European Integration Studies, Volume 10, Number 1 (2013), pp. 5–16.

BRIEF EVALUATION OF DEVELOPMENT OF EUROPEAN FAMILY LAW: SUCCESSES AND FAILURES*

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Introduction

First of all, we have to define what European family law means in this paper. In this context, the concept of European family law includes just that part of Union law which concerns cross-border matrimonial matters (divorce, legal separation, and marriage annulment), matters of parental responsibility (rights of custody, rights of access, wrongful removal or retention of a child) and those cross-border maintenance obligations which arise from a family relationship.

Nevertheless we have to state that "European family law" is wider than just the Union law and involves the conventions of the Hague Conference on Private International Law e.g. the Convention on Civil Aspects of International Child Abduction concluded in 1980.

Family law matters are of high priority in the European Union. The number of cross-border family law cases is constantly increasing. There were more than 1 million divorces in the EU Member States in 2007, of which 160 000 had an "international" element.[1] Judicial cooperation in civil matters, expanded by the Treaty of Amsterdam, aims to establish closer cooperation between the Member States of the European Union, in order to limit the barriers as far as possible, which stem from the existence of different national legal systems.

Adoption of the Treaty of Lisbon gave additional impetus to the legislation in this field which has begun in 2000 and the legal basis for judicial cooperation in civil matters was further expanded.[2]

Secondary legislations adopted after the Treaty's entry into force were typically universal in scope, respectively universal in application. This means that the EU-rule applies even if the defendant's domicile or habitual residence is not within the territory of a Member State, respectively if the norm requires the application of non-EU Member State' law.

* This paper is supported by the János Bolyai Research Scholarship.

[1] There are around 122 million marriages in the EU, of which around 16 million are considered "international". Those marriages are international where the spouses are of different nationalities, or they live in different Member States or live in a Member State of which they are not nationals.

[2] According to Art 81 judicial cooperation in civil matters should normally be adopted under the ordinary legislative procedure [Art 81(2)], except for "measures concerning family law with cross-border implications" which should be established under a special legislative procedure with unanimity at the Council and consultation with the European Parliament [Art 81(3)]. This specific treatment of family law is justified by the particular sensitivity of such questions as well as the strength of national traditions and cultures in this field.

As a consequence of universal application, especially in case of the EU norms that determine the applicable law, or the Hague instruments that are within the scope of Member States' law enforcement, the jurisdictional barriers arising from differences in national law increasingly come to the front, enhancing as well the importance of public policy aspects. These differences arise not only when national law does not apply, and the significant differences between Member States' national laws can act also as a barrier. Both theoretical and practical issues are raised by these differences which become apparent at the present stage of the European civil procedure law's development, and they are key issues of the future development of this field of law.

The aim of this paper is to summarize the achievements and failures of European family law and to examine the impact of the variations of the Member States' national law on the further development of judicial cooperation in civil matters; what kind of interactions, feedbacks are demonstrable between the national legal systems and the EU's legal source in the field of European family law.

1. The achievements and the faults of the new Brussels II Regulation in the field of matrimonial matters

One of the first achievements of the first pillar cooperation within the area of freedom, security and justice was the Brussels II Regulation, which has been replaced by the currently effective new Brussels II Regulation[3] (it is so called Brussels IIa or Brussels II bis also) which came into force on 1st of March 2005. This Regulation is the basic instrument in the area of EU family law.

The rules of jurisdiction in matrimonial matters take seriously the objective of "access to justice" when seek to provide a solution for all situations, by making it possible to commence a divorce proceeding at a number of courts: in the territory of which the spouses are habitually resident, or the respondent is habitually resident, or the applicant is habitually resident, or the court of the nationality of both spouses.

1.1. The problems of the concept of habitual residence

The jurisdiction of a court is based on *habitual residence* and the *common nationality of the spouses.* However, the Regulation does not provide a definition for *habitual residence* and neither does it refer back to national law, thus creating uncertainty.

Nevertheless this uncertainty has not constituted an obstacle for the habitual residence to be considered in the majority of the States as a favorite connecting factor to localize persons involved in different kind of actions. It generally implies the physical presence of an adult in a country for a prolonged period of time. In certain national case-law there is also a specific minimal duration required to assume the existence of habitual residence, such as six months term considered as sufficient permanence in Germany and Austria.[4]

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[3] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, in: Official Journal L 338 , 23/12/2003.

