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European Family Property Relations Article by Article Commentary on EU Regulations 1103 and 1104/2016

Editors
Lucia Ruggeri and **Roberto Garetto**

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European Family Property Relations

Article-by-Article Commentary on EU Regulations 1103 and 1104/2016

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Roberto Garetto

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Editors Lucia Ruggeri, Roberto Garetto

Scientific Committee Stathis Banakas, University of East Anglia
Silvia Landini, University of Florence

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CONTRIBUTORS

Ivan Allegranti, Phd Candidate, Research Fellow, University of Camerino

Ciro Ascione, Phd Candidate, University of Camerino

Eleonora Bazzo, Notary, Torino

Vincenzo Bonanno, Public Officer, Italy

Maria Paola Francesca Bottoni, Phd Candidate, University of Camerino

Paolo Bruno, Justice and Home Affairs Counselors, Permanent Representation of Italy to the EU

Cinzia Calabrese, President, Italian Association of Family Lawyers (AIAF)

Livio Calabrò, PhD, University of Calabria, Lawyer

Serena Cancellieri, Phd Candidate, University of Camerino

María José Cazorla González, Full Professor, University of Almeria

Giovanna Chiappetta, Full Professor, University of Calabria

Salvatore Coscarelli, Phd Candidate, University of Camerino

Giovanna Di Benedetto, Phd Candidate, University of Camerino

Andrea Fantini, Phd Candidate, University of Salento

Francesca Ferretti, Phd Candidate, University of Camerino

Roberto Garetto, Research Fellow, University of Camerino

Manuela Giobbi, Research Fellow, University of Camerino

Maria Cristina Gruppuso, Phd Candidate, University of Torino

Helena Mota, Associate Professor, University of Porto

Veronica Rita Miarelli, Phd Candidate, University of Camerino

Elena Napolitano, Phd Candidate, University of Camerino

Maria Paola Nico, Phd Candidate, University of Camerino

Federico Pascucci, Research Fellow, University of Camerino

Pietro Piccioni, Phd, University of Perugia

Ilaria Riva, Associate Professor, University of Torino

Maria Gabriella Rossi, Italian Women Lawyers Association (ADGI)

Lucia Ruggeri, Full Professor, University of Camerino

Mercedes Soto Moya, Full Professor, University of Granada

Giuseppe Vertucci, Phd Candidate, University of Camerino

Francesco Giacomo Viterbo, Associate Professor, University of Salento

Karina Zabrodina, Phd Candidate, University of Camerino

Giovanni Zarra, Researcher, University of Napoli Federico II

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PREFACE

Lucia Ruggeri and Roberto Garetto

The enhanced cooperation among 18 Member States represents a first, but fundamental, step on the path of effective justice for cross-border couples. Our previous experience in the European Project 'Personalized Solution in European Family and Succession Law' demonstrated the importance of the knowledge of the new European regulatory framework in family and succession matters. We think that it is a pivotal task studying, promoting and spreading the knowledge and the application of Regulation 1103/2016 on matrimonial property and Regulation 1104/2016 on the property consequence of registered partnerships.

This book is the result of a coral work in which the reader can find indications and information useful for a wide and conscious application of the two Regulations. The new regulatory framework enhances the use of private autonomy in the choice of law and jurisdiction. For this reason, enormous is the role of legal professionals for an effective use of the authonomy accorded by the European Union. The contributors of this book have different cultural and professional backgrounds and have a different level of experience, but together they offer a useful tool for all legal professionals involved in the EU-FamPro Project and for all people who would like to explore the legal system proposed by the two Regulations. As editors of this volume, we are glad for the commitment and the spirit of collaboration expressed by all contributors. A special thanks to the publisher, Edizioni Scientifiche Italiane, for supporting this Project and for including our volume in their prestigious editorial catalogue.

November 2021

Introduction

Giovanni Zarra

The Twin (EU) Regulations 1103 and 1104 of 24 June 2016 (in force since 29 January 2019) – implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of (i) matrimonial property regimes and (ii) registered partnerships (respectively) – are an essential piece within the complex puzzle representing the EU private international law regulations on family matters. While, from the perspective of the enhancement of the rights and freedoms of people within the regulation of private international law in the EU, the Regulations are certainly a great achievement, they are, nevertheless (and as obvious), the result of a compromise. On the one hand, they shall be welcomed because they start a process of uniformization of family law matters within the private international law of the EU, which is the necessary completion of the trend started with the Regulation 2201 of 2003 (on the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, so called 'Bruxelles II-bis Regulation), as well as Regulations 4 of 2009 (on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations), 1259 of 2010 (so called 'Rome III Regulation,' implementing enhanced cooperation in the area of the law applicable to divorce and legal separation) and 650 of 2012 (on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession). On the other hand, however, this process shall necessarily take its time because, in order to ensure that the harmony between EU legal system in family matters is gradually reached without sacrificing the domestic identities, it is first of all necessary to wait for more cultural homogeneity in family matters between EU Member States. Uniformity is important, but not at all costs, and, from this perspective, Regulations 1103 and 1104 of 2016 seem to be a good

point of balance in the tension between uniformity and protection of domestic traditions.

Which are, then, and taking into account these opposing needs, the rationales inspiring the Twin Regulations 1103 and 1104 ?

Preliminarily, it is worth noting that, as all the other instruments of EU private international law, the Regulations are based on the well-known mechanism of 'mutual trust,' according to which the courts of EU Member States shall trust the work carried out by other EU domestic courts. Therefore, they shall be considered as completely fungible and shall not review the decisions issued by each other, or the jurisdiction of other Member States' courts. Hence – except for the exceptions explicitly set forth in the Regulations – judges within all EU States must decline jurisdiction whenever another EU court already declared itself competent in respect of the same case, as well as recognize and enforce judgments coming from all other European Member States.

Having clarified the above, the first rationale inspiring the Regulations is, certainly, completeness: both the Regulations concern the entire private international law discipline, eg jurisdiction, applicable law and circulation of judgments. This is an undeniable advantage in terms of simplification for lawyers, who know in advance that the Regulations will provide them with all the necessary guidance concerning the property regime in marriages and registered partnership. In this regard, it is certainly worth mentioning what is stated by Recital 18 of the Regulations, providing that '[t]he scope of [the] Regulation[s] should include all civil-law aspects of matrimonial property regimes, both the daily management of matrimonial property and the liquidation of the regime, in particular as a result of the couple's separation or the death of one of the spouses.'

Simplification, indeed, is another rationale inspiring the Regulations. With this respect, the EU legislator made significant efforts in terms of coordination of Regulations 1103 and 1104 with the already mentioned instruments governing family and succession matters in EU private international law. This will be particularly evident when the various authors involved in this commentary will discuss about jurisdiction within the Regulations' system.

Uniformity, as foreseeable, is another relevant goal of the Regulations. This is expressed, first of all, by the ideas of universal application and

unity of applicable law, which respectively set forth that (i) 'the law designated as applicable by this Regulation shall be applied whether or not it is the law of a Member State' (Art 20); and (ii) '[t]he law applicable to a matrimonial property regime pursuant to Art 22 or 26 shall apply to all assets falling under that regime, regardless of where the assets are located' (Art 21, which applies save as for the application of the lex rei sitae to real estates). Secondly, uniformity is ensured by the autonomous definition that the EU legislator has given of 'matrimonial property regime,' which, according to Art 3 of the Regulation 1103, means 'a set of rules concerning the property relationships between the spouses and in their relations with third parties, as a result of marriage or its dissolution' . Uniformity, however, as already stressed above, should not be pursued at any cost (and in particular sacrificing the national identity of Member States). The Regulations do not even try to offer a single definition of the concepts of marriage (which continue to be defined and regulated, sometimes very differently, by domestic systems of law) and give adequate relevance to imperative norms of domestic systems, either expressed by principles (public policy) or more specific rules (overriding mandatory rules).

Strictly related is the need for legal certainty, which inspires the entire EU system of private international law: a party should be able to know in advance where it may start legal proceedings, which law will be applied and under what conditions a judgment may be recognized. In matters of applicable law, this is clearly expressed by Recital 43 of the Regulations, according to which '[i]n order to allow citizens to avail themselves, with all legal certainty, of the benefits offered by the internal market, this Regulation should enable spouses to know in advance which law will apply to their matrimonial property regime. Harmonised conflict-of-law rules should therefore be introduced in order to avoid contradictory results.'

In addition, and in strict relation with the idea of mutual trust, Member States which have taken part in the enhanced cooperation have been inspired by a *favor* for the circulation of judgments which enforce patrimonial regimes arising from marriages or registered partnerships. In this regard, it is significant that the Regulations contain a rule, namely Art 9, which has been enacted with the precise

purpose of avoiding the circulation of decisions denying the recognition of patrimonial regimes arising from marriages or registered partnership. Indeed, according to this rule, if a court of the Member State that has jurisdiction pursuant to the Regulations 'holds that, under its private international law, the marriage in question is not recognised for the purposes of matrimonial property regime proceedings, it may decline jurisdiction.' This provision clearly expresses the idea that is better to decline jurisdiction than to have a judgment against the recognition of patrimonial relationships between spouses or members of a registered partnership. On the other hand, the provision of a *forum necessitatis* (Art 11), to be activated in presence of strict requirements in the cases where there is no other available forum, reinforces the idea that Member States wanted, as much as possible, to ensure that spouses and members of registered partnerships are offered adequate protection in patrimonial matters within the EU framework.

As we said, however, mutual trust and the *favor* for the circulation of judgments shall find some limits, strictly anchored to the respect of national identities of Member States. Thus, it is not surprising that the Regulations give relevance to domestic imperative norms as a limit to the application of foreign law and to the recognition of foreign decisions. In this regard, Art 31 (titled 'Public policy (*ordre public*)') provides that '[t]he application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum,' while Art 30 (titled 'Overriding mandatory provisions') states that '1. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.' The reference respectively applies to those fundamental principles and rules which are considered so important as to require their application without exception also to transnational cases. The two provisions find some clarification in Recitals 53 and 54, which clarify that both public policy and mandatory rules shall be applied in 'exceptional circumstances' and on the basis of 'considerations of public interest.'[1]

[1] In this regard, while it is today acknowledged that public policy is a generalklausel composed by the fundamental principles of a State which are considered so essential as to require application in all cases (including those with a foreign element) where

Hence, considerations of public interest (expressed either by general principles – public policy – or by more specific rules – overriding mandatory rules) allow the application of imperative norms of the forum to a case concerning the transnational regulation of patrimonial regimes between couples and could lead to the non-application of foreign law and to the non-recognition of foreign judgments (in accordance with Art 37). This is an essential safeguard which, again, mediates between the needs to allow the international circulation of values and that of safeguarding national identities. In this regard, and from the important perspective of the enhancement of human rights through private international law, it is finally worth highlighting that Art 38 of the Regulations, titled 'Fundamental Rights,' provides that '[a]rticle 37 of this Regulation shall be applied by the courts and other competent authorities of the Member States in observance of the fundamental rights and principles recognised in the Charter, in

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the concrete application of foreign law generates a result which is incompatible with such principles, overriding mandatory rules ('lois de police' or 'norme di applicazione necessaria') are those domestic rules which claim to be applied in any case and regardless of the functioning of private international law rules. However, while this distinction seems to assume that there is a significant substantive distinction to be drawn between public policy and mandatory rules (the former being an expression of fundamental principles and the latter being an expression of States' organizational needs) it is here submitted that such a substantive difference does not exist and that the only difference between public policy and mandatory rules stays in the normative technique used to express them (general principles and specific rules, respectively). In this respect, Art 30 and Recital 54 specify that the application of overriding mandatory rules can be justified by considerations 'such as the protection of a Member State's political, social or economic organisation' (emphasis added). Does this mean that overriding mandatory rules only exist in the fields of political, social and economic organization? In our opinion this approach would be misplaced. Overriding mandatory rules are specific rules which express more general principles which are considered fundamental for the legal foundation of a country in a certain historical period. As paragraph 2 of Art 30 (in its first sentence) clarifies, '[o]verriding mandatory provisions are provisions the respect for which is regarded as crucial by a Member State for safeguarding its public interests.' This means that the reference to the aspects of political, social or economic organisation, preceded by the words 'such as' is only aimed at providing interpreters with an example of the mandatory rules justifying an exception to the normal functioning of the private international law mechanism.

particular in Art 21 thereof on the principle of non-discrimination.' This is a significant provision from two perspectives. First of all, it clarifies – even if it was pleonastic – that the EU Charter of Fundamental Rights constitutes an example of EU public policy, eg the general principles which represent the real core of the legal system of the EU and that shall be applied by domestic judges jointly with the international public policy of their countries. Secondly, the provision officially recognizes the relevance of human rights within the context of private international law, and, from this angle, this can both mean that a foreign decision violating fundamental human rights (protected by domestic and EU law) shall not be recognized and that the respect for human rights may dictate the recognition of a certain decision in a specific case. Before concluding this brief introduction, let me note that this Commentary will be one of the few complete operas dealing with the Regulations 1103 and 1104 of 2016 and, considering that it will be freely accessible (also thanks to the precious support of the Edizioni Scientifiche Italiane) it will certainly become a benchmark for all the scholars studying the subject.

Article 1
Scope

Francesco Giacomo Viterbo

Regulation (EU) 2016/1103

1. This Regulation shall apply to matrimonial property regimes. It shall not apply to revenue, customs or administrative matters.

2. The following shall be excluded from the scope of this Regulation:

(a) the legal capacity of spouses;
(b) the existence, validity or recognition of a marriage;
(c) maintenance obligations;
(d) the succession to the estate of a deceased spouse;
(e) social security;
(f) the entitlement to transfer or adjustment between spouses, in the case of divorce, legal separation or marriage annulment, of rights to retirement or disability pension accrued during marriage and which have not generated pension income during the marriage;
(g) the nature of rights *in rem* relating to a property; and
(h) any recording in a register of rights in immoveable or moveable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register.

Regulation (EU) 2016/1104

1. This Regulation shall apply to **matters of** the property **consequences of registered partnerships.** It shall not apply to revenue, customs or administrative matters.

2. The following shall be excluded from the scope of this Regulation:

(a) the legal capacity of **partners;**
(b) the existence, validity or recognition of a **registered partnership**;
(c) maintenance obligations;
(d) the succession to the estate of a deceased **partner;**
(e) social security;
(f) the entitlement to transfer or adjustment between **partners**, in the case of **dissolution or annulment of the registered partnership**, of rights to retirement or disability pension accrued during the registered partnership and which have not generated pension income during the **registered partnership**;
(g) the nature of rights *in rem* relating to a property; and
(h) any recording in a register of rights in immoveable or moveable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register.

Summary: I. Introduction. – II. *Ratione Personae* Scope of Application: Certainties and Uncertainties Concerning the (Undefined) Notion of 'Marriage' and the Definition of 'Registered Partnership'. – III. Material Scope of Application: Positive and Negative Delimitation Criteria. – 1. Positive Delimitation of Regulation 1103: a) All Civil-law Aspects of Matrimonial Property Regimes. – 2. Positive Delimitation of Regulation 1104: b) All Civil-law Aspects of the Property Consequences of Registered Partnerships. – 3. Negative Delimitation of the Twin Regulations: Exclusions. A) Legal Capacity of the Spouses or Partners and Other Preliminary Issues – 4. B) Maintenance Obligations Governed by Regulation 2009/4 – 5. C) Issues Regarding the Succession to the Estate of a Deceased Spouse or Partner, Covered by Regulation 2012/650 – 6. D) Other Exclusions.

I. Introduction

The slow and unstoppable advance of the codification process of European private international law ('creeping codification')[1] has led to the adoption of the Matrimonial Property Regulation[2] and the Regulation on Property Consequences of a Registered Partnership.[3] Both Regulations (hereinafter: the Twin Regulations) apply to couples with cross-border implications.[4] No reference is made as to when the matrimonial property regime or the property consequences of a registered partnership give rise to those implications. This will be the

[1] On the topic: M. Czepelak, 'Would We Like to Have a European Code of Private International Law?' *European Review of Private Law*, 18, 705, 705-728 (2010). 2 Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L 183/1.

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

[4] A.R. Benot, 'Article 1 Scope', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples. A Commentary* (Cheltenham: Edward Elgar, 2020), 20-21. The Author specifies that 'The cross-border nature of the property consequences of a marriage or a registered partnership arises when two or more national legal systems are involved and there is doubt as to which should apply.' Furthermore, the Twin Regulations are 'measures concerning family law with cross-border implications' under Art 81(3) TFEU.

case when one of the following circumstances is present: the different nationality of the spouses, different habitual residences, residence in a different country from that of their nationality, or possession of assets in different EU States.[5] The technique chosen by the European legislator over the last fifteen years in the field of family law has been the adoption of a plurality of regulations on well-defined and limited issues, rather than a single source applicable to the whole field.

The Twin Regulations follow the Rome III Regulation[6] regarding the law applicable to divorce and legal separation, Regulation (EC) no 4/2009[7] regarding maintenance obligations and Regulation (EC) no 2201/2003, regarding jurisdiction and recognition of decisions in matters of annulment, separation or divorce and of parental

[5] Discussing partnerships with cross-border implications means referring to those couples who, while sharing a common nationality, have assets or reside in different States: L. Ruggeri, 'I Regolamenti europei sui regimi patrimoniali e il loro impatto sui profili personali e patrimoniali delle coppie cross-border', in S. Landini ed, *EU Regulations 650/2012, 1103 and 1104/2016: cross-border families, international successions, mediation issues and new financial assets* (Naples: Edizioni Scientifiche Italiane, 2020). The Regulation (EU) 2016/1104 should also apply to couples who have formed their registered partnership in a State other than that of their nationality or residence: on point see 'Explanatory Handbook on Council Regulation (EU) 2014/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships', by the Council of the Notariats of the European Union, available at the following address: http:// www.ejtn.eu/Documents/Handbook-Registered%20Partnerships-EN.pdf (last visited on 5 July 2021).

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

[7] Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L 7/1.

responsibility.[8] This overview is completed by the Succession Regulation[9] and the Regulation (EU) 2019/1111.[10]

In this context, the first Articles of the Twin Regulations are essential, in which, in line with a constant and proven technique in European legislation, the scope of both regulations is largely defined. In particular, Art 1 aims to establish a delimitation *ratione personae* and *ratione materiae*.

In this regard, there are many uncertainties of interpretation on the boundaries which, in practice, separate the scope of Regulation 1103 from that of Regulation 1104, and the scope of application of the Twin Regulations from that of other main European sources of succession and family law and from the increasingly residual scope of effectiveness of the conflict of laws rules laid down within the laws of the individual Member States.

Finally, it should be noted that the scope of application of the Twin Regulations is also defined on a temporal and territorial basis.

At present, they are binding in their entirety and directly applicable only in the Member States which participate in the enhanced cooperation defined by virtue of Decision (EU) 2016/954,[11] eg Belgium, Bulgaria, Cyprus, Czechia, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, Netherlands, Austria, Portugal, Slovenia, Finland and Sweden (hereinafter: the participating Member States).

As regards the delimitation *ratione temporis*, with a few exceptions, the rules provided for in the Twin Regulations apply to 'legal proceedings

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[8] Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) 1347/2000 [2003] OJ L 338/1.

[9] European Parliament and Council Regulation (EU) 2012/650 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L 201/107.

[10] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction [2019] OJ L 178/1.

[11] Council Decision (EU) 2016/954 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction [2016] OJ L 178/1.

instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 29 January 2019' (Art 69). Specifically, those settlements approved or concluded by a court having jurisdiction on the basis of the rules contained in the Regulations, for legal proceedings pending before 29 January 2019, are recognizable and enforceable as provided for in the Regulations. In accordance with Art 69(3), the provisions of Chapter III on 'Applicable law' are applicable, in the case of Regulation 1103, 'only to spouses who marry or who specify the law applicable to the matrimonial property regime after 29 January 2019'; in the case of Regulation 1104, 'only to partners who register their partnership or who specify the law applicable to the property consequences of their registered partnership after 29 January 2019.'

II. *Ratione Personae* Scope of Application: Certainties and Uncertainties Concerning the (Undefined) Notion of 'Marriage' and the Definition of 'Registered Partnership'

The expression 'matrimonial property regime' in Art 1(1) of Regulation 1103 and the expression 'property effects of a registered partnership' in Art 1(1) of Regulation 1104 summarise the positive delimitation of the Regulations' scope of application.

The starting point must be a comparison of the scope of Regulation 1103 with that of Regulation 1104, in order to identify which 'couples' the regulations in question address. To this end, account must be taken of the distinction between the notion of 'marriage,' which is not defined in Art 3 of Regulation 1103, and the definition of 'registered partnership,' as determined by Art 3(1)(a) of Regulation 1104.

The definition of 'marriage,' in accordance with Recital 17 of Regulation 1103, is to be found in the national law of the Member States. It follows that Regulation 1103 also applies to same-sex marriages in the participating Member States whose legislation recognises and gives effect to these marriage relationships.[12]

[12] Regulation 1103 does not even define the concept of spouse, so that the identification of persons who may marry remains a matter for the Member States, which, by virtue of their respective social and cultural traditions, sometimes have

On the other hand, in the context of the sources of private international law of the Union, Regulation 1104 first adopted a definition of 'registered partnership,'[13] to be understood – on the basis of Art 3(1)(a) – as 'the regime governing the shared life of two people which is provided for in law, the registration of which is mandatory under that law and which fulfills the legal formalities required by that law for its creation.'[14] Furthermore, Recital 17 makes it clear that this concept is 'defined solely for the purpose' of Regulation 1104, that 'the actual substance of the concept should remain defined in the national laws of the Member States,' and that this Regulation does not require any Member State to introduce the institution of registered partnership if its domestic law does not provide for it. Indeed, there can be no doubt that the European legislator's choice to provide a definition of 'registered partnership' can apply well beyond the confines of the Regulation and contribute to the process of harmonising the laws of the Member States not only in private international law, but also in substantive European private law in matters of families and succession.

However, there are uncertainties of interpretation with regards to the boundary between the scope of Regulation 1103 and that of Regulation 1104.

The interpretation of the Twin Regulations, in fact, can lead to problems in countries that admit and recognize family relationships between persons of the same sex only through marriage (Finland or

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

[13] A. Dutta, 'Beyond husband and wife – New couple regimes and the European Property Regulations', in A. Bonomi and G.P. Romano eds, *Yearbook of Private International Law* Vol. XIX - 2017-2018 (Köln: Verlag Dr. Otto Schmidt, 2018), 148; C. Rudolf, 'European Property Regimes Regulations - Choice of Law and the Applicable Law in the Absence of Choice by the Parties' *LeXonomica*, 11(2), 127, 133 (2019). A previous attempt to introduce a legal definition of 'registered partnership' at the international level was made with the Munich Convention of 5 September 2007 Convention on the recognition of registered partnerships by the International Commission on Civil Status. However, this Convention has never entered into force.

[14] The reference to registered partnerships with cross-border implications is implied: on this point see A. Rodríguez Benot, 'Los efectos patrimoniales de los matrimonios y de las uniones registradas en la Unión Europea' *Cuadernos de Derecho Transnacional*, 11(1), 8, 15-16 (2019).

Sweden), or only within a registered partnership (Croatia, Italy).[15] In the latter case, where the registered partnership has identical effects to marriage, it could be argued that Regulation 1103 should apply instead of Regulation 1104.[16] This seems, indeed, to pose a false problem because the qualification of the relationship in terms of 'marriage' or 'registered partnership' according to the aforementioned Regulations depends on the domestic law of the individual States, in which the two institutions can usually neither confuse nor, at least formally, overlap completely.

A different approach is necessary in the cases of downgrading of a same-sex marriage celebrated in another Member State to a registered partnership (eg in Italy[17]) and of '*limping status*'[18] whereby a couple (eg

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[15] Similarly ibid, 25.

[16] D. Martiny, 'Die Kommissionsvorschläge für das internationale Ehegüterrecht sowie für das internationale Güterrecht eingetragener Partnerschaften' *Praxis des Internationalen Privat- und Verfahrensrechts*, 31(5), 437, 443 (2011); H. Mota, 'Os efeitos patrimoniais do casamento e das uniões de facto registadas no Direito internacional Privado da União Europeia. Breve análise dos Regulamentos (UE) 2016/1103 e 2016/1104, de 24 de Junho' *Revista Electrónica de Direito*, 2, 1, 14 (2017); A. Rodríguez Benot, n 14 above, 26.

[17] In Italy, Art 32-*bis* of Legge 218 of 31 May 1995 provides that '*Il matrimonio contratto all'estero da cittadini italiani con persona dello stesso sesso produce gli effetti dell'unione civile regolata dalla legge italiana* (tr. 'Same-sex marriage contracted abroad by Italian citizens shall produce the effects of a civil union governed by Italian law'). According to the prevalent Italian doctrine, this rule provides for the so-called *downgrade recognition*, in the sense that same-sex marriages contracted abroad between Italian citizens or between individuals of which one is an Italian citizen must be reclassified, turning into registered partnerships. It follows that, with regard to property effects, Regulation 1104 will apply to them: I. Viarengo, 'Effetti patrimoniali delle unioni civili transfrontaliere: la nuova disciplina europea' *Rivista di diritto internazionale privato e processuale*, 54(1), 33, 38-39 (2018); P. Bruno, n 12 above, 30. In the sense that Regulation 1103 should apply to the aforementioned marriages, see D. Damascelli, 'Le nuove famiglie nella dimensione internazionale', in A. Albanese ed, *Le nuove famiglie* (Pisa: Pacini Editore, 2019), 119. This approach is consistent with the parallel unanimous orientation of excluding marriages between foreign citizens from the downgrading method: on this point, see G. Biagioni, 'Unioni same-sex e diritto internazionale privato: il nuovo quadro normativo dopo il d.lgs. n. 7/2017' *Rivista di diritto internazionale*, 100(2), 496, 522 (2017).

[18] For a more in-depth analysis of the topic, see R. Garetto, 'Taxonomic variety of registered partnerships in the European Union', in M.J. Cazorla González, M. Giobbi, J. Kramberger Škerl, L. Ruggeri and S. Winkler eds, *Property elations of cross*

of different sex) legally recognised in one State as a registered partnership cannot be recognised in another State where they later settle (eg because in that State the institution of registered partnership is not allowed or is only allowed for same-sex couples). Although in all these cases it prevails the principle that none of the twin Regulations may require any Member State to introduce the institution of registered partnership or same-sex marriage if its domestic law does not provide for them, the application of either Regulation cannot depend on uncertain and unpredictable factors or criteria. In order to solve these problems, it is advisable to ground the assessment on the fundamental certainty that the marriage or registered partnership – regardless of its same-sex or opposite-sex character – has been legitimately formed under the law of a Member State. The legal status thus acquired by the spouses or partners requires transnational protection according to a principle recognised by European case law.[19] In order to determine which of the Twin Regulations should apply it is therefore reasonably necessary to refer at the time of the establishment of the legal relationship, thus determining the qualification of the relationship, regardless of whether this relationship has different consequences in other Member States where the couple subsequently decides to establish the centre of their interests. Such a solution could be based on the rules of the Treaties (in particular, Arts 20-21 TFEU) and the Charter of Fundamental Rights of the European Union (in particular, Arts 8, 21 and 45) which, if interpreted axiologically, guarantee citizens the right to move with their personal status and family situations legally acquired in the respective Member State of origin[20] and require, therefore, that the Twin Regulations be

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border couples in the European Union (Naples: Edizioni Scientifiche Italiane, 2020), 86-87.

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

[20] In this sense, L. Ruggeri, n 5 above, recalling 5 giugno 2018, Case C-673/16 *Relu Adrian Coman and Others* v *Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, Judgment of 5 June 2018, para 38, available at https://eur-lex.europa.eu/

applied consistently with the principles of non-discrimination and respect for private and family life,[21] so that they can thus achieve their effectiveness.[22]

It may also be the case that subsequent events in the relationship have an impact on the application of one Regulation or the other. For example, if a registered partnership is converted into marriage because the law of a Member State allows it (eg, in the Netherlands);[23] or if, during the marriage, one of the spouses undergoes the procedure for sex change and the couple wishes to continue the relationship. In this latter case, if under national law the marital relationship is to be converted into a civil partnership (eg, in Italy), Regulation 1104 would apply in the event of subsequent dissolution of the relationship. As a matter of fact, the occurrence of a gender identity change of one of the partners entails a change in the legal status of the couple which the interpreter cannot disregard when applying the Regulations.[24]

These considerations help to distinguish the scope of Regulation 1103 from that of Regulation 1104, introducing elements of certainty but also of uncertainty at a hermeneutical and application level.

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legal-content/EN/TXT/?uri=CELEX%3A62016CJ0673 (last visited on 5 July 2021). P. Perlingieri, 'Individualismo e personalismo nella Carta europea', in G. Vettori ed, *Carta europea e diritti dei privati* (Padua: CEDAM, 2002), 333, 333-338.

[21] Similarly, M. Soto Mota, 'El Regulamento (UE) 2016/1104 sobre régimen patrimonial de las parejas registradas: algunas cuestiones controvertidas de su puesta en funcionamiento en el sistema español de Derecho internacional privado' *Revista electrónica de estudios internacionales*, 1, 16-17 (2018).

[22] Case C-189/08, *Zuid-Chemie BV* v *Philippo's Mineralenfabriek* NV/SA, Judgment of 16 July 2009, para 30, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62008CJ0189 (last visited on 5 July 2021).

[23] B. Reinhartz, 'I Scope and Definitions: Articles 1-3' in U. Bergquist, D. Damascelli, R. Frimston, P. Lagarde, B. Reinhartz eds, *EU Regulations on Matrimonial and Patrimonial Property* (Oxford: Oxford University Press, 2019), 397-405.

[24] On issues related to the gender change of a spouse or partner in the context of family relationships, see F.G. Viterbo, 'Mutamento dell'identità sessuale e di genere e ricadute nella sfera privata e familiare della persona', in Id. and F. Dell'Anna Misurale eds, *Nuove sfide del diritto di famiglia. Il ruolo dell'interprete* (Naples: Edizioni Scientifiche Italiane, 2018), 23-73.

The registered partnership is a summary concept of the rules 'governing the shared life of two people' laid down by law. It follows that polygamic unions are certainly outside the scope of Regulation 1104.[25] Furthermore, the rules maintain a neutral tone in relation to the same-sex or opposite-sex nature of the couple, so that this aspect is left to the regulation of registered partnerships of the individual States. This choice is justified by the fact that, if one questions the nature and function of registered partnerships, an answer can be given only within each individual legal system and with reference to a specific historical period, since the way in which States have defined and regulated registered partnerships, in order to recognise certain forms of emotional relationships other than those based on marriage, varies considerably.[26]

Another certain and extremely important element in the definition of 'registered partnership' is the mandatory registration under the law. The nature and, furthermore, the legal regime of registration do not seem, in fact, to affect the application of Regulation 1104 which, also for these aspects, refers to the discipline of individual States. The registration, in fact, as well as being 'mandatory,' must fulfill 'the legal formalities required (...) for its creation.' This concept seems fundamental to establish which 'couples' or 'partnerships' are addressed by the Regulation and which must be excluded from its scope of application.[27] Certainly, those relationships based on a mere cohabitation agreement without any particular formality or on a communion of life relevant in terms of mere facts, not subject to any mandatory registration, must be excluded.[28] As an example, a reference

[25] P. Bruno, n 12 above, 24.

[26] J.M. Scherpe and A. Hayward eds, *The Future of Registered Partnerships* (Cambridge/ Amberes: Intersentia, 2017), VI. For a more in-depth analysis, in taxonomic and comparative terms, of 'legally recognized' partnerships, see R. Garetto, n 18 above, 86-98.

[27] On the subject see V. Bonanno, 'Patrimonial regimes and de facto cohabitation in European and Italian law' in J. Kramberger Škerl, L. Ruggeri and F.G. Viterbo eds, *Case studies and best practices analysis to enhance EU family and succession law. Working paper*, in *Quaderni degli Annali della facoltà giuridica dell'Università di Camerino 3* (Camerino: Edizioni Scientifiche Italiane, 2019), 19-30, available at the following address: www.euro-family.eu/documenti/news/e_book_afg.pdf (last visited on 5 July 2021).

[28] As highlighted by C. Rudolf, n 13 above, 134 'A formal partnership agreement without registration in a register is therefore not enough'; A. Dutta, 'Das neue internationale Güterrecht der Europäischen Union - ein Abriss der europäischen

could be made to the de facto partnerships recognized in France by Art 515-8 of the *code civil* (as '*concubinage*')[29] and, in Italy, the relationships between '*de facto* cohabitants,' as defined by Art 1, para 36, of Legge 76 of May 20, 2016 (*Legge Cirinnà*).[30] However, it is precisely the peculiarities of the Italian law that reveal some first important interpretative uncertainties regarding the *ratione personae* scope of application of the Regulation.

In fact, in the legal regime of *de facto* cohabitation established by the *Cirinnà* Law, it would seem that the requirement of registration as 'mandatory under the law' is missing since, although the law provides for the registration of the declaration of cohabitation in the same municipality pursuant to Art 1(37), it is not a constitutive element of that status, but merely evidence of cohabitation protected by law, and therefore not mandatory.[31] This approach raises a question. The question is whether Art 3(1)(a) of Regulation 1104 must be interpreted as meaning that, in order to qualify the regime governing the shared life of two people (which is provided for a national law) as a 'registered partnership' within the terms of the Regulation, registration must be prescribed by national law as mandatory for the creation of the partnership. To resolve this issue, it is necessary to interpret Art 3(1)(a) by referring, on the one hand, to the objectives and to the system of the Regulation and, on the other hand, to the general principles that can be inferred from all national legislation.[32] In some judgments,

Güterrechtsverordnungen' *Zeitschrift für das gesamte Familienrecht*, 1973, 1976 (2016). 29 See Art 515-518 c.c. which provides that '*Le concubinage est une union de fait, caractérisée par une vie commune présentant un caractère de stabilité et de continuité, entre deux personnes, de sexe différent ou de même sexe, qui vivent en couple*.'

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

31 See P. Bruno, n 12 above, 31.

32 Case C-271/00, *Gemeente Steenbergen* v *Luc Baten*, Judgment of 14 November 2002, para 28, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62000CJ0271 (last visited on 5 July 2021); Case C-251/12, *Christian Van Buggenhout and Ilse Van de Mierop* v *Banque Internationale à Luxembourg SA*, Judgement of 19 September 2013, para 26, available at https://eur-lex.europa.eu/

however, the Court of Justice seems to assign a prominent role to the literal interpretation. In *Soha Sahyouni v. Raja Mamisch*,[33] the Court ruled on the interpretation of Art 1 of Regulation 2010/1259, stating that divorces of a private nature, such as a divorce resulting from a unilateral declaration by one of the spouses before a religious court, do not fall within the scope of the Regulation. In the judgement's reasoning, decisive importance is given to the textual references in the legal framework, to the intervention of a 'judicial authority' and to the existence of a 'procedure.' A similar reasoning would lead to the interpretation of Regulation 1104 as excluding from its scope of application partnerships which can be formed independently of registration. The wording of Arts 3(1)(a) and 3(1)(b) would be apt in this sense; the latter, in particular, defines the 'property consequences of a registered partnership' as 'the consequence of the legal relationship *created by the registration of the partnership*.'[34] Nevertheless, the rationale of the Regulation seems to suggest that registration should only be 'in compliance with the legal formalities prescribed' by the *lex registrii* regardless of whether the registration is or is not mandatory in order to create the 'registered partnership.'[35] It should be emphasised

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legal-content/EN/TXT/?uri=CELEX%3A62012CJ0251 (last visited on 5 July 2021); Case C-1/13, *Cartier parfums – lunettes SAS and Axa Corporate Solutions assurances SA* v *Ziegler France SA and Others*, Judgment of 27 February 2014, para 32 available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62013CJ0001 (last visited on 5 July 2021).

[33] Case C-372/2016, *Soha Sahyouni* v *Raja Mamisch*, Judgment of 20 December 2017, para 36, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62016CJ0372 (last visited on 5 July 2021). The case involves the divorce of two Syrian spouses who have spent part of their married life in Germany. It should be stressed that Regulation 2010/1259 does not provide a definition of 'divorce,' nor does it refer to the law of the Member States with regard to this aspect. The Court argues in its reasoning that 'the inclusion of private divorces within the scope of that regulation would require arrangements coming under the competence of the EU legislature alone.' On the ruling see S. Arnold and M. Schnetter, 'Privatentscheidungen und die Renaissance der autonomen Kollisionsrechte Europas' *Zeitschrift für europäisches Privatrecht*, 646, 652-666 (2018); R. De Meo, 'Il diritto europeo e il divorzio privato islamico' *Il Foro italiano*, IV, 282, 282-287 (2018).

[34] Added italics.

[35] This point is more widely discussed by A. Rodríguez Benot, n 14 above, 25.

that the reason justifying the relevance of registration – and its essential role in the definition of 'registered partnership' and in the Regulation – lies not only in the function of 'formalising' the legal *status* of the partners,[36] but especially in the fact that the absence of registration would prevent third parties from knowing the existence of the partnership and, above all, the property consequences deriving from it.[37] If this is the case, *de facto* partnerships unions in which the partners have agreed to settle the property consequences of their shared life by signing an agreement that is brought to the attention of third parties by means of registration could be considered included in the notion of 'registered partnership' under Regulation 1104. This is, for example, the case of *de facto* partnership in Italy, provided that the partners have signed a 'cohabitation agreement' pursuant to Art 1(50) to (52), Legge no 76 of 2016, for which there is an obligation to register 'for the purposes of opposition to third parties' carried out by the professional who drafted it or who has authenticated the subscription.[38]

It is, therefore, the interpreter's duty to assess in concrete terms and within the framework of the values of the individual national legislation the possible inclusion or exclusion of *de facto* partnerships supported by an agreement regulating their property effects, on the basis of an interpretation of the relevant rules which is not only literal and functional, but also systematic and axiological, consistently with the cultural evolution over time.[39] Beyond the possible actual scenarios, in the aforementioned doubtful cases, it is up to the national

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[36] Similarly, M. Soto Mota, n 21 above, 8. The function of the registered partnership (in this case, in Italy, the civil union) in terms of 'life relationship "formalisation"' is recently highlighted by E. Quadri, 'Matrimonio, unione civile, convivenze' *Nuova giurisprudenza civile commentata*, 138, 138 (2020).

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

[38] On this subject, see P. Bruno, n 12 above, 29.

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

courts to request a preliminary ruling from the Court of Justice on the correct interpretation of the Regulations.[40]

III. Material Scope of Application: Positive and Negative Delimitation Criteria

The scope of Regulation 1103, on the one hand, includes 'all civil-law aspects of matrimonial property regimes' as positively specified in the same Regulation and, on the other hand, is essentially defined by a number of questions, listed in Art 1, which are expressly excluded from this perimeter.
The scope of Regulation 1104 is essentially defined, on the one hand, by the 'property consequences' of registered partnerships as positively specified in the same Regulation and, on the other hand, by the 'consequences' or issues expressly excluded, listed in Art 1. Therefore, the material scope of the Twin Regulations is defined as follows:
(1) positively, by referring to 'all civil-law aspects' of matrimonial property regimes or the property consequences of registered partnerships, both the daily management of the matrimonial property or partner's property and its liquidation, in particular as a result of the couple's separation or the death of one of the spouses or partners (Recital 18);
(2) in the negative, by reference to certain 'explicitly excluded' number of questions (Recital 19), as specified in Art 1(1) and (2). First, according to Art 1(1), the Twin Regulations do not apply to 'revenue, customs or administrative matters.' This exclusion is also to be found in other regulations, eg in Art 1(1) of Regulation (EC) no 44/2001 and Regulation (EU) no 650/2012. Indeed, like the other European instruments on private international law, the Twin Regulations cover only civil-law matters, thus excluding public and

[40] On the importance of constitutional and community judicial control in a spirit of loyal cooperation, see P. Perlingieri, *Leale collaborazione tra Corte costituzionale e Corti europee. Per un unitario sistema ordinamentale* (Naples: Edizioni Scientifiche Italiane, 2008), 18-21; Id., 'Il nuovo ruolo delle Corti Supreme nell'ordine politico ed istituzionale', in V. Barsotti and V. Varano eds, *Il nuovo ruolo delle Corti supreme nell'ordine politico e istituzionale. Dialogo di diritto comparato* (Naples: Edizioni Scientifiche Italiane, 2012), 145-150.

criminal law. In this respect, the Court of Justice, in the context of the application of the Brussels Convention, has clarified that the dispute concerns civil matters as long as it does not involve a person who 'must be regarded as a public authority which acted in the exercise of public powers.'[41]
The civil-law aspects of the relationship between spouses or partners that fall within the positive and negative delimitation of the Twin Regulations will be better analysed in the following paragraphs.

1. Positive Delimitation of Regulation 1103: a) All Civil-law Aspects of Matrimonial Property Regimes

Regulation 1103 defines its scope by using notions traditionally known to most Member States' legal systems and leaving intact the national rules to which they refer. Art 1(1) provides that this Regulation applies to matrimonial property regimes.[42] This Article should be read in conjunction with Art 3(1)(a), which defines the notion of 'matrimonial property regime' as 'a set of rules concerning the property relationships between the spouses and in their relations with third parties, as a result of marriage or its dissolution.' The same Regulation 1103 immediately clarifies that, for the purposes of the Union's private international law, the term 'matrimonial property regime' '*should be interpreted autonomously*.'[43] The resulting 'Europeanisation' of this term

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[41] Case C-29/76, *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol*, Judgment of 14 October 1976, aff. 29/76, Rec. 1976, 1541; Case C-172/91, Judgment of 21 April 1993, *Volker Sonntag v Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann*, Rec., 1093, 1-1963, pt 20.

[42] This notion is well known to most EU Member States (*regime patrimoniale, régime matrimonial, régimen económico matrimonial, ehelicher Güterstand*): see L. Ruggeri, I. Kunda and S. Winkler eds, *Family Property and Succession in EU Member States: National Reports on the Collected Data* (Rijeka: University of Rijeka, Faculty of Law, 2019), available at https://www.euro-family.eu/documenti/news/psefs_e_book_compressed.pdf (last visited on 5 July 2021).

[43] See Recital 18 of Regulation 1103. Added italics. For more details, see A. Las Casas, 'La nozione autonoma di "regime patrimoniale tra coniugi" del Regolamento UE 2016/1103 e i modelli nazionali' *Le nuove leggi civili commentate*, 6, 1529-1555 (2019). 'The rules in the Regulations call in principle for an autonomous interpretation': P. Franzina 'Scope and definitions', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples.*

implies that the material scope of the Regulation is defined not in relation to the range of issues that each national legal system, by virtue of its own internal laws, refers to the concept of 'matrimonial property regime,' but rather by reference to a concept that is autonomously defined by EU law, namely on the basis of the indications to be found in the regulations themselves and in the case-law of the Court of Justice of the European Union.

It can be seen that the concept of 'matrimonial property regime' is very widely defined and its scope is not limited to questions concerning property arrangements and management of assets. Thus, for instance, spouses' or partners' contributions to family burdens should be included in the property consequences of the marriage or registered partnership for their entire duration. According to Recital 18, that notion 'should encompass not only rules from which the spouses may not derogate but also any optional rules to which the spouses may agree in accordance with the applicable law, as well as any default rules of the applicable law. *It includes not only property arrangements specifically and exclusively envisaged by certain national legal systems in the case of marriage but also any property relationships, between the spouses and in their relations with third parties, resulting directly from the matrimonial relationship, or the dissolution thereof.*'[44]

A Commentary (Cheltenham: Edward Elgar, 2020), 16.

[44] Added italics. On the material scope of Regulation 1103 under Art 1, see P. Franzina, n 43 above, 14-16; A.M. Pérez Vallejo, 'Matrimonial Property regimes' in M.J. Cazorla González, M. Giobbi, J. Kramberger Škerl, L. Ruggeri and S. Winkler eds, *Property relations of cross border couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2020), 15; A. Bonomi, 'Champ d'application et définitions' in A. Bonomi and P. Wautelet eds, *Le droit européen des relations patrimoniales de couple. Commentaire des Règlements (UE) n. 2016/1103 et 2016/1104* (Brussels: Édition Bruylant, 2021), 107-110. See also I. Barriere-Brousse, 'Le patrimoine des couples internationaux dans l'espace judiciaire européen: Les règlements européens du 24 juin 2016 sur les régimes matrimoniaux et les effets patrimoniaux des partenariats enregistrés' *Journal du droit international*, 2, 2017, 485-514; H. Péroz, 'Les lois applicables au régime primaire - Incidences du règlement (UE) 2016/1103 sur le droit applicable au régime primaire en droit international privé français' *Journal du droit international*, 813-829 (2017); N. Chikoc Barreda, 'La protection du logement familial pendant le mariage et lors de la crise conjugale à l'épreuve de la définition des régimes matrimoniaux dans le règlement 2016/1103' *Revue international de droit comparé*, 883, 888-889 (2018).

This is reflected in Art 27 ('Scope of the applicable law'), which defines the type of matters to which the law designated under the Regulation applies, including *inter alia*: 'a) the classification of property of either or both spouses into different categories during and after marriage; b) the transfer of property from one category to the other one; c) the responsibility of one spouse for liabilities and debts of the other spouse; d) the powers, rights and obligations of either or both spouses with regard to property; e) the dissolution of the matrimonial property regime and the partition, distribution or liquidation of the property; f) the effects of the matrimonial property regime on a legal relationship between a spouse and third parties; and g) the material validity of a matrimonial property agreement.'[45]

2. Positive Delimitation of Regulation 1104: b) All Civil-law Aspects of the Property Consequences of Registered Partnerships

In order to delimit its material scope, Regulation 1104 has specified that the term 'property consequences of a registered partnership' is to be understood, pursuant to Art 3(1)(b), as 'the set of rules concerning the property relationships of the partners, between themselves and in their relations with third parties, as a result of the legal relationship created by the registration of the partnership or its dissolution.'
Furthermore, according to Recital 18 and Art 1(1), the Regulation applies only to the 'civil-law aspects' of the aforementioned relationships, not to the fiscal, customs and administrative aspects. Specifically, the following must be included in this area: (a) questions relating to the daily management of the partners' property during the course of their partnership; (b) the partners' property in respect of third parties; (c) property issues connected with the dissolution of the partnership, in particular the liquidation of the property regime following separation or the death of a partner.[46] This is consistent with the provisions of Art 27 and Recital 51, whereby the law applicable to the registered partnership – designated on the basis of the criteria established by the Regulation – must govern the property

[45] For more details see commentary to Art 27.
[46] On the subject, see P. Bruno, n 12 above, 50.

consequences of the entire partnership, 'from the classification of property of one or both partners into different categories during the registered partnership and after its dissolution to the liquidation of the property.'[47]
On this basis, the Regulation proceed to further restrict its scope of application, delimiting it with respect to the rules of private international law on family and succession matters, contained in other sources of the European Union and in the internal systems of the individual States.

3. Negative Delimitation of the Twin Regulations: Exclusions. A) Legal Capacity of the Spouses or Partners and Other Preliminary Issues

The civil-law aspects listed in Art 1(2) of the Twin Regulations must be excluded from their scope of application and will be the subject of a brief analysis below.
The negative delimitation of the sources' scope is a common legislative technique in EU law. The Court of Justice has consistently held that the exclusions constitute exceptions that, as such, 'must be strictly interpreted.'[48]
Some of them are justified in the light of the European Union's lack of competence with regard to notions and rules of substantive family law.
These exclusions are, in the first place:
a) the legal capacity of spouses or partners;
b) the existence, validity or recognition of a marriage or a registered partnership.

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[47] This is provided for in Recital 51 which, regarding the property consequences of the partners in respect to third parties, clarifies that 'the law applicable to property consequences of registered partnerships may be invoked by a partner against a third party to govern such effects only when the legal relations between the partner and the third party arose at a time where the third party knew or should have known of that law.'

[48] Case C-361/18, Judgment of 6 June 2019, *Ágnes Weil* v *Géza Gulácsi*, available at https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62018 CJ0361 (last visited on 5 July 2021), in which the Court ruled on the interpretation of Art 1(2)(a) of Regulation 2001/44.

It can be inferred from the text of Art 1(2) that issues relating to the lack of capacity of the spouses or partners, which typically affect the validity of the marriage or registered partnership, do not fall within the scope of the Regulations.[49] In line with these exclusions, Regulation 1103 states that the notion of 'marriage' 'is defined by the national law of the Member States'[50] and Regulation 1104 states that the 'actual substance' of the concept of 'registered partnership' should remain defined in the national laws of the Member States, and nothing should oblige a Member State whose law does not have the institution of registered partnership to provide for it in its national law. [51]

These are essentially preliminary questions relating to the valid and effective formation of the marriage or registered partnership, which normally fall within the scope of the private international law of the Member States (Recital 21).[52] Nonetheless, the boundaries between different scopes of application may sometimes mislead the interpreter. A dilemma could arise, for example, with regard to the capacity to inherit, for which the *lex successionis* is applied on the basis of Art 23(2)(c) of Regulation 2012/650.[53] In addition, the Twin Regulations themselves specify that their scope of application includes the 'specific powers and rights' of either or both spouses/partners 'with regard to property, either as between themselves or as regards third parties' (Recital 20), and that therefore these issues – for example, relating to the right or authority to dispose of the family home – do not concern the legal capacity of the spouses/partners.[54]

Notwithstanding their silence on this point, it is clear that the Twin Regulations do not apply to measures for the protection of persons wholly or partly lacking legal capacity, in particular the rules on their representation.[55] Thus, the power of one of the spouses to represent

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[49] P. Bruno, n 12 above, 55.

[50] See Recital 17.

[51] See Recital 17.

[52] C. Rudolf, n 13 above, 135.

[53] On the subject see, below, Chapter III.

[54] A. Rodríguez Benot, n 14 above, 17.

[55] In this regard, the Hague Convention of 13 January 2000 on the International Protection of Adults may be applied in a number of contracting Member States: Austria, Germany, Cyprus, Estonia, Finland, France, Latvia, Portugal, Czech Republic.

the other is excluded from the scope of Regulation 1103 when it constitutes a remedy to protect the spouse who is unable to express his or her will (as, for example, provided for in Art 219 of the French Civil Code). The situation is different, however, when a spouse's inability to express his or her will is not due to his or her incapacity but to other causes, such as his or her absence.[56]

Moreover, issues relating to the capacity to enter into a marriage or a registered partnership should not be confused with issues relating to the limit of public policy in the application of a provision of any national law pursuant to Art 31 of the Regulations. Consider the case in which a marriage or a registered partnership has been lawfully formed between an adult and a child, according to the law of a foreign country in which a marriage or a registered partnership is allowed from a very low age. Let us assume that the couple establish their habitual residence in a Member State where an essential element of the partnership (the age of a partner) is found to be contrary to public policy. In such a case, the issue under scrutiny is not the person's capacity to marry or form a registered partnership, but the compatibility of the effects of the marriage or registered partnership with the limit of public policy in the recipient legal system.[57] This issue would fall within the scope of the Twin Regulations.

4. B) Maintenance Obligations Governed by Regulation 2009/4

Also excluded from the scope of application of the Twin Regulations pursuant to Art 1(2) are:

'c) maintenance obligations.'

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[56] On this point, see B. Ancel, in S. Carneloup, V. Egéa, E Gallant, F. Jault-Seseke eds, *Le droit européen des régimes patrimoniaux des couples: commentaire des règlements 2016/1103 et 2016/1104* (Paris: Société de législation comparée – TransEuropeExperts, 2018), 23.

[57] The example is borrowed from P. Bruno, n 12 above, 56-57. On the technique to identify the principles of 'public policy' that are highlighted in the specific case under analysis, see G. Perlingieri, in Id. and G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale* (Naples: Edizioni Scientifiche Italiane, 2019), 83. See also S. Deplano, 'Applicable law to succession and European public policy', in J. Kramberger Škerl, L. Ruggeri and F.G. Viterbo eds, n 27 above, 47-54.

In this regard, Recital 22, in its most accredited version, states that 'maintenance obligations between spouses are governed by Council Regulation (EC) no 4/2009.'[58] Art 15 of this Regulation refers in turn to the Hague Protocol of 23 November 2007 ('the 2007 Hague Protocol') for the determination of the law applicable to maintenance obligations. Regulation 2009/4 defines its material scope in very broad terms, covering all 'maintenance obligations arising from a family relationship, parentage, marriage or affinity' pursuant to Art 1(1) – irrespective of the *nomen juris* they assume in the legal system of the individual Member States – without, however, providing a definition. The latter is also not found in the 2007 Hague Protocol. If we allow a different interpretation according to the notions adopted by the laws of the individual Member States, the uniform application of the rules laid down in the Regulation would be jeopardised and, together with them, the equal treatment between maintenance creditors. It follows that the notion of 'maintenance obligations' should be reconstructed autonomously, having regard to the context and the specific purpose of the Regulation at issue. According to the case-law established by the Court of Justice[59] relating to Art 5(2) of the 1968 Brussels Convention

[58] Such are the Italian, French, Spanish and German versions. The English and Dutch versions refer to the fact that Regulation 2009/4 applies to maintenance obligations *between spouses*. This seems to be a mistake, as there should be no doubt as to the application of this Regulation also to maintenance obligations between partners in a registered partnership: B. Reinhartz, n 23 above.

[59] Case C-120/79, *Louise de Cavel* v *Jacques de Cavel*, Judgment of 6 March 1980, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61979CJ0120 (last visited on 5 July 2021); Case C-220/95, *Antonius van den Boogaard* v *Paula Laumen*, Judgment of 27 February 1997, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61995CJ0220 (last visited on 5 July 2021). On the latter case, see P. Vlas, 'The EEC Convention on jurisdiction and judgments. Article 1: Definition of rights in property arising out of a matrimonial relationship' *Netherlands International Law Review*, 46(1), 87, 89-91 (1999); M. Weller, 'Zur Abgrenzung von ehelichem Güterrecht und Unterhaltsrecht im EuGVÜ' *Praxis des internationalen Privat- und Verfahrensrechts*, 14, 14-20 (1999); J.J. Forner Delaygua, 'Jurisprudencia española y comunitaria de Derecho Internacional Privado' *Revista española de Derecho Internacional*, 66(1), 239, 239-299 (2014). In line with the aforementioned orientation, national case law has also emerged: in Italy, see Corte di Cassazione- Sezioni unite 24 July 2003 no 11526, *Rivista di diritto internazionale privato e processuale*, 678 (2004).

at first, and then to the Brussels I Regulation, there are two factors which contribute to qualifying a given obligation as maintenance: a) the aim of the creditor spouse to provide for himself or herself; and, b) the assessment of the amount of the provision awarded on the basis of the needs and resources of each of the spouses.[60]

That said, a question of interpretation may arise regarding the distinction and delimitation between the notion of 'maintenance obligations' and that of 'property consequences' of a marriage or a registered partnership. In particular, the question arises as to which of the two scopes of application - between Regulation 2009/4 and the Twin Regulations – should cover cases relating to the recognition of the right to maintenance after divorce or the dissolution of the registered partnership, as well as the determination of its amount.[61] The problem is all the more sensitive in those Member States where the court having jurisdiction in the matter possesses a wide discretionary power to adopt measures of economic nature, being able to provide for the payment of periodic or lump sums and the transfer of ownership of property from one of the two former spouses or partners to the other. In such cases, the same judicial measure may concern the matrimonial property regime or the property consequences of the registered partnership and maintenance obligations resulting from the dissolution of the marriage or partnership. That is the context in which the case of *Van den Boogaard v. Paula Laumen* is placed, from which it follows that - according to the orientation of the Court of Justice - the interpreter is required to distinguish between aspects of the dispute or decision relating to the matrimonial property regime and those relating to maintenance obligations, assessing, in each specific case, the specific purpose of the *thema decidendum* or the judgment rendered.[62] In particular, the Court states that if that assessment 'shows that a provision awarded is

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[60] Similarly, case C-220/95, n 59 above, para 22.

[61] On the issue see, *amplius*, F.G. Viterbo 'Claim for maintenance after divorce: legal uncertainty regarding the determination of the applicable law', in J. Kramberger Škerl, L. Ruggeri and F.G. Viterbo eds, n 27 above, 171-184.

[62] Case C-220/95, n 59 above, para 21. In this case, a Dutch court had to rule on an opposition to an order of exequatur regarding a divorce issued by an English court, according to which, one of the former spouses was required to pay the other a sum of money in lieu of the obligation to pay a periodic maintenance cheque.

designed to enable one spouse to provide for himself or herself or if the needs and resources of each of the spouses are taken into consideration in the determination of its amount, the decision will be concerned with maintenance. On the other hand, where the provision awarded is solely concerned with dividing property between the spouses, the decision will be concerned with rights in property arising out of a matrimonial relationship.'[63]

Such 'guidelines' provided by the Court of Justice may be easily implemented in Member States where the spousal maintenance has an exclusively or predominantly welfare function (eg Germany). In addition, in the domestic case law of Member States, until the entry into force of the Twin Regulations, transnational issues relating to spousal maintenance were almost entirely brought within the scope of application of Regulation 2009/4. This approach, however, should be corrected in those Member States (eg Italy, France) where the maintenance following the divorce or the dissolution of the marriage or registered partnership may in practice have the main function of balancing the disparity in the economic and financial situation of the former spouses or partners at the time of the dissolution and compensating for the previous sacrifice of the professional and income expectations of one of the parties as a result of the assumption of an endo familiar supporting role.[64] These assumptions, due to their close connection with the property consequences of the partnership or with the property regime chosen by the couple, should more appropriately fall within the scope of the Twin Regulations.[65]

5. C) Issues Regarding the Succession to the Estate of a Deceased Spouse or Partner, Covered by Regulation 2012/650

It is also excluded from the scope of application of the Twin Regulations pursuant to Art 1(2):

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[63] Case C-220/95, n 59 above, para 22. Added italics.

[64] In Italy, on the balancing and compensatory function of the spousal maintenance, see Corte di Cassazione-Sezioni unite 11 July 2018 no 18287, *Giurisprudenza italiana*, 1843 (2018), commented by C. Rimini.

[65] F.G. Viterbo, 'Claim for maintenance after divorce: legal uncertainty regarding the determination of the applicable law', in J. Kramberger Škerl, L. Ruggeri and F.G.

d) the succession to the estate of a deceased spouse or partner.

In this regard, Recital 22 specifies that matters relating to succession to the estate of a deceased spouse or partner are governed by Regulation 2012/650. Specifically, the scope of application of this Regulation extends to 'all civil-law aspects of succession to the estate of a deceased person, namely all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession,' pursuant to Art 3(1)(a) and Recital 9.[66] The Succession Regulation does not limit its influence only to the assets of the estate located in the territory of the Member States bound by the Succession Regulation. On the contrary, it is intended to cover the entire estate, whether the assets are located in the territory of a Member State or in that of a third country. Furthermore, the Succession Regulation also has a broad vocation in that the conflict rules it establishes are drafted to allow the application of both the law of a Member State and the law of a third country.[67] Finally, according to the provisions of Art 23(1)(b), the law designated through the application of the Regulation determines the succession rights of the surviving partner.[68]

The possible intersection of the two distinct application fields of the Succession Regulation and the Twin Regulations depends on the fact that, in most national legal systems, the spouse or partner status in a marriage or registered partnership affects the ownership regime of the

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Viterbo eds, n 27 above, 171-183; C. Rimini, 'Assegno divorzile e regime patrimoniale della famiglia: la ridistribuzione della ricchezza fra coniugi e le fragilità del sistema italiano' *Rivista di diritto civile*, 66(2), 422, 422-441 (2020).

[66] On the subject see, I. Kunda, S. Winkler and T. Pertot, 'Jurisdiction and applicable law in succession matters' in M.J. Cazorla González, M. Giobbi, J. Kramberger Škerl, L. Ruggeri and S. Winkler eds, *Property relations of cross border couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2020), 99-131.

[67] P. Wautelet, 'La succession du conjoint ou du partenaire décédé', in A. Bonomi and P. Wautelet, n 44 above, 138-139.

[68] On the risks of discrimination of registered partnerships compared to married couples, on this topic, see F. Pascucci 'Intersectional discriminatio and survivors' pension', in J. Kramberger Škerl, L. Ruggeri and F.G. Viterbo eds, n 27 above, 129-143.

property. It follows that, in the event of death, the reconstruction of the inheritance of the spouse or partner must be carried out taking into account the effects of the dissolution of the marriage or registered partnership.[69] Indeed, the problem of delimiting the scope of application of the Twin Regulations from that of Regulation 2012/650 could arise in those Member States (eg Germany)[70] where the internal legislation provides for a different legal succession share of the surviving spouse or partner, resulting from the application of the rules on the property consequences of the marriage or registered partnership. In short, this begs the question as to which regulation should apply when the share allocated to the surviving spouse or partner is based, in part, on the inheritance law and, in the remaining part, on the property consequences of the marriage or registered partnership and its dissolution.

This issue was settled, even before the adoption of the Twin Regulations, by the Court of Justice in the *Mahnkopf* case.[71] In this judgment – albeit with regard to the status of a surviving spouse – the Court made it clear that such a provision of national law 'does not appear to have as its main purpose the allocation of assets or liquidation of the matrimonial property regime, but rather determination of the size of the share of the estate to be allocated to the surviving spouse as against the other heirs.'[72] Therefore, in doubtful cases such as those mentioned above, the interpreter must ask himself whether the rule to be applied to the specific case concerns primarily the succession in the deceased spouse's or partner's estate or the property consequences of the

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[69] On the topic, see P. Bruno, n 12 above, 59; F. Dougan, 'Matrimonial property and succession - The interplay of the matrimonial property regimes regulation and succession regulation', in J. Kramberger Škerl, L. Ruggeri and F.G. Viterbo eds, n 27 above, 75-87. Regulation 2012/650 itself specifies in Recital 12 that 'the authorities dealing with a given succession under this Regulation should, nevertheless, depending on the situation, take into account the winding-up of the matrimonial property regime or similar property regime of the deceased when determining the estate of the deceased and the respective shares of the beneficiaries.'

[70] B. Reinhartz, n 23 above.

[71] Case C-558/16, *Doris Margret Lisette Mahnkopf* v *Sven Mahnkopf*, Judgment of 1 March 2018, paras 41-44, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0558 (last visited on 5 July 2021). 72 ibid, para 40.

marriage or registered partnership. It is not easy to define the predominance or subordination of one area over the other, nor would it be correct to fix its hierarchy *a priori*. Indeed, even in these cases, the interpreter's assessment must be directed towards the functional and axiological profiles of the *thema decidendum* or decision at issue.[73] Uniform interpretation of the regulations in the Union must also be ensured by loyal cooperation between national courts and the Court of Justice.

6. D) Other Exclusions

Finally, according to Art 1(2), the Twin Regulations do not apply to:
e) social security;
f) the entitlement to transfer or adjustment between spouses or partners, in the case of divorce, legal separation, marriage annulment, dissolution or annulment of the registered partnership, of rights to retirement or disability pension accrued during the marriage or registered partnership and which have not generated pension income during the marriage or registered partnership;
g) the nature of rights in rem relating to a property;
h) any recording in a register of rights in immoveable or moveable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register.
Most of these exclusions have a common denominator: they are justified by the 'protective' function of the Member States' prerogatives.
With regard to 'social security' matters, the case law of the Court of Justice on the delimitation of the scope of application of the Brussels Convention, with specific regard to the distinction between judgments in civil and commercial matters and those in social security matters,[74]

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[73] C. Rudolf, n 13 above, 136.

[74] Case C-271/00, n 32 above. The proceeding has its origins in the preliminary agreement on the divorce concluded in Belgium between Mr Baten and Mrs Kil, by which they had agreed that the husband would pay his wife a monthly sum as a contribution to the maintenance and upbringing costs for their daughter, whereas there would be no claim against each other for benefits (pension) of any kind. Later, Mrs Kil settled with her daughter in the municipality of Steenbergen (Netherlands).

may be useful to resolve any uncertainties of interpretation regarding the issues to be included in the latter and, therefore, to be excluded from the scope of application of the Twin Regulations. The coordination of social security systems at the European level is governed by Regulation 2004/883[75] and Regulation 2009/987,[76] which define the implementation procedures. The exclusion of 'social security' is explained by the existence of important links between this field and the property regime that may exist within a couple. Consider the case where one of the parties receives a benefit paid to him or her under a social security scheme. In this situation, it is important to determine what the fate of this benefit will be. The application of the Twin Regulations can also be questioned when there is a claim by a social security institution against one of the spouses or partners.[77]

Regarding the exclusion referred to in point f), Recital 23 of the Regulations clarifies that issues of entitlements to transfer or adjustment between spouses or partners of rights to retirement or disability pension, whatever their nature, accrued during the marriage or registered partnership and which have not generated pension income during the relationship are matters that should be excluded from the scope of the Regulations, taking into account the specific systems existing in the Member States. However, '*this exclusion should be strictly interpreted*.'[78] Hence, the Twin Regulations should govern in particular the issue of classification of pension assets, the amounts that

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As the conditions laid down in its social assistance regulation (ABW) were met, the municipality decided to grant the two women a financial aid. Later, the same municipality brought an action for recourse against Mr Baten in order to recover the amount of the welfare allowance granted. The Court has ruled that 'the concept of 'social security' does not encompass the action under a right of recourse by which a public body seeks from a person governed by private law recovery in accordance with the rules of the ordinary law of sums paid by it by way of social assistance to the divorced spouse and the child of that person.'

[75] European Parliament and Council Regulation (EC) 883/2004 of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/1.

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

[77] P. Wautelet 'La sécurité sociale', in A. Bonomi and P. Wautelet, n 44 above, 151.

[78] Added italics.

have already been paid to one spouse or partner during the marriage or registered partnership, and the possible compensation that would be granted in case of pension subscribed with common assets.

Another exclusion is that concerning matters relating to the 'nature of rights *in rem*.' This wording clearly indicates that the scope of the exclusion is intended to be limited and must be strictly interpreted.[79] It is not the intention here to exclude the application of the Regulation whenever a matter has a connection with a right in rem. The purpose of this exclusion is to preserve the classification and the limited number ('numerus clausus') of rights *in rem* known in the national law of some Member States. This is consistent with Art 345 TFEU which states that 'The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.' Recital 24 of the Twin Regulations emphasises in this respect that a Member State 'should not be required to recognise a right in rem relating to property located in that Member State if the right in rem in question is not known in its law.' However, a temperament to these rules is the mechanism of the so-called 'adaptation of rights in rem,' provided for in Recital 26 and Art 29 of the twin Regulations. For a more detailed analysis of these aspects, see the commentary to Art 29.

The last exclusion mentioned in Art 1(2)(h) is that relating to '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.' This exclusion, which is also provided for in Art 1(2)(l) of the Succession Regulation, is intended to preserve the integrity of the recording system set up by each Member State. Matters relating to the recording in a register which are excluded from the scope of the twin Regulations will almost necessarily be governed by the law of the State in which the register is kept. This is referred to as *lex registrii*. Moreover, as Recital 27 of the Twin Regulations states, '[i]n order to avoid duplication of documents, the registration authorities should accept such documents, drawn up in another Member State by the competent authorities the circulation of which is provided for by this Regulation. This should not preclude the

[79] A. Köhler, 'Der sachliche Anwendungsbereich des Guterrechtsverordnungen und der Umfang des Guterrechtsstatuts', in A. Dutta and J. Weber eds, *Die Europäischen Güterrechtsverordnungen* (Munich: Editorship, 2017), 158.

authorities involved in the registration from asking the person applying for registration to provide such additional information, or to present such additional documents, as are required under the law of the Member State in which the register is kept, for instance information or documents relating to the payment of revenue.'

The effects of the recording of a right in the register are also excluded from the scope of the Twin Regulations. In this regard, some examples are given in Recital 28: 'It should therefore be the law of the Member State in which the register is kept which determines whether the recording is, for instance, declaratory or constitutive in effect. Thus, where, for example, the acquisition of a right in immoveable property requires a recording in a register under the law of the Member State in which the register is kept in order to ensure the erga omnes effect of registers or to protect legal transactions, the moment of such acquisition should be governed by the law of that Member State.'

These rules meet the need for legal certainty, also vis-à-vis third parties, concerning the entitlement and ownership of property rights as they result from the registers in question; this is essential when assessing the matrimonial property regime or the property consequences of a registered partnership.[80]

[80] P. Bruno, n 12 above, 64.

Article 2
Competence in matters of matrimonial property regimes/property consequences of registered partnerships within the Member States

Francesco Giacomo Viterbo and Andrea Fantini

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
This Regulation shall not affect the competence of the authorities of the Member States to deal with matters of matrimonial property regimes.	This Regulation shall not affect the competence of the authorities of the Member States to deal with matters of **property consequences of registered partnerships.**

Summary: I. Competence of the authorities of the Member States.

I. Competence of the authorities of the Member States

Art 2 helps to demarcate the boundaries between the scope of the Twin Regulations and that of national laws. According to this Article, the Twin Regulations do not affect the competence of the authorities of the participating Member States to deal with matters of matrimonial property regimes or property consequences of registered partnerships. It follows that the purview and the organisation of the work of these national authorities are left with the laws of the Member States concerned. For instance, whenever an issue arises before any national authority that calls for the application of Regulation 1103, that authority will ascertain the existence of a marriage under its *lex fori* in order to decide whether or not the jurisdiction has to be declined.

This Article emphasises that the Member States retain their authority to regulate the property relationships of couples. The adoption by the Twin Regulations of common conflict-of-law rules, supplemented by a

set of rules on jurisdiction and the free movement of decisions, does not affect the freedom of the Member States to determine the property consequences of marriage and registered partnerships.[1]

Finally, the Twin Regulations do not affect:

- the national laws governing the allocation of cases among the judicial authorities of the State concerned;
- the national laws governing the distribution of competences among the regional and local authorities of a given State;
- the national laws governing the distribution of competences and powers between judicial and administrative authorities, and those relating to the role of notaries.[2]

However, Member States were invited to provide the Commission with information on authorities potentially involved in proceedings under the Twin Regulations. According to Art 63, the participating Member States should have provided the Commission with a short summary of their national legislation and procedures relating to matrimonial property regimes, including information on the type of authority which has competence in matters of matrimonial property regimes and property consequences of registered partnerships. The participating Member States must have communicated to the Commission other information on the specific procedures and authorities referred to in Art 64(1).

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[1] P. Wautelet, 'Article 2. Compétences en matière de régimes matrimoniaux', in A. Bonomi and P. Wautelet eds, *Le droit européen des relations patrimoniales de couple. Commentaire des Règlements (UE) n. 2016/1103 et 2016/1104* (Brussels: Édition 2021), 204.

[2] S. Marino, 'Article 2. Competence in matters of matrimonial property regimes [of property consequences of registered partnerships] within the Member States', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples. A Commentary* (Cheltenham: Edward Elgar, 2020), 30-31.

Article 3
Definitions

Andrea Fantini

Regulation (EU) 2016/1103

1. For the purposes of this Regulation:

(a) 'matrimonial property regime' means a set of rules concerning the property relationships between the spouses and in their relations with third parties, as a result of marriage or its dissolution;

(b) 'matrimonial property agreement' means any agreement between spouses or future spouses by which they organise their matrimonial property regime;

(c) 'authentic instrument' means a document in a matter of a matrimonial property regime which has been formally drawn up or registered as an authentic instrument in a Member State and the authenticity of which:

(i) relates to the signature and the content of the authentic instrument; and

(ii) has been established by a public authority or other authority empowered for that purpose by the Member State of origin;

(d) 'decision' means any decision in a matter of a matrimonial property regime given by a court of a Member State, whatever the decision may be called, including a decision on the

Regulation (EU) 2016/1104

1. For the purposes of this Regulation:

(a) '**registered partnership**' means **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;**

(b) 'property consequences of a registered partnership' means the set of rules concerning the property relationships of the partners, between themselves and in their relations with third parties, as a result of the legal relationship created by the registration of the partnership or its dissolution;

(c) 'partnership property agreement' means any agreement between partners or future partners by which they organise the property consequences of their registered partnership;

(d) '**authentic instrument' means a document in a matter of the property consequences of a registered partnership which has been formally drawn up or registered as an authentic instrument in a Member State and the authenticity of which:**

determination of costs or expenses by an officer of the court;

(e) 'court settlement' means a settlement in a matter of matrimonial property regime which has been approved by a court, or concluded before a court in the course of proceedings;

(f) 'Member State of origin' means the Member State in which the decision has been given, the authentic instrument drawn up, or the court settlement approved or concluded;

(g) 'Member State of enforcement' means the Member State in which recognition and/or enforcement of the decision, the authentic instrument, or the court settlement is requested.

2. For the purposes of this Regulation, the term 'court' means any judicial authority and all other authorities and legal professionals with competence in matters of matrimonial property regimes which exercise judicial functions or act by delegation of power by a judicial authority or under its control, provided that such other authorities and legal profes sionals offer guarantees with regard to impartiality and the right of all parties to be heard, and provided that their decisions under the law of the Member State in which they operate:

(a) may be made the subject of an appeal to or review by a judicial authority; and

(b) have a similar force and effect as a decision of a judicial authority on the same matter.

(i) **relates to the signature and the content of the authentic instrument, and**

(ii) **has been established by a public authority or other authority empowered for that purpose by the Member State of origin;**

(e) 'decision' means any decision in a matter of the property consequences of a registered partnership given by a court of a Member State, whatever the decision may be called, including a decision on the determination of costs or expenses by an officer of the court;

(f) 'court settlement' means a settlement in a matter of the property consequences of a registered partnership which has been approved by a court, or concluded before a court in the course of proceedings;

(g) 'Member State of origin' means the Member State in which the decision has been given, the authentic instrument drawn up, or the court settlement approved or concluded;

(h) 'Member State of enforcement' means the Member State in which recognition and/or enforcement of the decision, the authentic instrument, or the court settlement is requested.

2. For the purposes of this Regulation, the term 'court' means any judicial authority and all other authorities and legal professionals with competence in matters of **property consequences of**

The Member States shall notify the Commission of the other authorities and legal professionals referred to in the first subparagraph in accordance with Article 64.

registered partnerships which exercise judicial functions or act by delegation of power by a judicial authority or under its control, provided that such other authorities and legal professionals offer guarantees with regard to impartiality and the right of all parties to be heard, and provided that their decisions under the law of the Member State in which they operate:

(a) may be made the subject of an appeal to or review by a judicial authority; and

(b) have a similar force and effect as a decision of a judicial authority on the same matter.

The Member States shall notify the Commission of the other authorities and legal professionals referred to in the first subparagraph in accordance with Article 64.

Summary: I. Introduction. – II. Lack of a Definition of Marriage. – III. Matrimonial Property Regime. – IV. Registered Partnership. – 1. Property Consequences of Registered Partnership. – V. Matrimonial/ Partnership Property Agreement. – VI. Authentic Instrument. – VII. Decision. – VIII. Court Settlement.. – IX. Member State of Origin and Member State of Enforcement.. – X. Jurisdiction.

I. Introduction

The definitions in Art 3 can be divided into five groups. A first group comprises those intended to clarify the scope of Art 1(1) and thus the material scope of the Regulation. This is the case with the definitions of 'matrimonial property regime' (Art 3(1)(a) of Regulation (EU) 2016/1103) and 'property consequences of a registered partnership' (Art 3(1)(b) of Regulation (EU) 2016/1104). The definition of 'registered partnership' (Art 3(1)(a) of Regulation (EU) 2016/1104)

also serves a similar function. In a second group appear the definitions of 'marriage contract' and 'partner contract.' A third group of definitions brings together the concepts used in the context of Chapters IV and V: these are the concepts of 'Member State of origin' and 'Member State of enforcement' (Art 3(1)(e) and (f)), as well as those of 'authentic instrument,' 'decision' and 'court settlement' (Art 3(1)(g) to (i)). Finally, Art 3(2) defines the term 'court': this concept plays a central role in the overall scheme of the text, in particular for the purpose of determining the scope of application of the rules on jurisdiction and those on recognition and enforcement.[1]

II. Lack of a Definition of Marriage

Proceeding in order, the Regulation (EU) 2016/1103 does not define either marriage or spouse, so there is no position of the legislator at European level on the relevant concepts and indeed Recital 17 clarifies that 'This Regulation does not define marriage, which is defined by the national laws of the Member States.'

The explanatory memorandum[2] accompanying the Regulation makes it clear that the future measure will in no way affect either the existence or the validity of a marriage under the law of a Member State or the recognition in a Member State of a marriage contracted in another Member State. These matters, as the Preamble makes clear, will of course continue to be governed by the national law of each Member State, including specific provisions of private international law.

The identification of the persons who may be united in matrimony is therefore a matter for the Member States, and an expression of the

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[1] A. Bonomi, 'Article 3', in A. Bonomi and P. Wautelet eds, *Le droit européen des relations patrimoniales de couple. Commentaire des Règlements (UE) nos 2016/1103 et 2016/1104* (Brussels: Bruylant, 2021), 213-214.

[2] European Commission, *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes*, COM/2016/0106 final - 2016/059 (CNS), 7, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52016PC0106 (last visited 13 September 2021).

various social and cultural traditions, which sometimes have diametrically different approaches.

Until the Court expressly pronounces on this point, the fact remains that the Regulation on matrimonial property regimes will only apply to same-sex marriages in those countries where this type of marriage is permitted by law or where the legal system in question gives effect to this type of marriage, whereas in the other Member States, the extension of its effects cannot be invoked.

The boundaries of the personal scope of application of the two Regulations do not, however, derive solely from the choices made by the European legislator but also depend on how each legal system classifies the cross-border legal relationship from which derive the property consequences to be regulated.[3]

The problem of the definition of marriage is not new in European private international law. Not even the other European Regulations on family law define the concept of 'marriage,' as is the case with the Brussels II-*bis*[4] Regulation and the Rome III Regulation.[5] The absence, in these texts, of a definition of marriage is explained by political considerations. Such a definition, in fact, inevitably raises the question of the admissibility of same-sex marriage, an issue that remains highly controversial even today within European States. While 'marriage for all' is now recognised in the legislation of a large and growing number

[3] P. Bruno, 'I Regolamenti UE n. 1103/16 e n. 1104/16 sui regimi patrimoniali della famiglia: struttura, ambito di applicazione, competenza giurisdizionale, riconoscimento ed esecuzione delle decisioni' *Diritto di famiglia: aggiornamento 2019*, available at https://www.distretto.torino.giustizia.it/distretto/allegato_corsi.aspx?File_id_allegato=3431 (last visited 13 September 2021).

[4] Council Regulation (EC) 2003/2201 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) 2000/1347 [2003], OJ L 338/1.

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

of Member States,[6] it is still anathema to others.[7] Between these two groups of countries there is an intermediary group, made up of countries which, without admitting same-sex marriage into their national legislation, are nevertheless prepared, when such a union has been celebrated abroad, to recognize it as a marriage or, at the very least, to give it certain effects, for example by assimilating it to a registered partnership.[8] The rejection of same-sex marriages, which in

[6] This marriage is currently provided for in the domestic law of 13 Member States: Germany, Austria, Belgium, Spain, Denmark, Finland, France, Ireland, Luxembourg, Malta, the Netherlands, Portugal and Sweden.

[7] Reference is made to a group of Member States that do not provide in their national law for any form of union between same-sex partners (neither marriage nor partnership): these are Bulgaria, Latvia, Lithuania, Poland, Romania and Slovakia.

[8] This solution, sometimes called 'downgrading,' is followed by most of the Member States that do not have 'marriage for all': Croatia, the Czech Republic and Slovenia. For all insights into matrimonial property regimes in Croatian law, see L. Ruggeri and S. Winkler, 'Neka pitanja o imovinskim odnosima bračnih drugova u hrvatskom i talijanskom obiteljskom pravu' 40 *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 167, 167-200 (2019). In Italy it is not applicable, pursuant to Art 32-*bis* legge 31 May 1995, no 218 and according to several commentators, that for marriages between persons of the same sex, contracted abroad by Italian citizens: C. Campiglio, 'La disciplina delle unioni civili transnazionali e dei matrimoni esteri tra persone dello stesso sesso' *Rivista di diritto internazionale privato e processuale,* 33, 42-66 (2017); D. Damascelli, 'La legge applicabile ai rapporti patrimoniali tra coniugi, uniti civilmente e conviventi di fatto nel diritto internazionale privato italiano ed europeo' *Rivista di diritto internazionale,* 1103, 1103-1155 (2017); I. Viarengo, 'Effetti patrimoniali delle unioni civili transfrontaliere: la nuova disciplina europea' *Rivista di diritto internazionale privato e processuale*, 33, 38 (2018); P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate* (Milan: Giuffrè Francis Lefebvre, 2019), 22; S. Marino, *I rapporti patrimoniali della famiglia nella cooperazione giudiziaria civile dell'Unione europea* (Milan: Giuffrè Francis Lefebvre, 2019), 28. This approach is compatible with the ECHR: Eur. Court H.R., *Hämäläinen* v *Finlande*, Judgment of 16 July 2014, available at http://hudoc.echr.coe.int/fre?i=002-9593 (last visited 13 September 2021); Eur. Court H.R., *Orlandi and Others* v *Italy*, Judgment of 14 December 2017, available at http://hudoc.echr.coe.int/eng?i=001-179547 (last visited 13 September 2021). Among the Member States that do not recognize 'marriage for all,' two (Malta and Estonia) would be ready to register as such a same-sex marriage celebrated abroad. The same should apply in Italy, at least when same-sex spouses do not have Italian nationality and their national law provides for 'marriage for all.'

some States extends to registered partnerships, was the main obstacle to the adoption of the Regulation through the unanimity rule laid down in primary law, obliging the Member States in favour to opt for enhanced cooperation.[9]

If the absence of a definition of marriage raises particularly controversial questions with regard to 'marriage for all,' it also has implications for other 'types' of union that do not correspond to the traditional model of marriage. This is the case, on the one hand, of polygamous marriages and, on the other hand, of informal marriages, which are formed without a real celebration and/or without civil-status registration. The question of the applicability of the Regulation to the property relationships of couples bound by such unions, not being decided by a uniform definition, will depend – as in the case of 'marriage for all' – on the classification of these unions in the Member State of the forum.

As is clear from Recital 21 and Art 9 of the Regulation, the validity, existence and recognition of a marriage remain subject to the private international law of the forum State; therefore, when this question arises, the concept of marriage is that used in the private international law of that State. When it comes to knowing whether a same-sex marriage celebrated abroad is valid in the forum or whether it must be recognised there, a Member State that does not provide for this type of union is nevertheless quite free to qualify it as a 'marriage,'if its private international law so allows. Applying the national rules on marriage, the courts of that State could therefore conclude that such a marriage is indeed valid or that it must produce effects in the State of the forum.[10]

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[9] For an overview, K. Boele-Woelki, 'The Legal Recognition of Same-Sex Relationships Within the European Union' *Tulane Law Review*, 82, 1949, 1950-1981 (2008); D. Gallo, L. Paladini and P. Pustorino, *Same-Sex Couples before National, Supranational and International Jurisdictions* (Berlin-Heidelberg: Springer, 2014), *passim*.

[10] A. Bonomi, n 1 above, 219-226

The differences between the Member States resulting from the lack of an autonomous and uniform definition of marriage could be overcome if the Court of Justice of the European Union were in future to infer from primary Union law an obligation on all the Member States to recognize and/or implement same-sex marriages validly celebrated in another Member State. In the Coman[11] judgment, the Grand Chamber of the Court took a first step in this direction, while remaining very cautious. In that judgment, the Court deduced, from the principle of freedom of movement and the right to respect for family life guaranteed by Art 7 of the Charter of Fundamental Rights, the obligation for a Member State to recognize same-sex marriages, even if such marriages do not exist under the law of that State. However, the Court has been careful to emphasize, on several occasions, that this obligation exists only 'for the sole purpose of granting' the same-sex spouse 'a derived right of residence' (or 'other rights which that person may derive' from Union law) and that 'it does not require that Member State to provide, in its national law, for the institution of same-sex marriage.'

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[11] Case C-673/16 *Relu Adrian Coman and Others* v *Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, Judgment of 5 June 2018, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016 CJ0673 (last visited 13 September 2021). For a commentary on the case: G. Perlingieri and G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordina mentale* (Naples: Edizioni Scientifiche Italiane, 2019), 158-160. The case concerns two men, Relu Adrian Coman, a Romanian who also holds US citizenship, and Robert Clabourn Hamilton, a US citizen. They got married in 2010 in Belgium. Both are resident in Belgium, by virtue of the right to free movement enjoyed by both EU citizens (Art 21 TFEU) and their family members, even if they have non-EU citizenship. In 2012, procedures were initiated in Romania, in order to allow Relu Adrian Coman to work and reside legally in his country with his spouse. The rejection of the request was appealed against, on the grounds that it was unconstitutional in relation to the provisions of Art 277, paras 2 and 4 of the Romanian Civil Code. The Court of Justice carried out a sort of balancing of principles, according to a criterion of reasonableness, and came to the conclusion that domestic public policy could be 'attenuated' by the risk of a limitation or exception being placed on freedom of movement within the territory of the Member States. This is on the assumption that recognizing some of the effects of a same-sex marriage validly constituted in another Member State does not affect the domestic Regulation of marriage, which is in any case a matter for each Member State.

On the other hand, for the time being, it does not seem possible to deduce an obligation to recognize same-sex marriages from the right to respect for family life, which is protected by Art 8 ECHR as well as by Art 7 of the EU Charter of Fundamental Rights.

As already noted, the European Court of Human Rights has in fact ruled that Art 8 of the Convention obliges member states to guarantee some form of recognition and legal protection of the rights arising from such a union.[12] However, it considers that contracting States are not obliged to provide for 'marriage for all' in their domestic law,[13] nor to recognize such a union as marriage when it is contracted abroad.[14] Therefore, respect for the family life of same-sex spouses is sufficiently protected if their union is recognised, at least, as a *de facto* union permitted by law.[15]

As indicated, this case-law seems to require Member States participating in enhanced cooperation who are not prepared to classify a same-sex marriage as a marriage, to subject that union, at the very least, to the provisions of the Regulation on unions.[16]

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[12] For a study, J. M. Scherpe, 'The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights' 10 *The Equal Rights Review*, 83, 83-96 (2013); P. Kinsch, 'European Courts and the obligation (partially) to recognise foreign same-sex marriages: on Orlandi and Coman', in A. Bonomi and G.P. Romano*, Yearbook of Private International Law* Vol. XXI 2019/2020 (Köln: Verlag Dr. Otto Schmidt, 2021), 47-59.

[13] Eur. Court H.R., *Schalk and Kopf* v *Austria,* Judgment of 24 June 2010, available at http://hudoc.echr.coe.int/fre?i=001-99605 (last visited 13 September 2021).

[14] Eur. Court H.R., *Hämäläinen* v *Finlande*, n 8 above.

15 Eur. Court H.R., *Orlandi and Others* v *Italy*, n 8 above.

[16] A. Bonomi, n 1 above, 229-231.

III. Matrimonial Property Regime

Having made this broad premise about the concept of marriage, it is necessary to specify the notion of 'matrimonial property regime' as indicated in Art 3(1)(a) of Regulation (EU) 2016/1103.

In the European context, it is widely accepted that the spouses, at the time of the marriage, choose the regime governing their property relations and, in the absence of such a decision, the legal regime of property is applied. There are some legal systems inspired by the rule of the separation of property, which nevertheless provide for certain exceptions to the separation of property, by granting the judge wide powers in the event of marital crisis. These are the so-called separatist systems in which there is also a minimum permeability of the spouses' assets.[17]

This is especially the case in common law countries where *ante nuptial contracts* are often recognised. The prevalence of the separation regime is essentially accompanied by a greater ease in recognizing an incisive autonomy of the individuals in the marriage, and also prior to it.

However, the legal regime in most civil law systems is still community of property.[18] In these systems, joint ownership relates only to rights acquired in any capacity after the marriage, as well as income and gains from the activities of the spouses and the fruits of personal and joint property received during the same period.[19]

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[17] These are England, Wales, Ireland, Scotland, Austria and Greece. In Greece eg a form of profit-sharing is established (Art 1400-1402 Civil Code) in the event of divorce, separation for more than three years or marriage annulment. A system of community of profits and acquisitions may also be stipulated by notarial agreement (Art 1403 ff. Greek Civil Code): E. Dacoronia, 'The Greek Family Law and the Principle of the Equality of the Two Sexes', in M. Rotondi ed, *Inchieste di diritto comparato - The Marriage* (Milan: Giuffrè, 1998), 234; In Austria, in the event of divorce, it is stipulated that the assets that were used by the spouses during their lives, such as the family home and the savings accumulated during their lives, are to be divided equally between the spouses, and if the spouses cannot agree on the division, the judge is given considerable power to decide on an equitable basis, taking into account criteria such as the contribution made to the creation of the assets, the interest of the children, the cooperation in the activities of the spouse, and the maintenance and education of the children.

[18] They are Belgium, France, Italy, Luxembourg, Portugal, Spain, but also Poland, the Czech Republic, Slovakia, Hungary, the countries of the former Yugoslavia, Romania, Bulgaria and the Russian Federation.

[19] F.R. Fantetti, 'Il regime patrimoniale europeo della famiglia' Famiglia, *Persone e Successioni*, 140, 140-141 (2011).

Generally speaking, it is possible to identify, by making a superficial observation of the foreign legal landscape, the following main categories of family property regimes community (legal regime in France,[20] Belgium, Luxembourg, Portugal, Spain, as well as in Central and Eastern European countries such as Poland, the Czech Republic, Slovakia, Hungary, Romania, Bulgaria and the Russian Federation), in which the spouses have joint ownership of rights, income and revenues acquired after the marriage, with the exception of the categories of property considered personal (those received by inheritance or by donation and those for strictly personal use) and where, correspondingly, a distinction is made between obligations imposed on common property, as they relate to the management of family life, and personal obligations, contracted before the marriage; universal community of property, which covers all the property of the spouses, with the exception of specific property and property excluded by the spouses themselves, by third parties or by law (conventional regime in Germany and legal regime in the Netherlands);[21] community of purchases and '*de residuo* community,' in which, in addition to the categories of common property and personal assets, a '*de residuo* community' emerges, which is to be divided, insofar as it exists and has not been consumed at the time of the dissolution of the regime, between both spouses (legal regime in Italy, in which

[20] In French law, where there is a system of community of property acquisition, there are three sets of assets, two of which are made up of the personal property of each spouse and one of which is made up of the joint property. The personal property includes: personal property *à raison de leur origine,* eg property that the spouse already owned before the marriage, property acquired free of charge through a donation or inheritance, and property that has been substituted for personal property; property *propres par leur nature*, eg property or income obtained by way of compensation for personal injury or non-pecuniary damage, property for strictly personal use and property used in the exercise of one's profession. The common property, on the other hand, is made up of property acquired jointly and severally by the spouses during the marriage, the proceeds of their respective work activities and the income from personal property received during the marriage.

[21] The Dutch *gemeenschap van goederen* consists of all the present and future property of the spouses, except for property donated or bequeathed to one or other of them on the condition that it remains personal and strictly personal property, as well as debts contracted before and during the marriage.

the '*de residuo* community' concerns the fruits of each spouse's own assets, the proceeds of their separate activities, assets and/or increases relating to the business of one of the spouses, according to Arts 177(b) and (c) and 178 of the Civil Code); community of increments, whereby the assets are personal during the period of the marriage bond, and tend to be freely available to each spouse,[22] and at the time of the dissolution of the regime, one spouse has a claim against the other corresponding to half of the increase in value of the latter's assets during the marriage bond (legal regime in Germany,[23] Greece, Switzerland, Denmark,

[22] The individual spouse's powers of disposal tend to be wide, as individual legal systems set specific limits on these powers. For example, in Danish law, no dispositive act may be carried out on the property used as a family residence and its furnishings without the consent of the other spouse. In German law there is a similar limitation for property intended as a family residence and its furnishings, with the consequence that, in the event of autonomous disposition by the owner spouse, the sanction provided by the law is the absolute ineffectiveness of the contractual act with the loss of the position of the third party purchaser of good faith.

[23] The community of increments in Germany is the *Zugewinngemeinschaft* (§§ 1363 ff. BGB). In particular, on the termination of the regime, the increase (*Zugewinn*) of the assets of each spouse is determined and an adjustment is made between the increases in assets (*Zugewinnausgleich*). This is done by calculating the difference between the value of the spouse's assets at the time of the marriage and the value of those assets at the time of the dissolution of the marriage. If there are liabilities at the beginning or end of the marriage, the value of the assets is considered to be zero. The assets received by each spouse during the marriage by way of inheritance or gift are also included in the initial assets, as are the assets that a spouse has given or dissipated. An inventory of the assets of one spouse and of the other should be carried out when the marriage bond is formed in order to make it possible, at the time of its dissolution, to calculate any balance that may be due, but in the absence of an initial inventory, it is assumed that the final assets of each spouse are fully increased and are the result of the activity and work carried out by him or her during the regime. On the dissolution of the scheme, the increments of the two assets are compared, so that if the increment obtained from the assets of one spouse is less than the increment obtained from the assets of the other spouse, the latter will be required to pay half the difference in money to the former.

conventional regime France,[24] as well as in the Netherlands, Spain and Catalonia);[25] separation of property[26] (legal regime in Austria,

[24] French law recognizes the principle of the autonomy of the spouses in the choice of matrimonial property regime, as well as the principle that the regime may be modified during the life of the marriage. The spouses are therefore given the option of opting by public deed for the *regime of participation aux acquêts*, referred to in Arts 1569 ff. of the Civil Code, eg for the community of increases.

[25] In these regimes, where there is a deferred sharing in the value of the increase of assets (see the German *Zugewinngemeinschaft*) or a deferred participation in the value of acquisitions (see *Errungenschaftsbeteiligung-participation aux acquêts*, Art 196 ff. of the Swiss Civil Code), the community profile only emerges at the dissolution of the marriage, unlike those in which the communion of fortunes is a genetic profile at the beginning of the marriage. In this respect, instruments are also provided to preserve the legitimate expectation of one spouse to obtain his or her due and not to see the assets of others depleted. This regime is therefore close to the so-called deferred community of property (*de residuo*) regime, in which there is no joint ownership of the property during married life but there is a form of property sharing at the end of married life. It should be noted that even with regard to *de residuo* community of property in Italian law, authoritative theories recognize that this form of community of property, far from taking the form of joint ownership, takes the form of an obligatory credit-debit relationship between the spouses. It is, therefore, an ideal communion which takes the form of the allocation of sums from one spouse to the other, as a balancing of the value of the property covered by it. In this sense F. Corsi, 'Il regime patrimoniale della famiglia', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milan: Giuffrè, 2nd ed, 1984), I, 191.

[26] The regime of separation of property is mitigated, in countries where it is provided for, by the possibility of the allocation, in the event of marital crisis, of an economic benefit (goods or credits) from one spouse to the other by the judge on the basis of a judgment of equity or automatically. This circumstance derives from the assumption that the less well-off spouse has, in any case, contributed to the wealth of others during the marriage. In such a case, the redistribution of family wealth will take into account the duration of the marriage, the work contribution made by the spouse to be 'benefited,' and the amount of the increase in assets under discussion. In this respect, see Arts 1400-1402 of the Greek Civil Code; Art 41 of the Civil Code of Catalonia; § 81 of the Austrian Marriage Law (*Ehegesetz-EheG*); *Section* 24 of the *Matrimonial Causes Act 1973*, as amended by the *Matrimonial and Family Proceedings Act 1984* and the *Family Law Act 1996*, which provides that the English court may, in the event of a marital crisis, trigger a mechanism for the redistribution of family wealth in favour of the weaker spouse, that is, it may proceed to a 'riallocation of property by issuing property adjustment orders upon divorce.'

England,[27] Greece, Catalonia[28]).[29] Turning to the issue of debts, European legal systems make a distinction between obligations contracted before the marriage, which are usually considered to be personal, and the obligations relating to the marriage, which affect the joint property. The administration of property is on an equal footing, each spouse being able to act separately, except in the case of extraordinary administration or certain individually identified acts of disposition. In essence, this is the community property system, which has taken on a number of different guises, if we consider, for example, the Swedish community of property regime, which, according to the provisions of the 1987 Marriage Code, provides that the property of each spouse that does not fall into individual ownership – by gift or inheritance or because it has a personality clause and in any case does not derive from the reuse of personal property – falls into the marital property and is to be divided in equal parts at the dissolution of the marriage, unless otherwise agreed. The Swedish matrimonial property regime is also similar to common law systems in that it allows the divorce court to order a division of the deferred community of property into unequal parts if the division by half is unequal.[30] Similarly, in Denmark, the regime of property acquired during the marriage union is defined as joint property where there is no indication of an agreement between the spouses on an alternative regime. Each spouse has wide powers of management in relation to the property acquired during the union and no act of disposition of the marital property may be carried out in such a way as to reduce the expectations of the spouse, on pain of an obligation to pay damages or

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[27] It should be noted that in most common law legal systems there is no concept of a family property regime in the strict sense of the term, since the matrimonial bond does not affect the property regime and the distribution of income between spouses.

[28] As well as in most states of the United States of America. In a few states of the United States of America the legal regime is that of community of purchase, as described above. These are, among others, the states of Texas, Arizona, California, Nevada, New Mexico, Idaho and Lousiana.

[29] This analysis is due to F. Mancini, 'Regimi patrimoniali della famiglia e prospettive di innovazione' *Rassegna di diritto civile*, I, 163, 168-170 (2014).

[30] D. Bradley, 'Marriage, Family, Property and Inheritance in Swedish Law' 39 *The International and Comparative Law Quarterly*, 370-395 (1990).

the possibility of requesting the annulment of the act against the third party purchaser or causing the early dissolution of the regime and the division of the property. This is a challenge given to the jointly-owned spouse who anticipates forms of protection in order to guarantee the community of property that will be formed when the bond is dissolved.

The model of deferred sharing in the value of the increase in assets acquired after the marriage – in which the creation of a claim to half of the increase in value realised by the spouse's assets during the marriage is deferred until the dissolution of the regime – clearly combines in itself some aspects of the separation regime and others proper to community. During the marriage, in fact, the regime functions as a separatist one, each spouse retaining his or her own management of the system, only to become communal after the dissolution of the marriage. In the German legal system, the 1957 reform law introduced new property ownership schemes that apply in the absence of a different agreement, consisting of the community of acquisitions or increases, the aim of which is to favor the weaker spouse who is unable to increase his or her assets because he or she is busy with family duties.[31]

The deferred sharing in the value of the assets acquired after the marriage – the *Zugewinngemeinschaft* (community of increments) – currently constitutes the German legal model, and includes in the calculation of the increase in value basically all the assets of each spouse, deducting only the assets considered to be the spouses' own – the assets acquired before the marriage – providing, however, for the obligation to provide detailed information on the precise assets of the spouses, not only at the time of dissolution but also in the event of an early request by one of them.[32]

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[31] In Germany, the regime of general community of property, eg community of property that includes not only the property acquired by the spouses during the marriage relationship but also that which they hold at the time of the marriage, is regulated as a conventional regime.

[32] D. Henrich, 'Sul futuro del regime patrimoniale in Europa', in S. Patti ed, *Annuario di diritto tedesco 2002* (Milan: Giuffrè, 2003), 29-48.

According to this model, each spouse remains the sole owner and administrator of the assets acquired during the marriage and, in the event of dissolution of the marriage, taking into account the initial assets of the spouses at the time of the marriage, it is verified which of the assets has had a greater increase and an adjustment is made, eg the difference consisting of the greater increase is divided between the spouses and the one who has had the greater increase is obliged to pay half of the difference to the other (§ 1378 BGB).[33]

There is therefore a commonality of principles between European legal systems, such as those identifiable in negotiating autonomy, the conclusion of matrimonial agreements and the implementation of mechanisms for adapting statutory matrimonial property regimes, and also in the modifiability of matrimonial agreements, as well as the possibility of creating atypical matrimonial property regimes. The comparative analysis confirms that spouses are free to adopt the matrimonial property regime of their choice and that the fundamental rule with regard to family property regimes is that of freedom of choice, eg the free exercise of private autonomy, at least as far as the fundamental alternative.[34]

At the same time, there is a tendency to bring European legal systems closer together, as we know they are originally different.[35] There is thus a common ground at European level that is identified in the principles of formal and substantive equality between men and women, of moving away from maintenance towards forms of contribution inspired by criteria of substantive equality, of moving away from the very distinction between communion and separation of property with the imposition of the principle of respect and attention to acts of disposal – such as family residence – regardless of the type of legal property regime chosen.[36]

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[33] D. Henrich, 'La comunione dei beni e la comunione degli incrementi', in S. Patti and M. Cubeddu eds, *Introduzione al diritto della famiglia in Europa* (Milan: Giuffrè, 2008), 223-240.

[34] A. Fusaro, 'I rapporti patrimoniali tra coniugi in prospettiva comparatistica', in G. Alpa and G. Capilli eds., *Diritto privato europeo* (Padua: CEDAM, 2006), 53-115; S. Patti, 'I regimi patrimoniali tra legge e contratto', in Id and M. Cubeddu eds, *Introduzione al diritto della famiglia in Europa* (Milan: Giuffrè, 2008), 191-222.

[35] G. Oberto, 'La comunione coniugale nei suoi profili di diritto comparato, internazionale ed europeo' *Il diritto di famiglia e delle persone*, 367, 367-400 (2008).

[36] For an extensive discussion, F.R. Fantetti, no 19 above, 141-142.36 For an extensive discussion, F.R. Fantetti, no 19 above, 141-142.

IV. Registered Partnership

In a partially different way from its 'twin' text, the Regulation (EU) 2016/2014 instead presents an autonomous definition of registered partnership in Art 3(1)(a), although Recital 17 takes care to specify that this notion applies 'solely for the purpose of this Regulation' and that 'The actual substance of the concept should remain defined in the national laws of the Member States,' such that 'Nothing in this Regulation should oblige a Member State whose law does not have the institution of registered partnership to provide for it in its national law.' The provision thus establishes an autonomous definition, independent of the definition adopted by the national law of each Member State. It corresponds closely to the definition of registered partnership in Art 1 of the Munich Convention of 5 September 2007.[37] According to Art 3(1)(a) of Regulation (EU) 2016/1104 a registered partnership means '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 fulfills the legal formalities required by that law for its creation.'

Four elements come to the fore from this definition: (a) a scheme aimed at organizing 'the common life of two persons'; (b) a scheme provided for by law; (c) compulsory registration; (d) compliance with the constitutive legal requirements laid down by law.

The European legislature also considered it appropriate to distinguish between couples whose union is institutionally formalised by registration before a public authority and couples who live in a de facto union: registration is in fact a constituent element of the family model that the European legislature had in mind.

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[37] Monaco Convention on the Recognition of Registered Partnerships of 5 September 2007, drawn up under the aegis of The International Commission on Civil Status (ICCS); it has only been ratified by Spain and is therefore not in force. According to Art 1, 'the expression "registered partnership" means a commitment to live together, other than a marriage, entered into by two persons of the same sex or different sex, giving rise to registration by a public authority.' The Convention is accessible on the ICCS website at http://www.ciec1.org/SITECIEC (last visited 13 September 2021).

Unlike the former, and although they are legally recognised by some Member States, *de facto* unions have therefore been separated from registered partnerships under the new European legislation (the formal nature of which makes it possible to take account of their specific nature and to lay down rules applicable to them in an EU instrument) and are therefore not covered by the latter Regulation. On the other hand, the fact that Art 3(1)(a) expressly defines a registered partnership as a community of life between 'two persons,' and not also between several persons, is reassuring that polygamous partnerships are excluded from the scope of the Regulation in question.

Since these are agreements signed by persons who are not married or even civilly united – and therefore before marriage or civil partnership – but without a future bond necessarily having to be celebrated, the 'cohabitation agreements' by which *de facto* cohabitants may regulate the property relations relating to their life together, do not fall within the scope of Regulation (EU) 2016/1104: there is no close connection with the (future) marriage or the (future) registered partnership. By entering into *de facto* cohabitation, the couple expresses the will not to enter into marriage or civil.[38]

The concept of 'registered partnership' only covers regimes governing the cohabitation of 'two persons.'[39] Unlike the 2007 Munich Convention, the Regulation does not expressly provide that it applies to same-sex or different-sex couples. However, by adopting neutral language, the Regulation makes no distinction on the basis of the sex of the partners: the definition therefore includes both unions open to persons of the same sex and those open to all partners, regardless of their sex.

[38] P. Bruno, n 3 above, 3-4.

[39] For an in-depth discussion on the topic, R. Pacia, 'Unioni civili e convivenze' *www. juscivile. it*, 6, 195, 195-214 (2016); F. Azzarri, 'Unioni civili e convivenze' *Enciclopedia giuridica* (Milan: Giuffrè, 2017), X, 997-1028.

States that reserve this institution for same-sex couples will therefore have to apply the Regulation also to heterosexual couples[40] especially as a refusal to do so could be considered contrary to the principle of non-discrimination on grounds of sexual orientation.[41] Art 3 refers to 'common life.' Despite the different terminology, we find here the same approach as in Art 1 of the 2007 Munich Convention, which defines registered partnership as a 'commitment to a common life.' In so doing, the Regulation seems to take up the distinction, of German origin, between partnerships aimed at regulating a 'community of life' ('*Lebensgemeinschaft*') between two persons and partnerships with a more limited or specific purpose ('*Zweckgemeinschaft*').[42] Only the former therefore fall within the scope of the Regulation: this text is therefore not intended to apply to partnerships formed between two persons for the purpose of organizing a community of life of limited duration or carrying on an activity together, whether commercial or ideal.[43]

The Regulation does not specify which law must 'provide for' the registered partnership. Since the existence, validity and recognition of the partnership are excluded from the scope of this text, the applicable law will have to be determined by the conflict rules of the Member

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[40] The 2007 Munich Convention gives member states the option of declaring a reservation in order to exclude its application to unions formed by persons of different sexes (Art 10 § 1, pt. a). This is obviously not the case with the Regulation on the property consequences of registered partnerships.

[41] In this sense, S. Marino, 'Strengthening the European civil cooperation: the patrimonial effects of family relationships' *Cuadernos de Derecho Transnacional*, 265, 269 (2017); K. Trilha Schappo and M.M. Winkler, 'Le nouveau droit international privé italien des partenariats enregistrés' *Revue Critique de Droit International Privé,* 319, 319 (2017).

[42] A. Dutta, 'Das neue internationale Güterrecht der Europäischen Union. Ein Abriss der europäischen Güterrechtsverordnungen' 23 *Zeitschrift für das gesamte Familienrecht*, 1973, 1976 (2016).

[43] A. Bonomi and G. Kessler, 'Article 3', in A. Bonomi and P. Wautelet eds, *Le droit européen des relations patrimoniales de couple. Commentaire des Règlements (UE) nos 2016/1103 et 2016/1104* (Brussels: Édition Bruylant, 2021), 237-238.

State of the forum.[44] In any case, given the universality of the Regulation (Art 20), the partnership may be provided for, without distinction, by the law of a Member State or a non-Member State.[45] The definition in Art 3 also requires the union to meet the legal conditions for its creation. Taken literally, this condition seems to indicate that the uniform definition of registered partnership depends, in part, on requirements laid down by national law. In fact, rather than laying down an element of the definition, this condition seems to require that the registered partnership be validly constituted according to the national law governing it. In other words, a court hearing an application concerning the property consequences of a registered partnership may apply the Partnership Regulation only after having verified the existence and validity of the registered partnership under the law applicable.[46]

1. Property Consequences of Registered Partnership

As for the definition relating to the property consequences of the registered partnership, Recital 17 of Regulation (EU) 2016/1104 merely states that 'The Regulation should cover matters arising from the property consequences of registered partnerships.' Under Art 3(1)(b), the property consequences in question are defined as 'the set of rules concerning the property relationships of the partners, between themselves and in their relations with third parties, as a result of the legal relationship created by the registration of the partnership or its dissolution.'

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[44] On this point, see N. Cipriani, 'Rapporti patrimoniali tra coniugi, norme di conflitto e variabilità della legge applicabile' *Rassegna di diritto civile*, I, 19, 19-57 (2009); P. Lagarde, 'Règlements 2016/1103 et 1104 du 24 Juin 2016 sur les regimes matrimoniaux et sur le regime patrimonial des partenariats enregistres' *Rivista di diritto internazionale privato e processuale*, 676, 676-686 (2016); D. Damascelli, n 8 above, 1103-1155.

[45] Contrary to what the reference to the law of the Member States in Recital 16 might lead one to believe.

[46] A. Bonomi, n 43 above, 239-240.

It should be borne in mind that the European Commission's starting point in presenting the proposal for a Regulation was the need to regulate the civil law aspects of the property consequences of registered partnerships, both from the point of view of the day-to-day management of the partners' property and from the point of view of the liquidation of this regime.
This arrangement, as intended by the Commission, encompasses both the property relationships between the partners and those between the partners and third parties who establish legal relations with them, in order to provide a complete solution for all scenarios that may arise in a cross-border context.
It has been authoritatively pointed out that 'it is not clear why the European legislature chose to differentiate, in terms of terminology, between the matrimonial property regime on the one hand and the property consequences on the other. It would not have been wrong to speak of matrimonial property regime also with regard to registered partnerships, since – in substance – the definitions in the two Regulations are identical, yet it seems as if the intention was (albeit only formally) to draw a line between the rules reserved for marriages and those for registered partnerships.'
In this regard, it was felt that the decision would have the flavor of an ideological choice, made with the intention of appearing (rather than actually creating) a difference between the status of married couples and those who have registered a civil partnership.[47]

V. Matrimonial/Partnership Property Agreement

The Regulations also uniformly define the concepts of matrimonial/ partnership property agreement as 'any agreement between spouses or future spouses (partners or future partners) by which they organise their matrimonial property regime (the property consequences of their registered partnership).'[48]

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[47] P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate. Commento ai Regolamenti (UE) 24 giugno 2016, nn. 1103 e 1104 applicabili dal 29 gennaio 2019* (Milan: Giuffrè, 2019), 53-54. On the new family models wide and accurate examination by G. Perlingieri, 'Interferenze tra unione civile e matrimonio. Pluralismo familiare e unitarietà dei valori normativi' *Rassegna di diritto civile*, I, 101, 101-129 (2018).

[48] Thus Art 3(1)(b) of Regulation (EU) 2016/1103 and Art 3(1)(c) of Regulation (EU) 2016/1104.

The Preamble to the Regulations in question specifies what is meant by a marriage or partnership agreement, referring to 'a type of disposition on matrimonial property (on partners' property) the admissibility and acceptance of which vary among the Member States. In order to make it easier for matrimonial property rights (for property rights) acquired as a result of a matrimonial property agreement to be accepted in the Member States, rules on the formal validity of a matrimonial property (of a partnership property) agreement should be defined.'

At the very least, the agreement should be in writing, dated and signed by both parties.[49]

The essential requirement laid down in Art 3 of the Regulation is that the agreement must have been the subject of an agreement between spouses or partners. In the absence of any other definition, the agreement must be understood in the common sense as the meeting of the wills of the parties.

One may wonder whether a mere verbal agreement between spouses or partners can claim the quality of a marriage or partnership agreement. Art 3 does not impose any formal requirement for the conclusion of an agreement between (future) spouses or partners. As such, the notion of convention in Art 3 may correspond to a mere verbal agreement, which has not been the subject of any written agreement. However, it is recalled that Art 25 of the Regulation provides for the conclusion of a marriage contract in writing, dated and signed. The existence of such a requirement therefore deprives of substance the claim of a verbal agreement to regulate the property relationships between spouses or partners.[50]

Art 3(1)(b) and (c) refers to the agreement concluded between spouses or partners or future spouses or partners. This indicates that the moment at which the agreement is concluded is irrelevant. It may be an agreement concluded by prospective spouses or partners in anticipation of their marriage or the conclusion of a partnership, or an agreement concluded during the union.

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[49] P. Bruno, n 47 above, 35.

[50] P. Wautelet, 'Article 3', in A. Bonomi and P. Wautelet eds, *Le droit européen des relations patrimoniales de couple. Commentaire des Règlements (UE) nos 2016/1103 et 2016/1104* (Brussels: Édition Bruylant, 2021), 285.

The definition expressly mentions 'engaged couple' and 'future partners,' thus endorsing the idea that the marriage or partnership agreement to which the Regulations refer may be concluded even before the marriage or registered partnership is concluded, whereas Arts 25 and the relevant recitals refer only to spouses and partners (thus legitimizing the contrary interpretation, whereby acts by which a couple, irrespective of the type of bond they will be bound by, disposes of jointly owned property before the bond is formed, are to be regarded as sources of obligations in the same way as any contract between them, such as a sale or donation of shares in a joint asset[51]). It is not uncommon for the members of a couple to conclude an agreement on the occasion of the dissolution of their marriage or partnership. If the parties are still married or in a civil partnership at the time the agreement is made, it is not difficult to consider that it is indeed a marriage or partnership agreement, at least insofar as the provisions included in such agreements actually concern property matters.

It is more difficult to take a position on agreements concluded after the dissolution of the marriage. This is a frequent occurrence. In many jurisdictions, spouses can have their marriage dissolved by postponing property matters to a later stage.[52] If two persons are already divorced and therefore enter into a settlement agreement ('*vereffeningsakkoord*'/'divorce agreements'),[53] the agreement is not between two spouses, but between two persons who are no longer bound by the marriage bond. It is doubtful whether the agreement still constitutes a matrimonial convention within the meaning of the Property regimes Regulations. The purpose of the agreement is not to 'organize a matrimonial regime.'

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[51] The reflection is by P. Bruno, n 47 above, 36.

[52] On this trend see M. Antokolskaia, 'Divorce Law from a European Perspective', in M. Scherpe ed, *Research Handbook on European Family Law* (Cheltenham: Edward Elgar, 2015), 41-82; Id, 'Dissolution of Marriage in Westernized Countries', in J. Eekelaar and R. Georges eds, *Routledge Handbook on Family Law and Policy* (Abingdon: Routledge, 2020), *passim.*

[53] The terminology is not fixed, various expressions being used, eg 'divorce settlement agreement,' 'property settlement agreement,' 'marital settlement agreement' or 'separation and property settlement agreement.'

In order to meet the definition of the Regulation, the agreement underlying the marriage or cohabitation contract must be concluded between spouses or partners (or future spouses or partners). The texts do not exclude, inter alia, the qualification of a marriage or cohabitation agreement when the agreement has also obtained the consent of a third party. A tripartite agreement between two spouses and a third party, such as a member of the family of one of the spouses or a creditor, could therefore meet the European definition. An example can be found in the institution of the 'patrimonial fund' under Italian law (Arts 167-171 of the Civil Code).

The patrimonial fund is a fund of assets intended to meet the family's needs. Although it is not strictly speaking a matrimonial regime as such, but rather a special arrangement that must be integrated into an existing regime, the patrimonial fund is nevertheless undoubtedly a legal figure directly linked to the property relationships between spouses. The fund may be set up by the spouses, in particular by contract. It may also take the form of a unilateral act, when one of the spouses decides to allocate part of his or her assets to the fund. The fund may also be set up by a third party on property owned by him/her.

In such a case, the constitution takes place by unilateral act between living persons or by will. However, the spouses must accept the establishment of the fund. With this acceptance, the institution is based on the consent not only of the spouses, but also of a third party. It is therefore a matrimonial agreement affecting and binding three parties.[54]

VI. Authentic Instrument

According to Art 3(1)(c) of Regulation (EU) 2016/1103 and Art 3(1)(d) of Regulation (EU) 2016/1104, authentic instruments are documents dealing with the subject matter of matrimonial property regimes or the property consequences of registered partnerships, which have been drawn up as authentic instruments in a Member State

[54] For a further exploration of the topic see P. Wautelet, n 50 above, 288-289.

and the authenticity of which concerns, firstly, the signature and the content of the authentic instrument itself and, secondly, have been established by a public authority or other authority empowered for that purpose by the Member State of origin.

Thus, two elements must concur for an act to qualify as an authentic act.

On the one hand, it is necessary that the instrument is considered authentic in its Member State of origin, which is the one where it was drawn up or registered. The origin of an authentic instrument is relevant for determining the evidentiary effects of that instrument in another Member State. As stated in recital 58 of Regulation 2016/1103 and recital 57 of Regulation 2016/1104, reference should be made to the nature and extent of the evidentiary effect of the authentic instrument in the Member State of origin.

The evidentiary effects that a given authentic instrument should have in another Member State therefore depend on the law of the Member State of origin.

On the other hand, in order for an instrument to qualify as an authentic instrument, its authenticity must have been established by a public authority of a Member State as regards its signature, its content and its author. Recital 59 of Regulation 2016/1103 and recital 58 of Regulation 2016/1104 state that the notion of authenticity should be understood as 'an autonomous concept covering elements such as the genuineness of the instrument, the formal prerequisites of the instrument, the powers of the authority drawing up the instrument and the procedure under which the instrument is drawn up.'

The aim of these Regulations is to facilitate the circulation of authentic instruments between the Member States. A uniform concept of authenticity is essential to ensure the circulation of these instruments, given that the Member States, in their legislation, follow different systems when dealing with acts relating to property relationships. Promoting trust and security is one of the key objectives of the EU legislator in this area and more generally in private international law.

