

# What Effect Does European Private International Law on Cross-border Divorce Have on National Family Laws and International Obligations of the Member States?

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*With the number of cross-border divorces in the EU soaring, the adoption of the 'Brussels II bis Regulation' and of the 'Rome III Regulation' seems like a logical step. Yet, discussion-provoking is the fact that the interaction between Brussels II bis and Rome III has resulted in Malta being forced to introduce the institution of divorce into its substantive family law. This shows that EU law may have some impact on the national family laws of the Member States in the future as well. For instance, Member States which have not yet legalised same-sex marriages may eventually be forced to do so. This paper argues why this acknowledgment is especially confirmed by Article 13 of Rome III. Besides, a Member State which participates in Rome III, but whose law does not provide for the institution of legal separation may be forced to deal with this institution. Moreover, although by using the public policy rule Member States may avoid the recognition of a Muslim divorce pronounced in a third country, problematic issues may be caused by the mufti divorce pronounced in Greece, which according to Brussels II bis could be entitled to an automatic recognition in the other Member States. Furthermore, this contribution suggests that, if according to Brussels II bis Greece automatically recognises a cross-border divorce of a Greek Muslim couple from Western Thrace with a habitual residence in, for instance, France, to which French law has been applied instead of the Sharia, Greece breaches its international obligations. Thus, this paper argues that the application of European private international law may create an awkward situation, in which a Member State may be forced to breach its international obligations in order to fulfil its obligations under EU law. Therefore, this contribution suggests an amendment to Article 22 of Brussels II bis.*

**Keywords:** *European private international law, conflict-of-laws, cross-border divorce, Brussels II bis, Rome III.*

## Introduction

For centuries there was a huge social stigma attached to divorce, which historically was mainly caused by the well-known negative attitude of the Roman Catholic Church towards the dissolution of marriage. If initially in Ancient Greece and Ancient Rome divorce was allowed, the situation dramatically changed during the medieval times when after the fall of the Western Roman Empire the canon law of the Roman Catholic Church determined the way of life for Europeans, for the first time in the history of Western civilisation also regulating the celebration

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and termination of marriage in detail. One of the main postulates of the canon law was a never before experienced complete abolition of the institution of divorce which, according to the opinion of prominent Catholic theologians, follows from the dogma of the New Testament.<sup>1</sup>

The legal situation of divorce changed significantly from the 16<sup>th</sup> until the 18<sup>th</sup> century when under the influence of the Protestant Reformation and the Enlightenment more and more countries began to see marriage as a secular rather than a sacred institution. The first big change happened when many European countries introduced divorce in their secular family codes which were adopted as a result of the Enlightenment. However, in these family codes the principle of fault was transferred from the religious institution of legal separation to the secular institution of divorce. Thus, at first it was possible to obtain a divorce only by proving the other spouse's fault in the breakdown of marriage. Therefore, the provisions of these family codes contained a number of so-called grounds for divorce which meant that divorce was a complicated and expensive process which was based on the principle of fault of one of the spouses.<sup>2</sup>

The second big change happened after World War II when the family law provisions on divorce were liberalised in many European countries and no-fault divorce was finally introduced. The institution of divorce experienced a very significant reform in the 1960s-1970s, when in many European countries divorce was allowed on the basis of an agreement between the spouses. Thus, divorce was not seen as a sanction that is applied to the guilty spouse anymore.<sup>3</sup>

The substantive family laws of all European Union (EU) Member States now provide for divorce. Since for various reasons a large number of marriages are not successful and it is comparatively easy to get a divorce, at the beginning of the 21<sup>st</sup> century divorce has become more widespread in Europe than ever before. At the same time divorce laws of the Member States are remarkably different, being quite liberal in some Member States and rather strict in others. Thereby, the material and procedural regulation of the institution of divorce varies significantly from one Member State to another.

In 2001 the Commission on European Family Law (CEFL) was established in order to facilitate the harmonisation of substantive family laws in Europe. In 2004 CEFL published the Principles of European Family Law Regarding Divorce and Maintenance between Former Spouses.<sup>4</sup> Although these principles are not law, but a legally non-binding model, they represent a significant step in the development of common divorce law in Europe. The aim of these principles is to represent the best of the divorce law provisions of the European countries; therefore they may serve as a source of inspiration for the national legislatures of those European countries which consider reforming their national divorce laws.<sup>5</sup>

Although 15 years have already passed since these principles were published, at present the huge differences in the national divorce law provisions of the

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<sup>1</sup>Rheinstein (1953).

<sup>2</sup>Ibid at 4.

<sup>3</sup>Antokolskaia (2006) at 313-314.

<sup>4</sup>See Commission on European Family Law. EFL Series.

<sup>5</sup>Antokolskaia (2016) at 65.

Member States remain and it seems very unlikely that with the help of CEFL or in any other way it would be possible to unify or even harmonise the substantive divorce law provisions of the Member States. This is because the substantive family law of every country has always been and still is a very sensitive area which, a lot more than any other legal area, reflects the social, cultural and religious views of the particular society and where changes happen very slowly. It would not be an exaggeration to say that family law is one of the core law areas of any country.

Because of the foreign element, cross-border divorces are more complicated than regular divorces, since in the case of a cross-border divorce it is necessary to first apply private international law provisions in order to determine the competent court (jurisdiction) and the applicable law. However, national private international law provisions of the Member States contain various connecting factors (nationality, domicile, habitual residence) in this respect, which means that, for instance, according to the conflict-of-laws rules of one Member State the strict Italian divorce law might be applicable to a particular cross-border divorce, while according to the conflict-of-laws rules of another Member State the liberal Swedish divorce law might be applicable to the very same cross-border divorce. This shows that the legal consequences of a cross-border divorce can be very different depending on the competent court and the applicable law. Since the national private international law provisions of the Member States regarding cross-border divorce differ significantly, it leads to uncertainty as to the court of which Member State will eventually be competent to hear the particular cross-border divorce case and the law of which country will eventually be applicable to the particular cross-border divorce.

