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De Facto Unions in Private International Law

Abstract

Over the past few decades, there has been a discernible trend among the European Union (EU) member states to regulate various aspects of *de facto* unions. Nonetheless, comparative analyses still reveal significant divergences in domestic laws. Within this spectrum, one may observe legal systems in which no explicit rules are envisaged for *de facto* unions, juxtaposed with those wherein the legal effects of such unions converge towards those of marriage. These differences in domestic substantive regulations of *de facto* unions inevitably pose formidable challenges for private international law. The article attempts to scrutinise the legal position of *de facto* unions under EU private international law and assess the extent to which such unions may benefit from the existing legal instruments. Overall, great fragmentation may be observed in the approaches found across various EU Regulations. In the second part, the article focuses on the regulatory landscape of *de facto* unions in Slovenia, encompassing both substantive and private international law aspects. Although Slovenia was once at the forefront of regulating *de facto* unions, it is now evident that the existing regulation in private international law is outdated and necessitates reform. This is particularly important, given that Slovenian substantive law attaches significant legal consequences to *de facto* unions, and such unions have become increasingly prevalent within Slovenian society.

Key words

de facto union, private international law, European cross-border family law, cross-border couples.

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1. Introduction

When reviewing the draft of the French *Code civil* in 1804, Napoleon famously stated "*Les concubins se passent de la loi, la loi se désintéresse d'eux*", which translates to "Cohabiting couples do without the law, and the law is indifferent to them." The historical lack of legal attention directed towards *de facto* unions may be attributed to various factors. In the past, unions between unmarried individuals were frequently considered immoral or even contrary to public policy.[1] If legal regulation did exist, it often aimed to sanction such unions, either through civil or even criminal law sanctions.[2] Furthermore, it was often considered inappropriate and overly paternalistic to impose legal consequences on couples, who may have intentionally chosen not to marry to avoid such consequences.

Nevertheless, it is evident that over the past few decades, an increasing number of legal systems have introduced substantive rules to govern various legal aspects of *de facto* unions. In doing so, the legislators have responded to the evolving social landscape, where an increasing number of couples choose to cohabit without formal marriage bonds.[3] A quick comparative analysis of such provisions across the Member States of the European Union (hereinafter: the EU) reveals that these states can generally be categorised into three distinct groups. On one end of the spectrum, we find legal systems, such as those in Slovenia and Croatia, where the legal consequences of *de facto* unions resemble those of marriage.[4] In these states, provisions regarding property relations, maintenance obligations, and succession rights of spouses are often applied *mutatis mutandis* for *de facto* unions.[5] Conversely, on the opposite end of the spectrum, certain Member States, such as Poland[6] and Lithuania[7], lack statutory regulations specifically addressing *de facto* unions. To remedy the legal *lacuna*, general rules of civil law are sometimes applied, particularly to decide in property disputes of *de facto* partners.[8] In between, a growing number of Member States can be identified where only specific aspects of *de facto* unions are subject

1 Permanent Bureau of the Hague Conference on Private International Law, 1992, p. 113.

2 Permanent Bureau of the Hague Conference on Private International Law, 1987, p. 159.

3 For an overview of statistical data, see: Boele-Woelki et al., 2019, pp. 15–35; and Permanent Bureau of the Hague Conference on Private International Law, 2015, pp. 3–7.

4 Winkler, 2022, pp. 248–254.

5 For more on substantive regulation of *de facto* unions in Slovenia, see part 3.1 of this Article.

6 Wąsik, 2019, pp. 510–511.

7 Limante and Chochrin, 2019, pp. 413–414.

8 *Ibid.*, pp. 417–418.

to regulation. These aspects may include tenancy protection, social security law, succession rights, etc., as seen in Austria[9] and Germany[10], for instance.

The divergences in substantive laws also reveal different understandings of what constitutes a *de facto* union.[11] This is further exemplified by the various terms used to describe such unions. In addition to the term *de facto* union, one encounters alternative designations, such as 'free union', 'non-marital union', 'unmarried couple', 'cohabitation', 'legal cohabitation', 'unmarried cohabitation', 'informal marriage', 'common law marriage', etc. For the purpose of this article, term *de facto* union will be used to refer to a union between two persons who live together in an intimate relationship on a permanent basis, are not married, and whose union was not officially formalised. Therefore, a distinction needs to be drawn between *de facto* unions and various types of registered partnerships, which have also become increasingly legally regulated.

The abovementioned differences in domestic substantive laws inevitably pose significant challenges to private international law. On one hand, courts are confronted with unfamiliar legal institutions and concepts, which can give rise to complex questions of characterisation. Should conflict rules regarding marriage be applied by analogy? Or should the relationships between *de facto* partners be subject to general rules of civil law? On the other hand, *de facto* partners face uncertainty, whether their union and its legal consequences will be recognised. The Hague Conference on Private International Law first acknowledged these issues as far back as 1987 when it added 'the law applicable to unmarried couples'[12] to its agenda, albeit without affording it any particular priority.[13] In the subsequent years, several comparative studies were prepared, yet thus far, no proposal for an international instrument in this field has been introduced.

The regulation of *de facto* unions in private international law thus remains in the domain of national legislators and, in the case of EU Member States, also within the domain of the EU. Consequently, this has led to the development of a complex patchwork of diverging solutions, with a consistent private international law approach to the treatment of *de facto* unions remaining elusive. To highlight some of the pertinent issues,

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9 See: Pertot, Austria, 2019, pp. 6 and 15. In Austria, surviving *de facto* partners can be intestate heirs if there are no other eligible heirs. Furthermore, they have the right to stay in the family home if the union lasted at least three years. They are also entitled to enter into the tenancy after the partner's death.

10 See Pertot, Germany, 2019, p. 264. In Germany, *de facto* partners (who maintained a joint household) have the right to enter into tenancy upon the death of their partner.

