PROPERTY AND CROSS-BORDER COUPLES FROM THE PERSPECTIVE OF EUROPEAN REGULATION

RÉGIMEN ECONÓMICO Y PAREJAS TRANSFRONTERIZAS DESDE LA PERSPECTIVA DE LA REGULACIÓN EUROPEA

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ABSTRACT: The family property regimes constitute a relevant sector of the EU regulatory framework strongly connected with fundamental rights policies. Family property offers specific issues which need to balance individual rights with general interests, especially in matter of real estate property. The fragmentation of the discipline in EU Family law, the diversity of the domestic rules regarding rights in rem requires a large use of flexibility from EU legislator and EU legal professionals. The discipline provides by EU Regulations 1103 and 1104/2016 could be an interesting example to manage cross-border couple's interests: the principles of universality and unity have to be used appropriately and, in some case, the best solution is "retraction" and "adaptation" of domestic legal framework.

KEY WORDS: Property; family; property regimes; cross-border couples.

RESUMEN: *Los regímenes económico-matrimoniales constituyen un sector relevante de la regulación de la Unión Europea conectado fuertemente con los derechos fundamentales. El régimen económico-matrimonial presenta problemas específicos que necesitan equilibrar derechos individuales con intereses generales, especialmente en materia de propiedad inmobiliaria. La fragmentación de la disciplina en Derecho de Familia de la UE y la diversidad de las reglas nacionales en relación con los derechos reales, requiere una gran flexibilidad por parte del legislador de la UE y los profesionales de la UE. La regulación proporcionada por los Reglamentos UE 1103 y 1104/2016 pueden ser un ejemplo interesante de cómo gestionar los intereses de parejas transfronterizas: Los principios de universalidad y unidad deben ser utilizados de forma apropiada y, en ciertos casos, la mejor solución es "retracción" y "adaptación" del sistema legal nacional.*

PALABRAS CLAVE: *Propiedad; familia; régimen económico; parejas transfronterizas.*

I. PROPERTY AND FAMILY BETWEEN "RETRACTION" AND ADAPTATION.

The topic of immovable property becomes extremely intricate when studied in the light of the European regulatory framework devoted to cross-border couples. The international nature of the legal relationship, determined by the existence of different nationalities, or of habitual residence in a State other than the one of origin, complicates the determination of the extent to which couples can choose the applicable law as opposed to rules whose application is mandatory. The criteria for identifying the applicable law come into play, which, within the European territory, increasingly tend to become more uniform, pushing those that have to interpret them to identify harmonised notions of categories belonging to private international law, such as residence[1], citizenship[2] or public policy (*ordre public*)[3]. In such an environment, the concept of property combined with that of family seems to interact in a peculiar manner, determining a sort of "retraction"[4] by the European legislation, and, at the same time, a necessary adaptation by the

1 On this subject, cf. Giobbi, M.: "The concept of «habitual residence»", in Cazorla González, M.J., Giobbi, M., Kramberger Škerl, J., Ruggeri, L. and Winkler, S. (ed.): *Property relations of cross border couples in the European Union*, Napoli, 2020, p. 75 ff.

2 On this topic see, among others, Salerno, F.: "I criteri di giurisdizione comunitari in materia matrimoniale", *Riv. dir. int. priv. proc.*, 2007, p. 63.

3 The discussion on the role of public policy is very broad. Regarding the need to link this institute with the principles of fair trial, see, among others, Trocker, N.: *La formazione del diritto processuale europeo*, Torino, 2011, p. 77; Boschiero, N.: "L'ordine pubblico processuale comunitario ed "europeo", in De Cesari, P. and Frigessi di Rattalma, M. (ed.): *La tutela transnazionale del credito*, Torino, 2007, p. 163 ff.; De Cristofaro, M.: "Ordine pubblico "processuale" ed enucleazione dei principi fondamentali del diritto processuale "europeo", in Colesanti, V., Consolo, C. and Gaja, G. (ed.): *Il diritto processuale civile nell'avvicinamento giuridico internazionale. Omaggio ad Aldo Attardi*, II, Padova, 2009, p. 893; Normand, J.: "Le rapprochement des procédures civiles à l'intérieur de l'Union européenne et le respect des droits de la défense", in Perrot, R.: *Nouveaux juges, nouveaux pouvoirs?: Mélanges en l'honneur de Roger Perrot*, Paris, 1996, p. 337; Rouhette, G.: "Sur l'harmonisation du droit du procès civil au sein de l'Union Européenne", *Justice*, 1995, no. 2, p. 365.

4 Property is not affected just by the cultural tradition of an individual State, but it is often considered as a value that is independent of legal recognition, assuming its own value and immanence. Consider, in this regard, the discussion that arose in Italy on the topic of "recognition" of private property provided for

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national legal system: property[5] and family[6] are, in fact, affected by the legal culture in which they operate, generating regulatory peculiarities.

Family matters, which are sensitive to the culture and tradition of individual Member States, are expressly considered in Article 81 of the Treaty on the Functioning of the European Union, which provides that rules in this context are adopted on the basis of unanimously taken decisions[7]. Unanimity guarantees common ground for the adoption of rules that every Member State would see as conforming to its own legal tradition, but, at the same time, it constitutes a certain obstacle to the adoption of legislation, as demonstrated in the case of Regulation Rome III concerning divorce. In fact, according to Article 81.3 TFEU, if it is not possible to achieve unanimity on a proposal for a regulation relating to family matters, a "*passerelle*" clause can be activated, which means a mechanism that allows for the adoption of a regulation by majority, provided that this step is unanimously accepted. As is well known, the vetoes imposed by States that did not provide for divorce, or that, on the contrary, feared having to adopt rules on divorce in their courts, which were too stringent compared to the national ones[8], prevented adoption by majority and for the first time forced the use of the enhanced cooperation procedure in a family context[9].

Another obstacle to the application of the "*passerelle*" clause is the difficulty in qualifying a given matter as undoubtedly and exclusively family related. An example is the Regulation on the creation of a European Certificate of Succession which has been excluded from the scope of Article 81.3, and brought back to Article 81.2, as if succession matters were completely extraneous and separate from family

in Article 42 of the Constitution. On this subject, see Perlingieri, P.: *Introduzione alla problematica della «proprietà»*, Napoli, 1971, p. 9.

