Property relations of cross border couples in the European Union

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Edizioni Scientifiche Italiane

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Publisher Edizioni Scientifiche Italiane s.p.a.
80121 Napoli, via Chiatamone 7
Internet: www.edizioniesi.it
E-mail: info@edizioniesi.it

Title Property relations of cross border couples in the European Union

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Reviewers Stathis Banakas, Manuel Feliu Rey

The book as whole and each chapter were double blind peer reviewed.

Publication Year 2020

ISBN 978-88-495-4366-7

This e-book is published as a part of the EU co-funded Justice Project "Personalized Solution in European Family and Succession Law (PSEFS)" No. 800821-JUST-AG-2017/JUST-JCOO-AG-2017, as the deliverable 4.1., and is available for downloading in the Croatian, English, Italian, Slovenian and Spanish languages at the PSEFS Project website www.euro-family.eu.

This project was co-funded by the European Union's Justice Programme (2014-2020)

Based on an idea of Fabio Padovini

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Foreword

Private international law has been one of the cornerstones of the European Union for more than half of the century. Bridging various legal traditions and value positions between different European Union Member States, it constantly contributes to the creation of the Area of Freedom, Security and Justice where free movement of persons and high level of protection to citizens are guaranteed. Increasingly comprehensive in its scope, in particular over the past couple of decades, private international law is shaping the private law relationships in European Union. From contracts to parental responsibility, and from jurisdiction and enforcement to applicable law, it has become the starting point in nearly every court proceedings with cross-border implications. This is a huge opportunity but at the same time a huge responsibility for both the European Union legislator and the national courts (and other competent authorities). The legislator is aware of the need for coherence in the system of the European Union private international law, while the national courts are aware of the need for uniform application. In that context, the Court of Justice of the European Union has confirmed its role of a crucial actor in assuring uniform interpretation though its substantial body of case-law, while considerable responsibility still remains on the national courts as true enforcers of European Union law.

The new legal instruments which have been adopted in recent years tend to test to a greater extent than ever before national courts' preparedness to apply European Union private international law. Progressive volume and complexity of these legal instruments, including the regulations on the couples' property regimes and succession, require special knowledge and skills on the part of the legal professionals, such as judges, notaries and attorneys. Thus, the importance of this publication and the related project, as well as similar endeavours ongoing in the academic and professional spheres, cannot be stressed enough. The project investigation into the comparative family and succession law in the first stage of the project has made a solid basis on which the private international law issues are discussed in this book with full appreciation of the underlying concerns.

The intention of the European Union legislator to create the legal framework based on which the parties may act before the dispute has arisen, by timely arranging their legal situation relying on the autonomy of the parties, is dealt with in more details in another project-related publication. As a complementary publication, this book puts an emphasis on the situation in which the proceedings before the court or other competent authority are taking place, where three classical private international law questions are asked: about the jurisdiction, about the applicable law and about the recognition and/or enforcement of judgments. Topic by topic, this book unfolds essential private international law concepts and schemes. Occasionally it also offers a deeper insight into certain issues which might soon become of practical relevance in some upcoming proceedings.

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* * *

Foreword

As Charles Chaplin warned in "The Great Dictator" the machinery that creates abundance, leaves us in need. Similarly, the proliferation of information sources relating to international law, favoured by the expansion of new technologies, has created an abundance of information that, for the most part, is without academic accreditation to back it up.

At the same time, mobility between countries, which is unstoppable despite the "pause" brought about by the current health crisis, gives rise to situations in which people who have exercised, exercise and will exercise their freedom of movement within the European Union need to be informed and will turn to whatever sources they can find; this search will, in many cases, lead to legal texts that are naked in terms of interpretation or to opinion articles that are naked in terms of substance.

That is why the effort involved in adopting the various European Union laws must be combined with making those laws accessible to those who submit to them, which requires attention not only to European instruments, but also to their interaction with the laws of the Member States and to the relationship of the laws of the various Member States to each other. All of this has been developed by professionals dedicated to this subject in a mainly non-anecdotal manner.

The work developed below focuses, among others, on the European Regulations 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions, acceptance and enforcement of authentic instruments in matters of succession and the creation of a European Certificate of Succession; 1103/2016 on jurisdiction, applicable law, recognition and enforcement of decisions concerning matrimonial property regimes; and 1104/2016 on jurisdiction, applicable law, recognition and enforcement of decisions concerning the property effects of registered partnerships.

This study provides a unitary overview of the three above-mentioned Regulations, supported by the academic background of their authors and providing answers rather than raising further questions.

Therefore, it is a book where the "machinery" that all the research carried out for its elaboration implies, does finally cover the "need" for information. A more than timely publication in these modern times.

Belén Barrios Garrido-Lestache.
Notary, Barco de Ávila, (Spain)

* * *

Foreword

Public notaries in Croatia have been conducting succession proceedings and issuing decisions since 8 October 2003. Over the years, they have encountered and applied a variety of new rules in deciding on succession. A particularly challenging period ensued after Croatia joined the European Union, and especially after the entry into force of the 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 enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. This Regulation determines the authorities of which Member State are competent to deal with matters of succession. In Croatia, the competent authorities are public notaries. Establishing the deceased's habitual residence is crucial for determining jurisdiction and law applicable to succession as a whole. Cross-border succession cases mostly involve situations where a deceased had assets in one state, but has lived or worked in one or more other states during his lifetime. In such situations, the following elements have to be determined: which authority has jurisdiction to conduct succession proceedings, which law is applicable, whether the competent authority has jurisdiction to decide on the estate as a whole, regardless where the assets are located, and whether it is possible to choose applicable law for succession during life. The Regulation offers answers to all of these questions, thus enabling the decisions on succession issued in one Member State to produce the same effects in another Member State, on an equal footing with authentic instruments of that other Member State where they are intended to be used.

The Regulation creates the European Certificate of Succession, to be used by heirs who wish to invoke their status in any other Member State. However, the European Certificate of Succession does not resolve issues related to the payment of succession-related tax, existence of marriage, or registered partnership or *de facto* cohabitation, or questions related to matrimonial property regimes or property regimes of registered partnerships or *de facto* cohabitations. However, a notary should bear in mind all of the above when conducting succession proceedings, because this is essential for determining the share of the estate. It should be emphasised that authentic instruments issued in matters of succession (in Croatia, this is the decree on succession issued by notary public) have the same evidentiary effect in other Member States as in the state of origin, provided that this is not manifestly incompatible with the public policy of the Member State where acceptance is sought.

This responsible and complex task that has often been entrusted on notaries requires a continuous accrual of knowledge and following of the European and national legal trends in succession and family law. This volume, in which different authors offer their interpretation and analysis of basic legal instruments of secondary EU law in this matter, is a very useful tool not only for younger generations who will practice law in the future, but also for all of us who are called to act within our respective legal profession to facilitate the life of cross-border families.

Biserka Čmrlec-Kišić
Notary Public Varaždin (Croatia)
Member of the Committee for International Cooperation of the Croatian Notaries Chamber
Member of the General Council of the Union Internationale du Notariat – UINL

* * *

Foreword

In the year in which this important work was published, the importance of freedom of movement of people and capital became particularly apparent around the globe. People saw how quickly freedoms can be restricted, or even abolished, and how quickly we may fall into hardship and problems which constrict our way of life. Such issues caused by the virus still represent a great unknown that is likely to shape our future and mobility.

Perhaps, however, this could be an opportunity to realise the importance of cooperation between countries and experts in various fields. When discussing legal regulations, the cooperation of lawyers is of particular importance. In our own countries and throughout Europe, we are responsible for enforcing legal certainty, the rule of law and enabling the civil society to act fairly and with as few obstacles as possible.

Of course, both globalisation and the adaptation of common European legal standards bring with them new challenges. As European citizens, it is indisputable that we all enjoy freedom of movement within the EU, and there are millions of those who have taken advantage of this freedom and decided to live in another country. This freedom has provided a foundation for many international couples - those who do not live in their country of origin and may not even have the same citizenship. But any mobility, relocation or employment in another country can mean a change in the legal regime, a change in an individual's obligations and perhaps a loss of rights that were taken for granted in the home country. All of this can affect couples, their children as well as their heirs.

Whether the single European legal area will live up to everyones expectations is also dependent on the activities of legal practitioners and academics. To do so, it must enable respect for human dignity and personal freedom, justice, democracy, the rule of law, equality, non-discrimination and solidarity. Furthermore, we need to respect the right of people to use artificial intelligence as a tool for the facilitation of the exercise of their rights must. Special attention needs to be paid to this when interpreting the provisions of the regulations and ensuring their implementation.

Sonja Kralj
Notary Public in Slovenj Gradec (Slovenia)
President of the Chamber of Notaries of Slovenia

* * *

Foreword

It is a great pleasure, after having attended the seminars in person, to see this volume published now. Scrolling through the pages of this book we can all understand the serious commitment of those who contributed to the success of this initiative, and moreover their enthusiasm in participating in this venture and the high quality of the final results.
The European legislator has given us, in recent years, important rules aimed to regulate aspects very close to the most sensitive personal and family interests: successions, registered partnerships and matrimonial property regimes. Furthermore, these areas of law are historically the most linked to the culture and traditions of the various peoples and countries, thus it is easy to imagine that these new rules will be destined to have an important impact on the family and social life of the people involved. Therefore, a common and, I dare say, intelligent reading of these texts is essential from the very beginning for their best comprehension and application.
As academics and legal practitioners we are the first to be called to study, interpret and apply the new regulations, make them known to citizens and families, disseminate them within the community of jurists and legal professionals. And in so doing we have the responsibility to make everybody understand that they are "European" rules: uniformly applicable throughout the European legal area. For this reason, the study of these subjects can only take place through the comparison between jurists coming from different countries and different legal cultures.
The new norms and solutions created by the European legislator, so carefully and deeply commented on in this book, offer large options for the private autonomy, but a real choice can be expressed only if well aware of its consequences. We, legal professionals, have the burden to duly prepare in order to accompany the citizens who will face important personal and family decisions. And this role is going to become a real commitment to legal comparison and cultural mediation, as it will be in principle necessary to know the original "legal environment" of the subject concerned and the sense, opportunity and possible consequences of one's choice of a different applicable law.
"Unity in diversity" is one of the slogans most frequently remembered in Brussels and ours is a perfect opportunity to demonstrate that we can make it work.

Paolo Pasqualis
Civil law notary in Portogruaro (Italy)

* * *

Introduction

*Juan Ignacio Signes de Mesa**[1]

I. One of the main objectives of the European Union is to maintain and develop an area of freedom, security and justice in which the free movement of persons is ensured. For the gradual establishment of such an area, the Union has adopted several measures relating to judicial cooperation in civil matters having cross-border implications, particularly when necessary for the proper functioning of the internal market. Article 81(2) of the Treaty on the Functioning of the European Union (TFEU) explicitly mentions measures "improving and simplifying the recognition and enforcement of decisions in civil and commercial matters, including decisions in extrajudicial cases" and measures "promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction". These are the subject matters of the three legal instruments examined in this book, i.e. Regulation No 650/2012[2], Regulation No 2016/1103[3] and Regulation No 2016/1104[4], which define the rules on jurisdiction, applicable law, recognition and execution of resolutions respectively in the fields of successions, matrimonial property regimes and the property consequences of registered partnerships.

The historical background of these regulations is firstly rooted in the European Council meeting in Tampere in 1999, which endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial cooperation in civil matters[5]. It also invited the Council and the Commission to adopt a programme of measures to implement that principle. A draft programme for implementation of the principle of mutual recognition of decisions in civil and commercial matters, common to the Commission and to the Council, was adopted in 2000.[6] It identified measures relating to the harmonization of conflict-of-laws rules as measures facilitating the mutual recognition of decisions, and provided for the drawing-up of instruments relating to wills and succession, to matrimonial property regimes and to the property consequences of the separation of

* Legal Secretary, Court of Justice of the European Union.

[1] All opinions expressed in this text are purely personal and do not engage whatsoever the Court of Justice of the Court of Justice of the European Union.

[2] 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 enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ 2012, L 201, p. 107).

[3] 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 (OJ 2016, L 183, p. 1).

[4] 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 (OJ 2016, L 183, p. 30).

[5] Presidency Conclusions, Tampere European Council, 15–16 October 1999.

[6] Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters (OJ 2001, C 12, p. 1).

unmarried couples.

At a further stage, the European Council taking place in Brussels in November 2004 adopted a new programme called "The Hague Program: strengthening freedom, security and justice in the European Union"[7]. This programme underlined, first, the need to publish a Green Paper on intestate and testate succession with an international dimension[8] and to adopt an instrument dealing, in particular, with the questions of conflict of laws, jurisdiction, mutual recognition and enforcement of decisions in the area of succession and a European Certificate of Succession. It also invited the Commission to present a Green Paper on the conflict of laws in matters concerning couples property regimes, including the question of jurisdiction and mutual recognition, and stressed the need to adopt an instrument in this latter area. In 2006, through the publication of the Green Paper[9], the Commission launched wide consultations on all aspects of the difficulties faced by couples in Europe when it comes to the liquidation of their common property and the legal remedies available. The Green Paper also addressed all issues of private international law encountered by couples in unions other than marriages, including couples with registered partnerships, and issues specific to them.

These previous actions were followed by the new multiannual programme called "The Stockholm Programme – An open and secure Europe serving and protecting citizens"[10]. In this programme, the European Council reaffirmed the priority of developing an area of freedom, security and justice and specified as a political priority the achievement of a Europe of law and justice, including in civil matters. The Stockholm programme considered that mutual recognition should be extended to fields not yet covered but essential to everyday life, for example succession and wills, matrimonial property rights and the property consequences of the separation of couples. It also underlined the need of taking into consideration Member States' legal systems, including public policy (*ordre public*), and national traditions in this area. Within the context of the Stockholm Programme, the European Council invited the Commission to assess whether there were grounds for consolidation and simplification in order to improve the consistency of existing Union legislation in those areas of law[11]. This request led to the elaboration of three different proposals by the Commission[12], which finally resulted in the adoption of the current legal instruments that apply, on the one hand, to

[7] Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union (OJ 2005, C 198, p. 1).
[8] COM(2005) 65 final.
[9] Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition [SEC(2006) 952], COM/2006/0400 final.
[10] OJ 2010, C 115, p. 1.
[11] See also "EU Citizenship Report 2010: Dismantling the obstacles to EU citizens' rights"', Brussels, 27.10.2010 [COM(2010) 603 final].
[12] See also Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession [COM(2009) 0154 final]; Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, Brussels, 16.3.2011, [COM(2011) 126 final]; and Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, Brussels, 16.3.2011 [COM(2011) 127 final].

successions and, on the other, to matrimonial and registered partnerships property regimes, all having cross-border implications.

II. With respect to successions, in the European area of justice, citizens must be able to organize their succession in advance. The rights of heirs and legatees, of other persons close to the deceased and of creditors of the succession must be effectively guaranteed. In order to satisfy these objectives, Regulation No 650/2012 brings together provisions on jurisdiction, on applicable law, on recognition or, as the case may be, acceptance, enforceability and enforcement of decisions, authentic instruments and court settlements and on the creation of a European Certificate of Succession. It applies to successions on or after 17 August 2015 in all EU countries, except Ireland and Denmark, which continue to apply their national law to international successions. The scope of this regulation includes all civil-law aspects of succession to the estate of a deceased person, specifically 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.

Regulation No 650/2012 ensures this way that cross-border successions are 'treated coherently, under a single law and by one single authority. As described by the Commission (European e-justice Portal), in principle, the courts of the Member State in which citizens had their last habitual residence will have jurisdiction to deal with the succession and the law of this Member State will apply. However, citizens can choose that the law applicable to their succession should be the law of their country of nationality. The application of a single law by a single authority to a cross-border succession avoids parallel proceedings with possibly conflicting judicial decisions. Finally, the European Certificate of Succession allows to heirs, legatees, executors of wills and administrators of the estate to prove their status and exercise their rights or powers in other Member States. The special feature of the certificate derives from the fact that, once issued, it must be recognized in all Member States without any special procedure being required.

As regards matrimonial regimes and registered partnerships, the recent adoption of Regulation No 2016/1103 and Regulation No 2016/1104 has led to a better definition of the rules applicable to the property of married couples or registered partners where the couples have different EU nationalities or where couples own properties in another EU country. They outline revised rules agreed by 18 EU member states on the jurisdiction, the laws that should be applied, and the recognition and enforcement of decisions about matrimonial property regimes or property consequences of a registered partnership arising when marriages or registered partnerships break up, or when one partner deceases. Since 29 January 2019, both regulations provide married and unmarried couples with legal certainty as to their property and offer them a degree of predictability, all in a single instrument.

Due to the absence of unanimity among EU member states, as required by Article 81(3) TFEU for family law dispositions, Regulation No 2016/1103 and Regulation No 2016/1104 result from the enhanced cooperation mechanism provided for in Article 328(1) TFEU.

Enhanced cooperation is open to all Member States, subject to compliance with any conditions of participation laid down by the authorizing decision. It is also open to them at any other time, subject to compliance with the acts already adopted within that framework, in addition to those conditions. At present, Regulation No 2016/1103 and Regulation No 2016/1104 are binding in their entirety and directly applicable only in the Member States which participate in the enhanced cooperation defined by virtue of Decision (EU) 2016/954[13], i.e. Belgium, Bulgaria, Cyprus, Czechia, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, Netherlands, Austria, Portugal, Slovenia, Finland and Sweden.

Regulation No 2016/1103 does not define the concept of "marriage", which is defined by the national laws of the Member States. By contrast, Regulation No 2016/1104 establishes a concept of "registered partnership", which is defined solely for the purposes of the regulation. The actual substance of the concept remains defined in the national laws of the Member States. In fact, nothing in Regulation No 2016/1104 obliges a Member State whose law does not have the institution of registered partnership to provide for it in its national law. This approach reveals the solid commitment of the EU to respect national systems of family law. However, given that the way in which forms of union other than marriage are provided for in the Member States' legislation differs from one State to another, Regulation No 2016/1104 draws a distinction between couples whose union is institutionally sanctioned and couples in *de facto* cohabitation. Regulation No 2016/1104 does only consider registered partnerships which have an official character for the purposes of the rules it provides.

III. It is important to note that, since the objectives of Regulation No 650/2012, Regulation No 2016/1103 and Regulation No 2016/1104 could not be sufficiently achieved by Member States and since unilateral action by them could run counter to those objectives, the Commission considered that the adoption of these three instruments respect the mandatory elements of the principle of subsidiarity as set out in Article 5 of the Treaty on European Union (TEU).

In fact, with respect to successions, the proposal elaborated by the Commission pointed out that there was the Hague Convention of 1 August 1989 on the law applicable to succession to the estates of deceased persons concerning the law relating to successions which had never entered into force and The Hague Convention of 5 October 1961 on the conflicts of laws relating to the form of testamentary dispositions. However, not all Member States had ratified this last convention. With respect to matrimonial property regimes, there were two international conventions relevant to this issue, namely the Convention of 17 July 1905 on conflict of laws relating to the effects of marriage on the rights and duties of spouses in their personal relationships and with regard to their estates, and the Convention of 14 March 1978 on the law applicable to matrimonial property regimes. However, only three Member States had ratified them and they did not offer the solutions needed to deal with the scale of the

[13] Council Decision (EU) 2016/954 of 9 June 2016 authorizing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships (OJ 2016, L 159, p. 16).

problems covered by Regulation No 2016/1103. Finally, no international agreements were applicable to the property consequences of registered partnerships, other than the Convention on the recognition of registered partnerships of 5 September 2007 of the International Commission on Civil Status. However, this Convention covered only the recognition of partnerships, and had not entered into force, so it was not likely to offer the solutions needed given the magnitude of the problems addressed by Regulation 2016/1104.

It was therefore evident for the Commission that, given the nature and the scale of the problems experienced by European citizens in the fields of successions and matrimonial and registered partnerships property regimes, the objectives to be fulfilled by Regulation No 650/2012, Regulation No 2016/1103 and Regulation No 2016/1104 could only be achieved at Union level. Furthermore, the need for legal certainty and predictability called for clear and uniform rules and imposed the form of a regulation. In fact, the objectives would have been compromised if the Member States had some discretion with regard to implementing these rules.

Besides, in accordance with the principle of proportionality, as set out as well in Article 5 TFEU, none of these regulations go beyond what is necessary, in the Commission's view, in order to achieve their objectives. In fact, they do not harmonize either the law of succession or the property law of Member States and fully respect national systems on these two ares.

Finally, it is important to point out that Regulation No 650/2012, Regulation No 2016/1103 and Regulation No 2016/1104 respect, according to the Commission, the relevant rights of the Charter of Fundamental Rights by the European Union, applicable to this area. Indeed, these regulations do not intend to affect the right to respect for private and family life nor the right to marry and to found a family according to national laws, as provided for in Articles 7 and 9 of the Charter. According to the Commission, the right to property referred to in Article 17 of the Charter is also strengthened. The predictability of the law applicable to all the couple's property would in fact enable spouses o exercise their property rights more fully. The Commission also checked that the proposal complies with Article 21, prohibiting any discrimination. Regulation No 650/2012, Regulation No 2016/1103 and Regulation No 2016/1104 increase citizens' access to justice in the EU. It facilitates therefore the implementation of Article 47 of the Charter, which guarantees the right to an effective remedy and to a fair trial. Moreover, by setting out objective criteria for determining the court having jurisdiction, parallel proceedings and appeals precipitated by the most active party can be avoided.

IV. As previously indicated, many legal instruments have already been adopted at EU level on the basis of Article 81 TFEU in order to satisfy the objective of progressively establishing a common area of freedom, security and justice, in particular by adopting measures regarding judicial cooperation in civil matters. Regulation No 650/2012, Regulation No 2016/1103 and Regulation No 2016/1104 continue the efforts of harmonization undertaken by the EU in the field of private international law until recent times.

To this respect, Regulation No 650/2012, Regulation No 2016/1103 and Regulation No 2016/1104 complement the already existing instruments regulating jurisdiction and applicable law in the EU. Indeed, the legal aspects concerned by the three regulations – jurisdiction, applicable law, recognition and execution of resolutions – are issues on which other EU rules already apply. However, all these latter rules had expressly excluded successions, matrimonial property regimes and the property consequences of partnership regimes from their scope. This is, for example, the case of Regulation No 1215/2012[14], which, according to its wording, does not apply to "rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage" and "to wills and succession, including maintenance obligations arising by reason of death".

Regulation No 650/2012, Regulation No 2016/1103 and Regulation No 2016/1104 are therefore embedded in a dense set of norms, with which they closely interact. They are as well sensitive to legal areas covered by other EU regulations, which entails that a number of questions that could be seen as having a link with successions, matrimonial property regimes and property consequences of partnership regimes are explicitly excluded from the scope of these three regulations.

As means of illustration, Regulation No 2016/1103 and Regulation No 2016/1104 do not refer to maintenance obligations between spouses, as it is already covered by Regulation No 4/2009[15], which correlatively refers to the Protocol of 23 November 2007 on the law applicable to this area. In addition, Regulation No 2016/1103 and Regulation No 2016/1104 are also closely related to other instruments concerning matrimonial issues, such as Regulation No 2201/2003, regarding jurisdiction and recognition of decisions in matters of annulment, separation or divorce and of parental responsibility[16]; and Regulation No 1259/2010, concerning the applicable law to divorce and separation[17]. With respect to the former of these two regulations, Regulation No 2016/1103 establishes that matters of matrimonial property regimes arising in connection with proceedings pending before the court of a Member State seized for divorce, legal separation or marriage annulment under Regulation No 2201/2003 must be dealt with by the courts of that Member State, unless the jurisdiction to rule on the divorce, legal separation or marriage annulment may only be based on specific grounds of jurisdiction. In such cases, the concentration of jurisdiction should not be allowed without the spouses' agreement.

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[14] 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 (OJ 2012, L 351, p. 1).

[15] 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 (OJ 2009, L 7, p. 1).

[16] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003, L 338, p. 1).

[17] Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (OJ 2010, L 343, p. 10).

Regulation No 650/2012, Regulation 2016/1103 and Regulation 2016/1104 have also certain rules intended to ease the proper coordination between these three legal instruments. For example, since issues relating to the succession to the estate of a deceased spouse are covered by Regulation No 650/2012, these latter issues do not fall under the scope of the regulations on property regimes of married and unmarried couples. Both Regulation No 2016/1103 and Regulation No 2016/1104 also determine that, where proceedings on the succession of a spouse are pending before the court of a Member State seized under Regulation No 650/2012, the courts of that State should have jurisdiction to rule on matters of matrimonial property regimes arising in connection with that succession case. Finally, where the estate of the deceased whose succession falls under Regulation No 650/2012 comprises assets located in a third state, the court seized to rule on the matrimonial property regime may, at the request of one of the parties, decide not to rule on one or more of such assets if it may be expected that its decision in respect of those assets will not be recognized and, where applicable, declared enforceable in that third state.

V. The existence of such a variety of norms generates the need of consistent and homogeneous application, which finally leads to bring all interpretative questions before the European Court of Justice (ECJ). To this respect, it should recalled that, while EU law is to be applied by any court of the Member States by virtue of the principle of direct effect, the ECJ ensures, according to article 19 TEU, that the interpretation and application of EU law is observed. The majority of cases that raise issues of family law and successions was brought before the ECJ pursuant to its exclusive jurisdiction to deliver preliminary rulings on the interpretation of EU law.

The ECJ has already had the opportunity to deal with five preliminary rulings on the interpretation of the dispositions of Regulation No 650/2012, i.e. *Kubicka*[18], *Mahnkopf*[19], *Oberle*[20], *Brisch*[21] and *WB*[22]. Given the recent entry into force of Regulation 2016/1103 and Regulation No 2016/1104, it is highly expectable that similar decisions will be soon rendered by the ECJ regarding these two regulations when answering the interpretative questions referred by national courts. The judgments concerning Regulation No 650/2012 raise issues of the utmost practical interest to European lawyers and notaries and have been the subject of much discussion in legal literature[23].

For instance, the question that the national court referred in *Kubicka* concerned the delimitation of the rules on succession and the rules on property. Specifically, this case referred to whether German provisions which exclude cases involving the application of the

[18] Judgment of 12 October 2017, Kubicka, C-218/16, EU:C:2017:755.
[19] Judgment of 1 March 2018, Mahnkopf, C-558/16, EU:C:2018:138.
[20] Judgment of 21 June 2018, Oberle, C-20/17, EU:C:2018:485.
[21] Judgment of 17 January 2019, Brisch, C-102/18, EU:C:2019:34.
[22] Judgment of 23 May 2019, WB, C-658/17, EU:C:2019:444
[23] See also pending case E. E., C-80/19, concerning the request for a preliminary ruling from the Lietuvos Aukščiausiasis Teismas (Lithuania) lodged on 4 February 2019, on the rules of international jurisdiction of Regulation No 650/2012.

law of the place where the concerned property is situated can support a refusal to recognize the material effects of a legacy "by vindication". By this type of legacy, the right in the property is transferred directly to the legatee upon the opening of the succession In the *Kubicka* case, the refusal concerned the right of ownership of immovable property located in Germany, where only legacies 'by damnation' exist, and not legacies 'by vindication'. In its decision, the ECJ held that such refusal was precluded under Regulation No 650/2012 and that a single legal system governs the succession as a whole. Therefore, the legacy "by vindication" had not only to be "recognized" in Germany but also to be formally applied.

By contrast, in *Mahnkopf*, the ECJ was asked to resolve a matter relating to the delimitation of the rules on succession and the rules on matrimonial property regimes. By its question, the referring court sought to ascertain whether the surviving spouse's share of an estate under Paragraph 1371(1) of the Bürgerliches Gesetzbuch (German Civil Code) may be recorded in a European Certificate of Succession. The ECJ held that that a national provision, such as that at issue in the main proceedings, which prescribes, on the death of one of the spouses, a fixed allocation of the accrued gains by increasing the surviving spouse's share of the estate falls within the scope of Regulation No 650/2012.

Finally, in *Oberle*, the uncertainties of the referring court concern the relationship between Regulation No 650/2012 and the provisions of national law on matters of succession. To be more precise, a German court sought to ascertain whether Regulation No 650/2012 also determines jurisdiction over procedures for issuing national certificates of succession. This would mean that Member States could not introduce rules determining national jurisdiction in that regard in a manner different from that laid down in that regulation.

It is evident from the wording of these latter judgements, and from the ones rendered in *Brisch* and *WB*, the ECJ's willingness to reinforce two basic principles of Regulation No 650/2012, which, in addition, are intimately interconnected to each other: first, the unity of the succession, regardless of the nature of the assets and the place where they are located; and, second, the general and all-encompassing effectiveness of the European Certificate of Succession. Further case-law, not only on Regulation No 650/2012, but also on Regulation No 2016/1103 and Regulation No 2016/1104, will make even more evident the final role of the European Court of Justice, through the preliminary ruling mechanism, in reinforcing the objectives of these legal instruments, whose application is relatively recent and which will definitely lead to decisive interpretative questions on their own and in the context of the set of norms on private international law designed by the EU for the service of citizens.

Chapter I

Matrimonial property regimes

Ana María Pérez Vallejo, Alba Paños Pérez and María José Cazorla González*

Part I - Matrimonial property regimes with cross-border implications: Regulation (EU) 2016/1103

1. Introduction. – 2. Preliminary considerations on the scope of Regulation EU 2016/1103 I. Applicable law (Articles 20 to 35). – 1. Introduction. – 1.1 Marriage covenants, agreements or settlements. – 1.2 Choice of Law Agreement. – II. Jurisdiction. – 1.1. What is a court? – 1.2 Competent court and choice of court agreement. – 1.2.1 Property issues related to inheritance and matrimonial proceedings. – 1.2.2 Property issues not connected with inheritance or matrimonial proceedings. – 1.3 Formal and material validity of the choice of law agreement. – 1.4 Effects of the applicable law.

Part II - Matrimonial property regimes in the absence of choice by the spouses under regulation (EU) 2016/1103

1. Introduction. – 2. Commentary on the applicable law under Regulation (EU) 2016/1103 in the absence of agreement in cross-border marriages. – I. Consequences of the application of European Regulations on the statutory matrimonial property regime. – 1. Introduction. – 2. Community of property. – 3. Separation of property. – 4. Systems of deferred community of property or participation in acquisitions. – II. Jurisdiction

Part I

Matrimonial property regimes with cross-border implications: Regulation (EU) 2016/1103

Ana María Pérez Vallejo

1. Introduction

The harmonious and proper functioning of a common area of justice, which respects the different legal systems and traditions of the Member States, is vital for the Union. Regulations (EU) 2016/1103 and 2016/1104,[1] following in the wake of others that have preceded them and with those that will come after, constitute further progress towards the unification of private international family law. This unification does not concern substantive law, as the European Union does not have competence here. As the doctrine points out, "the efforts of the EU institutions in the field of family law have been directed, rather than at the unification of its substantive rules, towards the creation of a uniform framework of conflicting rules aimed at resolving those family issues that have cross-border implications".[2] Thus, Regulation (EU) 2016/1103 provides for enhanced cooperation on three basic issues: determination of the competent court, determination of the applicable law, and recognition and enforcement of judgments in matrimonial property regimes. The Regulation repeatedly stresses the need for predictability and legal certainty. It is therefore necessary for the spouses to know which court will have jurisdiction over their matrimonial property relations and which law will be applicable to them. In this respect, it gives a wide margin to the autonomy of the will (explicit or implicit), making this choice the first point of connection.

2. Preliminary considerations on the scope of Regulation EU 2016/1103

Some clarification is needed on the scope of application and other related issues:

1) Regulation EU 2016/1103 does not incorporate a definition of marriage, unlike Regulation EU 2016/1104 which does define registered partnership. Therefore, it is the internal rules of each Member State that define marriage. This is of particular interest with regard to same-sex marriages.[3] Within the EU, it is regulated in the Netherlands (2001); in

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[1] M.J. Cazorla Gonzalez, 'Ley aplicable al régimen económico matrimonial después de la disolución del matrimonio tras la entrada en vigor del Reglamento UE 2016/1104', 21 *International Journal of Doctrine and Jurisprudence,* 87-104 (2019).

[2] A. López Azcona, 'La Europeización del derecho civil: crónica de un proyecto inconcluso' 8 *Actualidad Jurídica Iberoamericana,* 493 *et seq.* (2018).

[3] S. De Simone, 'Taxonomical Table Related to Models of Couple in the European Union', in R. Garetto ed, *Report on Collecting Data. Methodological and Taxonomical Analysis* (Torino: PSEFS/IgiTo, 2019), 24-27.

Belgium (2003); in Spain (2005); in Sweden (2009); in Portugal (2010); in Denmark (2012); in France (2013); in Ireland (2015); in Luxemburg (2015); in Finland (2017); in Germany (2017); in Malta (2017); in Austria (2019). But the cross-border nature of patrimonial effects "will be verified when they are linked to two or more national legal systems; in such a way that a doubt arises as to which of them would be the one to regulate them".[4] This will be the case when one of the following circumstances is present: the different nationality of the spouses, different habitual residences, residence in a different country from that of their nationality, or possession of assets in different EU States.

2) The material scope of Regulation EU 2016/1103 should include all aspects of civil law relating to matrimonial property regimes. This is understood as the "set of rules relating to property relations between the spouses and with third parties as a result of the marriage or its dissolution" (Article 3(1)(a)). For the purposes of the Regulation, the matrimonial property regime "must be interpreted autonomously and must cover not only the mandatory rules for the spouses, but also the optional rules which the spouses may agree upon in accordance with the applicable law. It therefore includes "not only marriage contracts specifically and exclusively provided for by certain national legal systems, but also any property relationship between the spouses and in their relations with third parties which arises directly out of the marriage bond or its dissolution" (Recital 18). It is, however, reasonable to accept that the scope of the Regulation would also cover "primary matrimonial property regimes",[5] eg all the mandatory provisions governing certain property consequences and effects in each law which apply to every marriage, irrespective of the economic rules agreed or governed by the law between the spouses.

3) Exclusions: In addition to tax, customs and administrative matters, certain matters relating to marriage are excluded from the scope of the Regulation. The Regulation expressly refers to the following which are excluded from its scope: the legal capacity of the spouses; the existence, validity and recognition of marriage; maintenance obligations; succession on the death of one of the spouses; social security; in the event of divorce, legal separation or annulment of the marriage, pension or disability rights accrued during the marriage; questions relating to the nature of rights *in rem* in property; any entry in a register of rights in movable or immovable property, including the legal requirements for entry, and the effects of entry or failure to enter such rights in a register (*ex* Article 1 of Regulation EU 2016/1103).

4) With regard to the temporal and territorial scope, Regulation EU 2016/1103 is applicable, since 29 January 2019, to legal actions before its courts, to public documents

[4] A. Rodríguez Benot, 'Los efectos patrimoniales de los matrimonios y de las uniones registradas en la Unión europea' 1 *Cuadernos de Derecho Transnacional,* 8 *et seq*. (2019).

[5] P. Peiteado Mariscal, 'Competencia internacional por conexión en materia de régimen económico matrimonial y de efectos patrimoniales de uniones registradas. Relación entre los Reglamentos UE 2201/2003, 650/2012, 1103/2016 Y 1104/2016' 1 *Cuadernos de Derecho Transnacional*, 306 (2017); A.M. Pérez Vallejo, 'Notas sobre la aplicación del Reglamento (UE) 2016/1103 a los pactos prematrimoniales en previsón de la ruptura matrimonial' 21 *Revista Internacional de Doctrina y Jurisprudencia,* 105-121 (2019).

that are drawn up and to legal transactions that are approved, with regard to matrimonial property regimes (*ex* Article 69(1))[6] whenever there are "cross-border repercussions" and it is binding only on the participating States. At present, it is applicable in eighteen EU countries: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, Netherlands, Portugal, Slovenia, Spain, Sweden. By contrast, Poland, Hungary, Denmark, Estonia, Ireland, Latvia, Lithuania, Slovakia and Romania do not apply the EU rules on financial arrangements for international couples. In these countries, national legislation applies. However, the law determined to be applicable is applicable even if it is not that of a Member State (principle of universality *ex* Article 20).

5) Multi-legislative States and conflicts of laws. In order to determine the law applicable in Member States comprising several territorial units with their own rules on matrimonial property regimes, Regulation (EU) 2016/1103 follows the model of indirect and subsidiary referral (*ex* Article 33).[7] Thus, in order to determine the applicable law in a plurilegislative system, such as the Spanish one,[8] the rules of the State in question on internal conflicts (Regulation 33(1)) are applicable, which would be resolved by Article 16. However, if the civil connection does not determine which regional legislation is applicable, the second rule would be the establishment of subsidiary connections to determine the applicable internal order (Article 33(2)), which would be determined by the law of the specific territorial unit for the connection of habitual residence, by the law of the closest connection for the connection of nationality, and by the law in which the relevant element is located for other points of connection. In Spain, the application of subsidiary connections would mean that the law of the forum would apply, even if there is no civil connection but the connection is habitual residence. Finally, and as a closing clause, Article 35 determines that they are not obliged to apply the Regulation to conflicts of laws arising exclusively between those territorial units: "a Member State which comprises several territorial units with their own rules of law in respect of matrimonial property regimes shall not be bound to apply this Regulation to conflicts of laws arising exclusively between such territorial units".

I. Applicable law (Articles 20 to 35).

1. Introduction

Regulation EU 2016/1103, for the sake of predictability and full legal certainty, aims to allow spouses to know in advance which law will be applicable to their matrimonial

[6] By means of the Implementing Regulation (EU) 2018/1935 of 7 December 2018, the forms in Annexes I, II and III (certificates relating to a decision, an authentic act and a court settlement, respectively, in matters of matrimonial property regimes) were approved.

[7] M. Soto Moya, 'El Reglamento (UE) 2016/1104 sobre régimen patrimonial de las parejas registradas: algunas cuestiones controvertidas de su puesta en funcionamiento en el sistema español de derecho internacional privado' DOI: 10.17103/reei.35.03 *Revista Electrónica de Estudios Internacionales*, 24 *et seq.* (2018).

[8] A.M. Pérez Vallejo and M.J. Cazorla González, 'National report on the collected data (Spain)', in L. Ruggeri, I. Kunda and S. Winkler eds, *Family Property and Succession in EU Member States National Reports on the Collected Data*, (Croatia: Sveučilište u Rijeci, Pravni fakultet, 2019) 610-657.

property regime and to avoid them being subject to different regimes depending on the competent court or the applicable law. It therefore provides for harmonised conflict-of-law rules to avoid contradictory results (Recital 43).

The great novelty of Regulation EU 2016/1103 is to offer married couples the possibility of regulating their property relations by applying a law different from the one of their nationality. The European legislator grants future spouses a wide margin of autonomy of will.[9] On the one hand, it encourages the conclusion of pacts, agreements or settlements; on the other hand, it allows agreement (choice of law agreement) on the law applicable to the substance of the economic consequences of the marriage. The provisions of this choice of law agreement become the first point of connection.

1.1 Marriage covenants, agreements or settlements

In order to materially organise the property effects of the marriage, the future spouses or the spouses (constant marriage) can establish agreements or covenants, included or not, in marriage settlements. Article 3 ((1) (b)) of the Regulation defines marriage settlements as "the agreement by virtue of which the spouses or future spouses organise their matrimonial property regime". And recital 48 refers to them as a type of provision on matrimonial property whose admissibility and acceptance varies between Member States. In order to make it easier for matrimonial property rights acquired as a result of marriage settlements to be accepted in the Member States, rules are laid down on the formal validity of such settlements.

The question we can ask is whether, for the purposes of the Regulation, marriage settlements are to be equated with pre-marital agreements in anticipation of a future marriage crisis. Pre-marital agreements have a long history and practice in *common law* systems, but they are not alien to *civil law* systems either, especially in continental European countries. It should be noted that the determination of the matrimonial property regime is the (typical) content of the matrimonial chapters, but it is not the only one. Today, in almost all EU countries, the conclusion of pre-nuptial agreements is legally or judicially admitted, and the content of such agreements may be diverse and may cover matters excluded from the scope of the Regulation.

However, as mentioned above, Regulation EU 2016/1103 aims to cover the widest possible range of matters relating to matrimonial property regimes, although it does not expressly mention premarital agreements in anticipation of judicial separation or divorce.

[9] M. Vinaixa Miquel, 'La autonomía de la voluntad en los recientes reglamentos UE en materia de régimenes económico matrimoniales (2016/1103) y efectos patrimoniales de las uniones registradas (2016/1104) El orden público interno, europeo e internacional civil, Acto en homenaje a la Dra. Núria Bouza Vidal' 2 *InDret,* 302 *et seq.* (2017); C. Grieco, 'The role of party autonomy under the regulations on matrimonial property regimes and property consequences of registered partnerships. Some remarks on the coordination between the legal regime established by the new regulations and other relevant instruments of European Private International Law' 2 *Cuadernos de Derecho Transnacional*, 457-476 (2018).

However, it is currently very common to include clauses of this type in marriage settlements. And although there is no total similarity between the pre-marital agreement and the settlements, "the important thing is that there is sufficient equivalence between the unknown foreign legal figure and the legal figure known in Spanish law". Sufficient equivalence exists, without a doubt, between the referred agreements and the matrimonial settlements.[10]

It should be noted that the majority of the Member States regulate the freedom of agreement, but with some differences in the formalisation and timing of the agreements. Thus, Austria, Croatia, Germany, Spain, Estonia, France, Greece, Finland, Italy, Lithuania, Latvia, Luxembourg, Poland, Malta, the Netherlands, among other States, admit agreements at the celebration of the marriage, or later.

It is provided that the agreements are duly formalised before a notary public and registered, so that they are effective against third parties from that moment on. Thus, marriage contracts entered into before the notary will be applicable only if the marriage is celebrated later, and those entered into after the marriage are effective from the time of their formalisation, also before the notary.

However, they can only be enforced against third parties from the date of their registration. In this context, there are other countries whose regulations include prerequisites, such as Slovenia, which allows pre-marriage agreements to be made by linking them to prior information between the parties on the property situation, and limiting agreements stipulating separate property to the time during which the marriage is in force.

On the other hand, countries such as Italy and Cyprus do not admit prenuptial[11] agreements, and others such as Slovakia admit them only to a limited extent, as they only regulate post-marital agreements to extend or reduce community of property.

However, the greatest difference among European countries lies in the authority before which the agreement is formalised: countries such as Hungary give validity to the agreement whether it is made in a public document or in a private document signed by a lawyer; Portugal admits that the drafting can be done both by a civil law notary and a civil registry office official; in Sweden, the marriage contract can be made in writing and filed with the Swedish Tax Office.

1.2 Choice of law convention

[10] I.A. Juarez, 'Acuerdos prematrimoniales: Ley aplicable y Derecho comparado', 1 *Cuadernos de Derecho Transnacional*, 44 (2015).

[11] With the exception of Cyprus, in the application of Article 13 of Law 232/91, regulating the property relations of the spouses, it is not possible for the spouses, by means of Matrimonial Agreements concluded either before or during the marriage, to agree upon or vary the matrimonial property regime. A. Oliva Izquierdo et al, *Los regímenes económicos matrimoniales del mundo* (Madrid: Centro de Estudios, Colegio de Registradores de la Propiedad y Mercantil de España, 2017), 245.

Regulation EU 2016/1103 encourages spouses to make a "choice of law agreement" on their economic regime, eg an informed choice, so that they can agree on the law applicable to the substance of the economic consequences of the marriage. This is to ensure that they do what is in their own best interests and thus guarantee legal certainty. Autonomy of will becomes the first point of connection established by the Regulation. This instrument is intended to ensure that the matrimonial property regime is governed by a "foreseeable law" with which it is closely connected (Recital 43). The option of choosing the applicable law thus has the advantage, among other things, of enabling the spouses to determine that the same law governs the various related family law matters.[12]

However, in order for the choice of law agreement to have a certain connection with the actual situation of the spouses, Article 22(1) of Regulation EU 2016/1103 provides for a certain limitation, with only two possibilities for choice: either the Law of the State in which both or one of the spouses have their habitual residence; or the Law of the State of the nationality of either of them. Consequently, there is no absolute freedom of choice of applicable law, but it is reduced to the law of the habitual residence or nationality of the spouses or future spouses or of one of them (Recital 45).

A choice of law agreement may be made at any time, eg before, at the time of, or after the marriage, and may even be amended thereafter (Recital 45 and Article 22). However, any retroactive change of the applicable law pursuant to paragraph 2 will not adversely affect the rights of third parties arising from that law (Article 22(3)). Along these lines, a further guarantee is imposed by the Regulation. In order to ensure legal certainty in transactions and to prevent any change in the law applicable to the matrimonial property regime without notice to the spouses, the law applicable to the matrimonial property regime should not be changed without the express wish of the parties. The change decided on by the spouses should not have retroactive effect, unless they expressly stipulate otherwise. In any event, it may not prejudice the rights of third parties (Recital 46).

1.3. Formal and material validity of the agreement on the choice of law

The rules relating to the formal and material validity of the agreement on the choice of law should be defined in such a way that the informed choice of the spouses is facilitated and their consent is respected in order to ensure legal certainty as well as better access to justice (Recital 47). This means that the agreement on the choice of law must meet substantive and formal requirements in order to be fully valid.

- *Substantive requirements or material validity* (*ex* Article 24): Under the heading "consent and material validity", paragraph 1 of this article provides that the existence and validity of an agreement on the choice of law or its provisions shall be determined by the law that would

[12] J. Rodríguez Rodrigo, *Relaciones económicas de los matrimonios y uniones registradas, antes y después de los Reglamentos (UE) 2016/1103 y 2016/1104* (Valencia: Tirant lo Blanch, 2019), 165.

be applicable under Article 22 if the agreement or provision were valid.

- *Formal requirements or formal validity* (*ex* Article 23): In this case, the Regulation introduces certain safeguards to ensure that spouses are aware of the consequences of their choice (Recital 47). The model of the form of the capitulations is followed (Article 25 and Recital 48). It should be noted that the provisions of Article 23 on the choice of law are the same as those of Article 25 on the formal validity of marriage settlements. The agreement on the choice of law (*ex* Article 23) must therefore be in writing, dated and signed. For this purpose, any communication made by electronic means that provides a durable record of the agreement shall be deemed to be in writing. However, it is added in paragraph 3 that if the law applicable to the matrimonial property regime imposes additional formal requirements, those requirements will apply. This article provides that if the law of the State of the common habitual residence at the time of the conclusion of the agreement lays down additional formal requirements for the settlement, those requirements will apply. If the spouses have their habitual residence in different Member States at the time of the conclusion of the agreement, and if the laws of the two States provide for different formal requirements for the settlement, the agreement is formally valid if it satisfies the requirements of one of the two laws. If only one of the spouses has his or her habitual residence in a Member State at the time of the conclusion of the agreement and the law of that State lays down additional formal requirements for the settlement, those requirements shall apply.

1.4 Effects of the applicable law

Using the autonomy of the will, and therefore through an agreement on the choice of law declared applicable by the country, some clarifications must be established:

- *Principle of universal application or erga omnes.*
The Regulation is binding only on the participating States, but the law determined to be applicable shall be binding even if it is the law of a State which does not apply the Regulations (Article 20), whether or not it is a member of the Union (Article 31).
- *Principle of unity of applicable law.*
In the interests of legal certainty, the applicable law regulates the entire matrimonial property regime, "regardless of the nature or location of its assets". The main rule should ensure that the matrimonial property regime is governed by a foreseeable law with which it has a close connection. For reasons of legal certainty and to avoid fragmentation of the economic matrimonial property regime, the applicable law should govern the economic matrimonial property regime as a whole, that is to say, the entirety of the assets of that regime, irrespective of the nature of the assets and whether the assets are located in another Member State or in a third State (*ex* Article 21 and Recital 43).

- *The law declared applicable covers the widest possible range of matters relating to the property content of the marriage* (*ex* Article 27). It can therefore be extended and applied ("*numerus apertus*") to

the following: (a) the classification of the property of either or both spouses into different categories during and after the marriage; (b) the transfer of property from one category to another; (c) the liability of one spouse for the obligations and debts of the other; (d) the powers, rights and obligations of either or both spouses with respect to the estate; (e) the dissolution of the property regime of the couple and the distribution, division or liquidation of the property; (f) the economic effects of the marriage on the legal relationship between one of the spouses and a third party;[13] and (g) the material validity of marriage settlements.

II. Jurisdiction

1.1. What is a court?

When Regulation EU 2016/1103 speaks of "courts", it includes authorities and legal professionals (such as notaries) who exercise judicial functions or who act by delegation of a court (Article 3(2)) "[p]rovided that such other authorities and legal professionals offer guarantees with regard to their impartiality and the right of all parties to be heard".[14] The idea is that their decisions should be treated as judicial decisions for the purposes of recognition and enforcement in a Member State other than the one in which they were delivered. The term "court" does not include notaries where they do not exercise judicial functions.

All courts, as defined in the Regulation, should be governed by the rules of the Regulation (Recital 29). Thus, where notaries exercise judicial functions, they should be bound by the rules of jurisdiction laid down in the Regulation, and the decisions they deliver should circulate in accordance with the provisions of the Regulation on the recognition, enforceability and enforcement of decisions.

Where notaries do not exercise judicial functions, they should not be bound by these rules of jurisdiction, and the authentic instruments they issue should circulate in accordance with the provisions of the Regulation on authentic instruments (Recital 31). In most countries, such as Spain, Luxembourg, the Czech Republic, Germany, Austria, Belgium, Bulgaria, Italy, Malta, the Netherlands, Portugal and Slovenia, notaries are not bound by these rules of jurisdiction and are therefore free to act, for example, in drawing up a marriage contract or a choice of law agreement or in the case of marriage settlements with cross-border implications. A similar situation is found in Greece, where the notary has the power to conclude a cohabitation contract but not a marriage contract, or in Slovenia, where, since 15 April 2019, the notary has had the possibility of concluding a formal marriage contract (notarial act).

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[13] L. Rademacher, 'Changing the past: retroactive choice of law and the protection of third parties in the European regulations on patrimonial consequences of marriages and registered partnerships', 1 *Cuadernos de Derecho Transnacional*, 7-18 (2018).
[14] A. Rodríguez Benot, n 4 above, 31.

With regard to authentic acts, it should be noted that Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016, which facilitates the free movement of citizens by simplifying the requirements for presenting certain authentic acts in the European Union, has been applicable since 16 February 2019. The application of the Regulation, which is mandatory in its entirety and directly applicable in each Member State, simplifies the movement of certain authentic acts. Thus, for example, the Spanish administration may not require the *apostille* to be affixed to a public document issued in a State of the European Union other than those laid down in the Regulation. And the public documents that fall within the scope of the Regulation would be those issued by a public authority, such as documents emanating from a court or from a civil servant attached to a court; administrative documents; notarial acts; official certificates that have been placed on private documents, and diplomatic and consular documents.

1.2 Competent court and choice of court agreement

Chapter II, Articles 4-19, regulates issues of international jurisdiction. For the purposes of predictability, Regulation EU 2016/1103 gives the spouses the possibility of reaching an "agreement" of choice or submission (express or tacit submission) to the jurisdiction of a given court, to deal with matters relating to their matrimonial property regime. With regard to jurisdiction, however, the Regulation lays down guidelines for the choice of court and the determination of jurisdiction based on the appearance of the defendant (Article 8), as well as alternative jurisdiction (Article 9), subsidiary jurisdiction (Article 10) and a *forum* of necessity (Article 11).

1.2.1 Property issues related to inheritance and matrimonial proceedings

Firstly, Regulation EU 2016/1103 refers to two different cases with respect to the rules of jurisdiction: one, that the matrimonial property regime is connected to the death of one of the spouses (Article 4), or that it is connected to divorce, judicial separation or annulment of the marriage (Article 5). In both cases, "the objective of the European Union legislator is the concentration of matters under one state court". To this end, Regulation (EU) 2016/1103 expressly refers to the provisions of the European regulations on private international family law, which regulate these matters and with which there must necessarily be coordination.[15]

When the question of the property of the marriage is connected to the death of one of the spouses, Regulation (EU) 2016/1103 expressly refers to Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law,

[15] On the possible lack of coordination that may exist, see P. Quinzá Redondo and J. Gray, 'La (des) coordinación entre la propuesta de reglamento de régimen económico matrimonial y los reglamentos en materia de divorcio y sucesiones' 13 *Anuario español de derecho internacional privado,* 513-542 (2013); M. Requejo Isidro, 'La coordinación de la competencia judicial internacional en el Derecho procesal europeo de la familia (sucesiones y régimen económico matrimonial y de las uniones registradas', in A. Domínguez Luelmo and M.P. García Rubio eds, *Estudios de Derecho de sucesiones, Liber Amicorum T.F. Torres García* (Madrid: La Ley, 2014) 1195-1217.

recognition and enforcement of decisions, acceptance and enforcement of authentic instruments in matters of succession and the creation of a European Certificate of Succession.[16] In this case, the situation would arise that occurs following the death of one of the spouses, in which the economic matrimonial regime must first be dissolved and liquidated, in order to then proceed to the division of the inheritance. This first operation is essential in order to carry out the second.

In this case, the competent court is given in Article 4 which refers to the Regulation on Succession: "Where a court of a Member State is seised in matters of the succession of a spouse pursuant to Regulation (EU) 2012/650, the courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that succession case". Consequently, such a referral is not subject to any condition or agreement and is independent of the forum resulting from the application of Regulation 2016/1103. The only condition, of course, is that the court determined under the Regulation on succession is that of a Member State participating in the enhanced cooperation.[17] In these cases, the court of the Member State with jurisdiction over the succession will have jurisdiction.

When the property issue of the marriage is connected with cases of annulment, separation or divorce, Regulation (EU) 2016/1103 makes an express reference to the Brussels II *bis* Regulation. The jurisdiction to settle the matrimonial property regime is determined by the existence of pending proceedings for divorce, legal separation or marriage annulment. Thus, the court of a Member State having jurisdiction to settle such proceedings, in accordance with Regulation (EC) 2003/2201 (Brussels II *bis*), may also decide, if the spouses agree, on the settlement of the matrimonial property regime connected or arising in connection with such a claim. That is to say, the concentration of this jurisdiction is subject to the agreement of the spouses, where the court which has to decide on the application for divorce, legal separation or marriage annulment is one of those provided for in Article 5(2):

a) a court of a Member State where the claimant is habitually resident and has been resident for at least one year immediately prior to the date on which the application is lodged, pursuant to the indent 5 of Article 3(1)(a) of Regulation (EC) No 2201/2003;

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[16] A. Bonomi, 'Il regolamento europeo sulle successioni' *Rivista di diritto internazionale privato e processuale*, 293-324 (2013).

