulations 2016/1103 and 2016/1104 make it possible for couples to choose the law of the State where at least one of them is resident or the law of nationality of one of them or, for registered partnerships, the law of the State under whose law the registered partnership was created. Therefore, depending on the qualification of the agreement, the role for party autonomy could be more or less relevant.

The issues would have been overcome if the 650/2012 regulation had similarly recognized the possibility to choose as applicable law to agreements as to successions the law of residence of one of the parties involved. In this way the difficulties in distinguishing the different kinds of agreements would have become less relevant as it would have been possible for couples to make a choice of law valid under both regulations that could cover all kinds of reciprocal agreements were they to be considered as related to succession or to matrimonial/partnership properties.

Moving to the analysis of some national legislations we may certainly include, in the notion of agreements as to succession regarding spouses and partners, legal institutes such as reciprocal wills and contracts dealing specifically with the future sharing of the estate of both of them.

The first one is the case of reciprocal wills, formulated in separate documents or in a single document as joint wills, as provided, for example, by German law in the case of the "Berliner Testament", ex parr. 2265 ff., BGB[36]. According to this rule, the spouses, or those who have concluded a *Lebespartnerschaft*, can establish each other as heirs, thus excluding the call of the descendants to the succession of the first one of them to die. The spouses or partners are therefore set up as mutual heirs, but at the same time they order that the entire inheritance after the death of the last one to die must go to the children of the couple. Subsequently the surviving one is no longer allowed to modify the testamentary disposition in favour of the descendants. A similar situation clearly falls within the scope of regulation 650/2012 even if it

no such rule in order to "ensure legal certainty for persons wishing to plan their succession in advance" (recital 48).

[34] On the need to check admissibility under a case by case approach see B. BAREL, *La disciplina, cit.* p. 125, and A. DAVÌ, A. ZANOBETTI *Il nuovo diritto internazionale* cit. p. 74.

[35] On the problems occurring with the cumulative application of all laws see A. BONOMI, *Successions internationales: conflits de lois et de juridictions*, *Recueil des cours*, 2011, vol. 350, p. 317 ff.

[36] Joint wills are regulated by § 2269 of the *Burgerliche Gesetzbuch* (BGB): *Gegenseitige Einsetzung* (mutual appointment as heir) that states: (1) If the spouses have specified in a joint will, by which they reciprocally appointed each other heir, that after the death of the survivor the estate of both is to pass to a third party, then it is to be assumed, in case of doubt, that the third party has been appointed the heir, for the whole estate, of the spouse to die later.(2) If in such a joint will the spouses have directed that a legacy be given that is to be performed after the death of the survivor, it is to be assumed, in case of doubt, that the legacy is not to pass to the person provided for until the death of the survivor. (see https://germanlawarchive.iuscomp.org/ for this English translation). On the validity of agreements on patrimonial matters in family relationships see S.MARINO, *I rapporti patrimoniali della famiglia nella cooperazione giudiziaria civile dell'unione europea*, Milano, 2019, p. 104.

involves both spouses/partners as its effects are post-mortem and it has no *inter vivos* effect and no influence on their matrimonial/partnership property regime.

A second example is that of the *Erbvertrag*, allowed under German Law (§ 2274 BGB), which is a "contract of inheritance" that can be concluded not only between spouses but also in other situations and is considered as an *inter vivos* agreement albeit having a *post mortem* effect[37]. A similar contract of inheritance also exists under Austrian Law (Sections 1249 *et seq.* of the Austrian General Civil Code (*Allgemeines bürgerliches Gesetzbuch – ABGB*) but in that Country it can only be concluded by spouses and registered partners (or future ones).

5. Agreements between spouses and partners and their effects on succession: national problematic cases and possible solutions

As we have seen in the previous paragraphs the qualification of these institutions as pertaining to the matrimonial property regime or to inheritance law can lead to the application of different conflict rules and consequently of different national legal orders: on this point the criteria provided for, and more generally the content of the two regulations under discussion, are not diriment [38.] As far as such agreements are not considered as agreements as to succession, their special regime under article 25 of regulation 650/2012 will not apply and the law governing the succession of the person involved will be the one of his/her habitual residence before death, that could be different from the one regulating the matrimonial/partnership agreement. In similar cases what is missing, in particular, is an effective coordination between the discipline of succession and that of the matrimonial regime of the *de cujus*, which could lead to the application of a single law to both cases. A similar coordination previously occurred in some national laws that allowed to crystallize the applicable law to succession at a given moment (thus not necessarily giving relevance to the law of last residence but also to that of residence at a given moment, as allowed by the regulations on property regimes) based on the principle of invariability over time of the applicable law[39].

