

# WHAT LAW SHOULD APPLY THEN? THE IMPLICATIONS OF THE SUCCESSFUL INVOCATION OF THE PUBLIC POLICY DEFENCE IN EU PRIVATE INTERNATIONAL LAW IN FAMILY MATTERS

## ¿Y QUE LEY SE APLICA DESPUÉS? LAS IMPLICACIONES DE LA EXITOSA INVOCACIÓN DEL LÍMITE DEL ORDEN PÚBLICO EN EL DERECHO INTERNACIONAL PRIVADO DE LA UE EN MATERIA DE FAMILIA

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**Abstract:** The EU legislation in the area of private international law addresses explicitly the “negative” aspect of public policy, i.e. the non-application of the otherwise applicable law on the ground that it is at variance with the fundamental values of the forum. By contrast, the legislative measures adopted so far remain silent as to the law or rules that one should apply as a result of the successful invocation of the public policy defence. The paper aims, first, to assess the approach whereby the latter issue should be decided in accordance with the private international law rules of the forum. Secondly, the paper contends that an autonomous solution to the issue of the subsidiarily applicable law should mirror the goals pursued by the EU legislator – namely autonomy, flexibility, proximity and foreseeability –, and enshrined in the already adopted instruments dealing with the conflict of laws, rather than following the more widely known and endorsed approaches either not ensuring foreseeability and legal certainty, or leading to the immediate application of the *lex fori*. The focus will be on conflict-of-law rules in family matters, although similar patterns can be exported to other areas of the judicial cooperation in civil and commercial matters.

**Keywords:** public policy, subsidiarily applicable law, EU private international law in family matters, party autonomy, flexibility, proximity, consistency.

**Resumen:** La legislación de la Unión Europea en materia de derecho internacional privado trata explícitamente del “aspecto negativo” del orden público, es decir, la no aplicación de una ley que contraste con los valores fundamentales del foro. Al contrario, los instrumentos adoptados no se ocupan de la individuación de la ley aplicable después de la exitosa invocación del límite del orden público. El ensayo se propone, en primer lugar, evaluar el método del recurso a las normas de derecho internacional privado del foro. En segundo lugar, el ensayo sostiene que una solución autónoma a la cuestión de la

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ley aplicable en vía subsidiaria debería reflejar los objetivos perseguidos por el legislador de la Unión –autonomía, flexibilidad, vecindad y previsibilidad – y consagrados en los instrumentos previamente adoptados sobre la ley aplicable, en vez de seguir métodos que conduzcan a resultados imprevisibles, o bien que lleven a la aplicación inmediata de la *lex fori*. El enfoque del estudio serán las normas de conflicto en materia de derecho de familia, aunque también podrían desarrollarse reflexiones semejantes en otras áreas de la cooperación judicial civil y comercial.

**Palabras clave:** orden público, ley aplicable en vía subsidiaria, derecho internacional privado de la UE en materia de familia, autonomía de la voluntad, flexibilidad, vecindad, consistencia.

**Summary:** I. Introductory remarks. II. The subsidiarily applicable law after the successful invocation of the public policy defence: the solutions adopted by national PIL rules. III. The unsatisfactory state of affairs. IV. A methodological proposal. V. An inquiry into the structure of EU conflict-of-law rules in family matters. – VI. The subsidiarily applicable law: the suggested solution. VII. Conclusions.

## I. Introductory remarks

1. All legislative measures enacted by the European Union to deal with the conflict of laws come with a provision whereby the law designated under the rules of the measure concerned may be disregarded where its application would offend the fundamental principles, i.e. the public policy, of the forum<sup>1</sup>.

2. By way of example, Article 21 of Regulation (EC) no. 593/2008 (Rome I)<sup>2</sup>, Article 26 of Regulation (EC) no. 864/2007 (Rome II)<sup>3</sup>, Article 12 of Regulation (EU) no. 1259/2010 (Rome III)<sup>4</sup>, Article 35 of Regulation (EU) no. 650/2012 (Succession Regulation)<sup>5</sup>, and Art. 31 of Regulations (EU)

<sup>1</sup> Academic discourse on the doctrine of public policy is extremely vast. See, among others, A. BUCHER, “L’ordre public et le but social des lois en droit international privé”, in *Recueil des Cours de l’Académie de La Haye*, vol. 239, 1993, p. 9-116; P. LAGARDE, “Public Policy”, in K. ZWIEGERT, U. DROBNIG (eds.), *International Encyclopedia of Comparative Law*, vol. 29, 1994, Leiden, Brill Nijhoff, p. 11 ff.; O. FERACI, *L’ordine pubblico nel diritto dell’Unione europea*, Milano, Giuffrè, 2012; P. DE VAREILLES-SOMMIÈRES, “L’exception d’ordre public et la régularité substantielle internationale de la loi étrangère”, in *Recueil des Cours de l’Académie de La Haye*, vol. 371, 2014, p. 153 ff.; A. JEAUNEAU, *L’ordre public en droit national et en droit de l’Union européenne – Essai de systématisation*, Paris, LGDJ, 2018. While public policy may be invoked to prevent both the application of a foreign law and the recognition of a foreign judgment where their application or recognition would contrast with the fundamental values of the forum, for the purpose of the present essay the sole aspect of public policy as a limit to the application of a foreign law will be considered.

<sup>2</sup> Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJ L 177* 4 July 2008, p. 6. See, in general, A.-L. CALVO CARAVACA/ J. CARRASCOSA GONZÁLES/C. M. CAAMIÑA DOMÍNGUEZ (eds.), *Litigación internacional en la Unión Europea II: La ley aplicable a los contratos internacionales. Comentario al Reglamento Roma I*, Navarra, Thomson Reuters Aranzadi, 2017. On Article 21, see P. FRANZINA, “Article 21 – Public policy of the forum”, in U. MAGNUS, P. MANKOWSKI (eds.), *European Commentaries on Private International Law – Vol. 2, Rome I Regulation*, Köln, Otto Schmidt Verlag, 2017, p. 820 ff.

<sup>3</sup> Regulation (EC) no. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), *OJ L 199* 31 July 2007, p. 40. See, in general, P. FRANZINA, “Il regolamento n. 864/2007/CE sulla legge applicabile alle obbligazioni extracontrattuali («Roma II»)”, in *Le nuove leggi civili commentate*, n. 5, 2008, p. 971 ff. On Article 26, see A. FUCHS, “Article 26 – Public policy of the forum”, in P. HUBER (eds.), *Rome II Regulation – Pocket Commentary*, Köln, Otto Schmidt Verlag, 2011, p. 423 ff.

<sup>4</sup> Council Regulation (EU) no. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III), *OJ L 343* 29 December 2010, p. 10. See, in general, P. FRANZINA, “The Law Applicable to Divorce and Legal Separation under Regulation (EU) no. 1259/2010 of 20 December 2010”, in *Cuadernos de Derecho Transnacional*, 2011, p. 85 ff. On Article 12, see B. HEIDERHOFF, “Article 12 – Public policy”, in S. CORNELOUP (eds.), *The Rome III Regulation: A Commentary on the Law Applicable to Divorce and Legal Separation*, Cheltenham, Elgar Publishing, 2020, p. 150 ff.