In order to overcome the differences of the substantive family law provisions on divorce between various countries, there have been attempts to unify private international law provisions on cross-border divorce, which began at the beginning of the 20<sup>th</sup> century and still continue today. The most prominent unification endeavours have been adopted under the auspices of the Hague Conference on Private International Law (HCCH).<sup>6</sup> Besides, some EU Member States have concluded bilateral agreements containing private international law provisions with several third countries, thereby unifying the provisions of private international law applicable in cross-border divorce cases in which these countries are involved.<sup>7</sup>

One of the fundamental freedoms of the EU internal market is the free movement of persons. This has resulted in a huge increase in the number of cross-border marriages, in which spouses have different nationalities or have different domiciles or have their habitual residences in different Member States. The huge number of cross-border marriages has in turn led to an increase in the number of cross-border divorces. At present the number of cross-border divorces in the EU is soaring.

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<sup>6</sup>See HCCH. Conventions, Protocols and Principles.

<sup>7</sup>For instance, Latvia has concluded such bilateral agreements on legal assistance with Russia, Belarus, Ukraine, Kyrgyzstan, Uzbekistan and Moldova. Ministry of Foreign Affairs of the Republic of Latvia. Bilateral Agreements.

The EU realised that the uncertainty about the competent court, the applicable law and the recognition of judgment in a cross-border divorce case could possibly hinder the free movement of persons within the EU, which is vital for the functioning of the EU internal market. Therefore, even though the EU is a politically economic union, it adopted two regulations which contain unified European private international law provisions on cross-border divorce and the aim of which is to facilitate the complicated divorce process for those EU nationals and/or habitual residents who have concluded a cross-border marriage. Since uncertainty about a person's marital status could hinder the free movement of persons, the main aim of both regulations is to exclude such uncertainties. It should be noted though that according to legal doctrine this connection between family law and the proper functioning of the EU internal market is exaggerated.<sup>8</sup>

Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (the 'Brussels II *bis* Regulation' or 'Brussels II *bis*')<sup>9</sup> determines jurisdiction and the recognition of judgments in cross-border divorce, legal separation and marriage annulment cases, while 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 (the 'Rome III Regulation' or 'Rome III')<sup>10</sup> determines the law applicable to a cross-border divorce and a cross-border legal separation. Both regulations are directly applicable in those Member States in which they are legally binding, thereby replacing the national private international law provisions on these matters. Both of these legal acts are the result of difficult compromises and their in-depth analysis and application in practice over the years has identified their various flaws and problematic issues. Despite this, on 29 January 2019 the recently adopted 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 became applicable.<sup>11</sup>

Although the majority of legal experts believe that the EU does not have legislative competence in substantive family law, this point of view is debatable and some legal scholars have expressed their opinion that Brussels II *bis* is just a temporary solution, stressing that the best long-term solution to the conflicts sought to be resolved by Brussels II *bis* would be the harmonisation of the substantive divorce laws of the Member States.<sup>12</sup> As already mentioned, it is highly doubtful that this might ever be achieved, considering the huge differences between the sensitive divorce law provisions of the Member States. Yet, one might find interesting the suggestion to create a separate *matrimonium europaeum* or EU matrimonial law which would only be applicable in cross-border cases.<sup>13</sup>

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<sup>8</sup>McEleavy (2002) at 897.

<sup>9</sup>Council Regulation (EC) No 2201/2003 of 27 November 2003.

<sup>10</sup>Council Regulation (EU) No 1259/2010 of 20 December 2010.

<sup>11</sup>Council Regulation (EU) 2016/1103 of 24 June 2016.

<sup>12</sup>Ní Shúilleabháin (2010a) at 22.

<sup>13</sup>Ibid at 23.

However, this suggestion too is debatable and requires a separate and detailed analysis. For now, as long as the differences in the substantive divorce law provisions of the Member States remain, European private international law provisions on cross-border divorce, namely, Brussels II *bis* and Rome III remain topical.

The aim of this paper is not to analyse in detail the problematic issues of Brussels II *bis* and Rome III since these have already been discussed in many articles, but rather to explore, analyse and discuss what effect some of the provisions of Brussels II *bis* and Rome III may have on the national family laws and international obligations of the Member States.

This paper consists of four sections following this introduction. First, there will be a review of Brussels II *bis* and Rome III, the relevant case law and the relevant and most up-to-date legal literature on the subject. It will be followed by a brief description of the methodology used in this paper. Afterwards, a joint section of findings/results and discussion will follow containing a critique of some of the provisions of both regulations in the way they may affect the substantive family laws of the Member States and their international obligations and suggesting solutions to some of the discovered problems. Finally, the conclusions of the research, findings/results and discussion carried out in this contribution will be listed in the form of theses.

## Legal Acts, Case Law and Literature Review

### *Brussels II bis*

In May 2000, the European Council adopted a regulation unifying the private international law rules of the Member States regarding jurisdiction and the recognition of judgments in matrimonial matters (divorce, legal separation and annulment) and matters of parental responsibility (the ‘Brussels II Regulation’ or ‘Brussels II’).<sup>14</sup> This was the first EU instrument to deal exclusively and directly with core family law matters, although it did so from a private international law perspective.<sup>15</sup> While at first it did not give such an impression, the adoption of Brussels II has since proved to be a watershed in the evolution of EU law with Member States having ceded their competence in very important areas of social policy.<sup>16</sup> Since Brussels II was criticised because of its unfair treatment of children born out of wedlock, it was soon replaced by Brussels II *bis*.<sup>17</sup> Thus, by adopting Brussels II *bis* the private international law provisions of the Member States (except Denmark)<sup>18</sup> regarding jurisdiction of cross-border divorce cases and the recognition of judgments in cross-border divorce cases have been unified. Yet, Brussels II *bis* has been heavily criticised by legal scholars for having various

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<sup>14</sup>Council Regulation (EC) No 1347/2000

<sup>15</sup>Ní Shúilleabháin (2010b) at 1023.

<sup>16</sup>Ibid at 1022.

<sup>17</sup>Ní Shúilleabháin (2010a) at 7.

