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**THE EU RULES IN THE AREA OF THE PROPERTY REGIMES OF
INTERNATIONAL COUPLES**



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Summary:

Council Regulation (EU) 2016/1103 and Council Regulation (EU) 2016/1104, both of 24 June 2016¹ implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes² (hereinafter: Regulation 2016/1103) and property consequences of registered partnerships³ (hereinafter: Regulation 2016/1104) provide for uniform rules whose scope is to facilitate the delivering of judgments concerning matrimonial property in cross-border disputes in 18 Member States⁴, which established enhanced cooperation between themselves in the area of the property regimes of international couples. The present paper presents rules on jurisdiction and applicable law under Regulations 2016/1103 and 2016/1104 which should be applied in proceedings concerning matrimonial property regimes. Application of the provisions of Regulation 2016/1103 on jurisdiction and applicable law and the detected different provisions of Regulation 2016/1104 for registered partnerships will be analyzed. The paper also elaborates on certain potentially problematic solutions, open issues revealed through interpretation of the new Regulations, as far as some speculations on matters arising in the future which will raise questions and uncertainties for judges while hearing a relevant case.

Introduction - The EU rules in the area of the property regimes of international couples:

A new phenomenon is observed in the European Union the last years: The economic crisis, the education goals, the opportunities for work and better working conditions urged a great number of people to move from their country of origin to another Member State in the

¹ Burcu Yüksel, An Analysis of the Effectiveness of the EU Institutions in Making and Interpreting EU Private International Law Regulations, page 39, in Paul Beaumont, Mihail Danov, Katarina Trimmings, Burcu Yüksel - Cross-Border Litigation in Europe, Bloomsbury Publishing, 2017.

² Robert Schutze, Oxford Principles of European Union Law: Volume 1: the European Union Legal Order, Oxford University Press, 2018, page 856.

³ Yuko Nishitani, Proof of and Information about Foreign law, page 166 in General Reports of the XIXth Congress of the International Academy of Comparative Law Rapports Généraux du XIXème Congrès de l'Académie Internationale de Droit Comparé, Martin Schauer, Bea Verschraegen, Springer, 2017.

⁴ Following Parliament's consent, the decision to authorise enhanced cooperation was adopted unanimously on 9 June 2016, with 18 Member States (BE, BG, CZ, DE, EL, ES, FR, HR, IT, CY, LU, MT, NL, AT, PT, SI, SF, SE) subsequently reaching a general approach within Council.

European Union. The number of couples created by people from different (EU and non-EU) countries and residing in the EU has therefore significantly increased⁵. The border-opening and the increased mobility has also contributed to an exponential growth of the number of international marriages or of couples living in a “cross-border” situation. According to a European Commission estimate of 2011, there are about 16 million couples⁶ in the EU living in a cross border situation⁷. It is estimated, that matters on property regimes (after separation or death) have a total value of over 460 million euros. Having in mind that the number of foreigners living in Greece has increased considerably, it is evident that such a private international law policy could equally increase the number of cases governed by Greek law.⁸

Some couples prefer marriage. Other citizens chose to live as unmarried couples in free or in “registered” partnerships. The increasing number of family cases justifies the adoption of Regulations from the EU, to achieve uniformity and avoid forum shopping.⁹ The Regulations aim to unify conflicts of laws in matters of partners’ and married couples’ properties. It was predicted that if all necessary agreements are reached, the final agreed text will lead to a new EU Private International Law (PIL) measure.¹⁰ As it was referred

⁵ A. Grammatikaki-Alexiou in A. Grammatikaki-Alexiou/Z. Papasiopi-Pasia/E. Vasilakakis, *Private International Law*, Sakkoulas Publication, 2017, page 198.

⁶ Maria Vilar Badia, EUROPEAN COMMISSION, DG Justice and Consumers, *The property regimes of international couples (marriages and registered partnerships) XXIII ELRA General Assembly Brussels*, 1 December 2016 at: <https://www.elra.eu/wp-content/uploads/2016/12/The-property-regimes-of-international-couples.pdf>.

⁷ Press Release number 320/16, 09/06/2016 of the Council of EU “18 EU countries agree to clarify rules on property regimes for international couples” at: <http://www.consilium.europa.eu/en/press/press-releases/2016/06/09/property-regimes-for-international-couples/pdf>.

⁸ Chryssapho Tsouca, *Greece: Foreign Law in the Greek Private International Law: Positive Solutions and Future Perspectives*, page 223, at Yuko Nishitani, *Treatment of Foreign Law - Dynamics towards Convergence?*, Springer, 2017 Article 22 of the Council Regulation EU 2016/1102 and M. Sotiropoulou, *The option given to spouses to choose the applicable law defined in the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes: Progress or not?*, RHDI 2013, pp. 21.

⁹ A. Grammatikaki-Alexiou in A. Grammatikaki-Alexiou/Z. Papasiopi-Pasia/E. Vasilakakis, *Private International Law*, Sakkoulas Publication, 2017, page 198.

¹⁰ Jonathan Fitchen, *Unharmonised Procedural Rules: Is there a Case for Further Harmonisation at EU Level?*, page 58, in Paul Beaumont, Mihail Danov, Katarina Trimmings, Burcu Yüksel - *Cross-Border Litigation in Europe*, Bloomsbury Publishing, 2017.