<sup>5</sup> 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 July 2012, p. 107. See, in general, P. FRANZINA, A. LEANDRO (eds.), *Il nuovo diritto internazionale privato europeo delle successioni mortis causa*, Milano, Giuffrè, 2013. On

no. 2016/1103 and 2016/1104, respectively on matrimonial property regimes and property consequences of registered partnerships<sup>6</sup>, embody public policy clauses.

Although not identical, the wording of the mentioned provisions is similar: according to Article 21 of the Rome I Regulation, Article 26 of the Rome II Regulation and Article 31 of both the property regimes Regulations, “(t)he application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum”. Article 35 of the Succession Regulation states that “(t)he application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum”. Pursuant to Article 12 of the Rome III Regulation, “(a)pplication of a provision of the law designated by virtue of this Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum”.

3. Despite their slightly different wording, the rules set forth share an identical structure: composed of a single sentence, they focus solely on the negative function of public policy, i.e. avoiding the application of a law or rule considered at variance with the fundamental values of the forum.

4. None of the legislative measures adopted by the EU legislator dealing with the conflict of laws, on the contrary, makes provision for the identification of the subsidiarily applicable law or rules<sup>7</sup>, namely, the law or rules applicable to the specific case at hand once the law initially designated by the conflict-of-laws rule has been set aside due to public policy considerations<sup>8</sup>.

5. Although the interest of the EU legislator appears to be focused on the ousting effect deriving from the successful invocation of the public policy defence, the issue of identifying the subsidiarily applicable law should not be underestimated and needs to be properly addressed.

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Article 35, see G. CONTALDI, C. GRIECO, “Art. 35 – Public policy (*Ordre public*)”, in A.-L. CALVO CARAVACA, A. DAVI, H.-P. MANSEL, *The EU Succession Regulation – A commentary*, Cambridge, Cambridge University Press, 2016, p. 505.

<sup>6</sup> 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 July 2016, p. 1, and 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 July 2016, p. 30. See J. L. IGLESIAS, G. PALAO MORENO, J. P. QUINZÁ REDONDO (eds.), *Régimen económico matrimonial y efectos patrimoniales de las uniones registradas en la Unión Europea – Comentarios a los Reglamentos (UE) no. 2016/1103 y 2016/1104*, Valencia, Tirant lo Blanch 2019. On Article 31, see M. GEBAUER, “Article 31 – Public Policy (*Ordre Public*)”, in I. VIARENGO, P. FRANZINA (eds.), *The EU Regulations on the Property Regimes of International Couples: A Commentary*, Cheltenham, Elgar Publishing, 2020, p. 306 ff.

<sup>7</sup> A lexical clarification is needed. For the purpose of the present essay, the expression “subsidiarily applicable law” will be used to indicate the process of identifying and applying the law applicable to the case at hand, once the initially designated rule has been deemed contrary to the public policy of the forum and consequently set aside. This is sometimes defined as the “positive function”, “positive aspect” or “positive consequence” of the public policy exception. Indeed, while the academic literature is unanimous in defining the ousting effect deriving from the successful invocation of the public policy defence as its “negative function”, scholars, on the contrary, tend to attribute different meanings to the “positive function” of public policy. For some authors, the operation of the public policy defence has the double purpose of, on the one hand, avoiding the application of a law or rules deemed to be at odds with the essential values of the forum (the so-called negative function), and the parallel aim of promoting those same, fundamental, values. In this respect, see F. SALERNO, *Lezioni di diritto internazionale privato*, Alphen aan den Rijn, Wolters Kluwer, 2020, p. 99, where the author affirms that the positive function of public policy “esprime valori fondamentali ‘immanenti’ nel sistema giuridico del foro” and “si collega [...] all’esigenza di rendere pur sempre effettivi i valori sottostanti a tale parametro anche attraverso il richiamo a norme straniere”. Other scholars describe the positive function of public policy as one of identifying and applying another law or rule, once the initially applicable law has been set aside due to the operation of the limit. See, in this respect, as well as for a historical reconstruction of the negative and positive conceptions, O. FERACI, *L’ordine pubblico*, cit., p. 60 ff. See also, J. VON HEIN, “A View from the Trenches on EU and Member State Private International Law”, in J. VON HEIN, E.-M. KIENINGER, G. RÜHL (eds.), *How European is European Private International Law? Sources, Court Practice, Academic Discourse*, Cambridge, Intersentia, 2019, p. 111 ff., p. 117. As a consequence, and in order to avoid misunderstandings, the choice has been made to adopt the neutral expression “subsidiarily applicable law” to indicate the process of substitution of the initially designated law with another one, after the successful raising of a public policy exception.

<sup>8</sup> See, *inter alia*, P. FRANZINA, “The Purpose and Operation of the Public Policy Defence as Applied to Punitive Damages”, in S. BARIATTI, L. FUMAGALLI, Z. CRESPI REGHIZZI (eds.), *Punitive Damages and Private International Law: State of the Art and Future Developments*, Alphen aan den Rijn, Wolters Kluwer, 2019, p. 43, p. 68 ff.

6. The first part of the present paper purports to shed a light on the current – unsatisfactory – state of affairs, in particular by analysing the solutions adopted by the EU Member States with a view to filling in the gap left by the successful invocation of the public policy exception. The second part will be then devoted to the illustration of a methodological proposal, which aims to provide – as discussed in the third part – a satisfactory response to the issue of the subsidiarily applicable law. As will be clarified *infra*, the analysis will be carried out from the specific point of view of the EU conflict-of-law rules governing family matters, due to the peculiar sensitivity of the latter. Nevertheless, similar patterns and thoughts might be effectively transposed into other areas of the judicial cooperation in civil and commercial matters.

## II. The subsidiarily applicable law: the solutions adopted by national PIL rules

7. The successful invocation of the public policy barrier against the application of a foreign law or rule does not in any case alter the need to regulate the situation considered. In other words, the non-application of the initially designated foreign law due to public policy considerations entails a regulatory gap. The issue therefore arises of identifying and applying the subsidiarily applicable law or rule called to fill the lacuna.

8. As a matter of fact, despite the proliferation of EU private international law instruments, some issues pertaining to the so-called general part of private international law are still not completely covered: domestic private international law must therefore come into play in order to address them<sup>9</sup>.

Accordingly, failing a uniform rule for identifying the subsidiarily applicable law, the commonly accepted view is that the regulatory gap left by the successful invocation of the public policy defence should be filled in each Member State by resorting to the relevant private international law rules of the forum<sup>10</sup>. In other words, whenever the application of a law is denied on the grounds that is at variance with the essential values of the forum, the issue should be addressed by resorting to domestic private international law.

9. National rules, in this respect, adopt divergent solutions, which are likely to fall into two tiers<sup>11</sup>, each one entrusting a different function to the negative aspect of the raising of a public policy exception and, therefore, reaching different conclusions as far as the distinct, connected issue of the identification of the subsidiarily applicable law is concerned.

