THE EU REGULATIONS ON MATRIMONIAL PROPERTY AND PROPERTY OF REGISTERED PARTNERSHIPS

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CONTENTS

CONTENTS

PART II. ANATOMY OF THE TWIN REGULATIONS

PROPERTY REGIMES AND LAND REGISTERS FOR CROSS-BORDER COUPLES

Lucia RUGGERI and Manuela GIOBBI*

1. LAND REGISTERS IN EUROPE: A FRAGMENTED REGULATORY FRAMEWORK

The Twin Regulations on property regimes and the property consequences of cross-border couples exclude from their scope of application matters of real estate and property disclosure (Article 1(2) of the Twin Regulations). This exclusion is not new. The Succession Regulation also excludes from its scope questions relating to the recording in a register of a right in immovable or movable property (Article 1(2) sub l). It is the law of the Member State in

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which the register is kept or where the immovable property is located that determines the legal conditions and recording procedures.

In this context, land registers constitute an area still strongly characterised by legislative fragmentation.[1] Its harmonisation at the European level is difficult due to the high degree of different national approaches that characterises the rights and obligations regarding real estate property. This can be seen in the field of guarantees, as well as with regard to the nature and content of institutions, such as timeshare, tenure, trust, etc.

Based on this situation, the exclusion made by EU regulations in the field of family and succession law is an almost mandatory choice the aim of which is to provide legal certainty, while the reference to national law in fact avoids the difficulty in determining the applicable legislation. The function of transparency is so important that any uncertainty would probably lead to conflicts in fundamental areas such as the knowledge of acts or facts of relevant importance by third parties. In some countries, a couple's bond determines the appearance of peculiar legal relationships of a patrimonial content. As a consequence, not only does the relevant act or fact that is to be registered need to be disclosed, but also the specific personal situation of the person, related to such an act or fact.

Such a fragmentation does not make the life of couples who live in countries other than those of origin, or who are composed of people of different nationalities, any easier. Each state attributes the keeping of registers to different ministries and organises registration in various ways by centralising, decentralising, separating or aggregating in a single register information related to the matrimonial regime or registered partnership and information related to property or real estate guarantees.

For this reason, dialogue between land registries initiated by the European Land Information Service (EULIS)[2] project and continued with the Land Registers Interconnections (LRI)[3] project is to be considered a complementary tool to the European policies laid out in the Twin Regulations. Freedom of movement laid out in Article 21 Treaty on the Functioning of the European Union (TFEU) may also become effective and be encouraged through a different organisation of the land registers aimed at making them easily accessible and intelligible.

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1 Significantly, it highlights that each property regime has an internal logic with its own rules on the subject of deeds of purchase, disposal and disclosure. E. Calò, 'Variazioni sulla *proprietà terza* nei regimi patrimoniali delle famiglie' (2017) 6 *Rivista del Notariato* 1293.

2 The project (initiated in 2006) has enabled the integration of the registers of the following countries: Ireland (Property Registration Authority), Lithuania (Valstybės įmonė Registrų centras - State Enterprise Centre of Registers), Netherlands (Kadaster), Austria (Bundesrechenzentrum für Justiz) and Spain (Colegio de Registradores de la Propiedad, Mercantiles y de Bienes Muebles de España).

3 The goal of this project is to create a single access point through an e-justice portal, a description of which can be found at <https://e-justice.europa.eu/content_land_registers_interconnection_lri-36276-en.do>

Accessibility to the different land registers would be easier for citizens and companies, as long as technological interoperability is accompanied by careful clarification of the legal terminology in order to better understand the similarities or differences that the institutions attribute to the term 'land'. In common law systems, this word has a broad meaning including not only the land but also every immovable property and every type of right exercised over this property.[4] Such a broad term, which can also be found in the Italian legal system (Article 813 of the Italian Civil Code),[5] makes interoperability difficult. The European legislative choice is justified also by the fact that states have over time developed measures that identify specific regulatory regimes for certain goods or rights.[6] For example, one just needs to consider the concept of ownership and the difficulties in making distinctions among different models such as long leasehold.[7] There are also systems such as the German or Anglo-Saxon ones[8] in which the recording of the sale of real estate has the constitutive effect[9] of law, unlike personal based systems, such as the Italian one, in which a transcription mainly is of a declarative function.[10]

Harmonisation conducted by the EU through regulatory instruments that involve only some Member States (as do the Twin Regulations) aggravates the problem. The set of third states in the matters of registration of family property regimes is, in fact, composed not only of traditional third countries but also of all those EU Member States that have not adhered to the enhanced cooperation procedure that led to the adoption of the Matrimonial Property Regulation and the Regulation on the Property Consequences of Registered Partnerships. The couple's choice to formalise a living communion in the form of marriage or registered partnership through a registration procedure that has not been harmonised is combined with the non-harmonised regulations of registration

4 V.I. Ferrari, *Land Law nell'Era Digitale*, Cedam, Padova 2013, pp 4–7.

5 Article 813 of the Italian Civil Code reads: 'Unless otherwise stated by the law, the provisions concerning immovable property also apply to rights *in rem* concerning immovable property and related actions; the provisions concerning movable property apply to all other rights'.

6 S. Gardner and E. MacKenzie, *An Introduction to Land Law*, 4th ed., Hart Publishing, Oxford 2015, p. 7.

7 V.M.P. Thompson and M. George, *Modern Land Law*, Oxford University Press, Oxford 2017, p. 245.

8 M.D. Panforti, 'Torrens title', *Digesto delle Discipline Privatistiche*, Utet, Torino 2000, Agg. I, p. 715. Sulle origini germaniche del sistema Torrens v, fra gli altri, A. Esposito, 'Ulrich Hubbe's Role in the Creation of the Torrens System of Land Registration in South Australia' (2003) 24(2) *Adelaide Law Review* 263–304, *HeinOnline*.

9 For example, in England and Wales, disclosure has assumed a constitutive value following the Land Registration Act 2002. V.I. Ferrari, *Land Law nell'Era Digitale*, Cedam, Padova 2013, pp. 185–186.

10 In some Italian regions (Trentino Alto-Adige and Friuli Venezia Giulia) there is a system of real estate advertising of German origin called 'intavolazione'. This type of transcription has constitutive effects. See F. Padovini, 'voce "trascrizione"' in Noviss. Dig. It., app. VII, Torino, 1987, p. 800 et seq.

of the financial consequences deriving from different family models. From this perspective, the exclusion of the matter of disclosure from the European legislation is only a temporary solution to a problem that still remains: no harmonisation of the field of family property consequences can work well unless it is possible also to achieve harmonisation of the rules regarding the registration of family models and the property consequences of the chosen models. Even where the legislator preferred not to introduce specific property regimes deriving from marriage the property discipline could be influenced by the presence of a marriage. Reference can be made to English jurisprudence regarding the assignment of a family home. In a country that attributes an exemplary constitutive value to land registers, this position was held in the case of *Grant v Edwards*.[11] In this case, a married woman who was not the owner of the house obtained recognition of community ownership of the property. This was made based on an assessment of the behaviour of the parties and of the specific circumstances from which it emerged that it was contrary to good faith to assign the formal title of the property to the husband alone.