“the enactment of a regulation concerning matrimonial property is highly welcomed”.¹¹ Through them, the European Union seeks to establish a clear and uniform legal framework on the subject.¹² The consolidated forms are methods of cooperation opened to all Member States, subjected to any conditions of participation set out in the authorization decision.¹³ These Regulations have a “treble nature”, since they regulate the jurisdiction, the applicable law, the recognition and the enforcement of foreign judgments within their scope of application. They aim at facilitating the management of family properties in cross-border situations.¹⁴ It is accepted that these Regulations have recently been passed as acts of enhanced cooperation and combine both choice of law and international civil procedure as well.¹⁵ The Regulations¹⁶ will enter into force on 29 January 2019.¹⁷ Marriages entered prior to that date will still be subject to the national choice of law Regulations applicable at

¹¹ Jan von Hein and Hannah Dittmers, Germany – Part II: Cross-border Litigation Pattern – Empirical Data and Analysis - III. Germany’s Experience in Cross - Border Family Law Disputes, page 157, in Paul Beaumont, Mihail Danov, Katarina Trimmings, Burcu Yüksel - Cross-Border Litigation in Europe, Bloomsbury Publishing, 2017.

¹² Mònica VINAIXA MIQUEL, “The party autonomy in the new EU Regulations on Matrimonial Property Regimes (2016/1103) and Property consequences of Registered Partnerships (2016/1104) (“La autonomía de la voluntad en los recientes reglamentos UE en materia de regímenes económicos matrimoniales (2016/1103) y efectos patrimoniales de las uniones registradas (2016/1104)”, pp. 274-314).

¹³ Juguastu, C. (2017), The Convention for Choosing the Applicable Law – a Construction Specific for the Relationships of Private Law with Foreign Element. *Jurnalul de Studii Juridice*, XII(3-4), 25-43. <https://doi.org/10.18662/jls/11>.

¹⁴ Silvia Marino - Common core or enhanced cooperation in European Family Law? UACES 47th Annual Conference Krakow, 4-6 September 2017, <https://www.uaces.org/documents/papers/1701/marino.pdf>.

¹⁵ Jan von Hein – EU Competence to Legislate in the Area of Private International Law and Law Reforms at the EU Level, page 22, in Paul Beaumont, Mihail Danov, Katarina Trimmings, Burcu Yüksel - Cross-Border Litigation in Europe, Bloomsbury Publishing, 2017.

¹⁶ Jan von Hein - The Relationship between the Legislature and the Judiciary in Developing General Principles of Private International Law in Jan von Hein, Hanno Merkt, Sonja Meier, Alexander Bruns, Yuanshi Bu, Silja Vöneky, Michael Pawlik, Eiji Takahashi, Relationship between the Legislature and the Judiciary: Contributions to the 6th Seoul-Freiburg Law Faculties Symposium, publications NOMOS, page 138.

¹⁷ The Regulation entered into force the twentieth day following that of its publication, but is applicable only as from the 29th January 2019 (except for articles 63 and 64 which enter into force in 29th April 2018 and articles 65, 66 and 67 which entered into force on 29 July 2016).

the time. The 18 Member States represent almost 70% of Union population and cover a majority of Union international couples.¹⁸

The Regulations strengthen the right to property which is referred in Article 17 of the Charter of Fundamental Rights by the European Union. They will not entail any financial or administrative burdens on citizens and will not affect the way in which the liquidation of property regimes of the parties will be taxed in Member States. It should be noted that none of the Regulations provide a definition of marriage or registered partnership. Extending in this field, Member States admitting same-sex marriage¹⁹, cannot refuse to accept “foreign” same-sex marriages. Surprisingly, Regulation 2016/1104 defines the registered partnership 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”.²⁰

It is accepted that with the new legislation, couples can elect the applicable law to their matrimonial property regime or the consequences of their registered partnership, before or during marriage or the registered partnership. This can be either the law of the state where the spouses, future spouses, partners, or future partners are habitually resident at the time of the agreement or the law of the state where one of them is a national or the law of the state where the partnership was created, provided the choice is expressed in writing, dated, and signed by hand or electronically by both parties. The Regulations leave the underlying institutions of marriages and partnerships untouched. Marriage and partnership remain thus matters defined by the national law of the Member States. The most important part of the Regulations is their universal scope, meaning that the EU Regulations apply, even if the governing law is the law of a third state. The Regulations provide recognition of the foreign

¹⁸ Maria Vilar Badia, EUROPEAN COMMISSION, DG Justice and Consumers, The property regimes of international couples (marriages and registered partnerships) XXIII ELRA General Assembly Brussels, 1 December 2016, <https://www.elra.eu/wp-content/uploads/2016/12/The-property-regimes-of-international-couples.pdf>.

¹⁹ Aspasia Archontaki and Paata Simsvi, Greece – Part II: Cross-border Litigation Pattern – Empirical Data and Analysis - III. Germany’s Experience in Cross - Border Family Law Disputes, page 324, in Paul Beaumont, Mihail Danov, Katarina Trimmings, Burcu Yüksel - Cross-Border Litigation in Europe, Bloomsbury Publishing, 2017: Until 2015, the same-sex marriages or partnerships, were not recognized in Greece. With the extension of civil unions to same - sex couples in 2015 with the Law 4356/2015, same-sex relationships are now characterized as family relationships in Greece.

