Réka Somssich*

Cohabitation of EU Regulations and National Laws in the Field of Conflict of Laws

Since the entry into force of the Treaty of Amsterdam in 1999, the European Union is entitled to issue legislative instruments in the field of private international law. This shift of competences first resulted in the transformation (at that time called *communitarisation* or *communitisation*) of the already existing conventions adopted under the former third pillar into legislative acts[1] and at the same time led progressively to the adoption of legal instruments regulating areas that had been earlier untouched by previous conventions. Some of these instruments lay down only conflict of laws rules;[2] others exclusively provide for rules on jurisdiction, recognition and enforcement of national decisions[3] and some regulate the subject-matter concerned in a comprehensive way, containing both types of provisions.[4] Although not closely belonging

* Réka Somssich (Ph.D., Dr.habil.) is Associate Professor at Eötvös Loránd University (ELTE), Budapest, Faculty of Law, Department of Private International Law and European Economic Law (e-mail: somssichreka@ajk.elte.hu). This paper is the written version of the author's lecture delivered at the conference 'Recent Trends in European Private Law and Private International Law (4th Greek-Hungarian Symposium)' held at the Eötvös Loránd University on 9 October 2015.

[1] See in particular the transformation of the *Rome Convention of 1980* or *the Brussels Convention of 1968* into Regulations.

[2] 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), 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), 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 Regulation).

[3] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) later repealed and replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia) and (Brussels IIa Regulation).

[4] 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 (Maintenance 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 (Succession Regulation).

to private international law, other important pieces of legislation had been adopted in the field of cooperation in civil matters in order to facilitate cross-border justice.[5]

Article 81(2) TFEU, on which the above instruments are based, does not specify the type of the legal measure (Directive or Regulation) to be adopted in order to ensure the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction. However, almost all of the legal acts adopted in the field of cooperation in civil matters are Regulations, i.e. directly applicable legislative acts replacing and overruling national laws, the only exception being the Directive on legal aid in cross-border disputes.[6] In the area of classical private international law, only Regulations apply. Regulation, as a type of EU act, better ensures uniform application through its uniform rules throughout the EU, thereby avoiding any fragmentation, which often occurs at the level of implementing Directives.[7] This characteristic of Regulations however does not exempt Member States from following a coherent policy when adjusting national provisions to EU Regulations.

I The Many Faces of Regulations

Regulations are legal acts peculiar to the legal system of the European Union. Under Article 288 TFEU 'A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States'. It means that Regulations penetrate national law without being transformed into a national legal instrument and thus they are self-executing by nature.[8] Moreover, already in its early case-law in 1973, the European Court of Justice (hereinafter referred to as 'the Court') made it clear that Regulations not only come into force by virtue of their publication in the Official Journal of the Communities as from the date specified in them but 'consequently all methods of implementation are contrary to the Treaty which would have the result of creating a direct effect of Community regulations and jeopardizing their simultaneous and uniform application in the whole Community'.[9] This statement was confirmed some months later in the *Variola* case.[10] In paragraph 10 of this judgment, the Court specified that 'The direct application of a Regulation means that its entry into force and its application in favour of or against those subject to it are independent of any measure of reception into national law.

[5] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.

[6] The only exception being Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

[7] Stefania Bariatti, *Cases and Materials on EU Private International Law* (Hart Publishing 2011, Oxford) 6.

[8] Nigel Foster, *EU Law* (OUP 2015, Oxford) 42.

[9] Case 39/72, *Commission of the European Communities v Italian Republic,* par. 17.

[10] Case 34/73, *Variola v Amministrazione Italiana delle Finanze.*

By virtue of the obligation arising from the Treaty and assumed on ratification, Member States are under the duty not to obstruct the direct applicability inherent in the Regulations and other rules of Community law.'

In practical terms it means that national laws cannot reproduce or repeat provisions of EU legislation and any such reproduction would amount to a breach of EU law.

However in an opinion delivered in 1982 and addressed to Denmark,[11] the European Commission recognised that, even if reproducing the provisions of a Regulation in national legislation is objectionable, there can be situations where they might appear justified. Such is the case if the intention of the national legislator is merely to provide a comprehensive code of legislation that will be more intelligible to the reader than provisions scattered in several instruments would be and when the origin of those rules is clearly indicated.[12] This opportunity, however, should be seen as a rare exception to the general rule which is the prohibition of reproduction. It proves however that even the Commission has recognised that directly applicable Regulations and national laws cannot coexist in complete isolation from one another.