<sup>18</sup>Recital 31 of the Preamble of Brussels II *bis*.

errors and for damaging the general development of international cooperation in private international law on cross-border divorce, particularly undermining the standing of the HCCH.<sup>19</sup>

As already mentioned, some legal scholars see Brussels II *bis* as only a step towards the harmonisation of the substantive family law provisions of the Member States which according to their view is the only means of truly abolishing barriers to the free movement of persons.<sup>20</sup> While on the one hand it is possible to agree to this opinion, on the other hand one should remember that substantive family law is a very sensitive area of law in which changes over the centuries have occurred extremely slowly and which is very closely connected to the social, cultural and religious views dominant in the particular country. In legal doctrine it has been indicated that the fundamentally different family laws in different Member States have resulted from the differing value-systems in each country.<sup>21</sup>

Since each Member State has its specific policy on various issues and a unique culture, it would not seem right to unify or even harmonise the substantive family law provisions of the Member States. Especially because in some Member States religion still has a very important role in society and the canon law of the Roman Catholic Church is still seen as the ultimate guidance in family relationships (Malta, Italy, Ireland, Spain, Portugal, Poland, Lithuania), while in other Member States the majority of the population does not believe in the existence of God at all (Estonia, Finland, Sweden).<sup>22</sup> These huge differences are proved by the fact that Brussels II *bis*, which contains only European private international law rules, is already clearly problematic insofar as it puts Member States in the difficult position of having to choose between their EU obligations and commitment to their own policy in the family law area.<sup>23</sup>

Article 3 (1) of Brussels II *bis* provides for seven alternative<sup>24</sup> grounds of jurisdiction in cross-border divorce cases, in which the common habitual residence of the spouses, the last common habitual residence of the spouses, the habitual residence of one of the spouses, as well as the common nationality of the spouses (in the case of the United Kingdom and Ireland – the common domicile of the spouses) are used as connecting factors. Thus, Brussels II *bis* establishes a flexible choice of jurisdiction, which in turn shows that Article 3 is based on a liberal divorce philosophy (*favor divortii*).<sup>25</sup> This relatively wide choice of jurisdiction has been and still is criticised by those legal scholars who believe it encourages forum shopping.<sup>26</sup> It should also be added that this unification of jurisdiction rules

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<sup>19</sup>Ní Shúilleabháin (2010b) at 1043 and 1046.

<sup>20</sup>Ibid at 1027.

<sup>21</sup>Ibid at 1049.

<sup>22</sup>For instance, according to the Eurobarometer survey conducted in 2010, 94 % of the population of Malta said that they believe there is God, while only 18 % of the population of both Estonia and Sweden said that they believe there is God. Obviously, that is a huge difference in religious beliefs between EU Member States. Eurobarometer 73.1. Biotechnology (2010).

<sup>23</sup>Ní Shúilleabháin (2010b) at 1029.

<sup>24</sup>Case C-168/08 *Hadadi v Hadadi* [2009] EUECJ (16 July 2009) [48].

<sup>25</sup>Ní Shúilleabháin (2010a) at 149.

<sup>26</sup>Ní Shúilleabháin (2010b) at 1031-1036.

allows a cross-border divorce judgment pronounced in one Member State to be almost automatically recognised in the other Member States.<sup>27</sup>

At first Article 3 (1) of Brussels II *bis* in interaction with its Article 6 caused several questions, namely, is Brussels II *bis* applicable only regarding EU nationals and/or habitual residents and is it applicable if only one of the spouses is an EU national or habitual resident?<sup>28</sup> The answers to both of these questions were provided by the European Court of Justice (ECJ) in its judgment in *Lopez v Lopez Lizazo*, in which it was recognised that Brussels II *bis* is also applicable when only one of the spouses has a connection with a Member State stressing that, if in cross-border divorce proceedings a respondent does not have a habitual residence in a Member State and he/she is not a national of a Member State, the court of a Member State may not substantiate its jurisdiction to hear the petition with its national law, if under Article 3 of Brussels II *bis* the court of another Member State has jurisdiction.<sup>29</sup> From this judgment it follows that Brussels II *bis* is also applicable to nationals of third countries who have a sufficiently close connection with a Member State. Thus, the grounds of jurisdiction stipulated in Brussels II *bis* are applicable *erga omnes*.<sup>30</sup> Namely, Brussels II *bis* is applicable to not only couples in which both spouses are EU nationals or have their habitual residence in the EU, but also if only the respondent has EU nationality and/or a habitual residence in the EU, as well as if the respondent is neither an EU national nor has a habitual residence in the EU, but according to Brussels II *bis* a court of a Member State has jurisdiction to hear the particular cross-border divorce case.<sup>31</sup>

Pursuant to Article 7 (1) of Brussels II *bis*, if no Member State court has jurisdiction according to the rules of Articles 3, 4 and 5 of Brussels II *bis*, jurisdiction in each Member State shall be determined by its national law. This happens when the spouses have different nationalities (or domiciles in the case of the United Kingdom and Ireland) and their habitual residence is outside the EU.<sup>32</sup> Namely, these are cross-border divorce cases, in which each spouse has the nationality (or domicile) of a different Member State, for instance, the husband has Italian nationality, while the wife has Latvian nationality and at the same time neither of them has his/her habitual residence in the EU, for instance, the husband's habitual residence is in Canada, while the wife's habitual residence is in Australia.

The problem though is that Article 7 (1) of Brussels II *bis* may lead to a situation, in which no country has jurisdiction in the particular cross-border divorce case. A real life example of such a situation is described in the Report that the Commission gave to the European Parliament, the Council and the European Economic and Social Committee on the application of Brussels II *bis*.<sup>33</sup> Since

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<sup>27</sup>Lamont (2007).

<sup>28</sup>Kruger & Samyn (2016) at 38.

<sup>29</sup>Case C-68/07 *Lopez v Lopez Lizazo* [2007] EUECJ (29 November 2007) [28].

<sup>30</sup>Persano (2010) at 10.

<sup>31</sup>Kruger & Samyn (2016) at 139.

<sup>32</sup>Ní Shúilleabháin, (2010a) at 158.

<sup>33</sup>See this example in footnote No 36 on page 8 of the Report. Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of Council Regulation (EC) No 2201/2003.