10. According to the so-called *German approach*<sup>12</sup>, the ousting effect deriving from the successful invocation of the public policy defence only affects the single rule applicable to the case at hand, not the foreign law *per se* considered<sup>13</sup>. In other words, as the application of a single, specific, foreign provision would be at odds with the public policy of the forum, solely that provision needs to be singled out and set aside.

The other rules of the initially designated law, indeed, remain unaffected by successful raising of the public policy limitation. As a consequence, a solution to the regulatory gap should – and needs to – be retrieved within the framework of the same applicable law initially designated by the appropriate

<sup>9</sup> See, among others, J. VON HEIN, “A View from the Trenches”, cit., p. 113.

<sup>10</sup> J. VON HEIN, “A View from the Trenches”, cit., p. 117. See also P. FRANZINA, “The Law Applicable”, cit., p. 125. It should however be recalled that, in the Explanatory Memorandum of the 2003 Draft of Rome II Regulation, the Commission stated that the public policy mechanism allows the court to replace foreign law with “the *lex fori*”. See Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (‘Rome II’), COM(2003) final, 22 July 2003, p. 28.

<sup>11</sup> For a complete reconstruction of the issue, see O. FERACI, *L’ordine pubblico*, cit., p. 66 ff.

<sup>12</sup> See, *inter alia*, P. DE VAREILLES-SOMMIÈRES, *L’exception d’ordre public*, cit., p. 262 ; O. FERACI, *L’ordine pubblico*, cit., p. 66 ff. An example of the German approach is represented by Art. 6 EGBGB. For a commentary, see J. Von Hein, ‘Art. 6’, in F.J. SÄCKER, R. RIXECKER, H. OETKER, B. LIMPERG (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 8<sup>th</sup> Ed., Munich, Beck, 2018, par. 210-241.

<sup>13</sup> P. FRANZINA, “The Purpose”, cit., p. 68 ff.

conflict-of-law rule. Once deprived of the provision at variance with the public policy of the forum, the originally designated foreign law is still – according to the German method – perfectly suitable for regulating the case at hand, on condition that the provision concerned is replaced with a different one<sup>14</sup>.

Such an approach is based on the idea that the conflict-of-laws rule should be paid the utmost respect<sup>15</sup>. Instead of being disregarded due to public policy considerations, the designated applicable law should therefore be accommodated with a view to finding a solution to the case at hand, thus limiting the de-activation function of the public policy defence to the single rule at variance with the core values of the forum.

In the framework of the German approach, very limited room is left to the *lex fori*. As a result, scholars endorsing this method underline that it may have a more deterrent function vis-à-vis forum shopping than the immediate, automatic recourse to the law of the forum<sup>16</sup>.

**11.** Although quite common among the EU Member States, the German approach has drawn criticism on two different grounds.

On the one hand, the application of the *lex causae*, although deprived of the rule offending the basic values of the forum, has been faulted for distorting and moulding foreign law, thus leading to the application of an artificially created, non-existing law<sup>17</sup>. That is, depriving a foreign law of one of its fundamental components would have the effect of perverting it and lead to the assumption that the same law might envisage a further rule, suitable for replacing the one set aside. A similar replacement, however, would not normally exist in the *lex causae*, as the rejected rule would normally be called on to regulate the matter concerned. Accordingly, the adoption of the German approach would result in a filling of the gap left by the successful invocation of the public policy defence with an inexistent law.

On the other hand – although this criticism is connected with the previous one – the mentioned approach has been accused of not providing a satisfactory solution when the incompatibility of the *lex causae* with the core values of the forum is linked to the inexistence of an appropriate provision, or of an alternative rule, within the framework of the *lex causae* itself<sup>18</sup> that could be adopted to regulate the case at stake. In other terms, the German approach has been faulted for disregarding both the likelihood of the inexistence, within the *lex causae*, of a further applicable rule, and the possible incompatibility of such a subsidiary rule as well with the essential values of the forum.

In this respect, and in order to tackle the above-mentioned shortcomings, the rules adopted by some EU Member States leave some room to the *lex fori*, which is likely to come into play where neither a primarily nor a subsidiarily applicable rule in the *lex causae* exists<sup>19</sup>.

**12.** Under the *Latin approach*<sup>20</sup> – and this is the second tier – the public policy ousting effect targets the designated applicable law considered as a whole. As a consequence, the initially designated foreign law should be either applied genuinely or set aside entirely once the public policy barrier has successfully been raised.

In this scenario, the public policy defence entails, on the one hand, the deactivation of the entire private international law mechanism embodied in the conflicts rule and, on the other hand, the expansion of the *lex fori*, deemed to be a general and residual law, whose application had been compressed by the functioning of the conflict-of-laws rule<sup>21</sup>.

<sup>14</sup> P. FRANZINA, “The Purpose”, *cit.*, p. 69.

<sup>15</sup> P. FRANZINA, “The Purpose”, *cit.*, p. 69; O. FERACI, *L'ordine pubblico*, *cit.*, p. 67.

<sup>16</sup> J. VON HEIN, “A view”, *cit.*, p. 117. According to the Author, the deterrent function vis-à-vis forum shopping of the German approach should be taken into account when considering the extension of the method towards EU private international law.

<sup>17</sup> See, *inter alia*, O. FERACI, *L'ordine pubblico*, *cit.*, p. 67.

<sup>18</sup> O. FERACI, *L'ordine pubblico*, *cit.*, p. 67.

<sup>19</sup> See, in this respect, Article 21, par. 3, of the Belgian Code of Private International Law, according to which “(l)orsqu’une disposition du droit étranger n’est pas appliquée en raison de cette incompatibilité, une autre disposition pertinente de ce droit ou, au besoin, du droit belge, est appliquée”. The Belgian Code is available here: [https://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg\\_2.pl?language=fr&nm=2004009511&la=F](https://www.ejustice.just.fgov.be/cgi_loi/change_lg_2.pl?language=fr&nm=2004009511&la=F)

<sup>20</sup> See P. FRANZINA, “The Purpose”, *cit.*, p. 69; O. FERACI, *L'ordine pubblico*, *cit.*, p. 65 ff.

<sup>21</sup> O. FERACI, *L'ordine pubblico*, *cit.*, p. 66.

13. Within the Latin method, however, different solutions have been proposed as to the moment in which the *lex fori* is called to play a role as the subsidiarily applicable law.

In the majority of countries – such as Austria<sup>22</sup>, Estonia<sup>23</sup>, Hungary<sup>24</sup>, Lithuania<sup>25</sup> and Romania<sup>26</sup> – the *lex fori* applies immediately after the dismissal of the initially designated law due to public policy concerns<sup>27</sup>. The immediate return to the *lex fori* has the advantage of providing a prompt solution to the impasse created by the operation of the public policy defence.

In other countries, the *lex fori* applies solely after the – unsuccessful – designation of the applicable law based on an alternative connecting factor<sup>28</sup>, this approach thus pays due respect to the conflict-of-law rules. Indeed, the raising of the public policy barrier does not hinder the operation of the conflicts rule. Therefore, the ousting effect is limited to the connecting factor whose operation leads to the application of law at variance with the core values of the forum<sup>29</sup>.