Interference among family situations, ownership structures and different systems on registration of property deeds are such[12] that is necessary to harmonise registration systems among the various states. This process, prefigured by the EU since the adoption of the Green Paper on Mortgage Credit,[13] has not yet taken place. The discussion of this issue with reference to the European framework introduced by the Twin Regulations can only take note of it.

The current legislation regarding family property regimes has its effects well beyond the couple itself. It may concern everyone whenever rights *in rem* are involved, while these have *erga omnes* effect in the legislative tradition of many states. Therefore, a close connection exists between a property regime, ownership or joint ownership of a property, registration rules and the protection of third parties who, for example, have a claim against one of the couple. The Twin Regulations expressly excluded from their scope '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). But this exclusion made by the Twin

11 *Grant v Edwards* [1986] 3 WLR 114 Court of Appeal.

12 The varied taxonomy of couples, which can no longer be reduced to the scheme of heterosexual marriage, has led to referrals to property regimes 'derived from sexual choices'. For the use of the term 'sexual property law', G.L. Gretton and A.J.M. Stevens, *Property, Trusts and Succession*, Bloomsbury, London 2017, p. 112. More generally on this topic see W. Pintens, 'Matrimonial Property Law in Europe' in K. Boele-Woelki, J. Miles and J. M. Scherpe (eds.), *The Future of Family Property in Europe*, Intersentia, Antwerp 2011, pp. 19-46; K. Boele-Woelki, F. Ferrand, C. González-Beilfuss, M. Jänterä-Jareborg, N. Lowe, D. Martiny and W. Pintens, *Principles of European Family Law Regarding Property Relations Between Spouses*, Intersentia, Antwerp 2013, pp. 1-420.

13 COM(2005) 0327 final.

Regulations is not conclusive. It specifically does not eliminate the need to study the interference between the law applicable to the property relationship and the *lex registri*, verifying the impact on the position of the third party who, for various reasons, came into contact with only one or both of the couple.

2. AUTONOMY OF THE WILL AND PROTECTION OF THIRD PARTIES: A DIFFICULT COMBINATION

The applicable law identified based on the Twin Regulations determines the effects of the property regime between spouses or partners of the registered partnership and the legal relationships between a spouse or a partner[14] and third parties. The law identified by the spouses during or prior to the marriage or registered partnership constitutes the *lex causae*. It governs not only the property relationships of the couple, but, as highlighted in Recital 18 of the Matrimonial Property Regulation, it includes also relationships between an individual spouse and third parties. Such a third party might be a creditor of a single or both spouses or partners, whereas a relationship may derive from a contract, from an unlawful fact, or from any other act or fact that may give rise to the mandatory relationship.

The law applicable to matrimonial property regimes or the property consequences of a registered partnership is the expression of a couple's negotiating freedom, which, by the expressly stated provision of Article 22 of the Twin Regulations, could also be changed with retroactive effect. The position of the third party is safeguarded by preventing the *ius variandi* exercised by the couple and therefore adversely affecting the third party on whom the law originally applied to the property regime will continue to have effect.[15]

There are many possible scenarios when concluding an agreement on the choice of law. Couples can identify the applicable law prior to formalising their union, or they can await the conclusion of the marriage or registered partnership to choose the law, they can stay with the first chosen law, or can later change it, even retroactively, or else make a choice of law that will have effect from a specific date. The choice of the applicable law, thus conceived, caters to the needs of the couple who is, based on the concrete situation, able to identify which law of which state can best govern the relationship. However, this is less satisfactory for third parties who enter into contact with the couple.

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14 A typographical error is noted in Article 27 point *f* of the Regulation on the Property Consequences of Registered Partnerships (Italian translation) where instead of a partner it reads 'spouse' ('coniuge').

15 There is a wide debate on the possible retroactivity of the *ius variandi*. V.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' (2018) 10 *Cuadernos de Derecho Transnacional* 1, 10.

The Twin Regulations were adopted on the basis of Article 81(3) of the TFEU as family law instruments with transnational implications. However, it is certain that whenever an individual member of a couple or both of them enter into contracts or assume obligations, the legal activity interacts with family law. Although the exclusion of disclosure on the one hand respects the traditions of each individual state and constitutes the leitmotif of European legislation in family and succession matters, on the other hand it prevents an adequate level of protection to third parties.

The Twin Regulations have intervened in an area that not even international conventions were able to regulate. In 1905[16] a convention was drawn up regarding the effects of marriage, which was overturned by the two world wars. In 1978, another convention[17] specifically regulated property regimes between spouses; however, it too was unsuccessful as it was ratified only by France, Luxembourg and the Netherlands. From this point of view, the adoption of the Twin Regulations is of great success on the path taken by the EU aimed at simplifying the life of cross-border couples.

The adoption of what is known as the autonomy of the will,[18] the basis of any rule that introduces the freedom to choose the applicable law, means, when it comes to family matters, sacrificing the needs of third parties. Family relationships are not exclusively personal, but inevitably also include a patrimonial character. The home is a place where the right to private and family life is exercised; however, at the same time it constitutes an asset regulated by the rules of real estate law. In order to manage their life, the couple necessarily establishes different contractual relationships. A wish of spending together their free time most likely includes travelling and rental contracts for holiday homes. For this reason, in some countries, marriage or the conclusion of a registered partnership also has consequences on the property regime of the members of the couple. Such consequences inevitably reverberate on relations with third parties who establish qualified relations with the members of the couple. The effects of the autonomy of the couple will therefore unravel beyond the couple itself and therefore implies a reversal from the traditional

16 This refers to the Hague Convention of 17 July 1905 on matrimonial property. The text can be consulted at <https://www.hcch.net/en/instruments/the-old-conventions/1905-effects-of-marriage-convention>.

17 This refers to the Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes.

18 The adoption of the criterion of the autonomy of the will to identify the applicable law in contexts characterised by internationality dates back to a famous French case (see Cass. civ., 5 December 1905, *American Trading Company v Quebec Steamship Company Limited*), but it also constitutes a tradition dating back to English culture (see *Girnar v Meyer* (1796), 2 Hy. Bl. 603). On this subject, see M. Giuliano and P. Lagarde, 'Relazione sulla Convenzione relativa alla legge applicabile alle obbligazioni contrattuali', *Comunicazione al Consiglio* in GUCE 31 October 1980, C 282, p. 16.

principle according to which an agreement has effect only between the parties that stipulate it. The choice of a living communion sealed by a formal marriage or a registered partnership, in the case of cross-border couples, determines the possibility of choosing the law applicable to the relationship with inevitable consequences on third parties. Article 27, point *f* of the Twin Regulations, therefore, reaffirms the effectiveness of a principle consolidated in private international law. However, it is characterised by greater difficulty in implementation. In fact, the third party is burdened by knowing the law chosen by the parties or the choice temporarily affecting the couple's relationships whenever the couple has exercised the *ius variandi* granted to it by Article 22, paragraphs 2 and 3 of both regulations.