[17] P. Quinzá Redondo, 'Armonización y unificación del régimen económico matrimonial en la Unión Europa: nuevos desafíos y oportunidades' 2 *Revista chilena de derecho,* 634 (2016); Id, 'El Reglamento 2016/1103 sobre régimen económico matrimonial: una aproximación general' *La Ley Derecho de Familia: Revista jurídica sobre familia y menores, Copy dedicated to: Normativa europea sobre Derecho de Familia,* 17(2018); M.I. Espiñeira Soto, 'Regímenes económicos matrimoniales y efectos patrimoniales de las uniones registradas con repercusiones transfronterizas' 90 *El Notario del Siglo XX*I, (2020) availabe at http://www.elnotario.es/practica-juridica/9147-regimenes-economicos-matrimoniales-y-efectos-patrimoniales-de-las-uniones-registradas-con-repercusiones-transfronterizas

b) a court of a Member State of which the claimant is a national and in which he is habitually resident and has been resident for at least six months immediately prior to the date on which the application is lodged, in accordance with indent 6 of Article 3(1)(a) of Regulation (EC) No 2201/2003;

c) a court which has to take a decision, pursuant to Article 5 of Regulation (EC) No 2201/2003, in cases of conversion of legal separation into divorce; or

d) a court that must give a ruling under Article 7 of Regulation (EC) No 2201/2003 in cases of residual jurisdiction.

If the agreement concluded between the parties precedes the court being seised of the economic system, the agreement must be in accordance with Article 7(2) (expressed in writing, dated and signed by the parties) in accordance with Article 5(3) of the Regulation.
In cases not referred to above, competence to deal with the crisis of the marriage and the case arising from the economic system connected with it would automatically, irrevocably and plausibly be referred to the authority designated by Regulation 2201/2003 (Article 5(1) of Regulation 2016/1103).[18]

1.2.2. Property issues not connected with inheritance or matrimonial proceedings

However, in this case, Article 7 of Regulation EU 2016/1103, under the heading of "choice of Court", again allows, on the basis of free will, the conclusion of an agreement in this respect, when it is a question of resolving issues of the matrimonial property regime that have no connection with any divorce, legal separation or marriage annulment proceedings pending before a court of a Member State.

The agreement of submission or choice can be made by means of the formulas of express submission and tacit submission.

a) *Express submission*

In this case, a double cumulative condition is required for the agreement of choice to be valid:

1. *That it is one of the cases of fact foreseen in Article 6.* Article 6, under the heading "Jurisdiction in other cases", refers to cases in which no court in a Member State has jurisdiction under Article 4 or 5, as already mentioned, cases in which questions of matrimonial property law are connected with inheritance proceedings or with divorce, legal separation or marriage annulment proceedings, and in cases other than those provided for in these articles. Therefore, Article 6 of EU Regulation 2016/1103 establishes a list of hierarchical connection points, when those provided for in Articles 4 and 5 are not applicable. The

[18] A. Rodríguez Benot, n 4 above, 35-36.

courts of the Member State in whose territory the spouses are habitually resident when the application is lodged are thus established as courts having jurisdiction; failing that, the court having jurisdiction is that of the Member State of the last habitual residence if one of the spouses still resides there or the habitual residence of the respondent, the last point of connection being the common nationality of the spouses when the application is lodged.

The court of the Member State whose law is applicable by virtue of Article 22 (law chosen by the parties) or Article 26 ((1)(a) or (b)), which refers to the law of the first common habitual residence of the spouses after the conclusion of the marriage or the common nationality of the spouses at the time of the conclusion of the marriage, or the courts of the Member State of the conclusion of the marriage, shall be chosen.

Within the parameters set out above, Article 7 of Regulation EU 2016/1103 provides that the parties may agree that the court of the Member State whose law is applicable pursuant to Article 22 or to Article 26(1)(a) or (b) which relates to the law of the first common habitual residence of the spouses after the conclusion of the marriage, or to the common nationality of the spouses at the time of the conclusion of the marriage, or to the courts of the Member State of the conclusion of the marriage, or that of the Member State where the marriage was celebrated, shall have exclusive jurisdiction in matters relating to matrimonial property regimes. The agreement must be in writing, dated and signed by the parties. Any communication by electronic means which provides a durable record of the agreement shall be deemed to be in writing. The spouses can therefore choose between the courts of the EU country whose law is applicable to their financial arrangements or the courts of the EU country where they entered into their marriage.

Once the two conditions set out above have been met, the jurisdiction voluntarily conferred would be exclusive in respect of matters relating to matrimonial property regimes.[19]

(b) *Tacit submission*

The courts of the Member State whose law is applicable under Article 22 (law chosen by the parties) or Article 26 ((1)(a) or (b)) or the common nationality of the spouses at the time of the marriage, and before which the defendant enters an appearance, shall also have jurisdiction. This is the case described by Article 8 under the heading "jurisdiction based on the appearance of the defendant". Article 8 provides that:
1. Apart from jurisdiction deriving from other provisions of this Regulation, the court of the Member State whose law is applicable by virtue of Article 22 or Article 26(1)(a) or (b) and before which the defendant enters an appearance shall have jurisdiction. But as Article 8 states, this rule does not apply if the defendant enters an appearance precisely to contest the jurisdiction, nor in cases governed by Article 4 or Article 5(1.2).
2. Before assuming jurisdiction under paragraph 1, the court shall ensure that the defendant

[19] A. Rodríguez Benot, n 4 above, 33.

is informed of his right to contest the jurisdiction and of the consequences of his appearance or non-appearance.
The doctrine points out that tacit submission prevails over express submission, so that, even if there is an agreement between the parties, if the plaintiff acts in this way and the defendant does not assert it by contesting jurisdiction, the tacit will shall prevail over the expressly agreed one.[20]

(c) *Other competition aspects*

By way of exception, the court of a Member State is permitted to decline jurisdiction where its national law does not recognise the marriage. It may therefore decline jurisdiction, and the parties concerned may apply to a court in any other EU country with which there is a connecting factor. That is to say, they may agree that the courts of the Member State whose law is applicable to the matrimonial property regime or the courts of the Member State where the marriage took place should rule on the dispute. Otherwise, the criteria set out in Article 6 will determine the Member State whose courts will rule on the case (Article 9).[21]

Finally, in order to complete the regulation of the rules on jurisdiction, where no Member State has jurisdiction under the above criteria, Article 10 of the Regulation, under the heading "Subsidiary jurisdiction", provides that the courts of the Member State in whose territory the immovable property of one or both spouses is situated shall have jurisdiction. However, the court hearing the case will have jurisdiction only over the immovable property in question. And Article 11 takes over the so-called *forum necessitatis*, which confers jurisdiction on the courts of a Member State where proceedings cannot reasonably be instituted or conducted or if they cannot be conducted in a third State with which the case has a close connection. In this situation, the case must have a sufficient connection with the Member State of the court seised.

[20] A. Rodríguez Benot, n 4 above, 33.
[21] M.I. Espiñeira Soto, n 17 above.

Part II

Alba Paños Pérez and María José Cazorla González*

Matrimonial property regimes in the absence of choice by the spouses under regulation (EU) 2016/1103

1. Introduction

European society has been changing in recent decades, and this is reflected in the different forms of family that currently live together on European territory, and whose reality, under the principle of equality and non-discrimination, has been maintained by the European Court of Human Rights when it determined in its judgments that a homosexual couple can be included in the concept of "private life" and "family life" in the same way as a heterosexual couple in the same situation.

Europe presents different *de facto* situations according to the law of the national *forum* and, as a consequence, a multi-legislative territory that includes practically all the legal institutions that are included in other regulations outside the European Union, which allows training and wide knowledge in comparative law on economic matrimonial systems. In this regard, and in relation to the issue at hand, it should be known that some States do not regulate marriages between people of the same sex. We refer to Bulgaria, the Czech Republic, Cyprus, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia.[22]

However, these differences do not translate into inequalities. In this respect, it should be recalled that the European Court of Justice has been applying the principle of equality in the exercise of rights of European citizens in general and of spouses and partners in particular. This can be seen from the judgment of 25 July 2008, *Metock and others, C-127/08, EU:C:2008:449*,[23] in which, according to the definition in Article 2(2) of Directive 2004/38,[24] the spouse is considered, as a member of the family, on the same level of equality and non-discrimination as the parties of an unmarried couple, although not by analogical application, since we are dealing with two different institutions (marriage and

* Alba Paños Pérez authored Part II, Section I.3, I.4 and Section II and María José Cazorla González authored Part II § 1 and § 2, Section I.1 and I.2.

[22] M.J. Cazorla González, n 1 above, 106-107.

[23] Case *C-127/08 Metock and Others v. Minister for Justice, Equality and Law Reform,* Judgment of 25 July 2008, ECLI:EU:C:2008:449, paras 98-99 available at *http://curia.europa.eu.*

[24] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) no 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance). Official Journal of the European Communities 30/04/2004, L 158/77.

registered partnership) which are constituted by the freedom of the parties taking into account the formal aspects which make up the legal transaction.

It is under this principle of equality that the rules of cross-border cooperation in family law have developed and which are currently emerging as a result of the union of citizens of different nationalities living in Europe and also as a result of the application of rules, which make the EU a territory rich in regulations with different economic legal regimes. These have been transferred to other civil codes outside the EU and which place the EU in a leading position when it comes to understanding and applying these institutions by EU courts.

Certainly, for a long time, the EU has considered family policy to be the responsibility of individual States, but with the arrival of the Schengen area, people have been moving from one State to another, working in other countries and starting life together with citizens of another State whom they decide to marry. The Commission is aware of the need for a new Regulation on the recognition and enforcement of judgments in cross-border marriages (Article 69(1)) and the need for supporting rules to resolve possible conflicts, such as Council Regulation (EU) 2016/1103 of 24 June 2016[25] establishing enhanced cooperation on jurisdiction, applicable law and the recognition and enforcement of decisions in matrimonial property regimes.[26]

This Regulation does not change the rules of each Member State but helps to determine the jurisdiction and law applicable to the matrimonial property regime for spouses who have entered into marriage on or after 29 January 2019[27] and have decided to choose the applicable law in accordance with Article 22. In other words, the application of the Regulation results in a shift in the national rules on the resolution of international or "cross-border" disputes, as far as their material and temporal scope of application is concerned.[28]

Furthermore, the application of Directive 2004/38 by the Court of Justice of the European Union will help us to understand the interpretation of the principle of equality in the field of the family, and, therefore, to know that, although *a priori* the territorial scope of Regulation 1103 is reduced to the countries participating in enhanced cooperation, the truth is that, depending on the place of residence, we can find judgments that resolve disputes in this field before the competent courts of a non-participating State, but which must apply the law of another State because it is the one chosen by the spouses to regulate their matrimonial regime. This is so because, although Council Regulation 2016/1103 is

[25] A.L. Calvo Caravaca and J. Carrascosa González, *Derecho Internacional Privado* (Granada: Comares, 18ª ed, 2018).
[26] A.M. Pérez Vallejo, n 5 above, 106-107; P. Peiteado Mariscal, n 5 above, 306.
[27] A. Clara Belío, 'Claves del futuro Reglamento europeo sobre Regímenes Económicos Matrimoniales: entrada en vigor y ámbitos de aplicación' *Diario La Ley*, (2018).
[28] P. Carrión García De Parada, 'Nuevos reglamentos europeos sobre regímenes matrimoniales y sobre efectos patrimoniales de las uniones registradas' 84 *El Notario del Siglo XXI*, (2019).

only binding on the participating States, the law determined to be applicable will be binding even if it is not that of a Member State under the principle of universality, as laid down in Article 20, in which, the law designated applies regardless of whether it is the law of a participating Member State.[29] It could therefore also be applicable to the property consequences of marriage through the universal application of that Article in countries which have not expressed a preference for enhanced cooperation, such as Ireland, in accordance with the Regulation.

In this regard, the judgment of the European Court of Justice of 5 June 2018[30] can serve as an example. The judgment concerned the marriage of two persons of the same sex, one of them a Romanian citizen, when the Romanian Civil Code prohibits marriage between persons of the same sex, denying any legal recognition to those contracted outside their state. However, the European Court recalled that the right to free movement of citizens of the Member States of the European Union and the European Economic Area would be applicable in all Member States. For this reason, a Member State may not rely on its national law to oppose recognition on its territory, for the sole purpose of granting a right of residence deriving from marriage to a third-country national of the same sex in another Member State in accordance with the law of the latter State.

Therefore, when choice of the applicable law exists, the provisions of Article 22 in both regulations will be followed; and when there is no choice, Article 26 of Regulation (EU) 2016/1103 will be implemented. Both situations differentiate the order of precedence in terms of whether or not the spouses have exercised their right to choose the applicable law and the determination of international jurisdiction.

However, we will only explain in this chapter the applicable law in the absence of an agreement of the spouses and the competent court to deal with disputes arising from the matrimonial property regime.

2. Commentary on the applicable law under Regulation (EU) 2016/1103 in the absence of agreement in cross-border marriages

[29] In circumstances such as these, where the recognition of same-sex marriages contracted in another Member State constitutes a restriction on Article 21 TFEU, States which do not recognise same-sex marriages argue that such a restriction is justified on grounds of public policy and national identity, as referred to in Article 4(2) TFEU. The Court has consistently held that public policy can only be invoked where there is a genuine and sufficiently serious threat affecting one of the fundamental interests of society (see, to that effect, Case C-438/14 *Bogendorff von Wolffersdorff,* [2016] ECR 2016:401, para 67, and Case C-193/16 *E v Subdelegación del Gobierno en Álava,* [2017] EU:C:2017:542*,* para 18 and the case law cited). Case C-438/14 *Nabiel Peter Bogendorff von Wolffersdorff v Standesamt der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhe*, [2016] ECLI:EU:C:2016:401 available at *http://curia.europa.eu/juris/document/document.jsf?text=&docid=179469&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3218304*. Case C-193/16-E *E v Subdelegación del Gobierno en Álava*, [2017], ECLI:EU:C:2017:542, available at *http://curia.europa.eu/juris/document/document.jsf?text=&docid=192691&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3218872*.

[30] See Chapter II, Section V.5.5.

Regulation EU 2016/1103 aims to allow spouses to know in advance which law will be applicable to their matrimonial property regime and to avoid being subject to different regimes depending on the competent court or the applicable law.[31] It therefore provides for harmonised conflict-of-law rules to avoid conflicting results (recital 43).[32]
Two rules of general scope are enshrined in the Regulations to specify the law applicable to the spouses' factual situations: a rule based on the will of the parties (subparagraph a) and a rule applicable in the absence of choice (subparagraph b), which we will deal with in this chapter.

Article 26 establishes a hierarchy that helps to determine the law applicable to the matrimonial property regimes.[33] On this basis, if the spouses do not choose the law applicable to the matrimonial property regime, the law is determined by a list of connecting factors structured in hierarchical order, which would ensure predictability for the spouses and for third parties:[34]
- the first criterion is the common habitual residence of the spouses after the conclusion of the marriage; or, failing that (Article 26(a)),
- then the law of the common nationality of the spouses at the time of the conclusion of the marriage, or, failing that (Article 26(b)),
- the third criterion is based on the place where the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances. So, if neither of these two criteria is applicable, or in the absence of a common first habitual residence in the case where the spouses have dual nationality at the time of the conclusion of the marriage,[35] the third criterion is the law of the State with which the spouses have the closest connection, for which the notary or civil servant must take account of all the circumstances and the fact that these connections must be those existing at the time of the conclusion of the marriage (Article 26(c)).

Exceptionally, at the request of either of the spouses with more than one common nationality (Article 26(2)) to whom only paragraph 1(a) and (c) apply, the judicial authority

[31] M.I. Espiñeira Soto, n 17 above.
[32] J. Rodríguez Rodrigo, n 12 above, 160 *et seq*. The whole of Chapter III of Regulation 1103/2016 (Articles 20 to 35) is based on considerations clearly set out in recitals 43 and 42, respectively. First, the purpose of the rules is to enable citizens to enjoy the advantages of the internal market; second, they must do so on a completely equal footing in law; third, the spouses must therefore be allowed to know in advance what the law applicable to the matrimonial property regime will be; fourth, they must lay down harmonised conflict-of-law rules to avoid contradictory results; fifth, in particular, the main rule must ensure that the economic regime is governed by a predictable law with which it has a close connection.
[33] A. et. al. Oliva Izquierdo, n 11 above.
[34] G. Cuniberti. and S. Migliorini, *The European Account Preservation Order Regulation: A Commentary* (Cambridge: Cambridge University Press, 2018), 265.
[35] In this matter, it is advisable to remember that when the nationality is mentioned in this Regulation as a point of connection, the question of how to consider a person with multiple nationalities is a preliminary issue which does not fall within the scope of this Regulation and which should be left to national law, including, where appropriate, international conventions, in full respect of the general principles of European legislation.

competent to rule on the financial consequences of a marriage, as determined in paragraph 3 of Article 26, may decide on the legislation of a State other than the State whose legislation is applicable under paragraph 1, if the legislation of that other State confers financial consequences on the institution of the registered partnership and if the applicant proves by this exceptional means that:
- the spouses had their last common habitual residence in that other State for a significantly longer period than in the State designated under paragraph 1(a), and
- both parties had relied on the legislation of that other State to organise or plan their property relations.

Both connections reflect a certain proximity to the personal circumstances of the spouses, and are also subsidiarily ordered and temporally fixed, in order to avoid problems of conflict arising from the mobility of the spouses, when the most extreme place and connection of the marriage must be determined. By way of exception and at the request of either spouse, the judicial authority having jurisdiction to rule on matrimonial property regimes may decide that the law of a State other than the State whose law is applicable by virtue of paragraph 1(a) shall govern the matrimonial property regime if the plaintiff proves that the spouses had their last common habitual residence in that other State for a significantly longer period than in the State of first common habitual residence of the spouses after the conclusion of the marriage, and that both spouses relied on the law of that other State in organising or planning their property relations.

Whereas Article 49 of Regulation 1103/2016 states literally that if the applicable law is not chosen, account should be taken of the scale of connecting factors already analysed. So, and with regard to the determination of the law applicable to matrimonial property regimes in the absence of a choice by the spouses[36] and in the absence of a marriage settlement, the judicial authority of a Member State should, at the request of either spouse, be able in exceptional cases, where the spouses have moved to the State of their habitual residence for a long period, to conclude that it is the law of that State which must be applied when the spouses invoke it. In any event, it may not prejudice the rights of third parties.

On the basis of these considerations, we therefore conclude that under Article 26 of the Regulation, the importance of nationality is displaced in favour of habitual residence, and, failing that, unless the spouses have a common nationality, the place of greatest connection, that is to say, where they have lived the longest. So, the deviations of the jurisdictions eligible for choice of law from the law found through objective connecting factors can arise if the spouses or registered partners exercise their private autonomy at a later point in time during their marriage or partnership. The reason[37] is that the objective connecting factors laid down in Article 26(1) of the Regulation consistently relate to the eginning of the marriage or registered partnership: the spouses' first common habitual residence after the conclusion of the marriage, their common nationality at the time of the

[36] C. Grieco, n 9 above, 465.
[37] L. Rademacher, n 13 above, 7-18.

conclusion of the marriage, or the closest connection at the time of the conclusion of the marriage, and the State under whose law the registered partnership was created. These objective factors are not dynamic but static. When the personal circumstances of the spouses subsequently change, eg by relocation to another State or a change of citizenship, the applicable law objectively determined by Article 26(1) of the Regulation remains the same.

I. Consequences of the application of European Regulations on the statutory matrimonial property regime

1. Introduction

Although Regulation (EU) 2016/1103 does not modify the substantive law of States, since its function is to strengthen cooperation on jurisdiction, applicable law, recognition and enforcement of decisions with property effects in marriages, it is necessary to know the substantive law of each of the States involved. This is important not only to resolve conflicts when the time comes, but also to provide information prior to the exercise of the right of option that the parties have to choose the applicable law in many States, or when not to because of the place of marriage or residence. In this sense, we understand that the law is more useful from the temporal and economic point of view if it is informed and advised prior to the moment in which the problem already exists, and that occurs when there is a crisis in the marriage, or due to the death of one of the spouses.

The differences between one applicable law and another in each State of the European Union are decisive in the legal liquidation of the economic regime, since the distribution in a community property regime is not the same as when the liquidation of assets takes place under the regime of separation of assets or by deferred or limited community property.

At present, the 27 Member States have a legal economic regime applicable in the absence of agreement, so that there is no legal gap in this respect, and, consequently, once residence is determined, or in the absence of it, common nationality or, if there is none, the place of closest connection, the legal economic regime regulated in that country will apply.

However, we must bear in mind that although the United Kingdom is no longer a Member State, its citizens have married European citizens, and, although it is a state which did not participate in enhanced cooperation when it was a Member State, the most important thing now is to know that neither England, Wales nor Northern Ireland regulates a legal financial system, although Scotland does, which determines the separation of property in the absence of an agreement when the spouses get married. In this sense, one advantage of the English system may be said to be the scope to devise a bespoke solution for each couple,

appropriate to their individual needs, because in England, Wales and Northern Ireland the statutes provide a framework within which judges can redistribute property.[38]

Therefore, matrimonial property regimes have important and direct effects for third parties. A third party's rights, entitlements, and liability *vis-à-vis* one or both spouses may depend on the substantive rules of the patrimonial regime. As a result, a third party may be disadvantaged legally by the application of one patrimonial regime compared to another.

The matrimonial statutory property regime in most European countries is the community of property (Belgium, Bulgaria, Czech Republic, Croatia, Estonia, France, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia), but some states have a system of deferred community of property, such as Denmark, Germany, Finland, and Sweden, and/or separation of property, such as Austria, Cyprus, Greece, Ireland or a territory which has more than one legal system such as the United Kingdom and Spain (Scotland, Catalonia or the Balearic Islands).[39]

In general, it should be recalled that Regulation (EU) 2016/1103 determines that, in the absence of a choice of law applicable to their matrimonial property regime, the criteria for determining such a choice are to be found in Article 26, and that they apply not only to marriages concluded after 29 January 2020, but also to those concluded earlier whose spouses have chosen the applicable law and have expressly declared this in accordance with the formalities laid down in the Regulation.

With these previous premises, the result is different. Thus, a marriage between a French person and a Spanish person with civil residence in Andalusia, who decide to reside in one or the other State in the general area of regulation, would not be very dissimilar, because both countries participate in enhanced cooperation, recognise marriage between people of the same or different sex, both regulate the principle of free choice of legal regime, and allow agreements to be made before a notary with an economic legal regime of community of property. Therefore, it would not have substantial differences *a priori*, beyond the limits that each code establishes and whose rules would have to be followed.

But let us consider the differences between an Austrian and a Latvian, where this second State not only does not regulate registered or unregistered couples, but only recognises heterosexual marriage and furthermore does not participate in enhanced cooperation. Two questions need to be answered here: on the one hand, in the absence of a choice of law, could Austrian or Cypriot law be applied if the couple were to settle in Austria? The answer is yes, in accordance with Article 26(1), and would govern the separation of property in the absence of an agreement. But it may happen that they get married in Austria and then

[38] E. Cooke et al., *Community of Property. A Regime for England and Wales* (London: The Nuffield Foundation/Policy Press, 2006), 2, available at *https://www.reading.ac.uk/web/files/law/CommunityofProperty_Version021106.pdf*

[39] *https://www.euro-family.eu/eu-database*

move to reside in Latvia. In such a case, as a Member State, it cannot claim to regard marriage between persons of the same sex as a matter of public policy, because the free movement of persons within the territory of the Community is a limit that cannot be violated. Consequently, when settling assets, it is not the same to apply the system of separation of property established in Austria as the system of community of property applied in Latvia, and the Latvian court could end up having jurisdiction to rule on the basis of Austrian law, since the marriage was validly concluded in a Member State.

The situation can become even more complicated if we introduce a country like Spain with multiple regulations applicable to both the applicable marital property regimes and the diversity of common-law couples that exist today. This means that when a citizen of any Member State marries a Spanish citizen, or when two citizens move to live in Spain, depending on their civil residence (by birth or by continuous residence),[40] their applicable legal regime will be different. For example, a Finnish woman (a registered partner under Finnish law) and a Spanish woman with Catalan civil residence (L 25/2010 of 29 July) are nationals of countries that participate in enhanced cooperation, recognise and regulate marriages and partnerships between people of the same and different sex, and where the legal regime established is that of separation of property. However, since 2017 a Finnish registered partnership may be turned into a marriage if the parties file a joint application at the Civil Registry, although if they decide not to do so, the parties continue to live in a registered partnership. New couples can no longer register, while in Catalonia they can register through the Permanent Partners Registry. Therefore, they can register with the Registry in Catalonia, and their relationship can be recognised in Finland.

2. Community of property

We should differentiate between the universal community system from the community of acquests. The first applies in the Netherlands which is the only European jurisdiction to retain this regime, given that Portugal abolished it, and joined the group of European countries that, in the absence of an agreement, govern the community of property.

a) Universal community system

A major change occurred in the Netherlands in 2018. If the applicable law is Dutch law, the default marriage regime is universal community of property until 1 January 2018, when the Dutch Civil Code underwent a major change.

Depending on whether the marriage took place before or after this date, there will be major differences in the application of the default property regime set out in the Dutch Civil Code:
- for marriages entered into before 1 January 2018, all property contributed by the spouses to the marriage and all property acquired subsequently (with some specific exceptions)

[40] A.M. Pérez Vallejo and M.J. Cazorla González, n 8 above, 610-657.

form their universal community of property, as does property obtained as a gift or inheritance (with some exceptions);
- for those married after 1 January 2018, the community of property is made up of all the property the spouses acquire during the marriage, including gifts, and inherited property (with some exceptions), which is not part of the universal community of property.

Therefore, after 1 January 2018, the marital community is considered much more limited, since the possibility of having one's own patrimony, together with the common property, is much greater.[41]

b) Community of property

The default marital regime in many countries is the community of property (eg the community of property acquired during the marriage). The spouses can regulate their property relations in another way, for example by choosing a different regime, but in the absence of a choice this regime will apply in Belgium, Croatia, the Czech Republic, France, Italy, Hungary, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia and Slovenia, but not in Catalonia or the Balearic Islands. Some of these countries (Hungary, Latvia, Lithuania, Poland, Romania and Slovakia) do not participate in enhanced cooperation. However, let us remember that Article 20 of Regulation (EU) 2016/1104 allows the courts to apply the law of any state, which has been designated as applicable, whether or not it is the law of a participating Member State (the principle of universal application).

Community of property is an example of a matrimonial regime that results automatically from the matrimonial relationship that provides for the automatic distribution of property and responsibilities during the relationship,; when the community is dissolved by divorce, by separation, or by the death of one of the spouses.[42] However, depending on the country, the courts will determine whether or not there should be economic compensation for the spouse or a widow's, widower's, or surviving civil partner's pension, together with the determine the common property when there is no agreement on its nature, and then assign it equally to the parties. This is usually easier said than done because, in reality, this is often difficult to determine and, in such a case, the presumption of community of property applies.

The community of property will have responsibility for all obligations undertaken by the agreement of both parties or of one of the parties with the consent of the other, and for the family legal obligations in the exercise of domestic authority. Where it cannot be determined whether the debt to third parties is owed by the community or by one of its members, an interpretation shall be made by the competent court. The term 'court' should therefore be given a broad meaning so as to cover not only courts in the strict sense of the

[41] F.W.J.M. Schols and T.F.H. Reijnen, n 8 above, 491.
[42] F. Gray and P. Quinzá Redondo, n 15 above; P. Quinzá Redondo, n 17 above.

word, exercising judicial functions, but also, for example, notaries in some Member States who, in certain matters of matrimonial property regime, exercise judicial functions like courts, and notaries and legal professionals who, in other Member States, exercise judicial functions in a given matrimonial property regime by delegation of power by a court.

3. Separation of property

The default (statutory) matrimonial property regime is the separation of property. So, each spouse has exclusive ownership of the assets brought into and acquired during the marriage and each spouse manages his or her property (however, common administration of the property can also be agreed) and is free to dispose of his or her assets. This means that each spouse owns the property which he or she has acquired before the conclusion of marriage and which he or she acquires during the marriage. Each spouse is also responsible for a debt that he or she has incurred regardless of whether it was incurred before or during the marriage. A limitation of this freedom through an agreement is possible, and this is opposable to third parties after registration in the land register.

On the other hand, each spouse is liable for his or her owns debts, and not for the debts incurred by the other spouse. Only if an obligation was entered into by both spouses is there joint and several liability of both spouses. If the spouses live under the matrimonial property regime of separation of property, each of them has the right to be compensated for assistance to the other spouse. An exception to the principle of separation of property is household spending, because both spouses have an obligation. But if one of the spouses has a low income or no income at all, their work at home will be considered as a contribution. That is to say, both spouses are jointly and severally liable for a maintenance debt – a debt that either of the spouses has incurred for the maintenance of the family – and for debts that they have taken together regardless of the purpose of the debt.

This system is applied in Austria, Finland, Ireland or in some territory divided into states with more than one legal system, as in Scotland (United Kingdom) and in Catalonia or the Balearic Islands (Spain). Of these countries, Ireland is the only Member State that does not currently participate in enhanced cooperation, and neither does the United Kingdom, although it no longer belongs to the EU. Consequently, a citizen of Ireland could choose to apply the law under Article 20, but, if this does not happen the Regulation would not apply.[43]

4. Systems of deferred community of property or participation in acquisitions

Deferred community of property means that the law has two phases. While the marriage subsists, the common law idea of "the separation of property" reigns in that a spouse gains an interest in the other's property only by the same general rules of property law so that family law has minimal input. Upon the termination of marriage, however, it is the civil law

[43] *https://eur-lex.europa.eu/homepage.html*

idea of "the community of property" that takes over. Precisely because both spouses are regarded within their equal co-operative partnership of marriage to have contributed to the acquisition of property whatever the exact role each discharged during their marriage, in particular whether this was a financial or a non-financial role, the courts are empowered to divide such property equitably between them upon their divorce. The law of division of matrimonial assets rests on the premise that both spouses contributed either financially or non-financially to the acquisition of property that constitutes matrimonial assets. As this new view of the acquisition of property is allowed only upon the award of a judgment of divorce, the community of property is deferred until this time.[44]

In this regime, each spouse can decide independently on the disposition of the property until possible legal separation, divorce or death, although, in the case of the disposition of the matrimonial home and/or its furniture, the consent of the other spouse is required. In contrast, non-transferable rights and personal rights are not included in the system, unless otherwise provided for in an agreement, and each spouse will generally be responsible for his or her own debts, although both may intervene in the case of debts for the household or for the needs of children, eg family burdens.

Germany, Denmark and Sweden are countries which, in the absence of an agreement, govern the system of participation, although let us remember that Denmark does not participate in enhanced cooperation.[45] Although in all three countries the spouses can choose between the different economic regimes, which in the case of Danish law is between two matrimonial regimes: deferred community of property and separation of property. However, in Danish law, if the spouses do not choose a regime of economic property, then deferred community of property applies. Even though Denmark does not participate in enhanced cooperation, the effects of *erga omnes* application through Article 20 can be extended when universal application is established.

In Spain, participation in the acquisitions regime is a convention regime[46] which must be agreed upon by the spouses in marriage settlements. It is interesting that in cases of marriage annulment, if one of the spouses has been declared in bad faith in judicial proceedings, he or she will not have the right to participate in the profits obtained by the other spouse, while the other spouse will be able to claim the profits regardless of the fact that the agreed-upon or legally established regime was not that of participation.

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[44] H.R. Hahlo, 'A Note on Deferred Community of Gains: The Theory and the Practice', *McGill Law Journal,* available at *https://lawjournal.mcgill.ca/wp-content/uploads/pdf/2351473-hahlo.pdf*; M. Jänterä-Jareborg, 'Swedish National Report', answers to Question 14, Question 18 and Question 23, in K. Boele-Woelki, B. Braat, I. Sumner eds, *European Family Law in Action*, *Grounds for Divorce*, (Oxford: Intersentia, 2003).

[45] *https://www.euro-family.eu/atlas*

[46] A.M. Pérez Vallejo and M.J. Cazorla González, n 8 above 610-657.

II. Jurisdiction

When determining the body competent to deal with matters arising from matrimonial property regimes, a distinction must be made between proceedings that were instituted before and on or after 29 January 2019, as this is the date on which Regulation 2016/1103 entered into force.

1) Proceedings instituted before 29 January 2019: the jurisdiction of the courts was based on the rules regarding international (universal) jurisdiction within each Member State in international cases.

2) Proceedings instituted on or after 29 January 2019: jurisdiction is determined by the rules contained in Regulation 2016/1103, for matters of matrimonial property regimes. These provide that the competent authorities are as follows:

a) Where the legal relationship is terminated by the death of one of the parties, jurisdiction shall lie with the court that has jurisdiction over the succession (Article 4).
b) In cases of divorce, legal separation or marriage annulment, jurisdiction is to be exercised by the court with jurisdiction to settle the matrimonial dispute (Article 5), pursuant to Regulation (EC) no 2201/2003.

Jurisdiction in matters of matrimonial property regimes under paragraph 1 shall be subject to the spouses' agreement where the court that is seised to rule on the application for divorce, legal separation or marriage annulment:

1) is the court of a Member State in which the applicant is habitually resident, and the applicant had resided there for at least a year immediately before the application was made (Article 3(1)(a) of Regulation (EC) no 2003/2201);

2) is the court of a Member State of which the applicant is a national and the applicant is habitually resident there and had resided there for at least six months immediately before the application was made (Article 3(1)(a) of Regulation (EC) 2003/2201);

3) in cases of conversion of legal separation into divorce (Article 5 of Regulation (EC) no 2003/2201);

4) in cases of residual jurisdiction (Article 7 of Regulation (EC) 2201/2003);

5) in other cases, a distinction must be made on whether or not there is an agreement.

Where the spouses agree on the jurisdiction of a Member State whose law is applicable or where the marriage has taken place, the agreement must be in writing, dated and signed by the parties.

In the absence of an agreement, proceedings shall be brought before the courts of the Member State concerned to settle any question relating to their matrimonial property regimes, except in the event of the death of one of the spouses or of a dispute in the matrimonial property regime, in the following order of hierarchy (Article 6):

1. If the spouses are residents in a State at the time of the application, it is of no matter what the nationality of the parties is, or where the marriage was celebrated. What matters is the common habitual residence at that time, which means in whose territory the spouses are habitually resident at the time the court is seised; or failing that,

2. When the marriage does not reside in a State, because one of the parties lives in another country. In this situation, the application shall be filed where both established their last common habitual residence, provided that one of them still resides there. That is to say, in whose territory the spouses were last habitually resident, insofar as one of them still resides there at the time the court is seised; or failing that,

3. When the couple are each resident in different States, and they have not had a common habitual residence for a long time, the jurisdiction to rule on a matter of the spouses' matrimonial property regime shall lie with the courts of the Member State where the respondent usually resides, that is, in whose territory the respondent is habitually resident at the time the court is seised; or failing that,

4. Finally, regarding the spouses' common nationality at the time the court is seised. In this case, if both are nationals of the same State, they may submit their application without any requirement of residence in their country. Although it should be noted in this case, the provisions of recital 50, where this Regulation refers to nationality as a connecting factor, the question of how to consider a person having multiple nationalities is a preliminary question which falls outside the scope of this Regulation and should be left to national law, including, where applicable, International Conventions, in full observance of the general principles of the Union. This consideration should have no effect on the validity of a choice of law made in accordance with this Regulation.

On the other hand, and as far as conflicts arising from the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes are concerned, there are also variables to be considered when determining the competent jurisdiction, since, for example, in Luxembourg,[47] disputes in matters of

[47] R. Herrera De Las Heras, D. Hiez, A. Paños Pérez, F. Pérez Ferrer and M.J. Cazorla González, n 8 above, 427-458.

matrimonial property regimes are independent of the location of the property; however, in Croatia, Latvia, Malta and Slovenia, for example, disputes arising from property in their territory, regardless of residence, are attributed to the jurisdiction of their courts in the case of marriages celebrated before 29 January 2019.

These situations change with the entry into force of the Regulation for those countries participating in enhanced cooperation, such as Croatia, Malta and Slovenia, because this Regulation shall apply in the Member States which participate in enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes (supremacy of EU law). It will also be applied to marriages celebrated before 29 January 2019, under the autonomy of the will, when the parties agree on the choice of court in favour of the courts of the Member State of the applicable law.

However, for those countries not participating in enhanced cooperation, such as Latvia, the rules of private international law will apply,[48] as they do for marriages celebrated in the EU before 29 January 2019, without the possibility of choice after the applicable law under the Regulation in all Member States.

When the couple agrees, the spouses can choose the court of the Member State as regulated in Article 7:

1. In cases which are covered by Article 6, the parties may agree that the courts of the Member State whose law is applicable pursuant to:

- Article 22 (habitually resident at the time the agreement is concluded; or the State of nationality of either spouse or future spouse at the time the agreement is concluded);
- or Article 26(1)(a) (of the spouses' first common habitual residence after the conclusion of the marriage); or failing that, b) (of the spouses' common nationality at the time of the conclusion of the marriage);
- or the courts of the Member State of the conclusion of the marriage

shall have exclusive jurisdiction to rule on matters of their matrimonial property regime.

2. If the spouses consider filing the application by mutual agreement, then they will choose at their own discretion the country where either of them habitually resides, knowing that the agreement has the force of law and that if relations subsequently become complicated there would be no possibility of modifying the agreement.

[48] J. Rodríguez Rodrigo, n 12 above; C. Vaquero López, 'Cuestiones prácticas sobre el sistema de Derecho internacional privado europeo en materia de disolución del vínculo matrimonial' *La Ley Derecho de Familia: Revista jurídica sobre familia y menores*, (2018).

3. Where the applicant has resided for at least six months in the country of which the applicant is a national, then he or she may file the claim or application in his or her own country.

Finally, it should be remembered that the Brussels II *bis* Regulation on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility applies only to divorce actions, and such jurisdiction results from its application without differentiating whether the marriage was concluded before or after 29 January 2019.

However, it should be recalled that this Regulation has been recently reformed by the Council Regulation (EU) 2019/1111 of 25 June 2019, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, and on international child abduction, which will enter into force in 2022. Until then, jurisdiction for divorce will continue to be governed by the rules of Regulation 2003/2201, Article 3, which provides for seven forums applicable to any nationality of the spouses, even if neither spouse is a national of an EU Member State.

Thus, jurisdiction could be transferred to the courts of the Member State where they are present: the habitual residence of the spouses, the last habitual residence of the spouses (in so far as one of them still resides there), the habitual residence of the defendant (in the case of a joint application), the habitual residence of one of the spouses, the habitual residence of the plaintiff if he or she has resided there for at least one year immediately before the application is made, the applicant's habitual residence if he or she resided there for at least six months immediately before the application was made and is a national of the Member State concerned or, in the case of the United Kingdom and Ireland, is domiciled there, and the courts of a Community country have jurisdiction where both spouses are nationals of the same country or, in the case of the United Kingdom and Ireland, where they have a common domicile.

CHAPTER II

Registered partnerships and property consequences

Roberto Garetto, Manuela Giobbi, Francesco Giacomo Viterbo, Lucia Ruggeri*

I. Introduction

The adoption of a European Regulation, specifically devoted to the property consequences of registered partnerships, has its origins in guidelines set by the European Council in the program of 30 November 2000, which clearly identified the exclusion of important sectors of private law from the scope of European regulations as one of the major obstacles to the creation of a European legal area, characterised by the mutual recognition of civil and commercial judgements. It was necessary to wait until 2016 to have a regulatory instrument specifically aimed at that segment of family law regarding the property consequences of non-marital unions; it was, in fact, only in 2006 that the issue of the property consequences

of non-marital unions was highlighted in a specific Green Paper on the property consequences of family law. The unsatisfactory experience of a Convention[1] dedicated to the law applicable to marital property regimes, ratified by very few States and only entered into force in 1992, led to the aim of not so much harmonising the rules of substantive law on family property as to identifying conflict-of-law rules which would make it possible to adequately deal with important issues relating to the property of unmarried couples. The path of the European Union in this area is marked by obstacles, forks and compromises caused by multiple factors: the failure to draft a European Constitutional Treaty, the progressive emergence of sovereign forces, the Brexit, the extreme fragmentation of domestic regulations in central issues such as the recognition of cohabitation, the conditions required by each individual State to consider a given cohabitation legally relevant, the provision of specific property regimes for couples, the identification of the rights *in rem* covered by these rules, the relationships within the couple and between the couple and third parties who are creditors of one or both partners.

The growing statistical significance of cross-border couples and of movable and immovable property in countries other than the countries of residence of the couples, together with the growing phenomenon of registered partnerships, have led a group of 18 countries[2] to use the enhanced cooperation procedure, abandoning the unanimity of the paths usually implemented in family law. As was the case for the Rome III Regulation,[3] also for the 2016/1104 Regulation,[4] the concept of a third country assumes, therefore, a broad connotation, including not only the countries that are not an integral part of the European Union, but also those Member States that have not participated in the enhanced cooperation procedure. Consequently, Regulation 1104 is applicable only to unmarried couples who have opted for the registration of the union and can only be invoked before the courts of countries that do not deny the partnership's recognition or decline their jurisdiction on grounds of public policy.[5] Almost paradoxically, the need to simplify and facilitate the life of cross-border couples, the primary purpose of regulation, ends up being difficult to achieve due to the required high level of knowledge and competence in the application of conflict rules and related jurisdictional rules. Therefore, the role of legal professionals is crucial to promote the optimal use of tools such as the choice of applicable law and *electio fori*. It is, thus, understandable how Article 68 introduced a special procedure for monitoring the functioning of the rules contained in Articles 9 (alternative jurisdiction), 37 (grounds of non-recognition) and 38 (fundamental rights): the review, carried out by the

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[1] Hague Convention of 14 March 1978 on the applicable law to marital property regimes.

[2] These are Belgium, Bulgaria, Cyprus, Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, Netherlands, Austria, Portugal, Slovenia, Finland and Sweden. For a first comment see N. Joubert, 'La dernière pierre (provisoire?) à l'édifice du droit international privé européen en matière familiale'. Les règlements du 24 juin 2016 sur les régimes matrimoniaux et les effets patrimoniaux des partenariats enregistrés' Revue critique de droit int. privé, 1-26 (2017).

[3] Council Regulation (EU) 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, in OJ L 343/10, 29 December 2010.

[4] 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, in OJ L 183/30, 8 July 2016.

[5] Cf. Chapter III, Part II.

European Commission in the form of a Report, scheduled after the conclusion of the first five-year period of adoption of the Regulation (29 January 2024), will have to assess the extent to which the principles of the Charter of Fundamental Rights have been respected, such as non-discrimination, and above all, the actual degree of effectiveness of the right of access to justice for cross-border couples. The inclusion of a review clause, which is common in European regulatory instruments, in the case of Regulation 1104 (but a similar provision can also be found in Regulation 1103) is characterised by a specific linking function of property and personal profiles of the couple relationship. A mismanagement of a couple's conflicts originating from property matters, a difficulty in identifying the law applicable to the property consequences of the partnerships, an excessive problem in identifying the court that offers a greater guarantee of acceptance of jurisdiction, all have a major impact on fundamental rights in complex dynamics that link the partner to events determined by other proceedings, such as the death of the one partner and the opening of dissolution or annulment proceedings. The failure to standardise family law and the approach based on conflict-based regulation eludes, but does not eliminate, the need for ongoing work towards a regulatory framework that is closer to the demands of cross-border couples and goes beyond the current dichotomies (duplication of European Regulations; bipartition between Member States that adopt them and States that do not; registered and cohabiting couples and, in some States, same-sex and heterosexual couples). Overcoming the classification problem constitutes an important objective towards simplification which, although not achievable now, is certainly desirable for the future in hope of a more synergistic regulatory approach to property regimes. Simplification in the field of property consequences of registered partnerships is a challenging goal since the Regulation, while prevailing over any other international convention, does not preclude the application of bilateral or multilateral conventions with third countries, including Member States that are not parties of the enhanced cooperation procedure. It is clear that the varied and complex interweaving of conflict rules drawn up from the Regulation and other sources of private international law complicates the framework that is already made complex by an acquis communitaire which is the result of a procedure involving only 18 States. Consider the choice made by Regulation 1104 to determine the law applicable to the effects resulting from a union and not to provide any indication about the law applicable at the time the union was formed. The split between the law applicable to the constitution of the relationship and its property consequences is not followed by all Member States: in the rules of domestic private international law, a uniform approach[6] prevails in many countries, by adopting identical conflict criteria both for the constitution and for the property consequences of registered partnerships. A further problem is posed by multiple citizenships that the Regulation (Recital 49) leaves to national legislation or international conventions while the latter, however, regarding registered partnerships[7] constitute a non-

[6] Cf. P. Corder and M.G. Cubeddu Wiedemann eds, *I decreti attuativi sulle unioni civili* (Milan: Wolters Kluwers, 2017), 34.

[7] On the subject of marital property regimes, on the other hand, there are international conventions which are expressly referred to in article 62(3) of Regulation No. 1103. There is, also, an international convention dedicated to the recognition of the constitution, annulment and dissolution of registered partnerships. This is the CIEC (Commission internationale de l'état civil) Convention No 32 of 5 September 2007 on the

existent legal instrument. From this point of view, it is necessary to reconsider the regulation of the property consequences of registered partnerships, including the Hague Conference[8], with an approach that realistically takes note of the choice made by the European Commission to authorise in this context an enhanced cooperation procedure, involving only part of the Member States and which, in any case, needs to be addressed in order to ensure a life with fewer bureaucratic problems for cross-border couples.

II. Scope of application

1. Introduction

The slow and unstoppable advance of the codification process of European private international law ("creeping codification")[9] has led to the adoption of the first European source containing uniform rules on the conflict of laws regarding the property consequences of registered partnerships with cross-border implications.[10] The technique chosen by the European legislator over the last fifteen years in the field of family law has been the adoption of a plurality of regulations on well-defined and limited issues, rather than a single source applicable to the whole field. With this in mind, it is essential that the scope of application of Regulation 1104 emerges clearly: this profile is governed by Articles 1, 3, 27, and Recitals 17 to 28 and 51.

The expression "property effects of a registered partnership" summarises the positive delimitation of the Regulation's scope of application.

The starting point must be the analysis of the definition of "registered partnership" – as determined by Article 3(1)(a) – to identify which "couples" the Regulation in question addresses. As a result, there is an inevitable comparison with the scope of Regulation 1103 on matrimonial property regimes, although there is no definition of "marriage" regarding which reference is made to the national law of the Member States.

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recognition of registered partnerships, ratified by Spain on 4 August 2010, signed by Portugal on 1 October 2008 and not yet entered into force. The Convention is available at http://www.ciec1.org.

[8] Court of Justice, 27 June 2006, Case C-271/00 *Gemeente Steenbergen v. Baten*, paragraphs 37 and 39: " it appears ... difficult to refute the 'Community' nature of the Convention and the fact that it cannot be interpreted in isolation from the Court's case-law on cognate concepts to be found in the Treaties or in secondary legislation" (par. 44, ECR 2002, p. I-10489 ff.). The technique has also been tested in other areas of EU law with reference to other international conventions.

[9] On the topic: M. Czepelak, 'Would We Like to Have a European Code of Private International Law?' 18 *European Review of Private Law* 705-728 (2010).

[10] B. Reinhartz, in U. Bergquist e D. Damascelli et al., The EU Regulations on Matrimonial and Patrimonial Property, (Oxford: Oxford University Press, 2019), p. 397-405. Discussing partnerships with cross-border implications means referring to those couples who, while sharing a common nationality, have assets or reside in different States: L. Ruggeri, 'I Regolamenti europei sui regimi patrimoniali e il loro impatto sui profili personali e patrimoniali delle coppie cross-border', in S. Landini ed, *EU Regulations 650/2012, 1103 and 1104/2016: cross-border families, international successions, mediation issues and new financial assets*, (Naples: Edizioni Scientifiche Italiane, 2020, in print). The Regulation should also apply to couples who have formed their registered partnership in a State other than that of their nationality or residence: on point see 'Explanatory Handbook on Council Regulation (EU) 2014/1104 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', by the Council of the Notariats of the European Union, available at the following address: *http://www.ejtn.eu/Documents/Handbook-Registered%20Partnerships-EN.pdf*

That being said, it is necessary to ascertain which aspects of the relationship between the partners fall within the scope of Regulation 1104.
This perimeter is essentially defined, on the one hand, by the "property consequences" of the relationship as positively specified in the same Regulation and, on the other hand, by the "consequences" or issues expressly excluded (negative delimitation), listed in Article 1.
Lastly, it is necessary to consider the *ratione temporis* delimitation of this discipline scope of application.
Despite the apparent simplicity of the approach adopted by the European legislator, there are many uncertainties of interpretation on the boundaries which, in practice, separate the scope of application of Regulation 1104 from that of Regulation 1103, and from the scope of application of other main European sources of succession and family law and from the increasingly residual scope of effectiveness of the conflict of laws rules laid down within the laws of the individual Member States.

2. *Ratione personae* scope of application: certainties and uncertainties concerning the definition of "registered partnership".

In the context of the sources of private international law of the Union, Regulation 1104 first adopted a definition of "registered partnership",[11] to be understood – on the basis of Article 3(1)(a) – 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".[12]
Furthermore, Recital 17 makes it clear that this concept is "defined solely for the purpose" of the Regulation, that "the actual substance of the concept should remain defined in the national laws of the Member States", and that the Regulation does not require any Member State to introduce the institution of registered partnership if its domestic law does not provide for it. Indeed, there can be no doubt that the European legislator's choice to provide a definition of "registered partnership" can apply well beyond the confines of the Regulation and contribute to the process of harmonising the laws of the Member States not only in private international law, but also in substantive European private law in matters of families and succession.
These considerations help to define the scope of application of the Regulation, introducing elements of certainty but also of uncertainty at a hermeneutical and application level.
The registered partnership is a summary concept of the rules "governing the shared life of *two people*"[13] laid down by law. It follows that polygamic unions are certainly outside the

[11] C. Rudolf, 'European Property Regimes Regulations - Choice of Law and the Applicable Law in the Absence of Choice by the Parties' 11 *LeXonomica*, 133 (2019); A. Dutta, 'Beyond husband and wife – new couple regimes and the European Property Regulations' 19 *Yearbook of Private International Law*, 148 (2017/18). A previous attempt to introduce a legal definition of "registered partnership" at the international level was made with the Munich Convention of 5 September 2007 Convention on the recognition of registered partnerships by the International Commission on Civil Status. However, this Convention has never entered into force.
[12] The reference to registered partnerships with cross-border implications is implied: on this point see A. Rodríguez Benot, 'Los efectos patrimoniales de los matrimonios y de las uniones registradas en la Unión Europea' 11 *Cuadernos de Derecho Transnacional* 15-16 (2019).
[13] Added italics.

scope of the Regulation.[14] Furthermore, the Rules maintain a neutral tone in relation to the same-sex or opposite-sex nature of the couple, so that this aspect is left to the regulation of registered partnerships of the individual States.

This choice is justified by the fact that, if one questions the nature and function of registered partnerships, an answer can be given only within each individual legal system and with reference to a specific historical period, since the way in which States have defined and regulated registered partnerships, in order to recognise certain forms of emotional relationships other than those based on marriage, varies considerably.[15]

Another certain and extremely important element in the definition of "registered partnership" is the mandatory registration under the law.

The nature and, furthermore, the legal regime of registration do not seem, in fact, to affect the application of the Regulation which, also for these aspects, refers to the discipline of individual States.

The registration, in fact, as well as being "mandatory", must fulfill "the legal formalities required [...] for its creation".

This concept seems fundamental to establish which "couples" or "partnerships" are addressed by the Regulation and which must be excluded from its scope of application.[16]

Certainly, those relationships based on a mere cohabitation agreement without any particular formality or on a communion of life relevant in terms of mere facts, not subject to any mandatory registration, must be excluded. [17]As an example, a reference could be made to the de facto partnerships recognized in France by Article 515-8 of the *code civil* (as "*concubinage*")[18] and, in Italy, the relationships between "*de facto* cohabitants", as defined by Article 1, paragraph 36, of L. 76 of May 20, 2016 (*Legge Cirinnà*).[19] However, it is precisely the peculiarities of the Italian law that reveal some first important interpretative uncertainties regarding the *ratione personae* scope of application of the Regulation.

In fact, in the legal regime of *de facto* cohabitation established by the *Cirinnà* Law, it would seem that the requirement of registration as "mandatory under the law" is missing since, although the law provides for the registration of the declaration of cohabitation in the same

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[14] P. Bruno, *I Regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate. Commento ai Regolamenti (UE) 24 giugno 2016, nn. 1103 e 1104 applicabili dal 29 gennaio 2019* (Milan: Giuffrè, 2019), 24.

[15] J.M. Scherpe e A. Hayward ed, *The Future of Registered Partnerships* (Cambridge/Amberes: Intersentia, 2017), VI. For a more in-depth analysis, in taxonomic and comparative terms, of "legally recognized" partnerships, see, below, Section V.

[16] On the subject see V. Bonanno, 'Patrimonial regimes and de facto cohabitation in European and Italian law' in J. Kramberger Škerl, L. Ruggeri e F.G. Viterbo eds, *Case studies and best practices analysis to enhance EU family and succession law. Working paper,* in *Quaderni degli Annali della facoltà giuridica dell'Università di Camerino 3* (Camerino: Edizioni Scientifiche Italiane, 2019), 19-30, available at the following address: *www.euro-family.eu/documenti/news/e_book_afg.pdf.*

[17] As highlighted by C. Rudolf, n 11 *supra*, 134 "*A formal partnership agreement without registration in a register is therefore not enough*"; A. Dutta, 'Das neue internationale Güterrecht der Europäischen Union - ein Abriss der europäischen Güterrechtsverordnungen' *Zeitschrift für das gesamte Familienrecht* 1976 (2016).

[18] See Article 515-8 c.c. which provides that "*Le concubinage est une union de fait, caractérisée par une vie commune présentant un caractère de stabilité et de continuité, entre deux personnes, de sexe différent ou de même sexe, qui vivent en couple*".

[19] This article provides that si intendono per "conviventi di fatto" due persone maggiorenni unite stabilmente da legami affettivi di coppia e di reciproca assistenza morale e materiale, non vincolate da rapporti di parentela, affinità o adozione, da matrimonio o da un'unione civile" (*tr. "de facto* cohabitants" means two persons over 18 years of age who are permanently united by the bond of affection as a couple and mutual moral and material assistance, not bound by kinship, affinity or adoption, marriage or civil partnership).

municipality *ex* Article 1(37), it is not a constitutive element of that status, but merely evidence of cohabitation protected by law, and therefore not mandatory.[20] This approach raises a question. The question is whether Article 3(1)(a) of Regulation 1104 must be interpreted as meaning that, in order to qualify the regime governing the shared life of two people (which is provided for a national law) as a "registered partnership" within the terms of the Regulation, registration must be prescribed by national law as mandatory for the creation of the partnership.

