ELI
EUROPEAN
LAW
INSTITUTE

ELI Principles on the Extra-Judicial Administration of Justice in Cross-Border Family and Succession Matters

The European Law Institute

The European Law Institute

The European Law Institute (ELI) is an independent non-profit organisation established to initiate, conduct, and facilitate research, make recommendations, and provide practical guidance in the field of European legal development. Building on the wealth of diverse legal traditions, its mission is the quest for better law-making in Europe and the enhancement of European legal integration. By its endeavours, ELI seeks to contribute to the formation of a more vigorous European legal community, integrating the achievements of the various legal cultures, endorsing the value of comparative knowledge, and taking a genuinely pan-European perspective. As such, its work covers all branches of the law: substantive and procedural; private and public.

ELI is committed to the principles of comprehensiveness and collaborative working, thus striving to bridge the oft-perceived gap between the different legal cultures, between public and private law, as well as between scholarship and practice. To further that commitment, it seeks to involve a diverse range of personalities, reflecting the richness of the legal traditions, legal disciplines, and vocational frameworks found throughout Europe. ELI is also open to the use of different methodological approaches and to canvassing insights and perspectives from as wide an audience as possible of those who share its vision.

European Law Institute
Schottenring 16/175
1010 Vienna
Austria
Tel: + 43 1 4277 22101
E-mail: secretariat@europeanlawinstitute.eu
Website: www.europeanlawinstitute.eu

ISBN: 978-3-9505495-6-0

P-2020-22

Approved by the ELI Council on 30 June 2025 and by the ELI Membership on 5 August 2025.
Final Draft published on 16 September 2025.

This publication was co-funded by the European Union's Justice Programme (Project ID 101046578). Acknowledgement is also due to the University of Vienna, which has generously hosted the ELI Secretariat under successive Framework Cooperation Agreements since 2011. Views and opinions expressed are those of ELI 's only and do not necessarily reflect those of the European Union, the University of Vienna or others. Neither the European Union nor others can be held responsible for them.

This project is co-funded by
the European Union

Table of Contents

Acknowledgements

Project Team
Project Reporters
Elena Bargelli (Professor, Italy)
Anatol Dutta (Professor, Germany)
François Trémosa (Notary, France)

Other Members of the Project Team
Nicola Chiricallo (Research Assistant)
Paul Patreider (Research Assistant)
Elisa Stracqualursi (Research Assistant)

Advisory Committee
Assessors
Matthias Neumayr (Judge, Austria)
Pascal Pichonnaz (Professor, Switzerland)
Ilaria Pretelli (Senior Fellow, Switzerland)
Jens Martin Scherpe (Professor, Denmark; until March 2024)

Other Members
Frédérique Ferrand (Professor, France)
José-Maria Gomez-Riesco Tabernero de Paz (Professor, Spain)
Tobias Helms (Professor, Germany)
Costanza Honorati (Professor, Italy)
Walter Pintens (Professor, Germany)
Andrea Schulz (Head of Unit, Federal Ministry of Justice, Germany)
Maciej Szpunar (Advocate General, Poland)
Camelia Toader (Professor, Romania)
Ilaria Viarengo (Professor, Italy)

Members Consultative Committee
Marina Androulaki (Lawyer, Greece)
Arvind Babajee (Corporate Jurist / Chartered Management Accountant, Mauritius)
Małgorzata Balwicka-Szczyrba (Lawyer, Poland)
Joaquín Bayo Delgado (Barrister, Spain)
Yurii Bilousov (Professor, Ukraine)
Mircea Bob-Bocsan (Professor, Romania)
Robert Bray(former Head of Secretariat of the Legal Affairs Committee of the European Parliament, Belgium)
Tomasz Chmielewski (Lawyer, Poland)
Gregor Christandl (Professor, Italy)
Olga Cvejić Jančić (Professor, Serbia)
Elena D'Alessandro (Professor, Italy)
Irina Dikovska (Professor, Ukraine)
Giulia Donadio (Professor, Italy)
Christiana Fountoulakis (Chair; Professor, Switzerland)
Cristina González Beilfuss (Professor, Spain)
Lukas Heckendorn Urscheler (Research Fellow, Switzerland)
Francisco Javier Jiménez Muñoz (Professor, Spain)
Jens Kleinschmidt (Professor, Germany)
Thalia Kruger (Professor, Belgium and South Africa)
Antonio Legerén Molina (Professor, Spain)

Elena Marinică (Lecturer, Romania)
Giuseppe Marino (Professor, Italy)
Lineke Minkjan (Legal Adviser, The Netherlands)
Daniele Muritano (Notary, Italy)
Jose Pau (Land Registrar, Spain)
Natalia Rueda (Professor, Colombia)
Carlo Rusconi (Researcher in Civil Law, Italy)
Sharon Shakargy (Senior Lecturer, Israel)
Stacie Stong (Judge, US)
Irina Zlatescu (Professor, Romania)

Association of Notaries of the Republic of Poland (represented by Wiktor Karpowicz)
CORPME (represented by Marta Hernández)

Country Reporters

Stéphane Berre (Professor, France)
Katarzyna Bogdziewicz (Professor, Lithuania)
Nicola Chiricallo (Research Assistant, Italy)
Nataša Erjavec (Notary, Slovenia)
Laura Esteve Alguacil (Research Assistant, Spain)
Aron Johanson (Research Assistant, Germany)
Merel Jonker (Professor, The Netherlands)
Katarzyna Kamińska (Professor, Poland)
Tiina Karm (Professor, Estonia)
Kathryn O'Sullivan (Professor, Ireland)
Paul Patreider (Research Assistant, Germany)
Frank Høgholm Pedersen (Professor, Denmark)
Rute Teixeira Pedro (Professor, Portugal)
Wendy Schrama (Professor, The Netherlands)
Elisa Stracqualursi (Research Assistant, Italy)
Lars Thøgersen (Ministry of Social Affairs and Housing, Denmark)
Laima Vaigė (Professor, Sweden)
Ioan Luca Vlad (Lawyer, Romania)
Eleni Zervogianni (Professor, Greece)

ELI Project Officer
Tomasz Dudek (Senior Project Officer, Austria)

Executive Summary

This Report sets out a series of recommendations for the European Union (EU) and its Member States. It addresses the extra-judicial administration of justice in family and succession matters. The Principles herein aim to increase the coherence and effectiveness of the rules on cross-border family and succession matters and to ensure the protection of fundamental procedural and substantive rights across jurisdictions.

The Principles are designed to support the development of both the private international law of the EU and national legislation, in situations where certain family and succession matters are reserved to courts in one Member State but may be handled by other authorities or the parties themselves in another (Principle 1).

Member States are encouraged to transfer competences from courts to other authorities or directly to the parties involved, whenever the legal consequences of acts in family and succession matters already depend on the will of the parties according to their national laws (Principle 2). In doing so, Member States should adhere to minimum standards. These minimum standards should include: the right of affected parties to participate in the procedures and express their views; access to judicial review; mechanisms ensuring the authenticity and fairness of party intentions; and the involvement of authorities qualified to receive and record party declarations (Principle 3).

Authorities other than courts should only participate in family and succession matters in cross-border cases if their Member State has jurisdiction under the relevant private international law instruments of the EU (Principle 4). The EU should also ensure that the effects of the respective acts are extended across Member States – provided that certain requirements are met. This would be facilitated by introducing uniform European certificates. Specific grounds for refusal should continue to apply (Principle 5).

Consistent with this approach, authorities other than courts substantially participating in family and succession matters should also be deemed to be 'courts or tribunals' for the purpose of Article 267 of the Treaty on the Functioning of the European Union (TFEU), thereby enabling them to request preliminary rulings from the Court of Justice of the European Union (CJEU; Principle 6).

Furthermore, the Principles strive for enhanced legal certainty and procedural efficiency (Principle 7). Where competences are reassigned from courts to other authorities, Member States should provide clear substantive and procedural rules. The EU should also comprehensively regulate and simplify the recognition regimes of such acts under its private international law rules.

The results of the project have been published in a collected volume.[1]

[1] Elena Bargelli, Anatol Dutta, François Trémosa (eds), *Extra-Judicial Administration of Justice in Cross-Border Family and Succession Matters* (Giuffrè Francis Lefebvre 2025). An open access version of the volume is available at https://backend.univie.ac.at/fileadmin/user_upload/p_eli/Publications/OPENACCESS_024224885.pdf.

Introduction

The concept and role of courts in family and succession matters present a practical challenge within the EU and its Member States. Most EU private international law instruments still assume that courts primarily administer justice in these areas. However, a current trend in the Member States is to transfer authority in family and succession matters from courts to other bodies, such as notaries, civil status officers, child protection agencies, judicial officers, lawyers, or even the parties involved themselves.

This shift raises the question of whether existing provisions on jurisdiction, applicable law, and the recognition and enforcement of foreign judgments are equipped to address this 'de-judicialisation'. Recent case-law from the CJEU indicates that reform may be necessary.

The project on Extra-Judicial Administration of Justice in Cross-Border Family and Succession Matters is based on an in-depth comparative analysis. This research identified the various out-of-court proceedings and non-judicial bodies involved in family and succession law at the national level, providing the foundation for assessing how European instruments can be adjusted to accommodate increasing de-judicialisation.

The main objectives of the project were to identify critical issues and best practices, thereby encouraging both national legislators and the EU to adopt substantive and procedural standards for the consistent application of EU instruments. The project also aimed to develop policy recommendations that could serve as a basis for improving the existing *acquis*, including the Brussels IIb Regulation,[2] the Maintenance Regulation,[3] the Rome III Regulation,[4] the Succession Regulation,[5] the Matrimonial Property Regulation,[6] and the Property Regulation for Registered Partners.[7]

The following Principles are addressed to the EU and its Member States in order to improve the extra-judicial administration of justice in family and succession matters, in particular, in cross-border cases. They are based on the comparative findings of the project, mainly on country reports from 16 jurisdictions[8] and a comparative report.[9] The project was conducted under the auspices of the European Law Institute (ELI; between 2020 and 2025) and funded by the European Union (between 2023 and 2025). It was conducted in collaboration with ELI, the University of Pisa, and Ludwig Maximilian University of Munich.

---

2 Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), OJ L 178, 2.7.2019, pp 1–115.

3 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, OJ L 7, pp 1–79.

4 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, OJ L 343, 29.12.2010, pp 10–16.

5 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, OJ L 201, 27.7.2012, pp 107–134.

6 Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183, 8.7.2016, pp 1–29.

7 Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183, 8.7.2016, pp 30–56.

8 Austria, Denmark, Estonia, France, Germany, Greece, Ireland, Italy, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain, Sweden. The reports are published in Elena Bargelli, Anatol Dutta, François Trémosa (eds), *Extra-Judicial Administration of Justice in Cross-Border Family and Succession Matters* (Giuffrè Francis Lefebvre 2025) and cited as Author, Country, para(s).

9 See Part I and II of Elena Bargelli, Anatol Dutta, François Trémosa (eds), *Extra-Judicial Administration of Justice in Cross-Border Family and Succession Matters* (Giuffrè Francis Lefebvre 2025). The comparative report is cited as *Dutta/Patreider*, Comparative Report, para(s).

1

Principle 1: Aim and Scope

The following Principles make policy recommendations for the European Union and the Member States regarding the extra-judicial administration of justice in family and succession matters. They should, in particular, improve the private international law instruments of the European Union and the national laws of the Member States when acts in family and succession matters are in at least one Member State reserved to courts, but fall in other Member States within the competences of other authorities or the parties themselves.

2

Principle 2: De-Judicialisation in Family and Succession Matters – More Consistency

As far as legal consequences of acts in family and succession matters depend on the will of the parties under the substantive law of the Member States, they should consider, for the sake of consistency, shifting competences from courts to other authorities or the parties themselves. In doing so, they should observe the minimum standards laid down in Principle 3.

3

Principle 3: Minimum Standards

1. *Member States should guarantee minimum standards if authorities other than courts participate in an act in family and succession matters, thus strengthening mutual trust and safeguarding fundamental rights.*

2. *When shifting competences to other authorities or the parties themselves according to Principle 2, Member States should in particular ensure:*

   (a) *that parties directly affected by an act in a family and succession matter are given the opportunity to take part in the proceedings and to express their views;*

   (b) *that an act can be made subject to judicial review;*

   (c) *that adequate mechanisms are put in place to ensure that an act is based on the genuine will of the parties and that their interests are fairly balanced;*

   (d) *that only authorities that are qualified to receive and record party declarations participate in the act.*

4

Principle 4: Jurisdiction

The European Union should ensure that courts or other authorities of a Member State only participate in an act in family and succession matters which is in at least one Member State reserved to courts if that Member State has jurisdiction for the matter according to the relevant rules of the European Union.