11 Regarding various concepts of *de facto* unions in substantive law, see: Boele-Woelki et al., 2019, pp. 55–63; and Permanent Bureau of the Hague Conference on Private International Law, 1992, pp. 113, 115 and 117.

12 In 1995, the scope was also extended to jurisdiction and recognition and enforcement of judgements relating to 'unmarried couples'.

13 Permanent Bureau of the Hague Conference on Private International Law, 1987, p. 161.

the article will initially explore the extent to which EU private international law addresses the relations between *de facto* partners. Subsequently, it will present the Slovenian approach to such unions, encompassing both substantive law and national private international law considerations.

2. *De Facto* Unions in EU Private International Law

Considering the aforementioned plethora of various approaches among EU Member States, it is unsurprising that relations between *de facto* partners have not received special attention of EU private international law. As will be explained bellow, where references to such unions were made, their purpose was to exclude their legal consequences from the scopes of application of different regulations. Nonetheless, it would be inaccurate to claim that the growing number of *de facto* unions has gone entirely unnoticed by the EU legislator. Indeed, the European Commission included them in the consultations,[14] which led to the adoption of the Regulation 2016/1103[15] (hereinafter: Matrimonial Property Regulation) and the Regulation 2016/1104[16] (hereinafter: Regulation on the Property Consequences of Registered Partnerships). The following analysis will seek to determine whether some EU regulations in the field of private international law may be applicable to the most common types of disputes between *de facto* partners.

2.1. Property Relations Between De Facto *Partners*

Disputes between *de facto* partners typically revolve around the property ties developed during the course of their union. Since the majority of EU jurisdictions do not attribute property consequences to *de facto* unions, the resolution of such disputes can be unpredictable, especially when they involve an international element.

As of 29 January 2019, the field of property regimes for cross-border couples is governed by unified rules of private international law, which are binding in the 18 Member States participating in the enhanced cooperation.[17] These rules are contained in the

[14] See: Commission of the European Communities, Green Paper on Conflict of Laws in Matters Concerning Matrimonial Property Regimes, Including the Question of Jurisdiction and Mutual Recognition, Brussels, 17 July 2006, COM(2006) 400 final, pp. 11–12.

[15] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, Official Journal of the EU, L 183/1, 8 July 2016.

[16] Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, Official Journal of the EU, L 183/30, 8 July 2016.

[17] Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain and Sweden.

Matrimonial Property Regulation and the Regulation on the Property Consequences of Registered Partnerships.

One of the intentions of the European legislator in adopting the two regulations—often jointly referred to as the 'Twin Regulations'—was to provide cross-border couples with a higher level of legal certainty and predictability.[18] However, in relation to *de facto* partners, the question arises whether the rules contained in 'Twin Regulations', were also intended to facilitate their legal certainty and predictability. Answering this question requires a careful examination of their personal as well as their material scope of application.

Taking into account Article 1 of both regulations, it becomes evident that their scopes encompass 'matrimonial property regimes' and 'the property consequences of registered partnerships', respectively. Both notions are autonomously defined in Article 3 of each regulation.[19] The former is to be understood as 'a set of rules concerning the property relationships between the spouses and in their relations with third parties, as a result of marriage or its dissolution', while the latter represents 'the set of rules concerning the property relationships of the partners, between themselves and in their relations with third parties, as a result of the legal relationship created by the registration of the partnership or its dissolution'.

Both definitions are essentially the same in substance, with their primary distinction lying in the type of partnership from which the property consequences arise. To gain a comprehensive understanding of both concepts, it is therefore necessary to also understand the concepts of marriage and registered partnership as the preconditions for the 'matrimonial property regimes' and for the 'property consequences of a registered partnership', respectively.

The Twin Regulations only contain an autonomous definition of a registered partnership. According to Article 3, a registered partnership is described as 'the regime governing the shared life of two people which is provided for in law, the registration of which is mandatory under that law and which fulfils the legal formalities required by that law for its creation'. Consequently, the Regulation on Property Consequences of Registered Partners exclusively applies to the property regimes of partnerships that have been registered.[20] This is further underlined in Recital 16, which highlights the importance of distinguishing between registered partnerships and *de facto* unions. Thus, the property relations of *de facto* partners do not fall within the scope of the Regulation on the Property Consequences of Registered Partnerships.[21]

Additional ambiguity arises around the concept of marriage, which, unfortunately, is not autonomously defined within the regulations.[22] The reasons for this approach can

[18] See, for example, Recital 15 of the Twin Regulations.

[19] Bonomi, 'Article 3', 2021, p. 213.

[20] See also: Dutta, 2018, p. 148.

[21] Rudolf, 2019, p. 134.

[22] Rodríguez Benot, 'Article 3, Definitions', 2020, p. 35.

be attributed to the divergences among Member States regarding the regulation of same-sex marriages and the ensuing disagreements on the content of the concept marriage.[23] This was also one of the key reasons why the Twin Regulations were only adopted in the context of enhanced cooperation.[24]

The absence of an autonomous definition is partially remedied in Recital 17. It stipulates that marriage is defined by the national laws of the Member States. Considering the prevailing view in academic literature, this reference should be interpreted as pointing to the substantive as well as private international law of the forum state.[25] In other words, the competent court will have to decide in each particular case whether it can characterise the union before it as marriage. In making this determination, the court will have to rely on its national concepts, including those stemming from its national private international law.

Given the reluctance of many Member States to regulate *de facto* unions, it appears improbable that their courts would characterise such unions as marriages and consequently apply the Matrimonial Property Regulation. According to academic literature, the property consequences of *de facto* unions are thus excluded from the Matrimonial Property Regulation's scope.[26] This view is also supported by the fact that the European legislator initially considered to (expressly) include the property relations of *de facto* partners in the Twin Regulations,[27] but ultimately abandoned this idea.