To resolve this issue, it is necessary to interpret Article 3(1)(a) by referring, on the one hand, to the objectives and to the system of the Regulation and, on the other hand, to the general principles that can be inferred from all national legislation.[21] In some judgments, however, the Court of Justice seems to assign a prominent role to the literal interpretation. In *Soha Sahyouni v. Raja Mamisch*,[22] the Court ruled on the interpretation of Article 1 of Regulation 2010/1259, stating that divorces of a private nature, such as a divorce resulting from a unilateral declaration by one of the spouses before a religious court, do not fall within the scope of the Regulation. In the judgement's reasoning, decisive importance is given to the textual references in the legal framework, to the intervention of a "judicial authority" and to the existence of a "procedure". A similar reasoning would lead to the interpretation of Regulation 1104 as excluding from its scope of application partnerships which can be formed independently of registration. The wording of Articles 3(1)(a) and 3(1)(b) would be apt in this sense; the latter, in particular, defines the "property consequences of a registered partnership" as "the consequence of the legal relationship *created by the registration of the partnership*".[23] Nevertheless, the rationale of the Regulation seems to suggest that registration should only be "in compliance with the legal formalities prescribed" by the *lex registrii* regardless of whether the registration is or is not mandatory in order to create the "registered partnership".[24] It should be emphasised that the reason justifying the relevance of registration – and its essential role in the definition of "registered partnership" and in the Regulation – lies not only in the function of "formalising" the legal *status* of the partners,[25] but especially in the fact that the absence of registration would

[20] See P. Bruno, n 14 *supra*, 31.

[21] Case C-271/00, *Gemeente Steenbergen v. Luc Baten*, Judgment of 14 November 2002, paragraph 28; Case C-251/12, *van Buggenhout and van de Mierop*, Judgement of 19 September 2013, paragraph 26; Case C-1/13, *Cartier parfums - lunettes SAS c. Ziegler France SA*, Judgment of 27 February 2014, paragraph 32.

[22] Court of Justice, 20 December 2017, Case C-372/2016, *Soha Sahyouni v. Raja Mamisch*, paragraph 36. The case involves the divorce of two Syrian spouses who have spent part of their married life in Germany. It should be stressed that Regulation 2010/1259 does not provide a definition of "divorce", nor does it refer to the law of the Member States with regard to this aspect. The Court argues in its reasoning that "the inclusion of private divorces within the scope of that regulation would require arrangements coming under the competence of the EU legislature alone." On the ruling see S. Arnold e M. Schnetter, 'Privatentscheidungen und die Renaissance der autonomen Kollisionsrechte Europas' *Zeitschrift für europäisches Privatrecht*, 652-666 (2018); R. Di Meo, 'Il diritto europeo e il divorzio privato islamico' *Il Foro italiano*, IV, 282-287 (2018).

[23] Added italics.

[24] This point is more widely discussed by A. Rodríguez Benot, n 12 *supra*, 25.

[25] Similarly, M. Soto Mota, 'El Regulamento (UE) 2016/1104 sobre régimen patrimonial de las parejas registradas: algunas cuestiones controvertidas de su puesta en funcionamiento en el sistema español de Derecho internacional privado' Revista electrónica de estudios internacionales, 8 (2018). The function of the registered partnership (in this case, in Italy, the civil union) in terms of "life relationship 'formalisation'" is recently highlighted by E. Quadri, 'Matrimonio, unione civile, convivenze' *Nuova giurisprudenza civile commentata*, 138 (2020).

prevent third parties from knowing the existence of the partnership and, above all, the property consequences deriving from it.[26] If this is the case, *de facto* partnerships unions in which the partners have agreed to settle the property consequences of their shared life by signing an agreement that is brought to the attention of third parties by means of registration could be considered included in the notion of "registered partnership" under the Regulation. This is, for example, the case of *de facto* partnership in Italy, provided that the partners have signed a "cohabitation agreement "pursuant to Article 1(50) to (52), L. no. 76 of 2016, for which there is an obligation to register "for the purposes of opposition to third parties" carried out by the professional who drafted it or who has authenticated the subscription.[27]

It is, therefore, the interpreter's duty to assess in concrete terms and within the framework of the values of the individual national legislation the possible inclusion or exclusion of *de facto* partnerships supported by an agreement regulating their property effects, on the basis of an interpretation of the relevant rules which is not only literal and functional, but also systematic and axiological, consistently with the cultural evolution over time.[28]

There are also uncertainties of interpretation with regards to the boundary with the scope of application of Regulation 1103.

The interpretation of the twin Regulations, in fact, can lead to problems in countries that admit and recognize family relationships between persons of the same sex only through marriage (Finland or Sweden), or only within a registered partnership (Croatia, Italy).[29] In the latter case, where the registered partnership has identical effects to marriage, it could be argued that Regulation 1103 should apply instead of Regulation 1104.[30] This seems, indeed, to pose a false problem because the qualification of the relationship in terms of "marriage" or "registered partnership" according to the aforementioned Regulations depends on the domestic law of the individual States, in which the two institutions can usually neither confuse nor, at least formally, overlap completely.

A different approach is necessary in the cases of downgrading of a same-sex marriage celebrated in another Member State to a registered partnership (e.g. in Italy[31]) and of

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[26] Indeed, during the activities of the "Working Party on Civil Law Matters" of the EU Council, in view of the proposals made by the Hungarian and Slovenian delegations to include de facto unregistered partnerships in the scope of application of the Regulation, the French delegation argued that such inclusion would cause legal uncertainty since the absence of registration of the partnership would prevent third parties from knowing its existence.

[27] On this subject, see P. Bruno, n 14 *supra*, 29.

[28] Similarly, see P. Perlingieri, 'Legal principles and value' *The Italian Law Journal*, 3, 125-147 (2017); Id., 'Constitutional Norms and Civil Law Relations', *ibid*., 1, 17-49 (2015).

[29] Similarly A. Rodríguez Benot, n 12 *supra*, 25.

[30] Cf. D. Martiny, 'Die Kommissionsvorschläge für das internationale Ehegüterrecht sowie für das internationale Güterrecht eingetragener Partnerschaften' *Praxis des Internationalen Privat- und Verfahrensrechts*, 5, 443 (2011); H. Mota, 'Os efeitos patrimoniais do casamento e das uniões de facto registadas no Direito Internacional Privado da União Europeia. Breve análise dos Regulamentos (UE) 2016/1103 e 2016/1104, de 24 de *Junho' Revista Electrónica de Direito*, 2, 14 (2017); A. Rodríguez Benot, n 12 *supra*, 26.

[31] In Italy, Article 32-*bis* of L. 218 of 31 May 1995 provides that "Il matrimonio contratto all'estero da cittadini italiani con persona dello stesso sesso produce gli effetti dell'unione civile regolata dalla legge italiana" (*tr.* "Same-sex marriage contracted abroad by Italian citizens shall produce the effects of a civil union governed by Italian law"). According to the prevalent Italian doctrine, this rule provides for the so-called *downgrade recognition*, in the sense that same-sex marriages contracted abroad between Italian citizens or between individuals of which one is an Italian citizen must be reclassified, turning into registered partnerships. It follows that, with regard to property effects, Regulation 1104 will apply to them: I. Viarengo,

"*limping status*"[32] whereby a couple (e.g. of different sex) legally recognised in one State as a registered partnership cannot be recognised in another State where they later settle (e.g. because in that State the institution of registered partnership is not allowed or is only allowed for same-sex couples). Although in all these cases it prevails the principle that none of the twin Regulations may require any Member State to introduce the institution of registered partnership or same-sex marriage if its domestic law does not provide for them, the application of either Regulation cannot depend on uncertain and unpredictable factors or criteria. In order to solve these problems, it is advisable to ground the assessment on the fundamental certainty that the registered partnership – regardless of its same-sex or opposite-sex character – has been legitimately formed under the law of a Member State. The legal status thus acquired by the partners requires transnational protection according to a principle recognised by European case law.[33] In order to determine which of the twin Regulations should apply it is therefore reasonably necessary to refer at the time of the establishment of the legal relationship, thus determining the qualification of the relationship, regardless of whether this relationship has different consequences in other Member States where the couple subsequently decides to establish the centre of their interests. Such a solution could be based on the rules of the Treaties (in particular, Articles 20-21 TFEU) and the Charter of Fundamental Rights of the European Union (in particular, Articles 8, 21 and 45) which, if interpreted axiologically, guarantee citizens the right to move with their personal status and family situations legally acquired in the respective Member State of origin[34] and require, therefore, that the Regulation be applied consistently with the principles of non-discrimination and respect for private and family life,[35] so that it can thus achieve its effectiveness.[36]

It may also be the case that subsequent events in the relationship have an impact on the application of one Regulation or the other. For example, if a registered partnership is converted into marriage because the law of a Member State allows it (e.g. in the Netherlands);[37] or if, during the marriage, one of the spouses undergoes the procedure for sex change and the couple wishes to continue the relationship. In this latter case, if under

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'Effetti patrimoniali delle unioni civili transfrontaliere: la nuova disciplina europea' *Rivista di diritto internazionale privato e processuale*, 38-39 (2018); P. Bruno, n 14 *supra*, 30. In the sense that Regulation 1103 should apply to the aforementioned marriages, see D. Damascelli, 'Le nuove famiglie nella dimensione internazionale', in A. Albanese (edited by), *Le nuove famiglie* (Pisa: Pacini Editore, 2019), 119. This approach is consistent with the parallel unanimous orientation of excluding marriages between foreign citizens from the downgrading method: on this point, see G. Biagioni, 'Unioni same-sex e diritto internazionale privato: il nuovo quadro normativo dopo il d.lgs. n. 7/2017' *Rivista di diritto internazionale*, 522 (2017).

[32] For a more in-depth analysis of the topic, see below, § V.2.

[33] On this point see S. Winkler, 'Il diritto di famiglia', in G.A. Benacchio and F. Casucci eds, *Temi e Istituti di Diritto Privato dell'Unione Europea*, (Turin: Giappichelli, 2017), 312-313, which highlights the fundamental role of European case law in the transnational protection of personal identity (even more so if they are European citizens), mentioning several Court of Justice judgments on the protection of the right to a name in the context of cross-border families.

[34] In this sense, L. Ruggeri, n 10 *supra*, recalling C.J., 5 giugno 2018, case C-673/16, *Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept c. Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne*, par. 38. Cf. P. Perlingieri, 'Individualismo e personalismo nella Carta europea', in G. Vettori ed, Carta europea e diritti dei privati, (Padova: Cedam, 2002), 333-338.

[35] Similarly, M. Soto Mota, n. 25 *supra*, 16-17.

[36] Cf. Court of Justice, 16 July 2009, Case C-189/08, *Zuid-Chemie BV v Philippo's Mineralenfabriek NV/SA*, paragraph 30.

[37] B. Reinhartz, n. 1 *supra.*

national law the marital relationship is to be converted into a civil partnership (e.g. in Italy), Regulation 1104 would apply in the event of subsequent dissolution of the relationship. As a matter of fact, the occurrence of a gender identity change of one of the partners entails a change in the legal status of the couple which the interpreter cannot disregard when applying the Regulations. [38] Beyond the possible actual scenarios, in the aforementioned doubtful cases, it is up to the national courts to request a preliminary ruling from the Court of Justice on the correct interpretation of the Regulations. [39]

3. Material scope of application: positive and negative delimitation criteria

The material scope of Regulation 1104 is defined as follows:
(a) positively, by referring to "all civil-law aspects of the property consequences of registered partnerships, both the daily management of the partner's property and its liquidation, in particular as a result of the couple's separation or the death of one of the partners." (Recital 18);
(b) in the negative, by reference to certain "explicitly excluded" number of questions (Recital 19), as specified in Article 1.

3.1 Positive delimitation: questions related to the property effects of registered partnerships

In order to delimit its material scope, Regulation 1104 has specified that the term "property consequences of a registered partnership" is to be understood, pursuant to Article 3(1)(b), as "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".
Furthermore, according to Recital 18 and Article 1(1), the Regulation applies only to the "civil-law aspects" of the aforementioned relationships, not to the fiscal, customs and administrative aspects. Specifically, the following must be included in this area: (a) questions relating to the daily management of the partners' property during the course of their partnership; (b) the partners' property in respect of third parties; (c) property issues connected with the dissolution of the partnership, in particular the liquidation of the property regime following separation or the death of a partner.[40] This is consistent with the provisions of Article 27 and Recital 51, whereby the law applicable to the registered partnership – designated on the basis of the criteria established by the Regulation – must

[38] On issues related to the gender change of a spouse or partner in the context of family relationships, see F.G. Viterbo, 'Mutamento dell'identità sessuale e di genere e ricadute nella sfera privata e familiare della persona', in Id. and F. Dell'Anna Misurale (edited by), "Nuove sfide del diritto di famiglia. Il ruolo dell'interprete', in *Quaderni di «Diritto delle successioni e della famiglia»* (Naples: Edizioni Scientifiche Italiane, 2018), 23-73.
[39] On the importance of constitutional and community judicial control in a spirit of loyal cooperation, see P. Perlingieri, 'Leale collaborazione tra Corte costituzionale e Corti europee. Per un unitario sistema ordinamentale', (Naples: Edizioni Scientifiche Italiane, 2008), 18-21; Id., 'Il nuovo ruolo delle Corti Supreme nell'ordine politico ed istituzionale', in V. Barsotti and V. Varano eds, *Il nuovo ruolo delle Corti supreme nell'ordine politico e istituzionale. Dialogo di diritto comparato* (Naples: Edizioni Scientifiche Italiane, 2012), 145-150.
[40] On the subject, see P. Bruno, n 14 *supra*, 50.

govern the property consequences of the entire partnership, "from the classification of property of one or both partners into different categories during the registered partnership and after its dissolution to the liquidation of the property".[41]
On this basis, the Regulation proceed to further restrict its scope of application, delimiting it with respect to the rules of private international law on family and succession matters, contained in other sources of the European Union and in the internal systems of the individual States.

3.2 Negative delimitation: exclusions. A) Legal capacity of the partners and other preliminary issues

The exceptions listed in Article 1(2) must be excluded from the scope of application of the Regulation and will be the subject of a brief analysis below.
The negative delimitation of the source's scope is a common legislative technique in EU law. The Court of Justice has consistently held that the exclusions constitute exceptions that, as such, "must be strictly interpreted".[42]
The exclusions are, in the first place:
"a) the legal capacity of the partners;
b) the existence, validity or recognition of a registered partnership".
It can be inferred from this that issues relating to the incapacity to act of the partners, which typically affect the validity of the registered partnership, do not fall within the scope of the Regulation.[43]
In line with these exclusions, the Regulation states in Recital 17 that the "actual substance" of the concept of "registered partnership" should remain defined in the national laws of the Member States, and nothing should oblige a Member State whose law does not have the institution of registered partnership to provide for it in its national law.
These are essentially preliminary questions relating to the valid and effective formation of the partnership, which normally fall within the scope of the private international law of the Member States (Recital 21).[44] Nonetheless, the boundaries between different scopes of application may sometimes mislead the interpreter. A dilemma could arise, for example, with regard to the capacity to inherit, for which the *lex successionis* is applied on the basis of Article 23(2)(c) of Regulation 2012/650.[45] In addition, Regulation 1104 itself specifies that its scope of application includes "the specific powers and rights of either or both partners with regard to property, either as between themselves or as regards third parties" (Recital

[41] This is provided for in Recital 51 which, regarding the property consequences of the partners in respect to third parties, clarifies that "the law applicable to property consequences of registered partnerships may be invoked by a partner against a third party to govern such effects only when the legal relations between the partner and the third party arose at a time where the third party knew or should have known of that law."
[42] See Court of Justice, 6 June 2019, Case C-361/18, *Ágnes Weil v. Géza Gulácsi*, in which the Court ruled on the interpretation of Article 1(2)(a) of Regulation 2001/44.
[43] P. Bruno, n. 14 *supra*, 55.
[44] C. Rudolf, n. 3 *supra*, 135.
[45] On the subject see, below, Chapter III.

20), and that therefore these issues – for example, relating to the right or authority to dispose of the family home – do not concern the legal capacity of the partners.[46]
Issues relating to the capacity to form a registered partnership should not be confused with issues relating to the limit of public policy in the application of a provision of any national law pursuant to Article 31 of the Regulation. Consider the case in which a registered partnership has been lawfully formed between an adult and a child, according to the law of a foreign country in which this legal relationship is allowed from a very low age. Let us assume that the couple establish their habitual residence in a Member State where an essential element of the partnership (the age of a partner) is found to be contrary to public policy. In such a case, the issue under scrutiny is not the capacity of the partner to form the registered partnership, but the compatibility of the effects of the partnership with the limit of public policy in the recipient legal system.[47] This issue would fall within the scope of Regulation 1104.

3.3 B) Maintenance obligations governed by Regulation 2009/4

Also excluded from the scope of application of Regulation 1104 pursuant to Article 1(2) are:
"c) maintenance obligations".
In this regard, Recital 22, in its most accredited version, states that "maintenance obligations between spouses are governed by Council Regulation (EC) No 4/2009".[48] Article 15 of this Regulation refers in turn to the Hague Protocol of 23 November 2007 ("the 2007 Hague Protocol") for the determination of the law applicable to maintenance obligations. Regulation 2009/4 defines its material scope in very broad terms, covering all "maintenance obligations arising from a family relationship, parentage, marriage or affinity" pursuant to Article 1(1) – irrespective of the *nomen juris* they assume in the legal system of the individual Member States – without, however, providing a definition. The latter is also not found in the 2007 Hague Protocol. If we allow a different interpretation according to the notions adopted by the laws of the individual Member States, the uniform application of the rules laid down in the Regulation would be jeopardised and, together with them, the equal treatment between maintenance creditors. It follows that the concept of "maintenance obligations" should be reconstructed autonomously, having regard to the context and the specific purpose of the Regulation at issue. According to the case-law established by the Court of Justice[49] relating to Article 5(2) of the 1968 Brussels

[46] A. Rodríguez Benot, n 4 *supra*, 17.
[47] The example is borrowed from P. Bruno, n 14 *supra*, 56-57. On the technique to identify the principles of "public policy" that are highlighted in the specific case under analysis, see G. Perlingieri, in Id. and G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordina mentale* (Naples: Edizioni Scientifiche Italiane, 2019), 83. Cf. S. Deplano, 'Applicable law to succession and European public policy', in J. Kramberger Škerl, L. Ruggeri and F.G. Viterbo eds, n. 16 *supra*, 47-54.
[48] Such are the Italian, French, Spanish and German versions. The English and Dutch versions refer to the fact that Regulation 2009/4 applies to maintenance obligations *between spouses*. This seems to be a mistake, as there should be no doubt as to the application of this Regulation also to maintenance obligations between partners in a registered partnership: B. Reinhartz, n 1 *supra*.
[49] Court of Justice, 6 March 1980, case C-120/79, *de Cavel II*; Court of Justice, 27 February 1997, case C-220/95, *Van den Boogaard c. Paula Laumen*. On the latter case, see P. Vlas, 'The EEC Convention on

Convention at first, and then to the Brussels I Regulation, there are two factors which contribute to qualifying a given obligation as maintenance: a) the aim of the creditor spouse to provide for himself or herself; and, b) the assessment of the amount of the provision awarded on the basis of the needs and resources of each of the spouses.[50]

That said, a question of interpretation may arise regarding the distinction and delimitation between the concept of "maintenance obligations" and the concept of "property consequences of a registered partnership". In particular, the question arises as to which of the two scopes of application - between Regulation 2009/4 and Regulation 1104 (or 1103) – should cover cases relating to the recognition of the right to maintenance after divorce or the dissolution of the registered partnership, as well as the determination of its amount.[51] The problem is all the more sensitive in those Member States where the court having jurisdiction in the matter possesses a wide discretionary power to adopt measures of economic nature, being able to provide for the payment of periodic or lump sums and the transfer of ownership of property from one of the two former partners (or spouses) to the other. In such cases, the same judicial measure may concern the property consequences of the registered partnership (or the matrimonial property regime) and maintenance obligations resulting from the dissolution of the bond. That is the context in which the case of *Van den Boogaard v. Paula Laumen* is placed, from which it follows that - according to the orientation of the Court of Justice - the interpreter is required to distinguish between aspects of the dispute or decision relating to the partnership's property regime and those relating to maintenance obligations, assessing, in each specific case, the specific purpose of the *thema decidendum* or the judgment rendered.[52] In particular, the Court states that if that assessment *"shows that a provision awarded is designed to enable one spouse to provide for himself or herself or if the needs and resources of each of the spouses are taken into consideration in the determination of its amount, the decision will be concerned with maintenance. On the other hand, where the provision awarded is solely concerned with dividing property between the spouses, the decision will be concerned with rights in property arising out of a matrimonial relationship"*.[53]

Such "guidelines" provided by the Court of Justice may be easily implemented in Member States where the spousal maintenance has an exclusively or predominantly welfare function (e.g. Germany). In addition, in the domestic case law of Member States, until the entry into force of Regulation 1104, transnational issues relating to spousal maintenance were almost

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jurisdiction and judgments. Article 1: Definition of rights in property arising out of a matrimonial relationship' *Netherlands International Law Review* 89-91 (1999); M. Weller, 'Zur Abgrenzung von ehelichem Güterrecht und Unterhaltsrecht im EuGVÜ', *Praxis des internationalen Privat- und Verfahrensrechts,* 14-20 (1999); J.J. Forner Delaygua, 'Jurisprudencia española y comunitaria de Derecho Internacional Privado' *Revista española de Derecho Internacional* 299-302 (1998). In line with the aforementioned orientation, national case law has also emerged: in Italy, see Corte di Cassazione, Sezioni unite, 24 July 2003 no. 11526, *Rivista di diritto internazionale privato e processuale*, 678 (2004).

[50] Similarly, case C-220/95, n. 49 *supra*, paragraph 22.

[51] On the issue see, *amplius*, F.G. Viterbo 'Claim for maintenance after divorce: legal uncertainty regarding the determination of the applicable law', in J. Kramberger Škerl, L. Ruggeri and F.G. Viterbo eds, n. 16 *supra*, 171-184.

[52] Cf. case C-220/95, n 49 *supra*, paragraph 21. In this case, a Dutch court had to rule on an opposition to an order of exequatur regarding a divorce issued by an English court, according to which, one of the former spouses was required to pay the other a sum of money in lieu of the obligation to pay a periodic maintenance cheque.

[53] Case C-220/95, No 49 *supra*, paragraph 22. Added italics.

entirely brought within the scope of application of Regulation 2009/4. This approach, however, should be corrected in those Member States (e.g. Italy, France) where the maintenance following the divorce or the dissolution of the registered partnership may in practice have the main function of balancing the disparity in the economic and financial situation of the former partners (or spouses) at the time of the dissolution and compensating for the previous sacrifice of the professional and income expectations of one of the parties as a result of the assumption of an endo familiar supporting role.[54] These assumptions, due to their close connection with the property consequences of the partnership or with the property regime chosen by the couple, should more appropriately fall within the scope of Regulations 1103 and 1104.[55]

3.4 C) Issues regarding the succession to the estate of a deceased partner, covered by Regulation 2012/650

It is also excluded from the scope of application of Regulation 1104 pursuant to Article 1(2):
"d) the succession to the estate of a deceased partner".
In this regard, Recital 22 specifies that matters relating to succession to the estate of a deceased partner are governed by Regulation 2012/650. Specifically, the scope of application of this Regulation extends to "all civil-law aspects of succession to the estate of a deceased person, namely 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", pursuant to Article 3(1)(a) and Recital 9.[56] Furthermore, according to the provisions of Article 23(1)(b), the law designated through the application of the Regulation determines the succession rights of the surviving partner.[57]
The possible intersection of the two distinct application fields depends on the fact that, in most national legal systems, the partner status in a registered partnership affects the ownership regime of the property. It follows that, in the event of death, the reconstruction of the inheritance of the partner must be carried out taking into account the effects of the dissolution of the registered partnership.[58]

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[54] In Italy, on the balancing and compensatory function of the spousal maintenance, see *Corte di Cassazione, Sezioni unite*, Case 18287 of 11 July 2018, *Giurisprudenza italiana*, 2018, 1843, commented by C. Rimini.
[55] F.G. Viterbo, 'Claim for maintenance after divorce: legal uncertainty regarding the determination of the applicable law', in J. Kramberger Škerl, L. Ruggeri and F.G. Viterbo eds, n. 16 *supra*, 171-183; cf. C. Rimini, 'Assegno divorzile e regime patrimoniale della famiglia: la ridistribuzione della ricchezza fra coniugi e le fragilità del sistema italiano' *Rivista di diritto civile* 422-441 (2020).
[56] On the subject see, below, Chapter III, § II.3.
[57] On the risks of discrimination of registered partnerships compared to married couples, on this topic, see F. Pascucci 'Intersectional discriminatio and survivors' pension', in J. Kramberger Škerl, L. Ruggeri and F.G. Viterbo (edited by), n 16 *supra*, 129-143.
[58] On the topic, see P. Bruno, n. 14 *supra*, 59; cf. F. Dougan, 'Matrimonial property and succession - The interplay of the matrimonial property regimes regulation and succession regulation', in J. Kramberger Škerl, L. Ruggeri and F.G. Viterbo eds, n. 16 *supra*, 75-87. Regulation 2012/650 itself specifies in Recital 12 that "the authorities dealing with a given succession under this Regulation should nevertheless, depending on the situation, take into account the winding-up of the matrimonial property regime or similar property regime of the deceased when determining the estate of the deceased and the respective shares of the beneficiaries".

Indeed, the problem of delimiting the scope of application of Regulation 1104 from that of Regulation 2012/650 could arise in those Member States (e.g. Germany)[59] where the internal legislation provides for a different legal succession share of the surviving partner, resulting from the application of the rules on the property consequences of the registered partnership. In short, this begs the question as to which regulation should apply when the share allocated to the surviving partner is based, in part, on the inheritance law and, in the remaining part, on the property consequences of the registered partnership and its dissolution.

This issue was settled, even before the adoption of Regulations 1103 and 1104, by the Court of Justice in the *Mahnkopf* case.[60] In this judgment – albeit with regard to the status of a surviving spouse – the Court made it clear that such a provision of national law "does not appear to have as its main purpose the allocation of assets or liquidation of the matrimonial property regime, but rather determination of the size of the share of the estate to be allocated to the surviving spouse as against the other heirs".[61]

Therefore, in doubtful cases such as those mentioned above, the interpreter must ask himself whether the rule to be applied to the specific case concerns primarily the succession in the deceased partner's estate or the property consequences of the registered partnership. It is not easy to define the predominance or subordination of one area over the other, nor would it be correct to fix its hierarchy *a priori*. Indeed, even in these cases, the interpreter's assessment must be directed towards the functional and axiological profiles of the *thema decidendum* or decision at issue.[62] Uniform interpretation of the regulations in the Union must also be ensured by loyal cooperation between national courts and the Court of Justice.

3.5 D) Other exclusions

Finally, Article 1(2) of Regulation 1104 does not apply to:

"e) social security;

f) the entitlement to transfer or adjustment between partners, in the case of dissolution or annulment of the registered partnership, of rights to retirement or disability pension accrued during the registered partnership and which have not generated pension income during the registered partnership;

g) the nature of rights in rem relating to a property;

h) any recording in a register of rights in immoveable or moveable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register".

These exclusions have a common denominator: they are justified by the "protective" function of the Member States' prerogatives.

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[59] B. Reinhartz, n. 1 *supra*.

[60] Court of Justice, 1 March 2018, case C-558/16, *Mahnkopf v. Mahnkopf*, paragraphs 41-44. For further information see Chapter III, § II.3.

[61] *Ibid.*, paragraph 40.

[62] C. Rudolf, n. 3 *supra*, 136.

With regard to "social security" matters, the case law of the Court of Justice on the delimitation of the scope of application of the Brussels Convention, with specific regard to the distinction between judgments in civil and commercial matters and those in social security matters,[63] may be useful to resolve any uncertainties of interpretation regarding the issues to be included in the latter and, therefore, to be excluded from the scope of application of Regulation 1104. The coordination of social security systems at the European level is governed by Regulation 2004/883[64] and Regulation 2009/987,[65] which define the implementation procedures.

Regarding the exclusion referred to in point f), Recital 23 of the Regulation clarifies that "Issues of entitlements to transfer or adjustment between partners of rights to retirement or disability pension, whatever their nature, accrued during the registered partnership and which have not generated pension income during the registered partnership are matters that should be excluded from the scope of this Regulation, taking into account the specific systems existing in the Member States. *However, this exclusion should be strictly interpreted. Hence, this Regulation should govern in particular the issue of classification of pension assets, the amounts that have already been paid to one partner during the registered partnership, and the possible compensation that would be granted in case of pension subscribed with common assets*".[66]

For matters relating to the "nature of rights *in rem*" and the regulation of "any entry in a register" of such rights, refer to paragraph IV.7 of this Chapter.

4. Temporal scope of application

The scope of application *ratione temporis* of Regulation 1104 is structured in several steps in order to facilitate the proper application of the discipline which, having entered into force on 8 September 2016, is applicable in the States that have joined the enhanced cooperation since 29 January 2019.

On the basis of Article 70, these States, as of 29 June 2016, had to draw up a list of authorities and legal professionals authorised to exercise judicial functions with regard to the property consequences of registered partnerships and to establish the forms and certificates that can be used in public instruments and judicial settlements. The long

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[63] Case C-271/00, n 8 *supra*. The proceeding has its origins in the preliminary agreement on the divorce concluded in Belgium between Mr Baten and Mrs Kil, by which they had agreed that the husband would pay his wife a monthly sum as a contribution to the maintenance and upbringing costs for their daughter, whereas there would be no claim against each other for benefits (pension) of any kind. Later, Mrs Kil settled with her daughter in the municipality of Steenbergen (Netherlands). As the conditions laid down in its social assistance regulation (ABW) were met, the municipality decided to grant the two women a financial aid. Later, the same municipality brought an action for recourse against Mr Baten in order to recover the amount of the welfare allowance granted. The Court has ruled that "the concept of "social security" does not encompass the action under a right of recourse by which a public body seeks from a person governed by private law recovery in accordance with the rules of the ordinary law of sums paid by it by way of social assistance to the divorced spouse and the child of that person".

[64] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, in OJ 30 April 2004, L 166/1.

[65] Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, in OJ L 284/1. of 30 October 2009.

[66] Added italics.

preparatory phase, provided for in Article 70 of the Regulation, proves how much the European legislator was aware of the difficulties of implementing procedures and practices that would allow a smooth flow of decisions.
In addition to this first preparatory phase, a further one was added, which concluded on 29 April 2018, during which the States were called upon to implement the European Judicial Network[67] with briefs on their internal, substantive and procedural rules on family property relationships, legal authorities with jurisdiction to manage the procedures and the opposition of the property effects in respect to third parties. This provision, set out in Article 63, present an important key to understanding legislative policy: without the involvement of citizens and an increase in accessibility to substantive and procedural legal information, the European legislative instrument would present numerous implementation problems.
Almost as a counterbalance to the long wait for a regulatory framework in matters of jurisdiction and applicable law of registered partnerships, it has been provided (Article 69(1)) that settlements approved or concluded by a court having jurisdiction on the basis of the rules contained in the Regulation, for legal proceedings pending before 29 January 2019, are recognizable and enforceable as provided for in the Regulation.

III. Jurisdiction

1. Introduction

It is very important to remember that jurisdiction can also be exercised by an authority other than a judge, since the Regulation provides a broad meaning of jurisdiction that includes all other authorities and legal professionals with competence in matters of succession which exercise judicial functions or act pursuant to a delegation of power by a judicial authority or act under the control of a judicial authority. Jurisdiction is an activity which is not the exclusive prerogative of state courts, but which may also be carried out by other authorities or legal professionals provided that they offer guarantees of impartiality and the right of all parties to be heard. Their rulings, with regard to the partners' property rights, must ensure standards that the Regulation identifies in the possibility of appeal or review before a judicial authority and in the circumstance of having a similar force and effect as a decision of a judicial authority on the same matter. Each Member State can, therefore, identify professionals who can take decisions under Regulation 1104[68]: for example, France has designated notaries, many States have not identified any category of professionals, while Italy has opted for civil registrars and lawyers who carry out assisted negotiation under d.l. 312 of 2014.[69] On closer inspection, the agreement resulting from the negotiation does not seem to have the characteristics akin to a "decision" referred to in Article 3(2) but rather seems to respond to an extra-judicial method of settling the dispute,

[67] European Judicial Network, in *https://e-justice.europa.eu*.
[68] The list of professionals considered "judicial authorities", following the notifications made under of Article 65, can be consulted on the European e-justice portal at *https://e-justice.europa.eu/content_matters_of_matrimonial_property_regimes-559-en-it.do?*
[69] D.l. 12 September 2014, no. 132, converted, with amendments, by L. 162 of 10 November 2014.

the use of which, although not expressly provided for in the Regulation, is advocated in Recital 38. In this recital, however, which has not given rise to any provision in the articles, it is assumed that the dispute on the property consequences of registered partnerships may be amicably settled out of court: the mention of assisted negotiations could be based on this recital, but not on Article 3(2).

2. Jurisdiction in the event of death of a partner

The main criterion for determining jurisdiction is based on the principle of concentration[70]: if proceedings for succession in the event of the death of a partner are pending, the court seised will also have jurisdiction over the property consequences of the registered partnership of the deceased; likewise, if proceedings have been initiated in relation to the dissolution or annulment of a registered partnership, this court will also be able to rule on related property issues arising from the registered partnership being dissolved or annulled, provided, however, that there is a specific consent of the parties to the concentration.
The coordination regulatory technique is employed in order to identify the jurisdiction in closely related fields, such as succession and the property regime of the couple. According to Article 4, the courts seised for the succession on the basis of Regulation 2012/650[71] (the so-called Succession Regulation) have jurisdiction to rule on the property consequences connected with the succession case. [72]
The fact that the rules contained in the Succession Regulation have been entrusted with the task of identifying the competent court, in concrete terms, causes significant difficulties for the deceased's partner, who may have to argue about the financial consequences of the registered partnership before a court that has no connection with the applicant. The reference made by Article 4 of Regulation 1104 to the Succession Regulation may establish jurisdiction in the courts of the State in which the deceased was habitually resident, but in the case of dual nationality, if the deceased had chosen the court of a country of which he was a national but in which he was not habitually resident, the related property issues would be discussed in the courts of a State completely unconnected with the partner, perhaps in a manner convenient for other persons, but not for the surviving partner.[73] The Regulation in this regard is extremely inflexible since the partner cannot invoke other jurisdictions based on different rights (including the *electio fori*) and seems to place the partner's status in a subordinate role, making the choice exercised by any heirs predominant. Article 78 of the Succession Regulation, whose rules of jurisdiction cover the entire subject of the property consequences of a registered partnership, provides that States

[70] Cfr. M.P. Gasperini, 'Jurisdiction and Efficiency in Protection of Matrimonial Property Rights*' Zbornik Znanstvenih Razprav, Letnik LXXIX*, 26 (2019).
[71] Regulation (EU) No 2012/650 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, in OJ L 201/107, 27 July 2012.
[72] See, among all, A. Bonomi, 'Successions internationales: conflicts de lois et des juridictions' 350 *Recueil des cours'*, 71-74 (2010); P. De Cesari, "Autonomia della volontà e legge regolatrice delle successioni", (Padua: Giuffré, 2001), 99.
[73] Cf. P. Bruno, n 14 *supra*, 77-80.

may also identify as having jurisdiction authorities other than judges or legal professionals. The citizen will be able to consult the European Judicial Network to verify if there are and which are these authorities, paying attention to the fact that the authorities under Article 78[74] may not coincide with the competent authorities other than the courts under Article 70 of Regulation 1104. Also from this point of view, the system appears cumbersome and complex, certainly not suitable to favour an easy and prompt identification of the competent authorities, so much so that there has been no lack of criticism of the EU legislator for not having brought together in a single Regulation the property consequences related to the succession of a spouse or a partner.[75] The only tool made available to the partner to influence the establishment of the jurisdiction is the power to limit the subject matter of the proceedings. According to Article 13 of Regulation 1104, if the estate comprises assets located in a third State, the partner could ask the court to refrain from deciding on one or more of such assets if it may be expected that its decision in respect of those assets will not be recognised and, where applicable, declared enforceable in that third State. The judge could allow the limitation request for reasons of expediency bearing in mind what is the "best interest for the administration of justice in the specific case".[76] In addition, the parties have the right to limit the subject matter of the proceeding on the basis of the law of the Member State of the court seised. By exercising these powers, the partner can prevent the ruling given by the competent court from being ineffective because it is not recognisable or cannot be enforced. The limitation of the subject matter has, however, consequently returned to a fragmentation of jurisdiction contrary to the principle of concentration which is reflected in the entire regulation on the succession of the partner.

3. Jurisdiction in the event of dissolution or annulment

The principle of concentration also operates with regards to the connection between the property consequences of registered partnerships and disputes arising from the dissolution or annulment of the registered partnership. Any dissolution or annulment inevitably leads to an evaluation of the assets, resulting from the interruption of the personal relationship between the partners. For this reason, Article 5 of the Regulation, with an approach inspired to promote the unity of the jurisdiction on such related matters, provides that the patrimonial aspects of the registered partnership are examined by the same judicial authority seised to decide on the termination of partnership.[77] The court seised could only deal with questions concerning the property consequences of a registered partnership if it operates in a State that has joined the enhanced cooperation procedure and therefore complies with Regulation 1104. Unlike in succession matters, the concentration, in this hypothesis, is not the result of a legislative automatism, but is subject to the agreement of both partners. Therefore, a further important space for private autonomy in property

[74] European Judicial Network, see *https://e-justice.europa.eu*.
[75] V. P. Lagarde, 'Règlements 2016/1103 et 1104 du 24 juin 2016 sur les régimes matrimoniaux et sur le régime patrimonial des partenariats enregistrés' *Rivista di diritto internazionale privato e processuale*, 678-680 (2016).
[76] Similarly P. Bruno, n 14 *supra*, 82-83.
[77] V., S. Bariatti and I. Viarengo, 'I rapporti patrimoniali tra coniugi nel diritto internazionale privato comunitario' *Rivista diritto internazionale privato e processuale*, 605-610 (2007).

matters emerges: an *electio fori* which is the result of an agreement on the suitability of having matters dealt with by the same national court chosen on the basis of conflict rules different from those of Regulation 1104. An opportunity which existence is left to the free evaluation of the partners who, even in this often delicate and conflictual phase, are called to decide in agreement and, for reasons of economy and not only procedural, to opt for the forum they find most convenient. Subordination of the concentration to the agreement of the partners marks a point of difference with respect to the similar provision contained in Regulation 1103: in marital matters, in fact, the role of the agreement as an instrument of concentration of jurisdiction operates in the context of a series of criteria for seising the court exhaustively listed in Article 5(2) of Regulation 1103.[78] The agreement may take place outside of legal proceedings and before the beginning of the dissolution case: it must be drawn up in writing and signed by the parties, even in electronic form, provided that it can be recorded in a durable form as established by Article 7 of Regulation 1104. The concept of durable medium is known to European law, which employs it in the particular field of electronic commerce. Directive 2011/83 on consumer rights[79] provides a definition that may also be used for the agreement referred to in Article 7 of Regulation 1104. A durable medium is any instrument which enables the consumer or the trader to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored. With the *ante causam* agreement, however, the parties are not free to designate any jurisdiction in any country, but must choose between the jurisdictions competent to deal with the dissolution on the basis of the conflict laws operating in the specific case.

4. Jurisdiction in other cases

Article 6 identifies the competent court on the basis of criteria other than the agreement of the parties or the concentration principle, indicating as the competent court the one in whose territory the partners are habitually resident at the time the court is seised,[80] or failing that, the court of the partners' common nationality at the time the court is seised or, again, the court in the territory under whose law the registered partnership was created. It is

[78] The spouses must be in agreement if the court seised of the application for divorce, legal separation or marriage annulment: (a) is the court of the Member State in whose territory the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, in accordance with the fifth subparagraph of Article 3(1)(a) in accordance with the fifth indent of Article 38(1)(a) of Regulation (EC) No 2003/2201; (b) is the court of a Member State of which the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made, in accordance with the sixth indent of Article 38(1)(a) of Regulation (EC) No 2003/2201. 2003/2201; (c) a case is brought under Article 5 of Regulation (EC) No 2003/2201 in cases of conversion of legal separation into a divorce; or (d) a case is brought under Article 7 of Regulation (EC) No 2003/2201 in cases of residual jurisdiction.

[79] Article 2(1)(10) of Directive 2011/83/EU of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, in OJ 2011 L 304/64, 22 November 2011.

[80] In the absence of a common habitual residence at the time the application is filed, the court of the country in which the partners' last habitual residence is located shall have jurisdiction provided that one of them still resides there at the time the court is seised or in whose territory the defendant's habitual residence is located.

evident that the criteria for starting a case are consistent with the criteria for identifying the applicable law in a simplification effort that seems to inspire the entire regulatory system: the choice of the parties, even if within a range of criteria identified by law, is the guiding criterion, as is clear from Article 8, which allows setting the jurisdiction whenever the defendant accepts it, provided that he is duly informed of the possibility of contesting the lack of it. The EU legislator in this regard aims at criteria that favour the proximity of the court to the parties by adopting unambiguous connecting criteria for the identification of the court and the applicable jurisdictional choice. This is an approach already tried and tested in matrimonial matters and parental responsibility: Regulation 2003/2201 (so-called Brussels II-*bis* Regulation) identifies habitual residence and nationality as suitable criteria for establishing jurisdiction, a choice which is also fully confirmed in the new Regulation 2019/1111.[81] Regulation 1104 differs from Regulation 1103 in the provision of an additional criterion consisting of the jurisdiction of the State in which the partnership was registered: it is a provision which aims to safeguard the partners from possible denials of justice. It should be pointed out that on the international stage, the Montreal Convention, the only Convention operating in the field of the mutual recognition of registered partnerships, has been signed by only two States and although it was launched in 2007, it has not yet entered into force at international level. The recognition of registered partnerships is therefore a matter for domestic law and, for this reason, in order to maximise the effectiveness of justice and to avoid situations of "deadlock", the specific criterion of jurisdiction constituted by the State in which the partnership was formed should be taken into account.

A particular criterion for establishing jurisdiction in a particular State is jurisdiction based on the appearance of the defendant. According to Article 8 of the Regulation "a court of a Member State whose law is applicable pursuant to Article 22 or Article 26(1), and before which a defendant enters an appearance shall have jurisdiction". This is an acceptance[82] which leads to a tacit prorogation of jurisdiction: an institution endorsed by the European case law,[83] also found in other European Regulations.[84] The institute of tacit prorogation is a sure sign of the growing role of private autonomy in the field of procedure, with a significant impact also on the formation of a new procedural culture of European origin with which national doctrine and judges are invited to engage.[85] The important role given

[81] This is Regulation (EU) 1111/2019 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, which recasts the previous Regulation 2201/2003, in OJ L 178/1, 2 July 2019.

[82] Cf. F. Salerno, *Giurisdizione ed efficacia delle decisioni straniere nel Regolamento* (*UE) n. 1215/2012* (*recast*) (Padua: Cedam, 2015), 247-251; M.P. Gasperini, n 70 supra, 2, 36.

[83] Court of Justice, 20 May 2010, Case C-111/09 C.V.I. Group, paragraph 21 and Court of Justice, 27 February 2014, Case C-1/13 *Cartier parfums-lunettes and A.C. assurances*, paragraph 34.

[84] See Article 5 of Regulation 2009/4; Article 9 of Regulation 2012/650; Article 26(1) of Regulation 1215/2012.

[85] For an interesting Italian case on the tacit prorogation of Regulation 44/2001 see *Corte di Cassazione, Sezioni Unite*, (ord.), 30 September 2016, no. 19473, in *www.ilcaso.it*. In referring to the institution of tacit prorogation, the national court sees its foundation in the "uniform regulation of the interstate civil and commercial judicial area, in order to avoid the emergence and continuation of uncertain situations as to the legitimate predictability of the jurisdiction of the court seised", pointing out that tacit prorogation "is in full harmony with the ruling principle, leaving the choice to the party to promptly challenge the legitimacy of the electio fori of the court operated by the other party".

to private autonomy requires a rigorous system of control over the presence of an effective, free and informed agreement to prorogate the jurisdiction. In a recent judgment, the Court of Justice[86] specified that "absence of observations cannot constitute the entering of an appearance within the meaning of Article 26 of Regulation No 1215/2012[87] (so-called Bruxelles I-*bis*) and, therefore, cannot be considered as tacit acceptance, by the defendant, of the jurisdiction of the court seised, such a provision concerning the implied prorogation of jurisdiction cannot be applied in circumstances such as those in question in the main proceedings". As established by the Court of Justice[88] in a case relating to Regulation 2001/44 (so-called Brussels I Regulation), with the reasoning undoubtedly also applicable to Regulation 1104, where the first defence contains submissions on the substance of the dispute as well as submissions on the jurisdiction of the court seised, this prevents the prorogation of jurisdiction and it is irrelevant that such submissions were not the only subject of the first defence. Likewise, jurisdiction cannot be considered accepted when appearance in court is made by the judge appointing a representative ad litem. In another decision, the Court of Justice[89] states, in fact, that "Since that representative has no contact with the defendant, he cannot obtain from him the information necessary to accept or contest the jurisdiction of those courts in full knowledge of the facts". In a case governed by Regulation 2001/44, the Court of Justice[90] also specified that a defendant "*in absentia*" is unable to interact adequately with the appointed curator and, therefore, to "effectively oppose that jurisdiction or accept it in full knowledge of the facts", excluding the possibility that the appearance of the curator could lead to tacit acceptance by the defendant. The appearance of the defendant renders inoperative any previous agreement made between the partners on the identification of the competent court and establishes the jurisdiction in that court even if the parties had previously indicated their intention to seise the court in a third country: these conclusions have been reached in the case law of the Court of Justice[91], which has been able to outline the functioning of the tacit prorogation in various Community[92] and international legal instruments[93].

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[86] See Court of Justice, 11 April 2019, case C-464/18, *Ryanair*, 3, *Revue trimestrielle de droit commercial et de droit économique*, 787-789, (2019), with commentary by A. Marmisse-D'Abbadie d'Arrast, '*Exploitation d'une succursale. Action paulienne*'. *Article 7, point 5 et article 26*' *Rivista diritto internazionale privato e processuale*, 200 (2020).

[87] 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, in OJ L 351/1, 20 December 2012.

[88] See Court of Justice, 13 July 2017, Case C-433/16, *Bayerische Motoren Werke AG c. Acacia s.r.l.*, 392, *Europe*, 48 (2017), commented by L. Idot, 'Relations avec le règlement sur les dessins ou modèles communautaires'.

[89] See Court of Justice, 21 October 2015, case C-215/15, *Gogova*, 12, *Europe*, Décembre, 49-50 (2015), commented by L. Idot, '*Champ d'application matériel et délivrance d'un passeport pour un mineur'.*

[90] See Court of Justice, 11 September 2014, Case C-112/13, *Common Market Law Review*, 1309-1337 (2015), commented by M. De Visser, 'Juggling centralized constitutional review and EU primacy in the domestic enforcement of the Charter: A.v. B.', 11, *European Constitutional Law Review*, 389-407 (2015 9, commented by D. Paris, 'Constitutional Courts as Guardians of EU Fundamental Rights? Centralised Judicial Review of Legislation and the Charter of Fundamental Rights of the EU'*,* 4, *Revue critique de droit international privé*, 915-921 (2015).

[91] See P. Bruno, n 14 *supra*, 96, who refers to Court of Justice, 7 March 1985, Case C-48/84, *Hannelore Spitzley v Sommer Exploitation SA.*

[92] It should be noted that the Regulation 2019 /1111, so-called *Brussels II ter* intended to replace Regulation 2003/2201, no longer expressly includes the institution of tacit prorogation, which is found in Article 12 of Reg. 2201. Already in Article 12 the legislator requested an express and, in any case, unambiguous acceptance of jurisdiction, but with the recasting of the Community regulation we are witnessing the removal of the

5. Choice of court and choice of applicable law

The choice of the partners is the main criterion for determining the competent court. The parties can, in fact, not only choose the law applicable to their property regime (so-called *professio iuris*), but also attribute jurisdiction to the authority of the same State whose law is applicable. In addition, by a specific agreement, they may choose as the competent court the court of the country whose law is applicable to property relations on the basis of the criteria operating pursuant to Article 26 of the Regulation. The twofold freedom of choice is an important means of simplifying the lives of citizens, who can thus identify not only the legislation but also the court that is more convenient because of its physical proximity or its substantive and procedural rules familiarity, on the basis of their concrete needs. On the basis of Recital 44 of the Regulation, the choice of *forum* should be exercised in such a way as to avoid creating dangerous "legal vacuums": in this sense, among the various eligible jurisdictions, the *electio fori* should also be carried out taking into account this substantive aspect, making sure to opt for a court that can then operate on the basis of a law attributing property consequences to registered partnerships. Partnerships are subject to fragmented recognition by the Member States, they still lack instruments of private international law specifically devoted to them, and therefore, the *electio fori* is an instrument which, if well used, contributes to the smooth operation of the regulatory framework so painstakingly established by the European Union. Couples are called upon to take an active part in avoiding time-consuming proceedings in order to reduce the risk of denial of justice. These are the reasons for restricting and controlling freedom of choice, limitations that are fully deserving and reasonable as they are functional to the achievement of values that characterize European regulation such as the legal certainty,[94] the accessibility of justice and the effectiveness of judicial protection.

According to Article 7, the parties may choose between "the courts of the Member State whose law is applicable pursuant to Article 22 or Article 26(1)" or the courts of the Member State under whose law the registered partnership was created. Consequently, the choice of court may lie within the State of common residence of the partnership or the court of the State of habitual residence of the partners or of one of them at the time of conclusion of the agreement; it may also lie within the courts of the State of nationality of one of the partners at the time of conclusion of the agreement. The choice of court

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institution. Recital 23 states that "before exercising its jurisdiction based on a choice of court agreement or acceptance the court should examine whether this agreement or acceptance was based on an informed and free choice of the parties concerned and not a result of one party taking advantage of the predicament or weak position of the other party". Acceptance leading to prorogation of jurisdiction is now regulated in Article 10(1)(b)(ii) which, in this respect, requires that all parties have "expressly accepted the jurisdiction in the course of the proceedings" and that the court has "ensured that all the parties are informed of their right not to accept the jurisdiction".

[93] The institution of tacit prorogation is also covered by Article 18 of the Brussels Convention of 27 September 1968.

[94] On the need for a uniform application in all Member States of legal concepts and qualifications developed by the Court of Justice in the application of rules of private international law, in order to better implement legal certainty, see Court of Justice, 14 July 1977, Case C-9/77 and C-10/77, *Bavaria Fluggesellschaft*, paragraph 4; Court of Justice, 11 August 1995, Case C-432/93, SISRO, paragraph 39; Court of Justice, 10 March 1992, Case C-214/89, paragraph 13 and Court of Justice, 23 April 2009, Case C-167/2008, Draka, paragraph 25

therefore operates on the basis of the criteria given to identify the applicable law in a similar way to the choice of courts provided for in Regulation 1103; only registered partnerships with these criteria are subject to the jurisdiction of the Member State under whose law the registered partnership was formed. It should be pointed out that, by express provision contained in Article 6, the choice of court is in any case possible only if the competent court do not have exclusive jurisdiction for succession or family reasons as provided for in Article 4 and 5 of the Regulation. The courts could anyhow intervene in these particular matters on a residual basis, to enable the freedom of choice for the partner concerned by the property consequences on his partnership caused by the death of the other partner or by issues of separation or divorce.

Of course, having established the choice of court in accordance with the applicable law, as provided for in Article 22, also has its drawbacks: if, in fact, a judicial procedure has to be initiated, the competent court is always identified by looking back at the past with the risk that at the time of filing the application no partner has a concrete connection with that particular State anymore. By referring to the residence or the country in which the partnership was formed, a situation of constant mobility of the couple and movements that make it very difficult to justify a current connection with that court could have occurred over the years. In this sense, perhaps the choice made by Regulation 2009/4 allowing the *electio fori* between the competent authorities in matrimonial matters or the court of the State of last common residence for at least one year was considered a better legislative technique.[95]

The combination of the double choice (*professio iuris* and *electio fori*) provided by both Regulations is in line with the rules adopted by the main European Regulations: the double choice is ensured both by Regulations 2009/4, 2012/650 and by Regulation 2012/1215, which, in order to facilitate the enforcement of an enforceable decision in another Member State of the European Union such as a national judicial order, has expressly emphasized the adjustment of the law and the court by private individuals so as to make them stakeholders in the procedural simplification and to allow them to reduce the costs of justice. The major role given to private autonomy makes it necessary to rigorously verify the presence of a clear and express agreement[96] reached by the partners on the applicable law and the competent court. In this area, the case law of the Court of Justice, for example on general terms and conditions,[97] has consistently required that it be proven that consent has actually been granted and that it has been knowingly given under that specific law or court. The nullity of the agreement on the applicable law could have as a consequence the nullity of the agreement on the choice of court: this dynamic is well known to the Court of Justice[98]

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[95] Similarly, P. Bruno, n 14 *supra*, 103.

[96] See Court of Justice, 9 November 2000, Case C-387/98, *Coreck Maritime GmbH* c. *Handelsveem BV and others*, paragraph 13 and Court of Justice, 7 February 2013, Case C-543/10, *Refcomp Refcomp SpA* c. *Axa Corporate Solutions Assurance SA*, paragraph 27.

[97] See P. Bruno, n 14, *supra*, 104. In case law on the requirement of written form in general terms and conditions see Court of Justice, 20 April 2016, Case C-366, *José Manuel Ortiz Mesonero v. UTE Luz Madrid Centro*.

[98] See previously, Court of Justice, 4 March 1982, Case C-38/81, *Effer Spa v. Hans-Joachim Kantner*, according to which "the national court's jurisdiction to determine questions relating to a contract includes the power to consider the existence of the constituent parts of the contract itself, since that is indispensable in order to enable the enable the national court in which proceedings are brought to examine whether it has jurisdiction."

which, for example, had to decide on which was the applicable law and the competent court in case of nullity of the agreement on the law concluding for the jurisdiction of the court to rule even when the application is directed to find the nullity of agreement on the law.

The choice of applicable law (Article 22) and the choice of court (Article 7) must be made in writing or in an electronic form that allows registration on a durable medium.[99] The case law of the Court has made it clear that forms of electronic communication may also meet the formal requirements provided that, if such means of choice are adopted, adequate proof of express consent can be provided. This would be the case, for example, if it is possible to store and print the general terms and conditions of the contract which contain a choice of court.[100]

As stated in Recital 46 of Regulation 1104, in any event the agreement must also comply with any further formal requirements under the law of the Member State in which both partners have their habitual residence at the time the agreement is concluded. The problem presented by choice of law or court clauses is a very complex one: they are often part of different and broader agreements or covenants. Only a careful analysis of the national legislation will make it possible to understand whether the clause is affected by the formal, but also substantive, requirements that the law states for the validity of the agreement in which the choice clause is contained. Recital 46 provides useful hermeneutical criteria for cases such as partners who are habitually resident in different countries at the time of the agreement. In this instance, for the validity of the agreement, "compliance with the formal rules of one of these States would suffice"; the provision seems to be consistent with the principle of preservation of the act of private autonomy which is a constant in European legislation. If either State has additional requirements, the agreement will be valid if it complies with them. The issue of the validity of agreements on applicable law and jurisdiction is a possible source of problems for cross-border couples, a problem amplified by the fact that many Member States have not joined the enhanced cooperation and are therefore to be considered third countries. It may therefore also be assumed that it is necessary to examine the validity of agreements which choose the law of a third country as the applicable law, with a consequent impact on the competent court, which will in any case have to operate on the basis of its own national law. It can be assumed that issues of validity and effectiveness expressly covered by Regulation 1104 such as form and content can be assessed under the same Regulation, but that a second check should be carried out on the basis of the *lex fori*. In case of third countries, other aspects of the agreement such as consent, representation and capacity of the parties will be assessed according to the applicable law of the chosen country, established under the rules of private international law.[101]

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[99] See *supra*, Ch. II, section III, par. 3.

