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Remarks on the EU regulation of 24 June 2016 in matters of matrimonial property regimes

Abstract: The article is devoted to an analysis of EU regulation 2016/1103 of 24 June 2016 in matters of matrimonial property regimes. It starts with a description of perturbations that emerged during the preparation of the regulation and led to the need for proceeding by way of enhanced cooperation. This part of the paper presents the official position adopted by Poland towards the regulation. The section that follows discusses the notion of matrimonial property regime within the meaning used in the regulation. In doing so, it addresses the issue of doubts accompanying the qualification of the obligation to participate in satisfying family needs and donations *inter vivos* between spouses. This is followed by presentation and evaluation of solutions adopted within the framework of particular conflict rules. Special attention in this regard is paid to the issue of the choice of law's effect over time. With respect to the rules that determine applicable law in the event of absence of a choice of law, the article concentrates on a solution consisting in petrification of applicable law and the possibility of breaking it. The final part is devoted to the scope of application of the law applicable to the matrimonial property regime. Here, the solution concerning the material validity of matrimonial property agreement and the effects of the matrimonial property regime on a legal relationship between a spouse and third parties is evaluated.

Keywords: regulation 2016/1103, matrimonial property regime, enhanced cooperation, conflict rules, choice of law, retroaction, material validity of matrimonial property agreement, third parties

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1. Introduction

Regulation 2016/1103 on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes was adopted by the Council of the European Union on 24 June 2016. It shall apply from 29 January 2019 in the 18 Member States which participate in enhanced cooperation centred on this regulation and on regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, treated as a second element of the so-called package. These 18 Member States are as follows: Malta, Croatia, Belgium, Germany, Greece, Spain, France, Italy, Luxembourg, Portugal, Slovenia, Sweden, Czech Republic, Netherlands, Bulgaria, Austria, Finland, and Cyprus. As it is easy to notice, Poland is not among these states.

The regulation is the fruit of works, whose beginning can be dated to 1998, the year of the adoption of the Vienna Action Plan[1], which among the measures intended to implement the provisions of the Amsterdam Treaty indicated the examination of the possibility of creating a European legal instrument regulating the issue of matrimonial property regimes. Invoking only the most important dates and stages leading to the adoption of said regulation, it must be mentioned that the Hague Programme[2], adopted in 2004, envisaged the establishment of legislation regarding "the conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition" before the year 2011. In 2006, the European Commission published a Green Paper concerning these problems[3]. Finally, on 16 March 2011, the European Commission adopted a proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes[4]. Adopted at the same time was a proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships[5]. It must he highlighted at this point that the majority of the Member States insisted that both the proposals be adopted as a whole. It should also be noted that the legal basis for establishing European Union normative acts concerning

[1] OJ C 19, 23.1.1999, p. 1—15.

[2] The Hague Programme: strengthening freedom, security and justice in the European Union OJ L 53, 3.3.2005, p. 1.

[3] COM(2006) 400.

[4] COM/2011/0126 final — CNS 2011/0059.

[5] COM/2011/0127 final — CNS 2011/0060.

family law and "having cross-border implications" is Article 81(3) of the Treaty on the Functioning of the European Union[6], pursuant to which a special legislative procedure requiring unanimity in the Council is applicable to this type of legal instruments. Hence, intensive consultations were launched, and changes were made in both drafts so that both of them could be accepted by all Member States. Notwithstanding the efforts, unanimity was not reached. This was due to a stance taken by Poland and Hungary. More precisely, during a session of the Committee of Permanent Representatives (COREPER), the Polish and Hungarian delegations proposed to include in the draft of the regulation on matrimonial property regimes a provision (based on Art. 13 of divorce regulation), in the light of which the scope of application of the regulation, with respect to those marriages which are not known in the legal systems of all the Member States, would depend on the stance of substantive *lex fori* on admissibility of the conclusion of marriage in question[7].

It should be explained at this point that the key factor that determined Poland's position on the issue was fear of the interference of the European Union with Polish substantive family law[8]. Said interference would allegedly be the consequence of the fact that the scope of the regulation was also to cover matrimonial property regimes of same-sex spouses[9]. In particular, the Information on the position of the Republic of Poland reads as follows: "If the adoption of the regulation were to lead to the obligation to apply its provisions also to matrimonial property regimes of relationships which do not meet the criteria of marriage laid down in the national law of a given state, it would in fact indirectly lead

[6] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union — OJ C 326, 26.10.2012, p. 1—390.

[7] See document 14660/15. Text available online at: http://www.consilium.europa.eu/register/en/content/out/?&typ=ENTRY&i=ADV&DOC_ID=ST-14660-2015-INIT.