5

Principle 5: Extension of Effects

1. *The European Union should ensure that the effects of an act in family and succession matters according to the law of a Member State whose authorities other than courts participated in the act are extended to all Member States as far as the law of the European Union harmonises the law applicable to, and the jurisdiction for, the family and succession matter.*

2. *The European Union should provide for uniform European certificates to facilitate the cross-border circulation of such acts between the Member States.*

3. *The European Union should allow the Member States the possibility to refuse the extension of the effects of an act if:*

   (a) *such extension is manifestly contrary to the public policy of the Member State to which the effects of the act are to be extended; or*

   (b) *it is irreconcilable with an act or decision issued in proceedings between the same parties in the Member State to which the effects are to be extended; or*

   (c) *it is irreconcilable with an act or decision issued in another Member State or in a third State in proceedings involving the same cause of action and between the same parties, provided that the act or decision fulfils the conditions necessary to extend its effects to the Member State to which the effects of the act are to be extended; or*

   (d) *the Member State whose authorities other than courts participated in the act did not have jurisdiction in the matter according to the relevant rules of the European Union.*

6

Principle 6: Preliminary Reference

If an authority of a Member State participates in an act in family and succession matters, this authority should be considered as a 'court or tribunal' for the purpose of Article 267 of the Treaty on the Functioning of the European Union.

7

Principle 7: More Legal Certainty

1. *When shifting competences from courts to other authorities or the parties themselves according to Principle 2, Member States should provide for clear substantive and procedural rules, and, in particular, clarify whether substantive or procedural remedies apply.*

2. *The European Union should ensure that its private international law instruments cover acts in family and succession matters comprehensively.*

3. *The European Union should simplify the regimes by which European private international law instruments extend the effects of acts in family and succession matters.*

Principles with Comments

Principle 1: Aim and Scope

The following Principles make policy recommendations for the European Union and the Member States regarding the extra-judicial administration of justice in family and succession matters. They should, in particular, improve the private international law instruments of the European Union and the national laws of the Member States when acts in family and succession matters are in at least one Member State reserved to courts, but fall in other Member States within the competences of other authorities or the parties themselves.

Comments

1 Principle 1 defines the aim and scope of these Principles, which contain policy recommendations for the EU and the Member States. It describes the scenario to which the following Principles apply.

2 The Principles only apply to acts in family and succession matters which are – currently or in the future – in at least one Member State reserved to courts, while in other Member States fall within the competences of other authorities or the parties themselves. Currently, this situation – which is a result of a de-judicialisation trend[10] – arises in the EU, for example, with regard to divorce and national certificates of succession. Whereas some Member States still provide that divorce requires court proceedings and a court decree dissolving the marital bond,[11] other Member States allow other authorities to dissolve a marriage[12] or even permit the spouses themselves to terminate their marriage by private declarations, with the involvement of certain authorities such as notaries or civil status registrars.[13] Another example of this scenario concerns certificates of succession which allow a person to prove the position as an heir, legatee, executor, or administrator regarding the succession upon death with third party effects. Such certificates are issued in some Member States by courts after even potentially adversarial proceedings;[14] however, in other Member States, notaries or other authorities are competent to issue succession certificates.[15] Another example concerns the change of legal gender: in some Member States the recognition of a certain gender identity still requires a court decision;[16] other Member States allow a person to change a gender entry in the civil status registers by way of a unilateral declaration.[17]

3 In those scenarios, certain policy problems arise at the level of both the law of the Member States and the EU which are addressed in the following Principles.

4 The term 'act' in family and succession matters is used deliberately in order to avoid terms already occupied and used by the terminology of the existing private

[10] See for details *Dutta/Patreider*, Comparative Report, 1ff.
[11] *Dutta/Patreider*, Comparative Report, para 19.
[12] *Dutta/Patreider*, Comparative Report, para 201.
[13] *Dutta/Patreider*, Comparative Report, paras 20–24.
[14] *Dutta/Patreider*, Comparative Report, para 59.
[15] Ibid.
[16] *Dutta/Patreider*, Comparative Report, para 76.
[17] *Dutta/Patreider*, Comparative Report, paras 70f.

international law instruments of the EU,[18] partly with overlapping and potentially different meanings, such as 'judgment', 'decision', 'authentic instrument' and 'agreement'. The term 'acts', on the other hand, should cover both public documents, authentic instruments, and agreements or, more generally: everything emanating from, drawn up, recorded by or resulting from the participation of an authority other than a court in one Member State, but with effects and functions similar to those of a judicial decision according to the law of at least one other Member State. The definition of 'act' thus requires that an authority is involved to an at least minimum extent (eg by registering the act). The reference to matters falling within the competences of the 'parties themselves' alludes to situations in which the substance of a legal relationship in family and succession matters is governed by party autonomy, while the non-judicial authority is mainly involved in the formal review or registration of the party declaration or agreement (see also para 64).

5 Acts in family and succession matters which are extra-judicial according to the law of all Member States fall outside the scope of these Principles, for example, wills, the conclusion of marriage or a registered partnership, marital agreements, recognition of parenthood, etc. The specific policy issues addressed in these Principles do not arise if no Member State reserves the act to its courts under the law of that Member State.

6 The term 'authorities other than courts' also refers to legal professionals and not just to other public or administrative authorities. It can thus also refer to notaries, lawyers, or other entities, acting in an official capacity and authorised under Member State law to participate in an act (see para 4 and below para 16) in family and succession matters. The term, however, also covers courts in the traditional sense when they do not exercise 'judicial functions'.

Principle 2: De-Judicialisation in Family and Succession Matters – More Consistency

As far as legal consequences of acts in family and succession matters depend on the will of the parties under the substantive law of the Member States, they should consider, for the sake of consistency, shifting competences from courts to other authorities or the parties themselves. In doing so, they should observe the minimum standards laid down in Principle 3.

[18] In particular, the Brussels IIb Regulation (Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) [2019] OJ L178/1), the Hague Child Protection Convention (Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children), the Maintenance Regulation (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 [2009] OJ L7/1), the Hague Maintenance Protocol (Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations), the Rome III Regulation (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 [2010] OJ L343/10), the Succession Regulation (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 [2012] OJ L201/107) and the Matrimonial Property Regulations for Spouses (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 [2016] OJ L183/1) and Registered Partners (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 [2016] OJ L183/30) but also future instruments such as the planned Parenthood Regulation (Commission Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood' COM (2022) 695 final) and on the International Protection of Adults (Commission, 'Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults' COM (2023) 280 final).

Comments

7 Under Principle 2, Member States should consider shifting competences from courts to other authorities or the parties themselves, as far as legal consequences of acts in family and succession matters depend on the will of the parties under the substantive law of the Member State concerned. This is especially the case where party autonomy is already the guiding principle in family and succession law, with parties being free to determine certain situations as they see fit, and where courts have a passive role (for example, merely recording or receiving party declarations). The contractualisation of status matters is particularly present in family law but can also be detected in various matters related to succession law. Principle 2 is directed to the Member States' legislators. It should also apply to cases in which Member States intend to reform existing out-of-court procedures.

8 De-judicialisation frequently occurs in non-contentious matters. Cases of dispute generally continue to have to be solved by judicial authorities.[19] This is not questioned by Principle 2. Where all parties are, however, in agreement, and (procedural and substantive law) safeguards (for minimum standards, see Principle 3 or paras 14ff) can otherwise be guaranteed, the delegation of tasks to out-of-court actors should be considered.

Policy considerations

9 Court proceedings are not only expensive for the State and the parties: in family and succession matters, judicial proceedings might at times also lead parties to escalate the dispute. Hence, court proceedings should only be used cautiously if they are necessary, for example, to establish the facts of the case or determine disputes between the parties.

10 Court proceedings are, however, not required if the applicable substantive law links certain legal consequences in family and succession law mainly to the intentions of the parties. Rather, other authorities can – for example, when participating in the necessary formalities of the parties' declarations – assess whether the declarations of the parties are based on their true intentions. For example, in some Member States, notaries might be better trained to identify the true intentions of parties when formalising their declarations, at the same time providing them with the necessary legal information – tasks they are already entrusted with under the laws of most Member States. Hence, it would be much more consistent if Member States shift competences from courts to other authorities (specialised in receiving and recording party declarations) or the parties themselves as far as legal consequences of acts in family and succession matters depend on the will of the parties.

Example: consensual divorce

11 Against this background, especially Member States whose family law allows for consensual forms of divorce[20] should consider whether, in such instances, the divorce could be dealt with in proceedings other than court proceedings (based on the minimum standards laid down in Principle 3), especially if the spouses do not only agree on the dissolution of the marriage as such but also on the (financial) consequences of divorce.

12 As far as Member State law does not link parental responsibility to the marital status of the parents, such alternative forms of out-of-court divorce should – contrary to the solution in some Member States currently[21] – not be restricted to spouses without minor children. The divorce as such will not have any consequences for parental

[19] *Dutta/Patreider*, Comparative Report, paras 26, 33f, 47, 86f, 92f.

[20] Eg in Denmark, Estonia, France, Greece, Italy, Lithuania, Portugal, Romania, Slovenia, and Spain. See *Dutta/Patreider*, Comparative Report, paras 20–24.

[21] *Dutta/Patreider*, Comparative Report, para 23.

responsibility but rather only the separation of the – married or non-married – parents.

Minimum standards

13 When shifting competences from courts to other authorities or the parties themselves in family and succession matters, the Member States should consider ensuring certain minimum standards as laid down in Principle 3 (see paras 14ff below).

Principle 3: Minimum Standards

1. *Member States should guarantee minimum standards if authorities other than courts participate in an act in family and succession matters, thus strengthening mutual trust and safeguarding fundamental rights.*

3. *When shifting competences to other authorities or the parties themselves according to Principle 2, Member States should in particular ensure:*

   (a) *that parties directly affected by an act in a family and succession matter are given the opportunity to take part in the proceedings and to express their views;*

   (b) *that an act can be made subject to judicial review;*

   (c) *that adequate mechanisms are put in place to ensure that an act is based on the genuine will of the parties and that their interests are fairly balanced;*

   (d) *that only authorities that are qualified to receive and record party declarations participate in the act.*

Comments

14 Principle 3 is mainly addressed to the Member States (cf however para 32). At the core of the Principle is the idea that national legislators should ensure the respect of substantive and procedural standards when shifting competences to authorities other than courts (see Principle 2) or reforming existing non-judicial procedures. The aim is to build and strengthen mutual trust in matters concerning the extra-judicial administration of justice. The standards identified reflect fundamental substantive and procedural rights (Article 47 of the Charter of Fundamental Rights of the European Union CFR]), with a focus on the rights of the child (Article 24 CFR, Article 12 United Nation Convention on Rights of a Child UNCRC). As such, the proposed safeguards are already widely implemented throughout the EU. Furthermore, in specific pieces of EU legislation, substantive and procedural safeguards are required for an authority to qualify as a court in family and succession matters.[22] Instead, no requirements are set by EU regulations for authorities other than courts, apart from the need to respect the child's right to be heard (Articles 39 and 68 of the Brussels IIb Regulation, see paras 23ff). While existing standards primarily concern judicial procedures, they should also be adapted to scenarios in which justice is administered by authorities other than courts.

15 The term 'minimum standards' identifies a minimum level of safeguards, some of which are of a procedural nature, while others also have substantive meaning. Although most of them are already respected by many Member States even in extra-judicial procedures, all should eventually be complied with by each Member State. Member States should in any case be free to decide to introduce additional guarantees.

[22] See Article 2(2) of the Maintenance Regulation, Article 3(2) Succession Regulation, Articles 3(2) of the Matrimonial and Partnership Property Regulation(s): impartiality; the right of all parties to be heard; judicial review; similar force and effect as a decision of a judicial authority on the same matter. These requirements apply to any court, regardless of whether it has a judicial or non-judicial nature.

16 The use of the term 'participate in an act in family and succession matters' ensures that the activities of non-judicial actors identified during the comparative phase of the project are covered by the present Principles. 'Participating' refers to instances in which an act is issued by an authority other than a court but can also mean that the authority receives and records a declaration or agreement. It further includes cases in which an act is deposited with an authority, in which the authority facilitates an agreement between the parties or even takes an authoritative decision on their behalf under national law. In certain limited cases, participation could thus also refer to the taking of a decision in a family and succession matter, even if contentious in nature. The term includes instances in which the authority assesses the declarations and agreements of the parties as to their substance but also cases in which the authority only checks the formalities that have to be met. What unifies the different ways of 'participating' is the need that the output of the participation has the same effects as the act of a judicial authority in at least one other Member State (see already above the definition of 'act' under para 4).

The need for minimum standards in the extra-judicial administration of justice (Principle 3(1))

17 Minimum standards are necessary to ensure that essential safeguards are also applied to the administration of justice in non-judicial contexts. They will also increase mutual trust between Member States. Indeed, Member States which receive foreign acts (hereinafter: Member State of destination) and are unfamiliar with out-of-court procedures in a particular matter, should be able to rely on the fact that basic standards and fundamental rights have been respected by the Member State of origin when their authorities have been involved in an act relating to family and succession matters.

