„Problemy Prawa Prywatnego Międzynarodowego". T. 22
ISSN 2353-9852

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The Questionable Impact of EU Regulations No 2016/1103 and 2016/1104 on the Identity of Marriage in a Member State

Abstract: The European Union holds no competence to enact substantive family law, however is entitled to exercise competences in the field of private international law *sensu largo* (rules on conflict-of-laws and international civil procedure). In the treaties this branch of law is referred to as "measures of judicial cooperation in civil matters" (Art. 81 TFEU). Such a cooperation not generally interfere with the fundamental legal principles of the forum (member state). One of the classic solutions, included in the general part of this branch of law, is the public policy clause (orde public clause, Vorbehaltsklausel).

Despite of the limited scope of European Union's competences, the recent development of European law raises issues related to the juridical expression of the identity of marriage. The presented detailed study of some recent legislative procedures shows that it could be otherwise. The possible affecting the understanding and identity of marriage in a Member State by EU Regulations No 2016/1103 and 2016/1104 are subject to the article.

Arguments presented inter alia by the Polish parliament and governments in recent years during the legislative processes aiming to adopt the discussed regulations at the EU level, have to be supported. It seems, that the abovementioned remarks concerning the consequences of the regulations on matrimonial property matters and registered partnerships, which were subject to enhanced cooperation in several member states, could be also important for these states. Some of them can be not aware of all future practical consequences of the discussed new EU regulations. In particular the attention shall be paid to the practical effect of "importing" of foreign legal concepts and judgments, that govern the institutionalization of couples. Secondly, what can be astonishing,

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foreign law governing the details of contract applies not only within parties to contract but also with third parties in above mentioned situations, where the couple is not habitually resident abroad.

The greatest concerns are raised by provisions, that — despite the lack of EU's competences in field of family law — in practice not only amend private international law, but also cause unwelcome changes to substantive rules governing marriage (including rules perceived as fundamental ones in the state — e.g. marriage perceived in a common scope as the union between one man and one woman). The measures of judicial cooperation in civil matters should not result in obligation to recognize foreign redefined legal concept of marriage, because this would mean circumventing of the conferred powers principle (Art. 4 of Treaty on European Union).

The motto of the European Union: In varietate concordia (United in diversity) is also worth recalling. Its essence should generally argue for a more cautious approach by the EU institutions and groups of scientists interfering with substantial family law matters of Members States.

Keywords: EU Regulation No 2016/1103, EU Regulation No 2016/1104, Marriage, Registered partnership, Ordre pubic clause, Competences of European Union, Enhanced cooperation, Constitutional identity of EU Member State

1. Competences of European Union conferred by Member States

1. In accordance with the fundamental principle of the conferred powers the European Union holds no competence to enact substantive family law[1]. Under Article 4 of the Treaty on European Union[2]:

"1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government […]".

[1] See R. Baratta: *Short Remarks on EC Competence in Matters of Family Law*. In: *The external Dimension of EC Private International Law In Family and Succession Matters*. Eds. A. Malatesta, S. Bariatti, F. Pocar. Milan 2008, pp. 189—194; R. Lamont: *Evaluating European Values: the EU's Approach to European Private International Law*. "Journal of Private International Law" 2009 (3), p. 371.

[2] Consolidated version of the Treaty on European Union. "Official Journal of the European Union" C 326/13, 26 October 2012.

According to Article 5 of the Treaty on European Union:

"1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States".

2. European Union is however entitled to exercise competences in the field of private international law in broad sense (rules on conflict-of-laws and international civil procedure)[3]. Generally speaking, the role of private international law and civil procedure is to regulate in particular case:

a) which state is competent to exercise jurisdiction, i.e. which courts are empowered to hear the case of private law and sound judgment (eg. in marital case);

b) which substantive law govern the matter (e.g. the capacity to conclude marriage) and should be applicable by court (i.e. be the ground of judgment as to the merits);

c) which consequences in one state (e.g. in Poland) induce judgments given in other state (e.g. in adoption case), in particular which conditions are necessary for its recognition and enforcement.

This branch of law is in the EU treaties referred to as "measures of judicial cooperation in civil matters". Under Art. 81 of the Treaty on the Functioning of the European Union[4]:

"1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

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[3] See. M. Župan, V. Puljko: *Shaping European Private International Family Law.* "Slovenian Law Review" 2000 (7), pp. 23—62; P. McEleavy: *The Brussels II Regulation: How the European Community has moved into Family Law.* "The International and Comparative Law Quarterly" 2002 (4), pp. 883—908; R. Wagner: *EG-Kompetenz für das Internationale Privatrecht in Ehesachen?* "Rabels Zeitschrift für ausländisches und internationales Privatrecht" 2004 (1), pp. 119—153; A. Fiorini: *Rome III — Choice of Law in divorce: Is the Europeanization of Family Law Going Too Far?* "International Journal of Law, Policy and the Family" 2008 (2), pp. 178—205.

[4] Consolidated version of the Treaty on the Functioning of the European Union. "Official Journal of the European Union" C 326/47, 26 October 2012.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:
(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases […];
(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction […].

3. Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament".

3. In the doctrine, using a shortcut, legal instruments regulating this cooperation are often characterized as "European family law", what can suggest substantial rules of EU's origin. In fact European Union's substantive family law doesn't exist and probably the scope of the competences conferred by Member States will not increase in the nearest future. Using this shortcut may, however, cause that less educated in law persons do not identify the "non-substantive" function of EU rules in this area[5].