[8] See information on the stance taken by Poland. Draft of 20 November 2015. Text available online at: https://bip.ms.gov.pl/pl/projekty-aktow-prawnych/prawo-unii-europejskiej/. See also: P. Mostowik: *Jak nie ujednolicać międzynarodowego prawa prywatnego i postępowania cywilnego, czyli o projektach rozporządzeń unijnych dotyczących majątkowych ustrojów małżeńskich i skutków związków partnerskich*. EPS November 2011, p. 12 and subsequent pages; Idem: *Kwestie kompetencji Unii Europejskiej oraz warunków pomocniczości i proporcjonalności prawodawstwa unijnego na tle projektów rozporządzeń o jurysdykcji, prawie właściwym i skuteczności zagranicznych orzeczeń w majątkowych sprawach małżeńskich i partnerskich*. „Zeszyty Prawnicze Biura Analiz Sejmowych Kancelarii Sejmu" 2011, Issue 3, p. 11 and subsequent pages; A. Mączyński: *Nowa regulacja międzynarodowego prawa rodzinnego*. In: *Rozprawy z prawa prywatnego oraz notarialnego. Księga pamiątkowa dedykowana Profesorowi Maksymilianowi Pazdanowi*. Eds. A. Dańko-Roesler, A. Oleszko, R. Pastuszko. Warsaw 2014, p. 231.

[9] Ibidem.

to interference with the area of family law of member states. […] This type of influence of the regulation on the national law system is objectionable. Accordingly, a solution should be introduced to the draft of the regulation that would enable member states to not apply its provisions to matrimonial property regimes of marriages which do not meet the criteria of marriage in the light of national law of a given member state, or alternatively other solutions having a similar effect should be introduced. In the absence of such a solution, objecting to the adoption of the regulation is legitimate"[10]. While Poland's official position was not against the idea of uniformisation of private international law in the EU with respect to matrimonial property regimes of spouses of different sex, and nor did it raise objections as to the detailed solutions envisaged in the draft, it did not accept the proposed scope of the regulation covering also matrimonial property regimes of same-sex spouses.

Similarly, Hungary expressed concerns regarding the application of the provisions of the regulation with reference to institutions unknown to the law of this country[11]. However, the vast majority of the delegations deemed the proposal to include the aforesaid additional provision unacceptable[12]. At the same time, the Polish delegation pointed out difficulties precluding the acceptance by Poland of the proposal regarding the property consequences of registered partnerships[13]. Finally, at the Justice and Home Affairs Council meeting held on 3—4 December 2015 it was concluded that it would not be possible to reach an EU-wide agreement in relation to both regulations within a reasonable period of time[14].

Hence, in response to such a state of affairs, the aforementioned 18 Member States took the initiative aimed to establish enhanced cooperation in matters explored by the two proposed regulations in question. As a result of this initiative, on 9 June 2016 the EU Council adopted the decision authorising said states to institute among themselves enhanced cooperation in the area of matrimonial property regimes and the prop-

[10] Ibidem. Cf. Position of the Republic of Poland of 2011, which reads as follows: "A possible supplementation for the public policy clause in the area concerning jurisdiction could be a provision enabling courts to decline jurisdiction in a case, if the law of the court does not consider a given relationship to be a valid marriage for the purpose of the case". Text available at: https://bip.ms.gov.pl/pl/dzialalnosc/projekty-aktow-prawnych/prawo-unii-europejskiej/download,1705,1.html.

[11] See document 14660/15.

[12] See document 14655/15 point 13. Text available online at: http://www.consilium.europa.eu/register/en/content/out/?&typ=ENTRY&i=ADV&DOC_ID=ST-14655-2015-INIT.

[13] Ibidem.

[14] See document 14937/15. Text available online at: http://www.consilium.europa.eu/en/meetings/jha/2015/12/03-04/.

erty consequences of registered partnerships[15]. Next, having consulted the European Parliament, on 24 June 2016 the EU Council adopted Regulation No 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes[16] and Regulation No 2016/1104 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships[17].

2. Scope of application of the regulation

As far as the material scope of application of the regulation is concerned, what draws attention is the fact that the notion of matrimonial property regime was defined in this act very broadly. More precisely, it also covers those property effects of marriage which the doctrine commonly classifies as the so-called primary regime (French *régime primaire*, *régime de base*). These are those effects which are provided for by the norms *iuris cogentis*, applicable irrespective of the matrimonial property regime in the strict sense of the term (*régime secondaire*) of the spouses in question. The literature identifies among these effects in particular the following ones: joint and several liability of spouses for commitments incurred to satisfy ordinary/daily household needs, presumption that the spouse who has control of a given movable and disposes of it, has property rights to this movable, the right of each of the spouses to collect their respective remuneration and dispose of remuneration received, restrictions aimed at protection of family home[18].

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[15] See: document 9979/16. Text available online at: http://www.consilium.europa.eu/register/en/content/out/?&typ=ENTRY&i=ADV&DOC_ID=ST-9979-2016-INIT. On 16 June 2016 the decision was published in the "Official Journal of the European Union" — OJ L 159, 16.06.2016, p. 16.