Therefore, one could think that the obligation that Regulations have imposed on Member States consists of a cautiously effected deregulation process with due regard to the consistency of national legislation. However, the situation is much more nuanced. Regulations, for instance, might invite Member States to enact national implementing measures ensuring and facilitating their effective application.[13] Such implementing measures can be either of an institutional nature, requiring the establishment of an institutional framework in charge of the application of the Regulation or of a procedural nature, laying down the procedural rules necessary for the implementation of the Regulation. Moreover, Hess and Spancken assume that these implementing provisions help to facilitate parties and courts in finding the respective legislation in European Union law.[14] More specifically, by indicating the relevant EU Regulation, the implementation of which they seek, such provisions can function as references connecting the two legal systems as well. Hess and Spancken however warn Member States, when using this technique, to avoid the risk of surpassing the stage of mere implementation by duplicating certain provisions of EU law and thereby breaching the Treaty.[15]

It is therefore, clear that Regulations impose upon Member States an uncontested obligation to repeal any national rule (whether conflicting or not) falling within the scope of the Regulation and if necessary to adopt implementing provisions as foreseen by the Regulation itself. In addition, by virtue of the case-law of the Court, Member States retain regulatory competences

---

[11] Commission opinion of 22 February addressed to the Government of Denmark regarding implementation of Regulation (EEC) No 954/79 concerning the ratification by Member States of, or their accession to, the United Nations Convention on a code of conduct for liner conferences, OJ L1982, 65/28.

[12] See also Henry G. Schermers, Denis L. Waelbroek, *Judicial Protection in the European Union* (Kluwer Law International 2001, The Hague) 606.

[13] Burkhard Hess, Stephanie Spancken, 'Operation of the Maintenance Regulation in EU Member States' in Paul Beaumont, Burkhard Hess, Lara Walker, Stephanie Spancken (eds), *The Recovery of Maintenance in the EU and Worldwide* (Hart Publishing 2014, Oxford) 388.

[14] Hess, Spancken (n 13) 388.

[15] Hess, Spancken (n 13) 389.

insofar as the directly applicable Regulation does not regulate the subject-matter exclusively.[16] Such competences are residual competences, limited to the issues untouched by the Regulation.

The challenge Member States face when bringing their legislation in line with the EU Regulations is to find the appropriate means to interconnect – if necessary – the two legal orders through references. This challenge is even more present in the field of private international law, where EU Regulations enter a relatively closed legal area traditionally regulated by a single comprehensive act (code) or by provisions inserted into the civil code and civil procedural code.

The coherency requirement does not stem directly from EU law. EU law is not concerned with how the interrelationship with national provisions and EU regulation is technically handled by the Member State unless the regulatory solution amounts to a breach of EU law. Coherency is rather a higher ranking requirement in each legal system, working as a guiding principle for the national legislator in order to have a transparent, consistent and informative set of rules for legal practitioners, which make clear the circumstances under which they should be guided by international conventions, by directly applicable EU Regulations or national legislation.

This implied and tacit requirement is supported still further by the fact that EU Regulations which were adopted in the field of private international law behave differently, as far as their interaction with national law is concerned, according to the area they cover. The first striking difference between Regulations on conflict of laws rules and Regulations on jurisdiction, recognition and enforcement is that legal acts belonging to the first category create *loi uniforme,* meaning that the Regulation is not only applicable to legal relationships within the EU but to any matter falling under its scope even in a non-EU context, while Regulations in the second category apply only between Member States. Exceptions are mixed Regulations, containing both conflict of laws rules and rules on jurisdiction, recognition and enforcement, which are also of a universal nature, as far as jurisdictional rules are concerned.[17] In the present contribution we will focus exclusively on the interference of Regulations with national laws in the area of conflict of laws and will not deal with jurisdictional and procedural rules. Although it would clearly be of added value to scrutinise that latter category, it should be underlined that rules on jurisdiction, recognition and enforcement in several Member States are regulated in various legal acts or inserted into the civil procedural code in a dispersed manner. This very fact makes a difference to the conflict of laws rules, which are as a general rule regulated in a single piece of legislation or in a coherent, standalone chapter or book of the civil code. At the same time, in countries where all rules on private international law (both conflict of laws rules and provisions on jurisdiction and procedures) are integrated in a single code,[18] regard should also be given to the nature and number of jurisdictional and procedural rules when devising the method of interconnecting Regulations and national laws.

