

LEGAL ISSUES IN CROSS-BORDER SAME-SEX DIVORCE DISPUTES AT EU LEVEL

Marian GOCIU*

Abstract

In the regulations adopted in the area of divorce, the Council of the EU reiterates in the very first recital the Union's main objective, namely to maintain and develop an area of freedom, security and justice. This area must ensure the free movement of persons. Although the measures taken are of increased importance in EU family law and contribute to the achievement of this objective, the Brussels IIb and Rome III Regulations do not define the notion of „divorce“, leaving the interpretation of the concept to the CJEU.

Some Member States have regulated same-sex marriages, while others have retained their traditional rules on different-sex marriages, while prohibiting same-sex marriages, and this is likely to create difficulties for EU citizens and national courts dealing with cross-border divorce applications, in particular in establishing international jurisdiction and in determining the applicable substantive law. National courts must therefore take a position on the recognition of the marriage legally conducted in a Member State in order to pronounce the divorce.

In this article we aim to analyze the legal issues of cross-border same-sex divorce litigation in the EU, taking into account the present EU family law framework and the differences in the relevant national legislation of the member states. We will first present a brief history of EU steps to convince Member States to recognize same-sex marriages, then we will analyze the legal rules of interest to the subject of the article. Next, we will review the relevant CJEU practice and, finally, we will propose solutions to the identified challenges in order to ensure non-discriminatory treatment for same-sex couples seeking divorce, while respecting the national identity of Member States. This paper will not examine the social aspects of the problem of regulating same-sex marriages, but will focus strictly on the legal issues.

Keywords: *same-sex divorce, national identity, international jurisdiction, substantial applicable law, inadmissibility, EU law.*

1. Introduction

The civil status of persons, which includes rules relating to marriage and filiation, is a matter which falls within the competence of the Member States, and Union law is without prejudice to that competence. The Member States are thus free to legislate or not, in their national law, same-sex marriages or same-sex registered partnerships, but in exercising this competence, each Member State must comply with Union law.

Same-sex marriages have been regulated in 13 out of 27 Member States, namely: Austria, the Netherlands, Belgium, Germany, Malta, Ireland, Ireland, Finland, France, Denmark, Luxembourg, Spain, Sweden and Portugal. Same-sex civil partnerships are legal institutions in 20 Member States: Austria, Belgium, Croatia, Cyprus, Czechia, Denmark, Estonia, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, the Netherlands, Slovenia, Spain and Sweden¹.

In the area of divorce, on one hand Council Regulation (EU) 2019/1111² (Brussels IIb) provides rules for establishing international jurisdiction in cross-border disputes and rules for recognition and enforcement of decisions and, on the other hand, Council Regulation (EU) no. 1259/2010³ (Rome III) stipulates uniform rules on the substantive law applicable to divorce.

There are two main problems regarding these regulations that concern the subject of this paper. The first one is territorial in nature because Brussels IIb Regulation applies territorially to all Member States, whereas the Rome III Regulation is applicable only to the 17 participating Member States, as it was adopted in the form of

* PhD Candidate, Faculty of Law, „Nicolae Titulescu” University of Bucharest (e-mail: marian17gociu@gmail).

¹ Data available at https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/civil-justice/family-law/property-international-couples-marriages-and-registered-partnerships_en, last consulted on 29.03.2025.

² Council Regulation (EU) no. 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, published in OJ L 178/02.07.2019, pp. 1-115.

³ Council Regulation (EU) no. 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, published in OJ L 343/29.12.2010, pp. 10-16.

enhanced cooperation. The second issue involves the material scope of the regulations, namely that these regulations do not define the concept of divorce, nor do they provide guidelines to interpret the content of this concept.

Different regulation of marriage by Member States and inconsistent EU legislation creates challenges for same-sex couples seeking to dissolve their marriages, in cross-border cases. In this paper, we aim to identify the legal issues that same-sex couples face when they decide to file a divorce application and practical implications faced by the national courts. After that, we will focus on providing solutions on how should national courts proceed to protect the EU citizens' rights, such as the right to a fair trial and the right to respect for private and family life, regardless of sexual orientation.