As for the relationship between agreements as to succession and matrimonial agreements or agreements between partners, the different authors maintain divergent positions. The main focus in this paper will be devoted to the case of matrimonial property regimes as the extreme variability of national rules applying to partnerships in the field of common property and inheritance law sometimes makes it difficult to fully extend the same considerations to unmarried couples[40].

On the one hand, there are those who say that a distinction must be made between matrimonial or partnership conventions in the traditional (i.e. Italian) sense of the term[41] , which are expressly excluded from the scope of the succession regulation[42] and different institutes

[37] On the reasons justifying the German *Erbvertrag* see. P. KINDLER, *La legge applicabile ai patti successori nel regolamento UE n. 650/2012, Riv. dir. int. priv. proc.*, 2017, 1, p.14 ff.

[38] S. MARINO, *I diritti del coniuge o del* partner *superstite nella cooperazione giudiziaria civile dell'Unione Europea*, *Riv. dir. int*., 2012, p. 1114 ff.

[39] For more details on the national legislation of other EU member States see A. DAVÌ, A. ZANOBETTI *Il nuovo diritto internazionale cit.* p. 43 ff.

[40] For instance, under Italian law registered partners are not heirs, and therefore, unless in case of inclusion of them in a last will, they do not receive inheritance and are therefore not fully equated to spouses.

[41] See D. DAMASCELLI *Diritto internazionale privato delle successioni cit.* p 107.

[42] As we have seen earlier article 1, point 2 letter d) excludes from the scope of regulation 650/2012 all "questions relating to matrimonial property regimes and property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage". However, we need to stress that under Recital 12 "the authorities dealing with a given succession under this Regulation should nevertheless, depending on the situation, take into account the winding-up of the matrimonial property regime or similar property regime of the deceased when determining the estate of the deceased and the respective shares of the beneficiaries".

such as the French *contrat de mariage* (article 1387 *code civile)* which in fact allows, under article 1390-1392 of the *code civile*, a *mortis causa* provision in favour of the surviving spouse and should probably be considered as falling within the scope of the Succession Regulation[43].

Other authors affirm the existence of some types of agreements between spouses or partners with *post-mortem* effects which can be considered matrimonial/partnership agreements, falling into the scope of the 2016 regulations, to be distinguished from the "true" agreements as to succession that are subject to the *lex successionis* instead**.** That could be the case of *communautè universelle* agreements with final *partage* under French law which is not a succession phenomenon but a forecast that attributes the assets to the surviving spouse from the outset and should therefore fall within the scope of the 2016 Regulation as agreement creating a peculiar matrimonial property regime[44].

On this subject the Court of justice of the European Union tried to set some principles in case *Mahnkopf*[45] in which the discussion was on the German *Zugewinngemeinschaft.* The problem of characterization of such an institute affected the national (German) academic debate for decades and now clearly becomes relevant for the application of EU conflict of law rules.

Paragraph 1371(1) of the German Civil Code (*Bürgerliches Gesetzbuch* – BGB) provides for spouses which choose *Zugewinngemenischaft* that the gains made during the marriage should be used to increase the surviving spouse's share by one quarter, in the event the marriage is ended by death of the other spouse. The German Federal Court of Justice (*Bundesgerichtshof* – BGH), in 2015[46] asserted the need to apply German PIL rules on matrimonial property as the institute is meant to deal with dissolution of marriage that is a task that ought to be dealt with before determining the composition of the estate to de divided between the heirs under succession law[47]. However, this decision was taken before the introduction of the harmonised framework of conflict of law rules at the EU level that we are discussing about.

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[43] The spouses may decide that in case of dissolution of marriage for death of one of them, the surviving spouse has a right to receive certain personal belongings of the deceased and the surviving spouse has the possibility "*d'acquérir ou, le cas échéant, de se faire attribuer dans le partage certains biens personnels du prédécédé, à charge d'en tenir compte à la succession, d'après la valeur qu'ils ont au jour où cette faculté sera exercée. La stipulation peut prévoir que l'époux survivant qui exerce cette faculté peut exiger des héritiers que lui soit consenti un bail portant sur l'immeuble dans lequel l'entreprise attribuée ou acquise est exploitée"* (1390 code civile). Under article 1391 "*Le contrat de mariage doit déterminer les biens sur lesquels portera la faculté stipulée au profit du survivant. Il peut fixer des bases d'évaluation et des modalités de paiement, sauf la réduction au profit des héritiers réservataires s'il y a avantage indirect*."