Brussels II *bis* should establish the jurisdiction of a cross-border divorce case if it turns out that no court has jurisdiction in the particular case, it would seem necessary to include *forum necessitatis* in Article 7 of Brussels II *bis* in the following wording: ‘*If no Member State court has jurisdiction in the particular divorce case and it is not possible to obtain the divorce in a third country, then, if the Member State, in whose court the divorce application has been lodged, has a sufficiently close connection to the case, the court of this Member State has the right to declare itself the competent court.*’ A very similar suggestion has already been expressed by legal scholars, stressing that another reason why *forum necessitatis* should also be included in Brussels II *bis* are cross-border same-sex divorce cases.<sup>34</sup>

On 15 April 2014 the Commission gave a Report to the European Parliament, the Council and the European Economic and Social Committee on the application of Brussels II *bis*.<sup>35</sup> In the Report the Commission named several flaws of Brussels II *bis*, which have been identified since the start of its application in the Member States.

Firstly, the Report implies that if both cross-border spouses have dual nationality of the same two Member States, then, according to the judgment of the ECJ in *Hadadi v Mesko*<sup>36</sup>, when determining the competent court in a cross-border divorce case, it is not necessary to consider which nationality is *effective*, but instead the courts of both Member States have jurisdiction. Thus, in this situation cross-border spouses have the right to choose the competent court.<sup>37</sup> Since this issue has already been resolved in the mentioned judgment of the ECJ, it should probably not be considered a flaw of Brussels II *bis* anymore, because from the wording of Article 19 (1) of the Treaty on European Union it follows that judgments of the ECJ are binding upon all the national courts of the Member States.<sup>38</sup>

Secondly, the Report states that another flaw of Brussels II *bis* is that the jurisdiction grounds listed in its Article 3 (1) are alternative, not hierarchical, which in conjunction with the fact that the conflict-of-laws rules on the law applicable to a cross-border divorce have not been harmonised throughout the EU, may lead to forum shopping. Namely, one of the spouses might rush to a court which is more convenient to this spouse, before the other spouse has managed to do the same, so that the law applicable to the particular cross-border divorce would be the law which better suits the interests of this spouse. This is because according to national conflict-of-laws rules the law applicable to a cross-border divorce

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<sup>34</sup>See Kruger & Samyn (2016) at 140.

<sup>35</sup>Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of Council Regulation (EC) No 2201/2003.

<sup>36</sup>Case C-168/08 *Hadadi v Hadadi* [2009] EUECJ (16 July 2009) [48].

<sup>37</sup>Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of Council Regulation (EC) No 2201/2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgements in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) No 1347/2000.

<sup>38</sup>Consolidated Version of the Treaty on European Union.

usually is the law of the court (*lex fori*) and only subsidiary – the personal law of the spouses (*lex causae*).<sup>39</sup>

One may find this conclusion of the Report to be only partly true, because typically the main reason for forum shopping is the desire for a particular law to be applied to the matrimonial property relations and maintenance.<sup>40</sup> Therefore, even if the conflict-of-laws rules regarding the law applicable to a cross-border divorce were unified in all the Member States, the problem of forum shopping would still remain. Furthermore, even if the conflict-of-laws rules on the law applicable to matrimonial property relations were unified in all the Member States (as already mentioned, there is the EU Regulation on enhanced cooperation regarding the law applicable to matrimonial property regimes<sup>41</sup>), the problem of forum shopping would still remain because of the procedural advantages that the court of one Member State might have over the court of another Member State.<sup>42</sup> There is currently no discussion in the EU as regards the unification or at least the harmonisation of national civil procedure laws of the Member States. To be fair, such a discussion seems very unlikely in the foreseeable future. Therefore, it seems that at present there is no solution to the problem of forum shopping.

Thirdly, the Report points out that yet another flaw of the jurisdiction grounds of Brussels II *bis* in cross-border divorce cases is that they do not provide for the cross-border spouses a possibility to make an agreement on the competent court. However, from Article 3 (1) subsection ‘a’ it follows that in the case of a joint divorce application cross-border spouses may choose between the courts of the countries, in which they have their habitual residences, since it stipulates that in the case of a joint divorce application jurisdiction lies with the court of the Member State, in which either of the cross-border spouses is habitually resident. This opinion has been expressed in legal doctrine on numerous occasions, including in the Commentary on Brussels II *bis*.<sup>43</sup> Therefore, it is possible to conclude that already now cross-border spouses have a limited possibility to agree on the competent court, choosing between the jurisdictions of two Member States in both of which joint divorce applications are allowed. However, it is hard to disagree with the suggestion expressed in the Report that the spouses should be given a wider option to jointly designate the jurisdiction of their cross-border divorce case.

### *Rome III*

Soon after the application of Brussels II *bis* began, it became clear that the EU had set a goal for European private international law on cross-border divorce to contain not only the provisions on jurisdiction and the recognition of judgments in cross-border divorce cases, but also rules on the law applicable to a cross-border divorce. At first, the aim of the EU was to include such provisions in Brussels II *bis*. But in 2008 it was concluded that there are insurmountable

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<sup>39</sup>Fawcett & Carruthers (2008) at 967.

<sup>40</sup>de Boer (2008) at 340.

<sup>41</sup>Council Regulation (EU) 2016/1103.

<sup>42</sup>Clarkson & Hill (2011) at 19.

<sup>43</sup>Borrás (2017) at 95. See, e.g. Shúilleabháin (2010a) at 137. See, e.g. Carruthers (2012).

difficulties which make it impossible to achieve this goal at that time or in the near future.<sup>44</sup> Therefore, it was decided to abandon the idea of European private international law that would determine the law applicable to a cross-border divorce.