[4] Carola Ricci: Habitual Residence as a ground of Jurisdiction in Matrimonial Disputes: From Brussels II-bis to Rome III. In: The External Dimension of EC Private International Law in Family and Succession Matters, eds: Alberto Malatesta, Stefania Bariatti, Fausto Pocar, Cedam, 2008. Padova, pp. 211–212.

In the *Swaddling case* the European Court of Justice emphasize that the phrase `the Member State in which they reside' (…) refers to the State in which the persons concerned habitually reside and *where the habitual centre of their interests is to be found.*

In that context, account should be taken in particular of the employed person's *family situation*; the reasons which have led him to move; the *length and continuity of his residence*; the fact (where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances.

For the purposes of that assessment, however, the length of residence in the Member State in which payment of the benefit at issue is sought cannot be regarded as an intrinsic element of the concept of residence.

In the case of a person who has exercised his right to freedom of movement in order to establish himself in another Member State, in which he has worked and set up his habitual residence, and who has returned to his Member State of origin, where his family lives, in order to seek work conditional upon habitual residence in that State, which *presupposes not only an intention to reside there,* but also *completion of an appreciable period of residence* there.[5]

1.2. The difficulty of dual nationality

As regards nationality as a ground of jurisdiction, only the common nationality of the spouses is relevant. However, it is not clear how to deal with problems arising from *dual nationality* e.g. is there a more effective nationality in the case of spouses who hold more than one nationality? If the habitual residence would be of fundamental importance in determining the more effective nationality, the forum of jurisdiction under the Regulation would often be the same.

In the Hadadi case[6] Julianne Kokott Advocate General stated "that limiting the meaning of nationality in to the more effective nationality is not consistent with either the wording or the objectives of Regulation No 2201/2003. The system of jurisdiction in divorce proceedings provided for in the Regulation is not generally based on the idea of excluding

[5] Judgment of the Court of 25 February 1999. Robin Swaddling v Adjudication Officer – Reference for a preliminary ruling: Social Security Commissioner – United Kingdom. – Social security – Income support – Conditions of entitlement – Habitual residence. Case C-90/97. European Court reports 1999 Page I-01075.

[6] László Hadadi and Csilla Márta Meskó were both born in Hungary and married there in 1979. They then emigrated to France and acquired French nationality. Mrs. Meskó declared that, between 2000 and 2004, she was the victim of repeated acts of violence perpetrated by her husband. In February 2002, László Hadadi instituted divorce proceedings before the Pest Regional Court in Hungary. Mrs. Meskó did not learn of the proceedings until six months later. The Hungarian court granted the divorce in May 2004. Meanwhile, in February 2003, Mrs. Meskó instituted proceedings for divorce on grounds of fault before the Meaux Regional Court in France, which ruled her application inadmissible. She appealed before the Paris Court of Appeal, which ruled, on 12 October 2006, that the divorce judgment issued by the Hungarian court could not be recognized in France and therefore declared Mrs. Hadadi's divorce application admissible. László Hadadi lodged an appeal before the French Court of Cassation, which applied to the EU Court of Justice for a preliminary ruling on interpretation of Regulation 2201/2003, known as 'Brussels II' concerning the criteria to be used in determining applicable law and the member state with jurisdiction in divorce matters. Should the more effective of the two nationalities be used or should the spouses have the choice of referring the case to either of the two states of which they are nationals?

multiple grounds of jurisdiction. Rather, it expressly provides for the coexistence of several equal-ranking grounds. This necessarily entails a *right of choice* on the part of the applicant. The fact that a person possessing dual nationality can choose between the courts of two Member States which are competent exclusively on grounds of nationality is not contrary to the Regulation. The requirement in Article 3(1) (b) that both spouses must have the nationality of the court seized ensures that, when that provision is applied, both spouses have the same link to that forum and that it is not possible to seize a court the jurisdiction of which would be entirely unforeseeable or remote from the point of view of either of the spouses. (…) Determining which nationality is *more effective* would entail considerable uncertainty not least because there is no definition of that vague concept. Furthermore, such an examination might require account to be taken of a number of factual circumstances which would not always lead to an unequivocal result. At worst, it could create a conflict of jurisdiction if two courts each considered the nationality of the other Member State to be the more effective. As regards such conflicts of jurisdiction, the Regulation contains no provision that would enable a court to refer a case with binding effect to the court of another Member State."[7]

The Regulation has received a lot of criticism (Green Paper in 2005, several commentaries) due to the fact, that alternative grounds of jurisdiction and the rule of *lis pendens* motivate the parties to rush to court, which is against legal certainty and predictability. The Union law must be foreseeable by the persons concerned.