The alternative connecting factor might either be specifically designed to apply in cases where the public policy exception has been raised<sup>30</sup>, or be in any case provided by the conflict-of-laws rule as an alternative or subsequent connecting factor.

<sup>22</sup> According to Article 6 of the 1978 Austrian Statute on Private International Law (IPR-Gesetz), “(e)ine Bestimmung des fremden Rechtes ist nicht anzuwenden, wenn ihre Anwendung zu einem Ergebnis führen würde, das mit den Grundwertungen der österreichischen Rechtsordnung unvereinbar ist. An ihrer Stelle ist erforderlichenfalls die entsprechende Bestimmung des österreichischen Rechtes anzuwenden”. The Statute can be found here: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002426>. On the Austrian Statute, see E. PALMER, “The Austrian Codification of Conflicts Law”, in *The American Journal of Comparative Law*, vol. 28, 1980, pp. 197 ff.; F. HEINDLER (eds.), *Festschrift 40 Jahre IPRG*, Wien, Jan Sramek Verlag, 2020.

<sup>23</sup> Art. 7 of the 2002 Estonian Private International Law Act – in the English translation – provides that “(f)oreign law shall not apply if the result of such application would be in obvious conflict with the essential principles of Estonian law (public order). In such an event Estonian law applies”. On the Estonian Act, see K. SEIN, “The Development of Private International Law in Estonia”, in *Yearbook of Private International Law*, vol. X, 2008, Otto Schmidt-De Gruyter, p. 459 ff. The text in Estonian is available here: <https://www.riigiteataja.ee/akt/13242136>.

<sup>24</sup> Article 10, Section 12 of the 2017 Hungarian Private International Law Act, in the English translation, clarifies that “(1) The foreign law determined by this Act shall be deemed contrary to Hungarian public policy and therefore shall not be applied if the result of its application in the given case would clearly and seriously violate the fundamental values and constitutional principles of the Hungarian legal system. (2) If the violation of public policy cannot be averted in any other way, the provisions of the Hungarian law shall apply instead of the refused provisions of the foreign law”. See, in this respect, K. RAFFAI, “The New Hungarian Private International Law Act – a Wind of Change”, in *Acta Univ. Sapientiae, Legal Studies*, vol. 6, 2017, p. 119 ff., p. 127, available here: <http://www.acta.sapientia.ro/acta-legal/C6-1/legal61-08.pdf>. The text of the Hungarian Private International Law Act, in Hungarian, can be accessed here: <https://magyarkozlony.hu/dokumentumok/016703e04c2a3e6791025f-6066da98b69fca22d8/megtekintes>

<sup>25</sup> According to the English translation of Art. 1.11, Chapter II, Book I of the Lithuanian Civil Code “(t)he provisions of foreign law shall not be applied where the application thereof might be inconsistent with the public order established by the Constitution of the Republic of Lithuania and other laws. In such instances, the civil laws of the Republic of Lithuania shall apply”. The English version is available here: <http://pjurcys.blogspot.com/2010/07/lithuanian-private-international-law.html>. On Lithuanian Private International Law, see V. MIKELENAS, “Reform of Private International Law in Lithuania”, in *Yearbook of Private International Law*, vol. VII, 2005, Otto Schmidt-De Gruyter, p. 161 ff.

<sup>26</sup> The French translation of Art. 2.564 of the Romanian Civil Code reads: “(1) L’application de la loi étrangère est écartée si elle viole l’ordre public de droit international privé roumain ou si la loi étrangère en cause est devenue compétente par fraude à la loi roumaine. Au cas où la loi étrangère est écartée, la loi roumaine s’applique”. On Romanian Private International Law, see C. AVASILENCEI, “La codification des conflits de lois dans le nouveau Code civil roumain: une nouvelle forme en attente d’un contentieux”, in *Revue critique de droit international privé*, 2012, p. 247 ff., available here: <https://www.cairn.info/revue-critique-de-droit-international-prive-2012-2-page-247.htm>. Translation by C. AVASILENCEI, L.E. PICARCA, “Nouveau Code Civil Roumain”, in *Revue critique de droit international privé*, 2012, p. 459 ff, available at <https://www.cairn.info/revue-critique-de-droit-international-prive-2012-2-page-457.htm>.

<sup>27</sup> F. M. WILKE, *A Conceptual Analysis of European Private International Law – The General Issues in the EU and its Member States*, Cambridge, Intersentia, 2019, p. 263.

<sup>28</sup> P. FRANZINA, “The Purpose”, cit., p. 70.

<sup>29</sup> O. FERACI, *L’ordine pubblico*, cit., p. 69.

<sup>30</sup> Pursuant to Article 12 of the 2010 Ukrainian Statute on Private International Law, when the public policy exception is successfully invoked, the law of the country having the closest connection with the case will apply. See. A. DOVGERT, “Codification of Private International Law in Ukraine”, in *Yearbook of Private International Law*, vol. X, 2008, Otto Schmidt-De Gruyter, p. 131 ff.

The latter solution is the one adopted by the Italian legislator: pursuant to Article 16, par. 2<sup>31</sup> of the Statute on Private International Law, the law designated by other, if any, connecting factors will apply. Accordingly, the *lex fori* has a residual function, as it plays a role only insofar as no other connecting factors are provided for the same case.

### III. The unsatisfactory state of affairs

14. The analysis of the various solutions adopted by the Member States to deal with the issue of identifying the subsidiarily applicable law, absent any uniform solution provided by the EU legislator, reveals an unsatisfactory state of affairs. The result is a fragmented scenario, where a successful invocation of the public policy defence is likely to lead to different outcomes, depending on the competent national judicial authority raising the public policy concern.

Such a state of affairs threatens the uniform application of EU conflict-of-law rules, on the one hand, and the attainment of the aims pursued by the EU legislator through the adoption of uniform conflict-of-law instruments, on the other. Indeed, the unification of private international law rules constitutes a fundamental element of the development of the area of freedom, security and justice the European Union purports to promote, according to Article 81 of the TFEU.

15. The issue therefore arises of whether resort to national private international law rules after the successful operation of the public policy exception is consistent with the *effet utile* of the conflict-of-law rules enacted by the EU legislator.

It should in fact be recalled that, on the one hand, according to the principle of sincere cooperation enshrined in Article 4, par. 3 of the TEU, Member States should refrain from adopting measures capable of jeopardising the achievement of the objectives of the EU.

On the other hand, as the area of freedom, security and justice belongs to the realm of shared competence pursuant to Article 4, par. 2 of the TFEU, Member States have maintained the competence to legislate on those private international law topics – such as, *inter alia*, the issue of the subsidiarily applicable law – that have not been covered by the EU unification (yet)<sup>32</sup>.

16. A uniform approach to the issue of the subsidiarily applicable law, rather than immediate resort to the national private international law rules of the forum, seems in this regard preferable<sup>33</sup> and, as a consequence, should be fostered and promoted. In this respect, an autonomous solution, not depending on the conflict-of-law rules of the various Member States, ought to be adopted by the EU<sup>34</sup>.