The scope of the chosen law is very broad, concerning not only the matters listed by Article 27 of the Twin Regulations, but also additional aspects that the parties wish to assign to the chosen law or that fall within the scope of the law as an effect determined by the specifically applicable national law.[19] The impact of Article 27 on third parties is even more interesting considering that this provision did not feature in the original proposal of the regulations.[20] Each state has its own approach to the property consequences of marriage or registered partnerships. As a consequence of that, many matters referred to in Article 27 of both regulations would, without this specific regulatory intervention, have been governed by the *lex fori* rather than by the law chosen by the parties. However, a provision as it is, enables the possibility of expanding matters that are subject to the chosen law, which reduces the impact of the possible application of the *lex fori*. The consequences of the *lex causae* in areas that are extremely relevant for those who come into contact with the couple is very problematic. On the one hand, this excludes the possibility for the Regulations to govern aspects such as the nature of rights *in rem* or issues regarding the registration of titles on movable or immovable property, while on the other hand, the instrument of choice of applicable law allows for the resolution of many issues by the lex causae with the consequent exclusion of the effect of the *lex fori* that would have been operating by default in matters excluded from the scope of the Twin Regulations. On the other hand, through the instrument of choice of applicable law, many issues are resolved by the *lex causae* with the consequent exclusion of the effect of the *lex fori* which would have been operating by default in matters excluded from the scope of the regulations.

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19 J.M. Carruthers, 'Article 27' in I. Viarengo and P. Franzina (eds.), *The EU Regulations on the Property Regimes of International Couples. A Commentary*, Edward Elgar 2020, p. 262.

20 COM (2011) 126 final. The introduction of specific details regarding the scope of application of the autonomy of the will is the subject of ongoing debate. See, among others, O. Lando, 'Contracts' in K. Lipstein (ed.), *Private International Law*, in *International Encyclopedia of Comparative Law*, vol. III, Brill, Leiden 1977, pp. 106–125.

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For issues regarding rights *in rem*, the *lex fori* will be in effect. The judge will also be able to identify a corresponding right *in rem* in his or her own legal system which can produce the effects that the parties would have liked to produce by using a right *in rem* from another legal system, but which did not exist in the legal system of the judge.[21]

Any question regarding the recording in a register pertains to the *lex registri*, which does not necessarily coincide with the *lex fori*: when the property is real estate, questions regarding the recording of the property fall within the field of application of the place where the immovable property is located (*lex rei sitae*). The registry system was considered as excluded from harmonisation with the aim to safeguard the exclusive competence of states to better organise the requirements for the registration of an asset in a specific register. The *lex registri*, which, in the case of real estate, coincides with the *lex rei sitae*, determines the conditions of registration, but also allows for the identification of the authorities in charge of verifying the documents that are necessary for the registration.

3. THE ARDUOUS, BUT NECESSARY, DIALOGUE BETWEEN *LEX CAUSAE* AND *LEX REGISTRI*

It is not easy to untangle this complex regulatory framework. On one hand, it must be understood how far the *lex causae* can affect specific areas of the *lex registri*, and, on the other hand, it must be verified how the knowledge of third parties is modulated. The latter is necessary for the enforceability of the effects of acts done by the couple regarding movable and immovable property that must be subject to registration.

The *lex causae* allows for the identification of the nature of the property, which in some countries may be legally classified as a personal asset or communal property. This circumstance impacts a third-party creditor who will be able to count on property guarantees whose content and conditions will be established by the *lex causae*. The European regulatory framework regarding family property regimes makes it necessary to analyse the level of protection granted to third parties who come into contact with the couple. The exclusion of the matter of the property registers from the scope of the regulations does not exclude this matter from an analysis regarding the specific situation of the third party. The latter ends up being influenced by the *lex causae* under relevant conditions, such as the knowledge that the third party may have about the family property regime.

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21 See P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate*, Giuffrè, Milano 2019, pp. 62-63.

The disclosure systems of property regimes are different in different states or are completely absent in some of them. For example, in Austria,[22] Croatia,[23] Ireland, Slovakia or Luxembourg, no form of disclosure is provided for family property regimes. Cyprus is also different given that it has introduced the principle of 'property independence' both for marriages[24] and for civil partnerships:[25] the marriage or the civil union do not affect the property independence of the spouses or of the partners.[26] Poland also lacks specific registers where it is possible to obtain information on property regimes from the Central Register of Entrepreneurial Activities,[27] as does Sweden, where the registration of spouses' and partners' agreements is handled exclusively for tax purposes.[28]

In some states, such as Italy, disclosure takes place through the civil registry records. When the *lex causae* is Italian law, an interested third party can identify whether the special regime of legal communion is in effect or if there are matrimonial agreements, or, again, a property fund.[29] The nature of the asset and its regime is regulated by the *lex causae* and, on this basis, a third party will be able to establish which rights and powers he or she can exercise, or may not exercise, on a particular asset.

However, where a state considers forms of disclosure of family property regimes, it is necessary to verify for what purpose such a disclosure is provided. In Italy, the civil registry allows for two different forms of disclosure. With regard to the personal *status* (e.g. records of marriage, finalised divorce), the civil register provides disclosure in the form of notification, that is, it constitutes a burden whose non-fulfilment can give rise to sanctions, but does not produce invalidity. In the event of failure to record, the burden of providing proof that the third party had knowledge of the situation of which he or she had not been given notice rests on one of the couple in question. If, on the contrary, the recording has taken place, the third party cannot invoke a lack of knowledge of that particular situation.

The recording of marriage agreements in the civil registry is, on the other hand, a disclosure with only declarative effects, the omission of which renders the act impossible to invoke against third parties. Precisely regarding property

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22 See T. Pertot, 'Austria' in L. Ruggeri, I. Kunda and S. Winkler (eds.), *Family Property and Succession in EU Member States. National Reports on the Collected Data*, Rijeka Faculty of Law, Rijeka 2019, p. 9.

23 See M. Bukovac Puvača, 'Croatia' in L. Ruggeri, I. Kunda and S. Winkler (eds.), ibid., p. 77.

24 See L. 232/1991, Sezione 13.

25 See L. 184(I)/2015, Sezione 33.

26 See A. Plevri, 'Cyprus' in L. Ruggeri, I. Kunda and S. Winkler (eds.), *Family Property and Succession in EU Member States. National Reports on the Collected Data*, Rijeka Faculty of Law, Rijeka 2019, p. 102.