Additionally, the rules of private international law, including internationally unified ones (e.g. in Europe), should not generally interfere with the fundamental legal principles of the forum. One of the classic solutions, included in the general part of this branch of law, is the public policy clause (*orde public clause*, *Vorbehaltsklausel*)[6]. Under this clause, the foreign law can be not applied by the forum, and also the foreign judgment may be not recognized or enforced in the forum state, if the effects of such applicability, as well as recognition or enforcement of judgment would be contrary to the public policy of this state[7].

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[5] This term is also used as the description of groups of researches and the rules proposed by the doctrine in case the unification of family law was considered in the future by European states. For example researchers acting in *Commission on European Family Law* (www.ceflonline.net) proposed harmonized European rules on of divorce and maintenance between former spouses, parental responsibilities and property relations between spouses. See D. Martiny: *Is Unification of Family Law Feasible or even Desirable?* In: *Towards a European Civil Code*. Eds. A. Hartkamp, M. Hesselink, E. Hondius, C. Mak, E. Perron. Nijmegen 2011, pp. 440—442.

[6] See L. Fumagalli: *EC Private International Law and the Public Policy Exception. Modern Features of a Traditional Concept*. "Yearbook of Private International Law" 2004, vol. 6, p. 178.

[7] See T.M. de Boer: *Unwelcome Foreign Law: Public Policy and other Means to Protect the Fundamental Values and Public Interests of the European Community*. In: *The External Dimension of EC Private International Law of Family and Succession Matters*. Eds. A. Malatesta, S. Bariatti, F. Pocar. Cedam 2008, pp. 305—312.

2. Domestic constitutional principles

1. Despite of the limited scope of European Union's competences, the recent development of European law raises issues related to the juridical expression of the identity of marriage. Taking into account the specifity of private international law, it could *prima facie* seem that exercising of the competence in field of "judicial cooperation in civil matters" by the EU institutions — in lawmaking practice in the form of EU regulations — should not affect the substantive understanding and identity of marriage in any member state, eg. in Poland the essence of union between one woman and one man[8]. However, a more detailed study of some recent legislative procedures shows that it could be otherwise. The possible affecting the understanding and identity of marriage in a Member State be "EU judicial cooperation" will be subject to the following comments. Detailed attention in the following remarks will be paid to the legislative processes which have been in recent years initiated by the EU Commission with publishing of the green papers, and then carried out on the basis of the proposals of regulations.

2. The starting point to study this problem should be the perspective of a Member State's fundamental rules of Constitution. For example article 18 of Polish Constitution of 2 April 2007. According to this provision — marriage, defined as a union between a woman and a man, is under the protection and care of the Polish Republic[9].

It is also worth pointing out the case law of the Polish Constitutional Tribunal with regard to this constitutional provision in the ruling on Poland's membership in the European Union (Accession Treaty). In the judgment of 11 May 2005 (ref. K 18/04) Tribunal stressed that: "Marriage, being the union of a man and woman, has acquired a distinct constitutional status within the domestic law of the Republic of Poland, on the basis of Article 18 of the Constitution. Any modification of this status would be possible only by the way of an amendment of the Constitution (according to Article 235 thereof); in no circumstances would it be pos-

[8] On general overview — see L.D. Wardle: *The Fundamental Importance of Laws Protecting the Marriage-Based Family.* In: *Liber Amicorum Marie-Thérèse Meulders-Klein. Droit comparé des personnes et de la familie.* Ed. J. Pousson-Petit. Bruxelles 1998, pp. 639—659.

[9] Article 18 reads as follows: *Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland.* English translation published at www.trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland.

sible by way of a ratified international agreement"[10]. Therefore, modification of this constitutional status would be *a fortiori* not possible by introducting EU secondary law, including EU regulations. According to Art. 90 para. 1 and Art. 91 para. 4 of Constitution, the law established by UE shall be applied directly and have precedence if the EU treaties so provides, but only in the scope in which the Republic of Poland has delegated the competence of state authority to this international organisation[11].

3. Legislative activities of EU institutions of 2006—2016 relating to marriage

3.1. Applicability of law of the state where partnership was registered

More accurate overview of the legislative procedure concerning the EU regulation on jurisdiction, applicable law and the recognition of foreign judgments in property matters of registered partnerships — ie. the Green Paper of 2006[12] (COM 2006/400), proposal of regulation of 2011[13] (COM 2011/127) and regulation 2016/1104 adopted in enhanced cooperation procedure[14] — leads to the conclusion, that their adopting in Poland

[10] English translation published at www.trybunal.gov.pl/en/case-list/judicial-decisions/art/5851-czlonkostwo-polski-w-unii-europejskiej-traktat-akcesyjny

[11] Article 90. "1. The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters. […]

Article 91. […] 3. If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws".

[12] Green Paper on Conflict Of Laws in Matters Concerning Matrimonial Property Regimes, Including the Question of Jurisdiction and Mutual Recognition, Brussels, Brussels, 17 June 2006, COM(2006) 400 final.

[13] Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, Brussels, 16 March 2011, COM(2011) 127 final.

