Chapter 5
The Proposed European Choice of Law Rules on Divorce

5.1 Introduction

As mentioned in Section 2.1 above, there is no multilateral convention or Regulation between the EU-Member States on the law applicable to divorce. Therefore, each Member State currently provides autonomously for rules on this issue.[1] However, according to the European Commission this situation has the following shortcomings: it leads to lack of legal certainty and predictability for the spouses, insufficient party autonomy, risk of results that do not correspond to the legitimate expectations of the citizens, risk of difficulties for Community citizens living in a third State, and risk of a rush to court.[2]

The Commission has accordingly proposed the introduction of common choice of law rules on divorce in the Brussels II*bis*-Regulation, which contains common rules on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (Brussels II*ter*-Proposal).[3] The introduction of common choice of law rules on divorce is regarded as a means to removing the mentioned shortcomings resulting from the lack of such rules.

[1] Within the framework of the Hague Conference on Private International Law a convention with regard to the choice of law on divorce did exist. However, this 1902 Hague Convention is no longer in force. According to Beyer the absence of such a convention is already a strong indication for the difficulty to find a consensus on this subject matter; see Beyer 2007, p. 21.

[2] See Green Paper on divorce, pp. 3–6.

[3] Since July 2006 on the basis of meetings of the Committee on Civil Law Matters (Rome III) and of the comments of the delegations, five more drafts have been published: Document No. 5274/07 JUSTCIV 4, 12 January 2007; Document No. 7144/07 JUSTCIV 47, 9 March 2007; Document No. 11295/07 JUSTCIV 183, 28 June 2007; Document No. 13445/07 JUSTCIV 250, 3 October 2007; and Document No. 9712/08 JUSTCIV 106, 23 May 2008. The Brussels II*ter*-Proposal and the last mentioned Council draft have been annexed to this study as Appendices Nos. 1 and 2, respectively.

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Besides the introduction of common choice of law rules, the Brussels II*ter*-Proposal also provides spouses the possibility to choose the competent court in divorce cases.[4]

This chapter closely examines the proposed common choice of law rules on divorce. Currently the EU-Member States have very different approaches with regard to divorce, both as regards substantive law and as regards the choice of law. These approaches will be discussed in Section 5.2. Subsequently, the choice of law rules of the Brussels II*ter*-Proposal will be analysed: their objectives (Section 5.3), scope of application (Section 5.4) and content (Section 5.5) will be inquired into. Further the application of foreign law (Section 5.6) and the public policy exception (Section 5.7) will be elaborated upon. Finally, the question whether the Brussels II*ter*-Proposal actually attains the objectives as set out in its Explanatory Memorandum will be discussed (Section 5.8).

5.2 Divorce in Substantive and Private International Law of the Member States

The core of the problems indicated by the Commission in the Green Paper on divorce is that the EU-Member States are far from united in their approach on divorce.

Substantive law and private international law are to a certain extent interrelated: if the substantive law supports a certain policy, this policy is often reflected in the choice of law rules as well.[5] This interrelationship is very well illustrated by divorce. If the aim of the internal law is not to preclude divorces (the principle of *favor divortii*), this will certainly influence the arrangement of the choice of law rules: these rules are very likely to favour the dissolution of the marriage as the outcome of the case. In contrast to this approach, the substantive divorce laws of some other Member States support a completely opposite policy, one that favours

[4] The proposed Art. 3a(1) states that 'the spouses may agree that a court or courts of a Member State are to have jurisdiction in a proceeding between them relating to divorce or legal separation provided that they have a substantial connection with that Member State by virtue of the fact that

(a) any of the grounds of jurisdiction listed in Article 3 applies, or
(b) it is the place of the spouses' last common habitual residence for a minimum period of 3 years, or
(c) one of the spouses is a national of that Member State or, in the case of the United Kingdom and Ireland, has his or her "domicile" in the territory of one of the latter Member States.'

This provision falls outside the scope of this study and will not be further dealt with, see for a more detailed discussion e.g. Lazic 2008, p. 80 ff.

[5] Cf., De Boer 2008a, p. 331 ff.

the preservation of the marriage (the principle of *favor matrimonii*). This policy implies that also in international cases a divorce will not easily be granted.[6]

Consequently, the values of the internal law may influence the outcome of cross-border cases and, hence, the policy to be propagated by the choice of law rules. With regard to the European unification of the choice of law on divorce one can already notice the tension in this respect. The profound differences in approach between the Member States constitute a serious obstacle to the establishment of unified choice of law rules.[7]

In order to properly value the choice of law rules of the Member States, a brief outline of their substantive divorce laws will be given. Subsequently, the different approaches of the Member States with regard to their choice of law on divorce will be set forth.

5.2.1 The Substantive Divorce Laws of the Member States

With the exception of Malta, all Member States provide for divorce in their national law. Nevertheless, large differences exist between these national systems in terms of both the grounds for divorce and the difficulty and length of time it takes to acquire a divorce.[8]

From the studies and questionnaires performed as part of the preparation of the Brussels II*ter*-Proposal, it is clear that the ground of irretrievable breakdown of the marriage prevails overall, yet also fault as ground for divorce still holds quite a prominent position.[9] However, none of the Member States provides for fault-based divorce as the sole ground for divorce.

The largest differences between the divorce laws of the Member States are not in the grounds for divorce, but in the conditions for divorce. Within the EU the two most extreme examples are, on the one hand, Ireland where divorce can only be obtained after a waiting period of 4 years and upon court approval of a number of cumulative conditions and, on the other hand, Sweden where there is no inquiry into the reasons for wanting a divorce and a waiting period of 6 months is only required in cases where there is no mutual consent between spouses and if they have any children younger than 16.

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[6] See in general De Boer 1993; Brilmayer 1995, pp. 9–112.

[7] See also De Boer 2008a, p. 334 ff. See further *infra* Sect. 6.5 for a discussion on the methodological problems underlying the European unification of the choice of law rules on divorce.

[8] See for an overview of the substantive divorce laws of all Member States the European Judicial Network website: http://ec.europa.eu/civiljustice/divorce/divorce_gen_en.htm.

[9] See e.g. Council Document No. 8839/00 JUSTCIV 67, Inventory of delegations' replies to the questionnaire on the law applicable to divorce (Rome III), p. 3 ff; EPEC Study on divorce, p. 36 ff; and Annex 1 to the Impact Assessment on Divorce, pp. 33–34.

These differing conditions for divorce in the Member States have their roots in the achievement of different compromises between two competing poles: in all Member States tensions exist between conservative and liberal family values. Moreover, in the divorce process a balance between the state and the autonomy of the spouses needs to be found.[10] Because the substantive divorce laws have been liberalised to a different extent in the Member States, currently five historical grounds for obtaining a divorce are present in the European Union, which can broadly be categorised as follows:

- fault-based divorce (divorce as sanction);
- divorce based on the irretrievable breakdown of the marriage (divorce as remedy or failure);
- divorce on the ground of separation for a declared period of time;
- divorce by mutual consent (divorce as an autonomous decision by the spouses themselves); and
- divorce on demand (divorce as a right).[11]

Rather than comparing the details of the different autonomous grounds on divorce of the Member States, a comparison is drawn on whether the Member State in question holds comparatively liberal or rather restrictive grounds for divorce. The table below shows this classification of the divorce laws of the Member States.[12] The most liberal category of states, where divorce is 'on demand', does not require any divorce ground. The category of states with comparatively strict divorce grounds do not provide for divorce upon mutual consent grounds, whereas in the category of states with comparatively liberal divorce grounds the possibility to divorce upon mutual consent grounds exists.

[10] See Antokolskaia 2006, pp. 33–58.

[11] Ibid., p. 34.

[12] This table is a copy from Table 6.3 of the EPEC Study on divorce, p. 39, to which Bulgaria and Romania, the two Member States that have acceded to the EU after the publication of this study, have been added.

Classification of the substantive divorce laws of the Member States			
Divorce on demand	Comparatively liberal grounds for divorce	Comparatively strict grounds for divorce	Divorce is not permitted
Finland	Austria	Cyprus	Malta
Sweden	Belgium	Ireland	
	Bulgaria	Italy	
	Czech Republic	Poland	
	Estonia	Slovak Republic	
	France	Slovenia	
	Germany	Spain[13]	
	Greece		
	Hungary		
	Latvia		
	Lithuania		
	Luxembourg		
	the Netherlands[14]		
	Portugal		
	Romania		
	United Kingdom		

5.2.2 *The Choice of Law Rules on Divorce of the Member States*

The previous paragraph shows that there are significant differences between the substantive divorce laws of the Member States. Furthermore, the respective choice of law rules on divorce differs as well. According to the nature of the choice of law rules, the Member States can be broadly divided into two categories.[15]

In the first category, the States exclusively apply their own national law (*lex fori*) to international divorce proceedings. Seven Member States belong to this

[13] By the entry into force of the new Spanish divorce law (Law 15/2005 of 8 July 2005, Boletín Oficial del Estado, No. 163, de 09-07-2005, pp. 24458–24461) Spain would change from the category of states with comparatively strict divorce grounds to the category of states where divorce is on demand.

[14] It is to be noted that, although EPEC has placed the Netherlands in the category of states with comparatively liberal grounds for divorce, it would have been more appropriate to place the Netherlands in the category of states where divorce is on demand. As seen in Sect. 2.2.3, the Dutch ground for divorce of irretrievable breakdown of the marriage (Article 1:151 BW) is virtually automatically complied with.

[15] See the EPEC Study on divorce, pp. 42–43. See equally Commission Staff Working Document, Annex to the Green Paper on applicable law and jurisdiction in divorce matters, SEC(2005) 331, p. 7 ff; Rüberg 2005, p. 16 ff; Martiny 2006, 123 ff; and Oderkerk 2006, pp. 119–128.

category.[16] The desire to apply solely the *lex fori* can either originate from a very strict or a very lenient internal law approach towards divorce.[17]

In the second category, the Member States determine the applicable law on the basis of a (hierarchical) scale of connecting factors that seek to ensure the application of the law with which the spouses are most closely connected. The majority of the Member States belong to this category.[18] The connecting factors employed in the Member States vary, but in most cases they include criteria based on the nationality or habitual residence of (either of) the spouses. In some Member States the choice of law rules on divorce include the reference to the *lex fori* as the applicable law. The provisions that are based on the approach of the closest connection attempt to determine a 'community' between the spouses, such as their common place of residence, their common place of habitual residence or their common nationality. Generally both spouses are decisive and reference is made to the law, which has lastly governed the personal relations of the spouses.[19]

France is the only Member State that does not belong to either of these categories, since it applies a unilateral choice of law rule to divorce, which solely specifies under which conditions French law applies. According to Article 309 of the French Code Civil, French law applies if both spouses have French nationality or if both spouses have their domicile in France or if no other court but the French court is competent to rule on an application on divorce.[20]

The following table shows the broad classification of the choice of law rules on divorce of the Member States.

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[16] I.e. Cyprus, Denmark, Finland, Ireland, Latvia, Sweden and the United Kingdom.

[17] E.g. the internal law approach of Ireland is based on the principle of *favor matrimonii*, whereas the internal law approach of Finland is based on the principle of *favor divortii*. Both Member States apply exclusively the *lex fori* to any divorce.

[18] Eighteen Member States belong to this category: Austria, Belgium, Bulgaria, Estonia, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, the Netherlands, Spain, the Czech Republic, Poland, Portugal, Romania, Slovakia and Slovenia.

[19] Cf., Rüberg 2005, p. 107.

[20] See on this provision of French law Carbonneau 1978, pp. 446–460. As of 1 July 2006 Article 310 has been renumbered to 309 Code Civil (Ordonnance No. 2005-759 du 4 juillet 2005).

Classification of the choice of law rules on divorce of the Member States				
Lex fori applied exclusively	First connecting factor based on the limited *professio iuris* of the spouses	First connecting factor based on nationality	First connecting factor based on residence/domicile	Unilateral choice of law approach
Cyprus Denmark Finland Ireland Latvia Sweden United Kingdom	Belgium the Netherlands	Austria Bulgaria Czech Republic Germany Greece Hungary Luxembourg Portugal Romania Italy Poland Slovakia Slovenia Spain	Estonia Lithuania	France

According to Ruberg the overview of the autonomous rules on divorce of the Member States (both the substantive rules and the choice of law rules) leads to two conclusions.[21] In the first place, neighbouring countries do not necessarily share the same substantive law approach on divorce, despite possible common cultural convictions. Secondly, the various choice of law approaches of the Member States even enhance the existing differences in their substantive law approaches, as the different choice of law approaches show that there seemingly is quite some discretion as to which legal system applies to the dissolution of a marriage.

These differences in both the substantive law and the choice of law approaches of the Member States and the resulting problems have inclined the European Commission to search for a solution: because of these differences, it may be of great relevance to the spouses in which country the divorce proceedings are initiated.[22] One of the solutions would, according to the Commission, be the

[21] Rüberg 2005, pp. 19–20: '[…] *zum einem, dass sich benachbarte Länder in Bezug auf ihre Rechtsordnung trotz ihrer gemeinsamen kulturellen Überzeugungen, ihrer daraus resultierenden gemeinsamen praktischen Bedürfnisse oder ihrer gemeinsamen Sprache in Scheidungsrecht nicht unbedingt einander anlehnen.* […] *Zum zweiten lassen die verschiedenen Kollisionsrechte erahnen, wie viel Willkür bestimmt, welche Rechtsordnung über die Scheidung oder gerichtliche Trennung entscheidet.* […] *Die Unterschiede im materiellen Recht werden damit durch das autonome Kollisionsrecht in Europa noch verstärkt*'.

[22] See for the problems resulting from the absence of common choice of law rules on divorce *supra* Sect. 5.1.

introduction of common choice of law rules based on a set of uniform connecting factors.[23] The Brussels II*ter*-Proposal gave shape to this solution.