18 If Member States receiving acts in family and succession matters from other Member States (see Principle 5) can trust in the fact that certain procedures were followed, and basic standards were complied with, they will be more inclined to extend the effects of that act to their territory, thus strengthening cooperation in civil matters. Implementing the proposed standards will therefore not only consolidate the mutual trust between Member States but further facilitate the extension of effects under Principle 5. This can further be facilitated by sharing comparative knowledge on non-judicial proceedings and by further clarifying which authorities are currently covered by existing definitions. This might, for example, follow from strengthening the rules requiring Member States to notify the European Commission of the authorities falling within the scope of the term 'court' in their respective jurisdictions.[23]

19 Mutual trust in this context should therefore be considered from the point of view of both the Member State of destination and the Member State of origin of an act in family and succession matters. Indeed, by complying with the standards set out in this Principle, the Member State of origin should be able to expect the effects of the act in which its authorities have participated to be extended to other jurisdictions without having to overcome disproportionate procedural hurdles. Furthermore, such Member State should be prepared to do the same in a similar scenario (reciprocity).

20 The present Principle seeks to ensure that Member States which receive acts in family and succession matters will not have to carry out checks concerning their compliance with the procedural and substantive standards set out under Principle 3(2).

[23] See Case C–658/17 *WB v Przemysława Bac* [2019] ECLI:EU:C:2019:444, para 47.

Elements of minimum standards (Principle 3(2))

21 Principle 3(2) focuses on the following elements: the right to be heard (see paras 23ff), judicial review (see paras 33ff), ensuring a genuine will, balancing the interests of the parties (see paras 37ff), and qualification of authorities (see paras 44ff).

22 Impartiality is a further requirement that a court should possess according to Article 47(2) of the CFR and the *acquis* of the EU in family and succession matters.[24] This is uncontroversially a requirement also for public authorities and notaries that participate in non-judicial acts,[25] as they are subject to the law and must apply it impartially and without bias. Impartiality of non-judicial authorities does not seem to be an issue in the surveyed jurisdictions.

The right to be heard (Principle 3(2)(a))

23 Parties directly affected by an act in a family and succession matter should be given an effective opportunity to take part in the proceedings and to express their views on the relevant subject matters (Principle 3(2)(a)). This presupposes that the parties have been informed about the proceedings and were given adequate means to participate in them (see also para 16).

24 'Parties directly affected' are the addressees of the effects of the act. Most non-judicial acts having the same legal effects as judicial decisions in the same matter presuppose the consent of the parties involved and are of a non-contentious nature.[26] Consequently, the parties whose consent is required for the act to take effect should, under Principle 3(2)(a), be granted the right to express their view personally (see below para 31) to the competent authority. In most jurisdictions, children above a certain age are currently required to express their consent in judicial and extra-judicial proceedings affecting their rights (adoption, establishment of parenthood, gender reassignment).

25 The right to be heard applies also to parties that – while not required to express their consent for the act to take effect – are nevertheless directly affected by it. This is typically the case for minors below the minimum age for consent, provided they are capable of making their own decisions (according to their age and maturity).[27] Matters relating to child custody are still under the control of the judicial authorities in most Member States, while in some others they have been de-judicialised in the case of parental agreement.[28] However, in some Member States, doubts arise as to the effectiveness of the implementation of the child's right to be heard.[29] The right to be heard must be granted also in proceedings affecting rights of adults in need of protection.[30]

26 It is obvious that, if the proceeding is contentious and the authority is required to decide in a controversial matter, the right of the parties

---

[24] Cf also European Law Institute, *Charter of Fundamental Constitutional Principles of a European Democracy* (European Law Institute 2024) 51ff (Principle 14: Judicial independence and impartiality).

[25] On the role of notaries as neutral advisors, see Jens Bormann and Philip M Bender, *Judge without lawsuit. The notary in civil law countries* (C.H.Beck 2024) 9, 33. On the impartial role of notaries see *Vlad*, Romania, para 36; *Karm*, Estonia, para 6; on impartiality of civil registrars, see *Teixeira Pedro*, Portugal, para 29. In a few jurisdictions, lawyers are required to assist the parties in drafting divorce agreements (see *Stracqualursi/Chiricallo*, Italy, paras 94ff). They are subject to the standards imposed by their professional codes (see the Code of Conduct for European Lawyers 2.1ff, in particular the principle on independence).

[26] *Dutta/Patreider*, Comparative Report, paras 75, 80f.

[27] This is a general principle that applies to all matters relating to children (eg parenthood, adoption, parental responsibility), be they judicial or non-judicial.

[28] *Dutta/Patreider*, Comparative Report, para 17.

[29] *Berre*, France, para 7; *Zervogianni*, Greece, para 83.

[30] In judicial proceedings see, for example, *Zervogianni*, Greece, para 182; *Stracqualursi/Chiricallo*, Italy, para 301; concerning judicial control over the *Guarda de hecho* in Spanish law, see *Esteve Alguacil*, Spain, para 273. Of course, the validity of a power of attorney requires the principal's consent (for example, see *Johanson*, Germany, para 207).

to participate and express their view *a fortiori* should be regarded as a minimum procedural standard. However, contentious non-judicial proceedings are quite rare.[31]

27 In situations involving children, hearing them, however, does not always constitute an absolute obligation. Nevertheless, the child's right to express their view should be guaranteed in cases in which, in the circumstances, the involved authority holds it necessary to ensure the best interests of the child notwithstanding the parents' agreement on a matter affecting them. This might, for example, occur in matters related to parenthood and parental responsibility.[32]

28 The specific modalities in which parties (including children and vulnerable adults) are given an effective opportunity to participate in proceedings and to express their views should generally remain a matter of the law of the Member States,[33] which should, however, comply with the relevant European and international standards,[34] and adapt them to non-judicial proceedings.

29 In any event, the authority entrusted with these tasks should be qualified (see paras 44ff), *inter alia*, to hear the parties and to provide special safeguards for children and vulnerable adults (for example, the presence of a qualified professional during the hearing; a minimum age requirement for the child; appropriate out-of-court settings; specific training for the authorities). This may require the involvement of non-legal experts.[35]

30 Should children's rights be involved in non-judicial proceedings, Member States ought to further consider giving the competent authority the power to examine the substance of the agreement in light of the best interest of the child.[36] Should the agreement not pass the test, the authority ought to refuse its participation in the act, and ensure the best interest of the child is observed, by summoning the parties and hearing all parties directly affected by the act.[37]

31 It is further observed that Principle 3(2)(a) might be best implemented if all parties appear, are heard and given the opportunity to express their views in front of the authority participating in the act, regardless of whether the non-judicial proceeding is contentious or not. In the case of consensual proceedings, requiring a personal appearance allows the authority to check the identity of the parties and better safeguard that an act is based on their genuine will and that their interests are fairly balanced (see paras 37ff). Currently, most[38] Member States already require interested parties to personally appear before the competent authorities in matters related to divorce, gender recognition and adult protection.[39]

---

[31] *Pedersen/Thøgersen*, Denmark, paras 43, 61–72 (disputed cases before the Family Law Agency); *Vaigė*, Sweden, para 21 (distribution of estates by executors of estates).

[32] For example, if an agreement on parental responsibility is manifestly contrary to the child's best interests (eg due to the deviation from the applicable default rules or best practices without any evident reason); if there is a gross disparity between the parents' maintenance obligations, having regard to their incomes and the arrangements on parental custody; if the child refuses to have contact with one parent; if proceedings on the violation of parental duties or domestic violence are pending or the agreement might not reflect the genuine will of at least one parent.

[33] See, Recital 39 Brussels IIb. See also Article 12, para 2 UNCRC, which affirms the child's right to be heard in both judicial and administrative proceedings in a manner consistent with the procedural rules of national law.

[34] While Article 12(2) UNCRC allows the hearing to be made either directly, or through a representative or an appropriate body, best practices are provided by Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (2010). See also, Wendy Schrama, Marilyn Freeman/Nicola Taylor/Marielle Bruning (eds), *International Handbook on Child Participation in Family Law* (Intersentia 2021); Anne Barlow and Jan Ewing (eds), *Children's Voices, Family Disputes and Child-Inclusive Mediation* (Bristol University Press 2024).

[35] See Stracqualursi/Chiricallo, Italy, para 54.

[36] Currently the case in Italy and Portugal: *Stacqualursi/Chiricallo*, Italy, para 104; *Teixeira Pedro*, Portugal, para 12. No control in this regard is carried out in Denmark or France: *Pedersen/Thøgersen*, Denmark, para 34; Berre, France, para 8.

[37] Under Italian law, for example, parents are summoned in front of the President of the Tribunal if the Public Prosecutor holds the parents' agreement as inconsistent with the best interests of the children (see *Stracqualursi/Chiricallo*, Italy, para 104).

[38] Exception: the Danish divorce before the Family Law Agency in 'green' cases, see *Pedersen/Thøgersen*, Denmark, para 34. Doubts might further arise in France in case of notarial divorce: *Berre*, France, para 11.

[39] *Dutta/Patreider*, Comparative Report, paras 20ff.

32 In order to allow for an easier circulation of acts in family and succession matters, the EU might also consider introducing specific fields or headings in the European certificates currently (or in the future) accompanying the respective acts for the purpose of the extension of their effects (see Principle 5 and paras 74ff).[40] This might avoid the need for an assessment by the authorities of the receiving Member State that could (potentially) be qualified as a *revision au fond* of the act.

Judicial review (Principle 3(2)(b))

33 When shifting competences to authorities other than courts, Member States should further ensure that acts in family and succession matters can be made subject to judicial review. Even if the areas affected by the de-judicialisation trend are mostly non-contentious in nature, parties should be given the opportunity to have acts reviewed by a court. The possibility of accessing the traditional court system should constitute a core right. This is in line with fundamental procedural standards (Article 47(1) CFR), further strengthens mutual trust in non-judicial procedures and consequently facilitates the circulation of acts in family and succession matters across borders (see Principle 5). Court proceedings should remain a means of last resort and guarantee for the parties involved.

34 The right to an effective remedy[41] before a judicial authority is to be understood broadly. While implementation should remain in the hands of the Member States, it should in any case entitle parties directly affected by an act in family and succession matters (see para 24) to unilaterally seize a court. The judicial authority should be able to examine the act as to its substance, and as to its compliance with formal or other procedural requirements provided for under national law. It should allow parties to challenge any act in family and succession matters. Member States should further consider making legal aid available to those lacking sufficient resources, insofar as such aid is necessary to ensure effective access to justice in non-judicial settings.[42]

35 The term 'judicial review' implies the right to have recourse to a judicial authority in cases where the parties intend to challenge the act, arguing that it violated procedural or substantive rules provided for by domestic law. In addition, under national laws, a change of circumstances usually justifies judicial review of family arrangements or personal choices in the case of supervening circumstances.

36 National laws remain competent to identify the parties entitled to unilaterally seize the judicial authority, the authority that has to be seized and the procedure that has to be followed. This means that an act might also be challenged by means of substantive remedies such as an annulment for vitiating factors, incapacity of the parties involved, the infringement of mandatory rules or public policy, etc. An open approach further accommodates the variety of review procedures currently in place in the Member States,[43] reflecting the different roles played by the intervention of the authority in the production of the legal effects of an act. Indeed, non-judicial acts can, in some Member States, be

---

[40] See currently Article 47(3)(b) of the Brussels IIb Regulation and Annexes III (Certificate concerning decisions in matters of parental responsibility, heading no 15), IV (Certificate concerning decisions ordering the return of a child to another Member State pursuant to the 1980 Hague Convention and any provisional, including protective measures taken in accordance with Article 27(5) of the Regulation accompanying them, heading no 16), V (Certificate concerning certain decisions granting rights of access, heading no 13), and VI (Certificate concerning certain decisions on the substance of rights of custody pursuant to Article 29(6) of the Regulation and entailing the return of the child, heading no 13) of the Regulation.

[41] Cf also European Law Institute, *Charter of Fundamental Constitutional Principles of a European Democracy* (European Law Institute 2024) 46f (Principle 10: Right to a fair trial and an effective remedy).

[42] Eg Article 47(3) CFR.

[43] *Dutta/Patreider*, Comparative Report, paras 20ff. For judicial review procedures, see *Pedersen/Thøgersen*, Denmark, para 71; *Teixeira Pedro*, Portugal, para 29; *Vlad*, Romania, para 38. For the application of substantive remedies, see *Zervogianni*, Greece, para 20; *Bogdziewicz*, Lithuania, para 41; *Esteve Alguacil*, Spain, para 41.

challenged by means of appeal,[44] while others apply substantive remedies.[45] Member States should in any case introduce clear substantive and procedural means of review and expressly specify applicable remedies (see Principle 7 and paras 107ff).

Safeguarding a genuine will and balancing party interests (Principle 3(2)(c))

37 The delegation of tasks to authorities other than courts should be accompanied by the introduction of appropriate mechanisms to ensure that an act in family and succession matters is based on the genuine will of the parties and that their interests are, as far as possible, fairly balanced.

38 In judicial proceedings, whether consensual or not, the respect of these mechanisms is generally safeguarded by the judicial authority itself, as well as by certain procedural standards, such as the personal appearance of the parties (see para 31), and their legal representation.[46] Similar standards should apply when justice is administered by authorities other than courts.