[14] Council Regulation (EU) 2016/1104 of 24 June 2016 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 183/30, 8 June 2016.

could lead *de facto* to "importing" of the consequences of legal constructions not accepted in Polish family law. Due to the possibility of choosing by partners the law to govern the registered partnership's effects (Art. 22 para. 1 of Regulation 2016/1104[15]) and to the applicability of the law of the registration state in the absence of choice of law done by the parties (Art. 26 para. 1[16]), the substantive effect would occur on Polish territory. Such an effect would happen also when a couple lives in Poland and is intensely connected with this state, while the relationship with the state, in which their partnership was registered, is loose and incidental (ie. limited only to a temporary residence for the purpose of registration).

The principle of applicability of registration law is, against all appearances, not in line with the member states' laws. The conflict-of-laws rules of domestic origin, which provide for application of the law of the state of registration, are constructed basing on internal interests to ensure that legal effects of registration in this state will exist. The same connecting factor (place of registration) used in norms binding in many states, including states where registered partnerships are not created, causes different practical implications. ia. the discussed "import".

The restriction of applying *orde public* clause, provided for in Art. 18 par. 2 of the proposal of 2011, clearly shows that the provisions, drafted by EU Commission, lead to effects within substantive family law, whereas no competences have been transferred from the Member States to the European Union[17]. Similar effect can occur if the understanding of non-discrimination principle, presented in recital (53) of Regulation

[15] Article 22 (Choice of the applicable law) reads as follows: "1. The partners or future partners may agree to designate or to change the law applicable to the property consequences of their registered partnership, provided that that law attaches property consequences to the institution of the registered partnership and that that law is one of the following: (a) the law of the State where the partners or future partners, or one of them, is habitually resident at the time the agreement is concluded (b) the law of a State of nationality of either partner or future partner at the time the agreement is concluded, or (c) the law of the State under whose law the registered partnership was created".

[16] Article 26 (Applicable law in the absence of choice by the parties) reads as follows: "1. In the absence of a choice-of-law agreement pursuant to Article 22, the law applicable to the property consequences of registered partnerships shall be the law of the State under whose law the registered partnership was created".

[17] Article 18 (Public policy) *reads as follows:* "1. The application of a rule of the law determined by this Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum.

2. The application of a rule of the law determined by this Regulation may not be regarded as contrary to the public policy of the forum merely on the grounds that the law of the forum does not recognise registered partnerships".

2016/1104[18], will be accepted by European Court of Justice. It is theoretically questionable, because of the limited scope of application of Charter of Fundamental Rights (art. 51[19]), but may happen in lawmaking practice.

3.2. Recognition of foreign judgments on registered partnership based on the law contrary to *orde public* of the recognizing Member State

Additionally the actual change of legal order on Polish territory would occur due to the far reaching consequences of the drafted principle of recognition of foreign judgments. Registered partners can easily lead to a ruling by the foreign court, whose law accept the effects of the legal concept of registered partnership (as an agreement on jurisdiction concluded by partners is possible under is Art. 7 para. 1 of Regulation 2016/1104[20], inter alia choosing courts of the Member State under whose law the registered partnership was created[21]). Under Art. 36 para. 1 and

[18] "(53) Considerations of public interest should also allow courts and other competent authorities dealing with matters of the property consequences of registered partnerships in the Member States to disregard, in exceptional circumstances, certain provisions of a foreign law where, in a given case, applying such provisions would be manifestly incompatible with the public policy (ordre public) of the Member State concerned. However, the courts or other competent authorities should not be able to apply the public policy exception in order to set aside the law of another State or to refuse to recognise —or, as the case may be, accept —, or enforce a decision, an authentic instrument or a court settlement from another Member State when doing so would be contrary to the Charter of Fundamental Rights of the European Union ('Charter'), and in particular Article 21 thereof on the principle of non-discrimination".

[19] Article 51 (Scope) reads as follows: "1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties".

[20] Ie. court of the state (a) in whose territory the partners are habitually resident at the time the court is seised, or failing that, (b) in whose territory the partners were last habitually resident, insofar as one of them still resides there at the time the court is seised, or failing that, (c) in whose territory the respondent is habitually resident at the time the court is seised, or failing that, (d) of the partners' common nationality at the time the court is seised, or failing that, (e) under whose law the registered partnership was created.

[21] Article 7 (Choice of court) reads as follows: "1. In cases which are covered by Article 6, the parties may agree that the courts of the Member State whose law is applicable

Art. 42 decision given in a Member State shall be recognised in the other Member States without any special procedure being required and it shall be enforceable after declaration of enforceability.

It's worth adding, that the possibility of declining the competence (non-exercising of jurisdiction under Art. 9 para. 1[22]) by the court of the State, in which the legal concept of registered partnership is not provided for in substantive law, is *de facto* irrelevant. Such a declining results in non-exercising the jurisdiction, and does not prevent the substantial effect ("importing") of foreign judgments and — indirectly — foreign law. In general, a judgment shall not be recognised, if such recognition is manifestly contrary to public policy in the member state in which recognition is sought. But the detailed provisions of the regulation restrict applying of this *orde public* clause. First, the Commission drafted in Proposal of 2011 that the recognition is not acceptable on the ground that the law of the member state does not recognise registered partnerships[23]. Then, the final content of Art. 38 of Regulation 2016/1104[24], as well as the above mentioned recital 54 ("however, the courts […] should not be able to apply the public policy exception") may suggest, that applying of *orde public* clause in practice will be contested.