²⁰ Silvia Marino - Common core or enhanced cooperation in European Family Law? UACES 47th Annual Conference Krakow, 4-6 September 2017, <https://www.uaces.org/documents/papers/1701/marino.pdf>.

law in order to ensure the mobility of international couples and allow for the unity of the governing law, regardless of where the assets are located, avoiding conflicts of laws, in case a third state is involved. Therefore, the Regulations create a bridge between European Member States and other countries in matters of couples' property.²¹

A) Main provisions of the Regulations 2016/1103 and 2016/1104 on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and property consequences of registered partnerships

I. Jurisdiction

The main principle is the unity of the court: various related procedures are handled by one court. For example, in case of death, according to art. 4 the court having jurisdiction over the property consequences of the registered partnership is the same court as that having jurisdiction under Regulation 650/2012 on the succession of the deceased partner, although in case of dissolution/annulment of the registered partnership, the court having jurisdiction is the same court as the court having jurisdiction over the dissolution or annulment of the partnership according to Art. 5. Specifically, Art. 5 of the Regulation 2016/1103 establishes that the Court seised on an application for divorce, legal separation or marriage annulment according to Regulation 2201/2003 has jurisdiction to rule on matters of the matrimonial property regime arising in connection with the first claim. If the Court is seised under some of the grounds of jurisdiction listed in para. 2, the jurisdiction is extended only insofar as the spouses agree²². Article 5 of Regulation 2016/1104 always requires the agreement of the partners. In other cases, such as change of the property regime of the registered partnership, a list of connecting factors will apply in order of precedence (article 6). These criteria are the following: the common habitual residence of the partners in the last year, or in the last six months, if he/she is a citizen of that Member State, the last common habitual residence, the habitual residence of respondent, common nationality of the partners, or the

²¹ Angelique Devaux, in "The year in review - An annual publication of the ABA/SECTION OF INTERNATIONAL LAW", published in cooperation with SMU DEDMAN SCHOOL OF LAW, vol. 51, page 644.

²² Maria Vilar Badia, EUROPEAN COMMISSION, DG Justice and Consumers, The property regimes of international couples (marriages and registered partnerships) XXIII ELRA General Assembly Brussels, 1 December 2016, p. 271, <https://www.elra.eu/wp-content/uploads/2016/12/The-property-regimes-of-international-couples.pdf>.

place where the registered partnership was created. In any case, the residual jurisdiction is to be determined according to national law.

Moreover, Article 7 of the Regulation grants the parties the possibility to agree²³ that the courts of the Member States whose law is applicable in accordance with the Regulations (arts. 22, 26 (1) (a) or (b) or under whose law the marriage took place, or the partnership was registered shall have exclusive jurisdiction to rule on the property consequences of their registered partnership, in cases covered by Article 6. Given that the objective of the codification of international private law in family law rules has been always debatable²⁴, Article 7 offers another opportunity to increase legal certainty, predictability and the autonomy of the parties.

II. Alternative jurisdiction: The introduction of a judicial margin of appreciation (Article 9 of Regulations)

Nevertheless, a very meaningful innovation is the introduction of a judicial margin of appreciation in the acceptance of the jurisdiction²⁵. This is a safeguard clause in order to avoid a denial of justice for spouses and partners and a violation of their fundamental rights. More specifically, under article 9, on the alternative jurisdiction, a court of the Member State having jurisdiction on the claim on the patrimonial regime may decline jurisdiction, if the *lex fori* does not provide for the institution of the registered partnership, or does not recognise the marriage at stake. The refusal to attribute any relevance to the personal relationship²⁶ would infringe the right to a family life; the dismissal of the case on the assets or the declaration of inexistence of any reciprocal obligation may undermine the rights to property of the couple. Article 9 aims at balancing the rights and the expectations of the parties and the judicial duty to apply the law. The court may decline the jurisdiction without

²³ Such an agreement should be expressed in writing, dated and signed by the parties (spouses or partners). Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing according to articles 7 of the new Regulations.

²⁴ Struycken, A.V.M., *Régimes matrimoniaux - banc d'essai de la codification internationale du droit international privé*, Liber Amicorum Georges A.L. Droz, The Hague/Boston/London 1996, p. 445.

²⁵ The innovation is extremely important even in the theoretical perspective. Indeed, the EU institutions, with particular regard to the Court of Justice, seemed hostile to the introduction of a margin of appreciation to the judge (CJEU 1 March 2005, *Owusu*, case C-281/02, EU:C:2005:120). Instead, the restrictive approach followed in the OCJEU case-law might be due to a strictly literal interpretation of the rules contained in the 1968 Brussels Convention and in the Regulation 44/2001.

²⁶ The term “personal relationship” refers, from now on, on both spouses and registered couples.

undue delay, i.e. without suggesting any position or solution on the regime. A refusal to assume jurisdiction based on the impossibility to decide has less drawbacks for the parties involved, because it does not contain any consideration on the merits of the case, with particular regard to the existence and the effects of the personal relationship. Spouses and partners are able to start proceedings in another Member State, without a foreign decision stating their status and jeopardising their patrimonial regime. A new proceeding on the merits must be restarted, but at least the parties involved will not be “followed” within the EU by a detrimental decision stating –even incidentally– that their personal relationship does not exist, or – definitively– that there are not patrimonial obligations between them. After the refusal to hear the case, the ordinary rules on the choice of court or on the allocation of the jurisdiction are applicable. Member States that do not recognise registered partnerships²⁷ may not want to deal with the property consequences of couples bound by such institutions.

The Regulation provides that the courts of a Member State which does not recognise a registered partnership as a form of legal symbiosis may decline jurisdiction to hear disputes about the property consequences of such couples²⁸. In order to ensure that such couples have access to justice, the Regulation provides that they can go to any other court which would have jurisdiction in accordance with the Regulation. The possibility to decline jurisdiction for Member States which do not recognize the institution of registered partnership is balanced by the obligation on those Member States to recognize and enforce in their territory a decision obtained by the couple in another Member State (for instance if the couple may have assets in the Member State where recognition or enforcement is sought). A specific reference to the Charter of Fundamental Rights recalls that a Member State cannot discriminate when the couple requests the recognition and enforcement of a decision given in another Member State. Subsidiary jurisdiction: where no Member State court is competent, a court is nevertheless competent in respect of assets located in its territory (to ensure access to justice in a MS).

²⁷ The Regulation does not impose the recognition of a registered partnership concluded in another EU Member State. The existence, validity and recognition of a partnership fall outside the scope of the Regulation.