This is due to the importance attached to the cross-border continuity of legal relationships and legal rights throughout the European judicial area.[55] The Regulations deal with the circulation of authentic instruments in Chapter IV. The chapter includes a rule on the acceptance of authentic instruments (Art 58) and a rule on their enforceability (Art 59).[56]

The medium on which the authentic instrument is materialised is irrelevant. It may be a paper document or an electronic record of data. Electronic notarial acts have become common practice.[57] In spite of the ambiguity that affects some language versions of the Regulations,[58] it is certain that a dematerialised document can be qualified as an authentic instrument within the meaning of the Regulations. Like the other definitions given in Art 3(1), the authentic instrument, as stated above, primarily concerns the Regulations only in so far as it relates to the matrimonial regime between spouses or to property relationships between partners. It is necessary to refer to the definition of the material scope of the Regulations to ensure that the authentic instrument relates to the area covered by the Regulations. An authentic instrument may benefit from the provisions of the Regulations either when it relates directly and integrally to the matter to which it relates or when it relates to it partially or indirectly.

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[55] An idea that had already appeared in the judgment of the Court of Justice in Case C-260/97, *Unibank A/S* v *Flemming G. Christensen*, Judgment of 17 June 1999, available at https://eur-lex.europa.eu/legal-content/EN/TXT/ ? uri=CELEX%3A61997CJ0260 (last visited 13 September 2021).

[56] A.R. Benot, 'Article 3' Definitions, in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples. A Commentary* (Cheltenham: Edward Elgar, 2020), 42.

[57] Eg in France, Art 1366 of the Civil Code. In addition to the electronic authentic act as it has existed for a number of years, the electronic authentic act at a distance has been added, the use of which has been extended in 2020 from the period of the restrictions decided to deal with the current pandemic. See in France Décret no 2020-395 of 3 April 2020 authorizing remote notarial acts during the health emergency period.

[58] The German version evokes a '*Schriftstück*,' which may lead one to think that only paper-based documents are covered.

In addition to this material scope requirement, Art 3(1)(c) and (d) makes the qualification as authentic subject to the intervention of a public authority or other authority 'empowered for that purpose' of the Member State of origin. The need for the intervention of a public authority had already been emphasised by the Court of Justice in the Unibank[59] judgment. It makes it possible to exclude from the definition documents bearing a private signature and, more generally, all documents which come into existence and are fully constituted without any intervention by a public authority.[60]

Furthermore, a deed can only be authenticated within the meaning of the Regulation if it is received by an authority, public or otherwise, of a Member State bound by the Regulation. An authentic act received by a Swiss notary therefore does not meet this requirement. This limitation is necessary because the provisions of the Regulations governing authentic instruments guarantee their free movement between the Member States. Such free circulation is inconceivable in relation to States not bound by the Regulations.

The European definition provides for the intervention of both a public authority and a delegated authority. The distinction between these two categories makes it possible to confer the status of an authentic act on an act received by a notary. While the status of the notary may vary from one State to another, in particular with regard to the conditions of appointment, the status of the notary or his prerogatives, the notary does not constitute a public authority in the proper sense of the term in the majority of Member States that are familiar with its institution.[61]

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[59] Case C-260/97, n 55 above.

[60] P. Wautelet, n 50 above, 318-319.

[61] In some States, the notary exercises his functions as a liberal profession. In others, the notary is a public official.

However, the notary is entrusted with important tasks in these States, in particular that of conferring authenticity on the acts and contracts of the parties.[62] This prerogative is based on legal authorisation, which makes it possible to consider that the notary is indeed an authority empowered for these purposes. In addition to the profession of notary, the consular authorities may be public authorities as provided for in Art 3.

The figure of the lawyer is different. Some states confer a special status on a private document that is countersigned by a lawyer. Under French and Belgian law, such a deed can have a special evidentiary force.[63] This privileged status certainly concerns both the writing and the signature of the parties, the lawyer intervening having to verify not only the identity of the signatory to the private document, but also that the signatories are aware of the legal consequences of the content of the document.

However, these jurisdictions do not qualify these acts as authentic, which seems to exclude them from access to the European category of authentic acts.

Art 3(1)(c) and (d) provides for a second requirement: the intervention of a public or equivalent authority must relate to a specific content. The role to be played by the public authority cannot be limited to a simple documentary check, the affixing of a visa or verification of the signature(s) on the document. On the contrary, the public authority must assimilate the content of the act in order to verify its authenticity.

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[62] In French law, see Ordinance no 45-2590 of 2 November 1945 on the status of notaries (*Journal officiel de la République française*, 3 November 1945, 7160), as amended.

[63] Art 1374 French Civil Code; Art 2 of the Belgian law of 29 April 2013 on the private agreement countersigned by the parties' lawyers.

As such, the authority must play an active role, without being able to content itself with a simple registration role. Authenticity is only acquired if authenticity has been ascertained by the public authority.[64]

VII. Decision

Art 3(1)(d) of Regulation (EU) 2016/1103 ((e) of Regulation (EU) 2016/1104) defines a decision as 'any decision in a matter of a matrimonial property regime given by a court of a Member State, whatever the decision may be called, including a decision on the determination of costs or expenses by an officer of the court.' This, the text specifies, irrespective of the name used.

In this field, the extreme variety of measures that can be adopted depending on the system in question could lead to doubts as to whether a given measure falls within the scope of the Regulations under consideration here, so the supranational legislator has followed the corresponding definition of the Regulation on succession – which is similar to that of the Regulations: Brussels II-*bis*,[65] on maintenance obligations ('the Maintenance Regulation')[66] and Brussels I-*bis*[67](which, however, also explicitly mentions provisional and protective measures) – by extending it to all types of decisions on the merits and on the award of costs in proceedings concerning matrimonial property regimes and the property consequences of registered partnerships.

The definition of decision must also be read in the light of the definition of 'court,' which explicitly includes professionals and 'other authorities' to which activities culminating in measures or acts relevant to the constitution, arrangement or dissolution of matrimonial property regimes or the property consequences of registered partnerships are attributed by delegation of functions or jurisdiction.

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[64] P. Wautelet, n 50 above, 319-321.

[65] Council Regulation (EC) 2003/2201, n 4 above.

[66] Council Regulation (EC) 2009/4 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7/1.

[67] Regulation (EU) 2012/1215 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351/1.

It must be a decision on matrimonial property regimes or on the property consequences of registered partnerships, which necessarily restricts the field to judgments on matters to be found among those listed in Art 1(1), and thus with the exception of matters excluded from the scope of the Regulations in the following para 2.
Similarly, if one considers that the Regulations also define the concept of a court settlement (see below*),* it can be easily deduced that the decision is taken at the end of a judicial procedure, without it being specified whether it is an ordinary or a chambers procedure.
Lastly, it should be noted that, in the absence of any indication to the contrary or a clear indication by the legislature, the concept of judgment can only include the measures referred to in Art 19, eg provisional and protective measures provided for by the law of a Member State (which will not necessarily be the one having jurisdiction as to the substance).[68]

VIII. Court Settlement

According to Art 3(1)(e) of Regulation (EU) 2016/1103 ((f) of Regulation (EU) 2016/1104), a court settlement is a settlement relating to a matrimonial property regime or the property consequences of a registered partnership that has been approved by a court or concluded before a court in the course of proceedings.[69] The notion is relevant for the application of Art 60 of the Regulations, concerning the enforceability of court settlements originating in a participating Member State.[70]
On the basis of the above definition, a court settlement can be concluded either independently and prior to any proceedings, provided that it is approved by a court, or in the course of

[68] P. Bruno, n 47 above, 40-42.
[69] At the meeting on 16 May 2011 of the Working Party on Civil Law Matters, the French and Romanian delegations proposed, to no avail, the inclusion of out-of-court settlements in this provision.
[70] A.R. Benot, n 56 above, 43.

proceedings, provided that the parties express their agreement before the court hearing the matter.[71]

This is an instrument of dispute settlement to which the Regulations devote much attention, as can be seen from the fact that – like other instruments of judicial cooperation, whose operation is based on the principle of mutual trust – also the Regulations under consideration here contain rules on the recognition and enforcement of the settlement: these rules are all aimed at facilitating its widest circulation, if necessary also through the use of standard forms.

The definition does not differ in substance from that used in other instruments of judicial cooperation[72] and therefore identifies the act of settlement of a dispute drawn up in a Member State that is party to enhanced cooperation and enforceable in that Member State.[73]

The intervention of the court may take two forms. As mentioned, the transaction may first have been approved by a court. In this case, the parties have reached an agreement without any court proceedings. To make the settlement more effective, they may choose to submit it to a court for approval. The form this approval may take and the concrete modalities of the court's review of the settlement are a matter for the Member States.[74] In some States the term 'approval' will be used. In others, the vocabulary used will be different. The Regulation does not require the Member States to provide for a particular procedure

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[71] A court decision and a court settlement are different in nature, which justifies the different treatment of their cross-border enforceability. These differences were highlighted by the CJEU in Case C-414/92 *Solo Kleinmotoren GmbH* v *Emilio Boch*, Judgment of 2 June 1994, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61992 CJ0414 (last visited 13 September 2021).

[72] Eg Art 3(1)(h) of the EU Succession Regulation; Art 2(1)(2) of the EU Maintenance Regulation; Art 2(b) Brussels I-*bis* Regulation.

73 P. Bruno, n 47 above, 42.

[74] Under Belgian law, if out-of-court mediation has led to an agreement, the parties may submit the agreement to a court for approval. The court may only refuse to approve the agreement if it is contrary to public order or if the agreement is contrary to the interests of the minor children (Art 1733 Belgian Code Judiciaire). In Germany, see §§ 796a and 796b ZPO as regards the '*Anwaltsvergleich*.'

enabling a court to take note of an agreement between the parties. It is up to the Member States to determine whether the parties may submit an agreement concluded out of court to a court and how the court should intervene.
The other hypothesis referred to in the Regulation is that in which the settlement is concluded before a judge during the proceedings. The scenario envisaged is that of litigation in which the parties reach an agreement. This agreement may take the form of a settlement.[75]

IX. Member State of Origin and Member State of Enforcement

In points (f) and (g)(1) of Art 3 of Regulation (EU) 2016/1103 ((g) and (h) in Regulation (EU) 2016/1104) there are instead the definitions of Member State of origin and Member State of enforcement as, respectively, 'the Member State in which the decision has been given, the authentic instrument drawn up, or the court settlement approved or concluded' and 'the Member State in which recognition and/or enforcement of the decision, the authentic instrument, or the court settlement is requested.'
It is therefore necessary to look to the court which delivered the judgment called upon to circulate between the Member States to identify the Member State of origin.

The identification of the Member State of origin does not raise questions when the decision is delivered by a judicial authority. In this case, in fact, the decision will be given in the name of one State, the one which established the court. The decision will include references to identify this State.
According to Art 3(2), a decision may also be given by an entity other than a court: it may be 'another authority' or a 'legal professional.' Where the judicial authority or the professional can be considered to be a court, the decision taken will necessarily include sufficient identifying elements to determine the Member State in which the authority or professional operates. It will therefore be easy to identify the Member State concerned.

[75] P. Wautelet, n 50 above, 315-316.

As said, as far as settlements are concerned, only court settlements are foreseen. The two modalities have also been illustrated: 1) the court may be asked to approve the settlement; 2) a settlement may also be adopted directly before the court during a procedure.
The intervention of a court will facilitate the identification of the Member State of origin. In the vast majority of cases, this court will be a judicial authority created and organised by a Member State. Homologation or approval will take the form of a decision delivered by the court.
As to the Member State of origin of an authentic instrument, this is the Member State in which the instrument was 'drawn up.' According to the definition in Art 3(1)(c) ((d) Regulation (EU) 2016/1104), an instrument may only be considered authentic, within the meaning of the Regulation, if its authenticity has been established by a public authority or other authorised authority.
The intervention of such an authority will result in identification elements in the act.
The Regulations define the Member State of enforcement taking into account not only the actual enforcement of the decision, authentic instrument or court settlement, but also its recognition.
The identification of the State in which the enforcement of a judgment, court settlement or authentic instrument is sought will follow different paths depending on whether it is recognition or enforcement. The circulation arrangements provided for by the Regulation differ according to the nature of the effect in question.[76]

X. Jurisdiction

Turning finally to the definition of 'court,' the Regulations include in this notion authorities and legal professionals (such as notaries) exercising judicial functions or acting on behalf of a judicial authority (Art 3(2)) 'provided that such other authorities and legal professionals offer guarantees with regard to impartiality and the right of all parties to be heard.'[77] The idea is that their decisions should be treated as judicial decisions for the purpose of recognition and enforcement in a

[76] ibid 308-309.
[77] A.R. Benot, n 56 above, 31.

Member State other than the one where they were issued. The term 'court' does not include notaries when they do not exercise a judicial function.

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

Where notaries do not exercise judicial functions, they should not be required to comply with these rules on jurisdiction, and the authentic instruments they issue should circulate in accordance with the provisions of the Regulation on authentic instruments (Recital 31). In many countries, such as Spain, Luxembourg, the Czech Republic, Germany, Austria, Belgium, Bulgaria, Italy, Malta, the Netherlands, Portugal and Slovenia, in the case of matrimonial agreements with cross-border implications, notaries are not bound by these rules on jurisdiction and as such may, for instance, draw up a marriage contract or an agreement on the choice of applicable law. A similar situation may be found in Greece, where the notary has the power to conclude a cohabitation contract but not a marriage contract, or in Slovenia, where, as of 15 April 2019, the notary has the power to conclude a formal marriage contract (notarial act).[78]

Having said that, it should be noted that the first category of persons designated by Art 3(2) concerns 'any judicial authority.' These are the authorities set up by the Member States and exercising judicial functions. *A priori*, in order to determine the contours of this category, it is sufficient to consult the law of the Member State which has established an authority to determine whether it can claim the status of 'judicial authority'. Art 3(2) does not make the classification of such authorities as judicial subject to any additional requirement.

[78] A.M. Pérez Vallejo, 'Matrimonial property regimes with cross-border implications: Regulation (EU) 2016/1103', in M.J. Cazorla González, M. Giobbi, J. Kramberger Škerl, L. Ruggeri and S. Winkler eds, *Property relations of cross border couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2020), 22.

It must be borne in mind, however, that the concept of jurisdiction as used by the Regulations remains a European concept. A judicial authority recognised as such by a Member State is therefore not *ipso facto* a 'court' within the meaning of the Regulations. It is still necessary that the judicial authority recognised as such within a Member State meets the European requirements for identifying courts.

Furthermore, the Court of Justice reserves the status of a judicial body to those authorities whose decisions are taken in accordance with the principle of an adversarial process. This does not mean that all decisions must necessarily have been preceded by an adversarial process. In particular, what interests the Court is the possibility of an adversarial process, whether it takes place at the beginning of the procedure or at a later stage.[79] In addition to the principle of an adversarial process, the Court also reserves the status of a judicial authority to those authorities which offer guarantees of independence and impartiality in the performance of their functions.[80]

The second category covered by Art 3(2) consists of other authorities and legal professionals.

According to the Preamble to both Regulations, notaries and legal professionals who, in certain Member States, exercise judicial functions in a given case relating to matrimonial property regimes or the property consequences of registered partnerships by delegation of jurisdiction to a court are also to be regarded as included in the concept of court.

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[79] Case C-39/02 *Mærsk Olie & Gas A/S* v *Firma M. de Haan en W. de Boer,* Judgment of 14 October 2004, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62002CJ0039 (last visited 13 September 2021). On the importance of the adversarial principle, see also Case C-394/07 *Marco Gambazzi* v *DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company*, Judgment of 2 April 2009, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62007 CJ0394 (last visited 13 September 2021).

[80] Case C-551/15 *Pula Parking d.o.o.* v *Sven Klaus Tederahn*, Judgment of 9 March 2017, available at https://eur-lex.europa.eu/legal-content/EN/TXT/ ? uri=CELEX:62015CJ0551 (last visited 13 September 2021).

The consequences of the inclusion or non-inclusion are not insignificant: all courts as defined in the Regulations are in fact subject to the rules of jurisdiction contained therein: on the other hand, the same Preamble makes it clear that the term 'judicial authority' does not include non-judicial authorities of the Member States empowered by national law to deal with the matters referred to above, such as notaries in most Member States, if, as is generally the case, they do not exercise judicial functions.

Ultimately, notaries in a given Member State are bound or not bound by the jurisdiction rules of this Regulation depending on whether or not they fall within the definition of a court for the purposes of this Regulation.

The expression, however, also refers to other authorities and legal professionals competent in matters of the property consequences of marriages or registered partnerships and exercising judicial functions or acting by delegation of a judicial authority or under its supervision, provided that such other authorities and legal professionals offer guarantees with regard to impartiality and the right of all the parties to be heard.[81]

Although the characteristics of these authorities and professionals are not identical for all the Member States, which have won the right to identify them independently, they must nevertheless comply with certain minimum characteristics, which are set out in Art 3(2).

In this sense, they must be authorities or professionals: a) with competence in matters of matrimonial property regimes (property consequences of registered partnerships) in accordance with national law; b) which exercise judicial functions or act by delegation of power by a judicial authority or under its control; (c) offering guarantees with regard to impartiality and the right of all parties to be heard; (d) taking decisions which may be made the subject of an appeal to or review by a judicial authority and have a similar force and effect as a decision of a judicial authority on the same matter.

[81] A.R. Benot, n 56 above, 44.

They will be entities acting on the basis of a specific mandate issued by a judicial authority in proceedings concerning the creation, management or dissolution of a matrimonial property regime or the property consequences of a registered partnership.[82]

[82] P. Bruno, n 47 above, 44-45.

Article 4
Jurisdiction in the event of the death of one of the spouses/one of the partners

Roberto Garetto

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
Where a court of a Member State is seised in matters of the succession of a spouse pursuant to Regulation (EU) no 650/2012, the courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that succession case.	Where a court of a Member State is seised in matters of the succession of a registered partner under Regulation (EU) no 650/2012, the courts of that State shall have jurisdiction to rule on matters of **the property consequences of the registered partnership** arising in connection with that succession case

Summary: I. Preliminary considerations. – II. Conditions for the jurisdiction. – III. The problems arising from ancillary jurisdiction.

I. Preliminary considerations

According to this Article, when the court of a Member State is asked to settle the succession under Regulation 650/2012, the courts of the same Member State shall have jurisdiction to rule on the property issues of the marriage or civil partnership that may arise from the succession. The choice made by the EU legislator pursues the clear aim of ensuring and implementing coordination and uniformity between the various systems of judicial cooperation, in order to offer to the citizens the possibility of settling - at least tendentially - unitary property issues arising from the death of their spouse or partner.[1]

[1] Cf P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate* (Milan: Giuffrè Francis Lefebvre, 2019), 76. See also A.M. Pérez Vallejo, 'Notas sobre la aplicación del Reglamento (UE) 2016/1103 a los pactos prematrimoniales en previsión de la ruptura matrimonial' *Revista Internacional de Doctrina y Jurisprudencia*, 105, 106 (2019); P. Quinzá Redondo, 'Armonización y unificación del régimen económico matrimonial en la Unión Europa: nuevos desafíos y oportunidades'

This is therefore a case of ancillary jurisdiction,[2] so that in the case specified in Art 4 of the Twin Regulations, jurisdiction will always depend on the application of Regulation (EU) 650/2012, and never - unlike in other cases of ancillary jurisdiction - on that of national law.[3] For the first time, a EU Regulation in the field of jurisdiction links its own connecting factors to the ones provided for by another Regulation.[4] As a matter of fact, this kind of ancillary jurisdiction is not new in the context of private international law.[5] One example is Art 51 of the Swiss Federal Act on Private International Law.[6]
Moreover, the reference to the provisions of Regulation 650/2012 on successions, which provides for an almost complete regulation of jurisdiction by means of an autonomous and basically self-sufficient system,[7] has the advantage of avoiding the coexistence of alternative

Revista chilena de derecho, 619, 643 (2016). With regard to a previous tendency to achieve uniform rules related to the death of the spouse or partner, see: D. Martiny, 'Die Kommissionsvorschläge für das internationale Ehegüterrecht sowie für das internationale Güterrecht eingetragener Partnerschaften' *IPRax*, 437, 446 (2011).

[2] The ancillary doctrine is deeply rooted in the common law, in which it is related to independence and self-sufficiency of the courts. Cf J. Silberg, 'Ancillary Jurisdiction in the Federal Courts' 12 *The Journal of Air Law and Commerce*, 288, 288-289 (1941). In a critical perspective, see also: J.H. Garvey, 'Limits of Ancillary Jurisdiction' 57 *Texas Law Review* 697, 699-700 (1979).

[3] A. Bonomi, 'Article 4', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples. A Commentary* (Cheltenham: Edward Elgar, 2020), 51-52.

[4] P. Bruno, n 1 above, 76; M.P. Gasperini, 'Jurisdiction and Efficiency in Protection of Matrimonial Property Rights' *Zbornik Znanstvenih Razprav*, 23, 28 (2019); S. Marino, 'Strengthening the European civil judicial cooperation: the patrimonial effects of family relationships' *Cuadernos de Derecho Transnacional*, 265, 270 (2017).

[5] A. Bonomi, n 3 above, 51.

[6] Loi fédérale sur le droit international privé (LDIP), du 18 décembre 1987, Art 51: *'[s]ont compétentes pour connaître des actions ou ordonner les mesures relatives aux régimes matrimoniaux: a. lors de la dissolution du régime matrimonial consécutive au dé cès d'un des époux, les autorités judiciaires ou administra ti ves suisses compétentes pour liquider la succession (art. 86 à 89)'.* Tr 'Federal Law on Private International Law (LDIP), of 18 December 1987, Art 51: "[t]he following are competent to hear actions or order measures relating to matrimonial property regimes: a. in the event of the dissolution of the matrimonial property regime following the death of one of the spouses, the Swiss judicial or administrative authorities competent to liquidate the estate (Art 86 to 89).'"

[7] F. Dougan, 'Matrimonial property and succession. The interplay of the matrimonial property regimes regulation and succession regulation', in J. Kramberger Škerl, L.

forums.[8] This way all the aspects arising from the event of death are concentrated before a single court, with the risk of complicating the situation of the surviving spouse/partner, who could be forced to defend himself or herself before the court of a Member State with which he or she does not have a close (or at least an easy) connection,[9] with the consequent increase in procedural time and costs.

II. Conditions for the jurisdiction.

The first condition for the ancillary jurisdiction to operate is that the court of a Member State must be seised in matters of succession.[10] The term 'court' is of course to be intended, in accordance with Art 3(2) of all the Regulations in question, eg both the Twin Regulations and the Succession Regulation, as any judicial authority as well as all other authorities and legal professionals exercising judicial functions. This is provided for as long as they are acting by delegation of competence from a judicial authority or under its supervision, on condition that they ensure guarantees of impartiality, respect for the adversarial process and that their decisions are open to appeal and

Ruggeri and F.G. Viterbo eds, *Case Studies and Best Practices Analysis to Enhance EU Family and Succession Law. Working Paper* (Camerino: Università degli Studi di Camerino, 2019), 78.

[8] On issues of jurisdiction with regard to the Regulation (EU) 650/2012 and the Twin Regulations, cf S.D. Schiopu, 'Legea aplicabilă succesiunii şi cea aplicabilă regimului matrimonial: unele delimitări şi interferenţe - The Law Applicable to the Succession and the One Applicable to the Matrimonial Property Regime: Some Delimitations and Interferences' *Revista Universul Juridic*, 40, 44 (2019). In any case, it accepted that the choice of the forum is not effective with regard to the party who would not have consented. Cf. A. Bonomi, n 3 above, 61; more widely: Id and P. Wautelet, *Le droit européen des successions. Commentaire du Règlement n°650/2012 du 4 juillet 2012* (Bruxelles: Bruylant, 2nd ed, 2016), 205-206.

[9] Cf P. Bruno, n 1 above, 76. See also L. Ruggeri, 'Jurisdiction', in M.J. Cazorla Gonzàlez, M. Giobbi, J. Kramberger Škerl, L. Ruggeri and S. Winkler eds, *Property relations of cross border couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2020), 60.

[10] Cf P. Franzina, 'Jurisdiction in Matters Relating to Property Regimes Under EU Private International Law', in A. Bonomi and G.P. Romano eds, *Yearbook of Private International Law Vol. XIX - 2017-2018* (Köln: Verlag Dr. Otto Schmidt, 2018), 159.

have the same effect as those of a judicial authority in the same matter.[11]

From this point of view, it seems likely that this definition does not cover notaries, at least in Italy, since they do not intervene with judicial functions or exercise delegated powers by judicial authorities or are under their control in matters of property regimes or property consequences of registered partnerships. Not to mention the fact that - even leaving aside the guarantees of impartiality and respect for the adversarial process - they do not adopt decisions that are subjected to appeal.[12] The situation is different in other Member States, such as France, where notaries are directly designated as 'judicial authorities.'[13]

Furthermore, the court must have jurisdiction in matters of succession not under the Twin Regulations but under the Succession Regulation, which sets out the criteria for jurisdiction in Arts 5-11.

Once jurisdiction is established in matters of succession, the courts of the concerned Member State may also rule on questions relating to the property consequences of marriage or civil partnership. It is necessary - and this is the second condition - that these questions be connected with the succession issue before the first court.

This means, firstly, that the property issue must relate to the deceased spouse or partner and, secondly, that the property issue must be adequately connected to the succession (such as a declaration of invalidity of the will combined with a request for distribution of the deceased's property).[14]

Furthermore, according to the principle of *perpetuatio jurisdictionis*, once the succession proceedings have begun, the courts of the Member State will have jurisdiction over the related property matter even if the

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[11] Cf A. Rodríguez Benot, 'Los efectos patrimoniales de los matrimonios y de las uniones registradas en la Unión Europea' *Cuadernos de Derecho Transnacional*, 8, 31 (2019); A.M. Pérez Vallejo, 'Ley aplicable y competencia judicial internacional en el Reglamento (UE) 2016/1103 sobre regímenes económicos matrimoniales' *Anales de Derecho*, 1, 11 (2020).

[12] Cf P. Bruno, n 1 above, 78-79, for whom this last observation seems diriment.

[13] Cf L. Ruggeri, n 9 above, 59.

[14] See this example in A. Bonomi, n 3 above, 55. See another example (in the form of case study) in: H. Machado Barbosa Da Mota, 'Regímenes matrimoniales y sucesión después de la disolución por muerte de un matrimonio transfronterizo: un caso de estudio' *Revista Internacional de Doctrina y Jurisprudencia*, 55, 56-57 (2019).

application relating to the main issue is withdrawn or filed elsewhere. This is of course on condition that the application on the related property issue has already been brought before a court of the same Member State.[15]
If, on the contrary, the application on the main issue has been withdrawn or the proceedings have been transferred elsewhere without the courts of the Member State having been seised of the matrimonial property matter, the mechanism provided for in Art 4 of the Twin Regulations may no longer be activated and jurisdiction must be determined in accordance with Art 6.

III. The problems arising from ancillary jurisdiction.

As noted above, by making a complete reference to the Succession Regulation, the provision of Art 4 is based on the concept of ancillary jurisdiction. This has as a consequence that the jurisdiction in matters of property consequences arising from the opening of the succession shall necessarily be determined first using - as the rule does not allow for exceptions - the criteria of Regulation 650 of 2012.
The first of these criteria is that of the deceased's last habitual residence,[16] and only secondly will any criteria provided for in the Twin Regulations be used.
Concentration has the undoubted advantage of allowing the courts of a single Member State to decide both succession and property issues arising from the succession. This avoids the possibility of courts in different Member States invoking concurrent jurisdiction over such matters, but it may also have a number of disadvantages.[17]
The first is the unnecessary correspondence between the court of the Member State deciding the main question and the court of the same

[15] Cf P. Mankowski, 'Internationale Zuständigkeit nach EuGüVO und EuPartVO', in A. Dutta and J. Weber eds, *Die Europäischen Güterrechtsverordnungen* (Munich: Beck, 2017), 14-15; B. Heiderhoff, 'Die EU-Güterrechtsverordnungen' *IPRax*, 1, 9 (2018).

[16] Cf A. Bonomi and P. Wautelet, n 8 above, 187.

[17] Cf P. Mankowski, n 15 above, 13. In a wider perspective, see also: A. Bonomi, 'The interaction among the future eu instruments on matrimonial property, registered partnerships and successions', in A. Bonomi and G.P. Romano eds, *Yearbook of Privat International Law Vol. XIII - 2011* (Berlin, Boston: Otto Schmidt/De Gruyter european law publishers, 2012), 222.

Member State deciding the question relating to property regimes.[18] The reason for this eventuality is that the rule laid down in this Article concerns only international jurisdiction and not domestic jurisdiction, which is to be determined in accordance with the national law of the Member State.[19] Hence the result that, in terms of both subject-matter jurisdiction and place of jurisdiction, two different courts could be called upon to rule within the same State.

Again, it is the very notion of Member State that may not coincide in the Regulations involved, since while the Succession Regulation applies to Member States, the Twin Regulations apply to Member States that have joined the enhanced cooperation in the context of which the property regimes Regulations were issued.[20] With the consequence that, in the event of the involvement of a Member State which has not joined the enhanced cooperation, the latter will have to be considered as a third State and will continue to apply its national law.

Finally, even if the main proceedings on the succession and the related proceedings on the matrimonial property regime were to coincide in the same court of the Member State, it is not a given that the court would have to apply its national law.

It may well be required to apply a foreign law on this point, as in the case where the deceased has chosen to apply his or her own national law to the succession if he or she is a national of a third country.[21]

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[18] A. Bonomi, n 3 above, 54; see also: P. Bruno, n 1 above, 79 and M.P. Gasperini, n 4 above, 26.

[19] Cf A. Bonomi and P. Wautelet, n 8 above, 204, M.P. Gasperini, n 4 above, 26.

[20] S.D. Schiopu, n 8 above, 43. See also: P. Quinzá Redondo, n 1 above, 634 and Id, 'El Reglamento 2016/1103 sobre régimen económico matrimonial: una aproximación general' *La Ley Derecho de Familia: Revista jurídica sobre familia y menores*, 6 (2018).

[21] In such a case the so-called prorogation of jurisdiction would anyway be impossible. According to this provision, if the deceased, who was a national of a Member State, had chosen to settle the succession according to his national law, an agreement to make the *lex patriae* coincide with the *forum patriae* would be possible. This would not be possible on the contrary if the deceased was a national of a third State and had chosen the law of that State. See on this point I. Kunda, S. Winkler and T. Pertot, 'Jurisdiction and applicable law in succession matters', in M.J. Cazorla Gonzàlez, M. Giobbi, J. Kramberger Škerl, L. Ruggeri, S. Winkler eds, n 9 above, 109-110. See also: D. Martiny, 'Article 4', in S. Corneloup et al eds, *Le droit européen des*

It may well be required to apply a foreign law on this point, as in the case where the deceased has chosen to apply his or her own national law to the succession if he or she is a national of a third country.[21]

régimes patrimoniaux des couples. Commentaire des règlements 2016/1103 et 2016/1104 (Paris: Société de législation comparée, 2018), 46.

Article 5
Jurisdiction in cases of divorce, legal separation or marriage annulment/dissolution or annulment

Roberto Garetto

Regulation (EU) 2016/1103

1. Without prejudice to paragraph 2, where a court of a Member State is seised to rule on an application for divorce, legal separation or marriage annulment pursuant to Regulation (EC) no 2201/2003, the courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that application.

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

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

(b) is the court of a Member State of which the applicant is a national and the applicant is habitually resident there and had resided there for at least six months immediately before the application was made, in accordance with sixth indent of

Regulation (EU) 2016/1104

1. Where a court of a Member State is seised to rule on the dissolution or annulment of a registered partnership, the courts of that State shall have jurisdiction to rule on the property consequences of the registered partnership arising in connection with that case of dissolution or annulment, where the partners so agree.

2. If the agreement referred to in paragraph 1 of this Article is concluded before the court is seised to rule on matters of the property consequences of the registered partnership, the agreement shall comply with Article 7.

Article 3(1)(a) of Regulation (EC) no 2201/2003

(c) is seised pursuant to Article 5 of Regulation (EC) no 2201/2003 in cases of conversion of legal separation into divorce; or

(d) is seised pursuant to Article 7 of Regulation (EC) no 2201/2003 in cases of residual jurisdiction.

3. If the agreement referred to in paragraph 2 of this Article is concluded before the court is seised to rule on matters of matrimonial property regimes, the agreement shall comply with Article 7(2).

Summary: I. Preliminary remarks. – II. The general rule of jurisdiction in case of divorce, separation or marriage annulment. – III. Special cases and agreement between the parties. – IV. Jurisdiction in case of dissolution or annulment of a registered partnership.

I. Preliminary remarks.

In this Article (like in the previous one) the EU legislator pursues the aim of avoiding the fragmentation of proceedings depending on the *causa petendi*, by concentrating jurisdiction in a single Member State.[1] This means that, as in Art 4 above, also Art 5 provides for a general

[1] Cf P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate* (Milan: Giuffrè Francis Lefebvre, 2019), 85. See also A.M. Pérez Vallejo, 'Notas sobre la aplicación del Reglamento (UE) 2016/1103 a los pactos prematrimoniales en previsión de la ruptura matrimonial' *Revista Internacional de Doctrina y Jurisprudencia*, 105, 106 (2019); P. Quinzá Redondo, 'Armonización y unificación del régimen económico matrimonial en la Unión Europa: nuevos desafíos y oportunidades' *Revista chilena de derecho*, 619, 643 (2016).

hypothesis of ancillary jurisdiction.[2] This way is avoided the rooting of related cases in different Member States, operating a concentration of jurisdiction by connection which ends up attracting the majority of hypotheses. The need to settle disputes concerning property regimes arising from marriage or civil partnership usually emerges at the time of the liquidation of such regimes as a result of the termination of the relationship between the partners, whether is it due to death, divorce, separation, annulment or dissolution.[3]

It follows that, in the event of property issues arising from the termination of the couple's relationship through divorce, separation, annulment or dissolution of the civil partnership, the authority of the Member State already seised to decide on the divorce or dissolution will have jurisdiction to rule on these related issues.[4] The differences between cases involving marriage and those involving partnership will be addressed later.

II. The general rule of jurisdiction in case of divorce, separation or marriage annulment.

Art 5(1) of Regulation 1103/2016 states that when a court of a Member State is seised to rule on a divorce, legal separation or marriage annulment, as provided for in Regulation 2201/2003,[5] the authorities of the same Member State shall have jurisdiction to rule on any property issues arising in connection with the main issue concerning the dissolution of the marriage.
In concrete terms, the cases to which Art 5, para 1 of Regulation 1103/2016 refers are the first four of those provided for in Art 3(1)(a) of Regulation 2201/2003. More precisely: the habitual residence of the

[2] Cf above in this Commentary, 'Art 4', *sub* n 2.

[3] P. Peiteado Mariscal, 'Competencia internacional por conexión en materia de régimen económico matrimonial y de efectos patrimoniales de uniones registradas. Relación entre los Reglamentos UE 2201/2003, 650/2012, 11103/2016 y 1104/2016' *Cuadernos de Derecho Transnacional*, 300, 311 (2017).

[4] C. Rimini, 'Il divorzio internazionale: le fonti e il metodo' *Famiglia e diritto*, 116, 111 (2021).

[5] Cf R. Frimston, 'Article 5',. in U. Bergquist et al eds, *The EU Regulation on Matrimonial and Patrimonial Property* (Oxford: Oxford University Press, 2019), 68.

spouses; their last habitual residence, if at least one of them still resides there; the habitual residence of the defendant or the habitual residence of one of the spouses in the case of a joint application. In addition to these cases, it is required to consider the criterion provided for in point b of the same paragraph, eg the spouses' common nationality, and the one provided for in Art 4.

In the cases provided for in Art 5(1), the EU legislator thus identifies 'strong' grounds of jurisdiction,[6] which automatically establish jurisdiction in the Member State[7] and exclude any other criterion.[8] Moreover, the provision in point does not seem to apply when the application concerning the matrimonial property regime is made without any previous dispute concerning the marriage bond. Nor is it applicable when such a dispute exists but has been filed in a third country, where 'third country' must also be intended as a Member State that is not part of the enhanced cooperation.[9] It follows that the main proceedings concerning the divorce or annulment must either already be pending or be filed simultaneously with the proceedings concerning the matrimonial property regime.[10] Consequently, when the status case is concluded, the rule of related jurisdiction provided for in this Article should not be activated. It would be inappropriate to assign jurisdiction to an authority which has already completed its task by issuing a decision, as the criterion in point would make sense only in connection with simultaneous proceedings.[11]

In the same Article, the provision refers only to the Member State whose courts have related jurisdiction. It does not, however, regulate which of those courts may hear the related case on matrimonial

[6] With regard to the distinction between 'strong' and 'weak' grounds of jurisdiction, cf P. Franzina, 'Jurisdiction in Matters Relating to Property Regimes Under EU Private International Law', in A. Bonomi and G.P. Romano eds, *Yearbook of Private International Law Vol. XIX - 2017-2018* (Köln: Verlag Dr. Otto Schmidt, 2018), 163.

[7] M.P. Gasperini, 'Jurisdiction and Efficiency in Protection of Matrimonial Property Rights' *Zbornik Znanstvenih Razprav*, 23, 33 (2019).

[8] I. Viarengo, 'Article 5', in Id and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples. A Commentary* (Cheltenham: Edward Elgar, 2020), 69.

[9] Cf P. Bruno, n 1 above, 87, according to which jurisdiction is conferred only when the court finds it under the rules of Regulation 2201/2003, and not under the respective rules of private international law.

[10] Cf I. Viarengo, n 8 above, 71. This is also the view of P. Bruno, n 1 above, 87. 11 Cf M.P. Gasperini,n 7 above, 33.

property regimes, the choice being left to the internal rules of the Member State identified.[12] It follows that the court hearing the main action on divorce, separation or marriage annulment will not necessarily be called upon to rule also on the related property matter.[13]

III. Special cases and agreement between the parties.

The rule laid down in Art 5(1) is automatic, since it is based on 'strong' connecting factors. The same cannot be said for the cases provided for in Art 5(2), where the connection is based on criteria which are certainly 'less strong,' not to say 'weak,'[14] established by Arts 3(1)(a), fifth and sixth indents, 5 and 7 of Regulation 2201/2003.
More precisely, jurisdiction is no longer automatic, but is activated only on a voluntary basis, when the jurisdiction of the court is that of the Member State in which the applicant is habitually resident and has resided there for at least one year immediately prior to the submission of the application. Otherwise, it shall be the jurisdiction of the Member State of nationality of the applicant, if he or she is habitually resident there and has resided there for at least six months immediately before the application was lodged. Or, moreover, in the event of conversion of legal separation into divorce or, finally, according to the law of that State, in the event of residual jurisdiction.
In all these cases, the EU legislator considered it more appropriate to introduce certain restrictions, given that Regulation 2201/2003 offers the plaintiff a wide range of choices when deciding which court is competent. The obvious aim is to discourage the temptation to misuse this opportunity to the detriment of the other party.[15]
It is also possible, if not probable, that in all the cases covered by Art 5(2), the Member State referred to will not be the one where the spouses had their common residence during the marriage. This raises more than one difficulty when it comes to resolving questions related

[12] Cf P. Peiteado Mariscal, n 3 above, 310-311.
[13] Cf I. Viarengo, n 8 above, 72.
[14] M.P. Gasperini, n 7 above, 32, and I. Viarengo, n 8 above, 73.
[15] P. Lagarde, 'Règlements 2016/1103 et 1104 du 24 juin 2016 sur les régimes matrimoniaux' *Rivista di diritto internazionale privato e processuale*, 679 (2016). See also M.P. Gasperini, n 7 above, 32.

to property, given that this property will most often be located in the Member State of common residence.[16] To remedy this undesirable situation, the Regulation therefore gives spouses the possibility to avoid jurisdiction crystallising far from the Member State where they lived together.[17]

If the agreement in point is concluded prior to the authority being seised to decide on the matrimonial property regime, it must meet the requirements of Art 7(3).[18] In practice, it must be in writing and dated and signed by the parties. However, an electronic format may also be used, provided that in this case the medium chosen is suitable for ensuring a durable record of the agreement.

Attention must also be paid to one point. The case concerning the property consequences has not yet begun, but the case concerning the status of the spouses could already be started. In such a situation, there are those who consider that the agreement may be tacit, with the acceptance of the jurisdiction chosen - perhaps even erroneously - by the party bringing the case.[19]

The problem may arise when no court has been seised, not even to hear the question of status, in the case of a real prenuptial agreement. In such a hypothesis, the parties will have to be very careful when choosing the court, given the close link between Art 5(2) and Art 7, which leads to the conclusion that the authorities of any Member State may not be chosen as the competent court, but only those provided for in Art 5(2). It goes without saying that the parties may in no case derogate from the 'strong' criteria laid down in Art 5(1). If the court

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[16] A. Oprea, 'Aspecte de drept european privind alegerea legii aplicabile regimului matrimonial - European Law Aspects concerning the Law Applicable to Matrimonial Regimes' *Studia Universitatis Babes-Bolyai Jurisprudentia*, 125, 127-128 (2017).

[17] This is the thesis of P. Bruno, n 1 above, 88.

[18] Cf S. Marino, 'Strengthening the European civil judicial cooperation: the patrimonial effects of family relationships' *Cuadernos de Derecho Transnacional*, 265, 270 (2017).

[19] P. Bruno, n 1 above, 89, and I. Viarengo, n 8 above, 76. See also: A.M. Pérez Vallejo, 'Ley aplicable y competencia judicial internacional en el Reglamento (UE) 2016/1103 sobre regímenes económicos matrimoniales' *Anales de Derecho*, 1, 12 (2020).

of a Member State is seised on the basis of that provision it must not take into account the parties' choice of a different jurisdiction.[20]
Finally, it remains to be considered what the formal requirements are, in the event that the authority has already been seized. The silence of the Regulation on this point leads to the conclusion that in this case no special form is required, and that it is sufficient a conduct that indicates the tacit acceptance of the authority seised.[21]

IV. Jurisdiction in case of dissolution or annulment of a registered partnership.

Art 5 of Regulation 1104/2016 provides different rules from the other Twin Regulation with respect to the property consequences of registered partnerships and the issues that may arise in the event of their termination.
The - albeit slight - differences in terminology concerning 'related' or 'connected' are not relevant, as it is quite clear that the EU legislator intended to refer to all property matters arising in the event of the dissolution of the family relationship, whether it be marriage or registered partnership. The most important difference in Art 5 between the Twin Regulations is the complete reversal of the perspective on the criteria for connection, providing for the agreement of the parties to have jurisdiction in all cases.[22]
In other words, when the court of a Member State is called upon to rule on the dissolution or annulment of a registered partnership, the authorities of that Member State will also have jurisdiction to rule on property issues related to the main proceedings.[23]
The reasons for this choice can be found in the absence, unlike in the case of marriage, of definite grounds of jurisdiction (whether 'strong' or 'weak'), given that, obviously, Regulation 2201/2003 applies only to marriage.[24] It is therefore logical that, by referring the question to the

[20] M.P. Gasperini, n 7 above, 33 and I. Viarengo, n 8 above, 76-77.
[21] So it seems to I. Viarengo, n 8 above, 76.
[22] According to P. Bruno, n 1 above, eg the proceedings on the annulment or dissolution of the registered partnership.
[23] I. Viarengo, n 8 above, 74.
[24] Cf I. Viarengo, 'Effetti patrimoniali delle unioni civili transfrontaliere: la nuova disciplina europea' *Rivista di diritto internazionale privato e processuale*, 33, 42 (2018); O.

private international law rules of each Member State, the EU legislator decided, in the absence of a certain and uniform point of reference,[25] to make the attribution of jurisdiction in favour of the main proceedings on the status dependent only on the agreement between the parties.[26] So in case of registered partnerships the attraction of jurisdiction provided by Art 5 is possible just with the partners' consent. Precisely for this reason, Art 8(1) under Regulation 2016/1104 does not refer to Art 5. A different provision, in effect, would be in contrast with the same content of Art 5.[27]

With regard to the form of the agreement, Art 5(2) of Regulation 1104/2016 provides that, if the agreement is concluded before the court that is seised to decide on the property consequences of the registered partnership, the provisions of Art 7 must be complied with. It follows that the agreement must be in writing, dated and signed by the parties, and that any electronic form that allows a durable record of the agreement is admissible.

Finally, with regard to further specific issues, the same considerations related to the agreement on disputes concerning the matrimonial property regime, can be applied, *mutatis mutandis*, to the property consequences of a registered partnership.[28]

Feraci, 'L'incidenza del nuovo regime europeo in tema di rapporti patrimoniali tra coniugi e parti di Unioni registrate sull'Ordinamento giuridico italiano e le interazioni con le novità introdotte dal d.lgs. 7/2017 attuativo della cd. Legge Cirinnà' *Osservatorio sulle fonti*, 1, 10 (2017).

[25] On the different regulations on the dissolution of registered partnerships in the EU, cf R. Garetto, 'Una nuova tassonomia per i nuclei familiari? Prospettive e problemi nella nuova regolamentazione UE in Italia e in Europa', in I. Riva ed, *Famiglie transfrontaliere: regimi patrimoniali e successori. Casi di studio. Atti del Convegno di Torino, 8 novembre 2019* (Turin: Università degli Studi di Torino, 2021), 28-30.

[26] Cf on this point M.P. Gasperini, n 7 above, 32, I. Viarengo, n 8 above, 74-75, and P. Bruno, n 1 above, 90.

[27] C. Grieco, 'The role of party autonomy under the regulations on matrimonial property regimes and property' *Cuadernos de Derecho Transnacional*, 457, 467 (2018).

[28] Cf para III above.

Article 6
Jurisdiction in other cases

Federico Pascucci

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
Where no court of a Member State has jurisdiction pursuant to Article 4 or 5 or in cases other than those provided for in those Articles, jurisdiction to rule on a matter of the spouses' matrimonial property regime shall lie with the courts of the Member State:	Where no court of a Member State has jurisdiction pursuant to Article 4 or 5 or in cases other than those provided for in those Articles, jurisdiction to rule on the **property consequences of a registered partnership** shall lie with the courts of the Member State:
(a) in whose territory the spouses are habitually resident at the time the court is seised; or failing that	(a) in whose territory the **partners** are habitually resident at the time the court is seised, or failing that
(b) in whose territory the spouses were last habitually resident, insofar as one of them still resides there at the time the court is seised; or failing that	(b) in whose territory the **partners** were last habitually resident, insofar as one of them still resides there at the time the court is seised, or failing that,
(c) in whose territory the respondent is habitually resident at the time the court is seised; or failing that	(c) in whose territory the respondent is habitually resident at the time the court is seised, or failing that,
(d) of the spouses' common nationality at the time the court is seised.	(d) of the **partners'** common nationality at the time the court is seised, or failing that,
	(e) under whose law the registered partnership was created.

Summary: I. General remarks. – II. Cases of residual jurisdiction. – III. The special nature of civil unions.

I. General remarks

The connecting factors laid down in Arts 4 and 5 of the Twin Regulations, while covering most of the cases concerning jurisdiction, do not completely exhaust the spectrum of cases concerning it. The

European legislator has therefore taken care to provide that, even outside the cases governed by the previous Articles, there is in any case - at least in principle - a single authority to which the dispute is referred.[1]

This function has been entrusted to Art 6 of the Twin Regulations, which basically identify two areas not covered by the general criteria, namely cases related to succession or dissolution/cancellation of marriage or civil partnership, which do not however meet the requirements laid down in Arts 4 and 5, and cases that are not tout court related to them. Moreover, according to a part of the doctrine, only cases connected with the dissolution of the marriage/civil partnership that did not meet the criteria of Art 5 would fall within the scope of Art 6. It seems to take it for granted that, on the contrary, any jurisdictional question concerning property regimes arising from the succession could always be resolved on the basis of the general rule of Arts 4 of the Twin Regulations[2].

Regardless of whether one wishes to accept the latter hypothesis or not, it is objective that Arts 6 of both Regulations propose a *per se* general, but subsidiary, rule of jurisdiction by exclusion. There is an obvious attempt to extend jurisdiction also to those Member States which would not normally have it.

To do so, the European legislator uses a proper 'hierarchical pyramid' of criteria in which the preceding automatically excludes the following. On the basis of these criteria, the court seised cannot make a 'quail's leap', eg skipping one or more 'levels', but must declare its jurisdiction only if one of the criteria enables it. This under condition that the higher criterion does not entrust jurisdiction to the authority of another Member State.[3]

II. Cases of residual jurisdiction

More analytically, Arts 6 of Regulations 1103 of 2016 provide for 4 'levels' of residual jurisdiction: (1) the territory of the Member State

[1] P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate* (Milan: Giuffrè, 2019), 93 and P. Franzina, 'Article 6', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples. A Commentary* (Cheltenham: Edward Elgar, 2020), 79.

[2] This seems to be the thought of P. Franzina, n 1 above, 79.

[3] Cf P. Franzina, n 1 above, 81.

where the spouses (or partners) are habitually resident at the time the court is seised; (2) the territory of the Member State where the spouses (or partners) were last habitually resident, if at least one of them still resides there at the time the application is made; (3) the territory of the Member State where the defendant is habitually resident at the time the application is made; and, lastly (4) the Member State of the common nationality of the spouses (or partners) at the time the authority is seised.

It remains to be seen, however, what is to be considered as 'habitual residence' and 'common nationality.' With regard to the first question, it may be helpful to recall the ruling of the Court of Justice in the Magdalena Fernandez case, according to which 'habitual residence' is to be defined as the place where the person concerned - in this case the spouse or partner - has established, 'with the intention that it should be of a lasting character, the permanent or habitual centre of his interests.'[4] Consequently, the determination of habitual residence will be based on duration, regularity and the reasons why the spouses (or partners) settled in that particular Member State. All this will be assessed in the light of the individual interests (profession, family, health, etc.) pursued by both.[5]

With regard to common nationality, problems arise when dealing with individuals with dual or even multiple nationalities. On this point, since it is not possible to use the letter of Arts 6 of both Regulations, which say nothing on the matter, reference should be made respectively to Recital 50 of Regulation 1103/2016 and Recital 49 of Regulation 1104/2016. It follows from these recitals that when nationality is used as a connecting factor, the question of how to consider a person with multiple nationality is a preliminary element that goes beyond the scope of the regulations and as such should be left to national legislation, subject always to compliance with general EU principles.

This means that in order to solve the problems concerning spouses (or partners) with double or multiple nationalities, reference must be made to the rules of private international law applied by the court before

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[4] Case C-452/93 P. *Pedro Magdalena Fernandez* v *Commission of European Communities* [1994] ECLI: EU:C:1994:332, para 22.

[5] P. Franzina, n 1 above, 82.

which the case is brought, with the caveat that these rules must be excluded, or at least adapted, if they are contrary to the principles of the Union (first and foremost, certainly the anti-discrimination principle on the basis of nationality, in this case).
On the one hand, the latter criterion has the undoubted advantage of establishing a fairly reliable link with a competent court. However, it is very weak in comparison with the previous criteria which, by referring to habitual residence, are certainly stronger. With the risk of 'disconnecting' the parties from the court probably best suited to decide the property issue arising between them[6].

III. The special nature of civil unions

The above considerations are valid also for Art 4 of Regulation 1104/2016. This Article adds a final criterion to the four already examined, which may be defined as a closing criterion, according to which, in the absence of all the others, jurisdiction must be entrusted to the authority of the Member State under whose law the registered partnership was formed.
The rationale of the latter rule is clear. Given the lack of a general recognition of this institution at Community level, the European legislator, concerned that the partners would be denied access to justice, has established a final link that makes it possible to always identify an authority that will not be able to decline jurisdiction on the grounds that its law does not recognise registered partnerships.[7]

[6] This is the risk referred to by P. Bruno, n 1 above, 94.
[7] P. Bruno, n 1 above, 94-95 and P. Franzina, n 1 above, 80-81.

Article 7
Choice of court

Federico Pascucci

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. In cases which are covered by Article 6, the parties may agree that the courts of the Member State whose law is applicable pursuant to Article 22, **or point (a) or (b)** of Article 26(1), or the courts of the Member State of the conclusion of the marriage shall have exclusive jurisdiction to rule on matters of their matrimonial property regime.	1. In cases which are covered by Article 6, the parties may agree that the courts of the Member State whose law is applicable pursuant to Article 22 or Article 26(1) or the courts of the Member State **under whose law the registered partnership was created shall have exclusive jurisdiction to rule on the property consequences of their registered partnership.**
2. The agreement referred to in paragraph 1 shall be expressed in writing and dated and signed by the parties. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.	2. The agreement referred to in paragraph 1 shall be expressed in writing and dated and signed by the parties. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.

Summary: I. Preliminary remarks. – II. The substantive requirements of the agreement. – III. Formal requirements. – IV. Particular assessment of civil unions.

I. Preliminary remarks

The Twin Regulations do not completely exclude the autonomy of the parties in choosing the body to which jurisdiction is to be entrusted. They allow the parties, subject to certain conditions, to conclude choice-of-court agreements in favour of the Member State whose law is applicable or the Member State where the marriage was celebrated

or the registered partnership formed.[1] The European legislator does not choose to establish a general clause on this point. It lays down a rule for particular cases which, once validly activated, allows contractual autonomy to obtain an effect both derogating from and extending jurisdiction.[2] Once the agreement has been concluded in accordance with Arts 7 of the Twin Regulations, only the courts of the chosen Member State will be entitled to hear the matter, whereas the courts of the excluded States will not be able to claim jurisdiction for themselves.

As stated in Recitals 36 and 37, the aim of the European legislator with these rules is to increase legal certainty, predictability and the autonomy of the parties. Indeed, the linking of jurisdiction to the choice of applicable law has the undoubted advantage of linking the *forum* to the *ius*. This greatly facilitates the judge's task,[3] who will be spared the embarrassment - and the difficulty - of having to judge using a foreign law. In addition, the reference to the State in which the marriage is celebrated or the union has been formed overcomes the many uncertainties that may arise with regard to the identification of the habitual residence of the spouses or partners.[4]

II. The substantive requirements of the agreement

The agreement on jurisdiction may take place in the cases provided for in Art 6 of the Twin Regulations and for the Authorities of those Member States whose law is applicable pursuant to Art 22 or to Art 26(1)(a) and (b).

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1 Cfr. P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate* (Milan: Giuffrè Francis Lefebvre, 2019), 101.

2 P. Franzina, 'Article 7', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples. A Commentary* (Cheltenham: Edward Elgar, 2020), 86.

3 Ibid, 89. On this issue see also M.P. Gasperini, 'Jurisdiction and Efficiency in Protection of Matrimonial Property Rights' *Zbornik Znanstvenih Razprav*, 23, 34 (2019), for whom the intention of the European legislator to promote the union between forum and ius is clear. On the other hand, P. Bruno, n 1 above, 103, seems critical on this point, as he points out that linking the choice of the parties to the criteria of Art 26(1), eg to factors referring to the past, creates the risk that in the meantime the couple has lost all contact with those countries.

4 Cfr. P. Franzina, n 2 above, 89.

In the first case (Art 22): the law of the State of habitual residence of the spouses/future spouses (or: partners/future partners) or of one of them or of the nationality of one of them at the time the agreement is concluded.
In the second case (Art 26(1)(a) and (b)): state of the spouses (or: partners') first common habitual residence after the marriage (or: after the establishment of the registered partnership) and of their common nationality at the time the marriage is concluded (or the registered partnership is established) or, finally - as stated above - the State of the conclusion of the marriage (or of the establishment of the registered partnership).
This means that the choice-of-court rule is a rule of residual application,[5] which is triggered only when the exclusive jurisdictions provided for in cases of succession or definition of status are not triggered, since in such cases the choice of the parties would be disregarded *ex lege*.[6]
From this point of view, as authoritative legal literature has pointed out,[7] the parties' freedom of choice as regards jurisdiction would appear to be of 'insignificant' importance. In fact, the need to settle issues concerning the matrimonial property regime usually arises in connection with succession matters or separation, divorce or dissolution of the union. It must be said, however, that the cases addressed by Arts 4 and 5 of the Twin Regulations are not exhaustive of all possible hypotheses. Moreover, although within very narrow margins, Art 5(2) also provides for cases in which the jurisdiction of the court seised is subject to the choice of the parties. It follows that there is still a residual margin for private autonomy in the choice of competent authority in matters of property regimes.
The agreement in question may take place at any time, whether before the celebration of the marriage or the establishment of the

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[5] See on the issue. P. Bruno, n 1 above, 102.

[6] P. Franzina, n 2 above, 86, according to which in cases of succession or status 'no choice' is not possible.

[7] M.P. Gasperini, n 3 above, 35. But *contra* seems M. Revillard, 'L'autonomie de la volonté dans les relations de famille internationales: regards sur les récents instruments internationaux', in *A Commitment to Private International law - Essays in Honour of Hans van Loon* (Cambridge: Intersentia, 2013), 487.

partnership, or after the marriage or the partnership, or when the question arises, or even when the proceedings are already pending.[8]

III. Formal requirements

The parties' agreement must also be subject to strict formal requirements in order to be valid. As provided for in Recitals 46 and 47, it must be in writing, dated and signed by the parties.[9]

Furthermore, as can be argued from Art 7(2), the agreement must be documented and documentable, also for purposes of proof.[10] From this point of view, the European legislator has also considered 'electronic means which provides a durable record of the agreement' to be equivalent to writing. According to a part of the doctrine, the rule should be interpreted literally, so that it would be sufficient that the electronic medium merely provides for the possibility of recording the agreement, irrespective of the actual recording by one or both parties.[11]

The Twin Regulations do not lay down any additional requirements for validity. They thus leave the question open as to what additional requirements may be required: possibly by the law of the Member State to whose courts jurisdiction is entrusted, or by the law of the Member State in which one or both spouses are habitually resident. In the first case, some believe that the provisions of Art 25(1) of Regulation 1215/2012 may be helpful. According to that Article, when the parties have concluded an agreement to confer jurisdiction to the authorities of a Member State, the validity of that agreement must be

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[8] P. Franzina, n 2 above, 86, according to which when proceedings are already pending it is up to the domestic law of procedure to determine the time limit within which the agreement should be concluded. In contrast, M.P. Gasperini, n 3 above, 34, who makes reference to an out-of-court agreement to be concluded before the commencement of proceedings concerning property regimes.

[9] According to P. Bruno, n 1 above, 103, these requirements are necessary to ensure that both spouses and partners are aware of the consequences of their choice. The same view is expressed by P. Franzina, n 2 above, 90.

[10] Cf P. Franzina, n 2 above, 90.

[11] See on the issue P. Bruno, n 1 above, 104-105, for which an exchange of emails between the parties clearly indicating their agreement would thus be sufficient for the agreement to be regarded as having been concluded in accordance with the requirements of Art 7 and thus valid.

verified in the light of the law of that Member State.[12] In the second case, on the other hand, the requirements of the law of the State of residence of one or both spouses would have to be met, as laid down in Recitals 46 and, in particular, 47 of the Twin Regulations.[13] In the event of a discrepancy between the required criteria, in order to comply with the principle laid down in Recital 46, according to which there should be no change of the chosen law without an explicit manifestation of the will of the spouses or partners, it would be preferable to opt for the argument that it is sufficient to comply with the requirements of a single State (that of the chosen law, that of the common residence or that of the residence of the individual spouse or partner).

IV. Particular assessment of civil unions

Art 7 of Regulation 1104/2016 on civil unions refers both to the cases provided for in Art 22 (which means that jurisdiction may be entrusted to the courts of the State of habitual residence of one or both partners or future partners at the time of the agreement, of the nationality of one of the partners or future partners, or of the establishment of the registered partnership) and to all the cases provided for in Art 26, i.e., in the absence of a choice, to the courts of the State where the civil partnership was established. According to some scholars, this means that the criterion of the law of the State where the civil partnership is registered is both a competing criterion within the autonomy recognised by the parties and a residual criterion in the event that there is no choice.[14]
On the other hand, there are no differences with regard to the formal requirements of the agreement, so the same considerations made for marriage agreements apply *mutatis mutandis*.

[12] P. Franzina, n 2 above, 90-91.
[13] P. Bruno, n 1 above, 105.
[14] Cf P. Bruno, n 1 above, 102.

Article 8
Jurisdiction based on the appearance of the defendant

Maria Paola Nico

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State whose law is applicable pursuant to Article 22 or **point (a) or (b)** of Article 26(1), and before which a defendant enters an appearance, shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or in cases covered by Article 4 or 5(1).	1. Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State whose law is applicable pursuant to Article 22 or Article 26(1), and before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or in cases covered by Article 4.
2. Before assuming jurisdiction pursuant to paragraph 1, the court shall ensure that the defendant is informed of his right to contest the jurisdiction and of the consequences of entering or not entering an appearance.	2. Before assuming jurisdiction pursuant to paragraph 1, the court shall ensure that the defendant is informed of his right to contest the jurisdiction and of the consequences of entering or not entering an appearance.

Summary: I. Jurisdiction based on the appearance of the defendant. General. – II. Limits to the operability of tacit submission. – III. The objectives pursued by the Art 8.

I. Jurisdiction based on the appearance of the defendant. General.

Arts 8 of Regulations (EU) 1103/2016 and 2016/1104 provide for the possibility to incardinate the jurisdiction, as well as in cases where the

competent judicial authority results from other provisions, in a given State as a result of the defendant's appearance in court.[1]
However, for the purposes of the second subparagraph, that criterion shall not apply if the appearance is intended to contest the lack of competence.
It is, therefore, an instrument establishing a further and specific title of jurisdiction.
It is in Chapter II that the Regulation provides guidelines for the choice of authority and the determination of competence.[2]
The appearance of the defendant is configured as a procedural acceptance through the formal requirement of the tacit prorogation of jurisdiction and is accompanied by the express prorogation referred to in art 7.
The choice of the parts turns out to be a guidelines, within a multiplicity of criteria identified by law.

II. Limits to the operability of tacit submission.

The institution of the tacit prorogation does not constitute a novelty but is present in other European regulations[3] and outlined in other international instruments:[4] it must be interpreted as meaning that a court of a Member State becomes competent where, although the defendant is not treated in the same way as the general and special criteria laid down in that Regulation, he shall appear before him.
It' s clear that there is a growing role for private autonomy, but there is also a strict system of control over the presence of an effective, free and conscious agreement to prorogate jurisdiction.
Although no express submission is required, the Articles in comment contain an invitation to the court before which the defendant appears

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

[2] I. Viarengo, 'Effetti patrimoniali delle unioni civili transfrontaliere: la nuova disciplina europea' *Rivista di diritto internazionale privato e processuale*, 41-42 (2018).

[3] Art 5 of EU Regulation 44/2001.

[4] The institution of the tacit prorogation is alsocontained in Art 18 of the Brussels Convention of 27 September 1968.

to ensure that the defendant is informed of his right to contest jurisdiction.
It should be added that the appearance of the defendant renders inoperative a previous agreement between the spouses or partners on the identification of the judge, conferring exclusivity on the prorogated court even if previously the parties had indicated their intention to bring an action before a court of a third country.
The tacit submission prevails over the expressed one: consequently, the tacit will prevail over the one expressly agreed upon.
In order to verify the validity of the choice of court agreement from a substantive point of view, it is necessary that the court must, on the one side, coincide with the one whose law is applicable pursuant to Art 22 and 26 and shall not have jurisdiction in the same way as Arts 4 and 5 of those Regulations: those titles shall prevail over the others. A similar formulation is referred to in art 24 of the Regulation (EU) no 44/2001.
Regulation no 44/2001, Regulation no 2016/1103 and Regulation no 2016/1104 reflect a policy choice of the European legislator consistent with the Court of Justice.
In fact the institution of tacit prorogation of jurisdiction is endorsed to European case law.
The Court of Justice, ruling in the context of a dispute in which the parties had concluded a convention conferring jurisdiction, recognition and enforcement of judgments in civil and commercial matters, which provide as grounds for non-recognition infringement of the rules of special jurisdiction, concern the non-recognition of judgments given by an inadmissible court not seised in accordance with those rules.
They are therefore not applicable where the decision has been given by a court having jurisdiction, a case which relies, in particular, in the case of the court seised - even if it does not comply with those rules of special jurisdiction - in which the defendant is constituted and there is no objection of lack of jurisdiction.
Finally, it appears that the instrument of the tacit prorogation reflects the operative principle of the process, resulting in full agreement as it leaves to the party the choice to challenge in good time the legitimacy of the choice of court made by the other party.

There is, therefore, no contradiction between the principles of tacit prorogation and infringement of the rules of jurisdiction.

III. The objectives pursued by the Art 8.

The general intention of the Regulation is to promote legal certainty in the European Union the autonomy of the parties while avoiding, however, any denial of justice.
The supranational legislator did not choose the elaboration of a system based on a general title of jurisdiction but provided for the choice of numerous derogatory forums that are variously inspired.[5]
The requirement of jurisdiction is therefore not difficult to satisfy; the multiplicity of Court's choice would, in fact, undermine the predictability of solutions, while encouraging the dynamics of *forum shopping*.

[5] M. Pinardi, 'I Regolamenti europei del 24 giugno 2016 nn 1103 e 1104 sui regimi patrimoniali tra coniugi e sugli effetti patrimoniali delle unioni registrate' *Rivista della cooperazione giuridica internazionale*, 104 ff. (2018).

Article 9
Alternative jurisdiction

Maria Paola Francesca Bottoni

Regulation (EU) 2016/1103

1. By way of exception, if a court of the Member State that has jurisdiction pursuant to Article 4, 6, **7 or 8** holds that, under its private international law, the marriage in question is not recognised for the purposes of matrimonial property regime proceedings, it may decline jurisdiction. If the court decides to decline jurisdiction, it shall do so without undue delay.

2. Where a court having jurisdiction pursuant to Article 4 or 6 declines jurisdiction and where the parties agree to confer jurisdiction to the courts of any other Member State in accordance with Article 7, jurisdiction to rule on the matrimonial property regime shall lie with the courts of that Member State.

In other cases, jurisdiction to rule on the matrimonial property regime shall lie with the courts of any other Member State pursuant to Article 6 or 8, **or the courts of the Member State of the conclusion of the marriage.**

3. This Article shall not apply when the parties have obtained a divorce, legal separation or marriage annulment which is capable of being recognised in the Member State of the forum.

Regulation (EU) 2016/1104

1. If a court of the Member State that has jurisdiction pursuant to Article 4, **5, or point (a), (b), (c) or (d)** of Article 6 holds **that its law does not provide for the institution of registered partnership, it may decline jurisdiction.** If the court decides to decline, it shall do so without undue delay.

2. Where a court **referred to in paragraph 1 of this Article** declines jurisdiction and where the parties agree to confer jurisdiction to the courts of any other Member State in accordance with Article 7, jurisdiction to rule on the **property consequences of the registered partnership** shall lie with the courts of that Member State.

In other cases, jurisdiction to rule on the **property consequences of a registered partnership** shall lie with the courts of any other Member State pursuant to Article 6 or 8.

3. This Article shall not apply when the parties have obtained a dissolution or annulment of **a registered partnership** which is capable of being recognised in the Member State of the forum.

Summary: I. Introduction: the genesis of Art 9 of the Regulation (EU) 2016/1103 and Regulation (EU) 2016/1104. – II. Analysis of Art 9: structure and objectives of the provision. – III. Practical applications and usefulness of Art 9 of the Regulation (EU) 2016/1103. – IV. The peculiarities of Art 9 of the Regulation (EU) 2016/1104.

I. Introduction: the genesis of Art 9 of the Regulation (EU) 2016/1103 and Regulation (EU) 2016/1104

Under the heading 'Alternative competence,' Art 9 of the Regulation (EU) 2016/1103, dedicated to property regimes between spouses and Art 9 of the Regulation (EU) 2016/1104 on the property consequences of registered partnerships, allow the courts of a Member State - whose law does not know the institution of registered partnership or does not recognize marriage - to decline their jurisdiction.

In spite of the almost perfect coincidence between the two regulations, such as to have deserved the appellation of 'Twin'[1] regulations, significant differences may be observed within the discipline of the 'competence,' which do not recommend the unitary treatment of the two rules. However, it must be noted that in both Regulations, Art 9 has been created with the aim of ensuring effective justice for those who got married or registered the partnership, in places geographically and legally different from those in which the communion of life and interests was then achieved. Art 9 provides a solution to the case in which the court competent to deal with issues related to the registered partnership/marriage by virtue of the canonical criteria, declines its jurisdiction, thus allowing the parties, spouses or partners, to apply to another court. The provisions set out in Art 9 do not represent a novelty in the European framework, as Art 13 of the Regulation (EU) 1259/2010 adopted by the Council of the European Union on 20 December 2010

[1] N. Joubert, 'La dernière pierre (provisoire?) à l'édifice du droit international privé européen en matière familiale Les règlements du 24 juin 2016 sur les régimes matrimoniaux et les effets patrimoniaux des partenariats enregistrés' *Revue critique de droit international privé*, I, 1-26 (2017).

already contained provisions applicable to cases of divorce and separation.

Art 13 of the Regulation (EU) 1259/2010 entitled 'Differences in national law' lays down in fact that the courts of a Member State, whose law does not provide for divorce or does not consider the marriage in question valid, are not obliged to issue a decision under the Regulation. Art 13 of the Regulation (EU) 1259/2010 is a rule of public order which allows the exclusion of the applicable law when the foreign law is in conflict with these values. Similar provisions are contained in the Regulation (EC) 2201/2003. However, there is a diametrically opposite view. The Regulation (EC) 2201/2003, in fact, restricts the importance of public order by establishing that the divergence between national legislation, the difference of the preconditions and conditions which are required by the various systems for the dissolution of marriage does not preclude recognition.[2] Some authors have identified in Art 13 the weak point of the future construction of judicial cooperation, as its application in conjunction with the criteria of jurisdiction laid down in the Regulation (EC) 2201/2003, would have led to hypotheses of denial of justice. Think of the case of a same sex couple who has contracted marriage in the State other than Italy, where the couple resides permanently.[3] In the event of a marital crisis, according to Regulation (EC) 2201/2003, the Italian judge would have exclusive jurisdiction, but he does not know the institution of same sex marriage, because it is absent in the Italian legal system. For hypotheses such as this, the need was felt to provide for the insertion of an alternative jurisdiction,[4] which gives the power to deal with the issue to the court other than that of the State in which divorce or separation cannot be pronounced, because they are not recognized.

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[2] I. Viarengo, 'Il regolamento UE sulla legge applicabile alla separazione e al divorzio e il ruolo della volontà delle parti' *Rivista Diritto Internazionale Privato e Processuale*, III, 623 (2011). The same doubts developed by theorists and commentators are shared by the Commission itself in doc. 17046/10.

[3] The example in the text is made by I. Viarengo, ibid.

[4] See: Council statement in Doc. 17046/10, Annex I. See also Rapporteur Tadeusz Zwiefka's Explanatory Statement to the Draft report of the European Parliament on the proposal for a regulation of 26 October 2010.

The European legislator provides for these requirements with the enactment of Art 9, whose wording does not stand out for clarity and has raised doubts in doctrine[5] that one can legitimately expect that they will turn into concrete issues in the courtrooms.

II. Analysis of Art 9: structure and objectives of the provision

As anticipated, the first objective pursued by Art 9 is to avoid the denial of justice that would occur when spouses or partners decide to institute legal proceedings, but the court cannot rule on the application by disregarding the institution of marriage or that of registered partnership. Such rejection would result in a violation of fundamental rights inherent in family life, whether this originated from a homoaffective or heteroaffective union.[6]

If the court seised, because it is the court of the succession, because it has jurisdiction pursuant to Art 6, because it is subject to the agreement of the parties, because it has become competent for the appearance of the defendant, considers that it is not competent, it could, without undue delay and in exceptional cases, decline its jurisdiction.

A general look at the whole Regulation requires us to ask ourselves whether this court, who has the power to declare its own incompetence, may also be the court called upon to rule on divorce, separation or the annulment of marriage.

The failure to recall Art 5 of the same Regulation, which serves to concentrate in a single jurisdiction the decision on the fate of the marriage bond and its patrimonial consequences, requires to give a negative answer to this question and to consider that the competent court in the matter of divorce/separation pursuant to Art 5, cannot dismiss the proceedings. To confirm this, in its last part, Art 9 states

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[5] N. Joubert, n 1 above, 14.

[6] The interpretation of the concept of the family proposed at European level is now beyond the formal legal qualification of the relationship, and the right to marry cannot be limited to marriage between two persons of different sex, as recognised in numerous EDU Court rulings, cf EDU Court, Sec. I, 24 June 2010, *Schalk and Kopf v Austria*, no 30141/04; EDU Court, Grand Chamber, 16 July 2014, *Hamalainen v Finland*, no 37359/09; EDU Court, Sect. IV, 21 July 2015, *Oliari and others v Italy,* nos 18766/11, 36030/11.

that the same shall not apply if the parties have obtained a decision on divorce, legal separation or marriage annulment, which may be recognised in the Member State of the forum, thus safeguarding the systematic uniformity of the Regulation and overcoming the failure to recall Art 5.
In its second part, Art 9 states that where the competent court in case of death of a spouse (Art 4) or the court identified according to the functional-territorial criteria referred to in Art 6 (residence and domicile), declines its jurisdiction, the parties can identify the competent authority to decide. With reference to Art 7, it becomes obvious that the identification of the competent authority to decide should be designated by means of a written, dated and signed agreement, from which it emerges that the spouses are fully aware of the consequences of their choice. Along the lines of the provisions of Arts 22 and the following of the same Regulation, with regard to the applicable law.
The option granted to the parties confirms the pre-eminent role that autonomy of will has assumed as an international private technique.[7] In the context of family relations, in particular, it is considered the most suitable one to protect the material interests of persons involved in the unique family dynamic. The rule allows spouses/partners to identify the most appropriate forum to meet their needs.

III. Practical applications and usefulness of Art 9 of the Regulation (EU) 2016/1103

Having examined the content of the legislation, it is now possible to envisage some examples of practical application.
Think, for example, of a couple of Latvian origin, same sex, united in marriage in France, permanently resident in Poland and eager to change their patrimonial regime. Letter a) of Art 6 of the Regulation, on the basis of the criterion of habitual residence, allows the Polish court to be identified as competent. However, let us imagine that the

7 P. Franzina, 'L'autonomia della volontà nel regolamento "Roma I" sulla legge applicabile ai contratti' in A.M. Benedetti et al eds, *La tutela dei "soggetti deboli" tra diritto internazionale, dell'Unione europea e diritto interno* (Rome: Aracne Editrice, 2012), 29-53.

latter feels unable to accept the request; on the assumption that the Polish legal system does not recognise the validity of a same sex marriage. The legal lack in the Polish legal system precludes a ruling on the couple's assets.

Questio iuris: what changes thanks to Art 9 of the Regulation (EU) 2016/1103?

At the first appearance hearing (in the silence of the provision, this is considered to be the useful moment in which to declare the incompetence in order to fulfil the not better specified requirement of the without undue delay') the Polish court declares that it has no jurisdiction and rejects the application, thereby granting a temporary refusal of protection. The parties to this point may agree to confer jurisdiction on the courts of any other Member State pursuant to Art 7 'Election of the forum.'

In identifying the court, it would not be a good thing to designate as competent the court of the State ~~in~~ of which the spouses are citizens, because; like the authority of the place where the spouses are resident, such court would decline the demand for a change of the patrimonial regime, assuming the same reasons as the Latvian colleague. Here then is the usefulness of the provision in comment: as a result of Art 9, the choice of spouses must and may apply to the court of the place where the marriage was contracted, in the present case, the French one.

IV. The peculiarities of Art 9 of the Regulation (EU) 2016/1104

As pointed out at the beginning, it is not possible to deal jointly with the two Regulations as Art 9 of the Regulation (EU) 2016/1103 and Art 9 of the Regulation (EU) 2016/1104 have significant differences which require separate treatment.[8]

The enactment of the Regulation (EU) 2016/1104 was accompanied by the awareness that some courts would have to rule on the property effects of registered partnerships not recognized in their own State. In order to overcome these difficulties, Regulation (EU) 2016/1104 itself introduces to Art 3 an unambiguous notion of 'registered partnership.'

[8] P. Bruno, *I Regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate. Commento ai Regolamenti (UE) 24 giugno 2016, n. 1103 e 1104 applicabili dal 29 gennaio 2019* (Milan: Giuffrè, 2019), 12.

Art 9 of the Regulation (EU) 2016/1104 differs from Art 9 referred to in the Regulation (EU) 2016/1103 because it does not provide for the exceptional nature of the declinatory, the phrase 'in exceptional cases' disappears, the reference to the titles of jurisdiction on the basis of which the court which disposes of jurisdiction is seised changes and the reference to private international law referred to in 'Twin' Art 9, here is done to domestic law namely national law.[9]

The reasons for these differences are explained in Recital 36. The institution of registered partnerships is not known in all the legal systems of the Member States. It is clear that in the first case (Regulation (EU) 2016/1103) in order to decline its jurisdiction, the court seised must determine whether 'under its private international law' the marriage in question is recognised for the purposes of the proceedings of the property regime. In the second case, the court's declaration will depend on whether or not the law of the forum provides for the institution of the registered partnership.

At the procedural level, Art 9 does not provide guidance on the identification of the moment from which and within which the declaration of jurisdiction can intervene, nor does it care about the consequences in terms of limitation that may lead to rejection, nor does it provide for the enforceability of the initiative of the spouses/partners in respect of third-party creditors.[10] In the absence of any indication, it is considered that these questions should be solved in accordance with the law of the State of the court seised at a later stage.[11]

The issue of *forum shopping* and *forum running,* raised in reference to previous Regulations on divorce and separation, then finds its course.[13]

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[9] P. Bruno, n 8 above, 13.

[10] P. Lagarde, 'Réglements 2016/1103 et 1104 du 24 jun 2016 sur les regimes matrimoniaux et sur le régime patrimonial des partenariato enregistrés', *Rivista italiana di Diritto Pubblico Comunitario*, V, 676-686 (2016).

[11] P. Franzina, n 7 above.

[13] As long ago as March 2005, the European Commission, in its Green Paper on applicable law and jurisdiction in matters of divorce, COM(2005) 82, Brussels, 14 March 2005, expressed doubts and concerns about elusive phenomena, such as divorce tourism.

The last *questio iuris*, concerns the compatibility between Art 9 and Art 31 'Public policy (ordre public)' to which every other provision of the Regulation should be parameterized. According to Art 31 in fact the application of the provision of the State law specified by this Regulation may be excluded only if such application is manifestly incompatible with the public policy of the forum.
The specification of the forum refers the provision to a set of rules and principles territorially circumscribed in the place where the dispute is taking place, but the latter provision seems to neglect that complex of rules which are superimposed on the public policy of the forum and on the national legal order, such as the right to respect for private and family life, the right to an effective remedy and the prohibition of discrimination, can raise doubts about the legitimacy of a decline in jurisdiction.[14]

[14] For more information on the issue of national and international public order, cf G. Perlingieri and G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale* (Naples: Edizioni Scientifiche Italiane, 2019); F. Angelini, *Ordine pubblico e integrazione costituzionale europea* (Padua: Cedam, 2007); S.M. Carbone, 'I diritti della persona tra CEDU, TUE e ordinamenti nazionali' *Diritto dell'Unione Europea*, 25 (2013).

Article 10
Subsidiary jurisdiction

Lucia Ruggeri

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
Where no court of a Member State has jurisdiction pursuant to Article 4, 5, 6, 7 or 8, or when all the courts pursuant to Article 9 have declined jurisdiction and no court has jurisdiction pursuant to Article 9(2), the courts of a Member State shall have jurisdiction in so far as immoveable property of one or both spouses are located in the territory of that Member State, but in that event the court seised shall have jurisdiction to rule only in respect of the immoveable property in question.	Where no court of a Member State has jurisdiction pursuant to Articles 4, 5, 6, 7 or 8, or when all the courts pursuant to Article 9 have declined jurisdiction and no court of a Member State has jurisdiction pursuant to **point (e) of Article 6, Article 7 or 8,** the courts of a Member State shall have jurisdiction in so far as immoveable property of one or both **partners** are located in the territory of that Member State, but in that event the court seised shall have jurisdiction to rule only in respect of the immoveable property in question.

I. Subsidiary jurisdiction: functional profiles of the institute

The institute of subsidiary jurisdiction is not a novelty in European family law. It is, in fact, a tool for identifying jurisdiction useful for making the protection of rights effective when there are complex situations and elements that have led other judges to be unable to operate because, for example, they have declined their jurisdiction. Without this legislative provision, the interests of cross-border couples would not be fully protected since the system would present a 'flaw' and would make it impossible for some matters to be actionable. Whenever the interests at stake are particularly relevant and there are situations of weakness and vulnerability, the European legislator uses

the instrument of subsidiary jurisdiction. An example, in this regard, is provided in Art 6 of Regulation (EC) no 4/2009. The right to maintenance together with the need for the correct administration of justice justify a new setting of the rules of private international law in the matter of jurisdiction,[1] allowing the procedure to be undertaken before a judge of the European Union. In the 2009 Regulation, subsidiary jurisdiction is conceived as a useful tool for cases in which the debtor is habitually resident outside the borders of the Union, and this determines that no judicial authority of a Member State or of a State party to the Lugano Convention which is not a Member State may be competent. In these cases, the 2009 Regulation identifies as subsidiary the jurisdiction of the authority of the Member State of which the parties have common citizenship. It is therefore necessary to determine in this Regulation the cases in which a court of a Member State may exercise subsidiary jurisdiction. Subsidiary jurisdiction has a very limited application in practice, as there are numerous criteria that make property matters ancillary. Consider, for example, property issues connected to separation, divorce, or marriage annulment which remain subsumed and, therefore, treated by the judge on the basis of Art 5 of the Regulation. The adoption of the Brussels II bis Regulation (recast) does not provide for any new application: even when the new Regulation comes into force, which will change the previous Regulation 2201/2003, property issues will be dealt with by the judge with jurisdiction in matters of separation, divorce, or annulment of marriage. On the other hand, the situation will be specific for registered partnerships made up of partners having Italian nationality. In this State, in fact, marriage between persons of the same sex is not allowed and at the same time registered partnership is an institute reserved only for homosexual couples. Consequently, the new Brussels II bis Regulation (recast), if literally understood, will be effective only for heterosexual couples and not for homosexual couples to whom a national law, such as the Italian one,

[1] See Recital 15 of Regulation (EC) no 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

denies recourse to marriage.[2] On the other hand, a different conclusion could be reached if questions relating to the property relations of registered partnerships are subsumed under the realm of 'matrimonial matters,' as contemplated by the Brussels II bis Regulation (recast), which, for example, in Italy, when it comes to separation and divorce, are regulated using the same institutes adopted for married couples.

Art 5 of Regulation 1104/2016 allows the judge competent for the dissolution or annulment of the registered partnership also to deal with issues concerning the couple's property relationships, as long as there is an agreement on the part of the partners.

Subsidiary jurisdiction is, however, also subordinated to the residual jurisdiction provided for by Art 6 of both of the Twin Regulations which, in the case of registered partnerships, is represented by the competent court under whose law the registered partnership was established.

Subsidiary competence is also subordinated to the functioning of Art 9 of the Twin Regulations: if, in fact, a court declines its jurisdiction and the parties have not agreed to attribute jurisdiction to the court of another Member State in accordance with the provisions of Art 7, the jurisdiction is determined on the basis of Art 10.

Declining jurisdiction is an exceptional circumstance: it is therefore understood how much more residual the functioning of Art 10 in these hypotheses is.

II. The relationship between subsidiary jurisdiction and ancillary jurisdiction in succession matters

The mosaic of the criteria for identifying jurisdiction is particularly complex when the couple's property issues intertwine with succession matters. If there is a connection between a succession dispute and the property profiles of the couple's relationship, jurisdiction is established on the basis of Art 4 of the Regulations. This Article makes any

[2] On the subject, see A. Zanobetti, 'Un nuovo atto di diritto internazionale privato in materia matrimoniale, di responsabilità genitoriale e di sottrazione minori: il regolamento UE 2019/1111' *Giustizia civile.com*, 1-19 (2019).

question concerning property regimes ancillary to the consequent attribution of competence to the authority identified by Regulation 650/2012. The relationships between the ancillary jurisdiction provided for by Art 4 and the subsidiary one pursuant to Art 10 have been interpreted by the doctrine[3] which predominantly identifies the ancillary jurisdiction referred to in Art 4 as the applicable criterion. In fact, subsidiary jurisdiction operates only if no competent authority can be identified on the basis of Art 4, and consequently the property issues pertaining to the couple's relationship can be considered absorbed in the prevailing succession-type jurisdiction. It should be noted that while succession jurisdiction involves disputes concerning any type of property, the subsidiary jurisdiction introduced by the Twin Regulations only concerns immovable property. The original provision to apply Art 10 to any type of property contained in the proposed regulation[4] has in fact been modified, leading to the current text which limits the application of subsidiary jurisdiction to immovable property only.

However, situations are conceivable in which a dispute over property relations does not fall within ancillary competence, with the consequent application of the subsidiary competence referred to in Art 10.

Consider a dispute concerning the personal property of a spouse or partner. In the event of the death of the other spouse or partner, this asset does not fall under the succession regime, but any dispute concerning this asset could be subject to subsidiary jurisdiction where the other criteria referred to in Arts 5, 6, 7 and 8 of the Twin Regulations are not applicable. In this case, even though the death of

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[3] Thus, A. Bonomi, 'Article 4', in A. Bonomi and P. Wautelet eds, *Le droit européen des relations patrimoniales de couple. Commentaire des Règlements (UE) no 2016/1103 et 2016/1104* (Brussels: Bruylant, 2021), 373.

[4] Along the lines of Art 10 of the Succession Regulation, the proposed regulations envisaged that subsidiary jurisdiction should be applicable to both movable and immovable property. See Art 6, Proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM (2011) 126 Final, and Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM (2011) 127.

the partner has occurred, the matter is dealt with independently by the competent judge on a subsidiary basis.

III. Subsidiary jurisdiction and immovable property

The application of subsidiary jurisdiction is subject to a double condition, one with a negative content (absence of the conditions that make Arts 4, 5, 6 and 9 of the Regulations applicable) and the other of a positive nature, the presence of a property owned by one of the members of the couple in the territory of the State of the court seised. Like other notions, a dilemma of interpretation also arises for that of immovable property: the notion can be deduced autonomously at a uniform level or obtained by the court on the basis of the applicable national legislation. The definition of immovable property is relevant in many areas and has led, with specific regard to tax profiles, to the adoption of unitary European definitions of immovable property. In this regard, the reference to the notion of immovable property contained in Art 13b of Regulation (EU) 1042/2013[5] seems useful. The definition used by the European legislator is based on an orientation expressed by the Court of Justice which had already established in 2002[6] that immovable property is implied whenever the property is 'a specific part of the earth's surface, including the buildings firmly constructed thereon, over which title and possession can be created.' As can be seen, establishing the concept of immovable property is even more complicated than identifying when an asset is

[5] See Council Implementing Regulation 1042/2013 of 7 October 2013 amending Implementing Regulation (EU) no 282/2011 as regards the place of supply of services [2013] OJ L284/1. The notion of immovable property given by Art 13 b is the following: '(a) any specific part of the earth, on or below its surface, over which title and possession can be created; (b) any building or construction fixed to or in the ground above or below sea level which cannot be easily dismantled or moved; (c) any item that has been installed and makes up an integral part of a building or construction without which the building or construction is incomplete, such as doors, windows, roofs, staircases and lifts; (d) any item, equipment or machine permanently installed in a building or construction which cannot be moved without destroying or altering the building or construction.'

[6] See para 30 of the Opinion of the Advocate General Kokott delivered in Case C-428/02 *Fonden Marselisborg Lystbådehavn* v *Skatteministeriet* [2004] ECR I-1529.

'naturally' immovable: it is in fact necessary to identify what meaning to attribute to the concepts of 'title' and 'possession' that can be exercised over the immovable property.[7] These issues are not explicitly addressed by the Twin Regulations which in Art 10 recall a generic belonging of the immovable property to one of the members of the couple. The Regulations exclude from their scope issues inherent in the nature of rights in rem, but there is no doubt that a unitary and uniform notion of the concept of ownership is more than needed to avoid possible conflicts and differences in application. If, at a tax level, a possession not accompanied by a formal title of ownership may be relevant, it is necessary to see whether with regard to spouses or members of a registered partnership, for the purposes of applying Art 10, substantial and economic forms of ownership of the immovable property can become relevant. The issue is very important and deserves holistic consideration[8] as the notion of immovable property is present in various unitary European regulatory instruments: consider, for example, the Brussels I bis Regulation.[9] The interpreter is also called upon to identify the concept of 'territory' given that the property which constitutes the reason for the jurisdiction must be located within the territory of the court called upon to resolve the issue as subsidiary jurisdiction. The concept of territory was investigated by the Court of Justice[10] which was able to clarify how it should be understood in a broad sense, also including parts of the territory over which a specific State does not exercise

[7] Again, with reference to the tax issue, it is useful to read the Explanatory notes on EU VAT place of supply rules on services connected with immovable property that enter into force in 2017, available at https://ec.europa.eu/taxation_customs/system/files/2016-09/explanatory_notes_new_en.pdf (last visited 16 August 2021).

[8] On this subject, see R. Frimston, 'Article 10', in U. Bergquist, D. Damascelli, R. Frimston, P. Lagarde, B. Reinhartz eds, *Commentaire des règlements européens sur la liquidation des régimes matrimoniaux et les partenariats enregistrés* (Paris: Dalloz, 2018), 153.

[9] See, specifically, Art 24 European Parliament and Council Regulation (EU) no 2012/1215 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast).

[10] Reference is made to Case C-420/07 *Meletis Apostolides* v *David Charles Orams and Linda Elizabeth Orams* [2004] ECR I-03571.

effective control.[11] The regulation provided on the territorial basis, grounded in the presence of immovable property found in the Twin Regulations, but also in the Succession Regulation and in Brussels I bis, seems to justify the overcoming of interpretation at a domestic level in order to avoid conflicts and make the implementation of European regulations less problematic. Interpretation at a European level is a path made difficult by the presence of institutes which in Art 10 touch on some key points such as the concept of ownership, that of a family property regime and, consequently, institutes such as that of marriage and/or registered partnership. In this context, the absence of specific indications and normative choices does not seem to preclude the rise of interpretation solutions that are functional to the most uniform possible implementation of competence in this area.

IV. Problematic profiles

The provision contained in Art 10 provides for subsidiary jurisdiction that presents numerous application issues. First of all, where used, it causes the principle of unity of the applicable law, the core principle of the Twin Regulations, to disappear. The introduction, even if within subsidiary jurisdiction, of the *lex rei sitae* criterion enables the fragmentation of discipline that the Regulations seek to eliminate.
The small number of cases in which this 'shattering' can actually occur does not diminish the importance of the problem. Positive conflicts of jurisdiction are, in fact, easily conceivable whenever the dispute is simultaneously brought before the court of the place where the property is located and before a court of a country that does not participate in the enhanced cooperation procedure or that does not belong to the European Union. In these cases, the judge seised second may not recognise the competence as identified by Art 10. The *lis pendens* not governed by the discipline contained in the Twin Regulations entails a difficult management of conflicts of jurisdiction and the use of domestic laws often not coordinated by appropriate international regulations. Cross-border couples who are hypothetically

[11] On the subject, see P. Franzina, 'Article 10', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples: A Commentary* (Cheltenham Glos: Edward Elgar, 2020), 113.

affected by the subsidiary competence are precisely those composed of members who are not habitually residents in a State that has joined the enhanced cooperation procedure or who do not have common citizenship of a Member State that has joined the enhanced cooperation procedure. Anchoring to immovable property could determine the greater probability of conflict because, by not using the criteria of the Regulations, the court seised could claim jurisdiction on the basis of other criteria adopted by domestic law which, for example, use the principle of unity and apply the law applicable to the family property regime also to immovable property located anywhere, and could consequently invoke its treatment under the same jurisdiction. In this sense, the application problems of Art 10 are comparable to those set by Art 28 which, in matters of applicable law, removes the relationship between a spouse or partner and third parties from the principle of unity of the applicable law, and the law chosen by the couple is hence not enforceable to such third parties.

Immovable property and third parties therefore constitute the two most problematic disciplinary profiles whose solution seems still to require a long legislative and interpretative journey.

The relationship between courts belonging to States that participate in the enhanced cooperation and States that do not participate in it brings up to date the current debate relating to the 1968 Brussels Convention that arose from the application of the *forum non conveniens*. In fact, in a historic decision made by the Court of Justice,[12] it was established that safeguarding the principle of legal certainty also operates in matters of jurisdiction and leads to not declining the jurisdiction attributed by the Convention in favour of courts belonging to countries not adhering to the Convention. How to solve the issue of legal certainty in the context of Regulations resulting from enhanced cooperation procedures therefore remains an open issue whose solution requires a wise study and monitoring of case-law guidelines and application practices.

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[12] Reference is made to Case C-281/02 *Andrew Owusu* v *N.B. Jackson, trading as 'Villa Holidays Bal-Inn Villas', Mammee Bay Resorts Ltd, Mammee Bay Club Ltd, The Enchanted Garden Resorts & Spa Ltd, Consulting Services Ltd, Town & Country Resorts Ltd* [2005] ECR I-01383.

Article 11
Forum necessitatis

Paolo Bruno

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
Where no court of a Member State has jurisdiction pursuant to Article 4, 5, 6, 7, 8 or 10, or when all the courts pursuant to Article 9 have declined jurisdiction and no court of a Member State has jurisdiction pursuant to Article 9(2) or Article 10, the courts of a Member State may, on an exceptional basis, rule on a matrimonial property regime case if proceedings cannot reasonably be brought or conducted or would be impossible in a third state with which the case is closely connected. The case must have a sufficient connection with the Member State of the court seised.	Where no court of a Member State has jurisdiction pursuant to Article 4, 5, 6, 7, 8, or 10 or when all of the courts pursuant to Article 9 have declined jurisdiction and no court of a Member State has jurisdiction pursuant to **point (e) of Articles 6, or Article 7, 8 or** 10, the courts of a Member State may, on an exceptional basis, rule on the **property consequences of a registered partnership** if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the case is closely connected. The case must have a sufficient connection with the Member State of the court seised.

Summary: I. Introductory remarks. – II. Lack of jurisdiction. – III. Denial of justice. – IV. Sufficient link with the *forum* Member State. – V. Application in practice.

I. Introductory remarks

Building on the experience of previous legislative acts adopted in the field of judicial cooperation in civil matters, such as Regulation (EC) 2009/4 on maintenance obligations and Regulation (EU) 2012/650 on successions, the European legislator recognized that the situation of EU citizens who live in a third State but retain strong links with a certain Member State and are likely to be involved in a civil

proceeding, highlights several problems: they either cannot get access to a court at all, or to a court in the EU, or they cannot have their judgment (obtained in a third country) recognized in the EU.

The need for a residual ground of jurisdiction – namely the *forum necessitatis* – emerged therefore also in the context of the negotiation which in the course of 2016 led to the approval, albeit in the form of an enhanced cooperation, of the two Regulations on matrimonial property regimes and on the property consequences of a registered partnership.[1]

The ground of jurisdiction in subject[2] is of a subsidiary nature, coming into operation only when no other EU Member State's court has jurisdiction, and does not contrast with the principle of mutual trust which constitutes the foundation of the space of freedom, security and justice in the EU: instead, it presupposes that principle, insofar as it may be invoked only in situations where the general and alternative grounds for jurisdiction are not operative (as the relevant criteria are not met in the particular case).

Since it would allow, on an exceptional basis, to hear the case if proceedings cannot be brought in a third State with which the case is closely connected or would be practically impossible, provided that the case has a sufficient connection with the Member State of the court seised, it is evident that it has to be interpreted strictly.

In this regard, recitals (respectively) 40 and 41 make an explicit reference to civil war, as an example of impossibility, or to the fact that

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[1] The same outcome could not be reached, however, in the recast of the Brussels IIa Regulation, which led to the approval of Regulation (EU) 2019/1111, where the impact assessment carried out by the European Commission recognized at the same time the opportunity to add a similar rule but also the political difficulty, due to differences in the legal order of several member States, to enact it in a negotiation governed by the unanimity rule on the basis of Art 81(3) TFEU.

[2] See, inter alia A. Leandro, 'La giurisdizione nel regolamento dell'Unione europea sulle successioni mortis causa', in P. Franzina and A. Leandro eds, *Il diritto internazionale privato europeo delle successioni mortis causa* (Milan: Giuffrè, 2013); G. Rossolillo, 'Forum necessitatis e flessibilità dei criteri di giurisdizione nel diritto internazionale privato nazionale e dell'Unione Europea' *Cuadernos de Derecho Transnacional*, 403-418 (2010); P. Franzina, 'Sul forum necessitatis nello spazio giuridico europeo' *Rivista di diritto internazionale*, 1121-1129 (2009); G. Biagioni, 'Alcuni caratteri generali del *forum necessitatis* nello spazio giudiziario europeo' *Cuadernos de Derecho Transnacional*, 20-36 (2012)

a spouse or a partner cannot reasonably be expected to initiate or conduct proceedings in the State in question.

II. Lack of jurisdiction

Art11 set some preconditions to the applicability of this ground for jurisdiction: the fact that no other judicial authority of a participating Member State be competent according to the general criteria set out in Arts 4-8 or on the basis of the subsidiary ground established in Art 10, or that a declinatory of competence has been made on the basis of Art 9 (excepts for those cases where the parties have already obtained a divorce, legal separation or marriage annulment which is capable of being recognized in the Member State of the forum).
The *ratio* behind this part of the provision is clear: *forum necessitatis* is a ground for jurisdiction which constitutes a safety net for the parties and cannot in any way be used in order to circumvent the whole complex of general and subsidiary grounds for jurisdiction composing the wider system of jurisdiction criteria.
Against this backdrop, the reference to the exceptionality of the provision eloquently shows that the sacrifice imposed to the proximity and predictability principles – which are inherent to the regulations, as well as for the other European regulations in family matters – cannot be stretched to an unreasonable extent.
Another element worth noting in the concrete functioning of this rule is the reversal of the traditional assessment carried out by the Court as for the jurisdiction:[3] while normally the first seised court verifies its jurisdiction, and in the positive case it is for the second seised court to decline it, in the *forum necessitatis* test the first seised court has to check whether any other court subsequently seised has jurisdiction and, in that case, should decline it. Again, this is coherent with the exceptionality of the rule and with the need to comply with the whole architecture of the jurisdictional criteria.

[3] G. Biagioni, 'Art 11', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples. A Commentary* (Chelyenham: Edward Elgar, 2020).

III. Denial of justice

From a structural point of view, the first element which justifies the application of this ground of jurisdiction is eloquently quoted in recitals 41 and 40 of the two Regulations: it is the denial of justice a party can incur when proceedings prove impossible in a third State. In this regard it has to be noted that for the purpose of the Regulations a third State can also be a non-participating Member State; however, the possibility of the latter having a legal order which prevents a proper access to Court is confined to a mere hypothesis. In a country which is not part of the European Union, instead, the risk of not being able to bring a proceeding – either because of an impossibility *stricto sensu* or a particular difficulty – can be concrete and affect the fundamental right of access to justice and to a fair trial enshrined in Art 6 of the European Convention on Human Rights and in Art 47 of the Charter of Fundamental Rights of the European Union.

Apart from the one referred to in the recitals (civil war) an example of a situation in which a proceeding cannot reasonably be brought is that of a third State where a woman is not allowed to sue her husband, or who can encounter insurmountable obstacles in her access to court. This is not a purely academic case, being well known that in several Middle Eastern Countries women do not enjoy the same rights as men and therefore also the possibility for them to successfully promote a judicial proceeding cannot be taken for granted.

It is questionable whether – in order for Art 11 being invoked – it is necessary to prove that an attempt to access to court was made, or the impossibility can be presumed on the basis of the alleged circumstances.[4] In this regard, without failing to the duty of carefully

[4] This particular aspect will presumably be solved following the reference for preliminary ruling made by the Audiencia Provincial de Barcelona and lodged on 6.10.2020 (C-501/20) with which the ECJ was asked to clarify 'how is the forum necessitatis in Article 7 of Regulation no 4/2009 to be interpreted and, in particular, what are the requirements for considering that proceedings cannot reasonably be brought or enforced or prove impossible in a non-Member State with which the dispute is closely connected (in this case, Togo)? Must the party have initiated or attempted to initiate proceedings in that State with a negative result and does the

scrutinize the scope of the provision, it can be assumed that the unsurmountable difficulty could be deducted from all the facts supporting the request by the party.
Another situation which can lead to the *forum* in question is the concrete likelihood for a decision made in a third State not to be recognized in a Member State, because of the law applied or because of the effects it produces in the latter.[5]
Finally, the case which is supposed to be adjudicated on a *necessitatis* basis should have a close connection with the third State where it cannot be brought.
The Regulations do not clarify, neither in the texts nor in the accompanying recitals, what a close connection is; lacking reasons for presuming a different approach, the characteristic of this link have therefore to be ascertained keeping in mind the possible connecting factors enumerated therein. In this regard reference has to be made to the habitual residence, the nationality and the property's location, as factors referring to a third State.

IV. Sufficient link with the *forum* Member State

Art 11 para 2 states, in substance, that a court seised with a proceeding falling within the scope of the Regulation, but different from the one which will be competent according to para.1, can retain its competence only if the case has a sufficient connection with the Member State of the court itself.
In contrast with the concept of close connection cited in para.1, the sufficient connection recalls the idea of a minimum set of factors or elements able to connect the forum Member State to the proceeding. On the basis of an *a contrario* reasoning, it can therefore be assumed that this kind of connection emerges when all the other grounds for jurisdiction set out in Arts 4 to 8 are not operative, and nevertheless a reasonable link with the court seised can still be found.

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nationality of one of the parties to the dispute constitute a sufficient connection with the Member State?'

5 On this aspect see A. Bonomi and R. Di Iorio, *Il regolamento europeo sulle successioni* (Milan: Giuffrè, 2015), 173.

The attraction of the proceeding to the court of a Member State by virtue of a link which is only sufficient[6] (thus weak by its very nature) may open the door to objections and disputes: what would be, for example, the decision of the court if the defendant claims that the same weak connection is present with another Member State?
The issue may be solved by relying on the individual assessment of the court, which will establish whether or not the link is sufficient; in this case the judge would ultimately make use of his or her margin of discretion in an evaluation of the case which recalls that conducted according to the *forum conveniens* test.

V. Application in practice

As we already anticipated in the preceding paragraphs, the *forum necessitatis* ground of jurisdiction has been introduced in the context of judicial cooperation in civil matters for different reasons, among which the need to avoid as much as possible parallel proceedings and the exigence of protecting fundamental rights such as the access to justice, as much as possible.
Its strict interpretation has been always advocated in literature and in the few case-law of the European Courts which have dealt with this topic.
In this context it is worth recalling at least two largely known judgments, namely *Gasser*[7] and *Nait-Liman*.[8] In the first decision, the Court of Justice – although interpreting the relevant provisions of the 1968 Brussels Convention – recalled that judicial cooperation among Member States is based on mutual trust, which in turn lays at the foundation of a compulsory ground for jurisdiction system that cannot be overcome because their operation points to the court of a Member State whose legal system does not properly function or suffers from evident failures.

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[6] See on this also I. Viarengo, 'Effetti patrimoniali delle unioni civili transfrontaliere: la nuova disciplina europea' *Rivista di diritto internazionale privato e processuale*, 33-58(2018).
[7] ECJ, 9.12.2003, *Erich Gasser GmbH vs MISAT Srl*, C-116/02.
[8] ECtHR, Grand Chamber, 15.03.2018, *Nait-Liman* v *Switzerland*, n 51357/07.

In the second decision, the European Court of Human Rights conducted a scrupulous review of the application of the *forum necessitatis* in the States parties to the Council of Europe and concluded that the right to a fair trial enshrined in Art 6 ECHR includes the right to act before a certain court, which it is not absolute and can suffer from limitations on the basis of which the said court is not obliged to retain jurisdiction if – as in the case considered – it is only the applicant in person (and not the case itself) who shows a sufficient link with the court seised.

As for the concept of sufficient connection, from its application in practice[9] it is possible to observe that among the Member States its understanding can vary from what is interpreted as an adequate relation (Poland) to a sufficient connection (Germany) to close contact (Belgium) or even a strong linking factor (Portugal).

[9] See Study on Residual Jurisdiction (Review of the Member States' Rules concerning the 'Residual Jurisdiction' of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations) service contract with the European Commission JLS/c4/2005/07-30-ce)0040309/00-37 - General Report (final version dated 3 September 2007).

Article 12
Counterclaims

Giuseppe Vertucci

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
The court in which proceedings are pending pursuant to Article 4, 5, 6, 7, 8, **9 (2)**, 10 or 11 shall also have jurisdiction to rule on a counterclaim if it falls within the scope of this Regulation.	The court in which proceedings are pending pursuant to Article 4, 5, 6, 7, 8, 10 or 11 shall also have jurisdiction to rule on a counterclaim if it falls within the scope of this Regulation.

Summary: I. Jurisdiction in the event of a counterclaim. – II. General characteristics. – III. Application drawbacks.

I. Jurisdiction in the event of a counterclaim

The Art 12 of EU Regulation 2016/1103 and 2016/1104, of the Council of 24th June 2016 provides that the court before which proceedings are pending pursuant of the articles cited by the same, is also competent to examine the counterclaim if the latter falls within the scope of those Regulations.
This is Chapter II, on jurisdiction, where Regulation 2016/1103 mentions Arts 4, 5, 6, 7, 8, Article 9, para 2, Articles 10 or 11, while Regulation 2016/1104, on the patrimonial effects of registered partnerships, excludes Article 9.

II. General characteristics

In a specific way, therefore, the Regulations state that, according to Art 12, the authority before which proceedings are pending pursuant to those Articles, is competent to examine the counterclaim if it falls within the scope of that Regulation. It is therefore a rule that

promotes the concentration of applications and, consequently, legal certainty through the harmony of the judges.[1]
The counterclaim is an instrument of defence enjoyed by the defendant. In essence, it is an institution that allows the original object of the judgment to be broadened, inserting additional elements compared to those inferred by the claimant. Therefore, the defendant can not only defend himself, but also attack using just the counterclaim and demanding the conviction of the plaintiff.
In this case, as the Court of Justice has made clear, this essentially concerns a separate application for the plaintiff to be convicted, in the sense that it must be possible to distinguish it from the plaintiff's action, and aimed at obtaining a separate sentence,[2] and does not relate to the situation in which the defendant invokes, as a simple exception, a claim against the plaintiff.[3]
The wording of this article is certainly an attempt to ensure the proper administration of justice, which allows the parties to obtain a ruling in the same procedure and, as provided for, before the same court, on all their mutual claims of common origin.
This simple concentration is therefore a good way of avoiding lengthy court proceedings and unnecessary measures which can be well taken by a single court having jurisdiction on the various points envisaged.
It should be noted that the provision in question must be read in conjunction with Art 1, which defines the scope of the regulations. Specifically, the latter article, which is its own scope, states that there must nevertheless be a clear correlation between the content of the counterclaim and the 'fact' underlying the main claim. In that sense, the court seised of an application relating to the property regime or the property consequences of registered partnerships cannot know what concerns the matters expressly excluded by means of Art 1.[4]

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[1] P. Bruno, *I Regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate. Commento ai Regolamenti (UE) 24 giugno 2016, n. 1103 e 1104 applicabili dal 29 gennaio 2019* (Milan: Giuffrè Lefebvre, 2019), 122.

[2] Case C-185/15 *Marjan Kostanjevec* v *FeS Leasing GmbH* (Court of Justice UE, sez. III, 12 October 2016).

[3] Case C-341/93 *Danvaern Production A/S* and *Schubfabriken Otterbeck GmbH & Co* (Court of Justice UE, 13 July 1995).

[4] P. Bruno, n 1 above, 123.

III. Application drawbacks

Certainly the most specific problems to be solved, regarding the verification of the exact scope of the regulations that are being analyzed, relate to those relating to the relationship between matters of succession and matters of property relating to matrimonial or registered partnership.
In some special cases, such as: the flat-rate increase which a surviving spouse had to claim against a third party in a counterclaim, but placed in a judgment the property regime of a marriage, could not be known by the court which has jurisdiction over the main application, but it could be interpreted as referring to other regulations in the event that they provide for it.

Article 13
Limitation of proceedings

Pietro Piccioni

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. Where the estate of the deceased whose succession falls under Regulation (EU) no 650/2012 comprises assets located in a third state, the court seised to rule on the matrimonial property regime may, at the request of one of the parties, decide not to rule on one or more of such assets if it may be expected that its decision in respect of those assets will not be recognised and, where applicable, declared enforceable in that third state.	1. Where the estate of the deceased whose succession falls under Regulation (EU) no 650/2012 comprises assets located in a third State, the court seised to rule on the property consequences of a registered partnership may, at the request of one of the parties, decide not to rule on one or more of such assets if it may be expected that its decision in respect of those assets will not be recognised and, where applicable, declared enforceable in that third State.
2. Paragraph 1 shall not affect the right of the parties to limit the scope of the proceedings under the law of the Member State of the court seised.	2. Paragraph 1 shall not affect the right of the parties to limit the scope of the proceedings under the law of the Member State of the court seised.

I. Introduction

Art 13 provides for a special procedural instrument whereby the court seised to rule on a matter concerning matrimonial property regimes or the property consequences of registered partnerships may decide not

to rule on one or more assets located in a third State if it may be assumed that its decision in respect of those assets will not be recognised or declared enforceable in that third State.
The rule, in essence, allows the court to limit the scope of the proceedings, authorising a fragmentation of jurisdiction within a regulation which, otherwise, is strongly inspired by the principles of unity and concentration.[1]
This is the reason why the operation of this rule is circumscribed, on the one hand, by specifying that the aforementioned power of abstention may be exercised only upon the request of one of the parties and, on the other hand, by limiting it only to matters connected with a succession falling under Regulation (EU) no 650/2012 (ESR).[2]
This second limitation is due, at least in part, to the fact that Art 13 reproduces the same rule already contained in Art 12 ESR. These two provisions need to be coordinated, if only because they deal with closely linked matters and present partly common interpretative problems, in respect of which it seems appropriate to seek unitary solutions aimed at clarifying the function performed by the instrument in question in the context of European private international law.

II. Functions of the rule

The provision contained in Art 13 responds above all to a need for realism[3] as well as procedural economy.[4] In fact, it could be an unnecessary waste of efforts and resources to deliver a judgment when

[1] L. Ruggeri, 'Jurisdiction in the event of death of a partner', in M.J. Cazorla González et al eds, *Property relations of cross border couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2020), 61.

[2] Council Regulation (EU) no 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107.

[3] P. Franzina, 'Article 13', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of international couples. A Commentary* (Cheltenham: Edward Elgar, 2020), 130, 131.

[4] P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate. Commento ai Regolamenti (UE) 24 giugno 2016, n. 1103 e 1104 applicabili dal 29 gennaio 2019* (Milan: Giuffrè, 2019), 81.

it appears highly likely that it will not be recognised or enforced in the State in which it is intended to produce its effects. Therefore, the rule is perfectly in line with the demands of reasonableness, pragmatism and openness that characterise those rules of private international law that in various ways impose a self-limitation of the jurisdiction of the *forum* in cases where excessive jurisdiction would be sanctioned by the ineffectiveness of judgments.

Thus, for example, it is not uncommon to come across national rules that exclude the jurisdiction of the State courts for disputes concerning assets (usually immovable) located abroad.[5] These rules are based on the purely pragmatic consideration that States often reserve jurisdiction on such matters and, therefore, most likely would not recognise a foreign decision on them.

Art 13, however, differs clearly from these rules in that it does not exclude the jurisdiction of the seised Member State's court, but merely allows it, where the conditions laid down in the rule are met, to limit the scope of the proceedings by refraining from ruling on assets located in a third State.

The fact the rule presupposes that the court seised has jurisdiction, as well as the circumstance that the limitation of the proceedings it allows is based on assessments of the opportunity of the decision,[6] might suggest that with this provision it was intended to apply the doctrine of *forum non conveniens*.[7]

Moreover, the power of abstention conferred on the court by Art 13 is not characterised by that wide discretion recognised by the rules which are an expression of the aforementioned doctrine.[8] On the contrary, it

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[5] See eg Art 86 Swiss Federal Act on Private International Law of 18 December 1987 (LDIP).

[6] P. Bruno, n 4 above, 81. With respect to Art 12 ESR see eg F. Kerem Giray, 'Possible Impacts of EU 7 Successions Regulation no 650/2012 on Turkish Private International Law' 18 *Annals of the Faculty of Law of the University of Zenica*, 235 (2016).

[8] See eg Art 15 Council Regulation (EC) no 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) no 1347/2000 [2003] OJ L338/1, as well as Art 6 ESR.

is based on much stricter and more objective assessments,[9] relating to the certain existence of a ground which, in the light of the law of the third State, leads to the presumption that it will almost certainly not recognise the judgment.

Similar considerations can also be extended with respect to a similar rule contained in Art 5.4 of the 'Proposal for a convention on jurisdiction and enforcement of judgments in family and succession matters' drawn up by the *Groupe Européen de Droit International Privé* (GEDIP).[10] This provision is very useful, if compared with Art 13, as it clarifies which is the privileged hypothesis of application of the rule: the judgment concerning immovable assets situated in a third State which reserves exclusive jurisdiction over them.

However, the scope of Art 13 is wider. Indeed, it does not limit the provision to immovable assets only, nor does it mention exclusive jurisdiction over them as a ground for non-recognition of the judgment by the third State. This testifies to the will of the EU regulator to formulate the rule in the most flexible and ductile way possible.[11]

This characteristic seems to suggest that the rule is also functionally designed to meet the need to coordinate the concrete exercise of jurisdiction over assets located in a third State with the requirements

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[9] Cf the remarks on Art 12 ESR by C. Consolo and F. Godio, 'Profili processuali del Reg. UE n. 650/2012 sulle successioni transnazionali: il coordinamento tra le giurisdizioni' *Rivista di diritto civile*, I, 18, 31 (2018).

[10] GEDIP, 'Proposal for a Convention concerning jurisdiction and the enforcement of judgments in family and succession matters' *Revue critique de droit international privé,* 841, 842 (1993), Article 5.4: 'The courts or authorities having jurisdiction under the first Section of this Article may decline jurisdiction to rule on the devolution or administration of immovable property situated outside the territory of the Contracting States if they consider that the courts of the place in which the immovable is situated are more appropriate to decide the issue, particularly when, according to their law, the latter have exclusive jurisdiction.'

[11] With respect to Art 12 ESR see C. Hertel, 'EU-ErbVO', in T. Rauscher ed, *Europäisches Zivilprozess und Kollisionsrecht EuZPR/EuIPR. Kommentar* (Köln: Otto Schmidt KG, 2016), V, 169, 265.

and peculiarities of its legal system,[12] as well as with proceedings pending or concluded before the courts of that State.

III. Scope of application

The scope of application of the court's power to limit the proceedings does not coincide with that of the Twin Regulations, but is circumscribed by Art 13 to cases in which the question concerning the matrimonial property regime (or the property consequences of a registered partnership) is connected with a succession falling within the scope of Regulation (EU) no 650/2012.
This means that the rule is intended to apply in cases where a decision is to be taken on a question relating to the dissolution and liquidation of the matrimonial property regime (or registered partnership) due to the death of one of the spouses (or partners).[13] In such cases, there is a very close connection between the two matters,[14] in fact, it will not be possible to decide on the succession without first having reconstructed the composition of the estate of the deceased and, for this purpose, it will be necessary to verify which assets belonging to the property

[12] P. Franzina, *Article 13* n 3 above, 135. See J.J. Forner Delagua, 'Consideraciones acerca de la regulación de la competencia internacional de autoridades en un futuro Reglamento comunitario de DIPr relativo a las sucesiones por causa de Muerte', in R. Viñas and G. Gariga eds, *Perspectivas del Derecho sucesorio en Europa* (Madrid-Barcelona-Buenos Aires: Marcial Pons, 2009), 90.

[13] F. Dougan, 'Matrimonial property and succession - The interplay of the matrimonial property regimes regulation and succession regulation', in J. Kramberger Škerl et al eds, *Case studies and best practice analysis to enhance EU Family and Succession Law. Working paper* (Camerino: Quaderni degli Annali della Facoltà Giuridica dell'Università di Camerino, 2019), 75-87.

[14] M. Álvarez Torné, 'The dissolution of the matrimonial property regime rights of the surviving spouse in Private International Law', in K. Boele-Worlki and T.S. Verdrup eds, *European Challenges in Contemporary Family Law* (Antwerpen: Intersentia, 2008), 395-410; A. Bonomi, 'The interaction among the future EU instruments on matrimonial property, registered partnerships and successions', in Id and G.P. Romano eds, *Yearbook of Privat International Law Vol. XIII - 2011* (Berlin, Boston: Otto Schmidt/De Gruyter european law publishers, 2012), 217-231; Á.L. Aguado, 'Claves del reglamento (UE) 650/2012 a la luz de la jurisprudencia del TJUE: de la especialización a la (in)coherencia a través del mito del principio de unidad y las calificaciones autónomas unívocas' *Revista electrónica de estudios internacionales*, XXXIX, 1, 15-16 (2020).

regime must be attributed to the surviving spouse by reason of its dissolution.[15]

Art 13, when limiting the operation of the instrument to cases where the matter is connected with a succession, takes into account precisely the need to establish in such cases a close disciplinary coordination,[16] by extending the operation of the same instrument provided for in Art 12 ESR. In so doing, it is intended to align the solutions to a similar problem (the possible non-recognition of the judgment in the third State) which arises specularly in the two proceedings potentially involving the same assets.[17]

The point, however, is to understand the reasons that led the EU regulator not to provide for a wider (if not generalised) application of the rule.[18] In other words, if the rationale of the rule is simply to avoid an unnecessary waste of procedural efforts and resources, this instrument should be able to operate also with respect to those decisions which, although not connected with a succession, appear equally destined to amount to nothing.