It's worth also stressing, that effects of the recognition of partnership registered abroad will vary from state to state depending on in which country in the world the partnership was registered or which court issued a ruling in the case. Under the same name "registered partnership" various and incomparable effects are provided for in different legal systems, including such legal instruments that actually overlap the institution of marriage. Thus, even in countries whose laws provide for the legal institution of registered partnership, the proposed regulation could result in a significant change. The practical consequence of the main con-

pursuant to Article 22 or Article 26(1) or the courts of the Member State under whose law the registered partnership was created shall have exclusive jurisdiction to rule on the property consequences of their registered partnership".

[22] Article 9 (Alternative jurisdiction) reads as follows: "1. If a court of the Member State that has jurisdiction pursuant to Article 4, 5, or point (a), (b), (c) or (d) of Article 6 holds that its law does not provide for the institution of registered partnership, it may decline jurisdiction. If the court decides to decline, it shall do so without undue delay".

[23] Article 24 (Differences in applicable law) reads as follows: "The recognition and enforcement of a decision, in whole or in part, concerning the property consequences of a registered partnership may not be refused merely on the grounds that the law of the Member State addressed does not recognise registered partnerships or does not accord them the same property consequences".

[24] Article 38 reads as follows: "Article 37 of this Regulation shall be applied by the courts and other competent authorities of the Member States in observance of the fundamental rights and principles recognised in the Charter, in particular in Article 21 thereof on the principle of non-discrimination".

flict-of-laws rule (e.g. applicability of the law of registering state) would be the "importing" into their legal area so far unknown effects of legal institution named abroad in the same way, but *de facto* of a different substantive nature (eg. more rights and obligations of partners or stronger position in relation to third parties[25]).

4. Legislative activities of EU institutions of 2006—2016 relating to registered partnership

4.1. Applicability of law of the state where marriage was registered

The overview of second legislative procedure concerning the EU regulation on jurisdiction, applicable law and the effectiveness of foreign judgments in matrimonial property (ie. the Green Paper of 2006[26], COM 2006/400; explanations contained in COM 2011/125; proposal of 2011[27], COM 2011/126 and regulation 2016/1103 adopted in enhanced cooperation procedure[28]) leads to the observation, that its authors have somewhat "hidden" the definition of the scope of the proposed normative instrument. The understanding of marriage for the purpose of drafted regulation was presented not in its provisions, but in footnote 13 of explanatory document announced separately as COM 2011/125[29]. It says, that the

[25] Under Art. 28 of Regulation 2016/1104, the law applicable to the property consequences of a registered partnership between the partners usually may be invoked by a partner against a third party in a dispute between the third party and either or both of the partners, because the third party will usually know or, in the exercise of due diligence, should have known of that law, which knowledge will be often assumed in circumstances described in para. 2.

[26] Green Paper on Conflict Of Laws in Matters Concerning Matrimonial Property Regimes, Including the Question of Jurisdiction and Mutual Recognition, Brussels, 1 7 June 2006, COM(2006) 400 final

[27] Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, Brussels, 16 March 2011, COM(2011) 126 final.

[28] Council Regulation (EU) 2016/1103 of 24 June 2016 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 183/1, 8 July 2016.

[29] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Bringing legal clarity to property rights for international couples", Brussels, 16 March 2011, COM(2011) 125 final.

proposal is "gender neutral" and "under the proposal dealing with matrimonial property regimes, for example, a same-sex marriage allowed by Portuguese law will be treated in the same way as an opposite-sex marriage".

It shuold be additionally pointed, that some fragments of this document are contradictory and misleading, for example: "marriage is a longestablished institution that exists in all 27 member states" and — in next sentence — "marriage may be open to oppositesex couples or to samesex couples". Truly speaking, the "longestablished institution of marriage in all member states" may not be characterized as "opened to samesex couples".

Including into the scope of the proposed regulation also the same-sex couples registered as a marriage in several Member States, in conjunction with the discussed detailed mechanism of international private law and procedure, immediately gave rise to the question whether the adopted initiative could have ended up with a success — i.e. if consent of the Member States on the drafted provisions may be reached. It is already known that the consent of the member States has not been achieved. It seems that if the authors of proposals had decided, that the adopting of "broadened scope" of this regulation (ie. also unions other than between a woman and a man) was not mandatory but optional for member state, the fate of legislative initiative (and, the most of "international couples" counted precisely in the documents supporting the need for a legislative activity) would be different. The Member States' views on foreign legal institutions, in particular the redefined marriage, may be diverse[30].

Summarizing, the proposed regulation on matrimonial property matters could lead in practice to the situation, when Polish court rules on the basis of foreign law accepting the redefined notion of marriage in a case of a couple habitually resident in Poland (ie. having *de facto* loose relationship with the country which law, for example chosen by parties, would govern property relations). The national law of one of future spouse can be for example chosen as applicable under article 22 of Regulation 2016/1103[31]. The applicability of foreign law with reference to

[30] See M. Bogdan: *Some Reflections on the Treatment of Dutch Same-sex Marriages in European and Private International Law*. In: *Intercontinental Cooperation Through Private International Law: Essays in Memory of Peter E. Nygh*. "T.M.C. Asser Press" 2004, p. 27; M. Saez: *Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families around the World: Why 'Same' is so Different*. "European Review of Private Law" 2011 (5), p. 668.

[31] Article 22 (Choice of the applicable law) reads as follows: "1. The spouses or future spouses may agree to designate, or to change, the law applicable to their matrimonial property regime, provided that that law is one of the following: (a) the law of the State where the spouses or future spouses, or one of them, is habitually resident at the time the

a couple living in a state could result in "importing" to this state of foreign legal constructions, that are contrary to the fundamental principles of its constitutional order.

