PRELIMINARY QUESTIONS IN EU PRIVATE INTERNATIONAL LAW

SUSANNE L GOESSL*

A. Introduction

Private International Law (PIL) in the European Union (EU) is getting more and more "Europeanised" by several enactments in International Private[1] and Procedural Law.[2] These enactments are beginning to form a consistent, interrelated system.[3] This allows the derivation of general principles or rules, even though a "general part" of EU PIL has not yet been created. For example, each Regulation on applicable law contains specific rules concerning general questions, such as *renvoi* or public policy.[4]

One very general issue of PIL has not attracted much attention yet: the treatment of preliminary questions.[5] This paper will analyse why the issue of preliminary questions is not only of academic interest for EU PIL and offer suggestions as to how it should be handled. Following a short description of the issue, this text will scrutinise the main constellations in which preliminary questions occur in EU PIL. The paper will show that a *lex fori* approach is preferable to a *lex causae* approach in the EU context.

* Doctoral student in Private International Law, Institute for Foreign Private and Private International Law, University of Cologne, and Referendar (legal trainee) in Hamburg.

1 Regulation EC No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), [2008] OJ L177/6; 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 (Rome II), [2007] OJ 199/40.

2 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I), [2001] OJ L12/1.

3 See Recital 7 of Rome I and II.

4 eg Arts 20 and 21 of Rome I and Arts 24 and 26 of Rome II.

5 For discussion of the issue see: CC Bernitt, *Die Anknüpfung von Vorfragen im Europäischen Kollisionsrecht* (Mohr Siebeck, 2010); A Junker, "Vor Art 1 Verordnung (EG) Nr 864/2007" in FR Säcker and R Rixecker (eds), *Münchener Kommentar zum BGB X* (CH Beck, 2010), paras 35–37; J Kropholler, *Internationales Privatrecht* (Mohr Siebeck, 2006) § 32 IV 2a, b; V, 226ff; D Solomon, "Die Anknüpfung von Vorfragen im Europäischen Internationalen Privatrecht" in J Bernreuther *et al* (eds), *Festschrift für Ulrich Spellenberg* (Sellier, 2010), 355, 367–68, 370; HJ Sonnenberger, "Randbemerkungen zum Allgemeinen Teil eines europäisierten IPR" in D Baetge *et al* (eds), *Die richtige Ordnung: Festschrift für Jan Kropholler zum 70. Geburtstag* (Mohr Siebeck, 2008), 227; HJ Sonnenberger, "Grenzen der Verweisung durch europäisches internationales Privatrecht" [2011] *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 325, 330 (cited as Sonnenberger 2).

B. Issue and Terminology

1. What Is a Preliminary Question?

Whenever a rule contains a legal concept, such as "property" or "matrimony", rarely are the legal requirements for the concept clarified in the same rule. Nevertheless, determining the meaning of such a concept is often necessary to resolve the principal question. Those concepts are often called "preliminary" or "incidental" questions. The judge has to find the legal requirements of the concept before he can decide the main question. In an international context he also has to find a choice-of-law rule to know which law determines the legal requirements.[6]

A simple case might illustrate the issue. A tort rule requires damage to the claimant's property. The judge has to determine whether the claimant owns the property in question. So, the incidental question that arises is: what are the legal requirements for ownership of that property? In a purely national case, the judge applies his national property law to find the answer. In an international case the tort rule itself might be a foreign rule that had been found to be applicable by the earlier application of the PIL of the forum. The judge now has to determine which national property law he is going to apply to find the rules for ownership. There are basically two possibilities: he can apply his national PIL (*lex fori*) to determine the law applicable to the preliminary question, or he can use the *lex causae*'s PIL to find the law applicable to the preliminary question.[7]

2. Advantages and Disadvantages of the *Lex Fori* and the *Lex Causae* Approach

(a) Lex Fori

The law of the forum can determine the law applicable to the preliminary question in the same way as it would if the determination of the ownership was the main question in the case.[8] To use the example from above: the judge therefore applies his national PIL rule to determine the ownership of the property, although the main question is (most likely) governed by the *lex loci delicti*. If

[6] K Schurig, "Die Struktur des kollisionsrechtlichen Vorfragenproblems" in H-J Musielak and K Schurig (eds), *Festschrift für Gerhard Kegel zum 75 Geburtstag* (Kohlhammer, 1987), 549, 550.