Nonetheless, Dutta argues that the Matrimonial Property regulation may exceptionally be applicable in cases where a *de facto* union is subject to the same (default) property regime as marriage.[28] Such substantive regulation can be found in Croatia and Slovenia among EU Member States. This position has been previously rejected concerning the Croatian opposite-sex 'extramarital union' (*izvanbračna zajednica)* and same-sex 'informal life partnership' (*neformalno životno partnerstvo*) as regulated by Article 11(1) of the Croatian Family Act[29] and Article 3(1) of the Croatian Life Partnership Act[30], respectively.[31] This conclusion is also supported by the provisions of Croatian Private International

23 Bonomi, 'Article 3', 2021, p. 215–216.

24 Wysocka-Bar, 2019, p. 189; Dougan, 2022, pp. 221–223.

25 Bonomi, 2017, p. 132; Dutta, 2018, p. 152; Vrbljanac, 2022, p. 75.

26 Andrae, 2019, p. 442; Rudolf, 2018, p. 957; Winker, 2022, p. 266.

27 See: Commission of the European Communities, Green Paper on Conflict of Laws in Matters Concerning Matrimonial Property Regimes, Including the Question of Jurisdiction and Mutual Recognition, Brussels, 17 July 2006, COM(2006) 400 final, pp. 11–12.

28 Dutta, 2018, pp. 156–157.

29 *Obiteljski zakon*, Official Gazette of the Republic of Croatia, Nos. 103/15, 98/19, 47/20 and 49/23.

30 *Zakon o* životnom *partnerstvu osoba istog spola*, Official Gazette of the Republic of Croatia, Nos. 92/14 and 98/19.

31 Vrbljanac, 2022, p. 81.

Law Act (hereinafter: PILA).[32] Only by virtue of an 'extending reference provision'[33] may the property relations of extramarital unions be governed by the Matrimonial Property Regulation and the property relations of informal life partnerships by the Regulation on the Property Consequences of Registered Partnerships.[34] This nomotechnical approach shows that the Croatian legislator did not consider extramarital unions and informal life partnerships to fall (automatically) within the scope of the Twin Regulations.

A similar position can also be taken in Slovenia.[35] This conclusion can be drawn from Article 41 of the Slovenian Private International Law and Procedure Act[36] (hereinafter: PILPA), which envisages a special conflict rule for the property relations of *de facto* unions. Slovenian private international law treats such property relations as distinct from matrimonial property relations, indicating that an automatic application of the Matrimonial Property Regulation is not possible (unless the PILPA were to expressly extend its application).

Having established that neither the Matrimonial Property Regulation nor the Regulation on the Property Consequences of Registered Partnerships are applicable to the property relations of *de facto* unions, the question remains, whether property relations stemming from such relationships could be characterised as 'civil matters'. Such characterisation would enable the courts of Member States to establish their international jurisdiction pursuant to the Regulation (EU) No 1215/2012[37] (hereinafter: Regulation Brussels I bis). Furthermore, depending on the characterisation of the claim, the courts could determine the applicable law either in accordance with the Regulation (EC) No 593/2008[38] (hereinafter: Regulation Rome I) or based on the Regulation (EC) No 864/2007[39] (hereinafter: Regulation Rome II).

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32 *Zakon o međunarodnom privatnom pravu*, Official Gazette of the Republic of Croatia, No. 101/17.

33 See Kunda, 2020, pp. 33. Such provisions of national private international law allow the scope of European regulations or international conventions to be extended to cases that would otherwise fall outside their scope. Their effect is constitutive in nature and applies only before the courts of the State whose national private international law includes such a provision.

34 Medić, 2022, pp. 100–101; Vrbljanac, 2022, p. 81.

35 Rudolf, 2018, p. 957.

36 *Zakon o mednarodnem zasebnem pravu in postopku*, Official Gazette of the Republic of Slovenia, Nos. 56/99, 45/08 – ZArbit and 31/21 – CC dec.

37 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), Official Journal of the EU, L 351/1, 20 December 2012.

38 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, Official Journal of the EU, L 177/6, 4 July 2008.

39 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, Official Journal of the EU, L 199/40, 31 July 2007.

Upon closer examination of their respective scopes of application as outlined in Article 1 of each regulation, it becomes evident that neither of them is applicable to matrimonial property regimes or to rights and obligations stemming from property regimes of 'relationships deemed by the law applicable to such relationships to have comparable effects to marriage'.[40] Although the wordings of the exclusions differ slightly, it is important to bear in mind that they were modelled on each other[41] and should be interpreted with a certain degree of consistency.[42]

To ascertain the applicability of the three regulations, the courts will have to examine whether a given *de facto* union can be characterised as a relationship having (property) effects comparable to marriage. While the exclusions in Article 1(2) stipulate that such characterisation should be performed in accordance with the 'law applicable to such relationships' (*lex causae*), the Recital 8 of the Regulation Rome I and the Recital 10 of the Regulation Rome II both point to the 'law of the Member State in which the court is seized' (*lex fori*). As proposed by Makowski, the ambiguity arising from these differing references can be resolved if the characterisation begins with the private international law of the forum state and the judge identifying the relevant (domestic) conflict rule. This rule will then lead, either directly or through the use of *renvoi*, to the substantive *lex causae*, which will in turn determine, whether the effects of the relationship are indeed comparable to marriage.[43]

The proposed approach seems to function effectively within the Slovenian context. A Slovenian judge, seized to rule in matter concerning property consequences of a *de facto* union, will first resort to Article 41 of the PILPA to determine the *lex causae*. Afterwards, two potential scenarios may unfold. First, if under the *lex causae*, the *de facto* union produces property consequences (comparable to marriage), the application of the Regulation Brussels I bis and the Regulation Rome I or Rome II will be excluded. Consequently, there will be no impediment to relying on Article 41 of the PILPA. On the other hand, if under the *lex causae*, the *de facto* union will not produce property consequences (comparable to marriage), the application of PILPA will need to yield to the application of the Regulation Brussels I bis and the Regulation Rome I or Rome II.