4.2. Recognition of foreign judgments on marriage based on the law contrary to *orde public* of the recognizing Member State

Furthermore, the amendment to Polish legal order would also result from the recognition and enforcement of foreign judgments in marital cases, that were given under foreign law in situations, where the couple habitually reside in Poland. The foreign jurisdiction could be indicated by future spouses, as choice of forum is provided for under Art. 7 of Regulation 2016/1103[32]. Foreign court will also hear the case after declining the jurisdiction by Polish one. The court may, according to Art. 9 para. 1, hold that, under its private international law, the marriage in question cannot be recognised for the purposes of matrimonial property regime proceedings and may exceptionally decline the jurisdiction[33]. In such a case "the courts shall act swiftly and the party concerned should have the possibility to submit the case in any other member state" (recital, 18). Once again, declining the jurisdiction doesn't prevent from "importing" of foreign legal concepts. A judgment given in other member state shall be recognised in the member state without any special procedure being required and it shall be enforceable in another Member State when they have been so declared. Such recognition and enforcement would indirectly (i.e. due to the property effects between the spouses and in their relations with third parties) result in functioning of the effects of asexual concept of marriage, that may come from some foreign jurisdictions.

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agreement is concluded; or (b) the law of a State of nationality of either spouse or future spouse at the time the agreement is concluded".

[32] Article 7 (Choice of court) reads as follows: "1. In cases which are covered by Article 6, the parties may agree that the courts of the Member State whose law is applicable pursuant to Article 22, or point (a) or (b) of Article 26(1), or the courts of the Member State of the conclusion of the marriage shall have exclusive jurisdiction to rule on matters of their matrimonial property regime".

[33] Article 9 (Alternative jurisdiction) reads as follows: "1. By way of exception, if a court of the Member State that has jurisdiction pursuant to Article 4, 6, 7 or 8 holds that, under its private international law, the marriage in question is not recognised for the purposes of matrimonial property regime proceedings, it may decline jurisdiction. If the court decides to decline jurisdiction, it shall do so without undue delay".

In general, according to Art. 37 a) and Art. 51 of Regulation 2016/1103, a foreign decision shall not be recognised or enforced if such recognition or enforcement is manifestly contrary to public policy in the member state in which recognition is sought. But Art. 38 and recital (54)[34], recalling the principle of non-discrimination, may be in practice quoted to call the possibility of adopting this *ordre public* clause into question.

Under Art. 38 the *orde public* clause "shall be applied by the courts and other competent authorities of the Member States in observance of the fundamental rights and principles recognised in the Charter, in particular in Article 21 thereof on the principle of non-discrimination". In my opinion, the Charter of Fundamental Rights should not be criterion to judge the case of marriage identity, because, according to Art. 51, it apply to situations of implementing Union law, whereas there is (and could be) no Union's substantive family law on marriage because lack of competences. Although the future contrary "lawmaking" interpretation, in particular in the doctrine, cannot be excluded.

5. Official statements by Polish governments

1. The draft of regulation on matrimonial matters was in general positively assessed by the Polish government in a statement of 5/4/2011[35]. Hovever the government added that 'there is no need or even the possibility of including the definition of a marriage in the Regulation' and that the *orde public* clause is a sufficient instrument enabling non-use of foreign law or non-recognition of foreign judgments regarding foreing concepts which can not be treated as a marriage under Polish law. The government assumed that marriage is to be understood in accordance with national law, and the EU can not interfere with the competence of national legislators. In addition, it noted that it would not be possible to agree definitions for the needs of all Member States due to the diametrical differences between domestic laws.

[34] "(54) […] However, the courts or other competent authorities should not be able to apply the public policy exception in order to set aside the law of another State or to refuse to recognise or, as the case may be, accept or enforce a decision, an authentic instrument or a court settlement from another Member State when doing so would be contrary to the Charter of Fundamental Rights of the European Union ('Charter'), and in particular Article 21 thereof on the principle of non-discrimination".

[35] https://bip.ms.gov.pl/pl/dzialalnosc/projekty-aktow-prawnych/prawo-unii-europejskiej/download,1705,1.html

In the next Polish statement of 23/11/2015 the detailed provisions of draft regulation were again positively assessed[36]. However the goverment stressed that the scope of application of its instrument are the marriages understood in accordance with the Polsih Constitution, i.e. as an union between a woman and a man. He clearly stated that he would not accept an obligatory wider scope, i.e. in particular the effects of foreign law or judgments on same-sex marriages. The explanatory memorandum stressed that: 'the draft regulation should introduce a solution that would allow Member States not to apply foreign provisions to the matrimonial property regimes of marriages not meeting the requirements of marriage under their domestic family law, or to introduce other solutions that would have a similar effect' (eg. registered partnerships).

2. A different attitude was expressed by the Polish government in the statement on the draft regulation regarding registered partnerships of 11/4/2011[37]. The EU Commission's initiative was assessed negatively. The government stressed that family law issues remain the competence of the Member States and Polish law does not provide for such a legal concept nor provide for recognition of it when registered abroad. The obligation to apply foreign law and recognition of foreign judgments would *de facto* mean introduction of such an institution into the Polish legal area. At least in relation to same-sex partnerships such an effect would 'undoubtedly' be contrary to the basic principles of the Polish legal order. The government criticized the proposed restrictions of *orde public* clause, which are in fact an attempt to shape substantive law rules, was considered as 'unacceptable due to the lack of EU competence to enact substantive family law'.