[16] Cases 205 to 215/82, *Deutsche Milchkontor v Germany.*
[17] See for instance Maintenance Regulation and Succession Regulation.
[18] Such countries are the Czech Republic, Hungary, Italy, Belgium, Slovenia, Croatia and Bulgaria.

II EU Regulations in the Field of Conflict of Laws

As far as Regulations adopted in the field of conflict of laws are concerned, the residual regulatory competences retained by or conferred upon the Member States can be of a different nature. Some Regulations do not regulate the area concerned in a comprehensive manner, as they explicitly exempt some issues from their scope. The Rome I and Rome II Regulations belong to this group as, although being applicable in principle to contractual obligations or non-contractual obligations in general, they both enumerate those issues they do not intend to cover.[19] In such cases, national legislators have in principle three options. They can either create specific rules only for the excluded areas, identifying them specifically; they can maintain their general rules underlining that these ones are only applicable where the relevant EU Regulations do not apply; or they can follow the 'do nothing' option, assuming that lawyers and especially judges will anyway know that national rules are only applied in so-called non harmonised areas. It should however be emphasised that, with regard to both the Rome I and II Regulations, the scope of the excluded areas is rather limited and very specific; some do not even fall under the traditional field of 'obligations', but are auxiliary to it.[20] What is relevant from a regulatory point of view is to make sure if there are issues under the traditional material scope of the law of obligations which remain in the competences of Member States and to decide whether there should be a direct or indirect reference to the fact that any rule on obligations will only apply in this narrow area (negative scope approach).

On the other hand, the Rome III Regulation, the Succession Regulation and the Maintenance Regulation making the Hague Convention on Maintenance Claims applicable throughout the EU regulate the subject-matter concerned in a comprehensive way; they do not exclude core areas, only auxiliary aspects, from their scope.[21]

However most of these Regulations contain provisions requiring or authorising Member States to adopt implementing measures necessary for the proper functioning of the EU act or where the EU legislator leaves some leeway for the national legislator to deviate from the uniform EU rules. The Rome II and Rome III Regulations both authorise Member States to determine the date until which parties can designate the applicable law. Under Article 5 (3) of the Rome III Regulation, the law of the forum may provide that that the spouses designate the applicable law before the court during the course of the proceeding and not only before the court is seized as foreseen by the Regulation in Article 5 (2). A similar but less explicit authorisation

[19] See Article 1 of the Rome I Regulation and Article 1 (2) of Rome II Regulation.

[20] See Article 1 (2) *a), b) c)* of the Rome I Regulation.

[21] In the case of the Rome III Regulation, Article 1 (2) enumerates these excluded areas from which the name of the spouses, the property consequences of the marriage, parental responsibility and maintenance obligations are the mostly connected to divorce; however, even under the laws of the Member States they have been regulated in an autonomous way, separately from defining the law applicable to divorce. Similarly, the Succession Regulation, in its Article 1 (2), contains a list of 12 issues excluded from the scope of the Regulation, most of them being only indirectly linked to inheritance except for the formal validity of dispositions of property upon death made orally [point *(f)*] especially because the Regulation is applicable to the formal validity of testamentary dispositions which are made in writing (see Article 27).

can be found in connection with Article 7 of Rome II Regulation. In the event of a non-contractual obligation arising out of environmental damage, the person seeking compensation for damage can choose to base their claim on the law of the country in which the event giving rise to the damage occurred instead of the law of the country in which the damage itself occurred. Article 7 itself is silent on the procedural implications of this kind of choice of law. It is recital (25) of the preamble and not the legal provisions of Regulation which specifies that the date until which this choice of law can be exercised should be determined by the law of that Member State.