Despite the need for an autonomous solution to the issue, it is rather unlikely that the EU legislator will directly intervene in relation to public policy clauses, either when recasting the existing instruments, or when adopting new ones. As has already been highlighted *supra*, the structure of public policy clauses has remained unchanged since the beginning of the Europeanisation of private international law. Considering that the issue of the identification of the subsidiarily applicable law is not new, one could argue that, had they wished to explicitly set forth a uniform solution, the EU legislator would have probably modified the structure of the rules dealing with public policy when drafting the most

<sup>31</sup> According to Article 16, par. 2 of Law of 15 May 1995, n. 218, “1. La legge straniera non è applicata se i suoi effetti sono contrari all’ordine pubblico. 2. In tal caso si applica la legge richiamata mediante altri criteri di collegamento eventualmente previsti per la medesima ipotesi normativa. In mancanza si applica la legge italiana”.

<sup>32</sup> See, in this respect, J. MEEUSEN, “Interaction Between EU Regulations and Member State Codification of Private International Law – From Patchwork to Network”, in J. VON HEIN, E.-M. KIENINGER, G. RÜHL (eds.), *How European*, cit., p. 61 ff., p. 69.

<sup>33</sup> B. HEIDERHOFF, “Article 12”, in S. CORNELOUP (eds.), *The Rome III Regulation*, cit., p. 160.

<sup>34</sup> Cf. W. WURMNEST, “*Ordre Public* (Public Policy)”, in S. LEIBLE (eds), *General Principles of European Private International Law*, Alphen aan den Rijn, Wolters Kluwer, 2016, p. 305 ff., p. 326. See also H. J. SONNENBERGER, “Grenzen der Verweisung durch europäisches internationales Privatrecht”, in *IPRax*, 2011, p. 325 ff., p. 332, according to whom guiding principles concerning the issue should be included in the recitals.

recently adopted instruments on matrimonial property regimes and property consequences of registered partnerships<sup>35</sup>.

However, while the EU legislator remains silent, the duty to loyal cooperation imposed on Member States compels them to help the EU to achieve the aims pursued so as to avoid the risk of the latter being hampered due to differing national measures. In this respect, the adoption by the judicial authorities of the different Member States of a uniform, consistent solution when public policy issues are successfully raised, and therefore when the issue of the subsidiarily applicable law needs to be addressed, would move in that direction.

17. National judicial authorities are, in this respect, required to ensure consistency both among themselves – by refraining from resorting to national schemes when addressing the issue – as well as with the goals pursued by the EU legislator in the field of judicial cooperation in civil and commercial matters.

#### IV. A methodological proposal

18. It is therefore submitted that an autonomous response to the issue – be it chosen among the solutions adopted in this regard by national legislators or developed as an alternative strategy – ought to mirror the policies pursued by the EU legislator and enshrined in the already enacted uniform instruments dealing with the conflict of laws.

Whatever the response to the issue of the subsidiarily applicable law, it should in fact consider the political role conflicts rules – and more generally private international law rules – have been increasingly vested with.

19. According to the Savignian approach<sup>36</sup>, the public policy exception has traditionally been considered a necessary “lifeline” in order to safely take the “leap in the dark<sup>37</sup>” deriving from the operation of a truly bilateral, or multilateral, conflict-of-laws rule.

In a scenario like the one described by Savigny, where purely geographical factors play a role in determining the location, or ‘seat’, of a legal relationship, public policy is entrusted with a corrective function, whereby it deactivates the normal functioning of a conflict-of-law rule when the outcomes of its operation would otherwise be at odds with the essential values of the forum State.

In other words, in a system – like the Savignian one – where conflict-of-law rules are not imbued with material considerations, public policy remains the sole instrument capable of protecting and promoting the values of the forum vis-à-vis the undesired outcomes – deriving from the blind operation of a bilateral or multilateral conflict-of-law rule – that may undermine the integrity of the forum<sup>38</sup>.

20. However, one should not underestimate the fact that the traditional neutrality of private international law has increasingly given way to its political dimension<sup>39</sup>: the task of promoting values and policies is nowadays entrusted not only to public policy clauses, but also to conflict-of-law rules – and, more generally, to private international law rules. In this perspective, the choice made by a legislator – national or supranational – of one connecting factor rather than another reflects political choices and contributes to promoting values and policies<sup>40</sup>.

<sup>35</sup> See, *supra*, n. 7.

<sup>36</sup> F. C. VON SAVIGNY, *System des heutigen Romischen Rechts*, t. VIII, 1849. See also P. FRANZINA, “The Purpose”, cit., p. 47 ff.

<sup>37</sup> L. RAAPE, *Internationales Privatrecht*, Berlin and Frankfurt am Main, Vahlen, 5<sup>th</sup> Ed., 1961, p. 90.

<sup>38</sup> See, *inter alia*, M.-P. WELLER, A. SCHULZ, “Political Private International Law – How European are Overriding Mandatory Provisions and Public Policy Exceptions”, in J. VON HEIN, E.-M. KIENINGER, G. RÜHL (eds.), *How European*, cit., p. 287.

<sup>39</sup> See, *inter alia*, P. KINSCH, “Le rôle du politique en droit international privé”, in *Recueil des Cours de l’Académie de La Haye*, vol. 402, 2020.

<sup>40</sup> P. FRANZINA, ‘The Purpose’, cit., p. 48.

21. This is particularly true in the case of the EU legislator<sup>41</sup>, who firmly promotes the values enshrined in Article 3 TEU in all areas covered by EU law. Accordingly, EU private international law instruments, too, show an increasingly political nature.

22. The political nature of the rules adopted by the EU legislator is even more evident when one considers EU private international law instruments dealing with family matters. Aware of the sensitivity of the issues involved,<sup>42</sup> the EU legislator has set forth a number of techniques and strategies aimed at balancing the need to respect the diverging views of the Member States on the one hand, and the aims of integration in the field of judicial cooperation in civil matters on the other<sup>43</sup>.

23. The techniques and strategies adopted by the EU legislator with a view to providing a response to the aforementioned political interests can have either an implicit or an explicit nature<sup>44</sup>. As will be better explained *infra*, among the ‘implicit’ techniques it is worth mentioning the design of conflict-of-law rules, and the use of some connecting factors – e.g. habitual residence – rather than others – such as nationality. Overriding mandatory provisions and public policy exceptions, by contrast, constitute clear examples of the explicit ways in which political interests are imposed.

24. Furthermore, awareness of the particular sensitivity characterizing the topic in question is the main reason underlying the choice of conducting the present analysis from the perspective of the legislative measures adopted by the EU legislator in family matters.

25. Indeed, as the task of reflecting and conveying political considerations is entrusted not only to the operation of a public policy clause, but also to conflict-of-law rules, it is submitted that the process leading to the designation of the subsidiarily applicable law should be guided by and mirror the same policies and values.

26. For the purposes of this assessment, an inquiry into the structure, the peculiar features and the logic of the applicable EU conflict-of-law rules in family matters – it is argued – will be of help in identifying the path to be followed in order to determine the subsidiarily applicable law after a successful raising of the public policy barrier.