[100] Similarly, Court of Justice, 21 May 2015, case C-322/14, *Jaouad El Majdoub c. CarsOnTheWeb.Deutschland GmbH*.

[101] The choice of the court of a third country has been the subject of rulings in particular with regard to the Brussels Convention of 1968 (Court of Justice, 9 November 2000, Case C-387/98, *Coreck Maritime GmbH v. Handelsveem B.V.*) and Regulation 2001/44 (Court of Justice, March 2016, Case C-175/15, *Taser International Inc. v SC Gate 4 Business SRL and Cristian Mircea Anastasiu*). On the topic see, L. Penasa, 'Gli accordi sulla

6. Alternative Jurisdiction

The consideration for cross-border couples emerges very clearly from the criterion of alternative jurisdiction and from that of the so-called *forum necessitates*. In fact, if the requested authority declines its jurisdiction due to the impossibility for its rules of private international law to recognize a civil partnership formed elsewhere, or even if an authority of a third country cannot accept the jurisdiction or declines it, Articles 9 and 11 allow the parties to seek justice by identifying other competent authorities.

The legal provision is similar to the one adopted in the Rome III Regulation, Article 13 that prevents a court of a Member State which does not allow divorce or dissolution of marriage from being obliged to give a judgment in this matter. This provision, known as the Maltese clause, allowed Malta to participate in the enhanced cooperation procedure which led to the adoption of Regulation 2010/1259: Malta at that time did not include the institution of divorce in its legal system. Article 9 of Regulation 1104 seems to be the result of a similar legislative technique aimed at encouraging the participation of States in enhanced cooperation but, at the same time, careful to prevent cross-border couples from finding themselves in a situation of "legal vacuum", without a competent court.

The decline of jurisdiction, an instrument which in Regulation 1104, unlike Regulation 1103, is presented as ordinary and not as an exception to the rule,[102] also contains a time limit that is binding for the court that wishes to decline its jurisdiction: it must proceed "without undue delay" in order to preserve the interests of the couple, which, at this point, may apply elsewhere. The court's decision declining the jurisdiction does not address the substantive issues and, therefore, the partners can re-apply without the problems that a substantive ruling would have brought (the need for an appeal against the rejection). The interests of the partners are the expression of rights and principles recognised as fundamental by the European Union, which, also in this Regulation as explained in Recital 71, requires compliance with the same by all national courts. National courts must, therefore, base their activities, including procedural ones, on respect for private and family life, the right to form a family under national law, the right to property, the principle of non-discrimination and the right to an effective remedy and to a fair trial, all rights and principles protected by the European Charter of Fundamental Rights.

It is clear that the evaluation of the partners' interest allows similarities with the common law *forum non conveniens* institution, which is poorly used by the case law of the Court of Justice.[103] In common law[104] the judge can acknowledge whether there is another court that can better handle the case and, on the basis of this assessment, can decline jurisdiction. In

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giurisdizione a favore dei di giudici di Stati terzi nel Regolamento Bruxelles I-*bis*', Rivista di diritto processuale, 1, 46 (2020).

[102] In the corresponding Article 9 of Regulation 1103 the alternative jurisdiction is expressly defined as an "exception". This classification is, however, absent in Article 9 of Regulation 1104.

[103] See Court of Justice, 9 December 2003, Case C-116/02, *Erich Gasser GmbH v. MISAT Srl.*, on the case see P. Bruno, ' 'I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate', n 14 *supra*, 110.

[104] For a description of the institution see J. Scherpe, 'Matrimonial property relationships and premarital partnerships in Common Law - some practical tips' *Rivista di diritto civile*, 920-923 (2017). The leading case is *Spiliada Maritime Corporation v. Cansulex Ltd.* (1987) A.C. 460, H.L.

this case Article 9(2) and (3) of Regulation 1104 provides that the partners may choose a different court which has jurisdiction under Article 7 or it provides that the courts of any Member State have jurisdiction under Article 6 or 8. This provision, which involves the partners in the search for a *forum conveniens*, is justified by the existence of Member States in which registered partnerships are not recognised and whose authorities may decline jurisdiction.

The decline of jurisdiction determined by the non-recognition of the registered partnership constitutes a non-exceptional possibility,[105] on the contrary it is entirely in line with the cultural traditions of each State as expressly recognised in Recital 38, which notes the absence of widespread recognition.

The court could decline jurisdiction under its national law (Article 9(1)): this marks a further difference from the decline in jurisdiction in matters of matrimonial property regimes. In the corresponding article 9 of Regulation 1103, in fact, the court may decline jurisdiction on the basis of the rules of private international law operating in the field of marriage recognition. The two different provisions show there is a long way to go in Europe in the field of family taxonomies when the couple is not united by marriage and the couple itself has elements of internationality.

It is true, however, that between 2016 and 2020, the family taxonomy of many countries has changed and that to date only six Member States do not recognize same-sex unions or marriages (Bulgaria, Latvia, Lithuania, Poland, Romania, Slovakia); as a result, the only State that has adopted the enhanced procedure and that does not recognize registered partnerships or same-sex marriages is Bulgaria. Portugal, despite not having registered partnerships, recognises same-sex marriages and, therefore, does not apply Regulation 2016/1104, while Spain at national level does not adopt the model of registered partnerships, making marriage accessible to all kinds of couples, providing only at autonomous regional level for forms of registered partnerships.[106]

7. Subsidiary Jurisdiction and forum necessitatis

The complex system of criteria that can be used to set up a proceeding having as its object the property consequences of a registered partnership is subject to a specific closing provision laid down in Article 10. If no court has jurisdiction or if it has opted to decline its jurisdiction, the partners may bring the case before the court of the State in which one or both partners have immovable property. The provision is only applicable where the property consequences of the dispute relate to immovable property, which excludes its application in case of movable property.

The so-called *forum necessitatis* is also a tool designed to avoid a denial of justice. It is regulated by Article 11, which exceptionally confers jurisdiction to the court of a Member State where proceedings "cannot reasonably be brought or conducted or would be impossible in a third State with which the case is closely connected". In view of the

[105] In Recital 38 of Regulation 1103/2016, on the other hand, the decline of jurisdiction is only hypothesised as an exceptional measure.

[106] See Section V, *infra*.

exceptional nature of the rule, however, it is required that there will be a reasonable possibility of an infringement of a substantive or procedural law if jurisdiction were to be established in a court of a third State[107] and that there is a "sufficient" link with the Member State of the seised authority.

The *forum necessitatis* as well as the subsidiary competence mentioned in Article 10 are not new: both institutions are present in other European family regulations such as Regulation 2009/4 and Regulation 2012/650. While generating fragmentation between forum and applicable law, they have the indispensable function of ensuring justice for partners by guaranteeing, even in this area, compliance with Article 47 of the Charter of Fundamental Rights. It is clear that resorting to the *forum necessitatis* in practice could bring the parties before the courts of States with which the connection is very weak, with the result that the principle of good administration of justice, which would prefer the court to be the one closest to the couple, would fail. The regulatory provision can, therefore, be read as an expression of the prevailing and essential importance of preventing a denial of justice and making it possible to have access to justice in any case, even if in a place not close to the couple. The provision of a *forum necessitatis* also responds to the protection of the right to a fair trial safeguarded by Article 6 of the European Convention on Human Rights (ECHR): it is clear, therefore, that the concrete identification of the prerequisites of the "reasonable" expectation that one's rights will be affected and of the "sufficient connection" with the third State is affected not only by the interpretation of the European Court of Justice, but also by the case law emerged on the subject of *forum necessitatis* by the European Court of Human Rights. [108]

8. The institution of the proceedings. Litispendence and connection

Regulation 1104 seems to be characterised by a great flexibility not only with regard to the identification of the competent court, but also with regard to the manner in which the application is filed and the possible object and title on which it is based. In this regard, Article 13(2) allows the partners to adjust the subject-matter of the dispute in order to facilitate its discussion: by a specific agreement, one or more assets located in a third State may be excluded from the subject-matter of the proceedings whenever the parties provide that the aforementioned State may neither recognise nor declare enforceable the judgment resulting from the proceeding. The availability of jurisdiction for the parties is not a new issue in a social context characterised by frequent migratory flows; only through a flexible regulatory framework can justice with European standards of efficiency, low cost and speed be guaranteed to cross-border couples, respecting the adversarial and fairness principles. A series of provisions also operate in this context: the necessary verification of

[107] See G. Biagioni, 'Alcuni caratteri generali del *forum necessitatis* nello spazio giuridico europeo' *Cuadernos de derecho transnacional*, [S.l.], 20 -36 (2012) in *https://e-revistas.uc3m.es/index.php/CDT/article/view/1462*.

[108] See, on the topic, the definition of *forum necessitatis* given by the Grande Chambre, 15 March 2018, Naït-liman v. Switzerland, paragraph 180 as a form or exceptional jurisdiction (or residual) "*assumed by a State's civil courts which would not normally have jurisdiction to examine a dispute under the general or special rules on jurisdiction laid down by that State's law, where proceedings abroad prove impossible or excessively and unreasonably difficult, in law or in practice*".

jurisdiction by the court seised, which must declare of its own motion that it has no jurisdiction (Article 15), the procedural rules adopted by Article 16 to ensure that the defendant who has not appeared in court has effective knowledge of the procedure, the suspensions provided for in Articles 17 and 18 by the second seised court in the event of litispendence or connection.

According to Article 14, the time frame for the court to be seised is determined by the lodging of the document instituting the proceedings or an equivalent document, the service thereof, or in the case of proceedings instituted ex officio, the date of commencement of the proceedings. The virtue of Article 14 is that it provides a certain legal framework with regard to the concept of instituting proceedings by introducing criteria that make it possible to identify the date of commencement, but also by providing that such institution is not recognisable unless all the necessary steps have been taken to ensure that the defendant is informed of the commencement of proceedings (notifications, communications, filings). The claimant is therefore called upon to take a proactive role in avoiding forms of procedural abuse and to prevent, as far as possible, double proceedings institutions from taking place at the same time.

As highlighted in Recital 41, justice is "harmoniously" functioning only if it manages to avoid irreconcilable decisions between different Member States. The litispendence rules operate to achieve this goal. These rules are a constant feature of the European civil justice regulatory framework (Succession Regulation, Brussels II-bis Regulation, Brussels I and Brussels I-bis Regulation). The chronological order is the criterion for establishing jurisdiction, but in order to avoid delays and problems between the courts simultaneously seised in different countries, Article 17 of Regulation 1104 provides for a sort of "dialogue" between the two courts, which are required to communicate to each other "without delay" the date on which they were seised in order to facilitate a timely decline of jurisdiction by the court seised at a later date. The principle of loyal cooperation between the courts of the Member States, a principle which characterises the current Euro-united legal system, requires the court declared to lack jurisdiction to notify the court first seised of the matter in good time, although there is no provision expressly providing for such notification.[109]

Unlike in the case of litispendence, where two related proceedings are pending at the same time, the court seised second has the possibility to continue the proceedings: under Article 18, suspension is only optional. The connection found when there is such a link between the issues covered by the two procedures as to make it appropriate for them to be dealt with as one, requires a discretionary assessment based on a judgment of expediency which does not lead itself to automatic suspensions. Where the procedure on which suspension is to be decided is at its first instance, the court will be able to suspend the proceedings only if there is an express joint request from both parties and only if the court first seised has the practical possibility of joining the proceedings.

A specific provision contained in Article 19 also clarifies that the jurisdiction to decide on provisional or protective measures may be different from the jurisdiction to decide on the substance of the matter. Regulation 1104 therefore admits that there are so-called

[109] See P. Perlingieri, n 39 *supra*, 11-12.

exorbitant forums other than those of dealing with the substantive rights that can issue measures aimed at protecting the rights of the parties pending future proceedings on the substantive rights.[110]

IV. Applicable law

1. Principles of universal application and unity of applicable law

One of the main goals of Regulation 2016/1104, as well as Regulation 2016/1103, is to establish which law is applicable to the property aspects of the registered partnership. The harmonisation of conflict of law rules is carried out by virtue of the principle of universal application (Article 20), according to which the applicable law may also be that of a third State, that in the specific case may be either a State which is not a member of the European Union or a Member State which has not participated in the enhanced cooperation procedure. The universality of the law is not a new concept, but it is a principle constantly used in many areas. It is found in the Rome Convention on the law applicable to contractual obligations and consequently in the Rome I Regulation, the Rome II Regulation on the law applicable to non-contractual obligations, the Rome III Regulation on the law applicable to divorce, in the Regulation on succession, and in the Hague Maintenance Convention. The adoption of the principle of universal application has the merit of identifying the applicable law without being subject to barriers and boundaries, with the consequence that whatever court has jurisdiction will be required to decide using the applicable law on the basis of Regulation 1104. In this way, cross-border couples have the possibility to know beforehand (and in some cases even to choose) the national law, on the basis of which, the court with jurisdiction will have to decide. The national law thus identified does not include the rules of private international law, so no renvoi can be made with regard to the property consequences of registered partnerships. The exclusion of renvoi, as expressly established in Article 32, is a significant step forward in the European Union's efforts to make life easier for cross-border couples. Certainly, transnationality contributes to an ever-higher degree of knowledge and competence required of civil justice professionals, removing the application of the ancient brocard *iura novit curia*. The decline of the renvoi technique, traditionally used in the rules of international private domestic law, is a leitmotif of European family law: the exclusion of the renvoi is in fact also operated by the Rome I, II, III Regulations. The elimination of the renvoi is a response to the many problems that could have arisen if the applicable national law contained rules of private international law which, instead of legitimising the continuation of the procedure, would have forced the court to apply the laws of other States on the basis of internal renvoi.[111]
In the regulatory system adopted for the property consequences of registered partnerships, in order to strengthen legal certainty, the principle of universal application is combined with the principle of unity (Article 21) according to which all assets, whatever their type or

[110] See P. Bruno, n 14 *supra*, 160-163.
[111] See R. Clerici, 'Reg. (UE), n. 1259/2019', in *Commentario breve ai trattati dell'Unione Europea* (Padova: Cedam, 2014), 654.

nature, even if located in a third State, are subject to the law applicable under the Regulation.

2. Choice of the applicable law

Article 22 of the Regulation provides the main criterion for the identification of the applicable law which, in full harmony with the rules of jurisdiction, identifies the choice of the parties as the first and most important method of selecting the applicable law. Freedom of choice is nowadays to be considered the preferred method by the European legislator to identify the law applicable in many areas of judicial cooperation in civil matters: it is used by the Rome III Regulation (Article 5), the Succession Regulation (Article 22), the Rome I Regulation (Article 3) and the Rome II Regulation (Article 14). The couple can exercise the power to jointly identify the applicable law by coming to a shared agreement on the property consequences of the partnership. This can be very beneficial in terms of adherence and acceptance of the decision that will result from the proceedings initiated. Resorting to private autonomy is in any case encouraged by the Regulation, which allows the exercise of private autonomy even before the partnership has been formed: those who are not yet partners in a registered partnership, in the same way as a marrying couple is referred to in Regulation 1103, can exercise the *professio iuris* before a future partnership. The partners are given the *ius variandi*: at any time, it will be possible for them to change the law that will apply to their property regime without this change having retroactive effects so as to prejudice any rights of third parties who had relied on the previous choice. Partners or future partners may choose between the law of the State where they have their habitual residence or one of them resides, the law of their State of nationality or the law of the State under which the registered partnership was formed.

3. Requirements for the formal and substantive validity of the agreement between partners. Invoking the agreement against third parties.

The *professio iuris* must be expressed, contained in a dated deed, in written or equivalent electronic form: like the agreements referred to in Article 7, it is necessary to comply with any additional formal requirements required by the law applicable to the agreement.[112]
One of the major problems arising from the agreement is its impact on third parties. The possibility for the partners to change the applicable law several times and to do so even retroactively has made it necessary to provide that, under no circumstances, may the agreement adversely affect the rights of third parties. The applicable law chosen by the parties may establish regimes of separation, communion, whether current and/or deferred, with significant repercussions on third parties. Depending on the national legislation in place, the third party could see a substantial change in the degree of protection provided to his position. Consider a third party who is a creditor of one of the two partners and the impact on his credit expectation that may have the possibility of claiming a jointly owned asset of the couple or the importance of the rules dictated regarding joint or separate

[112] See *retro* Section III.

legitimacy to perform acts of disposition of property belonging to both partners. According to Article 28, the law applicable to the property consequences of a registered partnership between the partners may not be invoked by a partner against a third party in a dispute between the third party and either or both of the partners "unless the third party knew or, in the exercise of due diligence, should have known of that law". The subjective good faith of the third party, defined as excusable ignorance of the law applicable to the property consequences of the registered partnership, constitutes a pillar on which the system of opposition revolves. The EU legislator, in this respect, also provides a list of presumptions, *iuris et de jure*, about the good faith of the third party. Under Article 28(2), the third party is presumed to have knowledge of the applicable law if that law is the one of the State whose law is applicable to the transaction between a partner and the third party. Likewise, knowledge is presumed if the applicable law is that of the State in which the contracting partner and the third party have their habitual residence. Furthermore, should the third party have rights to immovable property, the presumption of knowledge shall apply if the applicable law is the one of the State where the property is situated. The third party may not deny knowledge of the law applicable to the property consequences of the union if either partner had complied with the requirements for disclosure or registration of the property consequences of the registered partnership: "specified by the law of (i) the State whose law is applicable to the transaction between a partner and the third party, (ii) the State where the contracting partner and the third party have their habitual residence, or (iii) in cases involving immoveable property, the State in which the property is situated".[113]

4. Applicable law in the absence of choice by the parties

Regulation 1104 provides criteria for identifying the applicable law in the absence of choice. These are sequential criteria that make it possible to determine which law to apply using the place of constitution of the registered partnership, their "habitual residence" or "nationality".[114] According to Article 26, the law applicable to the property consequences of registered partnerships is, in fact, the law under which the registered partnership was formed. Only in exceptional cases and upon application of one of the partners may a judicial authority apply a different law to proceedings concerning property consequences. The application of a law other than the one regulating the institution of the registered partnership is, however, subject to the occurrence of two specific circumstances. The court can apply the different law only if the law of that other State attaches property consequences to the institution of the registered partnership and if the applicant demonstrates that the partners had their last common habitual residence in that other state "for a significantly long period of time"[115] or that both partners had relied on the law of

[113] Article 28(2)(b) of Regulation 1104.

[114] For an in-depth examination on the use of these concepts in European family law see K. Boele-Woelki, N. Detlhoff and W. Gephart eds, *Family Law and Culture in Europe* (Cambridge-Antwerp-Portland: Intersentia, 2014), XVII-360.

[115] The rules introduced by Regulation 1104 on the applicable law in the absence of choice by the parties differ considerably from the corresponding rules set out in Article 26 of Regulation 1103. In particular, several criteria are provided for precisely to identify which law is applicable under the concept of "common habitual residence". The court will have to verify, on the basis of the period of time of the couple's common

that other state in arranging or planning their property relations. Once the judge, in a discretionary capacity, has considered it possible to apply a law other than the law under which the partnership was formed, this law also applies to the institution of the partnership. This solution has the advantage of simplifying the procedure, but its functioning is subject to the agreement of both partners. In the event of disagreement, the applicable law identified by the court on application by a partner shall govern the property consequences of the registered partnership from the time when the partners have established their last habitual residence in the State whose law either of them invokes as applicable.[116] Third parties, by express provision of Article 26(2), may not be adversely effected by the partners exercising the criteria for the identification of the applicable law exceptionally provided for in this paragraph: for them the applicable law will remain the one identified in connection of the State in which the partnership was instituted.

5. The concept of "habitual residence"

Regulation (EU) no. 2016/1104[117] introduced the possibility for partners to choose the law applicable to the property consequences of their registered partnership based on specific connecting factors provided for in Article 22, namely: a) the law of the State where the partners or future partners, or one of them, is habitually resident at the time the agreement is concluded; b) the law of a State of nationality of either partner or future partner at the time the agreement is concluded, or; c) the law of the State under whose law the registered partnership was created.

In the event that the couple has not made any choice, in accordance with Article 26 of the Regulation, the applicable law is the one of the State in which the partnership has been registered. In addition, according to Article 26(2)(a), if one of the partners so requests, the law of the State where the couple had their last common habitual residence for a significantly long period of time may be applied. This option is an exception to the general rule laid down in Article 26(1), which allows the possible conflict between the partners to be overcome through the use of different criteria.[118] Similarly, Articles 22(1)(a) and (b) and 26(1)(a) and (b) of Regulation (EU) 2016/1103 refer to habitual residence and nationality as connecting factors for the identification of the law applicable to the matrimonial regime.

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residence in a given State, which law is applicable whenever a spouse exceptionally requests the application of the law of a State other the one where the couple has established their common habitual residence after the marriage.

[116] Obviously, if the partners have entered into an agreement before the establishment of the last common habitual residence, the rules introduced by Article 26(2) cannot be invoked, as expressly laid down in the last part of Article 26(2), which states: "This paragraph shall not apply when the partners have concluded a partnership property agreement before the establishment of their last common habitual residence in that other State".

[117] Regulation (EU) n. 1104/2016, n. 4, *supra*.

[118] P. Bruno, n 14 *supra*, 206-210; Id.,'I Regolamenti UE n. 1103/16 e n. 1104/16 sui regimi patrimoniali della famiglia: struttura, àmbito di applicazione, competenza giurisdizionale, riconoscimento ed esecuzione delle decisioni', in *www.distretto.torino.giustizia.it*; G.V. Colonna, 'Il Regolamento europeo sui regimi patrimoniali tra coniugi' *Notariato*, 308 (2019).

The European legislator has given a primary role, in the respective fields of the two Regulations, to the criterion of habitual residence.[119] This choice seems to be based on the need for a uniform interpretation of the legislation in relation to the increasing transnationality of couples and the free movement of persons.[120] Regarding these aspects, the criterion of habitual residence appears as a parameter expressing the flexibility needed to determine the place where the couple is actually settled. This is a connecting criterion that has been consolidated to the detriment of other parameters, such as domicile,[121] precisely because of its provision in other European legislation, including Regulation 2201/2003, Regulation 2010/1259 and Regulation 2012/650.[122]

Domicile, as a connecting criterion, is more difficult to apply, both because of the differences between common law and civil law systems and because of the different definitions that have been given within each system.[123] Moreover, the concept of domicile is mainly based on the economic aspects of a citizen, while the residence refers to a communion of life of the partners and therefore also refers to both the personal profiles of the couple, as well as their economic environment. The prevalence of the criterion of habitual residence over that of domicile has therefore been outlined in the European context as it allows an interpretation that can be tailored to the complex family situations affecting the cross-border couple. In any case, in the various regulatory texts as well as in the twin Regulations, the legislator did not provide a definition of habitual residence, so that it remained the subject of "autonomous" interpretation in the case law of the Court of Justice.[124] Long-established case law already refers to "habitual residence" as the place where there is a concrete evidence of integration between a citizen and the social environment. This is an assessment that cannot be made with reference to the registered

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[119] The criterion of habitual residence was introduced in Regulation (EU) 2010/1259, Regulation (EU) 2012/650, Regulation (EU) 2016/1103 and Regulation (EU) 2016/1104, at *https://eur-lex.europa.eu*; E. Calò, 'Variazioni sulla *professio iuris* nei regimi patrimoniali delle famiglie' *Rivista del Notariato*, I, 3-8 (2017); N. Cipriani 'Rapporti patrimoniali tra coniugi, norme di conflitto e variabilità della legge applicabile' *Rassegna di diritto civile*, I, 27-29 (2019).

[120] Regarding the aspects related to habitual residence and citizenship see R. Clerici, 'Alcune considerazioni sull'eventuale ampliamento del ruolo della residenza abituale nel sistema italiano di diritto internazionale privato', in C. Campiglio ed, 'Un nuovo diritto internazionale privato', (Milan: Cedam, 2019) 56-64.

[121] V, Ch. IV, *infra*. On this topic see, P. Rogerson, 'Habitual residence: the new domicile?' 9 *Int'l & Comp. L.Q.*, 86-96 (2000).

[122] The criterion of habitual residence has also been introduced in the so-called Rome I and Rome II Regulations concerning the law applicable to contractual and non-contractual obligations. See M.J. Cazorla González, 'Matrimonial property regimes after the dissolution by divorce: connections and variables that determine the applicable law', in J. Kramberger Škerl, L. Ruggeri and F.G. Viterbo eds, n 16 *supra*, 40-48; D. Damascelli, 'Applicable law, jurisdiction, and recognition of decision in matters relating to property regimes of spouses and partners in European and Italian private International law' *Trust & Trustees*, 6-11 (2019).

[123] C. Consolo, 'Profili processuali del Reg. UE 650/2012 sulle successioni transnazionali: il coordinamento tra le giurisdizioni' *Rivista di diritto processuale civile*, 18-20 (2018).

[124] In the Explanatory Report by A. Bórras, at *https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A51998xg0716*, included in the Hague Conference on Private International Law, the concept of habitual residence is defined according to the case law of the Court of Justice as a "place in which the person concerned has established, with the intention that it should be of a lasting character, the permanent or habitual centre of his interests. However, for the purposes of determining such residence, all the factual circumstances which constitute it must be taken into account". On the topic see M. Mellone, 'La nozione di residenza abituale e la sua interpretazione nelle norme di conflitto comunitarie' *Rivista di diritto internazionale privato e processuale*, 691-693 (2010); C.A. Marcoz, 'Il Regolamento (UE) 650/2012: la determinazione della "residenza" e altri problemi', in *Eredità internazionali: italiani con beni all'estero e stranieri con beni in Italia* (Milano: Consiglio Notarile, 2014), 3.

residence or citizenship, when it is clear that the main and ongoing aspects of the couple's life are centred in a different place.[125] In this context, an extensive interpretation allows to overcome the variety of the individual legal systems and to safeguard the interests of the couple, taking into account personal, economic and social aspects. The aim is to overcome the difficulties of identifying the law applicable to the property of cross-border couples without, however, having to distinguish between the marital bond and registered partnerships.[126]

The concept of habitual residence allows the analysis of a multiplicity of heterogeneous factors, and this favour the balancing of the aspects relevant to determining the law that will be called upon to regulate the concrete case. Residence must be understood as the place where the person concerned has established, in a stable manner, the permanent or habitual centre of their personal and economic interests, provided that all the elements of social reality which contribute to its constitution must be taken into account. The term "habitual" must therefore be given an autonomous interpretation that must be derived not only from the context in which the provisions of Regulations 1103 and 1104 are inserted, but also on the basis of the stability and social integration that the cross-border couple demonstrates with respect to a given territory.

5.1. Habitual residence in personal family relationships

A useful reference in the definition of habitual residence can be found in the case law on personal family relationships, where the Court of Justice recommends not to generalise, but to take into account all the interests at stake in order to understand where it should be situated.

As the Court has pointed out, the concept of habitual residence must be interpreted in accordance with the specific factors which distinguish one case from another, beyond the strict definitions and with respect for the family context in which it is situated. For example, in case A (C-523)[127] the Court of Justice[128] was asked to establish, in accordance with Article 8(1) of Regulation 2003/2201, the habitual residence of two minors who were formally resident in Sweden but had been living for some time in Finland where they had no fixed abode, did not attend school and were continually exposed by their mother to conditions of serious health danger.

The Court held that habitual residence should be established on the basis of the best interests of the children as well as the criterion of proximity to the territory. Moreover, consideration had to be given to the specific factual circumstances and reasons for

[125] The increased mobility of citizens contributes to the formation of cross-border couples who are bearers of different cultural identities and who need regulatory protection adapted to the increasingly complex social reality.

[126] L. Ruggeri, n 10 *supra*.

[127] Court of Justice, 2 April 2009, Case C-523/07. In legal literature, R. Lamont 'Habitual Residence and Brussels II-*bis*: Developing Concepts for European Private International Family Law' *Journal of Private International Law*, III, 261-281 (2007); N. Joubert, 'La dernière pierre (provisoire?) à l'édifice du droit international privé européen en matière familiale. Les règlements du 24 juin 2016 sur les régimes matrimoniaux et les effets patrimoniaux des partenariats enregistrés', n. 2, *supra*, 3-17.

[128] See also Court of Justice, 27 November 2007, Case C-435/06.

residence on the territory of a State, school attendance, language skills and family and social relations established by minors.[129] Essentially, the case law highlighted that the relevant aspects of "habituality" are those related to the non-occasional or temporary physical presence of a citizen or couple in the territory of a State.[130] In any case, the elements indicating a child's integration into a social and family environment remain variable.[131] In fact, within an increasingly complex social context, the analysis conducted by the Court based on subjective and objective elements relating to the relevant case, becomes necessary for the uniform application of the law in the national legal systems.

However, a child born in a non-member country, from a British father and a Bengali mother (*UD v. XB*, C-393/18), has not been recognised as habitually resident in the United Kingdom. In this case, both parents lived permanently in the United Kingdom, but the birth took place in Bangladesh, where the mother and the child continued to live because of the husband's coercion. Later, the mother asked to return to the UK and to be able to assign her new born child's habitual British residence. The Court held that the unlawful conduct of one parent on the other, which resulted in the birth of the child in a third State and the violation of the fundamental rights of the mother, still do not allow the child to be considered habitually resident, within the meaning of Article 8(1) of Regulation 2003/2201, in a Member State to which they have never been to.[132] Residence can be defined as habitual when "there are symptomatic indicators linked to the continuity of the couple's life or to the parties' intention to organise life together in a given state".[133]

The concept of habitual residence is invoked by the court to provide protection for the children but is always interpreted extensively and not automatically. Essentially, the judge is required to perform a complex analysis of subjective and objective factors.

Sometimes in order to establish the habitual residence of a child, it is necessary to first understand the place where the couple's life is rooted. The Court thus held in *HR v. KO* (C-512/17) that the habitual residence of the child should correspond to the place which, in practice, is the centre of that child's life. In that case, a Polish citizen asked to establish the place of residence of her daughter at her own place of residence. The child had dual nationality and expressed herself in Polish, but lived in Belgium with her mother, where she received constant visits from her father who was a Belgian citizen. Therefore, even if the

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[129] Case C-523/07, n. 11, *supra*, 127. On habitual residence see H. Storme 'Compétence internationale en matière d'autorité parentale. Résidence habituelle de l'enfant', *Revue du droit des étrangers*, 650-660 (2008); S. Marino, 'Nuovi criteri interpretativi per la determinazione della giurisdizione in materia di responsabilità genitoriale: la nozione di residenza abituale dei minori in una recente sentenza della Corte di giustizia CE' *Rivista di diritto processuale*, 467-476 (2010); G. Chiappetta, 'La «semplificazione» della crisi familiare: dall'autorità all'autonomia', in P. Perlingieri and S. Giova eds, *Comunioni di vita e familiari tra libertà, sussidiarietà e inderogabilità* (Naples: Edizioni Scientifiche Italiane, 2019), 435-464.

[130] Opinion of Advocate General Juliane Kokott delivered on 29 January 2009 in Case C-523/07 where it is noted in paragraph 44 that the intention of parents to settle with the child in a different State is manifested by external circumstances such as the purchase or lease of a residence. On the topic see É. Viganotti 'La notion de "résidence habituelle" de l'enfant selon la CJUE' *Gazette du Palais*, 40, (2018) 24-26; C. Nourissat 'Encore et toujours la résidence habituelle de l'enfant, *Procédures*, 4, 24-25 (2017).

[131] On the case law regarding the habitual residence of the child see also Court of Justice, 8 June 2017, case C-111/17, *C.G, OL. c. PQ.*

[132] Court of Justice, 17 October 2018, Case C-393/18, *UD v. XB.*

[133] Court of Justice, 14 February 1995, Case C-279/93, *Finanzamt Köln-Altstadt v. Schumacker*; Court of Justice, 14 September 1999, Case C-391/97, *Gschwind v. Finanzamt Aachen-Außenstadt*; Court of Justice, 16 May 2000, Case C-87/99, *Patrik Zurstrassen v. Administration des contributions directes.*

family environment of a new born is largely determined by the parent with whom he or she lives daily, it is true that the other parent is part of it if he or she maintains regular contact with the child. The habitual residence as a connecting criterion, therefore, does not arise from a static activity, but varies according to circumstances[134] which distinguish each different situation. In a context of increasing mobility of persons in a border-free area, which has led to an increase in the number of couples' transfers, habitual residence, as a connecting factor, expresses its suitability to simplify the identification of the applicable law and makes it possible to safeguard the values underlying the different legal systems, precisely because its definition varies according to the circumstances that distinguish each individual case.[135]

5.2. Residence in family property relations

The concept of habitual residence also acts as a link between property and personal aspects of family relations. The case of *MH, NI v. Oj, Novo Banco SA*[136] gave the Court of Justice the opportunity to rule on aspects of an insolvency proceedings in relation to a couple who were not engaged in business activities. The question concerned a couple who, while working and residing in the UK, requested the opening of its insolvency proceedings in Portugal where it owned a single asset. On the contrary, the *Tribunal da Relação* considered that the centre of interest of the couple should be understood as coinciding with the place of their habitual residence and therefore in the United Kingdom. In the opinion of the Advocate General[137] it is pointed out that the criteria used to identify the place of habitual residence under Regulation 2003/2201 do not seem to me to be transposable to Regulation 2015/848 in order to determine the reasons why the place of habitual residence is presumed to be the centre of a debtor's main interests. The location of the centre of main interests should be understood as the place, recognisable by third parties, where the debtor habitually carries out the management of his interests. The centre of interest of the couple, therefore, must be assessed taking into account how it is perceived by the social community in which the couple manages their family property. The identification can be done on the basis of the legitimate expectations of third parties and the social acknowledgement of the legal situation as it appears from the outside.
In the dynamic of legal interpretation, priority must then be given not to elements that relate to the social or family situation, but to those that relate to the debtor's property situation. However, this approach cannot also apply to interpersonal relations which have economic implications, such as marital relations or relations between members of the same family. Indeed, "such relationships may affect a debtor's situation in so far as concerns its assets and may, in particular, cause the debtor to enter into transactions with third

[134] Court of Justice., 28 June 2018, Case C-512/17, *HR* c. *KO, Prokuratura Rejonowa Poznań Stare Miasto w Poznaniu*; F. Mancini, 'Regimi patrimoniali della famiglia e prospettive di innovazione' *Rassegna di diritto civile*, 172-174 (2014).
[135] R. Clerici, n. 120, *supra*, 62-65; F. Salerno, n 82 *supra*, 36-42.
[136] Court of Justice, 30 April 2020, Case C-253/2019, *MH, NI c. Oj, Novo Banco SA*.
[137] Conclusions of Advocate General Maciej Szpunar submitted on 30 April 2020, paragraph 45.

parties".[138] The obligations undertaken to meet the needs of the family are not limited to the couple's internal relationships, but necessarily extend to the outside world and affect many aspects of life as a couple.[139] Thus, the line between the economic situation and the family situation of the couple is almost always likely to blur. The Advocate General therefore argues that in the absence of other factual elements,[140] the centre of the couple's main interests must be situated in the same State as their habitual residence, since it is there that the spouses carry out significantly long periods of their private life and exercise the management of their affairs on an ongoing basis.

According to case law, the criterion of connection between personal and property relationships is therefore comprised of a concrete analysis of the elements pertaining to each different situation.

European legislation, through the concept of habitual residence, has essentially introduced an evaluation criterion which originates from the analysis of the individual case and which does not only take into account economic aspects.[141]

The concept of habitual residence was also applied by the French courts to determine the law governing the succession in the *J.P. Smet* case.[142] In his will the deceased had chosen the law of the State of California, where he claimed to be a resident. At the request of the heirs, the French court, under Article 21 of Regulation 2012/650 and after an overall assessment of the circumstances of the deceased's life in the years preceding his death, found that the centre of the family's interests and social life was still in France, so that the place was to be considered the last habitual residence of the deceased, and declared applicable the French law.

It seems therefore to be necessary to attribute to habitual residence, as a criterion for the choice of the applicable law, an interpretation that abstracts itself from the national legal systems, to assume a not only formal, but rather a substantive nature. This does not exclude different interpretations by the courts of the Member States, but in any case, there is a renewed way of reasoning based on fairness and the balancing of principles and values being implemented beyond the multitude of jurisdictions. [143]

The Court of Justice thus guides the national courts, because the indications in its case law do not necessarily stop with the court which requested the judgment, but supplement the law of the different Member States, albeit in accordance with the principles which

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[138] See paragraph 46, opinion of the Advocate General Maciej Szpunar submitted on 30 April 2020, Case C-253/19, n. 20, *supra*.

[139] L. Ruggeri, n 10 *supra*.

[140] Conclusion, Case C-253/19, n. 138 *supra*, paragraph 65.

[141] On the topic cf. P. Perlingieri, *Il diritto civile nella legalità costituzionale* (Naples: Edizioni Scientifiche Italiane, 2006), 348.

[142] See Tribunal de Grande Instance de Nanterre, Ordonnance de Mise en Etat, rendue le 28 May 2019, n. 18/01502, in *www.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2019/06/doc190619-19062019144050.pdf*;; I. Kunda, S. Winkler e T. Pertot, Cap. III *infra*, Sect. III, § 1, where it is pointed out, with regard to the concept of habitual residence: "Although some authors are surprised that the definition of the "habitual residence" is not included in the Succession Regulation, this is done on purpose as in all other EU legal instruments with respect to the natural persons outside the professional sphere. This affords the national courts with the necessary flexibility when deciding in concreto, whereas they may rely on the extensive criteria and guidelines provided for in the CJEU".

[143] P. Perlingieri, 'Applicazione e controllo nell'interpretazione giuridica' *Rivista di diritto civile*, 317-342 (2010).

characterise each individual system.[144] As stated by authoritative literature[145], the "unity is given by the synthesis and integration of principles and rules from national, supranational and international sources". There is, therefore, a clear need for cooperation between the European Courts and those of the national legal systems, as it is from mutual dialogue that the process of harmonisation between European law and that of the Member States is integrated and conforms, while respecting the different national identities.[146]

6. The criterion of nationality

The criterion specified in Article 22(b) of the Regulation provides for the possibility of choosing the law of the State of nationality of the partners or future partners at the time of conclusion of the agreement. Nationality is the criterion that can be immediately identified as it is based on certainty.[147]

Nationality as a relationship between a citizen and a State has been complemented by the concept of "European citizenship"[148] which has given a renewed dimension to the integration of citizens which is no longer based solely on economic aspects.

European citizenship has not replaced the national one but has granted a number of essential additional rights to all citizens within the European Union. The status of European citizen has made it possible to obtain, irrespective of one's nationality, the same legal treatment, including the right of residence in another Member State, thus making European citizenship a source of the right to free movement.[149]

The territory of the Member States has become an area of freedom, security and justice[150] where citizens have the right to move freely while maintaining their personal and family status.[151] In fact, in the case of *Uwe Rüffler v. Dyrektor Izby Skarbowej we Wrocławiu Ośrodek Zamiejscowy w Wałbrzychu*[152] concerning an application for a reduced tax pension by a Polish national, settled in Germany, the Court held that the status of citizen of the Union allows a person in the same situation to obtain equal treatment, irrespective of nationality, as an affirmation of the freedom to move and reside in the territory of the Member States.

There is no reference in Regulation 2016/1104 to the multiple nationality of the partners, contrary to Article 26(2) of Regulation 2016/1103, which provides that if the spouses have

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144 P. Perlingieri, 'Diritto comunitario e identità nazionali' *Rassegna di diritto civile*, 530-545 (2011)

145 Similarly P. Perlingieri, 'Applicazione e controllo nell'interpretazione giuridica', n 143 *supra*, p. 341-342.

146 P. Perlingieri, 'Il rispetto dell'identità nazionale nel sistema italo-europeo' *Il Foro napoletano*, 451-453 (2014); G. Carapezza Figlia 'Tutela dell'onore e libertà di espressione. Alla ricerca di un «giusto equilibrio» nel dialogo tra Corte europea dei diritti dell'uomo e giurisprudenza nazionale' *Diritto di famiglia e delle persone*, 1012-1014 (2013); A. Alpini, *Diritto italo-europeo e princípi identificativi* (Naples: Edizioni Scientifiche Italiane, 2018) 130-139.

147 R. Clerici, n. 120, *supra*, 2-23.

148 The concept of citizenship of the European Union was introduced with the Maastricht Treaty of 1992, in *www.europarl.europa.eu/about-parliament/it/in-the-past/the-parliament-and-the-treaties/maastricht-treaty*.

149 See Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, Brussels, 16.03.2011, COM(2011) 127, 2011/0060 (CSN), in *www.europarl.europa.eu*.

150 See EU Citizenship Report 2010. Dismantling the obstacles to EU citizens' rights, Brussels, 27.10.2010 COM(2010) 603, in *https://eur-lex.europa.eu*.

151 L. Ruggeri, n 10, *supra*.

152 Court of Justice, 23 April 2009, Case C-544/07, *Uwe Rüffler* c. *Dyrektor Izby Skarbowej we Wrocławiu Ośrodek Zamiejscowy w Wałbrzychu*.

more than one common nationality at the time of the conclusion of the marriage, only the criterion of common habitual residence or that with which the spouses jointly have the closest connection applies.

However, the complexity of the issue has been addressed in Recital 49 where it is pointed out that the problem of how to consider a person with multiple nationality is a preliminary question which falls outside the scope of Regulation 1104 and should be left to national law, including, where applicable, international Conventions, in full observance of the general principles of the Union.[153] It should also be noted that this is a consideration that should have no effect on the validity of a choice of law that partners have made in accordance with the Regulation. In any case, it is a criterion that has its origin in the principle of non-discrimination on grounds of nationality.[154]

In the absence of a specific provision on multiple nationality in Regulation 1104, the interpreter should consult the relevant case law on marriage so that a definition of the applicable rules can be reached through a homogeneous assessment of the different family models.[155] On this point, the Court of Justice in the divorce proceedings *Laszlo Hadadi v. Csilla Marta Mesko Hadadi* argued that the courts of the Member States of which the spouses have dual nationality both have jurisdiction and that the spouses may freely choose the court of the Member State to which they wish to submit the case.[156] The coexistence of several jurisdictions is therefore allowed, without any hierarchy being established between them. It follows, according to the Court's reasoning, that there can be no grounds for establishing the prevailing nationality since «such an interpretation would restrict individuals' choice of the court having jurisdiction, particularly in cases where the right to freedom of movement for persons had been exercised».[157]

Therefore, one nationality cannot be considered to prevail over another even when it comes to identifying the applicable law.[158] In any case, the specific criteria dictated on jurisdiction mitigate the problems arising from the litispendence of proceedings.[159] One of the innovative aspects of Regulations 1104 and 1103 of 2016 is in fact that couples of different nationalities can find appropriate and specific provisions for the protection of the

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153 See R. Baratta, 'Riconoscimento dello stato personale e familiare straniero: una prospettiva basata sui diritti' *Rivista di diritto internazionale privato e processuale*, (2016) 413-415.

154 Article 18 TFEU provides that any discrimination on grounds of nationality is prohibited within the scope of application of the Treaties; V. D. Damascelli, 'La legge applicabile ai rapporti patrimoniali tra coniugi, uniti civilmente e conviventi di fatto nel diritto privato italiano ed europeo' *Rivista di diritto internazionale*, IV, 1111-1134 (2017).

155 On the definition of the rules applicable to "new family models" see G. Perlingieri, 'Interferenze tra unione civile e matrimonio. Pluralismo e unitarietà dei valori' *Rassegna di diritto civile*, 102-105 (2018), where it is highlighted that it is necessary to avoid creating "non-communicating categories or sub-categories", but to assess the opportunity for homogeneous treatment of the couple both in marriage and in partnerships. On the common foundation of all forms of family see F. Parente, 'I modelli familiari dopo la legge sulle unioni civili e sulle convivenze di fatto' *Rassegna di diritto civile*, 958-963 (2017).

156 Court of Justice, 16 July 2009, Case C-168/08 *Laszlo Hadadi v. Csilla Marta Mesko Hadadi*, paragraph 58.

157 Case C-168/08, n 156 *supra*, paragraph 53.

158 P. Bruno, n 14 *supra*, 205-208; Id., 'I Regolamenti UE n. 1103/16 e n. 1104/16 sui regimi di famiglia: struttura, àmbito di applicazione, competenza giurisdizionale, riconoscimento ed esecuzione delle decisioni', in *www.distretto.torino.giustizia.it*.

159 V. L. Ruggeri, n 10, *supra*.

patrimonial aspects of their own partnership[160] even when the relationship is not based on marriage.

7. Mandatory provisions and public policy

The possibility given to the courts to exclude the application of the law of a given State, or to decline jurisdiction whenever the applicable law conflicts with mandatory provisions or public policy, is one of the most sensitive aspects of Regulation 1104. The mandatory provisions of the court's law continue to apply, with the result that, in the event of conflict with the rules applicable under the Regulation, the latter are superseded. As expressly established by Article 30, whatever the law applicable to the property consequences of registered partnerships, the mandatory provisions for the protection of public interests relating to the "political, social or economic organization" of the State of the *forum* represent an obstacle to the application of foreign laws that may be adopted under the Regulation. A significant influence on the impact of the Regulation is due to the interpretation of Article 30 by the courts. A systematic and axiological interpretation of the body of law dedicated to the regulation of the property consequences of partnerships and matrimonial property regimes leads to the conclusion that the *lex fori* can only in exceptional cases prevent the application of foreign laws. In favour of the residual nature of the mandatory provisions, Article 30 limits them to the only rules for which compliance must be considered crucial for a Member State. A strict interpretation of the exceptions to the application of foreign law is called for in Recital 52, which limits the prevalence of the *lex fori* to "exceptional circumstances". Limiting the application of foreign law means not achieving the general objective of Regulation 1104: the greater the number of exceptions, the less predictable the discipline applicable to that particular registered partnership will be. There are mandatory provisions such as principles that regulate certain aspects of property relations that cannot be derogated by the private parties. The mandatory provisions in this specific context could result in a possible fragmentation of the partner's property regulation. A particular asset, if subject to a specific national regulation that the State of the court deems to be crucial for the national politics and economy or for the preservation of certain characteristics of its society, would be governed by the *lex fori* and, consequently, excluded from the uniform rules of Regulation 1104. "Crucial" interests can be considered to be the protection of the State's finances, the protection of the environment, the safeguarding of work: the classification of the mandatory provisions is, therefore, one of the activities that most closely characterises the role of the legal professional in this field, since the list of interests provided in Article 30 is merely an example. In areas subject to substantive harmonisation, the court may classify a rule as being of mandatory application, bearing in mind the crucial interests which also exist in European legislation. National legislators rarely self-declare a particular rule as mandatory: a recent example can be found in some emergency provision adopted during the pandemic by Covid-19 on travel,

[160] Case C-673/16, n 34 *supra*, clarified that the concept of spouse, within the meaning of the provisions of EU law on freedom of residence for nationals of Member States and their family members, also includes spouses of the same sex.

transport or supply contracts to protect public health or the national economy.[161] A provision is mandatory if in a given State it operates imperatively on the basis of a legal system wide interpretation and having regard to the interests protected by it.[162] As established by the Court of Justice, the mandatory provisions are national rules whose observance is so vital "as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State".[163] In Regulation 2012/650 the judge may consider rules which, "for family or social considerations" impose restrictions on the succession of assets to be of mandatory application: even if there is no reference to family considerations in Regulation 1104, the judges may qualify rules of domestic family law as mandatory. Consider, in this regard, the choices made by the Italian legislator in Article 32-ter of L. 1995/218 on civil partnership: the obstacles to the constitution of the civil partnership provided for in this rule represent an imperative rule to be qualified as of mandatory application.[164] The protection of fundamental interests is ensured not only by rules that safeguard public interests, but also by safeguarding the existential interests of each individual. The express reference to fundamental rights and the principles of the Charter of Fundamental Rights contained in Article 38 of Regulation 1104 suggests that enforcement of the inviolable human rights is of vital importance for all Member States and, as such, a possible object of protection through the instrument of the mandatory provisions.[165] The mandatory provisions are closely related to the concept of public policy as they regulate a given legal relationship on the basis of mandatory rules which express the public policy of a given legal system regardless of the applicable foreign rules. Public policy functions differently in that it removes the effects which would be produced by the application of a foreign law incompatible with it. Public policy, like mandatory provisions, is a possible barrier to the principles of circulation and mutual recognition of decisions. The concrete circumstances in which public policy may impede the system of mutual recognition of decisions are to be determined in the light of the fundamental rights which the national courts must also provide for. The exceptional nature of the use of public policy clearly expressed in Recital 53 confirms that courts "should not be able to apply the public policy exception in order to

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[161] In Italy, see for example, Article 28(8), of d.l. 9/2020 according to which "[l]e disposizioni di cui al presente articolo costituiscono, ai sensi dell'articolo 17 della legge del 31 maggio 1995, n. 218 e dell'articolo 9 del Regolamento (CE) n. 593/2008 del Parlamento europeo e del Consiglio, del 17 giugno 2008, norma di applicazione necessaria" (*tr.* "the provisions referred to in this article constitute, pursuant to Article 17 of the L. of 31 May 1995, no. 218 and Article 9 of Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008, a mandatory provision"). The provision concerns the right to reimbursement or the use of vouchers in organized travel contracts. On this subject, see G. Zarra, 'Alla riscoperta delle norme di applicazione necessaria breve note sull'Article 28, co. 8, del d.l. 9/2020 in tema di emergenza Covid-19', in *www.sidiblog.org*.

[162] As clarified by Advocate General Nils Wahl in his Opinion, 15 May 2013, in Case C-184/12, *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgarian*, "the Member States have the power to determine specifically when public interests, understood in the broad sense, (20) are affected, which justifies according certain provisions a mandatory nature. In order to classify a national rule as mandatory, the national court will have to take into account both the letter and the general content of the act to which it belongs".

[163] See Court of Justice, 23 November 1999, Joined Cases C-369/96 and C-376/96 *Jean-Claude Arblade and Arblade & Fils SARL*, paragraph 30

[164] Similarly P. Bruno, n. 14 *supra*, 225.

[165] See P. Perlingieri, n 141 *supra*, 936.

set aside the law of another State" if this violates the principle of non-discrimination or when doing so would be contrary to the Charter of Fundamental Rights. The public policy which applies in the case of partnership with international elements does not consist of all the mandatory rules of a given State, because if it did, only foreign rules identical to the domestic ones could be applied by the court.[166] It rather presents a complex content consisting of internal rules, but also European Union rules or international principles.[167] The exceptional nature of the public policy therefore leads to a strict interpretation of its content and its use which may be subject to review by the Court of Justice, where the rules of the European Union are concerned. In Regulation 1104, public policy is a possible impediment for the applicable law on the basis of the connecting factors contained therein and may pose an obstacle to the recognition and enforcement of decisions; however, it can never prevent the operation of the rules dictated on the identification of the jurisdiction, as expressly established by Article 39.

A peculiar problem of effectiveness of foreign laws within a given State is the overcoming of the principle of *numerus clausus* of rights *in rem*. In some Member States this principle is considered to be of public policy as it prevents private individuals from creating rights *in rem* other than those expressly provided for by law. In order to avoid that the applicable law under Regulation 1104 could not be applied by the competent court due to this principle, the EU legislator made use of the so-called adaptation. Article 29 of the Regulation provides that where a right *in rem* provided for by the law applicable to the property consequences of a registered partnership is not recognised as a right *in rem* by the law of the State in which the application is invoked, "that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right under the law of that State, taking into account the aims and the interests pursued by the specific right in rem and the effects attached to it". The adaptation is also included in Regulation 2016/650, which shows how close family law and succession law are linked, also from the point of view of the regulation of assets. The adaptation technique, once again, shows how decisive is the interpretation carried out by the competent judicial authority which, with discretionary activity, but always subject to review by the Court of Justice, will have to verify in what way and to what extent it can give effect to a specific right in rem provided for by a foreign system. With a decision concerning the adaptation of rights in rem provided for in Regulation 2016/650, the Court of Justice[168] has helped to outline the scope of this criterion by establishing that it relates exclusively to the content of rights *in rem* and that it does not include the different problem of the transfer of rights *in rem*. Adaptation is an important tool to ensure that the rights granted to partners are effective and represents a legislative solution that can steer interpretation in the European context towards increasingly "flexible" solutions to find the appropriate rule for the specific case.

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[166] For a thorough examination of the concept of public policy see G. Perlingieri e G. Zarra, n 47 *supra*, 15-90.

[167] See F. Sbordone, 'Discrezionalità e tradizioni costituzionali (ordine pubblico, margine di apprezzamento, ponderazione tra valori, comparazione tra princípi)', in Aa.Vv., 'L'incidenza del diritto internazionale sul diritto civile (Naples: Edizioni Scientifiche Italiane, 2011), 31-42.

[168] See Court of Justice, 12 October 2017, Case C-218/16 *Kubicka*, paragraph 63. On the topic see G. Russo, '*Legacy by vindicationem: how to manage right in rem issues*', in J. Kramberger Škerl, L. Ruggeri and F.G. Viterbo eds, n 16 *supra*, 159-169.

V. Taxonomic variety of registered partnerships in the European Union

1. Introduction

From the second half of the last century, in terms of social perception, marriage - in its "traditional" meaning – has begun to be no longer considered the only acceptable way to live as a couple and have children;[169] even nuclear families are now often based on cohabitation or – even more recently, where permitted – on registered partnerships. In the past, *de facto* cohabitation arose from two orders of reasons: necessity, in the case of people who for different reasons could not marry (for example: separated people awaiting divorce or same-sex couples), or personal, cultural or ideological reasons that led them to refuse marriage. Only a few decades ago, the alternative of *de facto* cohabitation was added, in some countries, to the possibility of registered partnership, both for same-sex couples and – sometimes – for opposite-sex couples. When the partnership, whether *de facto* or registered, is a free choice of parties who could have opted for marriage, it tends to be characterised by a strong emphasis on personal fulfilment and equality between the members of the couple. In this kind of family structure, life in a couple is the main objective and procreation occupies a secondary place and is often excluded, even in heterosexual couples.[170]

2. "Limping status" situations within the European Union

In the EU, despite the progressive intensification of migration flows,[171] there is a lack of a uniform view on the plurality of legal models for the recognition of couples, both among the countries that have signed the ECHR and within the European Union. This raises sensitive taxonomic issues, as a result of the considerable differences between Member States. The possibility that a couple legally recognised in one country cannot be recognised in another country is called "limping status" in the context of common law. This lack of recognition, which is contrary to the *locus regit actum* principle,[172] even though in several

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169 On the "traditional" concept of marriage and family, cf. J.M. Scherpe, 'Formal recognition of adult relationships and legal gender in a comparative perspective?', in C. Ashford and A. Maine eds, *Research Handbook on Gender, Sexuality and the Law* (Northampton: Elgar, 2020), 17: «[u]ntil fairly recently, family law was solely focused on marriage, understood as the union of a man and a woman for life. Indeed, families were only created through and by that kind of marriage, and any adult relationship beyond that was not even deemed to be family».