[16] OJ L 183, 08.07.2016, p. 1. The Regulation shall apply from 29 January 2019 (except for provisions set forth in Art. 63 and Art. 64, which shall apply from 29 April 2018, and Art. 65, 66 and 67, which shall apply from 29 July 2016).

[17] OJ L 183, 08.07.2016, p. 30. The Regulation shall apply from 29 January 2019 (except for provisions set forth in Art. 63 and Art. 64, which shall apply from 29 April 2018, and Art. 65, 66 and 67, which shall apply from 29 July 2016).

[18] See: P. Lagarde: *Presentation delivered at Conference on Clearer Patrimonial Regimes for Europe's international couples (Brussels, 17 October 2011).* Text available online at: http://www.notaries-of-europe.eu//index.php?pageID=2197.

Such a broad scope of the notion of matrimonial property regime emerges from the definition set forth in Art. 3 par. 1 point (a), interpreted following guidelines contained in point 18 of the Preamble. Namely, pursuant to this definition, matrimonial property regime is "a set of rules concerning the property relationships between the spouses and in their relations with third parties, as a result of marriage or its dissolution". Also, guidelines set forth in point 18 of the Preamble indicate that the notion should cover not only "optional rules to which the spouses may agree in accordance with the applicable law" and "default rules of the applicable law", but also "rules from which the spouses may not derogate"; moreover, from further guidelines set forth in point 18 it follows that: the notion in question includes not only the matrimonial property regime in the strict sense of the term, but also all sorts of property relations of the spouses which can be qualified as "resulting directly from the matrimonial relationship, or the dissolution thereof". Hence, the quoted guidelines (which help to determine positively the scope of the analysed notion) contain references to matrimonial property relations which fit within the framework of the primary regime.

As a side note, it should be added that the aforementioned point 18 of the Preamble corresponds with the interpretation of the term "rights in property arising out of a matrimonial relationship" (French "régimes matrimoniaux"), which was presented by the ECJ in its decision of 27 March 1979 in case de Cavel vs de Cavel, in regard to Art. 1.1 of the Brussels Convention of 1968[19].

It must be mentioned that the question of qualification of the property effects of marriage that fit within the framework of the so-called primary regime raised serious doubts in the light of previous versions of proposal for the regulation, which failed to touch upon this issue. The problem of uncertainty as to whether or not said effects are covered by the scope of the regulation was raised by, among others, representatives of the Italian[20], Portuguese[21], Spanish[22] and German doctrine[23]. Amend-

[19] ECJ, 27 March 1979, C-120/79, *de Cavel v de Cavel*, European Court Reports [1979], 1055.

[20] See: I. Viarengo: *The EU Proposal on Matrimonial Property Regimes. Some General Remarks*. "Yearbook of PIL" 2011, Vol. 13, p. 203.

[21] See: H. Mota: *El ámbito de aplicación material y la ley aplicable en la propuesta de reglamento „Roma IV": algunos problemas y omisiones*. "Cuadernos de derecho Transnacional" (Octubre 2013), Vol. 5, Nº2, pp. 428—447.

[22] See: J.M. Fontanellas Morell: *Una primera lectura de las propuestas de reglamento comunitario en materia de regímenes económico matrimoniales y de efectos patrimoniales de las uniones registradas*. In: *Nuevos reglamentos comunitarios y su impacto en el Derecho Catalán*. Ed. C. Parra Rodríguez. 2012, pp. 261—262.

[23] See: M. Buschbaum, U. Simon: *Les propositions de la Commission européenne relatives* à l'harmonisation des règles de conflit de lois sur les biens patrimoniaux des

ments that made it possible to settle this question were not introduced until the version of the proposal dated November 2015. The introduction of these amendments, aimed at fine-tuning of how the concept of the matrimonial property regime should be construed ought to be evaluated positively[24]. In view of difficulties with defining at conflict-of-laws level borderlines between the primary matrimonial regime and matrimonial regime of the "régime secondaire" kind, which could arise given the fact that the different national legal systems have a significantly different approach towards the problem of classifying the various issues to one regime or the other, we should also evaluate positively the solution itself, consisting in uniform treatment of the property effects of the marriage, regardless of whether they gravitate towards one regime or the other.

Nevertheless, it must be emphasised that there are significant doubts regarding the question of whether the scope of the regulation covers the obligation to participate in satisfying family needs. This is because what is also at issue is its qualification as maintenance obligation fitting within the scope of application of the Hague Protocol of 2007[25]. Also, it must be explained that maintenance obligation between spouses has explicitly been excluded from the scope of the analysed regulation. Similar doubts concern those forms of obligation of mutual assistance whose essence is the obligation to provide to a spouse in need means of subsistence (French: *devoir de secours*/Spanish: *deber de socorro*)[26].