While under the Rome III Regulation Member States are free to decide whether they avail themselves of the possibility to allow the choice of law at a later stage than the date foreseen by the Regulation and if yes, until when (optional implementation), no mandatory rule at EU level applies in the case of the Rome II Regulation; procedural aspects of the choice of law remain completely in the hands of the Member States (real implementation necessary for the effective application of the Regulation). Although not concerned with the time of the choice of law, the implementing provisions to be adopted under the Succession Regulation are similar in nature to those to be adopted under the Rome II Regulation. As Article 1 (2) *(f)* of the Regulation excludes the designation of the law applicable to formal requirements of testaments made orally from its scope, the conflict of laws rules in this field should be regulated by the national legislation. The implementation of this provision is not optional but necessary, as oral testaments in general are not excluded from the scope of the Regulation; substantial requirements concerning testaments apply to them.

It is still worth mentioning that the Rome I Regulation also contains an optional implementation provision in its Article 7 (4) *(b)* on insurance contracts with regard to insurance types for which Member States impose an obligation to take out insurance. In such cases, Member States have an option to specify that the insurance contract shall be governed by the law of the state imposing such an obligation.

Finally, not all enforcement measures necessary for the application of the above Regulations fit into the body of traditional private international laws. Implementing measures requiring the establishment of institutions or procedures that make the Regulation work in practice are of such a nature. Implementing provisions concerning, for instance, issuing the European Certificate on Succession are of this nature. They are normally found in distinct acts, not in the national Acts on Private International Law.[22] In this paper however we will only concentrate on the regulatory impact of EU Regulations on Acts on Private International Law.

EU Regulations in the field of conflict of laws have been subsequently adopted since 2001. Each newly adopted piece of legislation meant an intervention into the sphere of national private international laws, especially through the immediate penetration of the EU provisions due to

[22] See, for instance Germany where, beyond repealing the relevant provisions of the EGBGB, the German lawmaker adopted the International Succession Law Procedure Act (IntErnRWG) as a new Act specifically for the implementation of the Succession Regulation.

their directly applicable nature. Member States' primary duty linked to the entry into force of a Regulation is of course to repeal any provision of their national legislation falling under the scope of the Regulation, regardless of it being in conflict with or identical to the rules of the Regulation. If there is a comprehensive Private International Law Act or Conflict of Laws Act, Book or Chapter then, in practical terms, the impact of the Regulations is that legal acts become truncated as an important part of their substantial provisions disappear. The only provisions that can be retained or inserted are those concerning areas falling outside the scope of the relevant Regulation and those which are either necessary for the proper application or tolerated as derogating provisions. As a logical consequence of the growing number of EU Regulations, more sub-fields of the conflict of laws are Europeanised and the more truncated and less coherent the national Private International Law Acts become, and this is evidently not characteristic of traditional codes or even comprehensive acts. The main challenge for Member States is therefore how to deal with this radically changed nature of the national regulation of conflict of laws from a regulatory point of view. At a very early stage of the process, already in 2004, it was raised by some authors that, in the light of the emergence of EU Regulations, some Member States should reconsider the need to continue with the reform of their private international law.[23]

III Adjustment of National Private International Laws to EU Regulations from a Regulatory Point of View

When scrutinising Member States' national laws on private international law, the very first statement we can make is that one can distinguish roughly three larger groups of Member States. Some countries have not inserted any reference to EU Regulations into their national laws but only repealed overlapping provisions. Others contain a rather general clause on the prevailing nature of EU Regulations over the provisions of the Acts, while a third group of states use a specific and coherent system of references to make a clear interconnection with EU Regulations to the extent that interconnection is tolerated by the case-law of the Court. It seems that new reformed laws (the Czech PIL Act of 2012, the Polish PIL Act of 2009 and Book 10 of the Dutch Civil Code on Private International Law of 2011) have taken care of these aspects when reviewing their legislation and followed a rather coherent policy. This coherence is also present in the German Act on Private International Law. Below we will briefly present these models.