[44] In the case of choice of *communauté universelle* under article 1526 "*Les époux peuvent établir par leur contrat de mariage une communauté universelle de leurs biens tant meubles qu'immeubles, présents et à venir. Toutefois, sauf stipulation contraire, les biens que l'article 1404 déclare propres par leur nature ne tombent point dans cette communauté. La communauté universelle supporte définitivement toutes les dettes des époux, présentes et futures*." For a comment see see D. DAMASCELLI, *Brevi note sull'efficacia probatoria del certificato successorio europeo riguardante un soggetto coniugato o legato da unione non matrimoniale, Riv. dir. int. priv. proc.,* 2017, 1, p. 69.

[45] Judgment of the Court, 1st March 2018, c. C-558/16, Doris Margret Lisette Mahnkopf, ECLI identifier: *ECLI:EU:C:2018:138.* For a comment see I. BARRIÈRE BROUSSE *Conflit de lois, Journ.dr.inter.* 2018, 4, p.1218 ff.

[46] Judgement 13 May 2015, IV ZB, 30/14. The case was related to the inheritance of the wife of a couple of spouses (both having Greek nationality, married in Greece but subsequently living in Germany). The couple had bought two flats in Germany choosing in the contract the application of German law with an express reference to the *regime* of *Zugewinngemeinschaft.* The litigation between husband (from which she was separating) and son is due to the fact that the succession of the wife was regulated by Greek law, while acquisition of the property of the flats had been regulated under German law which attributed, in case of *Zugewinngemeischaft*, a share to the surviving spouse at the moment of death.

[47] On this issue see authors in footnote 11 of the Advocate general's opinion and in particular A. BONOMI, *Article 1 – Champ d'application*, in A. BONOMI e P. WAUTELET, *Le droit européen des succession*, in *Commentaire du règlement (UE) no 650/2012, du 4 juillet 2012*, Bruxelles, 2016, p. 89, A. REIS, *Succession and Family Law*, S. BARIATTI, I. VIARENGO e F.C. VILLATA, *Towards the Entry into Force of the Succession*

The CJEU in case *Mahnkopf* argues that paragraph 1371(1) of the BGB concerns "not the division of assets between spouses but the issue of the rights of the surviving spouse in relation to assets already counted as part of the estate" (para 40). Therefore, its main purpose is not the allocation of assets or liquidation of the matrimonial property regime, but rather the determination of the size of the share of the estate to which the surviving spouse is entitled as against the share recognized to other heirs. Henceforth, such a provision principally concerns succession to the estate of the deceased spouse and not the matrimonial property regime. Consequently, a rule of national law such as that at issue in the main proceedings should be regarded as a matter falling not under the scope of Regulation 2016/1103, but within the matter of succession for the purposes of Regulation No 650/2012.

The *Mahnkopf* decision is certainly interesting and sets clear and definite criteria when considered with reference to the European Certificate of Succession (ECS), as it asserts that the attribution to the spouse deriving from existence of a *Zugewinngemeinshaft* shall be included in such a certificate, under Article 69 of the Regulation[48]. However, a different decision may be reached in case future discussions will be focused not on the inclusion of the share in the ECS but on applicable law instead, as the connecting factors existing in the two regulation (on succession and on matrimonial property regimes) may lead to different results. This quite easily happens every time the spouses do not share the same habitual residence or one of them changed the habitual residence after marriage (as matrimonial property regimes are regulated by the law of the first common habitual residence while succession law is usually dealt by the law of habitual residence at the time of death).

Another particular case is the French *institution contractuelle*, regulated by articles 1082 and 1083 of the *Code Civil*, that allows any subject, on the occasion of a marriage, to dispose for the benefit of the spouse or offspring of all or part of the heritage that he/she will leave at the time of his death. Under article 1083 that contractual provision is qualified as a gift (*donation*) and does not preclude the donor the possibility to dispose of his goods for a fee[49]. Even if such a gift is contained in the marriage contract, the donor is not one of the spouses and so the regulation on matrimonial property regimes should not apply while regulation 650/2012 may or may not apply depending if we consider it falling under the exception of article 1.2 letter g. The French doctrine usually qualifies this article of *code civil* as a derogation from the prohibition of agreements as to succession and it is indisputable that such an agreement limits the right of the donor to dispose of his/her wealth and has a post-mortem effect. Thus, it seems that it could fall into the notion of agreement as to succession, even if not from the point of view of the relationship between the spouses. As a consequence, such agreements will not fall

Regulation: Building Future Uniformity upon Past Divergencies, JUST/2013/JCIV/AG/4666, p. 45. In favour of the application of inheritance law see in particular P. LAGARDE, P.H. DÖRNER, *«Einführungsgesetz zum Bürgerlichen Gesetzbuch/IPR. Art 25, 26 EGBGB. Anhang zu Art 25 f EGBGB: Ausländische Rechte»*, *Rev. crit. dr. int. privé*, 1996, p. 389.