[7] The judge can also apply the substantive rules of the *lex fori* or *lex causae*, but those cases remain exceptional. AE Gotlieb, "The Incidental Question Revisited – Theory and Practice in the Conflict of Laws" (1977) 26 *International & Comparative Law Quarterly* 734, 755–56; G Kegel and K Schurig, *Internationales Privatrecht* (CH Beck, 2004), § 9 II 2, 382; W Wengler, "§ 8 Die Technik des internationalen Privatrechts" in Mitglieder des Bundesgerichtshofs (eds), *Reichsgerichtsräte-Kommentar*, *Bd VI Internationales Privatrecht* (Walter de Gruyter, 1981), n 37b, 806.

[8] Gotlieb, *supra* n 7, 754.

the same claimant later has another issue where the determination of ownership of the same piece of property is necessary as well (eg a family law issue), the judge also applies his national PIL to determine the question of ownership. The same thing would happen in every court in that state. Wherever the *lex fori* applies, the owner of the property will always be the same, no matter if the question of the ownership occurs as a preliminary or main question.[9] This result is called "national harmony".

(b) Lex Causae

The other approach applies the PIL of the law of the main question (*lex causae*).[10] In the example, the judge applies the PIL of the *lex loci delicti* to the question of ownership. Each judge bound by the tort rule will do so. In areas where the PIL has been harmonised, all judges of Member States will come to the same result in preliminary questions if they all apply the *lex causae* approach, an effect which is called "international harmony". On the other hand, in the family law issue, the owner of the property will be determined by the PIL of the *lex causae* of the family law issue. Hence, the same property might have different owners depending on the legal context in which the question of ownership occurs.[11]

(c) Problems of Both Approaches

The achievement of national harmony is as an important concern as the achievement of international harmony in PIL. Unfortunately, the two often exclude each other. If all the judges apply the *lex causae* they will achieve international but not national harmony. On the other hand, if they all apply the *lex fori*, they achieve national harmony, but international disharmony.

This frequent dichotomy is one reason why there is no clear position as to how to treat preliminary questions. There is basic agreement that each approach is feasible in some cases and not in others.[12] In cases of purely national PIL national harmony is sometimes regarded as slightly more important than international harmony. Therefore in national PIL the *lex fori* approach usually prevails. The *lex causae* approach is mainly regarded as the better solution in preliminary questions with origins in international law, such as conventions. Those conventions usually are based on the idea of achieving international harmony between the Member States and are limited to a narrow scope. By becoming a member the interest in "international harmony" in this con-

[9] Gotlieb, *supra* n 7, 755; Kegel and Schurig, *supra* n 7, § 9 II 1 (S 380); Schurig, *supra* n 6, 581.
[10] Gotlieb, *supra* n 7, 754.
[11] Schurig, *supra* n 6, 549–98, 556; Kropholler, *supra* n 5, § 32 IV 1 (S 225); Gotlieb, *supra* n 7, 755.
[12] Bernitt, *supra* n 5, 58–59; H-P Mansel, "Zum Verhältnis von Vorfrage und Substitution" in D Baetge *et al* (eds), *Die richtige Ordnung: Festschrift für Jan Kropholler zum 70 Geburtstag* (Mohr Siebeck, 2008), 353, 361.

crete matter may be determined as more important than the one in "national harmony".[13] However, this would not be the case if the *travaux preparatoires* of the convention indicate that the drafters did not intend that a particular preliminary question would be governed by the *lex causae* under that convention.

To guarantee the uniform interpretation of European rules, the Court of Justice of the European Union (CJEU) sometimes[14] develops autonomous definitions specifically for concepts in a European act. Instead of looking for the applicable law, the concept "ownership of the property" could in our case be defined autonomously as well. On the other hand, the EU does not have the competence to define concepts in many substantive areas.[15] Hence, the CJEU could define "property" or "ownership" only within the scope of the harmonised PIL rule. Substantive rules and concepts on property and ownership remain untouched.