Book 10 of the Dutch Civil Code on Private International Law is one of the recent books of the Burgerlijk Wetboek, as it was enacted in 2011. Throughout the reform it was strongly debated whether it was worth devoting a separate book to private international law in the light of the multiplication of the sources and far-reaching competences that the EU has acquired in

[23] Katia Fach Gómez, 'Law Applicable to Cross-border Environmental Damage' (2004) 6 *Yearbook of Private International Law* 310.

this field, but in the end it was exactly the plurality of sources which intensified codification in order to bring coherence to the different sources.[24] Already in its first Article[25] the Act makes clear that '[t]he provisions of the Book and of other statutory regulations of private international law do not affect International and Community legislation that is binding for the Netherlands'. In line with EU law requirements, it is not the priority of Regulations which is declared (as it stems from EU law itself and not from national statutory provisions) but the subsidiary nature of national legislation. Article 10:1 does not identify the relevant international treaties or the EU Regulations, either. They are however both listed at the top of each thematic part under the heading 'Applicable law' or 'Definitions'[26] as an indication. Therefore the legislative technique which consists of directly referring to international texts is also used for EU Regulations.[27] The inclusion of both EU Regulations and the relevant international treaties by the Dutch legislator is a balanced approach although that might easily be explained by the fact that the Netherlands is a monist country, where international agreements do not have to be promulgated by national laws but apply directly, and in this respect they are somewhat similar to Regulations. As far as the regulation of areas falling outside the scope of the Rome I and Rome II Regulations, the solution followed by the Dutch legislator is unique as it extended the scope of the EU instruments to the areas originally excluded. Under Article 10:152, obligations falling outside the scope of application of the Rome I Regulation and the Conventions applicable as a result thereof, which obligations can be regarded as obligations arising from contract, are governed by the provisions of the Rome I Regulation accordingly. We will find a similar wording in Article 10:159 in connection with the Rome II Regulation and its application by analogy to any tortious act. It might be questioned whether it is wise to extend the scope of a directly applicable EU act by virtue of national legislation to areas which had been originally excluded from its scope by the EU legislator, but it should be underlined that the national legislator is completely free to act in the areas excluded from the scope of the Regulation and this freedom can mean to copy the already existing EU rules, either by repeating them or by explicit reference to them. Most probably the aim of the Dutch legislator was to have complete coherence between excluded and non-excluded areas by the application of identical provisions.

The Book also contains one classical implementing provision with regard to insurance contracts under the Rome I Regulation. The relevant Article[28] clearly indicates that it is implementing Article 7 of the EU Regulation.

---

[24] Jan Smits, 'Coherence and Fragmentation in the Law of Contract' in Pia Letto-Vanamo, Jan Smits, *Coherence and Fragmentation in European Private Law* (Sellier 2012, Munich) 21.

[25] Article 10:1. Conventions and Community legislation remain effective. Non official English translation available at: http://www.dutchcivillaw.com/civilcodebook01010.htm.

[26] For The Succession Regulation, see Article 145; for Rome I Article 153; for Rome II Article 157 (As the Netherlands is not participating in the reinforced cooperation in Rome III, we will not find a reference to this regulation). As far as the Maintenance Regulation is concerned, it is not the Regulation itself which is referred to by Article 10:90 but the Hague Convention on the Law Applicable to Maintenance Obligations and its Protocol of 2007 which are applicable anyway, by virtue of Article 14 of the Regulation.

[27] K. Boele-Woelki, D. van Iterson, 'The Dutch Private International Law Codification: Principles, Objectives and Opportunities' (2010) 14 (3) Electronic Journal of Comparative Law 6-7.

[28] Article 10:156.

The Dutch approach seems to favour transparency and works as a clear guidance for judges, as references are attached to the relevant thematic parts. A disadvantage of such a technique might be that the national legislation has to be adjusted each time a new Regulation is published or an international treaty is ratified and a reference to the relevant EU act or international instrument must be inserted. However this requirement should not appear as an extremely heavy burden, since the adoption and entry into force of new Regulations requires the amendment of the national legislation anyway, at least to repeal the overlapping substantive provisions.