However, Belgium, Bulgaria, Germany, Greece, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Rumania and Slovenia submitted a request to the Commission, in which they expressed their desire to create an enhanced cooperation between themselves regarding the legal acts applicable in cross-border divorce and legal separation cases (Greece later withdraw its request).<sup>45</sup> Interestingly, nine of these countries were from the 15 so-called *old* Member States, which had joined the EU before 2004, while six countries were from the 12 so-called *new* Member States, which had joined the EU in 2004 or 2007. Namely, the enhanced cooperation was desired by more than half of the *old* Member States and by exactly half of the *new* Member States, which clearly demonstrates that the *old* Member States did not wish to go ahead without the *new* Member States.<sup>46</sup> As a result, the Council adopted Decision 2010/405/ES, allowing an enhanced cooperation regarding the legal acts, which are applicable to cross-border divorce and legal separation, thereby creating an enhanced cooperation in this area.<sup>47</sup>

This decision has been heavily criticised in legal doctrine.<sup>48</sup> One of the main reasons for this is that Rome III<sup>49</sup>, which establishes rules on the law applicable to cross-border divorce and legal separation, is the first regulation on enhanced cooperation in EU history.<sup>50</sup> Thus, it has begun the so-called two-speed European private international law, which some legal scholars see as something negative.<sup>51</sup> This is arguable though, because a two-speed EU and the adoption of a regulation on enhanced cooperation is not necessarily a bad solution, if it is clear that at least in the near future it is impossible to reach unanimity among the Member States on the particular matter, since this solution allows the Member States to integrate in different tempo. This is actually a good thing considering that at present the EU has 28 Member States. It would not seem right to forbid integration between Member States wishing to integrate and being ready to do this. Besides, the fact that at least some of the Member States have been able to unify their private international law provisions on the law applicable to a cross-border divorce and legal separation promotes legal certainty and predictability on the particular matter at least among these Member States.

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<sup>44</sup>Recitals 4 and 5 of the Preamble of Rome III.

<sup>45</sup>Recital 6 of the Preamble of Rome III.

<sup>46</sup>Peers (2010) at 347.

<sup>47</sup>Recital 7 of the Preamble of Rome III.

<sup>48</sup>See, e.g. Fiorini (2010) at 1157. See, e.g. González Beilfuss (2013) at 32.

<sup>49</sup>Council Regulation (EU) No 1259/2010.

<sup>50</sup>Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of Council Regulation (EC) No 2201/2003.

<sup>51</sup>See, e.g. Peers (2010) at 357. See, e.g. Fiorini (2010) at 1157 and González Beilfuss (2013) at 32; Magnus & Mankowski (2017) at 12.

At present (August 2019) Rome III is directly applicable in 17 Member States – Belgium, Germany, Greece, Spain, France, Italy, Latvia, Lithuania, Estonia, Luxembourg, Hungary, Malta, Austria, Portugal, Bulgaria, Rumania and Slovenia.<sup>52</sup> The main reason, why the other 11 Member States are not participating in Rome III, is because they do not wish to apply foreign law. Firstly, because they oppose the difficulties and expenses created by the application of foreign law in general and, secondly, because they have objections against the possible content of the applicable foreign law, either because they do not wish to hinder divorce or – on the contrary – because they wish to support the institution of marriage and do not accept a legal regulation that is more liberal than their own law.<sup>53</sup>

The core or the main element of Rome III is considered to be the fact that its Article 5 (1) innovatively introduces a limited party autonomy as a connecting factor in cross-border divorce and legal separation cases.<sup>54</sup> Legal scholars of private international law positively evaluate the inclusion of party autonomy in Rome III, because it gives spouses a limited possibility to choose the law applicable to their cross-border divorce and legal separation with the aim of increasing flexibility and legal certainty.<sup>55</sup> It is important to note that among the Member States participating in Rome III, only some had recognised party autonomy in cross-border divorce proceedings before the adoption of Rome III.<sup>56</sup>

Article 8 of Rome III stipulates the law applicable to a cross-border divorce or legal separation, if the cross-border spouses have not made a choice according to Article 5 of Rome III or if the agreement made between the spouses on the applicable law has no legal effect. Although the wording of Article 8 is very similar to the wording of Article 5, there is a very significant difference between the two provisions, namely, Article 5 allows spouses to choose one of the four alternative laws applicable to a cross-border divorce and legal separation, while in Article 8 the four applicable laws are placed in a hierarchical order. Thus, the successive connecting factors in Article 8 are arranged as steps creating the so-called *Kegelsche Leiter* ('Kegel's ladder') – each subsequent connecting factor is subsidiary and only becomes relevant if the preceding connecting factor is not pertinent.<sup>57</sup> In legal doctrine this is called the combination of subsidiary connecting factors.

However, Rome III is criticised because it allows spouses to make an agreement on the applicable law very early<sup>58</sup>, namely, spouses may designate the law applicable to their cross-border divorce even before the celebration of the cross-border marriage itself. For instance, potential spouses may choose the

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<sup>52</sup>Law Applicable to Divorce and Legal Separation. National Information Concerning Regulation No. 1259/2010. The latest Member State to join Rome III is Estonia, with Rome III applicable there as of 11 February 2018. Commission Decision (EU) 2016/1366 of 10 August 2016 confirming the participation of Estonia in enhanced cooperation in the area of the law applicable to divorce and legal separation [OJ L 216 of 11.8.2016].

<sup>53</sup>González Beilfuss (2011) at 338-339.

<sup>54</sup>Viarengo (2014) at 551.

<sup>55</sup>Recital 15 of the Preamble of Rome III.

<sup>56</sup>Basedow (2012) at 139.

<sup>57</sup>Lein (2015) at 891.

<sup>58</sup>Kruger (2014).

law applicable to their cross-border divorce in a prenuptial agreement. As a result, the law applicable to the particular divorce might be the law of a country with which neither of the cross-border spouses has had a connection for a very long time.