27 See M. Wąsic, 'Poland' in L. Ruggeri, I. Kunda and S. Winkler (eds.), ibid, p. 513.

28 See S. Thorslund, 'Sweden', L. Ruggeri, I. Kunda and S. Winkler (eds.), ibid., p. 663.

29 In Italy, the disclosure is not mandatory but only if the act has been transcribed can this act be opposed to a third party.

regimes or the property consequences of registered partnerships, many states opt for a disclosure with declarative effects only. In addition to Italy, also Belgium,[30] Finland, Portugal and Spain[31] expressly subordinate the possibility to invoke the effects of the marriage and/or partnership against third parties to the recording of marriage or various types of partnership agreements in civil registers and to the recording of marriage agreements in registers of the various types of relationships. This allows for a possibility that the effects of the marriage and/or partnerships can be invoked against third parties.[32] In Czech law, the position of the third party is subject to specific protection since the marriage agreement may not infringe the rights of the third party unless the third party has consented in the agreement.[33]

In Denmark, the separation regime when chosen by the couple needs to be disclosed by publication in the Official Gazette of Denmark (*Statstidende*)[34] so as to allow it to be invoked against third-party creditors. In Estonia and Romania, there are specific registers devoted to matrimonial property regimes, the management of which is assigned to the Chamber of Notaries. Their aim is to enable the existence of the property regime to be invoked against third parties, which provides for an increased level of protection of the interests of third parties and of legal certainty.[35]

In France, although there is no specific register for property regimes, third-party creditors obtain information of the changes that have occurred in a couple's property regime by means of a notice published in specialised journals. The so-called Pact Civil de Solidarité (PACS) is entered in the civil registry with an aim of making its existence known to third parties. The enforceability of the property ownership regime is, however, subject to the transcription of the purchase deeds in public land registers.[36]

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30 The *lex causae* can, by virtue of the principle of universality, also be that of a state that has not adhered to the enhanced procedure, thus making relevant an investigation that also includes a state such as Bulgaria.

31 In Spain, the registration of marriage agreements occurs in the national Civil Register. The regulation of the systems of disclosure of registered partnerships, on the other hand, does not have a national character and is an expression of the regulatory power of the local authorities. See A.M. Pérez Vallejo, 'Spain' in L. Ruggeri, I. Kunda and S. Winkler (eds.), *Family Property and Succession in EU Member States. National Reports on the Collected Data*, Rijeka Faculty of Law, Rijeka 2019, p. 624.

32 See Article 1395 §2 Code Civil.

33 Based on Article 719 of the Civil Code, no legal effect can be produced by an agreement that has not involved the third party for the profiles of his or her concern.

34 See L. Nielsen, *Study on Matrimonial Property Regimes and the Property of Unmarried Couples in Private International Law and Internal Law*, Europäische Kommission/Generaldirektion Justiz und Inneres, Brussels 2003, pp. 1–78.

35 See S. Liin, 'Estonia' in L. Ruggeri, I. Kunda and S. Winkler (eds.), *Family Property and Succession in EU Member States. National Reports on the Collected Data*, Rijeka Faculty of Law, Rijeka 2019, p. 193. Per la Romania v. G. Russo, 'Romania' in L. Ruggeri, I. Kunda and S. Winkler (eds.), 'ibid', p. 556.

36 See <http://www.coupleseurope.eu/en/france/topics>.

The recording of the property regime chosen by the couple, even though not required for the deed to be valid, is a condition of it being invoked against third parties in German law. The formation of the register at the *Amtsgericht* allows for the knowledge that makes the couple's property situation be applied against the third party.[37] Additionally, publication of the registration in journals specialised in legal notices is also provided.

In Greece, a register kept at the Court of First Instance situated in Athens collects all the agreements concerning the property regimes of couples. Hungary has a specific national register of agreements concerning property relations of couples joined in marriage or registered partnership. The registration, therefore, certifies the existence of the agreements and enables them being applied against third parties. Lithuania, Netherlands, and Slovenia[38] also keep a specific register of marriage agreements: failure to record the agreements in the register makes them impossible to be applied against third parties, unless they otherwise had knowledge of them.[39]

On the contrary, Malta does not have a specific register dedicated to marriage agreements; however, these agreements must be entered into the Public Register kept at the Ministry of Justice. Such a form of registration fulfils the function of notification for third parties, who are thus presumed to possess legal knowledge of this fact.[40]

As can be concluded, the innate dialogue between *lex causae* and *lex registri* stresses the need for a case-by-case evaluation of the third party's position: the relationship between the third party and the couple is, in fact, tendentiously governed by the *lex causae*, but the system of disclosure remains anchored to the not always necessarily coincident *lex registry*. As a consequence, the autonomy of the couple's will ends up by adding to the burdens and obligations of the third party regarding the rules specifically applicable to his or her relationship.

4. THE PRINCIPLE OF UNITY AND THE PROTECTION OF THE THIRD PARTY

It follows from the complex regulatory framework that the *lex causae* chosen by the spouses or partners governs all property relationships, including those

37 See T. Pertot, 'Germany' in L. Ruggeri, I. Kunda and S. Winkler (eds.), *Family Property and Succession in EU Member States. National Reports on the Collected Data*, Rijeka Faculty of Law, Rijeka 2019, p. 268.

38 See F. Dougan, 'Slovenia', in L. Ruggeri, I. Kunda and S. Winkler (eds.), ibid., p. 595.

39 See A. Limante, 'Lithuania' in L. Ruggeri, I. Kunda and S. Winkler (eds.), ibid., p. 416. Per l'Olanda v. F.W.J.M Schols and T.F.H. Reijnen, 'The Netherlands' in L. Ruggeri, I. Kunda and S. Winkler (eds.), ibid., p. 493.

40 See M.V. Maccari, 'Malta' in L. Ruggeri, I. Kunda and S. Winkler (eds.), ibid., p. 468.

regarding real estate. Real estate law does not foresee any exception to the principle of unity introduced by Article 21 of the Twin Regulations. This article therefore applies to all family property relations with international elements. The undifferentiated application of the applicable law limits the negotiating autonomy of the couple who are not able to identify a different law for assets that are located in countries other than the one whose law governs all their property relations. However, the technique of *dépeçage*[41] constitutes an important management tool capable of adapting the choice of applicable law to the needs and peculiarities of a specific case. By combining adherence to the principle of unity with the application of the *lex registri*, it turns out that it is impossible to outline a common and general framework of the various regimes of disclosure of the property belonging to couples joined in marriage or civil unions.

The first difficulty is the non-existence of a single category of third parties: they can only be identified by referring to the *lex causae* that does not necessarily coincide with the *lex registri* as the law applicable to the property. In general, it can be assumed that a third party is either a creditor the position of who derives from an obligation that is not necessarily only contractual, or a person with other protected interests towards the couple. Such a third person can therefore make respective patrimonial claims.

The identification of the third party and his or her powers in relation to the couple's property can be derived from Article 28 of the Twin Regulations, which provide for different scenarios with different regulatory solutions.

Only if the third party has an effective knowledge of the law applicable to the property regime is this law invocable against the third party. The possibility of invoking this law determines that whatever the geographic location of the property, the law applicable to the relationship between the couple and the third party will be the one chosen by the couple or the one identified using Article 26 of either of the Twin Regulations. As can be understood, subjective conditions, such as a habitual residence or common citizenship, ultimately take the relationship between the third party and the couple back to a regulatory field that can be very different from that of the *lex registri*. In this regard, the European legislator strikes a good balance between legislative automatism and third-party protection when in Article 26(3) of the Twin Regulations the penultimate subparagraph establishes the split between the *lex causae* and the

41 The technique of dépeçage is a concept within the field of conflict of laws whereby different issues within a single case are governed by the laws of different Countries. See 8 W. L M Reese, 'Dépeçage: A Common Phenomenon in Choice-of-law' (1973) 73 Colum L Rev at 58; C. G. Stevenson, 'Dépeçage: Embracing Complexity to Solve Choice-of-Law Issues' *(2003-2004)* 37 Ind L Rev 303, 309. An example of dépeçage could be find in the Rome Convention on the Law Applicable to the Contractual Obligations, Art 3(1): 'A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.'

law applicable to the relationship between the third party and the couple. In fact, if one of the couple on the basis of Article 26(3) has asked the judicial authority to decide on the basis of a law other than the one provided for in Article 26(1), the law thus identified cannot regulate relations with the third party, but can be effective exclusively to regulate the property relations of the couple. In such case, a law of the state in which the spouses or partners have had a common habitual residence for a significant period and longer than the period of their life spent in the first common habitual residence, applies.