However, not the alternative grounds of jurisdiction are to be blamed for this „rushing to court", but rather the greatest fault of the Regulation: it fails to settle the issue of applicable law.

It must be noted that the new Brussels II Regulation governs only jurisdiction, not the conflicts-of-law rules which determine the substantive law applicable to the divorce. The court with jurisdiction under the Regulation must therefore determine the law applicable in accordance with domestic law.

The "blindness to the conflict of laws" for which the Regulation has been criticized in legal commentary may therefore indeed encourage a "rush to the courts" by spouses.

Instead of giving careful consideration to the institution of divorce proceedings, spouses in dispute may be tempted to rush into bringing proceedings before one of the competent courts in order to secure the advantages of the substantive divorce law applicable under the private international law rules of that forum. Such was the problem in the above mentioned case *Hadadi.*[8]

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[7] Opinion of Advocate General Kokott delivered on 12 March 2009. László Hadadi (Hadady) v Csilla Márta Meskó, épouse Hadadi (Hadady). Points 62, 65, 66. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008CC0168:EN:HTML

[8] The Court establishes that, on account of the fact that the grounds set out in Article 3 of the Regulation are alternatives, the coexistence of several courts having jurisdiction is expressly provided for, without any hierarchy being established between them. It observes that, through its wording, Article 3 of the new Brussels II regulation only refers to nationality, a link that is unambiguous and easy to apply, without providing for any other criterion relating to nationality, such as how effective it is. It also considers that it would be contrary to the purpose of this provision to give decisive weight to the "effective nationality". In fact, the need to check the links between the spouses and their respective nationalities would make verification of jurisdiction more onerous and thus be at odds with the objective of facilitating the application of the Regulation by the use of a simple and unambiguous connecting factor. The Court concludes that where, as in the Hadadi case, spouses each hold the nationality of the same two Member States, the Regulation

2. The Rome III Regulation[9]

2.1. The way to adopt the Rome III Regulation

In 2005 the Commission adopted a Green Paper on applicable law and jurisdiction in divorce matters.[10] In 2006 the Commission proposed a Regulation amending the new Brussels II Regulation – so-called Rome III – as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters.[11]

This proposal contained two significant elements: firstly, spouses would have been permitted to jointly select the competent court and, secondly, conflict of laws rules which determine the law to be applied in cross-border divorce cases would have become part of community law.

For the first time during the EC's legislative activities in cross-border matters unanimity in adopting (an amendment of) a Regulation could not be reached. By summer 2008 the Council concluded that there was a lack of unanimity on the proposal and that there were *insurmountable* difficulties that made unanimity impossible both then and in the near future. It established that the proposal's objectives could not be attained within a reasonable period by applying the relevant provisions of the Treaties.

In 2010 the issue of the Rome III Regulation took a turn for the better. Fourteen Member States addressed a request to the Commission indicating that they intended to establish enhanced cooperation between themselves in the area of applicable law in matrimonial matters and the Council adopted the Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation on 20th of December 2010.

The differences between national laws in the field of divorce law were so enormous that only by *enhanced cooperation*[12] and after many years of struggle the Council Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation was accepted, which apply from 21st June 2012 for 14 Member States.[13] The substantive scope and enacting terms of this Regulation should be consistent with the new Brussels II Regulation, however, it shouldn't apply to marriage annulment.

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precludes the jurisdiction of the courts of one of those Member States from being rejected on the ground that the applicant does not put forward other links with that State. The spouses may therefore seize the courts of either of the Member States of which they both hold the nationality, as they choose. In: Judgment of the Court (Third Chamber) of 16 July 2009. László Hadadi (Hadady) v Csilla Márta Meskó, épouse Hadadi (Hadady) C-168/08.