6. Lack of *concensus* and (not)enhanced cooperation between 17 Members States

1. Both proposed regulations met in some of member states with critical attitude[38]. Firstly, because of its redefined juridical notion of mar-

[36] https://bip.ms.gov.pl/pl/dzialalnosc/projekty-aktow-prawnych/prawo-unii-europejskiej/download,1705,0.html.

[37] https://bip.ms.gov.pl/pl/dzialalnosc/projekty-aktow-prawnych/prawo-unii-europejskiej/download,1706,0.html

[38] From Polish perspective — see P. Mostowik: *Między zniesieniem legalizacji zagranicznych dokumentów a uznawaniem skutków obcej rejestracji i rozumienia stanu cy-*

riage. Secondly, because of the possible infringements of the essence of constitutional concept of marriage due to the actual admission of functioning competitive legal construction of registered partnership (sometimes with similar to marriage content "hidden" under a differently named foreign legal registration).

At the very beginning of the legislative procedures discussed above, reasoned opinions on the incompatibility of those proposals with the fundamental EU principle of subsidiarity (Art. 5 par. 3 of the Treaty on European Union) were presented in 2011 by parliaments in Poland[39], Romania and Italy.

2. Then Poland and Hungary have not expressed consent to the final version of the regulations, and thus — in the absence of unanimity necessary in this area of EU law (what is sometimes in mass media called *veto*) — the described legislative proposals of the Commission did not end in success.

As a side note it could be indicated that at the end of the legislative process — despite the declarations in official positions, saying that these regulations should not impact on the definition of marriage, or the introduction of concept of registered partnership — the lack of unanimity of Member States was officially criticized by some organizations of lobbying character. Voices of discontent were in particular given by organizations operating in the interest of LGBTQ+ men and women (eg. ILGA Europe[40]).

3. The discussed proposals were subsequently subject to the procedure of enhanced cooperation, which led to applying of regulations on the limited territory of "judicial cooperation" in the European Union[41].

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wilnego [*Between abolishing the legislation of foreign documents and recognition of the effects od foreign personal status' registration*]. In: *Znad granicy ponad granicami. Księga dedykowana Profesorowi Dieterowi Martiny*. Eds. M. Krzymuski, M. Margoński. Warszawa 2014, pp. 187—212.

[39] Resolution of Sejm of Republic of Poland of 27 May 2011 declaring proposal for a Council regulation […] incompatible with the principle of subsidiarity, www.ipex.eu/IPEXL-WEB/scrutiny/CNS20110060/plsej.do; Opinion of the Senate of the Republic of Poland of 26 May 2011 on the non-compliance with the principle of subsidiarity of the proposal for a Council regulation […], www.ipex.eu/IPEXL-WEB/scrutiny/CNS20110060/plsen.do. On the grounds of Polish reservations — see P. Mostowik: *Jak nie ujednolicać międzynarodowego prawa prywatnego i postępowania cywilnego, czyli o projektach rozporządzeń unijnych dotyczących majątkowych ustrojów małżeńskich i skutków związków partnerskich* [*How not to Unify International Private Law and Civil Procedure, i.e. on drafts of EU Regulations on Matrimonial and Registered Partnerships Property Regimes*]. "Europejski Przegląd Sądowy" 2011 (11), pp. 12—24.

[40] E.g. the comment: *Disappointment as Poland and Hungary block EU proposal on property regimes of married and registered couples*, published at www.ilga-europe.org.

[41] In December 2015, after the Council had not been possible to reach unanimity among all member states, 17 of them (Sweden, Belgium, Greece, Croatia, Slovenia, Spain,

17 countries have been involved in this procedure, which resulted in adopting regulations on 24 June 2016. They will be applied from 29 January 2019. Thus, despite common in media point of view, that "only Poland indicated problems with the proposed regulations", it has turned out, that in the actual state of affairs such a reproach is unequal, because finally 10 Member States do not participate now in this enhanced cooperation. Additionally, the question shall be raised whether all the cooperating countries are fully aware of the practical consequences on their territories of new regulations. They will result in functioning of marriages and registered partnerships of people constantly living in these countries, which will can be governed by foreign law, whose concepts may be far different from the domestic ones.

7. Substantive effects relating to domestic concept of marriage through introducing European Union's private international law?

1. Arguments presented by the Polish parliament and governments in recent years during the legislative processes aiming to adopt the discussed regulations at the EU level, have to be supported. It seems, that the abovementioned remarks concerning the consequences of the regulations on matrimonial property matters and registered partnerships, which were subject to enhanced cooperation in several member states, could be also important for these states. Some of them can be not aware of all future practical consequences of regulations 2016/1103 and 2016/1104. In particular the attention shall be paid to the practical effect of "importing" of foreign legal concepts and judgments, that govern the institutionalization of couples. Secondly, what can be astonishing, foreign law governing the details of contract applies not only within parties to contract but also with third parties[42] in above mentioned situations, where the couple is not habitually resident abroad.

France, Portugal, Italy, Malta, Luxembourg, Germany, the Czech Republic, the Netherlands, Austria, Bulgaria and Finland) requested the Commission to propose a decision authorising the establishment of enhanced cooperation between themselves on the property regimes of international couples, covering both marriages and registered partnerships.

