Property Relations of Cross-Border Couples in the European Union

Eds.

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that other state in arranging or planning their property relations. Once the judge, in a discretionary capacity, has considered it possible to apply a law other than the law under which the partnership was formed, this law also applies to the institution of the partnership. This solution has the advantage of simplifying the procedure, but its functioning is subject to the agreement of both partners. In the event of disagreement, the applicable law identified by the court on application by a partner shall govern the property consequences of the registered partnership from the time when the partners have established their last habitual residence in the State whose law either of them invokes as applicable.[116] Third parties, by express provision of Article 26(2), may not be adversely effected by the partners exercising the criteria for the identification of the applicable law exceptionally provided for in this paragraph: for them the applicable law will remain the one identified in connection of the State in which the partnership was instituted.

5. The concept of "habitual residence"

Regulation (EU) no. 2016/1104[117] introduced the possibility for partners to choose the law applicable to the property consequences of their registered partnership based on specific connecting factors provided for in Article 22, namely: 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.

In the event that the couple has not made any choice, in accordance with Article 26 of the Regulation, the applicable law is the one of the State in which the partnership has been registered. In addition, according to Article 26(2)(a), if one of the partners so requests, the law of the State where the couple had their last common habitual residence for a significantly long period of time may be applied. This option is an exception to the general rule laid down in Article 26(1), which allows the possible conflict between the partners to be overcome through the use of different criteria.[118] Similarly, Articles 22(1)(a) and (b) and 26(1)(a) and (b) of Regulation (EU) 2016/1103 refer to habitual residence and nationality as connecting factors for the identification of the law applicable to the matrimonial regime.

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residence in a given State, which law is applicable whenever a spouse exceptionally requests the application of the law of a State other the one where the couple has established their common habitual residence after the marriage.

[116] Obviously, if the partners have entered into an agreement before the establishment of the last common habitual residence, the rules introduced by Article 26(2) cannot be invoked, as expressly laid down in the last part of Article 26(2), which states: "This paragraph shall not apply when the partners have concluded a partnership property agreement before the establishment of their last common habitual residence in that other State".

[117] Regulation (EU) n. 1104/2016, n. 4, *supra*.

[118] P. Bruno, n 14 *supra*, 206-210; Id.,'I Regolamenti UE n. 1103/16 e n. 1104/16 sui regimi patrimoniali della famiglia: struttura, àmbito di applicazione, competenza giurisdizionale, riconoscimento ed esecuzione delle decisioni', in *www.distretto.torino.giustizia.it*; G.V. Colonna, 'Il Regolamento europeo sui regimi patrimoniali tra coniugi' *Notariato*, 308 (2019).

The European legislator has given a primary role, in the respective fields of the two Regulations, to the criterion of habitual residence.[119] This choice seems to be based on the need for a uniform interpretation of the legislation in relation to the increasing transnationality of couples and the free movement of persons.[120] Regarding these aspects, the criterion of habitual residence appears as a parameter expressing the flexibility needed to determine the place where the couple is actually settled. This is a connecting criterion that has been consolidated to the detriment of other parameters, such as domicile,[121] precisely because of its provision in other European legislation, including Regulation 2201/2003, Regulation 2010/1259 and Regulation 2012/650.[122]

Domicile, as a connecting criterion, is more difficult to apply, both because of the differences between common law and civil law systems and because of the different definitions that have been given within each system.[123] Moreover, the concept of domicile is mainly based on the economic aspects of a citizen, while the residence refers to a communion of life of the partners and therefore also refers to both the personal profiles of the couple, as well as their economic environment. The prevalence of the criterion of habitual residence over that of domicile has therefore been outlined in the European context as it allows an interpretation that can be tailored to the complex family situations affecting the cross-border couple. In any case, in the various regulatory texts as well as in the twin Regulations, the legislator did not provide a definition of habitual residence, so that it remained the subject of "autonomous" interpretation in the case law of the Court of Justice.[124] Long-established case law already refers to "habitual residence" as the place where there is a concrete evidence of integration between a citizen and the social environment. This is an assessment that cannot be made with reference to the registered

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[119] The criterion of habitual residence was introduced in Regulation (EU) 2010/1259, Regulation (EU) 2012/650, Regulation (EU) 2016/1103 and Regulation (EU) 2016/1104, at *https://eur-lex.europa.eu*; E. Calò, 'Variazioni sulla *professio iuris* nei regimi patrimoniali delle famiglie' *Rivista del Notariato*, I, 3-8 (2017); N. Cipriani 'Rapporti patrimoniali tra coniugi, norme di conflitto e variabilità della legge applicabile' *Rassegna di diritto civile*, I, 27-29 (2019).