[48] For a critical evaluation of the case see J. VON HEIN, *The CJEU settles the issue of characterising the surviving spouse's share of the estate in the context of the Succession Regulation,* April 17, 2018 conflictoflaws.net. For a more extensive approach see F.MAOLI, *Successioni, regimi patrimoniali tra coniugi e problemi di qualificazione in una recente pronuncia della Corte di giustizia***,** *Riv. dir. int. priv. proc*., 2018,p. 676 ff. For an evaluation of the relationship between family links and the ECS see D. DAMASCELLI, *Brevi note sull'efficacia probatoria del certificato successorio europeo riguardante un soggetto coniugato o legato da unione non matrimoniale, Riv. dir. int. priv. proc.,* 2017, 1, p. 67 ff.

[49] A similar situation also exists in Belgium under the name "*donations entre époux*" but in this case as the donor is one or both of the spouse(s) it may be inserted in a marriage contract (modifiable only with the consent of both spouses),or signed afterwards.

into contractual obligations under the Rome I regulation[50] that usually deals with PIL rules on obligations arising from gifts[51].

6. Final remarks

Even if the existing legal framework helped to overrun some of the abovementioned issues, it is clear that the approach taken by the European Union law-makers through the adoption of succession and matrimonial property relationships regulations, while having brought appreciable results in harmonisation of conflict of law criteria, also fails to fully achieve the objective of protecting "international" families and their needs arising from free movement of persons. It is, in fact, a partial approach, both from the point of view of the issues (due to the numerous sectors excluded from the scope of these regulations) and from the point of view of the completeness of the system, as it does not apply to all Member States.

The coordination (or lack thereof) of the different existing regulations in the field of family law is clearly a relevant problem that exists in many different cases but becomes even more relevant when we deal with the succession of a couple [52].

However, it is essential to note that the coordination issues that we have seen in this essay only apply to couples married and partnership entered into on and after 29 January 2019 or to agreements concluded after that date (as expressly provided for by the twin Regulations). Therefore, succession for couples that married prior to said date or having previous agreements will still be dealt by national conflict of law rules from the point of view of their matrimonial (or partnership) property regimes and not by the EU regulations. This is the same situation that will take place for those countries that have not accepted to take part in the enhanced cooperation under the two 2016 EU regulations. Moreover, as stressed by some authors, the national private international law rules of non-participating Member States "are not a coherent system that may be opposed to the rules of an enhanced cooperation area"[53].

This means that for many years to come we will probably still have to deal with cross-border successions falling into the scope of regulation 650/2012 in cases in which the deceased matrimonial (or partnership) property regime will still be dealt under national conflict of law rules.

The lack of coordination between the law applicable to the succession and the law applicable to matrimonial property regimes is clearly stressed by Advocate General *Spuznar* in his opinion in case *Mahnkopf,* where he recognises the still existing differences between legislatures that use "instruments characteristic of the law of succession by favouring the surviving spouse over the other heirs" other that "rely on approaches relating to matrimonial property regimes, whilst at the same time passing over the spouse as an heir or limiting his or

[50] See P. LAGARDE, *Les principes de base, cit.* p. 717, G. KHAIRALLAH, *La détermination de la loi applicable à la succession*, in G. KHAIRALLAH / M. REVILLARD (eds) *Droit européen des successions internationales,* Paris, 2013, p. 61;A. DAVÌ, A. ZANOBETTI *Il nuovo diritto internazionale, cit.* p. 68.

[51] For some details on gifts and the application of Rome I or 650/2012 Regulations see G. PASSARELLI *Donation: short notes between Italian civil law and EU private international law, Cuadernos de der.trans.*, 2015, I,I p. 476 ff.

[52] On the coordination beween regulations see also A. RODRIGUEZ BENOT, *La exclusión de las obligaciones derivadas del derecho de familia y de sucesiones del ámbito material de aplicación del Reglamento Roma I, Cuadernos de der.trans.*, 2009, I, p. 124 ff.