Finally, it should be mentioned that the Court of Justice of the EU already dealt with disputes concerning cross-border property relations of *de facto* unions in the Ágnes Weil case. It held that such disputes fell within the material scope of application of the

[40] See: Article 1(2)(a) of the Regulation Brussels I bis, Art. 1(2)(c) of the Regulation Rome I and Art. 1(2)(b) of the Regulation Rome II.

[41] Mankowski, 2016, p. 124. Such exclusion was first established in the Regulation Rome II. Similar exclusion later followed in the Regulation Rome I and subsequently in the Regulation Brussels I bis.

[42] See: Recital 7 of the Regulation Rome I and Recital 7 of the Regulation Rome II.

[43] Regarding the Regulation Rome II see: Makowski, 2018, p. 94–95. Similar approach is supported regarding the Regulation Rome I: Von Hein, 2015, p. 67. Such approach is also proposed for the exclusion in Article 1(2)(a) of the Succession Regulation: Weller, 2016, p. 84.

Regulation 44/2001[44] (hereinafter: Regulation Brussels I) since they represent a 'civil and commercial matter'.[45] However, an important difference may be observed between Regulation Brussels I and its successor Regulation Brussels I bis. In Article 1(2), the former excluded only the rights and property arising out of matrimonial relationship, while the latter extended the exclusion to also cover rights and property arising out of a relationship deemed by the law applicable to have comparable effects to marriage. Therefore, the outcome of the case could be different if the Regulation Brussels I bis were applicable.

2.2. Maintenance Obligations Between De Facto *Partners*

In addition to property relations, disputes arising between *de facto* partners often revolve around the existence of maintenance obligations among them, either during their union or afterward. The private international law regulation of this field within the EU is divided between two legal sources. The international jurisdiction as well as the recognition and enforcement of decisions are governed by the Regulation (EC) No 4/2009[46] (hereinafter: the Maintenance Regulation), while the applicable law is to be determined in accordance with the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligation (hereinafter: 2007 Hague Protocol). The latter represents an international treaty, adopted within the framework of the Hague Conference on Private International Law, which became binding on the EU Member States by the approval of the European Community.[47]

In Article 1, both instruments define their scope of application as encompassing 'maintenance obligations arising from a family relationship, parentage, marriage or affinity'.[48] Indeed the wording of Article 1 of the Maintenance Regulation was modelled

[44] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal of the EC, L 12/1, 16 January 2001.

[45] CJEU C-361/18 Ágnes Weil of 6 June 2019, ECLI:EU:C:2019:473, para. 45.

[46] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, Official Journal of the EU, L 7/1, 10 January 2009.

[47] Council Decision of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, 2009/941/EC, Official Journal of the EU, L331/17, 16 December 2009.

[48] To this, the 2007 Hague Protocol explicitly adds 'maintenance obligation in respect of a child regardless of the marital status of the parents'.

on Article 1 of the 2007 Hague Protocol.[49] This indicates that their scopes of application fundamentally overlap[50] and necessitate interpretation with some degree of consistency.[51]

The interpretation of the notion 'family relationship' is of key significance in determining whether the scope of application of these instruments extends to the maintenance obligations within *de facto* unions. Although neither instrument contains its definition, it cannot be considered as a mere umbrella term encompassing parentage, marriage and affinity, but should be attributed an independent meaning reaching beyond parentage, marriage, and affinity.[52]

Unfortunately, due to differences in national family laws and different legal nature of the two instruments (one being an EU regulation and the other an international treaty), there appears to be a disagreement concerning the correct method of interpretation. On one hand, some authors contend that the notion 'family relationship' should be interpreted in line with the concepts stemming from the private international law of the forum state.[53] However, it is contended that even such interpretation should be broad[54] and can potentially include the maintenance obligations of *de facto* partners, even if the substantive law of the forum state does not regulate maintenance obligations between them.[55]

On the other hand, several authors support an autonomous interpretation of the notion 'family relationship'.[56] Indeed, such interpretation would be desirable, as it would lead to a uniform application of both instruments across the EU. Regarding the Maintenance Regulation, it is important to note that the notion 'family relationship' is not defined and more importantly, the Regulation makes no reference to the national law of the Member States. Thus, in light of the settled case law of the Court of Justice of the EU, such a situation would necessitate an autonomous interpretation taking into account the concept and the objectives of the Regulation.[57] Considering the close connection between the Maintenance Regulation and the 2007 Hague Protocol, an autono-

[49] Althammer, 2016, p. 630.

[50] Andrae, 2019, p. 659.

[51] Hausmann, 2018, p. 325. See also Recital 8 of the Maintenance Regulation.

[52] Hausmann, 2018, p. 328, Weber, 2012, p. 172.

[53] Regarding 2007 Hague Protocol, see: Bonomi, 2013, pp. 25 and 27 and Althammer, 2016, p. 631. Regarding the Maintenance Regulation and the 2007 Hague Protocol, see: Andrae, 2014, p. 479. Even so, Andrae leaves open the possibility of a single autonomous interpretation applicable between EU Member States.

[54] Althammer, 2016, pp. 630–631.

[55] Regarding German perspective, see: Andrae, 2014, p. 481.

[56] Regarding the 2007 Hague Protocol, see: Weber, 2012, p. 173. Regarding the Maintenance Regulation, see: Althammer, 2016, pp. 631–632; Hausmann, 2018, p. 328.

[57] See, for example: CJEU C-558/16 *Mahnkopf* of 1 March 2018, ECLI:EU:C:2018:138, para. 32; CJEU C-135/15 *Nikiforidis* of 18 October 2016, ECLI:EU:C:2016:774, para. 28. Compare also: Althammer (2016), p. 632.

mous interpretation of the notion 'family relationship' could also be supported with respect to the latter. This is especially pertinent since the 2007 Hague Protocol became part of EU law by virtue of the European Community's approval and that the Maintenance Regulation references it explicitly in its Article 15.[58] Of course, such an autonomous interpretation could only be possible among the EU Member States.