5.3 The Objectives of the Brussels II*ter*-Proposal

The Brussels II*ter*-Proposal aims to attain the following five objectives:

- *Providing for a Clear and Comprehensive Legal Framework*

The overall objective of the Brussels II*ter*-Proposal is to provide a clear and comprehensive legal framework in matrimonial matters in the European Union and to ensure adequate solutions to the citizens in terms of legal certainty, predictability, flexibility and access to court.[24]

- *Strengthening Legal Certainty and Predictability*

The Explanatory Memorandum to the Brussels II*ter*-Proposal states:

> [T]he great differences between and complexity of the national conflict-of-law rules make it very difficult for international couples to predict which law will apply in matrimonial proceedings.[25]

Because of the differences between the substantive divorce laws of the Member States, the conditions for divorce and the consequences for the parties concerned can differ drastically, depending on which Member State's law is applicable. It may, moreover, also have significant implications for ancillary matters, such as the division of matrimonial property or maintenance obligations. Accordingly, the large differences between the national choice of law rules of the Member States lead to legal uncertainty, as spouses are virtually unable to predict the law applicable to their divorce.

The Commission holds that by introducing common choice of law rules, spouses are enabled to easily predict which law will apply to their divorce, which will in turn lead to more legal certainty: spouses know where they stand.[26]

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[23] Green Paper on Divorce, pp. 6–7. The Commission introduces 8 policy options in the Green Paper ranging from leaving the situation unchanged (status quo) to a combination of the different solutions envisaged, see Green Paper on Divorce, pp. 6–11. The Brussels II*ter*-Proposal contains a combination of these policy options, as none of the individual policy options completely addresses the problems or fully achieves the policy objectives. By combining different aspects of the policy options, a higher degree of effectiveness could be achieved. See Impact Assessment on Divorce, p. 23.

[24] See Recital No. 5 of the Preamble to the Brussels II*ter*-Proposal and the Explanatory Memorandum, p. 3.

[25] Explanatory Memorandum to the Brussels II*ter*-Proposal, p. 3.

[26] Ibid., p. 3.

- *Increasing Flexibility and Party Autonomy*

The majority of the choice of law rules of the Member States foresees only one solution in a given situation, e.g. the application of the common national law of the spouses or of the *lex fori*. This may not always allow for sufficient flexibility.

In this regard, the Commission cites the example of a couple that may feel closely connected with a state where they have lived for a long time although they do not possess the nationality of that state.[27] On the other hand, in some cases spouses may live in another country than their country of origin for a number of years and still feel more closely connected to their country of origin. As a result, citizens are not always able to get divorced according to the law of a state with which they feel the closest connection. This may lead to results that do not correspond to the 'legitimate expectations' of the spouses, as they are unlikely to be aware that the conditions for divorce may change when they move to another Member State.[28]

The introduction of a limited degree of party autonomy in the Brussels II*ter*-Proposal could render the rules more flexible. Party autonomy in the field of divorce could be particularly useful in cases of divorce by mutual consent.

- *Ensuring Access to Court*

The Brussels II*ter*-Proposal equally seeks to improve access to court in divorce proceedings, mainly by introducing the possibility to choose the competent court in the latter proceedings. The possibility to choose the competent court in divorce cases will enhance access to court for spouses who are of different nationalities. The possibility of choice of court (Article 3a Brussels II*ter*-Proposal) applies regardless of whether the couple lives in one of the Member States or in a third State. The choice of court is, however, limited to the court or courts of a Member State with which the spouses have a substantial connection.

In addition, the Brussels II*ter*-Proposal specifically addresses the need to ensure access to court for spouses of different nationalities who live in a third State. The proposal introduces furthermore a uniform and exhaustive rule on residual jurisdiction in order to enhance legal certainty and ensure access to court in matrimonial matters for spouses who live in a third State but who would like to bring proceedings in a Member State with which they have a close connection (Article 7 Brussels II*ter*-Proposal).

- *Preventing a 'Rush to Court'*

From the beginning the Brussels II(*bis*)-Regulation has been criticised not only for including far too many jurisdiction grounds, but also for not ranking them in any hierarchy.[29] This is claimed to encourage forum shopping.

Under the Brussels II*bis*-Regulation the competent court which is seised firstly has exclusive jurisdiction according to the *lis pendens*-rule of Article 19(1). As a result,

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[27] Green Paper on Divorce, p. 4.

[28] Impact Assessment on Divorce, pp. 5–6.

[29] See McEleavy 2004, pp. 618–620; and Boele-Woelki and González Beilfuss 2007, p. 33.

both spouses may rush to court in order to be the first to initiate the proceedings to ensure that the divorce is governed by a particular law so as to safeguard his or her interests. This gives an advantage to the economically stronger party, who can more easily afford in-depth legal advice regarding the choice of law rules and the substantive laws of the available fora, as well as the additional costs of a legal dispute abroad.

The unification of the choice of law rules on divorce will prevent a rush to court: calculations on where to start divorce proceedings are useless as regards the applicable law to divorce if the courts of all Member States are to apply the same law to the divorce. Irrespective of the Member State in which the divorce proceedings are initiated, the same law is applied.

Should the abovementioned objectives be attained on the Union level?[30] It is clear that both strengthening legal certainty and predictability and preventing a 'rush to court' can only be achieved by Union action. No Member State acting alone is able to attain these objectives. While the Member States acting alone could theoretically improve the objectives of increasing flexibility and party autonomy and ensuring access to court, also for these objectives the appropriate level of action is probably the Union one.[31] For example, if increasing flexibility by introducing limited party autonomy in the field of both jurisdiction and the choice of law on divorce is a European goal which the Member States can work towards, the Union objective cannot be fully achieved unless all Member States introduce the same options.

Therefore, the objectives set by the Commission in the Brussels II*ter*-Proposal can best be attained on the Union level.

5.3.1 *Exclusion of* Renvoi

One means to attain the objectives of the Brussels II*ter*-Proposal, mainly the objective of strengthening legal certainty and predictability,[32] is the exclusion of *renvoi*. Article 20d determines:

> The application of a law designated under this Regulation means the application of the rules of that law other than its rules of private international law.

The Brussels II*ter*-Proposal contains so-called *Sachnormverweisungen*, i.e. choice of law rules that refer solely to the substantive rules of the applicable law.[33] It is clear that there is no place for *renvoi* if the parties have chosen the law to be applied to their divorce. If they have made such a choice, it is clearly the intention

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[30] As far as this question entails issues of subsidiarity and proportionality, see *supra* Sect. 4.4.4.

[31] Cf., Fiorini 2008, p. 185.

[32] See Explanatory Memorandum to the Brussels II*ter*-Proposal, p. 10.

[33] Article 20d of the Brussels II*ter*-Proposal thus precludes a so-called *Gesamtverweisung*, i.e. a choice of law rule that refers to a certain legal system including the choice of law rules of that law. Kropholler 2000, p. 393 points to the fact that the fundamental exclusion of *renvoi* is part of a particularly firmly-rooted tradition of the Hague Conventions, which has been taken up by other international instruments as well. See on *renvoi* in general: Sauveplanne 1990.

that the substantive law provisions of the chosen law be applicable; their choice accordingly excludes any possibility of *renvoi* to another law.[34]

With regard to the question whether *renvoi* should be allowed if the parties have not chosen the applicable law, it is clear that in cases in which the law of a Member State is designated as the applicable law the issue of *renvoi* does not arise. If the choice of law rules on divorce are unified within the European Union, all Member States apply the same choice of law rules, which means that every reference to the law of a Member State will automatically be accepted.[35]

However, with regard to cases in which the law of a third country is designated as the applicable law the exclusion of *renvoi* is not obvious. The issue of *renvoi* arises where the common choice of law rules refer an issue to the law of another country which, under its choice of law rules in turn refers the issue back to the law of the forum (*Rückverweisung*) or to the law of yet another country (*Weiterverweisung*). Kohler has questioned the exclusion of both these forms of *renvoi* in extra-European cases:

> Es geht um die Rückverweisung. Dass diese im Verhältnis zwischen Mitgliedstaaten ausgeschlossen ist, folgt aus der Vereinheitlichung der Verweisungsnormen. Art. 20d des Vorschlags schließt aber die Rück- und Weiterverweisung generell aus, also auch dann, wenn auf das Recht eines Drittstaates verwiesen wird. Dies sollte überdacht und eine Lösung angestrebt werden, nach der zumindest die Rückverweisung auf das Recht des Gerichtsstaates (eventuell auch eine Weiterverweisung auf das Recht eines anderen Mitgliedstaats) angenommen wird.[36]

According to this opinion, *renvoi* should, at least in cases of *Rückverweisung*, be accepted. Although the acceptance of a *Rückverweisung* is certainly tempting — it allows the competent court to apply its own law — it should be rejected from a methodological point of view.[37] The choice of law rules of the Brussels II*ter*-Proposal are based on the principle of the closest connection. These rules have been constructed in such a way that they refer — in the view of the European legislature — to the most closely connected law. From this perspective, accepting *renvoi* would be contrary to the principle of the closest connection.[38] Furthermore,

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[34] Cf., Report on the Convention on the law applicable to contractual obligations (Giuliano-Lagarde Report), [1980] OJ C 282/1, at Article 15.

[35] Cf., with regard to the European choice of law on succession, Knot 2008, pp. 200–201.

[36] Kohler 2008a, pp. 1679–1680. See also generally Martiny 2007, p. 96; and Siehr 2008, pp. 90–91.

[37] Incidentally accepting *renvoi* would involve a strict European definition of the concept. Cf., Kropholler 2006, p. 178 stating that countries can take: '*eine verschiedene Haltung zu den einzelnen Renvoi-Fällen* (*Rückverweisung im engeren Sinne, Weiterverweisung, Zirkelverweisung etc.*)' See Knot 2008, p. 126 for an overview of the different positions taken with respect to *renvoi*.

[38] See also Report on the Convention on the law applicable to contractual obligations (Giuliano-Lagarde Report), [1980] OJ C 282/1, at Article 15: '*the exclusion of renvoi is justified in international conventions regarding conflict of laws. If the Convention attempts as far as possible to localize the legal situation and to determine the country with which it is most closely connected, the law specified by the conflicts rule in the Convention should not be allowed to question this determination of place*'. Cf., with regard to Dutch private international law, Ten Wolde 2009, p. 66.

Kropholler rightly points to the fact that the aim of the regulation is the development of a new, uniform choice of law, which refers directly to the applicable substantive law, and not the development of a '*Superkollisionsrecht*', which refers to the existing choice of law systems.[39] Finally, accepting *renvoi* could endanger decisional harmony between the Member States, unless the use of *renvoi* is strictly defined. Therefore, the uniform European choice of law system requires the exclusion of *renvoi*.[40]

In Section 5.8 below the question whether the Brussels II*ter*-Proposal actually succeeds in attaining the objectives at issue will be discussed on the basis of the following analysis of the scope of application and the content of the proposed choice of law rules.

5.4 The Scope of Application of the Proposed Choice of Law Rules

In the following, the scope of application of the Brussels II*ter*-Proposal is divided into three distinct aspects: its territorial scope of application, its substantive scope of application and, finally, its temporal scope of application.

5.4.1 Territorial Scope of Application

5.4.1.1 Universal Application

Although no special mention is made in the original Brussels II*ter*-Proposal, the proposed choice of law rules are to apply universally.[41] Consequently, the choice of law rules can designate the law of a Member State or the law of a third State.

[39] Kropholler 2000, pp. 393–394. See also Rüberg 2005, pp. 104–105.

[40] It is to be noted that the exclusion of *renvoi* has more substantial advantages: it has the merit of simplicity and it has favourable effects towards strengthening legal certainty and predictability. Moreover, allowing *renvoi* would only detract from the clarity and ease of use that the uniform choice of law on divorce aims to realise, as it implies a considerable burden on legal practitioners and courts.

[41] Athough the universal nature of the choice of law rules is expressly mentioned in the Explanatory Memorandum to the Brussels II*ter*-Proposal (p. 10), strangely enough the actual Proposal does not make any mention of it. Cf., Meeusen 2007a, p. 345. According to Jayme and Kohler the lack of an explicit mention of the universality of the choice of law rules can be attributed to the fact that it has apparently been generally accepted ('*Allgemeingut geworden*'). See Jayme and Kohler 2007, p. 494.

In the Council-draft of 12 January 2007 a provision has been inserted on the universal character of the choice of law rules. The latter provision stipulates that

> [T]he law designated by this Regulation shall be applied whether or not it is the law of a Member State.[42]

Choice of law rules with a universal scope of application have several advantages.[43]

The application of the same law to a particular legal relationship by the courts of the Member States is one of the ultimate aims of the European unification of private international law. This holds true not only for intra-European legal relationships, but also for those involving extra-European aspects. While Union measures taken under Article 81 TFEU cannot influence the choice of law rules applied by third States, they can bring the choice of law provisions of Member States into line, which would at least reduce the risk of diverging judgments given within the Union.

Secondly, universal choice of law rules have the advantage that the Union and its Member States make a uniform appearance *vis-à-vis* third States.[44] In all Member States of the European Union the same choice of law rules are applied to a certain case regardless of the nature of the case, i.e. whether it concerns the relation among Member States or between a Member State and a third State.

In the third place, the universal scope of application is preferable from a practical point of view: it would provide for clarity and ease of use of the choice of law rules, and would thereby enhance legal certainty.[45] Without universally applicable choice of law rules the practical use of the regulation would be undermined: limiting the scope of application to intra-European cases would result in further fragmentation of the choice of law rules. For if only intra-European cases are regulated, this would lead to 'double-track' choice of law rules: rules at a national level rules for cases with relation to third countries, and rules at a European level for intra-European cases. This does offer the possibility to establish a European system of private *interregional* law, which might allow for a closer cooperation between the Member States on the basis of mutual trust.[46] The European Union could thereby also promote and advance specific European objectives, such as the principle of mutual recognition and the creation of an area of freedom, security and justice.[47]

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[42] See Council Document No. 5247/07 JUSTCIV 4 of 12 January 2007, p. 8.