170 Cf. R. Garetto, 'Social Perspective Related to Family Formations in the European Union', in Id. ed, *Report on Collecting Data. Methodological and Taxonomical Analysis (*Torino: PSEFS/IgiTo, 2019), 1-9.

171 Cf. M. Rizzuti, 'Ordine pubblico costituzionale e rapporti familiari: i casi della poligamia e del ripudio Constitutional Public Policy and Family Relationships: Polygamy and Repudiation as Case Studies', 10, *Actualidad Jurídica Iberoamericana*, 604, 604-605 (2019); R. Garetto, 'The Impact of Multicultural Issues on the Notion of «Family Member»' 79 *Zbornik Znanstvenih Razprav*, 7, 7-8 (2019).

172 Considering also the competing *lex loci celebrationis* principle, it seems that if this were to prevail over the *locus regit actum* principle, the possibility to generate a limping status would tend to be greater. Cf. I.F. Baxter, 'Recognition of Status in Family Law. A Proposal for Simplification' 39 *Canadian Bar Review*, 301, 344 (1961): «[a] universally adopted system whereby formal validity is referred to the lex loci celebrationis and essential validity to personal law would give rise to a higher rate of "limping" marriages than a universally adopted system of applying locus regit actum to total validity».

respects it is not desirable,[173] is nevertheless considered compatible with Articles 8 and 14 of the ECHR, as again recently stated by the European Court of Human Rights in the *Ratzenböck and Seydl v. Austria* case.[174]

The taxonomic analysis of legally recognized relationships shows that the problems of "limping status" are not only related to marriage, but also to registered partnerships. Marriage raises problems of recognition within the European Union when two persons of the same sex married in a Member State request the transcription of that marriage in a Member State where same-sex persons are not allowed to enter into marriage.

Less frequent, and often overlooked, is the hypothesis concerning the request for recognition of registered partnerships. The registered partnership poses particular recognition issues in two hypotheses:

a. in the case of a same-sex couple who have obtained registration of their partnership in a Member State which does not permit them to marry, if they apply for recognition of the partnership in a Member State which does not permit registered partnerships;

b. in relation to couples who - regardless of sex - may marry but opt for a registered partnership instead of marriage. At the root of this choice, which is often poorly taken into account, there may be cultural or ideological reasons relevant to the very concept of marriage.

If partners who have obtained their partnership registration were to move, for whatever reason, to a Member State which does not recognise registered partnerships, they would suffer the effects of "limping status". This aspect is significant because it allows us to understand how the negative effects resulting from the impossibility of obtaining the recognition of valid partnerships do not depend on the gender of the partners.

3. Taxonomic framework

The Regulation constantly refers to "partners", with no indication of their gender, and is therefore applicable to registered partnerships consisting of both persons of the opposite sex and persons of the same sex. However, registered partnerships have recently been the subject of regulation: the first Member State to allow them was Denmark, in 1989,[175] and

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[173] Cfr. F. Deana, 'Cross-border continuity of family status and public policy concerns in the European Union', 40, *Diritto Pubblico Comparato ed Europeo*, 1979, 1982 (2019): «[l]imping status might cause devastating consequences to status holder and his/her family members, such as impossibility to gain the citizenship of a given State, benefit from migration rights like family reunification and determine who holds parental responsibility or obligations of maintenance to a child or to a former spouse following divorce»; M. Ní Shúilleabháin, 'Private International Law Implications of «Equal Civil Partnerships»', 68, *International and Comparative Law Quarterly*, 161, 166 (2019): «[l]imping status can result in an arbitrary denial of all of the rights and obligations ordinarily associated with the status, particularly in the event of relationship breakdown».

[174] ECHR, *Ratzenböck e Seydl c. Austria*, 26 October 2017, 29475/12. The judgment is commented by P. Bruno, 'Coppie omosessuali e unione registrata: la Corte di Strasburgo evita la reverse discrimination', in *www.ilfamiliarista.it*.

[175] Denmark was the first Member State, in 1989. Cf. E.D. Rothblum, 'Same-Sex Marriage and Legalized Relationships: I Do, or Do I?' 1 *Journal of GLBT Family Studies*, 21, 23 (2005). In subsequent years, in the Scandinavian area, Norway (1993), Sweden (1995) and Iceland (1996) - the latter, at the time, under negotiation for EU membership - also allowed registered same-sex partnerships. More on the topic: K. Boele-Woelki, 'Private International Law Aspects of Registered Partnerships and Other Forms of Non-Marital Cohabitation in Europe Conflict of Laws', 60, *Louisiana Law Review*, 1053, 1053-1054 (2000).

originally answered the recognition needs of same-sex couples. Only later on - and only in some Member States - were couples of the opposite sex also able to apply for registration of their partnership.
By bearing in mind the peculiarity of registered partnerships, one can understand the non-uniform spread, and the reasons for the differences in regulation in the different Member States that have adopted them.
Fourteen Member States allow same-sex couples to register their union (Austria, Belgium, Croatia, Cyprus, Czech Republic, Estonia, France, Greece, Hungary, Italy, Luxembourg, Malta, the Netherlands, and Slovenia). In the past, before same-sex couples were granted the right to marry, in five other states (Denmark, Finland, Germany, Ireland and Sweden) it was provided that they could register their union and such registered partnerships are still valid in those Member States if the parties did not opt to convert them into marriage. Nine Member States also allow opposite-sex couples, in addition to same-sex couples, to register their union (Austria, Belgium, Cyprus, Estonia, France, Greece, Luxembourg, Malta, the Netherlands), while five Member States (Croatia, Czech Republic, Hungary, Italy, Slovenia) allow only same-sex couples to register their union. Two Member States have not made provision for registered partnerships but allow same-sex couples to marry (Portugal and Spain, but many Autonomous Communities have regulated registered partnerships in the latter Member State). Finally, in six Member States (Bulgaria, Latvia, Lithuania, Poland, Romania, Slovakia) registered partnerships are not provided for in any form whatsoever, nor are couples of the same sex allowed to marry.[176]

4. Map of property consequences in the Member States

As far as the property consequences of registered partnerships[177] are concerned, for purely structural reasons, the regulations are summarised by dividing the Member States between those who allow same-sex and opposite-sex partnerships to be registered and those who reserve registration for same-sex couples.
Where reference is made, by analogy, to the marital property regime, for further details see the specific coverage offered elsewhere in this publication.[178]
In Austria, although there are differences between registered partnerships and marriage (e.g. the parties of a registered partnership are not bound by mutual fidelity, but only by mutual trust and the dissolution of the partnership is easier and faster), the property consequences of registered partnerships between persons of the same or opposite sex are essentially the same as marriage, i.e. the application of the separation of property regime (*Gütertrennung*), unless the parties agree otherwise.

[176] The data reported is comprehensively compiled in: S. De Simone, 'Taxonomical Table Related to Models of Couple in the European Union', in R. Garetto ed, *Report on Collecting Data Methodological and Taxonomical Analysis*, n 2 *supra*, 24-27.
[177] Information on the property consequences applicable to civil unions, where recognised by individual Member States, is obtained from: L. Ruggeri, I. Kunda and S. Winkler eds, *Family Property and Succession in EU Member States National Reports on the Collected Data* (Rijeka: Sveučilište u Rijeci, Pravni fakultet, 2019). Please refer to it for further details.
[178] Cf. Cap. I, *supra.*

In Belgium, the general effects of registered partnerships (*cohabitation légale*), although similar to marriage, do not entail personal obligations between the parties, which may be of the same or opposite sex. Unlike marriage, the parties to the registered partnership are subject to a system of separation of property unless they agree otherwise.
In Cyprus, registered partnerships, which are allowed irrespective of the sex of the partners, have the same consequences as marriage. The separation regime shall apply to them unless the parties decide otherwise.
In Estonia the property regime of registered partnerships is similar to the marriage regime. The parties, of same or opposite sex, choose between the property regimes established by law for marriage. The consequences of this choice are the same as for marriage: community of property, separation of property or community of property increments. However, the partners may, by agreement, regulate their property relations in another way.
In France, the Pacs (*pacte civil de solidarité*) regulate the cohabitation of the parties, regardless of sex, and stipulate that they provide each other with moral and material support in proportion to their belongings. In relation to the property consequences, the separation of property is provided for, unless the parties, by agreement, decide otherwise.
In Greece, registered partnerships are based on the same principles of equality and solidarity as marriage, and registration is allowed for partners regardless of gender. They are subject to the property consequences of marriage, i.e. the separation of property, unless the parties choose a regime of community.
In Luxembourg, the property consequences of marriage, i.e. community of property, apply to registered partnerships, whether they are of the same or opposite sex, unless the parties opt for the separation of property, for a covenant community or for the community of property increases.
In Malta, registered partnerships, regardless of the sex of the partners, are subject to the property consequences of marriage, which provide for community of property, unless the parties agree otherwise.
In the Netherlands, the same property consequences as marriage, i.e. the "limited community of property" regime in force since 1 January 2018, apply to registered partnerships. However, the parties are allowed to regulate the matter differently, by agreement. The couple, consisting of persons of the same or opposite sex, may convert their registered partnership into marriage without the need to change their property regime.
As already noted, in only five Member States – Croatia, Czech Republic, Hungary, Italy, Slovenia – registration of the union is reserved exclusively for same-sex partners.
In Croatia, the rules governing the property consequences of registered partnerships are broadly in line with those laid down for marital regimes: there is a community of property unless the parties agree otherwise.
In the Czech Republic the registered partnership is only partially regulated as marriage. As far as the property consequences are concerned, unlike marriage, there is no community of property and the parties can at most acquire assets in co-ownership.
In Italy the discipline of registered partnerships mirrors the marital one, despite some differences: for example, there is no obligation of mutual fidelity. With regard specifically to the property consequences, the parties will be subject to the community regime, as is the

case in marriage, unless the parties opt for separation, the contractual community and/or the property fund.

In Slovenia, registered partnerships are subject to the property consequences of marriage, i.e. the community of property (*skupno premoženje*), with the exception of separation for the exclusive property of each of the parties.

In Hungary, the matrimonial property regime, i.e. community of property, from which the parties may nevertheless derogate by agreement, also applies to civil unions.

In five Member States, Denmark, Finland, Germany, Ireland and Sweden, same-sex couples have been allowed to register their partnership until each Member State has granted them the right to marry. Partners in registered partnerships were nevertheless given the option to convert the previous partnership into marriage.

In Denmark registered partnerships are no longer allowed since 15 June 2012. Those previously constituted remain valid unless the parties opt for their conversion into marriage. Registered unions are subject to the property consequences of marriage, which provide for a deferred community of property, the consequences of which are produced only at the eventual dissolution of the relationship, without prejudice to the possibility for the parties to choose, by agreement, the separation of property.

In Finland registered partnerships have been allowed from 2002 until 2017. After that year, following the change in the regulations governing marriage, the registration of new partnerships is no longer permitted. If the parties decide not to convert their union into marriage, the property consequences of their relationship - unless otherwise agreed - will coincide with the marital property regime, i.e. the separation of property, with the exception of the division of property into equal parts in the event of dissolution of the union.

In Germany since 1 October 2017 same-sex couples are no longer allowed to register their partnerships, as they are allowed to enter into marriage. Partners who have registered their partnership before that date may convert it into marriage. If they do not do so, the registered partnership will in any case remain valid and the provisions of the marriage will apply to it, or, unless the parties agree otherwise, the regime of community will be limited to increases in assets (*Zugewinngemeinschaft*).

In Ireland same-sex partners were able to register their union from 1 January 2011 until the entry into force of the Marriage Act 2015 on 16 November 2015. The property consequences for couples who do not opt for the conversion of their union into marriage are the same as for the matrimonial property regime, i.e. the separation of property, with no other option.

In Sweden from 1995 to 2009 same-sex couples were able to register their marriage. Since 2009, these couples have been given the opportunity to convert their civil union into marriage, following the reform of the rules on marriage. Couples who have not carried out the conversion are subject to the marital property regime, i.e. deferred communion (*giftorättsgods*), which guarantees each party half of the common property in the event of dissolution of the communion.

5. Inherent issues in the plurality of models of unions

Observing the evolution of the phenomenon of registered partnerships in the context of the European Union over the last few decades, it is clear that they have emerged in response to a specific need: legal recognition - other than marriage - for same-sex couples.[179] The rise in the following years in some Member States of a new and disruptive dynamic, such as the radical reform of marriage, so that it can also be celebrated by same-sex couples, has partly changed the function of registered partnerships. That is at least where such a model, made available to partners irrespective of gender, coexists with a gender-neutral marriage model. In this scenario, registered partnerships therefore tend to respond to a new need, namely the formalisation of the bond between people who, for personal, cultural or ideological reasons, do not intend to use the marriage model.[180]

From the many different models of union derives, consequently, the plurality of ways of dissolution or annulment of the bond. Right from the very first introduction of these new models, there was a perceived need to regulate the failure of the relationship, with divorce as a general term of reference. However, a less rigid formal procedure was identified, based on mutual agreement between the parties, and recourse to the courts was foreseen only in relation to property interests or to ensure protection for any minors involved.[181] The subsequent evolution and the strong differences, depending on whether the registered partnership is reserved for people of the same sex who do not have access to marriage, or is instead an alternative – available to anyone – to the matrimonial choice, affect the discipline of the dissolution of the relationship. Even in the first case, however, there are differences with respect to the dissolution or annulment of the marriage bond.[182]

The interpreter addresses a number of urgent issues in the different Member States: on the one hand, the asymmetry resulting from the introduction of registered partnerships for same-sex couples only, without prejudice to marriage for opposite-sex couples, and on the other hand, the demand for fair treatment between opposite-sex and same-sex couples, where the discipline of marriage has been innovated and the model of registered

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[179] J.M. Scherpe, 'The Past, Present and Future of Registered Partnerships', in J.M. Scherpe and A. Hayward eds, *The Future of Registered Partnerships. Family Recognition Beyond Marriage?*, n 15 *supra*, 570.

[180] J.M. Scherpe, 'Quo Vadis, Civil Partnership?' 46 *Victoria University of Wellington Law Review*, 755, 759 (2015).

[181] Cf. J.A. Hoogs, 'Divorce without Marriage: Establishing a Uniform Dissolution Procedure for Domestic Partners through a Comparative Analysis of European and American Domestic Partner Laws', 54, *Hastings Law Journal*, 707, 716-717 (2002). A less rigid formal procedure for the dissolution of a registered partnership does not, however, imply greater instability than marriage: cf. C. Draghici, 'Equal Marriage, Unequal Civil Partnership: A Bizarre Case of Discrimination in Europe', 29, *Child and Family Law Quarterly*, 313, 328 (2017).

[182] The dissolution of the "civil union" between persons of the same sex in Italy, for example, has a regulation that matches the divorce, but does not require the parties to have a prior period of separation. This exclusion is related to the exemption from the obligation of fidelity established in Italy for the "civil union", from which follows the impossibility of a fault, a sanction typical of marital infidelity. On the topic, cf. L. Olivero, 'Unioni civili e presunta licenza d'infedeltà' 71 *Rivista Trimestrale di Diritto e Procedura Civile*, 213, 213-215 (2017). It is necessary, however, to keep in mind that the exclusion of the separation in the "civil union" in Italy is questioned by part of the literature: see in particular G. Oberto, 'I rapporti patrimoniali nelle unioni civili e nelle convivenze di fatto', in M. Blasi, R. Campione, A. Figone, F. Mecenate and G. Oberto, 'La *nuova regolamentazione delle unioni civili e delle convivenze - legge 20 maggio 2016, n. 76*', (Torino: Giappichelli, 2016), 29, 55. In general on the subject of the dissolution of civil unions, cf. C. Rimini, 'Article 1, 24° comma' in A. Scialoja and G. Branca eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli, 2020), 346-358.

partnerships has been maintained, without extending it to opposite-sex partnerships.[183] In addition there are the issues of domestic law and private international law relating to the absence of the model of registered partnerships in the law of a Member State. This applies not only when same-sex couples are offered no possibility of recognition of their union, but also when they have access to marriage.

Considering five Member States such as Spain, Italy, the United Kingdom – before its exit from the European Union – Austria and Romania, there is clear evidence of these problems in terms of case law. In Spain, the adoption of a registered partnership model regulated by State law was not considered necessary; in Italy it was elected – in certain situations - to record a same-sex marriage celebrated abroad as a registered partnership; in the United Kingdom, it was found that heterosexual couples should also be able to register their partnership; in Austria, it was found that the rights granted to registered partners (same-sex) and spouses (opposite sex) have progressively come to coincide, so that there is no longer any justification for maintaining separate and alternative systems for opposite-sex/same-sex couples; finally, in Romania, where same-sex couples cannot register their union, nor have access to marriage, the European Court of Justice has recognised the right of same-sex partners to reside in the State, even if they are non-EU foreigners, if the couple has married abroad.

5.1. The Spanish experience

In Spain, after the approval of Law 13/2005 – which allowed persons of the same sex to marry – and Law 15/2005 – which allowed unilateral divorce, speeding up its procedure – a very stimulating debate was opened, aimed at coordinating the concept of marriage with other situations in the Spanish legal system.[184] It should be noted that Spain has a "multi-legislative" framework[185] in relation to registered partnerships: they are not governed by a State law, but are provided for and regulated in several Autonomous Communities, through *leyes autonómicas*.[186]

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183 On asymmetry and fairness of treatment, cf.: H. Fenwick and A. Hayward 'Rejecting asymmetry of access to formal relationship statuses for same and different-sex couples at Strasbourg and domestically', 6, *European human rights law review*, 544, 544-548 (2017).

184 Cf. P. Domínguez Lozano, 'Las uniones de personas del mismo sexo: las opciones de regulación y sus implicaciones jurídicas', 20, *Derecho privado y Constitución*, 173, 193 (2006); R. Garetto, 'Presupposti per una «ridefinizione» concettuale del matrimonio. Il dibattito fra sostenitori della tradizione e fautori del cambiamento negli Stati Uniti d'America ed in Spagna', 4, *Annali della Facoltà Giuridica Università di Camerino*, 51, 98 (2015).

185 Cf. M.J. Cazorla González, 'Ley aplicable al régimen económico matrimonial después de la disolución del matrimonio tras la entrada en vigor del Reglamento UE 2016/1104', 21, *Revista Internacional de Doctrina y Jurisprudencia*, 87, 93 (2019).

186 Cf. A.M. Pérez Vallejo and M.J. Cazorla González, 'Spain', in L. Ruggeri, I. Kunda and S. Winkler eds, n 9 *supra*, 612-615. In Cataluña: l. 25/2010 on *Uniones Estables de Pareja*. In Aragón: d.lg. n. 1, of 22 March 2011, containing the reformed text of the *Código del Derecho Foral de Aragón*. In Navarra: l. 6/2000 related to *Igualdad Jurídica de las Parejas Estables*. In the Comunidad Valenciana: l. 1/2001 on *Uniones de hecho*. Nelle Baleares: l. 18/2001 on *Parejas Estables*. In the Comunidad de Madrid: l. 11/2001 on *Uniones de Hecho de la Comunidad de Madrid*. In Asturias: l. 4/2002 on *Parejas Estables del Principado de Asturias*. In Andalucía: l. 5/2002 on *Parejas de Hecho de Andalucía*. In Canarias: l. 5/2003 on *Parejas de Hecho de la Comunidad Autónoma de Canarias*. In País Vasco: l. 2/2003, on *Parejas de Hecho*. In Extremadura: l. 5/2003, on *Parejas de Hecho de la Comunidad Autónoma de Extremadura*. In Cantabria: l. 1/2005 on *Parejas de Hecho*. In Murcia (Región de Murcia): l. 7/2018 on *Parejas*

In spite of the heterogeneity of the regulations on the subject, there are still elements that specifically characterise the registered unions of the different Autonomous Communities.[187] The first of these elements is their rapid possibility of dissolution. Since *Ley* 15/2005 has had a heavy impact on the matrimonial regime, allowing each of the spouses to terminate the marriage bond simply by a manifestation of will, without having to provide any cause whatsoever, the differences between marriage and registered partnerships in this area have been considerably diminished. Another element that specifically characterised registered partnerships – before 2005 – was the possibility for same-sex partners to have their partnership recognised and made official. This has ceased to be a distinguishing feature since the approval of l. 13/2005.

Currently, in the Autonomous Communities that regulate by law the regime of unions not based on marriage, those who have chosen to register their union and those who have, instead, preferred to marry are in many ways in a similar situation. In this sense, laws 13 and 15/2005 characterise the model of marriage in a particularly "flexible" way and, although they do not formally affect registered partnerships regulated by the Autonomous Communities, they strip them of certain features that were previously their exclusive prerogative. This concept is clearly expressed in a *Tribunal Supremo* judgment of 12 September 2005,[188] according to which, after the enactment of laws 13 and 15/2005, if the partners do not enter into marriage, it means that by no means at all, they do not wish the consequences of the marriage to regulate their relationship. In other words, anyone in Spain who wishes to obtain a certain legal status in relation to their union will have to marry, while those who – by their own choice – decide not to marry will renounce that status.[189] Any analogical application of matrimonial discipline to registered partnerships – as regulated in the individual Autonomous Communities – would therefore be unjustified, since it would affect the very freedom of partners who have opted for registered partnerships instead of marriage. [190]

It should be noted, however, that the lack of state legislation to regulate registered partnerships in a uniform manner raises questions of domestic law[191] and questions concerning the applicability of European legislation to registered partnerships governed by rules dictated by the Autonomous Communities.[192] Furthermore, the orientation of the

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de Hecho. In Galicia: l. 10, of 28 June 2007 containing the reformed text of additional provision 3 to l. 2 of 14 June 2006 on Galician civil law.

187 C. Martínez de Aguirre Aldaz, 'Perspectivas sobre el «matrimonio» entre personas del mismo sexo', in C. Martínez de Aguirre Aldaz and P. de Pablo Contreras, *Constitución, derecho al matrimonio y uniones entre personas del mismo sexo* (Madrid: Rialp, 2007), 19, 22-23.

188 Cf. STS n. 6U 1/2005, del 12/9/2005: «*hoy por hoy, con la existencia del matrimonio homosexual y del divorcio unilateral, se puede proclamar que la unión de hecho está formada por personas que no quieren, en absoluto, contraer matrimonio con sus consecuencias*».

189 Cf. C. Martínez de Aguirre Aldaz, n 19 *supra*, 23-24: «*una vez que el matrimonio civil ha asumido el ámbito subjetivo y las características jurídicas propios de las uniones de hecho ¿qué sentido tiene establecer otro estatuto, semejante pero no idéntico al matrimonial, para quienes no han querido casarse, pudiendo hacerlo?*».

190 Cf. M.J. Cazorla González, n 186 *supra*, 89.

191 M. Serrano-Fernández, 'Una propuesta de regulación de una ley estatal de parejas de hecho' 61 *Anuario de derecho civil*, 543, 544-553 (2008).

192 On issues related to the applicability of Regulation 2016/1104, cf. M. Soto Moya, 'El Reglamento (UE) 2016/1104 sobre régimen patrimonial de las parejas registradas: Algunas cuestiones controvertidas de su puesta en funcionamiento en el sistema español de derecho internacional privado Council Regulation (EU) 2016/1104 in Matters of the Property Consequences of Registered Partnerships: Some Controversial Issues

Tribunal Supremo seems to overlook one aspect: some people may opt for a registered partnership because of their cultural or ideological vision of marriage and, despite this, may have the desire to formalize their union. Ignoring this desire could lead to "limping status" situations[193] for couples – of the same or opposite sex – who have registered their marriage in a Member State which allows it and choose to move to a State – such as Spain – which regulates the matter in a "multi-legislative" way.

5.2 The Italian experience

In Italy, registered partnerships (civil unions) are only accessible to people of the same sex, which are not allowed to opt for marriage. As a result of the registration, their status largely mirrors that of marriage. With regard to the registration of same-sex marriage celebrated abroad, the *Corte di Cassazione* – with judgment n. 11696 of 14 May 2018[194] – established that same-sex marriage celebrated abroad between an Italian citizen and a foreigner cannot be registered in Italy and considers admissible only its recognition as a registered partnership.
In order to reach this conclusion, the Court interpreted l. 76 of 20 May 2016 and the implementing decrees (d.lg. 19 January 2017, 5 and 7) concerning private international law. The Court highlights the legislator's desire to introduce in Italy – in 2016 – an *ad hoc* model for the recognition of same-sex partnerships through registered partnerships. With regard to the registration in Italy of the marriage celebrated abroad between persons of the same sex, if one of the spouses is an Italian citizen, the Court recognizes that the text of Article 32 *bis* of l. 218 of 31 May 1995, with the amendments introduced by the d.lg. 7 of 19 January 2017, clearly reaffirms the legislator's choice for the registered partnership model. This downgrading of marriage[195] is, however, without prejudice, since the Court does not detect a discrimination on the grounds of sexual orientation, as the ECHR ruled in 2015 in the case *Oliari et al. v. Italy*,[196] same-sex partners must be guaranteed the right to private and

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from its Implementation in the Spanish IPLSystem' 35 *Revista Electrónica de Estudios Internacionales*, 1, 22 (2018): «*parece totalmente ilógico que España forme parte de un Reglamento que no pueda aplicar a las parejas que se han "registrado" en su propio territorio, o que se incluyan solo las registradas en determinadas Comunidades Autónomas*». On the same topics see: D. Marín Consarnau, 'Las "uniones registradas" en España como beneficiarias del derecho de la UE A propósito de la Directiva 2004/38/CE y del Reglamento (UE) 2016/1104 - Spanish "registered partnerships" as beneficiaries of EU law according to the Directive 2004/38 (EC) and the Regulation (EU) 2016/1104' 9 *Cuadernos de Derecho Transnacional*, 419, 420-424 (2017).

193 M. Ní Shúilleabháin, n 5 *supra*, 165, *sub* nota 25: «[*a*] 'limping' partnership is one which is valid and recognized in one country, but denied validity and recognition in another».

194 Corte di Cassazione-Sezione civile I 14 May 2018, n. 11696 *Foro it.*, I, 1965, commented by G. Casaburi (2018).

195 On the subject of downgrading, see *supra*, Sez. II, § 2. For more in-depth analysis, cf. S. Tonolo, 'La tutela internazionale del diritto fondamentale alle relazioni interpersonali e l'introduzione nell'ordinamento italiano degli istituti delle unioni civili', in R. Di Biase et al, *Diritto, economia e società. In ricordo di Luisa Cusina* (Trieste: Edizioni Università di Trieste, 2018), 249, 255.

196 ECHR, *Oliari et al. c. Italia*, 21 July 2015, 18766/11 and 36030/11, *Nuova Giurisprudenza Civile Commentata*, I, 918 (2015), commented by L. Lenti, 'Prime note a margine del caso Oliari c. Italia', in the same law review, II, 575-581. For more in-depth analysis, see also: M.C. Venuti, 'La regolamentazione delle unioni civili tra persone dello stesso sesso e delle convivenze in Italia' 47 *Politica del diritto*, 95, 95-99 (2016) and M.M. Winkler, 'Same-Sex Marriage and Italian Exceptionalism' 12 *Vienna Journal on International Constitutional Law* 431, 433-456 (2018).

family life, pursuant to Article 8 of the ECHR, without the individual State being required to adopt, specifically, marriage instead of registered partnership.

5.3 The United Kingdom experience

The United Kingdom, although as a result of Brexit no longer a Member State of the European Union since 31 January 2020,[197] offers a very interesting picture of the taxonomic aspects of the registered partnership due to the wide debate that has developed over the past few years on the subject and which has resulted in the "Equal Civil Partnerships" movement.

In very general terms, bearing in mind that there are three distinct legal jurisdictions within the United Kingdom, the debate is based on a rather complex situation: until 2019, opposite-sex and same-sex couples in England, Wales and Scotland were allowed to marry without distinction, whereas in Northern Ireland only heterosexual couples were allowed to marry; all same-sex couples had the option of registering their partnership, while opposite-sex couples were not allowed to do so.[198]

In 2014, the British Rebecca Steinfeld and Charles Keidan, *de facto* heterosexual cohabitants who had a personal objection to marriage, had their partnership registration application rejected, failing to meet the requirement of same gender as required by the Civil Partnership Act of 2004. Claiming discrimination against same-sex couples,[199] the two brought a case to the court. Their arguments were not admitted in the first instance and on appeal,[200] but in 2018 the Supreme Court found a blatant unequal treatment to the detriment of opposite-sex couples[201] and pointed out that, at the time of promulgation of the Marriage (Same Sex Couples) Act of 2013 (which allowed same-sex couples to have access to marriage), it would have been necessary to repeal the Civil Partnership Act of 2004 or provide for its extension to opposite-sex couples.[202] The Court found that sections 1 and 3 of the Civil Partnership Act 2004, which do not allow a heterosexual couple to register their union, were incompatible with section 4 of the Human Rights Act 1998. It also found a clear conflict with the combined provisions of Article 8 and Article 14 of the ECHR. Although the Court could not intervene in a corrective manner, it noted the discrimination which was taking place and made it clear that it would have been

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197 E. Dagilyte, 'The Promised Land of Milk and Honey? From EU Citizens to Third-Country Nationals after Brexit', in S. Mantu, P. Minderhoud and E. Guild eds, *EU Citizenship and Free Movement Rights* (Leiden: Brill Academic Publishers, 2020), 351, 351-352. For more information on the effects of Brexit on family law in a transnational perspective, cf.: L. Ruggeri, 'Brexit and new European framework in family property regimes' *6th SWS International Scientific Conference on Social Sciences. Conference Proceedings*, 59, 59-64 (2019)

198 R. Garetto, 'Opposite-sex registered partnerships and recognition issues', in J. Kramberger Škerl, L. Ruggeri and F.G. Viterbo, *Case Studies*, n 16 *supra*, 89, 89-90.

199 R. Garetto, 'Civil Partnerships: the EU Framework for Cross-Border Couples and the Recent Legislative Reform in the UK' *6th SWS International Scientific Conference on Social Sciences. Conference Proceedings*, 65, 66-67 (2019).

200 A. Hayward, 'Relationships between adults: Marriage, Civil Partnerships, and Cohabitation', in R. Lamont ed, *Family Law* (Oxford: Oxford University Press, 2018), 20, 50-51.

201 *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development*, [2018] UKSC 32, n. 3, available at *https://www.supremecourt.uk/*.

202 R (on the application of Steinfeld and Keidan) v Secretary of State for International Development, n 201 above, n. 50.

appropriate for the Government of England and Wales to reform registered partnerships.[203] In response to these concerns, the Government recognised the need to introduce a legislation to extend to opposite sex partners the possibility of registering their partnership. The legislative process ended on 16 March 2019, with the entry into force of the Civil Partnerships, Marriages and Deaths (Registration etc) Act.
On 13 January 2020 in Northern Ireland, with the Marriage (Same Sex Couples) and Civil Partnership (Opposite Sex Couples) (Northern Ireland) Regulations 2019, same-sex marriage is permitted and at the same time - applying the rationale of the UK Supreme Court ruling - the Civil Partnership Act 2004 is amended, also allowing heterosexual couples access to registered partnerships.
The Scottish Parliament is examining the Civil Partnership (Scotland) Bill, introduced on 30 September 2019, which should allow also opposite-sex couples to register their marriage in Scotland.

5.4 The Austrian experience

Austria introduced registered partnerships (*Eingetragene Partnerschaft*) in 2010 and reserved them for same-sex partners.[204] Since then, a series of changes in their discipline has increasingly aligned them with marriage in terms of rights and protections.[205] In 2012, the Austrian Constitutional Court found the unconstitutionality of the differences between marriage and registered partnership with respect to the celebration formalities[206] and in 2014 ruled that the prohibition placed on partners with respect to adoption - both joint and second-parent - was unconstitutional.[207]
On 26 October 2017, the ECHR in *Ratzenböck and Seydl* v. *Austria* case already mentioned,[208] ruled that the Austrian law on registered partnerships does not violate the ECHR by precluding heterosexual couples from entering into a partnership. The asymmetry that existed at the time of the Court's decision was not comparable to the one mentioned regarding England and Wales, since in Austria same-sex couples had no choice between two options – civil union or marriage – and, since they could only enter into civil union, they were in a substantially symmetrical situation (on a "functional" level) to that of opposite sex couples, who were precluded from registering their union.[209]
On 4 December 2017, however, the Austrian Constitutional Court – in spite of the ECHR ruling recently made – opted to allow same-sex couples to have access to marriage and, at

[203] A. Hayward, 'Equal Civil Partnerships, Discrimination and the Indulgence of Time: R (on the application of Steinfeld and Keidan) v Secretary of State for International Development' 82 *Modern Law Review*, 922, 925 (2019).
[204] *Eingetragene Partnerschaft-Gesetz, BGB1. I - Ausgegeben am 30. Dezember 2009 - Nr. 135.*
[205] Cf. S. Fulli-Lemaire, 'Legal Recognition of Same-Sex Relationships in Central Europe: Steady Progress', in K. Boele-Woelki and A. Fuchs eds, *Same-Sex Relationships and Beyond: Gender Matters in the EU* (Antwerpen: Intersentia, 2017), 19, 24-25.
[206] VfGH, No. B 125/11-11, 12.12.2012.
[207] VfGH, No. G 119/2014, 11.12.2014. On the case settled by the Constitutional Court, see: I. Murer, 'Exclusion of registered partners from adoption rights found to be discriminatory' 9 *Vienna Journal on International Constitutional Law*, 281, 281-286.
[208] Cf. n 174 *supra*.
[209] Cf. H. Fenwick and A. Hayward, n 183 *supra*, 555-556.

the same time, opposite-sex couples to have access to registered partnerships.[210] The judgment recognises that discrimination against same-sex couples violates the principle of equality of all citizens before the law, laid down in Article 7 of the Austrian Federal Constitution. Austria thus became the first Member State to introduce same-sex marriage following the ruling of a Constitutional Court, rejecting the principle of "functional equivalence" of models and also providing for the extension to all, irrespective of sex, of the right of access to registered partnerships.[211]

5.5 The Romanian experience

Currently six Member States, Bulgaria, Latvia, Lithuania, Poland, Romania and Slovakia, have not adopted the registered partnership model in their legislation and do not allow same-sex couples to marry. This clearly leads to an asymmetry within individual states, as opposite-sex couples who wish to live together have two options: *de facto* cohabitation or marriage, while the choice for same-sex couples is limited to cohabitation only.[212]
In terms of private international law, this raises the issue of the consequences in these Member States of marriages between persons of the same sex and partnerships, between persons of the same or opposite sex, validly constituted in other Member States. The Court of Justice of the European Union ruled on the subject on 5 June 2018,[213] in the *Coman* case.[214] The case refers to two men, *Relu Adrian Coman*, a Romanian with US citizenship and *Robert Clabourn Hamilton*, a US citizen. The two of them got married in 2010 in Belgium. Both are resident in Belgium, by virtue of the right of free movement enjoyed by both EU citizens (Article 21 TFEU) and their family members, even when they are non-EU nationals. In 2012, *Relu Adrian Coman* started the procedure in Romania to be able to work and reside legally in his country with his spouse. The rejection of the request was subject to judicial appeal, on the assumption of unconstitutionality with respect to the provisions of Article 277, paragraphs 2 and 4 of the Romanian Civil Code. The Court of Justice applied a sort of balance of principles, according to a criterion of reasonableness,[215] and concluded that domestic public policy can "be mitigated",[216] when faced with the risk of a limit or exclusion to free movement within the territory of the Member States. This is on the assumption that recognising certain consequences of a marriage between persons of the same sex validly constituted in another Member State does not affect the internal rules on marriage, which are in any case a matter for each Member State.

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[210] VfGH, No. G 258/2017, 4 December 2017.
[211] Cfr. J.M. Scherpe, n 169 *supra*, 22: «*Austria is the only European jurisdiction where the opening up of marriage was the result of litigation/judicial decision: the Austrian Constitutional Court ruled that the 'functional equivalent' approach was unconstitutional, and therefore held not only that marriage had to be open to same sex couples but also that consequentially the option of registered partnership must be available to opposite sex couples*».
[212] H. Fenwick e A. Hayward, n 183 *supra*, 544.
[213] For an overview of the case in the context of same-sex marriage, see Ch. I, *supra*.
[214] Case C-673/16, n 34 *supra*. The judgment can be found on the institutional website: *http://curia.europa.eu/juris/*. For a comment on the case, cf.: G. Perlingieri e G. Zarra, n 47 *supra*, 158-160.
[215] On the feasibility of balancing the principles in terms of public order according to criteria of reasonableness, cf. G. Perlingieri and G. Zarra, n 47 *supra*, 56-57.
[216] S. Álvarez González, '¿Matrimonio entre personas del mismo sexo para toda la ue? A propósito de las conclusiones del Abogado General en el Asunto Coman' 56 *La Ley Unión Europea*, 1, 3 (2018).

The *Coman* judgment is aimed primarily at recognising the right of residence of a third-country national and hopefully lays the foundations for the affirmation of a principle of "continuity" of personal status.[217] The European Court does not directly affect the asymmetry of the models of union but, within the limits of its jurisdiction and function, this decision guarantees the partners the possibility of having their fundamental right recognised, even where their union model has no recognition.[218]

[217] G. Noto La Diega, 'The European approach to recognising, downgrading, and erasing same-sex marriage celebrated abroad', in F. Hamilton and G. Noto La Diega eds, *Same-Sex Relationships, Law and Social Change* (Oxon-New York: Routledge, 2020) 33, 35.

[218] J.J. Rijpma, 'You Gotta Let Love Move ECJ 5 June 2018, Case C-673/16, Coman, Hamilton, Accept v Inspectoratul General pentru Imigrări' 15 *European Constitutional Law Review*, 324, 338 (2019): «[*t*]*he EU is not a human rights organisation and its Court of Justice, despite protecting fundamental rights within the EU legal order, is not a human-rights tribunal. Nor is the EU a federal state and its Court, despite fulfilling many similar functions, is not a Constitutional Court [...]. This has allowed the Court to arrive at an answer that is satisfactory from a fundamental rights perspective without taking a more controversial fundamental rights approach*».

Chapter III

Jurisdiction and applicable law in succession matters

Ivana Kunda, Sandra Winkler and Tereza Pertot*

I. Introduction. – II. Scope of application. – 1. Temporal scope of application. – 2. Territorial scope of application. – 3. Material scope of application. – 4. Cross-border implications. – III. Jurisdiction. – 1. General jurisdiction. – 2. Prorogation of jurisdiction. – 3. Subsidiary jurisdiction. – 4. Choice of law as basis of jurisdiction. – 5. *Forum necessitatis*. – 6. Coordination of jurisdiction. – IV. Applicable law. – 1. General rule. – 2. Choice of law. – 3. Law applicable to admissibility and validity of dispositions upon death. – 4. Certain general issues of the conflict of laws. – V. European Certificate of Succession. – 1. Reasons for introducing the ECS. – 2. From the Hague Convention to the Succession Regulation. – 3. The characteristics of the ECS.

I. Introduction

Over the years it has become increasingly frequent for European Union citizens to live and die in a Member State different from their state of origin and to own property there or in another Member State.[1] Intra-EU migrations have been facilitated by the freedom of movement and residence guaranteed by primary EU law. Consequently, many family relationships begin and later end because of a crisis or death in different Member States. Migration is also increasingly a global phenomenon, and hence the same issues may arise due to migration between the EU and a third State. As families gain cross-border attributes, so do their rights to family assets. Thus, subsequent to the analysis of EU rules concerning matrimonial property regimes and the property consequences of registered partnerships, it is important to turn attention to cross-border succession matters.

National successions laws are very heterogeneous due to various traditions and cultural and social differences among Member States.[2] Major differences exist in areas such as the

* Ivana Kunda and Sandra Winkler co-authored sections I.-IV and Tereza Pertot authored section V.

[1] This has been brought about by the economic growth and accumulation of wealth by an increasing number of families and due to internationalisation. A. Bonomi, 'Succession', in J. Basedow and others eds, *Encyclopedia of Private International Law: Volume 2*, (Cheltenham: Elgar, 2017), 1682.

[2] For an exhaustive overview of succession law rules in every single EU Member State, see the recent publication: L. Ruggeri, I. Kunda and S. Winkler eds, *Family Property and Succession in EU Member States: National Reports on the Collected Data*, (Rijeka: University of Rijeka, Faculty of Law, 2019), available at *https://www.euro-family.eu/documenti/news/psefs_e_book_compressed.pdf* (last visited on 5 June 2020). See also European Judicial Network in Civil and Commercial Matters: Succession available at *https://beta.e-justice.europa.eu/166/EN/succession?clang=en* (last visited on 5 June 2020); Successions in Europe, available at *http://successions-europe.eu/* (last visited on 5 June 2020). See also comparative publications related to some Member States: K. Reid, M. de Waal and R. Zimmermann eds, *Comparative Succession Law: Volume I: Testamentary Formalities* (Oxford: OUP, 2011); K. Reid, M. de Waal and R. Zimmermann eds, *Comparative Succession Law: Volume II: Intestate Succession* (Oxford: OUP, 2015).

determination of heirs and their shares, the right to a reserved share, the availability of succession agreements, the heir's liability for the deceased's debts, the ways in which ownership is transferred to heirs and legatees, and the estate administration. For instance, a reserved or forced share in the estate is one of the most varied features of succession law. In some European countries, it is part of the tradition and legal culture, in other countries there are trends to abandon it because it is considered out-dated, while in a third group of countries deriving from a common law tradition forced inheritance is generally not known. The issues that arise with regard to forced heirship concern the determination of the forced heirs, the rules on claw back and the calculation of the share or the regulation of the *collatio bonorum* considering that people often make gifts during their life, leaving a minor part of the assets to be shared upon death.

When it comes to matters of succession, the rules of private international law are often very different from one legal system to another, the major dividing line being between systems which embody the monist principle of unity of the estate and systems which follow the dualist principle of splitting the estate on a territorial basis.[3] National rules on jurisdiction have also enabled two or more courts to have competence concerning succession related to a single deceased person, often leading to different results and consequently the refusal to recognise foreign decisions.[4]

These circumstances have created the need to introduce common private international law rules to assist in overcoming the obstacles to the free movement of EU citizens caused by the variety of national solutions in the area of succession law.[5] Therefore, Regulation (EU) 2012/650 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession[6] (hereinafter: the Succession Regulation) was adopted so that the EU legislator could create more predictability and simplify cross-border succession, especially by stimulating EU citizens to plan in advance their succession. The common approach aims to: 1) unify the norms of jurisdiction and make a single law applicable to the succession as a whole; 2) provide for unified rules on recognition and enforcement of the different succession instruments and decisions used in different Member States;[7] 3) create an ECS, which produces effects in all Member States. Its contribution to the internal market is seen in removing obstacles to the free movement of persons who previously faced difficulties in asserting their rights in the context of succession with cross-border implications. Now, the rights of heirs and legatees, of other persons close to the deceased, and of creditors of the succession are more effectively guaranteed.[8]

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[3] A. Davì, in A.L. Calvo Caravaca, A. Davì and H.P. Mansel eds, *The EU Succession Regulation: A Commentary*, (Cambridge: Cambridge University Press, 2016), 3.

[4] A. Davì, n 3 above, 4.

[5] Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, Brussels, 14.10.2009, COM(2009)154 final, 2009/0157 (COD), 2-4.

[6] [2012] OJ L201/107. This regulation is also known by the name Brussels IV Regulation.

[7] See Chapter V, Part I, Sect. IV, below (J. Kramberger -Škerl).

[8] Recital 7 of the Succession Regulation.

The Succession Regulation takes priority over the provisions of national law dealing with cross-border succession. Some Member States have seen this as an opportunity or motivation to reform their national laws.[9] For instance, Member States have more or less systematically implemented the Succession Regulation at the national level.[10] At the same time, some Member States also reformed their substantive succession law. A case in point is Austria which changed the rights of forced heirs, increased the succession rights of the surviving spouse, and prescribed succession rights for the non-registered partner.[11] The Belgian legislator also intervened in the substantive succession law in order, among other things, to limit the reserved share, determine the valuation of gifts, and strengthen the freedom of disposition with assets.[12] This reveals a trend to increase the freedom of testation in substantive succession law, and more generally to introduce or widen party autonomy in concluding the succession agreements.[13] Interestingly, it is the unification of EU private international law which to a certain extent stimulated the changes in the substantive law of some Member States.[14]

II. Scope of application

The scope of application of the Succession Regulation is defined by three criteria: temporal, territorial and material.

[9] See eg S. Scola and M. Tescaro eds, *Casi controversi in materia di diritto delle successioni, Volume II, Esperienze straniere* (Napoli: Edizioni Scientifiche Italiane, 2019). On a proposed reform in Spain, see Asociación de Profesores de Derecho Civil ed, *Propuesta de Código Civil* (Madrid: Tecnos, 2018); G.G. Aizpurua, 'Una proposta dottrinale di riforma del sistema successorio nel Codice civile spagnolo', in S. Scola and M. Tescaro eds, *Casi controversi in materia di diritto delle successioni, Volume II, Esperienze straniere* (Napoli: Edizioni Scientifiche Italiane, 2019), 567.

[10] In Austria: Erbrechts-Änderungsgesetz 2015 – ErbRÄG 2015, BGBl I Nr. 87/2015. In Croatia. Zakon o provedbi Uredbe (EU) br. 650/2012 Europskog Parlamenta i Vijeća od 4. srpnja 2012. o nadležnosti, mjerodavnom pravu, priznavanju i izvršavanju odluka i prihvaćanju i izvršavanju javnih isprava u nasljednim stvarima i o uspostavi europske potvrde o nasljeđivanju, NN 152/14. In Germany: Gesetz zum Internationalen Erbrecht und zur Änderung von Vorschriften zum Erbschein sowie zur Änderung sonstiger Vorschriften vom 29. Juni 2015, BGBl I Nr. 26/2015. In Italy: Legge 161/2014 – Disposizioni per l'adempimento degli obblighi derivanti dall'appartenenza all'Unione europea- Legge europea 2013-bis, Gazz. Uff. 10 novembre 2014, n. 261, S.O. (Article 32).

[11] See eg G. Christrandl, 'La recente riforma del diritto delle successioni in Austria: principi normativi e problemi' *Rivista di diritto civile*, 423 (2017).

[12] Loi du 31 juillet 2017 modifiant le Code civil en ce qui concerne les successions et les libéralités et modifiant diverses autres dispositions en cette matière, MB 1er septembre 2017; Loi du 22 juillet 2018 modifiant le Code civil et diverses autres dispositions en matière de droit des régimes matrimoniaux et modifiant la loi du 31 juillet 2017 modifiant le Code civil en ce qui concerne les successions et les libéralités et modifiant diverses autres dispositions en cette matière, M.B., 27 juillet 2018. See eg T. Dumont and H. Hooyberghs, 'Reform of Belgian inheritance law: a summary of the main changes*'* 23 *Trusts & Trustees*, 1012 (2017).

[13] See L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above, especially reports: T. Pertot, Austria, 12-24; T. Pertot, Germany 273-286; R. Garretto, M. Giobbi, A. Magni, T. Pertot, E. Sgubin and M. V. Maccari, Italy 356-390; F. Dougan, Slovenia, 599-609.

[14] Other circumstances also influenced the reforms, for instance in Austria where this has been conceived in the context of the border reform related to the 200th anniversary of the ABGB.

1. Temporal scope of application

The Succession Regulation was passed in 2012 and applies as of 17 August 2015[15] to the succession of persons who die on or after that date.[16] The three-year-long *vacatio legis* is an indication of the far-reaching changes introduced by the Regulation. Therefore, only the succession of the person who passed away on or after the 17 August 2015 is subject to the Succession Regulation. In contrast, if the *de cujus* passed away before this date, the national rules of private international law of the forum apply, regardless of whether the issue of succession had been raised or proceedings commenced before or after that date. Linking *ratione temporis* application to the *de cuius*'s death is seen as advantageous because it is a matter of pure fact and is officially recorded, while the disadvantage of unpredictability[17] seems to be gradually fading away over time.

Additional rules are provided to exceptionally permit the retroactive application of the Succession Regulation if the deceased chose the applicable law before 17 August 2015, which are detailed in the section below related to the choice of law.

2. Territorial scope of application

The Succession Regulation is binding on all EU Member States, with the exception of Ireland and Denmark.[18] These two Member States have special positions under primary EU law. The former has not used the possibility to opt into the Regulation,[19] whereas the latter, while not having that option, has not taken part in the Regulation on the basis of an agreement with the EU which is an available option. Therefore, for the purposes of the Succession Regulation, these two Member States are in the same position as third States.

Regardless of these facts, the Regulation may apply in the case of a succession with a cross-border element, which is related to these Member States or any third country for that matter. For instance, if the deceased is a national of any of the excluded Member States (or any third State) the succession proceedings may nevertheless be held in a Member State provided that the deceased's habitual residence at the time of death was in the latter state. The same is true for the applicable law, as is discussed below in the sections on jurisdiction and choice of law, respectively. This results from the applicability *erga omnes* of the respective rules of the Regulation[20] and no limitation of its application *ratione personae*.

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[15] Articles 84 and 83 of the Succession Regulation.

[16] Article 83(1) of the Succession Regulation.

[17] P. Franzina, in A.L. Calvo Caravaca, A. Davì and H.-P. Mansel eds, *The EU Succession Regulation: A Commentary*, (Cambridge: Cambridge University Press, 2016), 854-855.

[18] Recital 82 of the Succession Regulation.

[19] Like Ireland, the United Kingdom did not opt into the Regulation in the first place. Hence, its position does not change due to Brexit.

[20] A. Bonomi, 'Introduction', in A. Bonomi and P. Wautelet eds, *Le droit européen des successions: Commentaire du Règlement n° 650/2012 du 4 juillet 2012* (Bruxelles: Bruylant, 2nd ed, 2012).

3. Material scope of application

The Succession Regulation's scope *rationae materiae* is defined in Article 1 thereof. It applies to "succession to the estates of the deceased person", with the exclusion of "revenue, customs or administrative matters". The latter represents a classic phrase of EU private international law indicating that only private law matters are included.[21] This is further confirmed by the Regulation's preamble which underlines that "the scope of this Regulation should include all civil-law aspects of succession to the estate of a deceased person, namely 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".[22] Aligned with this is the provision of Article 3(a) of the Succession Regulation which states that succession means "succession to the estate of a deceased person and covers 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". Therefore, this includes both modes of devolution of inheritance known in Europe: the testate succession, as the expression of the freedom of testation and the intestate succession, which embodies the principle of family solidarity. Article 23 of the Succession Regulation offers a list of issues included in the scope of the applicable law, and thus also in the scope of the Succession Regulation.[23] To cover many different legal institutes in national succession laws, the definition of succession is very broad.

On the other hand, Article 1(2) of the Succession Regulation offers a long list of subjects excluded from its scope.[24] Owing to the research carried out within this project, special emphasis is put on the connection between the twin Regulations: Regulation 2016/1103[25] and Regulation 2016/1104.[26] The exclusion of particular interest concerns "questions relating to matrimonial property regimes and property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage".[27] Mirroring this exclusion, the twin Regulations both exclude from their respective scopes succession to the estate of a deceased spouse/partner.[28] Thus, it appears that for situations involving succession by a spouse or a registered partner, the Succession Regulation and the respective twin Regulations constitute a complementary regulatory system for the property matters of the respective parties.

Recognising the dividing line between the Succession Regulation on the one hand, and the twin Regulations on the other, is a "classical problem of characterisation".[29] Liquidation of

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[21] See recital 10 of the Succession Regulation, which, by way of example, mentions succession-related tax.
[22] Recital 9 of the Succession Regulation.
[23] See G. Nikolaidis, 'Article 1: Scope', in H. Pamboukis ed, *EU Succession Regulation no 650/2012: A Commentary* (Beck, Hart and Nomos, 2017), 24.
[24] Recital 11 of the Succession Regulation states that it does not apply to areas of civil law other than succession, and that, for reasons of clarity, a number of questions appearing to be linked to matters of succession are explicitly excluded from its scope.
[25] [2016] OJ L183/1.
[26] [2016] OJ L183/30.
[27] Article 1(2)(d) of the Succession Regulation.
[28] Article 1(2)(d) of the Regulation 2016/1103 and Article 1(2)(d) of the Regulation 2016/1104.
[29] A. Davì, n 3 above, 87.

succession could depend on the distribution of family assets governed by rules provided for the property regime between the spouses or registered partners.[30] In a given legal system, substantive family law and succession law mechanisms are used in a coherent manner to protect the surviving spouse. Where more protection is secured for a surviving spouse by virtue of the matrimonial property regime (eg by the community of property), less protection is needed under the succession regime, and *vice versa*.[31] Therefore, the rights from the matrimonial property or a comparable regime should not be confused with the "succession rights of the surviving spouse or partner" referred to in Article 23(2)(b) of the Succession Regulation.

Although the Court of Justice of the European Union (CJEU) case law on the Succession Regulation is still rather scarce, it has nevertheless already tackled the very question of the delineation between succession and matrimonial property. In *Mahnkopf*,[32] the CJEU was asked to decide whether the share allocated to the surviving spouse under § 1371 of the German BGB fell within the scope of the Succession Regulation. The case involved Mrs and Mr Mahnkopf who, during their marriage, did not conclude a marriage contract. Mr Mahnkopf neither made any dispositions *mortis causae*. Thus, being German nationals living in Germany, the spouses were subject to the German default matrimonial property regime, which consists of a separate property regime during the marriage with the equalisation of accrued gains upon its termination (*Zugewinngemeinschaft*). In addition to property in Germany, Mr Mahnkopf owned a half share in a property located in Sweden. For this reason, following the death of her husband, Mrs Mahnkopf wished to obtain the ECS from the German public notary certifying her and her son's right to inherit the half share in the property in Sweden.

The notary handed the case over to the local court which refused to issue the ECS. In its reasoning, the court stated that the share of one quarter in the estate was allocated to Mrs Mahnkopf pursuant a provision of § 1371(1) of the German BGB regulating the matrimonial property regime and thus outside the scope of the Succession Regulation. The widow appealed against the court decision, and the question reached the CJEU.

In its judgment, the CJEU first stressed the principle of Euroautonomous and uniform interpretation of the notions in EU private international law, and then, by resorting to

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[30] Recital 12 of the Succession Regulation explains: "Accordingly, this Regulation should not apply to questions relating to matrimonial property regimes, including marriage settlements as known in some legal systems to the extent that such settlements do not deal with succession matters, and property regimes of relationships deemed to have comparable effects to marriage. The authorities dealing with a given succession under this Regulation should nevertheless, depending on the situation, take into account the winding-up of the matrimonial property regime or similar property regime of the deceased when determining the estate of the deceased and the respective shares of the beneficiaries".