Advocates for autonomous interpretation argue that the understanding of the notion 'family relationship' should be broad and encompass maintenance obligations between *de facto* partners.[59] Such an interpretation aligns with the objectives of the Maintenance Regulation, which seeks to ensure equal treatment of all maintenance creditors (as stated in Recital 11).[60] Furthermore, the form in Annex VII to the Maintenance Regulation anticipates the possibility that the maintenance obligation may be based on a relationship analogous to marriage. It is also worth noting that Article 5(2) of the Regulation Brussels I (before being replaced by the Maintenance Regulation) already governed international jurisdiction for all kinds of maintenance disputes,[61] including those involving *de facto* partners.[62] Consequently, adopting a narrower interpretation would curtail the protection already afforded by EU private international law instruments.

In conclusion, there are compelling reasons to support an autonomous and broad interpretation of the notion 'family relationships' within the EU, allowing the scope of both instruments' to encompass maintenance obligations between *de facto* partners. However, this interpretation will only facilitate the determination of international jurisdiction and applicable law. Whether maintenance obligations exist in a specific case, will still depend on the decision of the competent court based on the *lex causae* as determined pursuant to the 2007 Hague Protocol. It should also be noted that the preliminary questions regarding the partners' status and/or the existence of a *de facto* union are excluded from both instruments.[63]

2.3. Succession to De Facto *Partners' Estate*

As already mentioned, in some legal orders, *de facto* unions may produce legal consequences in the field of succession law. The final question thus remains, whether succession to *de facto* partner's estate may be subjected to the Regulation 650/2012[64] (hereinafter: Succession Regulation).

58 Compare: Weber, 2012, p. 173; and Althammer, 2016, p. 631.

59 Althammer, 2016, p. 632.

60 Novak, 2011, p. 158.

61 Althammer, 2016, p. 632.

62 Hausmann, 2018, p. 328.

63 Althammer, 2016, p. 631.

64 Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and en-

The Succession Regulation defines its scope of application in Article 1 as relating to 'succession to the estates of deceased persons'. The notion 'succession' is further clarified in Article 3 and encompasses 'all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession'. Together with Article 1, this definition demonstrates that the Succession Regulation's scope of application is broad[65] and includes 'all civil-law aspects of succession'.[66] Personal qualities of the subjects involved in a succession case are irrelevant for its application.[67] Furthermore, neither the exclusion of 'public law matters' in Article 1(1) nor the exclusion of 'other civil matters' in Article 1(2) indicates that the succession of the deceased's estate by their surviving *de facto* partner would fall outside the Succession Regulation's scope.

This argument is additionally corroborated by Article 23. It stipulates that the *lex successionis*, determined in accordance with Articles 21 or 22 of the Succession Regulation governs the succession as a whole, including 'the determination of beneficiaries' as well as 'the succession rights of the surviving spouse or partner'. It is argued that both the notion 'beneficiary'[68] as well as the notion 'partner' should be interpreted broadly. The latter should not be equated with the notion 'partner' from a 'registered partnership' as defined in the Regulation on Property Consequences of Registered Partnerships, which leads us to conclusion that a registration of a partnership is not a necessary precondition for the application of the Succession Regulation.[69]

On the other hand, whether a *de facto* partner will be entitled to any succession rights will depend on the (substantive) *lex successionis*. In this respect, it is important to note that in accordance with Article 1(2)(a) of the Succession Regulation, the status of natural persons and family relationships (including those that are deemed to have comparable effects by the applicable law) is excluded from the scope of Succession Regulation. Thus, the preliminary question concerning the validity of a *de facto* union will not be governed by the *lex successionis*, but will have to be resolved under conflict rules in national private international law. This leads to two possible approaches. The competent court can either rely on its own conflict rules (independent connection) or on the conflict rules of law applicable to the main question (dependent connection).[70] Considering that conflict rules governing the validity of *de facto* unions (or marriage) are not harmonised at the

forcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, Official Journal of the EU, L 201/107, 27 July 2012.

65 Pamboukis, 2017, p. 11.

66 Recital 9 of the Succession Regulation.

67 Nikolaidis, 2017, p. 20.

68 Lagarde, 2015, p. 133.

69 Dutta, str. 148.

70 Geč-Korošec, 2001, p. 136–137.

EU level, the second approach appears favourable as it facilitates international harmony of the outcomes.[71]

3. Slovenian Perspective

Over the past four decades, *de facto* unions have become a widespread and broadly accepted social phenomenon in Slovenian society. Statistics show that their number has increased significantly during this period, and this tendency may be expected to continue.[72] These social changes could, of course, be attributed to several reasons. However, at least based on anecdotal evidence, it seems that far-reaching legal regulation, which often puts *de facto* partners on an equal footing with spouses, has also contributed significantly to their proliferation.

3.1. Substantive Law

3.1.1. Historic Developments

Slovenia's substantive regulation of *de facto* unions dates back to the 1970s when Slovenia was a part of the Socialist Federative Republic of Yugoslavia. With the 1971 XX-XLII amendments to the Federal Constitution and the new 1974 Federal Constitution, the socialist republics and autonomous provinces gained exclusive jurisdiction over family and succession law.[73] This paved way for the adoption of the Slovenian Marriage and Family Relations Act (hereinafter: MFRA),[74] which introduced one the most progressive regulation of *de facto* unions at the time.

Pursuant to Article 12 of MFRA, an 'extramarital union' (*zunajzakonska zveza*) was defined as a long-term domestic community of a man and a woman who are not married and there are no reasons why their marriage (if concluded) would be invalid. Such unions created the same legal consequences under the MFRA as if the partners had concluded a marriage. In all other legal fields, the partners enjoyed the same legal consequences as spouses if the relevant law so provided.[75]

Despite some initial reservations about such far-reaching equalisation *de facto* unions with marriage, this institution gained acceptance in society and contributed to de-stig-

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71 Weller, 2016, p. 83; Metallinos, 2017, pp. 253–254.