[43] In general opposed to universally applicable European choice of law rules Ten Wolde 2004; and Calvo Caravaca 2006, pp. 38–40.

[44] See Basedow 2000, p. 702.

[45] Cf., Knot 2008, p. 178.

[46] Ibid., p. 179. See Ten Wolde 2004, pp. 504–506 for the advantages of a private interregional law system.

[47] Cf., Vonken 2006, p. 48. See further *infra* Sect. 8.4.2.1 on the question whether the character of the European Union requires an intra-European choice of law system.

However, Remien rightly stressed that it may be doubted whether such differentiation between intra- and extra-European cases is to be recommended, as there will most certainly be cases in which it is very hard to decide whether a certain situation concerns an intra- or an extra-European case.[48] Does the possession of common property of two French spouses in, e.g., Tunisia imply that the divorce should be considered as an extra-European case? And what about the divorce of an Indian couple, which has lived together in Slovenia for 5 years, the husband still resides there and the wife has already returned to India 3 years earlier? In the latter case the competence of the Slovenian court can be established according to the Brussels II*bis*-Regulation (Article 3(1)(a)(fifth indent)). Yet this case is only connected to one Member State: does this imply that it is an extra-European case?

Consequently, the establishment of universally applicable choice of law rules circumvents the need to make the intricate differentiation between intra- and extra-European relationships, as the same choice of law rules can be applied regardless of the nature of the case. The establishment of universally applicable choice of law rules on divorce is thus to be welcomed.

5.4.1.2 Denmark, Ireland and the United Kingdom

In Chapter 4, the respective positions of the United Kingdom, Ireland and Denmark with regard to judicial cooperation in civil matters pursuant to Title V of the Third Part of the Treaty on the Functioning of the European Union have been set forth.[49]

Denmark does not in principle participate at all in the European unification of matters of private international law. Therefore, if the Brussels II*ter*-Regulation enters into force, Denmark will not be bound by it. The only way Denmark can be bound to the common choice of law rules is by means of a convention to this end between Denmark and the other EU-Member States. It is, however, questionable if such a convention will be drawn up considering the fact that there is no convention similar to the Brussels II*bis*-Regulation yet. This situation may change if Denmark changes its position with respect to the judicial cooperation in civil matters in the EU.[50]

In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, these Member States have the opportunity to opt-into the adoption and application of any proposed measure under Title V TFEU. With regard to the proposed Brussels II*ter*-Regulation the United Kingdom and Ireland

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[48] Remien 2001, p. 75. Stone argues that an '*entirely perverse complexity*' would arise from any attempt to distinguish between intra- and extra-European disputes; see Stone 2004, p. 213. See also Struycken 2000, p. 739; Bergé 2003, p. 231; Kohler 2003, p. 411; Borrás 2005, p. 525; and Vonken 2006, p. 49.

[49] See *supra* Sect. 4.6.

[50] Cf., *supra* Sect. 4.6.2.

had until 26 October 2006 to opt-in, which they have each decided not to do.[51] The UK's opposition is based on the assumption that the proposed imposition of foreign law would carry with it fundamental changes in the form of increased costs, delays and difficulties in settling cases.[52] Such changes are, to the opinion of the House of Lords, not in conformity with the principles of subsidiarity and proportionality and also exceed the legal basis by the Treaty.[53] The Brussels II*ter*-Regulation will therefore not apply in the United Kingdom and Ireland.

5.4.2 Substantive Scope of Application

The Brussels II*ter*-Proposal applies to divorce and to legal separation. It expressly excludes marriage annulment from its scope of application (Section 5.4.2.1). The question is whether the Brussels II*ter*-Proposal determines the applicable law to the dissolution of same-sex marriages and to the termination of registered partnerships (Sections 5.4.2.2 and 5.4.2.3, respectively).

5.4.2.1 Marriage Annulment

The Brussels II*ter*-Proposal expressly states in its Preamble that the proposed choice of law rules apply only to divorce and legal separation. These rules do not extend to marriage annulment, as this issue is considered to be too closely linked to the conditions for the validity of the marriage.[54] According to the Commission annulment of a marriage is to be regarded as

> a reaction to defects in the contracting of a marriage. Member States' annulment arrangements primarily pursue public-order objectives (e.g. preventing bigamy). The validity of the marriage is therefore better determined according to the conditions of the law which provided for the prerequisites of entering into the marriage, or by the national law of the person concerned.[55]

The issue of marriage annulment is, furthermore, considered inappropriate for party autonomy.[56] Hence, the choice of law issues concerning marriage annulment are left to the national laws of the Member States.

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[51] See Hodson 2007, pp. 32–34.

[52] See www.publications.parliament.uk/pa/ld200506/ldselect/ldeucom/272/27202.htm.

[53] House of Lords Rome III Report, pp. 10–11. See further *infra* Sect. 6.3.2.

[54] See recital No. 6 of the Preamble to the Brussels II*ter*-Proposal. See equally Explanatory Memorandum to the Brussels II*ter*-Proposal, pp. 7, 9.

[55] Impact Assessment on Divorce, p. 25.

[56] Cf., the Impact Assessment on Divorce, p. 25: '*issues related to the validity of the marriage do not belong to the autonomy of the spouses, since they are related to the protection of the public interest*'.

5.4.2.2 Dissolution of Same-Sex Marriages?

A pressing question concerns the status of same-sex marriages: does the dissolution of these marriages fall within the scope of the proposed choice of law rules of the Brussels II*ter*-Regulation? This is a highly controversial issue.[57]

Recital No. 5 of the Preamble of the Brussels II*ter*-Proposal stipulates that

> [t]his Regulation should provide a clear and *comprehensive* legal framework in matrimonial matters in the European Union […]. [emphasis added]

From this wording one could conclude that the proposed rules apply to *all* international divorce cases within the European Union, irrespective of the nature of the marriage at hand.

However, witness the following statement in a press release of the Council, the issue has probably been subject of debate:

> the proposal does not determine the law applicable to a marriage. The definition of marriage and the conditions of the validity of a marriage are matters of substantive law and are therefore left to national law. Consequently, the court of a Member State which has jurisdiction as regards divorce or legal separation may assess the existence of a marriage according to its own law.[58]

On the one hand, it would be odd if the Brussels II*ter*-Proposal obliged the authorities of a Member State to dissolve a marriage, if it does not recognise the type of marriage in question. On the other hand, the exclusion of a certain type of marriage in advance seems to contradict the aim of the Brussels II*ter*-Proposal to provide for a comprehensive legal framework in matrimonial matters.

In the Council draft on the Brussels II*ter*-Proposal of 23 May 2008 this discussion has been put into the following provision:

> Nothing in this Regulation shall oblige the courts of a Member State whose law does not provide for divorce or does not recognise the marriage in question for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation.[59]

This provision leaves the question whether the Brussels II*ter*-Proposal equally covers the dissolution of same-sex marriages to the discretion of each individual Member State, which may apply the proposed choice of law rules to the dissolution of any type of marriage it recognises. Considering the position of many Member States as regards the institution of same-sex marriage, it is likely that the majority of the Member States will not apply the choice of law rules of the

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[57] Cf., the question whether the dissolution of same-sex marriage currently falls within the scope of the Brussels II*bis*-Regulation. This issue is highly disputed, see the national reports of the Member States in: Boele-Woelki and González Beilfuss 2007. See also Gaudemet-Tallon 2007, p. 156 ff.

[58] See Press Release No. 8364/07 (Presse 77) of the 2794th Council Meeting of Justice and Home Affairs held in Luxembourg 19–20 April 2007, p. 11.

[59] Council Document No. 9712/08 JUSTCIV 106 of 23 May 2008, Article 20e-1, p. 16.

Brussels II*ter*-Proposal to the dissolution of the latter type of marriage: most Member States do not recognise the same-sex marriage at all. As far as the same-sex marriage is recognised, it is generally not recognised as a marriage but as a registered partnership.[60]

The susceptibility of the issue of same-sex marriages makes it hardly surprising that the Brussels II*ter*-Proposal does not automatically apply to the dissolution of same-sex marriages. However, the solution to leave the issue to the discretion of the Member States does not seem to be the most suitable one.[61] It might have been better to follow a clear approach: either to not sear one's wings and to leave the whole subject matter aside or to reconcile oneself to reality — in which same-sex marriages simply exist — by autonomously defining the concept of marriage and to determine that the choice of law rules of the Brussels II*ter*-Proposal apply to the dissolution of *any* marriage as defined by the Proposal.

It is most unfortunate that the Brussels II*ter*-Proposal fails to provide for a clear and concise regulation as regards the dissolution of same-sex marriages. The choice of law rules of the Brussels II*ter*-Proposal is therefore, not very conducive to legal certainty for same-sex spouses.[62]

5.4.2.3 Termination of Registered Partnerships?

Does the unified choice of law rules of the Brussels II*ter*-Proposal equally extend to the termination of registered partnerships? The Brussels II*ter*-Proposal is limited to the dissolution of marriages. Therefore, the proposed choice of law rules cannot be considered to include other similar formal relationships, such as registered partnerships, which are currently recognised in many European countries.[63]

Member States are of course free to decide to apply by analogy the common choice of law rules on divorce to the termination of registered partnerships. Yet not all national concepts of registered partnership might be suitable for the application *per analogiam* of the unified choice of law rules on divorce, as in some Member States the concept of registered partnership verges more on a contractual agreement between the partners than on a marriage.

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[60] See for the analysis of the recognition of the Dutch same-sex marriage in a number of EU-Member States: Boele-Woelki et al. 2007, p. 190.

[61] See also Heinze 2008, p. 113 ff, spec. pp. 114–115 as regards the issue of the preliminary question.

[62] It must be noted that the Brussels II*ter*-Proposal does introduce a *forum necessitatis* for cases in which the courts that have jurisdiction are situated in Member States whose law does not recognise the marriage in question for the purposes of pronouncing divorce. Same-sex spouses may apply for divorce in another Member State: either the Member State of the nationality of either spouse or the Member State of the *locus celebrationis*. See Article 7a of the Brussels II*ter*-Proposal, introduced in Council Document No. 13445/07 JUSTCIV 250 of 3 October 2007, p. 6.

[63] See Curry-Sumner 2005, p. 428 and Mostermans 2006, p. 10, both concluding this with regard to the current Brussels II*bis*-Regulation. The Brussels II*ter*-Proposal does not bring any changes in this respect.

5.4.3 Temporal Scope of Application

The Brussels II*ter*-Proposal does not contain any explicit transitional provision with regard to the choice of law on divorce. In the absence of a specific transitional provision, the general provision of Article 64(1) of the Brussels II*bis*-Regulation will most probably apply, which stipulates:

> [T]he provisions of this Regulation shall apply only to legal proceedings instituted, to documents formally drawn up or registered as authentic instruments and to agreements concluded between the parties after its date of application in accordance with Article 72.

The temporal scope of application implies that the national choice of law rules on divorce of the Member States will continue to apply until the Brussels II*ter*-Regulation has entered into force. The common European choice of law rules on divorce will only apply to divorce proceedings that have been commenced after the entry into force of the Brussels II*ter*-Regulation.

5.5 The Proposed Choice of Law on Divorce

The proposed choice of law on divorce firstly offers the parties a limited opportunity to choose the law which is applicable to their divorce. In the absence of a choice by the parties, the applicable law is determined on the basis of a cascade rule.

In the following, the proposed choice of law rules will be discussed taking into consideration both the original Brussels II*ter*-Proposal and the proposed amendments that have subsequently been made by both the European Parliament and several Presidencies of the European Council.[64] The legislative procedure requires the Commission to submit the proposal to the Council, which in turn is obliged to seek the opinion of the European Parliament. The ultimate decision on the proposal is made by the Council and, as the Brussels II*ter*-Proposal concerns a measure in the field of international family law, a unanimous Council decision is required.[65]

5.5.1 The Spouses' Choice as to the Applicable Law

As a principal rule the Brussels II*ter*-Proposal introduces the possibility for the spouses to choose the law applicable to their divorce in Article 20a. This

[64] The last Council-draft on the Brussels II*ter*-Proposal of 23 May 2008 and the Legislative Resolution of the European Parliament have both been included as Appendices to this book. The earlier Council-drafts and other Council documents on the Brussels II*ter*-Proposal are available at http://register.consilium.europa.eu.

[65] Cf., *supra* Sect. 4.4.5.

possibility is part of a general trend towards liberalisation in private international law which more and more frequently recognises that it is the individual, and not the state, who can best weigh the relevant choice of law interests.[66] In European private international law party autonomy is becoming a fundamental principle.[67]

Currently only a few Member States allow the spouses to choose the law applicable to their divorce. This possibility exists at the moment in Belgium,[68] Germany,[69] and the Netherlands.[70] Consequently, for many Member States the introduction of the *professio iuris* on divorce would constitute a true novelty.

Consensus exists between the Member States as regards the possibility in itself to choose the law applicable to divorce.[71] However, there has been some discussion on the alternatives out of which the parties can choose and the formal requirements surrounding the *professio iuris*.

The possibility to choose the law applicable to divorce is provided for in Article 20a(1) of the Brussels II*ter*-Proposal:

1. The spouses may agree to designate the law applicable to divorce and legal separation. The spouses may agree to designate one of the following laws:
   a. the law of the State of the last common habitual residence of the spouses insofar as one of them still resides there.
   b. the law of the State of the nationality of either spouse, or, in the case of United Kingdom and Ireland, the "domicile" of either spouse.
   c. the law of the State where the spouses have resided for at least 5 years;
   d. the law of the Member State in which the application is lodged.

One of the objectives of the Brussels II*ter*-Proposal is to increase flexibility. Article 20a puts this objective into effect, as it allows the parties to choose the law applicable to their divorce. But in order to ensure the application of a law with which the spouses have a close connection and to avoid the application of 'exotic' laws, the choice is limited.[72] The alternatives out of which the spouses can choose have been subject of amendment in both the Council drafts and the resolution of the European Parliament.

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[66] See Hohloch 2007, p. 263; Basedow 2008, p. 14 ff.