In order to answer to these legal issues, first, the article provides a short historical overview of the EU's efforts to convince all Member States to recognize same-sex marriages and analyzes key regulations applicable in the area at hand. The author further engages with relevant CJEU jurisprudence and, in the end, provides solutions to the legal issues identified in the case of cross-border same-sex divorce proceedings.

While significant research exists in the specialized literature on family law concerning the rights of same-sex couples, less attention has been dedicated specifically to the implications of cross-border divorce disputes.

2. Cross-border same-sex divorce disputes

2.1. EU's efforts to convince Member States to recognize same-sex marriages

People who have same-gender sexual attraction are part of a larger community called LGBTIQ⁴. The European Union has become increasingly active over the last 10 years in promoting respect for the rights of members of this community, through the adoption of resolutions, action lists, recommendations and annual reports.

On February 4, 2014, the European Parliament issued the Resolution on the EU roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity⁵ in which it stated that the responsibility for the protection of fundamental rights lies with both the European Commission and the Member States. The European Parliament invited the European Commission to make full use of its competences, including facilitating the exchange of good practice between Member States, and invited Member States to fulfill their obligations under EU law and in line with the Council of Europe's Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity.

At the same time, in this document, letter H, the European Parliament specified that the European Commission should draw up guidelines to ensure the implementation of Directive 2004/38/EC⁶ and Directive 2003/86/EC⁷, in order to guarantee respect for all forms of family legally recognized under the national legislation of the Member States. The European Commission should also make proposals for the mutual recognition of the effects of all civil status documents throughout the EU in order to reduce discriminatory legal and administrative barriers for citizens and their families exercising their right to free movement. Member States which have adopted legislation on cohabitation, registered partnerships or same-sex marriage should recognize similar provisions adopted by other Member States.

Subsequently, in 2015 the European Commission has drawn up a List of actions to advance LGBTI equality⁸ between 2016-2019, among the activities being listed the following: simplifying the daily life of LGBTI families moving in Europe, and strong monitoring and enforcement of existing rights of LGBTI people and their families under EU law.

⁴ An acronym for persons who identify as homosexual, bisexual, trans, intersex or queer, according to the glossary of the European Commission available at https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/lgbtiq_en, last consulted on 28.03.2025.

⁵ Published in OJ C 93/24.03.2017, p. 21.

⁶ Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, published in OJ L 158/30.04.2004, pp. 77-123.

⁷ Directive 2003/86/EC of 22 September 2003 on the right to family reunification, published in OJ L 251/03.10.2003, pp. 12-18.

⁸ Available at https://commission.europa.eu/system/files/2017-06/lgbti-actionlist-dg-just_en.pdf, last consulted on 28.03.2025.

In 2016, the European Parliament and the Council issued Regulation (EU) 2016/1191⁹ which helps same-sex couples to have marriage certificates accepted as authentic in another Member State without the need for this document to bear an apostille, but it does not provide for the recognition of the effects of the certificate presented in another Member State which depends on the law of the receiving Member State.

The European Parliament, in its Resolution of 18 December 2019 on public discrimination and hate speech against LGBTI persons, including LGBTI-free areas¹⁰, stated that discrimination and violence against LGBTI persons have taken multiple forms, recent examples including homophobic statements in the referendum campaign to restrict the definition of family in Romania. The European Parliament therefore called on the European Commission to take concrete measures to ensure the free movement of all families, including LGBTI families, in line with the CJEU ruling in the Coman case, and called on Member States to introduce legislation for the equal recognition of same-sex marriages and partnerships so as to ensure that the right to private and family life is fully respected without discrimination.

Furthermore, the European Commission has developed a strategy for Implementation of the LGBTIQ Equality covering the period 2020-2025¹¹. According to the Report on the implementation of the 2020-2025 LGBTIQ equality strategy, issued by the European Commission in 25 September 2024¹², differences between Member States' national rules may lead to discriminatory treatment of members of the LGBTIQ community in the way that family ties may not be recognized when families comprising such members travel to different Member States. Related to this issue, in 2023 the European Union Agency for Fundamental Rights has conducted a survey¹³, according to which 14% of respondents in LGBTIQ-parented families faced problems in having their parenthood legally recognized in another Member State.