[53] For this opinion see A. WYSOCKA-BAR, *Enhanced cooperation,* cit. who gives some examples and underlines that non-participating Countries "provide for the whole range of different solutions with respect to the applicable law concerning the mutability or immutability rules, the admissibility of choice of the applicable law and connecting factors."

her rights of succession" and the mixed models that usually combine these two different systems in order to grant a correct balance of interests among spouse, heirs and other involved subjects[54].

In the European Union legal system (or at least, as we have seen, regarding the member States that have agreed to be fully involved in the harmonisation of EU PIL), the two sets of rules "must be complementary and their scope must not overlap"[55].

Characterisation according to *lex fori* could lead to divergences in the application of the conflict of law rules and is therefore inacceptable in the EU scenario[56]. Therefore, a harmonised and uniform approach, not only in the creation of a common set of PIL rules but also in the principles based upon which we need to proceed to characterisation, is absolutely needed. Adaptation instead may be used by judicial authority as an exceptional remedy to the lack of coordination among the different national legal system applying to a case, when the result of the combined application of them would be impossible or incoherent with their aims[57].

However, we need to remember that such a case by case approach leaves too much space to the subjective interpretative activity of national judges[58] and could put the uniform application of a directly applicable instrument of EU law such as a regulation at risk. At the same time, it is not possible for the EU legislator to prevent Member States from introducing or maintaining legal institutes that may lead to such incoherence in specific cases but that belong to their national legal traditions. Moreover we need to remember that all EU regulations have a universal application and may therefore lead to the application of the law of a non/member State. Therefore we also need to grant a uniform approach in the qualification related to third-country institutes, unknown to the traditions of EU member States as could the case for the *mahr* (also known as Islamic dower or morning gift), existing in Islamic law based upon which the wife may receive an amount of money at the moment of the dissolution of the marriage[59].

Common uniform concepts are required if we want to grant the positive consequences of harmonised PIL that is a real area of freedom, security and justice. An area in which free movement is not only permitted to EU citizens but it is also enhanced by the awareness that the EU grants continuity to the rights stemming from their family relationships, agreement as to succession, disposition of property upon death, matrimonial agreements, all rights that should

[54] See Para 54 -55 of the Opinion of the Advocate General, delivered on 13 December 2017.

[55] Para 72 of the Opinion.

[56] See R. BARATTA *Process of Characterization in the EC, cit.* p. 63, where he declares that a general principle of EC (now EU) law "forbids the Member States to rely on their national legal systems for the purpose of characterization".

[57] See for instance Recital 17 of the Succession regulation upon which "The adaptation of unknown rights in rem as explicitly provided for by this Regulation should not preclude other forms of adaptation in the context of the application of this Regulation"

[58] On adaptation as a remedy in EU PIL with specific reference to the Succession Regulation and the Matrimonial / Registered Partnership Property Regimes Regulations see S.L. GÖSSL, *Anpassung im EU-Kollisionsrecht) Adaptation in EU Private International Law*, *Rabels Zeitschrift fuer auslaendisches und internationales Privatrecht,* Volume 82, Number 3, July 2018, pp. 618-653. See also Advocate general Opinion in case *Mahnkopf*, cit. para 62-66 who referring to the possible characterization of Paragraph 1371(1) of the BGB states that irrespective of it being qualified "as a rule of the law of succession or of the law on matrimonial property regimes, in certain cases it may transpire that it results in excessive favouring of, or excessive detriment to, the surviving spouse. There may then arise a need to effect an adaptation, the method for which will naturally depend on the specific situation."

[59] For the problems in qualification and adaptation of "mahr" (under matrimonial property law, contractual obligation or divorce law) see P. FOURNIER, *Muslim Marriage in Western Courts: Lost in Transplantation,* Farnham UK, Ashgate, 2010, p. 35 ff.; S MOSA**,** *The impact of Islamic family law on the Swedish legal landscape: challenges and possibilities* in A-S. LIND, M. LÖVHEIM, U. ZACKARIASSON (EDS), *Reconsidering Religion, Law, and Democracy: New challenges for Society and research*, Nordic Academic Press, 2016, p. 166 ff.

be preserved independently from the eventual change of residence[60] or, at least, that could be knowingly modified after such a change, if needed.

[60] On the application of residence as a main connecting factor in EU PIL and on the consequences from the point of view of the shift from citizenship and the continuity of statuses see B. NASCIMBENE, *Le droit de la nationalité et le droit des organisations d'intégration régionales. Vers de nouveaux statuts de résidents?*, *Hague Academy of International Law, Recueil de cours*, 2014, vol. 367, p.398.