The results are two layers of legal concepts: autonomous substantive concepts for the EU PIL and different national substantive concepts for all remaining cases. Both concepts have to be separated strictly to not intervene in the competence of either the EU or the national law. This is unsatisfactory for a legal system such as the EU which wants to incorporate itself into the national legal systems and advance integration. Therefore, autonomous substantive definitions which are limited to EU PIL have to remain exceptional. They should be limited to cases where the EU has an urgent interest not only in uniform PIL rules but in uniform substantive definitions as well.[16]

Another way to avoid the issue of preliminary questions is a broad autonomous characterisation:[17] characterisation within European enactments happens autonomously.[18] If each legal concept is characterised as falling within the ambit of the main question, the judge has to determine the applicable law for the principal and all preliminary questions only once.[19] In our example the question of ownership then forms part of the (principal) tort question. The judge applies the substantive law which governs the tort question in property

[13] In relation to the whole paragraph, see Kropholler, *supra* n 5, § 32 IV 1 (S 225); C von Bar, *Internationales Privatrecht, Band 1, Allgemeine Lehren* (CH Beck, 1987), § 3 no 155.

[14] Case C-334/00 *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH [HWS]* [2002] I-ECR 7357 [23]; Case C-51/97 *Réunion européenne SA ua v Spliethoff's Bevrachtingskantoor BV et al.* [1998] I-ECR 6511 [15]. *Cf* Case C-440/97 *GIE Groupe Concorde et al v Master of the Vessel Suhadiwarno Panjan et al* [1999] I-ECR 6307 [13].

[15] See eg Art 345 Treaty on the Functioning of the European Union (TFEU) (ex-Art 295 TEC); Art 167(5) TFEU (ex-Art 151(5) TEC).

[16] S Grundmann, "Das Internationale Privatrecht der E-Commerce-Richtlinie – was ist kategorial anders im Kollisionsrecht des Binnenmarkts und warum?" (2003) 246 *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)* 67, 291–92; Schurig, *supra* n 6, 594. For an example see Recital 11 of Brussels I.

[17] Also known as "qualification".

[18] See Case C-265/02 *Frahuil SA v Assitalia SpA* [2004] ECR I-1543 [22]; (2004) 1291 NJW-RR, 1291.

[19] Sonnenberger 2, *supra* n 5, 330.

questions as well. All judges within the EU come to the same result. From a practical point of view, this solution seems very feasible.

From the point of view of EU law, however, this solution does not conform to the principle of conferred powers.[20] EU institutions and the Member State governments should ensure that the EU stays within its competence when legislating.[21] A broad autonomous characterisation without a clear legislative imperative gives strong legislative power to the judiciary without the same control as a legislative act itself. Hence, the control of the principle of conferred powers could be undermined. Furthermore, the competence of the EU to enact universal PIL rules is not yet universally accepted[22] and should not be broadened by the CJEU unless absolutely necessary. The scope of each principal question only includes preliminary questions if there is either a special substantive connection between the two questions or there is a clear statement about the two questions being governed by the same law in the act itself.[23]

Hence, relying on an autonomous interpretation of all concepts in EU instruments is not a good solution.

C. Necessity of the *Lex Fori* Approach in Some Areas

In areas where the substantive law or the private international law has been harmonised, the choice between the two approaches leads to one solution: the *lex fori*.

Whenever the PIL regarding the concept in question has been harmonised by the EU[24] the judge has to apply this harmonised rule.[25] Therefore, if in a tort issue the preliminary question comes up whether a valid contract has been concluded, the judge has to apply the relevant provisions of Rome I to determine the law applicable to the contract. The principle of *effet utile*, which

[20] A Goucha Soares, "The Principle of Conferred Powers and the Division of Powers between the European Community and the Member States" (2001) 57 *Liverpool Law Review* 23, 76–78. In Case C-210/06 *Cartesio Oktató és Szolgáltató bt* [2008] I-ECR 9664 [110] the CJEU left to national law the determination of connecting factors on the incorporation of a company.

[21] Solomon, *supra* n 5, 367–68, 370.

[22] Lettre ouverte au Président de la République in (2006) *La semaine juridique. Edition générale* 2312; Sonnenberger 2, *supra* n 5, 326: P Kindler, "Vom Staatsangehörigkeits- zum Domizilprinzip: das kündftige international Erbrecht der Europäischen Union" [2010] *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 44, 48.

[23] Such as Art 15 of Rome II. Against, see A Dickinson, *The Rome II Regulation* (Oxford University Press, 2008), 3.11.

[24] For examples see Rome I and Rome II, Art 12 of Council Directive 93/7/EEC of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, [1993] OJ L74.