[9] 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**,** Official Journal L 343, 29/12/2010.

[10] COM (2005) 82. http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0082en01.pdf

[11] Proposal for a Council Regulation of 17 July 2007 amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (COM[2006] 399 final – Not published in the Official Journal).

[12] Enhanced cooperation is based on the "hope that it will then be a catalyst and that other Member States will subscribe to such initiatives". In: Paul Craig: The Lisbon Treaty: Law, Politics and Treaty Reform, Oxford University Press, Oxford, 2010, p. 449.

[13] On 12 July 2010, the Council decided to authorize enhanced cooperation between Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia in the area of the law applicable to divorce and legal separation. Lithuania has notified its intention to participate in enhanced cooperation in the area of the law applicable to

2.2. Short evaluation of the Regulation

This Regulation should create a clear, comprehensive legal framework in the area of the law applicable to divorce and legal separation in the participating Member States; provide citizens with appropriate outcomes in terms of legal certainty, predictability and flexibility.[14]

The informed choice of both spouses is a basic principle of this Regulation. The Regulation should enhance the parties' autonomy in the areas of divorce and legal separation by giving them a limited possibility to choose the law applicable to their divorce or legal separation.

An agreement designating the applicable law should be able to be concluded and modified at the latest at the time the court is seized, and even during the course of the proceeding if the law of the forum so provides.[15]

Where no applicable law is chosen, and with a view to guaranteeing legal certainty and predictability and preventing a situation from arising in which one of the spouses applies for divorce before the other one does in order to ensure that the proceeding is governed by a given law which he considers more favourable to his own interests, the Regulation should introduce harmonized conflict-of-laws rules on the basis of a scale of successive connecting factors based on the existence of a *close connection* between the spouses and the law concerned.

The above-mentioned problem of dual nationality and the habitual residence of spouses may appear during the application of this Regulation having regarded that the spouses may choose between these two connecting factors.[16] But we have to make a distinction between jurisdiction and applicable law. According to Katharina Boele-Woelki as long as the formal nationality is usually a sufficient ground for jurisdiction (See in Hadadi case) it is not adequate to determine the applicable law.[17] The ground of applicable law could be only the effective nationality of both spouses.

The Regulation ensures two "loopholes" for participating Member States to refuse the application of a provision of foreign law in a given case. One is if this provision is where it would be manifestly contrary (incompatible) to the public policy of the forum under Article 12.

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divorce and legal separation by letter dated 25 May 2012. The Regulation (EU) No 1259/2010 shall apply to Lithuania from 22 May 2014. Commission Decision of 21 November 2012 confirming the participation of Lithuania in enhanced cooperation in the area of the law applicable to divorce and legal separation (2012/714/EU)

[14] 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; Preamble (9).

[15] Katharina Boele-Woelki notes the importance of time element in the field of choice of law. She established that the close connection with the law chosen at the time the agreement may no longer exist at the moment of the divorce. She pointed out the failure of the Article 5 of Regulation to impose any time limits for the spouses to conclude an agreement about the applicable law can be questioned. Moreover, certain circumstances and connecting factors: nationality and habitual residence might change. These changes will not be taken into account unless both spouses agree to change their initial choice of law. Katharina Boele-Woelki: For Better or for Worse: The Europeanization of International Divorce Law, in: Yearbook of Private International Law, Vol. XII. 2010. Sellier, Munich 2011. pp. 15–16.

[16] See Art. 5 and 8 of the Regulation.

[17] Katharina Boele-Woelki op. cit. pp. 18.

The European Economic and Social Committee is therefore pleased that a public policy exception clause will exclude any provisions of an applicable foreign law which, for example, might go against the EU Charter of Fundamental Rights, which is now part of primary law (with the same legal value as the treaties). Member States will invoke the international public policy of their domestic court to bring an exception to a third-country law which violates it.[18]

Article 13 called "Differences in national law"[19] allows the second "loophole" to refuse the application of the law designated by this Regulation, which is in contrary to the purpose of the norm and the enhanced cooperation.

Article 13 allows refusing the application of a provision of foreign law in two different situations:

1. if the participating Member State's law does not know the legal institution of divorce or
2. if the participating Member State's law does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce.