[67] See *inter alia* Martiny 2007, pp. 90–91; Hohloch 2007, p. 262; Pertegás 2007, p. 329 ff; and Rühl 2008, p. 209.

[68] Article 55(2) of the General Private International Law Act of 16 July 2004. The parties can choose either their common national law or the *lex fori*.

[69] Article 14(3) EGBGB.

[70] Article 1(2, second sentence) and (4) CLAD. See for the rationale behind the *professio iuris* on divorce in Dutch law *supra* Sect. 2.3.

[71] See Press Release No. 8364/07 (Presse 77) of the 2794th meeting of the Council on Justice and Home Affairs, held in Luxembourg 19–20 April 2007, p. 8. See equally Boele-Woelki 2008a, p. 261; Boele-Woelki 2008b, p. 784; and Jänterä-Jareborg 2008, p. 337.

[72] See Explanatory Memorandum to the Brussels II*ter*-Proposal, p. 9. See equally Green Paper on Divorce, p. 7.

The third possibility — the law of the State where the spouses have resided for at least 5 years — met with resistance by some Member States and its necessity was questioned. In the Council draft of 9 March 2007 the option to choose for the law of the State where the spouses have resided for at least 5 years had made its exit.[73] By contrast, the European Parliament proposed to maintain this possibility, but to amend it in such a way as to allow spouses the opportunity to choose the law of the state where they have resided for at least 3 years.[74] The European Parliament thereby proposed to bring in line all the time criteria posed by the Brussels II*ter*-Proposal to 3 years.[75]

The Council has proposed the introduction of another possibility. Already in the first draft of January 2007, the Council added the possibility to choose the law of the current habitual residence of the spouses.[76] This possibility seems a good extension, as it certainly is a law with which the spouses have a close connection.

The European Parliament has proposed the insertion of a fifth alternative out of which the spouses can choose: the law of the State in which the marriage took place (the *lex loci celebrationis*).[77] According to the rapporteur it 'makes sense' to allow the spouses the possibility to choose the law of the State in which the marriage took place.[78] Moreover, in the justification to the Report of the European Parliament it is stated that

> [I]t seems rational that his criterion should be included with the others for the purpose of choosing the applicable law.[79]

Yet why would the inclusion of the possibility to choose for the *lex loci celebrationis* be 'rational' or 'make sense'? The close connection between the marriage and the *locus celebrationis* is not obvious.[80] According to the European Parliament the choice by the parties of a country to celebrate their marriage should be reasonably presumed as implying possible acceptance of the law of that country

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[73] See Council Document No. 7144/07 JUSTCIV 47 of 9 March 2007 and Council Document No. 9714/07 JUSTCIV 106 of 23 May 2008.

[74] See the Legislative Resolution of the European Parliament of 21 October 2008, A6-0361/2008, Amendment 21.

[75] The Brussels II*ter*-Proposal also contains time criteria in Articles 3a(1)(b) and 7(a). Both these time criteria have been set to 3 years.

[76] See Council Document No. 5247/07 JUSTCIV 4 of 12 January 2007, p. 5. The addition of this possibility has been equally proposed by the European Parliament: Legislative Resolution of the European Parliament of 21 October 2008, A6-0361/2008, Amendment 18 and the Explanatory Statement to the Report of the European Parliament of 19 September 2008, A6-0361/2008, p. 19.

[77] See Legislative Resolution of the European Parliament of 21 October 2008, A6-0361/2008, Amendments 22 and 23.

[78] Explanatory Statement to the Report of the European Parliament of 19 September 2008, A6-0361/2008, p. 19.

[79] See the justification to Amendments 22 and 23 of the Report of the European Parliament of 19 September 2008, A6-0361/2008, p. 13.

[80] The connection that the *locus celebrationis* reflects depends on the criteria the *lex loci celebrationis* attaches to the entry into a marriage.

as well.[81] However, given the existing wedding tourism — couples marrying at an exotic location with which they do not have any connection, such as Las Vegas, Hawaii or the Seychelles — the *locus celebrationis* cannot be considered as automatically implying a close connection. Furthermore, the assumption made by the European Parliament that the choice by the parties of a country to celebrate their marriage should be reasonably presumed as implying possible acceptance of the law of that country can be strongly opposed. This view can — to a large extent — be subscribed to with regard to the matrimonial law, yet not with regard to the divorce law.

5.5.2 *Formal Requirements of the* Professio Iuris

For a *professio iuris* to be valid, it must comply with certain formalities. The *professio iuris* of Article 20a of the Brussels II*ter*-Proposal is bound to some specific formal requirements. Article 20a(2) stipulates with regard to these formal requirements:

> 2. An agreement designating the applicable law shall be expressed in writing and be signed by both spouses at the latest at the time the court is seised.

Pursuant to Article 20a(2) two formal requirements must be met. The first one relates to the form of the *professio iuris*: it has to be determined by a written agreement and signed by both spouses. The second formal requirement concerns the time of the conclusion of the agreement: it needs to be made at the time the court is seised at the latest. In the following both these formal requirements will be discussed.

5.5.2.1 Form of the Agreement on the *Professio Iuris*

Article 20a(2) of the Brussels II*ter*-Proposal contains two requirements on the form of the *professio iuris*: it should be determined by a written agreement and signed by both spouses. These requirements make clear that the *professio iuris* on divorce can only be realised by a joint choice of the spouses. A unilateral choice by one of the spouses cannot meet these requirements and is therefore not valid.

This formal requirement shows that the parties who wish to initiate divorce proceedings on the basis of mutual consent will benefit the most from the possibility to choose the applicable law.[82]

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[81] See the justification to Amendment 23 of the Report of the European Parliament of 19 September 2008, A6-0361/2008, p. 13.

[82] See also Lazic 2008, p. 91; Calvo Caravaca and Carrascosa González 2009, p. 52.

There has been quite some debate on this formal requirement in the Council.[83] Apparently, some Member States could not agree with the requirements on the form of the agreement on the *professio iuris*.[84] Consequently, several proposals for additional formal requirements were passed in review.

The last Council draft added firstly the additional requirement that the agreement must also be dated by both spouses.[85] Moreover, it equally poses another formal requirement in addition to Article 20a(2) Brussels II*ter*-Proposal:

> […] If the law of the Member State where both spouses have their habitual residence at the time the agreement is concluded provides for additional formal requirements, those requirements have to be satisfied. If the spouses are habitually resident in different Member States and the laws of those states provide for different formal requirements, the agreement is formally valid if it satisfies the requirements of either of those laws.[86]

Finally, the Council added the following sentence to the provision as regard the form of the agreement:

> Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.[87]

With regard to a *professio iuris* made in a marriage contract, the European Parliament has proposed in its resolution to supplement Article 20a(2) with the following:

> If the agreement forms part of a marriage contract, the formal requirements of that contract must be met.[88]

All in all, one can conclude that the Council and the European Parliament proposed to sharpen up the formal requirements of Article 20a of the Brussels II*ter*-Proposal.

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[83] See *inter alia* Paulino Pereira 2007, p. 392; De Boer 2008a, pp. 329–331.

[84] As the comments of the delegations of the Member States on the Brussels II*ter*-Proposal as part of the negotiations in the Council are not available, the reasons of the opposition of the Member States in this respect are obscured.

[85] See Council Document No. 9712/08 JUSTCIV 106 of 23 May 2008, Article 20a(3), p. 13: 'Such agreement [i.e. agreement designating the applicable law; NAB] shall be expressed in writing, dated and signed by both spouses'.

[86] See Council Document No. 9712/08 JUSTCIV 106 of 23 May 2008, p. 13. The resolution of the European Parliament contains more or less the same amendments, see the Legislative Resolution of the European Parliament of 21 October 2008, A6-0361/2008, Amendment 24.

[87] See Council Document No. 9712/08 JUSTCIV 106 of 23 May 2008, p. 13. See for similar provisions *inter alia*: Article 23(2) of the Brussels I-Regulation and Article 4(2) of the Maintenance Regulation.

[88] Legislative Resolution of the European Parliament of 21 October 2008, A6-0361/2008, Amendment 24.

5.5.2.2 Implied Choice of The Spouses as to the Applicable Law?

Pursuant to the requirement of Article 20a(2) as regards the form of the agreement on the *professio iuris* on divorce, Article 20a of the Brussels II*ter*-Proposal seems to exclude an implied *professio iuris*. Such choice as to the applicable law is, on the face of it, not valid considering the requirements that the agreement must be expressed 'in writing and signed by both spouses'.

But what about a covenant on divorce regulating the divorce and its consequences such as parental responsibility and matrimonial property that has been fully geared to a specific legal system, yet without any specific consideration as to the applicable law to divorce? The question that presents itself is whether the spouses have intended an implied choice for the application of the given law to divorce by fully gearing their covenant on divorce to the specific legal system. Such a covenant does comply with the formal requirement of Article 20a(2), as it is an agreement that has been expressed in writing and signed by both spouses.

However, as a *professio iuris* presumes that the parties have been aware of the possibility of the option to choose the law applicable to divorce, the assumption of such a choice in cases in which parties did not expressly intend it, does not seem very sensible. In addition, it is not in the least certain that the parties have been aware of the international character of their divorce.[89]

5.5.2.3 Time of Choice

With regard to the time factor, Article 20a of the Brussels II*ter*-Proposal allows the spouses to choose the applicable law at any time before the court is seised. In order to clarify this matter, the Council proposed two additions to Article 20a:

1. Without prejudice to paragraph 4 an agreement designating the applicable law may be concluded and modified at any time, but at the latest at the time the court is seised.
2. […]
3. If the law of the forum so provides, the spouses may also designate the applicable law before the court in the course of the proceedings. In such a case, it is sufficient that such designation is recorded in court in accordance with the law of the forum.[90]

A *professio iuris* can thus be agreed upon either before the divorce proceedings have commenced or even during the proceedings, if the law of the forum so provides. The proposal of the Council concerning the extension of the time to choose the applicable law in the course of the proceedings can be endorsed, as there does not seem to be any reason why a *professio iuris* should not be permitted after the court has been seised.[91] The rationale of allowing the parties to choose the applicable law is to increase flexibility; this objective is attained even more by

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[89] Cf., the objections raised against the assumption of an implied choice as to the applicable law to divorce according to Dutch choice of law, *supra* Sect. 2.3.4.2.

[90] Council Document No. 9712/08 JUSTCIV 106 of 23 May 2008, pp. 13–14.

[91] See equally Ibili 2006, p. 744.

extending the time-limit within which the agreement must be concluded. Moreover, the extension of the time-limit would equally be in the interest of the judiciary, as a *professio iuris* enables the competent court to simply apply the chosen law. Any determination of the applicable law on the basis of Article 20b of the Brussels II*ter*-Proposal can then be omitted.

The dependence on the law of the forum for the validity of a *professio iuris* during the divorce proceedings cannot be considered as a factor that contributes to the predictability and legal certainty of the regulation. It is not entirely clear why the Council has chosen for this solution.[92]

Pursuant to Article 20a(2) of the Brussels II*ter*-Proposal the parties can already determine in a marriage contract the applicable law to their possible divorce by means of a *professio iuris*. Even before the marriage takes place the parties can choose the applicable law. De Boer has posed the following questions that arise in this respect:

> [H]ow can the parties assess the consequences of an agreement that must be carried out, if at all, in a distant future they do not want to contemplate as yet, under circumstances they cannot possibly foresee? Can one of the spouses later opt out of the agreement without the cooperation of the other spouse? Which law governs the issues of consent or the principle of *rebus sic stantibus* when raised during the divorce proceedings?[93]

Such questions are certainly not easy to answer. Nevertheless, allowing a *professio iuris* on divorce in a marriage contract does compel to answer these questions.

Furthermore, it is questionable whether parties can already enter a *professio iuris* on divorce in their marriage contract in case there is not, or not yet, question of an international marriage.[94] In other words, would it be possible for two Italians who currently live in Italy and do not intend to move abroad in any near future to enter a *professio iuris* on divorce in their marriage contract? Article 20a(2) does not shed light on this issue.[95] An issue that is closely linked hereto is whether Article 20a permits (future) spouses to choose the law of an intended habitual residence. The current wording of Article 20a does not seem to permit such a choice.

5.5.2.4 The *Professio Iuris* as an Accurate Reflection of the Intention of the Parties

The choice of the applicable law to divorce can be a delicate issue: the parties should be well aware of the consequences of their choice. This is equally a point of

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[92] Most probably the introduction of the possibility for the spouses to choose the applicable law to divorce during the divorce proceedings met with resistance of the Member States. However, the impossibility to examine the comments of the delegations of the Member States on the Brussels II*ter*-Proposal as part of the negotiations in the Council obscures the true motives.

[93] De Boer 2008a, pp. 330–331.

[94] See for the definition of an international marriage *supra* Sect. 2.1.

[95] It should be noted that there is, incidentally, not much to choose for the parties in such a case: they can only choose their national law as the applicable law to their divorce pursuant to Article 20a(1) of the Brussels II*ter*-Proposal.

concern to the European Parliament, whose resolution contains the following statement:

> It must be ensured that the choice made by the parties is an enlightened one, i.e. that both spouses are duly informed of the practical implications of their choice. In this regard, consideration needs to be given to the best way of ensuring that comprehensive, reliable information is made available […] before the act is signed. Access to information must also be provided, irrespective of each spouse's financial situation. It must be ensured that both spouses receive comprehensive, accurate information concerning the implications of their choice of jurisdiction and the law applicable to divorce, especially since the Member States' laws differ considerably in a number of respects.[96]

The existing differences in the substantive laws of the Member States as regards the grounds and conditions for divorce and the consequences attached to divorce concerning maintenance obligations, parental responsibility and matrimonial property make it impossible for the parties to gain a view of the opportunities and implications. The situation is far too complex to assume that the parties will be able to know their way about. Therefore, the requirement to provide information on the (practical) implications of the *professio iuris* to both spouses is to be welcomed.[97]

However, some critical remarks in this respect are also called for. In the first place the question should be asked to what extent the choice of law on divorce should take the possible implications for ancillary matters into account. It is not obvious that the choice of law rules on divorce should do so.