5 For more on property in the light of the European Convention of Human Rights, and the Community regulation currently in force, see Fragola, M.: *Limitazioni e contenuto minimo della proprietà nel sistema italo-europeo*, Napoli, 2002, pp. 139-155. On this subject, see also Perlingieri, P.: "La funzione sociale della proprietà nel sistema italo-europeo", *Corti salernitane*, 2016, p. 175.

6 The topic of family taxonomy discrepancies is analysed in Garetto, R. (ed.): *Report on Collecting Data. Methodological and Taxonomical Analysis*, Torino, 2019, pp. I-III and 1-29.

7 On the basis of Article 81.3, subparagraph 1 of the Treaty on the Functioning of the European Union "measures concerning family law with cross-border implications shall be established by the Council acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament". The impossibility of reaching unanimity could lead to the use of the "*passerelle*" clause provided for by Article 81.3, subparagraph 2. So far, only failures have been recorded in using the passerelle clause, which was attempted on the occasion of the adoption of regulations on the right to maintenance and on matrimonial property regimes. On this subject, cfr. Fiorini, A.: "Which legal basis for family law? The way forward", in *European Parliament, Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs*, 2012, p. 12 ff.

8 On this point, see Fiorini, A.: "Harmonizing the law applicable to divorce and legal separation— Enhanced cooperation as the way forward?", *The International and Comparative Law Quarterly*, 2010, no. 4, pp. 1143-1158.

9 Peers, S.: "Divorce, European style: The first authorization of enhanced cooperation", *European Constitutional Law Review*, 2010, no. 3, pp. 339–358. Fifteen States applied the enhanced procedure: Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania, Slovenia and, after 2012, Lithuania.

matters[10]. The regulatory process, which was initiated late compared to the one adopted in commercial matters, has achieved quite an amount of success, including the launch of regulations such as that on maintenance obligations[11] and those on decisions in matrimonial matters and in matters of paternal responsibility and international child abduction[12]. However, the emergence of sovereignty, growing mistrust in the European Union experienced as an obstacle to the development of individual countries, ended up affecting family legislative policies, leading, on the one hand to the withdrawal of the UK from the European Union, and, on the other hand, to a balancing of interpretations to allow a specific matter to be qualified as not necessarily a family matter. In this regard, for example, Regulation 650/2012 in matters of succession was adopted through an ordinary procedure[13] because it was considered not to be relevant to family law. The choice of procedure made according to the Regulation in matters of succession highlights a problem that deserves to be further explored: the adoption procedures provided by the Treaty on the Functioning of the European Union are based on rigid taxonomies that are difficult to use in a specific case. In reality, the partition between civil, family and succession law constitutes a theoretical classification that forces subsumption with unsatisfactory results, and which seems to be obsolete[14] given that the Stockholm programme itself places succession and succession issues and those of family property regimes in the macro-area of civil law[15]. The latter matter addressed by Regulations 1103 and 1104 of 2016, as highlighted by the legal theory[16], is used for the resolution of existential situations that individuals achieve through a communion of life and affections. This introduces a peculiarity in the legal system of property relations and justifies the adoption of rules at EU level that can be

10 On this subject, cf. Barrière Brousse, I.: "Le Traité de Lisbonne et le droit international privé", *Journal du Droit International*, 2010, no. 1, p. 33.

11 Reference is made to Council Regulation (EC) no. 4/2009 of 18th December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ L 7, 10.1.2009, p. 1).

12 Reference is made to Regulation (EU) 2019/1111 of 25th June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters of paternal responsibility, and on international child abduction, repealing, from 1st August 2022 Council Regulation (EC) no. 2201/2003, also adopted through a special procedure.

13 The adoption of the ordinary procedure was possible using the *passerelle* clause provided for by Article 81.3. On this subject, see p. 31, which mentions the project elaborated by the so-called Heidelberg Group.

14 It should be noted that an initial draft regulation concerned both family and succession matters, both of which certainly refer to the broader field of civil law. On this point, see Borrás, A.: "Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters", in *Official Journal C 221, 16/07/1998 P. 0027 - 0064*, § 7, which mentions the project carried out by the so-called "Heidelberg Group", which actually included family, property and succession profiles.

15 See the Stockholm Programme – An open and secure Europe serving and protecting citizens (2010/C 115/01), 4th May 2010, OJ C 115/13, sub 3.1.2.

16 On this subject, see Perlingieri, P.: *Profili del diritto civile*, Napoli, 1994, p. 232. With regard to the specific topic of property regimes, see Ruggeri, L.: "I Regolamenti europei sui regimi patrimoniali e il loro impatto sui profili personali e patrimoniali delle coppie cross-border", in Landini S. (ed.): *EU Regulations 650/2012, 1103 and 1104/2016: cross-border families, international successions, mediation issues and new financial assets. GoInEU Plus Project Final Volume*, Napoli, 2020, pp. 117-136.

implemented with a view to removing the obstacles preventing the full protection of the rights of cross-border couples.

The mix of property and existential profiles is the basis of the long and troubled path of adoption of Regulations 1103 and 1104 of 2016 (hereinafter: Twin Regulations). In fact, as they are devoted respectively to family property regimes and the property consequences of registered partnerships, they were not adopted by using the procedures provided for in Article 81, but, as was the case for the Rome III Regulation, by using the enhanced cooperation procedure which involved 18 States[17]. The enhanced procedure undoubtedly produces a good result[18] when no agreement is conceivable under other instruments, but its application in the matter of matrimonial regimes raises many qualms[19] due to the multiple fragmentation of the legislation determined to be used in an area for which unanimity should be the privileged path.