As stated by the European Commission¹⁴, same-sex marriages and same-sex parenthood that are confirmed by a certificate issued by a Member State's authority must be recognized by the other Member States for the purposes of Directive 2004/38/EC and EU law, even if such relationships are not legally provided for in national law.

Although these aspects do not directly concern divorce, but other areas such as the right of free movement within EU and the recognition of parenthood, all of them have in common the same thing: they imply the pre-existing condition of the validity of same-sex marriage and the recognition of that marriage by the host Member State. Thus, all the recommendations set out above regarding the recognition of same-sex marriages are also applicable to cross-border divorce proceedings.

2.2. Does the concept of divorce under Brussels IIb and Rome III Regulations includes same-sex divorce or same-sex registered partnerships?

Art. 1 of the Brussels IIb and Rome III Regulations has been drafted in a similar way to the first articles of the other family law regulations adopted by the EU Council, in that it first specifies the particular scope of application and then clarifies this scope by excluding certain legal institutions. Regarding the subject matter, both of the regulations require two cumulative conditions to be met in order to be applied: the first is substantive - there must be a divorce; the second involves a cross-border element such as the habitual residence or the nationality of one or both of the spouses.

Concerning the concept of divorce, it has been suggested in the specialized literature¹⁵ that the Rome III Regulation excludes the notion of registered partners, as the regulation referred only to „spouses”. Thus, the

⁹ Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012, published in OJ L 200, 26 July 2016, pp. 1-136.

¹⁰ Available at https://www.europarl.europa.eu/doceo/document/TA-9-2019-0101_EN.html, last consulted on 31.03.2025.

¹¹ LGBTIQ Equality Strategy 2020-2025, issued by the European Commission, available at https://commission.europa.eu/publications/implementation-lgbtiq-equality-strategy-2020-2025_en, last consulted on 29.03.2025.

¹² Available at https://commission.europa.eu/publications/implementation-lgbtiq-equality-strategy-2020-2025_en#files, last consulted on 29.03.2025.

¹³ LGBTIQ equality at a crossroads: progress and challenges, available at <https://fra.europa.eu/en/publication/2024/lgbtiq-equality-crossroads-progress-and-challenges>, last consulted on 29.03.2025.

¹⁴ See Commission Notice – Guidance on the right of free movement of EU citizens and their families (C/2023/8500), art. 2.2.1, published in OJ C/2023/1392/22.12.2023, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C_202301392, last consulted on 31.03.2025.

¹⁵ See K. Boele-Woelki, *For better or for worse: The Europeanization of International Divorce Law*, in Yearbook of Private International Law, vol. 12 (2010), p. 29, available at https://www.researchgate.net/publication/254886404_For_better_or_for_worse_The_Europeanization_of_International_Divorce_

dissolution of registered partnerships does not fall within the scope of the Regulation. This conclusion applies also to same-sex registered partnerships.

The contrary view has also been mentioned in the doctrine¹⁶, according to which the distinction between divorce and dissolution of a registered partnership is only superficial, both being formalized relationships.

We agree with the first opinion, because there are wide differences between Member States' laws on important issues such as whether or not to regulate civil partnerships, the specific conditions, the implications of such a partnership and whether or not a Member State recognizes partnerships registered in another Member State or in a third country. Therefore, the distinction between the two concepts is not superficial, because they are two different legal institutions.

The same conclusion applies as regarding the Brussels IIb Regulation since according to recital (10) of the Rome III Regulation the substantive scope and enacting terms of both of the regulations should be consistent.

However, these two legal acts apply to divorce proceedings between same-sex persons¹⁷. We share this view, because in both of the regulations, the EU Council did not distinguish between the dissolution of marriages between persons of different-sex and those between persons of the same-sex and it uses the neutral gender concept of „spouse”.