Secondly, it must be stressed that spouses do have their own responsibility as regards their choice of the applicable law to divorce. If their choice no longer reflects their intentions, the spouses are free to make a new *professio iuris*. The Council draft determines in this regard in Article 20a(2) that an agreement designating the applicable law may be concluded and modified at any time.

A situation which must be distinguished in this respect is the one in which the chosen substantive law has been amended. In such a situation the spouses should be protected. Witness the following consideration of its Explanatory Statement, the European Parliament holds similar concerns in this respect:

> […] since laws can and do change, it may be that an agreement designating the applicable law which was signed at a given moment no longer meets the legitimate expectations of the parties at the time at which it should deploy its effects, since the legislation of the Member State in question has in the meantime been amended.[98]

Such situations may arise because of the time factor of Article 20a(2): quite some time may have lapsed between the agreement and the divorce. In the meantime the chosen law can be amended. A second consequence of the time

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[96] Explanatory Statement to the Report of the European Parliament of 19 September 2008, A6-0361/2008, p. 19.

[97] See equally Kohler 2008b, p. 195.

[98] See equally Explanatory Statement to the Report of the European Parliament of 19 September 2008, A6-0361/2008, p. 19.

factor as foreseen by Article 20a(2) of the Brussels II*ter*-Proposal is that it may lead to the application of a certain legal system with which the spouses had a close connection at the time of the agreement of the *professio iuris*, but with which no close connection exists at the time of the divorce.[99]

The formal requirements of Article 20a(2) are meant to ensure that the parties are aware of the consequences of their choice.[100] However, it is questionable whether the Brussels II*ter*-Proposal actually succeeds in this respect, as many questions remain unanswered. Therefore, more safeguards might need to be introduced to ensure that the *professio iuris* accurately reflects the intention of the parties; e.g. the court may be obliged to inform whether the parties still agree on their choice.

5.5.3 The Applicable Law in the Absence of a Choice by the Parties

The Brussels II*ter*-Proposal puts the possibility to choose the law applicable to divorce first. Consequently, only in the absence of a *professio iuris* in accordance with Article 20a, the law which is applicable is determined pursuant to Article 20b of the Brussels II*ter*-Proposal. Divorce will be governed by the law of the country with which the spouses are deemed to be most closely connected.[101] Article 20b stipulates:

> In the absence of choice pursuant to Article 20a, divorce and legal separation shall be subject to the law of the State:
> a. where the spouses have their common habitual residence, or failing that,
> b. where the spouse had their last common habitual residence insofar as one of them still resides there, or failing that,
> c. of which both spouses are nationals, or, in the case of United Kingdom and Ireland, both have their "domicile", or failing that,
> d. where the application is lodged.

In the absence of a *professio iuris*, the applicable law to divorce is determined on the basis of a hierarchical scale of connecting factors. Unlike the general jurisdictional connecting factors contained in Article 3(1) of the Brussels II*bis*-Regulation that are alternative, the connecting factors of Article 20b of the Brussels II*ter*-Proposal are hierarchic, meaning that the latter can be applied only in the absence of the prior.

Article 20b Brussels II*ter*-Proposal refers in the first place to the law of the country of the common habitual residence of the spouses, or failing that, to the law

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[99] See equally Beyer 2007, p. 23.

[100] Explanatory Memorandum to the Brussels II*ter*-Proposal, p. 9.

[101] See Explanatory Memorandum to the Brussels II*ter*-Proposal, p. 9; see also Recital 10b of the Preamble to Council draft of the Brussels II*ter*-Proposal of 23 May 2008.

of the country of their last common habitual residence insofar as one of them still resides there. In the absence of both of these connecting factors, the law of the common nationality of the spouses will apply. If the spouses also do not have a common nationality either, the law of the forum (*lex fori*) is designated. In the following these connecting factors will be discussed separately.

5.5.3.1 Habitual Residence

Habitual residence has gained a prominent position as connecting factor in the Brussels II*ter*-Proposal. Article 20b refers firstly to the law of the country of the common habitual residence of the spouses, or failing that, to the law of the country of their last common habitual residence insofar as one of them still resides there.

The (last) place of common habitual residence of the spouses is considered as an appropriate connecting factor on the European level: it corresponds with the EU policy striving for an integration of persons that live outside their home countries and it forms an appropriate response to the needs of a mobile Europe.[102] Moreover, habitual residence does not — as opposed to nationality — depend on national definitions. Consequently, the use of habitual residence as connection factor is of more avail to the establishment of a common European choice of law.[103] Furthermore, the reference to the law of the habitual residence of the spouses generally leads to the application of the law with which they have a close connection; with this law they are to a certain extent familiar and its application generally corresponds to their expectations. Finally, the petition for divorce will often be filed in the State of the habitual residence of the spouses, which permits the competent court to apply its own substantive law.[104] The use of habitual residence as a connecting factor thus synchronises jurisdiction and applicable law.[105]

The European Council has added the limitation to the possibility to connect to the last common place of habitual residence of Article 20b(b) that such connection can only take place 'provided that that period did not end more than 1 year before the court was seised'.[106] This limitation seems a valuable addition to Article

[102] See Dethloff 2004, p. 563; Rüberg 2005, p. 157: '*In einem immer mehr zusammenwachsenden Europa, in dem die Integration der Bürger großgeschrieben wird und in dem das Ziel eine fortschreitende Angleichung der Rechtsordnungen ist, wird die Anknüpfung an das Recht des gewöhnlichen Aufenthaltsortes den Interessen der Parteien am besten gerecht*'. See equally Martiny 2007, pp. 88–89; Baetge 2008, p. 82; Calvo Caravaca and Carrascosa González 2009, p. 59.

[103] See equally Baetge 2008, p. 88.

[104] Cf., Bonomi 2007, pp. 780–781. The Explanatory Memorandum to the Brussels II*ter*-Proposal, p. 10 equally mentions this circumstance.

[105] This does not only hold for the divorce, but also for other areas that are connected to divorce. E.g. habitual residence is equally the main connecting factor for maintenance obligations, see Article 3 of the Maintenance Regulation (jurisdiction) and Article 3 of the Hague Protocol on the Law Applicable to Maintenance Obligations (the choice of law).

[106] Council Document No. 9712/08 JUSTCIV 106 of 23 May 2008, p. 14.

20b(b), as it ensures that the last common habitual residence still reflects a close connection, which is the foundation of the Brussels II*ter*-Proposal. Suppose a Polish couple who has resided in Lithuania for several years. However, the husband cannot adjust to the Lithuanian way of living and decides to move back to Poland. The wife remains in Lithuania. Consequently, if she files for divorce 3 years after her husband has returned to Poland, it can hardly be said that Lithuanian law provides for a 'substantial' connection with the divorce in question, even though it is their last common habitual residence. Therefore, the limitation introduced by the Council will definitely limit the risk of reference to a legal system that does not reflect a substantial connection.

The reference to the habitual residence leads to the question what actually is to be understood by the notion of habitual residence in European context. The meaning of the connecting factor habitual residence is generally regarded as varying on the basis of the quality of the person it relates to and the context in which it plays a role.[107] The concept of habitual residence is equally part of the current Brussels II*bis*-Regulation, but nevertheless it is not defined in the Regulation.[108] The ECJ has given the following definition to the term habitual residence in other fields of law:

> the place of habitual residence is that in which the [person] concerned has established, with the intention that it should be of a lasting character, the permanent or habitual centre of his interests. For the purposes of determining habitual residence, all the factual circumstances which constitute such residence of the [person] concerned must be taken into account.[109]

It follows from this interpretation of the notion habitual residence that, on the one hand, the intention to reside in a certain place could be relevant only when the situation *de facto* would confirm it, but, on the other hand, it could also allow immediate acquisition of habitual residence, without a specific length of time being required.[110] Consequently, habitual residence is a very flexible notion that allows for reference to a legal system which is closely connected to the case at issue. However, its factual character makes it difficult to determine whether or not a person has changed his habitual residence, which may lead to legal uncertainty.[111]

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[107] Cf., Fiorini 2008, p. 197; Strikwerda 2008, p. 81; Stone 2002, p. 378.

[108] See on this issue: Richez-Pons 2005, pp. 355–360; Lamont 2007, pp. 261–281; Ricci 2008, pp. 207–219.

[109] See *inter alia* ECJ Case 13/73 *Angenieux* et al. v. *Hakenberg* [1973] ECR 935, para 32; ECJ Case C-297/89 *Rigsadvokaten* v. *Ryborg* [1989] ECR I-1943, para 19; ECJ Case C-452/93 *Fernández* v. *Commissio*, [1994] ECR I-4295, para 22; ECJ Case C-90/97 *Swaddling* v. *Adjudication Office* [1999] ECR I-1075, para 29; Case C-372/02 *Adanez-Vega* v. *Bundesanstalt für Arbeit* [2004] ECR I-10761, para 37; Case T-298/02 *Herrero Romeu* v. *Commission* [2005] ECR II-4599, para 51; Case C-66/08 *Kozłowski* [2008] ECR I-06041, para 54. See McEleavy 2008, pp. 278–290, for an extensive analysis of habitual residence in European case law.

[110] See ECJ Case C-90/97 *Swaddling* v. *Adjudication Office* [1999] ECR I-1075, para 30.

[111] Cf., Knot 2008, p. 196, who regards the factual character of habitual residence as its strength, but at the same time as its flaw.

It is questionable whether the abovementioned definition of habitual residence is suitable for family law purposes, as this is a very sensitive area of law that differs from social law, the area in which the ECJ has developed the definition of habitual residence. The respective provisions pursue different aims. So far the ECJ has, however, not clarified the extent to which this definition can be transposed to matrimonial matters.[112] In a recent case the ECJ did determine that its case law relating to the concept of habitual residence in other areas of European Union law cannot be directly transposed in the context of the assessment of the habitual residence of children for the purposes of Article 8(1) of the Brussels II*bis*-Regulation. Within this framework the Court gave the following interpretation to the concept of habitual residence:

> The 'habitual residence' of a child, within the meaning of Article 8(1) of the Regulation [i.e. the Brussels II*bis*-Regulation; NAB], must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all circumstances specific to each individual case.[113]

This definition of the habitual residence is specially geared to that of the child and cannot be copied indiscriminately to that of the spouses. In the first place, the emphasis the earlier definition of habitual residence has placed on the intentions of the persons concerned is better conceivable for adults than for children.[114] Secondly, with regard to parental responsibility the ratio of selecting the state of habitual residence is in the 'best interest of the child'. The courts of the Member State in which the child is habitually resident are generally best placed, for reasons of proximity, to judge what is in the interests of the child.[115] However, with respect to matrimonial matters, there is no similar guiding principle to help identifying the place of habitual residence of the spouses.

Consequently, the definition of habitual residence, as given in the *A.*-case, needs some adjustment in order to be used in matrimonial matters. Most of the factors that are mentioned in this case can very well be taken as point of departure, but the intentions of the parties concerned — on which the definition of habitual residence as previously given by the ECJ places strong emphasis — play an important role as well.

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[112] It is to be noted that the French *Cour de Cassation* adopted this definition of the ECJ as regards the notion of habitual residence in matrimonial matters. See Cour de Cassation — Première chambre civile, 14 December 2005 ('*la résidence habituelle* […] *se définit comme le lieu où l'intéressé a fixé, avec la volonté de lui conférer un caractère stable, le centre permanent ou habituel de ses intérêts*').

[113] ECJ Case C-523/07 *A* [2009] ECR I-02805, para 37.

[114] Cf., the Opinion of the Advocate General in Case C-523/07, para 36.

[115] Recital No. 12 of the Preamble to the Brussels II*bis*-Regulation.

Does this current definition of habitual residence meet the purposes of the Brussels II*ter*-Proposal as regards the choice of law? In accordance with its case law, the ECJ will take into account the context and the purpose of the legislation in question.[116] In matrimonial matters two different approaches underlie the jurisdictional rules, on the one hand, and the choice of law rules, on the other. Whereas the aim of the jurisdictional rules is to facilitate access to court, the choice of law rules are based on the approach of the closest connection. In order to achieve the desired *Gleichlauf*, i.e. the situation in which the competent court applies its own substantive law, the notion of habitual residence needs to be defined in such a way as to reconcile these two approaches. From this perspective, it is to be noted that the current definition of habitual residence — formulated in the framework of the jurisdictional rules — is too non-factual for choice of law purposes,[117] as the acquisition of habitual residence does not require a certain period of residence, which as such gives rise to the risk of manipulation.[118]

Therefore, the concept of habitual residence should for the choice of law purposes of the Brussels II*ter*-Proposal be interpreted as ensuring that it accurately designates the law with which there is a strong, current and — to some extent — lasting tie. The most pragmatic solution for choice of law purposes to help identifying the most appropriate law would simply be to add a presumption to the use of this connecting factor. E.g. a person having his residence in a given state for a period of at least 1 year is presumed to also have his habitual residence in that state.[119] This will provide certainty and ensure that an appropriate degree of connection exists.

From the foregoing it is clear that the term habitual residence is a question of fact to be appreciated by the court in each individual case. There is a risk of varying interpretations between the Member States as long as the ECJ has not given a definition expressly tailored to the Brussels II*ter*-Proposal. The lack of such clear-cut definition might lead to possible arbitrary interpretations by the courts of the Member States. Consequently, the lack of such a definition is not very conducive to legal certainty and predictability.[120]

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[116] See ECJ Case 283/81 *Cilfit Srl* et al. v. *Ministry of Health* [1982] ECR 3415, paras 19–20; Case C-98/07 *Nordania Finans and BG Factoring* [2008] ECR I-1281, para 17.

[117] The link established between a person and a certain country through habitual residence on the basis of its current definition is too weak to meet the requirements set up for the choice of law. See equally Gaertner 2006, p. 134.

[118] Cf., McEleavy 2008, pp. 291–292.