Among the elements that prevented unanimous adoption, we cannot fail to mention that they inevitably involve very delicate profiles of the property relationship since they must in some way establish the rules concerning the circulation of the decisions among States. This implies the consequent need to avoid the situation where the regulation in question could, to a certain extent, interfere with the national choices regarding the type and the content of rights in rem, or with the nature of disclosure in the public registers of legal events relating to property for which there is an obligation of registration under national law, or, again, with the methods of disclosure of the adopted family regimes. Indeed, when the subject of a right is immovable property, the general criteria for identifying the applicable law and the competent jurisdiction cannot always be established by adopting additional *ad hoc* rules. One example is provided by the provisions of Regulation 44/2001 (now replaced by Regulation 1215/2012) in the matter of rights in rem regarding immovable property and property rental contracts: for this type of dispute, the jurisdiction is attributed to the court in the place where the property is located, causing a deviation[20] from the general rules which, in contractual matters, base jurisdiction on the respondent's domicile. The notion of a dispute concerning rights in rem is conceived as an autonomous

17 The States that have joined this procedure are: Belgium, Bulgaria, Czech Republic, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, Netherlands, Austria, Portugal, Slovenia, Finland and Sweden. On this subject, see Bruno, P.: *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate. Commento ai regolamenti (UE) 24 giugno 2016, nn. 1103 e 1104 applicabili dal 29 gennaio 2019*, Milano, 2019, pp. 9-12.

18 V. Craig, P.: *The Lisbon Treaty: Law, politics and treaty reform*, OUP: Oxford, 2010, p. 449, according to which the enhanced cooperation procedure is based on the "hope that it will then be a catalyst and that other Member States will subscribe to such initiatives".

19 For some critical remarks about the adoption of the enhanced cooperation procedure in family matters, see Fiorini, A.: "Which legal basis for family law? The way forward", cit., p. 14 ff.

20 On the restrictive reading of this provision as exceptional with respect to the criteria of freedom of choice of the applicable law, see CJEU, 18th May 2006, ČEZ, C-343/04, ECLI:EU:C:2006:330, § 26 and 27.

notion[21] which was elaborated by the very Court of Justice through a reading and analysis procedure originating in the Brussels Convention. In an interesting decision[22], the Court of Justice was able to recognise the basis of the application of the *forum rei sitae* in the proximity of the court to the property which was the object of the dispute. This proximity makes rules, customs, and, more generally, the state of affairs on the basis of which a decision must be rendered better known, and, for this reason, in the case in question, the Court ruled that the sale of a share of a property located in Spain and encumbered by usufruct could be better considered by a Spanish judge than by a judge in Finland, the co-owners' country of origin. Disputes concerning immovable property within the jurisdiction of the court of the country where the property is located are those that have as their object the ownership or possession of immovable property or the existence of other rights in rem and which ensure the protection of prerogatives deriving from their title to the holders of these rights[23]. This is a widely shared notion: for example, in Anglo-Saxon jurisprudence regarding matters involving the actions of a bankruptcy trustee against a bankruptcy debtor, these actions are excluded from the jurisdiction of the court in the place where the property is located due to their personal nature[24]. The retraction and adaptation process, on the other hand, is less relevant regarding a debt relationship and relates to moveable property: in such a case, it is the *lex causae* chosen by the parties or identified pursuant to Article 26 of the Regulation that governs the dispute, and the judge can refer to it in rendering a decision.

II. FAMILY PROPERTY REGIMES AND RELEVANCE OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION: REASONS AND EFFECTS OF THE EXPLICIT REFERENCE INCLUDED IN RECITAL 73.

A further element that complicates this matter is the nature of the property which, in the European dimension, becomes a fundamental right expressly guaranteed by the Charter of Fundamental Rights. As highlighted in Recital 73, the provisions of the Twin Regulations must be interpreted and applied in compliance with the EU Charter, having specific regard to Article 17. In this context, the right to enjoy a property, to use it and to dispose of it, as well as to bequeath it, is

21 As established by CJEU, 3rd April 2014, Weber, C-438/12, ECLI:EU:C:2014:212, § 40. For a comment, see Debernardi, G.: "Reg. (CE) no. 44/2001: competenza giurisdizionale esclusiva e litispendenza", *Giur. it.*, 2014, p.1379 ff.; Pogorelćnik Vogrinc, N.: "Spememba Bruseljske uredbe", *Pravosodni bilten*, 2017, no. 1, pp. 207-221.

22 This refers to CJEU, 17th December 2015, Case C605/14, Komu and others, ECLI:EU:C:2015:833, § 25. See comment by Idot, L.: "Compétence exclusive en matière de droits réels immobiliers", *Europe*, 2016, no. 2, p. 41.

23 In these terms, see CJEU, ČEZ, C343/04, cit., § 29.

24 See Court of Appeal, 21th November 2000, Unanimous Opinion by Lord Parker - Pollard & Anor. v. Ashurst, *Int'l lis* 2002, 3(4), p. 135, with comment by Chizzini, A.: *Trusts fallimentari, forum rei sitae e Convenzione di Bruxelles*.

protected to such an extent that it is necessary to adopt a multiplicity of rules within the Twin Regulations to make the provisions comply with the Charter by adapting it to the need of protection provided therein[25]. The members of a cross-border couple must, in fact, face bureaucratic problems and difficulties given that their daily life takes place in countries other than those of origin[26]: in this sense, internationality determines a vulnerability that is not of an economic, but of a social and cultural nature. The knowledge of the law becomes more difficult, there is lesser understanding of the procedure, and a reduced opportunity to interact with offices and public administration; the gap in knowledge and interactions introduces the necessity to precisely identify those rights and those principles which, more than others, could be infringed in an international context.

The choice of the European legislator to include the right to property among these rights constitutes a significant novelty determined by two main factors: on the one hand, the relevance of the legal property situation in family property regimes, and, on the other hand, the necessity to comply with the Charter of Fundamental Rights even regarding the rules resulting from enhanced cooperation. As we have seen, European legislation in this matter has not been adopted unanimously, but through the new instrument provided for by the Lisbon Treaty, that is, through the enhanced cooperation procedure that involved 18 States. In this context, the reference to the protection of rights in rem has a dual purpose: a general legislative policy function, consisting of encouraging the implementation of the Charter in every area and procedure, and a more specific function, consisting of avoiding the situation where European family law fails to respect rights in rem. Moreover, at the supranational level, the European Convention for the Protection of Human Rights and Fundamental Freedoms already categorises this right among fundamental rights: for instance, Article 8 of the European Convention on Human Rights and Article 1 of the Additional Protocol of 1952[27]. Recital 73 is placed in a perspective that is only apparently different from the Italian cultural tradition that has placed the protection of property among economic relations and not among fundamental principles. Indeed, through the systematic reading of the articles of the Constitution, there are evident links between the category of having and that of being[28]: where property is working towards the realisation

25 Gambaro, A.: "Il *trust* simulato", *Trusts*, 2020, no. 5, p. 490 identifies "principles of legality and certainty of property situations enshrined in the 1st Protocol to the ECHR, and by Article 17 of the Charter of Fundamental Rights from which derogations and updates are not allowed".