[31] Max Planck Institute for Comparative and International Private Law, Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, 74 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (2010), 522, para 9.

[32] CJEU, case C-558/16 *Mahnkopf*, judgment of 1 March 2018, EU:C:2018:138. For additional case studies of the division between succession and matrimonial matters, see F. Dougan, 'Matrimonial property and succession – The interplay of the matrimonial property regimes regulation and succession regulation', in J. Kramberger Škerl, L. Ruggeri e F.G. Viterbo eds *Case Studies and Best Practices Analysis to Enhance EU Family and Succession Law. Working Paper*, in *Quaderni degli Annali della facoltà giuridica dell'Università di Camerino* 3 (Camerino: Edizioni Scientifiche Italiane, 2019), 75.

purposive and systematic methods of interpretation, reached the conclusion that the provision at issue falls within the scope of the Succession Regulation.[33] Otherwise, the purpose of the ECS would be jeopardised. The reasoning behind this is that the "provision (at issue) does not appear to have as its main purpose the allocation of assets or liquidation of the matrimonial property regime, but rather determination of the size of the share of the estate to be allocated to the surviving spouse as against the other heirs".[34] Thus, the main purpose of the provision as identified by the CJEU is the individualisation of the exact share of the estate to be allocated to the widow. The criterion provided by the CJEU to delimit the scopes of application between the Succession Regulation and one of the twin Regulations is whether the provision "principally concerns succession to the estate of the deceased spouse (or) the matrimonial (/registered partnership) property regime".[35]

A further issue has been raised in relation to the exclusions concerning the nature of rights *in rem* and recording in a register of rights in immovable or movable property.[36] In *Kubicka*,[37] a question was addressed to the CJEU regarding the recognition, in a Member State whose legal system does not provide for legacies "by vindication", of the material effects produced by such a legacy when succession takes place in accordance with the chosen succession law. Mrs Kubicka asked the notary to draw up a will including a *legatum per vindicationem*, which is allowed by Polish law, in favour of her husband, concerning her share of ownership of a jointly-owned immovable property in Germany, while leaving the rest of the estate to her husband and children in equal shares. The notary refused to do so, invoking German law, which prohibits such legacies, because the matters of rights *in rem* and registration are excluded from the Succession Regulation. Eventually, the Polish court turned to the CJEU for an interpretation of the scope of application of the Succession Regulation.

The CJEU reasoned that the rights *in rem* exclusion captures the classification of property and rights, the determination of the prerogatives of the holder of such rights, and the number of rights *in rem* in the legal order of a Member State (*numerus clausus*).[38] Thus, it captures ownership as a right *in rem*, which is consequently outside the scope of the Succession Regulation. However, it does not capture legacy either "by vindication" or "by damnation" because they "constitute methods of transfer of ownership of an asset",[39] which remain within the scope of the Succession Regulation. Similar reasoning is presented in relation to exclusion concerning the registers of rights. Therefore, competent authorities in a Member State cannot refuse to recognise the material effects of a legacy "by

[33] This conclusion is in contrast with the proposed qualification in academic writing, eg A. Davì, n 3 above 90; B. Walther, Die Qualifikation des § 1371 Abs. 1 BGB im Rahmen der europäischen Erb- und Güterrechtsverordnungen, 6 *Zeitschrift für das Privatrecht der Europäischen Union* (2014), 325, 329, and in line with some other, eg J. Kleinschmidt, Optionales Erbrecht: Das Europäische Nachlasszeugnis als Herausforderung an das Kollisionsrecht, 77 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (2013), 723, 757.

[34] CJEU, case C-558/16 *Mahnkopf*, judgment of 1 March 2018, EU:C:2018:138, para 40.

[35] CJEU, case C-558/16 *Mahnkopf*, judgment of 1 March 2018, EU:C:2018:138, para 40.

[36] Article 1(2)(k) and (l) of the Succession Regulation.

[37] CJEU, case C-218/16 *Kubicka*, judgment of 12 October 2017, EU:C:2017:755. It has been suggested that this judgment applies *per analogiam* to the same exclusions in the twin Regulations. I. Kunda, 'Novi međunarodnoprivatnopravni okvir imovine bračnih i registriranih partnera u Europskoj uniji: polje primjene i nadležnost', 19 *Hrvatska pravna revija*, 27, 29 (2019).

[38] CJEU, case C-218/16 *Kubicka*, judgment of 12 October 2017, EU:C:2017:755, paras 47-48.

[39] CJEU, case C-218/16 *Kubicka*, judgment of 12 October 2017, EU:C:2017:755, para 49.

vindication", provided for by the law governing succession and chosen by the testator in accordance with Article 22(1) of that Regulation, on the ground that such legacy is not provided in the law of the Member State where the immovable property is located. Interpretation to the contrary would jeopardise the principle of unity of the succession enshrined in Article 23 of the Regulation.[40]

4. Cross-border implications

Despite the fact that the Succession Regulation does not provide an explicit provision to that effect, its application is dependent on the existence of cross-border implications or, as traditionally named, an international element. This is a natural consequence of the legal basis used to justify its enactment, which is Article 81 of the Treaty on the Functioning of the European Union.[41] There are also several other references in the preamble and provisions which strongly suggest that it is intended for cross-border succession only.[42]

III. Jurisdiction

The main heads of jurisdiction in the Succession Regulation are the general jurisdiction and the prorogation of jurisdiction, both intending to ensure as much consistency as possible between the competent forum and applicable law (*Gleichlauf*).[43] The remaining provisions are concerned with jurisdiction based on choice of law, subsidiary and necessary jurisdiction, as well as with coordination of the proceedings. It is worth noting here that the jurisdiction scheme is mandatory and courts of the Member State seised with a succession matter and not having jurisdiction under the Succession Regulation have, pursuant to Article 15 thereof, the duty to declare of their own motion that they lack jurisdiction.

1. General Jurisdiction

The general rule of jurisdiction in succession matters is provided in Article 4 of the Succession Regulation according to which the "courts of the Member State in which the deceased had his habitual residence (*forum firmae habitationis*) at the time of death shall have jurisdiction to rule on the succession as a whole". There are several points to be made based on this provision. Article 4 of the Succession Regulation does not provide for the territorial or subject-matter jurisdiction of the national authorities, but only for international jurisdiction, as evident from the use of the plural in the phrase "the courts of the Member State".[44] In addition, it establishes the principle of unity of succession when it

[40] CJEU, case C-218/16 *Kubicka*, judgment of 12 October 2017, EU:C:2017:755, para 57.
[41] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.
[42] See A. Davì, n 3 above, 25-27.
[43] See recital 27 of the Succession Regulation.
[44] Given that different authorities may be competent in succession matters in different Member States, the notion of 'court' has a very broad meaning to "cover not only courts in the true sense of the word, exercising judicial functions, but also the notaries or registry offices in some Member States who or which, in certain matters of succession, exercise judicial functions like courts, and the notaries and legal professionals who, in

comes to jurisdiction by stating that the jurisdiction is for the court "to rule on the succession as a whole".[45] This includes both types of succession-related proceedings, contentious and non-contentious.[46]

The most important element of the provision of Article 4 is the connecting jurisdictional criterion of the deceased's habitual residence. This connecting criterion is one of the major criteria employed by the EU legislator to concretise the principle of proximity[47] – a counterpart of the closest connection principle for the purpose of setting jurisdiction criteria.[48] In the Succession Regulation, this is described as "a genuine connecting factor (...) between the succession and the Member State in which jurisdiction is exercised".[49] Against the background of the national laws of Member States at the time of the enactment of the Succession Regulation, the adoption of this criterion represents a "historic milestone".[50]

Although some authors are surprised that the definition of "habitual residence" is not included in the Succession Regulation,[51] this is done on purpose, as in all other EU legal instruments with respect to natural persons outside the professional sphere.[52] This grants the national courts the necessary flexibility when deciding *in concreto*, whereas they may rely on the extensive criteria and guidelines provided for in the CJEU. In its case law, the CJEU has established that the interpretation of the notion of "habitual residence" should be Euroautonomous, taking account of "the context of the provisions and the objective of the Regulation" in question.[53] These explanations and various guidelines in the preambles of regulations, especially in the Succession Regulation, have led to a division between two groups: some authors believe that cross-regulation consistency in the interpretation of

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some Member States, exercise judicial functions in a given succession by delegation of power by a court". Recital 20 of the Succession Regulation.

[45] According to Article 12 of the Succession Regulation, the unity may be limited by the court seised, at the request of a party, to exclude assets located in a third State if it could be expected that the decision would not be recognised or declared enforceable there. Additionally, under Article 13 the courts of the Member State of the habitual residence of the person making a succession-related declaration have jurisdiction to receive the declaration if under the law of the Member State the declaration may be made before the court.

[46] See CJEU, case C-20/17 *Oberle*, judgment of 21 June 2018, EU:C:2018:485, para 43.

[47] See eg recital 12 of the Council Regulation (EC) no 2003/2201 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) no 2000/1347 [2003] OJ L338/1 (Brussels II *bis*) and recital 12 of the Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction [2019] OJ L 178/1 (Brussels II *ter*).

[48] I. Kunda, 'Međunarodnoprivatnopravni odnosi', in *Europsko privatno pravo: posebni dio* (Zagreb, Školska knjiga, 2020 – in print), ch 5.3.1.

[49] Recital 23 of the Succession Regulation.

[50] A.L. Calvo Caravaca, in A.L. Calvo Caravaca, A. Davì and H.P. Mansel eds, *The EU Succession Regulation: A Commentary*, (Cambridge: Cambridge University Press, 2016), 130.

[51] A.L. Calvo Caravaca, n 50 above, 140.

[52] See in respect to other earlier instruments A. Borrás, Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, (1998) OJ C221/27.

[53] CJEU, case C-523/07 *A*, judgment of 2 April 2009, EU:C:2009:225, paras 34-35; CJEU, case C-497/10 PPU *Mercredi protiv Chaffe*, judgment of 22 December 2010, EU:C:2010:829, paras 44-46.

"habitual residence" is desirable,[54] while others are more inclined to take different routes guided by the particular regulation, especially its preamble.[55]

Drawing on the previous CJEU case law on habitual residence, the notion of "habitual residence" corresponds to the "centre of a person's life"[56] or "centre of his interests".[57] The criteria to establish "habitual residence" are fact-based and most developed in the context of the Brussels II *bis* Regulation and the child's habitual residence. Two basic criteria derive therefrom: the objective criterion – the presence in the territory of the Member State qualified by the level of integration in the social environment of the respective State, and the subjective criterion – a proven intention to establish stable life in the respective State.[58] The said criteria are identified from the judgment in *A*,[59] and have later been confirmed and detailed in other cases decided under the Brussels II *bis* Regulation. They generally coincide with the guidelines in the Succession Regulation.

In determining the habitual residence *in concreto* under the Succession Regulation, the authority dealing with the succession should make "an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation".[60] The court seised is thus given the task to assess all the relevant facts of the case at hand to determine the habitual residence of the deceased. This situation thus differs from the situations in other regulations to the extent that none of the parties proving or disapproving the habitual residence under the Succession Regulation will be the one whose habitual residence is being determined. In view of this, it might be somewhat difficult for at least some of the concerned parties to know or have access to information and documents which might be relevant for the purpose of determining the deceased's habitual residence.

There is, however, a special scenario mentioned in recital 24 of the Succession Regulation, which is not intended to provide an overall understanding of the "habitual residence" there. It only deals with a situation in which the deceased for professional or economic reasons had gone to live abroad to work there, even if for a long time, but had maintained a close and stable connection with his State of origin. This takes account of the economic realities in the internal market, where persons from one Member State migrate to another

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[54] T. Kruger, 'Habitual Residence: The Factors that Courts Consider', in P. Beaumont, M. Danov, K. Trimmings, B. Yüksel eds, *Cross-Border Litigation in Europe*, (Oxford and Portland, Oregon: Hart Publishing, 2017), 741, 743-744; Borrás (2017), 117.

[55] More on the controversy see A. Rentsch, *Der gewöhnliche Aufenthalt im System des Europäischen Kollisionsrechts*, (Tübingen: Mohr Siebeck, 2017), 346.

[56] A. Bonomi, 'Article 4', in A. Bonomi and P. Wautelet eds, *Le droit européen des successions: Commentaire du Règlement no 2012/650 du 4 juillet 2012* (Bruxelles: Bruylant, 2nd ed, 2012), 174.

[57] CJEU, joined cases C‑509/09 and C‑161/10 *eDate Advertising*, judgment of 25 October 2011, EU:C:2011:685, para 49.

[58] See A. Limante and I. Kunda, 'Jurisdiction in Parental Responsibility Matters', in C. Honorati ed, *Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction* (Torino and Berlin Giappichelli and Peter Lang, 2017), 61-91.

[59] CJEU, case C-523/07 *A*, judgment of 2 April 2009, EU:C:2009:225, paras 38 and 40.

[60] Recital 23 of the Succession Regulation.

sometimes with the expectation to come back, so that their families do not follow them, but remain in the State of origin. The EU legislator instructs that in such a case "the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located". This should be seen as an exception to the general definition of the "habitual residence" which involves a genuine personal connection between the deceased and the Member State, rather than his family and the Member State.[61] Another complex scenario mentioned in recital 24 of the Succession Regulation concerns the deceased who lived in several States alternately or travelled from one State to another without settling permanently in any of them. Such a situation could be resolved, as per the EU legislator, by paying heed to his nationality or the location of his main assets in one of those States as "a special factor in the overall assessment of all the factual circumstances". Enumerating the possible scenarios and providing for the concrete factors to be taken into account is the methodological equivalent of the casuistic approach of the CJEU when dealing with the notion of "habitual residence" in the context of other legal instruments.

Regardless of the fact that the Member State court may have jurisdiction based on Article 4, there is a discretionary option for the court to decline it pursuant to Article 6(a) of the Succession Regulation. The conditions are as follows: 1) the deceased had chosen the applicable law of a Member State to govern his succession under Article 22; 2) a party to the proceedings made a request that the jurisdiction is declined in favour of the courts of the Member State of the chosen law; and 3) the court seised considers that the courts of the Member State of the chosen law are better placed to rule on the succession. In deciding whether to decline jurisdiction or not, the court seised has to make its assessment based on the practical circumstances of the succession, such as the habitual residence of the parties and the location of the assets. Additional circumstances offered in the commentaries concern special procedures in place in certain legal systems for the administration of succession.[62]

2. Prorogation of jurisdiction

Although not conceived from the outset,[63] the Succession Regulation allows the parties concerned to agree on a competent court in matters of succession (*professio fori*). Pursuant to Article 5(1), choice of court is, however, limited only to situations in which the deceased has chosen the applicable law pursuant to Article 22. If so, "the parties concerned may agree that a court or the courts of the same Member State are to have exclusive jurisdiction to rule on any succession matter". As explained below, under Article 22 of the Succession Regulation, the person may choose as applicable the law of his nationality (*lex patriae*) at the time of making the choice or at the time of death. By tying the parties' choice of court to

[61] A.L. Calvo Caravaca, n 50 above, 129 especially n 7.

[62] A. Bonomi, Article 6, in A. Bonomi and P. Wautelet eds, *Le droit européen des successions: Commentaire du Règlement no 650/2012 du 4 juillet 2012* (Bruxelles: Bruylant, 2nd ed, 2012), 197.

[63] See Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, Brussels, n 5 above.

the chosen applicable law, the key idea of the Succession Regulation to have the competent court and applicable law aligned is preserved even where parties have exercised their autonomy.[64] This choice of *lex patriae* results in prorogation of the *forum patriae*.

A further limitation of choice of court relates to the notion of the Member State, as only the court or courts of one may be chosen in accordance with the Succession Regulation. This should mean only the twenty-five Member States which are bound by the Regulation.[65] Furthermore, the deceased's choice of law of the third State prevents a choice-of-court agreement under the Succession Regulation.[66] Likewise, the choice-of-court agreement proroguing the jurisdiction of the courts of a third State according to the rules of the national law of a Member State is not possible.[67]

The Succession Regulation does not prescribe when the parties concerned may conclude a choice-of-court agreement; hence, they are free to do so either during the deceased's life or upon his death. However, there is a logical limitation to this owing to the previously mentioned limitation that the chosen court has to correspond to the law chosen by the deceased. Under Article 22 of the Succession Regulation, this can be the nationality the deceased has at the time of making the choice or at the time of death. In the former case, if the parties have chosen the competent court during the deceased's life, he may change the chosen law if he becomes the national of another Member State or if he has more than one nationality, and thus render the choice-of-court agreement invalid under Article 5(1) of the Succession Regulation.

The choice-of-court agreement has to be concluded by all concerned parties. The meaning of the phrase "concerned parties" has to be "determined on a case-by-case basis, depending in particular on the issue covered by the choice-of-court agreement". The concerned parties may be heirs (testate and intestate), legatees and other beneficiaries named in the deceased's disposition. Although some authors tend to extend the notion of "concerned parties" to cover also the creditors,[68] this does not appear reasonable in the contexts of the Succession Regulation.[69] Sometimes the agreement will have to be concluded between all parties concerned by the succession and sometimes only by some of them who would be parties to the proceedings regarding a specific issue if the decision by that court on that issue would not affect the rights of the other parties to the succession.[70]

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[64] See Recitals 27 and 28 of the Succession Regulation. See also F. Marongiu Buonaiuti, 'Article 5', in A.L. Calvo Caravaca, A. Davì and H.P. Mansel eds, *The EU Succession Regulation: A Commentary*, (Cambridge: Cambridge University Press, 2016), 150.

[65] See A. Fuchs, The new EU Succession Regulation in a nutshell, 16 *ERA Forum* (2015), 122.

[66] M. Brosch, *Rechtswahl und Gerichtsstandsvereinbarung im internationalrn Familien- und Erbrecht der EU*, (Tübingen: Mohr Siebeck, 2019), 132.

[67] H. Pamboukis and A. P. Sivitanidis, Article 5 in H. Pamboukis ed, *EU Succession Regulation no 650/2012: A Commentary* (Beck, Hart and Nomos, 2017), 121. For arguments in favour of such choice-of-court agreements, see I. Dikovska, Can a Choice-of-Court Agreement Included in a Marriage Contract Meet the Requirements of both EU Succession and Matrimonial Property Regulations?, 15 *Croatian Yearbook of European Law and Policy*, 269, 283-284 (2019).

[68] H. Pamboukis and A. P. Sivitanidis, n 67 above, 124.

[69] I. Dikovska, n 67 above, 269, 288-289.

[70] Recital 28 of the Succession Regulation. Mentioning the option that only some of the parties may be the concerned parties to the choice-of-court agreement if it addresses specific issue affecting only their rights suggests that partial choice-of-law agreements are permitted under the Succession Regulation. This is at odds with the objective of jurisdiction concentrated in a single exclusively competent court when agreeing on jurisdiction under Article 5 of the Succession Regulation. A. Bonomi, Article 5, in A. Bonomi and P. Wautelet

Thus, the agreement can be multilateral or bilateral, and will usually not include the testator.[71] In any case, this is seen as a potential problem with choice-of-court agreements if some "concerned parties" are not known or are forgotten when the agreement is entered into. There is an option to subsequently include in the choice-of-court agreement parties external to it if they co-sign it, or if they enter an appearance without contesting the jurisdiction of the court. Under Article 9 of the Succession Regulation, the chosen court will in such a situation retain its competence under the agreement. If, however, these parties external to the choice-of-court agreement contest the jurisdiction, the chosen court has to decline its jurisdiction.

In order to be valid according to Article 5(2) of the Succession Regulation, a choice-of-court agreement has to be expressed in writing, dated and signed by the parties concerned. The strict requirements of formal validity serve the purpose of legal certainty. Recognising the technological neutrality standard adopted in other EU legal instruments,[72] any communication by electronic means which provides a durable record of the agreement is deemed equivalent to writing. In such instances, there should be a digital signature or another technical means which assures with sufficient certainty that the communication originates from the person stated.[73] As for material validity, there is no special rule in the Succession Regulation. Hence, the rule of the Brussels I *bis* Regulation may *per analogiam* govern the material validity of the choice-of-court agreement in the Succession Regulation. This rule points to the law of the Member State whose courts have been chosen as competent.[74]

The effects of a valid choice-of-court agreement are that the international jurisdiction of the courts of the chosen Member State are exclusively established, while the jurisdiction of courts of other Member States are derogated.[75] This includes all types of proceedings which are otherwise subject to general jurisdiction: contentious, non-contentious and proceedings for issuing the European Certificate of Succession (ECS).[76] Consequently, pursuant to Article 6(b) of the Succession Regulation, the court seised under Article 4 on general jurisdiction or Article 10 on subsidiary jurisdiction has a duty to decline jurisdiction if the parties to the proceedings have agreed, in accordance with Article 5, to confer jurisdiction on a court or courts of the Member State of the law chosen in accordance with Article 22.

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eds, *Le droit européen des successions: Commentaire du Règlement n° 650/2012 du 4 juillet 2012* (Bruxelles: Bruylant, 2nd ed, 2012), 191.

[71] Max Planck Institute for Comparative and International Private Law, n 31 above, para 107.

[72] See eg Article 25(2) of the Regulation (EU) no 2012/1215 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 (Brussels I *bis*) [2012] OJ L351/1.

[73] H. Gaudemet-Tallon, 'Les règles de compétence judiciaire dans le règlement européen sur les successions' in G. Khairallah and M. Revillard eds, *Droit européen des successions internationales: Le règlement du 4 juillet 2012* (Paris: Defrénois 2013), 127, 131.

[74] Article 25(1) of the Brussels I *bis* Regulation.

[75] H. Pamboukis and A. P. Sivitanidis, n 67 above, 124.

[76] I. Dikovska, n 67 above, 269, 287.

3. Subsidiary jurisdiction

Subsidiary jurisdiction under Article 10 of the Succession Regulation is intended to offer grounds of jurisdiction for all situations and thus disable recourse to the national rules on jurisdiction.[77] It comes into play if the habitual residence of the deceased at the time of death is not located in a Member State. For such situations, there is a provision granting jurisdiction on the succession as a whole to the courts of a Member State in which the assets of the estate are located (*forum rei sitae*). The criterion of the location of the assets is informed by the principle of proximity and the principle of efficiency.[78] The *forum patrimonii* is further conditioned by the personal connections of the deceased. The grounds on which the subsidiary jurisdiction may be exercised are listed exhaustively in hierarchical order.[79] The first level of subsidiary jurisdiction is provided in favour of the Member State of the deceased's nationality at the time of death. Reference to the nationality of the deceased at the time of death should be understood as reference to any of the nationalities if he had two or more nationalities of the twenty-five Member States in which the Regulation is applicable.[80] If the first-level condition is not met, the second level jurisdiction is vested in the courts of the Member State where the deceased had his previous habitual residence, provided that, at the time the court is seised, a period of not more than five years has elapsed since that habitual residence changed.

As an exception to the principle of unity of succession for the purposes of jurisdiction, it is provided in Article 10(2) of the Succession Regulation that, if no court in a Member State has subsidiary jurisdiction pursuant to the above criteria, the courts of the Member State in which the assets of the estate are located will have jurisdiction to rule on those assets only. This limitation is quite easily applied to actions such as the reduction of donation; however, claiming the reserved share or challenging the validity of a will which comprises the entire estate, the individual assets of which are located in different (Member) States, may generate problems.[81] Based on the premise that the jurisdiction of the Member State court under the Succession Regulation cannot be extended or reduced by the court itself, the court would have to decide on the reserved share or the validity of the will with the effect only as to the property within the territory of its Member State.

In the same vein as when the Member State court has jurisdiction under Article 4, the Member State court having jurisdiction based on Article 10 of the Succession Regulation may decline it pursuant to Article 6(a) of the Succession Regulation. The conditions are also the same: 1) the deceased had chosen the applicable law of a Member State to govern his succession under Article 22; 2) a party to the proceedings made a request that the jurisdiction is declined; and 3) the court seised considers that the courts of the Member

[77] H. Gaudemet-Tallon, n 73 above, 127, 130.
[78] F. Marongiu Buonaiuti, 'Article 10', in A.L. Calvo Caravaca, A. Davì and H.P. Mansel eds, *The EU Succession Regulation: A Commentary*, (Cambridge: Cambridge University Press, 2016), 189.
[79] Recital 30 of the Succession Regulation.
[80] See *per analogiam* CJEU, case C-168/08 *Hadadi*, judgment of 16 July 2009 EU:C:2009:474.
[81] A. Bonomi, 'Article 10', in A. Bonomi and P. Wautelet eds, *Le droit européen des successions: Commentaire du Règlement n° 650/2012 du 4 juillet 2012* (Bruxelles: Bruylant, 2nd ed, 2012), 221.

State of the chosen law are better placed to rule on the succession. In deciding whether to decline jurisdiction or not, the court seised has to make its assessment based on the practical circumstances of the succession, with two key circumstances being the habitual residence of the parties and the location of the assets.

4. Choice of law as a basis of jurisdiction

There are three sets of rules in the Succession Regulation which regulate the effects of the choice of law (*professio iuris*) over the jurisdiction of the courts of the Member States. There are specific provisions in Article 6 of the Succession Regulation on declining jurisdiction in the event of a choice of law which have been discussed in the context of Article 4 on general jurisdiction, Article 10 on subsidiary jurisdiction, and Article 5 on prorogation of jurisdiction. In parallel, there are special provisions in Article 7 of the Succession Regulation conferring jurisdiction in the event of a choice of law. Lastly, there are rules on closing own-motion proceedings in the event of the choice of law.

The courts of a Member State whose law had been chosen by the deceased pursuant to Article 22 shall have jurisdiction to rule on the succession if: (a) a court previously seised has declined jurisdiction in the same case pursuant to Article 6; (b) the parties to the proceedings have agreed, in accordance with Article 5, to confer jurisdiction on a court or courts of that Member State; or (c) the parties to the proceedings have expressly accepted the jurisdiction of the court seised. Since, under EU private international law rules, the choice of law does not entail the choice of forum, or *vice versa* for that matter,[82] these rules are intended to further promote coherence between *forum* and *ius*. The instances (a) and (b) entail situations in which the court of one Member State has decided on its own jurisdiction because it believes the court of another Member State has jurisdiction. Where such a decision is made, the other courts should be bound by this decision.[83] The instance under (c) is similar to the choice-of-court agreement, save that it is limited to the proceedings in question and to the parties to it, and it does not require any formalities under the Succession Regulation.

Article 8 of the Succession Regulation provides that, if succession proceedings are opened by a Member State court of its own motion, as is the case pursuant to the succession laws of certain Member States, that court has a duty to close the proceedings if the parties agree to settle the succession amicably out of court in the Member State of the law chosen by the deceased in accordance with Article 22. By virtue of this provision, again the EU legislator puts emphasis on the desired overlap between *forum* and *ius*. Where succession proceedings are not opened by a court of its own motion, this Regulation should not prevent the parties from settling the succession amicably out of court, for instance before a notary, in a Member State of their choice where this is possible under the law of that Member State.

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[82] See eg Recital 12 of the 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.

[83] See eg CJEU, case C-456/11 *Gothaer Allgemeine Versicherung*, judgment of 15 November 2012, EU:C:2012:719, para 43. See on other grounds F. Marongiu Buonaiuti, Article 6, in A.L. Calvo Caravaca, A. Davì and H.P. Mansel eds, *The EU Succession Regulation: A Commentary*, (Cambridge: Cambridge University Press, 2016), 175.

This should be the case even if the law applicable to the succession is not the law of that Member State.[84]

5. *Forum necessitatis*

To prevent situations of denial of justice, the Succession Regulation, as other private international law regulations,[85] provides a *forum necessitatis* allowing the courts of a Member State, on an exceptional basis, to rule on a succession despite the fact that it is closely connected with a third State. Thus, Article 11 of the Succession Regulation applies under the following conditions:1) no court of a Member State has jurisdiction pursuant to other provisions of this Regulation; 2) proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the case is closely connected; and 3) the case has a sufficient connection with the Member State of the court seised. The impossibility of proceedings in a third State may occur as a result of civil war or a natural disaster, or for other reasons when a beneficiary cannot reasonably be expected to initiate or conduct proceedings in that State.[86]

6. Coordination of jurisdiction

Like other private international law instruments, the Succession Regulation provides for the coordination of jurisdiction among Member States in cases of *lis pendens* and related actions. Thus, the situation of *lis pendens* arises where there is identity of the cause of action and identity of the parties in the proceedings brought before the courts of different Member States. Following the chronological principle, any court other than the court first seised on its own motion has to stay its proceedings until such time as the jurisdiction of the court first seised is established.[87] Article 17 of the Succession Regulation further states that where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

According to Article 18 of the Succession Regulation, related actions are those which are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable decisions resulting from separate proceedings. Where related actions are pending in the courts of different Member States, any court other than the court first seised has the discretion to stay its proceedings and wait for the decision of the court first seised to avail itself of the opportunity to receive information about the outcome of that case. In addition, if the related actions are pending at first instance, any court other than the court first seised may, on the application of one of the parties, decline jurisdiction if the

[84] Recital 29 of the Succession Regulation.

[85] See eg Article 11 of the Regulation 2016/1103, Article 11 of the Regulation 2016/1104 and Article 7 of the Council Regulation (EC) no 2009/4 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1.

[86] Recital 31 of the Succession Regulation.

[87] Time of the seising of the court is determined according to three rules in Article 14 of the Succession Regulation, two of which are already established standards in EU private international law, while the third results from the special nature of succession proceedings which may be opened of the court's own motion.

court first seised has jurisdiction over the actions in question and if its law permits the consolidation thereof.

IV. Applicable law

The Succession Regulation is an *erga omnes* regulation, meaning that it has universal application. Besides the fact that it is not subject to any reciprocity requirement, the law determined as applicable under the Succession Regulation applies irrespective of whether it is the law of any of the twenty-five Member States bound by the Regulation, the other two Member States not bound by the Regulation, or any third State.[88] In addition, the principle of unity of succession is enshrined in the formulation "the law applicable to the succession as a whole" contained in Article 21 of the Succession Regulation. This means that in principle all of the property forming part of the estate, irrespective of the nature of the assets and regardless of whether the assets are located in another Member State or in a third State, is governed by the single applicable law determined either by subjective or objective connecting factors. The aim is to provide legal certainty and avoid the fragmentation of succession.[89]

1. General rule

Article 21 of the Succession Regulation contains the rule which determines applicable law in the absence of the parties' choice of law by virtue of the objective connecting factor. In the spirit of coherence between *forum* and *ius*, here, as well as in the context of jurisdiction, the law of the State in which the deceased had his habitual residence (*lex loci firmae habitationis*) at the time of death is the main factor. To avoid repetition, reference is made to the section on general rules on jurisdiction, where the notion of "habitual residence" was discussed in more detail. It suffices to mention that the legislator has declared that habitual residence ensures close connection with and predictability as to the applicable law.[90]
The hard-and-fast rule is made more flexible by an escape clause which applies by way of exception, where it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable by reference to the deceased's habitual residence at the time of death. In those circumstances, the law applicable to the succession is the law of that other State. Although flexibility introduced by exception clauses is generally welcomed,[91] other commentators have expressed concerns about the one in the Succession Regulation mainly because it disrupts the coherence between jurisdiction and applicable law and weakens legal certainty.[92] The EU legislator explains the need for the escape clause in

[88] Article 20 of the Succession Regulation.
[89] Recital 37 of the Succession Regulation.
[90] Recital 37 of the Succession Regulation.
[91] See generally J. Basedow, 'Escape Clauses', in J. Basedow and others eds, *Encyclopedia of Private Internationasl Law*, vol. 1, (Cheltenham, Northhampton: Edward Elgar, 2017), 668, 674; M. Župan, *Načelo najbliže veze u hrvatskom i europskom međunarodnom privatnom ugovornom pravu*, (Rijeka: Pravni fakultet u Rijeci, 2006), 27-39.
[92] A.L. Calvo Caravaca, 'Article 21', in A.L. Calvo Caravaca, A. Davì and H.P. Mansel eds, *The EU Succession Regulation: A Commentary*, (Cambridge: Cambridge University Press, 2016), 320.

exceptional cases, for instance where the deceased had moved to the State of his habitual residence fairly recently before his death and all the circumstances of the case indicate that he was manifestly more closely connected with another State. This manifestly closest connection should, however, not be resorted to as a subsidiary connecting factor whenever the determination of the habitual residence of the deceased at the time of death proves complex.[93]

2. Choice of law

The widening of party autonomy in various fields of private international law is evident in succession matters as well. Pursuant to Article 22 of the Succession Regulation, a person may choose as the law to govern his succession as a whole the law of the State whose nationality (*lex patriae*) he possesses at the time of making the choice or at the time of death. This is a unilateral choice which is reserved only for the person in relation to succession upon his death. A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death.[94]

The reason to choose nationality as the only option for the choice of law has to do with the cross-border migrations mentioned in the introduction, due to which the person's succession would be subject to the new law of his habitual residence. If the person is not aware of the rules governing succession in that State, there is a risk of creating an expectation concerning the disposition of his assets upon death which would not correspond to the law actually applicable. Interestingly, people are often aware of the legal rules concerning forced inheritance. It is not an overstatement to say that in the tradition of European societies, the succession aspects of an individual's life have always been of great importance. Unlike in some other areas, people are often aware of the basic rules of succession and pay particular attention to the events that will affect their assets after their death. Such awareness and attention are, however, usually limited to the succession rules in the country of their nationality. Thus, the option to choose the law of one's nationality allows for the application of rules which the person is familiar with and had in mind when disposing of the assets or making a will in the course of his life.

Choice of law (*professio iuris*) can be made explicitly or implicitly. In the former case, it is contained in a declaration in the form of a disposition of property upon death such as a will, joint will or agreement as to the succession.[95] In the latter case, a choice of law has to be demonstrated by the terms of such a disposition of property upon death where, for instance, the deceased had referred in his disposition to specific provisions of the law of the State of his nationality or where he had otherwise mentioned that law.[96] In order to be

[93] Recital 25 of the Succession Regulation.
[94] This is in line with the CJEU, case C-168/08 *Hadadi*, judgment of 16 July 2009 EU:C:2009:474, which, however, cannot be relied on in the situation of an objective connecting factor.
[95] Article 3(1)(d) of the Succession Regulation.
[96] Recital 39 of the Succession Regulation.

determined, the tacit choice has to be clear and unambiguous.[97] Such is the situation where the disposition includes legal notions and institutes particular to the person's law of nationality, while the law of habitual residence does not know them.[98] An instance of this would be if, in a will drawn up by a Polish notary, a Polish national, residing in Germany, referred to the legacy *per vindicationem* which is not known in German but is regulated in Polish law.[99] According to Article 22(4) of the Succession Regulation, any modification or revocation of the choice of law has to comply with the requirements as to form for the modification or revocation of a disposition of property upon death.

A choice of law under this Regulation should be valid even if the chosen law does not provide for a choice of law in matters of succession. The substantive validity of the act whereby the choice of law was made, that is to say, whether the person making the choice may be considered to have understood and consented to what he was doing, is governed by the chosen law. The same should apply to the act of modifying or revoking a choice of law.[100]

3. Law applicable to admissibility and validity of dispositions upon death

There are significant differences among substantive succession laws when it comes to dispositions of property upon death, and in particular agreements as to succession. The results of recent comparative research on the succession laws of EU Member States show that some legal systems recognise such agreements, while others consider them inadmissible because they interfere with the deceased's freedom of disposal by means of a will. However, a trend of opening towards these agreements is becoming increasingly visible even in the Member States which until recently fully prohibited such agreements.[101] By introducing exceptions to a general prohibition, some legal systems are gradually making room for succession agreements.[102] Widening substantive party autonomy has taken place in Austria, Belgium, Estonia and Germany, while some others still have to take that path.[103] Therefore, the conflict-of-law rules, and especially the one on the choice of

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[97] E. Castellanos Ruiz, 'Article 22', in A.L. Calvo Caravaca, A. Davì and H.P. Mansel eds, *The EU Succession Regulation: A Commentary*, (Cambridge: Cambridge University Press, 2016), 345.

[98] D. Damascelli, 'I criteri di collegamento impiegati dal regolamento n. 650/2012 per la designazione della legge regolatrice della successione a causa di morte', in P. Franzina and A. Leandro eds, *Il diritto internazionale privato Europeo delle successioni* mortis causa, (Giuffrè, 2013), 102.

[99] Such were the circumstances in the CJEU, case C-558/16 *Mahnkopf*, judgement of 1 March 2018, EU:C:2018:138.

[100] Article 22(3) of the Succession Regulation; Recital 40 of the Succession Regulation.

[101] It is interesting to observe how in certain Member States, such as Italy, recent reforms introduced innovative legal solutions aimed at offering stronger protection to vulnerable parties, ie persons with disabilities. See L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above: R. Garetto, M. Giobbi, A. Magni, T. Pertot, E. Sgubin, M. V. Maccari, Italy, 375; report M. V. Maccari, T. Pertot, Belgium, 35, 38.

[102] See L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above, especially the report M. V. Maccari, T. Pertot, Belgium; R. Garretto, M. Giobbi, A. Magni, T. Pertot, E. Sgubin, M. V. Maccari, Italy; V. Koumpli; V. Marazopoulou, Greece; M. V. Maccari, France.

[103] See the national reports for individual Member States in L. Ruggeri, I., Kunda and S. Winkler eds, n 2 above. See also in relation to Germany, T. Raff, 'Patto successorio (Erbvertrag) e testamento congiuntivo (gemeinschaftliches Testament) nel diritto tedesco', in S. Scola and M. Tescaro eds, n 9 above, 809; C. Baldus, 'Il diritto tedesco delle successioni: forme e funzionalità delle disposizioni mortis causa', in S. Scola and M. Tescaro eds, n 9 above, 785.

applicable law which the person can make in organising his succession, have an important role in ensuring acceptance of those dispositions in the Member States.[104]

The law applicable to admissibility and the substantive validity of dispositions of property upon death is dealt with in Articles 24 and 25 of the Succession Regulation separately for agreements on succession and other dispositions, while Article 26 of the Succession Regulation lists elements which pertain to the substantive validity of dispositions of property upon death. Article 27 of the Succession Regulation lays down the rules on the formal validity of dispositions of property upon death made in writing, whereas Article 28 of the Succession Regulation provides for the formal validity of a declaration concerning acceptance or waiver.

Disposition of the property upon death includes a will, a joint will and an agreement as to succession, while agreement as to succession means an agreement, including an agreement resulting from mutual wills, which, with or without consideration, creates, modifies or terminates rights to the future estate or estates of one or more persons who are party to the agreement.[105] The admissibility and substantive validity of a disposition of property upon death other than an agreement as to succession is governed by the law which, under this Regulation, would have been applicable to the succession of the person who made the disposition if he had died on the day on which the disposition was made. This is usually referred to as the hypothetical applicable law. However, a person may choose as the law to govern the admissibility and substantive validity of his disposition of property upon death the law which that person could have chosen in accordance with Article 22 on the conditions set out therein. This choice is subject to principles similar to those in Article 22. Nevertheless, there is an important distinction when a clause on choice of law is included in the will, for instance. If the clause does not specify its purpose, it should be considered as intended to cover the entire succession (under Article 22), and not only the issues of admissibility and substantive validity (under Article 24). If, however, the clause specifies that the law is chosen for issues of admissibility and substantive validity (under Article 24), it should not be interpreted more widely, except if other circumstances indicate tacit choice of law (under Article 22). In the event that the clause is limited to issues of admissibility and substantive validity (under Article 24), the remaining matters are subject to the law applicable in the absence of choice (under Article 21).[106] Any modification or revocation of a disposition of property in question is also subject to one of these laws, as the case may be.

Article 25 of the Succession Regulation deals with the remaining dispositions not captured by Article 24 – agreements as to succession. There is a difference when there is an agreement on the succession of one or more persons. An agreement regarding the succession of one person is governed, as regards its admissibility, its substantive validity and its binding effects between the parties, including the conditions for its dissolution, by the law which, under this Regulation, would have been applicable to the succession of that person if he had died on the day on which the agreement was concluded. Again, the

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[104] Recital 49 of the Succession Regulation.

[105] Article 3(1)(b) and (d) of the Succession Regulation.

[106] J. Rodríguez Rodrigo, 'Article 24', in A.L. Calvo Caravaca, A. Davì and H.P. Mansel eds, *The EU Succession Regulation: A Commentary*, (Cambridge: Cambridge University Press, 2016), 377.

applicable law is determined based on the hypothetical applicable law. An agreement regarding the succession of several persons is admissible only if it is admissible under all the laws which, under this Regulation, would have governed the succession of all the persons involved if they had died on the day on which the agreement was concluded. An agreement as to succession which is so admissible is governed, as regards its substantive validity and its binding effects between the parties, including the conditions for its dissolution, by the law, from among those referred to in the first subparagraph, with which it has the closest connection. Instead, in both situations, involving an agreement regarding the succession of one person and an agreement regarding the succession of more than one person, the parties may choose as the law applicable to their agreement as to succession, as regards its admissibility, its substantive validity, and its binding effects between the parties, including the conditions for its dissolution, the law which the person or one of the persons whose estate is involved could have chosen in accordance with Article 22 on the conditions set out therein.

Article 27 regulates the formal validity of dispositions of property upon death made in writing by means of the alternative connecting factors *in favorem validitatis*. Thus, a disposition of property upon death made in writing is deemed valid as regards form if its form complies with the law: (a) of the State in which the disposition was made or the agreement as to succession concluded (*lex loci actus*); (b) of a State whose nationality (*lex patriae*) the testator or at least one of the persons whose succession is concerned by an agreement as to succession possessed, either at the time when the disposition was made or the agreement concluded, or at the time of death; (c) of a State in which the testator or at least one of the persons whose succession is concerned by an agreement as to succession had his domicile (*lex loci domicilii*), either at the time when the disposition was made or the agreement concluded, or at the time of death; (d) of the State in which the testator or at least one of the persons whose succession is concerned by an agreement as to succession had his habitual residence (*lex loci formae habitationis*), either at the time when the disposition was made or the agreement concluded, or at the time of death; or (e) in so far as immovable property is concerned, of the State in which that property is located.

The determination of the question whether or not the testator or any person whose succession is concerned by the agreement as to succession had his domicile in a particular State shall be governed by the law of that State. The above rules also apply to dispositions of property upon death modifying or revoking an earlier disposition. The modification or revocation shall also be valid as regards form if it complies with any one of the laws according to the terms of which, under the above alternatives, the disposition of property upon death which has been modified or revoked was valid. For the purposes of Article 27 of the Succession Regulation, any provision of law which limits the permitted forms of dispositions of property upon death by reference to the age, nationality or other personal conditions of the testator or of the persons whose succession is concerned by an agreement as to succession shall be deemed to pertain to matters of form. The same rule shall apply to the qualifications to be possessed by any witnesses required for the validity of a disposition of property upon death.

Finally, validity as to form of a declaration concerning acceptance or waiver is contained in Article 28 of the Succession Regulation. A declaration concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or a declaration designed to limit the liability of the person making the declaration, shall be valid as to form where it meets the requirements of: (a) the law applicable to the succession pursuant to Article 21 or Article 22 (*lex causae*); or (b) the law of the State in which the person making the declaration has his habitual residence (*lex firmae habitationis*).

4. Certain general issues of the conflict of laws

Renvoi is generally excluded in the Succession Regulation as it is in other EU private international law instruments (with minor exceptions). It is also fully excluded in the Succession Regulation with respect to the laws referred to in Article 21(2) – escape clause, Article 22 – choice of law, Article 27 – formal validity of dispositions of property upon death made in writing, Article 28(b) – validity as to form of a declaration concerning acceptance or waiver when the law of the State in which the person making the declaration has his habitual residence is applicable, and Article 30 – special rules imposing restrictions concerning or affecting the succession in respect of certain assets. Where renvoi is allowed, the rule in Article 34 of the Succession Regulation provides for the renvoi only under the condition that the law determined as applicable under the Regulation is the law of a third State. Where that is the case, reference to this law means reference to the rules of law in force in that State, including its rules of private international law, in so far as those rules make a renvoi: either (a) to the law of a Member State or (b) to the law of another third State which would apply its own law.[107]

The Succession Regulation provides for the adaptation of rights *in rem*. In Article 31, it states that where a person invokes a right *in rem* to which he is entitled under the law applicable to the succession, and the law of the Member State in which the right is invoked does not know the right *in rem* in question, that right has to be, if necessary and to the extent possible, adapted to the closest equivalent right *in rem* under the law of that State, taking into account the aims and the interests pursued by the specific right *in rem* and the effects attached to it. Both conditions may present difficulties in application: the qualification of the right *in rem* and the fact that such right "is not known" in the Member State where invoked. As regards the latter, there is a thorny path in distinguishing between the qualitative and quantitative differences.[108]

In Article 35 of the Succession Regulation, a provision is made for the public policy clause. Well-known restrictive phrasing is also used here to permit the refusal of the application of a provision of the law of any State specified by this Regulation only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.

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[107] Specific scenarios are discussed in J. von Hein, Chapter 12: 'Renvoi in European Private International Law', in S. Lieble ed, *General Principles of European Private International Law*, (Alphen aan den Rijn: Wolters Kluwer, 2016), 227, 253-254.

[108] E. Calzolaio and L. Vagni, 'Article 31', in A.L. Calvo Caravaca, A. Davì and H.P. Mansel eds, *The EU Succession Regulation: A Commentary*, (Cambridge: Cambridge University Press, 2016), 445.

While the Succession Regulation does not contain a general clause on overriding mandatory provisions, it does refer to "special rules imposing restrictions concerning or affecting the succession in respect of certain assets" in Article 30. Such rules apply to the succession provided that: 1) they from part of the law of the State in which certain immovable property (*lex rei sitae*), certain enterprises or other special categories of assets are located and where the law of the State contains special rules which, for economic, family or social considerations, impose restrictions concerning or affecting the succession in respect of those assets; and 2) under the law of that State, they are applicable irrespective of the law applicable to the succession. Such special rules may relate to the succession of the business where it is allocated to those who are involved in that business, or the right of first refusal of company shares in favour of the co-heir, possibly also moral rights of the deceased's authors[109] or the preservation of cultural or other heritage.

Article 36 of the Succession Regulation addresses the issue of the territorial conflicts of laws in States with more than one legal system, which, along the lines adopted in other legal instruments, gives priority to the internal conflict-of-laws rules of the respective State to determine the relevant territorial unit whose rules of law are to apply. In the absence of such internal conflict-of-laws rules: (a) reference to the habitual residence of the deceased is to be construed as referring to the law of the territorial unit in which the deceased had his habitual residence at the time of death; (b) reference to the nationality of the deceased is to be construed as referring to the law of the territorial unit with which the deceased had the closest connection; and (c) reference to any other provisions referring to other elements as connecting factors is to be construed as referring to the law of the territorial unit in which the relevant element is located. An exception to this relates to determining the relevant law pursuant to Article 27 for the formal validity of dispositions of property upon death made in writing. These issues will, in the absence of internal conflict-of-laws rules in the State referred to, be construed as referring to the law of the territorial unit with which the testator or the persons whose succession is concerned by the agreement as to succession had the closest connection.

Article 37 of the Succession Regulation addresses inter-personal conflicts of laws in the States with more than one legal system. The reference to the law of the State which has two or more systems of law or sets of rules applicable to different categories of persons in respect of succession is to be construed as referring to the system of law or set of rules determined by the rules in force in that State. In the absence of such rules, the system of law or the set of rules with which the deceased had the closest connection shall apply.

Article 38 of the Succession Regulation states that a Member State which comprises several territorial units, each of which has its own rules of law in respect of

[109] G. Contaldi, Article 30, in A.L. Calvo Caravaca, A. Davì and H.P. Mansel eds, *The EU Succession Regulation: A Commentary*, (Cambridge: Cambridge University Press, 2016), 432-438. The author points out that neither the national conflict of law rules that break the unity of the succession nor the substantive rules on reserved share may be qualified as special rules under Article 30 of the Succession Regulation, 440.

succession, shall not be required to apply this Regulation to intra-State conflicts of laws.

V. European Certificate of Succession

Regulation 2012/650 does not only deal with private international law issues.[110] In order to achieve the objectives laid down in recitals 7 and 67 and especially to ensure that a cross-border succession may "be settled speedily, smoothly and efficiently", despite national differences, the Succession Regulation also provides for the creation of an ECS[111] (recital 8 and Articles 62 *et seq.*), a legal instrument that aims at enabling "heirs, legatees, executors of the will or administrators of the estate (…) to demonstrate easily their status and/or rights and powers in another Member State".[112]

1. Reasons for introducing the ECS

The need for a uniform certificate became evident due to the increase in successions with cross-border implications,[113] which highlighted, for example, the existence of different mechanisms of proof of the quality of heir in Europe.[114] In fact, only in some European legal orders is a domestic inheritance certificate foreseen for this purpose:[115] The person

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[110] A. Dutta, 'The European Certificate of Succession: A New European Instrument between Procedural and Substantive Law', 5 *IJPL* 38 (2015) 40. See also page 43 for issues concerning the legal basis for the legislative competence of the EU in this case.

[111] On this topic, see only: F. Padovini, 'Il certificato successorio europeo' *Europa e Diritto Privato*, 729 (2013), and in M.G. Cubeddu Wiedemann, G. Gabrielli, F. Padovini, S. Patti, S. Troiano, A. Zaccaria eds, *Liber amicorum per Dieter Henrich*, II (Torino: Giappichelli, 2012), 215; I. A. Calvo Vidal et al., *Il certificato successorio europeo*, (Napoli: Edizioni Scientifiche Italiane, 2017), *passim*; I. Riva, *Certificato successorio europeo. Tutele e vicende acquisitive* (Napoli: Edizioni Scientifiche Italiane, 2017), *passim*; A. Ciatti Càimi, 'La tutela degli acquirenti di beni ereditari e il certificato successorio europeo', in *Libertà di disporre e pianificazione ereditaria*, XI Convegno Nazionale Sisdic – Napoli, (2017) 423; M. Medina Ortega, 'The European Certificate of Succession' 11 *Anuario Espanol Derecho Int'I Priv.*, 907 (2011); T. Ivanc, S. Kraljić, 'European Certificate of Succession – Was There a Need for a European Intervention', 18 *Annals Fac. L.U. Zenica* (2016) 249; A. Dutta, n 110 above, 40 (see footnote no. 10 for further literature).

[112] See recital 67.

[113] Cf. the analysis by the German Notaries' Institute (*Deutsches Notarinstitut*): Le Successions Internationales dans l'U.E. Perspectives pour une Harmonisation – Conflict of Law of Succession in the European Union. Perspectives for a Harmonisation – Internationales Erbrecht in der EU. Perspektiven einer Harmonisierung, Würzburg, 2004, 29.

[114] This part is based on my oral presentation at the conference PSEFS – Ljubljana Project Events – 12 & 13 December 2019 'Best Practices in European Family and Succession Law'. For an abstract, see: T. Pertot, 'Devolution of Inheritance in Europe: The Role of (European and National) Certificates of Succession, in *Best Practices in European Family and Succession Law* (collection of abstracts), 39-40, available at the following link *www.euro-family.eu/documenti/eventi/best_practices_ljubljanapsefsprojectevents.pdf*.

[115] A typical example is the German *Erbschein*, issued by a court or by a judicial authority (see, for more details, T. Pertot, 'Germany', in L. Ruggeri, I. Kunda and S. Winkler eds., n 2 above, *sub* question 3.1.4, available at the following link: *www.euro-family.eu/documenti/news/psefs_e_book_compressed.pdf*; D. Schwab, P. Gottwald and S. Lettmaier, 'Family and Succession Law' (Germany) *International Encyclopaedia for Family and Succession Law*, Suppl. 86, (2017), 170-174. A judicial certificate, the so-called *Einantwortungsurkunde*, is also known in Austria (see, for further details, T. Pertot, 'Austria', in L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above, *sub* question 3.1.4.). For more examples, see also A. Dutta, n 110 above, 42 (see footnote no. 11 for further literature) as well as the Collection of National Reports edited by L. Ruggeri, I. Kunda and S. Winkler, n 2 above, (see especially the answers to question 3.1.4). Cf. (in German language) R. Süß, Erbrecht in Europa (2020) and (in Italian language): A. Zoppini, 'Le successioni in diritto comparato', in R. Sacco ed,

who is identified as heir on such a certificate is usually presumed to be such[116] and is therefore authorised to enter into legal relations.[117] In contrast, in legal orders which do not know an instrument certifying the position of heir, alternative mechanisms of proof are in place.[118] For example, in legal orders based on the French tradition, the so-called *acte de notoriété* or *atto di notorietà*, issued by a public notary and certifying that a fact (eg the quality of heir) is known in a certain context, is normally used to supply proof of the status acquired. However, the public deed used for this purpose is not intended to develop a presumption and its value is only based on the sanctions foreseen for those who declare something untrue to a public official.[119]

Differences can be found in Europe also regarding the protection of third parties entering into legal transactions with those who affirm themselves to be heirs or to have succession rights. If a certificate of inheritance exists, it also aims to protect those who, relying on the accuracy of the certificate, contracted with the person identified as heir.[120] In contrast, in legal orders where such an instrument does not exists, the protection of third parties is usually guaranteed according to the rules applying to contracts with the apparent heir (cf, for example, Article 534 of the Italian Civil Code and Articles 730-4 of the French Civil Code).[121]

The first model, based on the existence of a certificate of succession, clearly gives more certainty to the heirs as regards their legitimation, ensuring the better protection of third parties as well. Nevertheless, reforms were adopted or have been proposed in order to improve the domestic instruments used to prove heirship also in legal orders traditionally following the second model. In 2001, the French legislator reformed, for example, the *acte de notoriété,*[122] "giving greater" importance to the notarial act.[123] In Italy, where a domestic

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Trattato di diritto comparato (Torino, 2002), 25. See also A. Bonomi ed, *Le droit des successions en Europe (Actes du colloque de Lausanne du 21 février 2003)*, (Genève: Librairie Droz, 2003), 89.

[116] See, for example, as regards the certificate of succession existing in the Italian districts covered by the *libro fondiario*: T. Pertot, in R. Garretto, M. Giobbi, A. Magni, T. Pertot, E. Sgubin and M. V. Maccari, Italy, in L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above, *sub* question 3.1.4.

[117] See, for example, regarding the German *Erbschein*, D. Schwab, P. Gottwald and S. Lettmaier, n 115 above, Chapter 3, § 2.

[118] Cf. T. Pertot, 'Devolution of Inheritance in Europe: The Role of (European and National) Certificates of Succession', n 114 above, 39-40.

[119] For such effects of the Italian certificate of succession, which however only exist in districts covered by the *libro fondiario*, see T. Pertot, in R. Garretto, M. Giobbi, A. Magni, T. Pertot, E. Sgubin and M. V. Maccari, Italy, in L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above, *sub* question 3.1.4.

[120] For the German legal system, cf D. Schwab, P. Gottwald and S. Lettmaier, n 115 above, Chapter 3, § 2.