In addition, neither art. 9 of the EU Charter of Fundamental Rights¹⁸ distinguishes between the right to marry on the basis of sexual orientation, thus the dissolution of a marriage between same-sex partners, with cross-borders implications, it's not only possible, but should be permitted regardless of the national court seized, if the respective court has established its international jurisdiction under art. 3 of the Brussels IIb Regulation.

2.3. CJEU relevant jurisprudence

2.3.1. Case Grzelczyk¹⁹

It does not deal specifically with same-sex cross-border divorces, but sets out the principles regarding non-discrimination on the basis of nationality and residence. These principles have implications for same-sex couples regarding their access to rights, such as the right of access to a court, and recognition of their marital status in EU member states, including during divorce situations.

Mr. Grzelczyk, a French national, moved to Belgium to pursue a degree in physical education at the Catholic University of Louvain-la-Neuve and at the start of his final year, he applied to the Public Centre for Social Action (CPAS) for financial support known as the „minimex”. Although the CPAS approved Mr. Grzelczyk request, the Belgian competent federal minister refused to reimburse CPAS on the grounds that Mr. Grzelczyk did not meet the nationality requirement for the grant. Later on, the CPAS withdrew the minimex support from Mr. Grzelczyk for the same reason.

The CJEU stated that art. 6 of the Treaty establishing the European Community²⁰, related to discrimination on the nationality criterion, must be read in conjunction with the provisions of the Treaty concerning citizenship of the Union in order to determine its sphere of application. Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for. A citizen of the European Union, lawfully resident in the territory of a host Member State, can rely on art. 6 of the Treaty in all situations which fall within the scope *ratione materiae* of Community law. Those situations include the ones involving the exercise of the fundamental freedoms guaranteed by the Treaty.

Law, last consulted on 29.03.2025; S. Corneloup, *The Rome III Regulation. A Commentary on the Law Applicable to Divorce and Legal Separation*, Edward Elgar Publishing, Cheltenham UK, 2020, p. 24, apud S. Corneloup, *Droit européen du divorce/European Divorce Law*, LexisNexis, 2013, p. 502, P. Franzina, *The Law Applicable to Divorce and Legal Separation under Regulation (EU) no. 1259/2010 of 20 December 2010*, Cuadernos de Derecho Transnacional, 2011, p. 102, P. Orejudo Prieto de los Mozos, *Rome III Regulation (divorce)*, Encyclopedia of Private International Law, p. 1575.

¹⁶ See S.L. Gössl, J. Verhellen, *Article 1: Scope*, in S. Corneloup, *The Rome III Regulation*, op. cit., p. 25.

¹⁷ See K. Boele-Woelki, op. cit., p. 29; S.L. Gössl, J. Verhellen, op. cit., loc. cit., p. 25, 26, apud S. Corneloup, *Droit européen du divorce/European Divorce Law*, LexisNexis, 2013, p. 502, P. Franzina, op. cit., 2011, p. 102, P. Orejudo Prieto de los Mozos, op. cit., p. 1575.

¹⁸ Published in OJ C 202/07.06.2016, pp. 389-405.

¹⁹ CJEU judgment of 20 September 2001, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, Case C-184/99, EU:C:2001:458.

²⁰ Art 18 TFEU, consolidated version 2016, published in OJ C 202/07.06.2016, pp. 1-388.

2.3.2. Case Coman²¹

This case refers to Union citizens' right of free movement and residence within the territory of the Member States and it is significant for the reason that the CJEU analyzes the definition of spouses in the light of art. 2(2)(a) of the Directive 2004/38/EC and whether this concept falls within the scope of the fundamental right to private and family life guaranteed by the Charter.

Mr. Coman, a Romanian and American citizen, and Mr. Hamilton, an American citizen, were married in Brussels on November 5, 2010. Mr. Coman has lived in Brussels since May 2009, and in December 2012, together with Mr. Hamilton, applied to the Romanian General Inspectorate for Immigration, asking about the procedure and conditions under which Mr. Hamilton, a non-EU national, could, as a member of Mr. Coman's family, obtain the right to reside legally in Romania for a period longer than three months. The inspectorate informed them that Mr. Hamilton only had a right of residence for a period of three months, since, as persons of the same sex, their marriage is not recognized under the Romanian Civil Code, and that, furthermore, the extension of Mr. Hamilton's temporary right of residence in Romania could not be granted by way of family reunification.