26 See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Bringing legal clarity to property rights for international couples" COM (2011) 125 final of 16th March 2011, OJ 140/11.

27 Reference is made to the Additional Protocol to the European Convention on Human Rights and Fundamental Freedoms, signed in Paris on 20th March 1952.

28 This delineates so-called personal property, understood as property aimed at realising a person's dignity, Perlingieri, P.: *Introduzione*, cit., p. 6. On this topic, see Marinelli, F.: "Funzione sociale della proprietà e natura delle cose dall'«avere» all'«essere»", in Tamponi, M. and Gabrielli, E. (ed.): *I rapporti patrimoniali nella giurisprudenza costituzionale*, Napoli, 2006, p. 32.

of private or family life, it becomes the recipient of specific rules that allow, by protecting and encouraging it, for the better realisation of that communion of life and affections which integrates the founding nucleus of the couple. However, it is clear that European family law cannot fail but face different traditions and cultures, and that family and property constitute two institutes that are largely affected by the particular vision of each State. It can be derived from all this how useful it is to analyse the rules devoted to the topic of property while having particular regard to real estate in an area such as that of international family relationships, which are characterised by a tendency to eradicate the regulations from the couple's country of origin. However, immovable property, with its inherent immovability, constitutes a challenge for private international law; taking up this challenge to prepare optimal solutions for cross-border families is an inescapable duty. The mitigation of the vulnerabilities of cross-border couples is an objective for all, not just for the legislator, but also for the interpreter of this legislation, and, more generally, for every subject that comes into contact with these couples (legal professionals and administrative officers).

III. THE RELEVANCE OF INDIVIDUAL RIGHTS WITH REGARD TO FAMILY PROPERTY REGIMES: REAL ESTATE DISCLOSURE *VERSUS* PROTECTION OF CONFIDENTIALITY.

The Charter of Fundamental Rights constitutes an important instrument for the modulation of public policy (*ordre public*)[29] which the Twin Regulations attempt to elaborate both from the point of view of content, and from a functional point of view, with an approach that invites those who interpret these provisions to apply them "case by case". The operational modalities of public policy are actually laid out in Recital 54 of Regulation 1103 and the corresponding Recital 53 of Regulation 1104, which prevent judicial authorities from invoking a violation of public policy to set aside the law of another State, or to refuse to recognise, accept or execute a decision, an authentic instrument or a court settlement issued in another Member State if doing so would be contrary to the Charter of Fundamental Rights of the European Union. Particular significance in this context is gained by the principle of non-discrimination under Article 21 of the Charter, which is intended to prevail over any other principles that would lead to blocking the application of the foreign rules or decision[30]. The property relations of spouses or registered partners give rise to a re-reading of the content of the domestic public policy: only in exceptional circumstances, where there are reasons of public interest,

29 See Silvestri, C.: "Il contrat de mariage in Francia e la circolazione Ue degli accordi prematrimoniali", in Landini, S. and Palazzo, M. (ed.): *Accordi in vista della crisi dei rapporti familiari*, Milano, 2018, p. 498 f.

30 For an outline of the principle of non-discrimination as a counter-limit to internal public policy, see Marino, S.: *I rapporti patrimoniali della famiglia nella cooperazione giudiziaria civile dell'unione europea*, Milano, 2019, p. 221.

can this lead to the non-application of the applicable foreign law or to the non-acceptance of a decision or an act coming from abroad. National courts have developed guidelines that prevent the entry of foreign rules when, for example, the succession rules discriminate between illegitimate and legitimate children[31] or when a particular purchase was subject to clauses that impose religious or personal choices[32]. However, not all national choices include a strict understanding of public policy: for example, foreign rules that do not recognise the concept of rightful share have not always been included in the field of public policy[33].

In this context, the national judicial authorities are called upon to restrict themselves to the use of internal public policy and, at the same time, to apply balancing techniques to reshape its content. In fact, if an internal principle was actually violating the principles contained in the Charter of Fundamental Rights, the judge should allow the entry of the foreign law or decision. Thus, a new sensitivity to public policy is established that does not limit itself to the matter of property relations, but which can also be found in other areas of family law[34]. For instance, the decision made by the Italian Supreme Court of Cassation (*Corte di Cassazione*)[35], which established that the control of public policy must be carried out in practice and, at the same time, it is not exhausted with a judgment based on foreign law, but requires an analysis of the effects that the recognition of that decision can have. In the case examined by the Supreme Court, it was not the merit of the Iranian decision regarding divorce that had to be reviewed, but whether the Iranian judicial procedure respected the rights of defence as laid out in the Constitution, the Charter of Fundamental Rights, and the overall rules of international law suitable to integrating that system of values constituted by public policy. Repudiation, which is regulated in Iran, is a mechanism of peculiar connotations, which, only following the introduction of some reforms, has progressively attributed rights to the wife. The role of the Italian judge was to

31 The equal treatment of children integrates a European value recognised by the Charter of Fundamental Rights, which has also been widely developed by the European Court of Human Rights. Thus, among others, the European Court of Human Rights, Marckx v. Belgium, cit. and the European Court of Human Rights, 29 November 1991, Vermeire v. Belgium, App. no. 12849/87. On this subject, see Contaldi, G. and Grieco, C.: "Article 35 – Public Policy (ordre public)" in Calvo Caravaca, A.L., Davì, A. and Mansel, H.P.: *The EU Succession Regulation: A commentary*, Cambridge, 2016, p. 515.

32 Cass. civ., 1ere, 21 novembre 2012, in *Recueil Dalloz*, 2013, p. 880.

33 On this point, see Marino, S.: *I rapporti patrimoniali*, cit., p. 220.

34 What is interesting is the decision rendered by the Tallinn Circuit Court (Tallinna Ringkonnakohus), Case No. 3-15-2355/24, 24th November 2016. The Lithuanian judge allowed a Lithuanian citizen who had concluded a same-sex marriage in Sweden to record this marriage as her family status. The decision is significant because it is the expression of a restrictive reading of domestic public policy. Although same-sex marriages are not recognised in Lithuania, the judge considered that such recording was compatible with public policy because it was not contrary to any general public interest nor did it affect the protection of other fundamental rights. This decision was reported on p. 23 of the Report "Making EU citizens' rights a reality: national courts enforcing freedom of movement and related rights", drawn up by the European Union Agency for Fundamental Rights FRA, 2018 and available at *https://fra.europa.eu/en/publication/2018/making-eu-citizens-rights-reality-national-courts-enforcing-freedom-movement-and* (last visited 01/06/2021).