In order to understand the reasons for such a limitation of the scope of the rule, it is necessary to start by observing that the unitary and tendentially all-encompassing approach adopted by the Regulation on successions entails a significant extension of the jurisdiction of the courts of the Member States, which can go so far as to include assets

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[15] M. Ho-Dac, 'Interaction between EU Regulations 2016/1103 and 2016/1104 and the Succession Regulation 650/2012' *The European Legal Forum*, V, 101, 102 (2017); A. Rodríguez Benot, 'Los efectos patrimoniales de los matrimonios y de las uniones registradas en la Unión Europea' *Cuadernos de Derecho Transnacional*, XI, 8, 18, 34 (2019).

16 P. Lagarde, 'Règlements 2016/1103 et 1104 du 24 juin 2016 sur les régimes matrimoniaux et sur le régime patrimonial des partenariats enregistrés' *Rivista di diritto internazionale privato e processuale*, III, 676-680 (2016).

[17] N. Joubert, 'La dernière pierre (provisoire?) à l'édifice du droit international privé européen en matière familiale. Les règlements du 24 juin 2016 sur les régimes matrimoniaux et les effets patrimoniaux des partenariats enregistrés' *Revue critique de droit international privé*, I, 1, 15 (2017); M. Ho-Dac, n 15 above, 103-104; P. Franzina, *Article 13* n 3 above, 131.

[18] Some authors complain that Art 13 has not been given a broader scope. See eg A. Wysocka-Bar, 'Enhanced cooperation in property matters in the EU and non-participating Member States' 20 *ERA Forum*, 187, 196 (2019).

located in a third Country.[19] Art 12 ESR aims precisely at counterbalancing this wide jurisdiction[20] by introducing a corrective[21] that allows to take into account the fact that States often reserve to themselves exclusive jurisdiction over all (immovable) assets located on their territory,[22] and that this often goes hand in hand with self-limitation of their jurisdiction over property situated abroad.[23]

A similar problem is not encountered with regard to the Twin Regulations, which, moreover, present another peculiarity, namely the choice (in Art 4) to concentrate jurisdiction on the courts called upon to rule on the succession of the spouse (or partner) under Regulation (EU) no 650/2012,[24] thus providing, in an unprecedented way, for the anchoring of the scope of one Regulation to the connecting factors set out in another.[25] While this makes it necessary to extend to the cases in question what has just been observed with respect to the wide extension of the jurisdiction recognised to the Member States' courts by the Succession Regulation, the characteristics of such a system of jurisdiction, combined with its mandatory and rigid nature,[26] may in

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19 A. Bonomi, 'The Regulation on Matrimonial Property and Its Operation in Succession Cases - Its Interaction with the Succession Regulation and Its Impact on Non-participating Member States' *Problemy Prawa Prywatnego Międzynarodowego*, XXVI, 71, 82 (2020).

20 G. Panopoulos, 'Limitation of Proceedings under Article 12 Successions Regulation (2012) - An Improbable Codification of the Improbable' *ELTE Law Journal*, II, 99, 106 (2015); P. Bruno, n 4 above, 81.

21 G. Panopoulos, n 20 above, 99-100.

22 See eg Arts 8 and 11 of the Tunisian Code of Private International Law, on which see P. Franzina, *Article 13* n 3 above, 134, and Article 43 of Turkish PIL, on the relationship between this rule and Article 12 ESR see F. Kerem Giray, n 7 above, 236. Finally, see also D. Damascelli, *Diritto internazionale privato delle successioni a causa di morte* (Milan: Giuffrè, 2013), 79.

23 P. Franzina, 'Jurisdiction in matters relating to property regimes under EU private international law', in A. Bonomi and G.P. Romano eds, *Yearbook of Private International Law Vol. XIX - 2017-2018* (Köln: Verlag Dr. Otto Schmidt, 2018), 191.

24 P. Mankowski, 'Internationale Zuständigkeit nach EuGüVO und EuPartVO', in A. Dutta and J. Weber eds, *Die Europäischen Güterrechtsverordnungen* (München: Beck Verlag, 2017), 13.

25 S. Marino, 'Strengthening the European Civil Judicial Cooperation: the patrimonial effects of family relationships' *Cuadernos de Derecho Transnacional*, IX, 265, 270 (2017); P. Bruno, n 4 above, 76.

26 S. Marino, n 25 above, 271.

practice generate a number of other drawbacks.[27] In particular, the surviving spouse (or partner) may be sued before a court, having jurisdiction to rule on the succession, located in a State with which he or she does not have a close connection and/or whose *forum* does not appear convenient or adequate to rule on the question concerning the matrimonial property regime.[28]
Consequently, although the limitation of the scope of Art 13 is certainly justified by reason of the attraction of the jurisdiction to the court seised to decide on the spouse's succession, thereby requesting the extension of the same instrument provided for in that context by Art 12 ESR, it must be pointed out that in this hypothesis it is also the only instrument available to the surviving spouse (or partner) to modulate a system of establishing jurisdiction which in practice may not ensure an adequate connection with the question concerning the matrimonial property regime.[29]

IV. The conditions under Art 13.1

Once the functions of the rule have been identified and the doubts on its operational scope have been clarified, it is now possible to proceed to an analysis of the conditions for the exercise of the court's power to limit the proceedings.
In particular, the wording of Art 13 makes it explicitly clear that the court may refrain from delivering a judgment exclusively on questions concerning assets situated in a third State; one of the parties must have made an express request to that effect; there must be a reason which makes it appear highly probable that the judgment will not be recognised in the third State where the assets is situated.
Finally, the rule seems to require that the court of the Member State has jurisdiction to hear (and decide) the dispute under the Twin Regulations.

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[27] See P. Bruno, n 4 above, 79-80.

[28] A. Bonomi, *The Regulation* n 19 above, 81; P. Quinzá Redondo and J. Gray, 'La (des)coordinación entre la propuesta de Reglamento de régimen económico matrimonial y los Reglamentos en materia de divorcio y sucesiones' *Anuario Español de Derecho Internacional Privado*, XIII, 513, 519-524 (2013); S. Marino, n 25 above, 271.
29 L. Ruggeri, n 1 above, 61.

1. The existence of a jurisdictional title under the Regulation

Starting with the precondition of the existence of a jurisdictional title, this is an (implicit) requirement that is closely linked to the nature of the abstention power in Art 13.

In fact, this is not a rule relating to the attribution of jurisdiction, in other words, it does not indicate the absence of jurisdiction to hear disputes concerning assets situated in a third State. This conclusion may also be drawn simply from the wording of the provision, which states that the court 'may' (and not 'must') abstain from ruling, as well as from the fact that it is, in any event, a power exercisable only at the request of a party (and not *ex officio*).

Similarly, it must be excluded that the exercise of the above-mentioned remedy removes the jurisdiction of the court seised in favour of the courts of the third State where the assets are located. In other words, the effect of this rule is not that of a waiver of jurisdiction.

In fact, this rule only concerns the extension of the scope of the proceedings, allowing the court, having received a request from one of the parties, to limit it and, therefore, not to rule on one or more questions.

All this implies that in order to use the instrument of Art 13, the first condition is that the court seised must have jurisdiction to decide the question under the Twin Regulations.

With respect to this aspect, however, a further question might arise: in particular, whether Art 13 operates with respect to any jurisdictional title provided for in the Regulations or it has a more limited scope of application.

If this question lends itself to a more complex solution with regard to Art 12 ESR,[30] with respect to Art 13, for the reasons stated above, it is likely that this procedural power can be exercised only by the court which appears to have jurisdiction under Art 4 of the Twin Regulations,[31] therefore only in cases where the principle of concentration with the succession of the spouse (or partner) operates.

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[30] See G. Panopoulos, n 20 above, 101.

[31] *Contra* P. Franzina, *Article 13* n 3 above, 133.

2. Prognostic assessment of non-recognition

Under Art 13 the court may, on the request of one of the parties, abstain from deciding on one or more assets located in a third State if it can be assumed that the judgment will not be recognised or, where applicable, declared enforceable in that third State. This prognostic assessment of non-recognition (or non-enforcement) is undoubtedly the cornerstone of the rule, guiding its application and influencing the interpretation of the other elements of the provision.

This condition presents at least two uncertain aspects: what criteria should guide this assessment and, consequently, the exercise of the relative discretional power of the court to limit the proceedings,[32] and the problem of identifying the grounds which may lead to the conclusion that the judgment will not be recognised or enforced in the third State.

Firstly, this power must be systematically framed within the principles and purposes that characterize the Twin Regulations. In particular, the operation of the instrument provided for in Art 13 entails a fragmentation of jurisdiction and, as such, stands as an exceptional rule with respect to a discipline that is otherwise inspired by the principle of concentration.[33] Therefore, as a general rule, the judge will have to make use of this power in limited hypotheses,[34] specifically whenever its use is necessary to ensure the interest in the proper administration of justice in the concrete case.[35]

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[32] In this respect, it should be recalled that, according to the Court of Justice, judicial discretion with regard to the exercise of jurisdiction must be kept to a minimum in order to avoid undermining the principles of legal certainty and uniform application of EU regulations. Case C-281/02 *Andrew Owusu* v *N.B. Jackson*, [2005], ECLI:EU:C:2005:120, paras 41-43. See P. Franzina, *Article 13* n 3 above, 132.

[33] With respect to Art 12 ESR see F. Marongiu Buonaiuti, 'Article 12', in A.L. Calvo Caravaca et al eds, *The EU Succession Regulation. A Commentary* (Cambridge: Cambridge University Press, 2016), 209, 211.

[34] This discretion should be exercised prudently according to A. Bonomi, 'Article 12', in A. Bonomi and P. Wautelet eds, *Le droit européen des successions. Commentaire du Règlement n°650/2012 du 4 juillet 2012* (Bruxelles: Bruylant, 2016), 231, 234; C. Hertel, n 11 above, 265; A. Dutta, 'Das neue internationale Erbrecht der Europäischen Union - Eine erste Lektüre der Erbrechtsverordnung' *Fam*RZ, 4, 7 (2013).

[35] See Recital 32.

The latter, in fact, if, on the one hand, requires that all questions concerning a succession and the related ones regarding the matrimonial property regime are dealt with by the same court (or, at least, by the courts of a single State), on the other hand, requires to take into account those circumstances which in practice would make such concentration of jurisdiction dysfunctional, making it appropriate not to exercise jurisdiction in those cases where the decision given would be *inutiliter data*.

The identification of the interest in the proper administration of justice as the main guiding criterion for the exercise of the power provided for in Art 13[36] requires that the choice made by the court is supported by an overall assessment (with the corresponding balancing) of the interest in the unitary treatment of all the questions and the interest in saving the procedural efforts and resources for the delivery of a decision destined to remain ineffective.

The principle of proportionality also plays a major role in this assessment. In particular, the court will have to verify whether, having regard to the party's interest in a decision on assets located in the third State and the efforts required to give judgment on the matter, the latter are unreasonably disproportionate to the former. On the other hand, if the efforts involved are negligible, in particular in the light of the plaintiff's interest in obtaining a judgment on the entire claim, it must be held that the court may not refrain from giving judgment, making use of the power conferred on it by Art 13.[37]

Indeed, although the rule is also an instrument to protect the defendant, the latter's position must yield within the overall architecture designed by the Twin Regulations, which is primarily based on the principles of concentration and unity.[38]

Similar considerations lead to the conclusion that only a degree of probability such as to suggest that the judgment will almost certainly

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[36] P. Bruno, n 4 above, 83; P. Franzina, *Article 13* n 3 above, 135.

[37] C. Hertel, n 11 above, 265-266.

[38] For the same reason, it must be considered that the assessment under Art 13 cannot be influenced by the fact that, should the court decide not to rule on the matter, the plaintiff would risk being faced with a denial of justice or a trial not fully compliant with fair trial standards before the courts of the third State. With respect to Art 12 ESR see F. Marongiu Buonaiuti, n 33 above, 219.

not be recognised (or enforced) in the third State can justify a limitation of the scope of the proceedings.

Turning instead to the issue of the possible grounds for non-recognition, it has already been said that the rule seems to be mainly directed to the hypothesis that the third State reserves to itself exclusive jurisdiction over assets located on its territory. Nevertheless, the broad and flexible wording of the provision allows it to include other cases. Thus, for example, where the judgment was given by the court of the Member State at the end of a trial which did not respect the right to a fair defence or the right of controverting, or where there is a lack of reciprocity or the third State refuses to recognise any foreign judgment.[39]

Moreover, a conflict with judicial proceedings pending or concluded before the courts of the third State could be a ground for non-recognition.[40] Similarly, the court seised could decide not to rule on the question when the law of the third State makes the recognition of a foreign judgment conditional on the fact that the dispute was decided using the same law as would have applied under its own conflict-of-law rules.[41]

A further possible ground for non-recognition is that the decision is contrary to the public policy of the third State, which is particularly relevant in cases where the court of the Member State has to decide on a question relating to the matrimonial property regime of a same-sex marriage or partnership and the assets under dispute are located in the territory of a third State that does not recognise this type of union.

3. Location of assets in a third State

Under Art 13 the court seised may abstain from ruling only on questions concerning one or more assets located in a third State.

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[39] A. Bonomi, *Article 12* n 34 above, 234; A. Dutta, 'Artikel 12 EuErbVO', in F. Jürgen Säcker et al eds, *Münchener Kommentar zum BGB* (München: Beck, 6th ed, 2015), para 6.

[40] P. Franzina, *Article 13* n 3 above, 131. *Contra* G. Panopoulos, n 20 above, 102.

[41] See F. Marongiu Buonaiuti, n 33 above, 217.

The rule actually refers to assets (located in a third country) forming part of an estate whose succession falls within the scope of Regulation (EU) no 650/2012, but then limits the court's power to abstain to questions concerning the matrimonial property regime relating to such assets. This wording is explained in the light of what has been said above concerning the necessary connection of the claim with a succession.

That said, the provision, with regard to the application condition in question, basically presents two interpretative doubts: firstly, the type of assets to which the rule refers and, secondly, the criteria applicable for determining the location in the third State of the assets.

With respect to the first question, Art 13 does not make any distinction, speaking only of assets,[42] thus ensuring a wide and flexible operating range, which allows the instrument to be used in heterogeneous hypotheses and for different purposes. This, moreover, is in line with the rationale of the rule which, as stated above, is also a tool that can be used by the party to reshape a particularly rigid system of jurisdiction which does not necessarily ensure a close link between the court seised and the dispute on the matrimonial regime.

In spite of its broad formulation, however, the rule seems to be intended to operate mainly in cases involving decisions on immovable assets. Indeed, it is precisely with respect to this type of assets that many legal systems reserve to themselves exclusive jurisdiction when these are located on their territory, and this, consequently, will be the main reason for non-recognition of a foreign judgment concerning rights over such assets.

However, the absence of a reference to immovable assets only, as well as to the reservation of jurisdiction as a ground for non-recognition, does not exclude that the rule may also be applicable to questions concerning movable assets or universalities of goods.

It is precisely with respect to this latter category of assets that the second question arises, namely the criterion to be used to identify the location of the assets. While the location of immovable and movable assets will, at least in principle, be easily ascertainable by using material

[42] 'Irrespective of the value of such assets and of their comparable importance in relation to the other assets located within one or more Member States', F. Marongiu Buonaiuti, n 33 above, 212, with respect to Art 12 ESR.

criteria, in the case of a universality of goods it will be necessary to have recourse to legal criteria, especially if it is composed of assets situated in different States,[43] which raises the further problem of identifying the law applicable to this end.
Hypothetically, the location of assets could be determined by applying the criteria provided for by the law of the *forum* or, alternatively, those indicated by the law of the third State,[44] or, finally, those that can be deduced from the EU framework.[45]
To resolve this issue, attention must be paid to the rationale of Art 13, which is above all an expression of a need for realism and pragmatism. This is why, as already mentioned, the cornerstone of the rule is to be found in the prognostic assessment of the likely non-recognition of the judgment in the third State. Indeed, it is the non-recognition (or the non-enforcement) that could render the judgment *inutiliter data*. This result, which Art 13 is in principle intended to avoid, would not be excluded if the court seised considered the assets to be situated in a Member State, even though it knew that the court of the third State, applying its own law, would consider them to be situated in its own territory and would therefore consider itself legitimated to hinder the effectiveness of the judgment in that context.[46]

4. Request of one of the parties

The condition which has attracted the most criticism is undoubtedly the provision that the remedy provided for in Art 13 can only be exercised at the request of one of the parties.
In particular, already with respect to a similar provision in Art 12 ESR, it has been argued that in the light of the rationale of the rule, identified in the need to save efforts and procedural resources necessary for the delivery of a judgment almost certainly condemned

[43] P. Franzina, *Article 13* n 3 above, 134.
[44] In this sense A. Bonomi, *Article 12* n 34 above, 231-232; F. Marongiu Buonaiuti, n 33 above, 212-213.
[45] A similar problem arises with respect to Art 10 ESR. Precisely by coordinating this latter rule with Art 12 ESR A. Dutta, *Artikel 12* n 39 above, para 8, affirms the need for a unitary and autonomous solution to the problem with regard to national laws.
[46] F. Marongiu Buonaiuti, n 33 above, 213.

to ineffectiveness, this instrument should be able to be used by the court even *ex officio*.[47]

Actually, as noted above, this is probably not the only function of the rule. In fact, it is also a means of counteracting the possible negative effects of the concentration of jurisdiction, which in practice could be detrimental to the defendant spouse, making the exercise of the rights of defence less easy.

Therefore, even if Art 13 is not a rule directly protecting the interest of the party, the EU legislator seems to consider it a necessary (but not sufficient) condition for the limitation of proceedings. In fact, the final assessment on the opportunity not to rule on the assets located in the third State is in any case up to the court, as it is normal considering that the interest in splitting the proceedings will have to be balanced with the opposite need for a unitary and concentrated treatment of all related issues.[48] But only the party is authorised to initiate the procedure by submitting a request, since it is only the party who has to assess its interest in using the instrument.

Finally, from an operational point of view, two issues remain to be dealt with in relation to the above-mentioned party request: the person entitled to raise it and the timing of its submission.

With regard to the first question, the rule refers generically to one of the parties, thus recognising the active legitimacy of both the plaintiff and the defendant. However, the plaintiff normally already has the possibility under national law to modulate the scope of the proceedings, either upstream with his claim or subsequently by waiving it. Consequently, the provision of such a remedy makes sense only if it is qualified as a procedural objection, that is as a request with a contrasting function to the claim. Accordingly, it will be of particular relevance for the defendant,[49] who, by raising such a plea, may ask the court to limit the scope of the proceedings outlined by the plaintiff in its claim.

As regards the form and timing of the request, attention must be paid to the domestic law of the *forum*,[50] keeping in mind that this must in

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[47] D. Damascelli, n 22 above, 80; G. Panopoulos, n 20 above, 104-105.

[48] Cf F. Marongiu Buonaiuti, n 33 above, 212.

[49] With respect to Art 12 ESR see G. Panopoulos, n 20 above, 102.

[50] P. Franzina, *Article 13* n 3 above, 133.

any case be interpreted in such a way as not to prejudice the effectiveness of the rules laid down by the Regulation.[51] In any event, the rationale of the rule and the need for certainty and procedural economy lead to the presumption that the party must raise the above objection with its first defence,[52] or, if the ground making recognition unlikely arises in the course of the proceedings, with the defence immediately following the knowledge that it will materialise.

V. The right of the parties to limit the scope of the proceedings according to the law of the forum

Finally, the second paragraph of Art 13 makes it clear that the rule laid down in the first paragraph does not affect the right of the parties to limit the scope of the proceedings under the law of the Member State. This is an apparently curious rule in that it merely recognises a power that the parties already have under their own national law[53] and which could not have been affected by the provision in the first paragraph because of the procedural autonomy granted to the Member States.[54] Thus, on a first reading, this provision would seem to clarify that under the Twin Regulations the possibility to limit the scope of proceedings is not necessarily bound by the limits and conditions set out in the first paragraph. Indeed, the parties by mutual agreement may do so in the cases and in the manner provided for by national law. In this way, therefore, the second paragraph seems to perform, for the most part, a function of clarification of the scope of the provision referred to in the first paragraph. In other words, the rule seems to confirm that the nature of the remedy provided for in Art 13 is that of a procedural objection which may be raised by one of the parties, asking the court seised to limit the scope of the proceedings even against the will of the counterpart.

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[51] Case C-33/76 *Rewe-Zentralfinanz et al* v *Landwirtschaftskammer*, [1976] ECLI:EU:C:1976:188, para 5.

[52] G. Panopoulos, n 20 above, 105.

[53] For this reason D. Damascelli, n 22 above, 80, considers that the provision actually refers to cases where the *lex fori* excludes jurisdiction with respect to immovable assets located abroad.

[54] Case C-33/76 *Rewe-Zentralfinanz et al* v *Landwirtschaftskammer*, [1976] ECLI:EU:C:1976:188, para 5.

Article 14
Seising a court

Cinzia Calabrese

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
For the purpose of this Chapter, a court shall be deemed to be seised:	(Same text)
(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the defendant;	
(b) if the document has to be served before being lodged with the court, at a time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court; or	
(c) if the proceedings are opened on the court' own motion, at the time when the decision to open the proceedings is taken by the court, or, where such a decision is not required, at the time when the case is registered by the court.	

Summary: I. The provision. – II. The rule.

I. The provision

The formulation of Art 14 is essentially identical in both Regulations no 2016/1103 and no 2016/1104.

The purpose of the rule is to identify the exact moment in which a court must be deemed to be seised in case of conflict of jurisdiction and lis pendens.
For this reason, the provision must be read in conjunction with Art 17 of the 'Twin Regulations,'[1] thus forming a complete system for determining the moment in which a proceeding must be deemed to have taken root.
The provision reproduces the content of the equivalent Art 14 of the Regulation on Succession,[2] which had already innovated the structure provided by the Brussels Convention, and Arts 30, 32 and 16 respectively contained in the Brussels I, I-bis and II-bis Regulations.[3]
The structure thus provided makes it possible to identify the judge charged with suspending the proceedings pending the establishment of the jurisdiction of the court previously seized.
To reinforce the functioning of this mechanism, the Regulations provide for a general obligation of cooperation between judicial authorities in para 2 of the aforementioned Art 17: 'In the cases

[1] Regulations no 2016/1103 and no 2016/1104: '1. Where proceedings involving the same cause of action and between the same parties are brought before courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. 2. In the cases referred to in para 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised. 3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.'

[2] Regulation no 650/2012. Art 14: 'Seising of a court. For the purposes of this Chapter, a court shall be deemed to be seised: (a)at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the defendant; (b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court; or (c) if the proceedings are opened of the court's own motion, at the time when the decision to open the proceedings is taken by the court, or, where such a decision is not required, at the time when the case is registered by the court.'

[3] Respectively, Regulation no 44/2001, Regulation no 1215/2012 and Regulation no 1347/2000.

referred to in para 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised.'

This result follows the need to respond to the absence of an autonomous definition of the moment at which a proceeding is deemed to be rooted in the Brussels Convention in Art 21.[4]

The decision to consider a case as pending only after the completion of the two phases of notification and registration of the case before the competent judicial authority had, in fact, caused the late determination of the situation of lis pendens, as the Commission reported in its explanatory memorandum of July 14, 1999.[5]

For this reason, while guaranteeing the equality of weapons of the claimants and protection against abuses of this procedure, the Commission has proposed the adoption of a uniform notion of the date of the court's seizure: this is determined by the execution of a single act, eg the filing of the document or the notification of the act or document originating the proceedings. In this case, the actual execution of the second act is still taken into account.

The Court of Justice has clarified[6] that pursuant to Art 30(a) of Regulation no 44/2001 and Art 16(1)(a) of Regulation no 2201/2003, the date on which the court is seised is the date on which a writ of summons or an equivalent document is submitted to the court, provided that the plaintiff has not subsequently neglected to take the necessary steps to ensure that the document is actually served on the defendant.

Thus, merely contacting the court seized is insufficient and has no definitive effect.

The above-mentioned Regulations have therefore adopted a uniform rule which makes it possible to identify with certainty the moment of

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[4] Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 1968. Art 21: 'Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion decline jurisdiction in favour of that court. A court which would be required to decline jurisdiction may stay its proceedings if the jurisdiction of the other court is contested.'

[5] COM (1999) 348 def.

[6] Court Of Justice, Eu, Section X, July 16, 2015, *P. v M.*, C-507/14.

contact with the competent judicial authority, without prejudice to the need to avoid possible abuses by virtue of the application of the regulatory provisions of the individual states.
Returning to the wording of Art 14 of the Twin Regulations, it provides an autonomous definition of the date of seisin replacing the domestic rules, respecting the peculiarities of the procedural systems of the individual member states in accordance with the principles of subsidiarity and proportionality. We shall see how.

II. The rule

Art 14(a) refers to the case where, according to the procedural rules of the forum, the document instituting the proceedings does not have to be served on the defendant before being lodged with the court. In that case, the court must be deemed to be seised at the time when the above document is lodged to the court.
It is useful refer to the jurisprudential elaboration of Luxembourg Court, that, with the decision of the case *Klomps v Michel*,[7] attributed the connotations of a judicial request to a document whose notification to the defendant allows the plaintiff, if no opposition has been made, to obtain an enforceable measure under the Convention.
In another recent ruling,[8] the court included in the notion of judicial demand also the act of initiating an evidentiary and antecedent procedure.
In any case, the applicant cannot neglect 'to take the steps he was required to take to have service effected on the defendant.'
This is a provision designed to discourage vexatious or frivolous use of court adjuncts and the lodging only meant to benefit from the advantages of an early seisin.
As anticipated, this doesn't require the subsequent service on the defendant to be done in order to consider the court seised; the lodging is sufficient, as long as the applicant performs all subsequent formalities necessary for the defendant to be served with the document which gave rise to the proceedings.

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[7] Court of Justice, 16 June 1981, C -166/80.
[8] Court of Justice, section II, 4 May 2017, *HanseYachts AG v Port d'Hiver Yacthing SARL, Société Maritime Côte d'Azur, Compagnie Generali IARD SA*, C-29/16.

Nonetheless, as clarified by the court, it shall not be considered a failure to take the necessitated steps if the applicant can't be reproached, as it occurred in the case of an applicant who asked the court to stay the proceedings prior to service pending an attempt to settle the dispute by means of conciliation.
It is precisely the literal reference to a judicial application or equivalent act that makes it possible to apply the rule to any document capable of determining the roots of a judgement.
The court recently included in the notion of judicial demand also the act of initiation of an autonomous and antecedent evidentiary procedure.
The question concerned the hypothesis of the commencement of an autonomous evidentiary procedure provided for by the procedural law of a Member State, in which the judge ordered an expert's report and, subsequently, between the same parties and in the same territory, an action on the merits was brought based on the assessment obtained in the evidentiary procedure.
In fact, if on the basis of the internal procedural rules it appears that there is a connection between the judge seized for the preliminary assessment and the judge competent for the merits, the evidentiary procedure is in any case autonomous with respect to the proceedings on the merits that could potentially be initiated, and the only procedure relevant for the purposes of lis pendens is the one on the merits. Therefore, the request for ascertainment or preventive expertise cannot fall within the scope of the application.
The same logical solutions were adopted in the case of proceedings on the merits that are preceded by an application lodged with the same court of interlocutory proceedings for taking evidence: the date of seisin must be determined with reference to the proceeding on the substance rather than the interlocutory proceedings whenever the two sets of proceedings are regarded by the relevant rule of civil procedure as being independent from each other.
Art 14 (b) refers to the case where the document instituting the proceeding has to be served on the defendant before being lodged with the court. In this case, the court must be deemed to be seised when the document is received by the authority responsible for

service. If prior service of the document instituting the proceeding is required, this is an element identified by the law of the forum.
If the service process involves two or more authorities, Art 14(b) states that the first authority that received the documents to be served should be the receiving authority.
The clarification explicitly stated in Art 32(1) of Regulation no 1215/2012 arguably also applies in the framework of the Property Regimes Regulations.
Following the reasons subtended to Art 14 (a), a court cannot be deemed to be seised if it appears that the applicant has failed to take the steps he was required to take to have the document lodged.
In *Brigitte Schlomp*,[9] a judgment concerning the interpretation of Lugano Convention, the court clarified that if the lex fori provides for a mandatory conciliation procedure as a prerequisite, the date on which the court must be deemed to be seised is the date on which such a conciliation procedure was lodged before the conciliation authority, as long as the latter can be considered a court for the purposes of the relevant rules on jurisdiction and lis pendens.
The Property Regimes Regulations explicitly consider, like Art 14 of Regulation 650/2012, the case of proceedings being opened on the court's own motion. Art 14 (c) provides that, in such cases, the court is to be considered as seised 'at the time when the decision to open the proceedings is taken by court, or, where such a decision is not required, at the time when the case is registered by the court.'
No European rule provides, or specifies, when a court ceases to be seised under the rules on the simultaneous presence of several proceedings.
In the case *A v B*,[10] concerning the interpretation of Regulation no 2201/2003, the court decided that if the proceedings before the first court seised cease before the second court in another Member State is seised, the conditions for lis pendens are no longer met. In fact, the court pointed out that the risk of pronouncements with opposite and irreconcilable scope, in such a case and in the light of the relevant provisions, is eliminated and consequently also the occurrence of lis pendens.

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[9] Case C-467/16.
[10] Case C-489/14 A v B, 2015, ECLI:EU:C:2015:654, para 37.

Practically, a court cannot be deemed to remain seised of an action that has been discontinued in accordance with the procedural law of the forum, and an action cannot be regarded as pending if it cannot be continued pursuant to those rules, save with a new application, especially if the court has discretion to refuse.[11]

[11] For more information, cf P. Franzina, 'Article 14. Seising a court', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples. A Commentary*, (Cheltenham: Edward Elgar, 2020), 137-145 and P. Bruno, *I Regolamenti sui Regimi Patrimoniali dei Coniugi e delle Unioni Registrate, Commento ai Regolamenti (UE) 24 giugno 2016, nn.1103 e 1104 applicabili dal 29 gennaio 2019* (Milan: Giuffrè Francis Lefebvre), 125-132.

Article 15
Examination as to jurisdiction

Cinzia Calabrese

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
Where a court of a Member State is seised of a matter of matrimonial property regime over which it has no jurisdiction under this Regulation, it shall declare of its own motion that it has no jurisdiction.	Where a court of a Member State is seised of a matter concerning the **property consequences of a registered partnership** over which it has no jurisdiction under this Regulation, it shall declare of its own motion that it has no jurisdiction.

Summary: I. The rule. – II. Art 8 provision. – III. Inadequate verification.

I. The rule

Art 15 provides the rule that where a court lacks jurisdiction under the Regulations it must declare that it has no jurisdiction.
It is important to analyse the context where this provision is specified. The provision of Art 15 reflects the wording of other Regulations. In particular, the same rule appears in Art 10 of Regulation no 4/2009[1] about maintenance obligations and Art 15 of Regulation no 650/2012[2] on matters of succession, and it's similar to other provisions contained in the Brussels II bis Regulation and the Regulation on Succession.[3]

[1] Examination as to jurisdiction: 'Where a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation it shall declare of its own motion that it has no jurisdiction.'
[2] Examination as to jurisdiction: 'Where a court of a Member State is seised of a succession matter over which it has no jurisdiction under this Regulation, it shall declare of its own motion that it has no jurisdiction.'
[3] Respectively, Regulation no 1347/2000 and Regulation no 650/2012.

A different rule is instead provided by Regulation no 2201/2003 on matrimonial matters and matters of parental responsibility: pursuant to Art 17,[4] the seised court is under the obligation to declare that it has no jurisdiction only if the Regulation confers jurisdiction on the courts of another Member State.
Regulation no 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matter states that where the court is seised of a matter for which the courts of another Member State have exclusive jurisdiction under the rule of Art 24, the seised court is under the obligation to dismiss the case *ex officio* for lack of jurisdiction when two conditions occur: the defendant is domiciled in one Member State and sued in another, the defendant must have failed to enter an appearance.
The two-aforementioned exceptions are a variation of a general system provided by the European Union where the legislation is concerned for effectiveness. To ensure the uniform effects of the jurisdiction, State Court should be required to enforce the rules. Without the law of the forum, which provides for appropriate safeguard, the rules about jurisdiction would fail to reach their purpose. In fact, the parties would be able to submit their case to a court of their choice in situations where their agreement would not confer jurisdiction on the seised court and the defendant would merely need to refrain from raising an objection as to that court's jurisdiction.
In addition, asking the court hearing the case to play an active role in assessing its jurisdiction is therefore a way to enforce settlement policies, while taking into account the actual difficulties litigants may face when their case is international in nature.
The legislator, with the rule determined by Art 15, requires the judge to verify his own competence on the basis of the facts constituting the plaintiff's claim.
The criteria for jurisdiction set out in Chapter II are general and exclusive: if the judge considers that he has no jurisdiction, the judicial authority must declare itself not to have jurisdiction.

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[4] Examination as to jurisdiction: 'Where a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation and over which a court of another Member State has jurisdiction by virtue of this Regulation, it shall declare of its own motion that it has no jurisdiction.'

II. Art 8 provision

Art 8 of the Property Regimes Regulations provides that 'apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State whose law is applicable pursuant to Art 22 or point (a) or (b) of Art 26(1), and before which a defendant enters an appearance, shall have jurisdiction.'

This provision may appear to contradict the content of Art 15, but on examining the legal framework, the two provisions only need to be coordinated.[5]

For the purposes of Art 8, if the defendant has appeared and has not raised a plea of jurisdiction, it does not provide the court seized with a sufficient basis for asserting jurisdiction, and the court will still have to examine whether it has jurisdiction, at least to assess whether the conditions of Art 8 have been met in the circumstance.

The scope of Art 8 is to determine if the seised court has jurisdiction, while Art 15 determines the procedure with which the seised court can pronounce on its jurisdiction. The two provisions perform different functions.

Once the *quaestio iurisdictionis* is placed before the court hearing the case, its decision depends on the relevant provisions of the Regulation, including Art 8, whenever the conditions for its application are met.

III. Inadequate verification

The competency test must be performed strictly and on the basis of the facts of the case.

By virtue of the principle of mutual trust set out in Art 17 para 2 ('upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised') the courts are bound by a mandatory system of well-structured jurisdiction.

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[5] For more information, cf I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples. A Commentary*, (Cheltenham: Edward Elgar, 2020), 149-150.

When examining jurisdictional claims, the judge hearing a case concerning matrimonial property regimes or registered partnerships must give a clear account of his or her decision, setting out the reasons why he or she considered himself or herself to have jurisdiction, without leaving any doubt as to the rule applied in the specific case.
These fulfilments are fundamental, especially in consideration of the fact that, in Art 39[6] of both Regulations, the jurisdiction of the court of the member state of origin cannot be subject to review during the circulation of the jurisdictional measure.
In the context of a family dispute (scope of application of the Regulation), the EU Court of Justice has clarified[7] that this limitation does not preclude a court to which a decision is submitted that does not contain elements that unequivocally establish the jurisdiction on the merits of the court of origin from verifying whether it emerges from this decision that the latter court intended to base its jurisdiction on a specific provision. In such a case, in fact, the verification does not constitute a check on the jurisdiction of the court of origin, but only the ascertainment of the basis on which the court first seised has based its jurisdiction.
From these elements, the Court has drawn the conclusion that when the jurisdiction on the merits of a judge who has ordered provisional measures is not evident from the elements of the decision taken or when the motivation of the decision is ambiguous, it can be concluded that the decision was not taken in compliance with the rules of jurisdiction laid down in the Regulation. This has effects on the correct application of the system of lis pendens and the circulation of decisions.

[6] Art 39: 'The jurisdiction of the court of the Member State of origin may not be reviewed.'
[7] CGUE, section II, 15 July 2010, *Bianca Parrucker v Guillermo Vallés Pérez*, C.256/09

Article 16
Examination as to admissibility

Cinzia Calabrese

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. Where a defendant habitually resident in a State other than the Member State where the action was brought does not enter an appearance, the court having jurisdiction pursuant to this Regulation shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in time to arrange for his defence, or that all necessary steps have been taken to this end.	(Same text)
2. Article 19 of Regulation (EC) no 1393/2007 of the European Parliament and of the Council ([1]) shall apply instead of paragraph 1 of this Article if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to that Regulation.	
3. Where Regulation (EC) no 1393/2007 is not applicable, Article 15	

[1] Regulation (EC) no 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) no 1348/2000 (OJ L 324, 10.12.2007, p. 79).

of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted abroad pursuant to that Convention.	(Same text)

Summary: I. The provision.

I. The provision

Art 16 of the Regulations no 2016/1103 and no 2016/1104 deals with the verification of the admissibility of the judicial application by the defendant, implementing a rule which largely reflects[2] the content of similar solutions found for the previous regulations on civil judicial cooperation.
According to the provision, 'where a defendant habitually resident in a State other than the Member State where the action was brought does not enter an appearance, the court having jurisdiction pursuant to this Regulation shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in time to arrange for his defence, or that all necessary steps have been taken to this end.'
Before being able to declare the defendant *in absentia*, the judge seized, as he would do in a purely national case, will have to impose a pause in the proceedings, waiting to obtain information and evidence that the defendant has been reached by the service of the document instituting the proceedings in time to allow him to exercise his right to defence or that the service procedure has been conducted according to the national or international rules applicable to the case.

[2] See on this topic: Art 16 Regulation on Succession; Art 18 Brussels II bis Regulation; Art 11 Regulation on Maintenance Obligations; Art 28 Brussels I bis Regulation.

The verification of the conformity of the service becomes even more evident in the light of the content of Art 37[3] letter b) which includes among the reasons for the refusal of the decision the fact that the defaulting defendant was not served with the document instituting the proceedings or an equivalent document in sufficient time and in such a way as to enable him to present his defence, except when, despite having had the opportunity, he did not appeal against the decision.
This is, therefore, an extremely important examination, not only from the point of view of favouring the rapid circulation and recognition of decisions, but also in consideration of the extra-procedural value of the decision (even negative) on jurisdiction, which can take the form not only of a sentence but also of an order or decree and which - according to the orientation of the EU Court of Justice[4] formed in

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[3] 'Grounds of non-recognition: A decision shall not be recognised: (a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State in which recognition is sought; (b)where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so; (c) if it is irreconcilable with a decision given in proceedings between the same parties in the Member State in which recognition is sought; (d) if it is irreconcilable with an earlier decision given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.'

[4] *Goather judgement* (section III, 15 November 2012, C-456-11) which acknowledged the binding force of the decision of lack of jurisdiction on the grounds that the notion of decision includes any decision issued by a court of a Member State, without distinction as to the content of the decision in question, which implies, in principle, that this notion also includes a decision by which a court of a Member State declines jurisdiction on the basis of a clause conferring jurisdiction. The judges also pointed out that the principle of mutual trust would be undermined if the court of a Member State could refuse a decision by which the court of another Member State declined jurisdiction on the basis of an agreement conferring jurisdiction. This would be contrary to the system established by Regulation 44/2001, since such a refusal would be likely to undermine the effectiveness of the rules set out in Chapter II of that Regulation concerning the allocation of jurisdiction among the courts of the Member States. For further information, see P. Franzina, 'Article 16. Examination as to admissibility', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples. A Commentary* (Cheltenham: Edward Elgar, 2020), 151-157 and P. Bruno, *I Regolamenti sui Regimi Patrimoniali dei*

relation to the Brussels I bis Regulation - takes on the value of a judgement, and as such is destined to circulate within the Union.
For this reason, the Regulations take care to dictate the rules of conduct of the judge in order to make the mechanism of verification of the procedural aspects harmonious, specifying that when the application of Regulation no 1393/2007[5] on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters comes into play, para 1 of Art 16 is replaced by Art 19[6] of the same Regulation.

Coniugi e delle Unioni Registrate, Commento ai Regolamenti (UE) 24 giugno 2016, nn.1103 e 1104 applicabili dal 29 gennaio 2019 (Milan: Giuffrè Francis Lefebvre, 2019), 134-137.

[5] Regulation no 1393/2007 of The European Parliament And Of The Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) no 1348/2000.

[6] Defendant not entering an appearance 1. Where a writ of summons or an equivalent document has had to be transmitted to another Member State for the purpose of service under the provisions of this Regulation and the defendant has not appeared, judgment shall not be given until it is established that:
(a) the document was served by a method prescribed by the internal law of the Member State addressed for the service of documents in domestic actions upon persons who are within its territory; or (b) the document was actually delivered to the defendant or to his residence by another method provided for by this Regulation; and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.
1. Each Member State may make it known, in accordance with Art 23(1), that the judge, notwithstanding the provisions of para 1, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled: (a) the document was transmitted by one of the methods provided for in this Regulation; (b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document; (c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities or bodies of the Member State addressed.
2. Notwithstanding paras 1 and 2, the judge may order, in case of urgency, any provisional or protective measures.
3. When a writ of summons or an equivalent document has had to be transmitted to another Member State for the purpose of service under the provisions of this Regulation and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiry of the time for appeal from the judgment if the following conditions are fulfilled: (a) the defendant, without any fault on his part, did not have knowledge of the document i n sufficient time to defend, or knowledge of the

According to this last provision, when a writ of summons or an equivalent document has been transmitted to another Member State for the purpose of service in accordance with the rules of the aforementioned Regulation, and the defendant does not appear, the court shall not give judgment until it is established that:
(a) The document has been served, in accordance with the formalities prescribed by the law of the Member State addressed for the service of documents in domestic proceedings, on persons within its territory;
b) the document was actually delivered to the defendant or to his habitual residence in accordance with another procedure provided for in the Regulation and that, in each of these cases, both the service and the delivery took place in sufficient time to enable the defendant to defend himself.
Regulation 1393/2007 has introduced an optional and uniform procedure for the service of judicial documents, as an alternative to the traditional means used in the Member States and respecting a certain margin of flexibility left to them, whereby 'Speed in transmission warrants the use of all appropriate means' and 'the possibility of refusing service of documents should be confined to exceptional situations.'
However, in order to guarantee the need for maximum certainty of the attainment of the goal by the notifier and to facilitate the correct establishment of the procedural relationship in a cross-border context, the same Art 19, referred to by Art 16 of the Regulations no 2016/1103 and no 2016/1104, is concerned with the possibility of procedural preclusion due to lack of knowledge of the document sent for notification: for these reasons, para 4 of Art 19 allows the judge shall have the power to relieve the defendant from the effects of the

judgment in sufficient time to appeal; and (b) the defendant has disclosed a prima facie defence to the action on the merits. An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment. Each Member State may make it known, in accordance with Art 23(1), that such application will not be entertained if it is filed after the expiry of a time to be stated by it in that communication, but which shall in no case be less than one year following the date of the judgment. 5. para 4 shall not apply to judgments concerning the status or capacity of persons.

expiry of the time for appeal from the judgment if (a)the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal; and if (b)the defendant has disclosed a prima facie defence to the has disclosed a prima facie defence to the action on the merits.

Therefore, in accordance with Art 16 of the Regulations no 2016/1103 and no 2016/1104, it is up to the judge who doubts the regularity of the service to stay the proceedings until it is ascertained that the defendant has actually been put in a position to receive the document instituting the proceedings (or an equivalent document) in sufficient time to enable him to present his defence, or that all the necessary steps have been taken to this end.

Finally, para 3 of the same rules specifies that 'where Regulation (EC) no 1393/2007 is not applicable, Art 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted abroad pursuant to that Convention.'

Here the reference is to the scope of application of the Notification Regulation, which does not include non-member countries, for which, therefore, the Hague Convention applies insofar as they are parties to it.

Article 17
Lis pendens

Lucia Ruggeri

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. Where proceedings involving the same cause of action and between the same parties are brought before courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.	(Same text)
2. In the cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised.	
3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.	

I. Lis pendens: functional profiles.

The regulation of *lis pendens* is in line with the regulation generally

adopted in European legislation on private[1] and procedural[2] international law. In fact, it grounds jurisdiction on the principle of prevention: the judge seised second, in fact, does not have jurisdiction. If the second judge considers that the first judge seised has no jurisdiction, he or she will not be able to render a decision but must stay the proceedings and wait for the first judge to ascertain jurisdiction.[3] The first judge is, therefore, the one who can proceed with the investigation: in this regard, the regulation is in line with the guidelines of the Court of Justice formulated over time with regard to other international instruments, such as the Brussels Convention,[4] for

[1] On this subject, for a general description of the functioning of *lis alibi pendens*, see M. Mojolaoluwa, 'Private International Law and the Doctrine of Lis Alibi Pendens' (2017), available at SSRN: http://dx.doi.org/10.2139/ssrn.2963914 (last visited 17 September 2021) and R.A. Schutze, 'Lis Pendens and Related Actions' 1 *European Journal of Law Reform*, 57-68 (2002).

[2] In general, on the basis and purpose of *lis pendens* in the matter of transnational family relationships, see A. Bonomi and R. Di Iorio, 'Litispendenza', in A. Bonomi and P. Wautelet eds, *Il regolamento europeo sulle successioni* (Milan: Giuffré, 2015), p. 197; F Marongiu Bonaiuti, 'Article 17. Lis Pendens', in A.L. Calvo Caravaca, A. Davì and P.H. Mansel eds, *The EU Succession Regulation: A Commentary* (Cambridge: Cambridge University Press, 2016), 251.

[3] There is wide debate about the remedies available against the provision of the national judge which, detecting the international *lis pendens*, stays the proceeding. In Italy, the issue has been the subject of a troubled jurisprudential path which has at times led to considering the jurisdiction regulation as practicable, at other times to exclude its application. In this sense, see Supreme Court - Joint Sections, 22 December 2017, n. 30877 available at www.deiure.it (last visited 17 September 2021). The decision was commented on, among others, by G. Fiengo, 'Il regime di impugnazione dell'ordinanza dichiarativa della litispendenza internazionale' *giustiziacivile.com,* 1-7 (2018) and E. D'Alessandro, 'Le sezioni Unite ribadiscono che è il regolamento necessario di competenza lo strumento utilizzabile avverso il procedimento di sospensione del procedimento di litispendenza internazionale' *Foro italiano*, 521-525 (2018). In general and on the subject with critical remarks, see C. Consolo, 'Litispendenza e convenzioni comunitarie: profili processuali e di diritto transitorio (desunti da alcuni recenti casi italo-svizzeri)', in Id ed, *Nuovi problemi di diritto processuale civile internazionale* (Milan: Giuffré, 2002), 226-227 and V. Carratta, 'Sospensione per connessione internazionale e regolamento necessario di competenza: un'impossibile "quadratura del cerchio"', *Int'l Lis* (2005).

[4] Opinion of Advocate General Van Gerven, Case C-351/89 *Overseas Union Insurance Ltd and Deutsche Ruck Uk Reinsurance Ltd and Pine Top Insurance Company Ltd* v *New Hampshire Insurance Company*, Judgment of the Court of 27 June 1991, para 15, available at www.eur-lex.europa.eu (last visited 17 September 2021).

example. Significantly, Art 17, para 2 introduces a specific tool aimed at facilitating the recognition of the chronology of applications. In fact, it is envisaged that at the request of another court, the court must 'without delay' communicate the date on which it was seised. This is an example of loyal collaboration between courts, which is where most of the organisational efforts of the European Judicial Network are focused. The provision is undoubtedly connected with others contained in the Regulations and aimed at avoiding delays or even denials of justice.[5] Think of a marriage or registered partnership unable to have effects in a particular legal system. The court seised must quickly decline jurisdiction so as to allow the parties to act in another Member State where the court may have jurisdiction on the basis of another connecting factor, regardless of the order of these criteria of jurisdiction, respecting the autonomy of the parties.[6] Declining jurisdiction in favour of the court first seised constitutes an obligation based on compliance with the system of jurisdiction adopted by the European Union, which the national courts are required to respect.[7] On the other hand, if the parties have attributed to the court seised second, pursuant to Art 7 of the Regulations, exclusive jurisdiction, as evidenced by the doctrine,[8] declining jurisdiction does not seem possible, but it remains nevertheless problematic, in the absence of a specific legislative provision, to establish whether the judge first seised is obliged to dismiss the case

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[5] The problem of the denial of justice assumes particular importance to the extent that it is the subject of specific regulation. See, in this regard, Recital 41 of Regulation 1103 and Recital 40 of Regulation 1104.

[6] Thus, Recital 38 of Regulation 1103 and Recital 36 of Regulation 1104.

[7] The Court of Justice has been able to establish this principle on the occasion of a dispute concerning derogation from the rules on *lis pendens* whenever the judge who is the first to be seised belongs to the States in which the duration of the trial is excessive. This is Case C-116-02 *Gasser GmbH* v *MISAT Srl.* [2003] ECR I-14693. For a comment, see, among others, J. Mance, 'Exclusive Jurisdiction Agreements and European Ideals', *The Law Quarterly Review*, 357-365 (2004) and L. Idot, 'Litispendance. Article 21 sur la litispendance doit s'appliquer même lorsque le juge saisi en second est compétent sur la base d'une clause attributive de jurisdiction', *Europe*, 22-24 (2004).

[8] See S. Migliorini, 'Article 17', in A. Bonomi and P. Wautelet eds, *Le droit européen des relations patrimoniales de couple. Commentaire des Règlements (UE) no 2016/1103 et 2016/1104* (Brussels: Bruylant, 2021), 544.

having taken count of the exclusive jurisdiction of the foreign judge.[9] Central to understanding the functioning of *lis pendens* is the concept of 'seising a court' governed by Art 14 of Regulations 1003 and 1104, a notion which is independent of national rules, and which assumes an autonomous value in European unitary law. The timings and the assumptions for considering an authority to be seised are, therefore, removed from the influence of national law[10] to give life to a concept that is understood as unambiguously as possible at the European level. In this context, even more so than in a domestic context, the circumstance that the same question is posed by the same parties before two different judges threatens the 'harmonious functioning of justice,'[11] which is considered to be the general interest. Only a harmonisation of procedural rules resulting from judicial cooperation in civil matters can mitigate the risk of incompatible decisions being taken. It should be noted, however, that the European unitary *lis pendens* has a specific connotation in family law. This is also evident when there are questions posed by the same parties, but which have a different content. In this sense, a 'broader' reading of the notion of *lis pendens* can certainly be seen in the case law of the Court of Justice. The latter,[12] in fact, with regard to a French couple residing in France, established that there was a case of *lis pendens* between the separation procedure initiated in France by the husband and the divorce

[9] S. Migliorini, n 6 above, 544, proposes allowing a *prima facie* assessment to the judge of the court seised second in the context of coordination between judges provided for by Art 17, para 2.

[10] In this sense, see the Opinion of Advocate General Jääskinen in Case C-296/10 *Purrucker* v *Vallés Pérez*, ECR 2010 I-11163, para 98. In the past, with regard to the Brussels I Convention, the notion of ' seising' was, on the other hand, considered applicable at the national level. See, in this regard, Case C-129/83 *Zelger* v *Salinitri* ECR 1984 -02397, para 16, according to which 'Art 21 of the convention must be interpreted in the sense that the judge before whom the requirements to which the definitive lis pendens is subordinated have been satisfied must be considered "first seised"; these requirements must be assessed on the basis of the national law of each of the judges concerned.'

[11] Thus, verbatim, Recital 42 of Regulation 1103 and Recital 41 of Regulation 1104.

[12] Reference is made to Case C-489/14 *A.* v *B.*, Judgement of 6 October 2015, available at www.eur-lex.europa.eu (last visited 17 September 2021). For a comment, see C. Chalas, 'Litispendance et décalage horaire dans le contentieux du divorce en Europe', *Revue critique de droit international privé*, 387-394 (2016).

procedure initiated in Great Britain by the wife. At the basis of the *lis pendens*, grounded only on the circumstance of the identity of the subjects, both mutually plaintiffs and defendants, the Court places a particular discipline set by European family law, in particular by Regulation 2201/2003, which, unlike Regulation 44/2001, does not require an identity of the subject matter. Therefore, *lis pendens* is also recognised when a court has to examine a divorce application and another court has instead been seised for a separation:[13] the interpretative solution should not change with the entry into force of Regulation 2019/1111, which did not bring any innovation on this matter.

The Twin Regulations are notable for the presence of a provision contained in the second paragraph of the Article, where a communication obligation between courts is established. In fact, the court must communicate 'without delay' the date when it was seised. Despite the absence of specific details relating to the methods of communication, the provision deserves to be signalled as an important step in the implementation of the duty of collaboration and mutual trust placed at the base of the European judicial area. The function of *lis pendens* is to minimise the adoption of parallel decisions and, in this sense, Art 37 serves as extreme and residual protection, which introduces the possibility of not recognising decisions issued between the same parties with incompatible content.[14]

II. Principle of prevention and public policy.

The harmonisation of *lis pendens* rules on family property regimes becomes particularly sensitive, stemming from the fact that property and family are matters difficult to harmonise, having a relevant domestic connotation. It is no coincidence, therefore, that the Court of Justice in this very domain was able to issue one of its most important decisions concerning the consequences of the violations of

[13] Thus, Case C-489/14 n 5 above, paras 33 and 34.

[14] On the subject, see N. Pogorelčnik Vogrinc, 'Refusal of Recognition and Enforcement', in M. J. Cazorla González, M. Giobbi, J. Kramberger Škerl, L. Ruggeri and S. Winkler eds, *Property Relations of Cross Border Couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2020), 159-161.

the European unitary *lis pendens*.[15] The violation of the principle of prevention is the subject of the question on the interpretation of EU law submitted by the Italian Supreme Court[16] with regard to a double procedure initiated by an Italian-Romanian couple. The Romanian court, although seised second, ruled on the divorce, with a decision that became definitive and without detecting the *lis pendens* and leaving to the Italian judge the competence to decide. The case was made even more relevant by the radical difference between Italian and Romanian laws: according to the former, in fact, the ruling should have been that of separation, an institute unknown to the Romanian legal system. The Court of Justice faces a question concerning the nature of the procedural rules of *lis pendens*: can the principle of prevention be considered pertaining to public policy? If the answer is yes, the court issuing a decision in breach of the principle should be considered not competent due to the lack of jurisdiction. It is necessary to verify whether the circulation of judgments within the European Union integrates the principle of procedural public policy. In the Union, the principle of prevention, placed at the base of the *lis pendens* rules, has the fundamental function of preventing legal procedure from being undertaken to avoid decisions that a specific person does not want to accept, perhaps for reasons of the substance of the matter. In this scenario, the concept of public policy assumes particular relevance. The variation of the content and the role attributable to it in procedural matters is closely connected with procedural rights and prerogatives. The last paragraph of Art 17 is confirmation of the importance of the recognition of competence on the basis of the prevention criterion. However, compliance with this procedural choice could not be so certain if the courts were granted the power not to accept decisions from other foreign courts. The issue of *lis pendens*

[15] Reference is made to Case C-386/17 *Liberato* v *Grigorescu*, Judgment of the Court of 16 January 2019, available at www.eurlex.europa.eu (last visited 17 September 2021). The decision was the subject of much debate. For all, see H. Muir Watt, 'Sanctionner ou circuler? Les conséquences sur le terrain des effets des jugements de la méconnaissance par le juge second saisi des règles relatives à la litispendance' *Revue critique de droit international privé*, 495-503 (2019); I. Barrière Brousse, 'Règlement Bruxelles II bis: CJUE, 1re ch., 16 janv. 2019, aff. C-386/17, Stefano Liberato c / Luminita Luisa Grigorescu: note' *Journal du droit international*, 1235-1242 (2019).

[16] Supreme Court, 20 June 2017, no 15183, *Diritto & Giustizia* (2017), 21 June 2017.

must necessarily be linked to the question of recognition of foreign decisions: *lis pendens* and legitimate refusal of recognition of decisions issued in violation of this principle are indispensable tools for making cooperation between the courts of different States truly effective.[17]
In this complex context, the Court of Justice considers it appropriate to reduce the scope of public policy, avoiding the situation where the rules on *lis pendens* can, if violated, alone justify the rejection of the decision issued by a foreign judge.
The European judicial area is based on the mutual trust and loyal collaboration of national courts: the choice to reduce the scope of application of public policy and to certify the exceptional character is functional to maintaining this trust.[18] For this same reason, the possibility of reviewing a decision issued abroad by a court on the grounds that it has misapplied European Union law is denied. The error of law is strictly interpreted[19] and can lead to a violation of public policy only when it constitutes a manifest violation of an essential legal rule at the European unitary level or a violation of a fundamental right.[20]

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[17] Thus, P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate. Commento ai regolamenti UE 24 giugno 2016, nn. 1103 e 1104 applicabili dal 29 gennaio 2019* (Milan: Giuffré Francis Lefebre, 2019), 140.

[18] Case C-195/08 *Rinau* ECR 2008 I-05271, para 50, proposes a minimisation of the reasons for non-recognition of foreign decisions.

[19] Thus, Case C-681/13 *Diageo Brands BV* v *Simiramida-04 EOOD*, Judgment of the Court of 16 July 2015, available at www.eurlex.europa.eu (last visited 17 September 2021). On this subject, see L. Idot, 'Reconnaissance et exception d'ordre public', *Europe*, 46-47 (2015); S. Marino, 'L'obbligo di rinvio pregiudiziale fra responsabilità dello Stato e circolazione della sentenza dell'Unione' *Rivista di diritto internazionale,* 1270-1274 (2015); M. Giannino, 'A Tale of Whisky and Sorrow: The Court of ustice Says that Misapplication of EU Rules on Exhaustion of Trade Mark Rights Is Not a Breach of Public Policy' *Journal of Intellectual Property Law and Practice*, 399-401 (2016); L. Pailler, 'La portée de l'obligation de reconnaître une décision relative à la garde d'un enfant émanant de la juridiction de l'État membre dans lequel l'enfant a été déplacé en application du réglement n° 2201/2003 "Bruxelles II bis"' *Journal du droit international*, 593-603 (2016).

[20] Even in this reduced and exceptional form, public policy control over foreign decisions is poorly tolerated. In this regard, see the consistent case law of the Court of Justice: Case C-7/98 *Krombach* v *Bamberski* [2000] ECR I-01935, paras 22-23; Case C-38/98 Renault [2000] ECR I-02973, paras 27-28); Case C- 420/07 *Apostolides* v *David Charles Orams e Linda Elizabeth Orams* [2009] ECR 2009 I-03571, paras 56-57;

III. Relations with countries that do not adopt the Twin Regulations: problematic issues

The *lis pendens* referred to in Art 17 can only be applied when two courts of two different States, both participating in the enhanced cooperation procedure, have received a request relating to disputes concerning the property regimes of a married couple or the property consequences of a registered partnership. If the court seised operates in a Member State that has not adhered to the Regulations or that does not belong to the European Union, the only useful provision seems to be that contained in Art 37 letter d) of the Twin Regulations, which establishes that no recognition is possible of decisions that are irreconcilable with previous decisions, even if taken in the States that did not participate in the enhanced cooperation procedure or in third countries. This provision, similar to that contained in Art 40 of the Succession Regulation, testifies to the European legislator's full awareness[21] of the high probability that cross-border couples will not benefit from the rules on *lis pendens* contained in the Twin Regulations. The possibility of recognising decisions pursuant to Art 37 should be accompanied by the possibility of detecting *lis pendens*, an extremely useful institute for mitigating uncertainties and procedural delays for subjects such as cross-border couples, whom significant statistical data

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and Case C-302/13 *flyLAL-Lithuanian Airlines* v *Starptautiskā lidosta Rīga VAS* and *Air Baltic Corporation AS*, Judgement of 23 October 2014, para 47, available at www.eur-lex.europa.eu (last visited 17 September 2021). For an in-depth study of the interactions between public policy and internal principles, see G. Zarra, 'Law and Morals in the Application of the Public Policy Exception Under the Twin Regulations 1103 and 1104 of 2016' *Actualidad Jurídica Iberoamericana*, 1-22 (2021). See also, among others, N. Trocker, *La formazione del diritto processuale europeo* (Turin: Giappichelli, 2011), 77; N. Boschiero, 'L'ordine pubblico processuale comunitario ed "europeo"', in P. De Cesari and M. Frigessi di Rattalma eds, *La tutela transnazionale del credito* (Turin: Giappichelli, 2007), 163; M. De Cristofaro, 'Ordine pubblico "processuale" ed enucleazione dei principi fondamentali del diritto processuale "europeo"', in V. Colesanti, C. Consolo and G. Gaja eds, *Il diritto processuale civile nell'avvicinamento giuridico internazionale. Omaggio ad Aldo Attardi* (Padua: Cleup, 2009), II, 893; J. Normand, 'Le rapprochement des procédures civiles à l'intérieur de l'Union européenne et le respect des droits de la défense', in R. Perrot ed, *Nouveaux juges, nouveaux pouvoirs?: Mélanges en l'honneur de Roger Perrot* (Paris: Dalloz, 1996), 337.

[21] On the subject, see S. Migliorini, n 4 above, 540.

identify as particularly vulnerable subjects within the European legal space.[22] At the moment, in the absence of specific legislation, it can be assumed that each court seised second that belongs to a Member State participating in the enhanced cooperation procedure, which has led it to adopt the Twin Regulations, may, on the basis of the operating rules at national level, consider whether to declare *lis pendens*. In making this assessment, the criteria contained in Art 37 letter d) of the regulations have to be respected in order to assess the existence of the requirements that could lead to recognition of the effectiveness of the foreign decision in one's own national territory.

IV. The identity of parties and subject matter.

The concept of *lis pendens* assumes an autonomous value as a result of intense elaboration work carried out by the Court of Justice with reference to international conventions and other European regulations.[23] Rules on *lis pendens* are present, in fact, in Regulation 650/2012 and in the Brussels I-bis and II-bis Regulations, so much so that it can be hypothesised that *lis pendens* will be brought back within the *acquis* of the European Union.[24] A first question of interpretation is given by the concept of 'identity of the parties:' even if prima facie it may be taken for granted that the parties are members of the couple,

[22] See Accompanying document to the communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Bringing legal clarity to property rights for international couples', SEC(2011) 327 final, 1-76.

[23] In this regard, it is useful to refer to Case C-144/86 *Gubisch Maschinenfabrik KG* v *Palumbo* [1987] ECR I-04861, para 11 and Case C-406/92 *The owners of the cargo lately laden on board the ship "Tatry"* v *The owners of the ship "Maciej Rataj"* ECR [1994] I-05439 with which the Court of Justice, with reference to the 1968 Brussels Convention, affirmed the autonomous nature of the substantive requirements of *lis pendens*. According to the Court, the substantive requirements represent a very specific choice of the international legislator and involve the implicit rejection of any possibility of referring to the notion of *lis pendens* used in the various national legal systems. On the subject, with reference to the *lis pendens* concerning actions *in personam* or *in rem*, see C.I. Nagy, 'Article 17', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples: A Commentary* (Cheltenham : Edward Elgar, 2020), 162-163.

[24] Thus, P. Bruno, n 14 above.

in practice, it may occur that a specific question concerning family property can be raised by third parties. In these hypotheses, it will be useful for the authority seised second to apply the institute of related actions to ensure that the procedure can be treated as a unit even though there is no coincidence between the parties. An interpretation is then needed with regard to the very concept of ' the party,' which in no way coincides with a single natural person since it is possible to determine *lis pendens* whenever it is possible to identify interests and positions between different subjects, for example by reason of a subrogation.[25]

In the same way, the concept of identity of the subject matter of the dispute cannot be understood rigidly: a request aimed at invalidating an agreement concerning family property matters can justify a ruling of *lis pendens* with respect to a request that concerns the enforcement of the agreement contested in its validity.[26] *Lis pendens* is when there is an identity of title or subject matter: as clarified by the case law of the Court of Justice,[27] the title means those facts and rules underlying the claim, while the subject matter means the purpose of the claim: *lis pendens* does not necessarily require a precise formal identification. *Lis pendens* operates whenever both the identity of the parties and the identity of the subject matter cumulatively recur and, to this end, only the main legal actions[28] are taken into consideration, and not other types such as those aimed at obtaining provisional and urgent measures.[29]

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[25] See in this regard Case C-351-96 *Drouot assurances* v *Consolidated metallurgical industries and Others* [1998] ECR I-03075. For a comment, see, among others, F. Seatzu, 'The Meaning of "Same Parties" in Article 21 of the Brussels Jurisdiction and Judgments Convention' *European Law Review*, 540-544 (1999) and F. Persano, 'Il rilievo della litispendenza internazionale nella Convenzione di Bruxelles del 1968. La nozione di "stesse parti"' *Rivista di diritto internazionale privato e processuale*, 713-726 (2000).

[26] On the subject, in this sense, see S. Migliorini, 542, n 11 above.

[27] Case C-406/92, n 17 above, paras 39 and 41.

[28] Thus, P. Bruno, n 11 above, 146.

[29] See P. Bruno, n 11 above, 149-150, where reference is made to Case C-296/10, n 8 above. *Lis pendens* in situations where the action entails a probative procedure is analysed by A. Rodriguez Vazquez, 'Lis Pendens and Measures of Inquiry' *Cuadernos DERECHO Transnacional*, 10, 630-638 (2018), with a comment concerning Case C-29/16 *Hanse Yachts AG* v *Port D'Hiver Yachting SARL, Société Maritime Côte D'Azur y Compagnie Generali IARD SA,* Judgment of the Court of 4 May 2017 available at eur-lex.europa.eu (last visited 17 September 2021).

V. *Lis pendens* and alternative dispute resolution tools for the process

In a context where the concept of a court does not necessarily coincide with that of a state judge, the development of alternative forms of dispute resolution to the trial raises further questions: in fact, can there be *lis pendens* between a procedure established before a judge and a procedure before a mediation body or before a professional authorised by the national legislator to carry out negotiation activities aimed at reaching an agreement or even before an arbitrator? One of the major shortcomings found in the Twin Regulations is the absence of a specific provision of ADR (Alternative Dispute Resolutions) tools. The issue is, in fact, only hinted at in the Regulations which in the Recitals indicate that amicable forms of settlement of the dispute should in no way be hindered by the application of the Regulations.

With regard to *lis pendens*, the application of this indication is rather complex: if, in fact, in a given State the use of an alternative procedure to the process were mandatory, it would be contrary to the spirit of the Regulations not to recognise, in this case, a *lis pendens* and not to apply the principle of prevention if the court first seised is not a judge. In this sense, it seems useful to adopt a functional interpretation[30] as done by the Court of Justice[31] in a case concerning *lis pendens* with regard to a mandatory mediation procedure. While at national level specific rules of admissibility have been developed that identify phases and relationships between ADR procedures and procedures before the State judge, for cross-border couples there is no such system, and everything is left to the interpretation that cannot but be affected by different functional and specific characteristics of each ADR procedure adopted by the national legislation in practice.[32]

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[30] In this sense, see Opinion of Advocate General Szpunar, Case C-467/16 *Schlömp* v *Landratsamt Schwäbisch Hall*, Judgment of the Court (Second Chamber) 20 December 2017, para 46, available at www.eur-lex.europa.eu (last visited 17 September 2021).

[31] Case C-467/16, above 21. For a comment, see. L. Idot, 'Convention de Lugano II - Litispendance et notion de jurisdiction' *Europe*, 100 (2018).

[32] The theme is addressed by P. Bruno, n 11 above, 142, which, with reference to the Italian assisted negotiation procedure, excludes the possibility of a *lis pendens* being found if the professional authorised by law to carry out the negotiation was first seised. The reason for this interpretative option is the non-mandatory, but purely voluntary, nature of the negotiation procedure.

Article 18
Related actions

Lucia Ruggeri

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.	(Same text)
2. Where the actions referred to in paragraph 1 are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.	
3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable decisions resulting from separate proceedings.	

Summary: I. The function of regulation. – II. The assessment and consequences of the presence of related actions.

I. The function of regulation

Art 18 introduces a mechanism that prevents a disputed issue that has a connection with another issue from being decided at the same time by courts operating in two or more Member States. The function of Art 18 as well as that of Art 17 is to avoid different judges issuing decisions at the same time and to prevent decisions that are incompatible with each other.

As evidenced by the legal doctrine,[1] irreconcilability between two decisions takes on a specific and different connotation from that of irreconcilability which can lead to the rejection of a decision on the basis of Art 37, letter c.
As established by the Court of Justice 'in order to achieve proper administration of justice,' the interpretation of the concept of related actions must be broad so as to avoid the risk of conflicting decisions. It is possible to join cases 'even if the judgments can be separately enforced and their legal consequences are not mutually exclusive.'[2]
It should be noted that the scope of application of Art 18 is wider than that of Art 17 since the concept of a related action is far broader than that of the 'same action' which is the basis of *lis pendens*.
To minimise the risks of simultaneous procedures and consequent conflicting decisions, the protective mechanism established by Art 37 of the Twin Regulations is also valid for Art 18. A double or multiple decision, based on Art 37, letter c), can justify the refusal of recognition. The central role of the proper application of Art 18 stems from all these rules, as this can ensure rapid procedures for cross-border couples and, above all, compliance with the principle of legal certainty.[3]

II. The assessment and consequences of the presence of related actions

Unlike *lis pendens*, the presence of a related action does not always determine the need to stay the procedure by the court seised second.
The choice to stay the trial is, in fact, left to the free evaluation of the court which will have to decide on the appropriateness of joining the cases before the judge first seised, weighing well the pros and cons of

[1] See V.C.I. Nagy, 'Article 18', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples. A Commentary* (Cheltenham: Edward Elgar, 2020), 169.

[2] See Case C-406/92, *The owners of the cargo lately laden on board the ship "Tatry"* v *The owners of the ship "Maciej Rata*], Judgment of the Court of 6 December 1994, available at eur-lex.europa.eu (last visited 21 September 2021).

[3] On the subject, see S. Migliorini, 'Article 18', in A. Bonomi and P. Wautelet eds, *Le droit européen des relations patrimoniales de couple. Commentaire des Règlements (UE) no 2016/1103 et 2016/1104* (Brussels: Bruylant, 2021), p. 551.

any potential staying.[4] Art 18 of the Regulations introduces, however, some parameters of evaluation that the judge first seised must necessarily take into consideration when the related action operates between pending procedures, both at first instance.

The second judge must, in fact, assess whether the other judge has the competence to decide on the issues proposed by the parties, whether the *lex foro* allows the joining of the proceedings, and whether, in this regard, there is a specific party request.

It is clear that if the related action concerns procedures established before a judge from a country not participating in the enhanced cooperation procedure or not belonging to the European Union, the related action will be governed by the domestic rules of private international law in practice.[5]

As is the case for *lis pendens*, also with regard to the related action, it is necessary to question the concept of seised court. In this regard, one cannot fail to point out a potential issue constituted by the possible non-overlapping of the term 'judicial authority' and 'court.' Art 3, para 2 of the Twin Regulations includes in the concept every judicial authority and 'all other authorities and legal professionals' giving a broad definition of authority. But the term 'court' used in Arts. 17 and 18 is, in the interpretation offered by the Court of Justice,[6] certainly less broad and could lead to the exclusion of the problem of joining cases whenever the court seised does not have characteristics such as to make it fall within the concept of court. In this regard, the reference to Recital 14 of Regulation 1111/2019 is useful, which specifies that 'Any agreement approved by the court following an examination of

[4] V.C.I. Nagy, n 1 above, 167.

[5] Thus P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate* (Milan: Giuffrè Francis Lefebvre, 2019), 157.

[6] The notion of 'court' is the result of an elaboration of the case law of the Court of Justice. Significantly, Recital 14 of Regulation 1111/2019 states that 'According to the case-law of the Court of Justice, the term "court" should be given a broad meaning so as to also cover administrative authorities, or other authorities, such as notaries, who or which exercise jurisdiction in certain matrimonial matters or matters of parental responsibility.' On the subject for some critical remarks, see E. D'Alessandro, 'The Impact of Private Divorces on EU Private International Law', in J. M. Scherpe and E. Bargelli eds, *The Interaction Between Family Law, Succession Law and Private International Law* (Cambridge: Intersentia, 2021), 74.

the substance in accordance with national law and procedure should be recognised or enforced as a 'decision.' Other agreements which acquire binding legal effect in the Member State of origin following the formal intervention of a public authority or other authority as communicated to the Commission by a Member State for that purpose should be given effect in other Member States in accordance with the specific provisions on authentic instruments and agreements in this Regulation. This Regulation should not allow free circulation of mere private agreements. However, agreements which are neither a decision nor an authentic instrument, but have been registered by a public authority competent to do so, should circulate. Such public authorities might include notaries registering agreements, even where they are exercising a liberal profession.' In this context, 'parallel' concepts of 'judicial authorities' are being developed with restrictive effects regarding the application of *lis pendens* and related actions for the purposes of the Twin Regulations.[7]

[7] The issue is complex and concerns the whole family and succession regulatory framework. On the subject, with reference to the Succession Regulation on the concept of judicial authority and of the contentious or non-contentious nature of the decision, see D. Wiedemann, 'Understanding and Interpreting the Succession Regulation through its National Origins', in J.M. Scherpe and E. Bargelli eds, *The Interaction between Family Law, Succession Law and Private International Law*, n 3 above, 142-144. On this topic, an interesting point is the overcoming of the literal interpretation of the concept of decision provided by Case 20/1 *V. P. Oberle*, Judgment of the Court 21 June 2018, para 40, available at eur-lex.europa.eu (last visited 21 September 2021). For a comment on this decision, see L. Idot, 'Champ de la règle de compétence internationale' *Europe*, 50 (2018).

Article 19
Provisional, including protective, measures

Paolo Bruno

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.	(Same text)

I. Introductory remarks

Art 19 of the Regulations is inspired by the analogous provisions of other legislative instruments adopted in the field of judicial cooperation in civil matters[1] and, even earlier, by Art 24 of the 1968 Brussels Convention.[2]

The *ratio* behind its introduction lays in the need to strike a fair balance between two different exigences: ensuring coherence among

[1] As for the judicial cooperation in family matters see the identical provisions of Art 14 Regulation (EC) no 4/2009 (maintenance obligations) and Art 19 Regulation (EU) no 650/2012 (successions), while a different approach was followed by Art 20 Regulation (EC) no 2201/2003 (Brussels IIa) subsequently recast in Art 15 Regulation (EU) no 1111/2019. In civil and commercial matters see Art 35 Regulation (EU) no 1215/2012 (Brussels Ia).

[2] Convention 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels Convention).

judgements, in order to streamline their circulation, and granting legal protection to those situations that imply a prompt reaction.
However, the temporal and territorial extent to which such a protection can be assured, as well as the grounds for jurisdiction for granting *interim* measures, has been largely debated in literature with different outcomes depending on the subject matter.
As a matter of fact, time is of the essence not only when dealing with general family law proceedings but also when the object of the dispute is related to financial aspects linked to that matter (notably because of the high level of contentiousness therein).
Against this background, the particularity of the cases falling within the scope of the Regulations on the property regimes of international couples – notably the management of the economic assets of the spouses or partners – is likely to trigger the adoption of provisional and protective measures perhaps more frequently than in other regulations in family matters.

II. Scope of the provisional and protective measures

The scope of Art 19 encompasses a wide range of measures, whose features vary according to the situation at stake and depending on the procedural rules of the *forum*, but which generally can be divided into conservatory and anticipatory measures.
Differently from the notion of decision (see Art 3, para 1, letter d) none of the Regulations on the property regimes of international couples specifically define them, nor are they quoted in the accompanying Recitals.
Useful elements for a correct interpretation can, however, be deduced from other legislative texts and from the case-law of the European Court of Justice regarding similar provisions of other Regulations.
As for the normative side, Recital 25 of Regulation (EU) no 1215/2012 states – for example – that the notion of provisional, including protective, measures should include protective orders aimed at obtaining information or preserving evidence, but it should not

include measures which are not of a protective nature, such as measures ordering the hearing of a witness.[3]

Although considering the diversity of the legal context, it must be recalled that the very essence of the notion has been explored by the Court of Justice with regard to the 1968 Brussels Convention and to Regulation (EU) no 1215/2012; some elements can therefore be deducted as being part of a concept that inevitably is understood in different manners across the European Union.

Firstly, the Court denied such a nature to the French 'action paulienne' (*actio pauliana*) – whose cause of action allows creditors to seize assets no longer belonging to their debtor, who sold or gave them away in an attempt to secure them from the creditor's enforcement[4] – because lacking the indispensable feature of instrumentality, in the *Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v Dresdner Bank AG* case (C-261/90).

In this occasion, the Court stated that regard should be had not to the measure itself but to the rights it aimed to protect, and emphasised that the expression 'provisional, including protective, measures' within the meaning of Art 24 of the 1968 Brussels Convention must be understood as referring to measures which, in matters within its scope, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter.

Furthermore, provisional measures are not independent in nature and the connection with other measures makes evident the need for a reversibility of their effects. This reversibility, following the adoption

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[3] The latter case would be excluded from the scope of the provision because otherwise – as the Court of Justice had the occasion to underline – an application to hear a witness could be used as a means of sidestepping the rules governing, based on the same guarantees and with the same effects for all individuals, the transmission and handling of applications made by a court of a Member State intended to have an inquiry carried out in another Member State: see ECJ, I, 28.04.2005, *St. Paul Dairy Industries NV vs Unibel Exser BVBA*, C-104/03, par.23.

[4] For this definition and for an extensive overview of the case-law of the ECJ on this matter, see I. Pretelli, 'Provisional and Protective Measures in the European Civil Procedure of the Brussels I System', in V. Lazic´ and S. Stuij eds, *Brussels Ibis Regulation, Short Studies in Private International Law* (The Hague: T.M.C. Asser Press, 2017), 103.

of an *interim* measure – insofar as it allows a possible contrary decision on the merits – was highlighted in the *Mietz* case.[5]

In general, and coherently with what anticipated above, it must be emphasised that all the protective measures that have irreversible effects should not be included in the scope of Art 19, due to their very nature (which is supposed to have only a conservative effect and should not result in an anticipation of the final judgement unless this effect can be removed with the judgement itself).[6]

This also means that the national judge should, according to the structure of the domestic procedural framework, limit himself or herself to adopt provisional or protective measures that – by their very nature – are able to be modified or withdrawn without undermining the decision on the merit.

According to what explained above, it seems evident that a matter of particular attention is the relation between the provisional and protective measure whose adoption is envisaged by the national judge, and the content of the possible measures adopted by the one who is competent on the merit. The interplay between two different legal orders, and the inherent difficulties, should advise the national judge to carefully handle every request for provisional or protective measures, balancing pros and cons with regard not only to his or her own proceeding but also to any other pending foreign proceeding.

As for the temporary effects, Art 19 – similarly to the corresponding provisions of Regulation (EC) no 4/2009 and Regulation (EU) no 650/2012 – does not provide for any limitation, whereas Art 20 of Regulation (EC) no 2201/2003 strictly connects the duration of provisional and protective measures to any 'appropriate' decision by

[5] ECJ, 27.04.1999, *Hans-Hermann Mietz v Intership Yachting Sneek BV*, C-99/96.

[6] Allow me, on this point, to refer to P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate* (Milan: Giuffrè Francis Lefebvre), 162.

the judge competent on the merit.[7] Consequently, the measures concerned remain governed by the relevant domestic law.
Finally, although not explicitly mentioned in Art 19, it seems that urgency be inherent to the measures in question. Be it for conservatory or anticipatory purposes, normally the adoption of a provisional or protective measure implies the need to proceed before a definitive decision is issued.
Against this background, reference can be made to the case-law of the Court of Justice according to which urgency can be related to the impossibility in practice of bringing an application before the court with jurisdiction as to the substance, but not to a simple change in the circumstances of the case.[8]
Whatever interpretative option is chosen, whether for this feature being constitutive[9] or eventual, it seems clear that the characteristic of urgency must be ascertained based on the relevant domestic law.[10]

III. Jurisdiction to adopt provisional and protective measures

As for the jurisdiction, with regard to the Brussels Ia Regulation the Court of Justice stated that a national court having jurisdiction as to the substance of a case also has jurisdiction to order any provisional or protective measures which may prove necessary.[11] What can be deducted by the overall assessment of the Court is that the evaluation

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[7] The difference could be explained taking into account the substance of the values involved. While the Brussels IIa Regulation deals with matrimonial and parental responsibility matters, the regulations on the property regimes of international couples have a narrower scope. Consequently, it is likely that provisional and protective measures will mainly be used, in the latter, to secure a *de facto* situation rather than to circumvent the grounds for jurisdiction. For the same reason, in the recast of the Brussels IIa Regulation – which led to the adoption of Regulation (EU) no 1111/2019 applicable as from 1 August 2022. – the possibility for the non-competent judge to adopt *interim* measures has been confined to specific circumstances occurring in the context of an international child abduction.

[8] See ECJ, III, 23.12.2009, *Jasna Detiček* **v** *Maurizio Sgueglia*, C-403/09 PPU, par.41-49. 9 On the same topic see also P. Wautelet and R. Di Iorio, *Il regolamento europeo sulle successioni* (Milan: Giuffrè, 2015), 215.

[10] See also ECJ, V, 6.06.2002, *Italian Leather SpA* **v** *WECO Polstermöbel GmbH & Co.,* C-80/00.

[11] ECJ, 17.11.1998, *Van Uden Maritime BV* **v** *Firma Deco Line*, C-391/95.

must be done on a case-by-case basis, and that attention must be paid to the true function of the measure in every dispute.

Similarly to what had been retained in other family law Regulations, also with regard to the property regimes the European legislator decided to grant a judge of a participating Member State the possibility to adopt provisional and protective measures as long as the domestic law provides for a suitable ground for jurisdiction and without interfering with that of the judge competent on the merit.

The jurisdiction ascertained based on the exorbitant *forum* allows a non-competent judge to only secure a certain situation – in view of the appropriate decision taken by the competent judge – but respects the overall framework of the general and subsidiary grounds for jurisdiction set out in Arts 1 to 12 of the Regulations. In other words, national rules of jurisdictions can be invoked to obtain such measures on a provisional basis but cannot be used for circumventing the set of rules deemed to identify the competent judge.

Another element whose presence the judge has to ascertain is the connection between the measures invoked and the State of the seised Court;[12] in this regard, attention should be paid to the necessary proximity between the judge entrusted with the power to grant an *interim* relief and any feature of the case able to establish such a link (an immovable or registered movable property located in the State of the *forum*, for example). Lacking this control, the jurisdiction on the requested provisional or protective measure would be stretched to an extent which would even go beyond the notion of exorbitant *forum* itself.

The Court of Justice endeavored to clarify the substance of what was named as a 'real connecting link' in the above cited *Van Uden*, but – be it the territory where the provisional measure must be enforced, or the presence of some assets therein, or the existence of another element showing personal or professional interests of a party on that territory – uncertainty remains, and a case-by-case approach must always be followed.

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[12] See on this L. Sandrini, 'Article 19', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples. A Commentary* (Cheltenham: Edward Elgar, 2020).

Finally, it is worth noting that the rules on *lis pendens* should not be applicable to a proceeding regarding a provisional measure concurring with a proceeding on the merits. As the Court clarified in a case concerning the Brussels IIa Regulation,[13] also the application of Art 19 of the two Regulations on property regimes does not prevent the court which has jurisdiction as to the substance of the matter being seised.
As the two proceedings do not have the same cause of actions, there is no possibility that a decision made in a judgment granting provisional measures and a judgment handed down by the court which has jurisdiction as to the substance of the matter can contradict each other, since provisional measures cease to apply when the court which has jurisdiction as to the substance of the matter has taken the measures it considers appropriate.

IV. Recognition and enforcement

The circulation of civil judgements in the Area of freedom, security and justice created by the Amsterdam Treaty is based on mutual trust between judicial authorities, which in turn relies on the use of harmonized jurisdiction rules and – as far as possible – a predictable applicable law.
However, while it is natural that an enforceable measure be authorized by a judge who is competent on the merits, after a scrutiny of all the elements of the case, the same can be disputed when it comes to the jurisdiction based on an exorbitant *forum*. In particular, when considering that the non-competent judge can be based in the State where the above-mentioned measure has to be enforced, the problem arises as regards the position of the defendant and the procedural rules according to which the measure is granted.
As for the circulation of provisional and protective measures within the participating Member States, Art 19 must therefore be read in conjunction with the peculiar procedural public policy rule set out in Art 37, lett. b) of the Regulations.
The latter establishes, *inter alia*, that a decision shall not be recognized where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an

[13] See ECJ, II, 9.11.2010, *Purrucker*, C-296/10.

equivalent document in sufficient time and in such a way as to enable him to arrange for his defense, unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so.

This poses the question whether an *ex parte* measure, that is a measure adopted without the defendant being heard, falls within the scope of the Regulations for the purposes of its recognition and enforcement.

Drawing a clear distinction with the decisions adopted pursuant to adversary proceedings, the negative answer was given by the European Court of Justice with reference to Art 24 of the 1968 Brussels Convention (whose text is identical to Art 19 of the Regulations) in its landmark decision *Denilauer*,[14] where it affirmed that the conditions imposed by the Convention on the recognition and the enforcement of judicial decisions are not fulfilled in the case of provisional or protective measures which are ordered or authorized by a court without the party against whom they are directed having been summoned to appear and which are intended to be enforced without prior service on that party.

[14] ECJ, 21.05.1980, *Bernard Denilauer* v *Snc Couchet Frères*, C-125/79.

Article 20
Universal application

Eleonora Bazzo

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
The law designated as applicable by this Regulation shall be applied whether or not it is the law of a Member State.	(Same text)

Summary: I. The application of the principle. – II. The necessity of legal certainty. – III. The exclusion of *renvoi*. – IV. Limits to the universal application.

I. The application of the principle

Art 20 has the same literal content for both Property Regimes Regulations. According to this provision, only one law must be applied to marriages and registered partnerships.

The nature of universality involves that the juridical system of the applicable law can be not only a Member State, but also a third State, without any limits within the European Union. In so doing, there will be always only one applicable law, without any distinctions between European cases and cases that have extra-European connections.[1]

The principle of universal application regards only the topic of property regimes and it is limited to substantial matters, whereas there are no provisions on procedural issues. So, in this topic, only principles of Regulations 2016/1103 and 2016/1104 are applicable and other national conflict-of- law rules can be considered abrogated. However,

[1] G. Grieco, 'The role of party autonomy under the Regulations on matrimonial property regimes and property consequences of registered partnerships. Some remarks on the coordination between the legal regime established by the new Regulations and other relevant instruments of European Private International Law' *Cuadernos de Derecho Transnacional*, 457 (2018).

different international and national provisions on applicable law are still applicable for other subjects.

II. The necessity of legal certainty

This principle allows couples and partners to know the applicable law in advance, according to the fundamental necessity of legal certainty typical of a 'rule of law' State.[2] In so doing, couples can program their economical choices in the subject of propriety regime before to take lifetime decisions, as it can be a marriage or a registered partnership. This principle contributes to create legal certainty not only in the field of the Regulations, but also in the creation of a unique European system of private international law. In fact, the principle of universal application is used also by other European Regulations, such as the ones regarding contractual and non-contractual obligations (Regulation EC 593/2008 and 86472007), law applicable to divorce and legal separation (Regulation EU 1259/2010)[3] and successions (Regulation EU 650/2012). In the same subject of matrimonial property regime, the same concept has already been known as *loi uniforme* since the previous Hague Convention on the law applicable to matrimonial property regimes of March 14, 1978.[4]
Many European Regulations have used this principle as an application of the general goal of the European Parliament and the Council to ensure 'the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction,' as stated in Art 82 of Treaty on the Functioning of the European Union.
The necessity of legal certainty can also lead to the application of a foreign law, not known by the parties, according to the general principles of the Regulations. In this case, parties have always the chance to choose a different applicable law with a written agreement,

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[2] C. Clarkson and E. Cooke, 'Matrimonial Property: Harmony in Europe?' 37 *Family Law*, 920 (2007).

[3] S. Corneloup ed, *The Rome III Regulation, A Commentary on the Law Applicable to Divorce and Legal Separation* (Cheltenham: Edward Elgar, 2020).

[4] A. Bonomi, 'The interaction among the future EU Instruments on Matrimonial Property, Registered Partnerships and Successions', in Id and G.P. Romano eds, *Yearbook of private international law Vol. XIII – 2011* (Berlin - Boston: Otto Schmidt/De Gruyter european law publishers, 2012).

within the possibilities of Art 22. In fact, the applicable law can be chosen by parties, if they have designated a specific one, according to Art 22, or it can be decided by legislative criteria, as listed in Art 26.

III. The exclusion of *renvoi*

The applicable law requires the application of all the national provisions in that field, except the rules of private international law. This leads to exclude the possibility to make a *renvoi* to another jurisdiction if allowed by private international law rules of a State.[5] The exclusion of *renvoi* does not consent to use national conflict-of-law rules to solve conflicts, but it requires to always apply the two Regulations, with their principles regarding applicable law, in the field of property consequences of marriages and registered partnerships. This can cause the application of a law of a State that would not be applicable according to its national conflict-of-law rules. This consequence is possible because the exclusion of *renvoi* is total and the two Regulations do not have an exception that allows a limited *renvoi*, differently from the matters of succession.
In this field, Art 34 of Regulation EU 650/2012 regarding *renvoi* states that 'the application of the law of any third State specified by this Regulation shall mean the application of the rules of law in force in that State, including its rules of private international law in so far as those rules make a *renvoi*: (a) to the law of a Member State; or (b) to the law of another third State which would apply its own law.' Similar provisions can be found in many national jurisdictions, such as Art 13 of Italian law no 218/1995 on private international law.

IV. Limits to the universal application

An important limit to the universal application is set by general principles of private international law regarding overriding mandatory provisions and public policy.[6] Regarding overriding mandatory

[5] A. Wysocka-Bar, 'Enhanced cooperation in property matters in the EU and non-participating Member States' 20 *ERA Forum*, 187 (2019).
[6] M. Jänterä-Jareborg, 'Inter-Nordic Exceptions in EU Regulations on matters of Family and Inheritance Law. Legal "Irritants" or Necessary Concessions in the

provisions, the application of a foreign law cannot be allowed in a jurisdiction if this causes a violation of national crucial interests regarding the safeguard of 'public interests, such as its political, social or economic organization,' as disposed by Art 30 of both Regulations. According to a similar principle, Art 31 does not allow that public policy of a State is violated by a foreign law, which has consequently to be disapplied.[7]

Moreover, Art 28 of both Regulations lists a series of cases according to which a third party is not required to know the law applicable to the property regime in marriages and registered partnerships; consequently, in these hypothesis, spouses and partners cannot invoke the application of this law against a third party.

Citizens' Interest?', in A.L. Verbeke et al eds, *Confronting the Frontiers of Family and Succession Law: Liber Amicorum Walter Pintens* (Antwerp: Intersentia, 2012), 733.

[7] S. Clavel and F. Jault-Seseke, 'Public interest considerations - changes in continuity, in Comments on Articles 30 and 21 of the Regulations on Patrimonial Consequences of Marriages and Registered Partnerships', in A. Bonomi and G.P. Romano eds, *Yearbook of private international law Vol. XIX – 2017-2018* (Köln: Verlag Dr. Otto Schmidt, 2018).

Article 21
Unity of the applicable law

Eleonora Bazzo

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
The law applicable to a matrimonial property regime pursuant to Article 22 or 26 shall apply to all assets falling under that regime, regardless of where the assets are located.	The law applicable to **the property consequences of a registered partnership** shall apply to all assets that are subject to those consequences, regardless of where the assets are located.

Summary: I. The concept of unity. – II. The application of the principle. – III. The exclusion of the *lex rei sitae* and other limits.

I. The concept of unity.

The principle of unity of the applicable law can be considered a natural consequence and application of the general principle of universal application, as explicated in Art 20. As the other principle, also the unity of the applicable law is a general principle that the European legislator has already used in other Regulations, such as the ones regarding the applicable law in matters of succession (Regulation EU 650/2012).[1]

Differently from the preceding provision, this Article has a different version between the two Regulations. In particular, only Regulation 2016/1103 mentions referral the criteria and the related Articles according to which the applicable law is decided. However, this referral has to be considered implicit in Regulation 2016/1104 and the discipline can be considered substantially identical same both for couples and registered partnerships.[2]

[1] F. Marongiu Buonaiuti, 'The EU Succession Regulation and third country courts' 12 *Journal of Private International Law* 545 (2016).

[2] D. Damascelli, 'La legge applicabile ai rapporti patrimoniali tra coniugi, uniti civilmente e conviventi di fatto nel diritto internazionale privato italiano ed europeo' *Rivista di diritto internazionale privato e processuale*, 1103 (2017).

The concept of unity is stated for all the property consequences of marriages and registered partnerships and Art 27 of both Regulations lists which these main consequences are according to the applicable law, such as (a) the classification of property of either or both spouses into different categories during and after marriage or (b) the transfer of property from one category to the other one.
The two Regulations are applied to spouses and partners not only during marriage or registered partnership, but also after dissolution of this bond. Moreover, the application of these legislations interests also relationships with third parties for all the issues connected to property, as a result of marriage or registered partnership or their dissolution.[3]

II. The application of the principle.

The concept of unity of the applicable law, as ruled in Art 21, is very wide and comprehends all the possible consequences, which will be analyzed in the following paragraphs and can be related to property regime connected to marriages or registered partnerships.
Firstly, the principle of unity implies that the applicable law cannot be modified in relation to the location of the property. This means that there has to be a unique applicable law, although assets are located in different States, and the applicable law cannot depend on the jurisdiction where there is an asset. The location of the property can be relevant only as a criterion for the choice of subsidiary jurisdiction, as ruled in Art 10. According to this provision, if jurisdiction cannot be determined on the basis of the rules of the two Regulations (Arts from 4 to 9), courts of a Member State have jurisdiction if 'immoveable property of one or both partners are located in the territory of that Member State' for only and limitedly questions related to immoveable property.
Secondly, the principle of unity cannot imply the change of the applicable law in relation to the nature of different assets. Consequently, the applicable law has to be the same for every kind of

[3] A. Bonomi, 'The interaction among the future EU Instruments on Matrimonial Property, Registered Partnerships and Successions', in Id and G.P. Romano eds, *Yearbook of private international law Vol. XIII – 2011* (Berlin - Boston: Otto Schmidt/De Gruyter european law publishers, 2012), 217.

property and right and there cannot be any difference between movable and immovable property or for any of personal right.
A third point regarding the concept of unity is connected to the will of the spouses. Once that the applicable law is defined, there cannot be a voluntary scission, according to an eventual decision of spouses or partners. The voluntary choice of a different applicable law is not even possible if this is based only on different location or nature of some assets, as explained in the previous paragraphs.

III. The exclusion of the *lex rei sitae* and other limits.

A natural consequence of this principle is the impossibility to refer to the *lex rei sitae*, which would lead to the application of different laws in relation to the location of the assets. The principle of *lex rei sitae* is typical of many private international law systems, such as Italy.[4] In this country, for example, Art 51 of Italian law no 218/1995 on private international law statues that possession, ownership and other real rights on movable and immovable property are governed by the law of the State in which assets are located. Regulations 2016/1103 and 2016/1104 derogate to this kind of provisions, which are not applied any more for all the property issues related to marriages and registered partnerships.[5]
Similarly to the concept of universal application in Art 20, also the principle of unity of the applicable law finds some limitations in overriding mandatory provisions and public policy (Arts 30 and 31 of both Regulations). At the same time, there is another limitation of the application of this principle when a third party is not required to know the law applicable to the property regime, as stated in Art 28 of both Regulations.

[4] O. Feraci, 'L'incidenza del nuovo regime europeo in tema di rapporti patrimoniali tra coniugi e parti di Unioni registrate sull'Ordinamento giuridico italiano e le interazioni con le novità introdotte dal d.lgs. 7/2017 attuativo della c.d. Legge Cirinnà' *Osservatorio e fonti.it*, 2 (2017), 20.
[5] S. Marino, 'I diritti del coniuge o del partner superstite nella cooperazione giudiziaria civile europea' *Rivista di diritto internazionale*, 1114 (2012).

Article 22
Choice of the applicable law

Eleonora Bazzo

Regulation (EU) 2016/1103

1. The spouses or future spouses may agree to designate, or to change, the law applicable to their matrimonial property regime, provided that that law is one of the following:

(a) the law of the State where the spouses or future spouses, or one of them, is habitually resident at the time the agreement is concluded; or

(b) the law of a State of nationality of either spouse or future spouse at the time the agreement is concluded.

2. Unless the spouses agree otherwise, a change of the law applicable to the matrimonial property regime made during the marriage shall have prospective effect only.

3. Any retroactive change of the applicable law under paragraph 2 shall not adversely affect the rights of third parties deriving from that law.

Regulation (EU) 2016/1104

1. The **partners** or future **partners** may agree to designate or to change the law applicable to the **property consequences** of their **registered partnership**, provided that that law **attaches property consequences to the institution of the registered partnership and that that law** is one of the following:

(a) the law of the State where the partners or future **partners**, or one of them, is habitually resident at the time the agreement is concluded

(b) the law of a State of nationality of either **partner** or future **partner** at the time the agreement is concluded, or

(c) the law of the State under whose law the registered partnership was created.

2. Unless the **partners** agree otherwise, a change of the law applicable to the **property consequences of their registered partnership** made during the **partnership** shall have prospective effect only.

3. Any retroactive change of the applicable law under paragraph 2 shall not adversely affect the rights of third parties deriving from that law.

Summary: I. The principle of party autonomy. – II. The possibility to choose two criteria for couples. – III. The time point of reference. – IV. The agreement of choice. – V. The possible choices. (a) Habitual residence. (b) Nationality. (c) Another choice for registered partnerships. – VI. Time effects of the agreement.

I. The principle of party autonomy

The European legislator has allowed parties to conclude a specific agreement to make their choice of the applicable law to the property regime of marriages or registered partnerships. The two Regulations regulate criteria in order to choose the applicable law for property regime and set the limits of this choice.

On the one side, this is recognition and an application of the principle of party autonomy, as parties are allowed to decide which law to apply to their property regimes.[1] The two Regulations have specific provisions about the formal validity of the agreement (Art 23) and the requirements for consent and material validity of the agreement itself (Art 24). Consequently, parties have to fulfill these precepts in order to conclude a valid choice of law.

Moreover, the choice of the applicable law involves that the agreement have to respect all the general principles set by the Regulations.[2] In particular, parties' autonomy can never derogate the two principles of universal application and unity of the applicable law, as set by Arts 20 and 21.

On the other hand, party autonomy on which law to apply is limited in the narrow possibilities that the European legislator has provided in Art 22. This means that parties cannot choose whichever applicable law they prefer, but they have to respect the possibilities that are expressly listed in Art 22 of both Regulations.

The two possible choices of the applicable law are connected to the concepts of habitual residence and national law of the parties. Parties

[1] J. Carruthers, *Party autonomy in the legal regulation of adult relationships: what place for party choice in private international law?* (Cambridge: Cambridge University Press, 2012).

[2] S. Marino, 'Strengthening the European Civil Judicial Cooperation: The Patrimonial Effects of Family Relationships' *Cuadernos Derecho Transnacional*, 265 (2017).

cannot have a free choice of the applicable law, because it is allowed only an '*option de legislation*' between these two possibilities.

II. The possibility to choose two criteria for couples

There is not a definition of the two notions of habitual residence and nationality in the Regulations, but they have been used in many other European Regulations, such as Regulation EU 650/2012 on successions[3] or Regulation EC 4/2009 on maintenance obligations.[4]
The interpretation of these two concepts can vary from one Regulation to another, according to the goals that the European legislator wants to achieve in each field. However, in Regulations 2016/1103 and 2016/1104 these two notions represent general principles that are used not only as a choice of the applicable law, but also as a connecting factor in order to set the applicable law in the absence of choice by the parties, as it will be analyzed furthermore.
In addition, a recurring general principle only for Regulation 2016/1104 is the law of the State under whose law the registered partnership was created. This criterion is used not only as a possibility for the choice of the applicable law, but also as the main, and by the way unique, element in order to establish the applicable law in the absence of choice by the parties.
The European legislator has used the principles of habitual residence and nationality in many other Regulations. This can imply that there are different applicable laws according to different matters, such as successions or maintenance obligations.[5] The applicable law can be decided by a Regulation or another on the basis of different criteria of each Regulation and its prevalence clauses. However, parties can always decide to combine different connecting factors and make a

[3] A. Leandro, 'La giurisdizione nel regolamento dell'Unione Europea sulle successioni mortis causa', in P. Franzina and A. Leandro eds, *Il diritto internazionale privato europeo delle successioni mortis causa* (Milan: Giuffré, 2013), 59.
[4] G. Lupşan, 'Reflections on the Maintenance Obligations from the Perspective of the European Law Enforcement' *Acta Universitatis Danubius. Juridica,* 44 (2014).
[5] P. Wautelet, 'Private international law aspects of same-sex marriages and partnerships in Europe. Divided we stand?', in K. Boele-Woelki and A. Fuchs eds, *Legal Recognition of Same-Sex Relationships in Europe* (Cambridge-Portland: Intersentia, 2012), 143.

combined choice of the applicable law according to more than a Regulation.

III. The time point of reference

The choice of the applicable law can be made at any moment, as expressly provided in the Recitals of both Regulations (Recital 44 of Regulation 2016/1103 and Recital 45 of Regulation 2016/1104). So parties can stipulate an agreement not only at the time of the conclusion of the union and during the marriage or the registered partnership, but also before the celebration of the union itself. In this case, the agreement will have effect only after the celebration of marriage or registered partnership. It can also be possible that the choice is made in order of a procedure of divorce or dissolution of the partnership, but however it has to be concluded when the relationship is still lasting.

These provisions apply to all the agreements that are concluded after January 29, 2019. All the previous agreements are regulated by private international legislations of Member States that were in force before this date.

The time point of reference in order to establish the applicable law is 'the time the agreement is concluded.' Spouses and partners can always change the applicable law if they stipulate another agreement and the moment when the new agreement is concluded is relevant in order to establish the applicable law. This means that, once parties have chosen the applicable law, this choice does not change until another agreement is stipulated. The chosen law does not vary also if parties change their habitual residence or nationality.[6]

This system ensures legal certainty of transactions and it prevents any change of the law applicable to the property regime without couple's consent, as established as a goal by the two Regulations. Nevertheless, it can be possible that the applicable law turns out to be one that the couple does not have close links with, for example because a spouse or

[6] S. van Erp, 'Matrimonial Property Regimes and Patrimonial Aspects of Other Forms of Union: What Problems and Proposed Solutions?', in *European Parliament Interparliamentary Committee Meeting – National Parliaments, Committee on Legal Affairs, Policy Department C - Citizens' Rights and Constitutional Affairs*, 2010.

partner has changed his or her habitual residence or nationality after the stipulation of the agreement. In this case, the European legislator has chosen to make parties' autonomy prevail on *de facto* changes of actual parties' situation, in order not to allow any change of the law applicable without an express request of those parties that have made an express choice.[7]

IV. The agreement of choice

Art 22 of both Regulations refers to an agreement of the parties about the choice of the applicable law and the following Art 24 rules substantial and formal requirements for the validity of the agreement. In the Regulations, it is not expressly stated that the choice of the applicable law must be made expressly, differently from other European Regulations.
However, the necessity to ensure legal certainty requires that the choice must be done, if not expressly, in an implicit, but univocal way. For example, parties can refer to a particular legal concept of a national legislation, as it can be the 'fondo patrimoniale' for the Italian system, and this can imply that they have wanted to choose the Italian law as the applicable one. This conclusion can be drawn only in exceptional cases and, in general, it is not allowed to infer the applicable law from parties' stipulations on other points.
Moreover, the choice of a property regime during the celebration of the marriage or the registered partnership does not imply a choice of the related law of that State as the applicable law for property regimes.

V. The possible choices

Before to analyze the different criteria that parties can use to determine their applicable law, it has to be highlighted that there is an important difference between the two Regulations. Only registered partnerships have a limitation for the choice of the applicable law to

[7] S.M. Carbone, 'Autonomia privata nel diritto sostanziale e nel diritto internazionale privato: diverse tecniche e un'unica funzione' *Rivista di diritto internazionale privato e processuale*, 569 (2013).

property regimes.[8] In fact, parties cannot choose, as applicable law, a legislation that does not recognize registered partnerships, because Art 22 of Regulation 2016/1104 expressly requires 'that that law attaches property consequences to the institution of the registered partnership.' This provision is important in order to make parties' choice effective and to avoid that the chosen law does not allow registered partnership to have effects, given that there are still some States that do not recognize this institute in their legislation.
Apart from this concept, the two Regulations have an almost identical provision on the choice of the applicable law and the only difference. This is represented by the further chance of partners of a registered partnership to choose 'the law of the State under whose law the registered partnership was created,' beyond the two possibilities that are recognized to all spouses related to habitual residence and nationality.[9]

(a) Habitual residence

Analyzing para 1 (a) of Art 22 of both Regulations, the first possibility for the applicable law is to choose the law of the State where at least one component of the couple is habitually resident at the time the agreement is concluded.
Spouses and partners can choose the law of a State where one of them is habitually resident and the time point of reference is the moment when the choice is made. This implies that a couple can choose a law connected to the habitual residence of a couple's member, although this law does not have any other connecting factors to the couple in that moment. Moreover, if the couple or also only one of its members decides to change their habitual residence, the choice remains valid until another agreement is concluded.
As seen above, the two Regulations do not have a definition of the concept of habitual residence, so it is necessary to extract it from its jurisdictional interpretation. Both Regulations use the principle of

[8] A. Limantė and N.P. Vogrinc, 'Party autonomy in the context of jurisdictional and choice of law rules of matrimonial property regulation' *Baltic Journal of Law & Politics* (2020).
[9] S. Vrellis, 'The Professio Iuris in EU Regulations' 2 *ELTE Law Journal,* 9 (2015).

habitual residence also for other purposes, but in the other Articles it has other requirements and different relevant points of time.
Firstly, Art 6 of both Regulations uses habitual residence to determine which state has jurisdiction. In this case, habitual residence is a criterion to understand the couple's closest connection to a specific State. For this reason, it has to be supported by other practical evidences and it cannot be just a theoretical fact from registry offices.[10]
Secondly, according to Art 26 of Regulation 2016/1103, habitual residence is the first criterion that is used to designate the law governing matrimonial property regime for those spouses that have not stipulated an express agreement. In this case, residence has to be common for both parties and the time point of reference is the first residence 'after the conclusion of the marriage,' as stated by Art 26 itself. Instead, Regulation 2016/1104 uses the concept of habitual residence in order not to designate the applicable law in the absence of a parties' agreement, but only to require additional formal requirements for partnership property agreements, if required by the law of a State where one of the partners is habitually resident (Art 26).

(b) Nationality

Art 22, para 1 (b) of both Regulations states that another possibility to determine the applicable law is the law of a State of nationality of at least one couple's component at the time the agreement is concluded.
Also in this case, the nationality of one spouse or partner is sufficient to choose a specific applicable law and it is not required that the nationality is common for the couple. So, if a couple has more than a nationality, the choice of the applicable law is wider and there are not other limitations if the couple chooses the law of a State, whose only connection is nationality. According to Recital 50 of Regulation 2016/1103 and Recital 49 of Regulation 2016/1104, 'the question of how to consider a person having multiple nationalities' has to be decided by national law and the European legislator has not

[10] D. Coester-Waltjen, 'Connecting factors to determine the law applicable to matrimonial property regimes', in A. Bonomi and G.P. Romano eds, *Yearbook of private international law Vol. XIX – 2017-2018* (Köln: Verlag Dr. Otto Schmidt, 2018), 195.

disciplined this matter, because it has considered a preliminary question.[11]

Another similarity between the concept of nationality and that of habitual residence is the relevant point of time, which is when the choice is made. Similarly to para 1 (b), the relevant moment is the time the agreement is concluded and the choice remains valid if nationality changes after this time.

The lack of a definition of the concept of nationality implies similar conclusions that have been drawn for para 1 (a). Indeed, Regulation 2016/1103 uses this principle not only as a possibility to make the choice of the applicable law, but also as the second criterion to establish the applicable law is the parties' common nationality in Art 26. The use of this concept is subordinated to the lack of the first one, connected to the common habitual residence of the spouses. Instead, common nationality is not a general principle for Regulation 2016/1104 regarding registered partnerships, because it is not even used in order to establish the applicable law in the absence of a parties' agreement.

(c) Another choice for registered partnerships

Regulation 2016/1104 has one paragraph more in Art 22, that is para 1 (c). This provision states that partners can choose 'the law of the State under whose law the registered partnership was created.' This option allows partners to refer to the legislation according to which the union was created. This legislation surely recognizes the institute of registered partnerships, otherwise the creation of the union would have not been possible. Moreover, the choice of this law fulfills the specific provision of Art 22 of Regulation 2016/1104 that requires that the chosen law has to attach property consequences to the institution of the registered partnership.

As the other analyzed options, also the choice of this applicable law does not change if partners change their habitual residence or nationality and this can mean that partners might have an applicable

[11] D. Damascelli, 'Applicable law, jurisdiction, and recognition of decisions in matters relating to property regimes of spouses and partners in European and Italian private international law' 25 *Trusts & Trustees*, 6 (2019).

law with few or none connecting factors with their actual life, which can be in another State and connected to other nationalities.

VI. Time effects of the agreement

Art 22 of both Regulations refers not only to a designation, but also to a change of the applicable law. Consequently, parties can change their applicable law at any time by stipulating a new agreement. This is the prevalence of the principle of party autonomy on the necessity of stability of propriety regime of marriages and registered partnerships.[12] Although it is not stated expressly, parties can stipulate an agreement where they choose an applicable law or they decide not to apply any more a particular law, which was applicable according to a previous agreement. In this case, the applicable law to property regime will be defined by criteria set by Art 26 of both Regulations, which are applicable in the absence of choice by the parties.

In Art 22, para 2, both Regulations expressly provide that this kind of agreements has generally prospective effect only (*ex nunc*). The goal of these provisions is to ensure the legal certainty of transactions not only to spouses and partners, but also to third parties.

However, as a concrete application of the principle of party autonomy, the parties of the agreement can decide that their choice of law has retrospective effect (*ex tunc*). In this case, the European legislator has wanted to protect third parties that make transactions with spouses and partners, so it has been provided that any retroactive change of the applicable law cannot adversely affect third parties' rights deriving from that law.[13]

The choice to have retrospective effect has to be expressly agreed by the parties of the agreement and cannot be implicit, because it represents an exception to the general rule of prospective effect. This

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[12] E. Jayme, 'Party Autonomy in International Family and Succession Law: New Tendencies', in A. Bonomi and P. Volken eds, *Yearbook of private international law Vol. XI –2009* (Berlin-New York: Otto Schmidt/De Gruyter european law publishers, 2010), 1.

[13] A. Bonomi, 'The Regulation on Matrimonial Property and Its Operation in Succession Cases - Its Interaction with the Succession Regulation and Its Impact on Non-participating Member States' 26 *Problemy Prawa Prywatnego Międzynarodowego*, 71 (2020).

conclusion can be asserted according to the same principle that requires that the choice of law has to be expressly stated, as explained above in the comment.

When the agreement has retrospective effect, it can be stated that previous transactions, which have been stipulated under the previous applicable law, are affected by the new applicable law that have been chosen. It is also necessary to highlight that retrospective effect can also overtake the date of January 29, 2019, which is the date after which the two Regulations can be applied in relation of the provisions on the applicable law. Consequently, parties can agree that their agreement has retrospective effect since the conclusion of marriage or registered partnership, although the celebration had been before January 29, 2019.

Article 23
Formal validity of the agreement on a choice of applicable law

Maria Gabriella Rossi

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. The agreement referred to in Article 22 shall be expressed in writing, dated and signed by both spouses. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.	1. The agreement referred to in Article 22 shall be expressed in writing, dated and signed by both **partners**. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.
2. If the law of the Member State in which both spouses have their habitual residence at the time the agreement is concluded lays down additional formal requirements for matrimonial property agreements, those requirements shall apply.	2. If the law of the Member State in which both partners have their habitual residence at the time the agreement is concluded lays down additional formal requirements for **partnership property** agreements, those requirements shall apply.
3. If the spouses are habitually resident in different Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements for matrimonial property agreements, the agreement shall be formally valid if it satisfies the requirements of either of those laws.	3. If the partners are habitually resident in different Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements for **partnership property** agreements, the agreement shall be formally valid if it satisfies the requirements of either of those laws.
4. If only one of the spouses is habitually resident in a Member State at the time the agreement is concluded and that State lays down additional formal requirements for matrimonial property agreements, those requirements shall apply.	4. If only one of the **partners** is habitually resident in a Member State at the time the agreement is concluded and that State lays down additional formal requirements for **partnership property** agreements, those requirements shall apply.

Summary: I. Premise – II. The minimum requirements of the agreement. – III. The 'additional requirements' laid down by the law of a Member State of 'habitual residence' of one of the parties. – IV. The Form: electronic communication.

I. Premise

Art 23 belongs to the group of rules of the Regulation[1] that pertain to the conflict rules governing the determination of the law on the regime of the couple, applicable by the courts and other authorities of the participating Member States.

The rule concerns the formal and substantive validity[2] of the agreement of the registered couple or partners, and therefore the choice of the law applicable to their assets. The first paragraph shall specify the minimum requirements for such an agreement to be valid with a specification that, in addition to the written form, equivalent forms of electronic communication shall be valid to ensure a long-term record of the instrument of choice.

The conditions under which additional formal requirements contained in the law of a Member State where the parties, or one of them, have their habitual residence may be required are set out in the following

[1] Cf P. Bruno, *I Regolamenti Europei sui Regolamenti dei coniugi e delle Unioni Registrate* (Milan: Giuffrè Francis Lefebvre, 2019), 167 ff; C. Kohler, 'Article 23: Formal validity of the agreement on a choice of applicable law', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples. A Commentary* (Cheltenham: Edward Elgar, 2020), 212–221; A. Albanese ed, *Unioni civili, convivenze, famiglie ricostituite: costituzione, diritti e doveri, rapporti personali e patrimoniali, filiazione, responsabilità, crisi della coppia e scioglimento, successione mortis causa, convenzioni e formule contrattuali* (Pisa: Pacini, 2019), 269 ff; D. Damascelli, 'La legge applicabile ai rapporti patrimoniale tra coniugi, uniti civilmente e conviventi di fatto nel diritto internazionale privato italiano ed europeo' *Rivista di diritto internazionale*, 1134 ff (2017); G.V. Colonna, 'I Regolamenti europei sui Regimi patrimoniali dei coniugi e delle Unioni registrate' *Famiglia e diritto,* 839 ff (2019); M. Pinardi, 'I Regolamenti europei del 24 giugno 2016 nn. 1103 e 1104 sui regimi patrimoniali tra coniugi e sugli effetti patrimoniali delle unioni registrate' *Europa e diritto privato*, 733 ff (2018).

[2] In this sense, cf P. Bruno, n 1 above, 168 ff, as suggested by the A. in order to understand the rationale of the standard it is necessary to read Recital 47 of the Twin Regulations 1103/20116 e 1104/2016.

paragraphs of Art 23. As these additional requirements exist in many Member States, these 'minimum requirements' will be sufficient, only in limited cases. *Lex loci Actus*, as the law of the state in which the agreement was concluded, is irrelevant.
It should be noted that the present provision does not contain any new features with respect to Regulation 1259/2010 on the formal validity of an agreement whereby spouses choose the law applicable to divorce and legal separation. Indeed, the objective pursued by both rules is the same: legal certainty. There is a need to give formal validity to that agreement between registered spouses or partners, in their respective contexts, through rules that guarantee an informed choice of applicable law by the spouses so that their will will be respected. This will also allow easier access to justice.
Of course, all this presupposes the assumption of information[3] by couples in their respective contexts. Recitals 17 and 18 of Regulation 1259/ 2010 make this clear; the first explicitly highlights the importance for spouses to have access to up-to-date information on essential aspects of national and Union law as well as procedures governing divorce and legal separation. The rule goes on to state that the Commission must regularly update this information. Recital 18 of Regulation 1259/2010 is addressed to the courts of the Member States, which must be aware of the importance of an informed choice by the spouses as regards the legal implications of the concluded agreement on the choice.

II. The minimum requirements of the agreement

For the formal validity of the agreement[4] on the choice of law by spouses or partners, it should be made clear that the rules of uniform

[3] P. Bruno, n 1 above, 193 ff.
[4] On the subject of applicable law: P. Bruno, n 1 above, 167 ff; C. Kohler, n 1 above, 212 ff; D. Damascelli, n 1 above, 1134 ff; O. Feraci, 'L'incidenza del nuovo regime europeo in tema di rapporti patrimoniali tra coniugi e parti di Unioni registrate sull'Ordinamento giuridico italiano e le interazioni con le novità introdotte dal d.lgs. 7/2017 attuativo della c.d. Legge Cirinnà' *Osservatorio e fonti.it*, 2 (2017); previously, G. Cubeddu, 'La pubblicità del regime dei beni e la scelta della legge applicabile' *Famiglia, Persone e Successioni*, 709 (2008).

substantive law[5] must be used, so that it must be written in writing, signed and affixed with the date on which it was signed by both Parties. Such an agreement shall be interpreted in accordance with the uniform law and not by the national law of each Party; although national law may be helpful for overall understanding, but always to give rise to a uniform and non-autonomous interpretation of individual national laws.

