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Setting the scene: key aspects of the EU acquis in family matters

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Topics of the seminar

- 1) EU competence in civil judicial cooperation;
 - 1a) the development of primary law regarding civil judicial cooperation
- 2) legal basis and legislative procedures for the adoption of acts in family matters;
- 3) family matters addressed by relevant EU Regulations;
- 4) main issues: diversity among national substantive legislations and enforcement procedures;
- 5) interplay with Hague Conventions

1. EU competence on civil judicial cooperation

Background

- principle of **free movement of persons**, guaranteed throughout all EU MS since the Maastricht Treaty
- since then, the EU legislation has aimed at strengthening the protection of this fundamental freedom, so that every EU citizen can exercise it in each MS as he/she were in his/her own MS State of origin

1. EU competence on civil judicial cooperation

Objectives

- 1) building a **European area of justice** through cooperation (Title V TFEU “Area of freedom, security and justice”)
- 2) different **levels** of cooperation:
 - administrative
 - judicial (both in civil and criminal matters)
 - Police bodies
- 3) avoiding the complexity of legal and administrative systems in EU countries, which can prevent and discourage individuals and companies from exercising their rights

1. EU competence on civil judicial cooperation

4) individuals and companies should be able to “approach courts and authorities in any EU country as easily as in their own” according to the conclusions of the **Tampere European Council** (15 and 16 October 1999)

-> closer cooperation between the authorities of the EU MS should eliminate any obstacles deriving from the complexity of 28 different systems. This cooperation draws on the **principle of mutual recognition based on mutual trust between EU countries**

1a. The development of primary law

- Judicial cooperation in civil matters was **not** one of the objectives of the EC when the **founding treaty** was adopted
 - the EC was originally set up as a *sui generis* international organization with the aim of following objectives of economic integration
- however, **Art. 220 of the EEC Treaty** stated that MS were bound to simplify ‘formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards”

1a. The development of primary law

- judicial cooperation in civil matters, in the intergovernmental context of 'Justice and Home Affairs', was **officially included** within the EU's sphere of activity by the **1992 (1993) Treaty of Maastricht**
- however, within the framework set out by the Treaty of Maastricht, judicial cooperation in civil matters was **only** defined as a “**matter of common interest to the Member States**”
-> actions to be taken by the Member States, **not** the EU itself

1a. The development of primary law regarding civil judicial cooperation

Meanwhile, at the international level:

- started negotiations in order to adopt the **1996 Hague Convention** on children protection
- **Brussels II Convention of 28 May 1998** for divorce jurisdiction, recognition and enforcement (see *infra*)

1a. The development of primary law regarding civil judicial cooperation

Turning point

- the **1997 (1999) Treaty of Amsterdam** brought judicial cooperation in civil matters **within the Community sphere**, transferring it from the Treaty on European Union to the Treaty establishing the European Community, although it did **not** make it **subject to the Community method**

1a. The development of primary law regarding civil judicial cooperation

- the **2000 (2003) Treaty of Nice** allowed measures relating to **judicial cooperation in civil matters** — with the exception of family law — to be adopted using the legislative **co-decision procedure**
- What for **family law**?
MS have always been **cautious** to confer legislative powers to the EU on this matter, because it deals with sensitive interests

1a. The development of primary law regarding civil judicial cooperation

- the **Tampere European Council** (October **1999**) laid the foundations for the European Area of Justice
- following recognition that not enough had been done to implement this, a new **action plan for 2005-2010** was launched at the European Council of The Hague (November **2004**)
 - > the **Hague Programme** underlined the need to continue the implementation of mutual recognition and to extend it to new areas such as **family, property, successions** and **wills**

1a. The development of primary law regarding civil judicial cooperation

- it was followed by the **Stockholm Programme**, which represents the roadmap for future developments in the area of freedom, security and justice (FSJ) over the five-year period from **2010 to 2014**
 - > it defines the political priorities and the legal tools to fulfil its objectives

1a. The development of primary law regarding civil judicial cooperation

- the **Treaty of Lisbon** makes all measures in the field of judicial cooperation in **civil matters** subject to the **ordinary legislative procedure**
- however, **family law** remains subject to a **special legislative procedure** -> the Council acts unanimously after consulting the Parliament (Art. 81 TFEU: see *infra*)