The first exclusion got into the Regulation because of Malta (this was one of the so-called "Malta-provision"), but the second paragraph means more serious exclusion. This funds that if the marriage in question is not recognized (as a preliminary question, typically the same-sex marriages) no divorce can be granted.

This second paragraph is contrary to the Article 2 which states that "This Regulation shall not apply to the following matters, even if they arise *merely as a preliminary question* within the context of divorce or legal separation proceedings: (b) the existence, validity or recognition of a marriage."

In the European Commission's view this Article, which permits judges of a participating Member State, whose law does not provide for divorce, not to apply the same rules as the other participating Member States, is a derogation that negates the very purpose of the enhanced cooperation authorized by Council Decision 2010/405/EU.[20]

In addition this Article 13 restrained Sweden and Finland to participate in the enhanced cooperation. Sweden's criticism concerning the original proposal for a Regulation was based on the opinion that they cannot accept solutions which limit the possibility to get a divorce in certain situations. The right to divorce, as well as the right to choose who to marry, is in Sweden's opinion, fundamental.

With regard to the implementation of enhanced cooperation, Sweden regrets that it contains solutions that in practice create exceptions limiting the right to divorce for certain groups. In this context, in particular Article 13 of the implementing Regulation should be noted.[21]

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[18] Opinion of the European Economic and Social Committee on the 'Proposal for a Council regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation' COM(2010) 105 final/2 – 2010/0067 (CNS) OJ 11.2.2011.

[19] 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. (Art. 13)

[20] Council of the European Union, JustCiv 214. Proposal for a Council Regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, General Approach, Brussels, 1 December 2010.

[21] Council of the European Union, JustCiv 214. Proposal for a Council Regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, General Approach, Brussels, 1 December 2010.

3. Short evaluation of the new Brussels II Regulation in matters concerning parental responsibility

The issues of parental responsibilities under the Regulation mean a broad spectrum. The Regulation shall apply, in civil matters relating to the attribution, exercise, delegation, restriction or termination of parental responsibility: rights of custody and rights of access; guardianship, curatorship and similar institutions; the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child; the placement of the child in a foster family or in institutional care; measures for the protection of the child relating to the administration, conservation or disposal of the child's property.

3.1. The definition of the concept of habitual residence

Pursuant to the Regulation the main ground of jurisdiction in matters concerning parental responsibility is the *habitual residence of the child* at the time court seized, however, the regulation does not contain a definition of the concept of habitual residence.

The European Court of Justice at first in the case of "A" applicant in 2009[22] has given important guidelines to define the concept of habitual residence. It merely follows the use of the adjective 'habitual' that the residence must have a certain stability or regularity.

According to the Court's interpretation "the concept of 'habitual residence' under Article 8(1) of the Regulation must be interpreted as meaning that it corresponds to the place which reflects some *degree of integration by the child in a social and family environment*. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.[23]

In the Case Mercredi the Court completed its opinion related habitual residence. In this case the court had to interpret the concept of the habitual residence of an infant. The Court stated that the social and family environment of the child, which is fundamental in determining the place where the child is habitually resident, *comprises various factors which vary according to the age of the child.* The factors to be taken into account in the case of a child of school age are thus not the same as those to be considered in the case of a child who has left school and are again not the same as those relevant to an infant. An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where the infant is in fact looked after by her mother, it is necessary to *assess the mother's integration in her social and family environment.* In that regard, the tests stated in the Court's case-law, such as the reasons for the move by the

[22] Case C-523/07, Reference for a preliminary ruling under Articles 68 EC and 234 EC from the Korkein hallinto-oikeus (Finland), made by decision of 19 November 2007, received at the Court on the same day, in the proceedings brought by "A" Reports of Cases, 2009 I-02805. 2 April 2009.

[23] Case C-523/07, Reference for a preliminary ruling under Articles 68 EC and 234 EC from the Korkein hallinto-oikeus (Finland), made by decision of 19 November 2007, received at the Court on the same day, in the proceedings brought by "A" Reports of Cases, 2009 I-02805. 2 April 2009.

child's mother to another Member State, the languages known to the mother or again her geographic and family origins may become relevant.[24]

Other aspects were also taken into consideration when developing the Regulation, thereby creating a flexible jurisdiction system. This aspect is – first of all – the "best interests of the child".[25]

Upon comparing the rules on jurisdiction of the Regulation in matrimonial matters and matters concerning parental responsibility, we can establish that the Regulation is much more flexible in the field of parental responsibility. Nevertheless this does not mean that there are no problems.