²⁸ This is in line with the autonomous legislation of those Member States but also prevents the situation that a couple finds itself before an authority which may either refuse to admit its request or which may rule on its property disregarding the status of their property as property in a registered partnership (thus treating the couple as ordinary citizens that have joint ownership of the property).

III. Rules on applicable law

1. The choice of the applicable law

To facilitate spouses' and partners' management of their property, the Regulation enhances the role of party autonomy in the organization of the property regime. Some national laws already admit a limited party autonomy^{29, 30}, while others do not favour self-determination in such matters³¹. It authorises them to choose the applicable law to the property consequences, regardless of the nature or location of the property³², among the laws with which they have close links: Regulation 2016/1003 among (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, while Regulation 2016/2014 adds a fourth connection, the possibility to choose (d) the law of the State under whose law the registered partnership was created³³. However, in order to avoid depriving the choice of law of any effect and thereby leaving the partners in a legal vacuum, such choice of law should be limited to a law that attaches property consequences to registered partnerships. This choice

²⁹ http://eur-lex.europa.eu/n-lex/index_en: A brief comparative perspective. For example, the Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes, in force in France, Luxembourg and the Netherlands, lists five possible different laws that can be chosen by the spouses as the applicable law to their matrimonial property regime (art. 3; a. BonoMi, M. Steiner (sous la dir.), *Les régimes matrimoniaux en droit comparé et en droit international privé*, Genève, Droz, 2006). In Italy, art. 30 of the Law n. 218/95 offers four possible alternatives (i. viarenGo, *Autonomia della volontà e rapporti patrimoniali tra coniugi nel diritto internazionale privato*, Padova, CEDAM, 1996). These systems can be considered as very liberal in a comparative perspective.

³⁰ Spanish law is slightly more restrictive: the choice of law is possible insofar as the spouses do not share a common nationality (art. 9.2 of the *Código Civil*), although admitting in this case four possible alternatives (a. I. Calvo CaravaCa, J. CarraSCoSa Gonzalez, «La celebración del matrimonio», cit., p. 1094). Inter alia, José Luis Iglesias Buigues, *La remission a la ley espanola en materia sucesoria y de regimen economic matrimonial*. The reference to Spanish law in matters of succession and matrimonial economic regime, at: <https://www.researchgate.net/publication/323661930>.

³¹ For example neither Greek nor Hungarian law provide for any possibility of the choice of the applicable law.

³² One single national law applies to all couple's assets regardless of their nature (moveable or immovable) and location (in a Member State or third country).

³³ The specular rule does not appear in Regulation 2016/1103, because the connecting factor is not provided for as the applicable law failing a choice, although it is possible that the parties agree on the jurisdiction to the judge of the State of celebration of marriage, a distinction which cannot be easily comprehended.

may be made at any moment, before the registration of the partnership, at the time of the registration of the partnership or during the course of the registered partnership. Also, according to art. 20, the law designated as applicable by the Regulations shall be applied whether or not it is the law of a Member State.

Although, effects of a wrong choice are not regulated, art. 22 of the Regulation 2016/1104 makes it clear that the applicable law must recognize property consequences to the registered partnerships³⁴. The same rule is not provided for in Regulation n. 2016/1103, although similar problems of recognition of the status and its effects may arise. The wrong choice can be corrected only if the *lex fori* and the *lex causae* correspond. The tool is the rule on the alternative jurisdiction. After the transfer of jurisdiction, or failing the coincidence, a judge, seating in a State recognizing the marriage at stake, might not apply the *lex causae*, not recognizing the marriage, because it produces effects contrary to public policy of the State where the court sits. Once more, the non-recognition of the personal relationship and the consequent patrimonial effects can infringe the human rights to family life and to property of the spouses³⁵.

In addition, articles 22, para. 3 establish the non-retroactivity of the choice: the law will be applied as from the date of the agreement³⁶. Any retroactive change of the applicable law shall not adversely affect the rights of third parties deriving from that law³⁷. Also, according

³⁴ The designation should be materially invalid and be disregarded.

³⁵ Maria Vilar Badia, EUROPEAN COMMISSION, DG Justice and Consumers, The property regimes of international couples (marriages and registered partnerships) XXIII ELRA General Assembly Brussels, 1 December 2016, p. 277, <https://www.elra.eu/wp-content/uploads/2016/12/The-property-regimes-of-international-couples.pdf>.

³⁶ For a further problematic on the time – line distinction between the time before the relevant agreement, when one law is applicable and the time afterwards, when this one changes, whereas the patrimonial assets are the same, being regulated by different laws, during the above period, see the French Cour de Cassation (Cass civ., 1ere, 12 April 2012, en Recueil Dalloz, 2012, p. 1125. Further on the French approach: J. foYer, «Le changement de régime matrimonial en droit international privé, entre règles internes et règles internationales», en *Liber amicorum Mélanges en l'honneur du professeur Gérard Champenois*, Paris, Defrénois, 2012, p. 273), in application of its national law.

³⁷ Further information in: Lukas Rademacher, «Retroactive choice of law and the protection of third parties in the European Regulations on patrimonial consequences of marriages and registered partnerships = Cambiando el pasado: elección retroactiva de la ley aplicable y protección de terceras partes en los reglamentos europeos sobre los efectos patrimoniales de los matrimonios y de las unions registradas»: https://www.researchgate.net/publication/323659118_Changing_the_past_retroactive_choice_of_law_and_t

to articles 23 of Regulation 2016/1103 and 2016/1104 such an agreement should be expressed in writing, dated and signed by the parties³⁸, spouses or partners. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing. The requirement of formal validity is the most important difference between the abovementioned Regulations and Regulation 593/2008 on contractual obligations. Due to the strict formal requirements, and failing any express rule, the tacit and the implicit choice of law seems to be not admissible, neither in *limine litis*^{39,40}. The issue is not new due to the formal requirements envisaged in the other regulations in family law, as for example Regulation 1259/2010⁴¹. The consent and the material validity must be assessed under the applicable law, if the choice were valid, reproducing the same rule envisaged in art. 10 of the Regulation 593/2008.