Also unclear is the issue of qualification, under the regulation, of donations *inter vivos* between spouses. Indeed, it must be observed that in the initial version of the proposal for the regulation, donations between spouses were explicitly indicated in the catalogue of issues excluded from the scope of application of the act in question. Later, however, it was decided that interspousal donations would not be set forth in this catalogue.

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couples mariés et *des partenariats enregistrés*. «Revue critique de droit international privé» 2011, p. 801 et seq.

[24] Cf. A.E. von Overbeck: *Rapport explicatif sur la Convention-Régimes matrimoniaux de 1978. Tiré à part des Actes et documents de la Treizième session (1976)*. Vol. 2: *Régimes matrimoniaux*…, p. 354—355.

[25] See: M. Revillard: *Droit international privé et communautaire. Pratique notariale*. Paris 2010, pp. 71—72. See also: P. Twardoch: *Stosunki osobiste i majątkowe między małżonkami*. In: "System Prawa Prywatnego". T. 20C: *Prawo prywatne międzynarodowe*. Ed. M. Pazdan. Warsaw 2015, p. 216. See, under the Hague Convention: M. Simon-Depitre: *De la loi applicable à la contribution aux charges du mariage Cour de cassation (1re Ch. civ.). — 6 novembre 1990, Paul Monthe c. Mme Monthe*. « Revue critique de droit international privé » 1991, p. 348 and subsequent pages; B. Audit: *Droit international privé*. Paris 2000, p. 560.

[26] See: P. Twardoch: *Stosunki*…, p. 162.

The same policy was applied when drafting the final version of the proposal[27]. Nevertheless, it is unknown whether the EU legislator wanted to determine in this way that donations *inter vivos* between spouses are covered by the scope of the regulation. If this was indeed its intention, it is difficult to answer the question of to what extent said donations are covered by the scope of the analysed act. After all, the issue of interpousal donations is — from the conflict-of-laws point of view — quite complex. Specifically, limiting the considerations to donations *inter vivos* between spouses, it should be observed that, on the one hand, we do come across in substantive law of various states special rules regarding the admissibility and revocability of such donations, established especially so as to account for the existence of wedlock[28]. Examples of said rules are: prohibition on donations between spouses, or the principle of revocability *ad nutum* of donations between spouses. As it seems, legal solutions of this kind gravitate towards law applicable to property relationships between the spouses[29]. On the other hand, those issues regarding donations *inter vivos* between spouses which do not fit within the framework of the par-

[27] Cf. also point 12 of the Preamble in the wording proposed by the European Commission (COM(2011)0126), and in the wording proposed by the European Parliament (P7_TA(2013)0338) within the framework of the procedure 2011/0059(CNS), and point 22 of the Preamble in the current wording.

[28] See: J. Valéry: *Manuel de droit international privé*. Paris 1914, p. 1086; G.A.L. Droz: *Les régimes matrimoniaux en droit international privé comparé*. In: *Recueil des Cours 1974—III*. Vol. 143. Alphen aan den Rijn 1974, p. 88; H. Batiffol, P. Lagarde: *Droit international privé*. Vol. 2. Paris 1976; P. Mayer: *Droit international privé*. Paris 1977, p. 550 ; G.A.L. Droz: *Regards sur le droit international privé comparé*. In: *Recueil des Cours, 1991—IV*. Vol. 229. Alphen aan den Rijn 1991, p. 165; and also I. Barrière Brousse: *Mariage — Effets*. "JurisClasseur Droit international privé" 2004, 11, fasc. 546—40; I. Dauriac: *Les régimes matrimoniaux et le Pacs*. Paris 2010, p. 160—162. On *ratio legis* of provisions establishing restrictions as to or prohibition of donations between spouses see L. Lyon-Caen: *La femme mariée allemande*. Paris 1903, p. 322. Text available online at http://dlib-pr.mpier.mpg.de/m/kleioc/0010/exec/books/%22167710%22.

[29] See: P. Glenn: *La capacité de la personne en droit international privé fran-ais et anglais*. Paris 1975, p. 204; P. Mayer: *Droit international…*, p. 550; A. Frada de Sousa, L. Moreira de Almeida: *Portugal*. In: *Régimes matrimoniaux, successions et libéralités dans les relations internationales et internes*. Ed. M. Verwilghen. T. 3. Bruxelles 2003, pp. 2110, 2132; H.L. Bauer, W. Baumann, P. Limmer: *Allemagne*. In: *Régimes matrimoniaux, successions et libéralités dans les relations internationales et internes*. Ed. M. Verwilghen. T. 1. Bruxelles 2003, p. 592; F. Salerno Cardillo, D. Damascelli: *Italie*. In: *Régimes matrimoniaux, successions et libéralités dans les relations internationales et internes*. Ed. M. Verwilghen. T. 2. Bruxelles 2003, p. 1590 footnote 11; T. Vignal: *Droit international privé*. Paris 2005, p. 156; P. Wautelet: *Les donations: questions choisies de droit international privé*. In: *Chronique de droit à l'usage du notariat*. Ed. Y.-H. Leleu. Belgique 2007, pp. 539—540; F. Monéger: *Droit international privé*. Paris 2009, p. 111; see also: P. Twardoch: *Stosunki…*, p. 206.

ticular regime that may be provided for with respect to spouses in the domain of contractual obligations can legitimately be qualified as covered by the scope of application of the conflict rules generally governing the donations *inter vivos*, in particular by the scope of application of the conflict rules of the Rome I Regulation[30].