35 See Cass., ord., 14th August 2020, no. 17170, with a note by Vanin, O.: "Divorzio iraniano e controllo «in concreto» di compatibilità con l'ordine pubblico del provvedimento straniero", *Fam. dir.*, 2021, pp.507-515.

verify whether the principles governing European and Italian due process, which constitute an unsurmountable barrier even for decisions rendered by States that are not members of the European Union, had been implemented within the Iranian procedure. The impact of the Charter of Fundamental Rights is not limited to Member States but is also an indispensable parameter of public policy for foreign laws, decisions and acts. In this sense, Recitals 54 and 53 of the Twin Regulations must, in turn, also be subject to systematic and axiological interpretation, allowing the judge to assess each time whether or not the values common to the European Union are respected, protecting them both in relations between judges of the Union and in relations with non-EU jurisdictions.

An example of this hermeneutic can be seen in a recent decision by the European Court of Human Rights regarding a violation of the right to freely dispose of property and the right to confidentiality[36]. The case concerns a divorce agreement between two Austrian spouses. During the divorce, the husband transferred a share of an immovable property and requested that his transfer be recorded in the competent public land register. The public register did not accept partial documents that reproduced only part of the agreement concerning the property transfer between the two ex-spouses. The amicable divorce concerned not only real property profiles, but also other types of relationships and included agreements relating to the maintenance and education of the couple's two minor children. Hence, the husband's interest lay in protecting areas of private and family life whose disclosure was not strictly necessary to meet the needs of real property disclosure. Through a strictly literal interpretation of Article 87 of the Austrian law on land registers, an extract of the divorce agreement could not fulfil the obligation to record the entire and original document expressly required by the law. This type of hermeneutics is, however, wholly unhinged by the need to respect the principles laid out in the European Convention for the Protection of Human Rights: without an adequate reconciliation of the need for disclosure with the need for individual protection, this ends up affecting the exercise of the powers of the owner who is also subject to protection pursuant to Article 1 of Protocol 1 of the Convention[37]. By continually following the case law of the European Court of Human Rights, any data concerning the assets that establish an imposable tax base[38] or concerning current bank accounts[39] is worthy of the protection provided by Article 8 of the Convention. This decision clarifies that States have the duty to

36 Reference is made to the European Court of Human Rights, 6th April 2021, Case of Liebscher v. Austria.

37 While not examining the merits of the violation of the right to freely dispose of property, the Court significantly notes that in the case in hand, the Austrian government also violated Article 1 of Protocol 1 of the Convention. See in this matter § 74 of the above quoted judgment.

38 Thus the European Court of Human Rights, 27th June 2017, Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland App no. 931/13, § 138.

39 Thus the European Court of Human Rights, 22th December 2015, M.N. and Others v. San Marino (App no. 28005/12, § 51, 7th July 2015) and G.S.B. v. Switzerland, App no. 28601/11, § 51.

prepare real property disclosure systems that guarantee the maximum protection of data concerning finances, income and the ownership of property or of the residence of a family unit with minor children.[40] This decision is also relevant for cross-border couples: the disclosure requirements related to immovable property regimes must, also in this area, respect the right to confidentiality, and systems cannot be organised without striking a balance between the interest to make data concerning property public and accessible without, at the same time, protecting personal data related to the situation of the couple or of the family with children. Consequently, whenever property relationships of couples end up in public registers (civil registers, cadastral or public land registers)[41], for these registrations, whatever the law applicable in practice, it will also be necessary to verify the respect of confidentiality and of the free exercise of ownership rights[42]. The impact of the respect for private and family life on the domestic law is a sensitive topic, also subject to intervention by national courts in an articulated dialogue with European courts. An example of this is the position taken by the Maltese Civil Court[43] in the field of constitutional review, which excludes the applicability of the Charter of Fundamental Rights whenever the matter is under national competence. Such national competence is recognised whenever it is a question of applying publicly relevant laws, removed from European competence. The Maltese court had to review the compliance with the protection of personal and family life of the Maltese legislation which requires that in the case of registration of sales deeds the marital status of the selling party must be stated when this party is a woman, indicating whether she is single, married or a widow. In this specific case, the seller who was divorced, lodged an appeal for violation of the respect of private and family life, of property law, and of the prohibition of discrimination on grounds of gender. The Maltese court, albeit excluding the application of the Charter, nevertheless upheld the appeal for the violation of the Maltese constitutional principles and

40 See European Court of Human Rights, 6th April 2021, Liebscher v. Austria, § 68.

41 In Italy, this topic was elaborated in the Code of Conduct on the Processing of Personal Data for Commercial Information Purposes, adopted by resolution on 12th June 2019, which allows access, for commercial purposes, to public sources or public registers, directories, acts or documents knowable by anyone on the basis of the referent legislation in force, within the limits and with the modalities established therein for the knowledge, usability and disclosure of the data contained therein. Among the data included in public sources, the following examples are listed: real estate deeds, detrimental and mortgage acts (for example, registration or cancellation of mortgages, transcripts and cancellations of foreclosures, or judicial documents and related annotations). These are "documents kept in the registries managed by the Revenues Agency (which include the former Land Registry Offices and the Cadastral Office), in the Public Motoring Register, and in the Resident Population Register" (see Article 4, point 2, letter a) subparagraph 2).

42 This is quite a sensitive topic since the retention of data extracted from property deeds is frequently abused. For example, a sanction of EUR 14.5 million was imposed on the real estate group Deutsche Wohnen SE in October 2019 by the Berlin Commissioner for Data Protection and Freedom of Information for an infringement of the GDPR. The press release referring to the imposed sanction is available at: *https://www.datenschutz-berlin.de/fileadmin/user_upload/pdf/pressemitteilungen/2019/20191105-PR-Translation-Fine_DW.pdf*.