Paragraph 1 of Art 23 textually, with reference to the agreement on choice, refers to the term 'in writing' to a document written by hand or machine, but in any case permanently registered. In the case in which the agreement on the choice of law is not declared in an express manner, it must be deduced from the context provided that the individual statements of the parties are in writing and the contract has the date of the day on which the parties have signed; and where the parties have signed at different times, both dates shall be disclosed. In the absence of date or dates the agreement is not valid, while the place where it was signed may be absent; this can be explained by the irrelevance of the *lex loci Actus* for the formal validity of the contract. While the place where the agreement was concluded is not decisive - it could also be located in another Member State - the 'habitual residence' of each party within a Member State may be important, in order to know any further formal requirements to be met.. The subscription, even if not simultaneous, must be from each of the 'manuscript' parts with the full names of each and placed at the end of the text.

This can be explained by the irrelevance of the *lex loci Actus* for the formal validity of the contract. While the place where the agreement was concluded is not decisive - it could also be located in another Member State - the 'habitual residence' of each party within a Member State may be important, in order to know any further formal requirements to be met.. The subscription, even if not simultaneous, must be from each of the 'manuscript' parts with the full names of each and placed at the end of the text.

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[5] Cf S. Winkler, 'Il Diritto di famiglia', in G.A. Benacchio and F. Casucci eds, *Temi e Istituti di Diritto Privato dell'Unione Europea* (Turin: Giappichelli, 2017), 296.

III. The 'additional requirements' laid down by the law of a Member State of 'habitual residence' of one of the parties

It should be noted that the presence of additional formal requirements contained in the law of a Member State is provided for in paragraphs 2-4 of Art 23 where there are several exceptions to Art 23, para 1. These would be additional 'requirements.' They are defined in Art 23 paras 2-4 also the conditions under which such additional requirements may be provided for in the choice set out in the agreements on the law applicable to the property relations between spouses or registered partners. These additional requirements must, however, relate to property agreements between spouses or partners as set out in Regulations 2016/1103 and 2016/1104, for real estate agreements. It should be made clear that in these Regulations the definitions given do not always coincide with those used by individual Member States, sometimes appearing wider - as happens for example in the marriage contract[6] - ; all this, however, is functionalized to obtain informed consent of the parties, ensuring that the spouses are aware of the far-reaching implications of any choice of applicable law. In fact of these 'additional formal requirements' it was not given a definition in the real estate regulations of 2016; this would be any requirement that in the context of Art Amendment no 23 implies an additional burden for the parties as for the form. This could be the possible mandatory participation of a third party in the process of concluding the agreement. In some states, for example, there is talk of authentication of the agreement by a notary, and this is a case of additional requirement pursuant to Art 23, paras 2-4; in other cases the presence of witnesses is necessary and this integrates an additional requirement; where instead the contract is required to be registered by a public authority or to be mentioned in the marriage contract, it is a formal requirement only if the validity of the contract results from such registration or mention. It is likely that in most Member States notarial certification or authentication of the agreement is required,

[6] In this sense, cf C. Kohler, n 1 above, 218 ff.

while simple unauthenticated written form is required in very few Member States.[7]

In the case in which the parties have their 'habitual residence' in the same Member State, at the time when the agreement is concluded, Art 23 para 2 provides that for further formal requirements for matrimonial property agreements or matrimonial property agreements the law of the Member State shall apply. Where, on the other hand, the parties have their 'habitual residence' in different Member States at the time of the conclusion of the choice-of-law agreement, and where the laws of those Member States provide for different formal requirements for ownership, agreements between spouses or partners, Art 23, para 3 provides that the agreement is formally valid only if it meets the requirements of those laws; and this applies regardless of what is the content of the laws in question.

Where only one party has 'habitual residence' in a Member State at the time of the conclusion of the choice-of-law agreement, while the law of that Member State lays down additional formal requirements in property matters for spouses or partners, according to Art 23, in para 4, those requirements shall apply.

If, on the other hand, none of the parties to the agreement has 'habitual' residence in a Member State, nothing is provided for in the current Regulation on property regimes. Essentially in this case, the requirements of Art 23, para 1, are sufficient, apart from the specific imposition of formal requirements of the law of the State of habitual residence.

Compliance with the *lex loci Actus* does not represent a guarantee that the contract is formally valid under the Regulations in question on Property Regimes; the law of the place where the agreement on the choice of applicable law, has been concluded, is therefore irrelevant in all situations regulated by Art 23.

IV. The Form: electronic communication

A specification concerning the requirements of the agreement on the choice of applicable law on capital regimes, is contained in Art 23,

[7] As is the case in Cyprus and Sweden ; also in Sweden as in Finland for the contract, it requires simple registration by a public authority and not even notarial authentication.

para 1; it provides that the agreement must necessarily be in writing. If the agreement is contained in a communication by electronic[8] means that provides a lasting record, in that case the communication is considered equivalent to writing, given that the same provision is contained in Art 7, para 1 of Regulation 1259/ 2010.[9] This forecast of exceptional nature becomes relevant in view of email communications, given that messages of this type can acquire the characteristic of durability, since they can be stored and printed permanently in each moment.

The agreement in electronic format replaces the written form, required pursuant to Art 23 of the Regulation. We wonder how it should be signed and dated, given that the essential requirements of the agreement, as anticipated, are the signing and the date. It is considered that it is not enough that the names of the parts are simply typed in the electronic message, on the computer, since this is not equivalent to a signature made personally and manually. All this in order to protect the parties who must be aware of the implications of their choice by signing personally, the electronic signature serves this purpose, being a qualified signature complying with the requirements of Regulation 910/2014 for electronic transactions in the internal market.

[8] Cf P. Bruno, n 1 above, 189 ff.

[9] Cf C. Kohler, n 1 above, 216.

Article 24
Consent and material validity

Maria Gabriella Rossi

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. The existence and validity of an agreement on choice of law or of any term thereof, shall be determined by the law which would govern it pursuant to Article 22 if the agreement or term were valid.	(Same text)
2. Nevertheless, a spouse may, in order to establish that he did not consent, rely upon the law of the country in which he has his habitual residence at the time the court is seised if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.	

Summary: I. Introduction. – II. Substantive validity of the agreement: the problem of existence.

I. Introduction.

Art 24, para 1, establishes a basic principle: the existence and validity of the agreement on the choice of law[1] must be determined by the law

[1] Cf P. Bruno, *I Regolamenti Europei sui Regolamenti dei coniugi e delle Unioni Registrate* (Milan: Giuffrè Francis Lefebvre, 2019), 168 ff; D. Martiny, 'Applicable law in the absence of choice by the parties', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples. A Commentary* (Cheltenham: Edward Elgar, 2020), 241; D. Damascelli, 'La legge applicabile ai rapporti patrimoniale tra coniugi, uniti civilmente e conviventi di fatto nel diritto internazionale privato italiano ed europeo' *Rivista di diritto internazionale*, 1134 ff; O. Feraci, 'L'incidenza del nuovo regime europeo in tema di rapporti patrimoniali tra coniugi e parti di Unioni registrate sull'Ordinamento

that would regulate it pursuant to Art 22, if the deal is good. Paragraph 2 of the same Article provides that a spouse or partner may, in order to establish it, not have access to this solution, and may instead use himself under certain conditions provided for by the law of the country in which he has his habitual residence. Provisions similar to those provided for in Art 24, are present in Regulation 593/2008 on the law applicable to contractual obligations, as well as in Regulation 1259/2010 on the law applicable to divorce and legal separation. In the Commission's 2011 and 2016 proposals on Matrimonial Property Regimes, the question of the validity of choice-of-law agreements applicable to spouses and partners is not exhaustively addressed.
Art 24 deals with the material validity of the agreement on the choice of applicable law; unlike Art 23 which contains the minimum requirements for the formal validity of the agreement, in Art 24 the requirements necessary for the material validity of the act are not indicated. It follows that for the formal validity provided by the agreement on the choice by the couple of the law applicable to asset regimes pursuant to Art 23, this will be interpreted autonomously; instead for the material validity of the same will be left entirely to the regime of national law. This being the case, however, although no autonomous interpretation will be given, uniform criteria will have to be defined: just as in the case where the indication of the applicable law has not been made explicit and may be inferred, the question arises as to whether the agreement on the applicable law, although formalised in material terms as well, may be set aside where, for example, it is unfair and unfair to one of the parties.

II. Substantive validity of the agreement: the problem of existence

We wondered whether the agreement on the applicable law, formalized pursuant to Art 24, materially existing, if it can then be disregarded by not meeting the requirements of Art 22, and be left exclusively under the operation of national law, or the parties will apply the rules relating to contracts in general.

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giuridico italiano e le interazioni con le novità introdotte dal d.lgs. 7/2017 attuativo della c.d. Legge Cirinnà' *Osservatorio e fonti.it*, 2 (2017), 2.

So the discourse is in terms of whether or not the consensual act of choice exists.[2] The term existence of the agreement is intended to refer, in the light of the foregoing, to the presence or absence of the elements which, according to the chosen national law, are necessary to constitute the actual agreement with regard to the law actually applicable. It must be a real 'proposal and acceptance' as essential element that converges towards the agreement on the law that spouses/ partners want to apply to their property regime. In ordinary order for there to be implicit consent, it is necessary that there are minimum formal requirements required according to authoritative jurisprudence. The obligatory prediction of the presence of the formal requirements, allows to establish the existence of the agreement, that is the effective presence of the double consent of the parties that converges towards the act of choice of the law applicable to their patrimonial regimes.

In ordinary order for there to be implicit consent, it is necessary that there are minimum formal requirements required according to authoritative Community jurisprudence,[3] the mandatory provision of the presence of formal requirements, allows the existence of the agreement to be established, that is to say the effective presence of the two-fold consent of the parties converging towards the act of choice of the law applicable to their capital regimes; This trend in the case-law of the Court of Justice, which links the Regulations on the Property Law of Married Couples and not the Brussels Convention referred to above, may be useful in defining the existence of the act.

However, each party may object to the lack of material validity of the act, in which case such objection shall be assessed through the Lex

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[2] Cf D. Martiny, n 1 above, 241; C. Kohler, 'Article 23: Formal validity of the agreement on a choice of applicable law', in I. Viarengo and P. Franzina eds, n 1 above; C. Calò, 'Variazioni sulla professio iuris nei regimi patrimoniali delle famiglie' *Rivista del Notariato*, 1093 ff (2017).

[3] In this sense, the EU Court of Justice, in relation to the choice agreements of the court pursuant to Art Art 17 of the 1968 Brussels Convention on Jurisdiction and the Application of Judgments in Civil and Commercial Matters, in view of the court's obligation to examine whether the clause was the subject of a de facto agreement between the parties, which must be demonstrated. The provision, contained in Art 17 cited in relation to the presence of the formal requirements imposed by Art 17, allows to establish the effective presence of the dual consent of the parties.

causae: ne of the hypotheses could be the lack of consent due to errors or misrepresentation, or if the consent was extracted with undue influence; in this case, the validity will be subject to the applicable national law under European Union law, for which each party must be aware of the legal and social effects of the choice of applicable law. An informed choice of the Property Regimes Regulations means that the consent of each party must be based on complete and reliable information from the parties and on the chosen law. In the event that all this information is incomplete or completely missing, and the spouse/partner opposes the validity of the agreement because he was mistaken about the consequences of the choice or the hypothetical effects of the lex causae - the law chosen by the forum tribunal from the relevant legal systems when he judges an international case - in that case, reference should be made to the rationale of the rules that inspire the Property Regime Regulation regarding the material validity of the agreement; in that case, it follows that the relevance of an error should not be denied under national law if the error is based on incorrect ideas or a lack of information on the content of the chosen law on matrimonial property regimes or registered couples.

One of the problems that needs to be addressed here is the affixing of a cross (X) on the form relating to the marriage act, with which it is doubtful whether it was intended to indicate the chosen law or the type of Matrimonial property regime; in this case in the case of opposition to the validity of the agreement by a spouse for the error on the meaning of the cross, this dispute is governed by national law pursuant to Art 24.

It is more generally asked whether the content of the Agreement of choice of the right of choice, in terms of autonomy as enshrined in Arts 22 and 23, may be subject to review by the parties or necessarily by the Court with a comment on the procedure proposed by the party concerned. It is considered that, irrespective of the intervention of the Court, an amendment may be made in cases where a position of the parties is very disadvantaged and therefore the agreement may be declared null and void by a Court of First Instance because it is contrary to the general rules of *bonos mores*.

Pursuant to Art 24 under consideration, it seems that this type of revision can also be applied to agreements on the choice of law in the areas of family law governed by the law of the EU In this sense the indication contained in the Hague Protocol of 2007 on the law seems to be understood applicable to maintenance under Regulation 4/2009 on maintenance obligations. In this provision it is possible to deduce an autonomous model of judicial control of the choice of agreements of law even if it is provided for very strict requiring that it may be implemented in the event of a choice that would lead to unreasonable or unfair consequences arising from of course from misinformation of the parties and not awareness of the consequences.

In this case, the need to protect the weaker part is even more stringent as it is property, so the lack of information that generates a strong information asymmetry between the parties must be taken into account and therefore the rigour is explainable requested for a review. In such cases, the injustice of the consequences deriving from an agreement in which there is a weaker party may lead to the annulment of the same; in fact, it would be contrary to the rights of the personality relating to family life as protected by the Charter of Fundamental Rights in Art 7 and by the European Convention on Human Rights. It follows that, in the interpretation of the present Regulation on Property Regimes pursuant to Art 22, an Agreement may be subject to revision in the light of the Charter of Fundamental Rights and the EDU Convention.

On the contrary, whether the revision of the content of choice was left to national law pursuant to Article it follows from Art 24 of this Regulation that there is a divergence of results which is contrary to the general objective of the uniform application of property rights regimes. Ultimately, for the purposes of the Revision of a flawed Agreement, reference should be made to Art 22 of the Property Law Regulation and not the national law.

Ultimately, for the purposes of the Revision of a flawed Agreement, reference should be made to Art 22 of the Regulation on Property Regimes[4] and not already to national law. In Art 24, para 2, it is stated that a spouse or partner may object to the validity of the agreement on the choice of applicable law by stating the alternative operation

[4] In this sense, cf C. Kohler, n 2 above, 225.

provided for in that rule, of the national law in which he is habitually resident at the time when the Court is examining the case, where it would not be reasonable to apply the provisions of Art 24, para 1.

It is more generally asked whether the content of the Agreement of choice of the right of choice, in terms of autonomy as enshrined in Art 22 and 23, may be subject to review by the parties or necessarily by the Court with a comment on the procedure proposed by the party concerned. It is considered that, irrespective of the intervention of the Court, an amendment may be made in cases where a position of the parties is very disadvantaged and therefore the agreement may be declared null and void by a Court of First Instance because it is contrary to the general rules of *bonos mores*. Pursuant to Art 24 under consideration,[5] it seems that this type of revision can also be applied to agreements of choice of law in the areas of family law governed by EU law.

In this sense, the indication contained in the 2007 Hague Protocol on the law applicable to compulsory maintenance laid down in Regulation 4/2009 on maintenance obligations seems to be understood. In this provision it is possible to deduce an autonomous model of judicial control of the choice of agreements of law even if it is provided for very strict requiring that it may be implemented in the event of a choice that would lead to unreasonable or unfair consequences arising from of course from misinformation of the parties and not awareness of the consequences.

In Art 24, para 2, it is stated that a spouse or partner may object to the validity of the agreement on the choice of applicable law by stating the alternative operation provided for in that rule, of the national law in which he is habitually resident at the time when the Court is examining the case, where it would not be reasonable to apply the provisions of Art 24, para 1.

This seems to be the indication contained in the 2007 Hague Protocol on the law applicable to maintenance under Regulation 4/2009[6] on maintenance obligations. In this provision it is possible to deduce an

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[5] It is about the '*Inhaltskontrolle*,' in the opinion of C. Kohler, n 2 above, 227.

[6] It is Art 15 Regulation 4/2009 on maintenance obligations, and Art 8, para 1 and 4, of Hague Protocol of 2007 allowing the creditor and debtor to choose between a limited number of laws, which will be the applicable law.

autonomous model of judicial control of the choice of agreements of law even if it is provided for very strict requiring that it may be implemented in the event of a choice that would lead to unreasonable or unfair consequences arising from of course from misinformation of the n this case, the need to protect the weaker part is even more stringent as it is property, so the lack of information that generates a strong information asymmetry between the parties must be taken into account and therefore the rigour is explainable requested for a review. In such cases, the injustice of the consequences deriving from an agreement in which there is a weaker party may lead to the annulment of the same; in fact, it would be contrary to the rights of the personality relating to family life as protected by the Charter of Fundamental Rights in Art 7 and by the European Convention on Human Rights. It follows that, in the interpretation of the present Regulation on Property Regimes pursuant to Art 22, an Agreement may be subject to parties and not awareness of the consequences.

This rule is parallel in Regulation 1259/2010[7] and applies to the conclusion of contracts, giving the person concerned the right to object to the fact that the validity of the consent given is presumed only because that party has acted conclusively. This provision has been extended to agreements on the choice of law applicable to the Property Regimes, so that the consent of one party is deduced exclusively from the conduct of that party, in particular from the silence of that party following the declaration of the other party, the first party may, pursuant to the second paragraph of Art 24 object to the successful conclusion of the contract, based on the law of one's habitual residence.

In this scenery one wonders when Art 24, para 2, in the context of the conclusion of an agreement to choose the Property Regimes Act. The parties' statements and behaviour play a key role in understanding what they implicitly intended to choose for the regulation of the applicable law on capital regimes. But this must be reconciled with what is required by Art 23 on the minimum requirements that the Act of choice must have, that is, formal requirements that necessarily

[7] More widely, cf M. Pinardi, 'I Regolamenti europei del 24 giugno 2016 nn. 1103 e 1104 sui regimi patrimoniali tra coniugi e sugli effetti patrimoniali delle unioni registrate' *Europa e diritto privato*, 745 ff (2018).

require the written form, with the date and signature affixed. Where there is silence on the part of a party, it will take on a meaning, perhaps hinting at aspects of falsehood or coercion in making the declaration of consent to the choice agreement.

It is considered,[8] in the case, the lex causae as provided for, in the special cases set out in Art 24 under consideration; the defect affecting the consent given by a party in the choice of the law applicable to property regimes, under the law relating to 'habitual residence,' should be overcome through the hypothetical lex causae, where the interested party invokes Art 24, para 2.

In that sense, Art 24, para 2, allows the person concerned to invoke the right of habitual residence at the time when the court is seised and not at the time when the agreement is concluded; it should be specified, however, that it remains within the discretion of the court seised to determine whether the person who opposes the validity of the agreement on the choice of applicable law may instead use the law relating to habitual residence, where the lex causae, considers that it would be unfair to take it as the law of that case.

[8] In this sense, cf C. Kohler, n 2 above, 230; P. Bruno, n 1 above, 189 ff.

Article 25
Formal validity of a matrimonial property agreement/partnership property agreement

Maria Gabriella Rossi

Regulation (EU) 2016/1103

1. The matrimonial property agreement shall be expressed in writing, dated and signed by both spouses. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.

2. If the law of the Member State in which both spouses have their habitual residence at the time the agreement is concluded lays down additional formal requirements for matrimonial property agreements, those requirements shall apply.

If the spouses are habitually resident in different Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements for matrimonial property agreements, the agreement shall be formally valid if it satisfies the requirements of either of those laws.

If only one of the spouses is habitually resident in a Member State at the time the agreement is concluded and that State lays down additional formal requirements for matrimonial property agreements, those requirements shall apply.

3. If the law applicable to the matrimonial property regime imposes additional formal requirements, those requirements shall apply.

Regulation (EU) 2016/1104

1. The **partnership property** agreement shall be expressed in writing, dated and signed by both **partners**. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.

2. If the law of the Member State in which both **partners** have their habitual residence at the time the agreement is concluded lays down additional formal requirements for **partnership property** agreements, those requirements shall apply.

If the **partners** are habitually resident in different Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements for **partnership property** agreements, the agreement shall be formally valid if it satisfies the requirements of either of those laws.

If only one of the **partners** is habitually resident in a Member State at the time the agreement is concluded and that State lays down additional formal requirements for **partnership property** agreements, those requirements shall apply.

3. If the law applicable to the **property consequences of a registered partnership i**mposes additional formal requirements, those requirements ....

Summary: I. Formal validity of a proposal-ERTY Agreement. – II. The objective of Art 25. – III. Content and structure of Art 25. – IV. The 'additional requirements'.

I. Formal validity of a proposal-ERTY Agreement

Art 25 of the Twin Regulations of 2016 nos 1103 and 1104,[1] clarifies that any marriage agreement must be expressed in writing, dated and signed by both spouses, as well as in the provision of Art 25 of Regulation 1104 of 2016, the partnership proposal-ERTY, must respect these formal characteristics.
It is deemed equivalent to writing, any communication of an electronic nature that provides a durable record of the agreement.
It should be specified that the present standard gives great importance to the provisions on formal requirements provided by the laws of each of the spouses: if the law of the Member State in which both spouses have their habitual residence at the time of the conclusion of the agreement, on the ownership of the spouses, provides for 'additional formal requirements,' these must be respected.
On the other hand, if the spouses are habitually resident in different Member States at the time of conclusion of the agreement and the formal requirements for the validity of the agreement are different, this will only be valid if it meets the requirements of these laws.
If only one of the spouses is habitually resident in one of the Member States at the time when the contract is concluded, and in that State formal requirements for marriage agreements are required, those requirements must be applied.
Where, then, the applicable law provides for the matrimonial property regime, further formal requirements, these must necessarily be respected.

[1] P. Bruno, *I Regolamenti Europei sui Regolamenti dei coniugi e delle Unioni Registrate* (Milan: Giuffrè Francis Lefebvre, 2019), 167 ff.; P. Franzina, 'Article 25- Formal validity of a proposal-ERTY Agreement', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples. A Commentary* (Cheltenham: Edward Elgar, 2020).

II. The objective of Art 25

The purpose of the provision was to substantially regulate the regulation of the Agreements under which spouses or partners regulate their property relationships and depart from the two previous Articles (Arts 23 and 24 on property regimes) which merely regulate the problem of the choice of applicable law.
In the presence of assets between spouses or future spouses, pursuant to Art 3, paras 1 and 6 of Regulations 2016/1103 and 2016/1104, the Agreement aims to ensure that the parties organize their arrangements for the assets of goods in communion. The scope and content of a property may vary depending on the applicable law and the circumstances of the case.
Spouses or partners may enter into an ad hoc property contract, for the sole purpose of submitting their own agreement other than that which would apply to their relationship, by default. This is usually the case where they consider the applicable rules to be inflexible or inaccurate.[2]
Any agreements between spouse couples or partners concluded in order to change, replace, suspend or terminate a real estate contract between them already existing, also constitutes a new property contract, therefore an Agreement for the purposes of the Regulation of Real Estate Schemes.
A real definition of form and 'formal validity' of property agreements both between spouses and between partnerships, is not included in the Regulations in question; It follows from the wording of the two rules that any agreement made as an external manifestation by a person expressing his or her will to be legally bound is valid and effective. In the absence of such a formal written and signed expression, that mere expression would not be effective.[3]

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[2] Cf D. Damascelli, 'La legge applicabile ai rapporti patrimoniale tra coniugi, uniti civilmente e conviventi di fatto nel diritto internazionale privato italiano ed europeo' *Rivista di diritto internazionale*, 1134 ff (2017).

[3] Cf P. Franzina, n 1 above, 234.

A property contract contained in an authentic instrument, although formally valid for the purposes of Art 25, this does not mean that it can be said that it has a certain enforceability and full acceptance outside the state of origin. Art 25 shall apply irrespective of where the ownership contract was concluded and irrespective of any link between the parties or goods concerned and the Member States participating in the enhanced cooperation which led to the Regulations on schemes proprietary. What matters, for the applicability of Art 25, is that the case in question falls within the competence of the Regulation, and more precisely in the provisions of Chapter II, both ratione materiae and ratione temporis, in accordance with Arts 1 and 69 respectively.

III. Content and structure of Art 25

The analysis of the content of this standard is as follows. Recital 48 of Regulation 2016/1103 and recital 47 of Regulation 2016/1104 state that a property contract is a provision on the relationship of property in the couple, which may vary between Member States, as regards admissibility and acceptance. The introduction of a uniform rule on the formal validity of property contracts should facilitate valid property rights acquired as a result of a property contract - concluded locally -which should be accepted by all Member States.
The purpose of this provision is to ensure that the effects of agreements between spouses or partners can be recalled by Member States without having to investigate from time to time whether local rules provide for it in the form of agreements and more stringent. For the validity of a property contract, the requirements must be only those prescribed in Art 25. This provision should be interpreted as providing for an extension of autonomy and legal certainty. As for the structure of Art 25, it should be noted that there is an affinity between Art 25 and Art 27 of Regulation 650/2012[4] on succession; this rule regulates the formal validity of the provisions in

[4] EU Council Regulation no 650/2012 on the authorisation, applicable law and enforcement of accepted decisions and the execution of authentic accession

the succession of property, due to death. That rule states that the testamentary provision is valid if its form complies with the requirements of one of the national rules specified therein.
On the one hand, the rule, in para 1, provides for autonomous formal requirements, which disregard provisions of national laws, are imposed by U.E. law: Art 25, para 1, on the one hand, requires the ownership contract to be drawn up in writing, with the signature of both spouses and the date; on the other hand, in paras 2 and 3, it stipulates that for the purposes of formal validity, in the event of conflict of national laws, that the formal requirements of the national legal system identified are respected.
It follows that the 'autonomous requirements' set out the minimum conditions that ownership agreements must comply with, irrespective of the applicable law; in essence, it is not for the Authority of the participating Member States to enforce an agreement on ownership if the latter does not meet the conditions laid down in Art 25, para 1.
Instead the so-called 'additional requirements,' that is those previewed in Art 25, paras 2 and 3, determine the nullity of the contract if they are not respected,[5] because they relate to the substance of the act and not to its form.
Although the structure and content of Art 25 are similar to those provided for by Art 23, it should be noted that Art 25, in addition to the form necessary for the validity of the act, also provides requirements for the very existence of the act; these are provided for by the Regulation in question for property relations between spouses and partners, and their absence gives rise to the nullity of the act itself.
The requirements imposed by Art 25, para 2 and those imposed by Art 25, para 3, apply cumulatively. If there is a conflict of laws for the conclusion of Property Agreements, which refer to the rules of the different states that prescribe requirements, it will be necessary, for the

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procedures and on the creation of a European Succession Certificate 2012/G.U. E20L107. Cf D. Damascelli, n 2 above, 1134 ff.

[5] These are extra-conditions that are additional requirements such as the provision of the form of the notarial act or the presence of witnesses at the time of the conclusion of the act, in the absence of which the act is null and void, as stated P. Franzina, n 1 above, 238 ff.

validity of the act, that all the required conditions - required by standards of the different states - are met.
The doubt as to whether the European Union is competent to adopt such a measure has been raised during the legislative process. But despite the clearly unfavourable position of the German representation - which does not allow the standardization of family law and the competence of the EU to legislate in the matter, with substantive law rules governing the validity of marriage agreements- the rule of Art 25, para 1, is still present.
In fact, as has been shared,[6] the European Union does not have a general competence to harmonise the rules of substantive law on family relations, however, has the power to adopt the substantive harmonised rules which seem necessary for the proper functioning in the EU.[7]
The legislator was probably pushed in this direction in the light of recital 47 with regard to the choice of law agreements. The harmonisation of minimum formal requirements was made necessary, in Art 25, which is being examined, the need felt by the European legislator, for a free, informed and genuine exercise of autonomy on the part of spouses; this is the only way in which it has been felt that spouses or partners, with the satisfaction of those requirements, there is a guarantee of full awareness of their agreement and its consequences.
According to Art 25, para 1, capital agreements may derive from acts drawn up in electronic written form, but only if they are created by means of minutes in a durable form; the European legislator used the same expression as that used in Regulation 1215/2012 on jurisdiction, the recognition and enforcement of judgments in civil and commercial matters.[8]
With regard to the 'minimum requirements,' one problem concerns the unregulated situation, where one of the parties to the agreement is

[6] Cf P. Franzina, n 1 above, 237.
[7] D. Damascelli, n 2 above, 1134 ff.
[8] On jurisdiction, recognition and enforcement of judgments, cf O. Feraci, 'L'incidenza del nuovo regime europeo in tema di rapporti patrimoniali tra coniugi e parti di Unioni registrate sull'Ordinamento giuridico italiano e le interazioni con le novità introdotte dal d.lgs. 7/2017 attuativo della c.d. Legge Cirinnà' *Osservatorio e fonti.it*, 2 (2017).

not able - due to a physical disability or other [9]- to sign the agreement. The excessively restrictive interpretation of that rule would entail discrimination prohibited by Art 21, para 1 of the Charter of Fundamental Rights of the European Communities.
There seems to be access to a broader interpretation so that the expression of equivalent will - as provided for by the law of the State in which the consent of the persons concerned was expressed, or according to the law governing the agreement - should be considered sufficient pursuant to Art 25, para 1. If for that agreement the consent has been expressed before a notary or other public Authority that attests that the parties have expressed such will, whatever the form, the balance sheet will not be affected but is to be considered valid.

IV. The 'additional requirements'

The formal requirements for agreements between spouses or partners on property ownership vary from legislation to legislation in different Member States.
In some - States such as Italy, Spain and Germany - only and not in others, for example, the drafting of a property contract cannot disregard the form of the Notarial Act or at least the Public Deed.[10]
The purpose of Art 25, paras 2 and 3, is precisely to indicate in which cases the formal validity of a company contract depends on compliance with national requirements which arise as additional requirements.
The law of a State with which the agreement is connected because the spouses or partners have their habitual residence at the time the agreement was concluded, may, pursuant to Art 25, para 2, prescribe additional requirements.
The provision refers to requirements imposed by the law of a Member State; If a third country adopts formal requirements by a national law, these have no relevance under Art 25, para 2. They are only relevant

[9] Cf P. Franzina, n 1 above, 238.
[10] Cf P. Franzina, n 1 above, *sub* n 11, 238; See: Art 1327 Spanish civ. cod., Art 162 Italian civ. cod., Section 1410 German civ. cod.

where ownership relationships are governed by the law of the third country.[11]

More realistically it should be specified that pursuant to Art 25, para 3, a property contract is null and void if it does not comply with the further formal requirements of lex causae, which pursuant to Art 20, may be the law of a Member State or that of a third country.

A problem that has been posed to scholars is that of the interpretation of Art 25, para 2, whether it relates to the 'participating Member States' or 'non-participating Member States;' on this point, opinions are divided. While some scholars believe that the expression 'Member State' refers to the meaning already present in the same Regulation, in Art 23 and 25, that is 'requesting Member State,' others, on the other hand, go beyond that distinction[12] by allowing the possibility of a reference to the requirements imposed by the law of any other Member State.

Some noted that the adoption of additional requirements under the national legislation of 'non-participating Member States' for the purposes of Arts. 23 and 25 derives from the provisions of Art 372 of the TFEU, according to which any enhanced cooperation[13] must respect the competences, rights and duties also of Member States not participating in it. Such an interpretative[14] choice would be functionalised to avoid creating a clear distinction between 'participating Member States' and 'non-participating Member States,' therefore between those that have joined or not joined the enhanced cooperation, but could still participate in it. A desirable trend

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[11] P. Lagarde, 'Article 25', in U. Berquist et al, *Commentaire des règlements européens sur la liquidation des régimes matrimoniaux et les partenariats enregistrés* (Paris: Dalloz, 2nd ed, 2018), 111 ff.

[12] Cf P. Franzina, n 1 above, *sub* n 14 and 15, 239.

[13] The concept of 'enhanced cooperation' is compared in A.L. Valvo, 'Integrazione europea in cammino: I Regolamenti europei in materia di regimi patrimoniali tra coniugi e in materia di effetti patrimoniali delle unioni registrate' *Rivista della cooperazione giuridica internazionale*, 11-17 (2019); M. Pinardi, 'I Regolamenti europei del 24 giugno 2016 nn. 1103 e 1104 sui regimi patrimoniali tra coniugi e sugli effetti patrimoniali delle unioni registrate' *Europa e diritto privato*, 733 ff (2018).

[14] In this sense, cf P. Franzina, n 1 above, 240; P. Bruno, n 1 above, 167 ff.

according to some,[15] which has an objective more of a political nature than of a legal necessity.
A clarification concerns Art 25, para 3, which does not find perfect correspondence with the previous Art 23; this would, however, be only an apparent discrepancy because the common element is to value and comply with the lex causae requirements which cannot be ignored because what is to be protected is the true will of the couple, the substance of the settlement of assets that couple wanted to conclude.
On the other hand, agreements on the choice of applicable law do not give rise to the same concern because they do not affect the true substance of the property relations between spouses or partners just as their will has determined them.

[15] In this sense, cf P. Franzina, n 1 above, 240.

Article 26
Applicable law in the absence of choice by the parties

Salvatore Coscarelli

Regulation (EU) 2016/1103

1. In the absence of a choice-of-law agreement pursuant to Article 22, the law applicable to the matrimonial property regime shall be the law of the State:

(a) of the spouses' first common habitual residence after the conclusion of the marriage; or, failing that

(b) of the spouses' common nationality at the time of the conclusion of the marriage; or, failing that

(c) with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances.

2. If the spouses have more than one common nationality at the time of the conclusion of the marriage, only points (a) and (c) of paragraph 1 shall apply.

3. By way of exception and upon application by either spouse, 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 pursuant to point (a) of paragraph 1 shall govern the matrimonial property regime if the applicant demonstrates that:

Regulation (EU) 2016/1104

1. In the absence of a choice-of-law agreement pursuant to Article 22, the law applicable to the **property consequences of registered partnerships** shall be the law of the State **under whose law the registered partnership was created.**

2. **By way of exception and upon application by either partner, the judicial authority having jurisdiction to rule on matters of the property consequences of a registered partnership may decide that the law of a State other than the State whose law is applicable pursuant to paragraph 1 shall govern the property consequences of the registered partnership if the law of that other State attaches property consequences to the institution of the registered partnership and if the applicant demonstrates that:**

(a) the partners had their last common habitual residence in that other State for a significantly long period of time; an

(b) both partners had relied on the law of that other State in arranging or planning their property relations.

The law of that other State shall apply as from the creation of the **registered**

(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; an

(b) both spouses had relied on the law of that other State in arranging or planning their property relations.

The law of that other State shall apply as from the conclusion of the marriage, unless one spouse disagrees. In the latter case, the law of that other State shall have effect as from the establishment of the last common habitual residence in that other State.

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.

This paragraph shall not apply when the spouses have concluded a matrimonial property agreement before the establishment of their last common habitual residence in that other State.

partnership, unless one partner disagrees. In the latter case, the law of that other State shall have effect as from the establishment of the last common habitual residence in that other State.

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 paragraph 1.

This paragraph shall not apply when the partners have concluded a **partnership property** agreement before the establishment of their last common habitual residence in that other State.

Summary: I. The applicable connecting factors. – II Habitual residence as a priority connecting factor. – III. The differences between the two Twin Regulations.

I. The applicable connecting factors

In the absence of *professio iuris*, Art 26, para 1, of Regulation (EU) 2016/1103 declares applicable to property relations between spouses the following laws in the following order:
a) the law of the State of the spouses' first common habitual residence after the conclusion of the marriage;

b) the law of the State of spouses' common citizenship at the time of the conclusion of the marriage;
c) the law of the State with which the spouses have the closest connection together in the latter moment, 'taking into account all the circumstances.'
Art 26, para 1, of the Regulation provides for the adoption of connecting criteria applicable to property relations between spouses. It is clear that in defining the framework of European Family Law, with the two Regulations enacted, the EU legislator was mainly animated by the intention of enhancing the effectiveness of the social, economic and emotional life of the spouses/partners, introducing universal principles mostly unchangeable in order to ensure legal certainty and predictability of the applicable law.
However, if on the one hand unifying intent ensures rules that are easy to apply, on some occasions it does not take into account some specificities, thus lending itself to some critical remarks. This is the case, for example, of the use by the EU legislator to the application of the criterion of connection to the 'common habitual residence' which, even today, escapes a certain and unambiguous notion and forces the operator of the right to obtain it using jurisprudential and doctrinal sources which have not been sufficiently consolidated yet.
A second observation could be made with regard to the adoption of the criterion of non-automatic modifiability of the applicable law in the absence of *professio iuris*. In this case, there is the inconvenience for which a married couple may find itself subject for the entire duration of the marriage to a law of a State in which the same couple has set the first habitual residence for only a short time and therefore, the conciliatory intent predictability and the need for legal certainty with the real life circumstances of the spouses/partners cannot be considered to be fully realized.
Undoubtedly, the actual realization of the enforceability of the applicable law against third parties generates doubts too. Therefore, despite the intent to overcome the fragmentation of the international - private sector regulations of the Member States on the subject of property regimes, the regulatory framework offered by the two Regulations does not fail to show signs of uncertainty.

In any case, the practical implementation of the new European legislation, from time to time, will point out the difficulties that spouses or partners will have to face in the concrete management of their property relationships.
The legislation in question has had an impact on Italian private international law.
On the other hand, this Regulation introduces the definition of the matrimonial property regime, comprising the set of rules governing the property relations of the spouses with each other and with respect to third parties as a result of marriage or its dissolution. Therefore, all aspects of civil law of matrimonial property regimes fall within the framework of this regulation, concerning both the day-to-day management and the liquidation of the property regime, in particular following legal separation, divorce or death of a spouse, and converge in this notion the autonomous nature of which makes it necessary to disregard the definitions found in the internal regulations of the individual participating Member States.
Even in this specific case concerning the applicable law in the absence of choice of the parties, the Regulations adopt the criterion of the non-automatic modifiability of the applicable law and therefore, there can be no change in the applicable law without the spouses expressing their will. It results to be different in Law no 218/1995 since if during the course of married life the spouses with different citizenship they acquire a common citizenship, it is quite possible that the law applicable to their property relationships will change whenever the new law no longer coincides with the one in which it is set the married life.[1]
In case of lack of choice by the spouses/partners, in order to identify the applicable law, the European discipline introduces harmonized rules on conflict of laws based on a series of cascade connecting criteria, thus overcoming the objective criterion of common citizenship of the spouses and the prevailing location of married life referred to in the aforementioned Law no 218/1995.
As regards the matrimonial property regimes, these are classic connecting factors, such as the law of the first common habitual

[1] legge 31 May 1995 no 218, Arts 29 and 30.

residence after marriage, or the law of common citizenship or the state that has the closest connection at the time of marriage.
In the absence of an exact indication, the concept of habitual residence will coincide with that developed by the jurisprudence of the Court of Justice of the EU and of the National Courts, according to which symptomatic indices linked to the continuity of life in a specific state, the intention of the parties, to the practical organization of common life must occur in order for a residence to be considered habitual.[2]
The solution adopted for cases of spouses with double or multiple nationality is noteworthy: if there is no agreement between them on the applicable law, only the other two connecting criteria can be applied, that is those related to residence.
This rule codifies a jurisprudence of the EU Court of Justice in the matter of non-discrimination based on citizenship[3] which confirms the pre-eminent role accorded in the EU international law system, to the connecting factor of habitual residence deemed most suitable to identify the social environment in which the couple is effectively integrated.
In the Regulation on the property effects of registered partnerships, however, the only connecting factor is the State in which the marriage was registered. Even in this case, the European rules aim to reconcile the predictability of solutions and the need for legal certainty with the circumstances of the couple's real life.[4]
Exceptionally and at the request of one of the spouses or partners, the European instruments establish a rule that guarantees a certain flexibility in the choice of the law applicable to the specific case. This rule, which is not provided for in the Italian private international law system, allows the judge to apply the law of the State in which the spouses had the last and significantly longer common habitual residence, or in any case the one they relied on in the organization of their real estate relationships. This exception to the principle of non-automatic modifiability of the applicable law illustrated above,

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[2] G.V. Colonna, 'I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate' *Famiglia e Diritto*, 827, 839 (2019).
[3] European Court of Justice, judgement of 16 July 2008.
[4] Recital no 48 of EU Regulation no 2016/1104.

allows the objective criterion identified in the main way to be overcome and leaves the possibility to apply the law of another state, but only in the presence of a more significant connection and in the case of protecting a specific entrustment of the parties to this effect.
The operation of the exception is instead excluded when the spouses have concluded a marriage agreement before moving to the State in which they subsequently stayed for a significantly longer period than their previous habitual residence.
In both regulations, in the aforementioned Art 26, by way of exception and at the request of a party, the requested authority, with questions on matters related to the matrimonial property regime or the property consequences of a registered partnership, may decide that the law of a State, different from the one whose law has been designated on the basis of the aforementioned criteria, is applicable to property relations, if the conditions set forth therein are respected and the rights of third parties are not prejudiced.
Every legal situation related to property matters that is not connected to the existence of a couple bond cannot therefore be considered included in the scope of application of the Regulation.
The regulations guarantee a certain flexibility in the choice of the applicable law considering the specific case, eg exceptionally and at the request of one of the spouses or partners, the judge may apply the law of the State in which the spouses had their last common habitual residence or in any case that which they have relied on in organizing their patrimonial relationships.
The principle of proximity and the discretion of the requested court to replace one connecting factor with another is relevant in the case we are dealing with.
The above exception clause does not operate when the spouses have concluded a marriage agreement before moving to the State in which they subsequently stayed for a significantly longer period than their previous habitual residence.
Art 22 of the Regulation expresses the main criterion for identifying the applicable law which, in full harmony with the rules laid down on jurisdiction, attributes to the choice of the parties the first and most important tool for selecting the applicable law. Freedom of choice is now to be considered the preferred tool by the EU legislator to

identify the applicable law in multiple sectors of judicial cooperation in civil matters: it is made use of it by the Rome Regulation III (Art 5), the succession regulation (Art 22), Rome Regulation I (Art 3) and the Rome II Regulation (Art 14).[5]

The couple can jointly exercise the power to identify the applicable law, arriving at a conscious and shared delineation of the patrimonial consequences of the union which is very profitable in terms of adherence and understanding of the decision that will arise from the procedure they will activate. Recourse to private autonomy is in any case encouraged by the Regulation which allows it to be exercised even before the union has arisen: those who are not yet partners in a registered partnership, like the engaged couple as referred to in Regulation 1103, they can exercise the *professio iuris* with a view to a future union. Partners are granted the *ius variandi*: at any time, it will be possible for them to change the law that will be applied to their property regime without that this change would have retroactive effects so as to prejudice any rights of third parties who had relied on the previous choice. Partners or future partners can choose between the law of the state where they have their habitual residence or one of them resides, the law of their home states or the law of the state under which law the registered partnership was formed.[6]

One of the major problems posed by the agreement is its impact on third parties. The possibility that the partners change the applicable law several times and that they do so even retroactively has made it necessary to provide that, in no case, the agreement may be prejudicial to third parties. The applicable law chosen by the parties can establish disciplinary regimes based on separation, communion, whether current and / or deferred, with significant repercussions on third parties.[7]

It should be noted that, depending on the national law actually operating, the third party could see the level of protection of his or her position substantially changed.

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[5] L. Ruggeri, 'Choice of the applicable law', in M.J. Cazorla Gonzalez, M. Giobbi, J. Kramberger Skerl, L. Ruggeri and S. Winkler eds, *Property relations of cross border couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2020), 73.

[6] ibid

[7] ibid

Regulation 1104 also contemplates criteria to identify the applicable law intended to operate in the absence of a choice of law. They are successive criteria that allow you to establish which law to apply using in sequence the place of incorporation of the registered partnership, the 'habitual residence' or 'citizenship.'

Based on Art 26, in fact, the applicable law to the property effects of registered partnerships is the one on the basis of which the registered partnership was established. Only exceptionally and if there is an express request from one of the partners, a judge can apply a different law to the procedure concerning property effects. However, the application of a law different from that governing the establishment of the registered partnership is subject to the actual occurrence of two circumstances. The judge, in fact, can apply the different law only if it attributes patrimonial effects to the institution of the registered partnership and only if there is proof, by the one who invokes the different law, of the fact that the partners had their habitual common last residence in that state 'for a significantly long period' or that both partners have relied on the law of that other state in organizing or planning their property relationships. Once the judge, with activity expressing a discretionary power, has deemed it possible to apply a law different from the one on which the union was established, this law is also applied to the constitution of the union. This solution has the advantage of simplifying the management of the procedure, but its operation is subject to the agreement of both partners. In case of disagreement, at the request of a partner, the applicable law identified by the court will govern the property consequences of the registered partnership starting from the moment in which the partners have established their last habitual residence in the State whose law is invoked as applicable by one of the parties. Third parties, by express provision of Article 26(2), may not be adversely affected by the partners exercising the criteria for the identification of the applicable law exceptionally provided for in this paragraph: for them the applicable law will remain the one identified in connection of the State in which the partnership was instituted.[8]

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[8] L. Ruggeri, 'Applicable law in the absence of choice by the parties', in M.J. Cazorla Gonzalez, M. Giobbi, J. Kramberger Skerl, L. Ruggeri and S. Winkler eds, n 5 above, 75.

The Art 26 of the Regulation provides that the applicable law in the absence of a choice of the parties is that of the State under whose law the registered partnership was established.
Exceptionally and at the request of one of the partners, the competent judicial authority deciding on matters relating to the property consequences of a registered partnership may decide that the law of a State different from the one under whose law the registered partnership is incorporated regulates the property effects of the registered partnership if the law of that other State attributes property effects to the institution of the registered partnership and if the applicant proves that: a) the partners have maintained their last common habitual residence in that State for a significantly long period; b) both partners have relied on the law of that other state in organizing or planning their property relationships.
The law of that other State, according to the aforementioned Art 26, is applied from the constitution of the registered partnership, unless one of the partners disagrees. In the latter case, the law of that other State produces effect from the establishment of the last common habitual residence in that other State. The application of the other state's law does not affect the rights of third parties under the law the registered partnership was formed. This provision is not applied if the partners concluded an agreement between partners before the date of establishment of the last common habitual residence in that other State.[9]

II. Habitual residence as a priority connecting factor

For the purposes of this comment, it is useful to analyse the concept of habitual residence.
Both Regulations refer to habitual residence and citizenship as connecting criteria for identifying the law applicable to the property regime of spouses or partners.
Within the respective sectors of the Twin Regulations, the EU legislator attributes a primary role to the criterion of habitual residence.

[9] E. Calò, 'Le norme di conflitto nelle unioni civili e nelle convivenze' *Rivista del Notariato*, 394 (2017).

This choice seems to be based on the need for a uniform interpretation of the legislation in relation to the growing transnationality of couples and the free movement of persons.[10]
It is not surprising that the priority is given to the spouses' common habitual residence rather than the common citizenship.
It was largely imposed by the need to ensure consistency with all other European regulations and, in particular, with those relating to family and succession law.
With regard to these aspects, the habitual residence criterion appears as a parameter that expresses the flexibility necessary for determining the place where the couple is effectively integrated. This is a transversal connecting criterion that has been consolidating to the detriment of other parameters, such as the domicile, precisely following its provision within other European regulations, including Regulation 2201/2003, Regulation 2010/1259 and Regulation 2012/650.[11]
The main weakness of this connecting criterion lies in the difficulty of determining habitual residence, in particular when spouses move frequently or live between countries.
It is not redundant to specify that, one of the first problems is to identify the exact moment in which the first common habitual residence of the spouses must be determined.
The interpreter must check whether to identify a specific moment immediately following the marriage or if, conversely, the first common habitual residence can materialize even after a long time.
This interpretative activity can lead to critical issues.
The jurisprudential elaboration of the EU Court of Justice and National Courts have defined residence as habitual when symptomatic indexes related to the continuity of life in a given state, the intention of the parties, the practical organization of common life occur.

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[10] R. Clerici, 'Alcune considerazioni sull'eventuale ampliamento del ruolo della residenza abituale nel sistema italiano di diritto internazionale privato', in C. Campiglio ed, *Un nuovo diritto internazionale privato* (Milan: CEDAM, 2019), 56-64.

[11] M. Giobbi, 'The concept of "habitual residence"', in M.J. Cazorla Gonzalez, M. Giobbi, J. Kramberger Skerl, L. Ruggeri and S. Winkler eds, n 5 above, 76.

It is thus possible to affirm that the habitual residence is where the person has fixed the permanent centre of her interests (her centre of life).[12]
Habitual residence is in fact distinguished from a simple temporary or occasional presence and must in principle be of a certain duration indicating sufficient stability.[13]
In absence of a common habitual residence of the spouses, the applicable law will be of their common citizenship State.
The scope of application of this criterion should remain limited given that the vast majority of spouses have a common habitual residence at the time of the marriage or establish it immediately after that moment.
The criterion of citizenship has the advantage of being easily determined, but it has disadvantages too.
In fact, this criterion often implicates a lack of effectiveness and consequently of proximity.
There is no guarantee that spouses actually have real and significant links with their state.
The default property regime in many countries is community of property (eg community of property acquired during marriage). Spouses can regulate their relations about this matter in another way, by choosing a different matrimonial property regime, but in the absence of a choice, this regime will be applied in Belgium, Croatia, France, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Czech Republic, Slovakia, Slovenia Spain (with the exception of Catalonia and the Balearic Islands) and Hungary.[14]
The community of property is an example of a property regime that results as an automatic consequence of the marriage relationship, providing for the automatic distribution of assets and responsibilities during the relationship and when the community is dissolved due to divorce, separation or death of one of them.

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[12] CJUE, 22 decembre 2010, Mercredi, prec., Rec., I-14309, pt 51.
[13] A. Bonomi, 'Observations générales', in A. Bonomi et al, *Le droit européen des relations patrimoniales de couple: Commentaire des Règlements (UE) 2016/1103 et 2016/1104* (Bruxelles: Emile Bruylant, 2021), 778.
[14] M.J. Cazorla Gonzalez, 'Community of property', in M.J. Cazorla Gonzalez, M. Giobbi, J. Kramberger Skerl, L. Ruggeri and S. Winkler eds, n 5 above, 36.

A study carried out in 2003 by the ASSER UCL4 consortium, on behalf of the European Commission, highlighted the importance of the phenomenon of international couples in the Union and the practical and legal difficulties that these couples have to face, both in the daily management of their assets as well as at the time of the division of assets because of personal separation or one of the partner's death.

In order to ensure legal certainty with regard to legal transactions and prevent the law applicable to the property regime or the property consequences of the registered partnership from being changed without the spouses/partners being aware of it, there can be no change of this law without express manifestation of the parties' will.[15]

The regulations, therefore, adopt a criterion of non-automatic modifiability of the applicable law. The German system is an example which accepts the principle of non-modifiability (*Unwandelbarkeit*) of the property regime following a change in the nationality of the spouses or their habitual residence. Therefore, in Germany, just to give an example, in order to establish which law regulates the property relations of the spouses are subject to, we should always - and only - refer to the applicable law at the time of the celebration of the marriage.[16]

That is, once the law has been identified, it will remain applicable for the entire duration of the marriage or registered union, unless the change is due to a choice of law made by the spouses/partners pursuant to Art 22.

The only exception to the principle of non-automatic modifiability of the applicable law is provided for by the last paragraph Art 26 upon decision of the judicial authority.

As regards the comparison with law 218/1995 and the impact in our legal system, it is necessary to specify what is following.

In our legal system, in certain cases, the automatic modifiability of the applicable law operates.

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[15] Recitals no 45 and 46 of EU Regulation no 1103/2016 and Recitals no 44 and 45 of EU Regulation no 1104/2016.

[16] T. Auletta, 'I rapporti patrimoniali fra coniugi', in Id ed, *Trattato di diritto privato*, IV (Turin: Giappichelli, 2011), 64.

In fact, the combined provisions of Arts 29 and 30 of the l. n 218/1995 establishes that the property relations between spouses are governed by the common national law, or, in the case of spouses having different citizenships or more common citizenships, by the law of the State in which married life is predominantly localized. Consequently, the circumstance that the spouses with different nationalities acquire a common citizenship during their married life, could lead to a change in the applicable law to their property regime. In fact, this will happen every time the law of the new common citizenship does not coincide with the one where they have located their married life.

Furthermore, the applicable law to the matrimonial property regime will change whenever the spouses with different citizenships or with several common citizenships locate their married life in a different State.

In all these cases - and without prejudice to the possible effects of the postponement pursuant to Art 13 l. no 218/1995 - starting from the acquisition of common citizenship or the new location of married life, a new law will be applied to the property regime which cannot affect the legal situations that have been exhausted, eg those that have already produced for the spouses or for third parties certain rights or required legal positions.

In our legal system these principles, at the moment, are also valid to the partners of a civil union pursuant to Art 1 paragraph 20 l. no 76/2016, which extends to them all the rules that refer to the spou se or spouses.

The Art 26 of the regulations governs the objective connection criteria for identifying the applicable law in the absence of a choice by the parties.

These connecting factors are deeply different depending on whether it is a marriage or registered partnership and these differences are dictated by the need to avoid the risk of identifying the law of a State that does not regulate registered partnerships.

This risk is even greater if we consider that, since the Regulation has universal application, the State, whose law should be applied, could also be a non-EU one.

For registered unions, only one objective connection criterion is forecast, which does not create particular application problems.
In the absence of an agreement of choice of the parties pursuant to Art 22 Regulation EU n 1104/2016, 'the law that is applicable to the property effects of registered partnerships is that of the State under whose law the registered partnership was established.'
It is noted that the criterion of the place where the union was registered, planned in the original proposal for a regulation, has been abandoned.
Normally the applicable law coincides with that of the State where the registered partnership is established. According to the wording of the aforementioned Art 22, probably the regulation wanted to regulate the hypothesis in which a particular State provides that, in the absence of an *optio iuris*, the registered union is necessarily constituted pursuant to a specific law (for example, that of the common residence or citizenship of partner) which may be different from his or her owns.
On the other hand, in the Regulation EU no 1103/2016, three objective connecting criteria are envisaged which operate in subsequent order.
The first consists in the 'first common habitual residence of the spouses after the celebration of the marriage.'
The second, which operates in the absence of the first, consists in the 'common citizenship of the spouses at the time of the celebration of the marriage.'
The third, which operates in the absence of the second or in the case in which the spouses have more than one common citizenship at the time of the celebration of the marriage, consists of the 'closest connection at the time of the celebration of the marriage, taking into account all the circumstances.'
It was highlighted that, pursuant to Arts 29 and 30 l. 218/1995, in certain cases there is an automatic modifiability of the applicable law and, more precisely, in cases where the conditions for the application of objective connecting criteria are changed (the spouses acquire a common citizenship or more common citizenships or locate their married life in another state).

On the contrary, the EU Regulations no 1103/2016 and 1104/2016 provide that as a rule the applicable law can change only by the will of the parties.
For registered unions there are no particular application problems, given that the only objective connection criterion is easy to apply.[17]
For spouses, once the applicable law has been identified by virtue of the objective connecting factors, this law will regulate their property regime for the entire duration of married life, unless the spouses decide otherwise by expressly operating an *optio iuris*.
As regards the first common habitual residence of the spouses after the celebration of the marriage, it should first of all be noted that - unlike the other two connecting factors, as well as that provided for in the matter of registered partnerships - it refers to a circumstance happened after the event which gives rise to the patrimonial regime, that is the celebration of marriage, even if no time limit is forecast.
In other words, no term is established within which the spouses must establish their first common habitual residence, after which this can be considered missing, thus giving rise to the application of the subsequent connecting criteria.
In theory, before being able to affirm that a common habitual residence has been fixed or not, one would have to wait for the entire duration of married life.
Even without reaching these extremes, in a world characterized by globalization and mobility, it is not difficult to imagine that a young couple that is abroad for temporary reasons (work placements, temporary work or who, in any case, foresee transfers for the first years continuous, etc.) may take several months or a few years before establishing a common habitual residence.
Pending that this happens, the problem will arise as to which law is applicable to their property regime. In fact It would not be conceivable that there is a temporal space between the moment of the celebration of the marriage and the establishment of the first common habitual residence, in which it is not known which law is applicable to the property regime, it does not matter whether it is days or years.
The matrimonial regime affects the ownership of properties, the powers of administration and disposition, as well as the regime of

[17] Art 22 of EU Regulation no 1104/2016.

debts and the determination of the law that should govern them concerns the spouses, third parties and, ultimately, the entire legal system, which must be based on criteria of legal certainty.
The fact that third parties can be adequately protected by the rules provided for the enforceability of regimes[18] does not exclude that spouses also have a primary interest in knowing with certainty which law is applicable to their property relationships and, ultimately, to which property regime are subject.
It could be said that the identification of the applicable law will have to be carried out when a question regarding the property regime arises, for example at the time of a purchase, payment of a debt.
However, in this way there would be the risk of obtaining different solutions at different times and this circumstance would not be acceptable, since the regulation is based on a principle of non-modifiability of the applicable law.
In fact, the law that is applicable to the matrimonial property regime, unless there is a voluntary change through a choice of law agreement, can only be one and only one for the entire duration of married life, with the sole exception provided for in Art 26 para 2 (of both Regulations) by the judge.
However, once the first common habitual residence has been established, the spouses could be subject to a different law and a different legal regime, in spite of the principle of non-modifiability of the applicable law accepted by the regulation and legal certainty.
It is difficult to accept this situation, just as it is difficult to imagine that for an indefinite and indeterminable period, the spouses and third parties do not have exact knowledge of the law applicable to the property regime.
As far as the second connecting factor is concerned, no particular problems arise (In our legal system, as in most of the continental legal systems (unlike the Anglo-Saxon countries where the criterion of domicile prevails), citizenship remains - despite the limitations of 218/1995 - the connecting criterion par excellence and it is valid for identifying the rules to be applied to the fundamental aspects of a person's life.[19]

[18] Art 28 of both Regulations.
[19] T. Ballarino, *Diritto internazionale privato italiano* (Padua: CEDAM, 2016), 74 and 149.

In the absence of common habitual residence after marriage, the law of the common citizenship of the spouses will be applied at the time of the celebration of the marriage.
If the spouses have not established common habitual residence or at the time of the celebration of the marriage they do not have a common nationality or have several common citizenships, then the criterion of the closest connection will be applied at the time of the celebration of the marriage, taking into account all the circumstances.
With regard to this last connecting factor, it is noted that in the original proposal for a regulation, among the circumstances that had to be taken into account in identifying the State with which the spouses had the closest connection, reference was made, in particular, 'at the place where the marriage was celebrated.'
In absence of this specific reference in the text of the regulation adopted, therefore, all circumstances must be taken into account without distinction.
As already highlighted, the Regulations accept a principle of non-modifiability of the applicable law.
However, the third paragraph of Art 26 Regulation EU no 1103/2016 and the second paragraph of Art 26 Regulation EU no 1104/2016, provide that exceptionally and at the request of one of the spouses/partners, the required court to decide on issues relating to the property regime or property effects of the registered partnership, may decide that the law of a State other than that of the first common habitual residence, regulates the property regime/property effects.
The power to take this decision is subject to three conditions.
The first is, in the case of marriage, that the petitioner proves that the spouses had their last common habitual residence in the other State for a significantly longer period than that of the first common habitual residence, while in the case of a registered partnership, that the partners have had their last common habitual residence in the other state for a significantly long period.
The second is that both spouses/partners have relied on the law of that other state in organizing or planning their property relationships.
The third is that, prior to the date of establishment in the last common habitual residence in the other State, the spouses/partners did not enter into a marriage agreement/agreement between partners.

As for the first of the required conditions, the fact that the duration of the last common habitual residence of the spouses was longer than the previous one will be easily demonstrable, since it is an objective situation.
As for the second of the required conditions, that is a little less easy to be recognised at least in less obvious cases, it could prove that the duration is 'significantly' longer (for the spouses), depending on various factors, first of all the duration of the entire duration of the couple's life, but also the intention of the spouses/partners, depending on the importance that it is recognized in the notion of habitual residence.
Finally, it could be even less easy to prove that both spouses/partners have relied on the law of that other State in the organization or planning of their patrimonial relationships, as this circumstance could be based on subjective states and in any case elements that are not always easily documentable.
Since this is an exception to the rule of the non-automatic modifiability of the applicable law, the required court may apply the different law only if the applicant has unequivocally demonstrated the presence of the superior circumstances.
As for the third of the required conditions, on the one hand, it is coherent with the principle of the autonomy of the will of the parties, by virtue of which it is correct to believe that the choice of a specific conventional regime must prevail over any form of automatic change of law applicable; on the other hand, it is the most suitable since the automatic modification of the applicable law would make the fate of the previous matrimonial agreement or agreement between partners very problematic which, moreover, could have as its object the choice of a regime completely unknown to the new law.
The current system of private international law does not provide for a provision similar to that of Art 26 para 3.
However, this rule will have practical consequences for spouses and third parties, especially in consideration of the retroactive application of the law that will be identified by the judge.
In fact, once the competent judicial authority has decided on the application of the law of the last common residence, this will be applied retroactively from the celebration of the marriage or from the

establishment of the registered partnership, unless one of the spouses/partners disagree.
In the latter case, the retroactivity will be only partial. In fact, the law of that other State, will produce effect from the establishment of the last common habitual residence in that other State, even if this circumstance is not always easy to be verified with accuracy, when a factual and non-formal notion of habitual residence is taken into account.
The identification of the exact effective date of the new applicable law has important consequences. In fact, the ownership of one or more assets or the debt regime could depend on it, if their regulation is different from that provided for in the previously applicable law.
Therefore, even in this case, the retroactivity of the applicable law could be a source of considerable application difficulties, which cannot always be resolved objectively and with suitable guarantees for both spouses or third parties.
In both cases of retroactivity, the application of the law of the other State does not affect the rights of third parties deriving, for the spouses, from the applicable law pursuant to Art 26 para 1 letter a to Regulation EU no 1103/2016, for partners, by the applicable law pursuant to Art 26 para 1 Regulation EU no 1104/2016.

III. The differences between the two Twin Regulations

Art 26 of EU Regulation no 1104/2016 is distinguished from the Twin rule first of all by the existence of a single connecting factor that operates in the absence of a choice by the parties: 'the law of the State under whose law the registered partnership was established.'
The political choice fell on a single indisputable connecting factor. This is the main difference between the two regulations: the EU legislator has not to extended the cascade connections that it has provided for married couples to registered unions.
This circumstance guarantees certainty, but it does not contemplate the case in which a civil union can be registered in different states, which could give rise to practical inconveniences and to a conflict of laws that can be applied abstractly.

The connecting factors referred to Art 26 constitute decidedly tested mechanisms for choosing the applicable law that works despite the inevitable abstractness of the rule.
These are criteria also adopted in other Regulations such as the adoption of the habitual residence of the deceased at the time of death as a title of general jurisdiction and objective connecting factor or also the criterion of the law of the State in which the deceased possesses citizenship.
The practical importance of objective regulations remains, in the matters governed by the Regulations, considerably higher than that of spouses or partners' choice of law.

Article 27
Scope of the applicable law

Salvatore Coscarelli

Regulation (EU) 2016/1103

The law applicable to the matrimonial property regime pursuant to this Regulation shall govern, inter alia:

(a) the classification of property of either or both spouses into different categories during and after marriage;

(b) the transfer of property from one category to the other one;

(c) the responsibility of one spouse for liabilities and debts of the other spouse;

(d) the powers, rights and obligations of either or both spouses with regard to property;

(e) the dissolution of the matrimonial property regime and the partition, distribution or liquidation of the property;

(f) the effects of the matrimonial property regime on a legal relationship between a spouse and third parties; and

(g) the material validity of a matrimonial property agreement.

Regulation (EU) 2016/1104

The law applicable to the **property consequences of registered partnerships** pursuant to this Regulation shall govern, inter alia:

(a) the classification of property of either or both **partners** into different categories during and after the **registered partnership**,

(b) the transfer of property from one category to the other one,

(c) the responsibility of one **partner** for liabilities and debts of the other **partner**,

(d) the powers, rights and obligations of either or both **partners** with regard to property,

(e) the partition, distribution or liquidation of the property upon dissolution of the r**egistered partnership**,

(f) the effects of the p**roperty consequences of registered partnerships** on a legal relationship between a **partner** and third parties, and

(g) the material validity of a **partnership property** agreement.

Summary: I. The rule. – II. The legal regime. – III. Comparison with reference to the legal regime.

I. The rule

Art 27 lists some matters governed by the law that is applicable to the matrimonial property regime or the property effects of registered partnerships.
The technique used by the European legislator, which consists in describing the field of application of the law declared to be applicable, has become classic in European private international law.[1]
Well, there is no provision dedicated to the scope of the law in the 1978 Hague Convention.
In fact, only some national codifications provide for a rule relating to the field of application of the law.
The intention of the European legislator with the law applicable to the property regime between spouses or partners is to regulate the latter starting from the moment of classification of the assets of one or both spouses or partners in various categories during the validity of the family relationship and after its dissolution, until the liquidation of the properties.
Art 27 is a direct expression of the principle of unity by defining the scope of application of the regulations, that is which aspects of the property regime are covered by the law that is applicable to the specific case.
Art 27 of the Regulations governs the scope of the applicable law with a non-exhaustive listing.
In the two Twin Regulations, the rule in question is identical except for the terminological adaptations in reference to partners and registered partnerships.
However, in Art 27 of both EU Regulations the management powers of the spouses are established with respect to the assets and the effects of the dissolution of the property regime (and therefore the fate of the assets that compose it).[2]

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[1] Art 12 Regulation Rome I, Art 15 Regulation Rome II and Art 23 Succession Regulation.

[2] G.V. Colonna, 'I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate' *Famiglia e Diritto*, 827, 839 (2019).

Art 27 of the Regulations governs the scope of the applicable law, with a list that is not to be considered mandatory, given the incipit 'among other things' that precedes the list.
Letters a) to d) and letter f), mutatis mutandis, are identical in both regulations, respectively providing that the law applicable to the matrimonial property regime and the property effects of registered partnerships, determines:
a) the classification of the assets of one or both spouses/partners into various categories during and after the marriage/registered partnership;
b) the transfer of goods from one category to another;
c) the liability of one spouse/partner for the liabilities and debts of the other spouse/partner;
d) the powers, rights and obligations of one of the spouses/partners or of both spouses/partners with regard to the assets.
f) the effects of the matrimonial property regime and the consequences of the property consequences of registered partnerships on the legal relationships between a spouse/partner and third parties;
Letter e) of Regulation 1103/2016 concerns 'the dissolution of the matrimonial property regime and the division, distribution or liquidation of assets', while letter e) of Regulation 1104/2016 concerns 'the division, distribution or liquidation of assets' act of dissolution of the registered partnership.'
Letter g) of Art 27 of Regulation EU no 1103/2016 refers to the 'substantial validity of a marriage agreement,' while letter g) of Art 27 of Regulation EU no 1104/2016 refers to the 'formal validity of the agreement between partners'.
This difference, however, must be considered the result of an error in the translation in the Italian text published in the GURI, given that the letter g) of both articles, both in the French text 113 and in the English text 114 text refers to 'material validity.' Moreover, there is no reason to justify such a difference in discipline.
The scope of the applicable law established in Art 27 of the regulations does not differ from that provided by the current legislation in our system.
The only small observation should be made with regard to the content of letter e) of Art 27 of Regulation EU 1104/2016, where no reference

is made to the hypothesis of the dissolution of the property regime, but only to the dissolution of the registered partnership.
On closer inspection, even in a registered partnership it is possible that only the 'property regime' of the partners will be dissolved and not also the registered partnership. In our legal system, for example, pursuant to Art 191 of the civil code, the application of which is referred to in Art 1 para 13 of law no 76/2016, this happens every time the partners of a civil union conventionally modify their property regime of legal communion, even without dissolving the registered union.
Since the listing of Art 27 must not be construed as mandatory, it is believed that, in the hypothesis made above, also the dissolution of the property regime is governed by the applicable law based on Regulation EU no 1104/2016, even if the registered partnership is not dissolved.
Therefore, only Art 27 letter G seems to relate to the establishment of the regime or the property effects of the registered partnership.
This rule specifies that the substantial validity of a marriage or couple agreement falls within the competence of the law designated by the Regulation.

II. The legal regime

Art 27 does not expressly refer to the existence and nature of the legal regime.
Aiming to classify the assets of spouses and partners into possible categories, Art 27 brings the founding operation of a possible legal regime back to the applicable law.[3]
The law declared applicable to the matrimonial property regime or to the property effects of a registered partnership is decisive in determining whether the conclusion of a marriage or a union involves the submission of the spouses or partners to any legal regime.[4]
The application of the law governing the matrimonial property regime or the property effects of the civil union for the effects of this regime

[3] P Wautelet, 'Le régime légal', in A. Bonomi et al eds, *Le droit européen des relations patrimoniales de couple: Commentaire des Règlements (UE) 2016/1103 et 2016/1104* (Brussels: Bruylant, 2021), 851.
[4] ibid

on a legal relationship between a spouse or partner and a third party must also concern the special protection mechanism provided for by Art 28.
The field of the applicable law brings with it all the substantive discipline.
For example, Art 27 letter D leads us to the powers, rights and obligations with regard to the assets that are subject to the applicable law identified by the Regulations.
The first element determined by the applicable law is the classification of assets into various categories depending on whether there is legal communion or separation of assets.

III. Comparison with reference to the legal regime

The legal matrimonial property regime in most European countries is community of property (Belgium, Bulgaria, Croatia, Estonia, France, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Czech Republic, Romania, Slovakia and Slovenia). In other countries this is not the case, as in the case of Denmark, Finland, Germany and Sweden, where a system of deferred communion is applied; while in others the separation of property regime is still applied: Austria, Cyprus, Greece and Ireland, or as in individual territories of multi-legislative states, such as the United Kingdom and Spain (Scotland, Catalonia or the Balearic Islands).[5]
It is very interesting to pause briefly on the comparison between France and Italy with reference to the community of property regime.
The matrimonial property regime is governed by the law of the country in which the marriage is celebrated. In Italy and France, the legal regime is the community of assets, except if the spouses explicitly choose the regime of separation of assets.
Under French law, the choice of regimes other than community of property ('contrat de mariage') must be made by signing a public deed before a notary and deposited at the Municipality before the marriage.

[5] M.J. Cazorla Gonzalez, 'Introduction', in Id, M. Giobbi, J. Kramberger Skerl, L. Ruggeri and S. Winkler eds, *Property relations of cross border couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2020), 34.

Therefore, the function of Art 27 is to define the field of application of the Regulations.
In other words, it clarifies which aspects of the overall arrangement of the property regime are covered by the law that is applicable to the specific case.[6]

[6] P. Bruno, *I Regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate. Commento ai Regolamenti (UE) 24 giugno 2016, nn. 1103 e 1104 applicabili dal 29 gennaio 2019* (Milan: Giuffrè Francis Lefebvre, 2019), 210.

Article 28
Effects in respect of third parties

Giovanna Chiappetta

Regulation (EU) 2016/1103

1. Notwithstanding point (f) of Article 27, the law applicable to the matrimonial property regime between the spouses may not be invoked by a spouse against a third party in a dispute between the third party and either or both of the spouses unless the third party knew or, in the exercise of due diligence, should have known of that law.

2. The third party is deemed to possess the knowledge of the law applicable to the matrimonial property regime, if:

(a) that law is the law of:

(i) the State whose law is applicable to the transaction between a spouse and the third party;

(ii) the State where the contracting spouse and the third party have their habitual residence; or,

(iii) in cases involving immoveable property, the State in which the property is situated; or

(b) either spouse had complied with the applicable requirements for disclosure or registration of the matrimonial property regime specified by the law of:

Regulation (EU) 2016/1104

1. Notwithstanding point (f) of Article 27, the law applicable to the **property consequences of a registered partnership** between the **partners** may not be invoked by a **partner** against a third party in a dispute between the third party and either or both of the **partners** unless the third party knew or, in the exercise of due diligence, should have known of that law.

2. The third party is deemed to possess the knowledge of the law applicable to the **property consequences of the registered partnership**, if:

(a) that law is the law of:

(i) the State whose law is applicable to the transaction between a **partner** and the third party,

(ii) the State where the contracting **partner** and the third party have their habitual residence or,

(iii) in cases involving immoveable **property**, the State in which the **property** is situated; or

(b) either partner had complied with the applicable requirements for disclosure or **registration of the property consequences of the registered partnership** specified by the law of:

(i) the State whose law is applicable to the transaction

(ii) the State where the contracting between a spouse and the third party;

(ii) the State where the contracting spouse and the third party have their habitual residence; or

(iii) in cases involving immoveable property, the State in which the property is situated.

3. Where the law applicable to the matrimonial property regime between the spouses cannot be invoked by a spouse against a third party by virtue of paragraph 1, the effects of the matrimonial property regime in respect of the third party shall be governed

(a) by the law of the State whose law is applicable to the transaction between a spouse and the third party; or

(b) in cases involving immoveable property or registered assets or rights, by the law of the State in which the property is situated or in which the assets or rights are registered.

(i) the State whose law is applicable to the transaction between a spouse and the third party have their habitual residence; or **partner** and the third party,

(ii) the State where the contracting **partner** and the third party have their habitual residence, or

(iii) in cases involving immoveable property, the State in which the property is situated.

3. Where the law applicable to the **property consequences of a registered partnership** cannot be invoked by a partner against a third party by virtue of paragraph 1, t**he property consequences of the registered partnership** in respect of the third party shall be governed:

(a) by the law of the State whose law is applicable to the transaction between a **partner** and the third party; or

(b) in cases involving immoveable property or registered assets or rights, by the law of the State in which the property is situated or in which the assets or rights are registered.

Summary: I. Introduction. – II. Third party dichotomy. – III. Third party protection tools: the difficulty of knowing the position of the spouse or future partner. – IV. Legal autonomy in European Private International Law. – V. Dispute as a condition of departure from Art 27, point f. – VI. *Onus probandi* and the nature of presumptions. – VII. Evidence of knowledge or lack of diligence. – VIII. The solution for the hypothesis of non-enforceability to third parties, arising from the law applicable to the property conventions of couples. – IX. Conclusions.

I. Introduction

Art 3, para 2, of the Treaty of Lisbon (TEU) clarified some of the relevant aspects related to European citizenship, including 'offering' to 'its citizens an area of freedom, security and justice without internal borders.'

In order to guarantee and facilitate the free movement of persons within the territories of its Member States, the European Union has regulated patrimonial family relations.[1]

New important principles about applicable law stem from Private International Law and European legislation.[2]

In European international law, the *'pactum de lege utenda'* has been transformed into the priority criterion of general application to

[1] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes; Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

[2] The choice of law sometimes becomes the means to overcome the obstacles linked to the lack of equivalence, between National rights and the election of the forum instrument for '*désactiver l'impérativité*,' of National legislative prohibitions. Thus, P. Hammjie, 'Ordre public et lois de police limites à l'autonomie de la volonté', in H. Fulchiron et al eds, *L'autonomie de la volonté dans les relations familiales internationales* (Brussels: Bruylant, 2017) 112-138, which highlights how European discipline, in order to ensure certainty and predictability of the applicable law, strongly frames the use of defence mechanisms through which Member States or participants in enhanced cooperation can protect national public policy. All the European Regulations in family law present the only reserve of the public policy exception not to safeguard the national conceptions of the Member States, but to promote a real '*ordre public européen de la famille*' which not only transcends but can wipe out the diversity of national conceptions (130). See, eg, Recital 54 of Regulation no 1103 of 2016. In relation to public policy as a protection for the various national conceptions, regulations are generally expressed in this way 'The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum' Art 31 of Regulation 2016/1103. Only Council Regulation (EC) no 4/2009 of 18 December 2008 (concerning the regulation of maintenance and divorce obligations) provides for the instrument of compliance with the mandatory rules of the forum.

identify the applicable law in many areas, including family relationships.
Recent indications by the European legislator point towards a mutual recognition of measures, decisions or acts perfectioned abroad.[3]

II. Third party dichotomy

Arts 28 of the so-called Twin Regulations in question introduce limitations to the enforceability of third parties of the law that are applicable to the matrimonial regime between spouses or to property effects between partners. This type of limitation operates, in general, if the third party did not know it and was not negligent in obtaining information on the applicable discipline.
In this commentary, we will proceed with the focus of the problems, determined by the different disciplines, in the matter of property conventions given the universal application of the law (Art 20) and the wide scope outlined by Art 27.
For example, the SS.UU. of the Italian Supreme Court (Italian *Cassazione*)[4] also include the patrimonial fund within the sphere of marriage agreements.
The latter can be constituted by each or both spouses, or by a third party.[5] Furthermore, the agreements between the spouses can be stipulated by the emancipated minor with the assistance of a third party pursuant to Arts 165 and 90 of the Italian Civil Code.

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[3] Council Regulation (EU) 2016/1103 of 24 June 2016, n 1 above; Council Regulation (EU) 2016/1104 of 24 June 2016, n 1 above.
[4] Cass. SS.UU. 13 October 2009 no 21658, compliant Cass. 23 July 2019 no 19824. 5 The patrimonial fund as a marriage agreement, is subject in Italy to both annotations in the Civil Status documents pursuant to Art 162 of the Italian Civil Code and to the transcription pursuant to Art 2647 of the Italian Civil Code. It follows that, in the lack of annotation, the knowledge that the third party has of the existence of the fund by virtue of the consultation of the property registers, is insufficient for the purposes of enforceability. Therefore, the establishment of a patrimonial fund is subject to double publicity which determines double charges, both for the constituents – who will be required to record in the Civil Status registers (declarative function) and to transcribe (publicity news function) – and for the third party creditors, who will be required to consult either the real estate registers or the Civil Status registers.

In these cases, the question arises as to compatibility with the model of agreement subjectively outlined by the regulations as an agreement perfectioned between spouses or future spouses or between partners or future partners (hereinafter also referred to as the couple).
In order to identify the scope of application of Arts 28, it is necessary, first of all, to outline the concept of party and 'third party,' for the purposes of enforceability.
As already highlighted also by the French doctrine, the concept of third party, pursuant to Arts 28 in question, arises from having a direct interest '*à déterminer quels sont les principes qui régissent les rélations patrimoniales au sein du couple*,'[6] whether it is matrimonial or union.
Interest in the knowledge (or knowability) of the legal regime applicable to property relations of the family community to avoid that the third party position is 'made vulnerable' by the choice of a favourable law and/or jurisdiction for the policyholders or for the recipients of the direct effects of the property agreement. It is clear the aim of guaranteeing the predictability of the applicable regime and avoiding 'fraudulent' intentions in favour of the couple, through the application of legal regimes that are not known or are not known by the third party.
The third category contemplates a plurality of interactions between the couple and strangers to it. A third party can be the creditor or debtor of the spouse or partner or both. The concept of party and third parties recalls the principle of relativity of the effects of the 'rectius convention' contract between the parties (Art 1372 of the Italian Civil Code) and that of opposability to third parties of the effects of the contract.
In this way, the third party is the one who has not perfectioned the agreement and is not the direct recipient of the effects deriving from it outside any choice for the applicable law. On the contrary, the party is the author of the act or the direct recipient of the effect of the agreement. Thus, in the hypothesis of a patrimonial fund, constituted

[6] P. Wautelet, 'Article 28 Opposabilité aux tiers', in A. Bonomi and P. Wautelet eds, *Le droit européen des relations patrimoniales de couple* (Brussels: Bruylant, 2021), 920.

by a third party, it will have the spouses and possibly the children as parties or recipients of the direct effects deriving from the fund.[7]

III. Third party protection tools: the difficulty of knowing the position of the spouse or future partner

The third party protection systems and the regimes of the property conventions of households differ from State to State and sometimes, as in Spain, from region to region. This complicates the question of enforceability of the legal regime against the third party.
Arts 28 resort to the system of presumptions to resolve the issue. However, in private international law, this system of presumptions does not seem to have an adequate protective function in its entirety. First of all, the third party may have difficulty in becoming aware of status held by the married person or partner with whom he or she enters into a relationship.
In particular, in the case of a couple with transnational[8] implications, the knowledge of family status is made more difficult for the third party, in the absence of a single advertising system. Even more difficult for third parties, it is to know that the person with whom he contracts, is a spouse or a future partner.
As well as any third party, it may have difficulty in verifying the existence of an agreement by the same, perfectioned before the marriage or the registration of the union to regulate the property relations of the couple. Patrimonial effects extend to relationships, even if there is a possibility of a dissolution of the union (Art 3, point b) or marriage (Art 3, point a).[9] In fact, the National Legal Systems

[7] For the meaning of party and third parties, see all in G. Chiappetta, *Azioni dirette e tangibilità delle sfere giuridiche* (Naples: Edizioni Scientifiche Italiane, 2000), 128 ff.

[8] Art 81 TFEU establishes the competence of the EU in the field of judicial cooperation for family law measures 'having transnational implications.' However, what this implication means is not specified. On the notion, see O. Lopes Pegna, 'La nozione di controversia "transfrontaliera" nel processo di armonizzazione delle norme di procedura civile degli Stati membri dell'Unione europea - The notion of "cross-border" dispute in the process of harmonization of the rules of civil procedure of the member states of the European Union' *Rivista di diritto internazionale privato e processuale*, 922, 922-943 (2018).

[9] In Italy there is no publicity of such agreements. On the applicability of the regulations in question to static Italian couples to the agreements in view of the dissolution of marriage or civil union of this discipline, G. Chiappetta, 'La

attribute a limited relevance to the situation of a spouse[10] or future partner. In any case, there is no advertising regime for vows and, even less for future partners.

Furthermore, Regulation 1104/2016 spells out the place of registration of party union among other connecting factors of the applicable law. In this way, even 'static' citizens who do not circulate in other States, can choose to register the union in a member country in order to be able to choose the registration law, as applicable to their property relationships (Art 22, point c). The negotiating autonomy of the parties to the union thus creates the link with a state other than that of citizenship, through the choice of the place of registration of the union, making their patrimonial relations transnational.

In such a context of cross border situation, how can any third party identify the applicable law, if it does not have the tools to verify the existence of the agreement and therefore its content?

The situation is further complicated by the existence of different national regimes for the advertising of property agreements, futures spouses, spouses, partners or such futures for the purposes of enforceability of third parties.

Some countries, such as Italy and France, adopt indirect advertising of the convention. It takes place with the annotation in the marriage deed in the civil status registers of the date of the agreement, the notary, the details of the contracting parties and in Italy, the possible choice of the separation of property regime, in the marriage certificate. Third parties should investigate whether the counterparty is a spouse or a future partner, who has entered into a patrimonial agreement, and only subsequently question the existence of an agreement.

The problem, as highlighted, is amplified when it comes to the so-called multi-transnational couples, as there is no single system for

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"semplificazione" della crisi familiare: dall'autorità all'autonomia', in P. Perlingieri and S. Giova eds, *Comunioni di vita e familiari tra libertà, sussidiarietà e inderogabilità. Atti del 13º convegno nazionale (Napoli, 3-4-5 maggio 2018)* (Naples, Edizioni Scientifiche Italiane, 2019), 435-464.

[10] In Italy, it notes the breaking of the promise of marriage, for the purposes of restitution of gifts and compensation for damages (Arts 79, 80 and 81 of the Civil Code) or for the request for publications in view of marriage (Art 96 of the Civil Code) and in others situations that are not relevant for the purposes of enforceability to third parties.

registering property agreements, valid for all EU Member States and when the choice of the couple falls on a law of a non-EU Country. In the latter case, the information system is made available to citizens by Arts 63 on the European judicial network.
Arts 28 therefore take on particular relevance for the protection of third parties, in the event of transnational implications of the couple's financial situations, also due to the role accorded to the negotiating autonomy of the newly-weds and future 'static'[11] partners.
This is because the applicable property regime can originate not only from a legislative provision but also from an act of negotiation autonomy (convention), which could have the purpose of reducing the guarantees of the rights of third parties.

IV. Legal autonomy in European Private International Law

The choice for several applicable laws or for the mechanism of recognition opens the door to the phenomenon of forum or system shopping even with regard to 'static' European citizens married or living together (who are not transnational families).[12]
The condition of the cross-border element, once considered as a dogma, is now considered as a result of the use (or judicial

[11] European action, while respecting the 'national identity' – in particular constitutional of the various legal systems (Art 4, para 2, TEU and 67, para 1, TFEU), with regard to a European dimension (eg relating to situations with transnational implications) – is expanding to 'static' European citizens, eg citizens residing in an EU country while not exercising the right to move within the Union. On the jurisprudence of the Court of Justice for the protection of the so-called static citizens see E. Pagano, 'La rilevanza della cittadinanza e dell'unità della famiglia nella recente prassi della Corte di giustizia in tema di ricongiungimento familiare - The importance of citizenship and unity of the family in the recent case-law of the Court of Justice concerning family reunification' *Il diritto dell'Unione Europea,* 279, 279-308 (2017). 12 The Court of Justice examined the rejection of applications for residence, submitted by parents for the purposes of family reunification with their children as 'static' European citizens. ECJ 5 May 2011, Case C-434/09, *Shirley McCarthy*; ECJ 15 November 2011, Case C-256/11, *Murat Dereci*; ECJ, 8 November 2012, *Yoshikazu Iida*; ECJ 6 December 2012, Cases C-356/11 and 357/11, *O. and S.*; ECJ 8 May 2013, Case C-87/12, *Kreshnik Ymeraga*; ECJ 10 October 2013, Case C-86/12, *Adzo Domenyo Alokpa*; ECJ, 13 September 2016 Case C-165/14, *RedònMarìn*, para 81, Case C-304/14, *CS*, para 36 respectively.

interpretation) of European citizenship, assimilated to purely internal situations.
Art 22 of (UE) Regulation 1104/2016 allows 'static' couples to choose the place of registration of the union and to choose the substantive law applicable to their property relations, also in the eventuality of the break of the union.
Therefore, a *quaestio iuris* arises:
'Is it possible that the abuse of the rights connected to European citizenship leads the couple to evade the application of an unavailable National law?'
The answer is 'in the negative' if the application of foreign legislation is in compliance with the constitutional public order (*lex fori*).
In this way, the distinction between cross-border and purely internal situations is blurred.[13]

V. Dispute as a condition of departure from Art 27, point f

In such a scenario, Arts 28 in question, in order to protect the kaleidoscopic category of third parties, introduce a limit to the enforceability of the applicable law pursuant to Arts 27, point f, the property regimes or the property effects of agreements between futures spouses or futures partner, spouses or partner.
It is about protection tools for third parties completed by Arts 22, para 3 and Art 30 of regulations. The former state with a *lex specialis*[14] that the retroactive change of the applicable law during the marriage or union cannot prejudice the rights of third parties deriving from this law, while the latter make it for the rules of necessary application to prevail over the applicable regime of the law of the forum.[15]
The dispute, therefore, cannot concern the change in the matrimonial property regime after the establishment of the relationship with the third party and the choice of a regime other than the national one of

[13] See E. Pagano, n 11 above, 279 ff.
[14] P. Wautelet, n 6 above, 946.
[15] In Italy eg rules of application necessary for the protection of the house, used as a family residence or the primary property regime of contribution to the needs of the family community (Art 143 of the Civil Code, Art 1, paras 11 and 53, point b) l. 76/2016). For similar protection in France, P. Wautelet, n 6 above, 942.

the 'static' couple, in order to escape the national rules of necessary application.[16]
Arts 28 do not require the formalization of the dispute. It can also be translated into an informal exchange of views, in which the third party highlights the existence of a dispute over the relationship with the couple. A further condition for the derogation regime, pursuant to Arts 28, is proof of the third party's ignorance of the law applicable to the matrimonial regime or the property effects of the registered partnership.
The Articles in question equate the inexcusable ignorance of the same by the third party to the notion of effective 'knowledge of this law.' These concepts contemplated in the Regulations must receive a European interpretation.
It should be remembered that the Court of Justice has preliminary jurisdiction under Art 267 of the TFEU to rule on the interpretation of EU[17] law and that the Recitals serve to give substance to the 'European' interpretation.

VI. *Onus probandi* and the nature of presumptions

Who bears the burden of proof for the enforceability of the law, applicable to property regimes?

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[16] L. Carpaneto and I. Queirolo, 'Norme di conflitto e ruolo dell'autonomia privata', in L. Carpaneto et al eds, *La 'famiglia in movimento' nello spazio europeo di libertà e giustizia* (Turin: Giappichelli, 2019), 174; G. Chiappetta, 'Cittadinanza europea: opportunità e abusi nel diritto internazionale privato della famiglia' *La cittadinanza europea*, 105, 106 (2020).

[17] On the autonomous interpretation and the so-called 'reference for a preliminary ruling,' the jurisprudence of the Court of Justice (see for all ECJ, Section III of 5 October 2010 in case C-400/10 PPU in case *J.McB.* v *LE*) noted that: '41. To the extent that the notion of "right of custody" is thus defined by regulation no 2201/2003, it is autonomous with respect to National regulations. Indeed, from the need to guarantee both the uniform application of EU law and the principle of equality, it follows that the terms of a provision of that law, - which does not contain any express reference to the law of the Member States, for the purposes of determining of its meaning and scope, - should be the subject, throughout the Union, of an autonomous and uniform interpretation, to be carried out taking into account the context of the provision itself and the purpose pursued by the legislation in question.'

Recital 52 for married couples and 51 for registered partnerships gives guidance on the burden of proof. The burden of proof of actual or presumed knowledge of the third falls on the couple. It is for the couple (whether represented by the couple or by the spouse or by the partner or by the future partner), who wants to make use of the property regime applicable to their property regimes, to demonstrate the existence of a presumed knowledge situation pursuant to Art 28, para 2, alongside the actual knowledge of the third party or the lack of diligence by the latter.

The hypotheses of presumption contemplated by the second paragraph are an abstract specification of the generic inexcusable ignorance, dictated in the first paragraph. However, the circumstances expressly enumerated in the second paragraph for the purposes of the enforceability of the law represent an 'absolute' presumption of knowledge.[18] The couple who intends to make use of the presumptions referred to in the second paragraph must limit themselves to demonstrating the conditions of application of a listed hypothesis. Any third party does not seem to be admitted to proof to the contrary.[19]

Otherwise, the negligence for duty of information by the third party, dictated in the first paragraph of Arts 28, requires the analysis of concrete circumstances adduced by the couple in contradiction with the third party. In this case, the parties to the dispute are on an equal footing. This *onus probandi* is independent of the provisions of national law.

The couple can alternatively choose whether or not to resort to typed presumptions, or whether to demonstrate real knowledge of the third party.

VII. Evidence of knowledge or lack of diligence

Greater difficulties for the enforceability of the law applicable to property regimes demonstrate that third parties possess or could have

[18] P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate* (Milan: Giuffrè Francis Lefebvre, 2019), 217.

[19] P. Wautelet, n 6 above, 955.

acquired sufficient knowledge.[20] Arts 28, para 1, imposes on the couple a test with a specific object, which must be identified on the basis of national laws and those of private international law. The object to examine is the knowledge or the knowability of the existence of a convention concluded by the couple. Evidence on which the Regulations do not intervene, by referring to the laws and jurisdictions called to resolve the dispute.

VIII. The solution for the hypothesis of non-enforceability to third parties, arising from the law applicable to the property conventions of couples

Arts 28, paras 3, offer solutions for the hypothesis of lack of proof of the opposability to third parties of the legal or voluntary regimes, which govern the couple's property relationships. There are two indications from the European legislator: the replacement of the non-enforceable law with the one that regulates the transaction between the third party and the spouse or partner (Art 28, para 3, point a) and the application of the law in force, where the property is located or in which the assets or rights, the subject of the dispute, are registered (Art 28, para 3, point b). These are considered preferable to regard Arts 28, paras 3, point b *lex specialis*, compared to that hypothesis in point a).

IX. Conclusions

Arts 28, paras 3 of the Regulations in question contain a novelty. This is providing the system for replacing the law applicable to the couple's property relationships with another law that has a closer connection with the transaction concluded or with the nature of the disputed assets. Unlike other provisions of private international law, it takes a position indicating two solutions to the conflict although they are not of a material nature.

[20] For a summary on the interpretations of the object of 'knowledge:' cf P. Wautelet, n 6 above, 969 ff.

Article 29
Adaptation of rights *in rem*

Vincenzo Bonanno

Regulation (EU) 2016/1103

Where a person invokes a right in rem to which he is entitled under the law applicable to the matrimonial property regime and the law of the Member State in which the right is invoked does not know the right *in rem* in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right under the law of that State, taking into account the aims and the interests pursued by the specific right *in rem* and the effects attached to it.

Regulation (EU) 2016/1104

Where a person invokes a right in rem to which he is entitled under the law applicable to the p**roperty consequences of a registered partnership** and the law of the Member State in which the right is invoked does not know the right *in rem* in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right under the law of that State, taking into account the aims and the interests pursued by the specific right *in rem* and the effects attached to it.

Summary: I. Applicable law, adaptation of rights *in rem* and legal certainty. – II. The nature of rights *in rem* between typicality and adaptation. – III. Implementation of the principle of free movement of citizens and their assets and rights. – IV. Tools to help interpreters and citizens. – V. Adaptation of rights *in rem*. Conclusions.

I. Applicable law, adaptation of rights *in rem* and legal certainty

The adaptation of rights *in rem* represents the solution chosen by the European Legislator in Regulations no 1103 and no 1104 of 24 June 2016 in order to allow the 'creation or the transfer resulting from the matrimonial property regime (property consequences of registered partnerships) of a right in immovable or movable property as provided for in the law applicable to the matrimonial property (to the property

consequences of registered partnerships regime).'[1] However, the same Regulations should not 'affect the limited number ("numerus clausus") of rights in rem known in the national law of some Member States. A Member State should not be required to recognise a right in rem relating to property located in that Member State if the right in rem in question is not known in its law.' This solution seems decisive in order to guarantee to married couples (unmarried couples) legal certainty and a certain predictability as to their assets.[2] In this way, Art 29 of both Regulations under discussion, provides for the adaptation of rights *in rem* to allow spouses and partners to enjoy the rights that have been created or transferred to them as a result of the matrimonial property regime or by virtue of the property effects of registered partnership in another Member State. The choice of bringing together in a single instrument, Regulation 1103/2016 all the rules applicable to matrimonial property regimes and Regulation 1104/2016 all the rules applicable to the property effects of registered partnerships, seems very appropriate.

In today's reality characterized by a constantly increasing mobility of people, the certainty of legal situations constitutes an important principle of legal civilization, especially for cross-border couples and for the possible purchases and transfers of rights on real estate and movable property. The application of Art 29 in this globalized context is decisive in order to carry out the integration process in the European context of which these Regulations are an expression. In fact, it is precisely within the scope of the applicable law referred to in Art 27 of the Twin Regulations which determines the classification of assets, the passage, the powers, the rights and obligations of the partners, the dissolution, division, distribution and finally the liquidation of the assets for which the adaptation of rights *in rem* requires the legal operators a decisive hermeneutic work for the purpose of their recognition. All this applies not only between the partners, but also towards third parties in the presence of a conflict between the law applicable to the property regime and that of the State in which these rights should be recognized in the case of transfers of real rights or other legal institutions of which they can be subject to.

[1] Recital 24 of both Regulations.

[2] Recital 15 of both Regulations.

II. The nature of rights *in rem* between typicality and adaptation

It is necessary to clarify, pursuant to Art 1 second paragraph letter g) of the Regulations in question that the nature of real rights are excluded from the scope of their application. In fact, these rights are based on their own and different traditions in the Member States which, although characterized by a certain continuity in the legal systems of civil law, may have different declinations or be non-existent even in comparison with the common law systems. Such differences may lead to coordination problems in the law applicable to the property regime relating to rights *in rem*. The solution of adaptation is in close continuity with the principle of universality of the applicable law,[3] which enables the traditions of the Member States to be preserved and affords protection in the recognition of a right which is as equivalent and closest as possible under the law of the Member States in which those rights are invoked. This right is adapted if necessary and to the extent possible in relation to the objectives, interests and effects pursued by the right *in rem* in question. The adaptation then relates to the content of real rights, it consists in the analysis of the concrete case and in the application of the community principles of balancing private interests with the general principles of the protection of legitimate expectations and the efficient and safe circulation of rights.

In the conflict of law between the *lex rei sitae* and the law applicable to the property regime of cross-border couples, the instrument of adaptation would allow the creation and transfer of rights on assets regardless of where they are located and regardless of whether they are known or not by the jurisdiction invoked. In conclusion, the adaptation is based on a systematic and axiological interpretation of the applicable rules thanks to which it will be possible to avoid the fragmentation of family assets and ensure legal certainty. This is more

[3] P. Bruno, *I Regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate. Commento ai Regolamenti (UE) 24 giugno 2016, nn. 1103 e 1104 applicabili dal 29 gennaio 2019* (Milan: Giuffrè Francis Lefebvre, 2019), 220.

evident in relation to Arts 30 and 31 of both Regulations because the rules of the overriding mandatory provisions and respect for the public policy may constitute a limit to the full application of the Regulations in question.
The *numerus clausus* principle of rights *in rem* is considered a principle of public order that excludes private autonomy capable of creating new rights. In the adaptation, the European legislator finds the continuity that leads to the application of the Regulations otherwise excluded by the principle of typicality. The foregoing highlights the very important role assigned to the interpreters of the law for the effective and correct application of the Regulations in question.

III. Implementation of the principle of free movement of citizens and their assets and rights

Laying the foundations for an interconnection of European registers with a harmonization of instruments and disciplines in order to ensure a prompt, dynamic and free transnational access to information will greatly help to implement the principle of free movement of citizens and their assets and rights. This is especially useful in order to overcome the differences between common law traditions based on Title Systems and civil law traditions characterised by Deed Systems. The use of electronics would lead to a harmonization of internal systems and technical tools for legal practitioners.[4] Legal certainty in the division between positive law (*common law*) and moral justice (*equity*) in the common law system can be affected by the application of the principle of good faith.
The property advertising system has also evolved differently in civil and common law systems. In the latter, we have moved from a system characterised on witness evidence to one of declaratory advertising to the current system of advertising constitutive of registration with the reform of the Land Registration ACT 2002, which can be won by applying the criterion of equity in the specific case with repercussions on legal certainty.[5] The criterion of equity is applied in the distribution of family assets, recognizing the great role of conciliator of the English

[4] I. Ferrari, *Land law nell'era digitale* (Milan: Cedam, 2013).
[5] *Scottish & Newcastle plc* v *Lancashire Mortgage Corp. Ltd* [2007] EWCA Civ 684.

judge. In particular, the rigidity of the legal system can be overcome in equity in the matter of trusts and assignment of the family home and more generally in the discipline of family relationships. The need for harmonization of law in the European context is evident for the future of legal Regulations in the discipline of family relationships of cross-border couples.

IV. Tools to help interpreters and citizens

As established by recital 25 of both Regulations, the authorities or competent persons of the State whose law is applied to the matrimonial property regime or to the property consequences of a registered partnership, may be contacted for further information on the nature and the effects of the right, in order to determine the closest equivalent national right. The European legislator suggests using for this purpose the existing networks in the field of judicial cooperation in civil and commercial matters and any other available means that facilitate the understanding of foreign law. Even if the matter of registration in registers is excluded from the scope of the Regulations, access to real estate data and information in other Member States may also be of help to the interpreter. Indeed, Member States regulate both the content and the registration of rights *in rem* in different ways as regards requirements, effects, rights and obligations, registers and procedures. For example, the regulation of the right of usufruct in Germany differs from that in France with regard to the rights and obligations of the right holder.

In carrying out the adaptation, some associations and networks of experts can be pointed out to facilitate the work of the interpreter. These include the ELRA (European Land Registry Association) and the ELRN (European Land Registry Network), the EULIS (European Land Information Service), the CROBECO (Cross Border Electronic Conveying) project, the European Justice Portal[6] under which official and reliable information can be obtained. The IMOLA project, whose investigation has compared the different types of real rights and registration methods, is useful in identifying both real rights and equivalent rights in a comparative perspective by reaching the

[6] Cf https://e-justice.europa.eu (last visited: 14 September 2021).

European real estate information document ELRD (Electronic Land Registry Document). In particular, in the field of succession, specific rules and procedures exist in some Member States for the adaptation of real rights. Such rules have been introduced for example in Estonia, Spain, Croatia, Luxembourg, Hungary, Portugal, Romania, Slovakia with differences concerning the type of jurisdiction, competent authorities, adaptation procedure, appeal against the adaptation measure.

V. Adaptation of rights *in rem*. Conclusions

The adaptation solution is not new in Europe. In fact, the provision referred to in Art 29 is identical to that contained in Art 31 of Regulation no 2012/650 in the matter of succession. Furthermore, in both the Twin Regulations and also in the succession Regulations it is established that the adaptation of real rights not recognized as explicitly provided for by the same should not preclude other forms of adaptation. In this sense, other forms of adaptation are allowed in the application of the aforementioned Regulations. The instrument of adaptation may be used where there is, on the one hand, a person who invokes a right which is real and which is due to him in relation to the matrimonial property regime or the property consequences of the union and, on the other hand, that right *in rem* is not known to the Member State in which it is invoked. In this context, one of the rights on which adaptation could perform the greatest social function is the right to housing, which, with the diversifications in the field of protection of rights *in rem*, represents a necessity and a fundamental right for the European citizen. The reference is in particular to the right of usufruct, the real right of use and the real right of residence. In cases of divergent recognition of the same in national law, a decisive role is given to the interpreter, who, by analysing the concrete case, has a margin of appreciation in identifying the closest equivalent right *in rem*.
The functional, systematic and axiological interpretation will be decisive, however, having to take into account the objectives, interests and effects pursued by the real law in question.

In a succession decision, the Court of Justice[7] has established that the adaptation procedure is concerned solely with respect for the content and not with the different issue of the transfer of real rights. This ruling outlines the meaning to be attributed to the adaptation tool which is still an exception to the rules applicable to property regimes with flexibility and capable of making the rights between spouses and registered partnerships effective in every specific case.
The approach of different legal cultures is possible through a work of harmonization in a climate of shared collaboration that includes the different state realities and which tends to a common vision of law in the European framework.

[7] Case C-218/16 *Kubicka,* Judgment of 12 October 2017.

Article 30
Overriding mandatory provisions

Vincenzo Bonanno

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.	1. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.
2. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a Member State for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the matrimonial property regime pursuant to this Regulation.	2. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a Member State for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the property consequences of a r**egistered partnership** pursuant to this Regulation.

Summary: I. The interpretation of the Court of Justice of the European Union. – II. The qualification of the overriding mandatory provisions. – III. *Lex fori* and interpretation of the overriding mandatory provisions: the impact of Twin regulations on the property discipline of cross-border families.

I. The interpretation of the Court of Justice of the European Union

In order to define the overriding mandatory provisions, the important reconstruction made by the Court of Justice of the European Union concerning the qualification of the provisions of a Member State as police and security laws and therefore mandatory rules of necessary application is very useful. The Court states that such are the national

provisions 'compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State.'[1] The Court emphasizes that the fact that national rules are categorised as public-order legislation does not mean that they are exempt from compliance with Community law which considers them in terms of the exceptions to Community freedoms expressly provided and on the ground that they constitute overriding reasons relating to the public interest. In order to avoid violations, the reference to the principles of primacy and uniform application of Community law is evident.
Pursuant to Recitals 53 and 52 of the regulations considerations of public interest, such as the protection of a Member State's political, social or economic organisation, should justify giving the courts and other competent authorities of the Member States the possibility, in exceptional cases, of applying exceptions based on overriding mandatory provisions. The concept of overriding mandatory provisions should cover rules of an imperative nature such as rules for the protection of the family home. This exception to the application of the law applicable to the matrimonial property regime or to the property consequences of registered partnerships requires a strict interpretation in order to remain compatible with the general objective of the Regulations.
The national court will assess the precise terms, the systematic structure and the set of circumstances in which the mandatory provision protecting an interest deemed essential by the Member State concerned was adopted by the national legislator.[2]

II. The qualification of the overriding mandatory provisions

There is no general criterion that allows identifying the necessary application rules for which this function is delegated to the interpreter.

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[1] Cases C-369/96 *Jean-Claude Arblade and Arblade & Fils SARL* and C-376/96 *Bernard Leloup, Serge Leloup and Sofrage SARL*, Judgment of 23 November 1999.
[2] P. Bruno, *I Regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate. Commento ai Regolamenti (UE) 24 giugno 2016, nn. 1103 e 1104 applicabili dal 29 gennaio 2019* (Milan: Giuffrè Francis Lefebvre, 2019), 225.

The classification of a given national rule as a mandatory rule must be made on a case-by-case basis in the light of the reasons for its adoption in the general interest. Their nature and object will be taken into account, as well as the consequences that would derive from their application or non-application. In the event that the *lex fori* extends the scope and also the level of protection granted by European legislation or the legislation of another Member State chosen by the parties, the national court may apply the mandatory provisions of the *lex fori*.[3] The same applies to harmonisation by referring to the interests of European law.

Art 30 is the expression of a principle already present in the regulation on the law applicable to contractual obligations (Rome I) and non-contractual obligations (Rome II) and known in private international law whose internal rules operate, unlike public order, as a preventive limit to system operation. The rules of necessary application exclude *ex ante* the application of foreign law provided for by the conflict rules, constituting an exception to the functioning of this system. They are considered indispensable for the domestic legal system so that, in relation to their object or purpose, they necessarily apply to both domestic and transnational cases. They are connected with the provisions on public order of the forum referred to in Art 31 of the regulations.

This category includes the self-limited rules that establish the limits of their scope of application and the rules self-declared as rules of necessary application by the legislator. In fact, there is nothing to prevent the legislator from being able to determine a norm as having a necessary application in addition to the judge. Art 30 in referring to the provisions 'the respect for which is regarded as crucial by a Member State for safeguarding its public interests, such as its political, social or economic organisation' does not limit the discretion of national legal systems in determining the rules of necessary application. This indication is to be understood as an example.[4] In fact,

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[3] Case C-381/98 *Ingmar GB Ltd* v *Eaton Leonard Technologies Inc.*, Judgment of the Court (Fifth Chamber) of 9 November 2000.

[4] Case C-184/12 *United Antwerp Maritime Agencies (Unamar) NV* v *Navigation Maritime Bulgare*, Opinion of Mr Advocate General Wahl deliveredon 15 May 2013.

the rules of necessary application could also concern the protection of interests that are not strictly public in nature, having regard to a systematic and axiological interpretation of the mandatory rule in the legal system.
With regard to obstacles to the freedom to provide services, the Court recognized as mandatory rules: protection of intellectual property; the need to protect the persons for whom a service is provided in so far as that need justifies the application to the provider of services of the professional rules of conduct in force in the host member State; social protection of workers; consumer protection; fair trading; certain rules relating to contractual relations, banking and insurance activities, financial markets, implementation of resolutions of international bodies, family relations, and antitrust law; a cultural policy aimed at maintaining a national radio and television system which secures pluralism; protecting the sound administration of justice; safeguarding the cohesion of the tax system; maintaining the good reputation of the national financial sector; conservation of the national historical and artistic heritage; appreciation of the places and things of archaeological, historical and artistic interest and the widest possible dissemination of knowledge of the artistic and cultural heritage of a country and the risk of serious damage to the financial equilibrium of the social security system. These may include the rules establishing minimum wages, the rules relating to safety and hygiene in the workplace, the principle of freedom of association, the principle of equal pay between male and female workers,[5] the protection of the environment and, most recently due to the Covid-19 pandemic, the rules protecting public health or the national economy.

III. *Lex fori* and interpretation of the overriding mandatory provisions: the impact of Twin regulations on the property discipline of cross-border families

Whatever the law applicable to the property regime or the property effects of a registered partnership pursuant to the regulations as

[5] Cases C-369/96 and C-376/96, Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 25 June 1998.

provided for by Art 30 involves the implementation of the rules provided for by the *lex fori* if it is considered a necessary application rule that cannot be waived by the partners. The realisation and protection of inviolable human rights can be implemented through compliance with the overriding mandatory provisions also following the reference to fundamental rights pursuant to Art 38 of both regulations. These rules could also include provisions of family law if qualified as overriding mandatory provisions. In this regard, the nature and object of these mandatory provisions may be taken into account in detail in the light of the *ratio* and wording on the basis of the will of the legislator including the preparatory work.

These rules, like all others, must be justified by overriding reasons relating to the general interest and must be objectively necessary to ensure the achievement of the result for which they were adopted. It must also be proved that the same result cannot be achieved by less restrictive rules.

It is evident that the qualification of a rule as overriding mandatory provision will be decisive for the impact and practical functioning of the regulations in question.

The affirmation of the principles of 'universal application' and 'unity of the applicable law,'[6] the 'exceptional circumstances,'[7] the provisions whose interest is considered 'crucial' for the safeguarding of public interests[8], such as political, social or economic organization, lead to a restrictive reading of the overriding mandatory provisions.[9]

Only a systematic and axiological, exceptional and restrictive interpretation of the overriding mandatory provisions will be able to avoid fragmentation of the regulation of cross-border family assets and give certainty to the legal situations protected.

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[6] Arts 20 and 21 of both Regulations.

[7] Recitals 53 and 52 of both Regulations.

[8] Art 30 of both Regulations.

[9] L. Ruggeri 'Mandatory provisions and public policy', in M. J. Cazorla González et al eds, *Property relations of cross border couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2020), 83-85.

Article 31
Public policy (*ordre public*)

Vincenzo Bonanno

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.	(Same text)

Summary: I. The public policy exception and the protection of Fundamental Rights of the European Union.

I. The public policy exception and the protection of Fundamental Rights of the European Union

The provision of this Article may be qualified as a safeguard rule prepared by the European legislator in order to take into account public policy and the national traditions of the legal systems of the member States.[1] The principles of public order are relative principles that change in time and space, being the result of jurisprudential evolution.

According to private international law, public order constitutes a general limit to the recognition of judgments and the application of foreign law by national courts in the domestic legal system. Although closely related to the overriding mandatory provisions, public policy is otherwise a subsequent limitation since it operates after the foreign law has been invoked. In fact, pursuant to Recitals 54 and 53 of the Twin Regulations considerations of public interest should also allow courts and other competent authorities dealing with

[1] P. Bruno, *I Regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate. Commento ai Regolamenti (UE) 24 giugno 2016, nn. 1103 e 1104 applicabili dal 29 gennaio 2019* (Milan: Giuffrè Francis Lefebvre, 2019), 226.

matters of matrimonial property regime (property consequences of registered partnerships) in the Member States to disregard, in exceptional circumstances, certain provisions of a foreign law where, in a given case, applying such provisions would be manifestly incompatible with the public policy of the Member State concerned. Representing a possible obstacle to the implementation of the principles of free movement and recognition of decisions,[2] the courts or other competent authorities should not be able to apply the public policy exception in order to set aside the law of another State or to refuse to recognise or, as the case may be, accept or enforce a decision, an authentic instrument or a court settlement from another Member State when doing so would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Art 21 thereof on the principle of non-discrimination.

Art 31 constitutes a limit to the application of the law of a State if such application is manifestly incompatible with the public order of the receiving State whose concrete effect is unacceptable because it is incompatible with the legal system. Public policy consists of all the fundamental principles laid down by International, Community and State law. The purpose of the public policy exception is to safeguard the ethical, economic, political and social principles operating in the various fields of social coexistence in a given Member State. The public policy clause gives the court fairly wide margins of discretion. The exception is subject to the manifest incompatibility of the effects of the foreign rule or judgment with the internal consistency of the law of the forum. Only a restrictive interpretation will be able to prevent the clause from constituting an obstacle to the implementation of the applicable law and to the recognition and enforcement of decisions.

Harmonisation between the various legal systems while respecting the different national traditions cannot disregard respect for and protection of fundamental human rights. These universal principles, in

[2] L. Ruggeri 'Mandatory provisions and public policy', in M. J. Cazorla González et al eds, *Property relations of cross border couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2020), 83-85.

particular the principle of equality and non-discrimination, are essential in the judge's assessment as they are able to ensure the protection of the inviolable rights of the person. On the contrary, the public policy clause can be transformed from a limitation into a supplementary instrument capable of filling the legislative gap in the regulation of cases in which fundamental rights are involved by protecting the effective enjoyment.

In order to ensure the effective enjoyment by individuals of their fundamental rights, the control of this limitation is attributed to the Court of Justice, which must be understood as an exceptional remedy.

Article 32
Exclusion of renvoi

María José Cazorla González and Helena Mota*

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
The application of the law of any State specified by this Regulation means the application of the rules of law in force in that State other than its rules of private international law.	(Same text)

Summary: I. Regulatory scope of renvoi and its exclusion. – II. Should reference to a foreign law as the applicable law be understood as to its material or substantive solutions or, in a broader sense, to its private international law?. – III. Exclusion of renvoi and the scope of application of Art 32 in both Regulations. – 1. And what if the spouses or the partners have chosen the applicable law?. – 2. Consequences of excluding renvoi. Effects in relation to the Succession Regulation, illustrated through examples.

I. Regulatory scope of renvoi and its exclusion

Renvoi is a mechanism that some countries (inside or outside of the EU) adopt to improve international coherence or consistency as it allows courts to apply the same law even if they have different conflicts-of-law rules. That happens because by accepting renvoi, the reference of a conflict-of-law rule to a foreign State law is made not only to its substantive rules and solutions but also to its PIL rules.

In other EU family private international law legislation there are also rules on renvoi such as Council Regulation 1259/2010 of 20 December 2010 establishing enhanced cooperation in the field

* María José Cazorla González authored paragraphs I., III. and III.2 and Helena Mota authored paragraphs II., III. and III.1

of law applicable to divorce and legal separation (Art 11), or the Hague Protocol of 2007, published on 16 December 2009 (Art 12). As in the legislation mentioned above, the exclusion of renvoi in Art 32 of the Twin Regulations is similar as to the solution of Art 24 of the Rome II Regulation,[1] where it regulates that if a provision refers to the law of a country, the judge must apply the substantive law of that State and must not apply its rules of private international law, because they could refer it to the law of another country.[2]

All of these draftings start from Art 20 of the Rome I Regulation, with the exception of respecting the provisions of the Regulation establishing something different, and the Hague Conventions as regards applicable law.

If we look at the regulatory field of renvoi in family law as an instrument at the service of international coherence, it will be common to find ourselves in situations where the interpretation of a conflict-of-laws rule necessarily involves the doctrine of renvoi. Despite the exclusion of renvoi under Art 32 of the Twin Regulations,[3] we must bear in mind three issues to be assessed in the specific case:

- The first deals with the freedom of choice of the parties in matters such as the agreements governing the matrimonial property regime or the property consequences of registered partnerships, both of which are freely available, so when the parties choose the law governing their contract, they do so by referring to the material law

[1] Regulation (EC) 864/2007 of the European Parliament and the Council of 11 July 2007, relating to the law applicable to extra-contractual obligations. (Rome II). The doctrine of renvoi was thus excluded from the Rome II Regulation, in the same way that it is now regulated for in Regulations 2016/1103 and 2016/1104.

[2] Renvoi is a legal technique that allows one to determine the law applicable to a specific case by means of remission (referral) to another law. In some countries, such as France, there are no limits on the number of remissions whereas, in others, there is only one remission, as happens in Spain, Italy or Luxembourg. In contrast, in Denmark, Greece and Peru, it is not regulated.

[3] P. Carrión García De Parada, 'Proyectos de Reglamentos europeos sobre regímenes matrimoniales y sobre efectos patrimoniales de las parejas registradas' *Academia Matritense del Notariado,* 115-117 (2014).

and not to the conflicting rules of that country, which results in the reservation of any eventual coordination of the conflict rules being excluded.

- The second question arising from the exclusion of renvoi would be caused by applying the law of a Member State to the dissolution of the couple's property regime, where there is immovable property situated in a third State, and where the law of that State establishes the *lex rei sitae* as being applicable in the event that the dissolution of the property regime affects immovable property.

We should recall the *locus regit actum* rule in relation to the *lex rei sitae*. The first rule determines that the act will be valid in terms of form, if the law of the place where it was carried out has been respected, which may determine that the law of the place where the property is situated is applicable (for example, in England), meaning that the obligation of this renvoi would ignore the objective pursued by our conflict rule. This guarantees the parties the validity of their act if, for the signing of the agreement, they have consulted the only law they could in fact know, which would be the law of the place it was concluded.

- And the third question is in relation to Art 20 of both Regulations, the wording of which allows the law of a third State to be applicable. So that the renvoi can be applied where the applicable law is the law of a third State, the rules of private international law refer to the law of a Member State, even though the Twin Regulations exclude it in Art 33, by universal application of Art 20, which would render it ineffective.

II. Should reference to a foreign law as the applicable law be understood as to its material or substantive solutions or, in a broader sense, to its private international law?

Due to the differences in the PIL systems, for the same issue or legal question, the conflict-of-laws rules in different States may vary, adopting connecting factors that do not coincide.

International disharmony or lack of consistency is harmful to cross-border situations, resulting in difficulties recognizing foreign civil status, disrespect of *vested rights*, legal uncertainty, and lack of predictability. Furthermore, if unifying the PILs across the EU can minimize these consequences, the applicable law (if it is the law of a third State, or a non-participating State, which is possible given the universal character of the Regulations (Art 20)), may not accept its own competence, not finding itself applicable. From differences between material rules, we go to differences between conflict-of-laws rules, which result in similar disadvantages: non-recognition by the State of the applicable law, neither the legal situation nor its legal effects.