[121] F. Padovini, 'Il certificato successorio europeo' in M.G. Cubeddu Wiedemann, G. Gabrielli, F. Padovini, S. Patti, S. Troiano, A. Zaccaria eds, n 111 above, 218; A. Fusaro, 'Linee evolutive del diritto successorio europeo' *Giustiziacivile.com*, 2 (2014).

[122] Loi n. 2001-1135 du 3 décembre 2001, relative aux droits du conjoint survivant et des enfants adultérins et modernisant diverses dispositions de droit successoral.

[123] M.V. Maccari, 'France', in L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above, *sub* question 3.1.3. See also J.-F. Pillebout, *Successions. Des preuves de la qualité d'héritie*r, Juris-Classeur Civil (2003). In the Italian language: A. Fusaro, n 121 above; F. Padovini, in M.G. Cubeddu Wiedemann, G. Gabrielli, F. Padovini, S. Patti, S. Troiano, A. Zaccaria eds, n 111 above, 218-219.

certificate exists only in the districts covered by the land register (*libro fondiario*), an extension of the instrument to the whole country has recently been proposed.[124]

The advantages of a certificate of inheritance, which allows heirs and legatees to assert their succession rights, enabling executors of wills and administrators to demonstrate their powers, and which at the same time guarantees protection to third parties, led to the adoption of equivalent instruments at the European level as well.[125] As the abovementioned domestic deeds are normally not recognised by foreign authorities,[126] the creation of a uniform certificate, producing the same legal effects in all Member States, will help citizens to legitimise themselves in the case of a cross-border succession. At the same time, the ECS will give security to legal transactions by protecting third parties which act relying on the elements certified therein.

2. From the Hague Convention to the Succession Regulation

The need to simplify the transfer of the estate upon death in the case of an inheritance with cross-border implications previously led to the adoption of the Hague Convention of 2 October 1973 concerning the International Administration of the Estates of Deceased Persons,[127] which provided for the need to "establish an international certificate designating the person or persons entitled to administer the movable estate of a deceased person and indicating his or their powers".[128]

The Hague Convention only entered into force in three States (Czechia, Slovakia and Portugal). One of the reasons for its lack of success was the scant consideration given to the peculiarities of the continental legal orders.[129] In particular, the Convention envisaged the introduction of a certificate aiming at determining the person who has the power to administer the deceased's estate. It was therefore clearly based on the model of devolution of inheritance followed by the common-law legal systems, where the estate devolves upon heirs indirectly, eg only after the liabilities have been paid by a personal representative.[130]

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[124] The proposal of the Italian Notaries is available at the following link: *www.notariato.it/en/certificate-succession*. See also F. Padovini, in M.G. Cubeddu Wiedemann, G. Gabrielli, F. Padovini, S. Patti, S. Troiano, A. Zaccaria eds. n 11 above, 226. More recently: Id., 'La revisione del codice civile: semplificazione ereditaria e certificato successorio', available at the following link: *civilistiitaliani.eu/images/notizie/atti_convegno_giugno_2019/Padovini_convegno_giugno_2019.pdf*.

[125] For the historical background and an illustration of the documents that preceded the Regulation (the Hague Convention of 1973, the Vienna Action Plan of 1998, the Hague Programme of 2001, the Green Paper of 2005 and the Regulation Proposal of 2009), see: T. Ivanc and S. Kraljić, 'European Certificate of Succession – Was There a Need for a European Intervention?' 18 *Annals Faculty of Law of the University of Zenica*, 253-255 (2016).

[126] Or only with reluctance, as observed by A. Dutta, n 110 above, 42.

[127] The text of the Convention is available at the following link: *www.hcch.net/en/instruments/conventions/full-text/?cid=83*.

[128] Article 1.

[129] In this sense F. Padovini, in M.G. Cubeddu Wiedemann, G. Gabrielli, F. Padovini, S. Patti, S. Troiano, A. Zaccaria eds, n 111 above.

[130] See for England and Wales: E. Sgubin, in R. Garetto, F. Pascucci and E. Sgubin, United Kingdom, in L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above, *sub question 3.1.4*. Cf. also A. Dutta, n 110 above, 44.

However, this method of devolution of inheritance is not typical of the continental legal orders, where the estate is usually directly devolved to the heirs, without being previously transmitted to a third person, who administers it. Legal orders where direct devolution of inheritance exists may then be further divided into two categories:[131] in some, the estate passes on to the heirs automatically upon the deceased's death (see eg § 1922 of the German Civil Code),[132] while in others an additional act – an acceptance of heirship[133] or a court decision[134] – is needed to assign the inheritance.[135]

Creating a certificate identifying the administrator of the estate, rather than the heirs and/or legatees, the Hague Convention was therefore clearly based on the model of indirect devolution of inheritance, which is typical of English law, but not of the civil law tradition. On the other hand, the characteristics of both models are properly considered by the Succession Regulation, which creates a certificate of succession to be used by administrators of the estate and executors of wills, but also (and especially) by heirs and legatees aiming at establishing their status and/or at exercising their rights in another Member States,[136] eg where the estate (or part of it) is located.[137]

3. The characteristics of the ECS

The Succession Regulation devotes to the ECS its Chapter VI, where detailed rules are provided regarding the application, the issuing and the effects of the Certificate.

Application

Pursuant to Article 65(1), the ECS may be issued upon application.[138] The latter, which shall contain the information listed in Article 65(3)[139] and be accompanied by relevant

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131 T. Pertot, 'Devolution of Inheritance in Europe: The Role of (European and National) Certificates of Succession', n 114 above, 39-40.

132 For the so-called *saisine*, see: B. Dutoit, 'Perspectives comparatives sur la succession ab intestat', in A. Bonomi ed, n 115 above, 16.

133 As it is, for example, in Italy (see Article 459 of the Italian Civil Code).

134 Eg in Austria. For a brief description of the proceedings, see T. Pertot, 'Austria', in L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above, *sub* question 3.1.4.

135 Some peculiarities exist with regard to the succession of the State: even in the legal orders where the State acquires an heirless estate (*bona vacantia*) as an heir and not because of its "territorial sovereignty" (the existing differences are properly considered by the Regulation: cf. Article 33 and recital no. 56), the model of acquisition differs under some aspects from the one prescribed for other heirs (additionally, a limitation of liabilities for debts is usually foreseen due to the impossibility of the State to renounce the estate). For more information, see: M. Tescaro, *La successione dello Stato nel diritto italiano tra modello pubblicistico di stampo francese, modello privatistico di stampo tedesco e loro contemperamento nell'art. 33 del regolamento UE n. 650 del 2012*, n 9 above, 51; A. Ciatti, 'La successione dello Stato', in R. Calvo and G. Perlingieri eds, *Diritto delle successioni e delle donazioni*, (Napoli, 2013); P. Wautelet and M. Salvadori, in A Bonomi and P. Wautelet eds, *Il regolamento europeo sulle successioni* (Milano, 2015) Article 33; K. Reid, M. de Waal and R. Zimmermann, 'Intestate Succession in Historical and Comparative Perspective', in K. Reid, M. de Waal and R. Zimmermann eds, *Comparative Succession Law: Volume II: Intestate Succession*, (Oxford: Oxford Scholarship Online, 2015), 442.

136 Article 63(1).

137 In some opinions (see A. Dutta, n 110 above, 45), "the cross border preconditions (…) are already met if the applicant needs [the ECS] to inquire whether parts of the estate have to be collected in other States".

138 Cf. recital 72.

documents, may be submitted by heirs, legatees "having direct rights in the succession" and executors of wills or administrators[140] needing "to invoke their status or to exercise respectively their rights as heirs or legatees and/or their powers as executors of wills or administrators of the estate". An autonomous interpretation of the legal terms used to identify the applicants and the positions to be certified is necessary in order to assess whether one has the quality required by law or not.[141] It should be noted that by restricting the use of the ECS to legatees "having direct rights in the succession", Article 63(1) seems to refer only to the beneficiaries of a legacy by vindication.[142] However, in some opinions, the legatee *per damnationem* could also apply for the ECS.[143]

Issuing authority

The issuing authority is determined according to the general rules of jurisdiction (Articles 4 *et seq.*).[144] The European legislator let the Member States free to determine the authority having the competence to issue the ECS within the single legal order, deciding whether it should be a court[145] or another authority, eg a public notary, who often has the competence in matters relating to succession under national law.[146]

As a comparative analysis shows, Member States opted for different solutions. Whereas some of them assigned the competence to courts, others decided to designate public

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[139] As stated in Article 65(3) this information shall be included in the application "to the extent that such information is within the applicant's knowledge and is necessary in order to enable the issuing authority to certify the elements which the applicant wants certified". The specific form which may be used for the purpose of submitting the application of the ECS according to Article 65(2) was adopted by the Commission implementing regulation (EU) 2014/1329 of 9 December 2014 establishing the Forms referred to in Regulation (EU) 2012/650 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (see Annex 4 Form IV).

[140] Cf Articles 63(1) and 65(1).

[141] A. Dutta, n 110 above, 44, according to whom some problems may rise with regard to common law legal systems (especially England and Wales), where the model of indirect devolution of inheritance is in place (see *supra*) and where the position of heirs towards the personal representative "is more akin to the position of a legatee in continental legal systems". For the question on whether or not an acceptance of the estate is needed in order to issue the ECS, see point 2.4 of the Guide prepared by the Fondazione Italiana del Notariato and the Consiglio Nazionale del Notariato: AA.VV., *Il Certificato Successorio Europeo – CSE. Prime proposte operative*, available at *the following link: https://www.notaioricciardi.it/UFFICIO/Successioni_Donazioni/certificato%20successorio%20europeo%20-%20cse%20-%20vademecum%20(cnn).docx*

[142] O. Jauernig and R. Stürner, EuErbVO, Article 73 para 1 (Munich: Verlag C.H. Beck 2018); A. Dutta, n 110 above, 44 (in whose opinion the same restriction should also apply to heirs); C. Benanti, 'Il certificato successorio europeo: ragioni, disciplina e conseguenze della sua applicazione nell'ordinamento italiano', Nuova giur. civ. comm. 2014, II, 10-11.

[143] See the Guide prepared by the Fondazione Italiana del Notariato and the Consiglio Nazionale del Notariato, 'Il Certificato Successorio Europeo (CSE) Prime proposte operative' *CNN Notizie*, 27 agosto 2015, point 2.6. For the question on if creditors could apply for the ECS, cf. W. Burandt, D. Rojahn and S. Schmuck, EuErbVO, Article 65 para 1 (Munich: C.H. Beck, 2019).

[144] See Article 64: "The Certificate shall be issued in the Member State whose courts have jurisdiction" under the Regulation. Cf also recital 70.

[145] As defined in Article 3(2).

[146] Cf Article 64 and recital 70. Member States had to provide information to the Commission regarding the authority competent to issue the ECS by 16 January 2014 (see Article 78).

notaries,[147] for whom assuming "competence in cross-border succession proceedings (…) was [often] a kind of (…) 'initiation' into their participation in the judicial cooperation in civil and commercial matters".[148]

Issuing proceedings

By issuing the ECS, the competent authority has to follow a procedure of a rather non-contentious nature,[149] establishing facts, taking "all the necessary steps to inform the beneficiaries of the application", hearing "if necessary (…) any person involved and any executor or administrator" and making "public announcements aimed at giving other possible beneficiaries the opportunity to invoke their rights".[150] In order to bridge the gaps within the Regulation, national procedural law may apply as well.[151]

Once the application is examined and the elements to be certified established, the ECS is issued without delay by the competent authority,[152] using a specific form prepared for this purpose.[153] The original of the Certificate remains with the issuing authority, while certified copies are issued to the applicant and to those who demonstrate a legitimate interest.[154] Copies are only valid for a period of six months. Exceptionally, the issuing authority may decide for a longer period of validity. An extension of this period may be applied as well.[155] Rectification, modification and withdrawal of the ECS are regulated in Article 71 and are all under the competence of the issuing authority. The Regulation also deals with redress against the latter's decisions, providing that challenges are lodged before a judicial authority.[156] Pending a modification or withdrawal or a challenge, the effects of the ECS may be suspended by the competent authority upon request.[157]

Content of the ECS

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147 For the different solutions, see also the answers to question no. 3.3.5.6, in L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above.
148 As stated by P. Poretti in her oral presentation at the conference PSEFS – Ljubljana Project Events – 12 & 13 December 2019 "Best Practices in European Family and Succession Law". For an abstract, see Id., 'Experience of Croatian Public Notaries with the Application of the Succession Regulation, in *Best Practices*, n 114 above, 30.
149 A. Dutta, n 110 above, 45.
150 Additionally, foreign authorities may be requested to provide the necessary information (held, *e.g.*, in the national registers). Cf. Article 66.
151 A. Dutta, n 110 above, 46-47.
152 Article 67(1). However, the ECS cannot be issued "if the elements to be certified are being challenged" (a); or if "the Certificate would not be in conformity with a decision covering the same elements".
153 See Commission implementing Regulation (EU) No 2014/1329 of 9 December 2014 establishing the Forms referred to in Regulation (EU) No 2012/650 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (Annex 5 as Form V).
154 Article 70(1); cf. recital no. 72.
155 See Article 70(3).
156 For more details see: Article 72; cf recital 72.
157 Article 73(1).

The ECS shall contain the information provided in Article 68.[158] Although the list is quite extensive,[159] there are some elements which seem to be relevant, even if their indication in the ECS is not explicitly required.[160] For example, according to Article 68(1)(h), the ECS should contain information concerning the matrimonial property regime. However, it is not clear if its effects upon the deceased's death[161] could also be certified.[162]

Effects

Once issued, the ECS can be automatically used in all Member States,[163] included the one whose authorities issued it[164] and serves mostly as an instrument of legitimation for those who intend to exercise their rights and/or prove their position in another Member State.[165] In fact, the ECS is connected with the presumption that the elements which have been established are accurate and that the one mentioned as the heir, legatee, executor or administrator in the certificate has that status and/or holds the rights or the powers as stated therein.[166]

The ECS also protects *bona fide* third parties.[167] Therefore, any person who, relying on the information stated in an ECS, makes payment or passes on property[168] to a person who is identified as being entitled to receive such performance shall be considered to have performed in favour of an authorised person.[169] The protection is also extended to the person who receives property from the person mentioned in an ECS as entitled to dispose of it.[170]

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158 In the sense that an ECS may also be partial, see W. Burandt, D. Rojahn and S. Schmuck, n 143 above. Cf. S.D.J. Schmitz, Das Europäische Nachlasszeugnis, RNotZ (2017), 275. However, some elements should be contained in the ECS even if it is only partial: see point 2.14 of the abovementioned Guide prepared by the Fondazione Italiana del Notariato and the Consiglio Nazionale del Notariato.

159 O. Jauernig and R. Stürner, n 141 above, Article 73 para 4: "eine sehr detaillierte und eher abschreckende Auflistung".

160 F. Padovini, in M.G. Cubeddu Wiedemann, G. Gabrielli, F. Padovini, S. Patti, S. Troiano, A. Zaccaria eds, n 111 above, 223; A. Dutta, n 110 above, 45-46.

161 Which fall into the scope of the Regulation: see C-558/16 (*Doris Margret Lisette Mahnkopf*, 1 March 2018).

162 See A. Dutta, n 110 above, 49, footnote 37. For a brief overview of the debate on this point, see: O. Jauernig and R. Stürner, Article 73 para 4, n 142 above. According to D. Damascelli, "Brevi note sull'efficacia probatoria del certificato successorio europeo riguardante la successione di un soggetto coniugato o legato da unione non matrimoniale" *Rivista diritto internazionale privato e processuale*, 73-74 (2017), information concerning the matrimonial property regime is also covered by the presumption in Article 69(2). See, however, P. Lagarde, "Le certificat successoral européen dans l'ordre juridique français" *Contratto e impresa. Europa,* 421 (2015); P. Wautelet and E. Goossens, 'Le certificat successoral européen - perspective belge' *Contratto e impresa. Europa*, 443-444 (2015).

163 Article 69(1). The possibility of a refusal would be excluded even in the case of a violation of the *ordre public*: P. Wautelet, in A. Bonomi and P. Wautelet eds, n 135 above, Article 69 para 8.

164 Article 62(3).

165 For the "Legitimations" as well as the "Beweiswirkung" of the ECS, see: O. Jauernig and R. Stürner, Article 73 para 6, n 142 above.

166 See Article 69(2).

167 For the "Gutglaubenswirkung" of the ECS, see again O. Jauernig and R. Stürner, Article 73 para 6, n 142 above.

168 The provision of services is not mentioned: see A. Dutta, n 110 above, 48.

169 Article 69(3) and recital 71.

170 Article 69 (4) and recital 71.

The third parties' protection is not without limits as it is only afforded if the third party "acted in good faith relying on the accuracy of the information certified" in the ECS.[171] Any person who "knows that [its contents] are not accurate or is unaware of such inaccuracy due to gross negligence" is not considered worthy of protection under the Regulation.[172]

Recording on the basis of the ECS

The presumption established by the ECS is also applicable within the register proceedings,[173] representing the ECS as "a valid document for the recording of succession property in the relevant register of a Member State".[174]

However, due to the uncertainty concerning the interpretation of Articles 69(5) and 1(2)(k)(l) of the Regulation, questions arise concerning the interplay between domestic law and European law.[175] One could especially ask if the ECS replaces the deeds usually required under the national law for registration. Think, for example, of a German-Italian succession, including immovables located in Italy. If German law applies, the quality of heir would be acquired without the need for acceptance due to the so-called "*Vonselbsterwerb*" principle (see § 1922 of the German Civil Code). However, as Italian law requires the acceptance of heirship also for the transcription of *mortis causa* transactions (see Articles 2648 and 2660 *et seq.* of the Italian Civil Code),[176] the question is whether the ECS (issued, for example, by German authorities) is to be considered a sufficient deed in order to provide for entry into the Italian registers. In this regard, it was stated that the ECS could replace some of the documents usually needed for the transcription according to Italian law, eg acceptance, the deed of inheritance and the abstract of the will. Therefore, in this opinion only the "transcription note" (mentioning the ECS) should be presented by demanding the registration.[177] The conclusion seems to be in line with the Regulation, considering that: i) the latter excludes from its scope "any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register";[178] and that ii) "the

[171] Recital 71 and Article (3)(4).
[172] Cf Article 69 (3)(4) and recital 71. For the differences existing, for example, between the effects of the German and the European certificate and the protection that the two instruments recognise for third parties, see D. Schwab, P. Gottwald, S. Lettmaier, n 115 above, 173-174. Cf. T. Pertot, Germany, in L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above, *sub* question 3.1.4.
[173] A. Dutta, n 110 above, 48.
[174] See recital 18 and in Article 69(5).
[175] See, for the Italian legal order, T. Pertot, Italy, in R. Garetto, M. Giobbi, A. Magni, T. Pertot, E. Sgubin and M.V. Maccari, Italy, in L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above, 383, *sub* question 3.3.5.2.
[176] See T. Pertot, in R. Garetto, M. Giobbi, A. Magni, T. Pertot, E. Sgubin and M. V. Maccari, Italy, in L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above, 373-374, *sub* question 3.1.4 and 383, *sub* question 3.3.5.2.
[177] F. Padovini, 'Il certificato successorio europeo', n 111 above, 222. See also A. Fusaro, *Tendenze del diritto privato in prospettiva comparatistica* (Torino: Giappichelli, 2017), 314. See, however, C.A. Marcoz, 'Nuove prospettive e nuove competenze per i Notai italiani: il rilascio del Certificato Successorio Europeo' *Notariato*, 508 (2015); A. Bonomi and P. Wautelet eds, n 135 above, 727; I. Riva, n 111 above, 137; C.M. Bianca, 'Certificato successorio europeo: il notaio quale autorità di rilascio' *Vita notarile*, 8 (2015).
[178] Article 1(2) lit. l.

authorities involved in the registration [should not be precluded] from asking the person applying for registration to provide such additional information, or to present such additional documents, as are required under the law of the Member State in which the register is kept".[179]

Interplay with national inheritance certificates

Based on the consideration that, with the creation of the ECS, the Regulation has not touched national instruments used for similar purposes,[180] which therefore coexist and may conflict with the ECS,[181] one could also ask what interplay there is between the European and domestic certificates of succession.[182]

Many questions arise due to the co-existence of a plurality of instruments to be used for the same purpose. For example, it is not clear if and how domestic certificates could also have cross-border effects.[183] Further, it is debated if an ECS can be issued in internal cases as well.[184] As domestic certificates are mostly required under national law to enter succession rights into the land registers, it could also be difficult, due to the lack of specific national provisions aiming at adapting the national law to the European law,[185] to assess if registration in the State where the immovables are located can be made on the basis of the ECS issued by the competent (foreign) authority, or if an internal certificate of succession is to be issued (in addition to the European one) by the authorities of the State, where the

[179] Recital 18. Additionally, also the authority "which issues the Certificate should have regard to the formalities required for the registration of immovable property in the Member State in which the register is kept". Of course, this requires an exchange of information on such formalities between the Member States (see recital no. 68). The ways of cooperation with foreign institutions were addressed in the oral presentation held by N. Podobnik Oblak at the conference PSEFS – Ljubljana Project Events – 12 & 13 December 2019 'Best Practices in European Family and Succession Law' (for an abstract of her presentation, see: 'Experience of Slovenian First-instant Courts with the Application of the Succession Regulation', in *Best Practices*, n 114 above, 32.

[180] Article 62(2)(3).

[181] Possible scenarios of conflict were examined by Vassiliki Marazopoulou at the conference PSEFS – Ljubljana Project Events – 12 & 13 December 2019 'Best Practices in European Family and Succession Law'. For an abstract, see: The Effectiveness of the European Certificate of Succession in View of Its Comparison with National Certificates of Succession, in *Best Practices*, n 114 above, 37.

[182] For some considerations, from the German perspective, see *eg* O. Jauernig and R. Stürner Article 73 para 7, n 142 above.

[183] A. Dutta, n 110 above, 42. Depending on their nature and design, recognition of national certificates may be based on Article 39 or Article 59. Cross-border effects of the national instruments could therefore differ.

[184] For the question about whether an extension of the ECS to internal successions would be possible, see with regard to the Italian legal order: T. Pertot, in R. Garetto, M. Giobbi, A. Magni, T. Pertot, E. Sgubin and M. V. Maccari, Italy, in L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above, 383, *sub* question 3.3.5.2. For the proposal to create a domestic certificate of succession for the whole Italian territory, see above.

[185] The systematic implementation of the European Regulation at the national level such as provided by the German legislator (see Gesetz zum Internationalen Erbrecht und zur Änderung von Vorschriften zum Erbschein sowie zur Änderung sonstiger Vorschriften vom 29. Juni 2015, BGBl I Nr. 26/2015) has failed in other Member States, which rather adopted a minimum solution. See, for example, the Italian Legge 161/2014 – Disposizioni per l'adempimento degli obblighi derivanti dall'appartenenza all'Unione europea-Legge europea 2013-bis, Gazz. Uff. 10 novembre 2014, n. 261, S.O. (Article 32). However, for a larger reform recently proposed, see F. Padovini, n 124 above.

immovables are located and the registration is to be done.[186] In attempting to give an answer to this question, one could, for example, argue that it would be against the scope of the Regulation, but even more against the statements made by the CJEU in the *Oberle* case, if additional domestic certificates, to be issued by authorities different from those competent under the Regulation, would be required in single Member States in order to provide for registration into national land registers. This solution was recently also followed by an Italian judge[187] who, despite the silence of the national law in this regard, considered the ECS a sufficient deed to provide for registration into the land register existing in some Italian districts (without the need to apply for an additional domestic certificate).[188]

[186] Think, for example, of an Austrian-Italian succession, subject to the application of the Austrian law and including immovables located in Trieste, where the *libro fondiario* exists. As a domestic certificate of succession is needed in Trieste in order to enter the succession rights in the land register, while the ECS is not expressly mentioned as a deed on which a registration may be done, one could think that a domestic certificate is still necessary for the purpose of registration into the land register.

[187] See Tribunale of Trieste, 8 May 2019, available at the following link: *www.rivistafamilia.it/wp-content/uploads/2019/10/Trib.-Trieste-_-decr_tav_8.5.2019.pdf.*

[188] § 35 of the German GBO is more explicit in this sense.

Chapter IV

Jerca Kramberger Škerl and Neža Pogorelčnik Vogrinc *

Part I - Recognition and enforcement under the Succession Regulation and the Property Regimes Regulations: procedural issues

I. Introduction. – II. Recognition of judgments. – III. The declaration of enforceability of judgments (exequatur). – 1. Admissibility of the application for *exequatur*. – 2. First instance proceedings. – 3. Appeal(s) against the declaration of enforceability. – 4. Provisional, including protective, measures during exequatur proceedings. – 5. Costs of the exequatur proceedings. – IV. European Certificate of Succession. – 1. Proceedings for the issue of the ECS. – 2. Legal remedies. – V. Acceptance and enforcement of authentic instruments and court settlements. – 1. Evidentiary effects of authentic instruments. – 2. Refusal and delay of acceptance. – 3. Enforcement of authentic instruments and of court settlements.

Part II - Refusal of recognition and enforcement

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Part I

Recognition and enforcement under the Succession Regulation and the Property Regimes Regulations: procedural issues

Jerca Kramberger Škerl

I. Introduction

The rules on recognition and enforcement of the three regulations only apply in Member States participating in the applicable regulation, and only for judgments, authentic instruments and court settlements from Member States equally participating. If a judgment originates in an EU Member State which does not participate, national rules on recognition and enforcement of foreign judgments apply, just as in the case of a judgment from a non-EU State. For the purposes of clarity, this limitation in the territorial scope of application of the three regulations will not be repeated throughout the Chapter, and the term Member States will be used for the participating States.

Regarding the temporal scope of application, the Succession Regulation applies to the recognition/acceptance and enforcement of judgments, court settlements and authentic instruments concerning the succession of persons who died on or after 17 August 2015 (Article 83(1)). The Property Regimes Regulations apply to the recognition and enforcement of judgments issued in legal proceedings instituted on or after 29 January 2019, as well as to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 29 January 2019. It is important to emphasise that the important date is that of the beginning of the court proceedings, and, in principle, not the date of the issuance of the judgment. However, the regulations allow for the recognition and enforcement of judgments issued after their entry into force, under their rules, even in the event the proceedings started before their entry into force, if the jurisdiction of the competent court was based on a rule compliant with the rules on jurisdiction from the regulation.[1]

The Property Regimes Regulations and the Succession Regulation provide the rules on "recognition, enforceability and enforcement of decisions" in their Chapter IV. These rules are largely identical[2] and follow the system well known to European lawyers from the

[1] This system is analogous to that from the Brussels I Regulation of 2000. For more on the issues that arise regarding such a system, see J. Kramberger Škerl, 'The application 'ratione temporis' of the Brussels I regulation (recast)', in D. Duić and T. Petrašević eds, *EU and Comparative Law Issues and Challenges: Procedural Aspects of EU Law* (Osijek: Faculty of Law Osijek, 2017), 341-363, *www.pravos.unios.hr/download/eu-and-comparative-law-issues-and-challenges.pdf*. For more on the rules on jurisdiction in the Matrimonial Property Regimes Regulation, see N. Pogorelčnik Vogrinc, *Mednarodna pristojnost v sporih glede premoženjskih razmerij med zakoncema* (Podjetje in delo no 1/2020), 178-203.

[2] F. Dougan, 'Nova evropska pravila o pristojnosti, pravu, ki se uporablja ter priznavanju in izvrševanju odločb na področju premoženjskih razmerij mednarodnih parov', in J. Kramberger Škerl and A. Galič eds, *Liber amicorum Dragica Wedam Lukić* (Faculty of Law, University of Ljubljana, 2019), 244.

original version of the Brussels I Regulation.[3] The recognition happens *ipso iure*, whereas enforcement is only possible after the declaration of enforceability (*exequatur*) is obtained in special proceedings conducted in the Member State of enforcement.

The (actual) enforcement, following the declaration of enforceability, will always be conducted under the national procedural rules of the Member State of enforcement.[4] In principle, the EU regulations do not interfere with these rules. They regulate the phase of "the transition" of the foreign judgment into the domestic legal system, ie the phase prior to the enforcement proceedings, which will be the same as for domestic judgments. Deciding on the application for enforcement, the enforcement judge will no longer verify the existence of the grounds for refusal from the regulations – the decision on the *exequatur*, issued in the (necessarily!)[5] separate *exequatur* proceedings is binding on all other courts.

The Succession Regulation further provides for the optional issuance of the European Certificate of Succession (ECS), on the basis of which the legal status of heirs, legatees, executors of wills and administrators of the estate gains "automatic" cross-border recognition. This is an innovation in cross-border succession proceedings (as well as a general novelty in Member States which do not provide for a similar instrument in internal proceedings) and an important improvement of the legal position of parties in such proceedings. The presumptions from the ECS are justified, on one hand, by strict conditions for issuing the ECS and, on the other hand, by concerns for the rapidity and cost-effectiveness of the cross-border management of succession.

This part of the Chapter focuses on procedural issues in the recognition and enforcement under the mentioned regulations and leaves aside any analysis of the grounds for refusal of recognition and enforcement, which will be treated in the second part of this Chapter.

II. Recognition of judgments

As mentioned in the Introduction, the rules on the recognition of the Succession Regulation and of both Property Regimes Regulations mimic the system under the Brussels I Regulation of 2000. This is very welcome, since the practitioners and the legislatures of the Member States have experience in dealing with such rules. Also very importantly, the case law of the Court of Justice of the EU (hereinafter: CJEU) and of national courts, adopted on the basis of the Brussels I Regulation (and, before that, the Brussels Convention), is able to serve as an instrument of interpretation.[6]

The recognition of judgments from other Member States is thus "automatic" (*ipso iure*), eg without any verifications in the Member State of recognition, and that Member State

[3] Council Regulation (EC) no 2001/44 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 012 of 16 January 2001. Paul Lagarde wrote: "The property regimes Regulations follow a sort of European common law on (the recognition and enforcement of decisions and authentic instruments)" in U. Bergquist et al., *The EU Regulations on Matrimonial and Patrimonial Property* (Oxford: Oxford University Press, 2019), 12.

[4] U. Bergquist, in U. Bergquist et al., n 3 above, 184.

[5] Unlike some national laws (for example in Slovenia), the regulations do not envisage an incidental declaration of enforceability within enforcement proceedings.

[6] U. Bergquist in U. Bergquist et al., n 3 above, 140.

considers such judgments as domestic judgments. However, this "presumption of regularity" can be confirmed in special recognition proceedings under the regulations, so as to become unrebuttable (Article 36(2) of the Property Regimes Regulations and Article 39(2) of the Succession Regulation). These proceedings are conducted pursuant to the rules on proceedings for the declaration of enforceability in the same regulations. According to the majority opinion in the doctrine, the decision on recognition is of a declaratory nature, since the judgment produced effects in all Member States at the same time as in the Member State of origin.[7]

Only if the interested party demands recognition, can the opposing party invoke grounds for refusal of recognition. Just as in the Brussels I Regulation of 2000, the Property Regimes Regulations and the Succession Regulation do not provide for the option of an application for non-recognition, which could, in some cases, be in of interest for one of the parties to the original proceedings (the Brussels II *bis* Regulation of 2003,[8] for example, provides for such options in Article 21(3)).

In contrast to the declaration of enforceability, recognition can be decided upon as a preliminary question in the proceedings on another main subject (incidental recognition). In such case, every court having jurisdiction in the main matter can also decide on recognition, which, in turn, only becomes final (unrebuttable) in such proceedings and not *erga omnes* (eg a different decision can still be taken in the stand-alone recognition proceedings mentioned above or in other incidental proceedings).

If stand-alone proceedings for recognition are instituted, the competent court can stay the proceedings if "an ordinary appeal against the decision has been lodged in the Member State of origin" (Article 41 of the Property Regimes Regulations and Article 42 of the Succession Regulation). According to the case law of the CJEU regarding the Brussels Convention, the term "ordinary appeal" must be interpreted autonomously.[9] The logical consequence of such regulatory provision is that the judgments, contrary to the requirements in numerous national legal systems, do not have to be final (*res judicata*) to be able to be recognised under the regulations.[10] If the judgment is annulled in the Member State of origin, the recognition procedure should be terminated, given that the recognition should only "broaden" the effects of the judgment which exist in the Member State of origin and a judgment cannot produce more effects abroad than in its country of origin.[11]

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[7] T. Ivanc, in M. Repas and V. Rijavec eds, *Mednarodno zasebno pravo Evropske unije* (Ljubljana: Uradni list, 2018), 554, U. Bergquist, in U. Bergquist et al., n 3 above, 144, 146.

[8] Council Regulation (EC) no 2003/2201 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) no 2000/1347, OJ L 338 of 23 December 2003.

[9] In the *Industrial Diamond* judgment, the CJEU wrote: "(A)ny appeal which is such that it may result in the annulment or the amendment of the judgment which is the subject-matter of the procedure for recognition or enforcement under the Convention and the lodging of which is bound, in the State in which the judgment was given, to a period which is laid down by the law and starts to run by virtue of that same judgment constitutes an 'ordinary appeal' (…)", no C-43/77 of 22 November 1977.

[10] T. Franzmann and Th. Schwerin, in R. Geimer and R. Schütze eds, *Europäische Erbrechtsverordnung* (Munich: C.H. Beck, 2016), 364.

[11] This fundamental rule in the field of recognition and enforcement of foreign judgments was already mentioned in the "Jenard Report" concerning the Brussels Convention of 1968. Jenard Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Signed at

The "fate" of the stayed proceedings is, however, determined by the national law of the Member State of recognition and is not addressed by the regulations.

III. The declaration of enforceability of judgments (*exequatur*)

The Succession regulation and the Property Regimes Regulations enable the enforcement of judgments from other Member States if such judgments are enforceable in the Member State of origin and if they were declared enforceable in the Member State of enforcement. The proceedings for the declaration of enforceability of the judgment from another Member State are regulated in an identical way in all three regulations. As mentioned beforehand, these procedural rules are also applicable in the case of an application for recognition.

The regulations provide several procedural rules to be respected in proceedings with the application for a declaration of enforceability, but leave broad autonomy to the national laws to regulate other procedural issues. Information on some of these issues (eg the jurisdiction of courts and other authorities within Member States and on the type and availability of legal remedies) is available in all official EU languages on the website of the European Judicial Atlas in civil matters, under the tabs Succession, Matters of Matrimonial Property Regimes and Matters of the Property Consequences of Registered Partnerships.[12]

It must be emphasised that national rules can only complement the rules of the regulations; while it is clear that the rules of the regulations have higher hierarchical value than any national provisions on the same subject-matter, it is also important that the complementary national provisions must not deprive the EU rules of their full effect (thus, for example, national law cannot provide for additional grounds for the refusal of a declaration of enforceability beside the ones provided by the regulations).[13]

According to the case law of the CJEU regarding the Brussels Convention and the Brussels I Regulation, court decisions on provisional and protective measures can also be declared enforceable, under certain conditions; most importantly, they would have to be issued in adversary proceedings.[14]

1. The admissibility of the application for *exequatur*

The application for a declaration of enforceability must be submitted to the court or competent authority of the Member State of enforcement, which that Member State communicated to the Commission. Thus, for example, Italy communicated the jurisdiction of the Court of Appeal (*Corte di Appello*), Spain of the Court of First Instance (*Juzgado de Primera Instancia*), Croatia of the municipal court (*općinski sud*), and Slovenia of the district

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Brussels, 27 September 1968), OJ C 59/1979, 43. It was later endorsed by the CJEU case law, eg in *Hoffman* (no 145/86 of 4 February 1988) and *Apostolides* (no C-420/07 of 28 April 2009).

[12] *https://e-justice.europa.eu/content_european_judicial_atlas_in_civil_matters-321-en.do*. All information on national legal systems, if not referenced otherwise, was accessed on this website.

[13] See, eg, CJEU judgment in *Salzgitter*, no C-157/12 of 26 September 2013 (regarding the Brussels I Regulation), where the Court wrote that: "the list of grounds for non-enforcement is exhaustive".

[14] CJEU, *Denilauler*, no 125/79 of 21 May 1980.

court (*okrožno sodišče*).[15] The territorial (local) jurisdiction is (interestingly) also determined by the regulations and lies with the court of the place of domicile of the party against whom enforcement is sought, or the court of the place of enforcement.[16] The determination of the domicile is made under the national law of the Member State of enforcement.[17] It may be useful to note that this notion is different from the "habitual residence" in the chapters of the regulations which concern jurisdiction and applicable law and which is to be interpreted autonomously.[18]

The regulations preclude the States from obliging the applicant to have a postal address or an authorised representative in the Member State of enforcement. For the purpose of the easier service of court documents, many national civil procedural rules provide for such an obligation for parties with domicile abroad.[19] In the EU, however, the Service Regulation[20] facilitates the service to and from other Member States, and therefore the aforementioned procedural obligation can be omitted and thus time and money saved. However, even if the regulations obviously intend to simplify the proceedings for the applicant by relieving them of obligatory representation, it is highly probable that most applicants will nevertheless choose to be represented by an attorney in the Member State of enforcement. The proceedings will namely be conducted in the language of that state and the *lex fori* will determine many important procedural questions. The questions of representation and address for service are, in most cases, connected, since many national laws provide for the service to be made to the attorney (only).[21]

Several prerequisites are determined in the regulations, which the applicant must fulfil in order for the application to be admissible. The applicant must provide: (a) a copy of the decision which satisfies the conditions necessary to establish its authenticity; and (b) the attestation issued by the court or competent authority of the Member State of origin using the appropriate form.[22] If the applicant does not produce the latter form, the court may set a time limit for its production or even decide on the application without such a form if the applicant produces an "equivalent document" or if the court deems that it has sufficient information to decide. This is a sensible decision of the European legislator, since the

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[15] As of May 2020, Slovenia has not yet communicated the competent courts on the basis of the Property Regimes Regulations. However, since the procedure is identical to the Succession Regulation and to the original Brussels I Regulation, we deem that the same courts should hold jurisdiction.

[16] The relevant time for assessing the domicile of the defendant is the time of the lodging of the application for *exequatur*; any changes of domicile after that time are irrelevant (*perpetuatio fori*). U. Bergquist, in U. Bergquist et al., n 3 above, 188.

[17] For example, in Slovenia, this will be so-called "permanent residence" (*stalno prebivališče*) and in Germany so-called "ordinary residence" (*Wohnsitz*), as is indicated in the translations of the three regulations into Slovenian and German.

[18] U. Bergquist, in U. Bergquist *et al.*, n 3 above, 185.

[19] See, eg, Article 146 of the Slovenian Code of Civil Procedure (*Zakon o pravdnem postopku*), Official Gazette of the Republic of Slovenia, no 26/1999, as amended.

[20] Regulation (EC) no 2007/1393 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) no 2000/1348, OJ L 324 of 10 December 2007.

[21] See, eg, Article 137(1) of the Slovenian Code of Civil Procedure.

[22] Annex I of the Commission Implementing Regulation (EU) 2018/1935 of 7 December 2018 establishing the forms referred to in Council Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 314 of 11 December 2018.

attestation is not a part of the judgment and is intended to simplify the work of the court in the Member State of enforcement by providing the most important information about the judgment on a form which is identical in all official EU languages and thus does not need translation.[23] If the court, however, has the information needed for its decision, insisting on the official form would be superfluous. Translation and/or transliteration of the documents is not obligatory, but is subject to the demand of the court.
If translation is required, it must be done by a person qualified to do translations in one of the Member States. Thus, the court cannot demand the translation necessarily to be made by a translator from the Member State of enforcement, but must accept a translation made by a translator "qualified" in another Member State.[24] We deem that the translator must be qualified and certified for the translation of court documents under the national procedures of their home Member State.

2. First instance proceedings

Proceedings for the declaration of enforceability are, at first, unilateral (*ex parte*). The opposing party is thus not notified about the lodging of the application. The court only verifies the fulfilment of the formal requirements from the regulations and from the national procedural law (eg concerning the representation of minors). It is very important to emphasise that the court will not verify on its own motion any of the four grounds for refusal of enforcement, such as public policy defence, the lack of service of the introductory document, etc.
If the admissibility requirements are met, the court will declare the judgment enforceable. This decision will then be notified on both parties. The regulations provide that the court must serve on the opposing party ("the party against whom enforcement is sought") also the judgment if such has not yet been served on that party. It might be surprising that the regulations envisage the possibility of the judgment not to have been served on the defendant, as enforceability usually follows such service.[25] In such cases, the defendant will be able to invoke that they could not exhaust all legal remedies in the Member State of origin and will thus be able to assert certain grounds for refusal, most importantly the lack of service of the introductory document in the proceedings (Article 37 b) of the Property Regimes Regulations, Article 40 b) of the Succession Regulation) if such a document was also not served on them.
As is usual in the field of recognition and enforcement of foreign judgments, partial enforceability is also envisaged in the three regulations. Such partial enforceability can be determined either following the request by the applicant or on the court's own motion, "(w)here a decision has been given in respect of several matters and the declaration of enforceability cannot be given for all of them". For example, partial enforceability can be

[23] It is also possible to invoke in the *exequatur* proceedings that the content of the form is wrong. Cf CJEU, *Trade Agency*, no C-619/10 of 6 September 2012. Thus, the presumption of correctness is rebutted: U. Bergquist, in U. Bergquist et al., n 3 above, 192.
[24] Doctrine is divided regarding the question whether the translator must have an official authorisation to translate legal documents: U. Bergquist, in U. Bergquist et al., n 3 above, 195.
[25] This is, however, not the case in all Member States: U. Bergquist, in U. Bergquist et al., n 3 above, 200.

the consequence of the fact that grounds for refusal exist as to certain part(s) of the judgment, or else because certain parts of the judgment fall outside the scope of application of the regulations (in the latter case, two or more partial decisions on enforceability will be issued on the ground of different legal acts).[26] Bergquist emphasises that "a declaration of partial enforceability can only be selective, not reductive".[27] In any case, for partial enforceability to be possible, the judgment must be "divisible".[28]

3. Appeal(s) against the declaration of enforceability

At least one appeal is possible against the declaration of enforceability. It can be lodged by either party, depending on the result of the proceedings with the application. Member States were obliged to communicate the competent courts for the decision on such an appeal. Italy communicated the jurisdiction of the Supreme Court of Cassation (*Suprema Corte di Cassazione*), Spain the jurisdiction of the Provincial Court (*Audiencia Provincial*), Croatia (again) the jurisdiction of the municipal courts, and Slovenia (again) the jurisdiction of the district courts. The proceedings with the appeal must guarantee the possibility of participation for both parties (the principle of adversary proceedings).

The decision of Slovenia and Croatia to nominate the same courts as competent for the *exequatur* proceedings and for the appeal might seem surprising, but this follows the system established in the national laws of these countries regarding proceedings for the recognition of foreign judgments.[29] The first (unilateral) stage of the proceedings is handled by a single judge, and the (first) appeal by a panel of three judges of the same first instance court.

The time limit for lodging an appeal is 30 days from the service of the declaration of enforceability (or of the refusal of such a declaration) for the appellants domiciled in the Member State of enforcement, and 60 days for appellants domiciled in another Member State. No extension of this deadline can be granted on account of distance (but it can be granted on other grounds if the national law of the Member State of enforcement so provides). The regulations do not expressly mention the applicants domiciled in third States. Bergquist, citing several authors, deems that the 30-day time limit applies in those cases, but that an extension can be granted under national law.[30]

Member States have the possibility of granting another appeal (although no more than one),[31] which is, however, not obligatory. Italy, Spain and Slovenia provide for such an additional appeal before the highest national courts. Croatia, however, does not provide for a second appeal under the Property Regimes Regulations, but provides for such an appeal under the Succession Regulation (which is, interestingly, decided upon either by the first instance court if it decides to modify the decision, or else by the second instance court).

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[26] U. Bergquist, in U. Bergquist et al., n 3 above, 219, 220.
[27] U. Bergquist, in U. Bergquist et al., n 3 above, 220.
[28] U. Bergquist, in U. Bergquist et al., n 3 above, 221.
[29] For Slovenia, see, eg, J. Kramberger Škerl, 'The recognition and enforcement of foreign judgments in Slovenia: national law and the Brussels I (recast) Regulation', *Yearbook of Private International Law*, 20, 281-314, (2018/19).
[30] U. Bergquist, in U. Bergquist et al., n 3 above, 204.
[31] U. Bergquist, in U. Bergquist et al., n 3 above, 206.

The grounds for the refusal of enforcement (Articles 37, 38 and 39 of the Property Regimes Regulations and Article 40 of the Succession Regulation) will first be verified by the court in the appeal proceedings. They can further be scrutinised on the basis of the second appeal if such is provided in the Member State of enforcement. The regulations demand that the courts decide on the appeals without delay, although, as is usually the case regarding the actions of the courts, no specific deadline is fixed.
Another guarantee is provided for the defendant. If, in the country of origin, the enforceability of the decision is suspended because a suspensive legal remedy has been lodged, then the court deciding on the first or second appeal against the declaration of enforceability stays the proceedings following the application of the opposing party (Article 52 of the Property Regimes Regulations and Article 53 of the Succession Regulation). In contrast to the recognition proceedings, where a stay is optional, such stay is obligatory in *exequatur* proceedings if the opposing party so demands. The court will thus wait for the result of the proceedings in the State of origin, since, just as in the case of recognition, a judgment cannot produce more effects in the State of enforcement than in the State of origin, ie it cannot be enforceable in another State if it is not enforceable in the State of origin.

4. Provisional, including protective, measures during *exequatur* proceedings

The regulations provide that provisional, including protective, measures (offered by the law of the State of enforcement)[32] are available to the person applying for the declaration of enforceability before a final decision on that issue is adopted. The applicant can apply for protective measures even before lodging an application for the declaration of enforceability.[33] The element of surprise, often aspired to by the applicant, will be ensured if the protective measures are granted before the defendant is served with the court's decision on the declaration of enforceability; until that moment, the defendant is usually not aware of the pending *exequatur* proceedings.[34] When the declaration of enforceability becomes final (eg at the end of the time limit for lodging the (first) appeal or when the decision on such an appeal becomes final), the applicant will have access to (actual) enforcement. The second appeal, if the law of the Member State of enforcement provides it, will thus not have a suspensive effect concerning the enforcement.

5. Costs of *exequatur* proceedings

Given that the costs of *exequatur* proceedings can be quite high in certain Member States, the provision of the regulations on legal aid is important. It states that the right of the applicant who benefited from legal aid or exemption from costs or expenses in the main proceedings in the Member State of origin of the judgment is "stretched" also to encompass proceedings for the declaration of enforceability in the Member State of

[32] U. Bergquist, in U. Bergquist et al., n 3 above, 216, 217.
[33] U. Bergquist, in U. Bergquist et al., n 3 above, 214.
[34] U. Bergquist, in U. Bergquist et al., n 3 above, 218.

enforcement.[35] Given that the legal aid systems differ considerably,[36] the broadest legal aid provided by the national law of the Member State of enforcement must be guaranteed (which is not necessarily the same in substance and/or ambit than the legal aid in the Member State of origin). The applicant must assert and prove that they benefited from legal aid in the Member State of origin.[37] Point 7 of the attestation form (Annex I of the implementing regulations) provided by the Commission is dedicated to such information.

Furthermore, no additional deposit or caution (*cautio judicatum solvi*, *cautio auctoris*) should be imposed on the applicant on the basis of their foreign nationality or domicile abroad. This rule encompasses both the *exequatur* proceedings and the (actual) enforcement.[38] This is an extension of the general EU rule of non-discrimination on the basis of nationality of residence and applies also to applicants who are nationals or residents of non-EU states (as well as of EU Member States not participating in enhanced cooperation).[39]

It is important to emphasise that the regulations do not provide for an "extension" of the right to legal aid beyond the proceedings for recognition (on the basis of Article 36/2 of the Property Regimes Regulations and Article 39/2 of the Succession Regulation) and *exequatur*, eg the proceedings regulated in these acts. If needed in the (actual) enforcement proceedings, the national law of the State of enforcement applies fully.[40] On the other hand, the fact that the applicant did not benefit from legal aid in the Member State of origin does not preclude them from applying for legal aid in the Member State of enforcement under the national rules of that state. The principle of non-discrimination in granting legal aid in cross-border disputes is enshrined in the EU Legal Aid Directive.[41]

In most Member States, a court fee is imposed for the instituting of *exequatur* proceedings. The regulations do not preclude such fees, although they must not be calculated by reference to the value of the matter at issue, as is common in other court proceedings. Cross-border proceedings tend to concern issues of a non-negligible value, at least to the parties (otherwise the parties would not bother to institute them), and therefore such provision is welcome. It is also justified, since the courts' task consists mainly of formal verifications (which can be more or less complicated, unrelated to the value of the original dispute), with the exception of public policy related issues. It must be emphasised that this rule only applies to "proceedings for the issue of a declaration of enforceability" (and, by analogy as determined in the regulations, to recognition proceedings), but not to other stages of the *exequatur* proceedings, nor to proceedings regarding provisional measures.[42]

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[35] Rudolf speaks of "the principle of continuity and extension of legal aid". C. Rudolf, in A. Deixler-Hübner and M. Schauer eds, *EuErbVO Kommentar zur Eu-Erbrechtsverordnung* (Manz, 2015), 405.

[36] The right to legal aid for those who lack sufficient resources for effective access to justice must, however, be guaranteed in all Member States on the basis of Article 47/3 of the Charter of Fundamental Rights of the EU, OJ C 326 of 26 October 2012.

[37] U. Bergquist in U. Bergquist et al., n 3 above, 225.

[38] U. Bergquist, in U. Bergquist et al., n 3 above, 227, and other authors cited there.

[39] U. Bergquist, in U. Bergquist et al., n 3 above, 227, 228.

[40] U. Bergquist, in U. Bergquist et al., n 3 above, 225, and other authors cited there.

[41] Article 4 of the Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 26 of 31 January 2003.

[42] U. Bergquist, in U. Bergquist et al., n 3 above, 229, and other authors cited there.

The three regulations only mention legal aid for the applicant, whereas the defendant might also need it when they lodge the appeal(s). Such legal aid is regulated by the national law of the Member State of enforcement, naturally in respect of the above-mentioned supra national rules.[43]

IV. European Certificate of Succession

The Succession Regulation provides, in its Chapter VI, for the European Certificate of Succession (hereinafter: ECS), which enables "automatic" recognition of the legal status of heirs, legatees, executors of wills and administrators of the estate, eg without any prior substantial verifications in other Member States. The ECS is "a certificate with evidentiary value which reflects elements identified by the law applicable to succession".[44] It is neither an enforceable title nor an authentic document, but rather an EU instrument *sui generis*.[45] The effects of the ECS are regulated in the mentioned chapter and the rules on the recognition and enforcement of judgments or authentic instruments do not apply.

First, it is important to note that the ECS is intended for use in another Member State, which means that the succession must present a foreign element, specifically the location of the estate in more than one country.[46] The use of the ECS is not mandatory, ie the recognition and enforcement of the decision on succession can always be applied for pursuant to the rules on the *exequatur* of judgments or the acceptance of authentic instruments and court settlements. The instruments provided for similar purposes in national legal orders continue to be in use and the heirs and beneficiaries can also choose to apply for such national instruments in the Member State of the location of the estate.[47] However, in order to ensure that only one certificate is necessary to handle the whole estate, Article 62/3 further provides that, once issued for use in another Member State, the ECS also produces effects in the Member State whose authorities issued it.[48] Nevertheless, the regulation does not preclude national authorities from issuing a national certificate of succession, whether prior or after the issuance of the ECS.[49]

According to the Succession Regulation, the ECS is intended "for use by heirs, legatees having direct rights in the succession, and executors of wills or administrators of the estate who, in another Member State, need to invoke their status or to exercise respectively their rights as heirs or legatees and/or their powers as executors of wills or administrators of the

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[43] In its order in the case *Grep* (C-156/12 of 13 June 2012), the CJEU decided that the appeal against the declaration of enforceability under the Brussels I regulation constituted an exercise of EU law in the sense of Article 51 of the EU Charter of Fundamental Rights, and that the obligation to provide legal aid from Article 47(3) of the Charter was applicable.

[44] T. Ivanc and S. Kraljić, 'European Certificate of Succession – Was There a Need for a European Intervention?' *Anali Pravnog fakulteta u Zenici*, 270, (2015).

[45] B. Kreße in A.L. Calvo Caravaca et al. eds, *The EU Succession Regulation, A Commentary*, (Cambridge: Cambridge University Press, 2016), 677.

[46] D. Stamatiadis, in H. Pamboukis ed, *EU Succession Regulation no 650/2012*, (Nomiki Bibliothiki, C.H.Beck, Hart, Nomos, 2017), 590.

[47] D. Stamatiadis, in H. Pamboukis ed, n 46 above, 591.

[48] The doctrine is sceptical as to whether the EU has the necessary competence to provide for the ECS to apply also in the Member State where it was issued, since this is an internal matter. B. Kresse, in A.L. Calvo Caravaca et al. eds, n 45 above, 674.

[49] B. Kreße in A.L. Calvo Caravaca et al. eds, n 45 above, 682.

estate". After the announcement in this general clause, the Regulation provides a (non-exhaustive) list of examples of what could be demonstrated via the ECS.
The ECS offers a very simple, time- and cost-effective possibility of asserting rights and obligations in cross-border successions. However, such an instrument presupposes a high level of mutual trust among the Member States, since the Member State of enforcement no longer decides on the "acceptability" of the certificate in the *exequatur* proceedings. Such trust is enhanced by a relatively strict procedural frame, as well as by the fairly broad *ex officio* powers of the issuing authority.

1. Proceedings for the issue of the ECS

An ECS can be issued in a Member State whose courts have jurisdiction, under the Succession Regulation, to rule on succession. The issuing authority should be either a court or another authority which, under national law, has competence to deal with matters of succession (typically: a public notary). Member States were required to communicate to the Commission which courts in their country have jurisdiction to issue an ECS, whether another authority exists which deals with succession, and, if so, which authority that is. In Italy, these are only notaries, in Spain, courts or notaries, in Croatia, municipal courts or notaries, and, in Slovenia, only local courts (*okrajna sodišča*). We can see from this short list of States that the competent authorities vary, which can cause legal uncertainty and more difficult cross-border dialogue between these authorities, but this is inevitable, at least for the time being, since the judicial systems in the EU do not have a unified structure.
Article 69 is of crucial importance, since it provides for the "automatic" effects in all other Member States. Kreße considers that three different effects are enshrined in this article, namely: "the presumption of substantial accuracy of the ECS, public faith in the ECS, and the validity for the recording of succession property in the relevant register of each Member State".[50] Regarding the latter, the doctrine, however, points out that this effect can be limited regarding rights *in rem*, since "the requirements and effects associated with the entry in registers will be evaluated by the law of the Member State in which the register is located".[51]
Certified copies of the ECS are valid for a limited period of *six months*, to be indicated on the certified copy by way of an expiry date. In exceptional cases, the issuing authority can prolong the validity of the ECS. Upon expiration of the ECS, the extension of its validity can be requested, or else a new application for the issuance of an ECS must be made.

2. Legal remedies

Pursuant to Article 71, the issuing authority will, at the request of any person demonstrating a legitimate interest or of its own motion, rectify the ECS in the event of a clerical error or else modify or withdraw the ECS where it has been established that the ECS or individual elements thereof are not accurate.