1a. The development of primary law regarding civil judicial cooperation

Special position of some MS

- **Denmark, Ireland** and the **United Kingdom** have **opt-outs** from Title V of Part Three of TFEU (Area of freedom, security and justice) under **Protocols No 21 and 22** to the Treaty of Lisbon
- **Protocol No 21** of the Treaty of Lisbon: **Ireland** and the **United Kingdom** have a **flexible opt-out** from legislation adopted in this area, which allows them to opt in or out of legislation and legislative initiatives on a case-by-case basis

1a. The development of primary law regarding civil judicial cooperation

- **Protocol No 22** of the Treaty of Lisbon :
- **Denmark** has a **more rigid opt-out** from the area of freedom, security and justice, which means that it does not take part at all in this policy. In the negotiations of the Treaty of Lisbon, Denmark obtained an option to convert its opt-out into a flexible opt-in modeled on the Irish and British opt-outs
- a referendum was held on 3 December 2015 to approve the exercise of this option: it was rejected by 53% of voters

1a. The development of primary law regarding civil judicial cooperation

Main objectives of the FSJ area

The EU's action in the area of judicial cooperation in civil matters seeks primarily to achieve the following objectives:

- to ensure a high degree of **legal certainty** for citizens in cross-border relations governed by civil law;
- to guarantee citizens easy and **effective access to civil justice** in order to settle cross-border disputes;
- to **simplify** cross-border cooperation instruments between national civil courts;
- to **support** the training of the judiciary and judicial staff

2. Legal basis and legislative procedures for the adoption of family acts in family matters

- Art. 81 TFEU
- Special legislative procedure
 - Enhanced cooperation

CHAPTER 3 - JUDICIAL COOPERATION IN CIVIL MATTERS

Article 81 TFEU (former Article 65 TEC)

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

2. For the purposes of para. 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;
- b) the cross-border service of judicial and extrajudicial documents;
- c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
- d) cooperation in the taking of evidence;
- e) effective access to justice;
- f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
- g) the development of alternative methods of dispute settlement;
- h) support for the training of the judiciary and judicial staff.

3. Notwithstanding para. 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**.

The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision.

Legal basis for EU acts in family law

- Special legislative procedure for the adoption of acts in family matters (legal basis: Art. 81(3) TFEU)
 - Council unanimity
 - after consultation of the EP
 - national Parliaments notified
- ↳ MS control over sensitive matters (see Protocol 2: warning system – yellow card procedure)
- should the unanimity not be reached, it is possible to initiate an enhanced cooperation (Art. 20 TEU, Arts. 326 to 334 TFEU)

Enhanced cooperation

(Art. 20 TEU; Arts. 326-334 TFEU)

- MS wish to establish enhanced cooperation between themselves within the framework of the **EU's non-exclusive competences** (see Art. 3 TFEU for the list of exclusive competences)
- enhanced cooperation shall **aim to further the objectives of the Union**, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all MS (see Art. 328 TFEU)

Enhanced cooperation (Art. 20 TEU; Arts. 326-334 TFEU)

- the decision authorising enhanced cooperation shall be adopted by the Council (see Art. 329 TFEU) as a last resort, when it has established that the **objectives** of such cooperation **cannot be attained within a reasonable period by the Union as a whole**, and provided that **at least 9 MS** participate in it

Enhanced cooperation

(Art. 20 TEU; Arts. 326-334 TFEU)

- all members of the Council may participate in its deliberations, but only members of the Council representing the **MS participating in enhanced cooperation** shall take part in the **vote**
 - > voting procedure: Art. 330 TFEU
 - unanimity = votes of the representative of the participating MS only
 - qualified majority = in accordance with Art. 238(3) TFEU

Enhanced cooperation (Art. 20 TEU; Arts. 326-334 TFEU)

- **acts** adopted in the framework of enhanced cooperation shall **bind only participating MS**
- these acts shall not be regarded as part of the *acquis* which has to be accepted by candidate States for accession to the Union

3. Family matters addressed by relevant EU Regulations

in chronological order

Overview of EU PIL acts

Brussels regime (jurisdiction/recognition and enforcement)

- Brussels I and Ia Regulations, for civil and commercial matters (Reg. No. 44/2001, repealed by Reg. No. 1215/2012)
- Brussels IIa Regulation, for matrimonial matters and parental responsibility (Reg. No. 2201/2003)

Rome regime (applicable law)