Reason guides the identification of the law applicable to relations with third parties. The *lex causae* binds the third party even in mere awareness of the applicable law, since actual knowledge is not required, but simply the possibility, through the exercise of due diligence, to identify the law that the parties or the legislator itself identifies as applicable to the property regime (Article 28, paragraph 1 of both regulations). The *lex causae* cannot bind the third party if it was not possible to acquire knowledge of it or whenever the law has been applied using exceptional criteria and in the exclusive interest of the spouses (Article 26, paragraph 3, penultimate subparagraph).[42]

The mitigation of the risk of legal uncertainty adds a further value pursued by the European legislator to strike a better balance between the protection of the couple's interests and those of related third parties. In fact, where the *lex causae* governs the agreement between a couple and a third party, or where a spouse or partner resides in the same state as the third party, the presumption of knowledge is in effect.[43] Due to the silence of the law, it is possible to debate the extent of the presumption which, in the opinion of the author, seems to be considered *iuris et de iure*, in order to minimise conflict in such a complex regulatory system, and to favour legal certainty.[44] The presumption of knowledge introduced by Article 28 of the Twin Regulations regarding immovable property deserves attention: if, in fact, the *lex causae* coincides with the law of the state in which these assets are located, the third party has no excuse regarding his or her lack of knowledge of the applicable law. Based on the

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42 Following Article 26 'The application of the law of the other State shall not adversely affect the rights of third parties deriving from the law applicable pursuant to point (a) of paragraph 1'. The third party cannot be affected by the lex causae if the judicial authority 'by way of exception and upon application by either spouse', decide that the law of a state other than the state whose law is applicable pursuant to point (a) of paragraph 1 shall govern the matrimonial property regime. This exceptional application occurs when the applicant demonstrates that: (a) the spouses had their last common habitual residence in that other state for a significantly longer period of time than in the state designated pursuant to point (a) of paragraph 1; and (b) both spouses had relied on the law of that other state in arranging or planning their property relations.

43 See Article 28 of the Twin Regulations.

44 The presumptions are also relevant in the context of the successions. With regard to the third's party presumption of good faith, see I. Riva, *Certificato successorio europeo. Tutele e vicende acquisitive*, ESI, Napoli 2017, pp. 161–166.

principle of unity of applicable legislation, the application of a law that coincides with the law of the place where the immovable property is located cannot be a surprise: in such a case, the third-party benefits from the coincidence between the *lex causae* and the *lex registri*, which cannot be seen in other cases.

The complex and articulated system of interference between the *lex causae* and the *lex registri* is specified by Article 28(2), point *b*. As can be seen, in some states the property regime of the spouses or the property consequences of registered partnerships benefit from specific registration tools or specific disclosure systems. If one of the spouses or partners has fulfilled the recording obligation required by the law of the state in which the property is located, then in this case, too, the *lex causae* cannot but coincide with the *lex registri*. If the recording has taken place by following the law of the state whose law is applicable to the transaction between a spouse or a partner and the third party, or the law of the state where the contracting spouse and the third party have their habitual residence, the third party cannot object the legal presumption of knowledge of the applicable law.

Article 28 of both regulations constitutes an indispensable point of reference for understanding which law is applicable to the relationship between a spouse or a partner and third party whenever the *lex causae* is not effective. The lack of alignment between the law applicable to the couple's property relations and the law applicable to the third party is resolved by considering the presence or absence of immovable property. If such a property exists, the third party benefits from the application of the law of the state in which the property is located, with the consequent application of the *lex registri*. If, on the contrary, there is no immovable property, the applicable law is the one that applies to the transaction between a spouse or a partner and the third party.

Article 28 of the Twin Regulations is a peculiarity that deserves to be analysed. A discrepancy exists between what is established with regard to legal knowledge and what is established in the matter of the law applicable to the third party in the case where the *lex causae* cannot be applied. In the first case, the legislator only mentions immovable property, and in the second, the legislator also refers to 'registered assets or rights'. The different drafting of the text can be overcome by systematic interpretation. It is clear that where the ownership of an asset or a right must be registered in order to be known and made invocable, the third party is given the possibility to gain knowledge of the existence of property rights on that particular asset or on the ownership of that particular right.

5. LAW APPLICABLE TO THE PROPERTY REGIME AND KNOWLEDGE HELD BY THIRD PARTIES

The Twin Regulations determine that the property regime of a cross-border couple is governed by a predictable law that governs all the assets, independent

of their nature or different places in which they are located.[45] However, this also entails a continuous comparison between the different regulatory systems.[46] The main problems encountered by couples in the management of family property concern the identification of ownership of the assets, the legitimacy of one of the spouses to dispose of an asset belonging to the family, the methods of registration of the assets and the consequent invocability against third parties.

The property consequences deriving from the regime chosen by the spouses or partners reflect their rights and obligations within the family organisation. However, they are also relevant in regard to the disclosure required for the effects *erga omnes* of the ownership of the assets or of the rights derived from them.[47] Depending on whether the property regime is attributable to the joining or the separation of the assets, the condition of third parties who exercise rights against the couple or against only one of the partners on the basis of reliance on the apparent legal situation may also vary.

It must be taken into account that the applicable rules not only refer to the administration of the property regime, but also affect the credit or debt situations of each spouse or partner.[48] Therefore, particular importance is attached to the correct identification of the ownership of assets acquired by the couple and of their property regime.

In some, mainly common law systems, the spouses' assets generally tend to remain separate, without prejudice to any different judicial decision.[49]

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45 Council Regulation (EU) 2016/1103 [2016] OJ L183/1; Council Regulation (EU) 2016/1104 [2016] OJ L183/30; L. Ruggeri, 'I Regolamenti europei sui regimi patrimoniali e il loro impatto sui profili personali e patrimoniali delle coppie *cross-border*' in S. Landini (eds.), *EU Regulations 650/2012, 1103 and 1104/2016: Cross-border Families, International Successions, Mediation Issues and New Financial Assets*, ESI, Napoli 2020, pp. 118–130.

46 P. Bruno, '*I regolamenti UE n. 1103/16 e 1104/16 sui regimi patrimoniali della famiglia: struttura, àmbito di applicazione, competenza giurisdizionale, riconoscimento ed esecuzione delle decisioni*' in <www.distretto.torino.giustizia.it>.