3.2. Questions at the field of parental responsibility on the basis of case law

We have to mention that there are preparations for proposal for a Council Regulation (EU) amending Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

The Stockholm Programme recognizes the need for minimum standards to be developed in relation to the recognition of decisions on parental responsibility (including those on custody rights). The Stockholm Action Plan therefore provides for a proposal for revision of Regulation (EC) No 2201/2003, and requires the Commission to consider the possible introduction of common minimum standards in relation to the recognition and enforcement of parental responsibility decisions in other Member States, and the abolition of all intermediate decisions (exequatur) in this area.[26] Furthermore, this proposal for an amending Regulation is one of the actions identified in the recently adopted EU Agenda for the Rights of the Child[27] to make justice systems in the EU more child-friendly.

The Commission's Initiative identifies problems on the basis of case law and infringement proceedings and may, for example, relate to:

- the lack of a uniform interpretation of the term 'enforcement' in Chapter III of the Regulation amongst Member States' authorities, with some authorities interpreting it in a narrow sense of 'forced execution' and other authorities in the sense of 'any action to be taken by a public authority on the basis of a foreign judgment',
- widely differing national standards for the hearing of the child and the designation of a guardian,
- costs and delays for the recognition and enforcement of judgments, authentic instruments and agreements abroad,
- the use of the certificates provided for in Annexes I to IV of the Regulation;
- the enforcement procedure in the Member State of enforcement.[28]

[24] Judgment of the Court (First Chamber) of 22 December 2010. Barbara Mercredi v Richard Chaffe. Case C-497/10 PPU. Reports of Cases, 2010 I-14309. Points 53–55.
[25] This principle is applied at the Article 12 (1) and (15) of the Regulation.
[26] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0171:FIN:EN:PDF
[27] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0060:FIN:en:PDF
[28] http://ec.europa.eu/governance/impact/planned_ia/docs/2013_just_003_amendment_regulation_matrimonial_parental_matters_en.pdf

4. Regulation in matters relating to maintenance obligation

After a decade of codification efforts the Council Regulation (EC) No 4/2009 was adopted on jurisdiction, applicable law, recognition and enforcement of decisions in matters relating to maintenance obligations.[29] It can be applied from 21 June 2011.
The scope of this Regulation should cover all maintenance obligations arising from a family relationship, parentage, marriage or affinity, in order to guarantee equal treatment of all maintenance creditors. For the purposes of this Regulation, the term "maintenance obligation" should be interpreted autonomously.

The Regulation has two significant improvements. One is that it has set itself the objective of harmonizing the applicable law regarding maintenance obligations, while the other improvement is the abolition of exequatur.

The text of the Regulation doesn't include the detailed rules of applicable law but refers back to the Hague Protocol of 2007[30] on this subject, which was developed within the framework of the Hague Conference on Private International Law. The differences between national laws relating to maintenance matters forced the EU legislator to adopt such legal solutions, which was unique in EU law until that time. What is the reason for this specific solution?

It was the United Kingdom who declared that it shall not adopt the regulation if the text of the regulation shall include rules on applicable law.

However, in case the regulation would not contain such rules and would refer back to the Hague Protocol, the United Kingdom could adopt the regulation, as it has happened, indeed.

5. Fields relating to family law that are not protected by Union law

Neither new Brussels II regulation nor the Rome III regulation covers the property consequences of the dissolution of the marriage.

The Member States have adopted a wide variety of criteria to determine jurisdiction as regards matrimonial property regimes. Most Member States allow spouses to choose the law applicable to the matrimonial property regime. The Commission would like to know whether this choice should be retained in a future Community instrument and, if so, which connecting factors must be taken into consideration in order to allow spouses to choose the matrimonial property regime.

In the 'EU Citizenship Report 2010: Dismantling the obstacles to EU citizens' rights', adopted on 27 October 2010[31], the Commission identified uncertainty surrounding the property rights of international couples as one of the main obstacles faced by EU citizens in their daily lives when they tried to exercise the rights the EU conferred on them across national borders.