It is nevertheless difficult to settle with certainty how to interpret the EU legislator's resignation from a provision excluding interspousal donations from the scope of application of the regulation.

Also a question to be asked is whether in the regulation on matrimonial property regimes the donations *inter vivos* between spouses haven't been encompassed by the scope of the notion "matrimonial property agreement", defined in Art. 3 of this regulation as "any agreement between spouses or future spouses by which they organise their matrimonial property regime". If this is the case, Art. 27 point (g) of the regulation would offer us an indication that material validity of a donation of the kind discussed here is covered by the scope of application of law applicable to the matrimonial property regime. Indeed, this is how the EU legislator classified, in the aforementioned provision, the issue of material validity of a matrimonial property agreement. We can also ask whether the expression "the transfer of property from one category to the other one", used within the list which was set forth in Art. 27 and which encompasses issues governed by the law applicable to the matrimonial property regime, should not be interpreted as covering also donations *inter vivos* between spouses.

3. Applicable law

3.1. Choice of the applicable law

In art. 22 of the regulation the EU legislator allowed the choice of law with regard to the matrimonial property regime. It is a natural solution if we adopt the conception, which appears to be correct, that property-wise spouses ought to enjoy as wide a range of freedom as possible[31].

[30] See: P. Mayer: *Droit international*..., p. 550; I. Barrière Brousse: *Mariage*..., fasc. 546—40; P. Lagarde: *Presentation*…

[31] See: G.A.L. Droz: *Cours général de droit international privé*. In: *Recueil des Cours IV—1991*. Vol. 229..., p. 218. According to this author, matrimonial property regime should, in the first place, be up to the spouses themselves. About this issue — see: P. Twardoch: *Stosunki*..., p. 133.

At this point it must be specified that, in the light of the regulation, the choice of law can only be made from among those legal systems that comply with the criteria explicitly set by the EU legislator. Thus, spouses or future spouses may designate as the applicable law:

1) the law of the State where at least one of the spouses or future spouses, is habitually resident at the time the agreement on a choice of applicable law is concluded; or
2) the law of the State of nationality of either spouse or future spouse at the time the agreement on a choice of applicable law is concluded.

Adoption of the principle of limited choice of law was intended to eliminate the possibility that the parties will submit their matrimonial property relationships to law which does not have a substantial enough connection with, as it was put in point 5.3 of the explanatory memorandum of the proposal for the regulation[32], "the couple's real situation or past history". As emphasised in the literature, the choice of such a legal system could turn out to be an abuse in respect of the spouse being less informed of its consequences (French "moins informé")[33]. Furthermore, the consequences of such a choice could also be surprising for third party creditor of one or both of the spouses. Hence, the concept adopted in the regulation should be deemed correct. Also correct appears to be the selection of options available in the sphere discussed here to spouses or future spouses. Based on experience obtained in the course of application of the 1978 Hague Convention on the law applicable to matrimonial property regimes[34], which in Art. 3 points 1 and 2 provides for a similar solution[35], it can be foreseen that variants of *professio iuris* admitted in the regulation will in most cases allow to meet the needs of spouses as regards the conflict-of-laws autonomy of will.

At the same time, it should be stressed that the EU legislator has resigned from allowing in the regulation the choice of *lex rei sitae* as

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[32] Proposal for the regulation in the version dated 2 March 2016 — COM(2016) 106 final 2016/0059 (CNS).

[33] See: A. Bonomi: *Les régimes matrimoniaux en droit international privé comparé*. In: *Les régimes matrimoniaux en droit comparé et en droit international privé: actes du Colloque de Lausanne du 30 septembre 2005*. Eds. A. Bonomi, M. Steiner. Genève 2006, p. 63.

[34] See: M. Revillard: *Droit international*..., p. 190.