[25] Bernitt, *supra* n 5, 135; Grundmann, *supra* n 16, 291; KF Kreuzer, "Was gehört in den Allgemeinen Teil eines Europäischen Kollisionsrechts?" in B Jud *et al* (eds), *Kollisionsrecht in der Europäischen Union* (Jan Sramek, 2008), 1, 55, 57.

requires giving effect to EU laws, applies. Furthermore, it achieves national harmony as well as international harmony within the harmonised area.[26] Technically, the EU rule is part of the *lex fori*.

If the substantive law of the legal concept in question has been harmonised[27] the judge also has to follow the *lex fori* approach. If not, an appropriate characterisation cannot be ensured. As seen above, the autonomous characterisation of preliminary questions interferes with the principle of conferred powers. Therefore, characterisation occurs from the (national) point of view of the *lex fori*. The judge in our example first characterises the question of the ownership of the property in the way the *lex fori* does to determine if it falls under property law[28] or perhaps as part of the law of trusts, succession or company law if some trusts, succession or company law matters are involved. The characterisation in universal PIL uses a broad understanding of terms in order to be open to unknown foreign legal phenomena.[29] Therefore, a substantive concept which has been harmonised is probably narrower than the concept PIL needs in order to include foreign phenomena. On the other hand, the *effet utile* requires a characterisation which includes the understanding of the concept in the harmonised substantive law. If the preliminary question is governed by the *lex causae* the characterisation occurs from the point of view of the *lex causae*. The *lex causae*, if not part of the EU system, might have no idea about and no interest in the harmonised understanding. To ensure that the characterisation includes the harmonised concept, it has to occur from the point of view of a Member State. This is only guaranteed by the *lex fori* approach.[30]

Thus, if the concept of the preliminary question falls within a harmonised area of law, the *lex fori* approach is required.

D. Advantages of the *Lex Fori* in Non-Harmonised Areas

The harmonisation of EU PIL started with conventions, ie international law.[31] In international conventions on conflict of laws the *lex causae* approach and its international harmony are regarded by some as a good solution.[32] On the other hand, EU law might differ in some points from international law and therefore require a different treatment. As a next step, the arguments usually given for

[26] Grundmann, *supra* n 16, 291.
[27] Such as is envisaged in Art 81(2)(f) TFEU in relation to civil procedure.
[28] In the case of *renvoi* the judge tries to follow the foreign law's way of interpreting its PIL.
[29] Eg security or company PIL uses broader concepts of security and of a company than in substantive law.
[30] Implicitly in the judgment of the Bundesgerichtshof of 9 July 2009, no Xa ZR 19/08 in (2009) *Neue Juristische Wochenschrift* (NJW) 3371, 3373.
[31] Eg 1980 Rome Convention on the law applicable to contractual obligations (consolidated version), [1998] OJ C27/34.
[32] Kropholler, *supra* n 5, § 32 IV 1 (S 225); C von Bar, *supra* n 13, § 3 no 155.

favouring the *lex fori* approach will be scrutinised to see whether they are still valid in the EU context.

1. Interest in National Harmony

The main advantage of the *lex fori* approach, national harmony, might appear to be only important in purely national PIL. Primarily EU PIL is not and cannot be concerned with contradictory decisions within one member state. On the other hand, it is concerned with the establishment of an effective judiciary in international questions. Preliminary questions mainly include legal relationships, such as marriage, ownership or the validity of a contract. In many legal systems these questions can be decided separately by a declaratory judgment.[33] Therefore, the claimant could, if other requirements are fulfilled, ask for a declaratory decision on the preliminary question which then becomes a principal question. This judicial decision is binding in the state in which it was issued, which creates national harmony. It also has to be recognised within the borders of the Brussels regime. The national harmony achieved by declaratory judgments thus becomes a "Brussels harmony". It seems contradictory if the claimant obtains a different result if he seeks a separate declaratory decision rather than obtaining a more complex decision that deals with the principal and the preliminary question. As national harmony broadens to the borders of the Brussels regime it is significant within the EU.

Furthermore, as EU law is still an evolving system it has not yet been stabilised through application and use. It overlaps with national law and still has to prove that it is a good alternative to the application of the traditional national rules. Therefore, to create or strengthen its credibility national interests behind national PIL systems should not be ignored by EU PIL. National harmony might not be of paramount interest for EU PIL but it remains an issue to be kept in mind.