- Rome I Regulation, for contractual obligations (Reg. No. 593/2008)
- Rome II Regulation, for tort and delict (Reg. No.864/2007)
- Rome III Regulation, for divorce and legal separation (Reg. No. 1259/2010): enhanced cooperation

Overview of EU PIL acts

“Complete” PIL instruments

- Maintenance Regulation (Reg. No. 4/2009)
- Successions Regulation (Reg. No. 650/2012)

Overview of EU PIL acts

Acts on European procedures in civil and commercial matters

- Regulation on European enforcement orders for uncontested claims (Reg. No. 805/2004)
- Regulation on European order for payment (Reg. No. 1896/2006)
- Regulation on European small claims procedure (Reg. No. 861/2007)
- Regulation on European account preservation order (Reg. No. 655/2014)

Overview of EU PIL acts

Insolvency proceedings

- Reg. No. 1346/2000, repealed by Reg. No. 2015/848 that entered into force on 26 June 2017

Service of documents

- Reg. 1393/2007

Taking of evidence

- Reg. 1206/2001

Brussels II Convention

Convention on **Jurisdiction** and the **Recognition and Enforcement of Judgments in Matrimonial Matters** of 28 May 1998

- predecessor (at the international level) of the EU Regulations on matrimonial matters, but **never ratified nor come into force**
- similar structure to the Brussels Convention of 1968 on jurisdiction and enforcement of judgment in civil and commercial matters, which was the basis of the Brussels I Regulation (basic principle of mutual recognition)
- **limited scope of application** regarding **parental responsibility**: (only if raised in divorce proceedings where both parties were the parents)

Brussels II – the Regulation

- the Commission submitted a **proposal** for a **Regulation based on the Brussels II Convention**, with the same text
- EU acted quickly: **Reg. 1347/2000** on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses
 - adopted on 29 May 2000
 - entered into force on 1 March 2001

Brussels II – the Regulation

Advantages of a EU Regulation over an international Convention

- 1) the Regulation is **directly applicable** in the Member States which are bound by it, **prevailing** over all national laws (including the relevant private and procedural law instruments)
- 2) **no ratification** by the MS is needed to have effect

Brussels II – the Regulation

- 3) uniform interpretation** ensured by the Court of Justice through the legal instrument of the **reference for a preliminary ruling** (Art. 267 TFEU)
- > possible **urgent preliminary ruling procedure – UPP** (Arts. 107-114 of the Rules of Procedure of the CJ – 2012) for the matters regarding the FSJ area (in particular, parental responsibility cases)

Reg. 1347/2000 (Brussels II)

Scope of application:

- a) civil proceedings relating to divorce, legal separation or marriage annulment;
- b) civil proceedings relating to parental responsibility for the children of both spouses on the occasion of the matrimonial proceedings referred to in (a)

Unresolved issues

- parental responsibility matters should be better regulated in a separate legal instrument rather than that on divorce (parental responsibility matters were limited to children of both spouses and to disputes arising in the context of divorce and separation proceedings)
 - > the Commission, however, pursued its intention of proposing a Regulation based on the Brussels II Convention with a broader scope on parental responsibility

Reg. 2201/2003 (Brussels IIa)

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

- It applies since 1 March 2005
- Ireland and the UK bound by it, not Denmark

Reg. 2201/2003 (Brussels IIa)

Art. 1(1)

This Regulation shall **apply**, whatever the nature of the court or tribunal, in **civil matters** relating to:

- a) **divorce, legal separation or marriage annulment;**
- b) **attribution, exercise, delegation, restriction or termination of parental responsibility**

Reg. 2201/2003 (Brussels IIa)

Open issues

- 1) No definition of “marriage”: each MS applies the Reg. according to the notion of marriage provided in its own legal order (thus, issues arise with regard to same-sex couples)
- 2) enforcement procedures still governed by national laws

Maintenance obligations

- provisions **originally** included in the **Brussels I regime** (Art. 5 of Reg. 44/2001)
- negotiations within both the **EU** and the **Hague Conference** systems to create an **harmonious regime on maintenance worldwide**

Maintenance obligations

The **applicable law** was a sensitive aspect during the negotiations

- **HCCH: optional protocol** in order not to alienate potential States parties
- **EU: no direct provision**, but the protocol applied as an option

Reg. 4/2009 (Maintenance)

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

- entered into force on 30 January 2009
- applicable since 18 June 2011
- all EU MS (including the UK and Ireland) with the exception of Denmark