[119] See with regard to the choice of law on succession, in which a same solution has been proposed: Ten Wolde 2004, p. 508; Ten Wolde and Knot 2006, p. 31.

[120] Cf., Stone 2002, p. 387 with regard to the Brussels II-Regulation: '*the absence of an explicit definition seems regrettable, since it tends to undermine the harmonising effect of the measures*'.

5.5.3.2 Nationality

In the absence of a common habitual residence and a last common habitual residence in which one of the spouses still resides, Article 20b(c) Brussels II*ter*-Proposal refers to the common nationality of the spouses.

The connection to the common nationality of the spouses raises several questions.[121] What happens if one of the spouses (or both of them) has more than one nationality? Is the Proposal limited to the law of the country with which spouses are most closely connected? In other words, can the court apply an effectivity test in order to assess which nationality reflects the closest connection?[122] The Brussels II*ter*-Proposal does not take any position as to the question how to deal with cases of multiple nationalities. This issue has been discussed in the Council and in its draft of 18 April 2008 a recital concerning multiple nationalities has been added to the Preamble to the Brussels II*ter*-Proposal. The solution found is to leave the question of how to deal with cases of multiple nationalities to the national law of the Member States.[123]

This solution is not very conducive to uniformity. Hence, the solution found for issues of multiple nationalities is not likely to lead to legal certainty and predictability. Instead, a more uniform approach should be employed, e.g. if faced with multiple nationalities, the competent court should apply an effectivity test.[124] In applying the effectivity test the national courts are obliged to take into account the purposes of the Brussels II*ter*-Proposal, i.e. applying the most closely connected law to divorce.

Moreover, one can also wonder whether the court has the authority to apply an authenticity test to a single nationality of the spouses: is the court to assess whether the spouses still have a real connection to their country of origin? In this connection one can think of refugees, where the application of the common national law is not obvious, even though they still possess their nationality. Application of the national law in such a case would therefore violate the principle of closest connection.

Where in national context the application of an effectivity test or an authenticity test can seem obvious from the perspective of the principle of closest connection,

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[121] See also Ibili 2006, p. 744.

[122] Cf., Case C-168/08 *Laszlo Hadadi (Hadady)* v. *Csilla Marta Mesko, married name Hadadi (Hadady)* [2009] ECR I-06871. In this case the ECJ held with regard to a jurisdictional issue of multiple nationalities that Article 3 of the Brussels II*bis*-Regulation precludes that only the effective nationality can be taken into account in applying that provision. The system of jurisdiction established in the Brussels II*bis*-Regulation 'is not intended to preclude the courts of several States from having jurisdiction. Rather, the coexistence of several courts having jurisdiction is expressly provided for, without any hierarchy being established between them.' See on this case V. Van den Eeckhout, 'Het beroep op het bezit van een nationaliteit in het geval van dubbele nationaliteit', *NTER* 2009, pp. 307–316.

[123] Recital No. 5c of the Preamble to the Brussels II*ter*-Proposal. See Council Document No. 8587/08 JUSTCIV 73 of 18 April 2008.

[124] See equally Siehr 2005, pp. 33–34.

in European context this might run counter to the principle of non-discrimination: any discrimination on the grounds of nationality is prohibited (Article 18 TFEU). The use of nationality as a connecting factor in European context has been subject of a lively debate by legal doctrine.[125]

According to the European Court of Justice the principle of non-discrimination is not concerned with disparities which may result from divergences between the laws of the Member States, but rather with the fact that all persons subject to those laws must be treated equally, i.e. the laws must be applied in accordance with objective criteria and without regard to nationality.[126] However, the principle of non-discrimination does not prevent the Member States from using nationality as a connecting factor to determine the law applicable to a certain case, provided that such designation is made without considering the content of the law that is designated as applicable. The principle of non-discrimination is thus not harmed in case of neutral choice of law rules that refer to the national law of the person(s) involved: it distinguishes between persons with different nationalities but it does not add further differences to the detriment of EU citizens. A unilateral approach, however, delimits the scope of application of particular substantive rules and could create distinctions which risk being considered discriminatory.[127]

The Court of Justice has confirmed this interpretation on several occasions.[128] With regard to international family law, the ECJ has implicitly maintained in *Garcia Avello* and *Grunkin-Paul* that the use of nationality as connecting factor is compatible with the European principle on non-discrimination.[129] In these cases the European Court of Justice pointed out that 'although, as Community law stands at present, the rules governing a person's surname are matters coming within the competence of the Member States, the latter must none the less, when exercising that competence, comply with Community law.'[130] Even though the Court did not explicitly consider the use of nationality as a connecting factor, it is clear that — as long as no discriminatory differentiation on grounds of nationality is made — the use of nationality as such is not contrary to Article 18 TFEU. Therefore, the mentioned cases support the conclusion that it is very likely that the ECJ would

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[125] See, *inter alia*, Drobnig 1970, Fischer 1991, Roth 1991, Schulz 2000, Puljak 2003, Ballarino and Ubertazzi 2004, Bogdan 2007, Schmidt 2008.

[126] ECJ Case 14/68 *Walt Wilhelm and others* v. *Bundeskartellamt* [1969] ECR 1, para 13.

[127] Cf., Meeusen 2007b, p. 294.

[128] ECJ Case C-339/89 *Alsthom Atlantique* v. *Compagnie de Construction Mécanique Sulzer SA* [1991] ECR I-107; ECJ Case C-305/92 *Albert Hoorn* v. *Landesversicherungsanstalt Westfalen* [1994] ECR I-1525; ECJ Case C-214/94 *Ingrid Boukhalfa* v. *Bundesrepublik Deutschland* [1996] ECR I-2253; and ECJ Case C-208/00 *Überseering BV* v. *Nordic Construction Company GmbH* [2002] ECR I-9919.

[129] ECJ Cases C-148/02 *Garcia Avello* v. *État belge* [2003] ECR I-11613 and C-353/06 *Grunkin-Paul* [2008] ECR I-07639.

[130] *Garcia Avello*, paras 25 and 26; and *Grunkin-Paul*, para 16.

consider the use of nationality as a connecting factor that is compatible with European law.[131]

From a strictly legal point of view, the use of nationality as a connecting factor offers, in terms of certainty, immense advantages over the use of habitual residence. A change of nationality can nearly always be verified by official documents. Habitual residence is much more difficult to determine with certainty — both for the person concerned and for the authorities — since it largely depends on the intentions of the person(s) involved which may be hard to prove. Further, the notion of habitual residence differs widely and may even give rise to controversies within one state. Furthermore habitual residence can be changed more or less overnight. Nationality on the other hand is much more stable: a person must generally have a domicile in a county for a certain number of years before being able to acquire nationality.

The current debates on the adherence to the principle of nationality in private international law rest upon a fundamental conflict and show that the application of the national law of the parties is in the middle of two contradictory developments.[132] On the one hand, the progressive process of integration — which is one of the principal objectives of the European choice of law — questions the justification of the application of the national law of the parties. On the other hand, the increasing internationalisation of society — which is accompanied by more and more awareness of diversity — seems to be a valid argument in favour of the application of the national law of the parties. The European choice of law rules have to strike a balance between these two developments.

The fundamental principles of the connection to the nationality can be traced back to Mancini, who regarded the application of the national law as a way of respecting the differences between sovereign states.[133] He argued that these differences would only be sufficiently taken into consideration if the applicable law in a private international law dispute was determined by the national law of the parties. In the course of time, the connection of the national law of the parties has increasingly given way to the reference to the most closely connected law, which is not *per se* the national law of the parties. Although it is beyond doubt that nationality serves as an objective and proportional criterion in the field of family law, as it responds to the ties between a State and its nationals, to the idea of a close connection and to the necessary stability of personal status,[134] the closest connection may very well require the application of another law.

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[131] See further Puljak 2003, pp. 195–196; Ballarino and Ubertazzi 2004, pp. 105–106; Lehmann 2008, p. 149.

[132] Cf., Gaertner 2008, p. 233.

[133] See on Mancini, Jayme 1980; and Jayme 1981, pp. 145–155.

[134] See also Hohloch 2007, p. 266; and Meeusen 2007b, p. 293.

5.5.3.3 The *Lex Fori*

The *lex fori* is the last step of the cascade rule of Article 20b Brussels II*ter*-Proposal.

The fact that several Member States have indicated a strong preference for the application of their own substantive law in divorce cases makes it hardly surprising that, in the negotiations on the Brussels II*ter*-Proposal, various attempts have been made in order to reach a compromise in awarding a more prominent role to the *lex fori*.[135] One of those attempts has led to the insertion of a new Article in the Brussels II*ter*-Proposal, functioning as a remedy for situations in which the applicable law 'does not provide for divorce'.[136] In such cases, the *lex fori* will apply:

> 1. Where the law applicable pursuant to Article 20a and 20b does not provide for divorce or does not grant one of the spouses because of his or her gender equal access to divorce or legal separation, the law of the forum shall apply.[137]

Proceeding from the principle of the closest connection, this provision is far from being welcomed. By means of this provision, which is clearly based on the principle of *favor divortii*, the neutral foundation of the choice of law rules on divorce of the Brussels II*ter*-Proposal is disrupted. It is not meant as an adjustment of the closest connection. De Boer considers this provision as an expression of a European policy, supporting divorce at least as an *ultimum remedium* that cannot be denied on the sole ground that it is not allowed in the state with which the spouses are supposed to be most closely connected.[138]

The introduction of this provision is surrounded by uncertainties, e.g. what does the wording 'does not provide for divorce' mean? Can it equally entail that a legal system which requires a waiting period of a few years may qualify as 'not providing for divorce' because the divorce cannot be directly pronounced? From several documents it is clear that this situation would not qualify as a situation in which the applicable law does not provide for divorce, as the provision only

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[135] See also De Boer 2008a, pp. 327–328.

[136] This attempt has evolved during the negotiations from the addition of an extra paragraph to Article 20b to the insertion of a completely new Article. The issue is discussed for the first time in Council Document No. 5274/07 JUSTCIV 4 of 12 January 2007, p. 7, which added a second paragraph to Article 20b stipulating that where the law applicable pursuant to para 1 (a), (b) or (c) does not provide for divorce, the law of the forum shall apply. In the jurisdictional provisions of the Brussels II*ter*-Proposal the introduction of the *forum necessitatis* is based on this same concern. See Article 7a, introduced in Council Document No. 13445/07 JUSTCIV 250 of 3 October 2007, p. 6.

[137] Article 20b-1 on the application of the law of the forum; see Council Document No. 9712/08 JUSTCIV 106 of 23 May 2008, p. 15.

[138] De Boer 2008a, p. 336. See also Silberman 2008, p. 2012.

applies to situations in which the applicable law does not provide for divorce at all.[139]

In the Council this provision has been a subject of debate, considering the following extract: '[F]uture work shall examine whether it would not be necessary to expressly indicate that the lex fori shall apply where […] the foreign law does not provide for divorce.'[140] As the provision has been maintained until the last Council draft on the Brussels II*ter*-Proposal, it was apparently deemed necessary to expressly indicate that the *lex fori* applies if the applicable law does not provide for divorce.[141]

However, should not the reference to a legal system which does not provide for divorce simply be accepted as a consequence of the choice of law system? The choice of law system of the Brussels II*ter*-Proposal offers the parties the opportunity to choose the law applicable to their divorce, by which they can designate a legal system which does provide for divorce.

If such a provision is deemed necessary at all, a more just solution to this problem would be to proceed to the next alternative connecting factor provided for by Article 20b and not automatically to the *lex fori*. This solution implies a less fierce disruption of the neutral foundation of the unified choice of law on divorce on the principle of the closest connection.

Another attempt to further the role of the *lex fori* in divorce proceedings was made by the French delegation, proposing to introduce a facultative choice of law:

1. In the absence of a choice pursuant to Article 20a, where neither of the parties has requested application of another law, lex fori shall apply.
2. If either of the spouses has requested application of another law, divorce and legal separation shall be subject to the following law:
   a. the law of the spouses' common habitual residence or, failing that,
   b. the law of the spouses' common nationality or, failing that,
   c. the law of the spouses' last common habitual residence, insofar as one of them still resides there or, failing that,
   d. the lex fori.[142]

This proposal would allow the courts, in the absence of a *professio iuris*, to apply the *lex fori* as long as neither party has requested the application of the law

[139] In Council Document No. 7144/07 JUSTCIV 47 of 9 March 2007 the Presidency suggests 'a recital clarifying that the provision covers cases where the applicable law does not know the concept of divorce *at all* […]' (emphasis added). The Council draft on the Brussels II*ter*-Proposal of 23 May 2008 added such recital in No. 9b of the Preamble: '[W]here the Regulation refers to the fact that the applicable law does not provide for divorce, this should be interpreted in such a way that the applicable law does not know the concept of divorce at all'.

[140] Guidelines of the Presidency of the Council, Council Document No. 8549/07 JUSTCIV 91 of 17 April 2007, para 19.

[141] Yet again the impossibility to examine the comments of the delegations of the Member States on the Brussels II*ter*-Proposal as part of the negotiations in the Council obscures the true motives.

[142] Council Document No. 6258/07, to know from Council Document No. 7144/07 JUSTCIV 47 of 9 March 2007, p. 9, footnote 2.

designated by Article 20b.[143] The advantage of this system is that the application of foreign law can be omitted if neither party has invoked that law and, often, the application of foreign law is quite a job.[144] However, there are several objections that can be raised against the doctrine of facultative choice of law. Most importantly, the doctrine of facultative choice of law would affect the basic premise of the choice of law, i.e. both forum law and foreign law are eligible for application.[145] Moreover, the doctrine of facultative choice of law would equally harm the principle of the closest connection, on which the common choice of law rules are based.

The French proposal on the introduction of a facultative choice of law on divorce in the European Union was removed from the last Council draft of 23 May 2008.