Besides, an early agreement on the law applicable to a future divorce can lead to two more problematic issues. First of all, by the time the particular agreement becomes effective the circumstances of the cross-border marriage may have changed. For example, the marriage may no longer have a foreign element, if, for instance, the spouses now have a common nationality and have their common habitual residence in the country of their common nationality. Rome III does not deal with this issue. On the one hand, one might say that since there is no conflict-of-laws situation anymore, Rome III is not applicable and therefore the spouses' agreement on the law applicable to their divorce should not be taken into consideration. On the other hand, one might as well say that the particular marriage was cross-border when the agreement was made and that a legally concluded agreement should be fulfilled.<sup>59</sup> This second opinion seems more likely, because *pacta sunt servanda*. Thus, even past circumstances may lead to a present conflict-of-laws.<sup>60</sup>

Secondly, the content of the applicable law as chosen by the spouses may have been significantly amended over the time. As a result, the basic principle of Rome III – a deliberate choice by the spouses – might not be respected. Recital 18 of the Preamble of Rome III stipulates that each spouse must precisely know the legal and social consequences of the choice of the applicable law. There is some reasonable doubt whether this requirement would be met, if the spouses had made the agreement on the applicable law many years ago and over the years the content of the applicable law had been significantly altered.<sup>61</sup>

## Methodology

The methodology used in this paper is a research, a critical evaluation, an analysis and a discussion of Brussels II *bis* and Rome III in order to discover the way this European private international law may affect the substantive family laws of the Member States and their international obligations. As a result of the methods used, conclusions are drawn and solutions to some of the discovered problematic issues are offered.

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<sup>59</sup>González Beilfuss (2013) at 42.

<sup>60</sup>Wiese (2015) at 860.

<sup>61</sup>González Beilfuss (2013) at 42-43.

## Findings/Results and Discussion

Having researched and made a critical evaluation of Brussels II *bis* and Rome III, as well as the relevant case law and most up-to-date legal literature, it is time to turn to the analysis and discussion on how Brussels II *bis* and Rome III may affect the national family laws of the Member States and their international obligations.

First, it is necessary to analyse and discuss how the interaction between Brussels II *bis* and Rome III has resulted in Malta being forced to introduce divorce into its substantive family law. Until 2011 the institution of divorce did not exist in the Maltese substantive family law. Despite this, Malta had already joined Brussels II *bis* and Rome III before 2011.

The application of Rome III from 2012 could have led to the following situation: a Maltese couple who would not have been able to divorce in Malta, could have easily circumvent the Maltese national legal framework, if at least one of the spouses established his/her habitual residence in, for instance, Spain. In this case pursuant to Article 3 (1) subsection 'a' of Brussels II *bis* this couple could file for divorce in a Spanish court, which would then determine the applicable law according to Rome III, which is directly applicable in Spain. According to the positive public policy rule established in Article 10 of Rome III, if the law applicable pursuant to Articles 5 or 8 of Rome III does not provide for divorce, the court applies the *lex fori*. Thus, in this case the Spanish court would apply Spanish law and divorce the couple. Afterwards, according to Article 21 (1) and (2) of Brussels II *bis* this judgment could have been automatically recognised in Malta. Since it became clear that the application of European private international law would discriminate those Maltese couples who would not be able to find a possibility to file for divorce in another Member State, on 28 May 2011 a consultative referendum took place in Malta, in which the majority of voters supported the introduction of the institution of divorce into Maltese substantive family law. As a result, the Parliament of Malta was forced to amend the Civil Code and finally introduce the institution of divorce in Malta.<sup>62</sup>

This situation shows that modern European private international law has already had a profound effect on the Maltese conservative substantive family law that had been protected and cherished by the Maltese nation over the course of centuries because of the huge power that the Roman Catholic Church has had and still has in this Mediterranean Island. This is very important because it leads to a finding that the legal acts of the EU, which so far remains a politically economic union, could seriously affect the substantive family law provisions of its Member States in the future as well. The reason why European private international law may push the substantive family laws of the Member States in a certain direction, is because private international law and substantive private law are interconnected. This leads us to a discussion in what other ways could Brussels II *bis* and Rome III potentially affect the substantive family laws of the Member States and their international obligations.

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<sup>62</sup>Marinai (2012) at 266-267.

For instance, at present (August 2019) exactly half of the 28 Member States have not yet allowed the celebration of same-sex marriages.<sup>63</sup> A number of these Member States also do not recognise same-sex marriages celebrated abroad. Meanwhile, according to the wording of Article 13 of Rome III the term ‘marriage’ as used in Rome III is a concept that has to be interpreted autonomously, which therefore may also include unconventional types of marriage.<sup>64</sup> However, a precise interpretation of the term ‘marriage’ as used in Rome III may only be given by the ECJ. Since it is clear that the term ‘marriage’ should have identical meaning in all EU regulations on private international law, the interpretation of the term ‘marriage’ as used in Rome III should be consistent with the interpretation of the term ‘marriage’ as used in Brussels II *bis* which the ECJ has also not given yet.<sup>65</sup> It should be noted though that Annex I of Brussels II *bis* refers to ‘husband’ and ‘wife’ respectively, thus it could be concluded that from the language of Brussels II *bis* it follows that this legal act is only applicable to traditional marriages.<sup>66</sup>

However, there are several reasons, why it is more likely than not that the ECJ in its judgment will indicate that the term ‘marriage’ as used in Brussels II *bis* and Rome III includes same-sex marriages too. Already from the *travaux préparatoires* of Rome III it followed that cross-border same-sex marriages should also be included in the scope of this legal act. Namely, the Report on the Proposal for Rome III discussed the problems that could arise from the application of Rome III to cross-border same-sex marriages. Notably, out of respect for same-sex marriages the Report implied that it is necessary to include *forum necessitatis* in Brussels II *bis*.<sup>67</sup>

Furthermore, the acknowledgment that the term ‘marriage’ as used in Rome III includes same-sex marriages as well as polygamous marriages is especially confirmed by Article 13 of Rome III, which stipulates that a court of a Member State whose law does not deem the particular marriage valid for the purposes of divorce proceedings is not obliged to pronounce a divorce by virtue of the application of Rome III. It logically follows from Article 13 that a court of a Member State whose law does deem the particular marriage valid for the purposes of divorce proceedings is obliged to pronounce a divorce by virtue of the application of Rome III. It seems undoubtedly clear that Article 13 has been written with cross-border same-sex marriages and polygamous marriages in mind. The idea that the broader interpretation of the term ‘marriage’ as used in Rome III may also be substantiated with Article 13 of Rome III has also been expressed in legal doctrine.<sup>68</sup>

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<sup>63</sup>Italy, Greece, Cyprus, Estonia, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Slovenia, Hungary, Croatia, Bulgaria and Romania. European Union. Marriage.

<sup>64</sup>Torga (2012) at 548-549.