72 See, *inter alia*: Dougan, 2019, pp. 585–586.

73 For a comprehensive overview of the development of family law in Yugoslavia (pertaining to *de facto* unions), see: Šarčević, 1981, pp. 318–325.

74 *Zakon o zakonski zvezi in družinskih razmerjih*, Official Gazette of the Socialist Republic of Slovenia, No. 15/76.

75 See also: Zupančič, 1999, pp. 100–103.

matising couples who chose to live together without marrying.[76] Therefore, it is not surprising that the existing legal regulation of extramarital unions in the MFRA remained in force even after Slovenia's independence in 1991. Moreover, the legal status of extramarital unions was reinforced with the adoption of the new Slovenian Constitution,[77] which elevated them to a constitutionally protected category. Article 53 of the Constitution stipulates that the legal consequences of these unions shall be governed by the law. Therefore, the Slovenian legislator became obligated to maintain the legal regulation of extramarital unions.[78]

In accordance with the definition in Article 12 of MFRA, an extramarital union could only exist between partners of opposite sex. *De facto* unions of same-sex couples did not confer any legal consequences. The 2005 Same-Sex Civil Partnership Registration Act,[79] which for the first time enabled same-sex couples in Slovenia to formalise their relationships, only regulated same-sex civil partnerships that were registered. Thus, the first recognition of same-sex *de facto* unions only came in 2016 with the enactment of the Civil Union Act (CUA).[80] Under the CUA, a distinction was made between a formal and informal civil union. A formal civil union, which was solemnised before the competent authority, created the same legal effects as marriage in all legal spheres except for mutual adoption and the right to biomedical assisted procreation (as stated in Article 2 of the CUA). On the other hand, an informal civil union was defined in Article 3 as a long-term domestic community between two women or two men who have not formalised a civil union, but for which there were no reasons why a civil union between them (if concluded) would be invalid. Such unions created the same legal consequences between the partners as if the partners had formalised their civil union. In all other legal spheres (i.e. outside family law), a non-formal union had the same legal consequences as an (opposite-sex) extramarital union, unless otherwise provided by the CUA.[81]

The adoption of the CUA was soon followed by the adoption of the Family Code[82] (hereinafter: FC), which replaced the MFRA. Apart from some stylistic improvements,

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76 Novak, 2022, p. 169.

77 *Ustava Republike Slovenije*, Official Gazette of the Republic of Slovenia, Nos. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99, 75/16 – UZ70a and 92/21 – UZ62a.

78 Novak, 2019, p. 40.

79 *Zakon o registraciji istospolne partnerske skupnosti*, Official Gazette of the Republic of Slovenia, Nos. 65/05, 55/09 – CC dec., 18/16 – CC dec., 33/16 – ZPZ and 68/16 – ZPND-A.

80 *Zakon o partnerski zvezi*, Official Gazette of the Republic of Slovenia, Nos. 33/16, 94/22 – CC dec. and 5/23 – DZ-B).

81 Pursuant to Article 3(4) of the CUA, partners living in an informal civil union could not adopt children together and did not have the right to biomedically assisted procreation.

82 *Družinski zakonik*, Official Gazette of the Republic of Slovenia, Nos. 15/17, 21/18 – ZNOrg, 22/19, 67/19 – ZMatR-C, 200/20 – ZOOMTVI, 94/22 – CC dec., 94/22 – CC dec. and 5/23.

the definition and the consequences of an extramarital union remained unchanged. It was deemed that the regulation of extramarital unions had become well-establish in the awareness of Slovenians, and any changes to it might disrupt already established social expectations.[83] In fact, the only changes to the existing regime were indirect, stemming from changes in the legal consequences of marriage.[84]

The most recent changes to the regulation of *de facto* unions in Slovenia occurred in 2023 through an amendment to the FC.[85] This amendment was prompted by two decisions of the Constitutional Court of the Republic of Slovenia, in which it ruled that the existing legislation, restricting the right to marry to couples of opposite-sex, was incompatible with the constitutional prohibition of discrimination.[86] By the same reasoning, the Constitutional Court further held that the exclusion of same-sex partners living in a formal civil union from joint adoption was unconstitutional.[87]

Following the amendment, the FC now defines an extramarital union as a long-term domestic community[88] of two persons who are not married and there are no reasons why their marriage (if concluded) would be invalid. With this, *de facto* unions of opposite-sex and same-sex partners are equalised and jointly regulated by the FC.

3.1.2. Legal Consequences of Extramarital Unions

As mentioned earlier, in the field of family law, an extramarital union in Slovenia creates the same legal consequences between the partners as marriage, as outlined in Article 4 of the FC. These consequences encompass both personal consequences (such as the right and duty of mutual respect, trust and assistance, the right to housing protection, the right to maintenance etc.) as well as the same property consequences (including default property regime or a contractual property regime).[89] In all other legal fields, an extramarital union is equalized with marriage only if the respective law so provides. In Slovenia, such examples are numerous.[90] Pursuant to Article 4a of the Inheritance Act[91],

83 Novak, 2019, p. 42.

84 Novak, 2017, p. 50.

85 *Zakon o spremembah Družinskega zakonika* (Official Gazette of the Republic of Slovenia, No. 5/23).

86 Constitutional Court of the Republic of Slovenia, U-I-486/20-14, Up-572/18-36 of 16 June 2022.

87 Constitutional Court of the Republic of Slovenia, U-I-91/21-19, Up-675/19-32 of 16 June 2022.

88 The law does not specify how long a living arrangement must last before it can be considered long-term. The necessary duration may, therefore, vary from case to case, with the court taking into account the intensity of the relationship as well as whether the partners have children together. See: Novak, 2022, pp. 172–173.