[120] Regarding the aspects related to habitual residence and citizenship see R. Clerici, 'Alcune considerazioni sull'eventuale ampliamento del ruolo della residenza abituale nel sistema italiano di diritto internazionale privato', in C. Campiglio ed, 'Un nuovo diritto internazionale privato', (Milan: Cedam, 2019) 56-64.

[121] V, Ch. IV, *infra*. On this topic see, P. Rogerson, 'Habitual residence: the new domicile?' 9 *Int'l & Comp. L.Q.*, 86-96 (2000).

[122] The criterion of habitual residence has also been introduced in the so-called Rome I and Rome II Regulations concerning the law applicable to contractual and non-contractual obligations. See M.J. Cazorla González, 'Matrimonial property regimes after the dissolution by divorce: connections and variables that determine the applicable law', in J. Kramberger Škerl, L. Ruggeri and F.G. Viterbo eds, n 16 *supra*, 40-48; D. Damascelli, 'Applicable law, jurisdiction, and recognition of decision in matters relating to property regimes of spouses and partners in European and Italian private International law' *Trust & Trustees*, 6-11 (2019).

[123] C. Consolo, 'Profili processuali del Reg. UE 650/2012 sulle successioni transnazionali: il coordinamento tra le giurisdizioni' *Rivista di diritto processuale civile*, 18-20 (2018).

[124] In the Explanatory Report by A. Bórras, at *https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A51998xg0716*, included in the Hague Conference on Private International Law, the concept of habitual residence is defined according to the case law of the Court of Justice as a "place in which the person concerned has established, with the intention that it should be of a lasting character, the permanent or habitual centre of his interests. However, for the purposes of determining such residence, all the factual circumstances which constitute it must be taken into account". On the topic see M. Mellone, 'La nozione di residenza abituale e la sua interpretazione nelle norme di conflitto comunitarie' *Rivista di diritto internazionale privato e processuale*, 691-693 (2010); C.A. Marcoz, 'Il Regolamento (UE) 650/2012: la determinazione della "residenza" e altri problemi', in *Eredità internazionali: italiani con beni all'estero e stranieri con beni in Italia* (Milano: Consiglio Notarile, 2014), 3.

residence or citizenship, when it is clear that the main and ongoing aspects of the couple's life are centred in a different place.[125] In this context, an extensive interpretation allows to overcome the variety of the individual legal systems and to safeguard the interests of the couple, taking into account personal, economic and social aspects. The aim is to overcome the difficulties of identifying the law applicable to the property of cross-border couples without, however, having to distinguish between the marital bond and registered partnerships.[126]

The concept of habitual residence allows the analysis of a multiplicity of heterogeneous factors, and this favour the balancing of the aspects relevant to determining the law that will be called upon to regulate the concrete case. Residence must be understood as the place where the person concerned has established, in a stable manner, the permanent or habitual centre of their personal and economic interests, provided that all the elements of social reality which contribute to its constitution must be taken into account. The term "habitual" must therefore be given an autonomous interpretation that must be derived not only from the context in which the provisions of Regulations 1103 and 1104 are inserted, but also on the basis of the stability and social integration that the cross-border couple demonstrates with respect to a given territory.

5.1. Habitual residence in personal family relationships

A useful reference in the definition of habitual residence can be found in the case law on personal family relationships, where the Court of Justice recommends not to generalise, but to take into account all the interests at stake in order to understand where it should be situated.