2. Clear and Foreseeable Rules

A major interest within the EU is the creation of a legal system with clear and foreseeable rules.[34] EU rules are not traditionally grown within the national systems and therefore do not always fit to the traditional rules. To be integrated

[33] Many systems require a legal reason why the relationship has to be ascertained separately from the final judgment, eg § 256 para 1 Zivilprozessordnung (ZPO) in Germany. If the uncertainty about the existence of the relationship until the final judgment might cause negative effects, this requirement is fulfilled, Bundesgerichtshof (BGH), 18 October 2000, no XII ZR 179/98, in (2001) *Neue Juristische Wochenschrift (NJW)* 221, 222. In cross-border litigations problems of distance and length of litigation can create such a need in ascertaining the existence of such preliminary issues. See B Hess, "Transatlantische Justizkonflikte" [2005] *Die Aktiengesellschaft (AG)* 809, 812.

[34] Recital 6 of Rome I and Rome II.

more easily the rules should be easy to understand and to apply. The EU PIL rules are becoming an increasingly complex system. Hence, the creation of understandable rules is of paramount interest in EU PIL.

The level of harmonisation differs depending on the legal area. Some parts of the substantive law are almost totally harmonised.[35] For some areas at least the PIL has been harmonised or is going to be harmonised sooner or later.[36] In some areas it has not yet been clarified whether a European act contains a PIL rule or remains substantive.[37] Almost no areas at all are uninfluenced by the harmonisation. Even initial core competences of the Member States, such as family law, the law relating to people's names or succession law are at least touched by decisions of the CJEU in PIL questions.[38]

In a complex legal case it might be hard for the judge to determine which parts of preliminary concepts have been harmonised or at least contain a harmonised PIL rule. If the tort case of our example touches questions of company, competition, cultural or intellectual property law, the judge has to examine the level of EU harmonisation in all those areas if the *lex fori* approach is only limited to those cases where the PIL and substantive law have been harmonised. This effort seems disproportionate regarding the result, which is not resolving the issue but only determining whether the *lex fori* is obligatory to treat the preliminary question (here of ownership). If the judge comes to the conclusion that the level of harmonisation is very low, he still has to decide between the *lex causae* and the l*ex fori* approach.

Alternatively, all preliminary questions could be treated equally. A clear rule would have to be the *lex fori* approach, as it is obligatory in some areas. Therefore, the EU interest in a clear and easily applicable rule supports the *lex fori* approach.

[35] Eg broad parts of competition law.

[36] Such as contracts and non-contractual obligations, probably soon succession law, indirectly company law. Overview: A Dutta, "Europäische Integration und nationals Privatrecht nach dem Vertrag von Lissabon: die Rolle des Internationalen Privatrechts" [2010] *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* 530.

[37] See the long discussion on Art 3 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), [2000] OJ L178/1 by AG Cruz Villalón on 29 March 2011 and by the Grand Chamber on 25 October 2011 in Joined Cases C-509/09 and C-161/10, *eDate Advertising GmbH v X* and *Martinez, Martinez v Société MGN Limited;* G De Baere, "'Is This a Conflict Rule Which I See Before Me?' Looking for a Hidden Conflict Rule in the Principle of Origin as Implemented in Primary European Community Law and in the 'Directive on Electronic Commerce'" (2004) 11 *Maastricht Journal of European and Comparative Law* 287.

[38] Case C-518/08 *Fundación Gala-Salvador Dalí et al v Société des auteurs dans les arts graphiques et plastiques (ADAGP) et al*, judgment of 15 April 2010; (2010) 554 EuZW; Case C-353/06 *Grundkin-Paul* [2008] ECR I-7639; J Meeusen, "The Grunkin and Paul Judgment of the ECJ, or How to Strike a Delicate Balance between Conflict of Laws, Union Citizenship and Freedom of Movement in the EC" [2010] *Zeitschrift für europäisches Privatrecht (ZEuP)* 189.

3. Practical Considerations and Interest in Further Integration

Apart from the advantages of legal certainty and foreseeability of a clear rule and of national harmony, which expands to the whole of the EU in harmonised areas, the *lex fori* approach also has another practical advantage: the application of foreign PIL increases the general problems of the application of foreign law in courts, as PIL usually is very technical and works differently than substantive rules.