Because of this response, the two filed a lawsuit against the Inspectorate seeking a declaration that they were discriminated on grounds of sexual orientation as regards the exercise of the right to freedom of movement within the Union, and raised the plea of unconstitutionality of art. 277 para. (2) and (4) CC²². Having referred this exception to Romania's Constitutional Court, the latter decided to address four preliminary questions to the CJEU, essentially concerning the interpretation of the concept of „spouse” in art. 2(2)(a) of Directive 2004/38.

The CJEU held that, as a Romanian national, Mr. Coman benefits, under art. 20(1) TFEU, from the status of citizen of the Union and that status is intended to be the *fundamental status* of nationals of Member States²³.

As to whether the concept of „spouse” includes a third-country national of the same sex as Union citizen who has married in a Member State in accordance with the law of that State, it must be emphasized, first of all, that the concept of „spouse” within the meaning of Directive 2004/38 is *neutral* from the gender point of view and therefore includes the same-sex spouse of the Union citizen concerned. Therefore, a Member State can't invoke its national law to oppose in its territory the recognition of a marriage concluded by a national of a third State with a Union citizen of the same sex in another Member State in accordance with the law of the latter Member State, solely for the purpose of granting a derived right of residence to the national of a third State.

The Court also held that the civil status of persons, which includes the rules relating to marriage, is a matter falling within the competence of the Member States, but in exercising that competence *the Member States must comply with EU law*.

Responding to the concerns of certain Member States, the Court stated that the refusal to recognize a same-sex marriage could not be based on the public policy ground that in the host Member State marriage was regulated only between a man and a woman, because the obligation of the host Member State to recognize a marriage between same-sex people contracted in another Member State under the law of that State, solely for the purpose of granting a derived right of residence to a national of a non-member State, does not affect the institution of marriage in that first Member State and, thus, does not prejudice the national identity²⁴ or threaten the public policy of the Member State concerned.

Furthermore, the Court found that *the concept of „spouse”, which refers also to same-sex spouses, falls within the scope of the fundamental right to private and family life guaranteed by the Charter and the ECtHR case-law*²⁵ clearly indicates that the relationship between a homosexual couple can be considered part of both „private life” and „family life”, just as the relationship of a heterosexual couple in a similar context.

2.3.3. Case V.M.A.²⁶

V.M.A., a Bulgarian national, and K.D.K., a UK national, have lived in Spain since 2015, and in 2018 the two women married in Gibraltar, the British territory where K.D.K. was born. In December 2019, V.M.A. and K.D.K.

²¹ CJEU judgment of 5 June 2018, *Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v. Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne*, Case C-673/16, EU:C:2018:385.

²² Law no. 287/2009 on the Romanian Civil Code, republished in the Official Gazette of Romania no. 505/15.07.2011;

²³ See Case *Grzelczyk*, ref. 16 para. 31.

²⁴ See art. 4(2) TFEU, consolidate version 2016, published in OJ C 202/07.06.2016.

²⁵ See ECtHR judgment of 7 November 2013, *Vallianatos and Others v. Greece*, CE:ECHR:2013:1107JUD002938109, para. 73, and ECtHR judgment of 14 December 2017, *Orlandi and Others v. Italy*, CE:ECHR:2017:1214JUD002643112, para. 143.

²⁶ CJEU judgment of 14 decembrie 2021, *V.M.A. v. Stolichna Obshtina, rayon „Pancharevo”*, Case C-490/20, EU:C:2021:1008.

had a daughter, S.D.K.A., who was born in Spain and lives with both parents. The daughter's birth certificate, issued by the Spanish authorities, mentions V. M.A. as „mother A” and K. D. K. as her "mother".