As the Court has pointed out, the concept of habitual residence must be interpreted in accordance with the specific factors which distinguish one case from another, beyond the strict definitions and with respect for the family context in which it is situated. For example, in case A (C-523)[127] the Court of Justice[128] was asked to establish, in accordance with Article 8(1) of Regulation 2003/2201, the habitual residence of two minors who were formally resident in Sweden but had been living for some time in Finland where they had no fixed abode, did not attend school and were continually exposed by their mother to conditions of serious health danger.

The Court held that habitual residence should be established on the basis of the best interests of the children as well as the criterion of proximity to the territory. Moreover, consideration had to be given to the specific factual circumstances and reasons for

[125] The increased mobility of citizens contributes to the formation of cross-border couples who are bearers of different cultural identities and who need regulatory protection adapted to the increasingly complex social reality.

[126] L. Ruggeri, n 10 *supra*.

[127] Court of Justice, 2 April 2009, Case C-523/07. In legal literature, R. Lamont 'Habitual Residence and Brussels II-*bis*: Developing Concepts for European Private International Family Law' *Journal of Private International Law*, III, 261-281 (2007); N. Joubert, 'La dernière pierre (provisoire?) à l'édifice du droit international privé européen en matière familiale. Les règlements du 24 juin 2016 sur les régimes matrimoniaux et les effets patrimoniaux des partenariats enregistrés', n. 2, *supra*, 3-17.

[128] See also Court of Justice, 27 November 2007, Case C-435/06.

residence on the territory of a State, school attendance, language skills and family and social relations established by minors.[129] Essentially, the case law highlighted that the relevant aspects of "habituality" are those related to the non-occasional or temporary physical presence of a citizen or couple in the territory of a State.[130] In any case, the elements indicating a child's integration into a social and family environment remain variable.[131] In fact, within an increasingly complex social context, the analysis conducted by the Court based on subjective and objective elements relating to the relevant case, becomes necessary for the uniform application of the law in the national legal systems.

However, a child born in a non-member country, from a British father and a Bengali mother (*UD v. XB*, C-393/18), has not been recognised as habitually resident in the United Kingdom. In this case, both parents lived permanently in the United Kingdom, but the birth took place in Bangladesh, where the mother and the child continued to live because of the husband's coercion. Later, the mother asked to return to the UK and to be able to assign her new born child's habitual British residence. The Court held that the unlawful conduct of one parent on the other, which resulted in the birth of the child in a third State and the violation of the fundamental rights of the mother, still do not allow the child to be considered habitually resident, within the meaning of Article 8(1) of Regulation 2003/2201, in a Member State to which they have never been to.[132] Residence can be defined as habitual when "there are symptomatic indicators linked to the continuity of the couple's life or to the parties' intention to organise life together in a given state".[133]

The concept of habitual residence is invoked by the court to provide protection for the children but is always interpreted extensively and not automatically. Essentially, the judge is required to perform a complex analysis of subjective and objective factors.

Sometimes in order to establish the habitual residence of a child, it is necessary to first understand the place where the couple's life is rooted. The Court thus held in *HR v. KO* (C-512/17) that the habitual residence of the child should correspond to the place which, in practice, is the centre of that child's life. In that case, a Polish citizen asked to establish the place of residence of her daughter at her own place of residence. The child had dual nationality and expressed herself in Polish, but lived in Belgium with her mother, where she received constant visits from her father who was a Belgian citizen. Therefore, even if the

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[129] Case C-523/07, n. 11, *supra*, 127. On habitual residence see H. Storme 'Compétence internationale en matière d'autorité parentale. Résidence habituelle de l'enfant', *Revue du droit des étrangers*, 650-660 (2008); S. Marino, 'Nuovi criteri interpretativi per la determinazione della giurisdizione in materia di responsabilità genitoriale: la nozione di residenza abituale dei minori in una recente sentenza della Corte di giustizia CE' *Rivista di diritto processuale*, 467-476 (2010); G. Chiappetta, 'La «semplificazione» della crisi familiare: dall'autorità all'autonomia', in P. Perlingieri and S. Giova eds, *Comunioni di vita e familiari tra libertà, sussidiarietà e inderogabilità* (Naples: Edizioni Scientifiche Italiane, 2019), 435-464.