Additionally, the *lex fori* approach furthers the integration of EU law in another aspect: it becomes more obligatory the greater number of areas of law that have been harmonised. Applying the *lex fori* approach now even to areas of PIL that have not yet been harmonised by the EU anticipates that the *lex fori* approach will become obligatory anyway once an area is harmonised in the future by EU legislation.

E. Advantages of the *Lex Causae* Approach in Non-Harmonised Areas

The following analysis takes account of the advantages of the *lex fori* approach identified above when it examines the different arguments in favour of the *lex causae* approach.

1. Competence of the *Lex Causae* to Define the Concept

One argument often used in favour of the *lex causae* approach is the competence of the legislator over his rules.[39] In a national rule, instead of expecting the judge to determine the legal requirements of ownership, the legislator of the rule could easily have given the requirements. The fact that he did not define ownership shows his understanding of the concept in the way he already defined it elsewhere.[40] Hence, the national law should also determine the applicable law on the concept.

This argument changes in the EU context: the principle of subsidiarity requires the legislator to justify particularly the harmonisation of a substantive concept.[41] The concept of property, for example, remains a core issue of each national legal system.[42] Therefore without special reasoning it should be presumed that the legislator did not want to define the concept because it wanted to leave it within the competence of the Member States of the EU.[43] This argu-

[39] Gotlieb, *supra* n 7, 744.
[40] Wengler, *supra* n 7, 174; *contra*: Schurig, *supra* n 6, 569–70.
[41] E Brödermann and H Iversen, *Europäisches Gemeinschaftsrecht und Internationales Privatrecht* (Mohr Siebeck, 1994), para 929.
[42] See Art 345 TFEU (ex-Art 295 TEC).
[43] Solomon, *supra* n 5, 370; similarly see Dickinson, *supra* n 23, 3.90.

ment for the *lex causae* approach in the EU context is really more in favour of the *lex fori* approach, as the *lex fori* approach leaves more competences to the Member States.

2. Close Connection between the *Lex Causae* and the Case

Another argument favouring the *lex causae* is its closer relationship to the case. By enacting the PIL rule of the principal question the EU legislator decided which legal system has the closest relationship to the whole case: the *lex causae*.[44] On the other hand, if the harmonised jurisdiction rules, such as the Brussels Regime, determine the forum, as is the usual case, the EU legislator has already decided the *lex fori* to have a very close relationship to the case: the act, which regulated questions of jurisdiction, declared the *forum* to be competent.[45] Hence, the EU legislator regards the *lex fori* also as a connecting factor for some substantive issues. As an example, recital 10 of Rome II[46] leaves the question of effects of certain family relationships to the *lex fori*. Here it is obvious that the European legislator saw a very close relationship between some substantive questions and the *lex fori*.[47] Moreover, the EU legislator enacted the PIL rules after the regulations on jurisdiction were already established. Therefore, when enacting the jurisdiction rules it tried to create a close connection between the forum and the case as the PIL rules had not yet been harmonised. This historical context therefore speaks for a connection with the case for the *lex fori* that will often be as close as the connection with the *lex causae*.

3. Deterrence of Forum Shopping

The *lex fori* depends on the forum. The claimant has the possibility to choose the forum and its *lex fori*.[48] Therefore there is no doubt that the *lex fori* approach favours *forum shopping*. But is the deterrence of forum shopping really a paramount value of EU PIL? *Forum shopping* originates in distrust against foreign court decisions and their jurisdiction rules. A major part of all relevant jurisdiction issues within the EU is based on EU regulations (such as the Brussels Regime). Those regulations are based on the idea of a partial party autonomy which not only permits but wants the claimant to choose between the possible

[44] Schurig, *supra* n 6, 556, 577; Kreuzer, *supra* n 25, 56.

[45] J-J Kuipers, "Cartesio and Grunkin-Paul: Mutual Recognition as a Vested Rights Theory Based on Party Autonomy in Private Law" (2009) 2 *European Journal of Legal Studies* 80; Schurig, *supra* n 6, 577.

[46] "The reference in Article 1(2) to relationships having comparable effects to marriage and other family relationships should be interpreted in accordance with the law of the Member State in which the court is seized."

[47] Junker, *supra* n 5, paras 36–37; M Würdinger, "Das Prinzip der Einheit der Schuldrechtsverordnungen im Europäischen Internationalen Privat- und Verfahrensrecht" (2011) 102 *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)* 75, 109.