[35] Art. 3 point 3 also allows the choice of the law of the first State where one of the spouses establishes a new habitual residence after marriage. However, as M. Revillard has observed, this option is seldom used by the spouses, as they fear that such a choice might be deemed ineffective. The reason being the fact that the notary drawing up the act in which the parties designate the applicable law is unable to verify whether the law chosen by them actually meets the criterion set forth in the aforesaid point of the Convention. See: M. Revillard: *Droit international*..., p. 190.

the law, which is to become, by virtue of the *professio iuris*, the law applicable to immovables[36]. It seems that, given the well-known difficulties arising in case of having to apply various legal systems with reference to various assets belonging to the couple of spouses in question[37], the aforementioned resignation from allowing the choice of *lex rei sitae* ought to be evaluated as well-founded[38]. It must also be added that the issue of matrimonial property relationships is, by its very nature, so complicated that its complexity should not be deepened any further by introduction, within this issue, of additional delimitations and differentiation of the applicable law for thus delineated scopes[39].

While discussing the issue of the *professio iuris*, it is worth pointing out that pursuant to Art. 22 of the regulation, if the choice of law or its change is effectuated during the marriage, then the resultant change of the applicable law shall "have prospective effect only", unless the spouses have given the change a "retroactive" effect.

It must be observed, at this point, that the meaning of the expressions used in the invoked provision is not obvious[40] due to the fact that, in the context of Hague Convention provision regulating the problem of impact of the choice of law made during the marriage, namely — in the context of Art. 6 par. 3 of the Convention, Convention commentators, in particular French ones, tend to employ the notion of retroaction in a specific

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[36] See: point 5.3 of the explanatory memorandum of the proposal for the regulation in the version dated 2 March 2016 — COM(2016) 106 final 2016/0059 (CNS).

[37] See: M. Revillard: *Droit international…*, p. 190; Ch. Bidaud-Garon: *Les propositions de règlements sur les régimes matrimoniaux et sur les partenariats enregistrés*. In: *Droit patrimonial européen de la famille*. Ed. E. Fongaro. Paris 2013, p. 80.

[38] Cf. E. Fongaro: *Le changement de régime matrimonial en droit international privé — entre présent et avenir*. «Droit et Patrimoine», December 2012, p. 87 and subsequent pages. On this issue — see also: Ch. Bidaud-Garon: *Les propositions…*, p. 80, footnote 14. See also the arguments invoqued by I. Viarengo: *The EU Proposal…*, p. 212.

[39] See: P. Twardoch: *Stosunki…*, pp. 118—120.

[40] Cf interpretations: B.E. Reinhartz: *The Differences between the Draft regulation on Matrimonial Property Law and the Hague Convention on Matrimonial Property Law 1978, With a focus on the Rules concerning Applicable Law and the Effects on Third Parties* — paper delivered during conference «Plus de clarté pour les régimes patrimoniaux des couples internationaux», Brussels, 17 October 2011, published online at http://www.notaries-of-europe.eu//index.php?pageID=6593#day-2011-10-17-hour-1020;

Ch. Bidaud-Garon: *Les propositions…*, p. 85; E. Fongaro: *Le changement…*, p. 87 et seq.; J. Foyer: *Le changement de régime matrimonial en droit international privé entre règles internes et règles internationales*. In: *Mélanges en l'honneur du professeur Gérard Champenois*. Eds. F. Bicheron, S. Gaudemet. Paris 2012, p. 284; I. Viarengo: *The EU Proposal…*, p. 215.

sense[41]. Strictly speaking, in their deliberations on the aforementioned article of the Convention, they use the word "retroaction" to indicate solely that the change of applicable law affects also the assets acquired before such a change[42]. That said, it should be noted that the aforesaid provision set forth in Art. 6 par. 3 is contrasted with a provision set forth in Art. 8 par. 1 of the Convention, pursuant to which the so-called automatic change of applicable law (which was abandoned in the regulation) "shall have effect only for the future, and property belonging to the spouses before the change is not subject to the new applicable law".

Hence, in the light of the above, it must be stated that the expressions "prospective… only" and "retroactive", used in Art. 22 of the regulation, can be interpreted in two ways: either in the way in which these expressions are understood in the context of the aforementioned provisions of the 1978 Hague Convention or in accordance with the meaning which is traditionally given to these terms. In particular, in case of the first variant of interpretation, it should be considered that, pursuant to the aforementioned provisions of the regulation: as a general rule, the new applicable law, designated by way of choice of law or change of choice of law effectuated during the marriage, governs only the assets acquired after the change of the applicable law[43], however the spouses may adopt another solution, according to which the new applicable law will govern all assets belonging to them, i.e. both those acquired after the change and those acquired before the change of applicable law, the change having — in the traditional meaning of the term — *ex nunc* effect.

However, it seems that from the practical point of view it would be desirable to consider that: as a general rule, the new applicable law, designated by way of choice of law or change of choice of law effectuated during the marriage, governs all assets belonging to the spouses, regardless of whether they were acquired before or after the change of the applicable law, the change in question having *ex nunc* effect, nevertheless the spouses may agree that the change will have a retroactive effect (in the traditional meaning of the term).