89 Novak, 2022, p. 174.

90 This frequently leads to an erroneous belief that marriage and an extramarital union are completely equalised.

91 *Zakon o dedovanju*, Official Gazette of the Republic of Slovenia, No. 13/94 – ZN, 40/94 – CC dec., 117/00 – CC dec., 67/01, 83/01 – OZ, 73/04 – ZN-C, 31/13 – CC dec. and 63/16.

an extramarital partner enjoys the same rights, obligations, restrictions and status as a spouse. Provisions, which equalise extramarital partners and spouses, may also be found in the field of social security law, tax law, housing law, etc.[92]

3.1.3. Procedural Aspects of Determining the Existence of Extramarital Unions

After the introduction of extramarital unions into Slovenian law, a discussion emerged on how to establish their existence. Some contended that the existence of an extramarital union could be submitted to the court as the main question in special proceedings, while others regarded it as either a mere question of facts or a preliminary question about the existence of a legal relationship upon which the decision on the main question depends.[93]

The ambiguities regarding the determination of the existence of an extramarital union have since been resolved through the inclusion of an explicit provision in the MFRA, which was subsequently incorporated into Article 4(2) the FC. The issue of the existence of an extramarital union can only be decided as a preliminary question (never as the main question in the proceedings). Furthermore, the resolution of such preliminary question has effects solely within the proceedings, in which it was raised. Furthermore, the resolution of such preliminary question has effects solely within the proceedings, in which it was raised.

4. Private International Law

The inclination to regulate the consequences of *de facto* unions in substantive law was not unique to Slovenia but could also be observed in some other republics of the former Yugoslavia.[94] This trend was reflected in the 1982 Yugoslav Act on the Resolution of Conflicts of Laws with the Laws of Other Countries in Certain Matters.[95] Its Article 39, which regulated the applicable law to property relations of *de facto* unions, is considered to be the first conflict-rule making explicit reference of such unions.[96] When PILPA was adopted in 1999, the exact same provision was included in Article 41.

Considering the scopes of application of various EU regulations in the field of private international law, PILPA continues to be applicable to cross-border disputes between *de facto* partners in two areas: regarding their property relations (given their exclusion from the Twin Regulations' scope) and to determining the existence and validity of a *de facto* union.

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92 Novak, 2022, pp. 175–176.

93 For an overview of the various arguments, see: Wedam-Lukić, 1987, pp. 402 and 404–406.

94 See: Šarčević, 1981, pp. 321–325.

95 *Zakon o ureditvi kolizije zakonov s predpisi drugih držav v določenih razmerjih*, Official Gazette of the Socialist Republic of Slovenia, Nos. 43/82, 72/82 – corr. and Official Gazette of the Republic of Slovenia, No. 56/99.

96 Medić, 2022, p. 94.

4.1. Property Relations Between De Facto *Partners*

Article 41 of the PILPA, which governs the law applicable to property relations of *de facto* unions differentiates between default property regimes and contractual property relations. Regarding the former, it envisages two connecting factors: the law of the state of the partners' common nationality (*lex patriae communis*) and in case the partners are of different nationalities, the law of their common domicile (*lex domicilii communis*). Article 41 does not specify the relevant moment of connection. Legal theory maintains that any change in the circumstances that underlay the determination of applicable law, such as a change of common nationality or common domicile, causes the change of the applicable law.[97] However, the new law only applies prospectively, while a different law will govern the property relations of the partners that existed prior to the change (doctrine of partial mutability).[98]

The abovementioned connecting factors are also envisaged for the property (and personal) relations between spouses under Article 38 of the PILPA. Yet, Article 38 also provides for two additional subsidiary connecting factors: the law of the state of spouses' last common domicile and the law of the state with which the relationship is in closes connection. It is not entirely clear why the legislator decided to omit these subsidiary connecting factors for property relations of *de facto* partners.[99] Considering that pursuant to Slovenian law, an extramarital union can sometimes exist even between partners who do not live together,[100] the inclusion of these additional connecting factors would undeniably be beneficial.[101]

The contractual property relations of *de facto* partners are governed by the law governing their default property regime at the time the contract was concluded (Article 41(3) of the PILPA). However, unlike spouses,[102] *de facto* partners cannot choose the applicable law for their contractual property relations.[103]

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97 Compare: Ilešič, Polajnar-Pavčnik and Wedam-Lukić, 1992, pp. 70–71 and 74.

98 *Ibid.*

99 Most probably, the legislator held that a *de facto* union cannot exist between partners, who do not share their domicile. See: Ilešič, Polajnar-Pavčnik and Wedam-Lukić, 1992, pp. 73–74.

100 Compare: Supreme Court of Republic of Slovenia, II Ips 264/2010 of 19 December 2013. The Supreme Court held that an extramarital union may exist even between the partners who do not live together if this decision was made by mutual consent and due to justifiable reasons, such as work or housing situation. Nonetheless, their union must include other characteristics, such as economic interdependence, emotional attachment and intimacy.

101 Geč-Korošec, 2002, p. 67.

102 In accordance with Article 39 of the PILPA, the contractual property relations of spouses are governed by the law applicable to their default property regime. However, if this law allows the choice of law, the spouses are also allowed to choose the law applicable to their contractual property relations.

103 Compare: Ilešič, Polajnar-Pavčnik and Wedam-Lukić, 1992, p. 74.

Conversely, the PILPA makes no explicit reference to *de facto* unions among provisions pertaining to international jurisdiction. Therefore, pursuant to the general rule in Article 48 of the PILPA, Slovenian courts will hold international jurisdiction if the defendant is domiciled in Slovenia (*actor sequitur forum rei*). This jurisdictional ground allows the competent court to decide on the entire property of *de facto* partners, regardless of its location.[104]

Article 67 of the PILPA also includes subsidiary grounds for international jurisdiction in property disputes between spouses. It is important to note that due to the adoption of the Matrimonial Property Regulation, this provision can no longer be applied to determine international jurisdiction in matrimonial property disputes.[105] However, the question remains, whether this provision could be analogously applied to property disputes of *de facto* partners. The case law[106] and the legal theory[107] seem to support this possibility. Following this line of argumentation, Slovenian courts may still hold international jurisdiction (even when the defendant is not domiciled in Slovenia) if the property of *de facto* partners is located in Slovenia (*forum patrimonii*). However, in this case, the courts' jurisdiction is limited solely to the property of *de facto* partners located in Slovenia and the courts are not allowed to rule on the property located abroad.[108] This is only possible if two additional conditions are met: (1) the majority of property is located in Slovenia and (2) the defendant (domiciled outside Slovenia) consented to the jurisdiction of Slovenian courts.