[130] Opinion of Advocate General Juliane Kokott delivered on 29 January 2009 in Case C-523/07 where it is noted in paragraph 44 that the intention of parents to settle with the child in a different State is manifested by external circumstances such as the purchase or lease of a residence. On the topic see É. Viganotti 'La notion de "résidence habituelle" de l'enfant selon la CJUE' *Gazette du Palais*, 40, (2018) 24-26; C. Nourissat 'Encore et toujours la résidence habituelle de l'enfant, *Procédures*, 4, 24-25 (2017).

[131] On the case law regarding the habitual residence of the child see also Court of Justice, 8 June 2017, case C-111/17, *C.G, OL. c. PQ*.

[132] Court of Justice, 17 October 2018, Case C-393/18, *UD v. XB*.

[133] Court of Justice, 14 February 1995, Case C-279/93, *Finanzamt Köln-Altstadt v. Schumacker*; Court of Justice, 14 September 1999, Case C-391/97, *Gschwind v. Finanzamt Aachen-Außenstadt*; Court of Justice, 16 May 2000, Case C-87/99, *Patrik Zurstrassen v. Administration des contributions directes*.

family environment of a new born is largely determined by the parent with whom he or she lives daily, it is true that the other parent is part of it if he or she maintains regular contact with the child. The habitual residence as a connecting criterion, therefore, does not arise from a static activity, but varies according to circumstances[134] which distinguish each different situation. In a context of increasing mobility of persons in a border-free area, which has led to an increase in the number of couples' transfers, habitual residence, as a connecting factor, expresses its suitability to simplify the identification of the applicable law and makes it possible to safeguard the values underlying the different legal systems, precisely because its definition varies according to the circumstances that distinguish each individual case.[135]

5.2. Residence in family property relations

The concept of habitual residence also acts as a link between property and personal aspects of family relations. The case of *MH, NI v. Oj, Novo Banco SA*[136] gave the Court of Justice the opportunity to rule on aspects of an insolvency proceedings in relation to a couple who were not engaged in business activities. The question concerned a couple who, while working and residing in the UK, requested the opening of its insolvency proceedings in Portugal where it owned a single asset. On the contrary, the *Tribunal da Relação* considered that the centre of interest of the couple should be understood as coinciding with the place of their habitual residence and therefore in the United Kingdom. In the opinion of the Advocate General[137] it is pointed out that the criteria used to identify the place of habitual residence under Regulation 2003/2201 do not seem to me to be transposable to Regulation 2015/848 in order to determine the reasons why the place of habitual residence is presumed to be the centre of a debtor's main interests. The location of the centre of main interests should be understood as the place, recognisable by third parties, where the debtor habitually carries out the management of his interests. The centre of interest of the couple, therefore, must be assessed taking into account how it is perceived by the social community in which the couple manages their family property. The identification can be done on the basis of the legitimate expectations of third parties and the social acknowledgement of the legal situation as it appears from the outside.
In the dynamic of legal interpretation, priority must then be given not to elements that relate to the social or family situation, but to those that relate to the debtor's property situation. However, this approach cannot also apply to interpersonal relations which have economic implications, such as marital relations or relations between members of the same family. Indeed, "such relationships may affect a debtor's situation in so far as concerns its assets and may, in particular, cause the debtor to enter into transactions with third

[134] Court of Justice., 28 June 2018, Case C-512/17, *HR* c. *KO, Prokuratura Rejonowa Poznań Stare Miasto w Poznaniu*; F. Mancini, 'Regimi patrimoniali della famiglia e prospettive di innovazione' *Rassegna di diritto civile*, 172-174 (2014).
[135] R. Clerici, n. 120, *supra*, 62-65; F. Salerno, n 82 *supra*, 36-42.
[136] Court of Justice, 30 April 2020, Case C-253/2019, *MH, NI c. Oj, Novo Banco SA*.
[137] Conclusions of Advocate General Maciej Szpunar submitted on 30 April 2020, paragraph 45.

parties".[138] The obligations undertaken to meet the needs of the family are not limited to the couple's internal relationships, but necessarily extend to the outside world and affect many aspects of life as a couple.[139] Thus, the line between the economic situation and the family situation of the couple is almost always likely to blur. The Advocate General therefore argues that in the absence of other factual elements,[140] the centre of the couple's main interests must be situated in the same State as their habitual residence, since it is there that the spouses carry out significantly long periods of their private life and exercise the management of their affairs on an ongoing basis.