The systematic application of the *lex fori* to any (international) divorce certainly has its advantages: its simplicity and effectiveness contribute to a fast settlement of the case and to a correct application of the divorce law.[146] Yet starting from the principle of the closest connection these advantages cannot convince. In the first place, the systematic application of the *lex fori* disturbs the presumed equality of local and foreign law, which is generally acknowledged as one of the premises of private international law. Furthermore, recourse to a mechanical and inflexible rule that does not take into consideration the specific circumstances of the case — other than the place where the court is seised — seems inappropriate in terms of the *rationale* of the principle of the closest connection behind the application of a particular law.[147]

However, the application of the *lex fori* as a last resort option for cases where the other connecting factors are not applicable, as proposed in Article 20b, is appropriate. The *lex fori* can, if it is seen in connection with the jurisdictional rules of the Brussels II*bis*-Regulation, be considered to represent the necessary close connection.

5.5.3.4 *Ex Officio* Authority?

Does the competent court have *ex officio* authority to apply Article 20b of the Brussels II*ter*-Proposal, provided that the parties fail to make a *professio iuris* and do not even plead the application of a certain law pursuant to Article 20b of the Brussels II*ter*-Proposal? This seems to be presupposed in the Proposal.

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[143] See in general on facultative choice of law: De Boer 1996; Mostermans 2004.

[144] See further *infra* Sect. 5.6 on the difficulties surrounding the application of foreign law.

[145] See further *infra* Sect. 6.5.3.2, where the question whether the field of a European choice of law on divorce is suitable for a facultative choice of law will be elaborated upon.

[146] Cf., e.g., De Boer 1996, pp. 304–308; Gaertner 2008, p. 215 ff.

[147] See e.g. North 1980, p. 82 ff; Rüberg 2005, p. 112 ff; Pertegás 2007, pp. 321–326; Looschelders 2008, p. 349.

However, the Member States' traditions strongly vary on this point.[148] There is a difference in particular between common law countries — where foreign law is to a certain extent on the same footing as the facts — and civil law countries — where the general approach is that the court applies the choice of law rules and foreign law *ex officio* (on the basis of the principle of *ius curia novit*).[149] There are, moreover, numerous variations of both approaches. But the question is whether the Brussels II*ter*-Proposal entails an implicit obligation to apply the choice of law and foreign law *ex officio* or whether this is still an issue of national civil procedure.[150]

The fact that the proposed choice of law rules on divorce will be part of a regulation implies that these rules should be applied *ex officio*. As seen in the previous chapter, a regulation has as main characteristic that it is binding in its entirety and directly applicable in all Member States.[151] Furthermore, the principle of solidarity contained in Article 4(3) second sentence EU-Treaty would require that courts apply foreign law *ex officio*.[152] From these characteristics one can conclude that the unified European choice of law rules is to be applied *ex officio*.[153] In addition, the uniform application of the common choice of law rules in all Member States equally requires the *ex officio* authority of the courts to apply the common rules.[154]

Moreover, does the competent court have the authority to assess whether the connecting factor to which Article 20b refers actually provides for a substantial connection? The same can be asked for the *professio iuris* of Article 20a.[155]

The choice of law rule of Article 20b is based on the approach of the closest connection. Obviously, the connecting factors as laid down in Article 20b are

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[148] Cf., Fiorini 2008, p. 197; Kreuzer 2008, p. 6 ff.

[149] See for an elaborate comparative analysis: Geeroms 2004. See also Hausmann 2008.

[150] Cf., with regard to the Rome II-Regulation, Kramer 2008, pp. 414–424, spec. at pp. 418–419. A Commission Statement attached to the Rome II-Regulation provides that the Commission, being aware of the differences in this regard between the Member States, will publish at the latest 4 years after the entry into force of this Regulation a horizontal study on the application of foreign law in civil and commercial matters, and take appropriate measures if necessary. Such study would, therefore, also encompass the application of foreign law in the field of family law. See also Communication from the Commission to the European Parliament and the Council, An area of freedom, security and justice serving the citizen, COM(2009) 262 final, p. 12: '*the proper functioning of the European judicial area sometimes requires a national court to apply the law of another Member State. The Union must consider how to avoid the current disparity in practices in this area*'.

[151] See *supra* Sect. 4.4.4.3.

[152] Cf., with regard to Article 10 EC-Treaty Jänterä-Jareborg 2003, p. 367 ff.

[153] See also Kreuzer 2008, p. 6 and pp. 8–9.

[154] Cf., Siehr 2008, p. 86: '*Denn was nützt eine schöne Vereinheitlichung, wenn das vereinheitlichte Kollisionsrecht und das anwendbare Privatrecht in den Mitgliedstaaten unterschiedlich gehandhabt werden?*'

[155] Cf., *supra* Sect. 5.5.2.4 with regard to the question how to ensure that the *professio iuris* is an accurate reflection of the intentions of the parties.

solely an assumption of a close connection.[156] However, what happens if the spouses are more closely connected to the country of their common nationality, even though they have their common habitual residence elsewhere? On the basis of Article 20b of the Brussels II*ter*-Proposal the court should in this case apply the law of the country of the common habitual residence of the spouses. But this seems to contravene the principle of the closest connection.

The Council has only dealt marginally with this issue. As seen above, the question of multiple nationalities has been left to the national law of the Member States.[157] There will most certainly be more cases in which the circumstances of the case justify the assumption that the case is more closely connected to another country than the one designated by the choice of law rules. For example a person can very well be estranged of his country of origin: in such a case the connecting factor of nationality does not reflect a close connection. Moreover, should the specified effective nationality of a person also be submitted to an authenticity test in order to determine whether or not the connection to the country of this nationality provides for the necessary close connection? The Brussels II*ter*-Proposal does not provide for any mechanism to adjust the result of the reference of the case according to Article 20b.

Since the absence of answers to these issues will not be too conducive to legal certainty and predictability, the European legislature has to respond to them. Otherwise Member States might be inclined to interpret the rationale of the choice of law in such a way that it will support their own preferences. An interference of the European Court of Justice then has to be awaited in issues resulting from such lack of clarity for uniformity to arise.

Article 20b of the Brussels II*ter*-Proposal would benefit from the insertion of an extra paragraph stipulating that 'where it is clear from all the circumstances of the case that the divorce is manifestly more closely connected with a country other than that indicated in paragraph 1, the law of that other country shall apply'.[158] On the one hand, such a correcting mechanism carries the risk with it as regards legal certainty and predictability, but, on the other hand, it would imply a just adjustment of the result of the connection with a certain legal system in the light of the principle of the closest connection.[159] Even though such a correcting mechanism leaves a considerable margin of appreciation to the national courts of the Member States, it does imply a just interpretation of the regulation from the perspective of the principle of the closest connection. It is beyond doubt that such manifest closer connection should not be assessed on the basis of substantive law concerns, but exclusively on the basis of factual and geographical factors. Consequently, this

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[156] Cf., Rüberg 2005, p. 173.

[157] Supra Sect. 5.5.3.2.

[158] Cf., Article 4(3) of the Rome I-Regulation and Article 4(3) of the Rome II-Regulation. See equally Kohler 2008b, p. 195.

[159] See also Rüberg 2005, p. 188 ff, who considers such correcting mechanism as a means to provide for '*Einzalfallgerechtigkeit*', i.e. the means to ensure justice at individual level.

correcting mechanism should have a reasonably high threshold in order to displace the otherwise applicable law: it should be demonstrated that the particular case has only a very slight connection to the law designated as applicable and has a much closer connection to another law. If necessary, the European Court of Justice can adjust possible excesses committed by national courts of the Member States.

Finally, the Brussels II*ter*-Proposal does not contain any provision for situations in which the applicable law is the law of a state with more than one legal system. For example, Article 20b of the Brussels II*ter*-Proposal may designate 'American' law as the applicable law. However, there is no 'American' divorce law, as each State of the USA autonomously provides for substantive divorce law.

The Council proposed to introduce a special provision on this issue in Article 20f:

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of divorce and legal separation, each territorial unit shall be considered as a State for the purposes of identifying the law applicable under this Regulation.
2. A Member State within which different territorial units have their own rules of law in respect of divorce and legal separation shall not be required to apply this Regulation to conflicts solely between the laws of such units.[160]

This provision is certainly a valuable addition, as it provides for clarity and legal certainty and ensures a more uniform application of the choice of law rules throughout the European Union.

5.5.4 Date of Reference

The connecting factors of the original Brussels II*ter*-Proposal are not completed with a date of reference. Both the Council and the European Parliament have filled this gap and completed the choice of law rules with a date of reference.

In case of a *professio iuris* the habitual residence or the nationality of either spouse needs to be present at the time of the conclusion of the agreement.[161] This date of reference is fairly strange, as the agreement on the law applicable to divorce can be concluded already before divorce proceedings have commenced (Article 20a(2) Brussels II*ter*-Proposal). The existence of the connection to the habitual residence or to the nationality of either spouse is thus not reviewed at the time of the divorce, but at the time of the conclusion of the agreement. However, possibly the spouses do no longer have any connection to the chosen law at the time of the divorce. The application of the chosen law will then conflict with the principle of the closest connection. From the perspective of the latter principle the time the court is seised would be a better date of reference.

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[160] See the Council draft on the Brussels II*ter*-Proposal of 23 May 2008.

[161] See Council Document No. 9712/08 JUSTCIV 106 of 23 May 2008, pp. 12–13; and the Legislative Resolution of the European Parliament of 21 October 2008, A6-0361/2008, Amendments 18–22.

With regard to the law applicable to divorce in the absence of a *professio iuris* the habitual residence or nationality of either spouse needs to be present at the time the court is seised.[162]

The addition of a date of reference is generally a good proposal. A fixed date of reference will provide for more clarity and, hence, have a favourable effect towards strengthening legal certainty and the predictability of results.

5.5.5 *The Law Applicable to Divorce: Synthesis*

The alternatives out of which spouses can choose pursuant to Article 20a are hardly different from the laws that would apply according to Article 20b in the absence of a choice.[163]

According to Article 20a the parties can choose the law of the last common habitual residence, if one of the spouses still lives there, the law of the common habitual residence, the national law of either spouse or the *lex fori*. If the spouses have not made a *professio iuris* according to Article 20a, the law applicable to divorce is determined on the basis of the scale of connecting factors of Article 20b. In the latter situation the divorce is governed by the law of the country of the common habitual residence of the spouses, or failing that, by the law of the country of their last common habitual residence insofar as one of them still resides there. In the absence of both these connecting factors, the law of the common nationality of the spouses applies. If the spouses do not have a common nationality either, the law of the forum (*lex fori*) is designated.[164]

A comparison of these provisions shows that Article 20a allows the parties to choose the national law of *either* spouse, while Article 20b refers to the *common* national law of the parties.[165] The main difference is that the parties may choose a law that would not be applicable under Article 20b, either because they have chosen an alternative that would not be the primary law in the absence of a *professio iuris*, or because the circumstances at the time of the choice were distinct from those at the time of divorce.

5.6 The Application of Foreign Law

The proposed choice of law rules of the Brussels II*ter*-Proposal can lead to the application of foreign law. The application of foreign law can result either from a valid *professio iuris* pursuant to Article 20a or from the cascade rule of Article 20b.

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[162] See Council Document No. 9712/08 JUSTCIV 106 of 23 May 2008, p. 14; and the Legislative Resolution of the European Parliament of 21 October 2008, A6-0361/2008, Amendments 27–29.

[163] See equally De Boer 2008a, p. 330.

[164] See *supra* Sects. 5.5.2 and 5.5.3, respectively.

[165] See further on Article 20b *supra* Sect. 5.5.3.

According to the Commission the application of the law designated by Article 20b will in most cases coincide with the *lex fori*:

> [T]he fact that the rule is based in the first place on the habitual residence of the spouses and, failing that, on their last common habitual residence if one of them still resides there will result in the application of the law of the forum in the majority of cases.[166]

However, Article 20b does not preclude the application of foreign law.[167]

In every cross-border case in which foreign law is designated the court is faced with the problem that it is generally not acquainted with the content of the foreign law. From the point of view of those Member States that systematically apply the *lex fori* to any divorce, the application of foreign law is surrounded by several disadvantages. In the first place, it will take much longer to settle cases as the court needs to inquire thoroughly into and understand the content of the foreign law. Moreover, the costs of the proceedings will increase significantly. The settlement rates will furthermore decrease because of the uncertainty and unpredictability that is strongly connected with the lack of knowledge of the foreign law.[168] Finally, in many countries substantive law and procedural law are strongly interconnected: the choice of law rules refer to the application of substantive law only. Consequently, courts have to apply the substantive law of the country with which the couple has the closest connection, but will apply their own procedural law to the case.[169]

There is no denying that the listed disadvantages certainly hold an element of truth: ascertaining the content of and applying foreign laws may be a long, costly and difficult process.[170] There may therefore be merit in the simple and pragmatic approach of systematically applying the *lex fori*. Yet this cannot be a reason to abandon the principle of the closest connection.

Article 20c of the Brussels II*ter*-Proposal contains a provision on the application of foreign law, which determines that the court may make use of the European Judicial Network where the law of another Member State is applicable. The Council deleted this provision in its drafts of the Brussels II*ter*-Proposal and it suggested that it be removed to a recital.[171]

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[166] Explanatory Memorandum to the Brussels II*ter*-Proposal, p. 10.

[167] See also Kohler 2008a, p. 1678.

[168] See Hodson 2008b, p. 10. See also Gaertner 2006, p. 107 ff; and the report of April 2009 of the British Centre for Social Justice, 'European Family Law: Faster Divorce and Foreign Law', p. 16 ff, available at: www.centreforsocialjustice.org.uk.

[169] See Hodson 2008a, p. 177.

[170] See equally Fiorini 2008, pp. 188–189.

[171] Council Document No. 5274/07 JUSTCIV 4 of 12 January 2007, p. 8. See recital No. 10c of the Preamble to the Brussels II*ter*-Proposal.