47 P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate*, Giuffrè, Milano 2019, p. 185.

48 N. Cipriani, 'Rapporti patrimoniali tra coniugi, norme di conflitto e variabilità della legge applicabile' (2019) 1 *Rassegna di diritto civile*, 27, 29; 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, 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, Università di Camerino, Camerino 2019, pp. 40–48, available at <https://afg.unicam.it/node/111> and also at <https://www.euro-family.eu/news-126-case_studies_and_best_practices_analysis_to_enhance_eu_family_and_succession_law_working_paper>; L. Ruggeri, 'Property and cross-border couples from the perspective of European regulation' (2021) *Actualidad Jurídica Iberoamericana*, 15, pp. 252–274.

49 G. Oberto, 'La comunione coniugale nei suoi profili di diritto comparato, internazionale ed europeo' (2008) *Il diritto di famiglia e delle persone* 369. See also K. Boele-Woelki, F. Ferrand, C. Gonzales Beilfuss, M. Jänterä-Jareborg, N. Lowe, D. Martiny and W. Pintens, *Principles of European Family Law Regarding Property Relations Between Spouses*, Cambridge 2013, p. 11; G. Oberto, 'Il divorzio in Europa' (2021) 1 *Famiglia e diritto* 112.

These common law systems do not include the concept of matrimonial property regime. As a consequence, these (common law) systems do not by themselves include the concept of a matrimonial regime, so that the decision on the allocation of the assets or part of the ownership shares is delegated to the judge, even regardless of the formal ownership. The judge bases the judgment on the criteria of reasonableness and fairness,[50] but also through an assessment of the economic and personal contribution that each spouse has made to the family organisation. Civil law systems mostly provide the communion of the assets purchased by the couple after the marriage.[51] Thus, in the event that a couple identifies the Italian law as the law applicable to their property regime, the assets purchased individually by the partners will constitute common assets if the separation of the property regime has not been chosen. This is different in the other Member States. In Austria, for example, it is generally expected that the purchase of assets by one of the spouses remains his or her exclusive property, or, alternatively, if purchased jointly, the assets enter into ordinary co-ownership. Therefore, depending on the applicable law, an agreement signed by one or both of the spouses or partners with a third party determines different effects.

As indicated by Recital 52 of the Matrimonial Property, and Recital 51 of the Regulation on Property Consequences of a Registered Partnership, the law determined as the law applicable by the couple should include the effects of the property regime of the spouses or partners on a legal relationship between a spouse and third parties. However, the effects of the law chosen by the partners or spouses can be invoked against a third party only if the latter has knowledge pursuant to Article 27, point *f* of the Twin Regulations. Therefore, it is necessary to assess whether third parties have the actual possibility or know with certainty the effects or legal consequences that the applicable law asserts on the couple's property regime and thus rely on this.

If the choice of law of spouses or registered partners can be changed at any time, the position of the third party must also be taken into account. It is necessary that the change of the chosen law can be invoked against third parties only where the formalities required for the recording in the appropriate registers have been correctly respected.

In this regard, notwithstanding Article 27, point *f* of the Twin Regulations, their Article 28(1) provides for uninvocability against third parties, in the event of a dispute, of the law applicable to the property regime of the spouses or partners, unless the third party knew or, in the exercise of due diligence, should

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50 G. Perlingieri, 'Sul criterio di ragionevolezza' in C. Perlingieri and L. Ruggeri (eds.), *L'incidenza della dottrina sulla giurisprudenza nel diritto dei contratti*, ESI, Napoli 2016, pp. 29–71.

51 The following states can be included among those that provide for the communion of assets: Belgium, France, Italy, Luxembourg, Portugal, Spain, Poland, the Slovak Republic, the Czech Republic, Hungary, Romania and Bulgaria.

have known of that law.[52] In such a case, as determined in Article 28(3), where the applicable law cannot be invoked by a spouse against a third party by virtue of Article 28(1), the effects of the matrimonial property regime with respect to the third party are governed by the law of the state applicable to the transaction and, in the cases relating to immovable property, by the law of the place where it is located or where the assets or rights are registered.

Therefore, it seems that it is necessary to adopt harmonised rules that can clarify the modalities in which any third party can have knowledge of the law chosen by the couple to regulate the property regime and thus be aware of the legal relationships that he or she intends to put in place.

With regard to the legal relationship, due diligence is presumed for the parties, which consists of the burden of fulfilling the disclosure provided for by the applicable law for the purpose of making it known to third parties, so as to avoid them inadvertently being subjected to rules other than those relied on.

6. RECORDING OF RIGHTS *IN REM* AND THE SCOPE OF THE TWIN REGULATIONS

According to what is indicated in Recital 27 of the Twin Regulations, the requirements relating to the recording in a register of a right on movable or immovable property are excluded from the scope of application of the Twin Regulations. Therefore, each Member State is required to determine the legal conditions and procedures for registration in its own land registers, as well as to indicate the authorities responsible for verifying the requirements and the necessary documentation.

Recital 28 of the Twin Regulations furthermore specifies that the effects of the recording of a right in a register are excluded from the rules of the Twin Regulations. They mandate the law of the Member State in which the register is kept to establish whether the recording is declaratory or constitutive in effect. Furthermore, Article 1(2) of the Twin Regulations expressly exclude from their scope of application the 'nature of rights in rem' point *g* and 'any recording in a register of rights in the immovable or moveable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register' (point *h*).

It is the task of the interpreter to identify the specific register to which the Twin Regulations are referred. This activity must be conducted by analysing

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52 On this issue, see A. Zanobetti, 'Il regime patrimoniale della famiglia nel diritto internazionale privato' in F. Anelli and M. Sesta (eds.), *Regime patrimoniale della famiglia*, in *Trattato di diritto di famiglia* diretto da P. Zatti, vol. III, 2nd ed., Milano 2011, p. 43; A. Clerici, 'Art. 30', in F. Pocar (eds.) *Commentario del nuovo diritto internazionale privato*, Cedam, Padova 1996, p. 142.

domestic regulation because there is no specific definition of 'register' at the EU regulation level. On the base of the *lex registri* it will be possible to understand which type of 'register' can carry out the disclosure function for the property regime of the spouses or partners. For example, if the *lex registri* is the Italian law,[53] the disclosure is carried out by two different registers with different functions and effects: the land register and the civil registry. Immovable property must be registered in the land register.[54] In the civil registry the marriage or registered partnership and the property regime chosen by the spouses or partners must be recorded.[55] Consequently, it is always necessary to consult the land register to know the ownership of real estate property and the civil registry to know which property regime has been chosen by the spouses or partners. The complex Italian disclosure system is not present in other European countries which, for example, do not include a specific recording for the family property regime and which provide different systems of real estate disclosure.[56]

In order to ensure the certainty of legal transactions and the *erga omnes* effect of the acquisition of a right on movable or immovable property, reference must, therefore, be made to the registration provided for in the law of the relevant Member State. At the same time, the property regime chosen by the couple, or the property effects in registered partnerships must be taken into account. Thus, in the event where a transaction has been carried out according to Italian law, or the property is located in Italy, or one of the parties has Italian residence, the recording of the property regime resulting from the formalities carried out on the basis of Italian law can be invoked against any third party, even if the law chosen by the couple is that of a different Member State or that of a third state. In this regard, points *a* and *b* of Article 28(2) of the Twin Regulations establish a presumption of knowledge by the third party,[57] where the parties have fulfilled their recording and disclosure obligations.