To avoid this, and to ensure international consistency, many PIL systems accept *renvoi.* They do this in various ways, from single to double-degree models,[4] following (or not) the *foreign court theory* or adopting a mitigated model, like the one supported by Arts 16 to 19 of the Portuguese Civil Code.[5]

There are others that deny it, adopting a *material* reference of their conflict-of-laws rules to a foreign State law (*Sachnormverweisung*) by excluding from that remission the private international law rules in force in the State of the applicable law, *id est* excluding *renvoi.*

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[4] What is known as *renvoi au premier degré,* in French terminology, or remission in English terminology, and *renvoi au second degré* or transmission*,* respectively. A. Ferrer Correia, *Lições de Direito Internacional Privado* (Coimbra: Almedina, 2017), 266.

[5] In the mitigated approach, the *material* reference is the starting point principle, *renvoi* being admitted strictly to fulfil certain objectives such as international consistency, merely as a technical tool. See A. Ferrer Correia, n 1 above, 269 and J. Baptista Machado, *Lições de Direito Internacional Privado* (Coimbra: Universidade de Coimbra, 1963), 178–221. In our view, this is also the approach followed by Art 34 of the Succession Regulation, as is stated in Recital 57: 'The conflict-of-laws rules laid down in this Regulation may lead to the application of the law of a third State. In such cases, regard should be given to the private international law rules of that State. If those rules provide for renvoi, either to the law of a Member State or to the law of a third State that would apply its own law to the succession, such renvoi should be accepted in order to ensure international consistency.' Cf H. Mota, 'A autonomia conflitual e o reenvio no âmbito do Regulamento (UE) n.º 650/2012 do PE e do Conselho, of 4 July 2012' *RED-Revista Electrónica de Direito*, 1-22 (2014).

The latter is the case of Art 32 of the Twin Regulations, as with all other PIL regulations before them,[6] except for the Succession Regulation[7], as well as other PIL Regulations before them.

Art 32 of the Twins Regulations states:

'The application of the law of any State specified by this Regulation means the application of the rules of law in force in that State other than its rules of private international law.'

Even though *renvoi* may allow international consistency as mentioned above,[8] its exclusion also has some advantages, especially if the applicable law follows certain principles such as immutability and unity.

In fact, in matters such as matrimonial property regimes and the property consequences of registered partnerships, it is crucial to respect the will and expectations of the spouses or partners, which cannot be surprised by the application of another law different from the one applicable at the time of concluding the marriage, especially if they do not choose the applicable law (*vg* in cases under Art 26 of the Twin Regulations). That is why the connecting factors under the Twin Regulations are immobilized at the time of the marriage and they can only be changed by virtue of the parties will. The same undesirable mutability could result from renvoi.[9]

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[6] Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Art 20), Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Art 24), Council Regulation (EU) 1259/2010 of 20 December 2010 on the law applicable to divorce and legal separation (Art 11), and the 2007 Protocol on the law applicable to maintenance obligations (Art 12).

[7] Regulation (EU) 650/2012 of the European Parliament and the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions, and the acceptance and enforcement of authentic instruments in matters of succession, and on the creation of a European Certificate of Succession (Art 34).

[8] Or 'decisional harmony' as highlighted by M. Gebauer, 'Article 32. Exclusion of *Renvoi'* in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples. A Commentary* (Cheltenham: Edward Elgar, 2020), 312-218.

[9] M. Gebauer, n 8 above, 313-315.

III. Exclusion of renvoi and the scope of application of Art 32 in both Regulations

The exclusion of renvoi has some advantages, especially if the applicable law follows certain principles such as immutability and unity.
However, we must bear in mind that the diversity that exists in the Member States creates complications in the application of Art 32, because not all countries regulate it, as we have seen in the first point. And among those that do regulate it, some do so by accepting a renvoi while others accept double renvoi. Perhaps that is why Art 32 in both Regulations discounts that renvoi can be produced.
On the other hand, we also encounter difficulties under the principle of choice established in Art 26 of both Regulations, because we must remember that we are dealing with cases in which the parties are free to choose the law applicable to the matrimonial property regime and the property consequences of registered partnerships, and that this choice must be respected and not changed under renvoi.

1. **And what if the spouses or the partners have chosen the applicable law?**

The result would be even more striking although it must be stressed that even in the Succession Regulation, which allows *renvoi* under certain terms, exceptions are to be made precisely when the applicable law is the one chosen by the parties (Art 34.2).[10]

On the other hand, unity of the applicable law under the Regulation demands that all assets and patrimonial legal issues relating to the spouses' or partners' lives will be governed by the same law - this

[10] Of course, there are situations where this choice cannot be made, for instance if one of the spouses or partners is dead, or if they do not agree on the applicable law. In those cases, especially if Art 26 refers to the applicable law whose PIL apply national law, the spouses or partners could ask the judge to apply the law with the closest connection (Art 26.3). On this, see P. Lagarde, 'Article 32', in U. Berquist et al, *Commentaire des règlements européens sur la liquidation des régimes matrimoniaux et les partenariats enregistrés* (Paris: Dalloz, 2nd ed, 2018), 132-134.

would be compromised by *renvoi* if the law applicable by that State is the *lex rei sitae* and they have assets in different States.[11]
However, there were some specific benefits of *renvoi* that were ignored, such as those matters included in the Twin Regulations' material scope of application: the application of *lex fori,* and consequently the domestic law if the conflict-of-laws rules of the State of the applicable law has a *rei sitae* connecting factor and the immovable assets are seized in the *lex fori.*[12]

2. **Consequences of excluding renvoi. Effects in relation to the Succession Regulation, illustrated through examples**

The exclusion of renvoi in Art 32 of the Twin Regulations initially allows a snapshot to determine the law applicable to the matrimonial property regime and the property effects of registered partnerships, which is summarised in Recital 35: as *points of connection in order to determine jurisdiction, which begins with the habitual residence* of the parties *at the time of the filing of the action, to ensure that there is a genuine point of connection between the spouses or members of the registered partnership and the Member State in which jurisdiction is exercised*; and which is developed in arts. 22 if the parties agree to the applicable law, or by Art 26 in the absence of an agreement.
At the same time, there are other issues relating to both Regulations *which relate to proceedings pending before the court of a Member State concerning the succession of one of the spouses, or the divorce, legal separation, or annulment of the marriage.* In such cases, the Twin Regulations must *establish a scale of* connection points existing at the time of concluding the marriage, and in the absence of agreement between the parties (Recital 49): the habitual common residence, the law of the nationality, or the law of the State where the spouses have the closest connection.

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[11] M.A. Gandía Sellens, 'Article 32. Exclusion of renvoi', in J.L. Iglesias Buigues and G. Palao Moreno eds, *International Successions. Commentaries on Regulation EU 650/12* (Valencia: Tirant lo Blanch, 2015), 353, *sub* n 6, and M. Gebauer, 'Article 32. Exclusion of *Renvoi'*, in I. Viarengo and P. Franzina eds, p. 314, n 8 above.
12 M. Gebauer, n 8 above, 313-314.

The differences between countries that accept a double renvoi and countries that only accept a single renvoi may have an effect when a case arises in connection with that succession (Art 4), i.e., where a court of a Member State hears the succession of one of the spouses pursuant to Regulation (EU) 650/2012, the courts of that State shall have jurisdiction to rule on the matrimonial property regime or the liquidation of the assets of the registered partnership in connection with that succession.

Let us imagine a succession scenario where the final result will depend on the applicable law, which will vary according to whether the remission to the law is made to a Member State, or to the law of a third State, which in turn would apply its own law, remembering that renvoi must be excluded in cases where the originator has made the choice of law favouring the law of a third State; hence, under no circumstance shall renvoi be applied in respect of the laws referred to in Arts 21(2), 22, 27, 28(b) and 30.[13]

Now, let us consider a case in which the spouse or member of the registered partnership, a Greek national, dies without choosing the applicable law, and who has habitual residence in Spain and property in Greece. The law of the forum being where the property is located, it will examine the law of the habitual residence of the deceased (Spain) and apply the Spanish law as the closest connection. Spanish law recognises the law of the nationality of the deceased, Greek law, which in turn does not contemplate the renvoi, while Spain, as a jurisdiction that only operates with a single renvoi system, will not accept the double renvoi. The situation would be different if the renvoi were with France, which does apply it.

Another example that affects the field of succession, yet with a different outcome, would be when the spouse or member of the partnership, of French nationality, with habitual residence in England (UK), but with domicile in Spain, dies leaving movable assets in Spain.

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[13] I. Espiñeira Soto, 'El reenvío del artículo 34 del Reglamento (UE) nº 650/2012, Notarios y registradores' *Notarios y registradores* (2017), available at https://www.notariosyregistradores.com/web/secciones/doctrina/articulos-doctrina/el-reenvio-en-el-reglamento-europeo-de-sucesiones/ (last visited 20 September 2021).

In this case, the court will have to assess which legislative forum to apply if there is no choice of applicable law to deal with the assets under the laws governing succession.
In this case, the law of the forum in Spain establishes that it will be the place where the assets are located applying the law of the nationality of the deceased, that is, France, and thus French law will be applied. French law observes the law of the deceased's habitual residence, which is England. However, England examines the domicile of the deceased, which is Spain.
As there were two transfers (from Spain to France and from France to England), Spain will not accept it again because it applies the single renvoi system. Consequently, the Spanish court, being the law of the forum, will apply the law where it was last left in the chain of remission, that is, with the law of England and Wales.
Finally, in connection with the Succession Regulation, which accepts renvoi, let us consider two cases involving third states:
The above-mentioned Regulation accepts renvoi in two cases:

- First, when the designated law - in this instance, the law of a third State - provides a renvoi of the law of a Member State. Thus, for instance, upon the death of a non-Muslim Italian man whose last habitual residence was in Saudi Arabia, the regulation designates the law of Saudi Arabia, which has a renvoi to Italian law.

- Second, when the law of the third State has a renvoi to another third State, which would apply its own law. For example, if the Italian Court considers the succession of a Russian citizen whose last habitual residence was in Saudi Arabia, the law of said country, applicable under the Regulation, would have a renvoi to Russian law, which accepts such a renvoi. One might wonder why the Matrimonial Property Regimes Regulations have not included similar provisions.[14]

[14] U. Bergquist et al eds, *The EU Regulations on Matrimonial and Patrimonial Property* (Oxford: Oxford University Press, 2019), 132.

Article 33
States with more than one legal system - territorial conflicts of laws

María José Cazorla González, Helena Mota
and Mercedes Soto Moya*

Regulation (EU) 2016/1103

1. Where the law specified by this Regulation is that of a State which comprises several territorial units each of which has its own rules of law in respect of matrimonial property regimes, the internal conflict-of-laws rules of that State shall determine the relevant territorial unit whose rules of law are to apply.

2. In the absence of such internal conflict-of-laws rules:

(a) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to provisions referring to the habitual residence of the spouses, be construed as referring to the law of the territorial unit in which the spouses have their habitual residence;

(b) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to provisions referring to the nationality of the spouses, be construed as referring to the law of the territorial unit with which the spouses have the closest connection;

Regulation (EU) 2016/1104

1. Where the law specified by this Regulation is that of a State which comprises several territorial units each of which has its own rules of law in respect of the **property consequences of registered partnerships**, the internal conflict-of-laws rules of that State shall determine the relevant territorial unit whose rules of law are to apply.

2. In the absence of such internal conflict-of-laws rules:

(a) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to provisions referring to the habitual residence of the **partners**, be construed as referring to the law of the territorial unit in which the partners have their habitual residence;

(b) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to provisions referring to the nationality of the partners, be construed as referring to the law of the territorial unit with which the **partners** have the closest connection;

* María José Cazorla González authored paragraphs II.2, II.3 and II.5, Helena Mota authored paragraphs I., II., II.1 and Mercedes Soto Moya authored paragraph II.4.

(c) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to any other provisions referring to other elements as connecting factors, be construed as referring to the law of the territorial unit in which the relevant element is located.

(c) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to any other provisions referring to other elements as connecting factors, be construed as referring to the law of the territorial unit in which the relevant element is located.

Summary: – I. Reference to the law applicable in Multi-Unit States. – II. Problems arising from the remission of a conflict-of-laws rule to the applicable law. – 1. Remission under Art 33 of the Twin Regulations. – 2. *Professio iuris*. The first subsidiary connection. – 3. In the absence of agreement on the applicable law. – 4. The civil *vecindad* in Spain does not harmonize with the Twin Regulations. Special reference to registered partnerships. – 5. Recent judgment of the Court of Justice in Spain regarding the lack of harmonization with the civil vecindad in a succession case.

I. Reference to the law applicable in Multi-Unit States

The reference of a conflict-of-laws rule to the applicable law, as State law, raises a problem when that law is not only one, but multiple, *id est* if in the legal system to which the reference is made a plurality of territorial-based legal suborders coexists (laws that differ from territory to territory), constituting a multi-unit Sate (a State with more than one legal system). To which law, in this case, is the conflict rule to be referred and applied?

In Art 33, the Twin Regulations introduce the form of indirect remission to the internal conflict rules of that State, that not taking into account the internal rules on matrimonial property regimes, on the one hand, and the property consequences of registered partnerships on the other.

However, the question therefore arises in those Member States where different regulations exist (Spain), and in third States under the application of the universal criterion in Art 20 (India). One must differentiate between those Multi-Unit State countries that have a territorial base (USA, Mexico, Switzerland, United Kingdom and Spain) and those that have a personal base (Sudan, India, Egypt, Morocco or Algeria) given that the problems generated are different. The system of indirect and subsidiary reference allows the application of the Twin Regulations while respecting the private international law rules of a Multi-Unit State State that has a territorial base, such as Spain,[1] although some problems could arise from its implementation. This system of indirect remission is also the model that is applied under the Regulation on Successions 650/2012.

This distinction is important because when the law is referred to a State where different applicable legal systems coexist, the question to be answered is to which law should the conflict rule be referred to and applied?

The answer will be given if we attend to several connection points, the first fixed by indirect remission[2] regulated in Art 33.1 of both Regulations: the Multi-Unit State shall determine the applicable law following the internal conflict rules laid down in that State.

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[1] P. Quinzá Redondo and G. Chistandl, 'Ordenamientos plurilegislativos en el Reglamento (UE) de Sucesión con especial referencia al ordenamiento jurídico español' *Dret*, 1-27 (2013).

[2] S. Álvarez González, 'El Reglamento 650/2012, sobre sucesión y la remisión a un sistema plurilegislativo: algunos casos difíciles o simplemente llamativos' *Revista de Derecho Civil*, 7-28 (2015). The author considers that indirect remission leaves the specific identification in the hands of the legal instruments of the State whose law has been claimed by the conflict rule. This is the traditional system used to respect national sovereignty although it is problematic when such rules do not exist or are not adapted to the specific scenario. Direct remission, on the other hand, ignores the rules for resolving internal law conflicts and uses the connection points of the conflict rules as identifying criteria for the specific applicable law. It becomes problematic when the point of connection is nationality or when the Multi-Unit State state is person-based.

The second point will come from Art 33.2 of both Regulations, where the subsidiary remission is determined in a supplementary way under three criteria that regulate an order of priority in permanent relation to the territorial unit: residence, nationality, or other points of connection of the parties in relation to the territorial unit.
So, before answering, one has to analyse two problems:

- Problems of remission to the Multi-Unit State system in the absence of an agreement between the parties.

- Problems arising from the application of the material content of the law when there is no regulation in the matter.

Which brings us to two solution models:

- The traditional model: which deals with the traditional classification of the direct models (it is the conflict-of-laws rule itself that identifies the applicable law in the multi-national State – a model adopted by the Rome I and Rome II Regulations) and the indirect models (the applicable law is identified by the internal conflict rules - a model adopted by the Twin Regulations and the Regulation on Successions).

- The mixed model: which combines both models, generally using the indirect model for the connection to nationality.

In the indirect model, or in the indirect component of the mixed model, subsidiary rules may coexist where the internal conflict-of-laws rules of the multi-unit State do not exist or are insufficient.[3] These

[3] The existence of subsidiary solutions in an indirect model (or in the indirect component of a mixed model) is probably the reason why some authors classify the Succession Regulation and the Twin Regulations as examples of 'subsidiary models.' See B. Campuzano Diaz, 'Article 33. States with more than one legal system – territorial conflicts of laws' in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples. A Commentary* (Cheltenham: Edward Elgar, 2020), 322. A similar classification is adopted by P. Quinzá Redondo and G. Christandl, n 1 above, 1-27, with some differences as they classify a model as followed by the Succession Regulation (identical to the Twin Regulations) as a 'subsidiary model' (and not as an indirect model) because they consider that an

subsidiary rules will normally respect the territorial connection factor of the conflict-of-laws rule itself or, in the case of nationality, will choose between a different connection (*eg* habitual residence) or the principle of the 'closest connection.'

A good example of a mixed model with subsidiary connections is the one followed by Council Regulation (EU) no 1259/2010 of 20 December 2010,[4] hereafter the Divorce Regulation: while maintaining a direct system of reference to a multi-unit State, the Divorce Regulation provides for a different solution if the conflict-of-laws rule contains the connecting factor 'nationality.'

In this case, the Divorce Regulation takes up the indirect model: the law of that multi-unit State shall 'designate the territorial unit.' The fact that the rule does not refer to 'internal conflict-of-laws rules' or 'PIL,' but, in broad terms, 'by the law of that State' (corroborated by Recital 28) leads to the conclusion that both bodies of rules will be convened, provided that they resolve the conflict in a satisfactory manner. Moreover, subsidiary solutions (the law chosen - *professio iuris* - and the law with the closest connection) will arise only in the absence of 'relevant' rules, which allows this global interpretation. This pertinence may also allow us to conclude that such subsidiary connections should intervene either in the absence of those internal conflict-of-laws rules (or PIL) or because they are insufficient due to them not being unified.

II. Problems arising from the remission of a conflict-of-laws rule to the applicable law

The question posed in the previous section - to which law is the conflict rule to be referred and applied in this case?[5] - is answered using a simulated scenario.

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indirect model is one in which there is only one subsidiary connection for all conflict-of-laws rules (eg the law with the closest connection) used in most of the Hague Conventions.

[4] Also classifying the Divorce Regulation as a mixed model, see B. Campuzano Diaz, n 3 above.

[5] For this conceptual approach, see J. Baptista Machado, *Lições de Direito Internacional*

The problem is easily illustrated: the conflict-of-laws rules (for example, Arts 25 and 31.1 of the Portuguese Civil Code) refer the question of legal capacity to the national law of M, M being a national of X (State X); in X, there are three territories with different rules, for example, on the age of majority: A, B and C, with A being 18 years of age, B being 21 and C being 19. So is M, who is 20 years old and has come of age, capable of exercising rights? Which is the applicable law giving legal capacity to M? The law of A, the law of B or the law of C? At first sight, recourse to the rules of the multi-unit State itself would solve the question, as it resolve such internal conflicts of application of local laws: if State X has a domestic conflict-of-laws system which, in the event, rules on capacity by virtue of the habitual residence of the declarant M, and M lives in A, despite the fact that he/she entered into the transaction in C, and the counterparty lives in B, the law of A applies and M is of age and capable, even if, in the event, he/she is underage under the law of B, the law of the habitual residence of the counterparty at the time of entering into the transaction.

However, recourse to these internal or domestic conflict-of-laws rules in X or, by analogy, to its private international law, may not be possible either because it does not exist (in X there are no domestic conflict-of-laws rules) or because they are not unified. To illustrate this: in X, the same issue — the acquisition of capacity by majority — can be resolved in B by the law of habitual residence (the law of A), in A by the law of the place where the contract was concluded (the law of C), and in C, by the law of the habitual residence of the counterparty (the law of B).

Privado (Coimbra: Almedina, 3rd ed, 1988), 235; I. De Magalhães Collaço, 'Direito Internacional Privado: determinação da ordem local aplicável em caso de remissão para ordenamentos plurilegislativos', in J. Pimentel, *Compil. P. Vasconcelos* (Lisbon: AAFDL, 1970), 6; A. Borrás Rodriguéz, 'Les ordres plurilegislatifs dans le droit international privé actuel', in *Recueil des Cours,* V, 249 (1994) and C. Ricci, *Il richiamo di ordinamenti plurilegislativi nel diritto internazionale privato* (Padua: Cedam, 2004).

1. Remission under Art 33 of the Twin Regulations

In the Twin Regulations, the reference to a Multi-Unit State of the applicable law on the matrimonial property regime or on the property consequences of a registered partnership follows an indirect model for all the connecting factors.

> '1. (...) the internal conflict-of-laws rules of that State shall determine the relevant territorial unit whose rules of law are to apply.'

Several problems arise from this solution, in addition to the questions raised by the preference for an indirect model, especially if it becomes the rule model, *id est,* that it applies in all cases and to all types of connecting factors, even those capable of individualising, within the multi-unit State system, the law of the relevant territorial unit, such as the habitual residence or even the chosen law, not forgetting the greater difficulties in determining the applicable law if the court with jurisdiction is not seized in a multi-unit State.[6]

But the proposed solution presents other problems of interpretation and application: what does '*internal conflict-of-laws rules'* mean? Can we interpret it in broad terms to include the rules of the Private International Law which that State uses, even by analogy, to resolve internal conflicts?

On the other hand, Art 33.2 establishes a set of subsidiary connections in the absence of those '*internal conflict-of-laws rules'* in the multi-unit State:

> '2. *In the absence of such internal conflict-of-lawsrules: (...)*

[6] B. Campuzano Díaz, n 3 above, 322.

And does 'absence' of such norms also mean 'lack of unification'?[7] Is 'absence' equivalent to 'unsatisfactory' or 'insufficient'?
Moreover, even though the subsidiary connections respect the conflict-of-laws solution in cases where there was a territorial element (habitual residence or another element):

'(a) any reference to the law of the State referred to in para 1 shall, for the purposes of determining the law applicable pursuant to provisions referring to habitual residence of the spouses, be construed as referring to the law of the territorial unit in which the spouses have their habitual residence'

'c) any reference to the law of the State referred to in para 1 shall, for the purposes of determining the law applicable pursuant to any other provisions *referring to other elements as connecting factors, be construed as referring to the law of the territorial unit in which the relevant element is located*.'[8]

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[7] Although Recitals 55 and 54 (for each of the Twin Regulations, respectively) are silent on this, it seems clear that the absence of internal conflict-of-laws rules are equivalent, for these purposes, to lack of unification. But it is unclear if Art 33.1 still applies when the internal conflict-of-laws rules are not unified, even though they are similar, with the same connecting factors. The same problem arises in other Regulations: in the Divorce Regulation, for instance. Portuguese authors believe that the subsidiary solutions should only be applied if there is a substantial difference between each of the conflict-of-laws rules of the territorial units; otherwise, if these territorial units do have legal autonomy in a broad sense and create their own conflict-of-laws rules fixing the territorial scope of application of their own law in each case (the USA and UK, etc.) but there is, nonetheless, coincidence on the connecting factors between them, the indirect system must be maintained because the multi-unit State is capable of giving a unified and unique solution in determining the applicable law. See J. Gomes Almeida, *O Divórcio em Direito Internacional Privado* (Coimbra: Almedina, 2017), 420 and L. De Lima Pinheiro, *Direito Internacional privado – Introdução e Direito dos Conflitos. Parte Geral,* I (Coimbra: Almedina, 3rd ed, 2014), 525. For an opposite view, see P. Lagarde, 'Article 32', in U. Berquist et al, *Commentaire des règlements européens sur la liquidation des régimes matrimoniaux et les partenariats enregistrés* (Paris: Dalloz, 2nd ed, 2018), 35.

[8] For examples of the limited application of Art 33, 2, c), mainly the law of the territorial unit where marriage was celebrated as the law of the State with the most

if the applicable law of the multi-unit State is the law of the nationality of the spouses, then the solution is different:

'(b) any reference to the law of the State referred to in para 1 shall, for the purposes of determining the law applicable pursuant to provisions referring to the nationality of the spouses, be construed as referring to the law of the territorial unit to which the spouses have the closest connection'

But would it not be useful and desirable to maintain the subsidiary reference to the law chosen by the parties, in the event that the conflict-of-laws rule complies with the conflict autonomy, as is done in the Divorce Regulation?
And how can this inflection be justified in matters of personal status, with regard to the Divorce Regulation, to move from the mixed model to an indirect model with subsidiary connections?These are questions that are not easy to answer, and which make the omission of any explanation in the Recitals of these Regulations even more striking, except for the very vague references present in Recitals 55 and 54 of the Twin Regulations.
It is, of course, difficult to say what the ideal model would be. But some points should be noted:
It seems clear that the indirect model *is not in itself sufficient and always needs a set of direct subsidiary solutions* and, *in the case of national law, a second special subsidiary connection*.
But even if there is a system of internal conflicts-of-law rules within the multi-unit State which can resolve the problem and which is unified, it is often inadequate for applying to an *international* issue because it is not designed for such situations and is therefore lacunae, failing to consider certain hypotheses (the Spanish case of the non-applicability of the criterion of *vencindad* to

significant connection with the spouses (Art 26. 1, c)) or the law of the territory in which the registered partnership was created (Art 26. 1 of Regulation 2016/1104) see B. Campuzano Diaz, n 3 above, 325.

foreigners is exemplary), and calling, in the case of reference to the solutions of the PIL law in force in that multi-unit State, for a problem of updating sources, when there are subsequent amendments to that body of law, as is now the case with the European PIL rules' the Regulations.[9] Furthermore, there will always be the problem of whether this is the most appropriate model in the case of conflicts-of-laws rules with a territorial connecting factor, since the internal solution could deviate from the law ordered to apply: if the conflict-of-laws rule refers to the law of the seller's place of residence and the internal conflict-of-laws rule to the law of the buyer's place of residence, *quid iuris*?

Of course, in the abstract, the indirect model is respectful of the legal diversity of the State to whose law the conflict-of-laws rule refers and of its sovereignty. But we can always question whether the particular way the internal conflict of laws is resolved in these States is the most appropriate for resolving *international* situations, in particular if the conflict-of-laws rules have a European source.

The direct model is not without its difficulties either, the most common being the determination of the law applicable as the *national* law.

[9] See S. Álvarez González, n 2 above, 7-28; P. Quinzá Redondo, 'Comentario al artículo 36', in J.L. Iglesias Buigues and G. Palao Moreno, *Sucesiones Internacionales. Comentarios al Reglamento (UE) 650/2012* (Valencia: Tirant lo Blanch, 2015), 291-301 and 307. It is discussed among Spanish authors whether the Regulations' solutions can also be applied to the internal conflict-of-laws. On this, see J.L. Iglesias Buigues, 'Comentario al artículo 33', in Id and G. Palao Moreno eds, *Régimen económico matrimonial y efectos patrimoniales de las uniones registradas en la Unión Europea. Comentarios a los Reglamentos (UE) 2016/1103 y 2016/1104* (Valencia: Tirant lo Blanch, 2019), 355-373. In the opposite sense, see S. Álvarez González, 'Sobre la aplicación de Convenios internacionales y Reglamentos europeos en Derecho Interregional'*AEDIPr,* 127-161 (2018).

If in that case the subsidiary connection is the law of the territorial unit with the closest connection, it may not correspond to the will of the parties who have chosen the national law. On the other hand, the subsidiary application of a connection other than nationality, such as habitual residence, calls for discrimination in treating a national resident abroad as a stateless person or, in any event, in a different manner from someone resident in the State of the same nationality, not to mention, once again, and in legislative terms, a failure to comply with the conflict-of-laws rule authorising *professio iuris* in favour of national law, or consideration of that law as the law with the closest connection by recourse to the exception clause.

A mixed model, which would consider an indirect system for cases referring to the national law of the multi-unit State, is obviously incapable of circumventing the drawbacks of this model, even if in a mitigated form.

The most reasonable solution, that avoids some of the major difficulties, would be to adopt a direct model for all connecting factors with the exception of nationality, in which case the subsidiary connection should refer to the law of the territorial unit to which the person concerned is most closely connected; where the *national law is the chosen law or by recourse to the exception clause* by the court, there should be an obligation on the parties, or on the court, to determine the law of the specific territorial unit to be applied in each case.[10]

2. *Professio iuris.* The first subsidiary connection

The first subsidiary connection, the choice of law, is referred to in Recital 28, from which it follows that the parties, where they have exercised their *professio iuris*, are obliged to determine the law of the

[10] H. Mota, 'A remissão a um ordenamento plurilegislativo de base territorial no direito internacional privado da União Europeia: uma oportunidade perdida?', in G. Ferraz de Campos Mónaco and M.R. Guimarães Loula eds, *Homenagem aos 70 anos do Professor Catedrático Rui Moura Ramos. Estudos de Direito Internacional Privado e Direito Privado Comparado*, I (S. Paulo: Quartier Latin, 2021), 283-309.

territorial unit where the law of the multi-unit State of nationality does not itself designate the applicable law.

This requirement for the parties to determine the law of the applicable territorial unit seems correct, but it should generally be made within the framework of Art 5, thus avoiding the need to resort indirectly to the Multi-unit State itself in the first place, whose solution may precisely distort the purpose of conflictual autonomy by having a law applied that the spouses did not count on or, in the absence of these rules, the law with the closest connection, which the spouses also did not have in mind.

This would be the best-case scenario since it avoids problems arising from remission to Multi-Unit States; this is because the parties have agreed on the law applicable to the matrimonial property regime or to the legal consequences of registered partnerships. Accordingly, the law agreed upon by the parties must be referred to and applied (Art 22 of the Twin Regulations) under freedom of choice.

3. In the absence of agreement on the applicable law

The problems of remission to the Multi-Unit State system in the absence of an agreement regarding the applicable law will correspond to the interregional law if it exists. Currently, the only EU Member State with this Multi-Unit State system is Spain and its rules on internal conflicts are subject to the provisions of Art 16.1 of the Spanish Civil Code.[11] Art 33 of the Twin Regulations refers to this Article and, in turn, Art 16.1 refers to 9.1 and 9.3 of the Spanish Civil Code.

The practical result of this remission is seen more clearly when considering an example: let us imagine a Lithuanian citizen who

[11] Art 16.1. Conflicts of laws that may arise from the coexistence of different civil laws in the national territory shall be resolved in accordance with the rules contained in Chapter IV, with the following particularities:1. It will be personal law determined by the civil *vecindad*. 2. The provisions of Art 12(1), (2) and (3) on qualification, remission and public policy shall not apply.

usually resides in Spain, yet dies in Navarra, a territory with its own civil legislation for family and succession matters.

Upon death in Spain, the law applicable under Art 9.8 of the Spanish Civil Code on succession by reason of death is the national law of the deceased at the time of his/her death (Art 9.1 of the Spanish Civil Code), i.e., the Lithuanian law. On the other hand, marriage agreements or capitulations are governed by the law of nationality or habitual residence of either party at the time they are granted (Art 9.3 of the Spanish Civil Code).

If the Lithuanian citizen had chosen Spanish nationality at some point, he/she would have chosen the Navarrese civil *vecindad* (civil status that every Spanish citizen possesses by virtue of local residence) and thus the civil legislation of Navarra would be applicable. However, having maintained his/her Lithuanian nationality and given that the Twin Regulations only allow a state law to be chosen, when there are seven civil laws in Spain, the conflict of rules is served - this is because, in Spain, interregional conflicts are articulated on a principle of remission to the PIL rules and establishing the civil *vecindad*[12] as a criterion of personal subjection to the different civil systems, and as a point of connection.

It should be borne in mind that the civil *vecindad* in Spain is a key element in resolving conflicts of interregional laws in terms of the general principle of connection and a technique for determining the subjection to a given civil legal system.[13] In the Spanish legal system, subjection to common civil law (the Civil Code) or to a special civil law applicable to the Autonomous Communities, is determined by the

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[12] The civil *vecindad* is a criterion for determining the civil legislation (common or *foral*) applicable to Spanish citizens. In Spain, the Constitutional Court, in judgement no 156/1993 of 06/05/1993, REC. The appeal of unconstitutionality 2.401/1990 determined that it is the competence of the state.

[13] As expressed by J.J. Álvarez Rubio, 'Derecho interregional, conflictos internos y Derecho comunitario privado', in J.L. Iglesias Buhigues et al eds, *Nuevas fronteras del derecho de la Unión Europea* (Valencia: Tirant lo Blanch, 2012), 41-56.

civil *vecindad* (Art 14.1 of the Spanish Civil Code), which determines the legislation to be applied in matters of succession law, matrimonial regime, or the property consequences of de facto couples.

4. The civil *vecindad* in Spain does not harmonize with the Twin Regulations. Special reference to registered partnerships

The issue is raised in cases where the person with a nationality other than Spanish requests the application of the civil law of the Autonomous Community where he/she resides, and consequently not being a Spanish national does not have a civil *vecindad*, since Art 15.1 of the Spanish Civil Code indicates that a foreigner who acquires Spanish nationality must opt for one of the existing civil *vecindades* in Spain when registering the acquisition of nationality: that of the place of residence, the place of birth, the last of one of the parents/adoptive parents, or that of the spouse. However, if the foreigner acquires nationality by *carta de naturaleza* (decree of naturalisation), the civil *vecindad* will be determined by the Royal Decree on concession, taking into account that option (Art 15.2 of the Spanish Civil Code). That is to say, whether you acquire nationality by choice or if you acquire it by c*arta de naturaleza,* you will obtain the civil *vecindad*, and consequently the applicable regulations resulting from it.

This common civil law/special civil law dichotomy is not valid for de facto couples for two reasons. Firstly, there is no common civil law on *more uxorio* unions because there is no state regulation. Secondly, the regional regulation is not limited to those Autonomous Communities with special civil law (Navarre, Aragon, Catalonia, Galicia, the Basque Country and the Balearic Islands), because their regulation is autonomous, and each autonomous community has its own law:

- In Andalusia, de facto unions are regulated by Law 5/2002, of 16 December, on De Facto Couples.
- In Asturias, it is the Law of the Principality of Asturias 4/2002, of 23 May, on Stable Couples, which is responsible for regulating de facto unions.

- In the Canary Islands, Law 5/2003, of 6 March, regulates de facto couples in the Autonomous Community of the Canary Islands.

- In Cantabria, The Law of Cantabria 1/2005, of 16 May, regulates De facto Couples.

- In Extremadura, de facto unions are regulated by Law 5/2003, of 20 March, on De Facto Couples in the Autonomous Community of Extremadura.

- In the Community of Madrid, they are regulated by Law 11/2001, of 19 December, on De Facto Unions.

In contrast, In the Autonomous Communities of La Rioja, Castilla-la Macha and Castilla y León, the treatment of the issue is limited to the 'registration' side via the following regulations:

- In La Rioja, it is regulated by Decree 30/2010, of 14 May, which created the Register of De Facto Couples of La Rioja.

- In Castilla y León, it is regulated by Decree 117/2002, of 24 October, which created the Register of De Facto Unions in Castilla y León and regulates its operation.

- Lastly, in Castilla-la Mancha, through Decree 124/2000, of 11 July, which regulates the creation and operating regime of the Register of De Facto Couples in the Autonomous Community of Castilla-la Mancha.

Once it has been determined which rule is applicable among the different ones subscribed by each of the Autonomous Communities, another problem inevitably arises: what shall be its material content? Not all autonomous legislation provides for the property regime of the couple in the absence of an agreement (although in almost all, the freedom of choice of the members of the couple has been established as the primary rule).[14]

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[14] For example, Law 18/2001 of the Balearic Islands, of 19 December, on Stable Couples, establishes that 'in all property relations, if there is coexistence, Article 4 of the Civil Law Compilation of the Balearic Islands shall be of supplementary application'; which relates to the matrimonial property regime (Art 5.5). For its part, Law 2/2003, of 7 May, regulates de facto couples in the Basque Country - in the absence of an express agreement, the economic-property regime of the de facto couple will be that of separation of assets established in the Civil Code (Art 5.3). The third Additional Law Provision 2/2006, of June 14, on Civil Law in Galicia, establishes that 'for the purposes of applying this law, marital relations maintained with the intention or vocation of permanence are

But that is not all, some of the regional legislations that have regulated the supplementary property regime of registered partnerships have been declared unconstitutional, such as the Navarrese Law, the Law of the Community of Madrid and the Valencian Law on stable unions.[15] The surprising thing is that the precepts declared unconstitutional are those that establish a supplementary economic regime for the couple if no choice has been made.[16] This is due, according to the Constitutional Court, to the fact that they violate Art 10 of the Spanish Constitution, for not respecting the freedom of choice[17] and because of the lack of jurisdiction of those Communities regarding the civil precepts contained in the law, in that they regulate the 'civil consequences of formalized de facto unions.' The crux of the matter, both in the laws declared unconstitutional and those that are still in force in Communities whose laws have not been the subject of an appeal or a question of unconstitutionality, is not so much the

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equated to marriage, with which the rights and obligations that this law recognizes to the spouses are extended to the members of the couple.' Law 1/2005, of 16 May, on De Facto Couples in the Autonomous Community of Cantabria prescribes that: 'in the absence of an agreement, it shall be presumed, unless proven otherwise, that the components of the de facto couple contribute to the maintenance of the dwelling and common expenses proportional to their possibilities through economic contribution or personal work'; it does not refer to the marriage regulation (Art 8.2). In contrast, Asturian and Andalusian law allow agreements between the partners but establish nothing in their absence.

[15] The Spanish Constitutional Court: Judgements of the TC 81/2013 of 11 April, 93/2013 of 23 April, and 82/2016 of 9 June 2016, respectively.

[16] Question of unconstitutionality 6760-2003). Judgement 81/2013, of 11 April 2013, in relation to the question of unconstitutionality (6760-2003), annulled certain autonomic precepts related to the regulatory agreements on the economic and property relations of the de facto couple (Question of unconstitutionality 6760-2003).

[17] In the opinion of the Constitutional Court: 'the legal regime that the legislator may establish for this purpose must be eminently operative and not mandatory, at the risk of violating the freedom enshrined in Art 10.1 EC. Thus, only those legal effects whose operability is conditioned on their prior assumption by both members of the couple' (STC 81/2013) may be considered respectful of personal freedom. Thus, only those legal effects whose operability is conditioned on their prior assumption by both members of the couple' (STC 81/2013).

violation of the free development of the personality, which in no case would occur for cohabitants who formalize their relationship, but rather the identical social reality that lies beneath the concepts of marriage and stable unions. Such an identity leads us to affirm that this is but a variant of marriage which, as such, affects the marriage system and which should therefore be regulated by the State.[18]

Once the diversity has been exposed, we can conclude that the connection to the civil *vecindad* does not solve the cases of internal law conflicts in Spain in matters of the property regime pertaining to registered partnerships when they do not have Spanish nationality. In other words, the civil *vecindad* does not comply with Regulations 2016/1103 and /2016/1104, in which there is a cross-border repercussion and the spouses or members of the cross-border couple residing in Spain have not changed their nationality, and consequently, have not obtained the civil *vecindad*, so it is not possible a priori to apply the special civil law of the Autonomous Community in which they reside.

But there is something else that cannot be ignored. If the couple has not chosen the law that will apply to the property consequences of their partnership or marriage, the Regulations lead to the application of Spanish law (The Spanish Civil Code) because the union has been formed in Spain, not because it is the place where they are habitually resident (Art 26 of the Regulations). That is why the solution cannot be an understanding of the civil *vecindad* connection in a broad sense, replacing it with habitual residence[19] because the couple's residence might even be in another country. In addition, some authors have considered this to be the safest connection for partnerships, unlike for marriages;[20] however, in Spain, the issue is even more complicated for

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[18] J. Nanclares Valle, 'Las parejas estables tras la inconstitucionalidad parcial de la Ley Foral 6/2000, de 3 de julio: el retorno de la unión de hecho' *Revista Crítica de Derecho Inmobiliario*, 1859, 1898 (2015).

[19] As can be done in other scenarios, A. Lara Aguado, 'Impacto del Reglamento 650/2012 sobre sucesión en las relaciones extracomunitarias vinculadas a España y Marruecos' *Revista electrónica de estudios internacionales*, 1, 61 (2014).

[20] Regulation 1103/2016 on the matrimonial property regime establishes in Art 26.1 that the applicable law in the absence of a choice-of-law agreement will be the law of the State: a) of the first common habitual residence of the spouses after concluding

registered partnerships because there is no national law, there are only regional laws, which do not regulate the property field because this is considered a state competence.

Consequently, if the civil *vecindad* connection does not determine which autonomous legislation will be applicable, not even understanding it in the broad sense as habitual residence, it will be required to conclude that the Spanish conflict-of-laws rules are not adapted to the specific case, and thus apply the subsidiary precepts provided for by Regulation (EU) 2016/1104 (Art 33.2). This is the solution advocated by part of the doctrine and with which we fully agree.

Where the rules are not adapted to the scenario because they are based on non-existent solution criteria, the locution 'in the absence of such rules' must be interpreted in a laxer way, also including the scenarios of inadequacy or inadaptability of said rules.[21] This could solve the problem of the law applicable to the succession of a foreigner who died in Catalonia, for example, and who is habitually resident in that territory, but without a civil *vecindad* (because he/she has not taken Spanish nationality). In this case, and overcoming the doctrinal controversy, the application of subsidiary connections would involve applying foral (Special or Regional Law) law, even though the deceased did not have a civil *vecindad*, he/she did have habitual residence[22] – this is accepted by some and criticised by others.

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the marriage, or, failing that, b) of the common nationality of the spouses at the time of concluding the marriage, or, failing that, c) that to which both spouses have the closest connection at the time of concluding the marriage, taking into account all the circumstances.

[21] S. Álvarez González, n 2 above, 7-28.

[22] Regarding the doctrinal debate, see (among others): J.J. Álvarez Rubio, n 13 above; 41-56; C. Parra Rodriguez, *La revisión del Derecho Interregional español: un análisis desde los principios generales del Derecho que inspiran la reforma, entre Bruselas y La Haya. Estudios sobre la unificación internacional y regional del Derecho internacional privado* (Spain-Madrid: Marcial Pons, 2013), 653-669; E. Zabalo Escudero, 'Conflictos de leyes internos e internacionales: conexiones y divergencias' *Bitácora Millennium DIPr,* 1 -17 (2016); L. Garau Juaneda, 'La necesaria depuración del Derecho interregional español', in A. Font i Segura ed, *La aplicación del Derecho civil catalán en el marco plurilegislativo español y europeo* (Barcelona: Atelier, 2011), 95-100.

However, one would have to analyse whether this solution, desirable or not in the field of succession law or the matrimonial property regime, would also be desirable in the context of the property regime of the registered partnership (Art 33.2 of both Regulations).
Let us remember that subsidiary connections will apply, as stated in that provision, 'in the absence of internal rules' to resolve interregional disputes.
In our opinion, the third paragraph would apply, and it should be in accordance with the legislation of the Autonomous Community where the union was formed, which is the connection established by Art 26 of the Regulation.

5. Recent judgment of the Court of Justice in Spain regarding the lack of harmonization with the civil vecindad in a succession case

In Spain, the personal status of civil *vecindad*, is required to apply the *foral* law, and not residence. However, recent Spanish jurisprudence[23] has considered for foreigners residing in Spain, that the internal rules cannot frustrate the objectives and purposes intended by the European Regulations by means of additional requirements,[24] arguing that while in Spanish law there is the civil *vecindad* for the Spanish national; for the foreign citizen with residence in this country (a

[23] Judgement of the Provincial Court Section no 3 Palma de Mallorca (Spain). Judgement 00529/2020, of 30 December 2020 available at https://januarconsulting.com/wp-content/uploads/2021/01/Sentencia-AP-Palma-3 0.12.2020.pdf (last visited 20 September 2021).

[24] In this regard, the CJEU judgements: Case 119/1984, Judgment of the Court (Fourth Chamber) 3 October 1985, ECLI:EU:C:1985:388; Case 388/1992, Judgment of the Court, 16 May 2000, ECLI:EU:C:2000:244 and Case 185/2007, Judgment of the Court (Grand Chamber) 10 February 2009, ECLI:EU:C:2009:69. These judgments show us the impossibility that the national rules prevent applying the European rules, in three cases on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

Multi-Unit State), the condition lies in the territorial unit.

Therefore, a in the order to exercise the right of free movement, the High Court of Justice of Balearic Island[25] considered that it was imperative to guarantee that any foreign citizen of the European Union can organise their succession effectively in accordance with the provisions of the European Regulation of Succession, without being subject to discrimination that would prevent them by reason of their nationality.

[25] Judgement of the High Court of Justice of the Balearic Islands. Civil and Criminal Chamber. Judgement: 00001/2021, of 14 May 2021. The content of this judgment is developed in the commentary to Art 35.

Article 34
States with more than one legal system - inter-personal conflicts of laws

María José Cazorla González

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
In relation to a State which has two or more systems of law or sets of rules applicable to different categories of persons in respect of matrimonial property regimes, any reference to the law of such a State shall be construed as referring to the system of law or set of rules determined by the rules in force in that State. In the absence of such rules, the system of law or the set of rules with which the spouses have the closest connection shall apply.	In relation to a State which has two or more systems of law or sets of rules applicable to different categories of persons in respect of the **property consequences of registered partnerships**, any reference to the law of such a State shall be construed as referring to the system of law or set of rules determined by the rules in force in that State. In the absence of such rules, the system of law or the set of rules with which the **partners** have the closest connection shall apply.

I. Preliminary considerations

The content of this provision exists in identical form in numerous regulations and conventions, and in particular, the Succession Regulation. It is based on the same principle as Art 33 for inter-territorial conflicts, in the sense that the solution to the interpersonal conflict must first be sought in the rules in force in the State specified by the Regulation.

It regulates conflicts of internal laws that arise from the remission to a multi-legislative State, where different internal laws applicable to different categories of people coexist. Since Spain is a state with a territorial base, this precept does not apply.

II. Differences between States that has a personal base and States that has a territorial base

It is necessary to bear in mind and differentiate a State that has a personal base from another that has a territorial base, knowing that in the absence of such rules, it is no longer possible to resort to territorial criteria to determine applicable law. The Article specifies that it is the system of law with which the spouses or partners have the closest connection. This connection is not defined but it might be appropriate to refer to the rules of each system, or of each community, to verify whether the spouses were subject to them.[1]

In the first case (States with a personal base), the internal conflict-of-laws system with which the spouses or members of the registered partnership have the closest relationship will apply, here resulting in the application of the law of a State that is not a member of the European Union (e.g., Morocco, Algeria, Saudi Arabia, Iraq, Lebanon, Syria, Egypt or India), which has a personal base, dealing with different laws depending on the religion, race or ethnicity of the citizens.

However, not all multi-legislative countries have a personal base. Spain, as a Member State of the European Union, has a territorial base, as do other non-member states such as the United Kingdom, the United States, Canada or Australia. Therefore, these types of internal conflicts of laws do not occur in them.

Of all the European Member States, only Spain is currently a multi-legislative country. This means that it attends to the point of connection of the conflict rule that refers to the territorial-based

[1] U. Bergquist et al eds, *The EU Regulations on Matrimonial and Patrimonial Property* (Oxford: Oxford University Press, 2019), 136.

system, that is, to the civil *vecindad* (Art 16.1), under which will be applied the common law, or a system of *foral* or special civil law, of the particular Autonomous Community, and for successions heeding the provisions of Art 9.8 of the Spanish Civil Code.

But the Regulations allow reference to other personal-based multi-legislative regimes, the laws of which may be applicable by a European court.

Let us think of those situations that may arise before a Spanish court when, for example, Moroccan Law is applicable in cases where it has a greater connection under the application of the Twin Regulations or by connection to the Succession Regulations, which serves the corresponding territorial unit (Art 36.1).

We must take international public order into account and the application of the law provisions of a third State, which in our example are those of Morocco, from which discrimination could derive that is contrary to the fundamental rights recognized in our Constitution or in the EU Charter of Fundamental Rights, such as an unequal distribution of property between women and men, based on sex.

An example of this is the case brought before the *Audiencia Provincial de Barcelona* (Provincial High Court), which gave rise to the Judgement of 20 October 2015,[2] dealing with a divorce between two Moroccan nationals residing in Spain, which could hear the matter according to 'The Law designated in Regulation 1259/2010, of the Council of 20 December 2010, which shall apply whether or not it is the law of a participating Member State (Art 4) thus declaring the principle of universal application as a way of providing legal certainty and protection to persons residing within the Union, regardless of their country of origin.'

[2] Judgement of the Provincial Court of Barcelona, of 20 October 2015, Appeal 323/2014. ECLI:ES:APB:2015:9775, available at https://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=7536475&links=marroqui&optimize=20151127&publicinterface=true (last visited 20 September 2021).

It is customary for the parties to choose the law applicable to the economic management of their matrimonial property, which should not be confused with the choice of the law applicable to separation, annulment, or divorce. In this case, the spouses chose Moroccan law for the constant marriage property regime, but they did not agree on the law that should be applied to the effects following a breakdown of the marriage. For this reason, attending to the place of residence, the applicable law was Spanish, because both parties resided in Terrassa (Barcelona) and had not chosen another law[3] at the time the divorce petition was filed; therefore, taking into account the territorial-based system, the applicable law would be the Civil Code of Catalonia.

But the result could have been different if the parties had chosen the law applicable to the breakdown of the marriage, or in the event, that the husband returned to his country of origin when the cohabitation ceased and after more than a year instituted the proceedings in Morocco. A similar situation would occur where one of the spouses of the same nationality, who comes to live in Spain, files a claim more than a year after the cessation of coexistence. Typically, jurisdiction rests on the last marital residence, or the current one in cases of *electio iuris*.

When the application of the conflict rule occurs in the area of succession, that is, when the rupture derives from the death of one of the spouses, Succession Regulation 650/2012 regulates (in Arts 4 and 21) that, as a general rule, for the purposes of determining jurisdiction and the applicable law, it is the habitual residence of the deceased at the time of death which determines the court of the Member State that must hear the succession as a whole, as well as the law that should be applied to it - unless the applicable law was chosen by applying Art 22, where such a possibility is established by designating the law of the State whose nationality one possesses at the time of making the choice or at the time of death.

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[3] In the absence of choice by the parties, Art 8 of Regulation 1259/2010 establishes that divorce will be subject to the law of the State a) in which the spouses have their habitual residence at the time of filing the claim or, failing that, b) in which the spouses have had their last habitual residence, provided that one of them still resides there at the time of filing the claim.

Article 35
Non-application of this Regulation to internal conflicts of laws

María José Cazorla González

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
A Member State which comprises several territorial units each of which has its own rules of law in respect of matrimonial property regimes shall not be required to apply this Regulation to conflicts of laws arising between such units only.	A Member State which comprises several territorial units each of which has its own rules of law in respect of **the property consequences of registered partnerships** shall not be required to apply this Regulation to conflicts of laws arising between such units only.

Summary: I. Considerations on the application of Art 35. – II. Harmonization between the application of national law under internal conflicts of laws and the obligation of the courts to ensure the full effectiveness of EU law. – III. Judgement of the Provincial Court and the High Court of Justice of the Balearic Islands. Art 38 with relation Art 36 of the Succession Regulation.

I. Considerations on the application of Art 35

This precept connects with Art 81.1 of the TFEU,[1] focusing on judicial cooperation in civil matters with cross-border repercussions

[1] Case C-281/02 Owusus, CJEU of 1 March 2005, ECLI:EU:C:2005:120. The purpose of this judgement is a request for a preliminary ruling made, in accordance with the Protocol of 3 June 1971, relating to the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judicial decisions in civil and commercial matters, by the Court of Appeal (England and Wales) Civil Division (United Kingdom), in the decision of 5 July 2002, heard at the Court of Justice on 31 July 2002, in the proceedings between Andrew Owusu and N.B. Jackson, operating under the trade name 'Villa Holidays Bal-Inn Villas.' Available at https://curia.europa.eu/juris/liste.jsf?language=es&num=C-281/02 (last visited 20 September 2021).

and the principle of mutual recognition of the judicial and extrajudicial decisions. It is from this cooperation that the adoption of measures to approximate the laws and regulations of the Member States can be included - and so, relates it to Art 33 of one or other of the Regulations commented on previously.

This Article, as with the preceding one, has become usual in international or European legislation in matters of private international law. A situation in which elements are spread among different territorial units of the same Member State is an internal issue for that Member State. The Member State may, if it so wishes, apply the Regulation in this situation, but this then applies as an internal rule of this Member State. The determination by this Member State of the solution to its internal conflict harmonises with the solution used by Art 33.1, which gives priority to the rules of the multi-legislative State to resolve the internal conflict within that State.

Consequently, Art 35 serves to recall in the text of each of the Twin Regulations, that which is generally applied by Art 81.1 of the TFEU. In our opinion, it is an unnecessary reiteration, or at best, a reminder of the specific application to a matter such as matrimonial property regimes or the property consequences of registered partnerships, when the law applicable to the particular case has to be determined; this is because it does not contemplate the conflict of rules when there is a foreign element, but rather refers to conflicts of laws that arise between the territories of the same country, with their own regulations on the law applicable to the matrimonial property regime or the property consequences of registered partnerships.

The freedom left to that State by Art 35 only exists if the conflict of laws occurs only between these units. If the factual element of a matter contained in Art 27, or otherwise within the scope of the Regulation, is located outside the legal system of that State, the situation becomes international, and the Regulation must be applied.[2]

[2] U. Bergquist et al eds, *The EU Regulations on Matrimonial and Patrimonial Property* (Oxford: Oxford University Press, 2019), 132.

As specified in Art 35, a Member State comprising several territorial units, each of which having its own legal rules regarding matrimonial property regimes or property consequences of registered partnerships, is not obliged to apply the provisions of the Regulation to the resolution of internal disputes that arise only between said units. In other words, the conflict rules of the Regulation (Art 33 and 34) are not applicable in purely internal cases. In the absence of any extraterritorial element, no problem of private international law arises, so States remain entirely free to apply their domestic rules (as they remain free, *mutatis mutandis*, to apply domestic rules relating to the determination of the competent jurisdiction).
Of course, any Member State can, on a purely voluntary and unilateral basis, decide to apply the conflict rules of the Regulation by analogy to resolve internal conflicts if it so wishes. This solution seems especially desirable when interstate conflict rules do not allow spouses or registered partnership members to designate the applicable law within a specific territorial unit,[3] which could compromise the freedom of choice recognized by Regulation 2016/1103 and 2016/1104, or Succession Regulation 650/2012.

II. Harmonization between the application of national law under internal conflicts of laws and the obligation of the courts to ensure the full effectiveness of EU law

Although, Art 35 of the Twin Regulations regulates that a Member State which comprises several territorial units each of which has its own rules of law in respect of the matrimonial property regimens or on the property consequences of registered partnerships, shall not be required to apply this Regulation to conflicts of laws arising between such units only. This content is like Art 38 of the Succession Regulations.

[3] A. Bonomi and P. Wautelet, *Le droit européen des relations patrimoniales de couple. Commentaire des Règlements (EU) 2016/1103 and 2016/1104* (Brussels: Bruylant, 2021), 1094.

In the order to exercise the right of free movement, it is imperative to guarantee that any foreign citizen of the European Union can organise their succession, their matrimonial property regimes or the property consequences of registered partnerships effectively in accordance with the provisions of the European Regulation, without being subject to discrimination that would prevent them by reason of their nationality.
In our opinion, it would not be suitable that by application of Art 35 for the Twin Regulations or Art 38 for the Succession Regulations, conflicts could be resolved which would lead to unequal treatment of foreigners.

III. Judgement of the Provincial Court and the High Court of Justice of the Balearic Islands. Art 38 with relation Art 36 of the Succession Regulation

In this section, we will analyse the recent judgements of the Audiencia Provincial (Provincial Court) of the Balearic Islands, of 30 December 2020[4] and of the High Court of Justice of the Islands, of 14 May 2021[5], referring to the field of succession and therefore to the Regulation on Succession, Art 36 of which regulates content similar to that of Art 33 in the Twin Regulations: one primary, on the internal conflict-of-laws rules of the Multi-Unit State that will be applicable to the territorial unit, and a supplementary system, which attends to the points of connection in the following order - in the absence of internal norms: the habitual residence, the nationality, or any other dispositions relative to other elements that are connection points, as a reference to the law of the territorial unit in which the pertinent element is located.
Both judgements share the facts dating back to March 16, 2018, the date on which the notarial public deed of donation (deed of covenant)

[4] Judgement of the Provincial Court Section no 3 Palma de Mallorca. Judgement 00529/2020, of 30 December 2020. Available at https://januarconsulting.com/wp-content/uploads/2021/01/Sentencia-AP-Palma-30.12.2020.pdf (last visited 20 September 2021).
[5] Judgement of the High Court of Justice of the Balearic Islands. Civil and Criminal Chamber. Judgement: 00001/2021, of 14 May 2021.

with a *pacto de definición* (defining agreement) was authorized in Palma de Mallorca,[6] which the party appealing today, a citizen of French nationality with habitual residence in Mallorca, granted as a donor and disposer, together with her beneficiaries and defining children.

When the beneficiaries request that the donated goods be registered in the property registry after accepting the donation, the registrar refuses to register the goods because he/she considers that there were defects that prevented their registration, thus motivating the Resolution of the General Directorate of Registries and Notaries of 24 May 2019,[7] in which it was denied that the Balearic civil law was applicable to certain French residents in Mallorca on the understanding that Art 50 of the Balearic Compilation seems to limit such an institution to 'the succession of the ancestors of the Mallorcan *vecindad*,' and the French who were the subject of the dispute did not have it.

This Resolution of the General Directorate of Registries and Notaries was confirmed by the Judgement of the Court of First Instance, no 10 of Palma de Mallorca on 11 May 2020.

This judgement was appealed before the Provincial High Court of Palma de Mallorca, which in the judgement of 30 December 2020 revoked the judgement of the Court of First Instance, in which the

[6] The Pact with definition, referred to in Arts 50 and 51 of the Compilation of Balearic Civil Law for Mallorca, also applicable in Ibiza and Formentera - Art 77 of the CB, which regulates the '*finiquito*' - since the reform introduced by Law 7/2017, of 3 August, also to Menorca -Art 65 of the CB - has in that precept the following regulation: 'By the succession pact known by definition, the descendants, legitimized and emancipated, can renounce all the succession rights, or only the "legitimate" that, at the time, might correspond to them in the succession of their ascendents, who have Mallorcan vecindad, contemplating any gift, attribution or compensation that they receive or have received previously from them.'

[7] Resolution of the General Directorate of Registries and Notaries of 24 May 2019 on the recourse interposed against the negation by the property registrar of Palma de Mallorca no 4 to deny the registration of the deed of covenant with definition BOE-A-2019-9472, no 150, of 24 June 2019, 66856-66867. Available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2019-9472 (last visited 20 September 2021).

personal status of Majorcan civil *vecindad* was demanded, which as we know is only applicable to Spanish nationals and let us remember, the donor maintained her French nationality even though she resided in the Balearic Islands.

The argument put forward by the Provincial High Court, supporting the revocation of the judgement of the Court of First Instance, was that the internal rules cannot frustrate the objectives and purposes intended by the European regulations by means of additional requirements,[8] arguing that while in Spanish law there is the Balearic-Mallorcan civil *vecindad* for the Spanish national, for the foreign citizen with residence in our country (a Multi-Unit State), the condition lies in the territorial unit, which in this case is Mallorca.

It is clear that the Succession Regulation applies to the date on which the aforementioned public deed was authorized. And being a succession covenant (a gift with legitimate definition) concluded by people of foreign nationality (French) in accordance with Art 50 of the Balearic Civil Compilation, it is evident that we are in a private cross-border legal situation, which must comply with the provisions of Regulation (EU) 650/2012.

As jurisprudential background in this area, we find the same Provincial High Court of the Balearic Islands, in the Judicial Decree of Section 4ª, no 184/2019, of 31 October, highlighted the *erga omnes* character and the primacy of EU law over the internal law of the Member States a year before, entailing that, in relation to the Law applicable to *mortis causa* succession, as is the case in question, the Spanish authorities, judicial and extrajudicial, will apply the conflict rules contained in Regulation 650/2012 (and not Art 9.8 of the Spanish Civil Code).

[8] In this regard, the CJEU judgements: Case 119/1984, Judgment of the Court (Fourth Chamber) 3 October 1985, ECLI:EU:C:1985:388; Case 388/1992, Judgment of the Court, 16 May 2000, ECLI:EU:C:2000:244 and Case 185/2007, Judgment of the Court (Grand Chamber) 10 February 2009, ECLI:EU:C:2009:69. These judgments show us the impossibility that the national rules prevent applying the European rules, in three cases on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

The judgement of the Balearic Islands' Provincial High Court of 2020 considers the deceased's habitual residence in Mallorca to be proven and considers Spanish law applicable to the succession agreement granted, resulting from the provisions of Arts 25.1 and 21.1 of Regulation (EU) No 650/2012 (the first of which subjects the validity of the covenant to the law that would be applicable to its succession if the grantor had died on the date of its conclusion, and the second establishes, as a general rule, that the law applicable to a succession is that of the State in which the originator had his/her habitual residence at the time of death).

The regulation and application of Art 36 of the Succession Regulation is structured in a primary section on preferential application, and a second paragraph which is supplementary in nature.

From this premise, it is necessary to resort to Art 36, which regulates 'States with more than one legal system - territorial conflicts of laws,' a scenario to which the Spanish case responds, given the validity of the different existing civil systems (the Civil Code and the Compilations).

Article 36.1 provides that 'the internal conflict-of-laws rules of that State shall determine the relevant territorial unit whose rules of law are to apply.' It is therefore understood that the internal conflict rule is Art 16 of the Civil Code, which establishes civil *vecindad* as a point of connection, and concludes that, since the applicant, being of foreign nationality, has no civil *vecindad*, she cannot avail herself of Art 50 of the Compilation, whereas the Spanish Civil Code can be applied. The problem here is that the Spanish Civil Code does not contemplate the figure of the*definición* (*definition*-the succession agreement).

In our view, the Chamber seeks to uphold in its judgement a practical consistency far removed from legal technique, but without denying that Art 16.1 of the Spanish Civil Code effectively contains an internal conflict rule which determines that personal law (the national conflict rule referred to in Art 33.1 of the Twin Regulations and 36.1 of the Succession Regulation) shall be that corresponding to civil *vecindad* (through Art 14 of the Civil Code).

However, such a conflict rule does not resolve the question of which of the various civil systems should be applied (Art 21 of the Regulation). That is to say, the internal rule - Art 16.1 of the Spanish Civil Code - employs a category or connection point - civil *vecindad* -which cannot be claimed by the foreign citizen unless he/she acquires Spanish nationality (Art 15 of the Spanish Civil Code), which is not the case here, so the issue raised cannot be resolved through Art 36.1.

This means we have to apply the supplementary connection criteria, regulated in Art 33.2 of the Twin Regulations, and which, in this case, referring to the field of succession, are regulated in Art 36.2[9] 'In the absence of such internal conflict-of-laws rules,' in para (a), and for the purpose of determining the law applicable under the provisions relating to the habitual residence of the deceased, as a reference to the law of the territorial unit in which the deceased had his/her habitual residence at the time of death;' the law (that 'law of the territorial unit in which he/she would have had his/her habitual residence at the time of death') which, in the present case, is the Compilation of Civil Law of the Balearic Islands (specifically Art 50), since the claimant, at the time of granting the succession agreement (Art 25.1 and 21.1 of the Regulation) had her habitual residence in Mallorca.

This solution (applying the Balearic Compilation) is supported by the RDGRN itself, although by way of applying Art 36.3 of the

[9] The DGRN Resolution of 24 May 2019 equates the situations in which there is no internal interregional Law – internal conflict-of-laws rules – with those in which there are such rules but where the originator is not a national (as FJ6 and FJ17 concluded, the first part of which reads: 'In the scenario analysed, no applicable interregional State rule exists, rather it will be the designated territorial-unit Law that directly resolves the question'). The judgement under appeal raised this issue and, after noting that Art 14.1 of the Civil Code provides that the subjection to foral law is determined by the civil vecindad and that Art 15 establishes that foreigners may access the civil vecindad only upon acquiring nationality, excluding the applicability of Art 36.2 of the Regulation with the following reasoning (in FJ3): 'The fact that the originator is a foreigner and has not acceded to the civil vecindad does not mean that there are no internal conflict rules in the Spanish law (Art 16 of the Civil Code), and we must resort to the criteria of Art 36.2 of the Regulation.'

Regulations and treating the requirement as a matter of form regarding the legal business (Art 27 of the Regulation). This provision (Art 36.3) states that 'in the absence of a conflict rule, it takes as a reference the territorial unit with which the testator or the persons whose succession is the subject of a succession pact would have had a closer connection. A connection that, referred to at the moment of granting the pact, is reflected in the habitual residence in the territorial unit.' Such a 'closer connection' criterion leads in this case to the same solution.
In this way, the Provincial High Court of the Balearic Islands considered the appeal and declared Art 50 of the Compilation of Balearic Civil Law applicable in its substantive part, recognizing accordingly the validity of the agreement with definition under the application of the civil law of the Island of Mallorca, and, consequently, orders the Property Registry of Mallorca to register the assets that appear in the notarial public deed.
This judgement was appealed by the General Directorate of Legal Security and Public Faith in cassation before the High Court of Justice of the Balearic Islands, which in a judgement of 14 May 2021 dismissed the appeal, confirming all the pronouncements given by the Provincial Court without imposing costs. Nevertheless, it expanded the arguments in which it ratified the Balearic legislation as the applicable law.
The High Court of Justice of the Balearic Islands considered that the question does not respond exactly to the purely registral perspective but deals with the conformity (or not) of the succession agreement to the law, whose validity constitutes an aspect that is also subject to the registration qualification, which integrates the subject matter of the resolved appeal.

The judgement comes from two previous premises:

- the statement that the General Directorate of Legal Security and Public Faith considers that the situation generated by the Balearic regulations raises a reflection on normative policy.

- And that the Balearic regulations can in no way regulate the Spanish conflict rules because it is a state competence.

It argues its decision as follows:

- *Professio iuris* is not formalized since the Succession Regulation, in Art 22.1 allows one to choose the national law of the State where the deceased had her habitual residence. In Spain, this law could be understood to be the Spanish Civil Code although it does not have direct application in the Balearic territory, since this Autonomous Community has its own Civil Law through its Compilation.

- Although Art 27.3 of the European Succession Regulation treats the personal conditions of someone whose succession is the subject of an agreement as matters of form; however, the mention of the ascendants' Mallorcan civil vecindad does not compromise the validity of the controversial 'definition,' since it complies with the subjection provided for in Art 27.1.a) of the European Succession Regulation, liable to or in conformity with the law of the State in which it was carried out, because:

> a) although it could be understood as a material rule, it does not refer to the requirement of Mallorcan civil vecindad for ascendants, rather that there is no need of this vecindad with respect to the descendants.
>
> b) and if it were to be understood as a conflictual rule, it would be irrelevant, because it is limited to reissuing the provisions of the Civil Code, which are territorial in nature.

The reference to the Mallorcan civil *vecindad* of the ascendants (Legislative Decree 79/1990, of 6 September) determines the connection between the person and the territory, appropriate for the applicability to whoever (the person) of the rule in force in wherever (the territory), and therefore they can 'define' the descendants even if

they do not have a Mallorcan civil *vecindad*, thus not interfering with the substantive regulation of the 'definition,' nor does it regulate its material content as an institution, which it does not affect, despite being integrated into a precept which is substantive in nature (Art 50 of the aforementioned Compilation).

- The rules of conflict that truly govern this issue are those laid down in the Civil Code, where the conflictual provision in arts. 14, 15 and 16 should be respected, since Art 38 of the European Succession Regulation excludes its own application in the face of conflict of laws arising exclusively in territorial units which have their own provisions on succession in a State with different legal systems. This is not the case here, however, because the scenario has cross-border implications.

* Spanish Civil Code Art 14: establishes the subjection to common or Spanish civil law or to *foral* or special civil law (the Balearic Islands in our case).

* Spanish Civil Code Art 15: The law of the Balearic Islands for the island of Mallorca is determined by the civil *vecindad*, whose acquisition by the foreigner is subject to Art 15 of the Civil Code, i.e., to previously obtaining Spanish nationality.

* Spanish Civil Code Art 16: This does not resolve which of the different legal systems should govern.

Hence, the rule of conflict that determines the applicable law is not resolved by applying Art 36.1 but by Art 36.2 - the supplementary application with reference to the points of connection, considering the Balearic Islands, which is part of the Spanish nation, to be the territorial unit where the interested party usually resided at the time of bestowing the gift of the definition agreement.

In the present case, we refer to the civil regulations applicable on the island of Mallorca. The conflictual system provided for in Art 36.2 is applicable for a State with more than one legal system, where a foreigner (except by choice or by *carta de naturaleza*) cannot acquire civil *vecindad*. It is legislatively coherent to interpret the rules in the spirit

and circumstances surrounding their application, hence when it is possible to determine an objective and undisputed point of connection such as habitual residence, regulated in the European Regulation on succession, it can be applied. It is also the will of the donor, freely chosen within a framework of legal certainty, although it would be advisable to improve the harmonization of our interregional law by adapting the Preliminary Title of our Civil Code so that any grantor can grant their succession in the way that best suits them.

As the High Court of Justice stated in the order to exercise the right of free movement, it is imperative to guarantee that any foreign citizen of the European Union can organise their succession effectively in accordance with the provisions of the European Regulation of Succession, without being subject to discrimination that would prevent them by reason of their nationality.

Article 36
Recognition

Andrea Fantini

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. A decision given in a Member State shall be recognised in the other Member States without any special procedure being required.	(Same text)
2. Any interested party who raises the recognition of a decision as the principal issue in a dispute may, in accordance with the procedures provided for in Articles 44 to 57, apply for the decision to be recognised.	
3. If the outcome of the proceedings in a court of a Member State depends on the determination of an incidental question of recognition, that court shall have jurisdiction over that question.	

I. Introduction

The system of recognition, enforceability and enforcement of decisions from a Member State on matrimonial property regimes and

the property consequences of registered partnerships is largely modelled on the corresponding provisions – Arts 33 to 56 – of Council Regulation (EC) no 44/2001 of 22 December 2000 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters.

This is the same regulatory framework – Arts 39 to 58 – as that laid down by Regulation (EU) no 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and the creation of a European Certificate of Succession.[1] Therefore, the case law of the Court of Justice of the European Union and of the national courts, formed on the basis of the

[1] On this subject, see, among others, R. Fentiman et al, *L'espace judiciaire européen en matières civile et commerciale - The European Judicial Area in Civil and Commercial Matters* (Brussels: Bruylant, 1999); W. Kennett, *The Enforcement of Judgments in Europe* (Oxford: Oxford University Press, 2000); G. Walter and S.P. Baumgartner, *Recognition and Enforcement of Foreign Judgments Outside the Scope of the Brussels and Lugano Conventions* (The Hague: Kluwer Law International, 2000); J.A. Pontier and E. Burg, *EU Principles on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters* (The Hague: T.M.C. Asser, 2004); G.P. Romano, 'Riconoscimento ed esecuzione delle decisioni nel Regolamento Bruxelles I', in A. Bonomi ed, *Diritto internazionale privato e cooperazione giudiziaria in materia civile* (Turin: Giappichelli, 2009); B. Hess, *Europäisches Zivilprozessrecht* (Heidelberg: Müller, 2010); G. Payan, *Droit européen de l'exécution en matière civile et commerciale* (Brussels: Bruylant, 2012); E. D'Alessandro, 'Il riconoscimento, l'esecutività e l'esecuzione delle decisioni e delle transazioni giudiziarie in materia successoria', in P. Franzina and A. Leandro eds, *Il diritto internazionale privato europeo delle successioni mortis causa* (Milan: Giuffrè, 2013); L. Mari and I. Pretelli, 'Possibility and Terms for Applying the Brussels I Regulation (Recast) to Extra-EU Disputes', in VV. AA., *Yearbook of Private International Law Vol. XV - 2013-2014* (Berlin, Boston: Otto Schmidt/De Gruyter european law publishers, 2014), 211-253; U. Bergquist, 'Recognition, Enforceability, and Enforcement of Decisions: Articles 36-57', in Id et al eds, *EU Regulations on Matrimonial and Patrimonial Property* (Oxford: Oxford University Press, 2019), 139-230; P. Franzina, 'Article 36 Recognition', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples. A Commentary* (Cheltenham: Edward Elgar, 2020), 334.

Brussels I Regulation and, even before that, on the basis of the Brussels Convention, is important and can serve as a tool of interpretation.[2] On the notion of decision, please refer to the Art 3(1)(d) and (e), respectively, Regulation (EU) 2016/1103 and Regulation (EU) 2016/1104 in this commentary.

It is appropriate, however, to quote here the definition of decision that follows from the letter of these rules: 'any decision in a matter of a matrimonial property regime given by a court of a Member State, whatever the decision may be called, including a decision on the determination of costs or expenses by an officer of the court.'

The rules on recognition and enforcement of the Regulations apply only in the Member States participating in the Regulations and only to judgments, authentic instruments and court settlements emanating from those Member States. If a judgment originates in a Member State of the Union which does not participate in the Regulations, the national rules on the recognition and enforcement of foreign judgments apply in the same way as a judgment originating in a non-EU Member State.[3]

Recital 56 of the Regulation on matrimonial property regimes and Recital 55 of the Regulation on the property consequences of registered partnerships emphasize that the general objective of these two instruments is to ensure 'the mutual recognition of decisions given in the Member States,' regardless of the procedure – contentious or non contentious jurisdiction – under which they are adopted. In order to achieve this objective it is necessary to establish 'rules relating to the recognition, enforceability and enforcement of decisions similar to

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[2] References to various pronouncements in the following notes.

[3] J. Kramberger Škerl, 'Recognition and Enforcement', in M.J. Cazorla González, M. Giobbi, J. Kramberger Škerl, L. Ruggeri and S. Winkler eds, *Property relations of cross border couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2020), 133.

those of other Union instruments in the area of judicial cooperation in civil matters.'[4]

The result has therefore been to create a regime of automatic recognition of such judgments but only a simplified enforcement procedure, without a total abolition of *exequatur*.[5]

Recognition takes place *ipso jure,* whereas enforcement is possible only after the declaration of enforceability (*exequatur*) is obtained in special proceedings conducted in the Member State of enforcement.

Enforcement, which concerns the material realisation of the rights recognised by the foreign court and requires the power of *imperium* of the State court within its legal system, presupposes a declaration establishing its enforceability (Arts 42 ff). Recognition is already in place at the normative level: it ensures, in the State *ad quem*, the indisputable definition of the relationship between the parties, as it results from the decision of the court *a quo*. Enforcement allows, through the power of coercion available to the public authority, the rights that are the subject of the judgment to be realised.

It should be pointed out that the Patrimonial Regimes Regulations apply to the recognition and enforcement of judgments rendered in court proceedings commenced on or after 29 January 2019, as well as to authentic instruments formally drawn up or registered and court settlements approved or concluded on or after 29 January 2019. It is important to note that the relevant date is the date of commencement of judicial proceedings, and in principle does not coincide with the date of issuance of the judgment. Notwithstanding this, the

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[4] I. Pretelli, 'Reconnaissance, force exécutoire et exécution des décisions', in A. Bonomi and P. Wautelet eds, *Le droit européen des relations patrimoniales de couple. Commentaire des Règlements (UE) n. 2016/1103 et 2016/1104* (Brussels: Bruylant, 2021), 1097-1098.

[5] On the subject of recognition and enforcement in private international law, see, among others, D. Damascelli, 'La "circolazione nello spazio giudiziario europeo di decisioni, atti pubblici e transazioni giudiziarie in materia successoria'", in Id, *Diritto internazionale privato delle successioni a causa di morte* (Milan: Giuffrè, 2013), 113-139.

Regulations allow for the recognition and enforcement of judgments issued after their entry into force, under the rules provided for therein, even if the proceedings began before their entry into force, if the jurisdiction of the competent court was based on a rule that complies with the rules on jurisdiction set out in the Regulations.[6]

II. Automatic Recognition

The principle of mutual recognition aims at strengthening the principle of effective judicial protection. That principle, as the Court of Justice has consistently held, is a general principle of European Union law which derives from the constitutional traditions common to the Member States and which is now guaranteed by Art 47 of the Charter of Fundamental Rights of the European Union to natural persons acting as such or through legal persons whose services they use in the exercise of their activities.[7] The principle of effective judicial

[6] This system is similar to the one provided for in the Brussels I Regulation of 2000. For a discussion of the issues surrounding this system, see J. Kramberger Škerl, 'The application '"ratione temporis"' of the Brussels I regulation (recast)', in D. Duić and T. Petrašević eds, *EU and comparative law issues and challenges: procedural aspects of EU law* (Osijek: Faculty of Law Osijek, 2017), 341-363, available at www.pravos.unios.hr/download/eu-and-comparative-law-issues-and-challenges.pdf (last visited 13 September 2021). For an in-depth discussion of the jurisdiction rules in the Regulation on matrimonial property regimes, see N. Pogorelčnik Vogrinc, 'Mednarodna pristojnost v sporih glede premoženjskih razmerij med zakoncema' 46 *Podjetje in delo*, 178, 178-203 (2020).

[7] The Court states, in particular, that the national court assessing the right of a legal person to legal aid may take into consideration, in particular, the form and the profit-making or non-profit-making purpose of the legal person in question, as well as the capacity of the financial resources of its members or shareholders and the possibility for them to obtain the sums necessary to bring legal proceedings. See: Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH* v *Bundesrepublik Deutschland*, Judgment of 22 December 2010, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CJ027 (last visited 13 September 2021); Case C-156/12,

protection is also enshrined in Arts 6 and 13 of the ECHR.[8] The European definition of the right to legal aid and the framework conditions for its exercise are laid down in Council Directive 2003/8/EC of 27 January 2003.[9]

The general principle is that of automatic recognition, with the possibility for a party wishing to rely on a judgment given by a court of another Member State to have it recognised (where appropriate, as an incidental question before the court dealing with the main proceedings in which the judgment is relied upon).

As regards the concept of 'recognition,' according to the doctrine, this consists in 'taking note of the capacity of the judgment to produce a normative effect in the system of the forum.'[10] This normative effect normally results from the acquisition of the authority of *res judicata*; it is the essential prerequisite for any enforcement. However, there are exceptions; indeed, the reference to *res judicata* was excluded from the Brussels Convention to cover certain judgments that are not *res judicata* but nevertheless liable to be recognised, such as interlocutory

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GREP GmbH v *Freitstaat Bayern*, Order of 13 June 2012, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A 62012CO0156 (last visited 13 September 2021).

[8] Cf Eur. Court H.R., *Airey* v *Ireland*, Judgment of 9 October 1979, available at https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=001-73486&filename=AIREY%20V.%20IRELAND.pdf (last visited 13 September 2021); Court H.R., *P., C. and S.* v *United Kingdom*, Judgment of 16 July 2002, available at https://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=002-5239&filename=CEDH.pdf (last visited 13 September 2021); Eur. Court H.R., *Steel et Morris* v *United Kingdom*, Judgment of 15 February 2005, available at http://hudoc.echr.coe.int/fre?i=002-4006 (last visited 13 September 2021).

[9] Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes [2003], OJ L26/41.

[10] Thus I. Pretelli, n 4 above, 1110.

judgments and judgments given in matters of non contentious jurisdiction.[11]

This automatic recognition mechanism, which is required by the principle of equivalence of judgments and is tempered by the possibility to have the foreign judgment declared non-recognizable, is followed: by Regulation (EC) no 2201/2003 in matrimonial matters and parental responsibility; by Regulation (EU) no 4/2009 in matters of maintenance obligations, albeit for (only) judgments issued in a Member State not bound by the 2007 Hague Protocol; by Regulation (EU) no 650/2012 in matters of succession.[12]

The grounds for non-recognition (and non-enforceability) are the 'classical' ones of manifest incompatibility with the public policy of the forum; lack of service of the judgment on the defendant in default of appearance (except in the case of negligence on his part, where he did not challenge the judgment when he had an opportunity to do so); irreconcilability with another judgment given in proceedings between the same parties in the Member State in which recognition is sought; and that it is irreconcilable with an earlier judgment given in another Member State or in a third country involving the same cause of action and between the same parties, provided that the earlier judgment fulfills the conditions necessary for its recognition in the Member State in which recognition is sought.[13]

By virtue of automatic recognition, the judgment produces its effects in the other Member States at the same time as it takes effect in the State of origin. Foreign judgments, on the other hand, are distinguished from domestic judgments by the possibility of

[11] See Report by Mr P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, available at https://op.europa.eu/en/publication-detail/-/publication/e69d7939-d016-4346-9651-963a63f53381/language-en (last visited 13 September 2021).

[12] P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate* (Milan: Giuffrè Francis Lefebvre, 2019), 241. 13 ibid 238.

challenging their recognition by invoking a ground of refusal under Art 37; in addition, a review may be exercised, on appeal, when the judgment must be enforced in the 'requested' State.[14] In both cases, review is merely possible since recognition is not always contested and enforcement is not always necessary. When such a review takes place, it may be carried out in main proceedings or in incidental proceedings; in either case, it results in a decision of a declaratory nature, the object of which is to establish recognition or non-recognition of the decision. According to the majority opinion in the doctrine, the decision on recognition is declaratory in nature, since the judgment took effect in all Member States at the same time as in the Member State of origin.[15]

An application for recognition may be made by 'any interested party.' This means, in addition to the parties to the proceedings in the State of origin, the successors in title, surrogates, heirs or other persons entitled under the original parties. At the time of the conception of the European judicial area, the drafters of the Brussels Convention intended to give a broad meaning to the term 'interested party.'[16]

The action for recognition of the judgment in the main proceedings is very close to the procedure for a declaration of enforceability. Art 36 refers to the rules in Arts 44 to 57 governing the enforcement procedure. This procedure consists of two stages. The first stage takes place *inaudita altera parte*, following the pattern of the interlocutory proceedings. Arts 44 to 48 lay down the rules on how the application is to be submitted to the court, territorial jurisdiction, the issue of the declaration of enforceability and its notification to the opponent. As is clear from Art 47, this is a step of a quasi-administrative nature, since the judge or bailiff responsible for reviewing it confines himself, for the most part, to checking the documents presented.[17] It ends with a

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[14] K. Siehr, 'Recognition and Enforcement', in U. Magnus and P. Mankowski eds, *Brussels IIbis Regulation* (Munich: Sellier, 2012), 256-291.

[15] J. Kramberger Škerl, n 3 above, 137.

[16] Report by Mr P. Jenard, n 11 above, 49.

[17] E. Merlin, 'Riconoscimento ed esecutività della decisione straniera nel Regolamento Bruxelles I' *Rivista di diritto processuale*, 433, 451 (2001).

first decision of recognition or, much more rarely, non-recognition of the decision. The second stage, which is purely possible, is opened if one of the parties challenges the decision rendered at the end of the first stage. Following the appeal, the procedure becomes adversarial and focuses mainly on the existence of one or more grounds for non-recognition within the meaning of Art 37; the procedure and the decision on appeal are governed by Arts 49 and 51. The appeal decision may in turn be appealed through a procedure that Member States have to communicate to the Commission until 29 April 2018 (Arts 51 and 64).[18]

1. Recognition in the Event of a Dispute

The principle of automatic recognition should not be understood in an absolute sense, since the European legislator has chosen to grant the Member State in which the judgment is to be recognised marginal powers of review, to be activated on the basis of specific objections by the party against whom recognition is sought.

In this sense, Art 36 para 2 provides that 'Any interested party who raises the recognition of a decision as the principal issue in a dispute may, in accordance with the procedures provided for in Arts 44 to 57, apply for the decision to be recognised.'

In other words, where objections are raised to the title of the court, the procedure described in Chapter IV must be followed, but governed by the procedural law of the Member State where the objection takes place.

The rule differs from Art 36(2) of Regulation (EU) no 1215/2012 – which is also the inspiration for it – in that the Brussels I-*bis* Regulation does not include the phrase 'as the principal issue in a dispute,' which suggests that the person concerned can bring a real action for prior assessment of the so-called procedural merits.

[18] I. Pretelli, n 4 above, 1115.

On the contrary, in the Regulations in question (as, moreover, also in Art 39(2) of Regulation (EU) 650/2012 on succession matters) such an incision is present and seems to hint at the need for an express objection to justify – either principally or incidentally – the introduction of the assessment procedure by the person who intends to avail himself of the decision.

Although the Regulations do not define what constitutes a challenge, for the purposes at hand, it must be considered that the proof of the existence of such a challenge need not necessarily emerge from the documents brought to the court's attention but may also be satisfied by the mere allegation of the party having an interest in recognition of the judgment, if only to comply with the requirements of speed and the encouragement of the rapid circulation of judgments within the common European area.

Where, on the other hand, no objection is even attached, the problem of the interest in bringing proceedings must be resolved in the light of the rules of the procedural order to which the 'requested' judge of the recognition belongs.[19]

On the other hand, the Regulations say nothing about the possibility of bringing an action for a negative declaration, probably because the recognition procedure was conceived and provided for in order to permit the circulation of decisions and not to prevent it.

2. Recognition that Depends on the Determination of an Incidental Question

Finally, under Art 36(3), 'If the outcome of the proceedings in a court of a Member State depends on the determination of an incidental question of recognition, that court shall have jurisdiction over that question.'

[19] Remarks by P. Bruno, n 12 above, 244-245.

As already provided for in other European Regulations in civil matters (eg Art 33 Brussels I Regulation and Art 21 Brussels II-*bis* Regulation), the question of recognition of a foreign title may arise in the context of separate proceedings having a different object but which must be resolved by the decision on recognition.

A party may wish to rely on the *res judicata* effect of the foreign judgment, or it may constitute a fact which prevents, modifies or extinguishes the opposing claim.

Clearly, the effect of the judgment in question will be limited to the proceedings in which it is given, so that if one of the parties has an interest in its recognition *erga omnes,* it will have to initiate the main proceedings referred to in the first two paragraphs of this rule (respecting functional jurisdiction).

On the contrary, in most cases, the question of recognition arises incidentally in the context of proceedings in the 'requested' State. This is the case when the foreign judgment is invoked by the defendant in support of a plea of *res judicata.* The same applies when the judgment on the main claim requires the resolution of a preliminary question that was the subject of the foreign judgment. In such cases, the court having jurisdiction to hear the main claim also has jurisdiction to rule incidentally on the recognition of the foreign judgment. The same solution is provided for in other European legislation.[20]

The decision on recognition or non-recognition as an incidental question has effect only in the ongoing proceedings. If one of the parties wishes the matter to be decided with the authority of *res judicata*, it will have to initiate main recognition proceedings.

The decision on recognition, even if given only on the basis of the principal decision, is always a final and binding decision. If the court

[20] See Art 33(3), Brussels I Regulation and Art 21(4), Brussels II-*bis* Regulation.

has verified that all the conditions for recognition are fulfilled, there is no reason to repeat that verification in the main proceedings, which might render the decision irreconcilable. On the other hand, it will be possible for the party opposing recognition to bring an interlocutory appeal under Arts 49 and 50 against the recognition decision.[21]

[21] I. Pretelli, n 4 above, 1117-1118.

Article 37
Grounds of non-recognition

Maria Cristina Gruppuso

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
A decision shall not be recognised:	(Same text)
(a) if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State in which recognition is sought;	
(b) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so;	
(c) if it is irreconcilable with a decision given in proceedings between the same parties in the Member State in which recognition is sought;	
(d) if it is irreconcilable with an earlier decision given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.	

Summary: I. Introduction. – II. Public policy. – III. Lack of service. – IV. Irreconcilable decisions.

I. Introduction

Art 37 of the European Regulations in matters of matrimonial property regimes and of the property consequences of registered partnerships, which has identical formulation for both Regulations, states the grounds of non-recognition of foreign decisions.
The above grounds are the same that legitimate denial of declarations of enforceability of the decision; in fact, Art 51, which likewise presents an identical formulation for both of the Regulations, envisages that 'the court shall refuse or revoke a declaration of enforceability only on one of the grounds specified in Art 37.'[1]
The Regulations under examination reproduce a list of typified grounds - already present in previous European Regulations - that is deemed exhaustive, it being necessary to consider that, also in conformance with the principle of mutual trust between States, recognition cannot be denied on grounds other than the ones referred to.[2]

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[1] The grounds for non-recognition have a dual nature because they operate both as grounds for refusing recognition and as grounds for refusing or revoking the declaration of enforceability. Cf E. D'Alessandro, 'Articles 40-41, Grounds of Non-recognition; No Review as to the Substance', in A.L. Calvo Caravaca et al eds, *The Eu Succession Regulation. A Commentary* (Cambridge University Press: Cambridge, 2016), 545.

[2] From a reading of the combined provisions of Art 37 and 51 it emerges that, in the case where one of the circumstances referred to in Art 37 arises, the court of the State where recognition is sought must deny recognition since no margin for discretionality can exist. Cf G. Cuniberti, 'Article 37: Grounds of non-recognition', in I. Viarengo and P. Franzina eds, *The Eu Regulations on the Property Regimes of International Couples. A Commentary* (Cheltenham: Edward Elgar, 2020), 345. On the other hand, the Court of Justice has stated that the list of the grounds referred to in Art 34 of Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1, the letter of which is identical to that of the Article under examination, constitutes an exhaustive list to be interpreted restrictively. See: Case C-157/12, *Salzgitter Mannesman Handel GmbH* v *SC Laminorul SA*, Judgment of 26 September 2013, available at www.eur-lex.europa.eu (last visited

In analysing what is envisaged by these Regulations, it will be necessary to bear in mind that in the preamble and, more precisely, in Recital (55) of the Regulation (EU) 2016/1103 and in Recital (56) of the Regulation (EU) 2016/1104, identified as general objective is the mutual recognition of the decisions given in the Member States in matters of property regime between spouses and of property consequences of registered partnerships.
Now, in proceeding to a classification of the grounds underlying non-recognition, these pertain to: public policy (*ordre public*) in its restricted sense - Art 37, letter a); lack of service - Art 37, letter b); irreconcilable decisions - Art 37, letters c) and d).

II. Public policy

Art 37, letter a) contemplates as first hypothesis of non -recognition the one in which recognition of the decision proves to be 'manifestly contrary to public policy (*ordre public*)' in the Member State where recognition is sought.
Public policy, insofar as it constitutes a general clause, presents a content determination of which cannot disregard application to the concrete case and the outcome of which varies in relation to the different legal system and historical periods of reference.
More precisely, by the term 'public policy' is meant the set of the fundamental principles expressing the values identifying the legal system of a State.[3]
Given that not all the principles of legal system can be said to identify the latter, in recognising foreign decisions the court must evaluate according to a criterion of reasonableness, by balancing the principles and values that emerge in the concrete case, whether there exist one or more principles - namely of public policy - that prevent recognition of the decision. Hence, what is important are those principles held to be essential and absolutely unrenounceable for the State where recognition is sought. In fact, in the restricted sense under

18 September 2021). In the same sense, A. Briggs, *Civil jurisdiction and judgments* (Abingdon: Informa law, 6th ed, 2015), 648.

[3] G. Perlingeri and G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale* (Naples: Edizioni Scientifiche Italiane, 2019), *passim*.

examination here, public policy consists of the fundamental principles characterising a Member State, as well as the fundamental principle of Community law.[4]

In this perspective, as emerges also from Art 40 - 'No review as to substance'- it is of no importance that the substantive law applied in the dispute is different from that of the State in which recognition is sought; the divergence between the rules applied by the court of the State of origin and those that the court of the State in which recognition is sought would have applied, in fact, cannot legitimise non-recognition.[5]

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[4] In fact, also the principles crystallised in the European Convention on Human rights (ECHR) fall within that core of fundamental principles that constitute the limit of public policy. In particular, the contracting States of the ECHR do not have to carry into effect decisions issued in infringement of fundamental rights consecrated in the Convention since the latter can be held to a fundamental and integral part of national law and the law of the European Union. See: I. Pretelli, 'I motivi di diniego del riconoscimento (Art 40)', in A. Bonomi and P. Wautelet eds, *Il Regolamento europeo sulle successioni. Commentario al Reg. UE 650/2012 applicabile dal 17 agosto 2015* (Milan: Giuffrè, 2015), 520; A. Briggs, n 2 above, 651; V. Égéa, 'Article 38. Motifs de non reconnaissance', in S. Corneloup et al eds, Le droit européen des régimes patrimoniaux des couples. Commentaire des règlements 2016/1103 et 2016/1104 (Paris: Société de législation comparée, 2018), 360; E. D'Alessandro, n 1 above, 547.

[5] On this point compare: E. D'Alessandro, *Il riconoscimento delle sentenze straniere* (Turin: Giappichelli Editore, 2007), 135; P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate. Commento ai Regolamenti (UE) 24 giugno 2016, nn 1103 e 1104 applicabili dal 29 gennaio 2019* (Milan: Giuffrè Francis Lefebvre, 2019), 253; I, Pretelli, n 4 above, 528; G. Cuniberti, n 2 above, 346. On the other hand, in a recent pronouncement of the Corte di Cassazione 14 August 2020 no 17170, available at www.dejure.it (last visited 18 September 2021), it has been stated that, as regards recognition of foreign decisions and of public policy, the court is precluded from making any evaluation on the legal relationship deduced or from calling into question the content given that the fact that the foreign decision applies a discipline out of line with imperative or unrenounceable domestic rules cannot constitute an obstacle to recognition. Otherwise, the conflict-of-law rules would work only in the case where they led to enforcement of substantive provisions that have a contest similar to Italian ones, thus cancelling out the diversity between legal systems and rendering pointless the rules of private international law. In the specific case, the question regarded recognition of the decision of divorce pronounced by the Supreme Court of Theran between two Iranian spouses.

The Court of Justice [6] has pointed out that, even though it does not pertain to the Court to define the content of the public policy of a State, it falls within its faculties to control the limits within which the court of a State where recognition is sought can use this clause to deny recognition of the foreign decision.

The phrase of Art 37, letter a) in relation to the adverb 'manifestly,' referring to the way in which opposition to public policy must emerge, has generated considerable perplexity.

According to a first reconstruction, the ground of non-recognition could be invoked only when there is a blatant contrast with the ensemble of fundamental principles that come under public policy such that the result of application of the foreign rule appears 'unacceptable.'[7]

However, another part of the doctrine has emphasised that the use of the aforesaid adverb adds nothing to the restrictive concept of public

[6] Case C-7/98, *Dieter Krombach* v *André Bamberski,* [2000] ECR I-1935; Case C-38/98, *Régie Nationale des Usines Renault SA* v *MAxicar SpA, Orazio Formento*, [2000] ECR I-2973; Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH* v *Oberbürgermeisterin der Bundesstadt Bonn*, [2004] ECR I-9609; Case C-619/10, *Trade Agency Ltd* v *Seramico Investments Ltd*, Judgment of 6 September 2012, available at www.eur-lex.europa.eu (last visited 18 September 2021); Case C-599/14, *Rudolfs Meroni* v *Recoletos Limited, third parties: Aivars Lembergs, Olafs Berķis, Igors Skoks, Genādijs Ševcovs*, Judgment of 25 May 2016, available at www.eur-lex.europa.eu (last visited 18 September 2021). Moreover, the serious economic consequences deriving from recognition do not constitute an infringement of the public policy of the Member State where recognition is sought (cf Case C-302/13, *flyLAL-Lithuanian Airlines AS, in liquidation* v *Starptautiskā lidosta Rīga VAS, AIr Baltic Corporation AS*, Judgment of 23 October 2014, para 58, available at www.eur-lex.europa.eu (last visited 18 September 2021).

[7] Basically the court which is called upon not to recognise a decision given in another Member State should do so only where the introduction of that decision into the legal system of its own is to be deemed 'intolerable' and such as to arouse disapproval. See: P. Bruno, n 5 above, 253; I Pretelli, n 4 above, 521. Cf Case C-54/99, *Association Église de Scientologie de Paris, Scientology International Reserves Trust* v *the prime Minister*, [2000] ECR I-1335: the Court stated that 'public policy and public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.' On the other hand, the court of the State where recognition is sought in evoking the limit of public policy must provide adequate reasons. Thus F. Salerno, *Giurisdizione ed efficacia delle decisioni straniere nel Regolamento (UE) n. 1215/2012 (rifusione)* (Assago: Wolter Kluwer Italia; Padua: CEDAM, 4th ed, 2015), 345.

policy already adopted by the Court of Justice.[8] In fact, to return to the reconstruction already made at the start of the section, the Court has for some time now deemed that recourse to the clause on public policy can be had only where recognition or enforcement of the decision given in another Member State is in contrast, to an unacceptable extent, with the legal system in which enforcement thereof is required insofar as said recognition or enforcement infringes a fundamental principle.[9]

In conclusion, public policy assumes the function of limit; eg it becomes an instrument through which to preclude entry into State where recognition is sought in the event of legal situations that run contrary to the fundamental and identifying values of the legal system.[10]

Before proceeding to an examination of the subsequent grounds of non-recognition, it is necessary to dwell somewhat on one last point linked to the content of the clause under examination.

Art 37, letter a) excludes recognition both in cases of contrast with the substantive public policy and in those cases of infringement of procedural public policy that do not fall within the, so to speak 'special' provision, referred to in Art 37, letter b).[11]

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[8] G. Cuniberti, n 2 above, 347, for whom it is not possible to hold that only the most evident and most important infringements are to be sanctioned (if this were the case, the formulation of the regulation would have had to be different); E. D'Alessandro, *Il riconoscimento* n 5 above, 138.

[9] The Court of Justice adopted a restrictive interpretation already when the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 27 September 1968 was in force, Art 27, no 1, of which did not contain the adverb 'manifestly.' See: Case C-7/98, *Dieter Krombach* v *André Bamberski*, n 6 above, para 37; Case C-38/98, *Régie Nationale des Usines Renault SA* v *MAxicar SpA, Orazio Formento*, n 6 above, para 30. Subsequently, Case C-619/10, *Trade Agency Ltd* v *Seramico Investments Ltd*, n 6 above, para 51.

[10] It would appear expedient to recall in this sense the metaphor of public policy as 'drawbridge' set at entrance to the 'ideal castle' constituted by the legal system of the State where recognition is sought, effectively used by G. Perlingeri and G. Zarra, n 3 above, 3.

[11] According to F. Salerno, *Giurisdizione ed efficacia delle decisioni straniere nel Regolamento (CE) N. 44/2001 (La revisione della Convenzione di Bruxelles del 1968)* (Padua: CEDAM, 3rd ed, 2006), 336-337, Art 34, no 1, of the Regulation (EC) 44/2001 is the instrument, apart from Art 34, no 2, through which it is possible to enforce the limits of procedural publicpolicy.

By this latter statement it is to be understood that denial of recognition on the grounds of the latter being contrary to public policy in conformance with letter a) can intervene also where the foreign decision is manifestly contrary to a fundamental principle of procedural public policy of the State where recognition is sought,[12] except in the case where it is a principle of procedural public policy that pertains to the scope of letter b) of the same Article.

III. Lack of service

Art 37, letter b), in stating as grounds for non recognition of the decision the condition that, in the case where said decision was given in default of appearance, 'the defendant was not served with the document which instituted the proceedings or an equivalent document in sufficient time and such in a way as to enable him to arrange for his defence (...),' implies, as has been anticipated, reasons connected to procedural public policy.

Reference is in particular to the principle of fair trial, which is disciplined by Art 6 of the European Convention on Human Rights (ECHR) and Art 47 of the Charter of Fundamental Rights of the European Union, as well as being contemplated and protected by the common constitutional traditions of the Member States.

According to the interpretation of the Court of Justice, Art 6 of the European Convention on Human Rights sanctions certain principles that have come to constitute fundamental values of the European Union. Assuming particular importance here amongst the above

[12] E. D'Alessandro, *Il riconoscimento* n 5 above, 156: for example, injury to the guarantee of neutrality and impartiality of the judge. Cf Corte di Cassazione 26 February 2021 no 5327, available at www.dejure.it (last visited 18 September 2021), which instituted that integrating an infringement of the right to evidence of the party, who must respect the obligations following upon the Court decision for which enforcement is required, and likewise an infringement of the procedural public policy, is the decision of the foreign court which, in relation to ascertainment of naturale paternity, bases that decision upon altogether peremptory reasons adduced after first ordering *ex officio*, and then revoking without explanation, admission to the DNA test, albeit in the presence of declared availability on the part of the alleged father to undergo the test, there thus emerging the irrationality of interruption of the procedure that constitutes evidence of particularly probative value.

principles is the right of defence, which, insofar as it is a fundamental principle of Community law, for this very reason must be guaranteed in any proceedings. [13]

Inherent in exercise of the right of defence are: the right of every subject to be informed of the proceedings pending in his regard, and hence the right to be put in the condition he can take part therein; the right of reply, which implies the possibility of knowing in sufficient time the claim of the counterparty; and observance of the adversarial principle.

Non-recognition operates in the event that there has been an injury to the trial guarantees of the defence, namely in the case where the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence.

It is expedient, at this point, to investigate the conditions required by the provision under examination, bearing in mind that the notions of 'document which instituted the proceedings,' 'defendant in default of appearance,' and 'sufficient time' are notions independent of those formulated in the Member States.

In the first place, the defendant must be 'in default of appearance,' eg he must not have appeared before the court of the State of origin, either in person, or through the representation of a lawyer. Also considered as being in default of appearance is the defendant who is not cognisant of the proceedings instituted against him and who has

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[13] Case C-135/92, *Fiskano AB* v *Commission of the European Communities*, [1994] ECR I-2885; Case C-7/98, *Dieter Krombach* v *André Bamberski*, n 6 above, para 42, where the Court stated that the 'observance of the right to a fair hearing is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question;' Case C-394/07, *Marco Gambazzi* v *DaimlerChrysler Canada Inc., CIBC Mellon Trust Company*, [2009] ECR I-2563, para 28, which reads: 'With regard to exercise of the rights of defence, (...) the Court has pointed out that this occupies a prominent position in the organisation and conduct of a fair trial and is one of the fundamental rights deriving from the constitutional traditions common to the Member States and from the international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, among which the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, is of particular importance.'

not been duly represented because in court a lawyer appeared upon whom he had not conferred any mandate.[14]

Another condition is the lack or tardiness of service. The provision regarding service does not circumstantiate application to the document which instituted the proceedings alone but extends it to any other 'equivalent document' owing to the fact that each legal system may contemplate different documents and formalities for instituting proceedings. By 'equivalent document' is to be understood the document whereby the legal action is instituted, and in particular, according to the perspective of the Court of Justice, the document or documents service of which to the defendant performed in sufficient time enables the latter to assert his rights before an executory measure is issued in the State of origin.[15] In concrete terms, this equivalent document is the document the contents of which allow the defendant to know of the existence of the proceedings against him (in the course of which he can assert his rights), as well to identify the subject-matter of the plaintiff's claim and the cause of action.[16]

There thus emerges from the words of the Court the criterion that must guide evaluation of the interpreter called upon to decide whether the case under analysis falls within the provision of Art 37, letter b), with consequent non-recognition. This criterion is the effective

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[14] Case C-78/95, *Bernardus Hendrikman, Maria Feyen* v *Magenta Druck & Verlag GmbH*,[1996] ECR I-4943, para 18. Instead the Court of Justice has held that the defendant is to be deemed as appearing when, in the context of a claim for compensation proposed in criminal proceedings, he has presented his defence through a lawyer in the course of the hearing, but not in the context of civil claim. Cf Case C-172/91, *Volker Sonntag* v *Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann*, [1993] ECR I-1963, para 44.

[15] Case C-474/93, *Hengs Import BV* v *Anna Maria Campese*, [1995] ECR I-2113.

[16] Case C-14/07, *Ingenieurbüro Michael Weiss und Partner GbR* v *Industrie- und Handelskammer Berlin, joined party: Nicholas Grimshaw & Partners Ltd*, [2008] ECR I-3367, para 73: 'Such a document must make it possible to identify with a degree of certainty at the very least the subject-matter of the claim and the cause of action as well as the summons to appear before the court or, depending on the nature of the pending proceedings, to be aware that it is possible to appeal'; Case C-39/02, *Maersk Olie & Gas A/S* v *Firma M. de HAan en W. de Boer*, [2004] ECR I-9657, para 56, where the Court pointed out that these grounds of denial cannot be invoked in the case where the defendant 'was notified of the elements of the claim and had the opportunity to arrange for his defence.'

respect of the rights of the defence, a parameter in the light of which further reflections can be brought forward and the questions that derive therefrom can be resolved.

Given that the provision of the Regulations connects the denial of recognition to cases of lack of service or tardiness of service, it is necessary to pose oneself the question regarding whether the decision should be recognised or not on case that service of the defendant with the judicial document that institutes the proceedings or with an equivalent document presents profiles of irregularity.

Unlike Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 27 September 1968 - of which Art 27, no 2, envisages as grounds for non-recognition, not only the lack of service to the defendant in default of appearance of the document which instituted the proceedings or of an equivalent document 'in sufficient time,' but also the case where the introductory document has not been duly served - no reference to regularity appears in the text of the provision under examination.[17]

The formal regularity of the introductory document cannot hence be considered a decisive element for the purposes of recognition.[18] In fact, the lack of such an indication in the text of the Regulations (EU) 2016/1103 and 2016/1104 has led interpreters to maintain that the mere irregularity does not render legitimate the denial of recognition unless said lack results in the impossibility for the defendant to arrange for his own defence.[19]

Thus in the same way an albeit formally regular service could prove unsuitable for guaranteeing the addressee exercise of the aforesaid right of defence. In this perspective, the court of the State in which recognition in sought, taking into account all the concrete circumstances, such as the means employed for effecting service, the relationship between the plaintiff and the defendant, and the nature of the action that has had to be undertaken to prevent judgment from

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[17] Reference to regularity no longer appears with the Council Regulation (EC) 44/2001.

[18] F. Salerno, *Giurisdizione ed efficacia delle decisioni straniere nel Regolamento (CE) N. 44/2001*, n 11 above, 325.

[19] Case C-283/05, *ASML Netherlands BV* v *Semiconductor Industry Services Gmbh (SEMIS)*, [2006] ECR I-12041.

being given in default, could reach the conclusion that the formal regularity of the document has not been sufficient to allow the defendant to arrange for his defence.

Consequently, the reasoning must be always founded upon the respect of the right of defence, which presupposes a concrete and effective protection.

The doctrine has occupied itself with the question of service of a document written in a language unknown to the defendant, concluding precisely in this direction that the lack of a translation of the document may constitute a circumstance that legitimises non-recognition of the decision in the case where such an omission has had adverse repercussions on the effective protection of the rights of defence of the addressee.[20]

Such is the logic that is to be observed also (and especially) in determining whether the defendant has been served with the document which instituted the proceedings or equivalent document in 'sufficient time,' eg, in the time necessary to allow the defendant to exert his right of defence.[21]

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[20] On this point E. D'Alessandro, *Il riconoscimento* n 5 above, 155-156: the Author follows a similar line of reasoning in relation to Art 34, no 2, of the Regulation (EC) 44/2001 and to the Council Regulation (EC) no 1348/2000 of 29 May 2000 on service in the Member States of judicial and extrajudicial documents in civil or commercial matters [2000] OJ L160/37. Likewise compare Case C-529/13, *Alpha Bank Cyprus Ltd* v *Dau Si Senh and o.*, Judgment of 16 September 2015, para 43, available at www.eur-lex.europa.eu (last visited 18 September 2021). In this case, the Court, in interpreting the Regulation (EC) no 1393/2007 of the European parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) no 1348/2000 [2007] OJ L324/79, stated: 'In essence, that court will be required, in each individual case, to ensure that the respective rights of the parties concerned are upheld in a balanced manner, by weighing the objective of efficiency and of rapidity of the service in the interest of the applicant against that of the effective protection of the rights of the defence on the part of the addressee.'

[21] Case C-166/80, *Peter Klomps* v *Karl Michel*, [1981] ECR 1593, para 21, the Court stated: 'the court in which enforcement is sought may as a general rule confine itself to examining whether the period reckoned from the date on which service was duly effected allowed the defendant sufficient time for his defence. However the court is also required to consider whether, in a particular case, there are exceptional

Finally, the lack or tardiness of the service of the document which instituted the proceedings or equivalent document cannot constitute grounds for non-recognition where the defendant 'failed to commence proceedings to challenge the decision when it was possible for him to do so.'

The rights of defence that the European Regulations aim at guaranteeing and protecting through the formulation of Art 37, letter b) do not undergo a compression or limitation in the case where the defendant has had the possibility of appealing against the decision given in default of appearance by essentially asserting the lack or tardiness of service that has prevented him from defending himself previously.[22]

Given that the *ratio* of the Article is the guarantee of the right of defence, the final phrase of the provision referred to in letter b) is aimed at discouraging any possible strategic intentions of the defendant in default of appearance, preventing him from tactically awaiting the procedure of recognition in the State where recognition is sought in order to assert infringement of the rights of defence of which, in actual fact, he had the possibility of complaint by lodging an appeal against the decision given in default of appearance in the State of origin.

The Court of Justice has pointed out that the defendant in default of appearance has the possibility of challenging a decision in default issued against him, and hence of availing himself of the means contemplated by the legal system *a quo* to cause lapsing of the defective judgment when he has had knowledge of the content of the decision, of course on the assumption that the service of the decision has been effected in sufficient time to enable him to arrange for his defence before the court of the State of origin. It cannot, however, be expected that the defendant, in order to protect his rights, takes action 'going beyond normal diligence.'[23]

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circumstances such as the fact that, although service was duly effected, it was nevertheless inadequate for the purpose of causing that time to begin to run.'

[22] Case C-420/07, *Meltis Apostolides* v *David Charles Nowms, Linda Elizabeth Nowsm*, [2009] I-3571, para 80.

[23] Case C-283/05, *ASML Netherlands BV* v *Semiconductor Industry Services Gmbh (SEMIS)*, n 19 above, paras 42-43, where, *inter alia*, the Court of Justice draws a parallel between the document instituting the proceedings and the judgment

IV. Irreconcilable decisions

The conditions mentioned in Art 37, letters c) e d) may be treated jointly since they constitute grounds for non-recognition that can both be subsumed in the sphere of irreconcilable decisions.
The provision of the Regulations concerning *lis pendens* and related actions should make it possible to avoid and prevent any contrast between decisions; where, however, in the stage of recognition and enforcement there emerged irreconcilable decisions, it will be necessary to resolve the conflict according to the modalities contemplated by the Article under examination.
A preliminary question addressed in the doctrine[24] regards the scope of Art 37, letters c) and d). The grounds for non-recognition refer to incompatibility between 'decisions,' where by 'decision' is to be understood, pursuant to Art 3 of the Regulations, 'any decision (...) given by a court of a Member State, whatever the decision may be called.'[25]
Notwithstanding this, Recital (63) of the Regulations (EU) 2016/1103 and Recital (62) of the Regulation (EU) 2016/1104 state that, in the event of incompatibility between an 'authentic instrument' and a decision, 'regard should be had to the grounds of non-recognition of decisions' under the Regulation itself.
In line with the grounds of non-recognition referred to in Art 37, letter c), recognition is hindered whenever the foreign decision runs counter to another decision issued between the same parties in the State in which recognition is sought.

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delivered in default of appearance and affirms that 'it is service of the document instituting the proceedings and the default judgment, (...), in sufficient time and in such a way as to enable the defendant to arrange for his defence which afford him the opportunity to ensure that his rights are respected before the courts of the State in which the judgment was given.' Cf case C-70/15, *Emmanuel Lebek* v *Janusz Domino*, Judgment of 7 July 2015, available at www.eur-lex.europa.eu (last visited 18 September 2021). On this point M. De Cristofaro, 'L'onere di impugnazione della sentenza quale limite al rilievo dei vizi nella fase introduttiva del giudizio chiuso da sentenza contumaciale: tra diritto di difesa e full faith and credit' *Int'l Lis*, 7 (2007).

[24] G. Cuniberti, n 2 above, 352; I. Pretelli, n 4 above, 535.

[25] Art 3, para 1, letter d), Regulation (EU) 2016/1103 and Art 3, para 1, letter e), Regulation (EU) 2016/1104.

The Court of Justice[26] stated that irreconcilability of decisions manifests itself when the controversial decisions produce juridical effects that are mutually exclusive.

As regards the criterion to be adopted to understand which of the conflicting decisions is to prevail, in the absence of any specification in the letter of the provision of the Regulations regarding the temporal criterion, it is deemed that recognition is to be denied, not only in the case where the foreign decision runs counter to a preceding domestic decision, but also in the case where there is incompatibility with a subsequent domestic decision; essentially, the court of the State in which recognition is sought is called upon to recognise primacy of the decision of the forum.[27]

If this were not so, by authorising recognition of a foreign decision that runs counter to a jurisdictional pronouncement issued in the State in which recognition is sought, according to the Luxembourg Court,[28] a result contrary to the principle of legal certainty would be arrived at.

Other are the conditions that justify the non-recognition referred to in Art 37, letter d).

In the first place, the irreconcilability lies between the foreign decision and a decision made in another Member State or in a third State provided that such decision 'fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.'

In the second place, relevant for the purposes of conflict is the decision issued previously and between the same parties in proceedings having the same cause of action.

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[26] Case C-145/86, *Horst Ludwing Martin Hoffman* v *Adelheid Kreig*, [1988] ECR 645, para 22: in the case in point the Court established that 'a foreign judgment ordering a person to make maintenance payments to his spouse by virtue of his conjugal obligations to support her is irreconcilable (...) with a national judgment pronouncing the divorce of the spouses.' On this point see also Case C-80/00, *Italian Leather SpA* v *WECO Polstermöbel GmbH & Co.*, [2002] ECR I-4995.

[27] P. Bruno, n 5 above, 260-261; A. Briggs, n 2 above, 661; I. Pretelli, n 4 above, 537, for whom this solution responds to the need to ensure the priority, in the State where recognition is sought, of the national decisions.

[28] Case C-80/00, *Italian Leather SpA* v *WECO Polstermöbel GmbH & Co.*, n 26 above, para 51.

On the other hand, the conditions set out in the provision under examination recall the conditions laid down in Art 17 of both Regulations, which concerns *lis pendens*.
However, as anticipated, where this mechanism, which ought to have avoided onset of the conflict, has not worked - since, for example, it has not emerged that proceedings involving the same cause of action and between the same parties have been brought before courts of different Member States or that the court has not suspended the proceedings - the question of irreconcilable decisions under examination arises.[29]
It should be noted that the ground referred to in letter d), by limiting non-recognition to decisions stemming from disputes with subjective and objective identity, as well as by attributing importance to the temporal criterion, reproposes a notion of conflict that is more restrictive than that of letter c).[30]

[29] *Amplius* I. Pretelli, n 4 above, 538-539.
[30] ibid.

Article 38
Fundamental rights

Ilaria Riva

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
Article 37 of this Regulation shall be applied by the courts and other competent authorities of the Member States in observance of the fundamental rights and principles recognised in the Charter, in particular in Article 21 thereof on the principle of non-discrimination.	(Same text)

Summary: I. Introductory remarks. – II. The principle of non discrimination as an expression of the public policy exception. – III. The principle of non discrimination as a counter-limit to the principle of public order. – IV. The judgment concerns the effects of the application of the foreign decision. – V. Non-discrimination as a general principle of EU law. –VI. Same-sex marriages and same-sex partnerships. – VII. Polygamous marriages. – VIII. Scope.

I. Introductory remarks

Art 38 deals with the grounds of recognition or not recognition of a foreign decision and it integrates the content of the previous Art 37. The provision represents an innovation in the panorama of current European Regulations of private international law, as it has no equivalent in other Regulations, although it represents a well known concept.

As respect for fundamental rights is a precondition for legality, foreign judgements should not be recognised if the recognition constitutes an infringement of human rights. Similarly, foreign decisions should be recognised if the non recognition constitutes an infringement of human rights.

Both Recital no 58 of the EU Succession Regulation no 650/2012[1] and Recital no 25 of EU Regulation no 1259/2010 on the law applicable to divorce and legal separation[2] provide that:
'Considerations of public interest should allow courts in the Member States the opportunity in exceptional circumstances to disregard the application of a provision of foreign law in a given case where it would be manifestly contrary to the public policy of the forum. However, the courts should not be able to apply the public policy exception in order to disregard a provision of the law of another State when to do so would be contrary to the Charter of Fundamental Rights of the European Union (ECHR), and in particular Art 21 thereof, which prohibits all forms of discrimination.'
Recital 30 of EU Regulation no 1259/2010 adds that:
'This Regulation respects fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, and in particular by Art 21 thereof, which states that any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. This Regulation should be applied by the courts of the participating Member States in observance of those rights and principles.'
The regulatory framework assumes the need to take into account respect for fundamental rights and the principles recognised by the Charter of Fundamental Rights of the European Union (ECHR or 'the Charter'), in particular the principle of non-discrimination.

II. The principle of non discrimination as an expression of the public policy exception

Art 38 can be interpreted in two different ways.

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[1] Regulation (EU) no 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

[2] Regulation (EU) no 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

In the first perspective, the Article states, in close correlation with the provisions of the previous Art 37, that the courts of a Member State can legitimately not recognise a foreign decision as far as it determines discrimination or other infringement of the fundamental rights of individuals proclaimed by the ECHR, on the basis of the assumption that the principle of non-discrimination and the protection of fundamental human rights represent the ethical foundations of civil coexistence in the European Union and limit the acceptance of conflicting foreign rules and decisions accordingly.