39 While parties do not necessarily need to be represented and defended when the effects of an act are closely linked to their consent or agreement, they may still need legal advice and assistance to ensure that they can express an informed will and to limit undue influence as far as possible. This is further ensured by requiring the authority to take the relevant circumstances of a case into account and to balance – as far as possible – the personal, economic and public interests at stake when intervening in family and succession matters.

40 Should more than one party be directly affected by an act, Member States should consider involving legal professionals in a preliminary phase, or have the parties represented by lawyers.[47]

41 Member States are also invited to consider introducing reflection periods when authorities receive declarations from parties. This would further ensure that an act reflects the genuine will of the parties. Analogous mechanisms are already in place in a number of jurisdictions across several areas.[48]

42 It is for Member States to decide on the specific measures to be put in place. The expression of the genuine will of the parties presupposes at least their informed consent.[49] In particular, parties directly affected by the act (see para 24) might have to be informed about: (a) the legal qualification of the authority and the way in which the proceedings are carried out under the applicable law; (b) the legal effects of the act under national law and the possibilities of having the act reviewed; and (c) the possibility of having the effects of the act extended to other Member States and enforced within the judicial area of the EU.

43 Assistance or advice by qualified professionals should also include the economic consequences of divorce and separation.[50] In order to ensure

---

[44] For example, in divorce matters, the civil registrars' acts can be appealed to the court of appeal under Portuguese law (*Teixeira Pedro*, Portugal, para 24); in Romania, those of civil status officers can be appealed to the lowest court in Romania (*Vlad*, Romania, para 38); the decisions of the Danish Agency can also be appealed (*Pedersen/Thøgersen*, Denmark, para 39).

[45] See above n 36.

[46] Eg Article 47(2) CFR.

[47] limited number of jurisdictions already require such assistance in divorce matters, see Berre, France, para 8; *Zervogianni*, Greece, para 18; *Stracqualursi/Chiricallo*, Italy, para 40; *Esteve Alguacil*, Spain, para 38. Others require notaries to give legal advice (see *Karm*, Estonia, para 8) or civil registrars to provide parties with necessary information (see *Teixeira Pedro*, Portugal, para 22).

[48] Divorce: *Stracqualursi/Chiricallo*, Italy, para 44; *Bogdziewicz*, Lithuania, para 33; *Vlad*, Romania, para 38. Gender recognition: *Pedersen/Thøgersen*, Denmark, para 150; *Johanson*, Germany, para 201; *Esteve Alguacil*, Spain, para 246.

[49] On the current role of notaries in translating between the legal and ordinary language, cf Jens Bormann and Philip M Bender, Judge without lawsuit. The notary in civil law countries (C.H.Beck 2024) 13.

[50] France, Greece, Italy, and Spain; notaries to give legal advice (for example, Estonia) or the civil registrars to give the necessary information (for example, Portugal).

that these are based on the genuine will of the parties and that their interests are fairly balanced, Member States should consider making it an obligation for the parties to disclose their income and financial assets, subject to verification by the authority, where this is directly relevant to the act.

Qualified authorities (Principle 3(2)(d))

44 Member States should, as a matter of principle, entrust specially qualified authorities with the task of drafting, receiving, and recording party declarations. This does not, however, imply the establishment of specialised authorities in family and succession law; conversely, these may be authorities that also operate within other areas of law (for example, notaries). This is especially pertinent in cases where the legal consequences of acts pertaining to family and succession matters are based on the will of the parties concerned. This phenomenon can usually be observed in situations where the administration of justice becomes de-judicialised (see paras 7ff).

45 In instances where participation in an act demands additional legal or other competences, Member States are advised to deliberate on the pertinent requirements when determining the appropriate authority to involve. Specific tasks (eg the hearing of children) may necessitate the involvement of judicial authorities or other professionals, whether they are legal or non-legal (see para 29).

46 Member States should further consider the financial consequences of shifting competences to such qualified authorities. This does not only concern the costs for the parties but also potential financial gains for the State. Fees for services carried out by public authorities (other than courts) will benefit public finances more directly than those carried out by private or semi-official authorities.

Principle 4: Jurisdiction

The European Union should ensure that courts or other authorities of a Member State only participate in an act in family and succession matters which is in at least one Member State reserved to courts if that Member State has jurisdiction for the matter according to the relevant rules of the European Union.

Comments

47 Principle 4 addresses the European legislator when reforming the current, or adopting new, private international law instruments. The EU should ensure that courts or other authorities of a Member State only participate (see above para 16) in an act in family and succession matters if that Member State has jurisdiction for the matter according to the relevant EU rules.

48 By following this Principle, the European legislator would ensure within its jurisdictional regimes that positive and negative conflicts are avoided in the administration of justice if one and the same act in family and succession matters is, at least in one Member State, reserved for the courts, while it falls in other Member States within the competences of other authorities or the parties themselves.

49 The rules on jurisdiction of the – current and future – private international law instruments of the EU should consequently apply to courts and other authorities alike. This Principle – if implemented by the European legislator – would require courts and other authorities to assess the jurisdiction of their Member State before participating in the acts entrusted to them under national law and would avoid parallel proceedings as well as incompatible acts from being performed in different Member States.

The current scope of the jurisdictional rules of the EU: many uncertainties

50 It is far from clear in the private international law instruments of the EU whether and, if so, to what extent the European rules on jurisdiction also cover the extra-judicial administration

of justice in family and succession matters if certain acts fall, under Member State law, within the competences of other authorities or the parties themselves. Most of the European rules on jurisdiction state that certain 'courts' of a Member State have jurisdiction and determine this Member State on the basis of various connecting factors. The concept of a court under European private international law is therefore central, but it is considerably blurred with regard to its limits.

51 It is true that most of the relevant instruments contain legal definitions of 'court' for the purposes of the respective Regulation, and thus also for its rules on jurisdiction.[51] However, the definitions do not help with the question of the extent to which acts of non-judicial authorities or even private individuals are to be regarded as judicial activities that require jurisdiction of the respective Member State under the relevant instrument. For example, Article 3(2) of the Succession Regulation provides that a court can be any judicial authority and all other authorities and legal professionals with competence in matters of succession. This also includes notaries, for example. Yet, the legal definition requires that these actors 'exercise judicial functions', without specifying what the exercise of judicial functions entails.

52 However, some indications can be derived from the case-law of the CJEU as to the extent to which non-judicial actors are to be treated as courts for the purposes of the rules on jurisdiction in the enforcement of family and succession law.

53 First of all, to the extent that they are parties to the relevant family or succession relationship, private individuals cannot be regarded as courts. This is the conclusion to be drawn from the Court of Justice's *Sahyouni* decision.[52] In that case, the CJEU made it clear that the Rome III Regulation does not apply to private divorces in which no State authorities are involved.[53] Although the Rome III Regulation does not govern jurisdiction in matrimonial matters, the CJEU emphasised that the concept of divorce in the European conflict rules of the Rome III Regulation, on the one hand, and in the jurisdiction rules of the old Brussels IIa Regulation, on the other hand, are the same,[54] so that the Brussels IIa Regulation (and seemingly also the jurisdiction rules of the new Brussels IIb Regulation) do not apply to purely private divorces. Of course, the question arises as to what extent private divorces with State involvement – regardless of what form this may take – are covered by the current European instruments. The CJEU did not comment unequivocally on this in *Sahyouni*. However, it later held in the *TB* decision that an Italian private divorce with the involvement of a civil status registrar[55] can be regarded as a judgment which has to be recognised as such under the Brussels IIa and IIb Regulations.[56] If the rules on recognition of a European private international law instrument are applicable to such private divorces before a registrar, then the rules on jurisdiction in that instrument should also apply, although the CJEU has not definitively decided this point so far.

---

[51] Article 2(1) of the Brussels IIa Regulation, Article 2(2)(1) of the Brussels IIb Regulation, Article 2(2) of the Maintenance Regulation, Article 3(2) of the Rome III Regulation, Article 3(2) of the Succession Regulation, Article 3(2) of the Property Regulations for spouses and registered partners, Article 4(4) of the Parenthood Proposal, Article 3(6) of the Proposal on the International Protection of Adults. Different approaches were adopted. While the 'Europeanised' Hague instruments do not contain an express definition of 'court' or 'authority', some Regulations refer applicants to the understanding of the *lex fori* (Brussels IIb, Rome III). Others introduced more detailed and autonomous definitions, referencing certain key requirements to be met (Succession Regulation, Maintenance Regulation, Matrimonial/Partnership Property Regulation). The most recent Proposals, on the other hand, seem to have adopted slightly different approaches altogether (the Proposal on the International Protection of Adults, for example, no longer contains a reference to 'courts' but rather speaks of 'authorities').

[52] Case C–372/16 *Soha Sahyouni v Raja Mamisch* [2017] ECLI:EU:C:2017:988.

[53] See para 39 of the decision: 'that the regulation covers exclusively divorces pronounced either by a national court or by, or under the supervision of, a public authority'.

[54] See, in particular, paras 40ff of the decision.

[55] *Stracqualursi/Chiricallo*, Italy, paras 34ff.

[56] Case C–646/20 *Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht v TB* [2022] ECLI:EU:C:2022:879.

54 On the other hand, according to the case-law of the CJEU, the rules on jurisdiction for family and succession matters are applicable if an authority other than a court has decision-making power and can definitively specify the applicable family or succession law in the individual case. For example, in its first decision on the Brussels IIa Regulation – in the *C* case – the CJEU already indicated that the decision of a social services committee of a Swedish municipality to take a child into care and place it with a foster family also falls within the scope of the Brussels IIa Regulation:[57] according to this ruling, youth welfare authorities should also be bound by the jurisdiction rules of the Regulation. A similar approach would therefore presumably be taken by the CJEU when authorities other than courts are involved in family and succession matters, for example, if dissolving a marriage in place of a formal court in divorce proceedings, as is the case in some Member States.[58]

55 Finally, the classification of notaries in the European jurisdiction rules for succession matters is somewhat unclear. In particular, the question arises as to what extent notaries are bound by European jurisdiction rules when issuing succession certificates based on Member State law.[59] The CJEU already made it clear in the *Oberle* decision that the granting of a certificate of succession under the law of a Member State is potentially a judicial activity. German probate courts can only issue a certificate of succession under German law if the German courts also have jurisdiction for a matter of succession under Article 4ff of the Succession Regulation.[60] On the other hand, the CJEU has so far been rather reluctant to classify notaries issuing succession certificates as courts. In its decision in *WB*, for example, the CJEU emphasised that a Polish notary is not a court in such a scenario[61] and is therefore likely not bound by the rules on jurisdiction of the Succession Regulation. In its more recent decision in *E.E.*, the CJEU confirmed this classification in the abstract,[62] but left it to the referring court to decide whether Lithuanian notaries should not be treated as courts under the autonomous criteria when issuing a certificate of succession.

The need for a jurisdictional filter

56 From a policy perspective, there is a clear need for a jurisdictional filter for the enforcement of family and succession law by non-judicial actors if the relevant act in family and succession matters is in at least one Member State reserved to courts.

57 First of all, a restriction of the rules on jurisdiction to the judicial enforcement of family and succession law by courts only would lead to contradictory results within the EU – a situation that EU law precisely seeks to prevent in the case of judicial enforcement by means of uniform rules on jurisdiction, including the *lis pendens* rules. This can be shown, for example, by the consequences of the CJEU case-law on the classification of notaries in the issuing of succession certificates under national law in *WB* and *E.E.* (*supra* para 55). The effects of notarial succession certificates in Poland or Lithuania, for example, might be largely identical to the effects of a court-issued succession certificate in Germany; the Polish notarial certificates even partly exceed the effects of such a judicial succession certificate.[63] According to *Oberle*, the German probate courts are bound by the rules on jurisdiction of the Succession Regulation. In contrast, Polish or Lithuanian notaries, when

---

57 Case C–435/06 C [2007] ECLI:EU:C:2007:714, para 33.

58 *Dutta/Patreider*, Comparative Report, paras 19ff.

59 The Court of Justice has already held that notaries do not act as courts when they are involved in the notarisation procedure, with regard to the right of the courts of the Member States to refer questions under Article 267 TFEU; see Case C–387/20 OKR [2021] ECLI:EU:C:2021:751; see also Principle 6.

60 Case C–20/17 Oberle [2018] ECLI:EU:C:2018:485.

61 Case C–658/17 WB v Przemysława Bac [2019] ECLI:EU:C:2019:444.

62 Case C–80/19 E.E. [2020] ECLI:EU:C:2020:230.

63 the description of Polish law in Case C–658/17 *WB v Przemysława Bac* [2019] ECLI:EU:C:2019:444, paras 8ff; *Kamińska*, Poland, paras 72–74.

issuing a certificate of succession according to *WB* or *E.E*, may – at least as a matter of EU law[64] – decide on the underlying succession matter without regard to the jurisdiction of the Polish or Lithuanian courts. As a result, contradictory succession certificates might be issued within the EU.