Formal validity is also required, under the same conditions, in matrimonial property agreements (articles 25). Since the agreement on choice of law is not encouraged, it could be easier for the parties to conclude a matrimonial or partnership property agreement pursuant to arts. 25 of the Regulations. These are defined as any agreement between spouses or partners by which they organize their property regime. The requirements for the formal validity are the same as those established for the agreement on the choice of law, but if the law applicable to the regime provides for further requirements, these must be fulfilled. The applicable law regulates the material validity (articles. 27). Although these rules, too, do not encourage party autonomy, the advantage in concluding a property

he protection of third parties in the European regulations on patrimonial consequences of marriages and registered partnerships Cambiando el pasado ele.

³⁸ Grammatikaki-Alexiou in A. Grammatikaki-Alexiou/Z. Papasiopi-Pasia/E. Vasilakakis, *Private International Law*, Sakkoulas Publications, 2017, p. 200.

³⁹ Silvia Marino, *Strengthening the European civil judicial cooperation: the patrimonial effects of family relationships verso il rafforzamento della cooperazione giudiziaria civile nell'unione europea: gli effetti patrimoniali delle relazioni familiari*, 12.01.2017 at: Silvia Marino, *strengthening the european civil judicial cooperation: the patrimonial effects of family relationships verso il rafforzamento della cooperazione giudiziaria civile nell'unione europea: gli effetti patrimoniali delle relazioni familiari*, 12.01.2017 at: <https://e-revistas.uc3m.es/index.php/CDT/article/viewFile/3621/2189>, p. 278, fn 44.

⁴⁰ This might complicate the determination of the applicable law when the situation is particularly fragmented, or the spouses have multiple common nationalities but feel more connected with one of the States.

⁴¹ Tristan Azzi, «La volonté tacite en droit international privé», *Travaux du Comité français de droit international privé*, 2010-2012, p. 165; a. deverS, M. farGé, «Le nouveau droit international privé du divorce – À propos du règlement Rome III sur la loi applicable au divorce», *Droit de famille*, 2012, p. 17.

agreement (instead of an agreement on the applicable law) is due to its content: parties decide the organization of their relationship directly and not only the relevant legal system. The tool can be extremely useful if the applicable law favors private autonomy, for instance establishing a set of regimes, among which the couple can choose: the property agreement may refer directly to one of those.

Still, it is quite logical that the requirements are similar in the two cases. Indeed, the conclusion of a property agreement cannot amount to an evasion of the limits established for the choice of law, i.e. to the selection of any regime provided for by any national law, despite the lack of connections with the situation, or to a completely free determination of the reciprocal obligations between spouses or partners. The rules on the validity are very similar, because the property agreement must find its basis in a legal system. Consequently, the parties benefit from the margin of autonomy admitted by the *lex causae*. These provisions lead us to submit that the choice of a property regime does not automatically amount to a tacit choice of law: this perspective would favour abusive agreements. If that were the case, every agreement could be validly concluded, since it would imply a tacit choice of the law, which allows that kind of private arrangements between spouses or partners. Nevertheless, under some circumstances the agreement on the property regime may amount to an implicit choice of law and the consent of the parties should be respected. This is the case if: - the agreement of the parties is formally and materially valid⁴²; it refers univocally to one legal system; - its law is listed in arts. 22 of the Regulations. Only an express clause on the applicable law is missing. In this case, the non-consideration of the implicit but clear will of the parties would undermine their legitimate expectations, the rights and the obligations between each other and with third parties, too, if the couple has always behaved according to that law.

2. The law applicable:

a) to the matrimonial property regime

Article 26 of the Regulation 2016/1103 provides for a list of alternative factors, implementing a quite classical method in the field of the EU civil judicial cooperation. These are a) the spouses' first common habitual residence after the conclusion of the marriage, or b) their common nationality, or c) the closest connection with the spouses. The

⁴² This condition is easily satisfied due to the convergence of the rules on the formal and the material validity of the agreement on the choice of law and the property regime agreement.

last two elements must be scrutinized at the time of the conclusion of the marriage. Notwithstanding the clear formulation of the provision, the connecting factors might raise some interpretative difficulties⁴³. This solution promotes the proximity between the case and the applicable law, it being very strictly connected with the family life. Nevertheless, it jeopardises the stability and the predictability of the applicable law. Indeed, if a dispute arises before the family reunification, the applicable law must be determined pursuant to the other connecting factors, failing any (first) common habitual residence; if the dispute arises afterwards, the law of the habitual residence is applicable. Furthermore, this law also applies to situations and relationships created before the family reunification, which become controversial afterwards. This outcome may amount to a surprise for third parties. Instead, if the first residence must be established shortly after the celebration of the marriage, the rule would grant the stability of the applicable law: this is determined by art. 26, para. 1, l. b) or c) even after the family reunification. The drawback of this solution is that it prevents the application of the law of the (newly created) common habitual residence, to which the family life is currently strictly connected. The spouses might rely on its application.

Article 26, para. 2 is the sole rule within the EU civil judicial cooperation regulating the issue of the multiple common nationalities. In that case, the connecting factor is not applicable. This solution complies with the CJEU case-law, to the extent that it implements the principle that there is not a prevalence of one citizenship over the others⁴⁴, but it does not codify its implications. These can be summarized in the equal relevance of all the

⁴³ For example, the first common habitual residence may be established immediately after the celebration of the marriage, or even years after. If spouses have always lived apart and they re-join after the retirement. If this is the place of their first habitual residence after the marriage, the law of that State is applicable.