Reg. 4/2009 (Maintenance)

Complete PIL legal instrument

- **BUT 2 procedure on recognition and enforcement**
 - a) for MS adopting the protocol on applicable law, the exequatur is abolished
 - b) for those MS that do not, Brussels I regime

Applicable law to divorce claims

- 14-3-2005: the Commission published a **Green paper on applicable law and jurisdiction in divorce matters** (COM(2005) 82 final)
- justification of the proposal: to **prevent forum shopping practices** deriving from the jurisdictional regime set forth in Brussels IIa (alternative grounds of jurisdiction)

Applicable law to divorce claims

Origin: a new piece of legislation complementing the BIIa Reg. with regard to the law applicable (PIL aspect not governed by it)

- Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, **COM(2006) 399** of 17-7-2006

Withdrawn by the Commission (lack of unanimity in the Council as required by Art. 81(3) TFEU)

Reg. 1259/2010 (Rome III)

- Council **decision 2010/405/EU** of 12 July 2010 **authorising enhanced cooperation** in the area of the law applicable to divorce and legal separation
- 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 (Rome III Reg.)

Reg. 1259/2010 (Rome III)

- **14 EU MS originally participating** in the enhanced cooperation:
Belgium, Bulgaria, Germany, Greece (then withdrew its request), Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia
- **Further MS participating:**
 - Lithuania: since 22 May 2014
 - Greece: since 29 July 2015
 - Estonia will participate starting from **11 February 2018**

Reg. 650/2012 (Successions)

Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on **jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession**

Complete PIL legal instrument

- UK, Ireland and Denmark opted out
- it applies to deaths on or after 17-8-2015

Matrimonial property

- 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**
- 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**

Matrimonial property

- both Reg. will be **applicable starting from 29-1-2019**
- **complete PIL** legal instrument
- **18 MS participating:** Belgium, Bulgaria, Cyprus, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, Netherlands, Austria, Portugal, Slovenia, Finland and Sweden
- Estonia announced its intention to take part in the cooperation

Future perspectives: the BIIa Recast proposal

COM(2016) 411 dating back to 30 June 2016

The EU Commission's initiative was preceded by **extensive preparatory works**

- a public consultation
- an external study on the operation of the Regulation
- the proposals made by a group of experts appointed by the Commission

Future perspectives: the BIIa Recast proposal

6 main shortcomings

- 1) child return procedure
- 2) placement of the child in another State (regulated in Chapter II, Section 2 on jurisdiction in parental responsibility matters and the newly inserted Chapter III on child abduction)
- 3) requirement of *exequatur*
- 4) hearing of the child
- 5) actual enforcement of decisions (regulated in the new Chapter IV on recognition and enforcement)
- 6) cooperation between Central Authorities (regulated in the new Chapter V)

Future perspectives: the BIIa Recast proposal

Matrimonial matters

The choice **not to amend Art. 3** on general jurisdiction is negative

- it is actually **possible to misuse** the alternative grounds of jurisdiction in order to initiate the legal proceedings before a more favourable court
- an amendment introducing a **hierarchy** between those grounds of jurisdiction, or **removing some of them**, may have been **welcomed**

4. Main issues: diversity among national substantive legislation

- MS sovereignty
 - diversity of family law notions
i.e. marriage/spouses/same-sex couples/
civil partnerships
- BUT autonomous concepts under EU law
such as habitual residence, seising of a
court, *lis pendens*, etc.

4. Main issues: diversity among national enforcement procedures

Enforcement procedures still follow the rules under national laws

- important role of certificates/annexes in the EU legal instruments
- BUT no common standards established at the EU level, nor harmonisation of national laws

5. Interplay with Hague Conventions

2007 Hague Protocol (applicable law to maintenance obligations)

- entered into force on 1 August 2013
- 29 Contracting States (all EU MS, plus Serbia and Kazakhstan; Ukraine signed on 21-3-2016)
- interplay with **Maintenance Reg.** with regard to the **applicable law to maintenance obligations** (Art. 15 of the Reg. directly refers to the Protocol)

5. Interplay with Regulations in other areas

Service of documents

- Reg. 1393/2007 of 13 November 2007
 - entered into force on 30 December 2007
 - it applies since 13 November 2008

Taking of evidence

- Reg. 1206/2001 of 28 May 2001
 - entered into force on 1 July 2001
 - it applies since 1 January 2004