As noted before, in Italian law the civil registry gives disclosure to the property regime chosen by spouses or partners, while the land register gives disclosure to the recording of immovable property. The Italian law regulates real

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53 On the Italian law, the property recording system or to the recording property regime of the spouses or partners, it is necessary to take account of the plurality of the registers.

54 In Italy, the complex system of real estate disclosure is achieved by recording real estate property in the land register held by the 'Agenzia delle Entrate'. The register is public and may be consulted by any person who so requests. On this issue, see P. Perlingieri, *Manuale di diritto civile*, ESI, Napoli, 2021, pp. 843–854.

55 Marriages, registered partnerships and the property regime chosen by spouses or partners shall be recorded in the civil registry. The recording is mandatory. The register is present in every Italian municipality.

56 On this point, see above Section 3.

57 E. Calò, 'Variazioni sulla *professio iuris* nei regimi patrimoniali delle famiglie' (2017) 6 *Rivista del Notariato* 1093, 1097. On this issue see A. Bonomi and P. Wautelet, *Le droit européen des relations patrimoniales de couple. Commentaire des Réglements (UE) 2016/1103 et 2016/1044*, Bruylant, 2021, pp. 843–883.

estate disclosure through two different systems.[58] The deed system is in force on nearly the entire Italian territory, while the title system is still currently operating in Friuli Venezia Giulia and in a few other northern provinces, including Trento and Bolzano.[59] A consequence of land registers is a disclosure of constitutive, translational and extinguishing contracts of ownership and other rights *in rem* over immovable property. Declarative disclosure is, therefore, in the function of attributing legal knowledge to a fact of which, as a consequence, no one can plead ignorance.

Invocablity against third parties and anyone who claims title to the property is limited to cases in which the formalities required for disclosure in those registers have been properly carried out. For example, the establishment of the property fund, if it relates to real estate, also needs to be transcribed (Article 2647 Civil Code), despite the fact that an apostille on the marriage deed is required for it to be invocable against third-party creditors. More generally, the land register constitutes a system aimed at making a specific case known and invocable against anyone and, consequently, also at addressing the needs of protecting third parties.

As far as the Italian legal system is concerned, the rules provided for marriage are applicable to registered partnerships introduced by law no. 76/2016, the so-called Cirinnà law, which provides for a general extension of the legislative provisions in family matters.[60]

7. DISCLOSURE OF ASSETS AND EFFECTS IN RESPECT OF THIRD PARTIES

In order to provide information as complete as possible, the family property regime is mentioned in the system of recording the property in the 'transcription note',[61] but without this being able to constitute a means of integrating the apostille on the marriage certificate, but only a declarative disclosure provided for in Article 162 of the Italian Civil Code. In this case, the disclosure of property regimes assumes the mere function of information disclosure. This type of disclosure has been the object of examination by the most recent jurisprudence.

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58 The recording in the Italian land register is further distinct in deed system and title system.

59 The deed system so-called 'trascrizione' has declarative effect. Other system so-called 'intavolazione' has constitutive effects. The system of Real Estate Registers can be found at <https://e-justice.europa.eu/content_land_registers_in_member_states-109-it>.

60 On civil partnerships, see G. PERLINGIERI, 'Interferenze tra unione civile e matrimonio. Pluralismo familiare e unitarietà dei valori normativi' (2018) 1 *Rassegna di diritto civile* 102.

61 The 'transcription note' so-called 'nota di trascrizione' is a document describing the asset to be recorded. It is a document required for assisting recording.

In the case No. 376/2021,[62] R.C. requested from the bankruptcy authorities of her spouse, P.T., from whom she had legally separated, the exclusive ownership of a property purchased after the separation, but before the opening of the bankruptcy procedure. The failure to mention the change of the property regime following the separation in the transcription note had, in fact, prevented third parties from gaining knowledge of it. As ruled by the Supreme Court, the property purchased by one of the spouses after the legal separation does not constitute communal property. The event of the separation itself causes a dissolution of the legal community. For the purpose of the effects of the dissolution of the communion deriving from the separation of the spouses being invocable against third parties, the recording in the land registers must be considered necessary and sufficient. Such a recording must correspond to the change of the property separation regime, regardless of the apostille on the act of separation on the marriage certificate. This is necessary because the deed system of disclosure is more accessible for consultation, albeit burdensome, than that on the marriage certificate on the civil registry. Therefore, the court notes that despite the dissolution of the legal community between the spouses, this cannot be invoked against third parties of good faith who have relied on the results of consulting the land registers, which did not indicate the separation of the assets resulting from the personal separation. The personal purchase of the property could, for example, not be invoked against the third party.

In this way, the court protects the formal content visible to third parties through access to land registers rather than the actual content of the title of ownership, which has indeed been transcribed, but is difficult to consult.

It follows that, even though reference must be made to the disclosure provided for in the civil registry to produce *erga omnes* effects of property regimes, along with the recording deed system, it has increased the degree of reliability regarding third parties and the social function of property.[63]

Similarly, as with the registers for the recording of the property regime of spouses or the property effects of registered partnerships, the systems of transcription of real estate or the registration of mortgages are not regulated in the same way within each Member State. Each of them has a system of recording of immovable and movable property inspired by completely different logics and mechanisms.

Just as an example, according to the Portuguese legislation, the recording of immovable property regulated in the *Registo Predial* has a declaratory effect. It can be invoked against third parties if it has been executed. As a result, such a disclosure represents a burden for the buyer. Recording in the register leads to the presumption that the right belongs to the person indicated as the owner.

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62 Cass. civ., 13 January 2021, n. 376, in *Dejure*.

63 G. Petrelli, 'L'autenticità del titolo della trascrizione nell'evoluzione storica e nel diritto comparato' (2007) *Rivista di diritto civile* 609.

Another different system is the French one, where several registration offices for recording property exist, which do not have a coordinated data retrieval mechanism. Additionally, they are difficult to consult since third parties cannot access them freely.

The lack of homogeneity of property recording systems among the Member States seems to require greater uniformity of rules. The goal is for the disclosure system to effectively ensure the invocability of the property regime of cross-border couples and the related applicable law against third parties.

8. ADAPTABILITY OF RIGHTS *IN REM*

With regard to the system of disclosure of couple's property and property regimes, the rules introduced by the Twin Regulations do not appear to be fully adjusted to the composition of the different regulatory solutions in various Member States. A harmonised disclosure mechanism could facilitate the acquisition of legal knowledge about the ownership of property purchased by the couple and the consequent effects with regard to third parties. The law chosen to govern the property regime also influences the debt liabilities of spouses and partners, and consequently, it will also affect relationships with possible third-party creditors. In fact, the Twin Regulations determine in their Article 27, point *c*, that they govern also the responsibility of one spouse or partner for liabilities and debts of the other spouse or partner.

The change in the law applicable to the property regime and property consequences of a marriage or registered partnership can, however, result in the transfer of the property from one category to another. If this extends or limits the rights of one or both spouses or partners to dispose of the property, important adverse effects can impact third parties who had relied on such a regime[64] if an adequate degree of knowledge of the change made has not been ensured.