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[41] See: A.E. von Overbeck: Rapport…, p. 345. See also: M. Revillard: *Droit international*…, p. 206 (cf. p. 219); R. Crône: *La loi applicable au régime matrimonial. Hier, aujourd'hui, demain*… In: *Mélanges en l'honneur du professeur Gérard Champenois*. Eds. F. Bicheron, S. Gaudemet…, p. 224; E. Fongaro: *Le changement*…, p. 87 i subsequent pages.; P. Murat: *Droit de la famille*. Paris 2013, point 523.114. Cf. F. Bouckaert: *Les points controversés dans les règles de conflit établis par le nouveau Code de droit international privé belge en matière de régimes matrimoniaux*. In: *Mélanges en l'honneur de Mariel Revillard*. Paris 2007, p. 41.

[42] On this issue — see: B.E. Reinhartz: *The Differences*…

[43] In this way: in particular B.E. Reinhartz: *The Differences*…; see also I. Viarengo: *The EU Proposal*…, p. 215.

3.2. Law applicable in the absence of choice of law

In the absence of *professio iuris*, the law applicable to the matrimonial property regime, pursuant to provisions set forth in Art. 26 par. 1 of the regulation, shall be: a) according to the primary rule — the law of the State of the spouses' first common habitual residence after the conclusion of the marriage; b) according to the first of the subsidiary rules — the law of the State of the spouses' common nationality at the time of the conclusion of the marriage, c) according to the second of the subsidiary rules — the law of the State with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances.

As far as the aforequoted provision is concerned, it should be noted that in case of couples changing their centre of life activity from one state to another during the initial period of marriage, the determination of which of these centres ought to be considered the "first common habitual residence after the conclusion of the marriage" may turn out to be difficult. This holds true in particular for couples getting married e.g. at the end of university or scholarship abroad and planning to return to the country of origin or deciding on labour emigration shortly after the conclusion of marriage[44]. In such cases, if the connecting factor discussed here comes to be applied, there is bound to be uncertainty as to the applicable law.

In regard to the principle of petrification of the applicable law, which emerges from the provision quoted above, it should be remarked that it may give rise to legitimate concerns as to difficulties which may arise as the principle: 1) makes impossible automatic adjustment of applicable law to the new situation of the spouses, 2) may lead to the spouses remaining under the law of a state they lost any and all ties with long ago[45]. These problems are well known to the judicature and are quite broadly described in literature[46]. It is also worth explaining that they manifest themselves particularly acutely in case of refugees, who left their home country wishing to sever all ties with the legal order imposed therein[47].

[44] See: G.A.L. Droz: *Les régimes*..., p. 38.

[45] See: M. Revillard: *Droit international*..., p. 205.

[46] See: G.A.L. Droz: *Cours général*..., p. 212; M. Revillard: *Droit international*..., pp. 159—161.

[47] See: G.A.L. Droz: *Les régimes*..., pp. 58—62; Idem: *Cours général*..., pp. 214—215; M. Revillard: *Droit international*..., pp. 161—162; R. Crône: *La loi applicable*..., p. 219.

However, it needs to be ascertained that the principle of petrification of the law applicable to the matrimonial property regime is broken in the regulation by a solution pursuant to which the choice of law (and the change of the choice law) may be effectuated (also) during the marriage. Besides, the principle of petrification of the applicable law may be broken by the application of an instrument established in Art. 26 par. 3. Indeed, pursuant to this provision, by way of exception and upon application by either spouse, the judicial authority having jurisdiction to rule on matters of the matrimonial property regime may decide that, instead of the law of the State where the spouses had their first common habitual residence upon the conclusion of the marriage, the law of another State shall govern the matrimonial property regime provided that the spouse making the request demonstrates that: a) in that other State the spouses had their last common habitual residence for a significantly longer period of time than in the first of aforementioned States, and b) both spouses had relied on the law of that other State "in arranging or planning their property relations"[48]. At this point, it should be observed that demonstration that the last condition has been satisfied may be incredibly difficult in cases when the spouses have not concluded a matrimonial property agreement. However, the very concept of granting the court the competence to correct the designation of applicable law following from the norm embodying the principle of petrification of the law applicable to the matrimonial property regime merits the approval.

4. Scope of application of the law applicable to the matrimonial property regime

The scope of application of the law applicable to the matrimonial property regime has been specified in Art. 27 of the regulation, which encompasses a catalogue of issues fitting within this scope. It must be highlighted, though, that this is not an exhaustive enumeration. Thus, the law applicable to the matrimonial property regime pursuant to this Regulation shall govern, *inter alia*:

a) the classification of property of either or both spouses into different categories during and after marriage;

[48] Pursuant to provisions set forth in Art. 26 par. 3.2 the law that was deemed applicable under this procedure shall govern the matrimonial property regime as from the conclusion of the marriage, unless one spouse disagrees.

b) the transfer of property from one category to the other one;
c) the responsibility of one spouse for liabilities and debts of the other spouse;
d) the powers, rights and obligations of either or both spouses with regard to property;
e) the dissolution of the matrimonial property regime and the partition, distribution or liquidation of the property;
f) the effects of the matrimonial property regime on a legal relationship between a spouse and third parties; and
g) the material validity of a matrimonial property agreement.