⁴⁴ CJEU 7 July 1992, case C-369/90, Micheletti, ECLI:EU:C:1992:295; CJEU 2 October 2003, case C-148/02, García Avello, ECLI:EU:C:2003:539; CJEU 16 July 2009, case C-168/08, Hadadi, ECLI:EU:C:2009:474. For some further reflections of this sort of EU indifference to the rules on the attribution of the citizenship and the multiple nationalities: R. Hüter, «Zur internationalen Zuständigkeit des Scheidungsgerichts bei doppelter Staatsangehörigkeit der Ehegatten», *European Law Reporter*, 2009, p. 351; J. diIger, «EuEheVO: Identische Doppelstaater und forum patriae (Art. 3 Abs. 1 lit. b)», *IPRax*, 2010, p. 54; W. Hau, «Doppelte Staatsangehörigkeit im europäischen Eheverfahrensrecht», *IPRax*, 2010 p. 50; P. laGarde, «L'application du règlement Bruxelles II bis en cas de double nationalité», *Revue trimestrielle de droit européen*, 2010, p. 770; P. MaeStre CaSaS, «Doble nacionalidad y forum patriae en divorcios internacionales (Notas a la STJUE de 16 de Julio 2009, Hadadi, As. C-168/08)», *Cuadernos de derecho transnacional*, 2010, p. 290; a. fuChS, «Mehrstaater im Internationalen Privatrecht», en *Festschrift für Dieter Martiny*, cit., p. 303.

citizenships in order to select the applicable law⁴⁵ and to allocate the jurisdiction⁴⁶. On the opposite, article 26, para. 2 of the Regulation 2016/1103 establishes the irrelevance of the common multiple nationalities. Apparently, two reasons justify this choice. First, unlike jurisdiction, one applicable law must be determined. Without any criteria on the prevalence of the citizenship, two or more laws are applicable to the whole claim, which is objectively impossible. Second, if the spouses have multiple nationalities, most probably any of them presents a close connection with the couple. Nevertheless, the proposal does not define if the connecting factor of multiple citizenships applies in if the spouses with multiple citizenships, have one of the multiple citizenships, in common⁴⁷. For example, if one of the spouses is of German and French nationality and the other of French and Greek nationality, it does not seem clear whether the common French nationality is in force according to the rule above, or whether in this case, a judge should turn to the proportionate application of thought 22 of the Preamble of Regulation 1259/2010 (Rome III). Rejecting the connecting factor, these rules do not seem to solve the problematic of only same citizenship in dual citizenship couples, a problem that is difficult to be confronted, given that EU provisions on multiple nationalities have been widely debated over the years⁴⁸. The solution of the case Hadadi could have been adapted⁴⁹: the multiple common nationalities can all operate as connecting factors, leaving a margin of party autonomy to the spouses. Failing the consent on the application of one the laws of the States of the common nationalities, the connecting factor is not applicable. Such an interpretation is impossible under article 26 para. 2. The last connecting factor is the principle of proximity at the time of the marriage. The judge must evaluate every relevant factual and legal element in a very fragmented

⁴⁵ Case García Avello.

⁴⁶ Case Hadadi at http://ec.europa.eu/dgs/legal_service/arrets/08c168_en.pdf: The Court concludes that where, as in the present case, spouses each hold the nationality of the same two Member States, the Regulation precludes the jurisdiction of the courts of one of those Member States from being rejected on the ground that the applicant does not put forward other links with that State. The spouses may therefore seise the courts of either of the Member States of which they both hold the nationality, as they choose.

⁴⁷ Grammatikaki-Alexiou in A. Grammatikaki-Alexiou/Z. Papasiopi-Pasia/E. Vasilakakis, *Private International Law*, Sakkoulas Publications, 2017, p. 274.

⁴⁸ Inter alia Olivier W Vonk, *Dual Nationality in the European Union: A Study on Changing Norms in Public and Private International Law and in the municipal laws of four EU Member States*, Martinus Nijhoff Publishers, Leiden-Boston 2012, p. 116.

⁴⁹ Indeed, at the very end, one judge must be seised and the situation of multiple pending claims should be avoided through the rules on the *lis alibi pendens*.

situation. The multiple common citizenships may come back into play in the determination of this strict connection⁵⁰. Specifically, the spouses might prove that they feel a particularly strong link with the State of one of their common nationalities, overcoming the impossibility to choose it once the dispute arises⁵¹. It being the last connecting factor, the proximity will most probably be quite faint, but the opposite risk is not to find any law applicable to the matrimonial property regime, which of course cannot be accepted.

b) to the registered partnership property regime

Art. 26 of the Regulation 2016/1104 establishes only one connecting factor: the law under which the relationship was created. The rule assumes that the *lex loci actus* admits the creation of a partnership pursuant to a different law. The rule grants the stability, since the applicable law does not change during the relationship. No relevance is attributed to the laws of the common habitual residence⁵² and of the common nationality. The reasons for the difference with the matrimonial property regimes are not clear. Whereas n. 48 of the Regulation 2016/1104 refers to the predictability of the connecting factor and to the legal certainty, but Regulation 2016/1103 promotes the same values, despite offering completely different solutions.

3. The flexibility in the choice of law: the *lex (non) conveniens*

The new Regulations offer a meaningful innovation. The margin of appreciation left to the judge when determining the applicable law. The rule can be considered as a *lex non conveniens* clause for its analogies with the common law *forum non conveniens* method⁵³. Different conditions frame the margin of appreciation of the judge. First, it can overcome only the application of the law of the first habitual common residence of the spouses.