43 Civil Court, Constitutional Jurisdiction / 52/2016/LSO, 28th March 2017, Marie Therese Cuschieri v. Attorney General.

of the European Convention for the Protection of Human Rights, which is an international regulatory instrument that is, unlike the Charter, always applicable.

IV. THE PRINCIPLES OF UNIVERSALITY AND UNITY: A NEW PERIMETER FOR THE *LEX FORI*.

Family property regimes are also affected by the need to modulate rules arising from the application of the principles of universality, which also allows the identification as applicable law of the law of a State that is not a member of the Union. In the case of enhanced cooperation, as is the case in matters concerning family property regimes, a Member State that does not participate in the enhanced cooperation procedure is also deemed to be a third State. At this point, it can be understood how the binomial of universality and restrictive interpretation of public policy can give way to new legal solutions which are all anchored in the "hard-core" principles of the Charter of Fundamental Rights, interpreted also on the basis of the European Convention for the Protection of Human Rights.

A first application has been provided, for example, from the admissibility of prenuptial and pre-partnership agreements[44]: pursuant to Article 22, the Regulations allow a choice of law applicable to property relations even before the registration of the marriage or partnership. In this context, the provision of Article 22 makes it necessary for the Italian judge to consider whether a prenuptial agreement is contrary to public policy. The answer, in the light of the restrictive interpretations emerging from cross-border relations, could be negative with an evident inequality of treatment between domestic couples, deprived of the possibility to make choices before the marriage or registration of the partnership, and cross-border couples that, on the other hand, could benefit from foreign rules that allow such an exercise of negotiating autonomy. There remains, in fact, in the jurisprudence of the Italian Supreme Court of Cassation[45], a closure in admitting forms of negotiating autonomy due to the unavailable nature of the rights and obligations derived from marriage or registered partnership. The novelty introduced by the Twin Regulations consists in having explicitly referred to the Charter of Fundamental Rights, thus imposing even on judges that are less

44 Oberto, G.: "I patti prematrimoniali nel quadro del diritto europeo", *Corr. giur.*, 2020, no. 6, p. 794. On this subject, see also Velletti, M. and Calò, E.: "La disciplina europea del divorzio", *Corr. giur.*, 2011, no. 5, p. 733; Pulvirenti, G.M.: "Patti prematrimoniali e trust - I parte", *Trust*, 2021, no. 2, p. 140.

45 Regarding settlements in the case of divorce, see Cass., 2224/2017 according to which "the agreements by which the spouses in the field of divorce agree upon the legal property regime in the case of a future and potential divorce are invalid due to the illegality of the cause, since they were stipulated in violation of the principle of radical non-derogability from rights in matrimonial matters referred to in Article 160 of the Civil Code". Finally, see also Cass., ord. 11012/2021 where a "lifelong" allowance agreement was examined requesting the appellate judge to identify the cause of the allowance by verifying its nature and compatibility with mandatory legislation. There is no shortage of isolated opening rulings. On this subject, see Oberto, G: "Gli accordi prematrimoniali in Cassazione, ovvero quando il distinguishing finisce nella Haarspaltemaschine", note to Cass. 21th December 2012, no. 23713, *Fam. dir.*, 2013, p. 323.

sensitive to an EU interpretation a balancing act that always reconciles the effects on the principles and fundamental rights of the rejection of a foreign decision or act. In the economy of the Regulations, the competent judge will have to apply a foreign law, and only in exceptional cases will he or she be able to invoke domestic public policy as a barrier to the foreign legislation. In this context, the public policy exception must be based on a clear and manifest incompatibility between the *lex fori* and the foreign applicable law, and there must be reasons of public interest to allow for the foreign law to be set aside. This concept of public policy is accorded even greater significance by the principle of unity of applicable law, introduced by Article 21, according to which the law applicable to the property regime shall apply to all assets, regardless of where these assets are located. The judicial authority is prompted to a change of mindset: the attraction of the law exercised by the place in which the property is located is, in fact, basically eliminated by the application of the principle. This is very peculiar regulatory rigidity in the international context if compared with the broad admission of *dépeçage* in matters concerning contractual obligations; it is justified by the need to avoid family property regimes being adversely affected by the type of assets and the nature of the property rights exercised by the couple. The principle of unity of applicable legislation has also actually been adopted in succession matters by Regulation 650/2012 and, on its basis, the case law of the Court of Justice has carried out important extensive interpretation of its scope, for example in the Mahnkopf case[46] where it established that the rights of the surviving spouse concerning the estate are to be classified under European succession legislation.

The principle of unity of applicable legislation produces its effects not only on couples' relationships, but also in the relationships that third parties may have with the couple. This double impact of the principle is enshrined in Article 28 which, by subverting the traditional rule according to which a contract does not produce effects beyond those between the parties[47], extends the enforceability[48] of the law chosen by the parties to all those third parties that were able to gain knowledge of the choice made by the couple. In other words, Article 28 attributes relevance[49] to the law chosen by the parties by virtue of an agreement concluded between them and, at the same time, identifies rules that could ensure legal certainty by resolving conflicts. These rules delimit the enforceability of the choice made by

46 This refers to CJEU, 1st March 2018, Case C-558/16, Mahnkopf. For a comment, see Barrière Brousse, I.: "Conflit de lois", *Journal du droit international*, 2018, no. 4, pp. 1218-1227. On this subject, see also Signes de Mesa, J.I.: "Introduction", in Cazorla González, M.J., Giobbi, M., Kramberger Škerl, J., Ruggeri, L. and Winkler, S. (ed.): *Property relations of cross border couples in the European Union*, Napoli, 2020, pp. 6-13.

47 See De Nova, G.: *Il contratto ha forza di legge*, Milano, 1993, p. 7.

48 The topic of the effects produced by a contract on third parties is strictly connected to the application or non-application of the principle of consensus. On this subject, see Vettori, G.: "Voce Opponibilità", in *Enc. giur.* Treccani, Roma, 2000, pp. 1-16; Franzoni, M.: "Degli effetti del contratto," in *Cod. civ. Commentario* Schlesinger, Milano, 1998, p. 110 ff.