The German Introductory Act to Civil Law[29] reflects a well-considered, consistent approach as well. This Act, adopted in 1994, is the one containing the German conflict of laws rules. It is Chapter 2 which is devoted to private international law. The first Article of this Chapter (Article 3), bearing the title 'Relationship with the rules of the European Union and with international conventions' delimits the scope of the Act. It sets forth that only unless the immediately applicable rules of the European Union are relevant that the applicable law is determined by the provisions of the Act. The Article itself lists all five EU Regulations adopted in the field of conflict of laws as those directly applicable measures that are 'in particular' *(insbesondere)* relevant.[30] The phrase 'in particular' is important as it leaves the floor open to the eventual future expansion of the Regulations and makes the provision work even without any immediate amendment of the Act with regard to the entry into force of a new Regulation.[31] Of course the original purpose was to add new EU acts to the list, as was done most recently with the Succession Regulation. In this way, the negative scope of the Act is already explicitly underlined among the very first provisions. Further, in the case of Rome III and the Succession Regulation, one can identify special provisions aiming to fine-tune the explicit nature of the negative scope approach. Article 17 on the special consequences of divorce makes it clear that proprietary consequences of the dissolution of marriage which are not covered by the Act should be governed by the Rome III Regulation. This reference in fact means that where the German legislator did not define how to determine the applicable law with regard to a specific aspect of the proprietary consequences, there is no need to apply a law other than the one which is anyway applicable to the divorce by virtue of the EU rules. Based on the same logic, Article 26 designates the law determined under the Succession Regulation as applicable law as far as the form of dispositions *mortis causa* is concerned.

Interestingly, the so-called 'real implementation measures' are contained in a separate section, distinct from the thematic parts and devoted exclusively to the implementation of the Regulations listed under Article 3.[32] This section contains provisions on the deadline for choosing the applicable law under the Rome II Regulation and the Rome III Regulation and the implementing provisions on insurance contract under the Rome I Regulation.

---

[29] *Einführungsgesetz zum Bürgerlichen Gesetzbuche* (EGBGB).

[30] For the non-official English translation of the Act see http://www.gesetze-im-internet.de/englisch_bgbeg/englisch_bgbeg.html#p0017.

[31] Götz Schulze, 'Die EU-Verordnungen unter dem Arbeitstitel "Rom"' – Das europäische Kollisionsrecht in weltbürgerlicher Absicht' (2015) 3 Ad Legendum 186.

[32] Seventh Section, Special provisions implementing rules of the European Union According to Article 3 No 1.

It seems that the German legislator was deliberately and clearly separating the issues which fall under the negative scope from those whose which enable the smooth application of the Regulations.

The Czech Code of 2012 (covering not only conflict of laws but issues on jurisdiction and recognition and enforcement of judgments as well) chose to make the link with the Regulations in an even more direct way. Similar to the German Act, the Czech Code clarifies its scope with regard to international agreements and EU Regulations among the first provisions. Article 2 (International agreements and EU Regulations) provides that the Act should be applied with due regard to international agreements binding the Czech Republic and directly applicable Regulations of the European Union. Contrary, however, to the German Act, the Czech law does not list the relevant Regulations under Article 2 but enumerates them in a non-exhaustive way (introduced by 'for instance') in a footnote attached to the Article. One can assume that the aim of the Czech legislator was not to overcharge the text of the law with references, especially taking into account that the Czech Act overlaps with a higher number of Regulations as its scope extends to all aspects of private international law, not only conflict of laws.

Beyond the general negative scope provision, in each thematic section reference is made to the relevant Regulation and to the fact that the Act only applies where the directly applicable EU act does not apply.[33] Each time, the specific Regulation appears in a footnote. Articles 50 and 57 on maintenance claims seem anomalous as they simply refer to international agreements and directly applicable EU rules which should apply in the field concerned. The Maintenance Regulation itself appears in the footnotes again. It is evident that the negative scope approach could not be used in this case, as the Maintenance Regulation does not leave any room for the national legislator. Hence, the Czech legislator choose to indicate the applicable legal act despite that fact that it had already been listed under the first footnote attached to Article 2 and despite the fact that no national legislation has been adopted in connection with the Regulation. The new Romanian Act of 2009 follows a similar path. Chapter VII of the new Romanian Civil Code on Private International Law[34] contains in its first article, among the general provisions,[35] a subsidiarity clause, according to which the provisions of the Act apply to the extent to which international agreements or EU Regulations do not prevail. Beyond this general clause, each thematic section[36] clearly indicates where an EU Regulation should apply instead of the national rules. The title or number of the Regulation is however not displayed at these sections.

A striking difference between the German approach on the one hand and the Czech and Romanian approach on the other is that the German Act does not duplicate the negative scope provision by repeating it at each relevant article.