## V. An inquiry into the structure of EU conflict-of-law rules in family matter

27. At a first glance, the conflicts rules adopted by the EU legislator in the area of family law show a complex structure.

<sup>41</sup> See, *inter alia*, M.-P. WELLER, A. SCHULZ, “Political Private International Law”, in J. VON HEIN, E.-M. KIENINGER, G. RÜHL (eds.), *How European*, cit., p. 287; S. FRANCO, “Public Policy and Overriding Mandatory Rules as Mirrors of the EU System of Thought and Integration – On the ‘Europeanness’ of Exceptions and Oddities”, in J. VON HEIN, E.-M. KIENINGER, G. RÜHL (eds.), *How European*, cit., p. 305 ff., p. 309; R. MICHAELS, “The New European Choice-of-Law Revolution”, in *Tulane Law Review*, 2008, p. 1607 ff.; J. MEEUSEN, “Instrumentalisation of PIL in the European Union: Towards a European Conflicts Revolution?”, in *European Journal of Migration Law*, 2007, p. 287 ff.; M.-P. WELLER, “Aknüpfungsprinzipien im Europäischen Kollisionsrecht – eine neue ‘kopernikanische Wende’?” in S. ARNOLD (eds.), *Grundfragen des Europäischen Kollisionsrechts*, Tübingen, Mohr Siebeck, 2016, p. 133 ff.

<sup>42</sup> P. FRANZINA, “The Law Applicable”, cit., p. 88 ff.

<sup>43</sup> Reference is being made here to Article 81, par. 3 TFEU, and the special procedure it provides for in relation to the adoption of private international law measures dealing with family matters. The requirement of unanimity has paved the way for the creation of an increasing number of legislative measures concerning family issues adopted via the technique of enhanced cooperation. It is no surprise, therefore, that the first legislation adopted within the EU under the enhanced cooperation scheme is Regulation no. 1259/2010 (Rome III), subsequently followed by Regulations nos. 2016/1103 and 2016/1104, respectively, on matrimonial property regimes and property consequences of registered partnerships.

<sup>44</sup> M.-P. WELLER, A. SCHULZ, ‘Political’, cit., p. 287 ff.

**28.** Firstly, they promote *party autonomy*, despite limiting the choice to a number of pre-determined options<sup>45</sup>.

In this respect, according to Article 5 of the Rome III Regulation<sup>46</sup>, spouses may agree to designate the law applicable to their legal separation or divorce among one of those listed in paragraph 1. The spouses may choose among the law of their habitual residence at the time the agreement is concluded, or the law of their last habitual residence, in so far as one of the spouses is still habitually resident there at the conclusion of the agreement, or the national law of either spouse when the agreement is concluded, or the *lex fori*.

Likewise, Article 22 of Regulation 2016/1103<sup>47</sup> makes room for party autonomy, allowing the spouses or the future spouses to choose among the law of the State where one or both of them is habitually resident, or the law of the State of nationality of either spouse or future spouse when the agreement is concluded. Similarly, according to Article 22 of Regulation 2016/1104<sup>48</sup>, the partners or future partners may choose among the law of the State where one or both of them is habitually resident, or the national law of either partner or future partner, at the moment when the agreement is concluded, or the law of the State under whose law the registered partnership was created.

**29.** The extension of party autonomy – traditionally reserved to contract law – to the area of family law reflects political considerations. Allowing the parties to choose the law applicable to their family relationships is in line with the tendency of EU institutions to promote self-regulation. It is in fact assumed that individual self-determination, also in the area of family law, represents the best way to ensure respect for private and family life, a principle enshrined *inter alia* in Article 8 of the European Convention on Human Rights and Article 7 of the Charter of Fundamental Rights of the EU<sup>49</sup>. Furthermore, party autonomy may be seen a way of reconciling the potential conflict between the aim of promoting integration – to be achieved through the increasing adoption of habitual residence both as a connecting factor and as a head of jurisdiction – and the aim of safeguarding the cultural roots of the individual – as reflected in the relevance accorded to citizenship in the design of private international law rules<sup>50</sup>. Moreover, party autonomy ensures legal certainty while promoting the continuity of personal and family status across borders, thus favouring the free circulation of people within the area of freedom, security and justice<sup>51</sup>.

**30.** It is therefore evident that allowing the parties to choose the law applicable to their family relations is far from a neutral choice: party autonomy adds a material flavour to EU bilateral conflicts rules, although the latter are deemed to be ascribable to the (originally) neutral Savignian method<sup>52</sup>.

**31.** Furthermore, while making limited room for party autonomy, all measures adopted by the EU legislator in family matters and dealing with the conflict of laws also allow the applicable law to be determined in the absence of a choice by the parties.

<sup>45</sup> On party autonomy in EU private international law in family matters, see *inter alia* J. GRAY, *Party autonomy in EU private international law: choice of court and choice of law in family matters and succession*, 2021, Cambridge, Intersentia; E. JAYME, “Party Autonomy in International Family and Succession Law: New Tendencies”, in *Yearbook of Private International Law*, 2009, p. 3 ff.; O. FERACI, “L’autonomia della volontà nel diritto internazionale privato dell’Unione europea”, in *Rivista di diritto internazionale*, 2013, p. 424, p. 443.

<sup>46</sup> C. GONZÁLES BEILFUSS, “Article 5 – Choice of Applicable Law by the Parties”, in S. CORNELOUP (eds.), *The Rome III Regulation*, cit., p. 65 ff.; I. VIARENGO, “Il regolamento UE sulla legge applicabile alla separazione e al divorzio e il ruolo della volontà delle parti”, in *Rivista di diritto internazionale privato e processuale*, 2011, p. 601 ff.; P. FRANZINA, “L’autonomia della volontà nel regolamento sui conflitti di leggi in materia di separazione e divorzio”, in *Rivista di diritto internazionale*, 2011, p. 488 ff.

<sup>47</sup> C. KOHLER, “Article 22 – Choice of the Applicable Law”, in I. VIARENGO, P. FRANZINA (eds.), *The EU Regulations*, cit., p. 195 ff.

<sup>48</sup> *Ibid.*

<sup>49</sup> See P. FRANZINA, “L’autonomia”, cit., p. 490.

<sup>50</sup> P. FRANZINA, “L’autonomia”, cit., p. 490.

<sup>51</sup> O. FERACI, “L’autonomia”, cit., p. 443.

<sup>52</sup> P. FRANZINA, “L’autonomia”, cit., p. 491.

**32.** An examination of the rules purporting to identify the governing law in family matters shows that they encompass a cascade of connecting factors, likely to entail the applicability of one or more foreign laws or the *lex fori*.

Indeed, Article 8 of Regulation no. 1259/2010 (Rome III)<sup>53</sup> subjects divorce and legal separation, absent a choice by the parties, to the law of the State of the habitual residence of the spouses at the time the Court is seized or, failing that, where the spouses were lastly habitually resident, if residence did not end more than a year before the seizure of the court and insofar as one of them still resides there when the court is seized or, failing that, of the common nationality of the spouses or, failing that, to the *lex fori*.