⁵⁰ Silvia Marino, Strengthening the European civil judicial cooperation: the patrimonial effects of family relationships verso il rafforzamento della cooperazione giudiziaria civile nell'unione europea: gli effetti patrimoniali delle relazioni familiari, 12.01.2017 at: <https://e-revistas.uc3m.es/index.php/CDT/article/viewFile/3621/2189>, p. 280.

⁵¹ Spouses are free to agree on the application of one of their citizenships, but this entails the respect of the strict formal validity requirements seen supra, para. VIII, 1. In the envisaged case a formal agreement would not be necessary, it being enough to declare the couple's will to the seised judge.

⁵² Further analysis in Thalia Kruger, *Habitual Residence: The Factors that Courts Consider* in Paul Beaumont, Mihail Danov, Katarina Trimmings, Burcu Yüksel - *Cross-Border Litigation in Europe*, Bloomsbury Publishing, 2017.

⁵³ Art. 26, para. 3 of Regulation 2016/1103 and art. 26, para. 2 of Regulation 2016/1104.

Therefore, this rule cannot resolve the difficulties in the determination of the first common habitual residence of the spouses. There must be a common habitual residence after the celebration of the marriage in order to bypass its application, or the law pursuant to which the partnership has been created. Second, the last common habitual residence of the spouses has been lasting longer than the first common habitual residence. This condition becomes a requirement of long-lasting residence in the field of the partnership property regime. This divergence depends on the fact that the first common habitual residence is not a connecting factor in the partnership property regimes. Third, the spouses or the partners must have relied on the application of this law. If these requirements are fulfilled, by way of exception and after the application of either spouse, the judge may decide to apply the law of the State of the last common habitual residence of the spouses or of the partners. The application is retroactive, unless the parties disagree. In the latter case, the law applies as from the establishment of the last common habitual residence. The rule seeks to promote the legitimate expectations of the parties according to a criterion of proximity. Indeed, the couple might have lost any substantial contact with the State of the law determined according to art. 26, para. 1, and its application might come to a surprise. It is therefore possible to overcome it.

Indeed, in matrimonial properties disputes, the rule targets a more strictly connected applicable law from the substantial point of view⁵⁴, although it is not necessary that the last common habitual residence is also the current one. Therefore, its application would amount to a non-sense when the law must be determined pursuant to art. 26, para. 1, l. b) and c) of the Regulation. If the *lex non conveniens* applies, the coincidence between forum and *ius* is achieved to the extent that the last common habitual residence corresponds to the current one.

4. Applicable law in the absence of parties' choice

In the absence of any agreement pursuant to article 22, and with the intention of reconciling the need for predictability and legal certainty with the consideration of the actual circumstances under which the couple lives⁵⁵, the law applicable to the property consequences of married couples and registered partnerships shall be the law of the State

⁵⁴ Meaning it is possible to disregard only the law of the first habitual residence.

⁵⁵ According to art. 26, Proposal for the Regulations COM (2016) 106 final, 2.3.2016: «*the life actually lived by the couple*».

under which the lawful marriage has been celebrated or registered partnership was created. Nevertheless, by way of exception and upon application by either spouse or partner, the judicial authority having jurisdiction to rule on matters of the matrimonial property regime may decide that the law of a State other than the State whose law is applicable shall govern the matrimonial property regime if the applicant demonstrates that: (a) the spouses or partners had their last common habitual residence for a significantly long period of time and (b) both spouses or partners had relied on the law of that other State in arranging or planning their property relations⁵⁶.

IV) Recognition, enforceability and enforcement of decisions

In line with the other EU instruments in the field of judicial cooperation in civil matters, the aim of these provisions is to ensure and facilitate the free circulation of decisions, authentic instruments and court settlements concerning matrimonial property regimes. This free circulation would take the form of a uniform procedure for the recognition and enforcement of decisions, authentic acts and legal transactions originating in another Member State. This procedure replaces the national procedures currently in force in the different Member States. The grounds for non-recognition or refusal to enforce are also harmonised at Union level or reduced to the absolute minimum. They replace the varied, and often broader grounds that currently exist at national level. The rules on the recognition and enforcement of decisions are also in line with those contained in Regulation 650/2012 on succession and wills. They therefore refer to the exequatur procedure laid down in that Regulation. This means that any decision of a Member State would be recognised in other Member States without any special procedure and that, to have a decision enforced in another Member State, applicants would have to follow a uniform procedure in the Member State of enforcement to obtain a declaration of enforceability. The procedure is unilateral and is initially confined to a verification of documents. Only a limited number of grounds for refusal of recognition exists⁵⁷. At present, the recognition and enforcement of decisions is governed by the Member States' national laws or bilateral agreements between some

⁵⁶ Art. 26 par. 3 of Regulations 2016/1103, 2016/1104.

⁵⁷ Only at a later stage, if the defendant objects, would the judge proceed to consider possible grounds for refusal. This offers adequate protection of the rights of defendants. These rules are a major step forward compared with the current situation.

Member States. For the procedures to be followed⁵⁸, the documents required for obtaining a declaration of enforceability and the grounds on which foreign decisions may be rejected vary with the Member States concerned. Given its specific circumstances, the free circulation of decisions is subject to the exequatur procedure. Nevertheless, the removal of intermediate proceedings (exequatur) could, as in other areas, be considered at a later stage, after an evaluation of the application of the rules in this Regulation and the development of judicial cooperation on matrimonial property regimes and related areas, notably the Brussels IIa Regulation. The acts of authorities exercising their powers by delegation in accordance with the definition of a court in Article 3 of the Regulation would be treated as court decisions and thus covered by the provisions on recognition and enforcement under this chapter. This acceptance means that they will enjoy the same evidentiary effect in respect of the contents of the instrument and the facts contained therein, and the same presumption of authenticity and enforceability as in the country of origin. Appeal is possible for both parties only on the grounds specified in Art. 37. According to article 40, under no circumstances may a decision given in a Member State be reviewed as to its substance. In any case, the recognition and enforcement of a decision on matrimonial property regime under these Regulations should not in any way imply the recognition of the marriage underlying the matrimonial property regime which gave rise to the decision 66 of proposal.