[48] Gotlieb, *supra* n 7, 757; Sonnenberger, *supra* n 5, 240–41; Kreuzer, *supra* n 25, 56.

fora and their rules.[49] The choice of possible, trustworthy *fora* within the Brussels Regime already satisfies the need to avoid exaggerated forum shopping at any cost. Therefore, if a claimant uses the options the Brussels Regime offers, and selects a system that is favourable to him, he acts exactly as the European legislator expects him to.[50] EU PIL does not have the goal of correcting the Brussels Regime but aims to concur with it.[51] To achieve that it has to accept, not correct, the pre-selection of the *forum* and follow its own goal to find the law of the closest connection. Therefore, in the European context the deterrence of forum shopping loses or has already lost its impact on the choice between the *lex causae* and the *lex fori* approach to the preliminary question.[52]

4. International harmony

The big advantage of the *lex causae* approach is the international harmony it advances.[53] But is this the core point not only of international conventions but also of EU law? At first sight the answer seems to be: yes. Recital 6 of Rome II states:

> "The proper functioning of the internal market creates a need, . . . for the conflict of law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought."

If the regulation only has the mission to establish this goal, the *lex causae* approach has to be applied. But is it really its only mission?

In other recitals the legislator modifies the intention of the regulation. For example, recital 10 of Rome II and recital 8 of Rome I refer to the *lex fori* and show that international harmony is only one goal of the harmonised PIL. Thus, the EU legislator himself made it clear that international harmony is not an absolute aim. It is aware of substantive questions outside of the scope of the instruments. And it is aware that it is not its duty to regulate those questions.[54] Therefore they are left to the *lex fori*. Hence, achieving international harmony is not mandatory in EU PIL.

Furthermore, international harmony makes the outcome of decisions in different courts more foreseeable. The parties to our property case only have to find out once what the law applicable on ownership is. Then they can be sure

[49] Kuipers, *supra* n 45, 80; Würdinger, *supra* n 47, 109.

[50] See R Lamont, "Evaluation European Values: The EU's Approach to European Private International Law" (2009) 5 *Journal of Private International Law* 371, 373. Eg see Case C-168/08 *Laszlo Hadadi [Hadady] v Csilla Marta Mesko, married Hadadi [Hadady]* [2009] ECR I-6871; (2009) 619 EuZW, 623 para 54.

[51] Recital 7. For family law, see Lamont, *ibid*, 374.

[52] Kuipers, *supra* n 45, 80; Würdinger, *supra* n 47, 108–09.

[53] Bernitt, *supra* n 5, 115; Kropholler, *supra* n 5, § 32 IV 1 (S 225); von Bar, *supra* n 13, § 3 no 179; Kreuzer *supra* n 25, 56.

[54] For family law issues, see Lamont, *supra* n 50, 376.

that this result will not change in the concrete case, no matter where else it is pending. On the other hand, as scrutinised above, there are areas where the EU has harmonised either parts of the PIL or the substantive law. In those areas the *lex fori* approach is obligatory. The extent of the level of harmonisation is not always clear. Therefore, it is not always easy to find out which questions fall within the harmonised parts. Thus, determining whether the *lex causae* approach is allowed makes the whole question much more unforeseeable.

Finally, the need for international harmony originates in problems created by differing jurisdiction rules. International harmony is necessary whenever different courts accept their jurisdiction on the same merits at the same time. Without international harmony, contradictory decisions in different countries are more likely. However, the Brussels Regime, not the PIL, is already concerned with many jurisdiction and recognition issues within the EU. It also provides some regulation on the issue of contradictory decisions. Therefore the need for international harmony is not as urgent in EU PIL as in general PIL.

The arguments favouring international harmony are not as compelling in the EU context as they are in national PIL.

5. First Conclusion

Those arguments which traditionally support the *lex causae* approach are not as convincing in the EU context. On the other hand, the *lex fori* approach has the advantage of a clear and simple rule with practical advantages. It also advances integration of EU law and trust between the EU system and the national systems. Therefore, the *lex fori* approach should be used for the determination of preliminary questions occurring in an EU PIL rule.

Can this first conclusion be extended to preliminary questions occurring where the substantive law that is applicable has been determined as a result of the application an EU PIL rule?

F. Is There a Need for the *Lex Causae* Approach in Substantive Law?

So, what if anything changes if the legal concept of the preliminary question occurs in a substantive rule that is applicable because of the application of a harmonised PIL rule?