As far as the last of the quoted points is concerned, it should be noted that indication of the material validity of a matrimonial property agreement within the catalogue in question allows to avoid the temptation to follow one of other theories presented in the literature as regards the classification of this issue at conflict-of-law plane. As an example, it is worth mentioning that Spanish author J.M. Fontanellas, in his considerations on the first version of the proposal for the regulation, which did not comprise a provision specifying the scope of application of the law applicable to the matrimonial property regime, expressed an opinion that the issue of law applicable to the material validity of a matrimonial property agreement is not encompassed by the provisions of the regulation at all, and, what follows, after the date of application of the regulation, this question should continue to be settled by virtue of the national rules of private international law[49].

At the same time, it must be observed that, in the light of the analysed provision of the regulation, the law applicable to the material validity of a matrimonial property agreement is, in the absence of a *professio iuris*, the law designated by a personal connecting factor supplied with a temporal sub-modifier referring to the moment of the conclusion of the marriage. This solution, natural from the perspective of states which are parties to the 1978 Hague Convention, may appear confusing in states whose private international law follows, in regard of the issue in question, the principle *tempus regit actum*[50].

[49] See: J.M. Fontanellas Morell: *La ley aplicable a los regímenes económicos matrimoniales y a los efectos patrimoniales de las uniones registradas en las respectivas propuestas de reglamentación comunitaria*. "Annuario de Derecho Civil" 2012, Vol. 65, fasc. I, p. 275—291.

[50] Cf. M. Pazdan, M.-A. Zachariasiewicz, A. Kozioł, W. Kurowski, P. Twardoch, J. Zrałek: *Uwagi do projektu rozporządzenia Rady w sprawie małżeńskich ustrojów majątkowych (2011/0059) (CNS) z dnia 20 grudnia 2012 roku (uwagi dotyczą przepisów o prawie właściwym)*. PPPM 2013, Vol. 13, p. 153, where it was proposed to submit

It is also worth discussing the issue of the effects of the matrimonial property regime on a legal relationship between a spouse and third parties. As the provision cited above, set forth in Art. 27 point (f) of the regulation, indicates, this issue is covered by the scope of application of the law applicable to the matrimonial property regime. However, a spouse may not invoke this law against a third party in a dispute between the third party and either or both of the spouse unless the third party knew of this law or, in the exercise of due diligence, should have known of it (Art. 28 par. 1). In this point, the EU legislator has specified the circumstances upon the coming into existence of which the third party is presumed to know the law of which state is the law applicable to the matrimonial property regime of the spouses in question (Art. 28 par. 2).

If, due to the fact that the third party was in good faith within the meaning of the regulation, a spouse may not invoke against this third party the law applicable to the matrimonial property regime, the effects of the matrimonial property regime in respect of the third party shall be governed: a); by the law of the State whose law is applicable to the transaction between a spouse and the third party; or b) in cases involving immoveable property or registered assets or rights, by the law of the State in which the property is situated or in which the assets or rights are registered (Art. 28 par. 3).

The fact that the EU legislator perceived the need to protect, in the context discussed herein, third persons being in good faith merits the approval. However, the particular solutions adopted within the said provisions raise reservations. What is especially surprising is that the EU legislator, creating the provision designating the law which takes in the situation discussed here the place of the law applicable to the matrimonial property regime, didn't indicate within this provision the law of the State where the contracting spouse and the third party have their habitual residence. After all, based on the content of the presumptions established in the analysed provisions, we can perceive the assumption that this legal system is one of the laws that come into play as plane of reference for assumptions made by the third party in question of the law applicable to the matrimonial property regime (see Art. 28 par. 2 point ii).

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the matrimonial property agreement, in the absence of choice of law, to the law applicable to the matrimonial property regime at the time of the conclusion of the agreement.

5. Final remarks

Despite the doubts and reservations relating to the particular solutions, the overall assessment of the regulation on matrimonial property regimes in terms of its substance should be positive. At the same time, the regulation undoubtedly constitutes a significant step towards the uniformisation of private international law within the European Union. Meanwhile, the concerns, formulated in the official Polish stance, as to alleged interference of the EU with the Polish family law, believed to be a result of the scope of the regulation also covering matrimonial property regimes of same-sex spouses, are entirely unfounded. A similar opinion should be expressed with regard to the regulation on the property consequences of registered partnerships. It is therefore to be hoped that Poland will change its position and join the states engaged in enhanced cooperation centred on both the regulations.