Art 38 would thus have a significant symbolic value, because it would introduce in the text of the Regulation, and not only in the Recitals, the recognition of the principle of non-discrimination and of the primary importance of the ECHR.

As far as practical application is concerned, this would not add much to what is stated in Art 37(a), namely that a decision shall not be recognised if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought.

'Ordre public' (or public policy) is a highly indeterminate legal concept, likely to change in connection with the evolution of civil society. Traditionally considered a 'territorial concept',[3] it aims at protecting basic legal, social and economic values of the Member State. As national public policy is used as a barrier to negative effects in the forum where recognition is sought, it must be balanced with the principle of mutual recognition, based on mutual trust between Member States and judicial cooperation between the courts of each Member State.[4]

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[3] 'The concept of public policy in the context of the Community and where, in particular, it is used as a justification for derogating from a fundamental principle of Community law, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community. Nevertheless, the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty' (Case 41/74 *Yvonne van Duyn* v *Home Office*, [1974] ECR 01337, para 4).

[4] C. Kessedjian, 'Public Order in European Law,' 1 *Erasmus Law Review*, 25, 28 (2007).

In any case, both from a national and a European perspective, there is no doubt that public policy takes into account not only the rights established by constitutional provisions but also the rights provided in international rules and in EU rules, also referring to the ECHR; the principle of non-discrimination and the respect of fundamental rights are a part of these fundamental values, and their violation constitutes a legitimate ground for the refusal of the recognition of foreign decisions.
The obligation of Member States to respect the principles expressed by the Charter is furthermore stated in Art 51 of the Charter.[5]

III. The principle of non discrimination as a counter-limit to the principle of public order

From a different and more interesting perspective, Art 38 can be perceived in the sense of a process towards the progressive disappearance of the public policy exception. Indeed, it is intended to promote the entry of foreign disciplines into the legal systems of the Member States, in accordance with the aspiration for free decisions in the European Union.
It is now an established principle that not any kind of contrariety to public policy is relevant, but only a serious contrariety. Pursuant to Art 37(a), a decision will not be recognised 'if such recognition is manifestly contrary to public policy ('ordre public') in the Member State in which recognition is sought.' Thus, public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.[6]

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[5] Art 51 'The provisions of this Charter are addressed to the institutions and bodies of the European Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.'

[6] Case C-54/99 *Église de Scientologie* v *The Prime Minister,* [2000] ECR I-1335, para 17; Case C-36/02 *Omega Spielhallen* v *Oberbürgermeisterin der Bundesstadt Bonn,* [2004] ECR I-9609, para 30.

In other terms, the goal of the public policy rule must be to protect a fundamental interest of the society concerned.

Art 38 adds that the recognition of a decision cannot be denied by the authorities of a Member State where the non-recognition is sought by invoking the limit of public policy if the effect of the non-recognition leads to discrimination or to an infringement of a fundamental right guaranteed by the Charter.

According to this perspective, Art 38 aims at placing the protection of the fundamental rights of the person and the principle of non-discrimination in a position of hierarchical superiority with respect to any other value that the authorities of the single Member State could invoke as a limit of public order.[7]

At the same time, Art 38 is part of a process towards an emerging conception of European 'ordre public,'[8] which refers to the Member

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[7] We can observe a similarity between Art 38 and Art 22 of the Hague Convention on parental responsibility and protection of children (or the Hague Convention 1996), which states that 'the application of the law designated by the provisions of this Chapter can be refused only if this application would be manifestly contrary to public policy, taking into account the best interests of the child.' According to this provision, the exception of public order recedes in the face of the guarantee of the best interest of the child. Eur. Court H.R., *Wagner and J.M.W.L.* v *Luxembourg*, Judgement of 28 June 2007; Eur. Court H.R., *Negrepontis-Giannisis* v *Greece*, Judgement of 3 May 2011; Eur. Court H.R., *Menesson* v *France*, Judgement of 26 June 2014; Eur. Court H.R., *Labassee* v *France*, Judgement of 26 June 2014, all available at www.hudoc.echr.coe.int (last visited 3 June 2021). K. Lemmens, 'The Margin of Appreciation in the ECtHR Case Law. A European Version of the Levels of Scrutiny Doctrine?' 20 *European Journal of Law Reform* 78 (2018).

[8] F. Sudre, 'L'ordre public européen?', in M.J. Redor ed, *L'ordre public: ordre public ou ordres publics. Ordre public et droits fondamentaux. Actes du colloque de Caen, 11-12 mai 2000* (Brussels: Bruylant, 2001), 109; S. Lavenex and W. Wallace, 'Justice and Home Affairs. Towards a 'European Public Order'?', in H. Wallace et al eds, *Policy-Making in the European Union* (Oxford: Oxford University Press, 2005), 457, 480; D. Rinoldi, *L'ordine pubblico europeo* (Naples: Editoriale Scientifica, 2008); C. Kessedjian, 'Public Order in European Law', n 4 above, 27-36; O. Feraci, *L'ordine pubblico nel diritto dell'Unione europea* (Milan: Giuffrè, 2012); J. Basedow, 'Recherches sur la formation de l'ordre public européen dans la jurisprudence,' in B. Ancel et al eds, *Mélanges en l'honneur de Paul Lagarde* (Paris: Dalloz, 2005), 55, 74; G. Karydis, 'L'ordre public dans l'ordre juridique communautaire: un concept à contenu variable', 38(1) *Revue trimestrielle de droit européen*, 1 (2002); G. Perlingieri and G. Zarra, *Ordine pubblico interno*

States' constitutional traditions and to the indications provided by international treaties relating to the protection of human rights. And it is part of a process towards the recognition of the greater power of the EU Court to judge how Member States apply the public policy exception.

The Court of Justice has already affirmed that it is for the Court to review the limits within which the courts of a Member State may have recourse to that concept for the purpose of refusing recognition of a judgment emanating from a court in another Member State.[9]

In the case-law of the ECJ, there is a clear tendency that substantive public policy only applies in exceptional cases where the recognition of a foreign judgment would entail unreasonable results.

However, it has also affirmed that the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty.[10]

Art 38 fixes a limit to this margin of discretion. If a decision constitutes, from the perspective of a Member State, a manifest infringement of an essential rule of law or of a right recognised as fundamental in the same legal system, public policy cannot be invoked if the denial of recognition of a decision is specifically intended to produce discriminatory effects for one of the parties to the proceedings, or an infringement of the fundamental rights recognised by the Charter.

As far as matrimonial property regimes and property consequences of registered partnerships are concerned, the possibility of invoking the public policy exception in order not to recognise a foreign decision is

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e internazionale tra caso concreto e sistema ordinamentale (Naples: Edizioni Scientifiche Italiane, 2019).

[9] 'While it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State' (Case C-7/98 *Dieter Krombach* v *André Bamberski*, [2000] ECR I-01935, para 23).

[10] Case C-36/02 *Omega Spielhallen* v *Oberbürgermeisterin der Bundesstadt Bonn,* [2004] ECR I-9609, para 31; Case 41/74 *Yvonne van Duyn* v *Home Office*, [1974] ECR 01337, para 18; Case 30/77 *Régina v Pierre Bouchereau*, [1977] ECR 1999, para 34.

very limited, in accordance with the objective of enhanced cooperation in the EU as set out in the TEU.[11]

IV. The judgment concerns the effects of the application of the foreign decision

Another pivotal question must be treated.
In order to assess the compatibility of a foreign decision with the public order of the Member State where the recognition is sought, and to evaluate if non-recognition is fully compliant with respect for human rights and fundamental freedoms and with the principle of non-discrimination, the court should take into account the concrete legal effects entailed by the recognition or non-recognition of the decision.
Therefore, even a decision based on foreign legislation that is abstractly discriminatory against women, because, for example, it provides that the husband's national law applies to property relations between spouses, could be recognised in another Member State if the decision does not actually have any negative or discriminatory effect on the wife. On the contrary, a decision could recognise specific rights with regard to the wife.
Recently, for instance, the Italy's 'Supreme Court'[12] ruled on the recognisability of Iranian divorce in Italy. More precisely, the Bari Court of Appeal ordered the cancellation of the transcription from the civil status registers of the divorce decision pronounced by the Supreme Court of Teheran on the grounds that Iranian divorce – which is quite similar to the institution of repudiation – is contrary to public order due to discrimination against women.
The Supreme Court criticised this approach, making clear that the Court of the Member State where the recognition is sought should not evaluate the foreign legislation, but it should just consider the specific effects of the foreign decision on the parties.

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[11] V. Egéa, 'Art 38', in Id et al eds, *Le droit européen des régimes patrimoniaux des couples. Commentaire des règlements 2016/1103 et 2016/1104* (Paris: Société de législation comparée, 2018), 363.
[12] Corte di Cassazione 14 August 2020, no 17170, *Rivista di Diritto Internazionale*, 1241 (2020).

Regardless of the interpretation given to Art 38, the judgment on the recognition or non-recognition of a foreign decision should always take into consideration the effects actually produced on the parties.

V. Non-discrimination as a general principle of EU law

Art 38 promotes the values underlying the fight against discrimination. Today, fundamental human rights and the principle of non-discrimination are enshrined in many international and national declarations. It is apparent from the Court's case-law that that principle must be regarded as a general principle of EU law.

The Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly in 1948, was the first legal document to set out the fundamental human rights to be universally protected.

With regard to the principle of non-discrimination, Art 2 states that 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.' Art 7 states that 'All are equal before the law and are entitled without any discrimination to equal protection of the law.'

At the European level, the ban on discrimination is explicitly provided for in Art 14 of the European Convention on Human Rights, which enshrines protection against discrimination in the enjoyment of the rights set forth in the Convention.[13]

The principle of non-discrimination is closely connected to the principle of equal treatment, which has been well defined by the ECHR. The principle of equal treatment is a general principle of EU

[13] Art 14: 'The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.' The reference to 'other status' means that the list of grounds of discrimination covered by the Convention is not exhaustive. See B. Rainey et al eds, *Jacobs, White, Ovey: The European Convention on Human Rights* (Oxford: Oxford University Press, 7th ed, 2017), 631.

law, enshrined in Art 20 of the Charter, of which the principle of non-discrimination laid down in Art 21(1) of the Charter is a particular expression. According to settled case-law, this principle requires the EU legislature to ensure, in accordance with Art 52(1) of the Charter, that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.[14]

These provisions require that persons in a similar situation be treated in an equal manner; in certain circumstances, a breach of Art 14 may arise from equal legal treatment, as Member States could be requested to attempt to correct significant inequalities through different treatment.[15]

A difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and if it is proportionate to the aim pursued by the treatment concerned.[16]

Not any differentiation of treatment is actually discrimination. In fact, certain legal inequality is allowed as it tends only to correct factual inequality. The European Court of Human Rights has stated: 'a

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[14] Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission,* [2010] ECR I-08301, paras 54 and 55.

[15] Eur. Court H.R., *Taddeucci and McCall* v *Italy*, Judgment of 30 June 2016, para 81; Eur. Court H.R., *Kurić and Others* v *Slovenia*, Judgment of 26 June 2012, para 388; Eur. Court H.R., *Sejdić and Finci* v *Bosnia and Herzegovina*, Judgment of 22 December 2009, para 44; Eur. Court H.R., *Muñoz Díaz* v *Spain*, Judgment of 8 December 2009, para 48; Eur. Court H.R., *D.H. and Others* v *the Czech Republic,* Judgment of 13 November 2007, para 175; Eur. Court H.R., *Stec and Others* v *the United Kingdom*, Judgment of 12 April 2006, para 51; Eur. Court H.R., *Thlimmenos* v *Greece*, Judgment of 6 April 2000, para 44; Eur. Court H.R., *European Commission of Human Rights* v *Belgium, Merits* (*Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*), Judgment of 23 July 1968, para 10, all available at www.hudoc.echr.coe.int (last visited 3 June 2021). In *Thlimmenos* v *Greece*, Greece was condemned for failing to take into account the specific needs arising from the applicant's faith. On the other hand, the same treatment reserved for the majority of citizens was applied to the applicant, even though he did not recognise himself in it. For the Court, there were no reasonable and objective reasons for not treating Mr. Thlimmenos differently (paras 42-47).

[16] Case C-127/07 *Arcelor Atlantique and Lorraine and Others* v *Premier ministre, Ministre de l'Écologie et du Développement durable, Ministre de l'Économie, des Finances et de l'Industrie,* [2008], ECR I-09895, para 47.

difference of treatment is discriminatory if it "has no objective and reasonable justification," that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised.'"[17]

The principle of non-discrimination is finally enshrined in Art 21 of the Charter, to which Art 38 refers. Pursuant to Art 21, '1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.'[18]

As can be read, Art 21 refers to many more discrimination factors than those foreseen in the Convention. In particular, as far as family property rights are concerned, sexual orientation is expressly

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[17] Eur. Court H.R., *Abdulaziz, Cabales and Balkandali* v *the United Kingdom*, Judgement of 28 May 1985, para 72, available at www.hudoc.echr.coe.int (last visited 3 June 2021). See also B. Rainey et al eds *Jacobs, White, and Ovey: The European Convention on Human Rights*, n 13 above, 634.

[18] 'Explanation on Article 21 — *Non-discrimination*

Paragraph 1 draws on Article 13 of the EC Treaty, now replaced by Article 19 of the Treaty on the Functioning of the European Union, Article 14 of the ECHR and Article 11 of the Convention on Human Rights and Biomedicine as regards genetic heritage. In so far as this corresponds to Article 14 of the ECHR, it applies in compliance with it. There is no contradiction or incompatibility between paragraph 1 and Article 19 of the Treaty on the Functioning of the European Union which has a different scope and purpose: Article 19 confers power on the Union to adopt legislative acts, including harmonisation of the Member States' laws and regulations, to combat certain forms of discrimination, listed exhaustively in that Article. Such legislation may cover action of Member State authorities (as well as relations between private individuals) in any area within the limits of the Union's powers. In contrast, the provision in Article 21(1) does not create any power to enact anti-discrimination laws in these areas of Member State or private action, nor does it lay down a sweeping ban of discrimination in such wide-ranging areas. Instead, it only addresses discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member States only when they are implementing Union law. Paragraph 1 therefore does not alter the extent of powers granted under Article 19 nor the interpretation given to that Article. Paragraph 2 corresponds to the first paragraph of Article 18 of the Treaty on the Functioning of the European Union and must be applied in compliance with that Article' (*Explanations relating to the Charter of Fundamental Rights* (2007/C 303/02) OJ C 303, 14 December 2007, 17).

mentioned in the Charter, as in the Convention discrimination on the grounds of sexual orientation could only be indirectly forbidden through Art 8, which provides the right to respect for one's 'private and family life.'[19]
With reference to Art 21, there is discrimination only when a difference in treatment is produced with regard to comparable situations; it is then necessary to exclude the existence of an objective cause of justification that makes the different treatment legitimate.
These criteria also apply in the context of Regulations 1103 and 1104/2016, where the factors that may come into consideration are mainly sexual orientation, sex and religion.

VI. Same-sex marriages and same-sex partnerships

Art 38 can be considered a sort of counter-limit, as a means of protecting European constitutional identity against the limits set by national courts to safeguard domestic public order.
Arguing from Art 21(1) TFEU, which gives every citizen of the EU the right, subject to very few exceptions, to move and reside freely within the territory of the Member States, and also from the point of view of the right to respect for private and family life, as enshrined in Art 8 of the ECHR, the CJEU and the ECHR promote respect of family status created abroad.[20]
The issue has been raised in relation to children of same-sex parents, but it is also relevant with regard to Regulations 1103/2016 and

[19] Eur. Court H.R., *Taddeucci and McCall* v *Italy*, n 15 above; Eur. Court H.R., *Salgueiro da Silva Mouta* v *Portugal,* Judgement of 21 December 1999, available at www.hudoc.echr.coe.int (last visited 3 June 2021); C-267/06 *Tadao Maruko* v *Versorgungsanstalt der deutschen Bühnen,* [2008], ECR I-01757; C-147/08, *Jürgen Römer* v *Freie und Hansestadt Hamburg*, [2011], ECR I-03591.
[20] P. Franzina, 'Some Remarks on the Relevance of Article 8 of the ECHR to the Recognition of Family Status Judicially Created Abroad' *Diritti umani e diritto internazionale* (2011); M. Bogdan, 'The Relevance of Family Status Created Abroad for the Freedom of Movement in the EU' 66 *Acta Universitatis Carolinae Iuridica*, 85 (2020).

1104/2016, as public policy reasons could lead to the non-recognition of family status on the basis of same-sex partnerships.[21]

With regard to same sex partnerships, almost all Member States provide for same-sex marriage or other forms of same-sex registred partnership. There is a tendential convergence of legislative choices within the EU, and consequently the margin of Member State discretion is very narrow.

The Court of Justice affirms that Member States are not required to grant homosexuals the right to get married, but it is nevertheless necessary that each Member State ensure the availability of a specific legal framework providing for the recognition and protection of their same-sex unions.[22]

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[21] R. Baratta, 'La reconnaissance internationale des situations juridiques personnelles et familiales' 348 *Collected Courses of the Hague Academy of International Law* (Leida: Brill, 2011) available at http://dx.doi.org/10.1163/1875-8096_pplrdc_A9789004185173_02 (last visited 3 June 2021).

[22] International human rights law, though not precluding the extension of marriage to same-sex relationships, does not impose such an obligation on States. See, Eur. Court H.R., *Oliari and Others* v *Italy,* Judgement of 21 July 2015; *Schalk and Kopf,* Judgement of 24 June 2010, para 101; *Orlandi and Others* v *Italy*, Judgement of 3 December 2013, paras 192 and 194, all available at www.hudoc.echr.coe.int (last visited 3 June 2021). Italy does not recognise equal marriage, but in 2016 it introduced the institution of civil unions for same-sex couples, guaranteeing rights very similar to those recognised for spouses (except for the right to adopt). In France, after the introduction of the so-called 'mariage pour tous,' it was recognised that access to same-sex marriage constitutes a principle of public policy, therefore suitable to exclude the application of a contrary foreign law, too, where designated by an international convention: Cour de cassation, 28 January 2015 no 96, *Revue critique de droit international privé*, 400 (2015) notes by D. Boden, S. Bollée, B. Haftel, P. Hammje and P. de Vareilles-Sommières. See also L. Sinopoli, 'Ordre public international et convention bilatérale devant la Cour de cassation: Droit au mariage des couples de même sexe' *La Revue des droits de l'homme* (2015) available at http://revdh.revues.org/1396 (last visited 3 June 2021). Article 46 of the Belgian 'Code de droit international privé' provides that '*l'application d'une disposition du droit désigné en vertu de l'alinéa 1er est écartée si cette disposition prohibe le mariage de personnes de même sexe, lorsque l'une d'elles a la nationalité d'un Etat ou a sa résidence habituelle sur le territoire d'un Etat dont le droit permet un tel mariage.*' See, F. Hamilton and G. Noto La Diega eds, *Same-sex relationships, Law and Social Change* (London-New York: Routledge, 2020).

As a result, it is widely thought that denial of marriage rights to same-sex people can be seen as a kind of discrimination.[23]

Take the case of an EU Member State that still does not provide for any form of recognition of same-sex unions, based on the idea that the diversity of sex between partners is a fundamental basis of marriage and of any kind of registered partnership.[24]

According to Art 38, this Member State is not allowed to apply a public policy exception to refuse recognition of a foreign decision that recognises the property effects of a homosexual union. Public policy shall not hinder the recognition of the rights claimed by the party of a registered partnership or of a same-sex marriage

Pursuant to Recital 63, '[t]he recognition and enforcement of a decision on matrimonial property regime under this Regulation should not in any way imply the recognition of the marriage underlying the matrimonial property regime which gave rise to the decision.' This statement presupposes that the source of the effects (that is, marriage) and the effects themselves (that is, the matrimonial property regime) are likely to be kept clearly separated. But this is highly questionable.

Art 38 can strengthen the control of the Court of Justice on the implementation of public order by national courts, thus implicitly promoting an evolution of domestic law.[25]

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[23] E. Kużelewska, 'Same-Sex Marriage – A Happy End Story? The Effectiveness of Referendum on Same-Sex Marriage in Europe' 24 *Białostockie Studia Prawnicze*, 13 (2019).

[24] In several EU Member States, such as Poland and Bulgaria, marriage is still the only legally recognised form of a family union and limited to persons of the opposite sex (for further information, visit www.euro-family.eu/atlas). In Slovakia, on 4 June 2014, the country's Parliament approved a constitutional amendment to ban egalitarian marriage. Cf. Martijn Mos, 'The Anticipatory Politics of Homophobia: Explaining Constitutional Bans on Same-sex Marriage in Post-communist Europe' 36 *East European Politics* (2020).

[25] I. Barrière-Brousse, 'Le patrimoine des couples internationaux dans l'espace judiciaire européen - Les règlements européens du 24 juin 2016 relatifs aux régimes matrimoniaux et aux effets patrimoniaux des partenariats enregistrés' *Journal du droit international* (*Clunet)* 485 (2017), where a risk of thus altering both the principle of subsidiarity and respect for the legal traditions of the Member States is posed.

VII. Polygamous marriages

The question of polygamous marriage appears to be even more problematic.
In this area, there is strong consensus among European States against polygamy, which is perceived as a discriminatory practice against women. However, there is a tendency to admit the recognition of a foreign decision, rendered in a State that admits polygamous marriage, which recognises property rights for the second wife or children based on the marriage.[26]
According to this line of thought, it would not be possible to invoke the exception of public order because here it is simply a matter of recognising property rights for a person who is legitimately married in his or her country of origin; this is not a question of recognising the institution of polygamous marriage. Art 38 confirms now the appropriateness of this solution.

VIII. Scope

Art 38 explicitly refers to the grounds for the recognition and enforcement of decisions. It doesn't deal with the application of foreign law by the judge of another Member State. However, considering the pre-eminent position of the fundamental rights enshrined in the Charter and the broad scope of these rights, it is possible to affirm that no discrimination is permitted either where a court is asked to recognise a decision or where a court is called upon to apply a foreign law. The counter-limit to the invocation of public order by the individual Member State should be effective in any hypothesis, even as far as Art 31 is concerned.
Although Art 38 refers to Art 37 in its entirety, the counter-limit especially concerns the public order exception referred to in Art 37(a). It has been observed that an application could also take place with regard to Art 37(d): if an earlier decision given in another Member State or in a third State has a discriminatory effect or infringes the

[26] J.M. Bischoff, 'Le mariage polygamique en droit international privé', in VV. AA., *Travaux du comité français de Droit international privé*, II (Paris: Editions du CNRS, 1980-1981), 91, available at https://www.persee.fr/issue/tcfdi_1140-5082_1981_num_32_1980 (last visited 3 June 2021).

fundamental rights of a person, the court of the Member State could recognise effect to the later decision.[27]

In fact, this result can also be achieved without applying Art 38. Pursuant to Art 37(d), the pre-eminence of the earlier decision – and the non-recognition of the later one – operates only if the first one is likely to be recognized : but it is not if it infringes on the fundamental rights of the person, and therefore pursuant to Art 37, the later decision should be recognised.

[27] M. Gebauer, 'Art 38', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples, A Commentary*, *Elgar Commentaries in Private International Law* (Cheltenham: Edward Elgar, 2020), 357.

Article 39
Prohibition of review of jurisdiction of the court of origin

Maria Cristina Gruppuso

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. The jurisdiction of the court of the Member State of origin may not be reviewed.	1. The jurisdiction of the court of the Member State of origin may not be reviewed.
2. The public policy (*ordre public*) criterion referred to in Article 37 shall not apply to the rules on jurisdiction set out in Articles 4 to 11.	2. The public policy (*ordre public*) criterion referred to in Article 37 shall not apply to the rules on jurisdiction set out in Articles 4 to **12**.

Summary: I. Rationale of the provision. – II. Scope of prohibition.

I. Rationale of the provision

The provision of the Regulation under examination is reflected in similar provisions of the Regulation (EC) 2201/2003[1] and of the Regulation (EU) 1215/2012.[2] This rule is an expression of the favour

[1] Art 24 of Council Regulation (EC) no 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) no 1347/2000 [2003] OJ L338/1: 'The jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in Articles 22(a) and 23(a) may not be applied to the rules relating to jurisdiction set out in Articles 3 to 14.'

[2] Art 45, para 3, of European Parliament and Council Regulation (EU) no 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1: 'Without prejudice to point (e) of paragraph 1, the jurisdiction of the court of origin may not be reviewed. The test of public policy referred to in point (a) of paragraph 1 may not be applied to the rules relating to jurisdiction.'

that the legislator accords to the circulation of the decisions and of the principle of mutual trust, which find expression in the mutual recognition of judicial decisions.[3]

In the preamble of the Regulations on matrimonial property regimes and on property consequences of registered partnerships, the principle of mutual recognition of decision given in the Member States is represented not only as cornerstone of judicial co-operation in civil matters,[4] but also as general objective.[5]

In this context, it emerges clearly that the regime of recognition and enforcement of foreign judgments, uniform application thereof, as

[3] P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate. Commento ai Regolamenti (UE) 24 giugno 2016, nn 1103 e 1104 applicabili dal 29 gennaio 2019* (Milan: Giuffrè Francis Lefebvre, 2019), 285; C. Ricci, 'Article 39 Prohibition of review of jurisdiction of the court of origin', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples. A Commentary* (Cheltenham: Edward Elgar, 2020), 361; V. Égéa, 'Article 39. Interdiction du contrôle de la compétence de la jurisdiction d'origine', in S. Corneloup et al eds, *Le droit européen des régimes patrimoniaux des couples. Commentaire des règlements 2016/1103 et 2016/1104* (Paris: Société de législation comparée, 2018), 365. Moreover, compare M.Weller, 'Mutual trust: in search of the future of European Union private international law' 11 *Journal of Private International Law*, 64, 75 (2015), which notes that mutual recognition appears as the predominant practice of granting mutual trust. The same principles have been recalled by the Court of Justice in the context of a dispute the subject of which was the custody of the children and which concerned the interpretation of the Regulation (EC) 2201/2003 regarding jurisdiction and recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. Cf Case C-256/09, *Bianca Parrucker* v *Guillermo Vallés Pérez*, [2010] ECR I-7353.

[4] Recital 3 of Regulations (EU) 2016/1103 and 2016/1104: 'The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial co-operation in civil matters and invited the Council and the Commision to adopt a programme of measures to implement that principle.'

[5] See Recital 56 of Regulation (EU) 2016/1103 and Recital 55 of Regulation (EU) 2016/1104, which state: 'In the light of its general objective, which is the mutual recognition of decisions given in the Member States (...) this Regulation should lay down rules relating to the recognition, enforceability and enforcement of decisions similar to those of other Union instruments in the area of judicial co-operation in civil matters.'

well as the restrictive interpretation of the grounds of non-recognition, are functional in the pursuit of mutual recognition.[6]
Art 39 of the Regulations in matters of matrimonial property regimes and of the property consequences of registered partnerships is certainly to be read, not only in the light of the provisions in matters of *lis pendens* and related actions - which are aimed at management and resolution of conflicts deriving from the proceedings simultaneously pending in different Member States - but also as corollary of Art 15 of the Regulations, which provides that where a court of a Member State is saised of a matter of matrimonial property regime or property consequences of a registered partnership over which it has no jurisdiction under the Regulations, it shall declare of its own motion that it has no jurisdiction.[7]

II. Scope of prohibition

Art 39 states the prohibition for the court of the State where recognition is sought to proceed to the review of the jurisdiction of the court of the Member State of origin and to avail itself of the exception of public policy in the case where wrong application of the provisions on jurisdiction is noted.
The above prohibition is not applicable to decisions that deal with questions that do not fall within the scope of material application of the Regulations or that come from a non-participating Member State or from third State.[8]
The Court of Justice, already with reference to the interpretation of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, has recognised as 'fundamental principle' the prohibition for the court seised to proceed to verification of the competence of the court of the State of origin, with the consequence that the public policy of the

[6] See the analysis under Art 37 in this Commentary. Moreover, compare M. Pertegás, 'Recognition and enforcement of judgments in family and succession matters', in A. Malatesta et al eds, *The external dimension of EC private international law in family and succession matters* (Padua: CEDAM, 2008), 179.
[7] P. Bruno, n 3 above, 285; V. Égéa, n 3 above, 365.
[8] *Amplius* C. Ricci, n 3 above, 364.

State in which enforcement is sought cannot be raised as a bar to recognition or enforcement of a judgment given in another Contracting State solely on the ground that the court of origin failed to comply with the rules related to jurisdiction.[9] As regards the effective scope of prohibition, given that Art 39 provides that the public policy (*ordre public*) criterion does not apply to the rules on jurisdiction set out in Arts 4 to 11 (and 4 to 12), in the doctrine the doubt has been raised concerning the exclusion in the formulation of the provision under examination of the rules in matters of *lis pendens* and related actions.[10] However, also in this regard, the Court of Justice has recently ruled. The question of interpretation resolved by the Luxembourg Court, albeit inherent in the Regulation (EC) 2201/2003 and concerning Art 24, in view of the tenor of the above provision that is altogether similar to what is laid down in Art 39 of the Regulations under examination, can assume significance also in the present context. The referring court, in the case in point, brought before the Court of Justice the question as to whether, for what is here of interest, 'the rules of *lis pendens* (...) must be interpreted as meaning that, where (...) the court second seised delivers a judgment which becomes final, in breach of those rules, the courts of the Member State in which the court first seised is situated may refuse to recognise that judgment on the ground that it is manifestly contrary to public policy.'[11]

The Court of Justice, after noting that the check on respect of the rules of *lis pendens* necessarily implies review of the jurisdiction, by applying leverage on the principle of mutual recognition of the judicial decisions as 'cornerstone for the creation of a genuine judicial area,' as well as on the premise that - as anticipated previously - the grounds

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[9] Case C-7/98, *Dieter Krombach* v *André Bamberski*, [2000] ECR I-1935, paras 31-32.

[10] P. Bruno, n 3 above, 286.

[11] Case C-386/17, *Stefano Liberato* v *Luminita Luis Grigorescu*, Judgment of 16 January 2019, para 32, available at www.eur-lex.europa.eu (last visited 6 October 2021).

for prohibiting recognition 'should be kept to the minimum required,' has instituted that breach of the rules of lis pendens cannot in itself warrant non-recognition of a judgment on the ground that it is manifestly contrary to public policy of the Member State where recognition is sought.[12]

[12] ibid.

Article 40
No review as to substance

Salvatore Coscarelli

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
Under no circumstances may a decision given in a Member State be reviewed as to its substance.	(Same text)

Summary: I. The rule. – II The existence in other regulations of the principle of the prohibition of re-examination on the merits as regards the recognition of the foreign decision. – III. The protection of the debtor.

I. The rule

The principle of the prohibition of review of the merits is an expression of the principle of mutual trust in the judicial systems of the Member States which informs European judicial cooperation.
The principle of the ban on merit review is crystallized in Art 40, as a result of the sentence 'the decision given in a Member State may in no case be the subject of a review of the merits.'
In this way, the only cognitive space that remains for the judge is that bounded by the grounds for refusal pursuant to Art 37. Once it is ascertained that the decision for which enforceability is sought falls within the field of the regulations, the required judge must stop: s/he cannot review the legal reasoning of the judge who issued the title; s/he cannot assess whether the former has committed errors of law, nor argue in the sense that in the title there is a manifest error on the application of the uniform rules or even of general categories of applicable law. In short, s/he cannot interfere in the merit or procedural assessments that must remain the prerogative of the judge

of the State from which the title that aspires to executive effectiveness comes from.[1]

This principle can also be found in Art 41 of the Regulation Succession, in Art 26 of the Brussels II-bis Regulation and in Art 52 of the Brussels Regulation I-bis.

In fact, even in the Regulation Succession, in ruling on recognition, the requested authority will not be able to evaluate the merit of the decision, while it is possible (not mandatory, as it is instead in the case in which enforceability is contested: see Art 53) suspend the recognition procedure, even ex officio, 'if the decision has been challenged by ordinary means in the Member State of origin.'[2]

This lack of substantive control implies total trust in the jurisdiction of the state of origin.

This prohibition does not completely prevent the judge from reviewing the decision.

However, even if the judge finds a difference between the law applied by the foreign judge and the law that he would have applied, s/he cannot review the decision unless this discrepancy arises from a reason for non-recognition.

The ban on re-examination on the merits limits the judge's analysis to the sole reasons for non-recognition explicitly invoked by the parties in support of their request.

The required Judge can certainly verify whether the foreign decision falls within the scope of the Regulation but s/he cannot modify it.

This principle of the prohibition of re-examination on the merits is also applied in the event that the court of origin has committed a judicial error even if the same error is manifest, that is, if it concerns the interpretation or application of the law.

Likewise, the criteria of jurisdiction on which the referring court based its jurisdiction are not relevant for this purpose.

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[1] P. Bruno, *I Regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate. Commento ai Regolamenti (UE) 24 giugno 2016, nn. 1103 e 1104 applicabili dal 29 gennaio 2019* (Milan: Giuffrè Francis Lefebvre, 2019), 287.

[2] As has been suggested, the jurisprudential principles already developed by the Court of Justice in relation to the qualification of 'ordinary means' will apply here: case *Industrial Diamont Supplies* v *Luigi Riva*, Judgement of 22 November 1977, 43-77.

It is not superfluous to specify that the ban on review on the merits concerns only the foreign decision to be recognized and not the certificate provided for by Art 45, para 3, letter b accompanying the decision.
In fact, according to the case law of the EU Court of Justice, the judge has the right to verify the accuracy of the information contained in the aforementioned certificate.
Therefore, in this case, there is margin of appreciation which is the object of the critical eye of the recognition judge.
It follows that, even if the regulatory differences between the State of origin and the requested State, both in substance and in the procedure, are in principle outside the jurisdictional control of the requested State pursuant to Art 40 of the Regulation, a limited control is always permitted to allow the court of the State to dissociate itself from the violation of fundamental rights possibly noted in the foreign decision and / or in the accompanying certificate.[3]
Indeed, the EU Court of Justice, in the Trade Agency case,[4] ratified that 'the regulation (EC Regulation no 44/2001) (...) does not contain any provision that expressly prohibits the judge of the requested Member State from verifying the correctness of the information on the facts contained in the certificate, since articles 36 and 45, para 2, of this regulation limit the ban on review on the merits solely to the judicial decision of the Member State of origin.[5]'
In fact, 'Art 34, point 2, of Regulation no 44/2001 of the Council of 22 December 2000 on jurisdiction, concerning jurisdiction, recognition and execution of decisions in civil and commercial matters, to which Art 45 (1) of that regulation refers to, read in conjunction with 'whereas' 16 and 17 of that Regulation, it must be interpreted as meaning that, when the defendant appeals against the declaration of enforceability of a decision issued in absentia in the Member State of origin and accompanied by the certificate drawn up

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[3] I. Pretelli, 'Article 40. Absence de révision quant au fond', in A. Bonomi et al, *Le droit européen des relations patrimoniales de couple: Commentaire des Règlements (UE) 2016/1103 et 2016/1104* (Brussels: Bruylant, 2021), 1152-1153.
[4] Case C-619/10 *Trade Agency Ltd* v *Seramico Investments Ltd,* Judgement of 6 September 2012.
[5] P. Bruno, n 1 above, 288.

pursuant to Article 54 of the same regulation, claiming not to have received communication of the judicial request, the judge of the requested Member State, entrusted with the appeal, is competent to verify the consistency between the information contained in said certificate and the evidence.'[6]

II. The existence in other regulations of the principle of the prohibition of re-examination on the merits as regards the recognition of the foreign decision

The principle of the prohibition of re-examination on the merits relates to the context of the recognition of the foreign decision.
Therefore, in this regard, it is also useful to find the existence of this principle as far as recognition in other regulations is concerned, including for example Regulation (EC) 21/04/2004, no 805/2004 on the 'Regulation of the European Parliament and of the Council establishing the European enforcement order for uncontested credits.'
Firstly, it must be specified that the principle of the prohibition of review on the merits is closely linked to the principle of the right of defence widely recognized by the charters of national laws as well as at the level of European legislation.
Art 19 of the Regulation on the European enforcement title entitled 'Minimum standards for review in exceptional cases', provides that '1. In addition to the requirements set out in Articles from 13 to 18, a judicial decision can be certified as a European enforceable order only if the debtor, in accordance with the law of the home Member State, is entitled to request a review of the decision in the event that: a) i) the document instituting the proceedings or an equivalent document or, where applicable, the summons to appear at the hearing have been served in one of the forms provided for in Article 14, and ii) the service was not made in time to allow him/her to present his/her defence, for reasons that are not attributable to him/her, or b) the debtor has not had the opportunity to contest the credit due to force majeure or exceptional circumstances for reasons that are not attributable to him/her, provided that in both cases he acts promptly.'

[6] Case C-619/10 *Trade Agency Ltd* v *Seramico Investments Ltd*, Judgement of 6 September 2012.

Furthermore, Art 21 of the same Regulation entitled 'Refusal of execution' provides that '1. At the request of the debtor, the enforcement shall be refused by the competent court of the Member State of enforcement if the judicial decision certified as a European enforceable order is incompatible with an earlier decision given in a Member State or in a third country, provided that:
(a) the earlier decision concerns a case having the same object and the same parties, and (b) the earlier decision was given in the Member State of enforcement or fulfils the conditions necessary for its recognition in the Member State of enforcement, and debtor has not pleaded and has not had the opportunity to plead the incompatibility in the proceedings in the home Member State. 2. Under no circumstances may the decision or its certification as a European enforcement order be subject to a review of the merits in the Member State of enforcement.'
Art 23 of the Regulations provides for the possibility for the Judge of the Member State of enforcement, at the request of the debtor, to suspend enforcement in the event of an appeal, including with review, of the judicial decision certified as a European enforcement order.
These are two rules aimed, on the one hand, at safeguarding the debtor's right of defence and, on the other, at maintaining the effectiveness of the judicial decision from a European executive perspective.

III. The protection of the debtor

A further protection of the debtor is, as mentioned above, that of the 'review' of the judicial decision subject to certification of a European enforcement order.
The judicial decision that has the certification of a European Enforcement Order must also be open to review according to the legislation of the State of origin[7].
The review must be undertaken in the event that the debtor has not received notification of the judicial request in time to allow him/her to carry out his/her defence or when s/he has not had the opportunity

[7] A. Carratta, 'Titolo esecutivo europeo' *Enciclopedia Giuridica* (Rome: Treccani, 2006), I Diritto processuale civile, 8.

to contest the credit due to force majeure or circumstances not attributable to him/her.[8]

Therefore, the legislation of the Member State must contain a discipline that allows the debtor to be able to 'act promptly' to demonstrate that the failure to challenge was due to reasons that are not attributable to him/her. However, the possibility for each Member State to provide for more advantageous review conditions for the debtor is reserved.[9]

In any case, it is up to the judge, who is required to certify the decision as European Enforcement Order, to check whether there is a remedy in the domestic system that ensures a review of the decision in favour of the debtor.

The regulation establishes remedies concerning both the certification and the execution of the title certified as a European executive one.

The Art 10 governs the rectification and revocation of the European Enforcement Order Certificate.

In para 4, it is envisaged that the issue of a European enforcement order certificate is not subject to any means of appeal: in this regard, we speak about 'intangibility' of the European enforcement order in the Member State of enforcement.

However, the issue of the certificate is subject to some limited forms of control in the State of origin of the qualification that are the rectification or revocation procedures.

The provision of the instruments of rectification and revocation exists to prevent the debtor from being damaged by errors or abuses committed at the time of issuing the certificate.[10]

Upon application submitted to the court of origin, the European Enforcement Order Certificate is rectified if there is a divergence between the court decision and the certificate due to a clerical error. Furthermore, the certificate is revoked if it is 'manifestly' granted in

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[8] M.A. Lupoi, 'Di crediti non contestati e procedimenti di ingiunzione: le ultime tappe dell'armonizzazione processuale in Europa' *Rivista trimestrale di diritto e procedura civile*, 171, 190 (2008).

[9] Art 19, para 2 of European Executive Title (TEE), introduced with EC Regulation 805/2004.

[10] V. Pozzi, 'Titolo esecutivo europeo' *Enciclopedia del diritto* (Milan: Giuffrè, 2007), Agg 2007, 1106.

error, taking into account the requirements established by the regulation.
From the reading of the law it emerges that the rectification institute has a more defined scope of application, referring to the hypothesis of discrepancies between the decision and the certificate for reasons of clerical errors, while the revocation seems to be more complex.
Now we will continue analysing which are the protection mechanisms granted to the debtor to oppose the execution based on a European enforcement order with particular regard to the oppositions to the execution governed by the Italian law.
An overview of the rules on the European enforcement order shows that the cornerstones of the discipline were established by the Community legislator.[11]
The only remedy provided for in Regulation (EC) no 805/2004 concerns the possible conflict between a judicial decision certified as European Enforcement Order and one previously pronounced in a Member State or in a third country (Art 21 of the Regulation).
At the request of the debtor, the court of the Member State, in which the title is enforced, may refuse the enforcement if the decision certified as European Enforcement Order is in contrast with another earlier decision concerning a case with the same object and the same parties. The enforcement can be refused if the earlier decision was given in the Member State of enforcement or if it fulfils the conditions that are necessary for its recognition in the same State. It is also necessary that the debtor has not asserted (due to inaction or impossibility) the incompatibility between the decisions in the proceedings carried out in the home Member State.
The Art 21 is the only hypothesis that legitimizes the judge of the 'downstream' State to refuse enforcement at the request of the debtor.
This provision of the regulation also provides that in no case the decision or its certification as a European enforcement order may be subject to a review of the merits in the Member State of enforcement.

[11] A. Pancaldi, 'La giurisprudenza italiana e il regolamento sul titolo esecutivo europeo: un esordio applicativo' *Rivista trimestrale di diritto e procedura civile*, I, 439, 448 (2009).

Any form of control over the qualification or certification can only be carried out in the courts of the Member State of origin.[12]
Therefore, unlike the provisions of the Regulation on property regimes, in the Regulation on the enforceable title can theoretically be applied all the remedies of the lex fori relating to formal or substantial defects in the execution, that are not directly referable to the formation or content of the qualification trained abroad. Therefore, incidental disputes concerning the enforcement procedure in the strict sense are possible in the country of execution.
The foreclosure in a technical sense of any dispute as to the merits of the dispute is absolute and total.
Even the EU Succession Regulation no 650/2012 Art 41 provides that in no case the decision that has been issued in a Member State may be subject to a review of the merits.
The aforementioned Article 41 reiterates the prohibition on the part of the court of the requested Member State to review the merits of the decision given in the Member State of origin.
This prohibition must include the one that forbids the judge of the requested Member State to check how the uniform rules of private international law in matters of succession have been applied, as well as how preliminary questions have been resolved.[13]
Well then, even Art 42 of the EC Regulation on maintenance obligations no 4/2009 states that 'Under no circumstances a decision issued in a Member State may be subject to a merit review in the Member State in which recognition, enforceability or enforcement are requested.'
In short, it cannot interfere in the merit or procedural assessments that must remain the prerogative of the judge of the State from which the title that aspires to executive effectiveness comes from.

[12] R. Siciliano, 'Il titolo esecutivo europeo per i crediti non contestati: presupposti e rimedi' *Rivista dell'esecuzione forzata*, 31, 31 (2015).
[13] D. Damascelli, 'Diritto Internazionale privato delle successioni a causa di morte (dalla l. n. 218/1995 al reg. UE n. 650/2012)', in F. Pocar ed, *L'Italia e la vita giuridica internazionale* (Milan: Giuffrè, 2013), 127-128.

Article 41
Staying of recognition proceedings

Livio Calabrò

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
A court of a Member State in which recognition is sought of a decision given in another Member State may stay the proceedings if an ordinary appeal against the decision has been lodged in the Member State of origin.	(Same text)

Summary: I. Free circulation and suspension of the identification procedure.

I. Free circulation and suspension of the identification procedure

The Regulation in the comment converges with the ratio (purpose) of the Regulations to which it accesses, aimed at the common aim of harmonizing and overtaking the fragmentation of the disciplines of property regimes subject, in order to meet the 'cross-border' needs of couples made up of citizens of different Member States, or resident in different Countries or whose assets are allocated in different States.[1]
It is exactly in favor towards the free circulation and towards the research for legal certainty and stability of judicial measures, that can be sought the reason of the rule in comment, aimed at avoiding potential conflicts that could arise from the procedure for the

[1] On the point: Recitals 14 and 72, Regulation no 2016/1103. O. Feraci, 'L'incidenza del nuovo regime europeo in tema di rapporti patrimoniali tra coniugi e parti di Unioni registrate sull'Ordinamento giuridico italiano e le interazioni con le novità introdotte dal d.lgs. 7/2017 attuativo della c.d. Legge Cirinnà' *Osservatorio e fonti.it*, 43 (2017).

recognition of decisions, which are still subject to scrutiny by the manating judicial authority and, therefore, still changing.[2]
The Article in question, as well as the subsequent Art 42, are placed in Regulations no 1103/2016 and no 1104/2016, under Chapter IV, dedicated to the discipline of: 'recognition, enforceability and execution of decisions.'
Indeed, it should be noted that already with Regulation no 650/2012, regulating the matter of succession *mortis causa*, the European legislation should aim to bring to the sector of property regimes, the regime on the recognition and execution of foreign decisions (and public acts) articulated for civil and commercial matters.
The purposes are those to obtain a significant simplification of the procedural aspects and to exclude or at least reduce any impediments to the mutual recognition of foreign decisions in the European judicial area.
Moreover, the scheme drawn up by Regulations 1103/2016 and 1104/2016 in relation to the recognition and execution follows the model of recognition and execution of foreign decisions dictated in the past by Regulation (EC) 44/2001 (so-called Brussels I).[3]
Furthermore, as with the EU Regulation 1215/2012, in matters of jurisdictional competence, the recognition and enforcement of decisions in civil and commercial matters, the Regulations in the comment provide for the automatic recognition of decisions taken by another Member State.
The aforementioned automatism, which characterizes the phase of the recognition of judgments issued by other Member States, is aimed at extending, also to the matter regulated by property regimes, the

[2] Art 36, para 1, Regulation 2016/1103 and Art 36, para 1 Regulation 2016/1104; E. D'Alessandro, 'Il riconoscimento, l'esecutività e l'esecuzione delle decisioni e delle transazioni giudiziarie in materia successoria', in P. Franzina and A. Leandro eds, *Il diritto internazionale privato europeo delle successioni mortis causa* (Milan: Giuffrè, 2013), 139 ff. 3 Regulation (EC) no 44/2001 of the Council, 22 December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 012, 16/01/2001 P. 0001 - 0023. Cf F. Mosconi and C. Campiglio, *Diritto internazionale privato e processuale* (Turin: Utet, 9th ed, 2020).

principle of mutual trust between the States participating in the enhanced cooperation.[4]

This is confirmed by the prohibition of re-examination of the merits and of the jurisdictional competence by the court seised for the identification or recognition.[5]

It is left to the interested party the right to appeal to the judicial authority in order to obtain confirmation of a recognition measure, which will have a declaratory nature.[6]

Expected the above, assumes particular importance the possibility, although limited, granted to the court of the requesting State, to suspend the recognition procedure.

In particular, in accordance with the Article in question, the recognition process can be suspended only following the appeal of the decision in the Member State of origin, by ordinary means.

Interpretation doubts may arise regarding the use of the term 'ordinary means' used by the European Council.

For this purpose, referring to what proclaimed with the sentence *Industrial Diamond*, by the EU Court of Justice where the definition of ordinary means of appeal is offered for the purposes of applying its own rules, defining it as any means that is such as to involve the annulment or modification of the sentence with is the subject of the recognition or enforcement procedure pursuant to the Convention and whose deposit is bound, in the State in which the sentence was iussed, to a term provided by law and which begins to run by virtue of the same sentence, it constitutes an 'ordinary means of appeal'.[7]

The rule referred to in Art 41, therefore, refers to decisions that are not yet final.

Thus, that a possible annulment of the decision following an appeal would overwhelm the identification procedure, leading to its cancellation.

Briefly and with regard to the semantic context of the term 'decision,'

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[4] Art 36, para 1, Regulation 1103/2016 and Art 36, para 1, Regulation 1104/2016.

[5] So Art 39 and Art 40, Regulation 1103/2016 and art 39 and Art 40, Regulation 1104/2016.

[6] M.J. Cazorla González, M. Giobbi, J. Kramberger Škerl, L. Ruggeri and S. Winkler eds, *Property relations of cross border couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2020), 137.

[7] CJEU, 22 November 1977, Case C- 43/77, *Industrial Diamond Supplies* v *Luigi Riva*.

it should be noted that this last one is to be understood in a broad sense, including provisional and precautionary measures and provided that it is issued by a competent authority on the merits, in compliance with (in the phase preceding the execution) of the right of defense.[8] This also in the light of the evolutionary jurisprudence issued by the Court of Justice which, on several occasions, has clarified how any provision issued by a judicial body in the cross-examination between the parties must be considered a 'decision,' regardless of the summary nature of the procedure, or regardless of the finality whether or not the decision or from having as its subject matters relating to jurisdiction.[9]

So much so, also with a view to guaranteeing European citizens to enjoy their rights throughout the territory of the Union without, therefore, running into bureaucratic and/or judicial problems. As anticipated, with this Regulation, the European legislator has opted to limit the suspension cases of the recognition procedure to the sole circumstance that the provision is challenged in the Member State of origin.

Differently in the general regulations in civil and commercial matters, Art 38 of EU Regulation 1215/2012, states that: 'The court or authority before which a judgment given in another Member State is invoked may suspend the proceedings, in whole or in part, if: a) the judgment is challenged in the Member State of origin; or; b) an application has been submitted for a decision that there are no grounds for refusal of recognition as referred to in Article 45 or for a decision that the recognition is to be refused on the basis of one of those grounds.'[10]

Minor differences are found, however, with the EU Regulation 2201/2003, which repeals Regulation (EC) no 1347/2000, in matrimonial matters and in matters of parental responsibility.

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[8] On this point: E. Gualco and G. Risso, 'Il riconoscimento e l'esecuzione delle decisioni giudiziarie nel regolamento Bruxelles I bis' *Diritto del commercio internazionale*, 694 (2014).

[9] Cf Art 2, Letter A) Regulation (EU) 1215/2012; CJEU, 15 November 2012, Case C-456/11, *Gothaer Allgemeine Versicherung AG and Others* v *Samskip GmbH*; CJEU, 6 June 2002, Case C-80/00 *Italian Leather SpA* v *WECO Polstermöbel GmbH & Co.*

[10] Art 38 of EU Regulation 1215/2012.

Indeed, Art 27 of the prefatory Regulation, relating to the suspension of the recognition procedure, expressly provides that '1. A court of a Member State in which recognition of a decision given in another Member State is sought may stay the proceedings if the decision has been challenged by ordinary means. 2. A court of a Member State in which recognition of a judgment given in Ireland or the United Kingdom is sought and the enforcement of which is suspended in the home Member State for an appeal may stay the proceedings.'

With regard to the faculty granted to the competent judicial authority, pursuant to the Article in question, to issue a provision for the suspension of the requested recognition,it is believed that the judge must make an assessment, albeit summary, in terms of fumus boni iuris, also with regard to the justification of the appeal explained.

For this purpose, it should be pointed out that submitting such an assessment to the judge could involve investigations into the merits of the dispute, aimed at a prognostic examination of the possibility that the provision, in the context of encumbrance in the State of origin, be reformed or revoked.

Obviously, the assessment must comply with the prohibition set out in Art 40 of the same Regulation, entitled 'Prohibition of re-examination on the merits,' according to which 'The decision issued in a Member State may in no case be subject to a review of the merits.'

Article 42
Enforceability

Livio Calabrò

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
Decisions given in a Member State and enforceable in that State shall be enforceable in another Member State when, on the application of any interested party, they have been declared enforceable there in accordance with the procedure provided for in Articles 44 to 57.	(Same text)

Summary: I. Simplified procedure for the declaration of execution. – II. Partial enforcement and suspension of the declaration.

I. Simplified procedure for the declaration of execution

From the letter of the Article it is clear that, differently from the the recognition, marked by a certain automatism, the declaration of enforcement (or execution) of the sentence given in a participating State, different from that in which the decision was issued, is left to the impulse of the interested party and based on a simplified procedure.

A prerequisite for an application for enforceability is that the decision has already been declared enforceable in the State that issued it.

In fact, the law relates to decisions issued in a Member State and 'declared enforceable there.'[1]

The simplified procedure, in case of contradictory results as governed by Arts 44 to 57 of the same Regulations.

[1] Art 42 of Regulation EU 1103/2016 and 1104/2016.

In particular, the competence to receive the application for enforceability is identified by Art 44 of Regulations 1103/2016 and 1104/2016 which states: 'The request for a declaration of enforcement is submitted to the court or competent authority of the Member State of enforcement communicated by that Member State to the Commission in accordance with Art 64 (...). Territorial jurisdiction is determined by the place of domicile of the party against whom enforcement is sought, or by the place of execution.'

For this purpose, the competent judicial authority, to be communicated by the Member State to the Commission, in accordance with the provisions of Art 64, can be easily found on the website of the European Judicial Atlas in civil matters, under the heading 'Matters of matrimonial property regimes,' where each Member State indicates its competent Authority.[2]

In particular, as regards Italy, the authority invested for the enforcement procedure is the Court of Appeal, with territorial jurisdiction.

The lack of automatism places the procedure for the release of enforceability in discontinuity with Art 39 of EU Regulation 1215/2012 - governing the general discipline of civil and commercial law - pursuant to which: 'The decision issued in a Member State which is enforceable in that Member State is also enforceable in the other Member States without being a declaration of execution is required.'[3]

The prefixed simplified procedure dictated by the Regulations is informed according to the scheme of a possible adversarial monitoring procedure and aimed at verifying the compliance of the application with the formal requirements for which the declaration is pre-ordered.

According to the jurisprudence of the Court of Justice concerning the Convention and the Brussels I Regulation, provisional and precautionary measures can also be declared enforceable, provided they are issued at the outcome of a proceeding that has safeguarded the contradictory and the related right of defense of the parties.[4]

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[2] Cf https://ejustice.europa.eu/content_european_atlas_in_civil_matters_321.en.do (last visited 20 October 2021).

[3] Art 39 of EU Regulation 1215/2012.

[4] CJEU, 21 May 1980, Case C-125/79, *Bernard Denilauler* v *SNC Couchet Frères*.

Successively to the notification of the decision on the application, the interested parties may appeal against the provision of acceptance or rejection of the application for enforcement.
The procedure that is activated, following any appeal against the predetermined decision, is informed by the rules of the contradictory and ends with a decision subject to appeal.[5]
It is to remember that the effective execution of the decision will always be governed by the national procedural rules of the executing Member State, given that the European Regulations do not interfere with these rules, regulating, rather, 'the transition phase of the foreign sentence into the domestic legal system.'[6]

II. Partial enforcement and suspension of the declaration

The declaration of enforceability can be made only on certain parts of the decision, just as the requesting party can also request a partial declaration of enforceability, limited only to certain parts of the decision.
Henceforth, it should be remembered that pursuant to Art 52 of Regulations 1103/2016 and 1104/2016, the judicial authority before which an appeal is lodged against the rejection of the application for enforcement, at the request of the interested party, is required to suspend the proceedings if the enforcement of the decision results suspended in the Home Member State following the submission of an appeal.[7]
The hypothesis contemplated by the above mentioned provision differs from the suspension referred to in Art 41 of the Regulations in question, given the absence of margins of discretion for the judicial authority, which, indeed, will be obliged to suspend the procedure aimed at issuing the declaration of enforcement.

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[5] Cf P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate* (Milan: Giuffrè Francis Lefebvre, 2019), 300 ff.
[6] U. Bergquist et al eds, The EU Regulation on matrimonial and Patrimonial Property (Oxford : Oxford University Press, 2019), 184 ff.; M.J. Cazorla González, M. Giobbi, J. Kramberger Škerl, L. Ruggeri and S. Winkler eds, *Property relations of cross border couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2020). 7 Art 52, Regulations 1103/2016 and 1104/2016.

Article 43
Determination of domicile

Giovanna Di Benedetto

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
To determine whether, for the purposes of the procedure provided for in Articles 44 to 57, a party is domiciled in the Member State of enforcement, the court seised shall apply the internal law of that Member State.	(Same text)

Summary: I. Determination of domicile. – II. Introductive observations. – III. Enforceability of domicile criterion.

I. Determination of domicile

The Arts 43 of EU Regulations 2016/1103 and 2016/1104, of the Council of 24th June 2016 establish the use of the internal law of the responsible Member State which determine whether or not the party is domiciled in the Member State of the execution of a transnational decision in the matter of matrimonial property regimes.
In particular, the determination of the domicile is carried out according to the verification of the legitimate territorial competence of the apt authorities to receive the request:

- for enforceability of a transnational decision, pursuant to Arts 44 of the Regulations;
- for exemption from taxes, rights or taxes relating to the request for enforceability of a transnational decision, pursuant to Arts 57 of the Regulations.

II. Introductive observations

As acknowledged under Recital 3 of the Regulations, the principle of mutual recognition of judgments and other decisions of judicial authorities constitutes a fundamental element of judicial cooperation in civil matters.
The rule in question must therefore be placed in an overall European framework aimed to adopt all the necessary measures to facilitate the mutual recognition of decisions.
Adopting the aforementioned measures, the peculiar differences in the legal systems of the member countries adhering to the Regulations were taken into account.
In particular, in consideration of the aforementioned legal diversity of the concepts of residence and domicile accepted in the various Member States, in order to prevent to prejudice the wide application of the Regulations themselves, it was decided to avoid to propose a criterion to determine the uniform definition of domicile.[1]
Therefore, the court of the executing member country can determine its jurisdiction in the same way as the national notion of domicile.
Otherwise, the general European favor for the maximum circulation of decisions in civil and commercial matters, within the European area of justice, security and freedom of movement, would have been compromised.

III. Enforceability of domicile criterion

For the purposes of the conditions of applicability of Arts 43 of the Regulations, it must be considered what it is following.
Pursuant to Arts 44(2) of the Regulations, the territorial jurisdiction of the authority of the member country called upon to receive the request aimed to obtain the declaration of enforceability is determined, inter alia, by the place of domicile of the party against which the enforcement is requested.

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[1] J. Re, 'Jurisdiction of local court', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples. A Commentary* (Cheltenham: Edward Elgar, 2020), 379.

Pursuant to Arts 43 of the Regulations, the responsible court must apply its lex foro in order to verify whether the party is domiciled in the Member State where the enforcement of the decision is sought.
Furthermore, in order to determine the territorial competence of the authorities of the executing member country to which to propose applications for exemptions from taxes, duties or taxes in the proceedings relating to the issuance of a declaration of enforceability, referred to Arts 57 of the Regulations, it is applied the criterion of domiciliation, referred to Arts 43 of the Regulations.
In other words, the Regulations delegate the jurisdictional authorities to adopt for the assessment of their territorial jurisdiction the criterion of the domicile of the party against which the execution of the transnational decision is proposed, not with reference to the laws of other member countries or of a possible single criterion, but on the basis of its national law.
For the purposes of the assessment referred to Arts 43, as clarified in Arts 44(2) of the Regulations, the domicile to be taken into consideration is that of the party against whom the enforcement of the transnational decision on matrimonial property regimes is sought.
Ratione temporis the domicile of the party against which the enforcement is sought is to be determined at the time of presentation of the application for enforceability of the ruling.
As supported by shared doctrine, any change of domicile made medio tempore is to be considered irrelevant (so called '*perpetuatio fori*').[2]
In fact, in the event that the responsible judicial authority has positively assessed its territorial jurisdiction, pursuant to the combined provisions of Arts 44(2) and 43 of the Regulations, the change of domicile of the person against whom the execution of the decision is requested, it is to be considered null and void for the purpose of an artificial shift of jurisdiction.
In addition, in the event of a plurality of domiciles, the responsible judicial authority will have to apply and make prevail the criterion

[2] J. Kramberger Skerl, 'Recognition and enforcement', in M.J. Cazorla Gonzalez, M. Giobbi, J. Kramberger Skerl, L. Ruggeri and S. Winkler eds, *Property Relations of Cross Border Couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2020), 136.

adopted by its own national law among the various regulatory criteria to determine the domicile.
Pursuant to Art 70, the mentioned Regulations are applicable starting from the date of 29th January 2019.[3]
In other words, the Regulations can be applied only to proceedings initiated, to public deeds drawn up or registered and to judicial transactions approved or concluded on or after 29th January 2019.
However, it should be noted that, pursuant to Arts 69(2) of the Regulations, all the provisions contained in Chapters IV of both Regulations, which are related to the recognition, the enforceability and execution of decisions and therefore including the provisions contained in Arts 43, are applicable to proceedings started in the States of origin before 29th January 2019.
Therefore, in case of proceedings started in the countries of origin on or before 28th January 2019, the taken decisions are recognizable and executable according to the rules of said Regulations.
In this case, the judicial authority will therefore be required to assess its own territorial jurisdiction in the same way as the criterion of domicile referred to in Arts 43 of the Regulations.

[3] I. Pretelli, 'Determinazione del domicilio e competenza territoriale', in A. Bonomi and P. Wautelet eds, *Il regolamento europeo sulle successioni* (Milan: Giuffrè, 2015) 556.

Article 44
Jurisdiction of local courts

Giovanna Di Benedetto

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. The application for a declaration of enforceability shall be submitted to the court or competent authority of the Member State of enforcement communicated by that Member State to the Commission in accordance with Article 64.	(Same text)
2. The local jurisdiction shall be determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement.	

I. Jurisdiction of local courts

Arts 44 of EU Regulations 2016/1103 and 2016/1104, of the Council of 24th June 2016, establish the functional competence and territorial competence of the judicial authority or competent authority of the Member State for the execution of a transnational decision.
In order to identify the authorities that are functionally competent to declare the enforceability of the transnational decision, the examined rules refer to Arts 64 of the aforementioned Regulations, regarding information about details and procedures.
In order to identify the territorially competent authorities, the rule referred to Arts 44(2) makes use of two criteria:

- that of the place of domicile of the party against which enforceability is sought, to be assessed pursuant to Arts 43 and the Regulations;
- that of the place of execution of the transnational decision itself.

II. Introductive observations

It should be noted that although the Articles in question are titled 'Territorial jurisdiction,' they are governed respectively by 44(1) functional competence and 44(2) territorial competence.
It should also be noted that, in accordance with the principle of procedural autonomy accepted by both the Regulations in question, the provisions of Arts 44 do not interfere with the organizational autonomy of the individual Member States.
In fact, pursuant to Arts 64, the Member States are free to determine the competent authority to receive the declaration of enforceability.[1]

III. Enforceability field

For the purposes of the conditions of applicability of Arts 43 of the Regulations, it must be considered what is following.
According to Arts 44(1) of the Regulations, the functional competence of the responsible authority for the declaration of enforceability is attributed by reference to Arts 64 of the same Regulations.
In this sense, the recourse to the judicial authority or to the competent authority of the Member State of enforceability must not be considered as an alternative to each other's. That is, in function of a possible free choice of the party interested in the enforceability of the transnational decision.
Furthermore, it should be specified that recourse to the judicial authority or the competent authority referred to Arts 44(1), must not be considered as subordinate to the other. That is, it is not a request of enforceability to be proposed in the first instance to an authority and,

[1] J. Re, 'Jurisdiction of local court', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples. A Commentary* (Cheltenham: Edward Elgar, 2020), 384.

if the first rejects, in the second instance, to be proposed to the second authority.
On the contrary, the provisions of Arts 44(1) must be read in conjunction with the provisions of Arts 64 of the Regulations.
In fact, the Member States are to determine which of the national judicial authorities or not is competent to deal with the requests aimed at obtaining the declaration of enforceability, by a communication sent to the Commission by 29th April 2018.
For this reason, the authority referred by the interested party to the enforceability of the transnational decision must verify its functional legitimacy on the basis of the communications sent by the acceding Member States, pursuant to Arts 64.
The territorial jurisdiction of the authority requested for the declaration of enforceability is regulated by Arts 44(2) of the Regulations.
In particular, it is established that territorial jurisdiction is determined either by the criterion of the place of domicile of the party against whom the enforceability of the transnational decision is sought or, alternatively, by the criterion of the place of execution.
In other words, in the event that the place of domicile of the party against which enforcement is sought does not coincide with the place of execution, the person who proposes the application for enforceability can freely determine at which forum to submit his request.
As correctly observed by the doctrine, the provision of an alternative forum consisting either in the place of the domicile of the party against which the enforceability of the decision is delegated or in the place of execution allows to locate the debtor's attachable assets and to apply directly to the authority of the place where the goods are located.[2]
The parties will therefore be able to appeal to the authority that is in the best position to preside over the execution, with considerable savings in time and costs.
On the other hand, the provisions of Arts 44(2) of the Regulations do not appear to be derogated by agreement between the parties.

[2] I. Pretelli, 'Determinazione del domicilio e competenza territoriale', in A. Bonomi and P. Wautelet eds, *Il regolamento europeo sulle successioni* (Milan: Giuffrè, 2015) 557.

In fact, the determination of the territorial competence of the authorities called upon to issue a declaration of enforceability of the transnational decision is not attributable to the parties' freedom of negotiation.
Therefore, the parties may not derogate from the jurisdictional options offered by the provisions referred to in Arts 44 by means of negotiation.
In other words, it will not be admissible an agreement by which the parties decide to contact a body other than that of the domicile of the party against whom enforceability is delegated or the place of execution.
However, in the hypothesis in which the chosen territorial jurisdiction is that of the place of execution, when the assets that are object of the execution are located in several places, the party is given the right to choose which of these courts to appeal to.
Ratione temporis it should be noted that the territorial jurisdiction of the authority called to proceed with the enforceability of the decision is established with reference to the date of filing of the application for enforceability.
Therefore, any subsequent obstructive modification of the domicile of the party against which to enforce the decision that occurs after the filing date of the application for enforceability is to be considered irrelevant, in application of the general principle of *perpetuatio iurisdictionis*.
Pursuant to Arts 70, these Regulations are applicable starting from the date of 29th January 2019.
In other words, the Regulations can be applied only to proceedings initiated, to public deeds drawn up or registered and to judicial transactions approved or concluded on or after 29th January 2019.
However, it should be noted that, pursuant to Arts 69(2) of both Regulations, all the provisions contained in Chapters IV of both Regulations are applicable to proceedings initiated in the States of origin prior to 29th January 2019, relating to the recognition, enforceability and execution of decisions and therefore, including the provisions contained in Arts 44.[3]

[3] The mentioned applicability of the Regulations for proceedings that arose prior to 29th January 2019 is expressly conditioned on the applicability of rules relating

Therefore, in the case of proceedings initiated in the countries of origin on or before 28th January 2019, the decisions taken are recognizable and executable according to the rules of the mentioned regulations. In this case, therefore, the parties will be able to address the request to the authority indicated by Arts 44 of the Regulations.

to jurisdiction that can be considered compliant with those contained in Chapters II of the Regulations.

Article 45
Procedure

Elena Napolitano

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. The application procedure shall be governed by the law of the Member State of enforcement.	(Same text)
2. The applicant shall not be required to have a postal address or an authorised representative in the Member State of enforcement.	
3. The application shall be accompanied by the following documents:	
(a) a copy of the decision which satisfies the conditions necessary to establish its authenticity;	
(b) the attestation issued by the court or competent authority of the Member State of origin using the form established in accordance with the advisory procedure referred to in Article 67(2), without prejudice to Article 46.	

Summary: I. Principle of judicial cooperation. – II. The European Enforcement Order. – III. The declaration of enforceability.

I. Principle of judicial cooperation

Since the end of the nineties, the Community legislature increasingly felt the need for regulatory standardisation in property regimes and property consequences of registered partnerships. The fragmentation that characterised the rules of private and procedural international law

in this area constituted a clear obstacle to the free movement of citizens in the 'internal market.' capable of under affecting the principle of 'mutual recognition.'[1]

A true cornerstone of judicial cooperation, that principle underlies, as is well known, the idea that in the European judicial context, the decisions of both civil and criminal courts of one Member State must be recognised by all other Member States.[2]

In this regard, it is helpful to retrace the fundamental stages of this evolution.

The Treaty of Amsterdam introduced Title IV of the EC Treaty to establish an 'area of freedom, security and justice' (Art 61).

This Treaty included 'measures in the field of judicial cooperation in civil matters' (Art 61, letter c): so-called 'European judicial area'). The Art 65 of the Treaty in question contemplated the contents and purposes, emphasizing the need for the cases to be regulated to have 'cross-border implications.'

The new Community competence, therefore, resumed a common interest of the Member States aimed at harmonizing the individual laws of private and procedural international law that have always invested the regulation of cases with elements of extraneousness (or with 'cross-border implications') mainly concerning three distinct profiles: the division of the sphere of jurisdiction, the conflict rules inherent in the applicable material law and the circulation of the and judicial decisions given in a Member State.

The original Art 220 of the EC[3] Treaty envisaged certain areas in which it was necessary to open negotiations between the Member States, particularly with to simplify the procedures for the recognition of judgments. For those pronounced in civil and commercial matters, albeit with the exclusion of some relevant sectors, the Brussels

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[1] C. Ricci, *Giurisdizione in materia di regimi patrimoniali tra coniugi nello spazio giuridico europeo* (Padua: CEDAM, 2020), 36.

[2] Case C-648/20 PPU *Svishtov Regional Prosecutor's Office*, [2021] ECLI:EU:C:2021:187, Judgment of 10 March 2021, available at https://eur-lex.europa.eu (last visited 1 October 2021).

[3] At the time of the adoption of the founding Treaty, the objectives of the European Community did not include judicial cooperation in civil matters. However, Art 220 of the Treaty establishing the European Community provided that the Member States simplify the 'formalities to which the mutual recognition

Convention was adopted in 1968 - also called 'Convention on Enforcement' - which sanctioned the automatic recognition of judgments, facilitating it through a simplified procedure for ascertaining the relative conditions of effectiveness according to a rite mainly comparable to the Italian injunction procedure.[4]
To reduce possible differences of assessment, the intra-community circulation of decisions was facilitated by the same conventional rules with its own uniform rules both on the criteria of jurisdiction and on the coordination of civil actions in the space. In addition, by the Luxembourg Protocol of 3 June 1971, the Court of Justice[5] of the European Communities was given jurisdiction to carry out the uniform interpretation of the Convention,[6] by a procedure similar to that laid down in Art 177 of the EC Treaty.[7]

II. The European Enforcement Order

When covered by 'European enforcement order' it is essential to refer to Regulation no 44/2001 (so-called Regulation Brussels I), where

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and enforcement of judgments and arbitral awards are subject.' In the intergovernmental framework 'justice and home affairs,' judicial cooperation in civil matters has been officially included in the EU's sphere of intervention by the Maastricht Treaty. The Treaty of Amsterdam then brought judicial cooperation in civil matters into the Community framework, transferring it from the Treaty on European Union to the Treaty establishing the European Community, without subjecting it to the Community method. The Treaty of Nice allowed measures relating to judicial cooperation in civil matters, excluding family law, to be adopted following the legislative procedure of codecision.

[4] Similar precedent was already found in Art 6 of the Convention of Friendship and Good Neighbourliness between Italy and San Marino of 31 March 1939.

[5] Order of 12 November 1988 in Case 162/98 *Hartmann*, [1988] ECR I-7083, available at https://app.justis.com (last visited 1 October 2021).

[6] In the view of the Court of Justice, the Convention should 'prevail over internal rules which are incompatible with it' (Judgment of 15 November 1983 in Case 288/82 *Ferdinand M.J.J. Duijnstee* v *Lodewijk Goderbauer*, [1983] ECR 3675). In a similar sense, Cour d'appel Paris, 14 June 1975 *Revue Critique de Droit International Privè,* 119 (1976); see also Cour d'appel Paris, 25 April 1979 Directory of Case-Law on Community Law, Series D, Convention of 27 September 1968, published by the Court of Justice of the European Communities, 17.1.1 – B 12.

[7] A. Adinolfi et al, 'La cooperazione giudiziaria comunitaria in materia civile', in G.

enforcement was not likely to circulate within the common judicial area[8] but had to be attributed *ex novo* by the system in which enforcement should take place.
This conferral was only in favour of a measure, a court settlement or an authentic instrument representing an enforceable title in the State of origin, provided that there was no obstacle requirement: for judicial decisions, reference should be made to those referred to in Arts 34 and 35 of Regulation no 44/2001.
The *exequatur technique,* which is certainly an evolution compared to the past, determines the emergence of a bilateral relationship between the State of origin of the enforceable title and the State sought of enforcement, in which approval had to be sought.
The value of an enforceable title in the State of origin is a necessary condition (but not sufficient) for obtaining a new enforceable value in the required legal system.
Regulation (EU) 1215/2012,[9] so-called *Bruxelles I bis*, which repeals and replaces *Brussels I* Regulation no 44/2001, now makes it possible to proceed directly with the enforcement of an enforceable decision in another Member State of the European Union, precisely as if it were a national judicial measure.
Among the major innovations introduced by the new Regulation is the abolition of the exequatur system, resulting in the consequential generalisation of the European Enforcement Order technique, only limited to some areas of civil judicial cooperation.[10]
However, it may well happen that in the panorama of the instruments of judicial cooperation in civil matters, we find models of

Strozzi ed, *Diritto dell'Unione Europea parte speciale* (Turin: Giappichelli, 2006), 462.
[8] E. D'Alessandro, *Il riconoscimento delle sentenze straniere* (Turin: Giappichelli, 2007), 6.
[9] E. D'Alessandro, 'Il titolo esecutivo europeo nel sistema del Regolamento no 1215/2012' *Rivista di diritto processuale*, 1044, 1045 (2013).
[10] EG Regulation no 2201/2003, on jurisdiction, recognition and enforcement of judgments in matrimonial matters, limited to decisions concerning the rights of access of the minore and the orders to return the child; Regulation no 805/2004 (European Enforcement Order for uncontested claims); Regulation no 1896/2006 (European demand for payment); Regulation no 861/2007 (European Enforcement Order consists of a conviction issued following a uniform minor claims procedure entity).

enforceability of decisions that do not provide for the complete abolition of exequatur but, in contrast, present themselves as more streamlined procedures.[11]
A confirmation can be found in Art 42 of the Regulation concerning us, where it is emphasized that 'The judgments issued in a Member State and enforceable there are enforced in a Member State after being declared enforceable there at the request of an interested party in accordance with the procedure referred to in Arts 44 to 57.'

III. The declaration of enforceability

As already the subject of in-depth analysis, Art 36 of the Regulations of our interest sets out the principle of the full ('or automatic') effectiveness of foreign judgments, eg without the need for any ad hoc procedure in the Member State addressed.
The automatic recognition system[12] is required by the principle of equivalence of judgments[13] and is tempered by the possibility of having it declared that the foreign decision does not have to be recognised. To ensure that principle, the system provides that the court of recognition is precluded from reviewing the substance of a judgment given by a Member State and that it is also precluded from reviewing the jurisdiction of the court of the State of origin (Arts 39 and 40). It may happen that, even though the above rules are intended to express mutual trust between the authorities of the Member States, there is a challenge to the recognition or enforcement of the foreign judgment.

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[11] Case C–139/10 *Prism Investments* v *Jaap Anne van der Meer* [2011] ECR I–9511, Judgment of 13 October 2011, available at https://curia.europa.eu (last visited 1 October 2021).

[12] The system followed by EC Regulation no 2201/2003, in matrimonial matters and parental responsibility; EU Regulation no 4/2009, on maintenance obligations, in part relating to decisions issued in a Member State not bound by the Protocol of the Aja of 2007; EU Regulation no 650/2012 on inheritance matters.

[13] M.M. Winkler, 'Circolazione delle decisioni contumaciali e ordine pubblico processuale nello spazio giudiziario europeo: un nuovo tassello della vicenda Gambazzi-Stolzenberg' *Nuova giurisprudenza civile commentata*, 574, 579-585 (2011). The Italian court may grant the recognition and enforcement of a default judgment rendered by an English court as a result of a measure of 'debarment' provided that, in the context of the verification of the compatibility of that judgment with

This exception is triggered through a specific procedure allowing the authority of the requested Member State to be transferred.[14]
The procedure to be followed for the declaration of enforceability is divided into the same phases that characterize the recognition as the main one (Art 36, para 2).
Similar to what has already been established in Art 46 of the Regulation successions and in Art 41 of the Brussels Regulation I-bis, 'the applicant is not required to have a postal address, nor an authorised representative in the Member State of enforcement.' That clarification, on the other hand, differs from what is governed by the Regulation Brussels I bis, where the applicant is required to elect domicile in the district of the court seised or – if the law of the executing Member State does not provide for this – a prosecutor must be appointed. The filing methods are then given by the lex fori whose provisions are supplemented by the uniform rules in Arts 45 and 46. This Article regulates the procedures for submitting the application, which must be filed together with a copy of the decision 'which satisfies the conditions necessary to establish its authenticity' (Art 45) and a copy - not mandatory - of the certificate issued by the court or the competent authority of the Member State of origin, together with the standard form drawn up by the European Commission with the assistance of a technical committee and omitted by the representatives of the Member States and whose rules are set out in Regulation (EU) no 182/2011.
As a preliminary point, it should be noted that the subject of that

procedural public policy and in particular with the guarantee of the rights of the defence in the main proceedings, it is established that the defendant participated in the stages preceding the 'debarment' and had at his disposal all the tools to oppose it.

[14] The reasons for refusal of recognition are typified in Art 37 of the Regulations nos 1103 and 1104. This Article, however, must be coordinated with that of Art 51, which expressly provides for the refusal reserved to the court seised according to Arts 49 and 50 of the declaration of enforceability or its revocation 'only for one of the reasons contemplated by Art 37,' highlighting the seriousness of these hypotheses. The situations that prevent the free movement of judgments can be traced back to the three categories of international public policy, procedural public policy and incompatibility between decisions.

procedure may be only judgments which are enforceable in the Member State of origin,[15] and the authentic nature of the judgment would appear, not in the case of any indication of this point in the Regulation, to be the subject of a discretionary assessment by the court seised.

In that regard, while it is true that recognition is intended to produce the effect of conferring on judgments the authority and effectiveness which they enjoy in the Member State in which they were given[16] it would not seem appropriate to confer on a judgment (at the time of its enforcement) rights which do not characterise it in the Member State in which they were given or even effects which a similar judgment given directly in the Member State requires or would not produce.[17] On the other hand, the absence of enforceability of the judgment in the Member State of origin prevents exequatur in the Member State addressed.[18]

Furthermore, in line with Art 41 of Regulation no 44/2001, the authorities of the Member State addressed must confine themselves, at an early stage of the procedure, to reviewing the completion of the formalities to issue the declaration enforceability of that decision. Consequently, in the context of those proceedings, they cannot examine the facts and legal elements of the dispute resolved by the decision whose enforcement is sought.

The evident restrictive nature of that review is justified by the purpose of that procedure: it is to allow a judgment given by a court of a Member State other than the Member State addressed to be enforced in that State using its incorporation into its legal order.

As for the elaboration of the forms, however, the same was implemented with the Commission Regulations no 1935 and 1990 of 2018, which established three annexes.

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[15] Case C-267/97 *Eric Coursier* v *Fortis Bank and Martine Coursier, née Bellami* [1999] ECLI:EU:C:1999:213, Judgment of 29 April 1999, available at https://eur-lex.europa.eu (last visited 1 October 2021).

[16] Case C-145/86 *Horst Ludwig Martin Hoffmann* v *Adelheid Krieg* [1988] ECR 00645, Judgment of 4 February 1988*Foro italiano*, 322, 323 (1988).

[17] n 10 above.

[18] n 10 above.

The data found in Annexes I and III, in respect of judgments and court settlements, concern the indication of the Member State of origin, the court or authority issuing the certificate; the court that issued the decision; the date and number marking the decision; the plaintiff and the defendant, with the essential data for their identification; the enforceability of the decision; interest, with the method of calculation; costs and expenses.
On the other hand, Annexe II refers to the authentic instrument and provides for an indication of the authority which drafted it, of the elements enjoying specific evidential effect, of the transactions and legal relationships registered therein, and of its enforceability.[19]

[19] P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate* (Milan: Giuffrè Francis Lefebvre, 2019), *passim*.

Article 46
Non-production of the attestation

Elena Napolitano

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. If the attestation referred to in point (b) of Article 45(3) is not produced, the court or competent authority may specify a time for its production or accept an equivalent document or, if it considers that it has sufficient information before it, dispense with its production.	(Same text)
2. If the court or competent authority so requires, a translation or transliteration of the documents shall be produced. The translation shall be done by a person qualified to do translations in one of the Member States.	

Summary: I. Absence of certificate. – II. Translation request.

I. Absence of certificate

The Regulations[1] are also concerned to contemplate the hypothesis that the applicant does not produce, in support of the application to obtain the declaration of enforceability,[2] the certificate referred to in Art 45, para 3, letter b).
However, failure to present the certificate is not a reason for nullity or absolute impediment in the procedure for issuing *exequatur*,

[1] P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate* (Milan: Giuffrè Francis Lefebvre, 2019), 267.
[2] A. Davì and A. Zanobetti, *Il nuovo diritto internazionale privato europeo delle successioni* (Turin: Giappichelli, 2014), 218.

considering that the function of the document is to facilitate the circulation of decisions and authentic instruments.[3]
Having a purely informative nature,[4] therefore, the assessment of the need for the certificate falls within the discretion of the court seised which, if it wishes, can also accept a document or equivalent to it and that meets the exact content requirements or recognise the decision based on the documentation in its possession.
Sometimes, the authority may already have the elements suitable for the definition of the application; sometimes, however, the court of the receiving State was able to grant a deferment to enable the plaintiff to find and present the certificate.

II. Translation request

The second paragraph provides that 'Where the court or competent authority requests, a translation or transliteration of the documents shall be submitted. A person authorised to carry out translations in one of the Member States shall translate.'
As seen from the Annex, the forms are standard and multilingual in themselves, designed to facilitate the circulation of decisions in the common European area.
The court of the State in which the request is sought may, however, require a translation (Art 46, para 2)[5] of any documents submitted in support of the application; documents for which the only problem of translation is sometimes raised, sometimes even of transliteration, if we are faced with acts where the original language is based on graphemes of a different writing system.[6]

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[3] Case C-347/18 *Avv. Alessandro Salvoni* v *Anna Maria Fiermonte* [2019] EU:C:2019:661, Judgment of 4 September 2019, available at https://curia.europa.eu/ (last visited 01 October 2021).

[4] Case C-619/10 *Trade Agency Limited* v *Seramico Investments Limited* [2012] EU:C:2012:531, Judgement of 6 September 2012, available at https://eur-lex.europa.eu (last visited 01 October 2021).

[5] S. Lalani and I. Petrelli, 'Iura Aliena Novit Curia, Theory and Practice of the Helvetic Experience', in L. Heckendorn Urscheler eds., *Rapports suisses présentés au XIXe Congrès international de droit comparé* (Zürich: Schulthess Verlag, 2014), 110.

[6] I. Petrelli, 'Il procedimento volto a ottenere la dichiarazione di esecutività

In this case, the Regulations in question provide that the translation must be certified or drawn up by a person authorized to carry out translations in the Member State of the origin or in another Member State.[7]
If the designated authority is not offered suitable clarifying elements, exequatur may be legitimately refused.[8]

(artt. 46-49)', in Bonomi and P. Wautelet eds, *Il Regolamento europeo sulle successioni* (Milan: Giuffrè, 2015), 558.

[7] E. D'Alessandro, Article 46, in I. Viarengo and P. Franzina eds., *The EU Regulations on the Property Regimes of International Couples* (Cheltenham: Edward Elgar, 2020), 391-392.

[8] Tribunal da Relação de Lisboa Empresa-A c. AA., Judgment 18 october 2007, in Cour de justice des Communautés européennes, *Information au titre du protocole n. 2 annexé à la Convention de Lugano*, available at https://curia.europa.eu/common/recdoc/convention/fr/index.htm (last visited 1 October 2021).

Article 47
Declaration of enforceability

Elena Napolitano

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
The decision shall be declared enforceable immediately on completion of the formalities set out in Article 45 without any review under Article 37. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.	(Same text)

Summary: I. The declaration of enforceability. – II. The first phase.

I. The declaration of enforceability

In force of Art 47, the decision is declared enforceable following the completion of the formalities of Art 45 (copy of the decision, certificate and any documents with relative translation), without any examination of the reasons for refusal contemplated by the previous Art 37.[1]
This shows the cardinal principle of the system that governs the

[1] V. Égéa, 'Art 37', in S. Corneloup and V. Egéa eds., *Le droit européen des regimes patrimoniaux des couples* (Paris: Société de législation comparée, 2018); U. Bergquist, 'Articles 36-57', in Id and D. Damascelli eds., *The EU Regulations on Matrimonial and Patrimonial Property* (London: Oxford University Press, 2019), 158-162; G. Cuniberti, Article 37, in I. Viarengo and P. Franzina eds., *The EU Regulations on the Property Regimes of International Couples* (Cheltenham: Edward Elgar, 2020), 348-351.

circulation of decisions,[2] especially when they must be recognized as having executive effects.
The European legislator, borrowing Art 41 of the *Brussels I* Regulation[3] and the same Article of the Lugano Convention of 2007, wanted to adhere to the same procedure already devised on the European Regulation on successions occasion.
It is clear from the letter of the rule that this procedure is essentially divided into two phases: a first, without adversarial approach and mainly of an administrative nature, which leaves the receiving authority no margin of appreciation on the application aimed at obtaining the declaration of enforceability; a second, deferred adversarial, in which it will be possible to challenge the release (or non-release) of the statement and enforceability.

II. The first phase

The first phase is characterized by a clear accelerator intent, to the point of being called 'monitoria.' As already mentioned, there is no active participation nor a prior dialogue between the authority and the party against whom enforceability has been requested.
Should the Commission become aware of the initiation of the procedure in question, it would not be able to bring any objection to

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[2] On the notion of recognizable decisions, *ex* Arts 25, 1968 Brussels Convention, and 32, Council Regulation (EC) no 44/2001 of 22 December 2000: cf S. Bariatti, 'What are judgments under the 1968 Brussels Convention' *Rivista di diritto internazionale privato e processuale*, 5, 5-22 (2001); F. Carpi and M.A. Lupoi, 'Provvedimenti giurisdizionali civili in Europa (Convenzione di Bruxelles)' *Enciclopedia del diritto* (Milan: Giuffrè, 1998), Agg II, 849; A. Carratta, 'La sentenza civile straniera fra "riconoscimento" ed "estensione dell'efficacia"' *Rivista di diritto processuale*, 1147, 1155-1170 (2006); C. Consolo, 'La tutela sommaria e la Convenzione di Bruxelles: la circolazione comunitaria dei provvedimenti cautelari e dei decreti ingiuntivi' *Rivista di diritto internazionale privato e processuale,* 593, 597-628 (1991); F. Salerno, *Giurisdizione ed efficacia delle decisioni straniere nel regolamento (CE) n. 44/2001 (La revisione della Convenzione di Bruxelles del 1968)* (Padua: CEDAM, 3ª ed, 2006), 305; G. Tarzia, 'Nozioni comuni per un processo civile europeo' *Rivista di diritto processuale*, 327, 328 (2003).
[3] E. Merlin, 'Riconoscimento ed esecutività della decisione straniera nel regolamento "Bruxelles I"' *Rivista di diritto processuale*, 451, 452 (2001).

the attention of the requested authority or, even less, interfere in the judicial decision.

The court, however, can of course, refuse to issue the declaration of enforceability of the decision if it considers the application inadmissible, for example, because the decision does not fall within the scope of the regulations that deal with us. The system thus outlined leaves the judge a margin of discretion in particular cases: think, for example, of the lack of a ruling on the costs of the trial, which integrates a fundamental omission of a conceptual and substantive nature and constitutes a defect in the judgment, given the lack of any decision by the judge on an application that has been ritually proposed and which therefore requires a decision of acceptance or rejection. It follows that the failure to pronounce on the costs in a decision-making measure that defines the judgment does not constitute a mere material error that can be amended with the particular correction procedure provided for by Art 287 of the Italian civil procedure code, but defect of failure to give a ruling to be asserted only through appeal.[4]

A judicial decision of general condemnation of the costs of the proceedings (or of a judgment of assessment limited to the '*an*') issued by a court of one of the Member States of the European Union (in this case, by the High Court of London),[5] is automatically recognized in another Member State (in this case, in Italy).[6] It is included, according to Arts 32 and 33 of EC Regulation no 44/2001, among those that, if invoked in a judgment for which the judge of the second State has jurisdiction, by the connecting criterion referred to in Art 2 of the aforementioned Regulation, do not require any procedure for recognition.

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[4] Corte di Cassazione 23 June 2005 no 13513, available at https://pluris-cedam.utetgiuridica.it (last visited 1 October 2021).

[5] Corte di Cassazione-Sezioni unite 1 July 2009 no 15386, *Rivista di Diritto Processuale*, 1213, 1215 (2010).

[6] However, it should be noted that from 31 January 2020 the United Kingdom has officially ceased to be a Member State of the European Union. From that moment, the transition period began, which ended at the end of 2020.

It follows that the party legitimately can establish in Italy the judgment of determination of the *'quantum'* by placing as its basis the realization of the right of credit subject to assessment, covered by res judicata, in the aforementioned decision.[7]

However, it may happen that the court does not have adequate means or sufficient information to complete the decision not otherwise enforceable.

In that case, there have been cases in which the court – although the Brussels Convention is applicable – considered it appropriate to reject the application for exequatur because of the vagueness of the content of thedecision.[8]

Art 34, para 38, letter a), of decreto legislativo 1 September 2011 no 150 introduced a para 1 *bis* to Art 67 of the Italian law of private international law, legge no 218/1995, according to which 'the

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[7] F. Carnelutti, 'Estensione del giudizio sul risarcimento del danno a iniziativa del convenuto' *Rivista di diritto processuale*, 626 (1959); A. Carratta, 'Condanna generica' *Enciclopedia giuridica* (Rome: Treccani, 1997), VII, 17; C. Cavallini, 'L'oggetto della sentenza di condanna generica' *Rivista di diritto processuale*, 523, 527 (2002); V. Colesanti, 'Riconvenzionale d'accertamento nel giudizio per danni?' *Giurisprudenza italiana*, I, 563 (1959); A. Gualandi, 'Domanda di condanna generica e richiesta del convenuto di accertamento contestuale dell'"an" e del "quantum"' *Rivista trimestrale di diritto e procedura civile*, 1141 (1959); E. Merlin, 'Condanna generica e opposizione del convenuto alla liquidazione del "quantum" in separato giudizio' *Rivista di diritto processuale*, 207 (1986); V. Rognoni, 'Condanna generica e provvisionale ai danni' (Milan: Giuffrè, 1961), *passim*; L. Collin, 'Provisional and Protective Measures in International Litigation (Volume 234)' *Collected Courses of the Hague Academy of International Law,* available at http://dx.doi.org/10.1163/1875-8096_pplrdc_A9780792322603_01 (last visited 01 October 2021); O. Merkt, *Les mesures provisoires en droit international privé,* (Zürich: Schulthess, 1993), *passim*; F. van Drooghenbroeck, 'Les mesures provisoires et le litige européen', in J. van Compernolle and G. Tarzia eds., *Les mesures provisoires en droit belge, français et italien* (Brussels: Bruylant, 1999); G. Cuniberti, 'Les mesures conservatoires portant sur des biens situés à l'étranger' *Revue internationale de droit comparé*, 968 (2000); M. Nioche, *La décision provisoire en droit international privé européen* (Brussels: Bruylan, 2012), *passim*; L. Sandrini, *Tutela cautelare in funzione di giudizi esteri* (Padua: CEDAM, 2012); A. Dutta, 'Cross-border protection measures in the European Union' *Journal of PrivateInternational Law*, 169 (2016).

[8] Cour d'appell de Versailles, 29 giugno 2000, *Societè Discophar Herbier de Provence c Societe Darley* S.P.R.L., *La Semaine juridique – enterprise et affaires*, 1402 (2000).

disputes referred to in para 1 are governed by Art 30' of the aforementioned legislative decree. The legislative decree in question recalls the application of the summary rite of cognition governed by Art 702 *bis* Italian processual civil code.
Therefore, it does not seem to doubt that the Court of Appeal declares (or denies) enforceability by an order.

Article 48
Notice of the decision on the application for a declaration of enforceability

Elena Napolitano

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. The decision on the application for a declaration of enforceability shall forthwith be brought to the notice of the applicant in accordance with the procedure laid down by the law of the Member State of enforcement.	(Same text)
2. The declaration of enforceability shall be served on the party against whom enforcement is sought, accompanied by the decision, if not already served on that party.	

Summary: I. Principle of effectiveness. – II. The obligation to notify. – III. Service of decision authorising enforcement. – IV. The Court of Justice on the point.

I. Principle of effectiveness

The general criterion of any legal system, and not only that of the European Union, is effectiveness, an indispensable instrument for the very existence of a legal system. At the transnational level, it behaves according to complex dynamics, which inevitably are affected by the specificities of an institutional political apparatus and, consequently, of a legislative production, such as that of the union. The notion of effectiveness is rather articulated and likely to be observed from multiple perspectives and, consequently, to be declined in different forms depending on the plan of investigation and the characteristics of

its scope. This has led to many doubts about the exact meaning of the term effectiveness and the real scope attributed to it by the Court of Justice in its abundant case law. However, it is agreed that the nature 'two-faced' of effectiveness, caught between its function as a parameter for assessing the proper functioning of the legal order of the union, and that of an instrument for the protection of individual rights also on the domestic side.

With the entry into force of the Treaty of Lisbon and the reorganisation of the EU regulatory system that resulted from it, there has been a codification of the general principle of effectiveness, particularly in its procedural meaning and, therefore, in terms of the principle of effectiveness of judicial protection. Art 19 of the Treaty on European Union and Art 47 of the Charter of Fundamental Rights. are the two reference standards.

As can be seen from its textual formulation, the rule enshrines the principle of effectiveness of judicial protection, declining its contents in terms of access to the court and the right to a fair trial within a reasonable time.

Although Art 47 reproduces the provisions of Arts 6 and 13 of the European Convention on Human Rights, relating respectively to a fair trial and access to the courts, it has acquired its conceptual, legal and functional autonomy concerning the conventional provisions, strictly consequential to the peculiarities of the system to which it is applicable.[1]

Art 47 of the Charter is relevant first of all from the point of view of active standing before the courts of the Union, with the main aim of ensuring an effective right of appeal against acts of the institutions, bodies, offices and agencies of the Union.

And it is precisely from the point of view of the effectiveness of protection that account must be taken of the principles which underpin the national judicial system, such as the protection of the

[1] M. Ancel and H. Gaudemet-Tallon, *Compétence et exécution des jugements en Europe* (Paris: L.G.D.J, 6e édition, 2010), 342; F. Marongiu Buonaiuti, *Litispendenza e connessione internazionale* (Naples: Jovene, 2008), 268.

rights of the defence, the principle of legal certainty and the proper conduct of the proceedings.[2]
For these principles to be applied, it is essential that everyone, for any dispute, has the opportunity to apply to a judge to protect their legal reasons.

II. The obligation to notify

Similar to the provisions of Art 49 of Regulation no 615/2012, the respective Art 48 of the Regulations in question provides for the decision on the application aimed at obtaining the declaration of enforceability must be brought to the attention of the applicant/applicant without delay, of whatever kind it is (positive or negative).
Within the framework of the first paragraph outlined by the supranational legislature, it is clear that such communication is mandatory and that the procedural rules follow the law of the executing Member State exclusively.
The party who has entered the application to obtain the declaration of enforceability will therefore be aware of the decision taken in the manner provided for by national law so that the same can decide whether to lodge an appeal (in the event of a refusal) or to take action to access the next phase.

III. Service of the decision authorising enforcement

The second paragraph specifies that 'The declaration of enforceability is served on the party against whom enforcement is sought, accompanied by the decision if the decision has not already been served or communicated to that party'.
Therefore, the second procedural step provides that the declaration of exequatur must be brought to the defendant's attention in the event of acceptance of the application in question.

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[2] J. Foyer, 'Reconnaissance, acceptation et exécution des jugements étrangers, des actes authentiques et des transactions judiciaires' *Droit européen des successions internationales*, 143 (2003).

[3]The applicant failed to serve or communicate the original decision to the party against whom it is to be relied upon; the applicant shall also attach the decision which has been granted enforceable effect.
Of course, the methods of communication or service are those provided for by the law of the executing State.
The notification of a decision rejecting the application would be of no use, given that it is not capable (even potentially) of invading the other party's rights.
Therefore, it may well happen that the other party never learns of the proceedings; at least until the proposition of an appeal against the declaration of enforceability as governed by Art 49 of these Regulations.
Further clarification on this point must be made considering a communication to be made in another Member State.
If the other party is domiciled in a State other than the State of enforcement, Regulation no 1393/2007[4] on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters shall apply.
In some Member States, such as Italy and France, service of the declaration of enforceability is the applicant's responsibility, while in others, such as Germany, service is the court's responsibility.

IV. The Court of Justice on the point

The notification of the decision, precisely with a view to the effectiveness of the protection previously acknowledged, achieves two different objectives: on the one hand, to protect the rights of the party against whom enforcement has been sought; on the other hand, to allow, on the evidentiary level, an exact calculation of the strict and peremptory period for opposition provided for in that provision.

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[3] E. D'Alessandro, Article 48, in I. Viarengo and P. Franzina eds., *The EU Regulations on the Property Regimes of International Couples* (Cheltenham: Edward Elgar, 2020), 395-397.

[4] Regulation (EC) 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

Art 36 of the Convention of 27 September 1968[5] (on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Accession Conventions of 1978, 1982 and 1989) must be interpreted as requiring regular service of the judgment granting enforcement, in the light of the procedural rules of the Contracting State in which enforcement was sought. In the case of non-existent or irregular service of the decision granting enforcement, the mere knowledge of that decision from the person against whom enforcement has been sought is not sufficient to enable the period laid down in that Article to run. As the Court of Justice also clarified in the *Verdoliva*[6] judgment, the dual function of notification, combined with the objective of simplifying the formalities to which the enforcement of judicial decisions rendered in the other Contracting States is subject, explains why the Convention submits the transmission to the party against whom enforcement has been sought of the decision granting enforcement under stricter formal conditions than those applicable to the transmission of the same decision to the applicant. Secondly, if only the knowledge by the party against whom enforcement has been sought of the decision granting enforcement were relevant, that would risk nullifying the obligation to notify and would also make it more difficult to calculate the exact period laid down in that provision, thus making it impossible for the provisions of the Convention to apply in uniform.

[5] Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters [1998] OJ C27/1.

[6] Case C-3/05 *Gaetano Verdoliva* v *J M. Van der Hoeven BV, Banco di Sardegna and San Paolo IMI SpA,* [2006] ECLI:EU:C:2006:113, Judgment of 16 February 2006, available at https://eur-lex.europa.eu (last visited 1 October 2021).

Article 49
Appeal against the decision on the application for a declaration of enforceability

Ivan Allegranti

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. The decision on the application for a declaration of enforceability may be appealed by either party.	(Same text)
2. The appeal shall be lodged with the court communicated by the Member State concerned to the Commission in accordance with Article 64.	
3. The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.	
4. If the party against whom enforcement is sought fails to appear before the appellate court in proceedings concerning an appeal brought by the applicant, Article 16 shall apply even where the party against whom enforcement is sought is not domiciled in any of the Member States.	
5. An appeal against the declaration of enforceability shall be lodged within 30 days of service thereof. If the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration of enforce ability was given, the time for appealing shall be 60 days and shall run from the date of service, either on him in person or at his residence. No extension may be granted on account of distance.	

Summary: I. Introduction. – II. The concept of 'either party'. – III. The appeal. – IV. Rules of the appeal. – V. No appearance – VI. Timing.

I. Introduction

The following Articles, from 49 to 51 of both Regulations discipline the consequences that a decision concerning the declaration of enforceability ruled by a Judge of a Member State can have in accordance with Art 47.
The decision ruled at Art 47 can bring two consequences: it can be appealed or not appealed. In this last case, the declaration of enforceability ruled by a Member State will have a definitive status for the parties. Otherwise the parties might appeal against the decision in light of Arts 49, 50 and 51 of both Regulations. In particular, it is important to underline that Art 49 rules the procedure in order to lodge an appeal against a declaration of enforceability ruled in a Member State pursuant Art 47, Art 50 disciplines how to appeal the decision made pursuant Art 49 and Art 51 rules in regards the appeals lodged under Arts 49 and 50 of both Regulations.

II. The concept of 'either party'

The first paragraph of Art 49[1] states that 'either party' can appeal on the decision on the application of enforceability. Firstly, we have to understand the meaning of the terms 'either party.' The Court of Justice, also if referred to Art 43 of the 2001 Regulation, has stated that these words 'must be interpreted strictly.'[2] In particular, the Court has stated that on the one hand 'the principal objective of the Brussels Convention is to simplify the procedures in the State where

[1] The text of this Article is modeled to the one of Art 43 of Regulation (EU) 2001/44. Council Regulation (EC) 2001/44 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/01.

[2] Case C-167/08 *Draka NK Cables Ltd, AB Sandvik international, VO Sembodja BV and Parc Healthcare International Limited* v *Omnipol Ltd,* [2009] ECR I-3490.; Case C-492/*93Société d'Informatique Service Réalisation Organisation (SISRO)* v *Ampersand Software BV,* [1995] ECR I-228; Case C-148/84, *Deutsche Genossenschaftsbank* v *Brasserie du pêchur,*[1985] ECR 1981.

enforcement is sought by laying down a very summary, simple and rapid enforcement procedure' and on the other hand, the scope of the procedure is to give to 'the party against whom enforcement is sought an opportunity to bring an appeal.'[3]
It is clear then that only the parties who lodged an appeal pursuant Art 47 of the Regulation can be formally qualified as those who have the right to appeal against a declaration of enforceability ruled in a Member State. This same rule, to date not denied by any other Court decision, applies also if a creditor of a debtor has not formally appeared as a party in the proceedings in which another creditor of that debtor applied for that declaration of enforceability.[4]

III. The appeal

Art 49(2) by stating that the 'appeal shall be lodged with the court communicated by the Member State concerned to the Commission in accordance with Article 64' provides us two important practical pieces of information. The first one concerns the fact that parties who want to lodge an appeal under Art 49 of both Regulations need to lodge it to the Member States competent court. The second one refers to the entire enforceability procedure.
Analyzing the first hint given by Art 49(2), in order to respect the principle of legal certainty[5] and of the harmonious functioning of

[3] *Draka NK Cables*, para. 26. See also Case C-414/92 *Kleinmotoren GmbH v Emilio Boch*, [1994] ECR I-2247; Case C-260/97 *Unibank* v *Flemming G. Christensen,* [1999] ECR I-3724.

[4] *Draka NK Cables,* para 31.

[5] Case C-17/03 *Vereniging voor Energie, Milieu en Water et al.* v *Directeur van de Dienst uitvoering en toezicht energie.* [2005] ECR I-5016. In particular, this decision is crucial to set out the principles governing the procedure of enforceability we are currently analysing as the Court states that 'With regard to the principle of legal certainty, this requires in particular that rules involving negative consequences for individuals should be clear and precise and their application predictable for those subject to them.' For instance, the procedure needs to be simple yet effective in order to allow the parts to exercise their rights. See also Case C-362/12 *Test Claimants in the Franked Investment Income Group Litigation* v *Commissioners of Inland Revenue, Commissioners for Her Majesty's Revenue and Customs*, [2013] ECLI:EU:C:2013:834. See P. Bruno, *I Regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate Commento ai Regolamenti (UE) 24 giugno 2016, nn.1103 e 1104 applicabili dal 29 gennaio 2019* (Milan: Giuffrè Francis Lefebvre, 2019), 21.

justice,[6] by the 29th of April 2018 Member States have communicated to the Commission each Member State's court which is the competent one to lodge an appeal against a declaration of enforceability disciplined by both Regulations.[7] For instance, only through this communication, an enhanced cooperation between Member States can be real yet effective.

In regards to the second information provided by Art 49(2), it emerges that both Regulations scope is to discipline how an EU citizen - who lives in a Member State part of the Regulation and who is married or in a registered partnership with another EU citizen who is resident also in a Member State part of the enhanced cooperation- can obtain a declaration of enforceability on a foreign enforceability decision. It is important to underline that both Regulations do not discipline the execution itself which continues to be governed by the domestic law of the state in which the execution is sought.[8] In fact, the Regulation's scope is to allow the mutual recognition of decisions given in a Member States in matters of the property consequences of cross-border partnerships.[9]

Putting Art 49(2) of both Regulations into a practical perspective it is worth noting that the rules provided are an exhaustive way on which a 'subsidiary jurisdiction may be exercised.'[10] which means that all the procedural matters to lodge an appeal against a declaration of enforceability are not disciplined by the Regulations but instead by the procedural rules of the Member State in which the appeal will be lodged.

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[6] Recital 41 Regulation (EU) 1104/2016 and 1103/2016.

[7] The E-Justice website identifies the competent court according to Art 64 of both Regulations. For more information visit: https://e-justice.europa.eu/content_matters_of_matrimonial_property_regimes-559-en.do (last visited 12 June 2021).

[8] E. D'Alessandro, 'Article 49 Appeal against the decision on the application for a declaration of enforceability', in P. Franzina and I. Viarengo, *The EU Regulations on the Property Regimes of International Couples: A Commentary* (Cheltenham: Edward Elgar, 2020), 399.

[9] Recital 55 Regulation (EU) 2016/1104 and 2016/1103.

[10] L Gillies, 'Creation of subsidiary jurisdiction rules in the recast of Brussels I: back to the drawing board?' 8 *Journal of Private InternationalLaw*, 489, 490-512 (2012).

IV. Rules of the Appeal

Art 49(3), in accordance with the above-mentioned Regulation's subsidiary principle, rules that the appeal shall be governed 'in accordance with the rules governing procedure in contradictory matters.' On a concrete level, Art 49(3) requires the applicant to lodge an appeal with all the formal requirements prescribed by the Member State's national law in which the appeal will be lodged like, for example, the type of act needed, the language in which the act must be written, the need for a legal representative.[11] At the same time, all the proceedings pursuant Art 49 of both Regulations need to follow the 'contradictory principles' ruled in Art 47 of the EU Charter of Fundamental Rights.[12]

V. No appearance

In order to grant the respect of the contradictory principle, Art 49(4) rules a special provision to the party that fails to appear before the appellate court. In this case, also if the defendant is not domiciled in a Member State, he will be granted access to the proceeding in light of Art 16 of both Regulations.[13] In this case, the court shall stay the proceeding as long as the claimant has not proven that the defendant was notified of all the documents instituting the proceedings or equivalent documents in time to arrange for his defence, or that all necessary steps have been taken to this end. These guarantees are also referred to any third party that might have an interest in the proceeding. In fact the Court has stated that an order has 'no legal effect on a third person until he has received notice of it and that it is for the applicants seeking to enforce the order to ensure that the third persons concerned are duly notified of the order and to prove that

[11] The E-Justice website (n 7 above) besides the indication of the Member States competent courts according to the regulations, gives also each member states procedural law references in order to lodge a formally correctly appeal pursuant Art 49 of both Regulations.

[12] Case C-189/18 Glencore Agriculture Hungary Kft. v Nemzeti Adóés Vámhivatal Fellebbviteli Igazgatósága, [2019]ECLI:EU:C:2019:861 paras 61-62.

[13] See this Commentary, Art 16.I: back to the drawing board?' 8 *Journal of Private InternationalLaw*, 489, 490-512 (2012).

that notification has indeed taken place. Furthermore, once a third person not party to the proceedings before the court of the State of origin has been notified of the order, he is entitled to challenge that order before that court and request that it be varied or set aside.'[14]

VI. Timing

Art 49(5), then, rules in regards to the time in which the appeal must be lodged. In particular, the Article states that the time frame to lodge the appeal starts from the day of service of declaration of enforceability until 30 days after. This means that on a practical level, the appeal can be lodged only in the 30 day timeframe ruled by Art 49(5). By stating this period of time, the Art also refers also to the parties who may not be domiciled in a Member State. In this case, the days to lodge an appeal against a declaration of enforceability are doubled from 30 days to 60 days. On a practical level, this means that the creditor can seek enforcement at least in one month if not two months after service.[15] In the meantime, the creditor can ask, pursuant Art 53 of both Regulations,[16] protective measures to protect his possessions.[17]

Art 49(5) also gives to the legal practitioners two other important pieces of information. The first one is that the 'day of service' is rightfully concluded if the declaration is notified either to the defendant or to his residence.[18] The second one is that due to the distance of the defendant's residence, the Member State court cannot grant a time extension for lodging an appeal before the competent court.

Finally, worth mentioning is that Art 49(5) does not openly give any limit to the creditor whose application on the declaration of

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[14] Case C-559/14 *Rudolfs Meroni* v *Recoletos Limited*,[2016] ECLI:EU:C:2016:349 para 49.

[15] D. Schramm, 'Enforcement and the Abolition of Exequatur under the 2012 Brussels I Regulation', in VV. AA., *Yearbook of Private International Law Vol. XV - 2013-2014* (Berlin, Boston: Otto Schmidt/De Gruyter european law publishers, 2014), 144-174.

[16] See this Commentary, Art 53.

[17] P. Hovaguimian, 'The enforcement of foreign judgments under Brussels I *bis*: false alarms and real concerns' 12 *Journal of Private InternationalLaw*, 212, 213–251 (2015).

[18] The Article uses the words 'on him' and 'at his residence.'

enforceability has been dismissed. That being said, Art 49(5) allows the creditor, within the limits given by Member State's procedural law rules, to lodge an appeal against a declaration of enforceability without any time limits.[19]

[19] Cf n 8 above.

Article 50
Procedure to contest the decision given on appeal

Ivan Allegranti

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
The decision given on the appeal may be contested only by the procedure communicated by the Member State concerned to the Commission in accordance with Article 64.	(Same text)

Summary: I. Making the decision.

I. Making the decision

Art 50[1] of both Regulations allow the parts of the proceeding ruled at article 49 of the Regulation to contest the decision.
It is worth noticing two details that this Article gives us. The first one is that the appeal ruled in this article is not mandatory: parties may decide not to appeal against the decision taken in light of Art 49. If they do not appeal, the decision taken by the Member State's court is definitive.
Otherwise the parties can appeal the court's decision. In this case, Art 50 of both Regulations does not give any detail on the exact procedure to follow in order to lodge an appeal. In fact the article invites each Member State to give, pursuant Art 64 of the Regulation, indication on the procedure to follow in order to lodge an appeal against the declaration of enforceability pursuant article 50.[2]

[1] The text of this article is modeled to the one of Article 44 of Regulation (EU) 44/2001. Council Regulation (EC) 2001/44 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/01.
[2] See this Commentary, Art 49, para III.

Article 51
Refusal or revocation of a declaration of enforceability

Ivan Allegranti

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
The court with which an appeal is lodged under Article 49 or Article 50 shall refuse or revoke a declaration of enforce ability only on one of the grounds specified in Article 37. It shall give its decision without delay.	(Same text)

Summary: I. Appeal lodged under Art 49 or 50. – II. Refusal and Revocation of the declaration of enforceability. – III. Without delay.

I. Appeal lodged under Art 49 or 50

Art 51[1] of both Regulations states that the court who received the appeal pursuant to Art 49 or Art 50 of both Regulations can refuse or revoke the declaration of enforceability only if the enforceability declaration violates Art 37[2] of both Regulations.
It is important to underline that the appeal lodged under Art 47[3] does not request any formal check by the court who, *ex officio*, provides to the creditor the declaration of enforceability thus abolishing the *exequatur* required in the 2001 Regulation.[4] The elimination of the

[1] The text of this Article is modeled to the one of Art 45 of Regulation (EU) 44/2001. Council Regulation (EC) 2001/44 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/01.

[2] See this Commentary, Art 37.

[3] See this Commentary, Art 47.

[4] On the abolition of the exequatur see: P. Oberhammer, 'The Abolition of Exequatur' 30 *Praxis des internationale Privat-und Verfahrensrechts,* 197, 198-199 (2010); G. Cuniberti and I. Rueda, 'Abolition of Exequatur. Addressing the Commission's Concerns' 75 *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 286, 287-316 (2011).

exequatur applies also for *ex parte* measures requests.[5] In fact, the procedure 'may involve only a purely formal check of the documents required for enforceability in the Member State in which enforcement is sought.'[6] That being said, the declaration may be refused or revoked by the competent court only on the grounds ruled in Art 37 and if appealed by the debtor. The reason behind this complete change between these two Regulations and the 2001 Regulation lies down in the need for a more rapid procedure[7] but also on the principle of 'mutual trust in the administration of justice in the Union' stated by the European Court of Justice.[8]

II. Refusal and Revocation of the declaration of enforceability

Art 51, then, allows the court, with an appeal under Art 49 and Art 50 of the Regulations, to 'refuse or revoke' a declaration of enforceability. By using these two words, the European lawmaker traces a difference between the two verbs. In fact the declaration might be 'refused' if the application has been dismissed and no declaration was granted. In this case also the appellate court might refuse to grant, in a second instance, the declaration of enforceability. On the contrary, the declaration is revoked if at first instance was granted but then, the appellate court noted that the grounds specified in Art 37 were not

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[5] X. E. Kramer, 'Abolition of exequatur under the Brussels I Regulation: effecting and protecting rights in the European judicial area' 4 *Nederlands Internationaal Privaatrecht,* 633*,* 634-641 (2011).

[6] Case C-157/12 *Salzgitter Mannesmann Handel GmbH v SC Laminorul SA*, [2013] ECLI:EU:C:2013:597, para 25.

[7] On the costs and benefits of the abolition of the exequatur see the report: Commission Staff Working Paper impact assessment, 'Accompanying document to the Proposal for a Regulation of the European Parliament and the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) enforcement of Judgments in Civil and Commercial Matters ("Brussels I")', Final Report dated 14 December 2010, {COM(2010) 748 final} {SEC(2010) 1548 final} available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2010:1547:FIN:EN:PDF (last visited 12 June 2021), 59-60. See also B. Hess et.al, *Report on the Application of Regulation Brussels I in the Member States* (München: C.H Beck, 2008) who analytically examines the pros and cons of the exequatur in EU proceedings.

[8] Case C-420/07 *Apostolides* [2009] ECR I-3571 para 73.

met. In this case, the declaration is ex post revoked. Worth mentioning is also that only the grounds specified in Art 37 allow the court to revoke the declaration. This means that no other reasons outside Art 37 allow the appellate court to revoke the declaration[9] nor the merits of the appeal.[10]

Still, some doubts come into light in regards to whether the appellate court might revoke the declaration of enforceability if Art 51 of both Regulations is read together with Art 45 of both Regulations. In fact, on the one hand Art 45(1) disciplines that the 'application procedure shall be governed by the law of the Member State of enforcement' while on the other hand Art 51 is mandatory in ruling that the revocation of the declaration has to be ruled only if violates the grounds stated in Art 37 of the Regulations. On those grounds, only the future jurisprudence might solve on a practical level which are the grounds pursuant Art 51 to revoke the declaration of enforceability as the competence, in this case, is of one of the Member State's courts.

III. Without delay.

The final provision principle ruled by Art 51 is that the court's decision shall be given 'without delay.' The scope of this provision is to allow a simple yet effective judicial remedy to the creditor thus respecting the 'a reasonable time' principle ruled in Art 6 of the European Convention on Human Rights.[11]

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[9] In Case C-139/10 *Prism Investments* [2011] ECR I-9511 para 43 the court ruled that 'Article 45 of Regulation No 44/2001 must be interpreted as precluding the court with which an appeal is lodged under Article 43 or Article 44 of that Regulation from refusing or revoking a declaration of enforceability of a judgment on a ground other than those set out in Articles 34 and 35 thereof, such as compliance with that judgment in the Member State of origin.'

[10] See this Commentary, Art 40.

[11] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available https://www.echr.coe.int/documents/ convention_eng.pdf (last visited 12 June 2021).

Article 52
Staying of proceedings

Manuela Giobbi

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
The court with which an appeal is lodged under Article 49 or Article 50 shall, on the application of the party against whom enforcement is sought, stay the proceedings if the enforceability of the decision is suspended in the Member State of origin by reason of an appeal.	The court with which an appeal is lodged under Article 49 or Article 50 shall, on the application of the party against whom enforcement is sought, stay the proceedings if the enforceability of the decision is suspended in the Member State of origin by reason of an appeal.

Summary: I. Staying of enforcement proceedings. – II. Recognition, enforceability and staying of proceedings. – III. Staying of proceedings and modification of the original decision.

I. Staying of enforcement proceedings

Art 52 of Regulations 2016/1103 and 2016/1104,[1] provides that the court[2] with which an appeal is lodged under Art 49 or Art 50 shall, on the application of the party against whom enforcement is sought, stay

[1] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L183/1 and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [2016] OJ L183/30.