Article 26 of Regulation 2016/1103<sup>54</sup> on matrimonial property regimes likewise encompasses a number of connecting factors, which are called on to play a role subsequently: firstly, the first common habitual residence of the spouses after the conclusion of the marriage (Art. 26(1)(a)); secondly, the common nationality of the spouses at the time of the conclusion of the marriage (Art. 26(1)(b)); and thirdly, the law of the State with which the spouses jointly have the closest connection at the time of the conclusion of the marriage. Likewise, Regulation no. 2016/1104<sup>55</sup> provides, in Article 26, that the law applicable to the property consequences of registered partnerships, absent a choice by the partners, is the law of the State where the registered partnership was created. Furthermore, exceptionally and upon application of one of the partners, the competent judicial authority may decide that the law of a State other than the one designated pursuant to the first paragraph of Article 26 is to apply, provided that it attaches property consequences to the institution of the registered partnerships and that the applicant proves that it had been the last common habitual residence of the partners for a significantly long period and both partners had intended to arrange or plan their property relations according to that law.

**33.** All in all, EU conflict-of-law rules relating to family matters – either allowing a choice of law by the parties, or providing other options where no choice has been made by them – might lead to the application of one among a range of different laws, depending on the peculiar features of the case at issue.

Thus, if the law chosen by the spouses pursuant to Article 5 of Regulation no. 1259/2010 (Rome III) contravenes the public policy of the forum, and is disregarded on that ground, the law applicable to the divorce should be determined in accordance with Article 8 of the same Regulation, which may well result in the designation of a foreign law.

Similarly, if the law of the country where the spouses first established their habitual residence under Article 26(1)(a) of Regulation no. 2016/1103 violates the public policy of the forum, the couple's property regimes should be governed by the law of the State, if any, of which they both possess nationality pursuant to Article 26(1)(b), irrespective of whether that State is the State of the forum, or not.

**34.** The decision made by the EU legislator to draft conflicts rules providing for a number of connecting factors and likely to entail the application of one or more different (foreign) laws reflects a political intent, where *flexibility*, rather than rigidity, is sought. Accordingly, a rigidly pre-determined choice between a single foreign law and the *lex fori* appears to have been rejected by the European legislator in favour of a ladder of connecting factors<sup>56</sup>, which are likewise capable of ensuring legal certainty.

**35.** Furthermore, the mentioned rules aim to take into account different policies, though respecting certain priorities. In particular, EU conflicts rules in family matters purport to strike a fair balance between the promotion of integration on the one hand, and the preservation of cultural identity on the other. However, the relevance accorded to factual connecting factors – such as habitual residence<sup>57</sup> – to

<sup>53</sup> P. FRANZINA, "Article 8 – Applicable Law in the Absence of a Choice by the Parties", in S. CORNELOUP (eds.), *The Rome III Regulation*, cit., p. 92 ff.

<sup>54</sup> D. MARTINY, "Article 26 – Applicable Law in the Absence of Choice by the Parties", in I. VIARENGO, P. FRANZINA (eds.), *The EU Regulations*, cit., p. 241 ff.

<sup>55</sup> *Ibid.*

<sup>56</sup> See, P. FRANZINA, "The law applicable", cit., p. 98 ff.

<sup>57</sup> Regarding habitual residence as an example of implicit ways of implementing the EU political interests in private international law see, among others, M.-P. WELLER, SCHULZ, "Political Private International Law", cit., p. 289; M.-P. WELLER, B. RENTSCH,

the detriment of legal connecting factors – such as national law – or the *lex fori*, the latter being likely to come into play only after the law, if any, agreed on by the parties, or otherwise determined according to the objective, factual connecting factors, similarly reflects political considerations.

Such a choice is aimed at fostering and promoting the goals pursued by the EU, namely the enhancement of cross-border mobility and the promotion of integration and inclusion in an area of freedom, security and justice, rather than focusing on the national and cultural roots of the individuals at stake. Although they do not disregard the relationships with their community of origins, EU conflict-of-law provisions seem to be informed with *proximity* considerations.

**36.** In other words, a general overview of the choice-of-law rules enacted by the EU legislator in family matters serves to clarify the aims of promoting autonomy, flexibility and proximity, while still preserving legal certainty, rather than following a static binary pattern, whereby either the *lex fori* or a rigidly pre-determined foreign law applies to the situation at stake.

## VI. The subsidiarily applicable law: the proposed solution

**37.** The peculiar features characterizing the structure of EU choice-of-law provisions in family matters – it is argued – should have an impact also when determining the subsidiarily applicable law after the successful invocation of the public policy defence.

Indeed, the identification of the applicable rules, after the law initially designated has been set aside for being at odds with the fundamental values of the forum, should be based on the same policy considerations informing the design and structure of EU conflict-of-law rules dealing specifically with family matters. The subsidiarily applicable law should therefore mirror the aims of autonomy, flexibility and proximity pursued by the EU legislator and enshrined in the already adopted rules.

**38.** Accordingly, both the option of applying the *lex causae*, deprived of the single rule contrasting with the public policy and essential values of the forum – the so-called *German approach*<sup>58</sup> – and the one of immediately applying the *lex fori*, can hardly be regarded as consistent with the logic and structure of EU conflicts rules in family matters.

**39.** The criticism that the German approach has the effect of distorting and moulding foreign law appears to be founded and should be endorsed<sup>59</sup>. Besides leading to the application of an artificially created, non-existing, law<sup>60</sup>, such a solution, where applied in the European context, could hardly be reconciled with the goals pursued by the EU legislator, and specifically that of ensuring legal certainty.

As already seen, the promotion of party autonomy, alongside the adoption of multiple connecting factors, has the aim of enabling individuals to benefit from a degree of flexibility, without disregarding the need for legal certainty and foreseeability. The individuals concerned can in fact either choose, or in any case reasonably foresee, the law according to which their family relations will be governed.

A solution to the issue of the subsidiarily applicable law consisting in the accommodation of the initially designated foreign law could hardly be deemed as foreseeable. For example, the spouses would not be able to reasonably foresee which rule would govern their legal separation after the initially identified one has been set aside for being at variance with the core values of the forum, especially because the second rule identified was not originally meant to address the specific issue involved. In other words, as the subsidiarily identified rule would normally not provide a response to the issue of legal separation,

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“Habitual Residence”, in S. LEIBLE (eds), *General Principles*, cit., p. 171 ff., p. 174; according to the authors, “habitual residence turns out to be the most commonly used connecting factor in the rapidly evolving system of the European conflict of laws”.

<sup>58</sup> See, *supra*, par. 12 ff.

<sup>59</sup> *Contra*, see M. GEBAUER, “Article 31”, cit., p. 311.

<sup>60</sup> See, *inter alia*, O. FERACI, *L'ordine pubblico*, cit., p. 67.

being on the contrary meant to address another – albeit related – situation, the parties would have no way of knowing in advance the private international law outcome of their legal separation.

40. Moreover, although scholars endorsing the adoption of the German approach have pointed out its utmost respect for conflict-of-law rules, such an approach cannot be upheld within the European private international law framework. As a matter of fact, effective respect for European conflicts rules in family matters ought to be based on the choice of adopting a plurality of connecting factors, with the aim of striking a fair balance among competing political interests.