According to case law, the criterion of connection between personal and property relationships is therefore comprised of a concrete analysis of the elements pertaining to each different situation.

European legislation, through the concept of habitual residence, has essentially introduced an evaluation criterion which originates from the analysis of the individual case and which does not only take into account economic aspects.[141]

The concept of habitual residence was also applied by the French courts to determine the law governing the succession in the *J.P. Smet* case.[142] In his will the deceased had chosen the law of the State of California, where he claimed to be a resident. At the request of the heirs, the French court, under Article 21 of Regulation 2012/650 and after an overall assessment of the circumstances of the deceased's life in the years preceding his death, found that the centre of the family's interests and social life was still in France, so that the place was to be considered the last habitual residence of the deceased, and declared applicable the French law.

It seems therefore to be necessary to attribute to habitual residence, as a criterion for the choice of the applicable law, an interpretation that abstracts itself from the national legal systems, to assume a not only formal, but rather a substantive nature. This does not exclude different interpretations by the courts of the Member States, but in any case, there is a renewed way of reasoning based on fairness and the balancing of principles and values being implemented beyond the multitude of jurisdictions. [143]

The Court of Justice thus guides the national courts, because the indications in its case law do not necessarily stop with the court which requested the judgment, but supplement the law of the different Member States, albeit in accordance with the principles which

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[138] See paragraph 46, opinion of the Advocate General Maciej Szpunar submitted on 30 April 2020, Case C-253/19, n. 20, *supra*.

[139] L. Ruggeri, n 10 *supra*.

[140] Conclusion, Case C-253/19, n. 138 *supra*, paragraph 65.

[141] On the topic cf. P. Perlingieri, *Il diritto civile nella legalità costituzionale* (Naples: Edizioni Scientifiche Italiane, 2006), 348.

[142] See Tribunal de Grande Instance de Nanterre, Ordonnance de Mise en Etat, rendue le 28 May 2019, n. 18/01502, in *www.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2019/06/doc190619-19062019144050.pdf*;; I. Kunda, S. Winkler e T. Pertot, Cap. III *infra*, Sect. III, § 1, where it is pointed out, with regard to the concept of habitual residence: "Although some authors are surprised that the definition of the "habitual residence" is not included in the Succession Regulation, this is done on purpose as in all other EU legal instruments with respect to the natural persons outside the professional sphere. This affords the national courts with the necessary flexibility when deciding in concreto, whereas they may rely on the extensive criteria and guidelines provided for in the CJEU".

[143] P. Perlingieri, 'Applicazione e controllo nell'interpretazione giuridica' *Rivista di diritto civile*, 317-342 (2010).

characterise each individual system.[144] As stated by authoritative literature[145], the "unity is given by the synthesis and integration of principles and rules from national, supranational and international sources". There is, therefore, a clear need for cooperation between the European Courts and those of the national legal systems, as it is from mutual dialogue that the process of harmonisation between European law and that of the Member States is integrated and conforms, while respecting the different national identities.[146]

6. The criterion of nationality

The criterion specified in Article 22(b) of the Regulation provides for the possibility of choosing the law of the State of nationality of the partners or future partners at the time of conclusion of the agreement. Nationality is the criterion that can be immediately identified as it is based on certainty.[147]

Nationality as a relationship between a citizen and a State has been complemented by the concept of "European citizenship"[148] which has given a renewed dimension to the integration of citizens which is no longer based solely on economic aspects.

European citizenship has not replaced the national one but has granted a number of essential additional rights to all citizens within the European Union. The status of European citizen has made it possible to obtain, irrespective of one's nationality, the same legal treatment, including the right of residence in another Member State, thus making European citizenship a source of the right to free movement.[149]

The territory of the Member States has become an area of freedom, security and justice[150] where citizens have the right to move freely while maintaining their personal and family status.[151] In fact, in the case of *Uwe Rüffler v. Dyrektor Izby Skarbowej we Wrocławiu Ośrodek Zamiejscowy w Wałbrzychu*[152] concerning an application for a reduced tax pension by a Polish national, settled in Germany, the Court held that the status of citizen of the Union allows a person in the same situation to obtain equal treatment, irrespective of nationality, as an affirmation of the freedom to move and reside in the territory of the Member States.