58 An example case would be the succession upon death of a Turkish national with last habitual residence in Berlin, who also had assets in Poland or Lithuania. In this scenario, based on the Succession Regulation as interpreted in *Oberle*, *WB* and *E.E.*, both the German courts and the Polish or Lithuanian notaries could issue a certificate of succession. These certificates would probably contradict each other. If the testator has not made a choice of law (Article 22 of the Succession Regulation), Polish or Lithuanian notaries will apply German inheritance law to the succession in accordance with the deceased's last habitual residence in Germany (Article 21(1) of the Succession Regulation). In contrast, the German probate courts will, on the basis of Article 75(1) of the Succession Regulation, determine the applicable law to the succession on the basis of the bilateral German-Turkish Succession Convention[65] and, on this basis, will come to the conclusion that Turkish inheritance law is decisive (at least for the movable assets of the testator, cf Section 14(1) of the Convention). But even if such scenarios are disregarded, in which old treaties of a Member State with a third State take precedence under Article 75(1) of the Succession Regulation, there is no guarantee that the results of a German probate court and a Polish or Lithuanian notary when deciding on the same case of succession will always match. For example, the habitual residence can be assessed differently, a will can be interpreted differently, or the statutory succession rule can be applied differently, to name just a few causes of contradictory results when assessing a succession upon death. If notaries are not also bound by the jurisdiction rules of the Succession Regulation, such contradictions are likely to arise.

59 The lack of a jurisdictional filter for the extra-judicial enforcement of family or succession law can also create incentives for undesirable forum shopping. If areas are not covered by the rules on jurisdiction, the parties involved may choose the Member State in which they can expect the family and succession law to be enforced extra-judicially in a manner that suits them. For example, spouses seeking a divorce are likely to be most attracted to a simple and inexpensive out-of-court divorce if a Member State offers such a divorce and is not bound by the rules on jurisdiction. Without a jurisdiction regime, the spouses would be free to choose, at least with regard to private divorces, while they can only initiate a court divorce in a Member State that has jurisdiction for matrimonial matters according to Articles 3ff of the Brussels IIb Regulation.

60 Finally, the policy basis for jurisdiction regimes also applies to a de-judicialised enforcement of family and succession law. International jurisdiction should determine the legal infrastructure of a State that is closely linked to the parties involved, the facts, the applicable law or the effects of an act.[66] This understanding should not only apply in the judicial enforcement of family and succession law, but also when the relevant provisions are implemented by authorities other than courts.

The proposed solution

61 There are two main regulatory approaches for including the de-judicialised enforcement of family and succession law in the law of jurisdiction.

---

[64] Although Polish procedural law provides for a judicial filter: notaries can only issue a Polish succession certificate if Poland has international jurisdiction under the Succession Regulation, see Kamińska, Poland, para 79. In Lithuania such a provision is apparently lacking.

[65] Annex to Article 20 of the Consular Convention between the German Empire and the Republic of Turkey of 28 May 1929, RGBl 1930 II p 758.

[66] See, for example, Jan Kropholler, 'Internationale Zuständigkeit' in Handbuch des Internationalen Zivilverfahrensrechts, vol I (Mohr Siebeck 1982) ch III paras 19ff.

Extension of the uniform rules on jurisdiction – Principle 4

62 Firstly, the jurisdiction rules of the relevant – current or future – European legal instruments could also be extended to non-judicial actors in the enforcement of family and succession law. In this case, authorities other than courts would only be allowed to take action if the Member State to which the activity – in whatever way – is attributable also has jurisdiction.

63 This model can already be found in the jurisdiction rules for succession matters, at least in a special rule. Article 64, sentence 1, of the Succession Regulation provides that the European Certificate of Succession is issued in the Member State whose courts have jurisdiction under the general jurisdiction rules of the Succession Regulation in Articles *4ff*. Article 64, sentence 2, of the Succession Regulation then clarifies that this extension of the rules on jurisdiction also applies if the authority entrusted with issuing the certificate is not a court (lit a of the provision), but another authority (lit b of the provision). This extension of the uniform rules on jurisdiction applies, for example, to notaries (or courts when they do not exercise judicial functions[67]), insofar as they are competent to issue the European Certificate of Succession under the respective implementing law of the Member State. It could even be considered whether this provision applies by analogy to the issue of Member State succession certificates by non-judicial bodies, such as notaries in the *WB* or *E.E.* scenario (see para 55 above).

64 However, the extension of the rules on jurisdiction to courts will in any case reach its natural limits if family and succession law is enforced by private individuals alone, for example, if a Member State were to allow a purely private divorce without State involvement – which is apparently not yet the case under the laws of the Member States, since divorce agreements of the spouses, if admissible, are in any case registered or notarised by the State.[68] This is because private actions cannot be restricted by rules on jurisdiction that are always addressed to State authorities. At best, one could consider the nullity of the legal transaction in question if it violates the 'rules on jurisdiction' because it was carried out in a non-competent Member State. This would, of course, raise numerous follow-up questions regarding the localisation of the legal transaction: Where is the legal transaction carried out if the parties are in different countries? What about legal acts in special sovereign zones, such as on the high seas? In any case, however, an extension of the jurisdiction rules to purely private actions would reach far into the substantive law of the Member States.

65 Against this background, and with regard to Principle 4, the European legislator – when drafting new jurisdictional rules, for example, on gender recognition, or reforming the current instruments, in particular, the Succession Regulation – should ensure that courts (especially where they do not exercise 'judicial functions') or other authorities of a Member State only participate in an act in family and succession matters if that Member State has jurisdiction for the matter according to the relevant rules of the EU.

Additionally in Principle 5(3)(d): Indirect examination of the uniform rules on jurisdiction in the case of the cross-border extension of effects

66 An alternative model would be the indirect application of the rules on jurisdiction when it comes to the cross-border extension of the effects of the de-judicialised enforcement of family and succession law.

67 Examples of such 'indirect' jurisdiction filters for the extra-judicial administration of justice in family and succession matters can also be found

[67] See Case C–187/23 Albausy [2024] EU:C:2025:34, para 66.
[68] *Dutta/Patreider*, Comparative Report, paras 20–23.

in the current private international law of the EU. Article 64 of the Brussels IIb Regulation provides that the new provisions on the recognition of authentic instruments and agreements in matrimonial matters only apply if the Member State in which the authentic instrument was formally drawn up or registered, or in which the agreement was registered, has jurisdiction under the uniform rules. In addition, Article 66(2)(a) of the Brussels IIb Regulation provides that the competent authorities in the Member State of origin may only issue a certificate for the authentic instrument or agreement – which is necessary for the cross-border extension of its effects under the new rules – if this Member State was also internationally competent under the Regulation. This ensures that the rules on jurisdiction are observed in any case when the effect is extended across borders.

68 The European legislator should additionally use this technique of indirect jurisdiction. As recommended in Principle 5(3)(d), the EU should allow Member States to refuse the extension of the effects of an act if the Member State whose authorities other than courts participated in the act did not have jurisdiction in the matter according to the relevant rules of the EU. Such an indirect jurisdictional filter is a discrimination of acts in family and succession matters in which authorities other than courts participate because, at least within the EU, jurisdiction is not checked when it comes to the recognition of court decisions; the lack of jurisdiction of the Member State of origin is not listed among the grounds for refusal of recognition in any of the existing instruments. However, this filter is necessary at least for a certain period of time while the authorities other than courts (for example, civil status officers and notaries) become accustomed to checking the jurisdiction of their State.

Principle 5: Extension of Effects

1. *The European Union should ensure that the effects of an act in family and succession matters according to the law of a Member State whose authorities other than courts participated in the act are extended to all Member States as far as the law of the European Union harmonises the law applicable to, and the jurisdiction for, the family and succession matter.*

2. *The European Union should provide for uniform European certificates to facilitate the cross-border circulation of such acts between the Member States.*

3. *The European Union should allow the Member States the possibility to refuse the extension of the effects of an act if:*

   (a) *such extension is manifestly contrary to the public policy of the Member State to which the effects of the act are to be extended; or*

   (b) *it is irreconcilable with an act or decision issued in proceedings between the same parties in the Member State to which the effects are to be extended; or*

   (c) *it is irreconcilable with an act or decision issued in another Member State or in a third State in proceedings involving the same cause of action and between the same parties, provided that the act or decision fulfils the conditions necessary to extend its effects to the Member State to which the effects of the act are to be extended; or*

   (d) *the Member State whose authorities other than courts participated in the act did not have jurisdiction in the matter according to the relevant rules of the European Union.*

Comments

69 Principle 5 is addressed to the European legislator when reforming the current, or adopting new, private international law

instruments. Its aim is to facilitate the extension of effects of acts in family and succession matters throughout the EU (subsections 1 and 2), while at the same time introducing necessary safeguards for Member States and the parties involved (subsection 3).

Extending the effects of an act (Principle 5(1))

70 Principle 5(1) intends to ensure that an act (para 4) in family and succession matters in which in one Member State an authority other than a court participated has the same effects in the other Member States, without any special procedure being required. Hence, it is proposed that the European legislator introduces rules similar to the recognition regime for court decisions (or extend the existing ones) for acts in which authorities other than courts participated, provided that the act (a) is in at least one Member State reserved to courts (Principle 1) and (b) produces as to its essential elements the same effects as a court decision (to the extent possible). The extension of effects under Principle 5(1) should then take place by operation of law.

71 The introduction of such a far-reaching extension of effects by the European legislator is, however, only justified if the EU harmonises (or already has harmonised in existing instruments) the rules on applicable law and jurisdiction in the respective area of family and succession law. Only then can a harmony of decisions within the EU and a jurisdictional filter avoid, at least in theory, irreconcilable acts in family and succession matters in different Member States. Extending the effects of an act in family and succession matters without harmonising the rules on applicable law and jurisdiction would additionally give an incentive to forum and law shopping. All these implications would endanger legal certainty[69] and the predictability of outcomes which the private international law of the EU aims to secure. Furthermore, mutual trust in connection to the extension of effects of de-judicialised acts in family and succession matters is only justified between Member States if they are already bound by common jurisdictional and conflict rules. It is, hence, consistent that, at least in the area of family and succession law, the European legislator has so far linked the extension of effects, in particular, of court decisions, to the harmonisation of the rules on jurisdiction and the applicable law. This connection appears both within the same instrument (for example, Succession Regulation) and complementary instruments (for example, in the Brussels IIb Regulation and the Rome III Regulation). Also, the automatic extension of the European Certificate of Succession and its uniform effects to the other Member States according to Article 69(1) of the Succession Regulation is based on the fact that the Succession Regulation harmonises jurisdiction and the applicable law.[70]

72 The term 'extension of effects' intends to convey a neutral and functional concept of transposing a legal situation shaped by means of a foreign act into the legal system of the other Member States. The need to introduce a different terminology further arises from the fact that, in de-judicialised settings, it is currently not always sufficiently clear whether changes in a legal situation (eg, the dissolution of a marriage) derive from the participation of a State authority in an act or directly from the declarations of the parties.[71] This leads to issues in the qualification of acts in cross-border scenarios (see also Principle 7(1) and paras 107ff) and thus in the identification of the applicable regime ('recognition' or 'acceptance').

---

[69] Cf also European Law Institute, *Charter of Fundamental Constitutional Principles of a European Democracy* (European Law Institute 2024) 44ff (Principle 9: Legal certainty).

[70] See Rembert Süß, 'Der Vorbehalt zugunsten bilateraler Abkommen mit Drittstaaten' in Anatol Dutta and Sebastian Herrler (eds), *Die Europäische Erbrechtsverordnung* (C.H.Beck 2014) 191 para 29.

[71] *Dutta/Patreider*, Comparative Report, paras 19ff.

73 Which effects an act has, and which thus are to be extended, is to be determined by the law of the Member State whose authorities participated (see para 16) in it. Competence in this regard should lie with the authorities of the Member State of destination. Where an act contains effects which are not known in the law of the Member State of destination, the authorities of that Member State should be allowed to adapt the act, to the extent possible, to an act or decision known under their Member State law which: (a) has equivalent effects attached to it; (b) pursues similar aims and interests; and (c) respects the essential elements of the incoming act. This should in any case not result in effects going beyond those provided for in the law of the Member State of origin.

European certificates for acts in family and succession matters (Principle 5(2))

74 Principle 5(2) proposes to further facilitate the circulation of acts in family and succession matters by introducing harmonised standard forms or certificates accompanying acts intended for cross-border use. Such certificates are already established under the existing instruments for the recognition and enforcement of decisions as well as of agreements and authentic instruments.[72] Acts accompanied by the respective certificate should be received by the authorities of the other Member State without any special procedure being required.[73] The grounds for refusal under subsection 3 continue to apply.

75 The certificates should serve the aim of facilitating the extension of effects of an act given in one Member State, namely by recording the essential contents of the underlying act in a formalised and easily understandable manner. Free text fields should be limited to the extent necessary, with the certificates mainly relying on numbered fields. In line with the existing *acquis*,[74] the certificates should thus not replace the acts to which they are attached but serve as an additional document accompanying and explaining them, as well as establishing their contents and thus also facilitating the examination of the grounds for refusal. No autonomous legal effects should be connected to the certificate.