<sup>65</sup>Ibid at 549.

<sup>66</sup>Ní Shúilleabháin (2010a) at 106.

<sup>67</sup>European Parliament. Report on the Proposal for a Council Regulation Implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation (COM (2010)0105 – C7-0315/2010 – 2010/0067(CNS)). (2010) at 31-33.

<sup>68</sup>Lein (2015) at 896.

Besides, legal scholars have already expressed their opinion that the term 'marriage' as used in Rome III definitely includes both same-sex marriages and polygamous marriages, because, firstly, it would create difficulties in legal practice, if Rome III were not applicable to these two types of cross-border marriages, secondly, EU nationals, who have entered into such marriages, should not be deprived of the legal certainty, predictability and flexibility provided by Rome III, thirdly, these EU nationals should not be excluded from the goal of promoting the free movement of persons within the EU, and, fourthly, these EU nationals should not be discriminated on the grounds of their gender, religious affiliation or sexual orientation.<sup>69</sup> The prohibition of discrimination on the mentioned grounds is also expressed in Recital 30 of the Preamble of Rome III.

Thus, it is very possible that in the future, when giving an autonomous interpretation of the term 'marriage' as used in Brussels II *bis* and Rome III, the ECJ in its judgment may indicate that the term 'marriage' as used in Brussels II *bis* and Rome III includes same-sex marriages too. This will lead to all the Member States applying Brussels II *bis* and Rome III being forced to recognise cross-border same-sex marriages celebrated abroad and to carry out cross-border same-sex divorces. This in turn may lead to those Member States, which at present do not allow same-sex marriages, being indirectly forced to legalise same-sex marriages in their substantive family laws.

There is also a way in which the family law practitioners of the Member States may be affected by European private international law. This may happen when it is necessary to convert a legal separation into a divorce according to Rome III. Pursuant to Article 9 of Rome III when a legal separation is converted into a divorce and if the spouses have not agreed otherwise, the competent court who has been asked to convert a legal separation into a divorce pursuant to Article 9 (1) has the duty to decide the case according to the law applicable to legal separation even if the *lex fori* makes no provision for legal separation.<sup>70</sup> Thus, a Member State which participates in Rome III, but whose law has never provided for the religious institution of legal separation, for instance, Latvia, may be forced to deal with legal separation, if during the course of cross-border divorce proceedings a request is submitted to convert a cross-border legal separation into a cross-border divorce. This may prove to be rather difficult, if the legal practitioners of the particular Member State are unfamiliar with the institution of legal separation, which is often the case in, for instance, Latvia.

As already mentioned, pursuant to Article 9 (1), if a cross-border legal separation is converted into a divorce, the law applicable to this cross-border divorce is the law which was applied to the cross-border legal separation, unless the spouses have agreed otherwise according to Article 5 of Rome III. However, pursuant to Article 9 (2) if the law that was applied to the legal separation makes no provision for the conversion of a legal separation into a divorce, Article 8 of Rome III is applicable, unless the spouses have agreed otherwise pursuant to Article 5 of Rome III. Thus, the court, which has to convert a legal separation into

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<sup>69</sup>Wiese (2015) at 861.

<sup>70</sup>Lein (2015) at 912.

a cross-border divorce, has the duty to check, if the law which was applied to the legal separation provides for the conversion of a legal separation into a divorce.

For instance, Italian law makes no provision for the conversion of a legal separation into a divorce because there legal separation and divorce are considered to be two separate legal institutions. Having not understood this, at present the German courts have created a wrong case law. Namely, before Rome III entered into force according to the German national conflict-of-laws rules Italian law was applied to the legal separation of an Italian couple with a habitual residence in Germany. After Rome III had become applicable pursuant to Article 9 (1) of Rome III the German courts apply Italian law to the cross-border divorces of these Italian spouses. This is wrong because since the Italian law does not make a provision for the conversion of a legal separation into a divorce, then, if the spouses have not agreed on the applicable law, pursuant to Article 9 (2) the law applicable to the cross-border divorces of these Italian spouses habitually resident in Germany is German law according to Article 8 subsection 'a' of Rome III.<sup>71</sup>

All the above mentioned suggests that the family law practitioners of all Member States participating in Rome III should be taught about the institution of legal separation, its legal consequences and the way it can be converted into a divorce. Therefore, perhaps special learning courses or seminars should be organised for the family law practitioners.

Another discussion-provoking issue arises out of the recognition rules of Brussels II *bis*. Article 22 of Brussels II *bis* establishes four grounds of non-recognition for foreign judgments relating to cross-border divorce and special attention should be paid to the fact that a judgment delivered in one Member State is not recognised in another Member State, if its recognition is manifestly contrary to the public policy of the Member State in which recognition is sought. Yet, the scope of the public policy clause of Brussels II *bis* is significantly limited with the help of its Articles 24, 25 and 26.

A Muslim divorce pronounced in a third country according to the *Sharia* will most likely be refused recognition in the Member States on the basis of the public policy rule. At the same time it should be noted that although that way by using the public policy rule of their national private international laws Member States may avoid the recognition of a Muslim divorce pronounced in a third country according to the Islamic law, there is a Member State which also allows a Muslim divorce pronounced according to the *Sharia* which could, according to Article 21 (1) and (2) of Brussels II *bis*, be entitled to an automatic recognition in the other Member States, namely, a *mufti* divorce in Greece.

As a consequence of a number of international treaties signed by Greece and Turkey, the *mufti*, who is the religious leader of the Muslims living in Greece, has been granted the power by law to decide according to the *Sharia* on the divorce cases of Greek Muslim couples living in Western Thrace. Thus, the *Sharia* has become a part of Greek law although it is only applicable to some 100,000 Greek nationals.<sup>72</sup> However, the decisions of the *mufti* do not have *res judicata* effect and

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<sup>71</sup>Viarengo (2014) at 558.