[42] In particular under Art. 28 of Regulation 2016/1103, the foreign law applicable to the property consequences of a marriage may be invoked by a spouse against a third party in a dispute between the third party and either or both of the spouses, because the

The greatest concerns are raised by provisions, that — despite the lack of EU's competences in field of family law — in practice not only amend private international law[43], but also cause unwelcome changes to substantive rules governing marriage (including rules perceived as fundamental ones in the state[44]). The measures of judicial cooperation in civil matters should not result in obligation to recognize foreign redefined legal concept of marriage, because this would mean circumventing/breach of the conferred powers principle (Art. 4 of Treaty on European Union).

2. Similar reservations have been made by Member States in recent years regarding to another Commission's proposal included in the Green Paper of 2010, which concerned the recognition of the substantial effects of foreign civil status registration[45]. This proposal contained i.a. conclusions relating to the identity of marriage. Point 4.3 of this paper, titled 'Mutual recognition of the effects of civil status records', reads as follows: […] each Member State would accept and recognize […] the effects of a legal situation created in another Member State. An example o such an "imported" situation created abroad could be, registered as a marriage, a union of two people of the same sex (also habitually resident in another state). The proposed solution met with critics of Member States. For example the German government stressed: 'The question of whether, for example, a particular institution should be created in family law, how a family-law relationship is established or annulled and what effects it produces is the subject of — often politically controversial — decisions by the legislature. As examples one might mention: the registered civil partnership or marriage of persons of the same sex, the filiation of a child in the case of a 'surrogate mother', the introduction of presumptions of filiation in favour of the mother's registered female partner, the

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third party will usually will have necessary attributes (ie. will know or, in the exercise of due diligence, should have known of that law, because such a knowledge will be often assumed in many circumstances described in para. 2).

[43] See A. Mączyński: *Le droit de la famille dans la nouvelle codification polonaise du droit international privé*. In: *Confronting the frontiers of family and succession law*. Eds. A.-L. Verbecke, J.M. Scharpe, Ch. Declerc, T. Hels, P. Senaeve. Liber Amicorum Walter Pintens, Cambridge, Antwerp, Portland 2012, part I, pp. 887—902; M. Krzymuski: *Reform des polnischen Internationalen Privatrechts und deutsch-polnische Rechtsbeziehungen im Personen- und Familienrecht*. "Zeitschrift für Standesamtswesen" 2012 (2), pp. 40—48, 2012/3, pp. 73—79.

[44] See P. Fiedorczyk: *Attempts at Redefining the Family in Contemporary Polish Law*. "International Journal of the Jurisprudence of the Family" 2012 (3), pp. 357—371.

[45] COM(2010)/747 final, *Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records***,** www.eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52010DC0747

admissibility and effects of adoption (full adoption, 'partial' adoption, admissibility of adoption of adults, adoption by same-sex couples, etc.). The EU has no legislative powers in this area. Neither can it therefore require a Member State's legislature to place its family law at the disposal of the 25 other Member States without restriction, allowing the persons concerned to have a family-law relationship that exists under the law of another Member State to be registered in that State even though they have no close ties with that state's legal order"[46]. The issue of lack of EU competences was also raised in the Dutch statement: 'We accordingly welcome the Commission's observation that the EU has no competence to intervene in the substantive family law of Member States, for example as regards the attribution of surnames in the case of adoption and marriage. However, this does not alter the fact that the Netherlands will continue to push for the multilateral recognition of same-sex marriages and registered partnerships in the EU"[47].

Finally these controversial rule on substantial effects of foreign family law was abandoned by the Commission. The EU Regulation No. 1191/2016[48] applies only to the formal aspects of evidence value of foreign documents issued by the registry offices such as abolishing legalization and similar requirements (Art. 2 para. 4)[49].

3. It is worth adding that Articles 2 of regulations No 2016/1103 and 1104 read as follows: "regulation shall not affect the competence of the authorities of the member states to deal with matters of matrimonial property regimes". Such a wording is *superfluum* from one point of view, and — from another perspective — an unjustifiably suggestion that competences of the Member States are appropriately taken into account and safeguarded. Firstly, it is obvious that the regulations may not affect "the competence of the authorities of the Member States" to regulate substantively matrimonial property matters, because they deal with private

[46] See Federal Government observations on the Commission Green Paper COM(2010) 747 final, www.ec.europa.eu/justice/newsroom/civil/opinion/files/110510/public_authorities/germany_minjust_en.pdf, p. 10—11.

[47] See Dutch response to Green Paper COM(2010) 747 final, www.ec.europa.eu/justice/newsroom/civil/opinion/files/110510/public_authorities/netherlands_minjust_en.pdf, p. 2.

[48] Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012. "Official Journal of the European Union" L, 200/1 26 July 2016.

[49] See P. Mostowik: *Fundamental Principles on Parentage in a Member State of European Union versus EU Commission's Proposal on Transnational Effects of Civil Status Records*. "International Journal of the Jurisprudence of the Family" (forthcoming).

international law, not with substantive one. Secondly, the actual change in legal order on the territory of a Member State, introduced by the regulations, stems from the provisions on applicability of foreign law, as well as from provisions on recognition and enforcement of foreign judgments in actual situations, that are close connected with this state, but not with a foreign one.