There is no reference in Regulation 2016/1104 to the multiple nationality of the partners, contrary to Article 26(2) of Regulation 2016/1103, which provides that if the spouses have

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144 P. Perlingieri, 'Diritto comunitario e identità nazionali' *Rassegna di diritto civile*, 530-545 (2011)

145 Similarly P. Perlingieri, 'Applicazione e controllo nell'interpretazione giuridica', n 143 *supra*, p. 341-342.

146 P. Perlingieri, 'Il rispetto dell'identità nazionale nel sistema italo-europeo' *Il Foro napoletano*, 451-453 (2014); G. Carapezza Figlia 'Tutela dell'onore e libertà di espressione. Alla ricerca di un «giusto equilibrio» nel dialogo tra Corte europea dei diritti dell'uomo e giurisprudenza nazionale' *Diritto di famiglia e delle persone*, 1012-1014 (2013); A. Alpini, *Diritto italo-europeo e princípi identificativi* (Naples: Edizioni Scientifiche Italiane, 2018) 130-139.

147 R. Clerici, n. 120, *supra*, 2-23.

148 The concept of citizenship of the European Union was introduced with the Maastricht Treaty of 1992, in *www.europarl.europa.eu/about-parliament/it/in-the-past/the-parliament-and-the-treaties/maastricht-treaty*.

149 See Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, Brussels, 16.03.2011, COM(2011) 127, 2011/0060 (CSN), in *www.europarl.europa.eu*.

150 See EU Citizenship Report 2010. Dismantling the obstacles to EU citizens' rights, Brussels, 27.10.2010 COM(2010) 603, in *https://eur-lex.europa.eu*.

151 L. Ruggeri, n 10, *supra*.

152 Court of Justice, 23 April 2009, Case C-544/07, *Uwe Rüffler* c. *Dyrektor Izby Skarbowej we Wrocławiu Ośrodek Zamiejscowy w Wałbrzychu*.

more than one common nationality at the time of the conclusion of the marriage, only the criterion of common habitual residence or that with which the spouses jointly have the closest connection applies.

However, the complexity of the issue has been addressed in Recital 49 where it is pointed out that the problem of how to consider a person with multiple nationality is a preliminary question which falls outside the scope of Regulation 1104 and should be left to national law, including, where applicable, international Conventions, in full observance of the general principles of the Union.[153] It should also be noted that this is a consideration that should have no effect on the validity of a choice of law that partners have made in accordance with the Regulation. In any case, it is a criterion that has its origin in the principle of non-discrimination on grounds of nationality.[154]

In the absence of a specific provision on multiple nationality in Regulation 1104, the interpreter should consult the relevant case law on marriage so that a definition of the applicable rules can be reached through a homogeneous assessment of the different family models.[155] On this point, the Court of Justice in the divorce proceedings *Laszlo Hadadi v. Csilla Marta Mesko Hadadi* argued that the courts of the Member States of which the spouses have dual nationality both have jurisdiction and that the spouses may freely choose the court of the Member State to which they wish to submit the case.[156] The coexistence of several jurisdictions is therefore allowed, without any hierarchy being established between them. It follows, according to the Court's reasoning, that there can be no grounds for establishing the prevailing nationality since «such an interpretation would restrict individuals' choice of the court having jurisdiction, particularly in cases where the right to freedom of movement for persons had been exercised».[157]

Therefore, one nationality cannot be considered to prevail over another even when it comes to identifying the applicable law.[158] In any case, the specific criteria dictated on jurisdiction mitigate the problems arising from the litispendence of proceedings.[159] One of the innovative aspects of Regulations 1104 and 1103 of 2016 is in fact that couples of different nationalities can find appropriate and specific provisions for the protection of the

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153 See R. Baratta, 'Riconoscimento dello stato personale e familiare straniero: una prospettiva basata sui diritti' *Rivista di diritto internazionale privato e processuale*, (2016) 413-415.