<sup>72</sup>Tsaoussi & Zervogianni (2008) at 209.

are only enforceable after a decision of the Greek court.<sup>73</sup> In the so-called Borrás Report it has been indicated that Brussels II *bis* is only applicable to civil proceedings and all merely religious proceedings are excluded from its scope.<sup>74</sup> Yet, in the legal literature it has been stated that, if the *mufti* divorces were excluded from the scope of Brussels II *bis*, it would not be fair to those EU nationals who are Greek Muslims living in Western Thrace.<sup>75</sup>

However, this opinion has been challenged, since in this case the civil court does not decide on the divorce itself, but rather only confirms a divorce that has already been declared. Thus, the main part of the divorce process takes place in a religious rather than in a civil context. At the same time the *mufti* divorces are not *purely* religious, because, after they have been confirmed by the Greek court, they become officially recognizable in Greece. Thus, if the main criterion in order to decide whether Brussels II *bis* is applicable is whether the divorce is recognised in the civil law of the particular country, Brussels II *bis* should be applicable to the *mufti* divorces that have been confirmed by the Greek court.<sup>76</sup>

Meanwhile, in the commentaries of Brussels II *bis* it has been stated that the *mufti* divorces are not included in the scope of Brussels II *bis*.<sup>77</sup> Although this is the opinion of Emeritus Professor Walter Pintens, a legally binding explanation on this issue may only be given by the ECJ. Thus, so far this issue remains unclear. However, it seems very likely that, if the Greek court has confirmed the *mufti* divorce and it is enforceable in Greece, Brussels II *bis* should be applicable to the recognition of the *mufti* divorce. Thus, if the divorce decision of the *mufti* has been confirmed by the Greek court, this Muslim divorce could be entitled to an automatic recognition in all the other Member States (except Denmark) pursuant to Article 21 (1) and (2) of Brussels II *bis*, despite the fact that the *Sharia* had been applied to this divorce.

Finally, another problematic issue may arise, if pursuant to Article 21 (1) and (2) of Brussels II *bis* Greece automatically recognises a cross-border divorce of a Greek Muslim couple from Western Thrace with a habitual residence in, for instance, France, to which French law has been applied instead of the *Sharia*. It is to be expected that, if a Greek Muslim couple from Western Thrace with a habitual residence in France files for divorce in France, pursuant to the positive public policy rule established in Article 10 of Rome III the French court would apply the *lex fori* (the French law) instead of the *Sharia* to this cross-border divorce. Afterwards, Greece would be obliged to recognise this cross-border divorce pursuant to Article 21 (1) and (2) of Brussels II *bis*. Would Greece thereby not breach its international obligations resulting from its international treaties with Turkey, which oblige Greece to ensure that all issues pertaining to the personal status of Greek Muslims would be resolved in accordance with their religious customs? It seems more likely than not that Greece would in fact thereby breach its international obligations.

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<sup>73</sup> Vassilakakis & Kourtis (2007) at 137.

<sup>74</sup> Borrás (1998) at 35.

<sup>75</sup> Vassilakakis & Kourtis (2007) at 138.

<sup>76</sup> Ní Shúilleabháin (2010a) at 125.

<sup>77</sup> Pintens (2017) at 58.

As a result, according to present European private international law an awkward situation may be created in which a Member State may be forced to breach its international obligations in order to fulfil its obligations under European private international law. Therefore, perhaps a subsection 'e' should be added to Article 22 of Brussels II *bis* in the following wording: '*a judgment relating to a divorce, legal separation or marriage annulment shall also not be recognised, if it does not correspond to the international obligations of the Member State*'. This suggestion could help to avoid the described awkward situation.

## Conclusions

1. It is possible to conclude that with the adoption of Brussels II *bis* and Rome III the EU has created European private international law on cross-border divorce, which has replaced the relevant national private international law provisions of those Member States which participate in Brussels II *bis* and Rome III.

2. While a critical evaluation of Brussels II *bis* and Rome III shows that these two legal acts have various flaws, discussion-provoking is the way Brussels II *bis* and Rome III may affect the substantive family laws and international obligations of the Member States. Modern European private international law has already had a profound effect on the Maltese conservative substantive family law. This is very important because it leads to a finding that the legal acts of the EU, which so far remains a politically economic union, could have a serious effect on the substantive family law provisions of its Member States in the future as well.

3. It is very possible that in the future, when giving an autonomous interpretation of the term 'marriage' as used in Brussels II *bis* and Rome III, the ECJ in its judgment may indicate that the term 'marriage' as used in Brussels II *bis* and Rome III includes same-sex marriages too. This will lead to all the Member States applying Brussels II *bis* and Rome III being forced to recognise cross-border same-sex marriages celebrated abroad and to carry out cross-border same-sex divorces. This in turn may lead to those Member States, which at present do not allow same-sex marriages, being indirectly forced to legalise same-sex marriages in their substantive family laws.

4. There is also a way in which the family law practitioners of the Member States may be affected by European private international law. This may happen when it is necessary to convert a legal separation into a divorce according to Article 9 of Rome III. This may prove to be rather difficult, if the legal practitioners of the particular Member State are unfamiliar with the institution of legal separation or have heard about it but are not fully aware of the regulation on legal separation. This suggests that the family law practitioners of all Member States participating in Rome III should be taught about the institution of legal separation, its legal consequences and the way it can be converted into divorce. Therefore, perhaps special learning courses or seminars should be organised for the family law practitioners.

5. Although so far this issue remains unclear, it seems very likely that, if the Greek court has confirmed the *mufiti* divorce and it is enforceable in Greece,

Brussels II *bis* should be applicable to the recognition of the *mufti* divorce. Thus, if the divorce decision of the *mufti* has been confirmed by the Greek court, this Muslim divorce could be entitled to an automatic recognition in all the other Member States (except Denmark) pursuant to Article 21 (1) and (2) of Brussels II *bis*, despite the fact that the *Sharia* had been applied to this divorce.

6. Finally, a conclusion may be drawn that according to present European private international law an awkward situation may be created in which a Member State may be forced to breach its international obligations in order to fulfil its obligations under European private international law. Therefore, it is suggested in this paper that a subsection ‘e’ should be added to Article 22 of Brussels II *bis* in the following wording: ‘*a judgment relating to a divorce, legal separation or marriage annulment shall also not be recognised, if it does not correspond to the international obligations of the Member State*’.

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