---

[33] For Regulation Rome I and II see Article 84 and the footnote attached to it, for the Maintenance Regulation see Article 50 and 57.

[34] For the English translation of the Act see: http://licitatii-juridice.bursa-avocatilor.ro/cartea-vii-dispozitii-de-drept-international-privat-codul-civil-noul-cod-civil-republicat-2011-legea-2872009-privind-codul-civil/.

[35] Article 2.557.

[36] See Article 2.612 on Obligations in general and Article 2.640 and 2.641 in particular.

Beyond the national acts mentioned above, only the Belgian Act – reformed in 2004 – contains a general reference to the prevailing nature of the Regulations. Article 2 of the Belgian Code on Private International Law specifies that the statute applies without prejudice to international agreements, the law of the European Union and provisions of special statutes. Regulations – except the Insolvency Regulation for jurisdictional and procedural issues – are not referred to in the substantive parts.

Unlike the aforementioned, no general provision is contained on the priority of EU Regulations in the new Polish Act on Private International Law of 2011. The Act however makes sure that at the relevant parts the EU Regulations are indicated. However the Polish Act goes further than the others as it does not merely use the negative scope technique but provides which EU Regulation should apply to the specific subject-matter.[37] Again, Article 63 on Maintenance Obligations is specific, inserted as a sole Article and expressly stating that the law applicable shall be designated by the Maintenance Regulation without containing any connecting implementing or residual provision. The Polish solution, stating which Regulation shall apply, seems to go somewhat beyond being mere reference as the use of 'shall apply' suggests that it is the national law which creates the obligation to apply the Regulation, which is definitely not the case. As the case-law of the Court presented above shows, the entry into force or the application of the Regulation should be independent of any national measure.

The Austrian Act on Private International Law[38] (containing only conflict of laws rules) does not define its scope with reference of the EU Regulations either (the Act does not even have a provision setting its scope) but mentions them at the relevant provisions using the negative scope technique (the provisions only apply to issues falling outside the scope of the relevant EU Regulation). Article 35 on contractual obligations and Article 48 on non-contractual obligations use this technique, while Article 35a is a real implementing measure, referring to Article 7 of the Rome I Regulation on insurance contracts.

Although the Italian reformed Act on Private International Law of 1995[39] declares its subsidiary application with regard to international agreements,[40] no such statement is made in connection with EU Regulations. Moreover, under the provisions on contractual obligations[41] reference is still made to the Rome Convention and not to the Rome Regulation. As such, it seems that no conceptual change has been undertaken after the overall reform of 1995 following the transformation of Conventions into Regulations and the adoption of new Regulations.

The above examples show that national legislators followed different paths to adapt their acts or codes to the changed regulatory framework brought about by the Regulations. It can also be seen that reforms undertaken during the last decade could not and did not even want to avoid dealing with this challenge and all of them established their own policy on the interconnection

[37] See Article 28 for Obligations, Article 33 for non-contractual obligations and Article 63 on Maintenance Obligations.
[38] *Bundesgesetz vom 15. Juni 1978 über das internationale Privatrecht* (IPR-Gesetz).
[39] *L. 31 maggio 1995, n. 218 (1). Riforma del sistema italiano di diritto internazionale privato.*
[40] Article 2 (1) under the heading International Conventions.
[41] Article 57.

of national law with EU Regulations. Of course, it is much more difficult to implement a coherent approach without comprehensive reform and by reacting to the subsequent new pieces of EU acts, and so – except the German model – most unreformed laws have not yet introduced a consistent policy.