[2] See Art 3, para 2, Council Regulation (EU) 2016/1103 and 2016/1104. On the notion of court, see L. Ruggeri, 'Registered partnerships and property consequences', in M.J. Cazorla González, M. Giobbi, J. Kramberger Škerl, Lucia Ruggeri and S. Winkler eds, *Property Relation of Cross-Border Couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2020) 70-82.

the proceedings if the enforceability of the decision is suspended in the Member State of origin by reason of an appeal.[3]

Art 52 acts as a 'link'[4] between the procedure that is submitted to the court of the Member State in which the enforcement is to be carried out and the judgment on the substance of the decision of the Member State of origin. In fact, it could happen that the court of the State of origin, before which the decision was the subject of an appeal, must judge both on the substance and on the granting or staying of enforceability. In this case, the staying of the proceedings by the judge of the Member State of enforcement becomes functional to the balancing of powers attributed to the different judicial authorities concerned. If this were not the case, greater power would be attributed to the judge of the State of enforcement than to the judge of the State of origin.

In this regard, it should be noted that the judge of the State of origin, being able to request the appearance of the parties, has the possibility to carry out a more detailed analysis of the elements that constitute the subject of the decision and can consequently decide with greater awareness on the possible denial of enforceability. The judge of the State of enforcement, on the other hand, would find himself having to grant enforceability to a decision solely on the basis of the documentation submitted and in the absence of any cross-examination between the parties.

For the ruling on enforceability, the court therefore must wait until the court of the State of origin has ruled, given that, as is already the case

[3] The appeal against a decision on the application aimed at obtaining a declaration of enforceability introduces the possibility for each of the parties to challenge the decision by means of an appeal provided for by the State of enforcement. It should also be noted that the term 'appeal' is used in a general way, as the specific means of appeal provided for by the law of the State in question must be taken into account. The court must nevertheless be identified on the basis of a communication sent by the Member States to the European Commission in accordance with the provisions of Art 64 of Regulations 2016/1103 and 2016/1104.

[4] On this point, see P. Bruno, *I Regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate* (Milan: Giuffré Francis Lefebvre, 2019), 279-280.

for recognition, a decision cannot produce different or greater effects in the State of enforcement.[5]

Art 52 does not seem to grant the court to which the application is submitted any discretion as regards the decision on the staying of the proceedings. Unlike the recognition procedure in which staying is optional, Art 52 provides, in the case of the exequatur procedure,[6] for an 'obligatory' staying each time the defendant submits a formal request to the court. In fact, Regulations 2016/1103 and 2016/1104 do not provide for a procedure for the automatic recognition of decisions, but only for a simplified enforcement procedure which does not include the total abolition of the exequatur.[7]

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[5] J. Kramberger Škerl, 'Appeal(s) against the declaration of enforceability', in M.J. Cazorla Gonzales, M. Giobbi, Kramberger Škerl, L. Ruggeri and S. Winkler eds, n 2 above, 141.

[6] The 'exequatur' procedure provided for by Regulation (EC) 44/2001, so-called Brussels I, was abolished with the entry into force of Regulation (EU) 1215/2012 which applies in civil and commercial matters. On the other hand, family law, bankruptcy, matters relating to succession and other matters specifically listed in the Regulations, such as social security and arbitration, are excluded from the application of Regulation 1215/2012. For matters falling within the competence of Regulation 2015/2012, decisions made in one EU State are recognised in other EU States without the need to resort to any specific procedure. Therefore, if a decision is recognised as enforceable in the State of origin, it must also be considered enforceable in the other States of the European Union without the need for any declaration of enforceability.

[7] The abolition of exequatur was not introduced with the Twin Regulations. It will be the competent judicial authorities of each Member State that will verify from time to time the existence of the 'mandatory' reasons that prevent the recognition or enforcement of a decision. Among the reasons for refusing recognition of decisions provided for by Art 37 of Regulations 2016/1103 and 2016/1104 there are a) manifest contrariety to public policy in the Member State in which recognition is sought; b) failure to notify or communicate in good time the judicial request or an equivalent document to the defendant in default of appearance; c) the incompatibility of the decision with another decision given in proceedings between the same parties in the Member State where recognition is sought; d) incompatibility with another decision previously issued between the same parties in another Member State or in a third country, in the context of proceedings having the same object and the same title. On this subject, see O. Feraci, 'L'incidenza del nuovo regime europeo in tema di rapporti patrimoniali tra coniugi e parti di unioni registrate sull'ordinamento giuridico italiano e le interazioni con le novità introdotte dal d.lgs. 7/2017 attuativo della c.d. legge Cirinnà' *Osservatoriosullefonti.it*, 2-4 (2017);

It follows that the court will have to wait for the definition of the procedure in the State of origin before giving its ruling. Therefore, if a decision is not enforceable in the State of origin, it cannot be enforceable in another State either.[8] This should help to ensure a higher degree of stability and security for judicial proceedings circulating within the Member States.[9] More precisely, the provision contained in Art 52 extends the defendant's protection to all those situations in which the decision has been suspended in the defendant's country of origin.[10]

II. Recognition, enforcement and staying of proceedings

The staying of proceedings provided for by Art 52 differs substantially from the regulatory provision dictated by Art 41 of Regulations 2016/1103 and 2016/1104. In this last case, the court has the necessary discretion to decide on the staying of recognition proceedings.[11] A further distinction can also be seen in Art 51, para 1 of Regulation 2012/1215.[12] This provision concerns jurisdiction, the recognition and enforcement of judgments in civil and commercial matters, with the exclusion of family law and succession matters and is mainly aimed at facilitating the free circulation of judgments as well as improving access to justice. Also in this case, the court of a State that must rule on the recognition of a decision given in a different Member

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E. D'Alessandro, 'Il riconoscimento, l'esecutività e l'esecuzione delle decisioni e delle transazioni giudiziarie in materia successoria', in P. Franzina and A. Leandro eds, *Il diritto internazionale privato europeo delle successioni* mortis causa (Milan: Giuffré Francis Lefebvre, 2021), 139-141.

[8] See J. Kramberger Škerl, n 5 above, 140-141.

[9] On this point, see P. Bruno, 'I Regolamenti UE n. 1103/16 e n. 1104/16 sui regimi patrimoniali della famiglia: struttura, ambito di applicazione, competenza giurisdizionale, riconoscimento ed esecuzione delle decisioni', available at www.distretto.torino.giustizia.it (last visited 30 June 2021).

[10] See E. D'Alessandro, 'Article 52. Staying of proceeding', in P. Franzina and I. Viarengo eds, *The Regulation on the Property Regimes of International Couples. A Commentary* (Cheltenham: Edward Elgar, 2020), 409.

[11] On this point see, P. Bruno, n 4 above, 280.

[12] Regulation (EU) 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1.

State is allowed discretion in relation to the staying of the proceedings. The staying of proceedings provided for in Art 52, on the other hand, constitutes 'due effect' that the authority disposes of as a consequence of the defendant's request.

The discretion that is granted to the court in the recognition proceedings compared to that of the enforceability of a decision thus depends on the different extent of the effects that stem from it. In fact, even irreparable effects can stem from enforceability, and these are realised precisely by virtue of the different implementation of the decision between the State of origin and the State of enforcement.[13]

In this regard, the Court of Justice pointed out in Case C-157/12[14] that the harmonised functioning of justice presupposes that the possibility of pending parallel proceedings is reduced to a minimum and that incompatible decisions are not issued in two Member States. Furthermore, the principle of mutual trust implies that decisions given in another Member State are fully recognised without the need for any procedure and that they are carried out effectively and quickly. To this end, the declaration of enforceability of a decision should be issued following a check of the documents submitted, without any possibility for the judge to detect *ex officio* any reasons for the refusal of enforcement and without the decision being subject to a review of the substance.

The correct functioning of this system, precisely because it is based on trust, means that the courts of the Member State of origin remain competent to assess the conformity of the decision to be enforced and that the correctness of the decision is not called into question.

III. Staying of proceedings and modification of the original decision

It may happen that the decision issued in the State of origin is partially or totally modified during the period in which the court of the State of enforcement has ordered the staying of proceedings. According to the

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[13] On this topic, see P. Bruno, n 4 above, 280-281.

[14] Case 157/12 *Salzgitter Mannesmann Handel GmbH* v. *SC Laminorul SA*, Judgment of 26 September 2013, available at www. curia.europa.eu (last visited 30 June 2021). On this topic, see P. Bruno, n 4 above, 280-281.

Supreme Court,[15] in the event that the staying was ordered during the appeal procedure of the exequatur, and that there is a modification of the decision by the State of origin, then the control must be renewed. Consequently, the exequatur must be considered valid within the limits in which the decision does not undergo modifications. Although the decision of the Supreme Court[16] concerns the staying provided for by the Brussels I Regulation, the principle must also be considered capable of being extended to the staying provided for by Art 52 of Regulations 2016/1103 and 2016/1104.[17]

[15] Corte di Cassazione 20 June 2018, no 16290, available at www.dejure.it (last visited 30 June 2021).
[16] ibid
[17] See P. Bruno, n 4 above, 281.

Article 53
Provisional, including protective, measures

Manuela Giobbi

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. When a decision must be recognised in accordance with this Chapter, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State of enforcement without a declaration of enforceability under Article 46 being required.	(Same text)
2. The declaration of enforceability shall carry with it by operation of law the power to proceed to any protective measures.	
3. During the time specified for an appeal pursuant to Article 49(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.	

Summary: I. Provisional, including protective, measures. Premise. – II. Protective measures following the declaration of enforceability of the decision. – III. Limits.

I. Provisional, including protective, measures. Premise

Art 53, para 1 of Regulations 2016/110 and 2016/1104 provides that if a decision must be recognised in accordance with the provisions of

Chapter IV of the same Regulations, the applicant can avail himself of provisional, including protective, measures in accordance with the law of the Member State of enforcement without a declaration of enforceability under Art 46 being required.

The formulation of Art 53 reproduces the provisions already contained in other previous regulations on civil judicial cooperation, and specifically Art 47 of Regulation 44/2001[1] and Art 54 of the Succession Regulation.[2] In any case, an analysis of Art 53 must be carried out with reference to Art 19 of Regulations 2016/1103 and 2016/1104, which provides that provisional, including protective, measures can be requested from the court of a Member State other than the one that issued the decision, even if the jurisdiction as to the substance of the matter lies with the court of another Member State.

Based on Art 53, a non-competent judge has the right to grant the provisional, including protective, measure requested of him without waiting for the decision on which the request is based to be enforceable.[3] In this case, the judge may use the instruments provided

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[1] Regulation (EC) 44/2001 of the Council of 22 December 2000 on jurisdiction, the recognition and enforcement of judgments in civil and commercial matters, 'Brussels I bis' [2001] OJ L12/1, no longer in force (Date of end of validity 9 January 2015), repealed by Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1; Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107.

[2] Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107. The formulation of Art 53 of Regulations 2016/1103 and 2016/1104 is, however, referable to Art 39 of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1998] OJ C27/1.

[3] On this topic, see P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate* (Milan: Giuffré Francis Lefebvre, 2019) 159-160. On this point, see also J. Kramberger Škerl, 'Provisional, Including Protective, Measures during the Exequatur Proceedings', in M.J. Cazorla González, M. Giobbi, J. Kramberger Škerl, L. Ruggeri and S. Winkler eds, *Property Relations of Cross Border Couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2020), 140, where it is shown that 'The

for in his own national system and may proceed with the adoption of protective measures provided there are conditions that allow for them. The anticipation of protective measures is therefore allowed, as is the protection of a given asset on the basis of the decision that was obtained in another Member State, even if, as specified in Art 53, para 1, the declaration of enforceability has not yet been made.[4]

Art 53 falls within the requirements of protection of the party who obtained the decision and who, however, is not yet in a position to be able to access the enforcement phase.[5]

By granting the protective or provisional measure, an attempt is made to protect the outcome of the future enforcement and, more specifically, to prevent it from becoming impossible or difficult to carry out. As indicated by the Court of Justice,[6] provisional or protective measures represent tools aimed at protecting rights that must be ascertained by the judge called to decide on the substance of the matter.

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regulations provide that provisional, including protective, measures (offered by the law of the State of enforcement) are available to the person applying for the declaration of enforceability before a final decision on that issue is adopted. The applicant can apply for protective measures even before lodging an application for the declaration of enforceability. The element of surprise, often aspired to by the applicant, will be censure if the protective measures are granted before the defendant is served with the court's decision on the declaration of enforceability; until that moment, the defendant is usually not aware of the pending *exequatur* proceedings.'

[4] See Art 36, Regulations 2016/1103 and 2016/1104. On this point, see P. Bruno, n 3 above, 292.

[5] On this subject, see L. Sandrini, 'Article 53. Provisional, including protective, measures', in P. Franzina and I. Viarengo eds, *The Regulation on the Property Regimes of International Couples: A Commentary* (Cheltenham: Edward Elgar, 2020), 414, where it is argued that in the event that 'anticipatory measures are taken (...), the reversibility of their effects must be assured, at least by way of security, so as to ensure compensation to the defendant at a later stage for any damage caused by the measure.'

[6] As highlighted by the Court of Justice, in Case C-143/78 *Cavel* v *Cavel*, Judgment of 27 March 1979, available at www.curia.europa.eu (last visited 30 June 2021), provisional or protective measures must be 'understood as referring to measures which are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter.'

It must also be borne in mind that the assets forming part of the matrimonial or registered partnerships' property regimes often have a close connection with the Member State in which the protective measure is granted and that, in general, the decisions concern family disputes that are characterised by remarkable complexity. The protective measure of the Member State of enforcement in this sense assumes a protective function of the interests of the party, but at the same time does not conflict with the ruling on the substance of the matter.[7]

The rationale of this legislative provision must be identified in the need to favour harmonisation, the circulation of decisions made regarding the property regime of spouses or registered partnerships,[8] and to ensure the principle of mutual trust of justice between the Member States.

II. Protective measures subsequent to the declaration of enforceability of the decision

Art 53, para 2 provides that the declaration of enforceability shall carry with it by operation of law the power to proceed to any protective measures.

In the event that the decision on which the protective measure is based is enforceable, the party has the right to act directly on the property of the party against whom enforcement was sought. This power must be considered inherent in the very enforceability of the decision, and therefore assigning further formalities or verifying the presence of additional requirements would only have the effect of delaying the action of the applicant.[9]

[7] As points out P. Bruno, n 3 above, 160, European legislation allows the courts that do not have unlimited jurisdiction, so-called *exorbitant jurisdictions*, to adopt urgent measures without, however, conferring on them unlimited jurisdiction which, on the other hand, remains the prerogative of the authority identified as the exclusive and general jurisdiction.

[8] On this point, see P. Bruno, *Le controversie familiari nell'Unione europea. Regole, fattispecie, risposte* (Milan: Giuffré Francis Lefebvre, 2018), 297.

[9] V. P. Bruno, n 3 above, 297. On this point, see also I. Pretelli, 'Article 53', in A. Bonomi and P. Wautelet eds, *Le droit européen des relations patrimoniales de couple. Commentaire des Règlements (UE) 2016/1103 et 2016/1104* (Brussels: Bruylant, 2021),

If, in fact, Art 53 para 1 grants the possibility of accessing a protective measure on the basis of a decision that has not yet been declared enforceable, it does not seem that there can be any impediment to the granting of a measure by the judge in the absence of activities aimed at ascertaining the preconditions. The same possibility must be considered extended to the party that has obtained the enforcement order. Asking the applicant to provide proof of the existence of conditions justifying the protective measure could prove to be an obstacle to the reasons of urgency that characterise the request for the protective measure. Furthermore, for the appellant, it would constitute a limitation of his own interest in preserving a right to the property without producing irreversible changes.[10] The possibility of requesting protective measures cannot in any case be considered subordinate to additional and different needs from those required for the declaration of enforceability.[11]

The Court of Justice,[12] albeit with reference to a similar provision of Art 39 of the Brussels Convention, in Case C-119/84 *Cappelloni and Aquilin*i v. *Pelkmans*, stated that the party who requested and obtained authorisation for enforcement can, during the time specified for an appeal and until any such appeal has been determined, proceed directly with protective measures against the property of the party against whom enforcement is sought, and is under no obligation to obtain specific authorisation. In this sense, European legislation is preferred to domestic regulations.[13] Basically, there is a tendency to ensure the coherence of the protective measure within a common regulatory framework.

In any case, taking into account the variety of measures offered by the domestic legislation of various Member States, it would be useful to indicate, within the Twin Regulations, a uniform notion of provisional and protective measures.[14]

1195, where it is pointed out that this mechanism strengthens the position of the party granted an exequatur, allowing it to benefit from an element of surprise.

[10] P. Bruno, n 3 above, 292.

[11] Cf L. Sandrini, n 5 above, 418.

[12] Case C-119/84 *Capelloni and Aquilini* v *Pelkmans*, Judgment of 3 October 1985, available at www.curia.europa.eu (last visited 30 June 2021).

[13] On the subject, see I. Pretelli, n 9 above, 1194.

[14] ibid

III. Limits

Art 53, para 3 states that during the time specified for an appeal pursuant to Art 49 para 5 against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought. Under this assumption, the judge finds himself having to possibly grant the protective measure that refers only to the assets of the party against whom enforcement is sought. In this case, the enforcement is limited to the assets of the party to whom the enforcement is addressed and is not also extended to a third party. This limitation allows the third party to be protected from any damage deriving from a protective measure granted based on a decision for which an enforceable ruling has not yet been rendered.

Article 54
Partial enforceability

Manuela Giobbi

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. Where a decision has been given in respect of several matters and the declaration of enforceability cannot be given for all of them, the court or competent authority shall give it for one or more of them.	(Same text)
2. An applicant may request a declaration of enforceability limited to parts of a decision.	

Summary: I. Partial enforceability of a decision

I. Partial enforceability of a decision

Art 54 of Regulations 2016/1103 and 2016/1104[1] provides that a decision can be declared partially enforceable. In particular, this provision states that where a decision has been given in respect of several matters and the declaration of enforceability cannot be given for all of them, the court or competent authority shall give it for one or more of them.

According to the provisions of Art 54, para 1, if the judge verifies that not all the matters of the application based on which the decision was given can be declared enforceable, he shall proceed *ex officio* with the

[1] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L183/1; Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [2016] OJ L183/30.

declaration of partial enforceability. It does not appear from the wording of the provision that the court can take a decision of a discretionary nature. The judge to whom the request is submitted therefore has an 'obligation' to limit enforceability exclusively to the parts to which it can actually be granted.

Art 54, para 2 also allows the party to request a declaration of enforceability limited to parts of a decision. In this case, it is the same applicant party that limits the request for enforceability to some specific items that have been the subject of the request[2] and which in any case meet the parameters indicated in Art 37 of the Twin Regulations. By limiting the request for enforceability to only some parts of the decision, the party can prevent the judge from issuing a provision of total denial. According to the provisions of Art 37, for example, in no case could decisions manifestly contrary to public policy be recognised. Nor could the enforceability of parts of the decision be recognised if these contain discriminating elements against one of the spouses or partners.[3]

The partial declaration of enforceability may also depend on the fact that the same decision concerns some matters included in the scope of the 2016/1103 and 2016/1104 Regulations, and others that fall within a different regulatory framework. Some problems also stem from the need for the various matters of the decision to be separable from each other and are not interdependent so that the judge can proceed with the declaration of partial enforceability.[4] In the event that the parts of the decision are closely connected, the existence of a reason for denial of enforceability will affect the entirety of the provision. According to what is indicated in Recital 64 of Regulation 2016/1103 and Recital 63 of Regulation 2016/1104, the recognition and enforcement of a decision on matrimonial property regime or on the property consequences of a registered partnership should not in any way imply the recognition of the marriage or the registered partnership which

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[2] In this regard, see P. Bruno, *I Regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate* (Milan: Giuffré Francis Lefebvre, 2019), 281.

[3] On this point, see P. Bruno, n 2 above, 281.

[4] On the subject, see I. Pretelli, 'Article 54', in A. Bonomi and P. Wautelet eds, *Le droit européen des relations patrimoniales de couple. Commentaire des Réglements (EU) 2016/1103 et 2016/1104* (Brussels: Bruylant, 2021), 1197.

gave rise to the decision.[5] Therefore, it seems that the partial enforceability of the decision can be declared by the judge even where the parts are interdependent.

The Court of Justice[6] also specified that when the same decision has ruled both on property relations and maintenance obligations, the judge called to rule on enforceability is required to distinguish between the various aspects by referring to each specific case. A decision can therefore be partially enforced as long as it is based on the assessment of the factual aspects of the various parts of which it is composed.

[5] G. Cuniberti, 'Article 54. Partial Enforceability', in P. Franzina and I. Viarengo eds, *The EU Regulation on the Property Regimes of International Couples: A Commentary*, (Cheltenham: Edward Elgar, 2020), 420-421.

[6] See Case C-220/95 *Van den Boogaard* v *Laumen*, Judgment of 27 February 1997, paras 21 and 22, available at www.curia.europa.eu (last visited 30 June 2021).

Article 55
Legal aid

Giovanna Di Benedetto

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
An applicant who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled, in any proceedings for a declaration of enforceability, to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the Member State of enforcement.	(Same text)

Summary: I. Legal aid. – II. Introductive observations. – III. Enforceability field. – IV. Rights to the most favourable legal aid and the widest exemption.

I. Legal aid

Arts 55 of the Regulations 2016/1103 and 2016/1104 of the Council of 24th June 2016 establish, in the procedure for the declaration of enforceability in a Member State other than that of origin, the right for the person who proposes the enforceability procedure of benefit from legal aid or the broader exemption provided for and governed by the law of the State where enforcement is delegated.

II. Introductive observations

Arts 55 of the Regulations are an expression of the general principle of effective judicial protection.
In practice, this is the right of equal judicial protection and therefore, equal access to justice which constitutes a general founding principle

of the European Union and the common cultural and legal heritage of the Member States.
Pursuant to Art 81 of the Treaty on the Functioning of the European Union, in fact, the Union has set itself the goal of preserving and developing an area of freedom, security and justice, in which the free movement of persons is ensured.
In order to establish such an area, the Union adopts measures in the field of judicial cooperation when this appears to be necessary for the proper functioning of the internal market.
To reach this objective, the European Parliament and the Council adopt all measures aimed at guaranteeing both effective access to justice and the elimination of obstacles to the proper conduct of civil and commercial proceedings.
The described principle of effective judicial protection is legitimated in Art 47(3) of the Charter of Fundamental Rights of the European Union. Pursuant to the aforementioned Art 47(3), the right to legal aid is guaranteed, without distinction, to those who lack sufficient economic resources for effective access to justice.
The same principle of effective judicial protection is also legitimate in Arts 6 and 13 of the European Convention on Human Rights. Within the aforementioned Arts 6 and 13, the right to effective access to jurisdiction is recognized in disputes of a transnational nature, even when there is a risk for the parties to see the free exercise of their rights prejudiced for economic reasons.
The aforementioned principle of effective judicial protection is to be traced back to the more general principle according to which the foreigner must always be admitted to stand in court under the same conditions as the citizen of the State of the forum responsible for the knowledge of the dispute or the execution of the relative decision.
This is a general international principle widely accepted in modern Western national legal systems and is instrumental in preventing possible conflicts of rules in transnational judicial procedures.
Arts 55 of both Regulations are therefore to be placed within the overall framework described to aim at guaranteeing an area of freedom, security and effective access to justice, even beyond the economic limits of those who are interested in the transnational effects due to decisions in civil or commercial matters.

Such a legislative provision was necessary in order to guarantee effective protection, beyond the contingent economic limits possibly suffered by the individual parties, even in the executive phase of the decisions.
Otherwise, the expectations of those interested in the transnational effects of decisions on matrimonial property regime or the property consequences of registered partners would be frustrated and the European area of freedom, justice and security would be compromised and for this reason the proper functioning of the European internal market would be compromised.

III. Enforceability field

Those who have benefited from legal aid in the Member State of origin or the exemption may request to benefit from the most favourable legal aid or the wider exemption provided by the law of the Member State where enforceability is requested, ratione personae, from the judicial expenses incurred.
Given the wording of the rule, where the aforementioned rights have already been recognized in the Member State of origin, it can be assumed that the competent authority of the Member State of enforceability cannot assess again whether or not to admit the applicant to free legal aid.[1]
In accordance with the *lex fori* of the member country where enforceability is requested, it is considered admissible only the confirmation of the prior recognition, by the Member State of origin of the benefit for the instant of legal aid at the expense of the state or the exemption from costs of procedural costs.[2]
Such a perspective seems to be confirmed by the provisions of Arts 39 and 40 of both Regulations. In fact, within the aforementioned Articles, in order to facilitate the free circulation of decisions, it is forbidden to review the jurisdiction of the court of origin and the merits of the decision itself.

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[1] P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate* (Milan: Giuffrè Francis Lefebvre, 2019), 557.
[2] I. Pretelli, 'Principio di protezione giurisdizionale effettiva', in A. Bonomi and P. Wautelet eds, *Il regolamento europeo delle successioni* (Milan: Giuffrè, 2015), 567.

This is in the interest of the harmonious functioning of justice, which requires avoiding duplication of decisions on the same issue.
Furthermore, the wording of the Regulations also reserves legal aid at the expense of the State and the exemption from procedural costs only to applicants for the enforceability of the decisions, without specifying anything else about the counterparty or any other party interested in enforceability on the transnational decision-making plan.
However, from an interpretative point of view aimed at the full realization of the principles of equality between the parties and effective jurisdiction, it must be considered that the rights to free legal aid at the expense of the State and to the exemption from expenses and charges can also be extended to the counterparty interested in the denial of enforceability of the transnational decision.
In fact, pursuant to Art 47, para 3 and Art 51 of the Charter of Fundamental Rights of the European Union, it must be held that the right to legal aid is guaranteed, in all Member States, for all those who lack sufficient economic resources for effective access to justice.
This right is ensured regardless of the procedural position and therefore, regardless of whether the beneficiary of the free legal aid of the State assumes the position of requesting the enforceability of a decision or of opposing the request for execution itself.
In this sense, it should be also be considered what is recognized in Recital 6 of Council Directive 2002/8/EC of 27th January 2003:[3] 'neither lack of resources of a party in court, plaintiff or defendant, nor the difficulties deriving from the cross-border nature of a dispute should constitute an obstacle to effective access to justice.'
Each of the parties involved or not in the enforceability of a decision regarding the matrimonial property regime or the property consequences of civil unions, therefore, must have the possibility of asserting their rights in the related proceedings, even in the event that they do not have sufficient and adequate financial means to support the procedural costs.
If the applicant has not benefited in whole or in part, from legal aid or from the exemption of costs or legal expenses, in the member country of origin, he is entitled to delegate to the competent authority in the

[3] Reporting 'Intended to improve access to justice in cross-border disputes through the definition of common minimum standards relating to legal aid in such disputes.'

member country where he requests enforceability access to the aforementioned benefits, in accordance with the *lex fori*.
The regulations we are examining, pursuant to Art 70, are applicable, ratione temporis, starting from the date of 29th January 2019.
However, it should be noted that, all the provisions contained in Chapters IV of both Regulations, relating to the recognition, enforceability and execution of decisions and therefore, thereby including the provisions contained in Arts 55 are applicable, pursuant to Arts 69(2) of both Regulations.
Therefore, in the case of proceedings initiated in the States of origin on or before 28th January 2019, the decisions made are recognizable and executable according to the provisions of the Regulations in question.
Therefore, the rights to the most favourable legal aid or the widest exemption provided for in the Member State where the application for enforceability is proposed will be recognizable to the parties involved in the execution of transnational decisions regarding family property regimes, even when these are proceedings initiated in the Member State of origin on or before 28th January 2019.

IV. Rights to the most favourable legal aid and the widest exemption

The rights ratified in Arts 55 of the Regulations consist in the recognition of the equal protection of the parties in accessing jurisdiction through the granting of legal aid or the exemption from certain costs and procedural expenses for citizens who have certain income requirements.
In particular, it is believed that the recognized rights are put in practice concretely thanks to the right for the parties involved in the execution of the transnational decision to be exempted from the payment of the fees due for the assistance of a lawyer and the right to be exempted from the payment of procedural charges consisting of both charges and related expenses.
Although the wording of the provision suggests an alternative application of one or the other law, an extensive reading of the provision should be considered preferable, which is aimed at broad application of the provision and therefore of the examined Regulation.

In particular, in our opinion, if the conditions are met, both the right to free legal aid and the right of exemption from costs and expenses in the procedures for the declaration of enforceability of the transnational decisions should be recognised.
The provisions referred to Arts 55 of the Regulations do not impose to the Member State services or exemptions that are not provided for or do not comply with the individual regulations.
Similarly, the provisions in question do not require the application of the same rules on legal aid and exemptions from charges provided for by the member country of origin or another country.
On the contrary, the rules in question provide for free legal aid and exemptions from any procedural charges in favour of those interested in the enforceability of the ruling in accordance with the law of the country where the enforceability of the decision is proposed.
As mentioned, it should be noted that Arts 55 of the Regulations do not detail the services required.
Furthermore, the practices regarding legal aid and legal costs and other costs vary from State to State.
Therefore, the determination of the quality and economic entity of the services must be considered to be left to the *lex fori* of the country.

Article 56
No security, bond or deposit

Francesca Ferretti

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
No security, bond or deposit, however described, shall be required of a party who in one Member State applies for recognition, enforceability or enforcement of a decision given in another Member State on the ground that he is a foreign national or that he is not domiciled or resident in the Member State of enforcement.	(Same text)

Summary: I. The prohibition of imposition of securities, bonds or deposits.

I. The prohibition of imposition of securities, bonds or deposits

According to the Articles in question, any party seeking the enforcement of a decision pronounced in a Member State, regardless of their nationality or domicile, is exempt from the payment of any discriminatory bail. Being the principle of irrelevance of the *nomen iuris* appliced, any form of encumbrance, however denominated, is precluded if it incurs the prohibition in question.
This provision constitutes a standard rule, an expression of the principle already enunciated by the Institute of International Law in 1877, according to which the foreigner must be admitted to trial under the same condition as the citizen of the State of the forum.[1] It has the same content as Art 17 of the Hague Convention relating to civil

[1] Institut de droit international, Règles internationales proposées pour prévenir des conflits de lois sur les formes de la procédure, Resolution 18 September 1877 no 5, Zurich session, 1, available at www.idi-iil.org/en/ (last visited 19 September 2021).

procedure which entered into force on 5 July 1957, as well as Art 45 of 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.[2] The same prohibition, described in more detail,[3] was also already provided for in Art 14 of the Hague Convention of 25 October 1980 aimed at facilitating International access to justice;[4] more recently, this provision has been included in other EU Regulations[5] of Private International Law. In the regulation under examination today, however, the provision is more specific, given that the wording of the Art refers both to the recognition, to the *exequatur* procedure, and to the effective execution of a decision.[6]

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[2] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version) [1998] OJ C 27, 1-27.

[3] A. Bonomi and P. Wautelet, 'Article 56. Caution ou dépôt', in Ids eds, *Le droit européen des relations patrimoniales de couple. Commentaire des Règlements (UE) 2016/1103 et 2016/1104* (Bruxelles: Bruylant, 1st ed, 2021), 1205.

[4] Hague Convention on International access to justice concluded 25 September 1980 [1980] RU 1994 2835, 3.

[5] The same provision is contained in Art 56 of the Regulation (EU) no 1215/2012 of the European Parliament and of the Council of 12 December 201 on jurisdiction and the recognition and the enforcement of judgments in civil and commercial matters [2012] OJ L 351/1; in Art 51 of the repealed Council Regulation (EC) no 44/2001 of 22 December 2000 on jurisdiction and the recognition and the enforcement of judgments in civil and commercial matters [2001] OJ L 12; in Art 51 of the Regulation (EC) no 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matter of parental responsibility, repealing Regulation (EC) no 1347/2000 [2003], OJ L 338; in Art 57 of the Regulation (EU) no 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decision and acceptance and enforcement of authentic instrument in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L 201/107; in Art 44 of the Council Regulation (EC) no 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decision and cooperation in matters relating to maintenance obligations [2009] OJ L 7/1.

[6] U. Bergquist, 'Article 56. No security, bond or deposit', in Id et al. eds, *The EU Regulation on Matrimonial and Patrimonial Property* (New York: Oxford University Press, 2019), 227-228; C. I. Nagy, 'Article 56. No security, bond or deposit', in I. Viarengo and P. Franzina eds, *The EU Regulation on the Property Regimes of International Couples. A Commentary* (Cheltenham: Edward Elgar, 2020), 425.

This provision constitutes a specific application of the general European principle of non discrimination[7] on the basis of nationality of residence, as enshrined in Art 18 TFEU: the Regulations cannot be applied in a discriminatory manner, not even in order to fulfil the obligation deriving from national law, and this provision tries to break down in all possible ways the obstacles to an effective and concrete freedom of circulation of decisions.

The jurisprudence of the Court of Justice has repeatedly confirmed that national legislation that imposes a *cautio iudicatum solvi* falls within the scope of the Treaty and has had the opportunity on several occasion to rule on this point,[8] especially in cases where such security was requested because of the applicant's foreign nationality or of his residence abroad. On the other hands, it is clear that if the procedural rules provide for the imposition of a security also to citizens of the

[7] The prohibition of discrimination, enshrined in Art 14 of the ECR, was applied also in the case *Nasser* v *United Bank of Kuwait* [2001] EWCA 495 Civ 1, [2002] 1 WLR 1868. For a reconsideration of the concept of risk that would justify the imposition of a deposit on a foreign individual, see the recent decision *Bestford Developments LLP and others* v *Ras AL Khaimah Investment Authority and others* [2016] EWCA Civ 1 32, [2015] 3 WC2A 1099. The court of Appeal has clarified the criterion to be applied in cases of security application for expenses, based on the fact that the applicant resides outside the jurisdiction. Overcoming the approach contained in the previous decisions, which considered sufficient evidence by the applicant of the mere likelihood of difficulties in the payment of the costs charged to the other party, the Court of Appeal ruled that the application for bond should be granted only where the applicant can provide evidence of a clear risk of non-payment of sums.

[8] Case C-291/09 *Francesco Guarnieri and Cie* v *Vandevelde Eddy VOF*, [2011] ECR I-02685, paras 19-22; case C-122/96 S*tephen Austin Saldana and MTS Security Corporation* v *Hiross Holding AG*, [1997] ECR I-5325, paras 20-21; Case C-323/95 *David Charles Hayes and Jeannette Karen Hayes* v *Kronenberger GmbH*, [1997] ECR I-01711, para 17; case C-43/95 *Data Delecta Aktiebolag and Ronny Forsberg* v *MSL Dynamics Ltd*, [1996], ECR I-4661, paras 16-17: 'In prohibiting "any discrimination on grounds of nationality", Article 6 of the Treaty requires perfect equality of treatment in Member State of persons in a situation governed by Community law and nationals of the Member State in question. A person such as the one at issue in the mains proceedings manifestly constitutes direct discrimination on grounds of nationality.'

executing Member State, the reason for discrimination does not arise.[9] Indeed, the imposition of a deposit is not prohibited as such, but only to the extent that the party requesting recognition, enforceability or enforcement is required 'on the ground that he is a foreign national or that he is not domiciled or resident in the Member State of enforcement.' In these cases, such a provision would not only involve the relationship of the Regulations, but, mainly, also the primary law of the European Union,[10] as explicitly stated by the European jurisprudence in a dispute initiated by a subject with a dual citizenship, both English and American, against an Austrian joint stock company.[11] From a subjective point of view, the provision also applies to applicants who are citizens or residents of third countries or EU Member States that have not participated in the enhanced cooperation. In fact, the rules on the recognition and execution of foreign judgments apply regardless of the identity of the parties to the

[9] S. Ziino, 'Article 57', in A. L. Calvo Caravaca et al, *The Eu Succession Regulation. A commentary* (Cambridge: Cambridge University Printing House, 2016), 621: 'Article 57 does not impose an absolute prohibition on demanding that security be provided by the applicant seeking enforcement. It simply excludes requirements for security that are based on the discriminatory grounds of the applicant's foreign nationality or of his or her residence or domicile abroad. It follows that where national legislation requires that security for costs or damages be provided, but such requirement is not linking to the applicant's nationality or domicile, Then such a requirement is legitimate and is not in conflict with article 57 ESR.'

[10] I. Petrelli, 'Principio di protezione giurisdizionale effettiva (artt. 56-58)' in A. Bonomi and P. Wautelet, *Il regolamento europeo sulle successioni: commentario al Reg. Ue 650/2012 in vigore dal 17 agosto 2015* (Milan: Giuffrè, 2015), 590; A. Bonomi and P. Wautelet , n 3 above, 1206.

[11] Case C-122/96 *Stephen Austin Saldanha and MTS Securities Corporation v Hiross Holding AG*, [1997] ECR I-5325 para 15; for a comment about the decision, see G. A. L. Droz, 'À propos de l'arrêt de la Cour de Cassation: 6ème Chambre civile du 2 octobre 1997' *Revue critique de droit international privé,* 283 (1998): '*Il y a lieu de rappeler que, se una règles de procédure telle que celle en cause au principal relève, en principe, de la compétence des États membres, il est de jurisprudence constante qu'elle ne peut opérer une discrimination à l'égarde de personnes auxquelles le le droit communautaire confère le droit à l'égalité de traitement ni restreinde les libertés fondamentale garanties par le droit communautaire.*' On the same topic, see also J. Basedow, 'Le rattachement à la nationalité et les conflits de nationalité en droit de l'Unione europeenne' *Revue critique de droit international privé*, 427 (2010); R. A. Schütze, 'Zur cautio iudicatum solvi im österreichischen Recht' *Praxis des Internationalen Privat - und Verfahrensrechts*, 100-103 (2015).

judgment: this is consistent with the purpose of these Regulations, which favour the circulation of decisions made by another State participating in the enhanced cooperation in the European judicial area.[12]

In general, the rationale for the provision of a deposit is to ensure that the party to whom it is placed is able to reimburse the legal costs, in the event of denial of the request for recognition, enforceability or execution of the decision. Therefore, Art 56 does not refer to cases in which the *cautio iudicatum solvi* is provided by the State ad quem to guarantee the defendant against the costs resulting from an unlawful execution or to ensure the payment of the costs of justice (*cautio pro expensis*) and allows the imposition of a security in the event that the judicial authority considers that the party against whom enforcement is sought may have difficulty in recovering the legal costs in the event that such an application is rejected.

As a matter of principle, these securities are always legitimate, as long as they are not discriminatory:[13] The purpose of the provision is in fact to allow the judge to make a distinction between legitimate and prohibited securities.

A deposit is not necessarily abusive, even if it limits access to justice: indeed, a limitation to this right can be justified precisely by the need to adequately protect the rights of defence.[14]

Having clarified this, it is evident that a very high *cautio iudicatum solvi* constitutes in itself a clear violation of the right of access to justice provided for by Art 6 of the ECHR, even where the aforementioned security is not discriminatory.[15]

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[12] C. I. Nagy, n 6 above, 426.

[13] A. Layton and H. Mercer, *European Civil Practice* (London: Thomson: Sweet & Maxwell, 2nd ed, 2004), 1012; L. Palsson, 'Art 51', in U. Magnus and P. Mankowski eds, *Brussels I Regulation* (Munich: Sellier, 2nd ed, 2012), 667; P. Mankowski, 'Art 51', in T. Rauscher eds, *Europäisches Zivilprozessrecht und Kollisionsrecht, EuZPR/EuIPR-Kommentar* (Koln: OttoSchmidt, 5th ed, 2020), I, 832.

[14] G. A. L. Droz, *La compétence judiciaire et effets des jugements dans le Marché commun: étude de la Convention de Bruxelles du 27 septembre 1968* (Paris: Dalloz, 1971), 441.

[15] Cour de Cassation 16 March 1999 no 96.12748, *Journal de droit international "Clunet"* 773 (1999); see also the comment of G. A. L. Droz, 'Nota a Cour de Cassation, Chambre civile 1, du 16 mars 1999' *Revue critique de droit international privé*, 181-183 (2000).

An interesting interpretative question emerges from the comparison of the Articles in question with the provisions contained in Regulation 1215/2012, in which, in addition to Art 56 - with the same content - there is the provision referred to in Art 44, para 1 letter b), according to which in the event of a request for rejection of enforcement, te court may, at the request of the party against whom enforcement is sought, 'make enforcement conditional on the provision of such security as it shall determine.' It could be considered that the lack in the Regulations in question of a provision similar to Art 44, para 1 letter b) would constitute an expression of the legislative intention to prevent the judge from imposing a security.
On the other hand, *argumentum a contrario* works better even if applied to Art 56 of the Regulations in question: the provision excludes the imposition of the deposit for certain reasons, implicitly attributing to the courts of the Member States the general power to predict it. If the judges had not had the power to impose a bail, the rule - which contains a delimitation of that power - would have been completely redundant.[16]

[16] C. I. Nagy, n 6 above, 426-427.

57
No charge, duty or fee

Serena Cancellieri

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
In proceedings for the issue of a declaration of enforceability, no charge, duty or fee calculated by reference to the value of the matter at issue may be levied in the Member State of enforcement.	(Same text)

Summary: I. The absence of charge, duty or free.

I. The absence of charge, duty or free

Given that Art 57 closes Chapter IV of Regulations 1103 and 1104 of 2016, which is devoted to the 'recognition, enforceability and enforcement of judgments,' it therefore refers to the issue of declaration of enforceability of judgment.

It is necessary to note a distinction, which appears to be unquestionable in doctrine and jurisprudence and which considers the 'recognition' and 'enforcement' of foreign judgments and two distinct institutions.[1]

Recognition therefore confers on judgments the effectiveness they enjoy in the Member State in which they were rendered, whereas enforcement presumes the cooperation of public bodies in the requested State.

In any case, it seems to be a limited distinction since, as observed by the best legal doctrine, in order to operate, it presupposes that there is no dispute on the part of foreign authority, with the consequence that normally the parties will adopt the exequatur procedure to ensure that the judgments has an enforceable formula.

1 F. P. Mansi, *Il giudice italiano e le controversie europee. I principali regolamenti comunitari di diritto processuale civile* (Milan: Giuffrè, 2nd ed, 2010), 363.

The above premises are indispensable for understanding that the provision in question is intended on the one hand to safeguard the simplification and optimisation of the circulation of declarations of enforceability, and on the other hand to protect the citizens of the Member States of cooperation by exempting the from the payment of taxes, duties or fees in relation to the value of the matter.

This Article also satisfies the free movement of judgments that are enforceable within the European judicial area and therefore enjoy easier treatment.[2]

This provision is also found in the other Eu legislative measures providing for the recognition and enforcement of judgments, even if they do not concern matrimonial property regimes or property consequences of registered partnerships.[3]

It is also based on the principle of mutual recognition of judgments and the other judicial decisions, codified in Art 67 and 81 of the Treaty on the Functioning of the European Union, which lays the foundations for judicial cooperation in civil matters.[4]

The free movement of judgments in the European legal area had already been established as a principle in the light of Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

On the other hand, Art 21 of the aforementioned EU Regulation 2201/2003 and art 39 of Regulation 1215/2012 expressly refers to the automatic recognition of judgments, but no mention is made of the absence of taxes, duties or fees in the procedures for granting enforceability.

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[2] S.M. Carbone and C.E. Tuo, *Il nuovo spazio giudiziario europeo in materia civile e commerciale. Il Regolamento UE n.1215/2012* (Turin: Giappichelli, 7th ed, 2016), 387.

[3] See, for example: Art 58 of the Regulation (EU) no 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decision and acceptance and enforcement of authentic instrument in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L 201/107; Art 38 of the Council Regulation (EC) no 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decision and cooperation in matters relating to maintenance obligations [2009] OJ L 7/1.

[4] A. Davì and A.Zanobetti, *Il nuovo diritto internazionale privato europeo delle successioni* (Turin: Giappichelli, 1st ed, 2014), 219.

The critical issue encountered in the determination of taxes, duties or fees for the issue of a declaration of enforceability seem to have not disappeared, despite legislative interventions aimed at simplifying and facilitating the circulation of decisions.
In fact, the question still appears to be unresolved in a number of European Regulations on civil matters which provide for a simplified exequatur procedure in favour of the free circulation of judgments but make no mention of the problem of determining taxes.
In this sense, Art 57 merely excludes a method for setting taxes, but does not standardise national rules, nor does it limit them, which still leaves an open question in this respect, with particular reference to the implementation aspect of the Regulations.
It should be noted, however, that a prohibitively or outrageously high fee would be contrary to one of the main objectives of the Patrimonial Regimes Regulations, namely the facilitation of the free circulation of judgments.[5]
The roots of Art 57 can be traced back to Art 3 of the Protocol to the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters to the 1958 Benelux Treaty, specifically Art 2, para 2 letter f).[6]
The rationale for including this provision was that in some Member States the costs to be paid for a declaration of enforceability were fixed, whereas in others the charge was proportional and calculated with specific reference to the value of the claim from the judgment.[7]
This discrepancy in the rules was considered a distortion and Art 3 of the Protocol to the 1968 Brussels Convention, the precursor to Art 57 of the Property Regimes Regulations, was inserted to remedy this situation.
The rule contained in Art 57 limits the discretion of the court of the forum in determining the amount of the taxes, duties or charges in a proceeding.

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[5] C. I. Nagy, 'Article 57. No charge, duty or fee', in I. Viarengo and P. Franzina eds, *The EU Regulation on the Property Regimes of International Couples. A Commentary* (Cheltenham: Edward Elgar, 2020), 428.

[6] I. Petrelli, 'Principio di protezione giurisdizionale effettiva (Artt 56-58)' in A. Bonomi and P. Wautelet eds, *Il regolamento europeo sulle successioni: commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015* (Milan: Giuffrè, 2015), 591.

[7] ibid 593.

Primarily, these considerations would be a matter for the forum State, but Art 57 prohibits their implementation, thus preventing Member States from imposing fees proportional to the value of the dispute for the procedure to enforce the foreign judgment.
Not all Member States calculate fees and taxes in proportion to the value of the dispute, so in addition to the above aspect, there could be a problem of discrimination in access to the recognition and enforceability procedure.
In fact, this would be configured differently depending on whether the State in which the proceedings are instituted provides for fixed or proportional fees or taxes.
The cost of exequatur proceedings can be high in some Member States, which is why the discipline of the legal aid Regulations is so important.[8]
The entitlement of an applicant benefiting from legal aid, as established under Art 55 of the Regulation, or benefiting from exemption from costs or expenses in the main proceedings in the Member State of origin of the judgment is 'stretched' to include also the procedure for declaration of enforceability in the Member State of enforcement.[9]
It should be pointed out that this rule applies only to proceedings for issue of declaration of enforceability, and it does not refer to other stages of the exequatur procedure, neither to proceedings concerning provisional measures, nor to lawyers' fees.[10]
Although the Regulations provide for numerous procedural rules on the application for declaration of enforceability, they leave considerable autonomy to national laws to regulate other questions of

[8] J. Kramberger Skerl, 'Acceptance and enforcement of authentic instruments and court settlements', in M.J. Cazorla Gonzáles et al eds, *Property relations of cross border couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2020), 144.
[9] C. Rudolf, 'Zu Artikel 58. Keine Stempelabgaben oder Gebühren', in A. Deixler-Hübner and M. Schauer eds, *Kommentar zur EU.Erbrechtsverordnung EuErbVO* (Vienna, ed MANZ Verlag, 1st ed, 2015), 405.
[10] 1968 Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version) [1998] OJ C 27, 1-27.

procedure, since a judgment cannot have more effect abroad than in its State of origin.[11]

It therefore represents an extension of the general European principle of non- discrimination on the basis of nationality of residence and the free movement of decisions.[12]

Art 57 is also inspired by the principles contained in Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common standards relating to legal aid in such disputes.

In the light of these considerations and sources, it seems clear that the rationale of Art 57 is, therefore, to eliminate the possible problems that would be encountered in the determination of taxes, duties or fees on the basis of criterion of proportionality in some countries, to the detriment of others that would implement a fixed amount.

Art 57 contains no limitation on the power of Member States to set their own tariffs, promoting the use of a fixed tariff rather than one that is proportional to the value of the claim.

[11] This principle was already present in the 1968 Brussels Convention. See also, case C-420/07 *Meletis Apostolides* v *David Charles Orams and Linda Elizabeth Orams*, [2009] ECR 03571.

[12] Case C-42/76 *Josef de Wolf* v *Harry Cox BV*[1976], ECR 01759.

Article 58
Acceptance of authentic instruments

Francesca Ferretti and Serena Cancellieri*

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. An authentic instrument established in a Member State shall have the same evidentiary effects in another Member State as it has in the Member State of origin, or the most comparable effects, provided that this is not manifestly contrary to public policy (ordre public) in the Member State concerned.	1. An authentic instrument established in a Member State shall have the same evidentiary effects in another Member State as it has in the Member State of origin, or the most comparable effects, provided that this is not manifestly contrary to public policy (ordre public) in the Member State concerned.
A person wishing to use an authentic instrument in another Member State may ask the authority establishing the authentic instrument in the Member State of origin to fill in the form established in accordance with the advisory procedure referred to in Article 67(2) describing the evidentiary effects which the authentic instrument produces in the Member State of origin.	A person wishing to use an authentic instrument in another Member State may ask the authority establishing the authentic instrument in the Member State of origin to fill in the form established in accordance with the advisory procedure referred to in Article 67(2) describing the evidentiary effects which the authentic instrument produces in the Member State of origin.
2. Any challenge relating to the authenticity of an authentic instrument shall be made before the courts of the Member State of origin and shall be decided upon under the law of that State. The authentic instrument challenged shall not produce any evidentiary effect in another Member State for as long as the challenge is pending before the competent court.	2. Any challenge relating to the authenticity of an authentic instrument shall be made before the courts of the Member State of origin and shall be decided upon under the law of that State. The authentic instrument challenged shall not produce any evidentiary effect in another Member State for as long as the challenge is pending before the competent court.
3. Any challenge relating to the legal acts or legal relationships recorded in an authentic instrument shall be made before the courts having jurisdiction	3. Any challenge relating to the legal acts or legal relationships recorded in an authentic instrument shall be made before the courts having jurisdiction

* Francesca Ferretti authored I., II., III., IV., V., VI. and IX and Serena Cancellieri authored paragraphs VII. and VIII.

under this Regulation and shall be decided upon under the law applicable pursuant to Chapter III. The authentic instrument challenged shall not produce any evidentiary effect in a Member State other than the Member State of origin as regards the matter being challenged for as long as the challenge is pending before the competent court.

4. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question relating to the legal acts or legal relationships recorded in an authentic instrument in matters of matrimonial property regimes, that court shall have jurisdiction over that question.

under this Regulation and shall be decided upon under the law applicable pursuant to Chapter III. The authentic instrument challenged shall not produce any evidentiary effect in a Member State other than the Member State of origin as regards the matter being challenged for as long as the challenge is pending before the competent court.

4. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question relating to the legal acts or legal relationships recorded in an authentic instrument in matters of property consequences of registered partnerships, that court shall have jurisdiction over that question.

Summary: I. Introductory remarks and objective purpose of application. – II. The acceptance of the authentic instrument. – III. The extension of the evidentiary effects of the authentic instrument. – IV. Modulation of acceptance: the attribution to an authentic instrument of the 'most comparable effects'. – V. Refusal of acceptance: a) the limit of public order; b) the conflict between incompatible authentic instruments. – VI. The substantial effectiveness of the authentic instrument (the *negotium*). – VII. Challenges to the authenticity of the authentic instrument. – VIII. Challenges to the legal acts and legal relationships of the authentic instrument. – IX. The incidental dispute.

I. Introductory remarks and objective purpose of application

The rules governing the recognition and execution of out-of-corts acts, such as authentic instruments and court settlements, have been included in both Regulations in question. The formers were attributed generalized probative efficacy, equivalent or comparable to that

recognized in the country where the deed was issued. First this affirmation generates problems of qualification of national acts and about the effective possibility of the same to produce some effect to member States that do not know similar instruments.[1]
As for the definition of authentic instrument, the same is provided by the Regulation, specifically by Art 3 para 1 letter c) and d) - respectively of Regulations 1103 and 1104 - which defines 'authentic instrument' as any document relating to the matrimonial property regime or the property regime of the registered partnership that has been formally drawn up or registered as a public deed in a Member State, the authenticity of which: concerns the signature and the content of the public deed; has been certified by a public authority or other authorized authorities for this purpose by the home Member State. It is also necessary to recall the instructions of the Court of Justice which, in the Unibank judgement[2] stated the authenticity of such acts must be demonstrated indisputably, and this is possible only for those acts whose authenticity has been certified by a public authority of the State of origin or any other authorized authorities.
It is obvious that Art 58 can only be applied only to authentic instrument relating to property relations between couples, and therefore will mainly concern matrimonial regimes or the property effects of registered partnerships: if only a part of the act is related to

1 S. Marino, *I rapporti patrimoniali della famiglia nella cooperazione giudiziaria civile dell'Unione Europea* (Milan: Giuffrè Francis Lefebvre, 2019), 251.
2 Case C-260/97 *Unibank A/S* v *Flemming G. Christensen*, [1999] ECR I-03715, paras 14 and 15. On the same subject, see R. Cafari Panico, 'L'efficacia degli atti pubblici stranieri. La proposta di regolamento su giurisdizione e legge applicabile a successioni e testamenti', in Id and M. C. Baruffi eds, *Le nuove competenze comunitarie. Obbligazioni alimentari e successioni* (Padua: CEDAM, 2009), 184. See also the classification of authentic instruments proposed by C. Pamboukis, *L'acte public étranger en droit international privé* (Paris: LGDJ, Librairie générale de droit et de jurisprudence, 1993), 21-66.

the object, the Article in question will apply only to that part of the act.[3]

The Regulations also exclude 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,'[4] thus limiting the scope of Chapter V to the probative effects of authentic instruments.[5]

On this point, however, it is possible to recall the restrictive interpretation of the analogous exception referred to in letter l) of the Succession Regulation provided by the jurisprudence of the Court of Justice,[6] from which it follows that the methods of transfer due to death also fall within the scope of application of the aforementioned regulation; similarly, as far as we are concerned, the transfer methods fall within the application of these Regulations as stated in Art 1, para 2 letter h).[7] On this point, it has also been argued in legal literature that

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[3] P. Wautelet, 'Article 58. Acceptation des actes authentiques', in A. Bonomi and P. Wautelet eds, *Le droit européen des relations patrimoniales de couple. Commentaire des Règlements (UE) 2016/1103 et 2016/1104* (Brussels: Bruylant, 1st ed, 2021), 1214. In the same sense, about Art 59 of the Regulation (EU) no 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decision and acceptance and enforcement of authentic instrument in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L 201/107, H. P. Mansel, 'Article 59. Acceptance of authentic instruments', in A.L. Calvo Caravaca et al eds, *The Eu Succession Regulation. A commentary* (Cambridge: Cambridge University Press, 2016), 640.

[4] Art 1, para 2 lett. h); the same rule is contained in the Art 1, para 2 lett. l) of the Regulation (EU) no 650/2012 of the European Parliament and of the Council.

[5] P. Franzina, 'Article 58. Acceptance of authentic instruments', in I. Viarengo and P. Franzina eds, *The EU Regulations on the property regimes of international couples. A commentary* (Cheltenham: Edward Elgar, 2020), 435: 'The issue appears to fall as such outside the scope of the Regulation pursuant to Article 1(2)(h)'; D. Damascelli, 'Article 58. Acceptance of authentic instruments', in U. Bergquist et al, *The EU Regulations on Matrimonial and Patrimonial Property* (New York: Oxford University Press, 2019), 235-236.

[6] Case C-218/16 *Aleksandra Kubicka*, Judgement of 12 October 2017, available at www.eur-lex.europa.eu (last visited 19 September 2021).

[7] Interpretation supported by Z. Crespi Reghizzi, 'Succession and Property Rights in Eu Regulation n 650/2012' *Rivista di diritto internazionale privato e processuale*, 633 (2017).

the national provisions prohibiting the registration of instruments from foreign States are in conflict with the European Union law,[8] but such a radical interpretation is not convincing.
Furthermore, according to Recital 18 of the Succession Regulation and Recitals 27 of the Regulations in question, it is up to the law of the Member State where the register is held to determine the legal condition, the registration procedures, the authorities in charge, the documentation submitted and the necessary information. Therefore, there is a risk that the foreign instrument is transposed into a national act for the purposes of real estate registration,[9] without the Regulation providing the solution for this possibile criticality. However, the preamble of the Regulations suggest a certain flexibility on the part of authority responsible for keeping the registers of foreign authentic instruments, with a view to adopting a substantive e not merely formal approach, since it invites the authorities responsible for registration to accept documents drawn up by the competent authorities of the other Member States. The circulation of authentic instruments and the principle of loyal cooperation would impose on the receiving authorities the obligation to evaluate the content and to admit the required registrations, if the foreign authentic instrument complies with the requirements of form and substance required by the corresponding internal document for the purposes of registration.[10]
Art 58 cannot be applied to some public documents, such as marriage, divorce, death, nationality certificates, issued by the competent authorities of the Member State, which do not directly concern patrimonial issues deriving from couple relationships.[11] Nonetheless, these documents can be presented in another Member State in

[8] D. Damascelli, *Diritto internazionale privato delle successioni a causa di morte* (Milan: Giuffrè, 2013), 187.

[9] P. Pasqualis, 'La circolazione degli atti pubblici in materia successoria in Europa', in P. Franzina and A. Leandro eds, *Il diritto internazionale privato nelle successioni mortis causa* (Milan: Giuffrè, 2013), 187.

[10] S. Marino, n 1 above, 258.

[11] P. Franzina, n 5 above, 437; M. Makowsky, 'Article 58', in R. Hubtege and H.P. Mansel eds, *Bürgerliches Gesetzbuch: BGB Rom-Verordnungen - EuGüVO - EuPartVO - HUP - EuErbVO* (Baden Baden: Nomos, 3rd ed, 2019), VI, 1024.

compliance with EU Regulation 2016/1191[12] on the simplification of the requirements for presenting certain public documents in the European Union, which entered fully into force on 16 February 2019.

II. The acceptance of the authentic instrument

The heading of Art 58 refers to the concept of 'acceptance' of the authentic instrument. The use of the term 'acceptance' in place of 'recognition'[13] (see Art 36) underpins the difference in the type of effects arising from authentic instrument referring to a judicial decisions, since in this second case the production of effects is based on the authority of the sentence and on the possibility for it to obtain the effectiveness of r*es iudicata*, unlike the authentic instrument, characterized by a lower level of stability.[14]
The term 'acceptance' was in fact used to specifically qualify the mechanism for transposing foreing authentic instruments. This lexical choice does not represent a novelty[15] in the examined Regulations,

[12] Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) no 1024/2012 [2016] OJ L 200/1.
[13] The debate is ancient: already Gothot and Holleaux criticized the use of the concept of 'recognition' for authentic instruments, since it fell within the scope of conflict rules, in relation to the profiles of the validity and of the effect of the *negotium*: P. Gothot and D. Holleaux, *La Convention de Bruxelles du 2 septembre 1968: compétence judiciaire et effets des jugements dans la CEE* (Paris, Jupiter, 1985), 201. The matter has been further developed by G. de Leval, 'Reconnaissance et exécution de l'acte notarié dans l'espace judiciaire européen', in C. Biquet-Mathieu et al eds, *Liber Amicorum Paul Delnoy* (Brussels: Larcier, 2005), 667-668, that declares himself in favour for the recognition also of the authentic instruments; the opposite opinion is supported by M. Goré, 'L'acte authentique en droit international privé' *Droit international privé: travaux du Comité français de droit international privé*, 29-33 (1998-00).
[14] P. Callé, 'La circulation des actes authentiques', in H. Bosse-Platiere and N. Y. Dereu Damasco eds, *L'avenir européen du droit des successions internationales* (Paris: Lexis Nexis, 2011), 49-50. G. A. L. Droz, 'L'activité notariale internationale' *Recueil des cours. Académie de droit international*, 127 (1999) proposed to refer to the different concept of 'authority of fact agreed and implemented' (*autorité de chose prouvée*) instead of the reference to the 'authority of judgment', quality of which the authentic instrument is devoid.
[15] P. Franzina, n 5 above, 435.

having been taken up by Art 59[16] of Regulation no 650/2012, having the same content as Art 58 examined here.[17] With regard to the debate that took place during the preparatory work for the adoption of the Regulation on Succession, the Commission in 2009 had initially proposed the introduction of a mechanism for the recognition of authentic instruments, without prejudice to the possibility to refuse it if it conflicts with public order.[18] This possibility seemed to be justified in a Resolution of the European Parliament[19] and in some provisions of other European Regulations, which allowed the mutual recognition of authentic instrument, in particular Art 46 of the Brussels II*bis* Regulation and Art 48 of maintenance obligations Regulation, according to which 'authentic instruments which are enforceable in he

[16] For a comment on the Art 59 of the Regulation (EU) no 650/2012 of the European Parliament and of the Council, see J. Carrascosa González, *El Reglamento Sucesorio Europeo 650/2012 de 4 de julio 2012: análisis crítico* (Granada: Editorial Comares, 2014), 312-315; D. Damascelli, 'La circulation au sein de l'espace judiciaire européen des actes authentiques en matière successorale' *Revue critique du droit international privé*, 425 (2013) and Id, 'Actes authentiques et transactions judiciaires', in U. Bergquist et al, *Commentaire du règlement européen sur les successions* (Paris: Dalloz, 2015), 205; P. Wautelet, 'Article 59', in A. Bonomi and P. Wautelet eds, *Le droit européen des successions. Commentaire du Règlement n. 650/2012 du 4 juillet 2012* (Bruxelles: Bruylant, 2nd ed, 2016), 719-721; C. Schmitz, *Die "Annahme" öffentlicher Urkunden nach Art. 59 Abs. 1 EuErbVO* (Tubingen: Mohr Siebeck, 2020), 109-114; A. Davì and A. Zanobetti, *Il nuovo diritto internazionale privato europeo delle successioni* (Turin: Giappichelli, 2014), 225; P. Pasqualis, 'La circolazione', n 9 above, 171.

[17] M. Farge, 'Article 58', in S. Corneloup et al eds, *Le droit européen des régimes patrimoniaux de couples. Commentaire des règlements (UE) n. 2016/1103 et 2016/1104* (Paris: Société de législation comparée, 2018), 409-416.

[18] Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of declaration and authentic instrument in matters of succession and on the creation of a European Certificate of Succession, [2009] Brussels, 14.10.2009 COM/2009/0154 final COD 2009/0157; specifically, see Recital 26 and Art 34.

[19] Report with recommendation to the Commission on the European Authentic Act (2008/2124 (INI) 19 November 2008 A6-0451/2008); in point no 2 of the report, the European Parliament Committee on Legal Affair called on the Commission to submit a text establishing 'the mutual recognition and enforcement of authentic acts.'

ember State of origin shall be recognized in another Member State and be enforceable there in the same way as decisions.'[20]

With regard to Brussels II*bis* Regulation, the purpose of the concept of 'recognition of authentic instrument' referred to in Art 46 was rather controversial: according to some the recognition was addressed to the content of the instrument itself;[21] according to others, however, such recognition could only concern the particular probative force attached to the instrument.[22] Art 48, on the one hand, considered that its purpose was limited to the imposition on the requested State of the obligation to grant the foreign document a particular probative force which had in the State of origin. According to others, on the other hand, the interpretation of Art 48 remained mysterious, provoking the transposition of the rules providing judicial decisions towards authentic instruments with more doubts than solutions.[23]

The proposal of the recognition of authentic instruments in the European Succession Regulation met with two main criticisms: on the one hand, the inadequacy of the concept of recognition for public documents; on the other hand, there is no real need to allow it.[24] In relation to this second aspect, it was noted that no particular difficulties had been encountered, and that the national laws of some

[20] The mere assimilation by those Regulations of the authentic instruments into judicial decision has sometimes been approved (H. Muir Watt and B. Ancel, 'La désunion européenne: le Règlement dit "Bruxelles II"' *Revue critique de droit international privé*, 436-441 (2001)) and other times criticized (P. Callé, 'L'acte public en droit international privé' *Economica*, 267-270, 337-338 (2004)).

[21] T. Raucher, 'Art 46 Brüssel IIa-Vo', in Id ed, *Europäisches Zivilprozessrecht und Kollisionsrecht, EuZPR/EuIPR- Kommentar* (Köln: Otto Schmidt, 5th ed, 2020), IV, 364; also U. Magnus seems to accept that the Art 46 may constitute the basis for the recognition of authentic instruments: U. Magnus, 'Article 46', in Id and P. Mankowski eds, *Brussels IIbis Regulation* (Munich: Sellier, 2012), 383.

[22] R. Geimer, *Internationales Zivilprozessrecht* (Köln: Otto Schmidt, 7th ed, 2015), 2865.

[23] J. Fitchen, '"Recognition", Acceptance and Enforcement of Authentic Instruments in the Succession Regulation' 8 *Journal of PrivateInternational Law*, 339-342 (2012).

24 M. Kohler and M. Buschbaum, 'La "reconnaissance" des actes authentiques prévue pour les successions transfrontalières. Réflexion critiques sur une approche douteuse entamée dans l'harmonisation des règles de conflits de lois' *Revue critique de droit international privé*, 643-651 (2012) and Ids, 'La "reconnaissance" des actes authentiques? Réflexions critiques sur une approche douteuse entamée dans l'harmonisation des règles de conflits de lois' *IPRax Praxis des Internationalen Privat-und Verfhrensrecht*, 313-316 (2010).

Member States already accepted in particular circumstances authentic instruments formed abroad or in accordance with the law of the Member State of origin.[25] This led to a further reflection according to which the circulation of the probative value of public documents would already constitute an element of the *acquis communautaire*.[26] Moreover, the Court of Justice, with the Dafeki sentence, has imposed the recognition of certificates as well as similar documents relating to civil status issued by the competent authority of the Member State.[27]
The above mentioned considerations are not convincing. Jurisprudence lastly reported that - in addition of having a rather general purpose[28] - it is limited only to the recognition of certains acts, and the Court has in any case left the possibility for a State to refuse a foreignt act when the accuracy of its content is 'seriously unsigned

[25] For example, the Art 28 of the Belgian Private International Law Code recognises the authenticity of foreign authentic instruments, making the transposition of their probative value subject to the required condition for their authenticity under the law of the Member State of origin and without prejudice to compliance with the condition laid down by the Belgian code for the form of act. See also Spanish law cases: Tribunal Supremo 19 June 2012 no 998, available at www.vlex.es (last visited 19 September 2021), accepting a German notarial sale and purchase act of immovable property situated in Spain, with the comments of H. Duintjer Tebbens, 'Vers une "libre circulation" des actes authentiques dans l'Union européenne: réflexion à propos d'un arrêt du Tribunal Supremo d'Espagne du 19 juin 2012', in J. J. Forner Delaygua et al eds, *Entre Bruselas y la Haya: estudios sobre la unificación internacional y regional del derecho internacional privado: Liber Amicorum Alegría Borrás* (Madrid-Barcelona: Marcial Pons, 2013), 309-322; R. Geimer, 'Eintragungsfähigkeit einer von einem deutschen Notar errichteten Kaufvertragsurkunde im spanischen. Eigentumsregister (Tribunal supremo, 19.6.2012 - 489/2007)' *IPRax Praxis des Internationalen Privat- und Verfahrensrecht*, 479 (2013); Juzgado de Primera Instancia no 10 de Las Palmas de Gran Canaria 7 January 2014 no 574, available at www.vlex.es (last visited 19 September 2021). See also French case: Cour d'Appel Aix en Provence 2 March 2000, no R.2001.163, available at www.legifrance.gouv.fr (last visited 19 September 2021). About the circulation of authentic instruments between France and Germany: J. Fitchen, 'Authentic instruments and European Private International Law in Civil Law and Commercial Matter: is now the time to break new ground?' 7 *Journal of Private international Law*, 49-54 (2011).

[26] M. Kohler and M. Buschbaum, 'La "reconnaissance"' n 24 above, 646-647.

[27] Case C-336/94 *Eftalia Dafeki* v *Landesversicherungsanstalt Württemberg*, [1997] ECR I-06761.

[28] H. P. Mansel, 'Article 59' n 3 above, 630-631.

with concrete clues relating to the individual case considered.'[29] Furthermore, recourse to a general principle, such as that of mutual trust, does not allow the installation of a sufficiently solid or certain regime for the circulation of authentic instruments; finally, an acceptance left to individual national practises does not eliminate the risk of inhomogeneity in the existence of numerous barriers and obstacles to the free circulation of authentic instruments.[30]

The debate which arose around the corresponding Article of the Succession Regulation led to a change in the text of the Regulations in question, up to the final version currently in force. The text referred in Arts 32 and 28[31] of the 2011 Commission proposals for Regulations on property regimes[32] also provided for the automatic recognition of authentic instruments. Following the amendments made to the Succession Regulation, similarly, in 2013 the European Parliament adopted an amendment[33] aimed at aligning Art 58 with the terminology adopted in Regulation no 650/2012, and therefore the

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[29] Case C-102/98 *Ibrahim Kocak* v *Landesversicherungsanstalt Oberfranken und Mittelfranken*, [2000] ECR I-01287, paras 41-44; case C-17/97 *Barry Banks and others* v *Théâtre Royal de la Monnaie*, [2000] ECR I-02005.

[30] For a careful study of the obstacles to the circulation of notarial acts between France and Germany, see E. Jacoby, 'La circulation des actes notariés dans les relations franco-allemandes', in O. Cachard and L. Nau eds, *Europäisches Privatrecht in Vielfalt geeint - Droit privé européen: l'unité dans la diversité* (Berlin-Boston: Otto Schmidt-De Gruyter european law publishers, 2012), 101-117.

[31] Art 32 and Art 28 (same text): 'Recognition of authentic instruments. 1. Authentic instruments drawn up in a Member State shall be recognised in the other Member State, unless their validity is disputed in accordance with the applicable law, and provided such recognition is not contrary to public policy in the Member State addressed. 2. The recognition of authentic instruments confers on them evidentiary effects with regard to their contents and a presumption of validity.'

[32] Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decision in matters of matrimonial property regimes [2011] Brussels, 16.3.2011 COM(2011) 126 final 2011/0059 (CNS); Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decision regarding the property consequences of registered partnership [2011] Brussels, 16.3.2011 COM(2011) 126 final 2011/0060 (CNS).

[33] Amendment 98, European Parliament Legislative Resolution of 10 September 2013 on the proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decision in matters of matrimonial

term 'recognition' contained in the two draft Regulations was replaced with that of 'acceptance,' and its purpose has been limited to the circulation of the evidential effectiveness only. Thanks to Art 58, a European standard is therefore introduced on the basis of which the probative value of the instrument will be able to circulate in accordance with common rules: the discipline thus established represents a common and mandatory basis for the circulation of authentic instruments in the related matters.[34]

The lexical choice adopted by legislators, however, underpins a certain hierarchy of instruments intended for circulation:[35] the authentic instrument has less value than a decision, because it is based exclusively on the will expressed by the parties instead of a judicial reasoning carried out by a third and impartial judge to the outcome of an adversarial procedure.[36]

III. The extension of the evidentiary effects of the authentic instrument

The Article in question does not focus on the content of the authentic

property regimes 2011/0059(CNS); Amendment 100, European Parliament Legislative Resolution of 10 September 2013 on the proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decision regarding the property consequences of registered partnership 2011/0060 (CNS).

[34] S. Marino, n 1 above, 254. The debate, however, has not yet been settled, since there are still those who support the use of recognition also in the case of the circulation of authentic instrument, for example I. Somarakis, 'Article 59', in C. Pamboukis ed, *EU Succession Regulation n. 650/2012: a commentary* (Athens: Nomiki Bibliotiki; Munchen: C. H. Beck; Oxford: Hart, 2017), 534-535. 35 Case C-260/97 *Unibank A/S* v *Flemming G. Christensen*, [1999] ECR I-03715, especially the findings of the Advocate General La Pergola.

[36] This opinion is present in many commentaries: P. Wautelet, 'Article 58' n 3 above, 1213-1214; H. P. Mansel, 'Article 59' n 3 above, 629, and Id, 'Negotium und Instrumentum: zur Urkundenanerkennung und Urkunde Annahme im europäischen Kollisionsrecht', in B. Hess et al eds, *Europa als Rechts-und Lebensraum: Liber Amicorum für Christian Kholer zum 75. Geburtstag am 18, Juni 2018* (Bielefeld: Ernst und Werner Gieseking, 2018), 301-311; M. Farge, n 17 above, 418.

instrument, but on its specific aspect, the evidentiary effect.[37] In practice, the authentic instrument will be considered equipped with the same probative value attributed by the Member State of origin until they are challenged according to the procedures expressly provided for this purpose, in application of the so-called 'extension of effects'[38] mechanism.

The Regulations do not provide an explicit definition of the extent of the evidentiary effects (*force probante*, *Beweiskraft*, *valor probatorio*) of an authentic instrument; it is therefore necessary to refer to the national law of the Member State of origin of the instrument[39] to determine which elements of the instrument benefit from particular probative value. For these reason, Art 58 is the expression of a conflict-of-laws rule: it identifies the law according to which, in a Member State, the content and limits of the probative value of an authentic instrument are drawn up in a different Member State: such law is identified - as just said - in that of the home Member State.[40]

Although, as just clarified, the conflictual paradigm has sometimes been used to clarify the modalities of circulation of the evidential force

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[37] CNUE Study, C*omparative Study on Authentic Instruments national provisions of private law, circulation, mutual recognition and enforcement, possibile legislative initiative by the European Union, Study for European Parliament*, PE 408.329, 58-65, available at www.europarl.europa.eu (last visited 19 September 2021).

[38] For further information on this concept, see G. Cuniberti, 'Le fondement de l'effet de des jugements étrangers' 394 *Collected course of the Hague Academy of International Law*, 87-283 (2019).

[39] During the preparatory work for the Regulation (EU) no 650/2012 of the European Parliament and of the Council, the opposite solution was also envisaged: in a document prepared by the Presidency, it was proposed that the evidential value of an act should be determined on the bases of the law of the Member State of destination, on the understanding that this probative value could not have exceeded that attributed to the act in its State of origin. See Document no 13510/10 JUSTCIV 156 of 1 October 2010, Authentic instruments in matter of succession [2010], 16. 40 In the same terms, also in relation to the Art 59 of the Regulation (EU) no 650/2012 of the European Parliament and of the Council, J. Foyer, 'Reconnaissance, acceptation et exécution des jugements étrangers, des actes authentiques et des transactions judiciaires', in G. Khairallah and M. Revillard eds, *Droit européen des succession internationales: le règlement du 4 juillet 2012* (Paris: Defrénois, 2013), 161; H. P. Mansel, 'Article 59' n 3 above, 625, 627; P. Wautelet, 'Article 58' n 3 above, 750; C. Schmitz, n 16 above, 113-118.

of an authentic instrument,[41] it can be given to this Article a mere explanatory function.[42] While not reproducing verbatim the formula according to which no procedure is necessary to make use of the evidentiary effect of an authentic instrument, it is implicit that such circulation occurs automatically, without the intervention of any administrative or judicial authority. The practical effect deriving from Art 58 is that of an inversion of the burden of proof: a party can make use of the particular probative force of the authentic instrument attributed by the law of Member State of origin, if necessary it is up to the other party to contest the same, through the procedures laid down in the home Member State.

The verification of the probative effectiveness of the instrument in the Member State of origin may not be easy,[43] given that the extension of the probative value connected to authentic instruments can be subject to assessments rooted in the national traditions of the individual States. The European legislator takes these difficulties into account and, also in order to facilitate the task of the receiving authority, has borrowed from the Succession Regulation[44] the solution of using a standard form issued by the same authority that drafted the authentic instrument and that contains a clear reference of the evidentiary effects that the authentic instrument has in the Member State of origin. The scheme of suh forms is contained in Annex II of the two Implementing Regulations nos 2018/1935 and 2018/1990,[45]

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[41] For French law, *ex multis*, see G. Cuniberti et al, *Droit international de l'exécution. Recouvrement des créances civiles et commerciales* (Paris: LGDJ, 2011), 180-181. 42 P. Wautelet, 'Article 58' n 3 above, 1218.

[43] M. Farge, n 17 above, 420.

[44] See the recent study of P. Beaumont et al, *The evidentiary effects on authentic acts in the Member States of the European Union in the context of successions. Study for the JURI Committee*, European Parliament, 2016, PE 556.935.

[45] Commission Implementing Regulation (EU) 2018/1935 of 7 December 2018 establishing the forms referred to in Council Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2018] OJ L 314/14; Commission Implementing Regulation (EU) 2018/1990 of 11 December 2018 establishing the forms referred to in Council Regulation (EU) 2016/1104 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnership [2018] OJ L 320/1.

depending on whether they are married couples or registered unions. Although this is an alternative to the use of the authentic instrument only, since the use of the standard form is a mere possibility and not an obligation, it will probably constitute a useful tool and its presentation should facilitate the authority to assess the probative force of the instrument. The request will be forwarded, according to the circumstances, by each of the spouses or partners, or possibly by a third party who has a legitimate interest in proposing it. The authority responsible for issuing the form is the same authority that drew up the authentic instrument or, if circumstances provide, a substitute or successor; it does not seem possible to further delegate competence to another authority.

IV. Modulation of acceptance: the attribution to an authentic instrument of the 'most comparable effects'

The general rule therefore provides that Member States attribute to authentic instruments drawn up in a foreing State the same probative force that they regulate in the Member State of origin.[46] However, the same Article also provides a rule that allows the requested Member State to opt for the application of its own law instead of the law of the Member State of the origin of the act, granting the latter only the 'most comparable effects' with respect to those produced in the State of origin.[47]

This is a legislative solution that follows the mechanism for adapting real rights referred to in Art 29 of both Regulations: in both cases, in fact, the law of executing State must ascertain that the requested State will not be forced to change its attitude towards the probative efficacy of the act.[48] This possibility represents an alternative rule to be applied

[46] P. Franzina, n 5 above, 440.

[47] P. Pasqualis, 'Il problema della circolazione in Italia degli atti notarili provenienti dall'estero' *Rivista del notariato*, I, 588 (2002), which highlights the need to identify in the foreign authentic instrument some minimum elements that allow to establish its equivalence with another type of act provided for by the law of the requested State.

[48] P. Franzina, n 5 above, 440; P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate. Commento ai Regolamenti (UE) 24 giugno 2016, nn. 1103 e 1104 applicabili dal 29 gennaio 2019* (Milan: Giuffrè Francis Lefebvre, 2019), 307.

residually, subject to the negative completion of the attempt to respect the probative value determined by the law of the State of origin.[49] This mechanism of reference to the law of the requested State is applied primarily when the aforementioned State does not know the institution of the authentic instrument, or attributes effects which may be totally different from those recognized by the Member State of origin.[50] The lack of a corresponding equivalent[51] does not lead to the denial of any evidentiary effect of the authentic instrument, since it is up to the requested State to obtain a probative equivalent adequate to the value of the autenic instrument from abroad. Furthermore, the question arises whether this subsidiary rule is applicable only if the requested State does not know the concept of a public document at all:[52] such an interpretation appears too restrictive, since the rule can be applied even when the requested State recognizes the institution of the authentic instrument as provided for in the Member State of origin. The mechanism referred to Art 58 is not intended to automatically impose a limitation on foreign instruments, which could never produce greater effects than the local acts, even if such an interpretation has indeed been

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[49] On the subsidiary nature of the expression 'most comparable effects', M. Farge, n 17 above, 420, highlights that this residual rule is explained by '*le caractère parfois irréaliste de l'exportation de la force probante de l'acte authentique d'un Etat membre vers un autre Etat membre*'. This interpretation has already been supported on the subject of the Art 59 of the Regulation (EU) no 650/2012 of the European Parliament and of the Council by J. Fitchen, '"Recognition"' n 23 above, 356-357.

[50] This is the case, for example, in England and Sweden; see also the comparative CNUE Study, n 37 above, 103. This is also the case in Finland, where, according to the European Judicial Network, tasks of public notaries differ considerably from those of other European and US notaries.

[51] L. Calvo Caravaca and J. Carrascosa González, in Id eds, *Derecho internacional privado* (Madrid: Comares editorial, 2017), I, 645 underline the need for a '*equivalencia funcional*' between foreign and domestic act. On the same topic, eg Art 1, Institut de droit international, Substitution and Equivalence in Private International Law, Resolution 27 October 2007 no I, Santiago session, 1, available at www.idi-iil.org/en/ (last visited 19 September 2021).

[52] As suggested by J. Fitchen, '"Recognition"' n 23 above, 356.

supported by authoritative doctrine with regard to the same norm contained in the Succession Regulation.[53]
The thesis now examined would introduce a double limitation of the effects produced by an authentic instrument, deriving from both the law of the Member State of origin and that of executing State: however, it can hardly be reconciled with the text of Art 58, which indicates clearly that the possibility of producing the 'most comparable effects' constitutes an alternative to the general rule rather than a particular way of implementing it.
The rule referred to in Art 58 may, on the other hand, lead to attributing to a foreign authentic instrument more reduced effects than those that the same act would have in the country of origin, constituting a limit and an inevitable consequence of the lack of harmonization rules on the effects of authentic instruments. On the other hand, the probative value of an authentic instrument used in a foreign Member State will never be able to produce more extensive effects than those it may issue in the Member State of origin.[54]

V. Refusal of acceptance: a) the limit of public policy; b) the conflict between incompatible authentic instruments

Art 58 explicitly provides two limits for the circulation of the evidential effectiveness of the authentic instrument: the recourse to the public order exception; cases of challenge. It is a system to be

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[53] U. Simon and M. Buschbaum, 'Die neue Eu-Erbrechtsverordnung' *NJW, Neue Juristische Wochenschrift*, 2397 (2012) according to which the Art 59 of the Regulation (EU) no 650/2012 of the European Parliament and of the Council does not allow an authentic instrument originating from abroad to have a probative value which exceeds that enjoyed by local authentic instruments. Those authors recall the '*doppelbegrenzung der formellen Beweiskraft Wirkungen nach dem Recht des Ursprungs und des Zielmitgliedstaats*'. Similarly, M. Buschbaum, 'Die künftige Erbrechtsverordnung. Wegbereiter für den acquis im europäischen Kollisionsrecht', in H. P. Mansel et al eds, *Weitsicht in Versicherung und Wirtschaft - Gedächtnisschrift für Ulrich Müller Hubner* (Heidelberg: C.F. Muller, 2012), 603. On the contrary, the '*doppelbegrenzung*' was refused by C. Schmitz, n 16 above, 144-153.
[54] J. Kramberger Skerl, 'Acceptance and enforcement of authentic instruments and court settlements', in M.J. Cazorla Gonzáles et al eds, *Property relations of cross border couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2020), 146; D. Damascelli, *Diritto* n 8 above, 235.

interpreted strictly, in the sense that, in addition to the limits expressed, other means of opposition to public acts are not allowed (except for the hypothesis of incompatibility between public acts, see below).

a) A Member State may appeal to public policy to refuse the acquisition in its territory of the probative force resulting from a foreign authentic instrument.[55] Where an authentic instrument explains totally unacceptable effects in the legal system in which it is presented and its use involves a violation of the inalienable principle of he same legal system, its circulation can be prevented on the basis of the aforementioned limitation (for example, if the act is the result of corruption).[56]

Member States should make limited use of this exception. The Court of Justice has already reserved the possibility of assessing the way States have made use of the public order exception. The Court also clarified that States should take into consideration the particular context in which the circulation of documents takes place, to the point that only an explicit violation of public order is capable of legitimizing the refusal of the probative efficacy of the foreign instrument.[57] As in case of Succession Regulation, however, one may wonder what the practical usefulness[58] of the public order reserve may be, specifically when it refers to the acceptance of the particular evidentiary effect connected to the foreign authentic instrument. The probative value concerns only some aspects, such as the presence of parties at the signing of the instrument or the declaration made

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[55] P. Pasqualis, 'La circolazione' n 9 above, 186 considers that the clause is the one in use in the sector of private and procedural law.

[56] P. Franzina, n 5 above, 442.

[57] Case C-7/98 *Dieter Krombach* v *André Bamberski*, [2000] ECR I-01935, para 23.

[58] The removal of the reference to the principle of public order had already been urged by R. Cafari Panico, n 2 above, 219, as well as by P. Pasqualis, 'La circolazione' n 9 above, 186, who doubts the practical usefulness of the clauses in view of the progressive convergence of the legal system of the Member States. In the same sense, A. Dutta et al, 'Comments on the European Commission's Proposal for a Regulation of the European Parliament end of the Council on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Authentic Instruments in Matter of Succession and the Creation of a European Certificate of Succession' 74 *Rabel Journal of Comparative and International Private Law (RabelsZ)*, 671 (2010).

before the public official: in such cases it appears difficult that the requested State can avail itself of the public order exception. The content of the authentic instrument is not directly governed by Art 58, para 1, therefore in that case the use of public policy is not diriment;[59] furthermore, it does not even seem relevant to allow the use of the exception to monitor the correct fulfillment by the originating authority of the rights of defense or other procedural requirements.[60]
As it was correctly written, '*on a du mal à saisir la portée [de l'exception] dès lors que le contenu de l'acte authentique n'est pas en jeu. Ce qui a force probante, ce sont les constatations personnelles du notaire (identité des parties, date etc…) et l'on ne voit pas comment de telles constatations pourraient être contraires à l'ordre public.*'[61]
In a large study conducted on the circulation of authentic instruments under the Succession Regulation, it was found, following an analysis carried out on reports from experts of more than 25 Member States, the total absence of any use of exception to deprive foreign decisions in succession matters of this effect.[62] It is therefore legitimate to question the usefulness of maintaining such an exception.[63]
b) Lastly, it should be remembered that, in addition to public policy, another limit to the circulation of the probative value of a public document can be linked to the existence of two incompatible acts; although this is an infrequent hypothesis, it nevertheless needs a solution.

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[59] *Contra*, J. Foyer, n 40 above, 163, which seems to allow the content of the act to be taken into account in the similar situation regulated by the Art. 59 of the Regulation (EU) no 650/2012 of the European Parliament and of the Council.
[60] ibid 162; for judicial decisions, see case C-7/98, n 57 above.
[61] P. Callé, 'L'acceptation et l'exécution des actes authentiques' *Juris-Classeur périodique-La semaine juridique*, 1085 (2013). M. Farge, n 17 above, 421 considers that the scope of public order is '*difficile à saisir*.'
[62] P. Beaumont et al, n 44 above, 36. The study has textually underlined the 'overwhelming absence of any such reported use of domestic or international public policy as a means of depriving foreign decisions of their effect in matters of succession. If there were few examples of foreign decisions being successfully challenged via a public policy exception there were no reported examples at all of a foreign authentic instrument being so challenged.'
[63] P. Wautelet, 'Article 58' n 3 above, 1229.

Taking up the examples provided by illustrious doctrine[64] in succession matters, if the individual has drawn up two wills by public act to the authorities of two different States and these wills contradict each other, the conflict between the manifestations of will will concern the content of the acts (the *negotium*) but it will not concern their evidential effectiveness, and this contradiction must be resolved according to the *lex causae*. A similar solution will be applied, *mutatis mutandis*, in the case of marriage agreements or between partners, for example, if two spouses have entered into two patrimonial agreements containing conflicting provisions.[65] It is even more difficult to envisage a contradiction that directly concerns the aspects of authenticity: one could imagine the remote hypothesis of two public officials belonging to two different Member States declaring the presence of a subject at the same time.

The Recitals 63 of EU Regulation no 1103/2016 and 62 of EU Regulation no 1104/2016 - whose content is not reflected in the regulatory text[66] - provide that the authority to which two incompatible authentic instruments are presented, in the contest of the application of the Regulations, should assess which of the two instruments should be given priority, in the light of the circumstances of the specific case, which are not currently defined. This leaves a wide decisional power to the authority, which could give priority to the chronology[67] of events or, on the contrary, to the evolution of relations between the parties, or even prefer the authentic instrument drawn up according to the most complex procedure, having regard to the editorial methods of both.

If it is not clear from these circumstances which authentic instrument should be given priority, the question should be resolved by the judge having jurisdiction under the Regulations, whether the dispute directly concerns the matter of matrimonial regimes or property relations

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[64] J. Carrascosa González, n 16 above, 245.

[65] S. Marino, n 1 above, 256; P. Franzina, n 5 above, 444.

[66] P. Wautelet, 'Article 58' n 3 above, 1232: '*Les règlements ne consacrent pas de disposition spécifique à ces conflits. Un considérant évoque néanmoins des pistes de solution. On mesure la fragilité de ces pistes, puisqu'elles n'ont pas fait l'objet d'une consécration dans le corpes des règlements.*'

[67] M. Makowsky, n 11 above, 1232-1233 considers that the chronology of events is not a decisive criterion.

between registered partnerships. If the question is raised incidentally in the course of proceedings having a different object, it should be resolved incidentally by the court in which the main proceedings are held.
In the event of incompatibility between an authentic instrument and a decision, the aforementioned Recitals 63 propose a more precise solution, and invite to take into account the ground of non-recognition of decisions under this Regulation. The most relevant hypotheses are contained in letters c) and d) of Art 37, which respectively provide for the prevalence of the previous local decision and a rule or temporal priority, in the event of conflict between decisions issued by two States other than of the forum. Lastly, public order can also be used here, as a criterion both to be as the basis of the refusal to execute the sentence incompatible with an earlier authentic instrument, and to give priority to a local authentic instrument over a foreign judicial decision.

VI. The substantial effectiveness of the authentic instrument (the *negotium*)

One might wonder whether Art 58 constitutes the basis for the circulation of the substantive contents recorded in an authentic instrument. This idea had been put forward during the preparatory works, in Recitals 28 and 24 of the two Regulations and in the Art 32 which introduced a 'presumption of validity,' which may be rebutted only in the event of a contestation. A similar provision was proposed in the proposal for the Succession Regulation in Recital 26, with identical content.
But in the case of Regulation 650/2012 as well in the case of the Regulations in question, Arts 59 and 58 respectively do not allow any circulation of the authentic instrument: the circumscribed nature of the system based on the aforementioned Regulations can be deduced precisely from the fact that these Arts apply only to the evidentiary effects of the act, without extensions to the substantive contents. It is in fact necessary to maintain the distinction between two different aspects of the *instrumentum* and the *negotium*: the first is a 'container', the document where the declarations of the parties and other

informations are indicated; the second is the 'content', the substantive relationship that the document supports. The *negotium* does not benefit from the acceptance regime provided for by Art 58.[68] In confirmation of the aforementioned distinction, Recital 64 of Regulation 2016/1103 and Recital 63 of Regulation 2016/104 clarify that the acceptance of an authentic instrument relating to property regimes does not in any way imply the recognition of marriage or union registered subtended. The declarations made by the parties and transposed into the instrument are covered by the probative values, therefore their existence and relevance cannot be contested, because in many Member States, the particular probative force of an authentic instrument also extends to the declarations of parts contained therein. An authentic instrument can also produce, or contribute to produce, a series of substantial effects (so-called decisional effects/*effet decisionnel*[69]) such as the constitution, modification or extinction of the subjective legal situation (right or *status*). However, the content and the legal effects deriving from it do not depend on the acceptance or non-acceptance of the public act, and therefore do not fall within the provision of Art 58; conversely, they must be assessed on the basis of the law applicable under the Regulations.

Even if Art 58 does not guarantee the free circulation of the legal relationship contained in the instrument, it nevertheless provides the framework for this circulation.[70] In fact, it can be inferred from para 3 that the authentic instrument must comply with the law declared applicable by the Regulation, which constitutes the parameter of the validity check to which the competent jurisdiction will proceed. In other words, the provision referred to in Art 58, para 3 has the merit of clarifying the complete submission of the dispute relating to the

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[68] H. P. Mansel, 'Negotium' n 36 above, 305; P. Franzina, n 5 above, 438.

[69] For the concepts of '*effet décisionnel*' and '*effet de titre*' for an authentic instrument, see P. Callé, 'L'acte public' n 20 above, 243-245.

[70] P. Wautelet, 'Article 58' n 3 above, 1222: *'L'Article 58 n'as pas pour vocation de mettre en place un régime de circulation du negotium. Indirectement au moins, l'Article 58 dessine néanmoins les contours d'un tel régime'* and 1224: *'Avec ces précision, l'Article 58 dessine les prémices d'un régime européen de la circulation du negotium: (...) l'unification des règles de conflit de lois entre États membres liés par les Règlements permet d'envisager une circulation facilitée du negotium.'*

validity of the content of the instrument to the rules of jurisdiction provided for by the Regulations.[71]

VII. Challenges to the authenticity of authentic instrument

The procedures for challenging an authentic instrument are governed by paras 2 and 3 of Art 58 of Regulations 1103 e 1104 of 2016 respectively. These paragraphs deal with any challenges that may be made to an authentic instrument.

The fact that a public document has been 'recognised' does not mean that it cannot be challenged, either in its authenticated form or in its content. Here again, the example is given by judicial decisions, which can be recognised or challenged.[72]

A distinction is made between cases in which the authenticity of the authentic instrument is contested and those in which objections are raised to the content of the information recorded in it.[73] The distinction between the two types of objection is functional for the purpose of the indication by the Regulation of the competent court and the law it will have to apply for the resolution.[74]

Specifically, para 2 concerns the authenticity of the document and includes verification of its truthfulness, compliance with formal requirements and the powers of issuing authority, the date, the actual appearance of the person named in it and their identity and must be assessed by the courts of the issuing country, which will apply their domestic law.[75]

As recently reiterated by the Court of Justice: 'the "authenticity" of the authentic instrument should be an autonomous concept covering

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[71] As already suggested by G. A. L. Droz, *La compétence judiciaire et effets des jugements: dans le Marché commun: étude de la Convention de Bruxelles du 27 septembre 1968* (Paris: Dalloz, 1971), 127-128; P. Wautelet, ibid, 1223: '*Ce faisant, l'Article 58, paragraphe 3, confirme l'application de la méthode conflictuelle dès lors qu'est en cause une relation juridique et non un simple effet procédural comme la force probante*.'

[72] CNUE Study, *Le problème de la circulation des actes notaires*, PE 425.656, 20-22, available at www. europarl.europa.eu (last visited 19 September 2021).

[73] A. Davì and A. Zanobetti, 'Il nuovo diritto internazionale privato delle successioni nell'Unione europea' *Cuadernos de derecho transnacional,* 78 (2013).

[74] D. Damascelli, *Diritto* n 8 above, 132.

[75] C. Pamboukis, n 2 above, 193.

elements such the genuineness of the instruments, the formal prerequisites of the instrument, the powers of the authority drawing up the instrument and the procedure under which the instrument is drawn up. It should also cover the factual elements recorded in the authentic instrument by the authority concerned, such as the fact that the parties indicated appeared before that authority on the date indicated and they made the declarations indicated and that they made the declaration indicated. A party wishing to challenge the authenticity of an authentic instrument should do so before the competent court in the Member State of origin of authentic instrument under the law of that Member State."[76]

The second paragraph of Art 58 provides that in the event of a challenge as to authenticity of an authentic instrument, the challenge shall be brought before the courts of the Member State of origin and consequently decided in accordance with the law of the State. This mechanism confirms the principle, often emphasised by the Court of Justice, that legal situations legitimately arising in a Member State, according to the rules in force there, in the absence of European obligations providing otherwise, must be able to circulate freely in the European legal area.[77]

In this respect, in the area of succession, with reference to Regulation 650/2012, the need to identify in the contested foreign deed certain minimum elements that make it possible to establish its equivalence to a type of deed provided for by the law of the requested State has been stressed.[78] A part of the doctrine has also emphasised the need for functional equivalence between foreign and domestic acts.[79] Thus, this necessity stems from the fact that the contested authentic instrument has no evidentiary effect in other Member States as long as the challenge is pending.

Indeed, Recital 62 states that a contested authentic instrument should not have evidentiary effect in a Member State other than the Member

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[76] Case C-658/17 *WB* v *Notariusz Przemysława Bac*, Judgement of 23 May 2019, available at www.eur-lex.europa.eu (last visited 19 September 2021).

[77] Thus reiterated in case C-120/78 *Rewe-Zentral AG* v *Bundesmonopolverwaltung fur Branntwein*, [1979] ECR 00649.

[78] P. Pasqualis, 'Il problema' n 47 above, 588.

[79] A. L. Calvo Caravaca and J. Carrascosa Gonzàles, n 51 above, 645.

State of origin as long as the challenge is pending. If the challenge relates only to a specific matter concerning legal acts or legal relationships recorded in a Member State other than the Member State of origin with regard to the matter being challenged as long as the challenge is pending.

An authentic instrument which has been declared invalid as result of challenge should cease to produce any evidentiary effects.[80] In some jurisdictions, which give particular evidentiary force to the authentic instrument, there is a specific procedure for challenging its value.[81] For example, in France, Belgium and Italy, the procedure for filing a false claim is used to challenge the value of an authentic instrument, as the truthfulness of declarations made by the notary public is contested.[82] As regards the challenge as to the content of the document, it is not subject to a particular procedure and may take place before the competent court.

In other jurisdictions, the challenge of the special evidentiary value of the document may take place before the competent court according to ordinary rules.[83] The Regulation takes into account different rules depending on whether the challenge concerns the authenticity or the content of the document. 'In the first case, the Regulation is not intended to call into question the exclusive jurisdiction of the courts of the State of origin,'[84] as is the case cited by France, whose Court decided that a court does not have the power to annul a foreign act on the ground of fraud.

This is based on the fact that a public document enjoys a particular evidentiary value, which is based on a 'partial delegation of sovereignty' that cannot be questioned by a foreign judge.[85]

The court of the State of origin has exclusive jurisdiction to rule on the dispute, both as regards its content and its procedure. It follows

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[80] eg Recital 62 of Council Regulation (EU) 2016/1103.

[81] Comparative CNUE Study, n 37 above, 153.

[82] eg Art 221 Code de Procédure Civile in French law and Arts 895-906 Code de procédure civile in Belgian law.

[83] J. Fitchen, 'Authentic instruments' n 25 above, 57.

[84] Cour de Cassation civile 20 March 2001 no 99-12.150, available at www.legifrance.gouv.fr (last visited 19 September 2021).

[85] P. Callé, 'La circulation' n 14 above, 51-53.

that there may be divergences depending on the rules of the State before which the proceedings are brought.
As regards the 'paralysed' evidentiary effect of the document, it may not extend to the entire content of the document, but only affect the specific subject of the dispute. In the case of a provisional neutralization of evidentiary value of the document, the question may arise as to the fate of the court proceedings pending in a Member State other than the State of origin of the facts if the evidentiary condition is attached to certain parts of the document which are decisive for the outcome of the dispute.[86]
Art 58 does not mention the possibility of suspending the proceedings, but thus can be done prudently, compatibility with the procedural rules of the receiving State.

VIII. Challenges to the legal acts and legal relationships of authentic instrument

The challenge of an authentic instrument does not only concern its authenticity; Art 58, para 3 takes into account disputes relating to the content of authentic instrument, and in particular to transactions and legal relationships established in the context of matrimonial property regimes or registered partnerships. In this case, the object of the dispute is to question the transaction or legal relationship contained in an authentic instrument, such as a contract of property. This is the case, for example, of two spouses who have concluded the marriage agreements, with conflicting provisions; the question can only be governed according to the law applicable to the relationship in question.
The principle in question is different: the 'exclusive' jurisdiction of the courts of the Member State of origin is no longer applicable, and the court to which the dispute is to be addressed is identified by reference to the jurisdiction rules of the Regulations. The competent authority will in turn decide on the basis of the applicable law designated by the parties or by the Regulations.
Under para 3 the object of the challenge is not the authenticity of the authentic instrument but the validity of the relationships indicated, as

[86] P. Wautelet, 'Article 58' n 3 above, 1219.

if the instrument were a container of rights and obligations arising therefrom. In this specific case or Regulations 1103 and 1104 of 2016 the object could be, for example, the validity of a marriage contract in the light of the applicable law.[87] For this reason, the terms 'legal transaction' or 'legal relationships' recorded in an authentic instrument should be understood as referring to the content and substance in the authentic instrument.

Consequently, it is the courts that would decide on the dispute arising from that legal relationship. In this specific case, in fact, the object of the challenge is not linked to the peculiarities of the system in which the act was issued, but concerns a more general and at the same time more specific aspect linked to the content of the act.

This is also consistent with the distinction between *instrumentum* and *negotium*.[88] In the first case, i.e. where the object of the challenge is authenticity of the instrument, the law of the State of origin of the instrument applies; in the second case, on the other hand, the choice of jurisdiction is conditioned by the law governing the content of the instrument and hence the relationship.

A further difference para 2 above concerns the consequences for the evidentiary effect of the instrument. In the first case, an authentic instrument on which a challenge is made as to its authenticity tends to freeze the evidentiary force of the instrument entirely. In the second case, on the other hand, since it concerns the content of the act, the suspension of the probative force is limited to the points that are contested.

Recital 63 of Regulation 1103/2016 provides that the authority to which two incompatible public documents are submitted shall determine which of the two should be given priority. The assessment that the authority is required to make relates to the circumstances of the particular case. It should be borne in mind that 'where the incompatibility relates to the negotium, as in the case of conclusion of two marriage contracts with conflicting provisions, the matter cannot be dealt with other than in accordance with the *lex causa*.'[89]

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[87] P. Bruno, n 48 above, 297.

[88] P. Franzina, n 5 above, 449.

[89] S. Marino, n 1 above, 250-255.

Recitals 63 of Regulation 1103/2016, 62 of Regulation 1104/2016 and 66 of Regulation 650/2012 with the same wording, resolve the possible case of a conflict between two contradictory authentic instruments that may have been presented by the same Member State.
This hypothesis seems unlikely, although it cannot be ruled out that more than one public document may be issued, as the authorities may:

- Not be aware that authorities in other Member States have been requested to issue official acts concerning the same matter;
- In the absence of a judicial network that also involves notaries and public authorities, cooperation is more difficult;
- The instruments of lis pendens may not work between notaries.[90]

Taking an example from the succession field, where a person has made two wills with authorities in two different Member States, the conflict between the manifestations of wills must be resolved in accordance with the law applicable to the succession, the content of the act being taken into account.
The same example can be extended to marriage settlements or registered partnerships. Here too the control of the instrument will relate to its content and thus to the truthfulness of declaration made. The authority before which the two documents are presented will assess which one should be given priority, taking into account, of course, the specific case.[91]
If the allocation of priority is not clear, apart from the hypothesis of manifest falsity of the act, one instrument could be an investigation by the issuing authority. The criterion of attribution, although apparently in contradiction with the circulation of judgments, would at least make it possible to choose which instrument to give priority to without annulling the other which will not produce any transnational effect although validly constituted on the basis of the rules of the State of origin.[92]

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[90] P. Wautelet, 'Article 58' n 3 above, 1227.
[91] J. Carrascosa González, n 16 above, 425.
[92] S. Marino, n 1 above, 257.

A conflict could also arise between an authentic instrument and judgments, in which case the rules of recognition and enforcement of judgments would have to be applied, since it is necessary to understand whether the latter can produce effects in the requested State. As regards the regime of acceptance of authentic instruments and possible dispute, entries in land property registers and their effects are outside the scope of the Regulation.
According to Recital 18 of the Regulation on successions and Recital 27 of the Regulation on property regimes, it is for the law of the Member State in which the register is kept to determine the legal conditions. The Regulation does not provide a solution to this problem, but the Recitals do provide for flexibility on the part of authorities responsible for keeping the registers in accepting foreign authentic instruments.[93]
Quite apart from the interpretation given by the Court, the circulation of public documents and the principle of sincere cooperation require the authorities receiving the document to assess their content and accept the registrations requested if they meet the formal and substantive requirements for entry in the register.
In the light of the considerations set out above, as regards Art 58, para 3 it is desirable that Member States adopt a substantive rather than a formal approach to the assessment of objections.

IX. The incidental dispute

If the dispute occurs incidentally during a procedure concerning another main object (other than the property regimes between spouses or the property effect of a registered partnership), for the same hypothesis proposed in the same paragraph (dispute relating to agreements or legal relationship recorded in an authentic instrument), the court having jurisdiction is the same as that which deals with resolving the main dispute. This incidental ruling will produce effects limited to the proceeding in progress, in implementation of the

[93] Case C-218/16, n 6 above.

principle of sound administration of justice, in accordance with the provisions of Recitals 61 and 60 of the Regulations in question.[94]
On the other hand, asimilar extension of jurisdiction cannot be applied to the advantage of the court of the requested State if it is brought before it with a request relating to the enforceability of a foreign act; such a hypothetical extension of the subject of the dispute, allowing the judge to know the contestation of the merits of a foreign authentic instrument, would transform the *exequatur* procedure into a procedure for recognizing the transaction contained therein.[95]

[94] The text of the Recitals is as follows: 'If a question relating to the legal acts or legal relationships recorded in an authentic instrument is raised as an incidental question in proceedings before a court of a Member State, that court should have jurisdiction over that question.'

[95] P. Wautelet and P. Pasqualis, 'Articolo 59. Accettazione degli atti pubblici', in A. Bonomi and P. Wautelet eds, *Il regolamento europeo sulle successioni: commentario al Reg Ue 650/2012 in vigore dal 17 agosto 2015* (Milano: Giuffrè, 2015), 612; G. A. L. Droz, *La compétence* n 71 above, 129.

Article 59
Enforceability of authentic instruments

Francesca Ferretti

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. An authentic instrument which is enforceable in the Member State of origin shall be declared enforceable in another Member State on the application of any interested party in accordance with the procedure provided for in Articles 44 to 57.	(Same text)
2. For the purposes of point (b) of Article 45(3), the authority which established the authentic instrument shall, on the application of any interested party, issue an attestation using the form established in accordance with the advisory procedure referred to in Article 67(2).	
3. The court with which an appeal is lodged under Article 49 or Article 50 shall refuse or revoke a declaration of enforceability only if enforcement of the authentic instrument is manifestly contrary to public policy (ordre public) in the Member State of enforcement.	

Summary: I. Introductory remarks. – II. The application for issuing the declaration of enforceability. – III. The appeal against the declaration of enforceability. – IV. The effects of the declaration of enforceability. – V. The contestation of the content or authenticity of the authentic instrument.

I. Introductory remarks

Art 59 of both Regulations provides that, under certain conditions, an

authentic instrument issued in one Member State can also be declared enforceable in a different State. This provision has no innovative content, but takes up a rule already known and present in other and different European private International law Regulations, which also allow the circulation of intra-European enforceability of authentic instruments, to the point that the rules on the use of te authentic instrument as an enforceable title have been correctly considered part of the *acquis communautaire*.[1]

The changes made in the final version to the text proposed by the Commission in 2011,[2] originally envisaged in Arts 33 and 29,[3] were modest and were merely clarifications intended to make it easier to understand. The most significant change concerned the deletion of the reference to the *exequatur* procedure for judicial decisions contained in the Brussels I Regulation,[4] replaced by the reference to the internal

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[1] P. Pasqualis, *Il problema della circolazione degli atti notarili nello spazio giuridico europeo*, Nota per il Parlamento europeo, Direzione generale per le politiche interne, PE 425 656, [2010], 18.

[2] Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decision in matters of matrimonial property regimes [2011] Brussels, 16.3.2011 COM(2011) 126 final 2011/0059 (CNS); Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decision regarding the property consequences of registered partnership [2011] Brussels, 16.3.2011 COM(2011) 126 final 2011/0060 (CNS).

[3] ibid, respectively Arts 33 and 29: 'Enforceability of authentic instruments. Authentic instruments drawn up and enforceable in another Member State following the procedure set out in Articles [38 to 57] of Regulation (EC) no 44/2001. The court with which an appeal is lodged under Article [43 and 44] of Regulation (EC) no 44/2001 may refuse or revoke a declaration of enforceability only if enforcement of the instrument is manifestly contrary to public policy in the Member State addressed.'

[4] The content is the same as the Art 35 of the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of declaration and authentic instrument in matters of succession and on the creation of a European Certificate of Succession, [2009] Brussels, 14.10.2009 COM/2009/0154 final COD 2009/0157, on the basis of the authoritative consideration that '*il n'y a aucune raison que la procédure d'exequatur soit différente selon que l'acte authentique porte sur l'une ou l'autre matière*:' highlighting by P. Callé, 'La circulation des actes authentiques', in H. Bosse Platière et al eds, *L'avenir européen du droit des successions internationale*s (Paris: Lexis-Nexis, 2011), 46.

provisions of the Regulations relating to the procedure for enforcing judicial decisions (Arts from 44 to 57). Furthermore, while the initial proposal did not foresee the release of the module, this provision was then inserted in para 2 of the final version. Regulations do not provide for a system of automatic circulation of the enforceability of authentic instruments: the persistence of the obligation of prior obtaining a declaration of enforceability[5] remains an obstacle to the free circulation of the same, and we wonder about the reason for maintaining this additional requirement. Recitals 56 and 55 respectively of Regulations 1103 and 1104, with regard to decisions, indicate that the Regulations contain rules similar to those of other Union instruments in the field of judicial cooperation in civil matters, but this statement is not entirely satisfactory. In particular, the question arises as to why the automatic circulation of the enforceability of authentic instruments without the need for a prior declaration of enforceability is provided for in some instruments of European private International law[6] - among which the Brussels I*bis*

[5] Similar provision is contained in Art 60 of the Regulation (EU) no 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decision and acceptance and enforcement of authentic instrument in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L 201/107; in Arts 48 and 26 of the Council Regulation (EC) no 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decision and cooperation in matters relating to maintenance obligations [2009] OJ L 7/1; in Arts 28 and 46 of the the Regulation (EC) no 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matter of parental responsibility, repealing Regulation (EC) no 1347/2000 [2003], OJ L 338.
6 An automatic circulation system of the enforceability of authentic instruments is provided by the Art 25, para 2 of the Regulation (EC) no 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims [2004] OJ L 143/15 and in Art 65 para 2 of the Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility, and on international child abduction [2019] OJ L 178/1.

Regulation is to be included[7] - and excluded in these Regulations. At first glance, the persistence of this obstacle appears little justified, also because these Regulations have unified not only the rules on jurisdiction, but also these on the conflict of laws. If on the one hand it would be appropriate to opt for the complete removal of the obstacle constituted by the intermediate procedure,[8] there still seem to be solid reasons for maintaining it, without necessarily reaching the specific sector of family law here in question, the radical simplification

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[7] Regulation (EU) no 1215/2012 of 12 December 2012 on jurisdiction and the recognition and the enforcement of judgments in civil and commercial matters [2012] OJ L 351/1, Art 58: 'Authentic instruments and Court settlements. 1. An authentic instrument which is enforceable in the Member State of origin shall be enforceable in the other Member States without any declaration of enforceability being required. Enforcement of the authentic instrument may be refused only if such enforcement is manifestly contrary to public policy (*ordre public*) in the Member State addressed'. For further information about the *exequatur* procedure abolition in Regulation 1215/2012, albeit with regard to decisions and not to authentic instruments, see X.E. Kramer, 'Cross-Border Enforcement and the Brussels I-Bis Regulation: towards a new balance between mutual trust and national control over fundamental rights' 60 *Netherlands International Law Review*, 343 (2013); O. Lopes Pegna, 'Il regime di circolazione delle decisioni nel regolamento (UE) n. 1215/2012 (Bruxelles "Ibis")' *Rivista di diritto internazionale*, 1206 (2013); E. Gualco and G. Risso, 'Il riconoscimento e l'esecuzione delle decisioni giudiziarie nel regolamento Bruxelles Ibis' *Diritto del commercio internazionale*, 637 (2014); D. Schramm, 'Enforcement and the abolition of exequatur under the 2012 Brussels I Regulation', in VV. AA., *Yearbook of Private International Law Vol. XV - 2013-2014* (Berlin, Boston: Otto Schmidt/De Gruyter european law publishers, 2014), 143-147.

[8] P. Wautelet, 'Article 59. Force exécutoire des actes authentiques', in A. Bonomi and P. Wautelet eds, *Le droit européen des relations patrimoniales de couples: Commentaire des Règlements (UE) 2016/1103 et 2016/1104* (Brussels: Bruylant, 1st ed, 2021), 1239-1240. The same question is shared by M. Farge, 'Article 59', in S. Corneloup et al eds, *Le droit européen des régimes patrimoniaux des couples. Commentaire des règlements (UE) N. 2016/1103 et 2016/1104* (Paris: Société de législation comparée, 2018), 429. P. Callé makes a similar comment on the Regulation (EU) no 650/2012 of the European Parliament and of the Council: '*N'y a aucune raison que la procédure ne soit pas la même selon que l'acte authentique porte sur telle ou telle matière. Soit la procédure d'exequatur est nécessaire et il ne fallait pas la supprimer dans le Règlement successions. Le principe de confiance mutuelle, sur lequel repose la suppression de l'exequatur, serait-il moins fort en matière successorale que dans les autres matières de droit privé?* cf P. Calle, 'L'acceptation et l'exécution des actes authentiques in dossier Succession internationales: maîtriser le Règlement du 4 juillet 2012' *Juris-Classeur périodiques-La semaine juridique*, 1085 (2013).

of the system of circulation of instruments, as otherwise provided in civil and commercial matters.[9]

The mechanism contained in this Article produces effects in respect of authentic instruments falling within the definition referred in Art 3, para 1 letter c) and d) respectively; acts other than these will obviously not benefit from the application of the enforceability rules. Art 59 applies only to authentic instruments which are already enforceable in the Member State of origin;[10] if they have only declarative content, the norm is irrelevant to them. Furthermore, the instrument must have been drawn up in a State that took part in these Regulations, that are instruments of enhanced cooperation. In determining whether an act is enforceable, reference must be made to the rule of the issuing Member State; this will result in the exclusion of those States that do not know the concept of an executive public act, such as the Scandinavian countries,[11] or even Ireland or the United Kingdom.[12] As already pointed out by the doctrine on succession

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[9] S. Marino, *I rapporti patrimoniali nella famiglia nella cooperazione giudiziaria civile dell'Unione Europea* (Milan: Giuffrè Francis Lefebvre, 2019), 234-235: '*In primo luogo si tratta delle prime misure dell'Unione Europea in questi settori: pertanto, non è sembrato opportuno stabilire strumenti estremamente semplificati di cooperazione, alla luce dell'esperienza nell'applicazione delle relative disposizioni e nella necessità di costruire la mutua fiducia degli Stati membri in quelle materie (...). In secondo luogo, l'armonizzazione delle norme di conflitto è contestuale all'adozione della disciplina sulla circolazione delle decisioni (...). In terzo luogo gli Stati membri dimostrano una certa sensibilità in materie correlate al diritto di famiglia, che limita la possibilità di cooperazione*.' 10 Case C-555/18 *K.H.K v B.A.K.*, Judgement of 7 November 2019, para 45, available at www.eur-lex.europa.eu (last visited 19 September 2021).

[11] Case C-260/97 *Unibank A/S* v *Flemming G. Christensen*, [1999] ECR I-03715, paras 15 and 21, from which it seems to be inferred that Danish law has an enforceable title, the *Goeldsbrev,* that however does not constitute an authentic instrument. On the fact that there is no authentic instrument in Sweden, see the CNUE Study, C*omparative Study on Authentic Instruments national provisions of private law, circulation, mutual recognition and enforcement, possibile legislative initiative by the European Union, Study for European Parliament*, PE 408.329, 15-17. See also the recent study of P. Beaumont et al, *The evidentiary effects on authentic acts in the Member States of the European Union in the context of successions. Study for the JURI Committee*, European Parliament, 2016, PE 556.935, available at www. europarl.europa.eu (last visited 19 September 2021).

[12] About the absence of the authentic instrument in English common law, J. Fitchen, â€˜Authentic instruments and European Private International Law in Civil Law and

matters, at a comparative level there are few executive public acts.[13] The same can be said for matrimonial regimes and the property effects of registered partnerships:[14] the agreements that spouses and partners can conclude, both at the time of their union and during the course of the relationship, while certainly containing provisions that have a direct impact on the couple's financial situation, are not necessarily enforceable as such.[15] The execution of the aforementioned agreements often requires recourse to a specific procedure, in most cases of liquidation of the property regime; only the division agreement that puts an end to the post-liquidation community regime is in principle enforceable.

Art 59 aims to extend the eligibility for enforceability granted by a Member State of an authentic instrument to other Member States. One may wonder what is the relationship between the circulation of enforceability and the evidentiary effect of the authentic instrument. Arts 58 and 59 apply independently: for example, a dispute on the authenticity of the authentic instrument pursuant to Art 58 could provisionally deprive it of any probative value in another Member State, but will not affect the possibility of requesting a declaration of enforceability in that State.[16] On the other hand, the declaration of enforceability concerns only the enforceable nature of the act and does not, at the same time, determine that the evidentiary effect is also imposed in the requested Member State; the granting of a declaration of enforceability under Art 59 does not prevent the circulation of the probative value provided for in Art 58 from being called into question.

Commercial Matter: is now the time to break new ground?' 7 *Journal of Private international Law*, 33-34 (2011).

[13] These acts may include, for example, the *acte de partage successoral* in French legislation (that is the inheritance division carried out by a notary in case of presence of immovable property in the succession); H. P. Mansel, 'Article 60. Enforceability of Authentic Instruments', in A. L. Calvo Caravaca et al, *The Eu Succession Regulation. A commentary* (Cambridge: Cambridge University Press, 2016), 665.

[14] M. Farge, n 8 above, 430.

[15] P. Wautelet, n 8 above, 1237.

[16] J. Fitchen, "'Recognition", Acceptance and Enforcement of Authentic Instruments in the Succession Regulation' 8 *Journal of PrivateInternational Law*, 333-334 (2012).