If a conflict arises between the law applicable to the property regime by the partners or spouses and that of the state in which a right of a third party may be invoked, Article 29 of the Twin Regulations allows for the 'adaptation of rights *in rem*'. Therefore, although rights *in rem* are not included in the scope of application of the Twin Regulations, their Recital 24 determines that the creation or a transfer of a right in immovable or movable property should be allowed, as provided for in the law applicable to the property consequences of

64 See 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' (2018) 10 *Cuadernos de Derecho Transnacional* 1, 7–18. More generally, see W. Pintens, 'Matrimonial Property Law in Europe' in K. Boele-Woelki and J.M. Sherpe (eds.), *The Future of Family Property in Europe*, Intersentia, Antwerp 2011, pp. 19–46; D. Martiny, 'European Family Law' in J. Basedow, K.J. Hopt and R. Zimmermann (eds.), *The Max Planck Encyclopaedia of European Private Law I*, Oxford 2012, p. 595.

the spouses or the matrimonial property regime. Such a right, however, should not affect the limited number of rights *in rem* known in the national law of each Member State. Additionally, a Member State should not be required to recognise a right *in rem* relating to property located in that Member State if this right is not known in its legal system.

A recent decision rendered by the Court of Justice of the European Union (CJEU)[65] seems relevant in this regard. In the case *Kubicka* (C-218/16), a Polish citizen residing in Germany was denied by the German legal system a request for the recognition of the material effects of a legacy 'by vindication', which is allowed by Polish law for which the testator had opted in conformity with Article 22(1) of the Succession Regulation. The denial was based on the fact that the object of a legacy was a right *in rem* in an immovable property situated in Germany, which does not provide for the establishment of a legacy having a direct material effect.

The CJEU emphasised that for reasons of legal certainty, the chosen law should govern the succession as a whole, that is to say, 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. The CJEU also noted that the legacy 'by vindication' provided for by Polish law, and a legacy 'by damnation' provided for by German law, constitute methods of transfer of ownership of an asset, and as also highlighted by the Advocate General, a right *in rem* that is recognised in both of the legal systems concerned. The testator's will was essentially to transmit a right *in rem* on immovable property located in German territory by means of a legacy 'by vindication'. Therefore, the CJEU held that the case did not concern the method of the transfer of rights *in rem*, but only the content of rights *in rem*, and therefore the right had to be recognised.[66]

Article 29 of the Twin Regulations introduce the possibility of the adaptation of rights *in rem*. Specifically, if a person invokes a right *in rem* on the basis of the law applicable to the property regime, and the law of the Member State in which the right is invoked does not provide for the same right, it is possible to adapt it to the closest equivalent right under the law of that state. However, such adaptation must be made taking into account the aims and the interests pursued by the specific right and its effects.

Therefore, it seems that to perform a correct analysis of the law and to carry out the consequent adaptation, an investigation must be conducted not only in

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65 Case C-218/16 *Aleksandra Kubicka*, ECLI: EU:C:2017:387.

66 See P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate*, Giuffrè, Milano 2019, pp. 220–221; 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' (2019) 1 *Trusts & Trustee*, 6, 16; C. Consolo, 'Profili processuali del Reg. UE 650/2012 sulle successioni transnazionali: il coordinamento tra le giurisdizioni' (2018) 1 *Rivista di diritto civile* 18.

the spouses or the matrimonial property regime. Such a right, however, should not affect the limited number of rights *in rem* known in the national law of each Member State. Additionally, a Member State should not be required to recognise a right *in rem* relating to property located in that Member State if this right is not known in its legal system.

A recent decision rendered by the Court of Justice of the European Union (CJEU)[65] seems relevant in this regard. In the case *Kubicka* (C-218/16), a Polish citizen residing in Germany was denied by the German legal system a request for the recognition of the material effects of a legacy 'by vindication', which is allowed by Polish law for which the testator had opted in conformity with Article 22(1) of the Succession Regulation. The denial was based on the fact that the object of a legacy was a right *in rem* in an immovable property situated in Germany, which does not provide for the establishment of a legacy having a direct material effect.

The CJEU emphasised that for reasons of legal certainty, the chosen law should govern the succession as a whole, that is to say, 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. The CJEU also noted that the legacy 'by vindication' provided for by Polish law, and a legacy 'by damnation' provided for by German law, constitute methods of transfer of ownership of an asset, and as also highlighted by the Advocate General, a right *in rem* that is recognised in both of the legal systems concerned. The testator's will was essentially to transmit a right *in rem* on immovable property located in German territory by means of a legacy 'by vindication'. Therefore, the CJEU held that the case did not concern the method of the transfer of rights *in rem*, but only the content of rights *in rem*, and therefore the right had to be recognised.[66]

Article 29 of the Twin Regulations introduce the possibility of the adaptation of rights *in rem*. Specifically, if a person invokes a right *in rem* on the basis of the law applicable to the property regime, and the law of the Member State in which the right is invoked does not provide for the same right, it is possible to adapt it to the closest equivalent right under the law of that state. However, such adaptation must be made taking into account the aims and the interests pursued by the specific right and its effects.

Therefore, it seems that to perform a correct analysis of the law and to carry out the consequent adaptation, an investigation must be conducted not only in

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65 Case C-218/16 *Aleksandra Kubicka*, ECLI: EU:C:2017:387.

66 See P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate*, Giuffrè, Milano 2019, pp. 220–221; 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' (2019) 1 *Trusts & Trustee*, 6, 16; C. Consolo, 'Profili processuali del Reg. UE 650/2012 sulle successioni transnazionali: il coordinamento tra le giurisdizioni' (2018) 1 *Rivista di diritto civile* 18.

general terms. A specific case must be examined and an adequate protection of the interests underlying that particular process has to be pursued.[67] Such a process fits into the more general principle of serving in the best possible way the interests of the spouses or partners, as well as third parties. Such an examination is of a positive value if the exercise of the rights proves to be adequate for the realisation of the actual interests of the parties and for the compliance of the law with the applicable regulatory provisions.[68]

9. CONCLUDING REMARKS

Although the Twin Regulations have harmonised the rules governing the matrimonial property regime and the property consequences of registered partnerships, there are still many differences in the property recording system and disclosure of the assets in the Member States. Therefore, it would have been useful to provide for a simplification of legal terms in the Twin Regulations, and to implement a coordinated system that would have made it easier to access the different land registers in the Member States. This provision could certainly encourage third parties to become aware of the property regime chosen by the spouses or partners, and thus increase the level of protection of the interests of their spouses, partners and third parties. Thus, it seems necessary to harmonise the property recording system and disclosure of the assets, and these aspects should be the subject of further regulatory action by the European Union.

In conclusion, if the uniformity introduced by Article 21 of the Twin Regulations delineates predictable rules for the purposes of certainty, it should still favour the provision of uniform and functional models of disclosure for the correct identification of the adopted property models and of the consequent effects.

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67 On this point, cf. P. PERLINGIERI, 'Fonti e interpretazione', vol. II, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, 4th ed., ESI, Napoli 2020, p. 379.

68 M. LIBERTINI, 'Le nuove declinazioni del principio di effettività' (2018) 4 *Europa e diritto privato*, 1071.

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