154 Article 18 TFEU provides that any discrimination on grounds of nationality is prohibited within the scope of application of the Treaties; V. D. Damascelli, 'La legge applicabile ai rapporti patrimoniali tra coniugi, uniti civilmente e conviventi di fatto nel diritto privato italiano ed europeo' *Rivista di diritto internazionale*, IV, 1111-1134 (2017).

155 On the definition of the rules applicable to "new family models" see G. Perlingieri, 'Interferenze tra unione civile e matrimonio. Pluralismo e unitarietà dei valori' *Rassegna di diritto civile*, 102-105 (2018), where it is highlighted that it is necessary to avoid creating "non-communicating categories or sub-categories", but to assess the opportunity for homogeneous treatment of the couple both in marriage and in partnerships. On the common foundation of all forms of family see F. Parente, 'I modelli familiari dopo la legge sulle unioni civili e sulle convivenze di fatto' *Rassegna di diritto civile*, 958-963 (2017).

156 Court of Justice, 16 July 2009, Case C-168/08 *Laszlo Hadadi v. Csilla Marta Mesko Hadadi*, paragraph 58.

157 Case C-168/08, n 156 *supra*, paragraph 53.

158 P. Bruno, n 14 *supra*, 205-208; Id., 'I Regolamenti UE n. 1103/16 e n. 1104/16 sui regimi di famiglia: struttura, àmbito di applicazione, competenza giurisdizionale, riconoscimento ed esecuzione delle decisioni', in *www.distretto.torino.giustizia.it*.

159 V. L. Ruggeri, n 10, *supra*.

patrimonial aspects of their own partnership[160] even when the relationship is not based on marriage.

7. Mandatory provisions and public policy

The possibility given to the courts to exclude the application of the law of a given State, or to decline jurisdiction whenever the applicable law conflicts with mandatory provisions or public policy, is one of the most sensitive aspects of Regulation 1104. The mandatory provisions of the court's law continue to apply, with the result that, in the event of conflict with the rules applicable under the Regulation, the latter are superseded. As expressly established by Article 30, whatever the law applicable to the property consequences of registered partnerships, the mandatory provisions for the protection of public interests relating to the "political, social or economic organization" of the State of the *forum* represent an obstacle to the application of foreign laws that may be adopted under the Regulation. A significant influence on the impact of the Regulation is due to the interpretation of Article 30 by the courts. A systematic and axiological interpretation of the body of law dedicated to the regulation of the property consequences of partnerships and matrimonial property regimes leads to the conclusion that the *lex fori* can only in exceptional cases prevent the application of foreign laws. In favour of the residual nature of the mandatory provisions, Article 30 limits them to the only rules for which compliance must be considered crucial for a Member State. A strict interpretation of the exceptions to the application of foreign law is called for in Recital 52, which limits the prevalence of the *lex fori* to "exceptional circumstances". Limiting the application of foreign law means not achieving the general objective of Regulation 1104: the greater the number of exceptions, the less predictable the discipline applicable to that particular registered partnership will be. There are mandatory provisions such as principles that regulate certain aspects of property relations that cannot be derogated by the private parties. The mandatory provisions in this specific context could result in a possible fragmentation of the partner's property regulation. A particular asset, if subject to a specific national regulation that the State of the court deems to be crucial for the national politics and economy or for the preservation of certain characteristics of its society, would be governed by the *lex fori* and, consequently, excluded from the uniform rules of Regulation 1104. "Crucial" interests can be considered to be the protection of the State's finances, the protection of the environment, the safeguarding of work: the classification of the mandatory provisions is, therefore, one of the activities that most closely characterises the role of the legal professional in this field, since the list of interests provided in Article 30 is merely an example. In areas subject to substantive harmonisation, the court may classify a rule as being of mandatory application, bearing in mind the crucial interests which also exist in European legislation. National legislators rarely self-declare a particular rule as mandatory: a recent example can be found in some emergency provision adopted during the pandemic by Covid-19 on travel,

[160] Case C-673/16, n 34 *supra*, clarified that the concept of spouse, within the meaning of the provisions of EU law on freedom of residence for nationals of Member States and their family members, also includes spouses of the same sex.