76 The contents of the forms will vary depending on the family and succession matter concerned. The authorities receiving the certificate should, however, be put into a position to retrace the relevant facts of the underlying act, the procedural steps taken[75] and considerations applied by the authority issuing the act or certificate. This strengthens mutual trust in matters concerning the extra-judicial administration of justice.

77 The European legislator, when implementing Principle 5(2) in existing or future instruments, should provide that the certificates be issued by the authorities of the Member State whose authorities participated in the act to which the certificate is attached. Which authorities to involve, be they judicial or non-judicial, should in the end be left to the national laws of the Member States in their implementing legislation. The authority participating in the act does consequently not necessarily have to be the authority issuing the certificate. However, Member States should, for the purpose of procedural economy, limit the need to involve several authorities.

Grounds for refusal (Principle 5(3))

78 Principle 5(3) proposes that the European legislator implements safety measures to ensure

---

[72] See Article 36 and Annexes I–IX of the Brussels IIb Regulation; Article 80 of the Succession Regulation.

[73] See eg Article 65 in conjunction with Article 31(1) Brussels IIb Regulation.

[74] In particular, Article 36 and Annexes I–IX of the Brussels IIb Regulation.

[75] Eg whether the authority checked their jurisdiction. See Point 4 of Form V Annex 5 of the Commission Implementing Regulation (EU) No 1329/2014 of 9 December 2014 establishing the Forms referred to in Regulation (EU) No 650/2012 of the European Parliament and of the Council 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.

that Member States can refuse the extension of effects of an act to their territory. Member States should not be obliged in every case to extend the effects of an act according to the law of a Member State whose authorities other than courts participated in the act. The provision is consistent with the *acquis* of the EU in family and succession matters and modelled on similar rules found in the relevant European private international law instruments, especially when it comes to the recognition of decisions.[76] If in the existing or future instruments the EU extends the effects of acts in family and succession matters as proposed under Principle 5(1), it becomes necessary to introduce similar grounds here. The notions should, in principle, coincide with the current meaning given to the terms under the private international law instruments of the EU. Where necessary, changes in the application or interpretation might have to be adopted.

79 Bearing this in mind, the courts or other competent authorities asked to extend the effects of an act should not, for example, be able to apply the public policy exception (Principle 5(3)(a)) on the mere ground that the act stemmed from an authority other than a court, especially if the minimum standards established by Principle 3 were complied with. Although not expressly mentioned, a Member State could further consider an act contrary to its public policy if said act was not enacted in compliance with the minimum standards of Principle 3. A similar approach applies to Principle 5(3)(b) and (c). Authorities should not automatically consider acts irreconcilable with judicial decisions based on the fact that their origins are in one case judicial and in one case not. The acts or decisions, for the present purposes, consequently, do not have to be of equal status or final. Principle 5(3)(d), on the other hand, expands the *acquis*. The ground for refusal is, however, closely connected to, and justified by, the obligations established under Principle 4 (see, in particular, paras 66ff).

Principle 6: Preliminary Reference

If an authority of a Member State participates in an act in family and succession matters, this authority should be considered as a 'court or tribunal' for the purpose of Article 267 of the Treaty on the Functioning of the European Union.

Comments

80 Principle 6 suggests that the CJEU (when interpreting the TFEU) or the Member States (when reforming the Treaty) should consider expanding the concept of 'court or tribunal' for the purpose of Article 267 TFEU, in order to include authorities other than courts participating in acts in family and succession matters (see para 16). This Principle primarily addresses the Member States as the parties to the Treaty, although similar outcomes could be achieved through an extensive interpretation of Article 267 TFEU by the CJEU. This Principle relates mainly to the existing and future private international law instruments of the EU.

81 The Principle applies to all authorities participating in de-judicialised proceedings. This could include: (a) authorities which take decisions in certain matrimonial, succession or parental responsibility matters, carrying out substantive controls and adopting a measure having the same effect as a decision;[77] (b)

[76] See eg Articles 38f Brussels IIb Regulation; Article 40 Succession Regulation; Article 24 Maintenance Regulation; Articles 37 of both the Matrimonial and Partnership Property Regulations.

[77] The following authorities carry out this substantive control: Romanian notaries (who may reject a divorce agreement if it is not in accordance with the best interests of the child, as indicated in the social investigation report: *Vlad*, Romania, para 34); Lithuanian notaries (who may assess the fairness of the agreement between the spouses: *Bogdziewicz*, Lithuania, para 34); Portuguese civil registrars check that all legal requirements have been met and assess whether agreements on the maintenance of the spouse, the allocation of the use of the family home and the future treatment of pets protect the interests of both spouses and their children (*Teixeira Pedro*, Portugal, para 22).

authorities drawing up authentic instruments after a formal and procedural scrutiny;[78] and (c) those merely recording a declaration and an agreement, after verifying their own competence to receive it.[79] All these authorities may need to apply the private international law instruments of the EU when participating in an act in family and succession matters.[80] Therefore, the possibility of a preliminary ruling can be a useful tool for all the authorities mentioned above, in order to clarify any questions that may arise, and is also consistent with the doctrine affirmed by the CJEU, which has exclusive jurisdiction to interpret EU law through preliminary rulings, with the aim of ensuring the uniform application of EU law across all Member States.[81]

82 Against this background, not all authorities are entitled to submit preliminary references, from the perspective of the proposed Principle 6, which is limited to scenarios where the relevant act is reserved to courts in at least one Member State (see Principle 1). For example, Austrian notaries involved in succession proceedings, preparing decisions ultimately issued by courts but not independently adjudicating disputes, generally lack the essential characteristics of an authority participating in an act within the meaning of Principle 1.[82] In Sweden, the Tax Agency (*Skatteverket*) plays an important role in civil status registration, but its decisions are not constitutive – they do not establish or alter legal statuses or relationships in the same manner as court rulings.[83] These authorities do not take decisions which are reserved for courts in at least one Member State, nor do they participate in proceedings intended to produce equivalent legal effects. Consequently, it is considered that they should not have access to the preliminary reference procedure under Article 267 TFEU in accordance with Principle 6.

83 Given the increasing use of out-of-court procedures, providing these proceedings with access to Article 267 TFEU would promote the uniform interpretation and application of EU law. This inclusion would not only enhance the consistency and coherence of the Union's legal system, which is the very purpose of Article 267 TFEU, but would also directly support the objective of judicial cooperation of Article 81 TFEU,[84] which seeks to develop a legal area based on mutual trust and common standards.

84 Moreover, by implementing this Principle, the European legislator could turn extra-judicial procedures into a truly competitive alternative to judicial proceedings in cross-border situations.

---

[78] See the Italian lawyer-assisted negotiations for separation and divorce (*Stracqualursi/Chiricallo*, Italy, paras 94ff), the Spanish divorce decreed by the *Letrado de la Administración de Justicia* (*Esteve Alguacil*, Spain, para 6) and the Greek notarial deed of divorce and dissolution of a registered partnership (*Zervogianni*, Greece, para 18). Acts drafted by an administrative authority are classified as an 'authentic instrument' under Article 2(2)(2) Brussels IIb Regulation, Article 3(1)(c) Matrimonial Property Regulation and Article 3(1)(i) Succession Regulation.

[79] See the Italian divorce before the mayor (*Stracqualursi/Chiricallo*, Italy, paras 107ff) or the Danish divorce in front of the Agency in green cases, where the public authorities' involvement in family law cases will mostly be reduced to the registration or granting of a formal approval of the agreement reached between the parties, without any substantial review (*Pedersen/Thøgersen*, Denmark, para 34). Such arrangements are defined as 'agreements' in Article 2(2)(3) of the Brussels IIb Regulation.

[80] Doubts have arisen in succession cases (C–387/20 OKR [2021] ECLI:EU:C:2021:751; C–148/22 OP [2023] ECLI:EU:C:2023:924), in divorce cases (C–68/07 *Sundelind Lopez* [2007] ECLI:EU:C:2007:740) and more recently for parental responsibility (Case C–572/21 CC v VO [2022] ECLI:EU:C:2022:562), a problem that had long remained unanswered. This can be complicated by overlapping Regulations with different rules (ie the Brussels IIb and Maintenance Regulation) or by the criteria set by individual Regulations. For instance, the Court of Justice clarified the notion of citizenship in the *Hadadi* case (Case C–168/08 *Hadadi* [2009] ECLI:EU:C:2009:474), while a clear interpretation of 'habitual residence' in divorce cases was given in 2023 (C–462/22 *BM* [2023] ECLI:EU:C:2023:553), but when residence is fragmented, some doubts could still arise.

[81] That principle is enshrined in particular in Article 344 TFEU, under which the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties (Opinion 2/13 [Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms] of 18 December 2014, EU:C:2014:2454, para 201 and *ex multis* Case C–284/16 *Achmea* [2018] EU:C:2018:158, para 32).

[82] *Patreider*, Austria, para 120.

[83] *Vaigė*, Sweden, para 2.

[84] The concept of 'court' is relevant in other contexts of European Union law (it is used in the European private international law instruments, in Article 19 TEU and Article 47 CFR), but the definitions are not uniform.

Those procedures already offer significant advantages, such as shorter timelines and lower costs, at the same time preventing an escalation of disputes in family and succession matters (see para 9): by allowing them to request preliminary rulings, they would also gain an additional layer of reliability and compliance with EU law, ensuring outcomes that are not only efficient but also legally robust and trustworthy, making them an attractive and fully viable alternative (see in general Principle 2).

The current definition of 'court' according to the Court of Justice of the European Union under Article 267 TFEU

85 The concept of 'court or tribunal' in Article 267 TFEU has been shaped and refined by the case-law of the CJEU.[85] The CJEU applies an autonomous and uniform interpretation to qualify a 'court or tribunal' for the purposes of preliminary rulings.[86] This assessment is guided by a number of factors that are related, in particular, to the institutional features and the functional role of the referring body.

86 In fact, the referring body is required to be established by law, permanent (it must not be a temporary or *ad hoc* institution) and independent. Independence[87] includes both *external* and *internal* aspects, as the body must be free from hierarchical control or external influence, and, in addition, members must act impartially and without bias. Moreover, the body must resolve disputes[88] and deliver decisions of a judicial nature; procedures must allow for adversarial debate.[89]

87 The approach of the CJEU has become even stricter in its most recent judgments. For example, in *Nada*, the Court dismissed a preliminary reference, arguing that the referring body, the Austrian *Unabhängige Schiedskommission* (Independent Arbitration Commission), lacked sufficient independence;[90] in *CityRail*, the Czech Republic Transport Infrastructure Access Authority was not qualified as a court for failing to meet the institutional criteria of a court;[91] in *OKR*, a Polish notary was denied the qualification of court with the argument that its role was administrative rather than judicial.[92] In *Albausy*, Advocate General *Campos Sánchez-Bordona* quotes *OKR* and mentions that the Court of Justice has to verify whether there is a case pending before a court and 'whether it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature'.[93] If these conditions are not fulfilled, the referring body cannot be considered to be exercising a judicial function, even if it fulfils the other conditions laid down in the case-law of the CJEU. This strict approach is largely due to the increasing number of preliminary references, which has made the CJEU a supranational judicial review body of national legislation.[94]

---

85 Case C–115/22 *Nada* [2024] ECLI:EU:C:2024:384, para 34; Case C–722/21 *Frontera Capital* [2022] ECLI:EU:C:2022:412, para 11.

86 Case C–658/17 WB v Przemysława Bac [2019] ECLI:EU:C:2019:444.

87 Cf also European Law Institute, *Charter of Fundamental Constitutional Principles of a European Democracy* (European Law Institute 2024) 52–56 (Principle 14: Judicial independence and impartiality; Principle 15: Rules governing judicial independence; Principle 16: Specific guarantees), 56f (Principle 17: Independence as a general principle of reviewing bodies).

88 Case C–138/80 *Borker* [1980] ECLI:EU:C:1980:162, para 4; Case C–318/85 *Greis Unterweger* [1986] ECLI:EU:C:1986:106, para 4; Case C–111/94 *Job Centre* [1995] ECLI:EU:C:1995:340, para 9; Case C–134/97 *Victoria Film* [1998] ECLI:EU:C:1998:535, para 14; Case C–195/98 *Österreichischer Gewerkschaftsbund* [2000] ECLI:EU:C:2000:655, para 25; Case C–58/13 *Torresi* [2014] ECLI:EU:C:2014:2088, para 19; Case C–453/20 *CityRail* [2022] ECLI:EU:C:2022:341, paras 43ff.

89 See, *inter alia*, Case C–54/96 *Dorsch Consult* [1997] ECLI:EU:C:1997:413, para 23; Case C–53/03 *Syfait and Others* [2005] ECLI:EU:C:2005:333, para 29; Case C–246/05 *Häupl* [2007] ECLI:EU:C:2007:340, para 16 and Case C–118/09 *Koller* [2010] ECLI:EU:C:2010:805, para 22; more recently: Case C–453/20 *CityRail* [2022] ECLI:EU:C:2022:341, para 41, Case C–718/21 *Krajowa Rada Sądownictwa* [2023] ECLI:EU:C:2023:1015, para 40; Case C–115/22 *Nada* [2024] ECLI:EU:C:2024:384, para 35.