V) Same sex marriage and same sex registered partnership: The ambiguous approach of the new Regulations on property regimes.

The ECtHR has repeatedly affirmed that the homosexual affective relationships are included in the notion of family life, pursuant to art. 8 of the ECHR⁵⁹. This characterisation does not impose to the States a duty to allow same-sex marriage within their jurisdiction⁶⁰, but the material scope of application of the Regulation must include the same-sex marriages, in the states where there are provided for. Which approach can be instead suggested to the judge seating in a jurisdiction, which does not allow same-sex marriages, required to state on the patrimonial regime? The plain recognition is not always possible

⁵⁸ A unilateral procedure to obtain the declaration of enforceability governed by the law of the Member State of enforcement is provided, which is initially limited to the verification of documents.

⁵⁹ ECtHR, 24 June 2010, *Schalk and Kopf v. Austria*; ECtHR, 23 June 2016, *Pajić v. Croatia*.

⁶⁰ ECtHR, 24 June 2010, *Schalk and Kopf v. Austria*.

due to the classical issues raised by the unknown institution⁶¹. Moreover, some Member States expressly require the sexual difference of the spouses⁶²: the court might have troubles recognizing the unknown relationship apparently conflicting with its Constitution. A coherent solution is still possible if we leave aside the problem of the recognition of civil status abroad. The marriage can be incidentally considered as a fact that causes the legal consequence of a patrimonial regime. The State cannot accept the foreign marriage as a status acquired abroad, but can consider it as a pure fact, occurred abroad, to which patrimonial consequences are attached. This solution is also consistent with n. 54, recalling the principle of non-discrimination as envisaged in the Charter of Fundamental Rights of the European Union. In this opinion, the possible refusal to take the foreign same-sex marriage into consideration as a fact only on the ground of sex or of sexual orientation might amount to a violation of the principle of non-discrimination.

Another approach is possible. The foreign marriage might be downgraded into a national same-sex registered partnership, provided for by the *lex fori*, as many Member States envisage this solution, among them Italy, Greece, Germany and Austria, Switzerland and others. This characterisation does not seem to infringe the right to family life as interpreted by the ECtHR, admitting the downgrade in purely internal situations (as in the *Hämäläinen* case)⁶³. The possible refusal to recognise a same-sex marriage is a persisting risk⁶⁴. The rule on the alternative jurisdiction (art. 9 of the Regulation 2016/1103) demonstrates this conclusion, since it considers the event of non-recognition of the marriage at stake by the State of the judge vested in the patrimonial regime claim. As a consequence, the Regulations cannot grant the free circulation of familiar status.

⁶¹ Already K. von Savigny, *System des heutigen römischen Rechts*, vol. 8, Berlin, 1849, p. 39 resolved the issue of unknown foreign institutions through the public policy safeguard clause.

⁶² This is for example the case of Greece, Hungary, Poland, Croatia and Slovakia.

⁶³ *“The solution presents some drawbacks, as the inconsistency with the legitimate expectations of the spouses and the nonuniform application of Regulation 2016/1103, which are disregarded if the marriage is considered as a partnership. Nevertheless, this solution would grant at least a legal status to the couple and a positive Regulation of the patrimonial regime. Still the scope of application of Regulation n. 2016/1103 is variable, depending on the national law and approach to foreign unknown institution”*, Silvia Marino, strengthening the European civil judicial cooperation: the patrimonial effects of family relationships verso il rafforzamento della cooperazione giudiziaria civile nell’unione europea: gli effetti patrimoniali delle relazioni familiari, 12.01.2017 at: <https://e-revistas.uc3m.es/index.php/CDT/article/viewFile/3621/2189>.

⁶⁴ As mentioned before, failing any EU competence in family law, it is not possible to impose a duty to accept foreign familiar status through Regulations on the patrimonial regimes.

VI) Conclusions: Thoughts on the effectiveness of the two Regulations

These two Regulations: one on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, and the other on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, are the implementing measures of the enhanced cooperation established 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. The automatic change of the applicable law is abandoned, whereas the opposability to thirds and to public order rules can separate the law applicable in matrimony regimes. The Regulations do in some sense achieve their objective to increase foreseeability and legal certainty regarding jurisdiction and applicable law in the matter of property regimes of international couples, as well as harmonizing the international private law rules between the EU countries.

Although, the rules of conflict issued by Haye Convention and the European Constitution do not seem that distinct from one another. Before their enforcement doubts are already created about the desirable guarantee of a total judiciary security. Couples also should be cautious selecting the applicable law. Usually, infringement of the law takes place when parties receive autonomy. Although Regulations place boundaries in private autonomy of selecting the applicable law, a margin of manipulation of the weak party still remains.

Also, 64 of Regulation 2016/1103 and 63 of Regulation 2016/1104 clearly state that the recognition of a decision on the property consequences of a registered partnership does not imply the recognition of the registered partnership. Therefore, the judge may decline to hear the case, if the *lex fori* does not provide for the institution of the registered partnership, or the national private international law does not admit the recognition of the marriage. The reason is that the two new Regulations accept that not every family institution is accepted and/or granted within all the Member States. As a consequence, this margin of appreciation left to the Member States on family law matters, poses the question whether, in the case debated, the harmonization through private international law in matrimonial property regimes practically leads to an approximation of laws, which is the main scope.