The international jurisdiction of Slovenian courts will also exist in case of prorogation of jurisdiction (as outlined in Article 52) and in case of tacit prorogation (as stipulated in Article 53). However, prorogation is only possible if one of the parties involved is a Slovenian national.

It should be noted that since the adoption of the Twin Regulations, property relations of spouses have been governed by substantially different rules on international jurisdiction and applicable law when compared to those governing *de facto* unions. No differences of this extent existed prior, since in Slovenia both marriage and *de facto* unions pro-

[104] *Ibid.*, p. 103.

[105] Provisions in the Matrimonial are exclusive in nature.

[106] See: Ljubljana Higher Court, I Cp 628/2019 of 10 July 2019, and Maribor Higher Court, I Cp 653/2017 of 5 September 2017. In both cases, which concerned property disputes between *de facto* partners, the courts based their international jurisdiction on Article 67 of the PILPA. This indicates that its analogous application to *de facto* unions is possible. Nonetheless, it cannot be overlooked that in both cases, the defendants had their habitual residence in Slovenia. Therefore, the courts should rely on Article 48 of the PILPA. It seems that the possibility of an analogous application of Article 67 also stems from the decision of the Supreme Court of the Republic of Slovenia, II Ips 184/2015 of 1 December 2016 (although this issue was raised *obiter dictum*).

[107] Compare: Rijavec, 2005, pp. 259–261.

[108] Compare: Ilešič, Polajnar-Pavčnik and Wedam-Lukić, 1992, p. 103.

duce the same property consequences. As a result, the question arises as to whether the current regulation under the PILPA is still appropriate. The differences that have arisen are probably not in line with the expectations of couples in Slovenia, who have become accustomed to receiving same treatment. In this context, the Croatian PILA can offer an interesting example. In Articles 40(2) and 49(2), it provides that the provisions of the Matrimonial Property Regulation regarding international jurisdiction and applicable law shall apply *mutatis mutandis* to property relations of extramarital unions.[109]

4.2. Determining the Existence and Validity of De Facto *Unions*

In proceedings concerning the legal consequences of a *de facto* union, Slovenian courts will also need to resolve the preliminary question, whether a valid *de facto* union actually exists. Since the unified rules of the EU private international law do not regulate these issues, Slovenian courts will have to rely on Slovenian private international law.

Unfortunately, the PILPA remains silent on how to resolve preliminary questions. In Slovenian legal theory, both independent and dependent connections are proposed as potential approaches. As a possible solution, it is suggested that in choosing the appropriate conflict rules for the resolution of such preliminary question, courts should take into account the legal order with which the relationship is most closely connected.[110]

If Slovenian courts decide to resolve the preliminary question in accordance with Slovenian conflict rules, they may encounter another *lacuna.* PILPA provides no explicit conflict rules pertaining to the existence and validity of *de facto* unions. Pursuant to Article 3 of the PILPA, legal *lacunas* should be resolved by analogous application of the provisions and principles of the PILPA as well as the principles of the legal order of the Republic of Slovenia and the principles of private international law. Following this approach, Article 36 governing the law applicable to the (in)validity of marriage, appears to be the most appropriate for determination of the validity of *de facto* unions. It points to any substantive law under which the marriage was concluded under Article 34 (law applicable to material conditions for marriage) and Article 35 (law applicable to the formal conditions for marriage). As *de facto* unions require no formalisation for their validity, only Article 34 requires closer examination. It stipulates that law applicable to material conditions for marriage shall be the law of each spouse's nationality. In cases where the *de facto* partners have the same nationality, applying this provision poses no issues. However, the situation is different when the partners have different nationalities, potentially resulting in situation, where one legal order regulates *de facto* unions while the other does not.[111] To resolve this issue, an additional conflict rule on formation and

[109] See also: Medić, 2022, pp. 100–108.

[110] Polajnar-Pavčnik, 1987, p. 545.

[111] *Ibid.*, pp. 546–547.

termination of *de facto* unions would be desirable. Inspiration could be drawn from Article 38 of the Croatian PILA, which points to the law of the state with which the *de facto* union has or had the closest connection.[112]

5. Conclusion

The growing number of couples cohabitating without formal marriage, the rising number of countries regulating the legal consequences of *de facto* unions, and the increased mobility of individuals in a globalised world all underscore the mounting necessity to regulate the relations of *de facto* partners within private international law. To date, EU legislative activity has not comprehensively addressed these needs. The regulation of some of the consequences of *de facto* unions within EU private international law has not been based on an awareness of the importance of such unions in modern society, but occurred only indirectly. Moreover, the varying approaches adopted by different Member States make it unlikely that a comprehensive regulation of this area will be adopted in the near future. A well-considered and comprehensive approach in national private international law is, therefore, all the more vital in states that recognise the legal consequences of *de facto* unions and desire to protect such couples in their relations with an international element. From a Slovenian perspective, it should be highlighted that the previously avant-garde regulation in this field has become outdated over time, so it no longer adequately responds to the needs of *de facto* partners. A reform of the existing law would, therefore, be welcome, and the Slovenian legislator could also draw inspiration from the innovative solutions found in Croatian private international law.

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[112] Medić, 2022, pp. 99–100.

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