41. The option of immediately resorting to the *lex fori*, i.e. the so-called *Latin approach*<sup>61</sup>, in the variant adopted in Austria, Estonia, Hungary, Lithuania and Romania – each time an otherwise applicable foreign law happens to be at variance with the public policy of the forum seems hardly convincing either, although for different reasons and despite being fostered by scholars<sup>62</sup>.

Such an option indeed seems to echo a rigid, binary approach according to which either a fixed, predetermined, foreign law, or the *lex fori* should apply. However, EU conflict-of-law rules in family matters appear to preclude such an approach, as they set forth a number of connecting factors that are likely to come into play in a step-by-step manner.

42. Furthermore, the possibility of immediately referring back to the *lex fori* might represent an incentive for the competent national judicial authority to resort to public policy exceptions to a larger extent in order to avoid applying the normal mechanism of a conflict-of-laws rule. In other words, national tribunals, either being unwilling or not accustomed to applying the designated foreign law, might be to a certain extent encouraged to raise public policy considerations – although within the strict limits set forth by the EU legislator – in order to apply the *lex fori*.

43. A further argument against the immediate application of the *lex fori*, once public policy has been fruitfully activated – and, as will be contended *infra*, in favour of a more flexible solution – is based on the fact that the EU legislator did not hesitate to indicate the immediate application of the *lex fori* in other situations giving rise to a potential contrast with the essential values of the forum.

In this regard, it is worth noting that according to Article 10 of Regulation no. 1259/2010 (Rome III)<sup>63</sup>, the *lex fori* should apply any time “the law applicable pursuant to Article 5 or Article 8 makes no provision for divorce or does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex”.

Article 10 of Rome III Regulation shows that on some occasions the EU legislator has explicitly paved the way for a return to the *lex fori*. However, the structure of the cited provision also demonstrates that the EU legislator’s intention was to leave room for the application of the *lex fori* solely after the attempt to explore the other opportunities set forth by the rules considered has proven unsuccessful, i.e. solely after it has shown to be unfeasible to apply the designated law via the other existing connecting factors.

44. Accordingly, judicial authorities facing an issue raised by the successful invocation of the public policy defence should avoid resorting immediately to the *lex fori*; they should rather seek a more nuanced solution, which takes into consideration the specificities of the goals pursued by EU legislation in the area of judicial cooperation in family matters, as well as the techniques adopted for that purpose, namely conflict-of-law provisions designed to enable the reconciliation of competing interests.

<sup>61</sup> See, *supra*, par. 20 ff.

<sup>62</sup> See, *inter alia*, W. WURMNEST, “*Ordre public* (Public policy)”, in S. LEIBLE (eds.), *General Principles*, cit., p. 313 ff.; P. DE VAREILLES-SOMMIÈRES, “L’ordre public”, in T. AZZI, O. BOSKOVIC (eds.), *Quelle avenir pur la théorie générale des conflits de lois*, Bruxelles, Bruylant, 2015, p. 169 ff.; F.M. WILKE, *A Conceptual Analysis*, cit., p. 262 ff.

<sup>63</sup> Regarding Article 10 of the Rome III Regulation, see B. HEIDERHOFF, “Article 10 – Application of the Law of the Forum”, in S. CORNELOUP (eds.), *The Rome III Regulation*, cit., p. 125 ff.; P. FRANZINA, “The law applicable”, cit., p. 121. See also F. M. WILKE, *A Conceptual Analysis*, cit., p. 258.

45. As already specified *supra*, under a second variant of the Latin approach, the *lex fori* is called on to play a role only after the unsuccessful operation of another connecting factor, which is either precisely meant to operate in the event that the public policy exception is raised<sup>64</sup>, or is in any case provided by the conflict-of-law rule.

The solution adopted by the Ukrainian legislator, namely to resort to the law of the country having the closest connection with the case, seems hardly convincing either. Indeed, it should be considered that proximity is *one* among the various goals pursued by the EU legislator when dealing with private international law in family matters. A solution to the issue of the subsidiarily applicable law which focuses solely on the closest connection between the law and the case at hand would risk disregarding the other coexisting political interests promoted by the EU.

46. Ultimately, despite the limited attention it has drawn<sup>65</sup>, the approach which consists in applying, subsidiarily, the law specified in accordance with other conflict-of-law rules governing the matter concerned seems to be the most consistent with the policies promoted by the EU legislator in cross-border family matters and enshrined in the already enacted conflict-of-law rules<sup>66</sup>.

A solution to the issue of the subsidiarily applicable law such as the one adopted by the Italian legislator in Article 16, par. 2 of Law no. 218/95 would pay due respect to the structure of and logic underlying the complex conflict-of-law rules enacted by the EU legislator. The scheme followed in the design of conflicts rules in family matters would indeed also later be applied in the event of a successful invocation of the public policy defence.

In such a scenario, the *lex fori* would be called to play a role only insofar as another connecting factor does not exist – which, as seen, is rather unlikely in the EU private international law context – or in the event that the other connecting factor specifically allows a resort to the *lex fori*. In other words, the *lex fori* would not be the overriding choice, but rather just one among the various choices of the applicable law apt to play a role under the functioning of bilateral conflict-of-law rules.

At the same time, such a solution should be also endorsed because it provides a solution to an issue raised by the operation of the conflict-of-laws rule, within the same conflicts rule.

Furthermore, resorting to the other connecting factors in order to identify the subsidiarily applicable law would be consistent with the aims the EU legislator purports to achieve. In particular, if this solution is adhered to, the values of autonomy, flexibility, proximity and foreseeability, already enshrined in the design of EU conflict-of-laws provisions in respect of family matters, would also inform the subsequent process, if any, after the operation of the public policy defence.

## VII. Conclusions

47. The present paper is aimed at portraying the current state of affairs regarding the issue of the effects of the successful invocation of the public policy defence, as well as endorsing and advocating the adoption of a response that is satisfactory from a European private international law perspective.

48. While the analysis has been conducted with a particular focus on the rules adopted by the EU legislator in the politically sensitive area of family law, the same reasoning and schemes can be extended to other areas belonging to the vast realm of judicial cooperation in civil matters.

49. Hence, an autonomous solution to the issue of identifying the subsidiarily applicable law after a successful invocation of the public policy defence would need to be consistent with the objectives pursued by the EU legislator, as well as with the private international law techniques adopted in order to fulfil them.

<sup>64</sup> This is the solution adopted by the Ukrainian legislator.

<sup>65</sup> As was already been specified *supra*, in the European context this technique is envisaged solely in the Italian Statute on Private International Law.

<sup>66</sup> See, *inter alia*, O. FERACI, *L'ordine pubblico*, cit., p. 69; P. FRANZINA, “The Law Applicable”, cit., p. 125.

**50.** Accordingly, both approaches that do not ensure foreseeability and legal certainty and ones that entail immediate reference back to the *lex fori* should be discarded, in favour of a technique, such as the one adopted by the Italian legislator, designed to modulate and adapt the functioning of the public policy exception in accordance with a politically sensitive – rather than neutral – conception of the conflict of laws.