49 V. Falzea A.: "voce Rilevanza giuridica", in *Enc. dir.*, Milano, 1989, XL, p. 901.

the couple: the European legislator assesses through them when the law chosen by the parties should also become the law applicable to the relationship between a spouse or a partner and third parties. Article 27 makes enforceable against third parties the law chosen by the parties by establishing that the relationship with third parties is subject to it. It is the role of Article 28 to balance the position of the third party by subordinating this enforceability to the knowledge possessed by the third party of the choice of law made by the couple. The legislator relies on a system of presumptions that highlights the peculiar relevance and significance of immovable property. It is presumed that the third party has knowledge of the law chosen by the couple if the relationship connecting him or her to the spouses or partners concerns immovable assets, and if the law applicable to the property relationship is that of the State in which these assets are located.

The consequences of the *lex causae* on third parties occur not only when the third party has effective knowledge of the chosen law, but also when he or she should have known it through the exercise of due diligence[50]. The perimeter of the efficacy of the choice made by the parties is extendable on the basis of circumstances that require an analysis of the specific case: among these circumstances, a "subjective" element has great relevance, and this is constituted by the behaviour of the third party. This scenario is invaded by subjectively understood good faith, such as "innocent ignorance": a mechanism tested in possessional relations and applicable here in relationships between the couple and third parties who are owners of subjective situations that can be activated against the couple.

If the third party finds himself or herself in a subjective state of "innocent ignorance", this again gives rise to a peculiar treatment of the property concerning immovable assets. The effects of the property regime between spouses or registered partners and a third party are subject to the *lex rei sitae*, or, in the case of registered movable assets or rights subject to registration, to the *lex registri*. Pursuant to Article 28 paragraph 3 letter b), there are two possible applicable laws in the case of "innocent ignorance" of the *lex causae* by the third party: the *lex rei sitae* and the *lex registri*. The principle of unity of applicable legislation does not apply to this hypothesis, and the relationship with the third party will be subject to the law of the place where the immovable property is located or in which the immovable property or movable asset or the related right has been registered.

V. THE *VIS ATTRACTIVA* OF IMMOVABLE PROPERTY IN IDENTIFYING THE APPLICABLE LAW.

If the assets of the couple or of one of its members consists of a plurality of immovable property or registered movable assets, this will consequently

50 The topic of knowledge of the law assumes peculiar relevance in cross-border cases. On this argument, see among others Ivaldi, P.: "In tema di applicazione giudiziale del diritto straniero", *Riv. dir. int. priv. proc.*, 2010.

imply a multiplicity of applicable laws. The Twin Regulations do not regulate the disclosure regimes of assets that are the object of family property: this exclusion is caused by difficulties in harmonising legislative systems[51] that provide for different understandings of property, different reconstructions of rights in rem, and which, in general, consider disclosure as a matter reserved for the States.

For this reason, immovable property or property having as its object registered movable assets or registrable rights constitutes a *vulnus* in the regulatory framework of family property regimes and emphasises the difficulties and inconveniences caused to cross-border couples by contributing to the reduction of the degree of effectiveness of the right to free movement of persons laid down in Article 21 TFEU. The harmonisation difficulties are magnified by the combination of the theme of property with that of family. If there is an area where harmonisation cannot be carried out without interfering in the sphere of national cultural traditions, this is precisely the area of family taxonomy. This arises from a simple reading of the Twin Regulations where it is made clear that the recognition and the execution of a decision in property matters does not implicate in any way the recognition of the marriage or registered partnership on which this property regime is founded. Therefore, the impermeability of the property regime operates both with respect to the negotiating acts from which these regimes arise and with respect to the land registers in which they are recorded. A recent case filed with the United Sections of the Italian Supreme Court of Cassation is the best example of the peculiarity of immovable property. After the death, which occurred in Italy, of a UK citizen who owned immovable property in Tuscany, a complex dispute was initiated between the heirs, leading to an interlocutory order aimed at prompting the clarification by the United Sections regarding the application of UK rules. A dividing system is in force in the British legal system pursuant to which movable assets are subject to the law of the *de cuius* State (the law of the country of the deceased), whereas immovable assets are subject to the *lex rei sitae*; this system is contrary to Italian succession legislation, which, on the other hand, in international cases, follows the principles of unity and universality of applicable laws. In this specific case, however, we are faced with the creation of two distinct masses subject to different laws[52], which, for immovable property, are represented by the Italian law. Indeed, the UK law refers to the *lex rei sitae*, while the Italian system adopts the national law of the deceased, with consequent convergence on the application of Italian law. This case was not resolved pursuant to Regulation 650/2012, but constitutes an important

51 There are some pilot projects in the European Union that aim to experiment with data sharing and registration methods. Reference is made to the following projects: European Land Information Service (EULIS), and Land Registers Interconnections (LRI).

52 The creation of masses regulated by laws of different States is frequent. For example, this can be generated by spouses or partners changing their choice of applicable law. On this subject, see p. 118, which describes the fictitious dissolution of the property regime in force pursuant to a previous law with a contextual establishment of a new regime, along the lines of the solutions adopted by the French case law (Cass civ., 1ère, 12 April 2012, in *Recueil Dalloz*, 2012, p. 1125).

example of the relevance assumed by immovable property in constitutive or transactional events in a cross-border family context.

What makes this topic increasingly complex is the further fragmentation of legislation constituted by the value attributable to disclosure regarding property regimes between spouses or registered partners, and their rights regarding the assets that make up this property regime. For example, in Italy, a country where the registration of a marriage agreement at the Revenue Agency (former Land Registry Office) assumes the value of public disclosure, while an annotation in the Civil Registers within municipalities makes the registered act and the right described therein enforceable against third parties.