[50] B. Kreße in A.L. Calvo Caravaca et al. eds, n 45 above, 679.
[51] T. Ivanc and S. Kraljić, n 44 above, 270.

Decisions taken by the issuing authority regarding the application for the ECS may be challenged by any person entitled to apply for an ECS. Decisions taken by the issuing authority concerning the rectification, modification or withdrawal of the ECS, or concerning the suspension of the effects of the ECS, may be challenged by any person demonstrating a legitimate interest. The challenge shall be lodged before a judicial authority in the Member State of the issuing authority in accordance with the law of that State.
If, as a result of a challenge, it is established that the ECS issued is not accurate, the competent judicial authority shall rectify, modify or withdraw the ECS or ensure that it is rectified, modified or withdrawn by the issuing authority. If, as a result of a challenge, it is established that the refusal to issue the ECS was unjustified, the competent judicial authority shall issue the ECS or ensure that the issuing authority re-assesses the case and makes a fresh decision.
The effects of the ECS may be suspended either by the issuing authority, at the request of any person demonstrating a legitimate interest, pending a modification or withdrawal of the ECS, or by a judicial authority, at the request of any person entitled to challenge a decision taken by the issuing authority, pending such a challenge. During the suspension of the effects of the ECS no further certified copies of the ECS may be issued.

V. Acceptance and enforcement of authentic instruments and court settlements

Chapters V of the three regulations are dedicated to the acceptance and enforcement of authentic instruments and court settlements. The regulations use the term "acceptance" and not "recognition". The reason for a different term is that, besides on the basis of the grounds for the refusal of recognition of judgments, the effects of the foreign authentic instruments can also be refused because of the nullity of the legal transaction (*negotium*) attested by the authentic instrument.[52]
The Property Regimes Regulations distinguish clearly between evidentiary effects (governed by the national law of the Member State of origin), authenticity (which can only be challenged in the Member State of origin), and material validity, ie the validity of the legal transaction attested by the authentic instrument (which can be challenged before the court having jurisdiction to rule on the property regimes).[53]
An authentic instrument is defined in the three regulations as a document which has been formally drawn up or registered as an authentic instrument in a Member State and the authenticity of which relates to the signature and the content of the authentic instrument and has been established by a public authority or other authority empowered for that purpose by the Member State of origin.[54] The doctrine emphasises that the instruments to which the regulations offer their regime of acceptance and enforcement are only those where "the public official's contribution is not limited to a certification of the authenticity of the parties' signatures, but concerns also the essential content of the instrument, for which the official assumes full responsibility, and taking into account its validity check".[55]

[52] P. Lagarde, in U. Bergquist et al., n 3 above, 13.
[53] P. Lagarde, in U. Bergquist et al., n 3 above, 13-14.
[54] Articles 3/1 c) of the Property Regimes Regulations and Article 3/1 i) of the Succession Regulation.
[55] U. Bergquist, in U. Bergquist et al., n 3 above, 233.

If the recognition and enforcement of judgments is modelled, in all three regulations, on the original version of the Brussels I Regulation, the system of acceptance and enforcement of authentic instruments is "highly innovative".[56] More precisely, the system of the Succession Regulation is innovative and the Property Regimes Regulations follow that system. The novelty is that authentic instruments must not only be enforced in other Member States, but must also be "accepted" there.

1. Evidentiary effects of authentic instruments

The three regulations dispose: "An authentic instrument established in a Member State shall have the same evidentiary effects in another Member State as it has in the Member State of origin, or the most comparable effects, provided that this is not manifestly contrary to public policy (*ordre public*) in the Member State concerned". On a practical level, the regulations provide that an interested party may ask the authority establishing the authentic instrument to fill in the form provided in the Commission's Implementing Regulation describing the evidentiary effects which the authentic instrument produces in the Member State of origin.

The "evidentiary effect" means that "the authenticity of the public deed cannot be contested if not by means of particular legal procedures".[57] Given that the evidentiary effects of the authentic instruments vary to some extent in different Member States, the regulations provide for the "same" or "the most comparable" effects in the requested Member State. In such a way, the effects of an authentic instrument can be reduced (but not extended!) in the requested Member State in comparison with those in the Member State of origin.[58]

The regulations exclude from their scope of application "any recording in a register of rights in immoveable or moveable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register" (Article 1(2)(h)) of the Property Regimes Regulations and Article 1(2)(l)) of the Succession Regulation) and thus restrict the scope of Chapter V to the evidentiary effects of authentic instruments.[59]

2. Refusal and delay of acceptance

The only ground for the refusal of acceptance is the (manifest) violation of public policy in the requested Member State.

Furthermore, acceptance can be delayed during the proceedings for a challenge of the authentic instrument. If the challenge is successful, acceptance must be refused, since the

[56] U. Bergquist, in U. Bergquist et al., n 3 above, 232.
[57] U. Bergquist, in U. Bergquist et al., n 3 above, 234.
[58] U. Bergquist, in U. Bergquist et al., n 3 above, 235.
[59] Bergquist, however, notes that a mitigation of the said exclusion can be found in Recital 27 to the Property Regimes Regulations: U. Bergquist et al., n 3 above, 235, 236. An analogous text can be found in Recital 18 of the Succession Regulation.

authentic instrument cannot produce more effects abroad than in the Member State of origin.

The effects of authentic instruments can be challenged on multiple bases. First, the authenticity of the instrument can be challenged. The regulations dispose that such a challenge must be made in the Member State of origin and decided upon according to the law of that State. A challenge can also concern the legal acts or legal relationships recorded in the authentic instrument. Such a challenge must be decided by the court which holds jurisdiction according to the applicable EU regulation and under the law designated by such a regulation. If the legal acts or legal relationships recorded in the authentic instrument constitute an incidental question in the main proceedings pending before any other court, such a court will have jurisdiction to decide also on such a question.

Bergquist notes that there may be other grounds for the challenging of an authentic instrument that are not encompassed by the two hypotheses of the regulations; he deems that, despite the jurisdiction and applicable law being determined by national legislation, such challenges should equally suspend acceptance of the authentic instrument in other Member States for the time of the proceedings.[60]

The regulations do not expressly provide for court proceedings in the case of a refusal of acceptance. Bergquist deems that the provisions of the regulations regarding stand-alone and incidental recognition proceedings can apply by way of analogy.[61]

3. Enforcement of authentic instruments and of court settlements

Enforcement of authentic instruments and court settlements (the latter are autonomously defined by the three regulations) is modelled on the Brussels I Regulation of 2000, eg a declaration of enforceability must be obtained under the rules of the regulations before (actual) enforcement under national law can begin.

Given that court settlements have different effects in different Member States, the question has arisen (just as it did regarding authentic instruments) as to the extent of the effects of the court settlement in the Member State of enforcement. The regulations do not address this (potentially important) question. Bergquist deems that, contrary to the rules regarding authentic instruments, the Member State of enforcement must acknowledge all enforceable effects that the court settlement produces in the Member State of origin.[62]

The proceedings for the declaration of enforceability follow the rules regarding the *exequatur* of judgments in the same regulations. Special forms are provided in the Commission's Implementing Regulation. The only ground for refusal is the public policy defence.

[60] U. Bergquist, in U. Bergquist et al., n 3 above, 236.
[61] U. Bergquist, in U. Bergquist et al., n 3 above, 238.
[62] U. Bergquist, in U. Bergquist et al., n 3 above, 240-241.

Part II

Refusal of Recognition and Enforcement

Neža Pogorelčnik Vogrinc

I. Introduction

Regulation 2016/1103 and Regulation 2016/1104, and Regulation 650/2012 share the same overall objective – the mutual recognition of decisions issued by Member States[63] concerning matrimonial property regimes, the property consequences of registered partnerships, and matters of succession.[64] This objective is a part of efforts to facilitate the free movement of court decisions between EU Member States. Consequently, all three regulations provide simplified rules on the recognition, enforceability, and enforcement of decisions. On the basis of these regulations, a foreign decision is automatically effective. Non-recognition[65] is thus an exception and is allowed on predetermined and explicitly defined grounds. The grounds that the examined regulations provide are almost identical. Articles 37 of both Regulation (EU) 2016/1103 and Regulation (EU) 2016/1104 and Article 40 of Regulation (EU) 650/2012 stipulate that a decision shall not be recognised:
a) if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;

b) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so;

c) if it is irreconcilable with a decision given in proceedings between the same parties in the Member State in which recognition is sought;

d) if it is irreconcilable with an earlier decision given in another Member State or in a third state involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

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[63] Whereby Member State is not deemed to mean all EU Member States, but only those that take part in the enhanced cooperation concerning the respective regulations.
[64] See Recital 56 of Regulation 2016/1103, Recital 55 of Regulation 2016/1104, and Recital 59 of Regulation 650/2012.
[65] The same grounds may also result in the refusal or revocation of a declaration of enforceability (Articles 51 of Regulation 2016/1103 and Regulation 2016/1104 and Article 52 of Regulation 650/2012), but for the sake of clarity I will hereinafter only discuss the grounds of non-recognition.

The three examined regulations draw on Regulation (EU) 2001/44 and its successor, Regulation (EU) 2012/1215[66] for the grounds on which the recognition (and enforceability) of a foreign decision may be refused. The Convention of 27 September 1968 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (ie the Brussels Convention),[67] the first such legal instrument at the European level, provided almost identical grounds. Whereas the grounds have changed little since then in normative terms[68] where they are still applied in EU legal sources,[69] the case law of the Court of Justice of the European Union (CJEU) has had a significant effect on their substance. This is because the Court extensively defined the substance of the legal standards that constitute grounds of non-recognition and that are filled by case law with each specific case considered. Where the examined regulations determine conditions that mirror the conditions under Regulation 2001/44, it is possible to additionally apply the relevant CJEU case law by analogy as regards the grounds of non-recognition.

The grounds of non-recognition are explicitly enumerated in the examined regulations (see Articles 51 of Regulation 2016/1103 and Regulation 2016/1104, and Article 52 of Regulation 650/2012). This means no other grounds may be examined when courts consider whether to refuse to recognise a foreign decision. The range of circumstances in which recognition may be refused is relatively modest. Since the regulations give defendants different guarantees during the course of proceedings, there is a tendency to maximise the freedom of movement of decisions – hence the simplified rules on recognition and the declaration of enforceability – and minimise restrictions on this freedom of movement.

Grounds of non-recognition thus have to be examined narrowly. Non-recognition should be an exception; the general rule is to recognise foreign decisions. But if the court determines that grounds of non-recognition exist, it follows from the wording of Articles 37 of Regulation 2016/1103 and Regulation 2016/1104 and Article 40 of Regulation

[66] Articles 37 of Regulation 2016/1103 and Regulation 2016/1104 are identical to Article 40 of Regulation 650/2012 and Article 34 of Regulation 44/2001. Unlike the first three, the successor regulation to the last of these determines additional grounds of non-recognition in the event of a violation of the rules on exclusive jurisdiction or jurisdiction determined for the purpose of protecting weaker groups (Article 45(1)(e) of Regulation 1215/2012).

[67] The Convention of 27 September 1968 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [1968] OJ L 339/3.

[68] The public policy grounds of non-recognition faced the biggest substantive change when a proposal to narrow the grounds to procedural public policy appeared during the preparation of the revised version of Regulation 44/2001. Due to opposition from EU Member States, that did not occur, which is why the grounds are conceptually the same in its successor, Regulation 1215/2012, and all subsequently adopted regulations.

[69] At the EU level, the options for taking action against the recognition of a foreign decision have been gradually phased out, which means that invoking one of the traditional grounds of appeal (eg public policy) is disabled. See, for example, Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European enforcement order for uncontested claims [2004] OJ L 143, Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L 1991/1, and Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure [2006] OJ L 399/1.

650/2012, which states that "... a decision shall not be recognised", that refusal of recognition is mandatory. If the judge in the state in which recognition is sought determines that grounds of non-recognition exist, he or she does not have the discretion to decide whether recognition should be refused or not.

II. Indent A) Public policy

Public policy is referred to twice in the relevant regulations, which also determine the applicable law. The first instance concerns the use of the conflict-of-laws rules of a different state where the competent court may refuse the application of such law if the application thereof is incompatible with the public policy of the forum (Articles 31 of Regulation 2016/1103 and Regulation 2016/1104 and Article 35 of Regulation 650/2012).[70] The second time it appears is as one of the grounds of the non-recognition (and non-enforcement) of a foreign decision. In examining whether a decision is contrary to public policy (and in examining other grounds of non-recognition as well as regarding considerations beyond the mere examination of grounds of non-recognition), the court where recognition is sought may not examine the substance of the foreign decision (Articles 40 of Regulation 2016/1103 and Regulation 2016/1104 and Article 41 of Regulation 650/2012).[71] Hence the court may not examine the facts or the application of substantive law even if it deems the decision of the court of origin wrong either with regard to the facts or the application of law. The court at which recognition is sought may not refuse recognition on the grounds that it would have reached a different decision on the merits.[72] There is a difference in how public policy is applied in both cases: in the former, the court examines whether the effects that the application of a specific provision of foreign law will have are contrary to public policy; in the latter, it merely examines whether the effects of the foreign decision on the basis of which the parties have already acquired certain rights are contrary to public policy.[73] Grounds of non-recognition are applied only if recognition of the decision would be contrary to public policy, ie the effects of its recognition, not the substance of the decision. In the event the court is required to apply a specific provision of foreign substantive law, it may determine that it is contrary to national public policy and thus would not apply it; but in the event the same provision of

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[70] See also Recital 54 of Regulation 2016/1103, Recital 53 of Regulation 2016/1104, and Recital 58 of Regulation 2012/650.

[71] A similar provision is contained in Article 36 of Regulation 44/2001 and Article 52 of Regulation 1215/2012. However, these regulations prohibit merely a substantive review of the provision, not the certificate, which is why the information in the certificate may be subject to a review in the state in which recognition is sought. Pamboukis, n 46 above, 465, and U. Bergquist, D. Damascelli, R. Frimston, P. Lagarde and B. Reinhartz, n 3 above, 177.

[72] U. Bergquist, D. Damascelli, R. Frimston, P. Lagarde, F. Odersky and B. Reinhartz, *EU-Regulation on Succession and Wills*, Commentary (Köln: O. Schmidt, 2015), 205.

[73] J. Kramberger Škerl, '(Ne)razumevanje pridržka javnega reda in posvojitev s strani istospolnih partnerjev' [(Mis)understanding of Public Policy Grounds of Non-recognition and Adoptions by Same-sex Partners], 29-30 *Pravna praksa*, Appendix, III (2010), illustrates this by differentiating between "whether an act is permitted in the state of origin or such conduct tolerated in another state, whereby the ensuing legal relationship is recognised here". In connection with the recognition of foreign decisions, this is referred to as attenuated public policy.

substantive law was applied in the decision, the effects of recognising the decision are not contrary to the national public policy in the state in which recognition is sought.[74]
Regulation 650/2012 (Article 40), Regulation 2016/1103 (Article 37), and Regulation 2016/1104 (Article 37) contain the same wording: "A decision shall not be recognised: (a) if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State in which recognition is sought". These regulations thus follow the example of Regulation 2001/44 (Article 34) and its predecessor, the Brussels Convention (Article 34). But whereas Regulation 2001/44 and the Brussels Convention use the term "judgment" in reference to (non)recognition, the examined regulations use the term "decision" since they may cover decisions by other bodies (for example notaries public), not just courts. The wording of the relevant provision is stylistically different but substantively the same in the new version of Regulation 2001/44, eg Regulation 1215/2012 (Article 45). The only difference between these regulations is the addition of *ordre public* in brackets, which is not present in Regulation 2001/44 but appears in all subsequent regulations. This is the French term for "public policy", which appears in the English version of the text and is substantively unnecessary in the wording of the specific article.

The primary function of public policy is the protection of the fundamental values and principles of an individual state against "the intrusion of foreign regulations and decisions that would be manifestly and significantly contrary to our fundamental values and hence cause intolerable legal effects in our legal order".[75] Also referred to as international public policy, the concept cannot be defined more precisely but it can broadly be described as "a set of values on which the legal, social and cultural order of an individual state is based and which must (also) be respected in so-called relations with an international element".[76] The substance of public policy thus may differ depending on the state (at least the "national" aspect thereof).

But by virtue of membership in the EU and the Council of Europe, Member States are also committed to respecting the values of these organisations which form European public policy.[77] In reviewing public policy grounds of non-recognition, national judges must thus consider not just their national public policy but also European public policy,[78] whose substance is (in the part of the Community public policy, which involves the fundamental values of the European Union) strongly determined by CJEU[79] decisions. CJEU judgments have a strong influence on the substance of (European public policy).

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[74] U. Bergquist et al., n 3 above, 154.
[75] J. Kramberger Škerl, n 73 above II.
[76] J. Kramberger Škerl, 'Evropeizacija javnega reda v mednarodnem zasebnem pravu' [Europeanization of Public Policy in Private International Law] Pravni letopis, 349 (2008).
[77] Ibid 352. Here J. Kramberger Škerl distinguished between European public policy and Community public policy, which includes European Union values, and Convention public policy, which includes the values of the Council of Europe.
[78] Ibid 361.
[79] For example, in *flyLAL-Lithuanian Airlines AS v Starptautiskā lidosta Rīga VAS and Air Baltic Corporation AS*, the CJEU emphasised that public policy seeks to protect legal interests that are expressed through the rule of law, and not purely economic interests. (C-302/13 *flyLAL-Lithuanian Airlines AS v Starptautiskā lidosta Rīga VAS and Air Baltic Corporation AS*, [2014] ECR 2319, para. 56).

In civil and commercial matters, which have been subject to European legal instruments (the Brussels Convention, Regulation 2001/44, and Regulation 1215/2012) for a number of years, there are few fundamental differences in the interpretation of public policy in practice. To a large extent this is due to the relative similarity in substantive law arrangements in EU Member States (whereby differences in substantive law alone do not constitute grounds of a violation of public policy[80]), which rarely leads to a decision whose recognition would be contrary to the public policy of another Member State. The situation is (potentially) different in succession and family law, where national law differs with respect to several sensitive issues (eg inheritance of the male heirs only). However, differences in national law alone do not constitute a violation of public policy either.[81] Violation in this context refers to a violation of substantive public policy (which is examined in the application of the contested provision of substantive law (Articles 31 of Regulation 2016/1103 and Regulation 2016/1104 and Article 35 of Regulation 650/2012).[82]

But public policy grounds of non-recognition also include procedural public policy,[83] and procedural violations of public policy are more frequently the subject of judicial examinations of the grounds of non-recognition. Such cases involve violations of procedural provisions applied in decisions, whereby the entire proceedings carried out in each specific case must be considered. Again, the mere existence of differences in national procedural law is not a sufficient reason to refuse the recognition of a decision on public policy grounds. It is also important to distinguish between public policy grounds and other grounds since public policy grounds do not include violations that constitute any of the other grounds of the refusal of recognition. The main competing grounds of non-recognition are provided in Articles 37(a) of Regulation 2016/1103 and Regulation 2016/1104 and Article 40(a) of Regulation 650/2012, which determine that recognition may be refused if (generally speaking) the defendant was not able to enter an appearance. The grounds of non-recognition do not overlap substantively and if recognition may be refused under any other grounds, public policy grounds may not be applied.[84] Yet public policy grounds cover violations of procedural law, and in the absence of circumstances for refusing recognition on other grounds it is possible in specific cases to examine whether a

[80] The (mere) opposition to the application of a provision of private international law of the state in which recognition is sought or to EU law is not contrary to public policy either. U. Bergquist et al., n 72 above, 192; U. Bergquist et al., n 3 above, 155.
[81] U. Bergquist et al., n 3 above, 153-154.
[82] U. Bergquist et al., n 3 above, 153, stress that the application of public policy grounds of non-recognition to substantive issues is useful in particular when a decision applies the substantive law of a third state (a non-EU state), where there is a greater chance of divergence as regards fundamental principles. Sharia law is provided as an example.
[83] Based on this, U. Bergquist et al., n 3 above, 156, conclude that public policy in Articles 31 of Regulation 2016/1103 and Regulation 2016/1104 and Article 35 of Regulation 2012/650 is therefore broader than in Articles 37 of Regulation 2016/1103 and Regulation 2016/1104 and Article 40 of Regulation 2012/650.
[84] According to the CJEU in case 145/86 *Horst Ludwig Martin Hoffmann v Adelheid Krieg*, [1988], ECR 00645, para. 21.

violation is contrary to public policy.[85] This latter option is thus applicable as a last resort when there are no other grounds of non-recognition available.

In examining whether a decision is contrary to public policy, the court at which recognition is sought may not review the correctness of the application of the provisions on international jurisdiction under Regulation 2016/1103 and Regulation 2016/1104 (Article 39/II of both regulations). The provisions thereof differ slightly: both regulations exclude a review of international jurisdiction under Articles 4-11, but Regulation 2016/1104 additionally excludes international jurisdiction for counterclaims (Article 12). The reason for this difference is unclear and cannot be attributed to any differences in the legal arrangements between the two regulations. This leads to the conclusion that the difference in Article 39(2) between the two regulations is unintentional. Regulation 650/2012 does not prohibit a review of the application of provisions on jurisdiction in the framework of public policy. Since the regulation is in general modelled on Regulation 2001/44 with regard to the grounds for the refusal of recognition, some legal theorists think that the omission is a mistake[86] and that the relevant provision of Regulation 2001/44[87] that the succession regulation is modelled on should apply by analogy.

CJEU case law plays an important role in the interpretation of public policy when the application of EU regulations is concerned. The Court has strongly defined its substance and hence provided guidelines for national courts that interpret the concept of public policy when examining the recognition of foreign decisions. States "in principle remain free (…) to determine according to their own conceptions what public policy requires" but "the limits of that concept are a matter for interpretation of the Convention"[88] (ie the applicable regulation). This indirectly ensures that national interpretations of public policy do not diverge substantially and, even though public policy is a national concept, it therefore includes elements of EU law.[89] The CJEU has ruled (in interpreting the provisions of Regulation 2001/44 and its predecessor, the Brussels Convention) that public policy may be violated by:

- recognition of a decision in which the defendant was not allowed to have his defence presented because he did not appear in person – did not appear at the court to which he was correctly invited;[90]

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[85] U. Magnus and P. Mankowski, *European Commentaries on Private International Law: ECPIL: Commentary*, Vol. 1 *Brussels Ibis Regulation* (Köln: O. Schmidt, 2016), 895.
[86] T. Ivanc, in M. Repas and V. Rijavec eds, n 7 above, 554, and U. Bergquist et al., n 72 above, 193.
[87] J. Dolžan and C. Rudolf, *Uredba o dedovanju v teoriji in praksi Pravosodni bilten*, II, 49 (2017).
[88] The CJEU further determines that although it is not for the court to define the content of public policy in an individual State, it is nonetheless required to review the limits within which the court of that State may have recourse to that concept for the purpose of refusing recognition of a judgment emanating from a court in another State. C-7/98 *Dieter Krombach v André Bamberski*, (2000) ECR I-01935 paras. 22-23.
[89] U. Magnus et al., n 85 above, 879.
[90] C-7/98 *Dieter Krombach v André Bamberski*, (2000) ECR I-01935. In line with that judgment, the English Court of Appeal decided that recognition of a decision issued in proceedings of which the defendant was not notified when the proceedings continued after twelve years even though the defendant correctly informed the competent authority of his new address abroad, was contrary to public policy (*Maronier v Larmer*, 2002, English Court of Appeal).

- recognition of a court ruling issued after the defendant was excluded from the proceedings by an order on the grounds that he had not complied with the obligation imposed by an order made earlier in the same proceedings, whereby the CJEU warned that the court must examine whether the exclusion is a clear and disproportionate violation of the defendant's right and must do so in a comprehensive assessment of the proceedings and in the light of all circumstances;[91]
- recognition of a judgment given in default of appearance which disposes of the substance of the dispute but which does not contain an assessment of the subject matter or the basis of the action and which lacks any reasoning of its merits.[92]

On the other hand, the CJEU, for example, ruled that a judgment that concerned land situated in an area of the state over which the government does not exercise effective control does not constitute grounds of non-recognition, whereby the judgment did not violate the fundamental rights of the state in which it was recognised.[93]

Since each case concerns a specific situation, all the relevant circumstances must be considered. Exemptions must be interpreted narrowly and used as a matter of exception.[94] And in conducting a narrow interpretation of public policy, it is necessary to define the fundamental principles that constitute public policy.[95] The CJEU delievered all the above-mentioned judgments in cases in which it examined violations of public policy in the framework of the Brussels Convention or Regulation 2001/44. Decisions concerning violations of procedural public policy may be used in cases where the succession regulation and property regulations apply; however, when it is claimed that a decision is substantively contrary to public policy in these fields it is possible to imagine completely different situations. Recognition might thus be contrary to the fundamental legal values of the state in which recognition is sought when a decision, for example in inheritance proceedings or in the division of matrimonial property, was discriminatory on grounds of gender or religion.[96]

All regulations that provide grounds of non-recognition stipulate that decisions must be manifestly contrary to public policy. The court may thus refuse to recognise a decision only when a substantial and consequently manifest violation of public policy occurs, which is deemed to mean violations of the fundamental values of the State at an unacceptable

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[91] C-394/07 *Marco Gambazzi v DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company,* (2009) ECR I-02563.
[92] C-619/10 *Trade Agency Ltd v Seramico Investments Ltd*, (2012) ECR 531. The CJEU indicated in its judgment that recognition of the decision would not be contrary to public policy if the court of recognition decided, after a comprehensive review of the proceedings and all the relevant circumstances, that the judgment is a manifest and disproportionate breach of the right to a fair trial referred to in Article 47 of the Charter of Fundamental Rights of the European Union on account of the defendant being unable to bring an appropriate and effective appeal against it.
[93] C-420/07 *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams*, (2009) ECR 271.
[94] Jenard Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Official Journal 1979, C 59, para. 44.
[95] U. Magnus et al., n 85 above, 881.
[96] For details, see U. Bergquist et al., n 72 above, 196; H.P. Pamboukis, n 46 above, 456-457; U. Bergquist et al., n 3 above, 154.

scale;[97] violations that cannot be tolerated under any circumstances;[98] and encroachment on the fundamental rights and values on which the legal order of the State of recognition rests,[99] whereby a decision merely running contrary to such values in a *normal* scope does not suffice.[100]

The court thus examines on a case-by-case basis whether a decision is contrary to public policy, which it does not do of its own motion. Declaration of the enforceability of decisions is automatic (Articles 57 of Regulation 2016/1103 and Regulation 2016/1104 and Article 48 of Regulation 650/2012), which requires that the party that opposes automatic recognition claim and prove (in legal remedy proceedings) that the decision is contrary to public policy.[101] This raises the question of whether in legal remedy proceedings a court should consider of its own motion the existence of grounds of non-recognition that it has noticed and that the party has not raised. Despite differences in opinion,[102] the dominant position in legal theory is that even in legal remedy proceedings the court may not undertake such a consideration of its own motion.[103]

III. Indent B) The breach of a right to be heard

Grounds of non-recognition under Article 37(b) of Regulation 2016/1103 and Regulation 2016/1104 and Article 40(b) of Regulation 650/2012 are applied if the defendant did not enter an appearance and was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way so as to enable him to arrange for his defence. The defendant cannot demand non-recognition if he could have claimed a violation in the originating state of origin but did not do so. Such grounds of non-recognition thus cover cases where a decision was issued without the defendant entering an appearance, whereby the examined regulations define such a decision as any decision in a matter of a matrimonial property regime, a matter of the property consequences of a registered partnership, or a matter of succession issued by a court of a Member State, whatever the decision may be called, including a decision on the determination of costs or expenses by an officer of the court (Article 3.1(e) of Regulation 2016/1104, Article 3(1)(d) of Regulation 2016/1103, and Article 3(1)(g) of Regulation 650/2012).

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[97] U. Bergquist et al., n 72 above, 192.
[98] H.P. Pamboukis, n 46 above, 455.
[99] U. Magnus et al., n 85 above, 880.
[100] A. Ekart and V. Rijavec, in M. Repas and V. Rijavec eds, n 7 above, 272.
[101] In accordance with Article 36(2) of Regulation 2016/1103 and Regulation 2016/1104 and Article 39(2) of Regulation 2012/650, the provisions apply to recognition as well.
[102] H.P. Pamboukis, n 46 above, 452, highlights public policy grounds of non-recognition as the only exemption to the application of Regulation 2012/650 that the court should consider of its own motion, arguing that succession relations are not merely property relations and that consequently certain other observations should be considered by the court of its own motion. See also U. Bergquist et al., n 72 above, 151-152.
[103] U. Bergquist et al., n 72 above, 191, and U. Magnus et al., n 85 above, 870.

The grounds of non-recognition under indent b) are procedural in nature and more narrow than non-recognition on grounds of public policy, which includes procedural as well as substantive errors. If a specific decision is found to not satisfy the grounds of non-recognition under indent b), it may then be examined whether it satisfies the public policy grounds of non-recognition under indent a).[104]

The issuance of decisions when the defendant does not enter an appearance is not rare in practice. This mostly occurs in connection with default judgments issued due to protection of the plaintiff's right to a legal remedy, which may, however, violate the defendant's right to defence. If the defendant did not enter an appearance in the proceedings, he has the right in proceedings for the simplified recognition and execution of an issued decision in a Member State in which recognition is sought to oppose that and assert violations concerning the service of the decision that prevented him from participating in the proceedings. This is the most frequently invoked – and the most frequently successfully invoked – grounds of non-recognition under Regulation 2001/44 and Regulation 2012/1215,[105] which is an indication of the large number of wrongly issued documents instituting proceedings or equivalent documents.

Certain conditions must be satisfied for the application of the grounds of non-recognition, and the CJEU has provided an autonomous interpretation of the concepts described below.[106]

1. Service of the document instituting proceedings or an equivalent document

One of the reasons why a defendant does not enter an appearance in proceedings is his lack of information regarding the course of proceedings due to issues with the service of documents. When serving a defendant in another Member State, it is necessary to consider Regulation (EC) no 2007/1393 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) and repealing Council Regulation (EC) no 2000/1348[107] and the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters. However, violations concerning service that did not prevent the defendant from arranging his defence are not sufficient grounds to refuse the recognition of a decision.[108]

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[104] J. Kramberger Škerl, 'The Recognition and Enforcement of Foreign Judgments in Slovenia, National Law and the Brussels I (recast) Regulation', 20, *Yearbook of Private International Law*, 294 (2018/2019), emphasises that the principle of contradiction is regulated as a special ground of non-recognition (and not as a part of public policy), "to emphasise its importance and eliminate every possible doubt that its violation could be the reason for the refusal of recognition and enforcement".

[105] A. Dickinson, E. Lein and A. James, *The Brussels I Regulation in Recast* (Oxford: Oxford University Press, 2015) 452.

[106] Ibid 452.

[107] Regulation (EC) no 2007/1393 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) and repealing Council Regulation (EC) no 2000/1348 (2007) OJ L 324/79.

[108] A. Dickinson et al, n 105 above, 459; U. Magnus et al., n 85 above, 910.

Indeed, under the regulations, errors concerning the service of the document instituting proceedings on a defendant who lives outside the State where the proceedings are held are in certain cases supposed to be rectified in the course of the issuance of the decision. In the event the defendant does not have habitual residence in the State where the action was brought, the court has the duty to verify during the course of proceedings whether the defendant was able to receive the document instituting proceedings in time to arrange his defence, ie that all necessary steps have been taken to this effect (Articles 16 of Regulation 2016/1103, Regulation 2016/1104, and Regulation 650/2012). Such a procedural error made in proceedings against a defendant whose habitual residence is either in another Member State or in a third state is thus typically rectified in the course of the issuance of the decision.[109] Subsequently, the same circumstance is verified in the issuance of the attestation concerning a decision in matters of matrimonial property regimes (Appendix I of Commission Implementing Regulation (EU) no 2018/1935 of 7 December 2018 establishing the forms referred to in Council Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes),[110] attestation concerning a decision in a matter of the property consequences of registered partnerships (Appendix I of Commission Implementing Regulation (EU) no 2018/1990 of 11 December 2018 establishing the forms referred to in Council Regulation (EU) 2016/1104 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),[111] or attestation concerning a decision in matters of succession (Appendix I of Commission Implementing Regulation (EU) No 650/2012 of 9 December 2014 establishing the Forms referred to in Regulation (EU) No 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession[112]). Even when the originating court determines that the defendant received the document instituting the

[109] In the examined regulations, the provision is expanded compared to Regulation 2012/1215 (Article 28), under which a court examines the correctness of service only if the defendant who did not enter an appearance is domiciled in another Member State, but not if he is domiciled in a third state. Consequently, the grounds of non-recognition under Article 45.1(b) of Regulation 2012/1215 are expected to be applied more frequently than in the examined regulations, which determine that service is reviewed in a broader scope of cases (including in procedures against an (inactive) defendant domiciled in a third State.

[110] Commission Implementing Regulation (EU) no 2018/1935 of 7 December 2018 establishing the forms referred to in Council Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (2018) OJ L 314.

[111] Commission Implementing Regulation (EU) No 2018/1990 of 11 December 2018 establishing the forms referred to in Council Regulation (EU) 2016/1104 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 [2018] OJ L 320.

[112] Commission Implementing Regulation (EU) no 2012/650 of 9 December 2014 establishing the Forms referred to in Regulation (EU) no 2012/650 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (2014) OJ L 359/30.

proceedings or an equivalent document in time to arrange for his defence, the court in the Member State in which recognition is sought may arrive at a different conclusion from the same facts as it examines the defendant's grounds of non-recognition.[113]

2. The defendant does not enter an appearance

Activities by the defendant are examined in each specific proceeding in view of the specific circumstances. Legal theory holds that a defendant has entered an appearance if he or his attorney[114] presented his position with regard to the subject of the dispute,[115] but not if the defendant merely contested the court's jurisdiction or the correctness of service.[116] A defendant is also deemed not to have entered an appearance when he was represented by an attorney (as a result of which the proceedings are considered bilateral) who was not authorised by the defendant[117] but appointed by the State and the defendant did not have contact with him.

3. Instituting document

Service of the document instituting proceedings is generally deemed to mean service of the claim, but it may also mean another equivalent document. What is important is that the document provides the defendant with the basic information about the case that allows him to understand the substance and basis of the claim; it does not necessarily have to include information about the precise value of the claim or the plaintiff's precise grounds.[118] The examined regulations define the document served on the defendant functionally: the document must allow the defendant to exercise his rights before the decision is issued.[119] This cannot constitute grounds of non-recognition if the document instituting the proceedings was served on the defendant correctly and errors were made in the service of subsequent documents about the proceedings. In the event of such, the

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[113] This follows indirectly from the CJEU judgment in C-619/10 *Trade Agency Ltd v Seramico Investments Ltd*, (2012) ECR 531, in which the central issue is whether the court at which recognition is sought has jurisdiction to review the correctness of information from the certificate that accompanied the court decision. In Point 45, the Court states that limiting the scope of the power of review which the court in the Member State in which enforcement is sought has in that phase, solely because the certificate has been produced, would amount to "rendering the review that that court must undertake devoid of any effectiveness and, therefore, to preventing the attainment of the objective of ensuring that the rights of the defence, referred to by that regulation and set out in Recital 18 in the preamble thereto, are respected". The CJEU applied the same analogy in case 166/80 *Peter Klomps v Karl Michel*, [1981], ECR 01593.

[114] The CJEU held that the defendant entered an appearance in a case in which the defendant did not express a view on a civil claim accompanying criminal charges, where the defendant was represented by a counsel of his own choice (case C-172/91 *Volker Sonntag v Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann*, 1993, ECR I-01963).

[115] U. Magnus et al., n 85 above, 908.

[116] A. Dickinson et al., n 105 above, 455; U. Magnus et al., n 85 above, 909; U. Bergquist et al., n 72 above, 197; U. Bergquist et al., n 3 above, 159.

[117] The CJEU in C-78/95 *Hendrikman and Feyen v Magenta Druck & Verlag*, (1996) ECR I-04943. See also U. Bergquist et al., n 72 above, 197; U. Bergquist et al., n 3 above, 159.

[118] U. Magnus et al., n 85 above, 906; U. Bergquist et al., n 72 above, 199; U. Bergquist et al., n 3 above, 161.

[119] CJEU, C-474/93 *Hengst Import BV v Anna Maria Campese*, (1995), ECR I-02113.

defendant was already informed of the proceedings and could have actively entered an appearance.

4. Prompt service in a manner allowing the defendant to arrange for his defence

The regulations under discussion do not determine how documents should be served. Accordingly, any kind of service that informs the defendant of the procedure and allows him to decide whether to enter an appearance is acceptable. The court in the Member State in which recognition is sought ascertains whether the defendant actually had sufficient time in the course of proceedings to arrange for his defence. The relevant aspect here is the time he was given after the service and during which he may have effectively prevented the issuance of a default judgment.[120] The court does not review whether the service as it was carried out was in conformity with national rules on service in the originating state or the state in which recognition is sought, or whether national procedural law (of the originating state or the state in which recognition is sought) gave the defendant sufficient time to lodge a statement of defence against the claim or another procedural act by which the defendant enters an appearance. The court in the Member State in which recognition is sought may thus determine that the service allowed the defendant to effectively enter an appearance even if service rules were not followed of either the originating State or the State in which recognition is sought.[121] The opposite applies as well: even when service is in conformity with national procedural rules, it may not be possible for the defendant to arrange for his defence, which allows him to successfully request non-recognition under indent (b).[122] For example, one of the grounds of non-recognition is correct and lawful service on the defendant's court-appointed attorney[123] that the defendant, whom the court cannot find[124] for service purposes, does not know about or have any contact with.

5. The defendant did not exercise the option to challenge the decision

The purpose of the grounds of non-recognition under indent (b) is to *de facto* allow the defendant to arrange his defence in the originating State, which is why a prerequisite for its

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[120] Case 166/80 *Peter Klomps v Karl Michel*, (1981), ECR 01593.

[121] The general view is that a decision cannot be recognised if the application or equivalent document was not served on the defendant, even if he knew of the existence of the proceedings. See U. Bergquist et al., n 72 above, 199.

[122] A. Dickinson et al, n 105 above, 460; H.P. Pamboukis, n 46 above, 461; U. Bergquist et al., n 3 above, 161. These are mostly examples of substitute service in which the defendant never learns about the proceedings and which courts typically review very strictly. But in such cases, it is also necessary to protect a plaintiff who has done everything possible to trace the defendant. In C-292/10 *G v Cornelius de Visser*, (2012), ECR 142, paras. 55-56, the CJEU emphasised that even if all necessary steps have been taken to ensure that a defendant who has not entered an appearance can defend his interests (eg all investigations required by the principles of diligence and good faith have been undertaken to trace the defendant), taking further steps in the proceedings without the defendant's knowledge by means of "service by public notice" constitutes a restriction of the defendant's rights of defence. However, that restriction is "justified in the light of an applicant's right to effective protection, given that, failing such service, that right would be meaningless".

[123] A. Ekart and V. Rijavec, in M. Repas and V. Rijavec eds, n 7 above, 276, name as an example service under Article 82 of the Slovenian Contentious Civil Procedure Act (Official Gazette RS, no. 73/07, as amended).

[124] Here an important aspect is the diligence that the court and the plaintiff exercised in tracing the defendant.

application is that the defendant tried to rectify the procedural error committed in the proceedings for the issuance of the decision. The defendant must first challenge the procedural violations that prevented him from entering an appearance in the originating State, provided such an option exists. The examined regulations do not determine which legal remedy the defendant must use, which is why they cover all options that the defendant has at his disposal to claim procedural violations in the originating State. In examining the defendant's request for non-recognition, the court in the State in which recognition is sought thus first examines whether the defendant had the *de facto* option to challenge the decision under the national procedural rules of the originating State. For that to be possible, the defendant must be informed of the substance of the decision and must have sufficient time available to arrange a legal remedy.[125] Furthermore, the court at which recognition is sought must determine whether the defendant initiated the legal remedy correctly and in time to protect his rights. The legal remedy proceedings thus substitute for the absence of the defendant's defence in the issuance of the decision. In the event the defendant does not exercise this option[126] even if he could have initiated proceedings to challenge the decision in the originating State, he may not invoke the grounds under indent (b) to challenge the recognition of the decision at the court at which recognition is sought. If the defendant challenged the procedural violation in the originating State and failed, he may exercise this right again by challenging the recognition of the decision in the State in which recognition is sought.

IV. Indents (C) and (D) Irreconcilability with another decision between the same parties

The grounds that prevent recognition under Articles 37(c) and 37(d) of Regulation 2016/1103 and Regulation 2016/1104 and Article 40 of Regulation 2012/650 are very similar at first glance. In essence, both prevent the recognition of a decision under the rules that the mentioned regulations determine for recognition and enforceability in the event of irreconcilability with another decision – one that takes priority. Another aspect that both grounds have in common is the requirement that the same parties (or their successors[127]) have participated in both proceedings, where it is not important whether they participated in the same role in both.[128]

The existence of an irreconcilable decision is (in theory) prevented by the *lis pendens* provision (Articles 17 of Regulation 2016/1103, Regulation 2016/1104, and Regulation 2012/650) and the provision on related actions (Articles 18 of Regulation 2016/1103,

[125] U. Magnus et al., n 85 above, 917.
[126] The examined regulations (as well as Regulation 2001/44 and Regulation 1215/2012) use the wording "unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so". The CJEU has interpreted the term "when it was possible for him to do so" determined by Regulation 2001/44 in the sense that "it was possible for the defendant to appeal a default judgment against him only if he was served in time and was actually acquainted with its substance so that he was able to defend himself at the court in the state of origin".
[127] U. Bergquist et al., n 3 above, 164.
[128] A. Dickinson et al, n 105 above, 470.

Regulation 2016/1104, and Regulation 2012/650[129]) that prevent parallel proceedings on the same or related actions. But in practice it may happen that courts (for different reasons, for example because they intentionally ignore ongoing proceedings in another state or are unaware of such proceedings, or because they assess that proceedings are not the same or similar, and for other similar reasons) do not follow these rules, and a proposal for the recognition or actual recognition of irreconcilable decisions is filed in a Member State.[130] This may also occur in the event of a decision with irreconcilable effects issued in a third state[131] (indent (d)) or in the event of a decision with irreconcilable effects that does not substantively fall under the scope of the examined regulations.[132] In the event of such, the rules on *lis pendens* and related actions under the three regulations discussed do not apply, which increases the likelihood that a decision with irreconcilable effects will be issued. Any acts designated as "decisions" in accordance with Article 3 of all three examined regulations may be irreconcilable. A decision is defined as "any decision in a matter of the property consequences of a registered partnership, in a matter of a matrimonial property regime or in a matter of succession given by a court of a Member State, whatever the decision may be called, including a decision on the determination of costs or expenses by an officer of the court".

Grounds of non-recognition under indents (c) or (d) require that decisions be irreconcilable. But determining when decisions are irreconcilable is not straightforward. It is necessary to examine the effects of the decisions in each specific case. The CJEU has provided guidance in its case law by ruling that decisions are irreconcilable if they entail legal consequences that are mutually exclusive, but they do not necessarily need to involve the same legal problem.[133] In determining irreconcilability, circumstances with regard to admissibility and procedure are not relevant either.[134] Instead, it is necessary to compare the effects of both decisions, which the court does in the State in which recognition is sought when it examines whether grounds of non-recognition exist. As is the case with all other grounds, the defendant must himself claim the grounds under indents (c) and (d). Failing that, irreconcilability will not be examined and decisions with irreconcilable effects will be recognised in the State in which recognition is sought. If the court determines that the decisions are irreconcilable, it is necessary to refuse the recognition of one of the decisions.[135] The grounds under indents (c) and (d), however, differ in determining which of the decisions must not be recognised in the event of such.

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[129] Articles 18.3 of the examined regulations stipulate that, for the purposes of this article, "actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable decisions resulting from separate proceedings".
[130] U. Bergquist et al., n 3 above, 162, emphasise that the danger of decisions with irreconcilable effect is even greater in the property regulations in that, unlike the succession regulation, they allow alternative jurisdictions.
[131] The provisions of the property regulations or the succession regulation do not apply to the recognition and enforcement of decisions from third countries; instead, national rules of private international law apply in the absence of other rules.
[132] U. Magnus et al., n 85 above, 919, U. Bergquist et al., n 72 above, 201, U. Bergquist et al., n 3 above, 163.
[133] The CJEU in case 145/86 *Horst Ludwig Martin Hoffmann v Adelheid Krieg*, (1988), ECR 00645, para. 22.
[134] Case C-80/00 *Italian Leather SpA v WECO Polstermöbel GmbH & Co.*, (2002) ECR 342.
[135] Case C-80/00 *Italian Leather SpA v WECO Polstermöbel GmbH & Co.*, (2002) ECR 342.

1. Indent (C)

Article 37(c) of Regulation 2016/1103 and Regulation 2016/1104 and Article 40(c) of Regulation 2012/650 stipulate that a decision is not recognised if it is irreconcilable with a decision issued in proceedings between the same parties in the Member State in which recognition is sought. This provision gives precedence to the decision issued in the Member State in which recognition is sought, whereby the regulations do not assume the "domestic" decision should be of an earlier date than the "foreign" decision. It should therefore follow that the "domestic" decision takes precedence even if proceedings were commenced later and/or it was issued later than the "foreign" decision whose recognition is refused. Precedence thus goes to the decision issued in the "domestic" procedure, which should be interrupted due to *lis pendens*, and the court should declare it has no jurisdiction. However, questions arise as to the effect of such an irreconcilable "domestic" decision if the "domestic" decision has not yet been issued at the moment the foreign decision is recognised and enforced. The foreign decision is (under the provisions of all of the examined regulations) recognised and declared enforceable automatically and cannot be subject to grounds of non-recognition under indent (c) because the "domestic" decision does not exist yet. Some legal theorists hold that in this event the "domestic" decision does not have a bearing on the effect of the foreign decision,[136] but the opposite conclusion may be drawn from the CJEU judgment in the "Hoffman case".[137] It follows from that judgment that the foreign decision remains in effect in the Member State until or provided that a decision with an irreconcilable effect is subsequently issued there. If a "domestic" decision is issued whose effects are irreconcilable with the foreign decision, the latter may not have any effect in the former's State of origin.[138]

Another question that arises is whether a "domestic" decision (issued in the State in which recognition is sought) may represent an obstacle to the recognition of a decision in the event it is not yet final at the time of the recognition of the "foreign" decision because it is still subject to current or potential legal remedies.[139] This is because these legal remedies may alter the "domestic decision" to an extent that it is no longer an obstacle to the foreign decision having effect. Some legal theorists argue that in order for the grounds of non-recognition to be successfully invoked, the "domestic" decision must be final,[140] or that the court at which recognition is sought autonomously decides whether or not to consider such a non-final decision in the specific case.[141]

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136 U. Magnus et al., n 85 above, 926.
137 Case 145/86 *Horst Ludwig Martin Hoffmann v Adelheid Krieg*, (1988), ECR 00645, para. 18.
138 This raises the question of how and when grounds of non-recognition under indent (c) are considered. The party has a limited time to lodge an appeal invoking these grounds under Articles 49 of Regulation 2016/1103 and Regulation 2016/1104 and Article 50 of Regulation 2012/650, but due to the non-existence of a domestic decision he will not be able to do so within the specified time. For some of the issues concerning the temporal effect of the grounds under indent (c), see A. Dickinson et al, n 105 above, 471.
139 U. Bergquist et al., n 3 above, 164.
140 U. Bergquist et al., n 72 above, 201.
141 U. Magnus et al., n 85 above, 920.

For the application of the grounds of non-recognition under indent (c), it is important that the decisions are substantively irreconcilable, but, unlike under indent (d), the actions do not have to be the same.

2. Indent (D)

Indent (d) stipulates that a decision is not recognised if it is irreconcilable with an earlier decision issued in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which recognition is sought. Application of these grounds requires that the decision whose recognition is refused is subject to the provisions of the examined regulations, but this is not necessary for the earlier decision that satisfies the condition for recognition under different rules in the Member State in which recognition is sought. Accordingly, in the absence of other rules (eg a bilateral agreement on the recognition and enforceability between the State where the decision was issued and the State in which recognition of the specific "foreign" decision is sought), a decision issued in a third State that satisfies the conditions for recognition under the private international law of the Member State in which recognition is sought may have such precedence. In this context, third State is deemed to mean not just non-EU countries but also EU Member States that do not participate in enhanced cooperation regarding Regulation 2016/1103 and Regulation 2016/1104. Unlike in the grounds of non-recognition under indent (c), precedence is thus given to the earlier decision, regardless of the State in which it was issued and regardless of which rules will be applied in its recognition or declaration of enforceability. The only thing that matters is whether it satisfies the condition for recognition in the Member State in which recognition is sought. It is, however, important how a decision is determined to be the earlier one, which is significantly affected by the different methods of recognising decisions in different Member States in which a decision was issued. The moment of issuing and the moment of recognition of a foreign decision in the State in which recognition is sought are possible solutions in determining this time frame.[142]

In the application of these grounds of non-recognition, it is also important that both decisions involve the same cause of action and – just like in the grounds under indent (c) – are between the same parties.

V. Respect for fundamental rights and principles

Regulation 2016/1103 and Regulation 2016/1104, the latest EU regulations in the broad area of family law, provide a new provision not contained in the earlier regulations, namely Regulation 2012/650, Regulation 2002/44, Regulation 2012/1215, Council Regulation (EC) no 2003/2201 of 27 November 2003 concerning jurisdiction and the recognition and

[142] For details, see U. Bergquist et al., n 3 above,165, U. Bergquist et al., n 72 above, 203, U. Magnus et al., n 85 above, 927, and A. Dickinson et al, n 105 above, 473.

enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) no 2000/1347[143] (eg the Brussels Regulation II *bis*), and Council Regulation (EC) no 2009/4 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.[144] This provision stipulates that courts and other competent authorities in Member States apply Article 37 of both regulations, which enumerate the grounds of non-recognition, in observance of the fundamental rights and principles recognised in the Charter of Fundamental Rights of the European Union[145] (hereinafter: the Charter),[146] in particular Article 21 thereof. This article defines the principle of the prohibition of discrimination and invokes the similar principle enshrined in Articles 18 and 19 of the Treaty on the Functioning of the European Union[147] (hereinafter: TFEU) and Article 14 of the European Convention on Human Rights (hereinafter: ECHR).[148]

Paragraph 1 of Article 21 of the Charter states: "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited".

In this paragraph, the Charter determines a broad range of grounds on which it is prohibited to discriminate, whereby the English version lists them as examples.[149] In practice, the most commonly invoked prohibition is against discrimination on grounds of gender, which is also the oldest such grounds for the prohibition of discrimination;[150] for the areas covered by Regulation 2016/1103 and Regulation 2016/1104, discrimination on grounds of religion and sexual orientation is also bound to become relevant in the framework of Article 38.

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143 OJ L 338 of 23 December 2003.
144 OJ L 7/1 of 10 January 2009.
145 OJ C 83/389 of 30 March 2010.
146 Respect for fundamental rights and observance of the principles recognised in the Charter in the application of both regulations is determined in Recital 73 of Regulation 2016/1103 and Recital 71 of Regulation 2016/1104.
147 OJ C 326 of 26 October 2012. Article 19 of the TFEU states: "1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. 2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1".
148 The ECHR is available at *www.echr.coe.int/Pages/home.aspx?p=basictexts&c.* Article 14 states: "Prohibition of discrimination – The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".
149 The English version uses the expression "such as" before the circumstances are enumerated.
150 See, for example, The Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979, which has been ratified by all EU Member States.

Paragraph 2 of Article 21 of the Charter states: "Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited".

Separately from other grounds of discrimination listed together in paragraph 1, paragraph 2 of Article 21 of the Charter prohibits discrimination on grounds of nationality.[151] This gives it particular weight, which is logical given that the free movement of persons is one of the fundamental principles of European treaties.[152] However, considering the substance of the matrimonial property regimes and property consequences of registered partnerships, examples of discrimination on grounds of nationality are not expected to occur in the application of Regulation 2016/1103 and Regulation 2016/1104. It is also notable that the prohibition of discrimination on grounds of nationality protects the nationals of all EU Member States, not just the nationals of the Member States that joined enhanced cooperation, in the framework of which both regulations were adopted.[153]

As stipulated by Regulation 2016/1103 and Regulation 2016/1104, the principles of non-discrimination must be observed by courts and other competent authorities when they examine whether grounds of non-recognition exist. This implies that it is necessary to interpret the grounds narrowly.[154] Although Articles 38 of both regulations invoke the Charter, and in particular the prohibition of discrimination, in the examination of all grounds of non-recognition of a foreign decision, this provision plays a particularly important role in the public policy grounds of non-recognition given that other grounds are defined more specifically than public policy grounds; this also follows from the recitals of all three regulations discussed. As mentioned before, only Regulation 2016/1103 and Regulation 2016/1104 explicitly refer to the Charter. Nevertheless, the prohibition of discrimination is also mentioned in Regulation 2012/650: in the introductory provisions all three regulations prohibit courts and other competent authorities from applying public policy to refuse to recognise or enforce a decision, an authentic instrument, or a court

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151 U. Bergquist et al., n 3 above, 170, warn that the Charter prohibits discrimination on grounds of nationality only in general terms, whereby the prohibition is not limited to EU nationals only. However, CJEU case law indicates that protection against discrimination on grounds of nationality does not cover third-state nationals.

152 Article 18 of the TFEU states: "1. Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. 2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination". While the ECHR does not list nationality among the grounds on which it prohibits discrimination, CJEU case law does. See, for example, the cases ECtHR, *Gaygusuz v Austria* App no 17371/90, Judgment of 16 September 1996; ECtHR, *Koua Poirrez v France* App no 40892/98, Judgment of 30 September 2003; and ECtHR, *Andrejeva v Latvia* App no 55707/00, Judgment of 18 February 2009.

153 U. Bergquist et al., n 3 above, 170.

154 F. Dougan, 'Nova evropska pravila o pristojnosti, pravu, ki se uporablja ter priznavanju in izvrševanju odločb na področju premoženjskih razmerij mednarodnih parov [New European Rules on Jurisdiction, Applicable Law, and Recognition and Enforcement of Decisions in International Matrimonial Property Relations]', in A. Galič and J. Kramberger Škerl eds, *Liber amicorum Dragica Wedam Lukić* (Ljubljana: Pravna fakulteta, 2019), 245.

settlement from another Member State when doing so would be contrary to the Charter, and, in particular, Article 21 thereof on the principle of non-discrimination.[155]

[155] Recital 54 of Regulation 2016/1103, Recital 53 of Regulation 2016/1104 and Recital 58 of Regulation 650/2012.

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**The bibliography and case-law was edited by: Vincenzo Bonanno, Giovanna Di Benedetto, Paola Nico and Elisabetta Sini Spanu*

Naples, September 2020

742017419I

PERSONALIZED SOLUTION
IN EUROPEAN FAMILY AND
SUCCESSION LAW

ISBN 978-88-495-4366-7