In January 2020, V.M.A. requested the Sofia municipality to issue a birth certificate of S.D.K.A., which was necessary in particular for the issuance of a Bulgarian identity card or a passport, but her request was refused on the grounds that there was missing information on the identity of the biological mother of the child in question and that the mention of two female parents on a birth certificate was contrary to the public policy of the Republic of Bulgaria, which does not allow marriage between two persons of the same sex.

V.M.A. filed an application against this decision before the Sofia Administrative Tribunal, who addressed the CJEU four questions on whether art. 21 TFEU precludes the practice of state authorities refusing to recognize the marital status of same-sex parents of a child for the purpose of issuing the child's travel documents.

In this case, the Court found that S.D.K.A. was a Bulgarian citizen and also an EU citizen and the Bulgarian authorities had the obligation to issue her identity card or travel document regardless of issuing a Bulgarian birth certificate.

As to refusal to issue an identity document on the grounds of public policy because Bulgarian law does not provide for same-sex marriage, the Court resumed its reasoning in the Coman case and held that the obligation of the Bulgarian State to issue an identity card or passport and, on the other hand, *to recognize the parent-child relationship between that child and each of those same-sex persons* in the context of the exercise by that child of its rights under art. 21 TFEU *is not prejudicial to the national identity* of that Member State and does not threaten the public policy of that Member State.

The Court also stated that the refusal of the Bulgarian State represented a discrimination of the child on the grounds of her parents' sexual orientation and emphasized the importance of respecting the principle of non-discrimination based on this criterion.

For the purpose of ensuring respect for the right to free movement, the Court reaffirmed the need for Member States to recognize same-sex marital relationships concluded under the law of another Member State.

2.4. Legal issues of cross-border same-sex divorce litigation in the EU and possible solutions

As it is clear from the CJEU case-law reviewed, all Member States have an obligation to recognize same-sex marriages for the purpose of ensuring respect for the right to free movement. The obligation of „recognizing” is not equivalent to legislating same-sex marriages.

To understand the legal issues involved, we will analyze a practical example: after the ruling of the CJEU in the Coman case, the Romanian state was compelled to recognize the marriage between Mr. Coman and Mr. Hamilton concluded in Belgium, for the purpose of establishing residence for both in Romania. Let's assume that their present habitual residence is in Romania and if they no longer understand each other and wish to file a divorce, according to art. 3 of the Brussels IIb Regulation, they have to submit the divorce petition only to a Romanian court, based on the criterion of the common habitual residence and taking into account that no other criterion applies.

Firstly, the question that poses is if the Romanian court will verify and establish its international jurisdiction according to art. 3(a) (i) of the Brussels IIb Regulation, given that national legislation regulates marriage only between persons of different sex, and the regulation does not define the concept of divorce.

In the specialized literature²⁷ was expressed the belief that spouses of same-sex marriage may find themselves in negative conflict of jurisdiction, since many EU Member States still do not provide for divorces of such marriages. We don't agree with this opinion, since Brussels IIb Regulation stipulates seven criteria to establish international jurisdiction and the courts of the Member States that didn't regulate same-sex marriage still have the obligation to comply to the EU law, especially with the fundamental rights provided for EU citizens, amongst which we find the right of access to a court of justice as part of the right to a fair trial²⁸.

Our opinion, based on the specialized doctrine and CJEU jurisprudence presented above, is that the Romanian court has an obligation to recognize the marital status of the same-sex couple and establish its international competence to hear the cross-border divorce dispute according to Brussels IIb Regulation because

²⁷ See L. Carpaneto, M. Župan, *Jurisdiction in matrimonial matters and in matters of parental responsibility*, in C. González Beilfuss et al., *Jurisdiction, Recognition and Enforcement in Matrimonial and Parental Responsibility Matters. A Commentary on Regulation 2019/1111 (Brussels IIb)*, Edward Elgar Publishing, Cheltenham, 2023, p. 48.

²⁸ Art. 47 of the Charter.