IV The Hungarian Decree-Law on Private International Law and its Current Reform

The Hungarian Decree-Law on Private International Law was adopted in 1979[42] after thorough academic preparatory work led by Prof. Ferenc Mádl. The Decree-Law, as a type of legal act, ceased to exist after the democratic changes in Hungary as it was an act issued by the executive branch in an area falling traditionally under the competences of the legislative authority. Decree-Laws adopted before 1989 which had not been explicitly repealed remained in force but they could only be modified by the Parliament. The Hungarian Decree-Law on Private International Law is a code-type instrument, regulating all aspects of private international law including conflict of laws rules and rules on jurisdiction, recognition and enforcement. Since its entry into force the Code has been amended several times, some of the amendments aimed clearly at adapting the provisions to the subsequently published EU Regulations.[43] However, due to the fact that no comprehensive reform had been undertaken since its entry into force, each legislative intervention followed a different approach, depending on the nature of the Regulation concerned. In the case of the Rome I and Rome II Regulations the negative scope approach was used, making it clear that the provisions of the Hungarian Code only apply if the subject-matter does not fall under the Regulations.[44] As far as the Maintenance Regulation is concerned, the relevant provisions were simply repealed[45] without any reference to the EU instrument, contrary to the outcome of the Polish or Czech Act. For the Rome III Regulation, the Hungarian legislator decided to use the option to determine the date until which spouses are free to choose the law applicable to their divorce. Here, the Code makes a clear link between the newly added provision and the Regulation by underlining that its insertion was necessary for the application of the Regulation.[46] All other provisions on divorce overlapping with the Regulation were repealed. Contrary to the above examples under the provisions on inheritance matters, no reference was made to the Succession Regulation when – beside repealing all former provisions concerning inheritance – a single paragraph was added on alternative connecting factors, designating the law under which the validity of oral statements should be

[42] Decree-Law No 13 of 1979 on Private International Law.

[43] For Regulations in the field of conflict of laws see Act IX of 2009 as far as the Rome I and Rome II Regulations are concerned, Act LXXI of 2015 for the implementation of the Succession Regulation, Act LXVII of 2011 for the Rome III Regulation, Act CXXVII of 2011 for the Maintenance Regulation.

[44] See Article 24 and Article 32 of the Decree-Law.

[45] See Articles 45-47.

[46] See Article 40.

measured.[47] The reasoning of the amending act explains this lack of reference by the fact that the Succession Regulation – unlike the Rome I and Rome II Regulations – leaves only a minor area to the national legislator and therefore no similar exclusion provision should be inserted. This approach could be easily contested by arguing that national measures adopted under the Succession Regulation are closer to implementing measures than to residual competence provisions.

It should also be added that while Article 2 of the Code has contained a specific rule foreseeing that the provisions of the Code should be applied without prejudice to international obligations from the outset, no similar rule had been later inserted for EU measures. This is also due to the fact that no comprehensive reform of the Code had been undertaken since its adoption and thus Article 2 remained untouched. At the end of the Decree-Law however, in the so-called legal approximation clause, one can retrace all the EU Regulations with which the amendments of the Code aimed to align national legislation. The legal approximation clause is a special provision that the Hungarian legislator is bound to insert by virtue of the Act of Legislation[48] and its implementing decree[49] among the closing articles of any legislative measure, the aim of which is to bring national legislation in line with EU measures, namely these Directives or Regulations.[50] Thus even in the absence of a general provision underlining the subsidiary nature of the national act, judges and lawyers in general have received adequate information on the Regulations which should be applied in parallel with or instead of the provisions of the Decree-Law.

In spring 2015 the Hungarian Government decided to review and reform the Code on Private International Law.[51] Professor Vékás, in a thought provoking paper[52] on the necessity of such a reform – published at the same time as the review process was launched – underlined that one of the major tasks of the reform should be to establish a coherent and transparent approach in handling the relationship between EU instruments and the new Act.

Therefore the reform offers a unique opportunity to review and regulate the cohabitation of EU Regulations and Hungarian private international law rules in a comprehensive manner. In that respect, the different approaches and solutions of the Member States can definitely serve as a source of inspiration.

---

47 See Article 36.

48 Act CXXX of 2010 on Legislation.

49 Government Decree 302/2010. (XII. 23.) on the accomplishment of legal approximation tasks in the legislative process.

50 It should be noted that while under EU law only Directives require Member States to insert a reference when transposing them, the Hungarian requirements go much further as they oblige the national legislator by the force of the law to insert references to any EU act (not only Directives) which had to be taken into account when adopting the legislative act.

51 Government Decision 1337/2015. (V. 27.) on the codification of the new private international law rules and the setting up of a Committee on the Reform of Private International Law.

52 Lajos Vékás, 'Egy új nemzetközi magánjogi törvény megalkotásának néhány elvi kérdéséről' (2015) 6 Jogtudományi Közlöny 295-299.