5.7 Public Policy Exception

The proposed choice of law rules of the Brussels II*ter*-Proposal are meant to have universal application. The choice of law rules could, therefore, lead to the reference to the law of either a Member State or a third country. Consequently, the problems described above in relation to the public policy exception with regard to the Dutch choice of law rules on divorce, can occur *mutatis mutandis* in relation to the public policy exception in European context.[172] These problems mainly occur in relation to non-Western legal systems: the principle of equality between men and women clashes fairly often with certain non-egalitarian rules of Islamic law. Repudiation is the most significant example in this respect.

The Brussels II*ter*-Proposal contains the following public policy exception in Article 20e:

> The application of a provision of the law designated by this Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum.

The wording 'manifestly incompatible' expresses that the public policy exception must be seen as an *ultimum remedium*.[173]

Article 20e of the Brussels II*ter*-Proposal refers to the public policy notion of the forum. However, the national approaches to the public policy exception differ greatly from one Member State to another. Practice in certain Member States shows that more restrictive foreign laws are excluded through the application of the public policy exception. It is also not inconceivable that courts from more 'conservative' Member States would equally rely on their public policy exception to exclude the application of very liberal foreign divorce laws.[174]

Kreuzer argued that the current differences in application of the public policy exception between the Member States are to diminish with the development of the jurisprudence of the European Court of Justice and the European Court on Human Rights.[175] But in such a sensitive area as divorce, where the substantive laws of the Member States are based on conflicting policies,[176] the differences in the application of the public policy exception could very well prove to be persistent.

Consequently, doubts can be cast on how the reference to the public policy exception of the forum state could lead to uniform decisions.[177] Two possible solutions to this problem are suggested.

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[172] See *supra* Sect. 2.5.

[173] Cf., De Boer 2008b, p. 296.

[174] See Romano 2006, pp. 500–501.

[175] Kreuzer 2008, p. 46.

[176] See *supra* Sect. 5.2.1.

[177] See equally Cadet 2004, p. 9: '*l'application de l'exception d'ordre public risque de se développer, mettant en péril les objectifs d'espace judiciaire unifié au sein de l'Union européenne*'.

The first alternative would be to refer to the European public policy exception. However, does such exception exist? In other words, is there a distinct category of *European* values and interests, or do the values and interests of each Member State coincide with those of the European Union?

The European Union system does have its own public policy that is formed by the fundamental freedoms, European citizenship, human rights and the principles of non-discrimination and subsidiarity.[178] But it is not clear whether or not there is a specific European public policy requiring the defence of European values and interests, to the extent that they do not coincide with those of the forum.[179] Yet with regard to divorce the content of the European *ordre public* is highly uncertain.[180]

The reference to a European public policy exception would have the advantage that the European Court of Justice can provide for a uniform interpretation of this concept.

The second alternative suggested in literature is for the Member States to reach a basic agreement on what can and cannot constitute a 'manifest incompatibility' with the public policy in the sense of Article 20e Brussels II*ter*-Proposal.[181] However, such an agreement does not seem to be very realistic, given the strongly diverging views on the concept of divorce in the various Member States.

One of the most far-reaching agreements in this respect is to envisage the impossibility for the courts of a Member State to invoke its public policy exception as to refuse to apply the law of another Member State: e.g. 'the application of a provision of the law of a Member State designated by this Regulation shall not be refused on the ground of public policy.'[182] In an area of freedom, security and justice the exclusion of the public policy exception in cases in which the law of a Member State is designated as the applicable law would mean a major step forward, as it would express a deep-rooted belief in the fundamental fairness of the divorce laws of the Member States.[183] In fact, such a definition would imply that the public policy exception of Article 20e of the Brussels II*ter*-Proposal can only be invoked in cases in which the law of a third country is designated as the applicable law.[184] Yet it is highly questionable whether such a definition can be

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[178] See on this issue: Thoma 2007, p. 120 ff; Reichelt 2007, pp. 7–11. Cf., ECJ case C-7/98 *Krombach* v. *Bamberski* [2000] ECR I-01935.

[179] Cf., De Boer 2008b, p. 328.

[180] See equally Kroll 2007, p. 335. See generally on the European public policy in choice of law matters: Basedow 2004.

[181] See also Martiny 2006, p. 132; Jänterä-Jareborg 2008, p. 339.

[182] Cf., Leible 2009, pp. 68–69.

[183] See Meeusen 2008, pp. 332–333.

[184] The Commission Proposal for the Maintenance Regulation contained such a provision, COM(2005) 649 final. Article 20 of this proposal stipulated: '[T]he application of a provision of the law designated by this Regulation may be refused only if such application is manifestly incompatible with the public policy ('*ordre public*') of the forum. *However, the application of a provision of the law of a Member State designated by this Regulation shall not be refused on such a ground*' (emphasis added). This provision has, however, disappeared since the law applicable to maintenance obligations is removed from the Maintenance Regulation and is instead determined by the Hague Protocol on the law applicable to maintenance obligations.

reached between the Member States considering the delicate issues surrounding divorce, e.g. the issue of same-sex marriages, the impossibility to dissolve a marriage pursuant to Maltese law and the concept of fault-based divorce recognised in a number of Member States.[185] Furthermore, the Member States cannot be expected to apply the law of another Member State if this would violate their national fundamental values.[186]

The subsequent question to be answered is what happens if the public policy exception of Article 20e is successfully invoked? Can the competent court apply the *lex fori* or is it required to proceed to the next alternative connecting factor?

In order to prevent the problem described above of courts applying the public policy exception so as to apply their own more liberal or restrictive divorce law, the competent court should only fall back on the *lex fori* if it is the only acceptable solution.[187]

To sum up, one can conclude that the protection of the current provision on public policy is uncertain, as it leaves (too) much room to the national preferences of the Member States.

5.8 Does the Proposal Attain the Objectives as Set Out by the Commission in the Explanatory Memorandum to the Brussels II*ter*-Proposal?

In Section 5.3 above the five objectives the Brussels II*ter*-Proposal attempts to attain have been set forth. Below the question whether these objectives are actually attained with the proposed choice of law rules will be analysed.

- *Providing for a Clear and Comprehensive Legal Framework*

This objective is very ambitious and is not attained by the Brussels II*ter*-Proposal.

The exclusion of a certain type of marriage in advance, i.e. same-sex marriages, implies that a solution is found only for the dissolution of a — albeit large — part of the existing marriages. As mentioned above, the exclusion of same-sex marriages seems to contradict the overall objective of the Brussels II*ter*-Proposal to provide for a comprehensive legal framework in matrimonial matters in the European Union: a solution is not found for all marriages.[188] Consequently, the existing problems resulting from the lack of unified rules on the law applicable to divorce as indicated by the Commission will continue with regard to the

[185] See Working Document on the law applicable in matrimonial matters of the European Parliament of 21 June 2007, p. 6.

[186] Cf., De Boer 2008b, pp. 323–325.

[187] See Kreuzer 2008, pp. 46–47.

[188] Recital No. 5 of the Preamble to the Brussels II*ter*-Proposal. See further *supra* Sect. 5.4.2.

dissolution of same-sex marriages, be it on a smaller scale given the fact that currently solely three Member States provide for same-sex marriages in their legislation.[189]

Moreover, considering the substantial number of obscurities surrounding the Brussels II*ter*-Proposal, the legal framework can hardly be considered to be clear. To name a few, the issues of multiple nationalities, of *ex officio* authority of the courts, of the application of the public policy exception of the forum and of the definition of the concept of habitual residence have incited to quite some debate and no (satisfying) answer is found to solve these issues.

- *Strengthening Legal Certainty and Predictability*

The proposed choice of law rules of the Brussels II*ter*-Proposal ensure that in principle in all Member States the same law is applied to an international divorce in the European Union, irrespective of which court is seised. Consequently, it can definitely be said that the Brussels II*ter*-Proposal attains the objective of strengthening legal certainty and predictability.

However, the achievement of this objective is relatively limited: the outcome of a case can only be predicted once a specific jurisdiction has been seised. The common choice of law rules on divorce cannot achieve uniform results if the case can be brought before the courts of both an EU-Member State and a third country. Certainty and predictability can thus only be ensured in intra-European cases, in which the requesting party has no access to a court outside the EU.[190]

Furthermore, equally the lack of a common approach to general issues, such as the application of foreign law and the public policy exception, does constitute an obstacle for the attainment of this objective.[191] The fact that the Member States can follow their own approach to such issues does not strengthen legal certainty, since it involves less predictability for the parties concerned. As a result, the proposed choice of law rules on divorce of the Brussels II*ter*-Proposal is not yet truly crystallised.

Legal certainty and predictability in international divorce cases are, finally, not only dependent on the law applicable to divorce. Legal certainty and predictability imply that parties know which law will govern their divorce and the consequences thereof. Consequently, ancillary matters, such as parental responsibility and

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[189] Belgium, the Netherlands, Sweden and Spain provide for same-sex marriage. Some other Member States, among which Portugal, currently consider the introduction of same-sex marriage. Yet, there are also a few Member States, such as Latvia, Lithuania and Poland that are strongly opposed to same-sex marriage.

[190] Cf., De Boer 2009, p. 302.

[191] Such open questions need not necessarily all be clarified in the legislative act itself. One could in this respect envisage the development of a more elaborate Explanatory Memorandum or a 'Guide to Good Practice' accompanying the legislative act. Cf., thesis No. 6 appended to Knot 2008: '*Europese wetgeving op het gebied van het internationaal privaatrecht dient, wil het ooit de kwaliteit van de in het kader van de Haagse Conferentie tot stand gebrachte verdragen benaderen, te worden voorzien van een uitgebreide(re) toelichting; dit komt de rechtszekerheid ten goede*'.

maintenance obligations, are of equal importance when it comes to legal certainty and predictability in international divorce cases.[192] However, the scope of the Brussels II*ter*-Proposal is limited to divorce and does not cover its consequences.

- *Increasing Flexibility*

By introducing a limited degree of party autonomy, the Brussels II*ter*-Proposal has definitely increased flexibility. By means of the *professio iuris* introduced by Article 20a spouses are offered the opportunity to choose the law applicable to their divorce.

Because the possibilities out of which the spouses can choose are limited, the spouses are not offered full flexibility. The limitation of the *professio iuris* is well reasoned: there should be a (close) connection between the divorce in question and the law to be applied.

Consequently, the Brussels II*ter*-Proposal succeeds in increasing flexibility.

- *Ensuring Access to Court*

The fourth objective of the Brussels II*ter*-Proposal seeks to improve access to court in matrimonial proceedings. In this respect reference is made to the possibility to choose the competent court in divorce cases and to the introduction of a uniform and exhaustive rule on residual jurisdiction.

However, as both these matters fall outside the scope of this study, they have not been analysed in-depth. Therefore, it is impossible to ascertain whether the proposed rules of the Brussels II*ter*-Proposal have attained this objective.

- *Preventing a 'Rush to Court'*

The proposed choice of law rules ensure that, wherever the spouses file their petition for divorce, the courts of a Member States will normally apply the same substantive law. Consequently, the risk of forum shopping for a (more) favourable substantive divorce law is severely limited. The Brussels II*ter*-Proposal has largely shut the door to forum shopping as regards the applicable law to divorce.

But, as argued in Section 4.3.1 above, forum shopping mostly occurs if a great deal of money is involved. With respect to divorce, forum shopping will mostly arise for ancillary claims, such as maintenance obligations and the division of matrimonial property. Therefore, forum shopping in matrimonial matters is likely to continue as long as the choice of law rules on maintenance obligations and on matrimonial property have not been unified.[193]

It can, consequently, be stated that the Brussels II*ter*-Proposal can only partly attain the specified objective of preventing a 'rush to court', as the lack of uniform

[192] See equally Fiorini 2008, p. 194.

[193] For both these fields of law legislative measures on the European level are in the pipeline. See Maintenance Regulation and Green Paper on Matrimonial Property. The Maintenance Regulation will most probably apply from 18 June 2011 (cf., Article 76 of the Maintenance Regulation).

rules applicable to the consequences of the divorce will lead to a continuing rush to court and to forum shopping.[194]

Overall, the conclusion is that the Brussels II*ter*-Proposal does achieve its objectives quite well. However, some of the objectives set by the Proposal seem too ambitious to be attained by this single instrument.

5.9 Conclusion

This chapter contains an analysis of the proposed choice of law rules on divorce of the Brussels II*ter*-Proposal.

The Brussels II*ter*-Proposal provides in Article 20a for the opportunity for the spouses to choose the law applicable to their divorce. This *professio iuris* is limited to a number of legal systems that (are deemed to) express a close connection. The *professio iuris* is also formally limited: both the form and the time of the agreement are bound to specific requirements.

In the absence of *professio iuris* pursuant to Article 20a by the parties, the applicable law to divorce is determined by Article 20b of the Brussels II*ter*-Proposal. The latter Article contains a cascade rule entailing in the first place the application of the law of the common place of habitual residence of the spouses. In the absence of a common place of habitual residence, Article 20b refers to the law of the last common place of habitual residence of the spouses insofar as one of them still resides there. In the absence of both these connecting factors, the divorce is governed by the common national law of the spouses. If the spouses do not have a common nationality either, the *lex fori* will apply.

The analysis of the choice of law rules of the Brussels II*ter*-Proposal has shown that there are still many difficulties to be clarified. The fact that quite a number of issues are left to national law is not very conducive to clarity and legal certainty.

The Brussels II*ter*-Proposal aspired to attain five objectives: providing for a clear and comprehensive legal framework, strengthening legal certainty and predictability, increasing flexibility, ensuring access to court and preventing a rush to court. The Brussels II*ter*-Proposal succeeds quite well in attaining these objectives. However, some of the objectives set by the Proposal seem too ambitious to be attained by this single instrument: as no choice of law rules on the consequences of divorce are established, legal certainty and predictability are not entirely strengthened and a rush to court and forum shopping for the latter issues will continue.

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[194] The European Economic and Social Committee has suggested to deal with all consequence of divorce in one single instrument; see its Opinion on the Proposal of 13 December 2006, SOC/253, n. 4.3. See equally Fiorini 2008, p. 195. See further *infra* Sect. 8.2.3.

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