Mr. Coman is a citizen of the European Union and this fundamental status implies that Member States have to respect his rights provided for by the Charter of Fundamental Rights of the European Union²⁹: the right of respect for private and family life, the right to equality, the right to non-discrimination and the right of access to court as a component of the right to an effective remedy and to a fair trial.

This solution doesn't affect the national identity of the state and its traditional view over the marriage institution, being in line with the CJEU case-law.

The contrary opinion, according to which the Romanian court would reject the application in respect of the national provisions that prohibit marriages between same-sex people would discriminate Mr. Coman on the grounds of sexual orientation and would violate his rights listed above.

Secondly, after establishing international jurisdiction, the Romanian court has to determine the substantive applicable law according to Rome III Regulation. Next, the legal issue is represented by art. 13 of Rome III Regulation. According to this provision, in the event that the legislation of a Member State does not provide for the legal institution of divorce or does not consider a marriage valid for the purposes of divorce proceedings, the regulation does not oblige the courts of that State to pronounce the dissolution of the marriage.

Returning to the example set forth, the Romanian legislation governing marriage³⁰ is an obstacle for recognizing the validity of Mr. Coman and Mr. Hamilton's marriage, so it remains at the discretion of the Romanian court if it will reject the petition of divorce as inadmissible or it will hear the case and pronounce the divorce.

For the same reasons presented when analyzing the first legal issue, in our opinion the Romanian court should hear the case and determine the substantive applicable law depending on the choice of the parties or, in the absence of choice, according to art. 8 of Rome III Regulation. If the parties choose the Romanian substantive law, the Romanian court has to apply these provisions to pronounce the divorce, treating same-sex marriage like opposite-sex marriage, with respect to the right of equality and non-discrimination.

If the Romanian court decides to reject the claim as inadmissible, because Romanian law prohibits same-sex marriage, then, as long as Mr. Coman and Mr. Hamilton are habitually resided in Romania, they are unable to obtain a divorce, because only Romanian courts have international jurisdiction to hear their case. This means that the parties four rights provided by the Charter and listed above are being violated.

Therefore, the main issues of cross-border same-sex divorce litigation in the EU are represented by establishing international jurisdiction and determining the applicable substantive law by the national courts and, regardless the law of the Member States relating to the regulation of marriage, the correct solution in compliance with EU law and the CJEU case-law is to apply both Brussels IIb and Rome III Regulations and hear the case for the reasons listed above.

3. Conclusions

Despite the efforts of the European Commission in the last 10 years, Member States which didn't regulate same-sex marriage did not take legal measures to recognize this type of marriage even after the judgment of the CJEU in Coman case, although the Court stated clearly that this doesn't mean they have to legislate same-sex marriage. A legally conducted marriage in a Member State has to be recognized in all the other Member States so that the effects of the marriage won't become illusory and the rights of the EU citizens won't be violated.

Disparities between national law and the ambiguity created by the lack of definition of the concept of divorce in Brussels IIb and Rome III Regulations created important issues in cross-border same-sex divorce disputes, such as the possibility that the national court seized with the divorce may reject the application on the grounds that its domestic law does not recognize the validity of a same-sex marriage and, even if it establishes its international jurisdiction according to art. 3 of the Brussels IIb Regulation, the court may reject the application as inadmissible on the same reason.

We found the conclusions from the CJEU jurisprudence very important to answer these issues, because the status of citizen of the Union is intended to be the fundamental status of nationals of Member States and, according to art. 2 TFEU, the Union was founded, among other things, on the values of respect for human dignity, equality and respect for human rights. Art. 6 of the same treaty states that the Union recognizes the rights set

²⁹ Art. 7, 20, 21 and 47 of the Charter.

³⁰ See art. 277 para. (1) CC („same-sex marriage is prohibited”).

out in the EU Charter of Fundamental Rights and Member State have the obligation to respect all of these rights, in particular to the subject in discussion – art. 7, 20, 21 and 47.

The recognition of same-sex marital status for the purpose of establishing international jurisdiction to settle and pronounce divorce does not entail the need to change the substantive national law to recognize same-sex marriage, as it does not affect the national identity of the Member States. The traditions of these Member States can be preserved and, at the same time, the right to equality and the right of access to a court for the purpose of divorce proceedings can be respected.