90 Case C–115/22 Nada [2024] ECLI:EU:C:2024:384.

91 Case C–453/20 CityRail [2022] ECLI:EU:C:2022:341.

92 Case C–387/20 OKR [2021] ECLI:EU:C:2021:751.

93 Case C–187/23 Albausy [2024] EU:C:2024:309, Opinion of AG Campos Sánchez-Bordona, para 26.

94 Initially, the criteria were less strict (see C–61/65 *Vaassen-Göbbels* [1966] ECLI:EU:C:1966:39).

88 Nevertheless, the CJEU has occasionally adopted a functional approach, especially in family and succession matters. For example: in the *Brigitte Schlömp* case, the CJEU considered a Swiss conciliation body to be a 'court' on the basis of the functional equivalence of its decisions to those of judicial authorities.[95] Most recently in the *Albausy* case, the CJEU dismissed a preliminary reference from a German court issuing a European Certificate of Succession, holding that, in that role, it was not exercising judicial functions.[96] However, the CJEU, while declaring the referral inadmissible, effectively addressed the substantive questions raised. Reading between the lines, this decision, while seemingly reinforcing the restrictive interpretation of Article 267 TFEU, demonstrates how this restrictive interpretation can lead to procedural inefficiencies without necessarily serving the underlying purpose of preliminary references.

The opportunity of extending preliminary references to authorities other than courts in family and succession matters

89 Against this background, one may object that interpretative questions concerning the application of EU law can be raised in the course of judicial review proceedings against extra-judicial acts, where a court could then request a preliminary ruling under Article 267 TFEU. This argument was developed in the *OKR* judgment,[97] suggesting that there is no need to grant a preliminary reference at the level of the extra-judicial proceedings, because judicial remedies are sufficient to ensure the effectiveness of the preliminary ruling mechanism.

90 However, this argument is not fully convincing for a number of reasons. Firstly, it lacks consistency, because it contradicts the idea that courts other than those of last instance can make preliminary references; this is, however, possible under Article 267(2) TFEU, which is aimed to ensure the uniform application of EU law at all stages of judicial proceedings. Secondly, the above-mentioned reasoning leads to delays and an increase in litigation, as the parties may be forced to take disputes to courts simply to resolve uncertainties in EU law. Finally, it makes the preliminary ruling dependent on the availability of the parties to judicially challenge the acts of authorities other than courts.

91 Following Principle 6, in allowing preliminary references during the drafting or registration of an act in family and succession matters, the CJEU would help resolve ambiguities earlier. This proactive approach promotes efficiency, ensures legal certainty, and supports the uniform application of EU law. It also helps to prevent unnecessary appeals that could overburden judicial systems of the Member States. Furthermore, it acknowledges the increasing use of out-of-court procedures, safeguards their efficiency, and strengthens their reliability in cross-border legal situations.

92 An extension of Article 267 TFEU would also be beneficial to ensure that authorities other than courts carry out their duties correctly, minimising the risk of professional liability or sanctions due to errors or omissions in the performance of their duties.[98]

The need for extending preliminary references to authorities other than courts in family and succession matters

93 The CJEU case-law in family and succession matters represents a relatively small portion of its total caseload.[99] One possible explanation is that the de-judicialisation trend may have

---

[95] Case C–467/16 *Brigitte Schlömp v Landratsamt Schwäbisch Hall* [2017] ECLI:EU:C:2017:993.
[96] Case C–187/23 *Albausy* [2025] ECLI:EU:C:2025:34.
[97] Case C–387/20 OKR [2021] ECLI:EU:C:2021:751, para 33.
[98] Only in some countries, if doubts arise regarding a person's rights or legal facts, notaries must refuse to certify such rights or facts (see eg *Bogdziewicz*, Lithuania, para 7; see also the role of the Italian Public Prosecutor: *Stracqualursi/Chiricallo*, Italy, para 104).
[99] Annual Report 2023 Statistics concerning the judicial activity of the Court of Justice.

limited the number of preliminary references in these areas, as the strict doctrine upheld by the CJEU requires an act to be challenged before the court for a preliminary reference to be made. In some legal systems, however, this requirement may be limited in practice, particularly where the legal effects derive directly from the will of the parties rather than from decrees of authorities other than courts.

94 The comparative analysis shows that the effects of out-of-court procedures sometimes depend on an out-of-court decision and in other cases they result directly from the will of the parties (the agreement or the declaration itself, after a structured procedure involving an authority). This, in particular, applies to succession law, where, in many Member States, notaries rather than courts play the central role in the implementation of the succession upon death,[100] but also to divorce and separation proceedings. This distinction has significant implications for legal remedies.[101] In Member States such as Italy or France, where extra-judicial divorces are directly established by binding agreements, these acts can usually only be challenged through substantive (contractual) remedies. Challenges are often limited to issues such as lack of consent or breach of mandatory rules; therefore, there is no general possibility of appeal. In such cases, granting authorities other than courts participating in the act the right to make preliminary references under Article 267 TFEU becomes crucial. Without this option, the parties may lack effective mechanisms to resolve questions of EU law that arise during procedures.

95 The need to entitle authorities other than courts to raise a preliminary reference is even more compelling in countries where no consensual judicial alternative to non-judicial procedures is contemplated (even if there is the possibility of having the act reviewed in court). For example, since December 2017, divorce by mutual consent in Greece has been possible only before a notary, and the dissolution of a registered partnership between same-sex couples is only possible out-of-court.[102] In Portugal, if the spouses, in addition to the consensual dissolution of the marriage, also conclude complementary divorce agreements (on additional issues arising from divorce), they must file a common request to the civil registrar.[103] In Lithuania, the courts will dismiss a claim if the claimant has not first followed the mandatory out-of-court settlement procedures prescribed by law for this type of case. In these jurisdictions, therefore, the parties are forced to resort to contentious proceedings in order to bring the family and succession issue before a court that can refer the case to the CJEU.[104]The extension of the preliminary reference to these authorities is, therefore, necessary and impelling.

Compatibility of the proposed solution with the purpose of preliminary rulings

96 The solution proposed in Principle 6 is not only beneficial and sometimes essential to enhance mutual trust that underpins judicial cooperation in civil matters, but is also consistent with the fundamental purpose of preliminary references.

97 Article 267 TFEU is intended to provide a framework for cooperation between the CJEU and national courts (and potentially other authorities exercising judicial functions) in order to ensure the correct and uniform application of

[100] *Dutta/Patreider*, Comparative Report, paras 35ff.

[101] *Dutta/Patreider*, Comparative Report, paras 18ff. The acts of Romanian notaries can be challenged by any interested person through an action for annulment in court. Further, any decision to reject the application may be appealed to the lowest court within ten days from receiving it (*Vlad*, Romania, para 37). In Lithuania, an interested party may file an appeal with the court that is within the area of the notary's office if they are of the opinion that an executed notarial deed or the refusal to execute a deed is erroneous (*Bogdziewicz*, Lithuania, para 40). A decision taken by the Danish Agency in yellow cases may be appealed within four weeks to the family court, with permission from the appeals permission board (*Pedersen/Thøgersen*, Denmark, para 39).

[102] *Zervogianni*, Greece, paras 17 and 22.

[103] *Teixeira Pedro*, Portugal, para 21.

[104] *Bogdziewicz*, Lithuania, para 19.

Union law in the Member States,[105] preventing the CJEU from becoming an advisory body to public administrations.[106] This purpose should guide the best interpretation of the term 'court or tribunal' in Article 267 TFEU, excluding inconsistent criteria, such as the existence of a dispute.

98 In consensual family and succession matters, the main purpose of the judicial procedure is to provide a formal framework to the will and ensure that procedural and substantive requirements are met but does not necessarily imply the exercise of an administrative function. Indeed, in the *CityRail* case, the CJEU considered that neither the presence nor the absence of a contentious proceeding was decisive when it came to the question of whether an authority exercised judicial functions.[107] On the contrary, the CJEU clarified that an activity is administrative in nature when: (a) it can be initiated *ex officio* by the authority itself; and (b) the authority lacks impartiality (because it favours and promotes public interests over private ones), conditions that are not present in the context under consideration here.

99 Therefore, when an authority's decisions produce definitive legal effects in family and succession matters, it exercises judicial rather than administrative functions: in those cases, the courts' role does not differ from that played by non-judicial authorities when they issue a final decision that regulates the substantive legal situation[108] (in cases such as divorces finalised by Lithuanian notaries[109] and civil registrars in Portugal).[110]

100 A possible counter-argument might be that the extension of the preliminary reference mechanism to non-judicial authorities acting in family and succession matters would open the floodgates to all cases involving authorities other than courts. However, family and succession cases concern the enforcement of private rights, therefore, there is no significant risk of turning the CJEU into a consultative organ for public administrations and overburdening the CJEU by extending preliminary reference mechanisms to all authorities other than courts.

101 Besides, non-judicial authorities, according to Principle 5, should respect certain standards. These safeguards ensure that authorities other than courts meet the other criteria that the CJEU considers essential for preliminary references.

102 As a result, the extension of the right to raise a preliminary reference to authorities other than courts falling within the definition of 'court' in the relevant Regulations of the EU is argued for.[111]

---

[105] Case C–115/22 Nada [2024] ECLI:EU:C:2024:384, para 33; Case C–338/23 Bravchev [2024] ECLI:EU:C:2024:4, para 18; Case C–378/08 ERG [2010] ECLI:EU:C:2010:126, para 72.

[106] See Case C–453/20, *CityRail* [2022] ECLI:EU:C:2022:341, para 45; Case C–462/19 *Anesco and Others* [2020] ECLI:EU:C:2020:715, para 49; Case C–394/11 *Belov* [2013] ECLI:EU:C:2013:48, para 40; Case C–136/11 *Westbahn Management* [2012] ECLI:EU:C:2012:740, para 27; Case C–134/97 *Victoria Film* [1988] ECLI:EU:C:1998:535, para 15.

[107] C–453/20 *Cityrail* [2020] ECLI:EU:C:2022:341.

[108] Only in Denmark's yellow cases is the administrative authority (the Family Law Agency) allowed to settle a dispute between a couple. Unlike the green cases, the outcome in these cases is a decision.

[109] *Bogdziewicz*, Lithuania, para 34.

[110] *Teixeira Pedro*, Portugal, para 22.

[111] These criteria generally ensure that the authority: exercises judicial functions or acts under the delegation or supervision of a judicial body; ensures impartiality and the right of all parties to be heard; makes decisions that are subject to review or appeal before a judicial authority; makes decisions which have the same legal force and effect as those made by judicial authorities in equivalent matters.
These authorities are classified as *judicial authorities* under the Matrimonial Property Regulation (Recital 29 and Article 3(1)(d)) and the Succession Regulation (Article 3(2)). The Court of Justice of the European Union further confirmed this approach in the *WB case* (Case C–658/17 WB v Przemysława Bac [2019] ECLI:EU:C:2019:444), where it emphasised that the concept of 'court' in the Succession Regulation must be interpreted broadly to include notaries exercising judicial functions. The Rome III Regulation (Article 3(2)) does not contain specific criteria, while, according to the Brussels IIb Regulation (Recital 14 and Article 2(2)(1)), the term should be given a broad meaning so as to cover administrative authorities, or other authorities, such as notaries, who or which exercise jurisdiction in certain matrimonial matters or matters of parental responsibility. Any agreement approved by the court following an examination of the substance in accordance with national law and procedure should be recognised or enforced as a 'decision'. The Italian negotiation assisted by lawyers and under the control of the public prosecutor, seems to meet all these requirements (*Stracqualursi/Chiricallo*, Italy, paras 94ff). Lithuanian notaries, who assess the fairness of the agreement between the spouses, meet all these requirements as well (*Bogdziewicz*, Lithuania, para 34).

103 Principle 6 could potentially apply to cases where the legal effects stem directly from the will of the parties, with the role of the authority other than courts limited to procedural functions, such as registration. This is a particularly ambitious proposal given the current case-law of the CJEU, as it concerns scenarios where there is no formal decree or decision issued by a public authority. This extension is nevertheless very important because such acts are not easily challenged, since the remedies are not clearly identified, not all States provide for specific procedures, or allow remedies for any circumstances. Without the possibility of a preliminary ruling for authorities participating in these acts, there is a significant risk of an inconsistent or unconvincing application of EU law, undermining its uniform interpretation and the rights of individuals in cross-border matters.