Not all countries have a similar system or attribute the same effect to the act of recording in public registers, just as not all States attribute the same content to property. This emphasises the need to modulate the European legislation, imprinting it with maximum respect for national legal categories. For this reason, rights in rem are among the matters excluded from the scope of the Twin Regulations (Article 1, letter g). Once the law applicable to the property regime based on this law has been identified, the powers that each spouse or registered partner can exercise on the assets with the following adoption of the rules of the State of the chosen or applicable law are outlined pursuant to Article 26. Rights in rem constitute a non-uniform category, which is also an expression of the culture and tradition of each State. Therefore, even in this aspect, private international law withdraws by adopting strategies that reduce the bureaucratic obstacles and difficulties faced by cross-border couples. The adopted strategy is complex: couples can create or transfer rights on assets on the basis of the law applicable to the property regime, but, at the same time, they permit themselves not to recognise a specific right in rem if this is not contemplated by the law of the State in which the asset is located. The *vis attractiva* exercised by the *lex rei sitae* with regard to the typology of rights in rem is evident. As highlighted by Recital 24, the Regulations should not affect the *numerus clausus* of rights in rem as established in different States. To overcome an impasse caused by the absence of a specific right in the State where the asset is located, a mechanism already tested by Regulation 650/2010 is introduced, which is an adaptation of the right in rem. The judicial authority is authorised to apply the rules of the right in rem that can be considered "the closest" under the law of the State because it is equivalent to the one contemplated by the *lex causae*. Looking at the aims and the interests pursued by the right in rem provided for by the foreign law, and referring to interests subject to protection, the judicial authority can use a domestic right in rem with a view to allowing the recognition of the efficiency of the right in rem created or transferred by the spouses or registered partners.

Adaptation requires a fine comparison between the mechanisms present in different regulations that can only be favoured by cooperation between professionals supported by a well-organised information exchange network. Knowledge of foreign law constitutes one of the major obstacles to the implementation of rules for the recognition of foreign decisions and acts, and the adaptation instrument constitutes a tool for a flexible and ductile regulatory framework catering for the needs of cross-border individuals and families. Adaptation thus becomes the main tool for managing transnationality in the presence of categories with a strong national connotation, which are not "uniform". Even the kind of *downgrading* carried out by the Italian legislation concerning the recognition of same-sex marriages concluded abroad by Italians which establishes that "a marriage concluded abroad by Italian citizens with persons of the same sex produces the effects of registered partnership regulated by the Italian law" (Article 132-bis L. 218/1995) can also find anchorage in this. As highlighted by case law[53], the provision does not require this kind of downgrading for marriages concluded abroad by two foreign citizens, which, due to their total extraneousness to the Italian legal system, can be recognised. On the other hand, when the couple is composed of Italians or is "mixed", an adaptation is made that determines the effects of the registered partnership being attributed to the marriage contracted abroad, the only scheme that Italian same-sex couples can use in a reading that the Supreme Court of Cassation founded primarily on the necessity to avoid conflicts regarding the form and effects of the transcription of the marriage deed, and to avoid unequal treatment with respect to those Italians who have had only the typical model of registered partnership available to seal their communion of life and affections[54].

Therefore, case law and legal theory are called upon to deal with the adaptation strategies adopted in cases characterised by transnationality with interesting results. One example is the well-known decision by the Court of Justice regarding the purchase of immovable property under succession[55]. The issue concerned the possibility for German judicial authorities to reject the recognition of a legacy by vindication, which is allowed under Polish law. The discrepancies between the two legal systems regarding the purchase of property resulting from a legacy cannot prevent the recognition of the right in rem on the property located on German soil

53 See Cass., 14th May 2018, no. 11696 which, among other things, has rejected the issue of constitutionality related to the unequal treatment between foreign couples, mixed couples and Italian couples. For a comment of this decision, see Winkler, M.: "A case with peculiarities: Mixed same-sex marriages before the Supreme Court", *The Italian Law Journal*, 2018, no. 1, pp. 273-288.

54 For some critical remarks concerning the grounds for the exclusion of marriages concluded abroad by "mixed" same-sex couples, see Miri, V.: "Matrimonio same-sex celebrato all'estero e *downgrading* in unione civile: una prima lettura di Cass. 14 maggio 2018, n. 11696", *Rivista di diritti comparat*i, 2018, available at *https://www.dirittocomparati.it/matrimonio-sex-celebrato-allestero-e-downgrading-unione-civile-una-prima-lettura-di-cass-14-maggio-2018-n-11696*.

55 Reference is made to CJEU, 12 October 2017, Case C-218/16, *Kubicka*. For a comment, see, among others, Idot, L.: "Domaines respectifs de la loi successorale et de la loi réelle", *Europe*, 2017, no. 12, pp. 46-47; Achille, D.: "Lex successionis e compatibilità con gli ordinamenti degli Stati membri nel reg. UE no. 650/2012", *Nuova giur. civ. comm.*, 2018, pp. 697-707.

since there is no difference in the content of the right subject to the legacy such as to prevent its recognition[56]. In this sense, the principle of adaptation experiences an important delimitation: in order be applied, a diversity of contents and effects should not exist. If such diversity exists, the person interpreting this principle must make a judgment on equivalence that can lead to the avoidance of non-recognition, an occurrence that goes against the principles of the free movement of persons.

VI. CONCLUDING REMARKS.

The examination of European legislation concerning cross-border couples and property highlights a pressing need to review the regulatory approach based on matters such as those laid out in Article 81 TFEU. The procedures that can be introduced for the adoption of EU rules are based on categorisations and taxonomies that are difficult to implement in practice. Tracing a theme or an issue to a family matter is not always certain, as family matters are closely connected with property and succession issues. Consequently, greater dialogue with the legal culture at national level would be appropriate, which has led to hermeneutical approaches increasingly oriented to the analysis of the case in hand and less and less based on categorisations and procedures of the subsumption of concrete cases to abstract cases. It is also necessary to further develop the impact of fundamental rights on national laws which, in the matter in question, often consists of the *lex rei sitae* and/or the *lex registri*. The rules introduced by Regulations 1103 and 1104 keep these domestic laws from within its scope on the basis of assessments of opportunity and greater proximity whenever this relates to immovable property or on the basis of reasons of public interest when it is necessary to proceed with the registration of rights in rem or other rights. The fact that these areas are not subject to the rules for identifying the applicable law and jurisdiction does not exclude the fact that European principles concerning fundamental human rights also apply in these areas. This issue is primarily dealt with by national courts or by the European Court of Human Rights, but we need to ask, regardless of whether or not a matter can be attributed to European Union law, if even in this matter the national legislation must in any case comply with and respect the principles expressed by the Charter of Fundamental Rights and the European constitutional tradition. In this regard, even in the presence of the decisions of the Court of Justice that point in this direction, it can be said that property and family in the European dimension constitute another arduous challenge for the effective implementation of fundamental rights.

56 See in particular § 63 of the decision.

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