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[29] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, 10.1.2009. OJ

[30] Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, http://www.hcch.net/upload/conventions/txt39en.pdf

[31] COM (2010) 603

This subject has been on the agenda for years. In 2006 the Commission published a Green Paper on conflict of laws in matters concerning matrimonial property regimes[32], including the question of jurisdiction and mutual recognition, that launched wide-ranging consultations on the subject.

In the Action Plan of Implementing the Stockholm Programme the Commission planned to submit a proposal for a Regulation in 2010 on the conflicts of laws in matters concerning matrimonial property rights, including the question of jurisdiction and mutual recognition, and for Regulation on the property consequences of the separation of couples from other types of unions.

In 2011 according to the Action Plan – some delay – the Commission submitted two proposals for council regulation. Because of the distinctive features of marriage and registered partnerships, and of the different legal consequences resulting from these forms of union, the Commission presented two separate Regulations: one on jurisdiction, applicable law and the recognition and enforcement of decisions *in matters of matrimonial property regimes* [COM (2011) 126], and the other on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the *property consequences of registered partnerships* [COM (2011) 127].

The Council held a public debate on two proposed regulations on the jurisdiction, applicable law and the recognition and enforcement of decisions as regards matrimonial property regimes, on the one hand, and the property consequences of registered partnerships, on the other. The Presidency noted a very large agreement on political guidelines to further advance the work at expert level.

The objective of both proposals is to establish a framework in the EU determining jurisdiction and the law applicable to matrimonial property regimes and the property consequences of registered partnerships and to facilitate the recognition and enforcement of decisions and authentic instruments among the member states.

The two proposals will complement the instruments already adopted at EU-level concerning family-related issues, such as the new Brussels II Regulation regarding matrimonial matters and parental responsibility, the Regulation on maintenance obligations, and the Rome III Regulation on the law applicable to divorce and legal separation.

Once these two new regulations are adopted, the citizens of the EU will benefit from a complete set of legal instruments covering international private law issues in the field of family matters.

Both regulations are subject to a special legislative procedure based on Article 81 (3) since they refer to measures concerning family law with cross-border implications. The Council will act unanimously after consulting the European Parliament.

The United Kingdom and Ireland have decided not to take part in these instruments[33] and Denmark will not participate also.[34]

The latest news about the current status of these proposals is that the Working Party on Civil Law Matters (Matrimonial Property Regimes and Registered Partnerships) held a

[32] COM (2006) 400

[33] According to former statements of the United Kingdom it would be impossible to harmonize legal systems that include legislation regarding property rights arising out of a matrimonial relationship with the English system, which contains no such legislation.

[34] Council of the European Union, Press Release 3207th Council meeting Justice and Home Affairs Brussels, 6 and 7 December 2012. http://europa.eu/rapid/press-release_PRES-12-509_en.htm

meeting on the 11th and 12th of February 2013 in Brussels but we have no information about the outcome of the meeting.

Conclusions

It can be stated that the Community Legislation made great achievements in the most important areas of family law but the current situation may give rise to a number of problems in matrimonial proceedings of international nature. Some of the foreign commentaries[35] are skeptical about the future of European legislation in field of family law. They succeeded in creating unanimity concerning Regulation on maintenance obligations in 2008, with a tricky solution; the Protocol on the Law Applicable to Maintenance Obligations also prevails in 25 Member States. In contrast, the Rome III Regulation is in force only in 14 Member States. The Rome III Regulation showed us the "emergency exit"[36] in the cooperation at the field of European family law. This possibility should be avoided even if there seem to be insurmountable conflicts between common law and civil law Member States, since the future of European family law depends on this, especially concerning the Commission's Proposals on Matrimonial Property Regimes and Property Consequences of Registered Partnerships.

[35] See e.g.: Maarit Jantera-Jareborg: Europeanization of Law: Harmonization or Fragmentation – a Family Law Approach, Tidskrift utgiven av Juriduska föreningen i Finland 5/2010. pp. 504–515. or Cristina González Beilfuss: The Unification of Private International Law in Europe: a Success Story? in: K. Boele-Woelki, Jo Miles and Jens Scherpe, European Family Law Series – no. 29, The Future of Family Property in Europe, 2011. Intersentia

[36] Katharina Boele-Woelki: For better or Worse op. cit. p. 25