Principle 7: More Legal Certainty

1. *When shifting competences from courts to other authorities or the parties themselves according to Principle 2, Member States should provide for clear substantive and procedural rules, and, in particular, clarify whether substantive or procedural remedies apply.*

2. *The European Union should ensure that its private international law instruments cover acts in family and succession matters comprehensively.*

3. *The European Union should simplify the regimes by which European private international law instruments extend the effects of acts in family and succession matters.*

Comments

104 When shifting competences to authorities other than courts (see para 6) and when reforming existing extra-judicial procedures in family and succession law, Member States act independently of each other based on their competences for substantive family and succession law. Procedures thus inevitably vary from Member State to Member State. Nonetheless, especially in view of the increasing corpus of regulations concerning cross-border family and succession law, it appears desirable that Member States follow some common guiding criteria when considering what to regulate and what not. Among these is the need to increase legal certainty and predictability.[112]

105 Principle 7 intends to strengthen legal certainty and predictability by inviting Member States and the EU to clarify certain aspects of the existing framework for cross-border family and succession matters, while changing others. It is addressed to both the Member States (Principle 7(1)) and the EU (Principle 7(2) and (3)).

106 In particular, when starting to involve non-judicial authorities in the administration of justice, Principle 7(1) proposes to clearly identify the roles and functions of the parties and authorities involved, including potentially applicable legal remedies. Principle 7(2) and (3), on the other hand, focus on the cross-border dimension of acts in family and succession matters. They constitute broader recommendations both for existing and forthcoming instruments of the EU on cross-border family and succession matters. Principle 7(2) sets out to guarantee consistency, by closing gaps in the current framework and by avoiding inconsistencies in, or with, future instruments – especially if they are due to the participation of authorities other than courts. It argues for the strengthening of a functional understanding of the terms 'court' and 'decision' as well as for a potential revision of the scopes of application of the existing instruments. At the same time, the existing regimes, in particular in matters of 'recognition', should be simplified (Principle 7(3)).

[112] Cf also European Law Institute, *Charter of Fundamental Constitutional Principles of a European Democracy* (European Law Institute 2024) 44ff (Principle 9: Legal certainty).

Substantive or procedural remedies (Principle 7(1))

In general

107 Principle 7(1) is intended to apply both when shifting competences to authorities other than courts and when reforming existing extra-judicial procedures. The scope of application is determined by Principle 1 (see paras 1ff).

108 When further de-judicialising the administration of justice in family and succession matters, Member States should ensure that the role of the parties and authorities involved is clearly identified. Establishing whether the legal consequences are determined by the involvement of the authority or already by the declaration or agreement of the parties would bring more legal clarity to family and succession matters and allow for an easier qualification of the act for cross-border purposes. An indication might be provided by the remedies given to parties when challenging the respective act. The applicability of contractual remedies or the extension of the general rules of the law of obligations can indicate that the de-judicialised solution adopted in a Member State is contractual in nature and that the legal effects already derive from the agreement or the declarations of the parties. Should the legal effects, on the other hand, be determined, or the legal situation between the parties be shaped, by the involvement or activities of an authority, a qualification of the act as a 'decision', also for the purposes of European private international law, might be more feasible.

109 An easier characterisation of an act as a contract or agreement rather than a public decision under the relevant European private international law rules facilitates the circulation of the act, strengthens legal certainty and accelerates proceedings. Member States should, thus also strive to find uniform qualifications for out-of-court solutions intended to cross borders and consider that their national acts might circulate throughout the Union, with their effects having to be extended to other jurisdictions (see paras 69ff). Comprehensible and transparent rules in this regard will further help to strengthen mutual trust between Member States.

The need for more legal clarity in out-of-court proceedings – the example of divorce

110 The need for more legal clarity is best showcased by highlighting the current framework in extra-judicial divorce matters. In recent years, a growing number of Member States have introduced the possibility of dissolving marriages through partially or completely de-judicialised proceedings.[113] It is, however, not always easy to determine whether the dissolution of the marital bond results directly from the parties' agreement, whether it arises from the public authority's decree or whether substantive or procedural remedies apply. In Italy, an out-of-court divorce option before a mayor was introduced in 2014:[114] in the proceedings, that cannot be accessed in the presence of minor children, the mayor's role is confined to verifying the fulfilment of formal requirements and confirming the parties' intention to divorce or separate. Moreover, agreements presented to the mayor cannot include provisions related to asset transfers or lump-sum maintenance payments. While many procedural aspects relating to this kind of divorce were expressly regulated, and while the agreement has the same effects as a judicial decision and produces *res judicata* effects, the rules do not clarify what kind of remedies apply. It thus had to be clarified by the Italian Supreme Court that contractual remedies as well as the rules on vitiating factors could be extended to this type of out-of-court divorce.[115]

[113] *Dutta/Patreider*, Comparative Report, paras 19ff.
[114] Article 12 of Decree-Law 132 of 2014.
[115] *Stracqualursi/Chiricallo*, Italy, paras 116ff.

111 Another example is the notarial divorce in Romania:[116] here, the divorce derives from a public deed issued by a notary. Parties can proceed to the divorce even if they have minor children, who in that case must be heard by the notary. Romanian law, however, does not specify the consequences of instances in which a child is not heard or of cases in which an agreement is incompatible with the child's best interests.

More comprehensive approach of European private international law (Principle 7(2))

112 The EU should ensure that, in the situation described in Principle 1, the existing and future private international law instruments cover acts in family and succession matters comprehensively.

113 The conflict rules of the family and succession law instruments should generally apply to courts and other authorities (including entities acting in an official capacity or authorised under national law to carry out certain tasks) alike, provided that they are entrusted with the same or corresponding tasks in different Member States and should the acts emanating from them produce the 'same' legal effects.[117] As highlighted, applying certain (jurisdictional or recognition) regimes should, in principle, not merely depend on the fact that a function is carried out by a court rather than by another authority. The focus should lie on the function itself. This does not necessarily mean that all acts in family and succession matters should automatically be subject to the same regime, but rather that functionally equivalent tasks or acts should be treated alike, especially for the purpose of the extension of their effects.

114 The EU should, however, not only consider ensuring that all acts in family and succession matters are covered by a specific regime of its instruments but by a private international law instrument in general. The current situation is best highlighted by the Rome III Regulation.

115 Rome III implemented an enhanced cooperation in the area of the law applicable to divorce and legal separation. 17 Member States apply its rules at the moment.[118] According to the jurisprudence of the CJEU, the harmonised conflict rules can, however, only be invoked if the applicable law was determined in court proceedings. Rome III thus cannot determine the law applicable to a mere private divorce based only on the declaration of the spouses, as it 'cover[ed] solely divorces pronounced either by a national court or by, or under the supervision of, a public authority'.[119]

116 Not all forms of de-judicialised divorces that have been (or will be) introduced in the Member States in recent years (or in the future) might necessarily meet the respective requirements. The lines are, it seems, blurred when it comes to the French 'notarial' divorce. The role of the notary, as an authority exercising public authority, is very limited in these cases. While the divorce agreement is drawn up by lawyers, signed by them and the parties, the notary only formally[120] reviews the act and files it in their register in order to render the act enforceable.[121] The agreement thus – at its core – constitutes a private deed. Whether the lawyers involved can be qualified as a public authority for the present purposes might be questionable (even if they might qualify as an entity acting in an official capacity or exercising public powers

---

[116] *Vlad*, Romania, paras 20ff.
[117] Recital 70 Brussels IIb Regulation.
[118] Austria, Belgium, Bulgaria, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia, and Spain.
[119] Case C–372/16 *Soha Sahyouni* v *Raja Mamisch* [2017] ECLI:EU:C:2017:988, paras 48 and 45. See also Case C–372/16 *Soha Sahyouni* v *Raja Mamisch* [2017] ECLI:EU:C:2017:686, Opinion of AG Saugmandsgaard Øe, para 65.
[120] In practice, they verify that the time limits have been complied with.
[121] *Berre*, France, para 11. The French Ministry of Justice clarifies that notaries could always receive such divorce agreements provided that French law applied without the strict need for them to have international jurisdiction.

under national law).[122] Similar doubts arise as to the role of the notary. Given that they do not carry out a control as to the substance of the agreement, it does not seem that they either pronounce or supervise the dissolution of the marriage as would be required under the case-law of the CJEU.[123]

117 The current post-*Sahyouni* framework for these and other types of purely private divorces is consequently problematic: purely private divorces have to be dealt with on the level of the applicable law determined by the pertinent *national* conflict rules and not by those of the Rome III Regulation. Some national legislators have already introduced rules referring parties in any case to the provisions of the Regulation, regardless of the fact that a case formally fell within the Regulation's scope of application. Others have established autonomous rules. Member States that abolished pre-existing internal conflict rules after the adoption of the Rome III Regulation are left with applying the Regulation by way of analogy.[124] The different solutions adopted to close the '*Sahyouni* gap' can consequently lead to different solutions on a private international law and substantive level, causing disharmonies in an area of European private international law that was at least partly harmonised under the enhanced cooperation that is Rome III. A consistent approach and a comprehensive system would provide for mechanisms inclusive of the different types of de-judicialised divorces, addressing jurisdiction, applicable law and recognition. Consequently, the question of whether a private divorce (from a third country or the EU) is to be recognised under conflict of laws should be determined under EU law.

Simplifying existing regimes (Principle 7(3))

118 The current recognition rules of European private international law instruments in family and succession matters have become more complex in recent years. Traditionally, recognition was a category reserved for judicial decisions. The effects of authentic instruments were extended by other means.[125] While their substantive effects (ie those of the underlying legal relationship [*negotium*]) had to be determined by the applicable law, the acceptance of a document (*instrumentum*) was ensured by way of presumptions of authenticity or the automatic extension of the instruments' evidentiary effects.[126]

119 These approaches were challenged, however, when the EU started to introduce uniform European certificates with autonomous effects,[127] and, later on, regimes differing from the traditional categories, specifically established for certain types of documents.[128] These developments seemingly blurred the lines drawn between the original regimes, the more so as the CJEU has extended the recognition regimes for decisions considerably (see para 53), leaving little room for these other regimes.

120 The planned Parenthood Regulation might be taken as an example for the rising complexity in 'recognition' matters. The initial proposal provides for four different regimes, distinguishing between the recognition of decisions and of authentic instruments with binding legal effects, on the one hand, and the acceptance of authentic instruments without binding legal effects as well as the circulation

---

[122] Eg Case C–342/15 *Leopoldine Gertraud Piringer* [2017] ECLI:EU:C:2017:196, para 67.

[123] Case C–646/20 *Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht* v *TB* [2022] ECLI:EU:C:2022:879, paras 54f, 59 ('retain control over the grant of the divorce'; 'examin[ing] the conditions of the divorce in the light of national law and the actual existence and validity of the spouses' consent to divorce').

[124] Cf Anatol Dutta, 'Private divorces outside Rome III and Brussels II bis? The Sahyouni gap' (2019) 56 CMLR 1661, 1661ff.

[125] See eg Article 59 of the Succession Regulation.

[126] Ibid.

[127] European Certificate of Succession (Articles 62 of the European Succession Regulation). More recently: the European Certificate of Parenthood (Articles 46ff of the planned Regulation on Parenthood [COM (2022) 695 final]) and the European Certificate of Representation (Articles 34ff of the Proposal on the International Protection of Adults [COM (2023) 280 final]).

[128] Eg agreements with binding effects under the Brussels IIb Regulation.

of a European Certificate of Parenthood, on the other. While the creation of new sub-categories in theory ensures that most Member State documents, be they judicial or non-judicial in nature, are covered by at least one of the regimes, it further increases uncertainties as to the documents' qualification and as to the scope of application of the respective regimes. Concerning the potentially new instrument in matters of parenthood, this might cause issues for authorities and legal practitioners to determine, for example, whether an authentic instrument has binding legal effects or not. The distinctions in the Regulations can at times appear theoretical and can, in practice, often only be implemented with difficulty, especially where the respective doctrinal categories do not exist.[129]

121 Different approaches might be taken to tackle these issues. The EU could, for example, extend or further clarify existing definitions (and widen the obligations of Member States to provide and update lists of authorities and types of documents and decisions) rather than introduce additional regimes for specific types of Member State documents. This would further ensure the flexibility required for changes in national legislation or the introduction of new types of acts.

[129] Council document 13200/23, p 10: 'BE is not in favour of the distinction between authentic instruments with binding legal effect and authentic instruments with no binding legal effect but with evidentiary effect, as the distinction is highly theoretical and not practical.' Repeated in Council document 15669/23, p 140 where the Belgian delegation further proposes to consolidate all rules on authentic instruments in one chapter. Similar concerns (clarity of the distinction) were also raised by Lithuania, see Council document 15669/23, p 141. Austria (ibid) proposed to remove the rules on binding authentic instruments altogether. Concerns were also expressed by the Romanian delegation, ibid, p 142.

The European Law Institute (ELI) is an independent non-profit organisation established to initiate, conduct and facilitate research, make recommendations and provide practical guidance in the field of European legal development. Building on the wealth of diverse legal traditions, its mission is the quest for better law-making in Europe and the enhancement of European legal integration. By its endeavours, ELI seeks to contribute to the formation of a more vigorous European legal community, integrating the achievements of the various legal cultures, endorsing the value of comparative knowledge, and taking a genuinely pan-European perspective. As such, its work covers all branches of the law: substantive and procedural; private and public.

ELI

EUROPEAN
LAW
INSTITUTE

ISBN: 978-3-9505495-5-3