In the absence of action by Member States, it is for the national courts to mitigate the identified legal issues regarding cross-border same-sex divorce disputes and it is imperative that they apply both Brussels IIb and Rome III Regulations consistently by prioritizing the fundamental rights provided for in the EU Charter for EU citizens, in accordance with the principle of priority application of EU law.

References

Books and articles

- Boele-Woelki, K., *For better or for worse: The Europeanization of International Divorce Law*, in Yearbook of Private International Law, vol. 12 (2010), at https://www.researchgate.net/publication/254886404_For_better_or_for_worse_The_Europeanization_of_International_Divorce_Law;
- Corneloup, S., *The Rome III Regulation. A Commentary on the Law Applicable to Divorce and Legal Separation*, Edward Elgar Publishing, Cheltenham UK, 2020;
- González Beilfuss, C., et al., *Jurisdiction, Recognition and Enforcement in Matrimonial and Parental Responsibility Matters. A Commentary on Regulation 2019/1111 (Brussels IIb)*, Edward Elgar Publishing, Cheltenham, 2023.

Case-law

- CJEU judgment of 20 September 2001, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, Case C-184/99, EU:C:2001:458;
- CJEU judgment of 5 June 2018, *Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v. Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne*, Case C-673/16, EU:C:2018:385;
- ECtHR judgment of 7 November 2013, *Vallianatos and Others v. Greece*, CE:ECHR:2013:1107JUD002938109;
- ECtHR judgment of 14 December 2017, *Orlandi and Others v. Italy*, CE:ECHR:2017:1214JUD002643112.

Legislation

- Charter of Fundamental Rights of the European Union, published in OJ C 202/07.06.2016;
- 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, published in OJ L 343/29.12.2010;
- Council Regulation (EU) no. 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, published in OJ L 178/02.07.2019;
- Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, published in OJ L 158/30.04.2004;
- Directive 2003/86/EC of 22 September 2003 on the right to family reunification, published in OJ L 251/03.10.2003;
- Law no. 287/2009 on the Romanian Civil Code, republished in Official Gazette of Romania no. 505/15.07.2011;
- Treaty establishing the European Community, published in OJ C 325/24.12.2002;
- Treaty on the European Union, consolidate version 2016, published in OJ C 202/07.06.2016;
- Treaty on the Functioning of the European Union, consolidated version 2016, published in OJ C 202/07.06.2016.

Reports, resolutions and other documents of the EU institutions, without legal force

- Commission Notice – Guidance on the right of free movement of EU citizens and their families (C/2023/8500), published in OJ C, C/2023/1392/22.12.2023, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C_202301392;
- European Parliament resolution of 18 December 2019 on public discrimination and hate speech against LGBTI people, including LGBTI free zones, available at https://www.europarl.europa.eu/doceo/document/TA-9-2019-0101_EN.html;
- European Parliament Resolution of 4 February 2014 on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity, published in OJ C 93/24.03.2017;
- LGBTIQ equality at a crossroads: progress and challenges, survey conducted by the European Union Agency for Fundamental Rights, available at <https://fra.europa.eu/en/publication/2024/lgbtiq-equality-crossroads-progress-and-challenges>;

- LGBTIQ Equality Strategy 2020-2025, issued by the European Commission, available at https://commission.europa.eu/publications/implementation-lgbtiq-equality-strategy-2020-2025_en;
- List of actions to advance LGBTI equality 2015-2019, available at https://commission.europa.eu/system/files/2017-06/lgbti-actionlist-dg-just_en.pdf;
- Report on the implementation of the 2020-2025 LGBTIQ equality strategy, issued by the European Commission in 25 September 2024, available at https://commission.europa.eu/publications/implementation-lgbtiq-equality-strategy-2020-2025_en#files.

Online sources

- https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/civil-justice/family-law/property-international-couples-marriages-and-registered-partnerships_en;
- https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/lgbtiq_en.