The big difference is that the national legislator enacted the rule and used the concept. Hence, here the national legislator decided to use a term instead of a legal definition. It therefore might also determine the applicable law to define this term.[55] Then the decision of the judge would exactly reflect the

[55] Gotlieb, *supra* n 7, 757; Grundmann, *supra* n 16, 292; Wengler, *supra* n 7, 149.

decision as if it happened in a purely national case in the courts of the state of the *lex causae*. But does EU PIL, which first of all decided which *lex causae* applies, want to achieve harmony in this sense? Is the applicable law supposed to reflect a decision as to how it would have been made by a judge of the *lex causae*?

Which techniques can be used to try to achieve what would be the decision of a *lex causae* court is a heavily discussed issue in PIL. There is a well-known discussion about the use or non-use of *renvoi*, or "double *renvoi*" or the "foreign court theory".[56] Having that in mind, the EU legislator has made it clear up to now that it is not very eager to reflect the *lex causae* decisions: EU PIL rules show a very strong tendency to exclude any form of *renvoi* (Article 20 Rome I; Article 24 Rome II)[57].

Therefore, the law which determined the application of a rule does not want to hand over the whole issue to the *lex causae*. Hence, this common argument in favour of the *lex causae* approach fails in the EU context.[58]

The argument that the *lex causae* has the closer relationship to the case again is less strong due to the Brussels Regime: the EU legislator has stated a very close relationship between the principal question in the case and the *lex causae*.[59] However, in many cases the jurisdiction issue is determined by the same legislator. Therefore the legislator sees a close relationship between the *lex fori* and the case, as well as between the *lex causae* and the case.

An exception should only be made in rare cases. There must be an urgent need of international harmony. In those cases the EU legislator should expressly order an application of the *lex causae*. Only in these cases should the *lex causae* approach be applied.

G. Final Analysis and Conclusion

1. In the harmonised parts of EU legislation the *lex fori* approach is necessary. The only room for the *lex causae* approach is in the non-harmonised parts of PIL in the EU.
2. The most cited argument supporting the *lex causae* approach is international harmony. In the EU context, international harmony loses some of its

[56] D Hughes, "The Insolubility of Renvoi and its Confuences" (2010) 6 *Journal of Private International Law* 195, 224; K Siehr, "Paolo Picone, Gesammelte Aufsätze zum Kollisionsrecht und die Blockverweisung auf die 'zuständige Rechtsordnung' im IPR" [2005] *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 155, 157.

[57] P Mankowski, "Binnenmarkt-IPR" in J Basedow, J Drobnig *et al* (eds), *Aufbruch nach Europa – 75 Jahre Max-Planck-Institut für Privatrecht* (Mohr Siebeck, 2001), 595, 614; Bernitt, *supra* n 5, 131. However, it is likely that the new EU Succession Regulation will allow for the use of *renvoi* in cases where the applicable law is a non-EU law that has not been chosen by the testator.

[58] Bernitt, *supra* n 5, 132–33; *contra*: Grundmann, *supra* n 16, 292.

[59] Grundmann, *supra* n 16, 292.

cogency: recital 6 of Rome I itself focuses not only on international harmony, but also on the foreseeability of the applicable law. As both interests are mentioned together, they should be regarded as at least equally important.

3. It serves the aim of foreseeability if the parties and judges only have to follow a single clear approach without having to undertake research about the status of harmonisation in the whole PIL and substantive law of the area. As an increasing number of the preliminary questions has to be determined by the *lex fori*, this simple rule has to be the *lex fori* approach. And as seen above, the reasons which usually favour the *lex causae* approach lose their weight in the EU context.
4. On the other hand, many traditional reasons for the *lex fori* approach, now in many parts on a EU level, remain valid. They even grow stronger the more EU law expands and the mutual trust of the Member States in each other's legal systems grows.
5. Hence, the *lex fori* approach leads to a practical, foreseeable solution which advances the integration of EU law in the national systems. Therefore, no matter whether the concept occurs in a PIL or a substantive rule, the *lex fori* approach is the better solution.[60] An exception which leads to the application of the *lex causae* approach should be made only in rare cases and expressly mentioned in the EU act.
6. As a general rule, the *lex fori* approach should apply.

[60] Junker, *supra* n 5, para 19.