4. At the end, the motto of the European Union of Member States is worth recalling. This motto, announced at the session of the European Parliament in 2000 sounds: *In varietate concordia* (pol. *Zjednoczeni w różnorodności*, eng. *United in diversity*, germ. *In Vielfalt geeint*)[50]. Its essence should generally argue for a more cautious approach of the EU institutions and groups of scientists to drafting amendments and interfering in family laws of Member States. Family law is distant from the economic core of European integration and tend to be firmly rooted in the principles of domestic societies and constitutional systems.

8. Concluding remarks

The European Union is entitled to exercise competences in the field of private international law *sensu largo*, i.e. including also rules of international civil procedure. In the treaties this branch of law is referred to as "measures of judicial cooperation in civil matters" (Art. 81 TFEU). One of the classic solutions, included in the general part of this branch of law, is the public policy clause (*orde public clause*, *Vorbehaltsklausel*). Under this clause, the foreign law can be not applied by the forum, and also the foreign judgment may not be recognized or enforced in the forum state, if the effects of such applicability, as well as recognition or enforcement of judgment, would be contrary to the public policy.

Prima facie it seems that the competence in field of "judicial cooperation" should not affect the identity and understanding of marriage in the law of any Member State, e.g. Polish definition as union between one woman and one man. However, a more detailed analysis of legislative procedures, that have taken place in recent years, shows that it could be otherwise, which will be subject to the detailed comments (in particular the Green Paper of 2010 with the slogan of "reducing bureaucracy").

[50] It is also reflected in the following fragment of the preamble to the Charter of Fundamental Rights: *The Union contributes to the preservation and to the development of [its] common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States.*

Arguments presented by the Polish governments in recent years during the legislative processes aiming to adopt EU regulations No 2016/1103 and 2016/1104 are worth supporting. It seems that the arguments concerning the consequences of the regulations on matrimonial property matters and registered partnerships can be also important for some of states, which are now participating in legislative procedure of enhanced cooperation. These countries can be not aware of all future consequences. In particular their attention shall be paid to the practical effect of "import" of foreign legal concepts and judgments, that will govern both the institutionalization of couples and the details of contracting within them and with third parties also in *de facto* "non-foreign" situations, where the couple is not habitually resident abroad.

From the perspective of a Member State the starting point for deciding if agree to a common EU instrument can be the domestic Constitution. Art. 18 of Polish Constitution (marriage, as union between a woman and a man, is under the protection and care of the Polish Republic). Constitutional Tribunal stressed that: "Marriage […] has acquired a distinct constitutional status within the domestic law of the Republic of Poland […]. Any modification of this status would be possible only by the way of an amendment of the Constitution (judgment of 11 May 2005, K 18/04).

The draft of regulation on matrimonial matters was in general positively assessed by the Polish government in a statement of 5/4/2011. However the government added that 'there is no need or even the possibility of including the definition of a marriage in the Regulation' and that the *orde public* clause is a sufficient instrument enabling non-use of foreign law or non-recognition of foreign judgments regarding foreing concepts which can not be treated as a marriage under Polish law. The government assumed that marriage is to be understood in accordance with national law, and the EU can not interfere with the competence of national legislators. In addition, it noted that it would not be possible to agree definitions for the needs of all Member States due to the diametrical differences between domestic laws. Also in the statement of 2015 the detailed provisions of draft regulation were again positively assessed. However the goverment stressed that the scope of application of its instrument are the marriages understood in accordance with the Polsih Constitution, i.e. as an union between a woman and a man. He clearly stated that he would not accept an obligatory wider scope, i.e. in particular the effects of foreign law or judgments on same-sex marriages. The explanatory memorandum stressed that: 'the draft regulation should introduce a solution that would allow Member States not to apply foreign provisions to the matrimonial property regimes of marriages not meeting the

requirements of marriage under their domestic family law, or to introduce other solutions that would have a similar effect' (eg. registered partnerships). A different attitude was expressed by the Polish government in the statement on the draft regulation regarding registered partnerships of 11/4/2011. The EU Commission's initiative was assessed negatively. The government stressed that family law issues remain the competence of the Member States and Polish law does not provide for such a legal concept nor provide for recognition of it when registered abroad. The obligation to apply foreign law and recognition of foreign judgments would *de facto* mean introduction of such an institution into the Polish legal area. At least in relation to same-sex partnerships such an effect would 'undoubtedly' be contrary to the basic principles of the Polish legal order. The government criticized the proposed restrictions of *orde public* clause, which are in fact an attempt to shape substantive law rules, was considered as 'unacceptable due to the lack of EU competence to enact substantive family law'.

The motto of the European Union: *In varietate concordia* (*United in diversity*) is also worth recalling. Its essence should generally argue for a more cautious approach by the EU institutions and groups of scientists interfering with substantial family law matters.

Problemy Prawa Prywatnego Międzynarodowego

Tom 22

pod redakcją
Maksymiliana Pazdana

Wydawnictwo Uniwersytetu Śląskiego · Katowice 2018

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Publikacja jest dostępna także w wersji elektronicznej:

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ISSN 2353-9852

Wersją pierwotną referencyjną pisma jest wersja elektroniczna

Czasopismo wcześniej ukazywało się w formie drukowanej
z identyfikatorem ISSN 1896-7604

Czasopismo dystrybuowane bezpłatnie

Wydawca
Wydawnictwo Uniwersytetu Śląskiego
ul. Bankowa 12B, 40-007 Katowice
www.wydawnictwo.us.edu.pl
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Wydanie I. Ark. druk. 6,25. Ark. wyd. 7,50.