Even if in both cases the public order parameter of the requested State may limit the effectiveness of the foreign act (*sub specie* of probative value or enforceability), the evaluation could vary, regarding different objects and effects.[17]

Art 59 does not necessarily require that the act be equipped, in the State of origin, with the enforceable formula, since its suitability to be valid as an enforceable title is sufficient; this determines that in the State where the formula is necessary, the act is in any case equipped with it. In accordance with the law of the State of origin, an authentic instrument can be *ex se* enforceable, without the need for additional requirements, or require the express mention of the enforceability requirement, following an express request made by the parties to that effect.[18] The law of the State of origin provides whether an authentic instrument is subject to enforceability to a limited extent, pecuniary or other obligations (for example, the obligation to deliver something certain and specific). Consistently, if an authentic instrument ceases to be enforceable in the Member State of origin, it will similarly cease to be enforceable in the Member State of execution notwithstanding the previous declaration of enforceability that may have already been made in the latter country.

Normally, enforceability is declared on the original documents. From the reading of Art 45, para 3 letter a) it would seem that authentic copies can also be declared enforceable if it is proven that the conditions required for their authenticity are satisfied. On this point, it may be useful to distinguish between administrative documents and notarial acts: the former are usually original documents, such as the entries registered in official registers; the originals of the notarial documents, on the other hand, are deposited in the notarial offices, where they are kept and are not normally intended for circulation as

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[17] P. Wautelet and P. Pasqualis, 'Articolo 60. Forza esecutiva degli atti pubblici', in A. Bonomi and P. Nautlt eds, *Il regolamento europeo sulle successioni: commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015* (Milan: Giuffrè, 2015), 619.

[18] P. Franzina, 'Article 59. Enforceability of authentic instruments', in I. Viarengo and P. Franzina eds, *The EU Regulation on the property regimes of international couples. A commentary* (Cheltenham: Edward Elgar, 2020), 448.

such; in the event that they are in any case put into circulation, the notary carries out an *en brevet* registration in this registers.[19]
The procedure for issuing the declaration of enforceability is characterized by a first phase without cross-examination, followed by a possible phase of contesting and verifying the declaration of enforceability and by a further phase, equally possible, of challenging the decision on the appeal.
In the first stage, the authority in charge of examining the application for a declaration of enforceability cannot take into consideration the possible conflict between the execution of the act and the public policy: Art 47, applicable *mutatis mutandis* to authentic instruments, provides that the authority in charge of examining the application for a declaration of enforceability cannot proceed with the examination of any reasons for the refusal under Art 37: the only verification allowed concerns the presence of all the documents required by the Regulation pursuant to Art 45, in addition of course to the verification whether it is a case in which the Regulation is applicable.
The procedure in this first phase does not provide for a contractionary phase.[20] Art 47 precludes the party against whom enforcement is initiated from submitting observation, so that the procedure is likely to be flexible and rapid.[21] From this consideration it follows that it is not necessary to invite this party to examine the application, as also confirmed by the provisions of Art 48, para 2, which on the other hand requires the communication or notification of the declaration of enforceability only, instead of the preliminary request to get it.

II. The application for issuing the declaration of enforceability

As already clarified, it will not be possible to rely on the enforceability of an authentic instrument from another State in a Member State

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[19] H. Dyson, *French Property and Inheritance Law. Principle and Practice* (Oxford: Oxford University Press, 2003), 31.

[20] On the unilateral nature of the procedure, see H. Gaudemet-Tallon and M.E. Ancel, *Compétence et exécution des jugements en Europe: matières civile et commerciale. Règlements 44/2001 et 1215/2012, Conventions de Bruxelles (1968) et de Lugano (1988 et 2007)* (Issy-les-Moulineaux: LGDJ, 6th ed, 2018), 667.

[21] M. Farge, n 8 above, 431, where it is expressed in terms of a '*contrôle purement formel*.'

unless after having initiated a procedure aimed at obtaining such enforceable.

The Regulations do not provide for a specific system for the circulation of the enforceability of authentic instruments: Art 59 generally refers to the procedure provided for judicial decisions (Arts from 44 to 57). The assimilation created by Regulations between authentic instruments and judicial decisions avoids the creation of a double parallel and redundant system for the granting of enforceability, creating a substantially uniform regime.[22] However, it is a framework procedure that needs to be completed in some points by the national legislation of the individual Member States.

In the absence of an express provision to the contrary, this regime also included the favourable rules recognized for judgments regarding the absence of guarantees, securities deposits, duties or taxes, referred to in Arts 56 and 57. The Member State requested, however, may require the payment of a fixed fee, the amount of which does not correspond to the value of the case (for example, a court fee or a right to register on a lump-sum roll). Total uniformity of discipline is to be viewed favourably from the perspective of the interaction of the Regulations on property relations in the family; it is the simple and effective result

hat relies on the success of the application of the Regulation no

[22] As regard the assimilation of decisions and authentic acts, read case C-260/97, n 11 above, para 14: 'It must be borne in mind at the outset that Article 50 of the Brussels Convention treats a 'document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Contracting State' in the same way, with regard to its enforceability in the other Contracting States, as judgements within the meaning of Article 25 of that Convention, in that it declares the provision on enforcement contained in Article 31 et seq. thereof also to be applicable to such documents. The purpose of those provisions is to achieve of the fundamental objectives of the Brussels Convention, which is to facilitate, to the greatest possible extent, the free movement of judgments by providing for a simple and rapid enforcement procedure;' eg also case 148/84 D*eutsche Genossenschaftsbank* v *SA Brasserie du pêcheur*, [1985] ECR 01981, para 16; case C-414/92 *Solo Kleinmotoren GmbH* v *Emilio Boch*, [1994] ECR I-02237, para 20.

44/2001,[23] which did not cause particular difficulties on this point. The application can be presented on the application of 'any interested party:' this expression refers to all the subjects involved in the property regime, both as beneficiaries and as injured parties, who could still decide to exercise their rights through the use of an authentic instrument. This could be applied in the event that a contract is concluded to extinguish the property regime in force between the spouses, assign property assets and provide for the rights and obligations of the spouses or partners, towards third parties. It should be also understood whether the request can only be submitted by one of the parties to the act or whether the legal standing is wider. For example, it is considered possible that the application may be presented by the creditor of one of the parties to the instruments, who may be of interest to it when the execution of the instrument could benefit his debtor's assets.[24] The development of a European approach is hoped for in order to determine in a harmonised and uniform manner whether and under what condition the creditor of the debtor bound in an authentic instrument can request the declaration of enforceability.

The application for the issuance of the declaration of enforceability must be submitted pursuant the Art 44, para 1 'to the court or competent authority of the Member State of enforcement.' It is up to the Member State to identify the authority competent to grant it and communicate this information to the Commission, in accordance with the provisions of Art 64, para 1 letter a); this information will be made available on the European Judicial Atlas in Civil Matters, through the E-Justice portal.[25]

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[23] In the repealed Council Regulation (EC) no 44/2001 of 22 December 2000 on jurisdiction and the recognition and the enforcement of judgments in civil and commercial matters [2001] OJ L 12, Art 57 para 1 about the enforceability of authentic instruments referred to the procedures provided by Art 38 for judicial decisions.

[24] eg *azione surrogatoria* in Italian law (Art 2900 Codice civile), or *action oblique* in France (Art 1341, para. 1 Code civil) and in Belgium legislation (Art 1066 Code civil).

[25] P. Franzina, n 18 above, 450, fn 15, with reference to the link https://e-justice.europa.eu (last visited 19 September 2021).

It is possible that some State (such as France,[26] in Art 509, paras 2 and 3 of the code de procédure civile) choose to distinguish authentic instruments from judicial decisions and to attribute the competence to issue the declaration of enforceability not to a judicial authority but to a different authority. Such a distinction is perfectly legitimate, as it is an expression of the principle of subsidiarity and of the maintenance of State sovereignty with regard to the organization of the authorities involved. Several countries have not opted for the aforementioned distinction, drawing instead the same authority for both types of the act.[27]

By virtue of the reference made to Art 44, para 2, territorial jurisdiction is determined on the basis of the domicile of the party against whom enforcement is sought, or on the basis of the place of enforcement. The domicile of a party is determined in accordance with Art 43, taking into account the domestic law of the Member State in which the person is presumed to be resident.

The application must be accompanied by some documents.

Art 45, para 3 letter a) requires the filing with the application of a 'copy of the decision:' in the case of the authentic instrument, the applicant must add a copy of the same act suitable to satisfy the necessary condition to guarantee the authenticity. For the hypotheses of an act signed by a notary, an authentic copy will be sufficient, while the attachment of an enforceable copy of the instrument will not be necessary, even if usually it is necessary to proceed with the execution in the Member State of origin.

The applicant must also, pursuant to Art 45, para 3 letter b), attach a declaration drawn up on the basis of a specific form, issued by the authority that received the authentic instrument, whose model is determined by Art 67, para 2; if the notary draws up the authentic

[26] France has provided that requests relating to authentic instruments and court settlements are brought before the *Tribunal de grande instance*, while the President of the *Chamber of Notaries* is competent for requests relating to notarial public documents.

[27] Belgium has designated the Family Court (and the Court of Appeal to appeal the first instance decisions) to decide such questions; Italy has designated the Court of Appeal and to rule on appeals, the Court of Cassation; for Germany, see Art 4 para 1 of the International Property Law Procedure Act, Internationales Guterrecthsverfahrengsgetz of 17 December 2018, eg 'intGuRVG.'

instrument, he himself will fill in the form referred to in Art 59, para 2. the competent authority will use the form contained in Annex II of Implementing Regulation (EU) 2018/1935[28] in the case of matrimonial property regime or the Implementing Regulation (EU) 2018/1990,[29] if the authentic instrument concerns the property regime of registered partnerships.
On the contrary what reports Art 58, para 2, the production of the certificate is compulsorily required by Art 59, para 2. However, Art 46, para 1 of the Regulation introduces a double exemption: the court seised, in the event of failure to produce the certificate, may alternatively set a deadline for its submission or directly exempt the appellant from this obligation, if he has sufficient information on the instrument in question from other sources.
In addition to the information required by Art 59, the form may contain further details on the enforceability of the authentic instrument, in order to allow a better assessment of its scope. The form is intended to provide information on any limitation to enforceability only for certain obligations, or on the interest of which they are due, as well as the expenses incurred for the recovery of the requested amounts. Art 46, para 2 expressly provides that a translation may be required for judicial decisions; this provision is also applied when the declaration of enforceability of a foreign authentic instrument is required. In fact, the discretion of the authorities of the Member States allows them to systematically require a translation of

[28] Commission Implementing Regulation (EU) 2018/1935 of 7 December 2018 establishing the forms referred to in Council Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2018] OJ L 314/14.

[29] Commission Implementing Regulation (EU) 2018/1990 of 11 December 2018 establishing the forms referred to in Council Regulation (EU) 2016/1104 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnership [2018] OJ L 320/1.

documents drawn up in a foreign language.[30]
Pursuant to Art 61, authentic instruments benefit from the abolition of the legalization procedures and similar formalities;[31] the use of an authentic instrument cannot therefore be subject to the condition that it should be covered by a legalization or an apostille or other similar formality. Further provisions exempt the agent from the possession of certain requisites, generally requested: for example, Art 45, para 2 provides that the applicant is not required to have a postal address or an authorized representative in the executing State.
Beyond these elements, each Member State retains the freedom to determine how and according to what rules an application for obtaining the declaration of enforceability must be submitted. Art 45, para 1 confirms that 'the application procedure shall be governed by the law of the Member State of enforcement;' it will therefore be up to each State to determine, for example, the need for the defence ministry for the presentation of the application and the language required for carrying out the procedure.[32]

III. The appeal against the declaration of enforceability

The declaration of enforceability can be challenged, in accordance with what has already been said about Arts 49 and 50. The right to appeal does not distinguish between the parties involved, since the right is attributed to 'either party.' An appeal against the decision of the requested authority by the applicant can therefore also be envisaged if the declaration of enforceability has been denied to him: this eventuality, however, will rarely occur, given the limited scope for

[30] For example, in Italy, Art 33 of the Decreto del Presidente della Repubblica 28 December 2000 no 445 provides that '*deve essere allegata una traduzione in lingua italiana certificata conforme al testo straniero da parte della competente rappresentanza diplomatica o consolare, ovvero da un traduttore ufficiale*' to documents drawn up by the foreign authorities and written in a foreign language, before being used in Italy.
[31] P. Wautelet and P. Pasqualis, n 17 above, 620.
[32] Art 2, para 2 of the Dutch law accompanying the two Regulations (Law 11 July 2018) does not require the ministry of a lawyer for the request for the issue of enforceability; similarly, the German law ('intGuRVG') does not require it exclusively for the first degree.

action enjoyed by the authority in charge of deciding on the release of the declaration of enforceability.

The examination of the appeal will be based on the rules governing the cross-examination phase (Art 49, para 3). Unlike the application for a declaration of enforceability, which can be filed before a judicial authority or another competent authority (Art 44, para 1), the appeal against this decision must be examined exclusively by the judicial authorities (Art 49, para 2), designated by the Member State pursuant to Art 64. The need to assign this task exclusively to a judicial authority depends on the change in control carried out on the public document, which is no longer merely formal as the time of the request for the release of the declaration, but it concerns the question of the possible violation of public policy.[33] Most Member States have assigned the task of deciding about the appeal of an authority other than the one competent to rule on the requests aimed at obtaining the declaration of enforceability of the authentic instrument.

For the actual conduct of the appeal, the Regulations still refer to the procedure established for judicial decisions, in particular Arts 49 and 50. Art 49, para 5 sets the time limit of 30 days for the appeal as a general rule, extended to 60 days if the party against whom enforcement is required is domiciled in another Member State. Para 4 provides for a precautionary measure to protect the party against whom the declaration of enforceability is requested: if the defendant does not appear, the court is required to ascertain the methods of communicating the application of the judgment pursuant to Art 16. This additional protection has a broad subjective spectrum and applies indifferently whether the defendant is domiciled in a Member State bound by Regulations or in a third State: consequently, all defendants benefit from this protection, regardless of their residence.[34]

The object of examination by the judge in the appeal is limited: unlike judgements, for which Art 37 of the Regulation provides for various reasons for refusal, the declaration of enforceability can be rejected

[33] P. Wautelet, n 8 above, 1244-1246.

[34] ibid 1248.

only if the execution of the foreign authentic instrument contravenes public policy.[35]

In this way authentic instruments benefit, as in the case of other European Regulations, from a preferential treatment with respect to sentences and a privileged circulation regime.[36] Furthermore, in the application practice, this ground of appeal has rarely been used;[37] it follows that the enforceability of an authentic instrument is almost automatic and tends to be stable. Part of the doctrine, on the other hand, invites not to overestimate the difference between the two appeal regimes, since the grounds for refusal referred to in Art 37 not envisaged for authentic instruments are physiologically relevant only for judicial decisions, therefore they would not be of any relevance as far as to the circulation regime of other instruments.[38]

It is implicit that, in addition to verifying compliance with public policy, the judge may verify compliance with the condition of application referred to Art 59, including the qualification of the act as an authentic instrument pursuant to the Regulation and its enforceability in the Member State of origin.

The limit of public policy should in any case always be interpreted in the same - restrictive - sense about the recognition and execution of

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[35] J. Kramberger Skerl, 'Enforcement of Authentic Instrument and of Court Settlements', in M.J. Cazorla Gonzáles et al eds, *Property relations of cross border couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2020), 146.

36 S. Marino, n 9 above, 258-259.

[37] Oberlandesgericht Saarbrücken 6 July 1998 no 160, *IPRax Praxis des Internationalen Privat- und Verfhrensrecht*, 238-241 (2001), relating to a case of a non contrariety to

public order; Rechtbank Roermonnd 27 August 2008 no 310, *Nederlands Internationaal Privaatrecht*, 575-573 (2008), dealing a case of incompatibility in content between two authentic instruments (specifically, two sale and purchase contracts with the same immovable property site in Germany); eg also J. Fitchen, 'Authentic instruments' n 12 above, 73-75 and id, 'Public Policy in Succession Authentic Instruments: Articles 59 e 60 of the European Succession Regulation' *InDret Revista para el Análisis del Derecho*, 366-396 (2017).

[38] P. Wautelet, n 8 above, 1246: '*En effet, les motifs de refus de l'Article 37 qui ne sont pas repris pour les actes authentiques sont typiques de la circulations des décisions judiciaires. Il s'agit notamment de la question de l'inconciliabilité des décisions et du respect des droits de la défense lors de l'introduction de l'instance. De tels motifs n'ont que peu de pertinence lorsqu'est en jeu la circulation d'un acte authentique.*'

sentences.[39] Furthermore, although it is accepted that the requested State maintains control over its public policy, it will ultimately be up to the Court of Justice to verify the conformity of the national choice with the European spirit.[40] On this point, the Court clarified that recourse to public policy is adequate only if the execution of the foreign sentence is in conflict with the legal system of the requested State, infringing a fundamental principle;[41] recourse to this criterion must therefore remain exceptional. In legal literature it has also been argued that the public policy that can be opposed to the execution of a foreign instrument is to be understood in a substantive and non-procedural sense, since the latter is not conceivable for authentic instruments.[42]

The requested authority must therefore assess whether the execution of the authentic instrument is contrary to public policy, and therefore must pay attention not to the content of the instrument, but to the effects of its enforceability in the forum of the requested State. When forced execution is requested for an instrument based on an obligation (payment of a certain amount of money; performance obligation), the control must not concern the cause of the obligation as much as the consequences of its enforceability. There may be cases in which the judge of enforcement is also interested in the content of the foreing authentic instrument, given that the Regulation does not expressly prohibit, in the case of authentic instruments, a review as to substance.

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39 In the only judgement of the Court of Justice on executive authentic instrument under the application of Council Regulation (EC) no 44/2001, the act was considered as a judicial decision: case 148/84, n 22 above; in doctrine, see J. Fitchen, 'Authentic Instruments' n 12 above, 70-71.

40 Within the scope of Regulation (EU) no 1215/2012 of the European Parliament and of the Council see: case C-7/98 *Dieter Krombach* v *André Bamberski*, [2000] ECR I-01935, para 22; case C-38/98 *Régie nationale des usines Renault SA* v *Maxicar SpA and Orazio Formento*, [2000] ECR I-02973, para 27; case C-40/07 *Meletis Apostolides* v *David Charles Orams et Linda Elizabeth Orams*, [2009] ECR I-03571, paras 56 and 57.

41 Case C-7/98, ibid para 37.

42 J. Fitchen, 'Authentic Instruments' n 12 above, 77; in the same sense, G. de Leval, 'Reconnaissance et exécution de l'acte notarié dans l'espace judiciaire européen', in C. Biquet-Mathieu et al eds, *Liber Amicorum Paul Delnoy* (Bruxelles: Larcier, 2005), 666.

[43] On the other hand, there are those who have considered the provisions of Art 40 - relating only to decisions - susceptible of generalized application, capable of preventing the control of compliance with the rules on conflict of laws also towards the authority that issued the authentic instrument: according to the thesis in question, a control having this object would constitute an unacceptable review as to the substance.[44]

The judge of the requested State cannot modify the content of the act, but can nevertheless take it into account when assessing the compliance of the execution with public policy; in fact, the hypothesis could arise that the content of an authentic instrument is such as to justify the use of the limit of public policy to deny forced execution. Doctrine also envisages the distinction between opposition to public policy dependent on the execution itself, and that deriving from the legal relationships contained in the foreign authentic instrument: this last element could exceptionally be placed at the basis of the refusal to grant the declaration of enforceability.[45]

Finally, it should be remembered that the validity of the content is not a condition for the granting of enforceability, and that the general rule relating to respect for public policy cannot be used to assess the competence of the authority that originally placed the instrument, because the examination of indirect jurisdiction is denied.[46] In fact, not only the question of internal jurisdiction does not have, with regard to authentic instruments, the same relevance as it does for judicial decisions, but also in application of Art 39, para 1, which prohibits any review of jurisdiction of the court of the Member State of origin.

IV. The effects of the declaration of enforceability

Once the declaration of enforceability has been issued, the authentic

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[43] Similar to the provision of Art 57 of the Council Regulation (EC) no 44/2001 for the authentic instrument falling within it; see J. Fitchen, "'Recognition'" n 16 above, 71.

[44] P. Wautelet, n 8 above, 1247.

[45] J. Fitchen, 'Authentic instruments' n 12 above, 76-81.

[46] Similar to the Council Regulation (EC) no 44/2001; see on the point, L. Vekas, 'Art 57', in U. Magnus and P. Mankowski eds, *Brussels I Regulation* (Munich: Sellier, 2nd ed, 2012), 685; G. de Leval, n 42 above, 666.

instrument enjoys in the requested State the same enforceable as it enjoys under the law of its State of origin; it will be necessary to refer to this second legal system in order to determine the executive effect deriving from it. Once such enforceability has been granted, effective enforcement will instead proceed according to the general rules laid down in the requested Member State.

Since Art 9 speaks of 'declaration,' it is deduced that the granting of such enforceability has no constitutive effect:[47] once this declaration has been obtained, the instrument is considered enforceable from origin. The granting of the declaration of enforceability does not interfere with the validity of the legal acts and legal relationships contained in the authentic instrument, since the Article in question concerns only the circulation of a particular effect referring to the public act, that is its enforceable. The requested State must submit only to this limited effect when the declaration is made, while the release of the declaration of enforceability does not affect the legal acts or relationships contained in the authentic instrument. A contestation of the content of the instrument may be raised before the competent judicial authorities according to the Art 58, para 3 of Regulations; it will be the law of the requested Member State that determines whether the enforceability of the authentic instrument must be suspended due to the existence of a dispute relating to its content.

Once the authentic instrument has been the object of a declaration of enforceability it also constitutes the right to proceed with precautionary measures, as expressly provided for in Art 53, para 2. It is more difficult to establish whether the authentic instrument can form the basis for the issuance of provisional and precautionary measures even before the aforementioned declaration is issued. This hypothesis can be put into practice with regard to judicial decisions, by virtue of the provision of Art 53, para 1, which expressly excludes the need for a declaration of enforceability. In the different case of authentic instruments, it is believed that such a possibility is precluded,[48] although the opposite solution has also been treated in the doctrine.[49]

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[47] ibid 664.

[48] P. Wautelet and P. Pasqualis, n 17 above, 624.

[49] G. de Leval, n 42 above, 667-668, about the Art 47, para 1 of the Council

In fact, Art 53, para 1 offers the possibility of applying precautionary measures to the recognition of a foreing sentence, while the Regulation has firmly rejected the extension of this concept to authentic instrument, preferring to apply to them the different and narrower category of acceptance; moreover the solution referred to in Art 53, para 1 is not based on the enforceability of the decision, but on its binding force or on the authority of *res iudicata*, of while the authentic instrument does not.

The question then arises whether the declaration of enforceability granted to a foreing authentic instrument can allow its use for the purposes of transcription or registration in public registers; also in this case the answer seems to be negative. The suitability of the instrument to be transcribed or registered in a public register cannot be reduced to the aptitude of an act to be enforceable, not even for its probative values, as defined by the Regulation. What is relevant for inclusion in a public register is the function of the authentic instrument as a title capable of being written in that register, but this aspect is not included in the Art 59. Furthermore, instruments relating to immovable property and rights *in rem* are connected to strict regulatory requirements over which each individual State intends to maintain control.[50] Although the European legislator wished that 'in order to avoid duplication of documents, the registration authorities should accept such document, drawn up in another Member State by the competent authorities the circulation of which is provided for by this Regulation' (Recital 27), the declaration of enforceability does not appear to allow the use of a foreign authentic instrument as a basis for updating land registers.[51]

Regulation (EC) no 44/2001. The same opinion is shared by P. Franzina, n 18 above, 450: 'It is contended that interim relief may in fact be sought pursuant to Art 53 *either before* a declaration of enforceability is issued or after that time, including where appropriate, pending an appeal on the enforceability of the instrument.'

[50] P. Pasqualis, n 1 above, 16-17.

[51] See also the European Parliament Resolution of 18 December 2008 with recommendation to the Commission on the European Authentic Act [2010] OJ

V. The contestation of the content or authenticity of the authentic instrument

An instrument can also be challenged with regard to its content, and in this first case the dispute is connected to the transaction (legal act or legal relationship) that the document contains; it is also possible that a dispute may also regard its authenticity. Unlike Art 58, Art 59 does not provide for these two cases of appeal or the consequences that may have on the issuance of the declaration of enforceability. With regard to the profile of the dispute on the substantive validity, it may be asked whether the judge of the requested Member State, having an appeal against a decision granting the enforceability of a authentic instrument, can also rule on the content of the instrument, coming to express a judgment in terms of nullity. Such an extension of the powers of the Court cannot be accepted, because it does not respect the rules of jurisdiction imposed by the Regulation.[52]

C 45 E/60: expressing the wish that authentic instruments could be recognised and enforced in all Member States, the Commission suggested that documents relating to immovable property and which must or may be subject to entry or mention in a public register should be excluded (point 4) for the reason that 'differences in the structure and organisation of public registry system in the field of immovable property (...) has to be excluded from a future Community instrument, given the close correlation between the method of drawing up an authentic act and entry in the public register (Recital N).'

[52] In the same sense, already about the Art 50 of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version) [1998] OJ C 27, P. Gothot and D. Holleaux, *La Convention de Bruxelles du 2 septembre 1968: compétence judiciaire et effets des jugements dans la CEE* (Paris: Jupiter, 1985), 211; P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate. Commento ai Regolamenti (UE) 24 giugno 2016, n 1103 e 1104 applicabili dal 29 gennaio 2019* (Milan: Giuffrè Francis Lefebvre, 2019), 311; with regard to the same rule contained in the Regulation (EU) no 650/2012 of the European Parliament and of the Council, see P. Wautelet and P. Pasqualis, n 17 above, 625.

A possibile interpretative solution would consist in applying of Art 58, paras 2 and 3 - although verbatim formulate for the different and sole hypothesis of acceptance of authentic instrument - to all the hypotheses of contesting respectively the authenticity or the content of the document, as well as during the procedure for issuing the declaration of enforceability. When the dispute concerns the authenticity of the document, the solution cannot be referred to the court of the requested Member State, but must remain an exclusive competence of the judicial authority of the Member State of origin pursuant to Art 58, para 2. Instead, the provision referred to in para 3 below requires compliance with the general rules on jurisdiction whenever a dispute arises about the content of the authentic instrument (negotiations and legal relationships contained therein), even during the execution phase.[53] Secondly, one wonders how a dispute regarding the content or authenticity of an authentic instrument can affect the issuance of the declaration of enforceability, in the sense that the requested authority should suspend the procedure or refuse the issuance of the declaration. With regard to the same problem in the Eu Succession Regulation, the Commission's initial proposal provided that the requested authority could refuse or revoke the declaration of enforceability 'if contestation of the validity of the instrument is pending before a court of the home Member State of the authentic instrument.'[54] The deletion of this proposal indirectly indicates that the requested Member State cannot rely on the presence of a dispute on the validity or authenticity of the act to refuse or revoke the

[53] Solution proposed by P. Wautelet and P. Pasqualis, ibid 626.

[54] Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of declaration and authentic instrument in matters of succession and on the creation of a European Certificate of Succession, final COD 2009/0157, Art 35: 'Enforceability of authentic instruments. (...) The Court with which an appeal is lodged in accordance with Articles 43 and 44 of this Regulation shall refuse or revoke a declaration of the enforceability only (...) if contestation of the validity of the instrument is pending before a court of the home Member State of the authentic instrument.'

declaration of enforceability,[55] and indeed the possible presence of such a dispute should not prevent the judge from granting enforceability to the authentic instrument in any case.[56] Moreover, this possibility has not be re-propose for these Regulations, not even in the Commission initial proposals.

If on the one hand, the existence of a dispute on the authentic instrument does not deprive it *ipso facto* of its enforceable nature, problems could arise later during the phase of the actual execution of the act itself. In other words, once the declaration of enforceability has been obtained, the judge in charge of execution could take into account the existence of a dispute on the validity of the act to suspend its execution, according to the rule of his national law. As has been pointed out by legal doctrine, in fact, there is a certain instability about the act, the validity of which can be contested even in the presence of the granting of *exequatur*, through the experiment of nullity action.[57] Art 52 provides that if a judicial decision is subject to appeal in the Member State of origin and such appeal has the effect of suspending its enforceability, the foreign judge seised through an appeal against the declaration of enforceability, must stay the proceedings: this rule is usually applicable also to authentic instruments through the reference made by Art 59 to the procedure needed for decisions.[58] From a lexical point of view[59] however, it should be noted that Art 52 requires an 'appeal' against the decision in question, similarly to Art 57 of Brussels I Regulation. However, an authentic instrument is not normally subject to 'appeal' (*recour; rechtsbehelf; recurso; rechtsmittel*),

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[55] D. Damascelli, 'La "circulation" au sein de l'espace judiciaire européen des actes authentiques en matière successorale' *Revue critique de droit international privé*, 425 (2013).

[56] In the same sense, already about the Art 50 of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, see P. Gothot and D. Holleaux, n 52 above, 210.

[57] G. de Leval, n 42 above, 627.

[58] P. Wautelet and P. Pasqualis, n 17 above, 627.

[59] On the terminological difficulties caused by the extension to authentic instruments of the provision relating to judicial decisions, J. Fitchen, "'Recognition"', n 16 above, 333 and Id, 'Authentic instruments' n 12 above, 66-69. However, this is not a new problem, as can already be seen in G.A.L. Droz, *La compétence judiciaire et effets des jugements: dans le Marché commun: étude de la Convention de Bruxelles du 27 septembre 1968* (Paris: Dalloz, 1971), 621.

asserting the disputes on the validity of the act throughout the different procedural instrument of the nullity action. It therefore seems correct to believe that Art 52, with reference to authentic instrument, should be read not as a reference to an appeal or other means of redress, but as a challenge on the legal content of the instrument; in any case it will be necessary to verify whether the contestation has the effect of suspending the enforceability of the act in the Member State of origin.[60]

[60] In French legislation, see Art 1319, para 2 Code Civil: '*Néanmoins, en cas de plaintes en faux principal, l'exécution de l'acte argué de faux sera suspendue par la mise en accusation; et, en cas d'inscription de faux faite incidemment, les tribunaux pourront, suivant les circonstances, suspendre provisoirement l'exécution de l'acte.*' In Italy, see Art 313 Codice di Procedura Civile: '*Se è proposta querela di falso, il giudice di pace, quando ritiene il documento impugnato rilevante per la decisione, sospende il giudizio e rimette le parti davanti al tribunale per il relativo procedimento. può anche disporre a norma dell'art. 225 secondo comma.*'

Article 60
Enforceability of court settlements

Ciro Ascione

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. Court settlements which are enforceable in the Member State of origin shall be declared enforceable in another Member State on the application of any interested party in accordance with the procedure provided for in Articles 44 to 57.	(Same text)
2. For the purposes of point (b) of Article 45(3), the court which approved the settlement or before which it was concluded shall, on the application of any interested party, issue an attestation using the form established in accordance with the advisory procedure referred to in Article 67(2).	
3. The court with which an appeal is lodged under Article 49 or 50 shall refuse or revoke a declaration of enforce ability only if enforcement of the court settlement is manifestly contrary to public policy (ordre public) in the Member State of enforcement.	

Summary: I. The policy. – II. Public Policy Doctrine.

I. The Policy

Both Regulations of Art 60 govern the enforceability of court settlements, making reference to the rules relevant to the enforceability of court rulings. Taking into consideration the diverse systems for processing patrimony among Member States, these

Regulations ensure the approval and precise enforcement of public instruments and court settlements, in all Member States.
The policy in question is indicated in Arts 58 to 60, according to which: Art 58 of both Regulations governs the acceptance of public instruments which, unless opposed by the public policy doctrine, have the same probative efficacy in all Member States, with comparable effects; the enforceability of public instruments (Art 59) and of court settlements (Art 60) is in keeping with the required decision-making procedure.
Briefly, the simplified recognition regime – which until now applied to court rulings only – is extended to the evidential efficacy of public instruments stipulated before notaries in a Member State. As stated, on the procedural level, the provisions of court rulings and public instruments[1] apply, and must be referred to.
It can therefore be argued that the Regulations in question do not represent an instance of legal innovation, but rather the consolidation of a definitive and implementational process, already initiated by the European Union with regards to court settlements.[2]
On this matter, suffice it to take note of Regulation 2004/805/EC, which establishes the European Enforcement Order, which in Art 3, alongside 'court rulings,' also makes reference to 'court settlements', namely those that have been 'approved by the judge, or concluded before the judge during a judicial proceeding, and having enforceable

[1] Regarding the definition of 'public acts,' already in the Regulation on the European enforcement order (2004/805) they are included among the acts suitable to become such - according to the definition assumed by Art 4, para 3 - 'any document that has been formally drawn up or registered as a public document and whose authenticity: i) concerns the signature and content and ii) has been ascertained by a public authority or by another authority authorized to do so by the Member State of origin or any agreement on maintenance obligations concluded before the administrative authorities or authenticated by them.'

[2] In this regard, cf S. Marino, 'Strengthening the european civil judicial cooperation: the patrimonial effects of family relationships' *Cuadernos Derecho Transnacional*, 265, 274 (2017): 'For many aspects, the new regulations take advantage of the well-established experience in the EU civil judicial cooperation. Some solutions envisaged are nowadays classic.'

effect in the Member State in which they were approved or concluded."[3]

To be eligible as a European Enforcement Order, the settlement can either be issued or pending further processing - such as eg in the Italian legal system, pursuant to Arts 185 and 420 of the Codice di procedura civile, or following out-of-court agreements subsequently approved by the judge, such as (again in the Italian system) those pursuant to Arts 411 and 696 of the Codice di procedura civile.[4] It remains to be highlighted that 'the implementation of the enhanced cooperation within the civil judicial cooperation is subject to many critics. The most controversial issue is due to the fact that such a method may preserve the fragmentation of the EU legal area, instead of unifying and approaching the national legal systems'[5] and that 'These Regulations represent the second implementation of an enhanced cooperation in civil judicial cooperation affecting family law, after the Regulation no 2010/1259.'[6] 'On the opposite, civil and commercial law do not seem to rise difficulties in the approval of different regulation, even when establishing uniform rules of civil procedure' and 'The most meaningful example is the Regulation (EU) 2014/655 of the European Parliament and of the Council, of 15 May

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[3] Definition also in Art 3, para 1, letr h) Regulation UE 2012/650, in Art 2 of the Regulation UE 2009/4 and in Art 2 letter b) Regulation UE 2012/1215.

[4] A. Carratta, 'Titolo Esecutivo Europeo' *Enciclopedia Giuridica* (Rome: Treccani, 2007), XXI,1147,1154 which also recalls P. De Cesari, 'Atti pubblici e transazioni certificabili quali titoli esecutivi europei' *Foro italiano*, 229, 231 (2006); M. Farina, 'Il titolo esecutivo europeo per i crediti non contestati (Regolamento CE n 805/2004)' *Nuove leggi civili commentate,* 3, 55 (2005).

[5] I. Ottaviano, 'La prima cooperazione rafforzata dell'Unione europea: una disciplina comune in materia di legge applicabile a separazioni e divorzi transnazionali' *Diritto dell'Unione europea,* 113, 115 (2011); F. Pocar, 'Brevi note sulle cooperazioni rafforzate e il diritto internazionale privato' *Rivista di diritto internazionale privato e processuale,* 297, 301 (2011); O. Feraci, 'Sul ricorso alla cooperazione rafforzata in tema di rapporti
patrimoniali fra coniugi e fra parti di unioni registrate' *Rivista di diritto internazionale,* 529, 532 (2016).

[6] S. Marino, n 2 above, 284.

2014, establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters [in Official Journal L 189, 27 June 2014, 59]. The Regulation provides for an autonomous procedure in order to obtain a provisional and protective measure to be automatically recognized and enforced in all Member States.'[7] Despite these assumptions, the Regulations in question still represent a valid attempt to implement the principles of the European Union, established to protect the individual, and their social manifestations.

II. Public Policy Doctrine

As stated, recognition is contingent on consistency with the public policy doctrine.
Public policy doctrine can be defined as a general clause, consisting of the set of fundamental values of a society and the order on which it is based. It is, on one hand, a pillar of the legal system, and on the other, an expression of the values and feelings of the society that shapes the system itself.[8] There is no European law that diverges from, opposes, juxtaposes, or coordinates with any law of a Member State; rather there is a Member State-European law. Laws of European or international origin must be implemented immediately and directly by the judges, so as to concord in the formation of a unitary system of

[7] ibid; see also: A. Leandro, 'La circolazione dell'ordinanza europea di sequestro conservativo dei depositi bancari', in P. Franzina and A. Leandro eds, *Il sequestro europeo di conti bancari - Regolamento (UE) n. 655/2014 del 15 maggio 2014* (Milan: Giuffrè, 2015), 119-121 and P. Franzina, 'L'ordinanza europea di sequestro conservativo di conti bancari: rilievi generali', in Id and A. Leandro eds, *Il sequestro europeo di conti bancari - Regolamento (UE) n. 655/2014 del 15 maggio 2014* (Milan: Giuffrè, 2015), 3.

[8] P. Lotti, *L'ordine pubblico internazionale* (Milan: Giuffrè, 2005), 12: '*Nel diritto privato internazionale si parla di ordine pubblico internazionale, indicando con tale locuzione la clausola di ordine pubblico attraverso la quale viene aperto un varco al passaggio dell'ordinamento interno di istituti giuridici non originari oppure viene chiuso l'ingresso agli stessi nell'ordinamento domestico.*' See also: A. Magni, *Brevettabilità e biodiversità* (Naples: Edizioni Scientifiche Italiane, 2008), 47.

European Member States.[9] In reality, public policy is unique.[10] Indeed, being internal, it should be evaluated 'by the light of the principles of European public policy, with consequent graduation of internal regulations with respect to the prior legislative choices made at the Community level.'[11]

Public policy doctrine, therefore, is a unitary concept not for the finding of solutions, but for the axiological specification of judgement criteria. In fact, it is the specific circumstances of each case, and the normative values at play[12] that determine how these must be combined in order to reach the most reasonable solution each time.[13] However,

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[9] In this regard, cf V. Barba, 'L'Ordine pubblico internazionale' *Rassegna Diritto civile*, 403, 418-419 (2018): '*Una norma di un Regolamento europeo, piuttosto che una norma del Trattato si applica (per esempio) al cittadino italiano unitamente alle norme statali o, addirittura, in luogo di una preesistente norma statale in conflitto con quella. Di là dalla configurabilità di un diritto europeo o di un diritto internazionale, autonomo e coordinato rispetto a quello dei singoli Stati nazionali, che pure sotto taluni profili è possibile prendere in seria e adeguata considerazione, non v'è dubbio che il sistema ordinamentale vigente è composto non soltanto delle norme statali, ma anche della c.d. disciplina materiale dei c.dd. ordinamenti sovranazionali*'. See also P. Perlingieri, *Diritto comunitario e legalità costituzionale. Per un sistema italo-comunitario delle fonti* (Naples: Edizioni Scientifiche Italiane, 1992), 59-91.

[10] P. Perlingieri, *L'ordinamento vigente e i suoi valori. Problemi del diritto civile* (Naples: Edizioni Scientifiche Italiane, 2006), 494.

[11] P. Perlingieri, *Il diritto dei contratti tra persona e mercato. Problemi del diritto civile* (Naples: Edizioni Scientifiche Italiane 2003), 27.

[12] F. Sbordone, 'Discrezionalità e tradizioni costituzionali (ordine pubblico, margine di apprezzamento, ponderazione tra valori, comparazione tra principi)', in VV. AA., *L'incidenza del diritto internazionale sul diritto civile - Atti del 5° Convegno nazionale SISDiC* (Naples: Edizioni Scientifiche Italiane, 2011), 31, 34, according to which: '*il particolare compito della clausola generale dell'ordine pubblico è quello di attivare un procedimento selettivo (di natura interpretativa) tra regole (in concorso o in alternativa al criterio di collegamento presente nelle norme di conflitto) di diversa origine (straniere-interne) al fine di consentire la costruzione dell'ordinamento giuridico del caso concreto. (...) Non appare incauto immaginare, in questa direzione, che il criterio di legittimazione sia da individuarsi in uno o più principi, eventualmente da bilanciarsi e compararsi (se presenti negli ordinamenti stranieri ai quali si riferisce la legge applicabile) racchiusi proprio nella clausola generale di ordine pubblico*.'

[13] G. Perlingieri and G. Zarra, *Ordine pubblico interno ed internazionale tra caso concreto e sistema ordinamentale* (Naples: Edizioni Scientifiche Italiane, 2019), passim. In this sense, very recent judgement of the Corte Costituzionale no 33/2021, on the subject of recognition of foreign judgements (Supreme Court of the British Columbia -Canada) which recognized the inclusion in the civil status deed of a child procreated with the methods of management for others (otherwise called *surrogacy*) of the so-called non-biological intended parent, who on the basis of living law was in

such an opposition can be repealed only when, having balanced the interests and examined the specifics of the case, the decision is in unacceptable conflict with the legal system of the Member State, as per the consolidated guidelines of the Court of Justice.[14]

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conflict with public order. Contrast overcome with the reference (see judgement 102/2020) '*al principio secondo cui in tutte le decisioni relative ai minori di competenza delle pubbliche autorità, compresi i tribunali, deve essere riconosciuto rilievo primario alla salvaguardia dei* migliori interessi *(*best interests*) o dell'*interesse superiore *(*intérêt supérieur*) (...) Gli interessi del minore dovranno essere allora bilanciati, alla luce del criterio di proporzionalità, con lo scopo legittimo perseguito dall'ordinamento di disincentivare il ricorso alla surrogazione di maternità, penalmente sanzionato dal legislatore; (...) Tuttavia, la stessa Corte EDU ritiene comunque necessario che ciascun ordinamento garantisca la concreta possibilità del riconoscimento giuridico (...) lasciando poi alla discrezionalità di ciascuno Stato la scelta dei mezzi con cui pervenire a tale risultato (...) a condizione che le modalità previste dal diritto interno garantiscano l'effettività e la celerità della sua messa in opera, conformemente all'interesse superiore del bambino.'*

[14] In Case C-302/13: 'The public policy clause in Article 34 may be used, point 1 of Regulation no 44/2001 only where the recognition or enforcement of a decision given in another Member State is in unacceptable conflict with the legal order of the requested State, as it infringes a fundamental principle. In order to respect the prohibition of a review of the substance of the decision given in another Member State, the infringement should constitute a manifest infringement of a rule of law which is regarded as essential in the legal system of the requested State or of a right recognised as fundamental in the same legal system (see: Apostolides, EU:C:2009:271, para 59 and the jurisprudence cited therein).' And in Case C-455/15 PPU where, in terms of maintenance obligations, it is clearly established that 'although it is not for the Court to define the content of public policy in a Member State, it is, however, obliged to examine the limits within which the courts of one Member State may use that concept in order not to recognise a decision given by a court of another Member State (see: *Diageo Brands*, Case C-681/13, EU:C:2015:471, paragraph 42). In addition, as opposed to the public policy clause referred to in point 1 of Article 34 of Council Regulation (EC) no 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. 1 (OJ 2001 L 12, p. 1), which is the subject of the case-law cited in the preceding paragraph of this judgment, Article 23 a) of Regulation no 2201/2003 requires that the decision on a refusal of recognition be taken in the best interests of the child. The use of the public policy clause referred to in Article 23 a) of that Regulation should therefore be admissible only where, taking into account the best interests of the child, recognition of a decision given in another Member State is in unacceptable conflict with the legal system of the requested State, since that decision would infringe a fundamental principle. In order to respect the prohibition of a substantive review of the decision given in another Member State, as referred to in Article 26 of that Regulation, the injury should constitute a manifest infringement, in the light of the best interests of the child, a rule of law regarded as

Regardless, in evaluating whether a decision is contrary to public policy (and in examining other causes of non-recognition, including other reasons beyond the simple examination of causes of non-recognition), the judicial authority of which the recognition is requested cannot examine the substance of the foreign decision (Arts 40 of Regulations 1103 and 1104, and Art 41 of Regulation 650). Therefore, the judicial authority cannot assess the facts or the application of substantive law, and cannot refuse recognition on the basis that it would have reached a different verdict on their basis.[15]
Clearly, given the above, the enforceability of court settlements is discussed upon their circulation from one Member State to another, whereupon states participate in the enhanced cooperation underlying the aforementioned Regulations.[16]

essential in the legal order of the requested State or a right recognised as fundamental in that law (see the judgement *Diageo Brands*, C-681/13, EU:C:2015:471, para 44). In Case C-681/13 where everything already mentioned in C 302/13 (see the judgement *flyLAL-Lithuanian Airlines*, C-302/13, EU:C:2014:2319, paragraph 49 and the jurisprudence cited therein).'

[15] N. Pogorelčnik Vogrinc, 'Refusal of Recognition and Enforcement', in M.José Cazorla González, M. Giobbi, J. Kramberger Škerl, L. Ruggeri and S. Winkler eds, *Property relations of cross border couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2019), 150: 'Grounds of non-recognition are applied only if recognition of the decision would be contrary to public policy, eg the effects of its recognition, not the substance of the decision.' U. Bergquist et al, *EU-Regulation on Succession and Wills. Commentary (*Köln: Otto Schmidt, 2015), 205 and J. Kramberger Škerl, '(Ne)razumevanje pridržka javnega reda in posvojitev s strani istospolnih partnerjev - (Mis)understanding of public policy grounds of non-recognition and adoptions by same-sex partners' *Ius-Info*, 26, 27(2010).

[16] P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate* (Milan: Giuffrè Francis Lefebvre 2019), 312-313.

Article 61
Legalisation and other similar formalities

Karina Zabrodina

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
No legalisation or other similar formality shall be required in respect of documents issued in a Member State in the context of this Regulation.	(Same text)

Summary: I. International and European legislative background. – II. Authenticity, enforceability, evidentiary effects and material validity. – III. Relation between Article 61 and the *Apostille* Convention.

I. International and European legislative background

Art 61[1] provides, in a completely identical way for both Regulations, an important simplification rule for the circulation of public documents in order to further encourage the creation of the wider area of freedom, security and justice without internal frontiers and to promote the free movement of Union citizens. The possibility that documents issued in a Member State under the Twin Regulations do not require any legalisation or other similar formalities constitutes a concrete remedy to the difficulties, costs and delays of authentication procedures that international couples might otherwise encounter when

[1] B. Reinhartz, 'General and Final Provisions: Articles 61-70', in U. Bergquist et al eds, *The EU Regulations on Matrimonial and Patrimonial Property* (New York: Oxford University Press, 2019), 244; P. Bruno, *I Regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate. Commento ai Regolamenti (UE) 24 giugno 2016, nn. 1103 e 1104 applicabili dal 29 gennaio 2019* (Milan: Giuffrè Francis Lefebvre, 2019), 315-316; C. István Nagy, 'Article 61 Legalisation and other similar formalities', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples* (Cheltenham: Edward Elgar, 2020), 456-457.

submitting them to the authorities of the Member State other than the issuing one.[2]

On closer inspection, however, it is not an entirely new provision. At international level, it should be recalled that all the Member States of the European Union are contracting parties to the Hague Convention of 5 October 1961, known as the *Apostille* Convention, on the abolition of the legalisation for foreign public documents.[3]

This Convention has the merit of having introduced the first system for the simplified circulation of public documents[4] issued by the contracting States through the replacement of the complex process of

[2] It should be borne in mind, however, that the Council Regulations (EU) 2016/1103 and 2016/1104 apply only to Member States participating in enhanced cooperation. Therefore, the rule of exemption from the legalisation applies only in case both Member States, the issuing one and that of the presentation of the document, participate in enhanced cooperation.

[3] Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, available at www.hcch.net (last visited 25 May 2021). For more on the Convention, see Y. Loussouran, 'Explanatory Report on The Hague Convention of 5 October 1961 Abolishing the requirement of Legalisation for Foreign Public Documents', in VV. AA., *Acts and Documents of the Ninth Session (1960), II, Legalisation* (The Hague: HCCH Publications, 1961) available at https://www.hcch.net/en/publications-and-studies/details4/?pid=52 (last visited 2 June 2021); E. Calò and A. Caruso, *La legalizzazione nell'attività notarile, consolare e forense. Normativa nazionale, comunitaria e internazionale* (Milan: Ipsoa, 2001); J.W. Adams, 'The Apostille in the 21st Century: International Document Certification and Verification' 34 *Houston Journal of International Law*, 519 (2012); B. Mulitzer, *International Judicial and Administrative Co-operation: by Taking the Examples of the Hague Apostille Convention and the Hague Service Convention* (Saarbrücken: AV Akademikerverlag, 2013); J.M. Szewczyk, 'A Dodgy Question of the Legal Form: Formality Requirements for the POA Granted Abroad to Act on the Territory of Poland' *European Scientific Journal*, 253-261 (2014); N. De Araujo et al, 'The Procedural Hague Conventions and their Implementation in Brazil', in A. Bonomi and G.P. Romano eds, *Yearbook of Private International Law Vol. XX - 2018/2019*, (Köln: Verlag Dr. Otto Schmidt, 2019), 149-170.

[4] Art 1 of the *Apostille* Convention defines 'public documents' as 'documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of a court or a process-server ("*huissier de justice*"); administrative documents; notarial acts; official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures.'

legalisation[5] by a more streamlined procedure of 'apostillisation' which may be carried out upon the authorities of the issuing State.[6] The simplified authentication through the so-called 'one step process' has not only made it possible to facilitate the circulation of public documents but, above all, to increase the creation of cross-border relations in multiple situations: international marriages, intercountry adoption procedures, applications for studies, residency or citizenship in a foreign State, international business transactions and foreign investment procedures, foreign legal proceedings, etc.

At European level, instead, it is important to emphasise the numerous legislative measures adopted in the field of judicial cooperation in civil matters and of enhanced cooperation which, compared to the *Apostille* Convention, constitute a further effort on the part of the European Union to enhance dialogue among Member States through major flexibility, integration and simplification of procedures. In fact, the several Regulations resulting from these cooperations have specifically provided for total exemption for documents coming within their scope not only in relation to legalisation in the strict sense but also to any other similar formalities.[7]

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[5] 'Legalisation describes the procedures whereby the signature/seal/stamp on a public document is certified as authentic by a series of public officials along a "chain" to a point where the ultimate authentication is readily recognised by an official of the State of destination and can be given legal effect there'. Before the adoption of the Apostille Convention, although the Embassies and Consulates of the State of destination located (or accredited to) in the State of origin were ideally situated to facilitate this process, however, they did not maintain samples of the signatures/seals/stamps of every authority or public official in the State of origin, and therefore additional intermediate authentication was often required. In most cases, this involved the use of the authentication procedure at the Ministry of Foreign Affairs of the State of origin and, therefore, such a 'chain' of legalization inevitably entailed an onerous, long and expensive process for interested parties. See, Hague Conference on Private International Law, *Apostille Handbook. A Handbook on the Practical Operation of the Apostille Convention* (The Hague: The Hague Conference on Private International Law Permanent Bureau, 2013), 3.

[6] Arts 2 and 3 of the Hague Convention, n 3 above.

[7] The definition of the concepts of 'legalisation', 'similar formalities' and 'other formalities' is provided in Art 3 of the European Parliament and of the Council Regulation (EU) 2016/1191 of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union [2016] OJ L200/1.

With particular regard to the area of judicial cooperation, it seems useful to mention Art 52 of the Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility that is going to be repealed from 1 August 2022 by the Council Regulation (EU) 2019/1111;[8] Art 4, para 4 of the European Parliament and of the Council Regulation (EC) 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters; Art 65 of the Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations; Art 61 of the European Parliament and of the Council Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Regarding instead the instruments adopted in the field of enhanced cooperation, including also Twin Regulations, the same possibility has been established, for example, in Art 74 of the European Parliament and of the Council Regulation (EU) 2012/650 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

In other words, for documents issued in a Member State in accordance with above-mentioned Regulations, not only no formalities are required to certify the authenticity of a public office holder's signature, the capacity in which the person signing the document has acted or the identity of the seal or stamp which it bears; but it is not even necessary to add the appropriate certificate required by the *Apostille* Convention.[9]

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[8] In particular, Art 90 of the Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) [2019] OJ L178/1, which established that 'no legalisation or other similar formality shall be required in the context of this Regulation'

[9] As has been highlighted, in this way 'Article 61 of the Property Regimes Regulations confers, on the documents originating from a Member State, the status enjoyed by domestic documents.' C. István Nagy, n 1 above, 457.

Such a regulatory framework, which widely demonstrates the huge effort of the European legislator to seek faster and easier solutions to the complex issues that may arise from situations with cross-border implications, is further confirmed in the European Parliament and Council Regulation (EU) 2016/1191 of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union.[10] This Regulation, in fact, in addition to the exemption from legalisation and *apostille*, also expressly provides for the exemption from translation of certain public documents[11] when they are written in the official language of the Member State in which they are presented or, otherwise, when such documents are accompanied by a specific multilingual standard form. Furthermore, when the national law of a Member State requires the presentation of the original of a public document, the authorities of that State may not also require the presentation of a certified copy.

II. Authenticity, enforceability, evidentiary effects and material validity

As has been opportunely observed,[12] Art 61 constitutes in all respects a 'prohibition of legalisation' which objectively extends to all documents relating to matrimonial property regimes and property consequences of registered partnerships;[13] while, from the subjective point of view, it binds the authorities of the Member States in which the Twin Regulations apply, establishing for the latter a real

[10] The European Parliament and Council Regulation (EU) 2016/1191.

[11] The European Parliament and Council Regulation (EU) 2016/1191 applies to public documents the primary purpose of which is to establish the following facts: birth, that a person is alive, death, name, marriage (including capacity to marry and marital status), divorce, legal separation or marriage annulment, registered partnership (including capacity to enter into a registered partnership and registered partnership status), dissolution of a registered partnership, legal separation or annulment of a registered partnership, parenthood, adoption, domicile and/or residence, or nationality.

[12] P. Bruno, n 1 above, 315.

[13] The application of Art 61 is however limited only to deeds 'issued by Member State courts and authorities or by private entities who have been granted a special status by the law (eg notaries).' C. István Nagy, n 1 above, 457.

prohibition to require couples any form of legalisation of documents intended to prove their authenticity.[14]

In this way, for example, the spouses or partners of registered partnerships are not obliged to bear the cost of apostillisation attesting the authenticity of the public document that must for some reason be presented in a different Member State.[15]

However, it should be pointed out that the provision in question only concerns the profile of the authenticity[16] of documents and therefore does not have any direct effect in terms of their enforceability and evidentiary effect.[17]

In this regard, Recitals 59 and 58 of the Council Regulations (EU) 2016/1103 and 2016/1104 specify that the notion of 'authenticity' of the public document is an autonomous notion which includes the genuineness, the formal prerequisites, the powers of the drawing up authority as well as the procedure under which the document is drawn up. Furthermore, this concept extends to the facts recorded in the document by the authority concerned, with particular reference to the

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[14] Note that Art 61 is a general rule for the circulation of all public documents issued within the scope of both Regulations, including documents issued by notaries. However, in certain cases notaries exercise judicial functions and in such cases the decisions they take will circulate in accordance with the provisions relating to the recognition, enforceability and enforcement of decisions.

[15] As highlighted by B. Reinhartz, n 1 above, 244, this provision is very important, especially 'when it concerns the international use of an authentic instrument, for example, a notarial marriage contract which is issued according to this Regulation.'

[16] Although with reference to the succession matter, see on definition of authenticity Case C-658/17 *WB*, Judgment of 23 May 2019, available at www.eur-lex.europa.eu (last visited 2 June 2021).

[17] With specific regard to the enforceability and evidentiary effects of public documents under the Council Regulations (EU) 2016/1103 and 2016/1104, see Art 58 on the acceptance of authentic instruments and Art 59 on the enforceability of authentic instruments and the related comments in this book. See also, D. Damascelli, 'Authentic Instruments and Court Settlements: Articles 58-60', in U. Bergquist et al eds, n 1 above, 231-242; S. Marino, *I rapporti patrimoniali della famiglia nella cooperazione giudiziaria civile dell'Unione europea* (Milan: Giuffrè Francis Lefebvre, 2019), 231-268; J. Kramberger Škerl, 'The recognition and enforcement under the Succession Regulation and the Property Regimes Regulations: procedural issues', in M.J. Cazorla González et al eds, *Property Relations of Cross-Border Couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2020), 133, 144-146.

fact that the parties mentioned appeared before that authority on that date and made the declarations indicated.
Following these considerations, it is therefore important to point out that the party wishing to challenge the authenticity of a document, within the above-mentioned meaning, will have to apply to the competent court of the Member State which issued the document in accordance with the law of that State.
Instead, with regard to legal effects relating to the content of the document, and therefore to its material validity, it is necessary to remember that the Twin Regulations do not provide for any indication on the recognition of such effects in a Member State other than that of issuing, so this aspect shall be regulated by the national law of the European country where the document is presented.[18] However, if the party intends to contest the content of authentic instrument, it shall do so before the competent court under the Twin Regulations on the law applicable to the matrimonial property regimes or to the property consequences of registered partnerships; while, if the challenge is raised incidentally in proceedings before a court of a Member State, that court should have jurisdiction to decide thereon.[19]

III. Relation between Article 61 and the *Apostille* Convention

At this point, in an attempt to provide the reader with a systematic and comprehensive view of the specific rules applicable in the face of the different cross-border situations, it is possible to draw a summary framework through the following examples:
A. Where the document is issued and presented in a Member State of the European Union, party to enhanced cooperation, no legalisation or other formalities are required for the purpose of its authenticity, as provided for in Art 61 of the Twin Regulations.[20]

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[18] On this point, with particular regard to the Italian law, see A. Davì, 'Il riconoscimento delle situazioni giuridiche costituite all'estero nella prospettiva di una riforma del sistema italiano di diritti internazionale privato' *Rivista di diritto internazionale*, II, 319-419 (2019).
[19] See, Art 58 of the Council Regulations (EU) 2016/1103 and 2016/1104.
[20] In such a case, the prevalence of the application of the Twin Regulations, and therefore of the respective Arts 61, is stated in Art 62 that rules the relations

B. Where the document is issued in a Member State not participating in the cooperation and has to be presented in a Member State which is part of it, the *Apostille* Convention shall apply. Same consideration also applies to the opposite case as well as to the case where none of the Member States participate in enhanced cooperation.
C. Where the document is issued in a Third State and is to be presented in a Member State of the European Union, the *Apostille* Convention shall apply if both States are contracting parties to it. Otherwise, the national law of the State in which the document is presented will apply.

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with the international conventions in force and to which handling reference is made in the following pages. In any case, it should be specified at this point that the Twin Regulations do not affect the application of the Conventions to which the Member States are party. However, where such Conventions concern matters covered by the Regulations, the latter shall prevail in their application.

Article 62
Relations with existing international convention

Veronica Rita Miarelli and Karina Zabrodina*

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. This Regulation shall not affect the application of the bilateral or multilateral conventions to which one or more Member States are party at the time of adoption of this Regulation or of a decision pursuant to the second or third sub paragraph of Article 331(1) TFEU and which concern matters covered by this Regulation, without prejudice to the obligations of the Member States under Article 351 TFEU.	1. This Regulation shall not affect the application of the bilateral or multilateral conventions to which one or more Member States are party at the time of adoption of this Regulation or of a decision pursuant to the second or third subparagraph of Article 331(1) TFEU and which concerns matters covered by this Regulation, without prejudice to the obligations of the Member States under Article 351 TFEU.
2. Notwithstanding paragraph 1, this Regulation shall, as between Member States, take precedence over conventions concluded between them in so far as such conventions concern matters governed by this Regulation.	2. Notwithstanding paragraph 1, this Regulation shall, as between Member States, take precedence over conventions concluded between them in so far as such conventions concern matters governed by this Regulation.
3. **This Regulation shall not preclude the application of the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden containing international private law provisions on marriage, adoption and guardianship, as revised in 2006; of the Convention of 19 November 1934 between Denmark, Finland, Iceland, Norway and Sweden comprising private international law provisions**	

* Veronica Rita Miarelli authored paragraphs IV. and V. and Karina Zabrodina authored paragraphs I. II. and III.

on succession, wills and estate administration, as revised in June 2012; and of the Convention of 11 October 1977 between Denmark, Finland, Iceland, Norway and Sweden on the recognition and enforcement of judgements in civil matters, by the Member States which are parties thereto, in so far as they provide for simplified and more expeditious procedures for the recognition and enforcement of decisions in matters of matrimonial property regime.

Summary: I. Introduction. – II. The principle of non-affection as a general rule and its limit. – III. Implications of Article 62, para 1 over the competence to conclude future International conventions within the scope of Twin Regulations. – IV. Exception to the general principle and precedence of Regulations over Conventions. – V. Relationship between Regulations and International conventions on matrimonial property regimes.

I. Introduction

Although only a few years after the application of the Twin Regulations, the enhanced cooperation has proved to be an important instrument for the integration and harmonisation of rules on conflicts of laws and jurisdiction.[1] In fact, on the one hand it has provided the

[1] Several Authors in doctrine supported the establishment of the enhanced cooperation in matters of Twin Regulations. See, in particular, M. Buschbaum and U. Simon, 'Les propositions de la Commission européenne relatives à l'harmonisations des règles de conflit de lois sur les biens patrimoniaux des couples mariés et des partenariats enregistrées' *Revue critique de droit international privé*, 801-816 (2011); F. Pocar, 'Brevi note sulle cooperazioni rafforzate e il diritto internazionale privato' *Rivista di diritto internazionale privato e processuale*, 297-306 (2011); T. De Pasquale et al, 'Diritto pubblico delle relazioni familiari e processo di europeizzazione dei diritti' *Rivista italiani di diritto pubblico comunitario*, 787-817 (2012). On different and opposite considerations on the concept of the harmonisation, see G. Oberto, 'I cinquant'anni

participating Member States with a clear and comprehensive legal framework on the jurisdiction and applicable law on the property regimes of international couples;[2] and on the other one, it has facilitated mutual recognition and enforcement of judicial decisions.[3] However, this harmonisation landscape, besides being quite recent, involves only 18 Member States which have currently joined the enhanced cooperation and therefore imposes the need for coordination between Regulations in question and other conventional international instruments to which the Member States are party.[4] The conclusion of conventions by the Member States, including those resulting from the Hague Conference on Private International Law, represents in fact a driving force for the European legislator to regulate the dynamics of private and procedural international law

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della legge sul divorzio' *Famiglia e Diritto*, 112 (2021). See also N. Cipriani, 'Rapporti patrimoniali tra coniugi, norme di conflitto e variabilità della legge applicabile' *Rassegna di diritto civile*, 19, 19-22 (2009); M.R. Marella, 'The Non-Subversive Function of European Private Law: The Case of Harmonisation of Family Law' 12 *European Law Journal,* 78-105 (2006); R. Baratta, 'Verso la «comunitarizzazione» dei principi fondamentali del diritto di famiglia' *Rivista di diritto internazionale privato e processuale*, 573-606 (2005); D. Henrich, 'Sul futuro del regime patrimoniale in Europa' *Familia*, 1055 (2002).

[2] See, in this perspective, S. Marino, *I rapporti patrimoniali della famiglia nella cooperazione giudiziaria civile dell'Unione europea* (Milan: Giuffrè Francis Lefebvre, 2019), 1-44.

[3] Even though there were doubts of those who argued that the advantages of enhanced cooperation in the field of private international law could hardly overcome the drawbacks. For an overview of the advantages and disadvantages of enhanced cooperation, see A. Fiorini, 'Harmonizing the Law Applicable to Divorce and Legal Separation – Enhanced Cooperation as the Way Forward?' 59 *International & Comparative Law Quarterly*, 1143, 1143-1158 (2010); X. Kramer et al, *A Framework for European Private International Law: Current Gaps and Future Perspectives* (Brussels: European Parliament, 2012), 86, 86-88, available at https://www.europarl.europa.eu/portal/en (last visited 18 June 2021); O. Feraci, 'Sul ricorso alla cooperazione rafforzata in tema di rapporti patrimoniali fra coniugi e fra parti di unioni registrate' *Rivista di diritto internazionale*, 529-537 (2016).

[4] On the necessity of coordination of different European and International instruments and their impact on European family law, see D. Martiny, 'The impact of the EU private international law instruments on European family law', in J.M. Scherpe ed, *European Family Law. The impact of Institutions and Organisations on European Family Law* (Cheltenham: Edward Elgar, 2016), I, 261, 261-293. Recently, S. Marino, n 2 above, 48-65.

through instruments that can ensure uniformity and simplification.[5] However, this ambition can only be achieved through specific solutions for regulatory coordination between these instruments and conventions.[6]

In order to regulate the procedural aspects of family law, and in particular those relating to property regimes, the States resort to the

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[5] See, A.E. von Overbeck, 'La contribution de la Conférence de La Haye au développement du droit international privé', in VV. AA., *Collected Courses of the Hague Academy of International Law* (Leiden: Martinus Nijhoff Publishers,1992), 9-98.

[6] Some coordination solutions proposed by the European legislator can be found, for example, in the Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1, repealed by the European Parliament and Council Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1. Art 69 of both Regulations lays down the principle that between Member States the Regulations apply in place of conventions regarding the same matters. However, such conventions continue to have effects in relation to matters not covered by the Regulations (see Art 70). In addition, the legislator pointed out that, in any case, such Regulations do not affect any conventions which, in relation to particular matters, govern jurisdiction, the recognition or enforcement of judgments (see Art 71). On this specific point, the European Court of Justice (Case C-533/08 *TNT Express Nederland BV v AXA Versicherung AG*, Judgment of 4 May 2010, available at www.eur-lex.europa.eu, last visited 12 June 2021) highlighted that the application of the convention is subject to the fact that it facilitates the sound administration of justice and 'ensure, under conditions at least as favourable as those provided for by the Regulation, the free movement of judgments in civil and commercial matters and mutual trust in the administration of justice in the European Union.' The same coordination solution has also been adopted with regard to the first Council Regulation (EC) 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses [2000] OJ L160/19, repealed by the Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2003] OJ L338/1, and recently by the Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction [2019] OJ L178/1. The latter, which shall apply from the 1 August of 2022, provides an entire Chapter dedicated to relations with other instruments (see Arts 94-99) specifying their scope and effects. For deepening, see F. Mosconi and C. Campiglio, *Diritto internazionale privato e processuale* (Turin: Utet, 9th ed, 2020), 1-152.

conclusion of several bilateral or multilateral conventions with the States in which the Regulations do not apply; and between the latter, it is necessary to distinguish Third States and other Member States of the Union non participating in enhanced cooperation. Consider, for example, the Hague Convention of 1905 on Effects of Marriage;[7] the Hague Convention of 1978 on the law applicable to matrimonial property regimes;[8] or even the different conventions concluded between Denmark, Finland, Iceland, Norway and Sweden.[9]

In all these cases, therefore, as already clearly outlined in Recitals 65 and 64 of the Council Regulations (EU) 2016/1103 and 2016/1104,[10] it is necessary to 'specify' and understand the cases in which the application of the Regulations in question will take precedence and

[7] Hague Convention of 17 July 1905 on Conflict of Laws Relating to the Effects of Marriage on the Rights and Duties of Spouses in their Personal Relationships and with Regard to their Estates available at www.hcch.net (last visited 20 June 2021).

[8] Note that the Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes, although concluded between Austria, France, Luxembourg, Netherlands and Portugal, is currently in force only in France, Luxembourg and Netherlands. The Hague Convention is available at www.hcch.net (last visited 23 June 2021).

[9] The Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden containing international law provisions on marriage, adoption and guardianship, as revised in 2006, the Convention of 19 November 1934 between Denmark, Finland, Iceland, Norway and Sweden comprising private international law provisions on succession, wills and estate administration, as revised in June 2012 and the Convention of 11 October 1977 between Denmark, Finland, Iceland, Norway and Sweden on the recognition and enforcement of judgments in civil matters.

[10] Both Recitals state in identical way that the relationship between examined Regulations and existing bilateral or multilateral conventions on matrimonial property regime/on the property consequences of registered partnerships to which the Member States are party 'should be specified'. On this purpose, the Council Decision (EU) 2016/954 of 9 June 2016 authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships [2016] OJ L159/16 ensures that the enhanced cooperation 'respects the competences, rights and obligations of those Member States that do not participate in it' as well as that 'the common rules on jurisdiction, conflict of laws and recognition and enforcement in the participating Member States do not affect the rules of the non-participating Member States.'

others, instead, where the bilateral or multilateral conventions to which the Member States of the European Union are party will be applied as a matter of priority.[11]

For this purpose, Art 62 of the respective Regulations offers three coordination solutions: on the one hand, para 1 establishes the principle of non-affection as a general rule for the discipline of relations with existing conventions, on the other one para 2 provides for the hypothesis of exception to the general rule that operates through the principle of prevalence of the Twin Regulations. This exception, however, does not apply to the conventions expressly mentioned in para 3 which are only partially subject to the principle of non-affection to the extent that they provide for simplified and accelerated procedures compared to the two Regulations.

II. The principle of non-affection as a general rule and its limit

As has recently been suggested by the doctrine, Art 62, para 1 introduces a 'compatibility clause'[12] which allows Member States

[11] This necessity is not entirely new to the European legislator. In fact, prior to the Twin Regulations, the need to outline the relationship between cooperative instruments and existing international conventions has been dealt with in Art 19 of the Council Regulation (EU) 2010/1259 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L343/10 on which see, in particular, T. Kruger, 'Article 19: Relationship with Existing International Conventions', in S. Corneloup ed, *The Rome III Regulation* (Cheltenham: Edward Elgar, 2020), 214, 214-222; V. Wiese, 'Article 19 Rome III Regulation', in G.P. Calliess and M. Renner eds, *Rome Regulations* (Alphen aan den Rijn: Kluwer Law International, 3rd ed, 2020), 962, 962-963; G. Biagioni, 'Articolo 19', in P. Franzina ed, *Regolamento UE n. 1259/2010 del Consiglio del 20 dicembre 2010 relativo all'attuazione di una cooperazione rafforzata nel settore della legge applicabile al divorzio e alla separazione personale*, in *Le nuove leggi civili commentate*, 1537, 1537-1540 (2011). Similarly, but in a more articulated way, the same matter has been tackled in Art 75 of the European Parliament and of the Council Regulation (EU) 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107 on which, see H. Pamboukis, 'Article 75', in H. Pamboukis ed, *EU Succession Regulation No 650/2012* (Oxford: C.H. Beck - Hart, 2017), 668, 668-672.

[12] 'Article 62 introduces a compatibility clause that enables the participating Member States to act in compliance with international law in the framework of their

participating in the enhanced cooperation to apply any existing bilateral or multilateral conventions provided that such conventions concern matters covered by the Regulations[13] and were concluded before the adoption of the Twin Regulations or before the adoption of the decision pursuant to Art 331, para 1, subparas 2 and 3, TFEU.
In other words, from a temporal point of view, the existing conventions will apply as a matter of priority and without prejudice if they were concluded before 24 June 2016; or, in the event of subsequent accession to enhanced cooperation by a Member State, where such agreements were concluded before the Commission adopts the decision authorising the participation in the cooperation of the requesting State; or, in the case of subsequent accession to enhanced cooperation by a Member State, where such conventions were concluded before the Council decision.[14]

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relationship with non-participating Member States and non-EU States'. Thanks to such a mechanism, the Member States where the Twin Regulations apply are able to 'meet the obligations arising from existing bilateral and multilateral conventions' and therefore to continue to regulate the private international law aspects through the negotiated provisions. See, C.M. Mariottini, 'Article 62 Relations with existing international conventions', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples* (Cheltenham: Edward Elgar, 2020), 458, 458-459.

[13] The identity of matters dealt with in existing conventions and those in Council Regulation (EU) 2016/1103 and 2016/1104 are to be assessed not only on the basis of the provisions of the instruments in question but also in accordance with the rules on treaty interpretation provided for in the Vienna Convention on the Law of Treaties concluded on 23 May 1969 and entered in force on 27 January 1980. See, in particular, S. Saluzzo, *Accordi internazionali degli Stati membri dell'Unione europea e Stati terzi* (Milan: Ledizioni, 2018), 43-47.

[14] Art 331, para 1 of the Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 provides for a detailed procedure through which non-participating Member States may join the enhanced cooperation. After having notified the Council and the Commission the intention to participate, there are two possibilities. According to the first one, the Commission confirms the participation of the Member State concerned and where necessary adopts any transitional measures necessary with regard to the application of the acts already adopted within the framework of enhanced cooperation. In the second case, instead, it might happen that the Commission considers that the conditions of participation have not been fulfilled and, therefore, indicates a new deadline to re-examine the request. If even in this case the Commission considers that the conditions of participation have still not been met, the Member State concerned may refer the matter to the Council,

The compatibility clause is therefore an expression of the general principle of non-affection of the application of existing international agreements.[15] A principle that, however, must necessarily be coordinated with the obligations of Member States under Art 351 TFEU and which acts in this way as a precondition and as a limit to the operation of the general rule.[16]

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which shall decide on the request. For more, see M. Franchi Fiocchi, 'Articolo 331 TFUE', in F. Pocar and M.C. Baruffi eds, *Commentario breve ai Trattati dell'Unione europea* (Padua: CEDAM, 2014), 1496; R. Geiger, 'Article 331 TFEU', in R. Geiger et al eds, *European Union Treaties. A Commentary* (München, Oxford: C. H. Beck - Hart, 2015), 1014-1015; M. Kellerbauer, 'Articles 326-334 TFEU', in M. Kellerbauer et al, *Commentary on the EU Treaties and the Charter of Fundamental Rights* (Oxford: Oxford University Press, 2019), 2004.

[15] In this perspective, the principle of non-affection is an important corollary of the principles of international law (in particular, see Arts 39, 49 and 59 o the Vienna Convention) under which a Treaty concluded between two States cannot be repealed as a result of the subsequent conclusion of another Treaty, to which only one of the mentioned States is party. It follows that the State participating both in the first and in the second Treaty, will have to respect both of them. Precisely on the basis of these international principles, the European legislator provided for Art 351 of the Treaty on the Functioning of the European Union containing an appropriate compatibility clause. See, L. Daniele, 'Il diritto internazionale generale e gli accordi internazionali nel sistema delle fonti dell'Unione europea', in L.F. Pace ed, *Nuove tendenze del diritto dell'Unione europea dopo il trattato di Lisbona* (Milan: Giuffrè, 2012), 207-219.

[16] Art 351 of the Treaty on the Functioning of the European Union provides for the so-called 'subordination clause' by virtue of which the rights and obligations deriving from international conventions concluded with Third States maintain their operation also in the face of the assumption of new obligations by the Member States following the accession to the European Union. Actually, this provision constitutes a transposition into the European law of Art 30 of the 1969 Vienna Convention which expressly provides in para 2 that 'when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail'. On Art 351, see P. Manzini, 'The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law' 12 *European Journal of International Law*, 781-792 (2001); J. Klabbers, *Treaty Conflict and the European Union* (Cambridge - New York: Cambridge University Press, 2009); M. Forteau, 'Droit international conventionnel et droit de l'Union européenne', in M. Benlolo Carabot et al eds, *Union européenne et droit international. En l'honneur de Patrick Daillier* (Paris: CEDIN, 2012), 587; R. Mastroianni, 'Articolo 351', in A. Tizzano ed, *Trattati dell'Unione Europea* (Milan: Giuffrè, 2nd ed, 2014), 2540-2550; S. Saluzzo, 'La natura *erga omnes*

According to this provision in fact, in view of the general principle that the Treaties of the European Union do not affect the application of existing conventions to which the Member States are party,[17] the latter however, are required to ensure the compatibility of such agreements with the Treaties through the use of all appropriate means to eliminate any incompatibilities found.[18] For this purpose, the above

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partes degli obblighi derivanti dalla Convenzione ICSD e il rapporto con il diritto dell'Unione europea' *Osservatorio sulle fonti*, 883, 888-897 (2020).

[17] Exemplary on this point are the decisions Case C-10/61 *Commission* v *Italy*, Judgment of 27 February 1962, available at www.eur-lex.europa.eu (last visited 12 June 2021) and Case C-812/79 *Attorney General* v *J.C. Burgoa*, Judgment of 14 October 1980, available at www.eur-lex.europa.eu in which the Court of Justice specified that the Community institutions have a duty not to impede the performance of the obligations of Member States arising from a prior agreement and therefore the main purpose of the provision establishing the precedence of the existing conventions 'is to lay down, in accordance with the principles of international law, that the application of the Treaty does not affect the duty of the Member State concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder'. However, 'that duty of the Community institutions is directed only to permitting the Member State concerned to perform its obligations under the prior agreement and does not bind the Community as regards the non-member country in question.'

[18] According to Art 351, para 2 of the Treaty on the Functioning of the European Union, the Member States have to eliminate any conflict, even if only potential, between Conventions to which they are party and European law in order to comply with the obligations arising from the European legal system (see, Case C-203/03 *Commission* v *Austria*, Judgment of 1st February 2005, available at www.eur-lex.europa.eu; Case C-249/06 *Commission* v *Sweden*, Judgment of 3 March 2009, available at www.eur-lex.europa.eu; Case C-118/07 *Commission* v *Finland*, Judgment of 19 November 2009, available at www.eur-lex.europa.eu). For this purpose, the Member States may potentially take any measure, legal, economic or political, thus maintaining a certain margin of discretion in the choice of the most appropriate measure. See, in particular, R. Mastroianni, n 11 above, 2548-2549. On this point it should be furthermore noted that the European Court of Justice, Case C-13/93 *Office national de l'emploi (Onem)* v *Madeleine Minne*, Judgment of 3 February 1994, available at www.eur-lex.europa.eu, stated that generally, the national court will be competent to determine the content of the obligations arising from an international convention concluded with the Third State and, therefore, to determine whether those obligations are contrary to European law (in the same way, see Case C-124/95 *The Queen, ex parte Centro-Com Srl* v *HM Treasury and Bank of England*, Judgment of 14 January 1997, available at www.eur-lex.europa.eu; Case C-533/08

mentioned article introduces a mutual duty of assistance between Member States which does not exclude, where appropriate, the adoption by Member States of a 'common attitude'. Finally, the European legislator reminds the Member States that the advantages deriving from the Treaties fully integrate the process of establishing the Union as well as contribute to the creation of common institutions, the allocation of competences and the granting of the same benefits to all Member States. Therefore, taking into account such specificity due solely to participation in the Union, Member States should not confer on Third States the benefits resulting from such participation.[19]

As a general rule, therefore, establishing the need for harmonisation and integration between international conventions and *acquis communautaire*,[20] the same must also be respected in relation to the relationship between international conventions and instruments of cooperation as an essential limit for the operation of the principle of non-affection.[21]

TNT Express Nederland BV v *AXA Versicherung AG*, Judgment of 4 May 2010, available at www.eur-lex.europa.eu).

[19] Art 351, para 3 of the Treaty on the Functioning of the European Union.

[20] In this regard, it has recently been pointed out that the main aim of the rule of precedence stated in Art 351 TFEU lies down not just in the protection of the interests of Third States, but first of all in the need to balance, in accordance with Art 30 of the 1969 Vienna Convention, the protection of previous agreements with the protection of rights and obligations binding all countries as members of European Union. See, P. Koutrakos, *EU International Relations Law* (Oxford - Portland: Hart, 2nd ed, 2015), 321, 322; S. Saluzzo, n 13 above, 115-119. With a different opinion, R. Mastroianni, n 12 above, 2541: the author, in fact, observed that the main purpose of Art 351 TFEU consists in the protection of Third States' rights deriving from existing agreements and in enabling the latter to meet the international obligations assumed.

[21] It follows in fact, that if the incompatibilities between existing bilateral or multilateral Conventions and European law may not be removed or otherwise overcome, the general principle of non-affection laid down in Art 62 cannot be invoked by the Member States party to such Conventions and therefore the Twin Regulations will apply.

III. Implications of Article 62, para 1 over the competence to conclude future International conventions within the scope of Twin Regulations

Art 62, para 1 whether, on the one hand, expressly specifies, from a temporal and material point of view, which conventions are relevant within the meaning of the above-mentioned provision and when they may be considered to be applicable as a matter of priority with respect to the Twin Regulations as well as sets limits to the principle of non-affection; on the other one, however, it does not provide any indication as to the power of Member States participating in enhanced cooperation to conclude on matters governed by the Regulations new international agreements with non-participating Member States or with Third States.[22] This inevitably leads to some evaluations on the competence to conclude agreements in question.

Namely, whether a State party to the cooperation decides to enter into agreements with a Third State or another non-participating Member State in the area of competence, applicable law, recognition and enforcement of decisions on matrimonial property regimes or property consequences of registered partnerships, shall the Member State be competent or the European Union?

In order to answer this issue, it is necessary to recall the consolidated principle of parallelism between the internal and external competences of the European Union.[23]

As the result of the gradual development over time of implicit external competences, this principle confers the European Union, even in the absence of an express provision, the external competence to conclude

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[22] Instead, it is evident from para 2 of Art 62, on which see in this contribution, that, by joining the enhanced cooperation, the participating Member States are precluded from applying existing conventions between them or from concluding new conventions on matters covered by the Twin Regulations.

[23] See, in particular, I. Macleod et al, *The External Relations of the European Communities* (Oxford - New York: Clarendon Press - Oxford University Press, 1996); E. Cannizzaro ed, *The European Union as an Actor in International Relations* (The Hague, New York: Kluwer Law International, 2002); F. Pocar ed, *The External Competence of the European Union and Private International Law* (Padua: CEDAM, 2007); R. Schütze, *Foreign Affairs and the EU Constitution* (Cambridge: Cambridge University Press, 2014); S. Saluzzo, n 13 above, 189-258.

international agreements with Third States whenever it has exercised its internal competence in the same field.[24] This means that while on the one hand the European Union has the implicit external power which is based on the exercise of internal competences;[25] on the other hand, there is a restriction of the foreign powers of the Member States which results in the loss of the right to enter into obligations with Third States when common rules are adopted at European level with which such obligations may interfere.[26]

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[24] This principle has been developed in jurisprudence since the judgment of the Court of Justice, Case C-22/70 *Commission* v *Council*, Judgment of 31 March 1971, available at www.eur-lex.europa.eu, by which the Court stated that 'with regard to the implementation of the provisions of the Treaty, the system of internal Community measures may not be separated from that of external relations.' For this purpose, 'the Community enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined by the Treaty. This authority arises not only from an express conferment by the Treaty but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions.' Therefore, 'each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form they may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules or alter their scope'. On this decision, see A. Tizzano, 'La controversia tra Consiglio e Commissione in materia di competenza a stipulare della CEE' *Il Foro italiano*, IV, 339-362 (1971); D.S. Collinson, 'The Foreign Relations Powers of the European Communities: A Comment on Commission v. Council' 23 *Stanford Law Review*, 956-972 (1971); J.V. Louis, 'Compétence internationale et compétence interne des Communautés' *Cahiers de droit européen*, 479-490 (1971).

[25] According to a constant doctrinal and jurisprudential orientation, external competence is reserved to the European Union not only in case of the existence of its exclusive competence in a specific matter, but also in case the Union has exercised its shared competence internally or has achieved harmonisation of a sector concerned. See, in particular, Case C-22/70 *Commission* v *Council*, n 19 above; Opinion 2/91 of the Court of Justice of 19 March 1993 available at www.eur-lex.europa.eu; Case 467/98 *Commission* v *Denmark*, Judgment of 5 November 2002, available at www.eur-lex.europa.eu; Opinion 1/03 of the Court of Justice of 7 February 2006, available at www.eur-lex.europa.eu; Opinion 1/13 of the Court of Justice of 14 October 2014, available at www.eur-lex.europa.eu.

[26] In this sense, Opinion 1/94 of the Court of Justice of 15 November 1994, available at www.eur-lex.europa.eu, on which see J.M.I.J. Zijlmans, 'The (Exclusive) External Competence of the European Community' *Maastricht Journal of European and Comparative Law*, 405-419 (1995); A. Maunu, 'The Implied External Competence of

Moving from this premise, it is now possible to frame the question of the competence to conclude future agreements in the context of enhanced cooperation. Taking into account that the cooperation binds only participating Member States,[27] two different scenarios emerge according to whether or not the Member State participates in the cooperation.

On the one hand the participating Member States, as members of the closer integration and cooperation laying down common rules of harmonisation, lose the possibility to exercise external competence in the same field. Consequently, this competence may be exercised exclusively by the European Union.[28]

On the other one, since no internal competence has been exercised by the European Union towards non-participating Member States, such States are in no way bound by the common rules laid down in the Regulations. Therefore, they remain free to apply their national law on matrimonial property regimes and property consequences of registered partnerships; as well as maintain the power to act externally in order to conclude agreements with Third States.[29]

IV. Exception to the general principle and precedence of Regulations over Conventions

The delimitation of the scope of application cannot be considered complete without recalling the relationship of both Regulations with the international conventions that concern the matters governed by the Twin Regulations. To this end, in relation to the second paragraph of Art 62, the exception to the general rule which operates through the principle of prevalence can be seen. An exception which, as will be

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the European Community after the ECJ Opinion 1/94 - Towards Coherence or Diversity?' 22 *Legal Issues of European Integration*, 115-128 (1995); G. Tognazzi, 'Il parere nº 1/94: nuovi sviluppi in tema di relazioni esterne della Comunità europea' *Diritto comunitario e degli scambi internazionali*, 75-86 (1996).

[27] Art 20, para 4 of the Consolidated version of the Treaty on European Union [2012] OJ C326/01. See also the Council Decision (EU) 2016/954.

[28] C.M. Mariottini, n 12 above, 461-462.

[29] 'To state the opposite would amount to a violation of Article 327 of the TFEU, according to which any enhanced cooperation shall respect the competences, rights and obligations of those Member States that do not participate in it', ibid 463.

analysed in the third paragraph of the same article, will not apply to the conventions expressly mentioned, which are only partially subject to the principle of non-affection, insofar as they provide for simplified and accelerated procedures with respect to the two Regulations.
However, in other words, with reference to heterosexual or same-sex couples formed after 20 January 2019, the internal rules of each individual country will give way to those set out in the Regulation (EU) 2016/1103, devoted to matrimonial property rlationships, and Regulation (EU) 2016/1104, on the property consequences of registered partnerships.
These Regulations exhaustively regulate the subject-matter they deal with, as does the Regulation (EU) 650/2012,[30] which they complement and have largely inspired.
For a better understanding of the second paragraph, here are some practical examples: the legislator with Regulation (EU) 2016/1103 has kept in mind the choices made by the Hague Convention of 14 March 1978, simplifying, however, its complexity - Convention signed by five States and in force only between France, Luxembourg and the Netherlands.
Within the limits of its application *ratione temporis*, in these three Member States, the Regulation (EU) 2016/1103 replaces the Convention. On the other hand, the conventions mentioned in para 3 of the same provision remain in force in relations between the Member States that are party to them;[31] The Hague Convention of 17 July 1905 on the Conflict of Laws Relating to the Effects of Marriage on the Rights and Duties of Spouses in their Personal Relations and with Respect to their Property is currently in force between Italy, Portugal and Romania. All three States ratified the Convention on 22 August 1912, when it entered into force. Pursuant to Art 62(1), the Regulation (EU) 2016/1103 gives way to the 1905 Hague Convention in relations between Romania, Italy and/or Portugal. However,

[30] See n 11 above.
[31] D. Damascelli, 'La legge applicabile ai rapporti patrimoniali tra coniugi, uniti civilmente e conviventi di fatto nel diritto internazionale privato ed europeo' *Rivista di Diritto Internazionale*, 1134-1135 (2017).

pursuant to Art 62(2) thereof, the Regulation takes precedence over the Convention in relations between Italy and Portugal.[32]

With regard to the practical examples just mentioned, the principle of prevalence is justified by the need to ensure that directly applicable secoral rules on property regimes and the property consequences of registered partnerships take precedence over certain bilateral commitments entered into beforehand between States that have agreed to join a joint project on a much wider scale than bilateral relations.

Therefore, this means that the Conventions with third States (also understood as EU Member States but not part of the enhanced cooperation) remain in force if they have already been entered into, while new ones cannot be entered into since - once the Regulations have been adopted - the European Union acquires exclusive competence over the matters governed by them, with some exceptions.

In this respect, it is important to recall the consolidated case law of the Court of Justice of the EU, such as: the judgment of 31 March 1971 on the European Road Transport Agreement (AETR) case;[33] Opinion 1/03 of 7 February 2006, 'Community competence to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters'; Cases C-466, 467, 468, 469, 471, 472, 475, 476/1998.[34]

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[32] C.M. Mariottini, n 12 above, 465-466.

[33] C-22/70 *Commission* v *Council*, n 19 above: the Court affirmed the exclusive competence of the Community to conclude international agreements on matters for which the treaty provides, thus precluding Member States from concluding agreements on the same subject with non-member States. Thus, whenever, for the implementation of a common policy as provided for in the Treaty, the Community adopts provisions containing, in whatever form, common rules, the Member States do not have the power, either individually or collectively, to enter into obligations with third countries which affect those rules.

[34] The Commission alleges that the defendant Member States (with the exception of the United Kingdom) infringed the Community's external competence by concluding the agreements at issue. The Commission claims in essence that the Community had exclusive competence to negotiate the agreements in question. In spite of the absence of an appropriate legal basis, and therefore of an act of internal legislation adopted by the principles set out by the Court of Justice in its opinion 1/76, in which it clarified the role of the adoption of legislative measures at the

The Court reiterates that the Union has exclusive competence to negotiate and conclude international agreements on matters in which there is already an *acquis communautaire*, in order to prevent the uniform application of EU law from being hindered. Member States may be authorised, by a Commission decision, to open negotiations with a view to concluding separate agreements where it is necessary to provide an appropriate legal framework to meet the specific needs of a given Member State in its relations with a third country.[35]

The Lisbon Treaty has redefined the scope and operational means of the European Union's external action. The changes that have taken place, therefore, together with a case law that has always been inclined to interpret the powers of the Union broadly, have clearly brought about a substantial change also in the powers of action of individual states on the international stage; it is likely that, over, time, substantial limits to the freedom of states in their international relations have gradually emerged.

However, since the Treaty of Rome in 1957, the Community's external competences have been rather limited and certainly did not cover the same areas as those covered by specific internal competences, over time, however, thanks to the interventions of the EU's external competences has progressively expanded. This is largely due to the application of the principle of parallelism of competences, according to which the conferral of an internal competence is necessarily - and even in the absence of an external competence.

However, according to settled case law of the Court, which is also applicable to external competences, Member States are precluded from concluding international agreements with third parties in meters of shared competence when the Union has already exercised that competence internally and the international agreements fall within the

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internal level in the process of the emergence of external competence. In other words, the 'necessity' of the exercise of the Community's external competence would establish that competence and exclude that of the Member States. A. Tizzano, 'Conclusion', 31 January 2002, III legal analysis, I-9449 - I-9450, available at https://eur-lex.europa.eu.

[35] P. Bruno, *I Regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate* (Milan: Giuffrè Francis Lefebvre, 2019), 68-69.

same scope of application of rules adopted or, more generally, within the same field.[36]

V. Relationship between Regulations and International conventions on matrimonial property regimes

In relation to Regulation (EU) 2016/1103 on matrimonial property regimes alone, para 3 evinces the exception to the exception of application to the general principle,[37] through a punctual listing of the Conventions that survive the entry into force of the aforementioned Regulation; therefore, only partially subject to the principle of non-affection, insofar as they provide for simplified and accelerated procedures compared to the provisions of the Regulation.

The Regulation (EU) 2016/1103, 'shall not preclude the application of the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden comprising international private law provisions on marriage, adoption and guardianship, as revised in 2006: the Convention of 19 November 1934 between Denmark, Finland, Iceland, Norway and Sweden comprising international private law provisions on succession, wills and estate administration, as revised in June 2012; the Convention of 11 October 1977 between Denmark, Finland, Iceland, Norway and Sweden on the Recognition and Enforcement of Judgments in Civil Matters by the Member States which are parties thereto, in so far as they provide for simplified and accelerated procedures for the recognition and enforcement of judgments in matrimonial property regimes'. In accordance with the case-law of the Court of Justice, the application of the conventions specified therein must respect the principles governing judicial cooperation in civil matters within the Union.

In relation to the aforementioned conventions, and in connection with Recital 66 of Regulation (EU) 2016/1103 itself, the conventions take precedence over the Regulation to the extent that, as mentioned above, they provide for simplified and accelerated procedures for the recognition and enforcement of decisions in matters of matrimonial property regimes.

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[36] S. Saluzzo, 13 above, 190-195.

[37] In line with Recital no 66 of the same Regulation.

The exemption of conventions from the priority of the Regulation is the subject of a procedural advantage, intended to operate in the countries mentioned, to the benefit of judicial cooperation in civil matters, for the matters covered by the Regulation.
The legislator, with this provision, mirrors, to a certain extent, that of Art 75 of Regulation (EU) 650/2012 in matters of succession. In line with the restrictive reading given by the Court of Justice in the section on the interpretation of Art 71 of Regulation (EU) 2012/1215 on the application of specialised conventions between Member States[38] - according to which such application may not hinder the attainment of the objectives of the Regulation, such as the free movement of judgments and the minimisation of parallel proceedings - in this respect Regulation (EU) 2016/1103 should be interpreted restrictively. In accordance with the case-law of the Court of Justice, the application of the conventions specified therein must respect the principles governing judicial cooperation in civil matters in the Union.

[38] Case C-533/08 *TNT Express Nederland BV* v *AXA Versicherung AG*, Judgment of 4 May 2010, para 45 available at www.eur-lex.europa.eu; Case C-452/12 *Nipponkoa Insurance Co. (Europe) Ltd* v *Inter-Zuid Transport BV*, Judgment of 19 December 2013, para 36 available at www.eur-lex.europa.eu; Case C-157/13 *Nickel & Goeldner Spedition Gmbh* v *Kintra UAB*, Judgment of 4 September 2014, para 38 available at www.eur-lex.europa.eu. For a critical assessment of these judgments, see P. Mankowski, 'Article 71' in U. Magnus et al eds, *Brussels Ibis Regulation* (Cologne: Otto Schmidt, 2016), 1044, 1051 et seq.; P. Rogerson, 'Article 71' in A. Dickinson and E. Lein eds, *The Brussels I Regulation Recast* (Oxford: Oxford University Press, 2015), 567, 569 et seq.; C.M. Mariottini, n 12 above, 466-467.

Article 63
Information made available to the public

Veronica Rita Miarelli and Karina Zabrodina*

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
The Member States shall, with a view to making the information available to the public within the framework of the European Judicial Network in civil and commercial matters, provide the Commission with a short summary of their national legislation and procedures relating to matrimonial property regimes, including information on the type of authority which has competence in matters of matrimonial property regimes and on the effects in respect of third parties referred to in Article 28.	The Member States shall, with a view to making the information available to the public within the framework of the European Judicial Network in civil and commercial matters, provide the Commission with a short summary of their national legislation and procedures relating to the property consequences of registered partnerships, including information on the type of authority which has competence in matters of the **property consequences of registered partnerships** and on the effects in respect of third parties referred to in Article 28.
The Member States shall keep the information permanently updated.	The Member States shall keep the information permanently updated.

Summary: I. The object and the purpose of the provision: sharing and accessibility to information. – II. A brief overview of the information available to the public. – 1. Competent authority in matters of matrimonial property regimes and property consequences of registered partnerships. – 2. Information on the effects in respect of third parties.

* Veronica Rita Miarelli authored paragraph I. and Karina Zabrodina authored paragraph II.

I. The object and the purpose of the provision: sharing and accessibility to information

The obligation for Member States to provide information on the content of their national legislation on matrimonial property regimes and the property consequences of registered partnerships is a common feature of EU measures in the field of private international law.

The importance of ensuring information, is based on considerations clearly set out in Recital 67 of Regulation (EU) 2016/1103 and Recital 65 of Regulation (EU) 2016/1104,[1] provide for an obligation on Member States to communicate information to the Commission

[1] The European Parliament and Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L183/1, Recital 67: 'In order to facilitate the application of this Regulation, provision should be made for an obligation requiring Member States to communicate certain information regarding their legislation and procedures relating to matrimonial property regimes within the framework of the European Judicial Network in civil and commercial matters established by Council Decision 2001/470/EC. In order to allow for the timely publication in the *Official Journal of the European Union* of all information of relevance for the practical application of this Regulation, the Member States should also communicate such information to the Commission before this Regulation starts to apply.' The European Parliament and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decision in matters of the property consequences of registered partnerships [2016] OJ L183/30, Recital 65: 'In order to facilitate the application of this Regulation, provision should be made for an obligation requiring Member States to communicate certain information regarding their legislation and procedures relating to the property consequences of registered partnerships within the framework of the European Judicial Network in civil and commercial matters established by Council Decision 2001/470/EC. In order to allow for the timely publication in the *Official Journal of the European Union* of all information of relevance for the practical application of this Regulation, the Member States should also communicate such information to the Commission before this Regulation starts to apply.

before this Regulation begins to apply; this is to enable the timely publication in the European Judicial Network in civil and commercial matters[2] - such as the *Official Journal of the European Union* - of all information relevant to the practical application of the Regulations.[3]
Art 63 requires the Member States not only to share the information with the Commission but also to update it if necessary. In particular, Member States must: provide a brief summary of their national legislation and procedures relating to matrimonial property regimes and the property consequences of registered partnerships, to the authorities responsible for matters covered by the Regulations, and explain the effects of property regimes in relation to third parties referred to in Art 28.[4]
In the Italian *'Treccani'* dictionary, the verb *'condividere'* means *'to share, to share with others.'* Therefore, states are called upon to inform so that everyone can be made aware of their rights and duties.
It follows from this that the aim of Art 63 is in fact to provide the couples concerned with basic information so that they can take

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[2] The European Judicial Network in Civil and Commercial Matters (EJN) helps to improve the conditions for effective access to justice: by providing citizens directly with a wide range of information on European, national and international law in civil and commercial matters by means of thematic fact sheets; by producing publications, especially for citizens, on specific instruments of Union law. For more details, see: https://e-justice.europa.eu (last visited 10 June 2021).

[3] For similar rules of other Regulations, see Art 29 of the European Parliament and of the Council Regulation (EC) 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims [2004] OJ L143/15; Art 70 of the Council Regulation (EC) 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1; Art 77 of the European Parliament and of the Council Regulation (EU) 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107; and Art 74 of the European Parliament and of the Council Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1.

[4] J. Re, 'Article 63 Information made available to the public', in I. Viarengo and P. Franzina eds, *The EU Regulation on the Property Regimes of International Couples* (Cheltenham: Edward Elgar, 2020), 468-469.

advantage of the opportunities offered to organise and plan their relationships.[5]

Sharing and informing ensures compliance with the principle of transparency, enshrined in Art 1 of the Treaty on European Union.

However, in the first paragraph, the legislator specifies in Art 63 that the information is to be made available to the 'public', thus referring generally and not specifically to the recipients of the communications; consequently, these will not only be professionals or persons with a legal background but the general public.

The right of access to documents is an essential component of the transparency policy implemented by the European institutions.

The European Parliament strives to ensure a high level of visibility for its work. This effort is particularly important as the institution represents the citizens of the EU, who directly elect its Members.[6] In keeping with the principle of transparency referred to above, Art 15 of the Treaty on the Functioning of the European Union stipulates that citizens and residents of the European Union should have a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.[7]

Thus, the right of access is found in the Union system in two respects: both as a means of participating in the procedure and exercising the right of defence, and as a means of information to allow democratic control over the actions of the public authorities. The Union system, however, tends more and more to enhance the second profile of the right of access.

The Court of Justice has pointed out in this regard that the democratic principle requires transparency in the work of public institutions and that access, 'by allowing different points of view to be openly

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[5] ibid.

[6] The rules on public access to documents are laid down in the European Parliament and the Council Regulation (EC) 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43. For more information, see https://www.europarl.europa.eu (last visited 20 June 2021).

[7] Treaty on the Functioning of the European Union, Art 15(3): 'Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.'

discussed, help to give the institutions greater legitimacy in the eyes of European citizens and to increase their confidence', whereas 'a lack of information and debate may give rise to doubts on the part of citizens, not only as regard the legitimacy of an individual act, but also as regards the legitimacy of the decision-making process as a whole.[8]

The protection of fundamental interests is ensured not only by rules to safeguard public interests, but also by the safeguarding of existential interests peculiar to each individual. The express reference to fundamental right and the principle of the Charter of Fundamental Rights in Art 38 of Regulation (EU) 2016/1104 suggests that the realisation and implementation of inviolable human rights is of vital importance to all Member States and, as such, can be protected by the instrument of the rule of necessary application.[9]

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[8] The European Parliament and Council Directive 2003/4/EC of 28 January 2003, on public access to environmental information and repealing Council Directive 90/313/EEC, Art 3(1). F. Donati, 'Accesso ai documenti nel diritto dell'Unione europea', in C. Colapietro ed, *Il diritto di accesso e la Commissione per l'accesso ai documenti amministrativi a vent'anni dalla legge 241 del 1990* (Naples: Editoriale Scientifica, 2012), 123-140.

[9] P. Perlingieri, *Il diritto civile nella legalità costituzionale* (Naples: Edizioni Scientifiche Italiane, 2020), III, 364-366; L. Ruggeri, 'Norme di applicazione necessaria e ordine pubblico del foro', in M.J. Cazorla González et al eds, *Regimi patrimoniali delle coppie transazionali dell'Unione europea* (Naples: Edizioni Scientifiche Italiane, 2020), 85. The Twin Regulations 1103 and 1104 of 2016, are binding in their entirety and directly applicable only in those member States participating in enhanced cooperation, pursuant to Decision (EU) 2016/954, and pursuant to a decision adopted pursuant to Art 331(1) second or third subparagraph, TFEU, it being understood that, pursuant to Art 328(1) TFEU, participation in enhanced cooperation remains possible at any time. In this regard, it is useful to recall that the EU Regulation is defined by Art 288 TFEU as an act of general application, binding in its entirety and directly applicable in all Member States. Hence the abstract nature of the addressees, which include all the legal entities of the Union (Member States and natural and legal persons of the States themselves); the fact that the rules laid down by the Regulation must be observed as such by the addressees; and the fact that the Regulation takes effect in the Member States without - unlike directives - the need for an act of reception or adaptation by the individual state systems (this is referred to, not by chance, as self-executing rules). C. Salerno Cardillo, 'I Regolamenti comunitari in materia di regimi patrimoniali tra coniugi e unioni registrate ed il loro impatto nella normativa nazionale' *Archivio istituzionale della Ricerca - Università di Palermo*, available at https://core.ac.uk (last visited 16 June 2021).

From a temporal point of view, with regard to Art 70 of both Twin Regulations, it specifies that these have been in force since 28 July 2016 and the application is from 29 January 2019, except for certain articles for which there is a different deadline, such as for Art 63, the application of which is form 29 April 2018.[10]

II. A brief overview of the information available to the public

The provision in question therefore contains one of the first information requirements which the legislator demands the Member States to comply with. In addition to a brief summary of national legislation and procedures relating to the property regimes and property consequences of registered partnerships, Member states are also required to communicate their competent authorities as well as information on the effects in respect of third parties. On the basis of the information communicated by the Member States and subsequently published by the Commission, the following overview can be drawn up.[11]

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[10] The Twin Regulations 1103 and 1104 of 2016, are binding in their entirety and directly applicable only in those member States participating in enhanced cooperation, pursuant to Decision (EU) 2016/954, and pursuant to a decision adopted pursuant to Art 331(1) second or third subparagraph, TFEU, it being understood that, pursuant to Art 328(1) TFEU, participation in enhanced cooperation remains possible at any time. In this regard, it is useful to recall that the EU Regulation is defined by Art 288 TFEU as an act of general application, binding in its entirety and directly applicable in all Member States. Hence the abstract nature of the addressees, which include all the legal entities of the Union (Member States and natural and legal persons of the States themselves); the fact that the rules laid down by the Regulation must be observed as such by the addressees; and the fact that the Regulation takes effect in the Member States without - unlike directives - the need for an act of reception or adaptation by the individual state systems (this is referred to, not by chance, as self-executing rules), ibid.

[11] Information referred to in the following paragraphs is available at www.e-justice.europa.eu, European Judicial Network in civil and commercial matters, Information on national law, tabs Matrimonial property regimes and Property consequences of registered partnerships. Note that, if necessary, additional information can be found at http://www.coupleseurope.eu/en/home (last visited 20 June 2021) and at https://psfes.euro-family.eu/eu-home (last visited 24 June 2021).

1. Competent authority in matters of matrimonial property regimes and property consequences of registered partnerships

Firstly, it should be pointed out that not all the information available to date can be found in the European e-Justice portal. In fact, as regards Belgium, Bulgaria, Greece, Croatia, Cyprus, Luxembourg and the Netherlands, the information requested under Art 63 of both Regulations (EU) 2016/1103 and 2016/1104 is still missing; while with regard to Italy, there is no information available about the competent authority on issues relating to the property consequences of registered partnerships.[12]

With particular reference to the authorities competent for matrimonial property regimes, the Czech Republic, Italy, Austria and Slovenia communicated the jurisdiction of the Court without further details.

Spain pointed out that the competence lies with the Court of the First Instance which was seized of annulment, separation or divorce or, failing that, the Court before which actions to dissolve the matrimonial property regime are being or have been brought for any of the reasons.[13]

Germany and France indicated the competence of the Family Court, while Malta, that of the Civil Court (Family section). With regard to Portugal, it should be noted that, according to specific situations, Courts, Registry offices or Notaries will have competence.

Finally, Finland and Sweden communicated the competence of the Court which, in the event of disagreement between the spouses on the division of assets, shall appoint the executor competent to carry out such division.

On the other hand, with regard to the competent authorities for the property consequences of registered partnerships, the Czech Republic

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[12] Some information on substantive and procedural family property law in European Countries can also be found in L. Ruggeri et al eds, *Family Property and Succession in EU Member States National Reports on the Collected Data* (Rijeka: Sveučilište u Rijeci, Pravni fakultet/University of Rijeka, Faculty of Law, 2019).

[13] It should be noted however that Spain is a State with more than one legal system, therefore, in those judicial districts with specialized Family Law Courts, the latter will always be competent for dissolution and liquidation of the property regime, even in case the proceedings do not result from a prior annulment, separation or divorce proceeding.

highlighted that national law does not provide a specific framework for the regulation of the property effects issues, therefore, in case of disputes the Court will be competent. The same considerations apply to Spain as, unlike matrimonial property regimes, no specific competence exists. Therefore, the related matters of division of assets will be settled in accordance with the general discipline.
In Austria, the rules governing matrimonial property regimes apply. As regards property matters between partners in registered partnerships, the Court will therefore have the competence. So did Finland and Sweden.
Germany and France indicated the competence of the Family Court, while Malta, that of the Civil Court (Family section). Finally, the legal system of Portugal does not provide provisions for registered partnerships; while in Slovenia registered partnerships are not part of the legal system.

2. Information on the effects in respect of third parties

Art 27 of the Regulations (EU) 2016/1103 and 2016/1104 states that the law applicable to the matrimonial property regimes and property consequences pursuant to such Regulations determines the effects of these regimes on the legal relations between spouses or partners of registered partnerships and third parties. However, the following Art 28 states that, by way of derogation from that provision, the law applicable between spouses or between partners of registered partnerships shall not have effect against third parties, unless the latter were aware of it, or were required to be aware of it, exercising due diligence. Hereafter, the same Article, for whose more in-depth analysis we refer to the commentary in this book, lists some of cases in which the knowledge by third parties of the applicable law is deemed presumed.
Therefore, thanks to the read-in-conjunction of these provisions with Art 63, it emerges as the legislator, against the presumption of knowledge of the applicable law by third parties, wanted to ensure a minimum level of knowledge and certainty about the effects of the law applicable to third parties through the duty of the Member States to communicate the required information.

Starting from this brief premise, it should be noted that in the legal system of the Czech Republic[14] the division of the assets of the spouses is governed by the principle of freedom to decide on the modalities of the division. However, this freedom should not affect the rights of third parties. Therefore, both spouses will be liable before third parties for any debts relating to property under the community regime. In addition, in the event of prejudice resulting from the division, third parties will have the opportunity to act against them in order to obtain the declaration of invalidity of the division. On the other hand, the spouses will be individually liable for any debts relating to the assets of their exclusive property.

In Germany, otherwise, the principle of free disposal of one's assets applies.[15] Such principle entails the liability of the spouses only for personal debts. The only exception to this principle is the case in which the debt is functional to the needs of the household. A similar principle of personal liability towards third parties, exclusively with personal property, can be found in Spanish law where, however, creditors have the possibility to attack also the goods of community regime through the seizure when personal goods of the spouse are insufficient to pay off the debt.

Except for special cases,[16] the French legislator provided for the principle of joint and several liability for household debts of the spouses, even if they were contracted only by one of the spouses. More articulated, instead, is the Italian discipline. In general, the

[14] Furthermore, it should be noted that the Czech law provides for the optional registration in the Public Register of a contract on matrimonial property regime. It follows that if there is no registration, and therefore there is no consent of the third person, such contract shall have effect only *inter partes*. On the contrary, if the contract is registered, it shall be effective *erga omnes*.

[15] Same principle also applies to the registered partnerships. See Section 8(2) of the German Law on Registered Partnerships and Section 1357 of the Civil Code.

[16] Art 220 of the French Civil Code specifies in fact that 'the joint and several liability shall not apply to expenditure that is manifestly excessive in the light of the household's lifestyle, the usefulness or non-uselessness of the transaction or the good or bad faith of the contracting third party. Nor shall it apply if it was not incurred with the consent of both spouses for hire purchase or loans, unless these are for small sums necessary for everyday needs and the cumulative amount of the sums, in the case of multiple loans, is not manifestly excessive having regard to the household's lifestyle.'

spouses administer separately the goods which are part of the property community. However, according to Art 180 of the Civil Code, the completion of any acts that exceed the ordinary administration requires the consent of the other spouse. Therefore, if during marriage acts of extraordinary administration are performed without the aforementioned consent, the agent spouse will be personally responsible for the obligations contracted. However, the exception to this principle is the case where the personal property of the obligated spouse is insufficient, in which case Art 189 of the Civil Code provides for the possibility for creditors to satisfy themselves also on the goods which are part of the community property.[17] Conversely, the exact opposite logic is applicable when the goods which are part of the communion are insufficient to satisfy the debts which they incur. In this case, in fact, third-party creditors may act, as a subsidiary measure, also on the personal property of each spouse.[18] A similar principle concerning the need to obtain the consent of the other spouse in the event of the establishment of legal relations with third parties also applies in Portuguese law. It follows that, in case of lack of consent, the other spouse may invoke the nullity of the contract.[19]

As regards Malta, under domestic law, the spouses may be liable separately or jointly, and depending on who third parties have entered into a contract or debt with, they will have the right to act against the spouses jointly or separately.

In Austria, instead, spouses may represent each other in carrying out legal transactions which are functional to the satisfaction of the family's needs, but within the level corresponding to the spouses' standard of living. If at the time of the transaction the third party is

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[17] Note that according to the Art 189 of the Civil Code, the possibility for creditors to satisfy themselves on the goods covered by the community regime is limited in quantitative terms only to the value corresponding to the share of the obligated spouse and not to the entire common property. Moreover, it should be added that the creditors of the spouse who contracted the obligation before the marriage may also be satisfied on the same share.

[18] See Art 190 of the Civil Code.

[19] Art 1687 of the Portuguese Civil Code specifies that if the contract regards the transfer of the ownership of unregistered movable property or the creation of a charge over that property, the invalidity of such contract shall not be invoked against a third party who acted in good faith.

unable or encounters any kind of difficulties in determining whether the spouse acts as a representative, both spouses may be jointly and severally liable for their obligations.

The Slovenian legal system establishes joint and several liability with the common goods as well as with the personal ones for obligations relating to family needs. On the contrary, for the obligations contracted before marriage or after marriage but in relation to the goods not part of the communion, each spouse will be personally responsible with his own goods and with his share of the common goods.[20]

Finally, as regards Finland and Sweden, both systems provide for the principle of personal liability for obligations contracted. However, Finnish law specifies that spouses will in any event be jointly liable only in the case of the assumption of obligations for the purpose of maintaining the family.[21]

[20] It should also be pointed out that, in respect of third parties, the principle of the presumption of the existence of a system of communion between spouses applies where, although they have concluded a contract on matrimonial property regime, they have not registered it.

[21] A particular instrument of protection against third parties is also provided at the time of the division of communion. In fact, the spouses will not be able to waive their rights to the part of divided matrimonial property if this can affect the rights of third creditors

Article 64
Information on contact details and procedures

Karina Zabrodina

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. By 29 April 2018, the Member States shall communicate to the Commission:	(Same text)
(a) the courts or authorities with competence to deal with applications for a declaration of enforceability in accordance with Article 44(1) and with appeals against decisions on such applications in accordance with Article 49(2);	
(b) the procedures to contest the decision given on appeal referred to in Article 50.	
The Member States shall apprise the Commission of any subsequent changes to that information.	
2. The Commission shall publish the information communicated in accordance with paragraph 1 in the Official Journal of the European Union, with the exception of the addresses and other contact details of the courts and authorities referred to in point (a) of paragraph 1.	
3. The Commission shall make all information communicated in accordance with paragraph 1 publicly available through any appropriate means, in particular through the European Judicial Network in civil and commercial matters.	

Summary: I. General information. – II. Competent authorities and contesting procedures: a practical case.

I. General information

Similarly to Art 63, the provision in question, identical within the text of the Twin Regulations, establishes the obligation for the Member States to communicate to the Commission,[1] in addition to information concerning their domestic legislation, also some procedural information and contact details in order to facilitate the application of property regimes legislation.[2] Such a duty finds expression in an important guarantee instrument for access to relevant and constantly updated information,[3] not only for legal professionals but also for all interested parties involved in cross-border situations.[4] In fact, the

[1] The obligation which, if not fulfilled, may lead the Member State to the infringement proceedings pursuant to Arts 258-260 of the Treaty on the functioning of the European Union [2012] OJ C326/47. In this sense, J. Re, 'Article 64 Information on contact details and procedures', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples* (Cheltenham: Edward Elgar, 2020), 472. For more on infringement proceedings, see L. Prete, *Infringement Proceedings in EU Law* (Alphen aan den Rijn: Kluwer Law International, 2017); D. Chalmers et al, *European Union Law* (Cambridge: Cambridge University Press, 4th ed, 2019), 328-363.

[2] Recital 67 of the Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L183/1 and Recital 65 of the Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [2016] OJ L183/30 specify in fact that in order to facilitate the application of the Regulations, provision should be made for an obligation requiring Member States to communicate certain information regarding their legislation and procedures relating to property regimes.

[3] Art 64, para 1 of the Council Regulations (EU) 2016/1103 and 2016/1104, points out that the Member States have to apprise the Commission of any subsequent changes to the information communicated pursuant to this Article.

[4] Similar provision may also be found for example in Art 68 of the Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2003] OJ L338/1 that is going to be repealed from 1

information thus communicated, in addition to being published in the *Official Journal of the European Union*, is made public, and therefore freely accessible by anyone, through the European Judicial Network in civil and commercial matters,[5] or by any other appropriate mean, suitable to ensure that such information is made available to all citizens.[6]

In particular, by the date of 29 April 2018, and thus a few months before the entry into force of Regulations,[7]

August 2022 by the Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) [2019] OJ L178/1; in Art 71 of the Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1; in Art 78 of the Council Regulation (EU) 2012/650 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107; in Art 75 of the Council Regulation (EU) 2012/1215 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1.

[5] All information communicated to the Commission pursuant to Art 64 within the framework of the European Judicial Network in civil and commercial matters established by the Council Decision 2001/470/EC of 28 May 2001 [2001] OJ L174 and amended by the European Parliament and the Council Decision 568/2009/EC of 18 June 2009 [2009] OJ L168/35, is available on the website of the European Judicial Atlas in civil matters (e-justice.europa.eu), under the tabs Matters of Matrimonial Property Regimes and Matters of the Property Consequences of Registered Partnerships (last visited 17 June 2021).

[6] Art 64, paras 2 and 3 of the Council Regulations (EU) 2016/1103 and 2016/1104.

[7] Recitals 67 and 65 of the Council Regulations (EU) 2016/1103 and 2016/1104, provide that in order to allow for the timely publication in the *Official Journal of the European Union* of all information of relevance for the practical application of Twin Regulations, the Member States should communicate the required information to the Commission before the Regulations start to apply. On this point, see J. Re, n 1 above, 473, who highlights that pursuant to Art 64, Member States had to provide the required information by 29 April 2018, the same day on which Art 64 became applicable according to Art 70, para 2, arguing whether 'it would have been more sensible to refer to the earlier date indicated in Article 70(2), and provide for their application from 29 July 2016, as occurred with Articles 65-67.' See, also M. Penadés Fons, 'Articulo 78', in J.L. Iglesias Buigues and G. Palao Moreno eds, *Sucesiones internacionales. Comentarios*

the Member States were invited to provide information concerning the national authority competent to declare enforceability of decisions given in a Member State other than that of enforcement; the national authority competent to receive any appeal lodged by the parties against the enforcement decision; and, information relating to existing contesting procedures against the appeal decision.

II. Competent authorities and contesting procedures: a practical case

In order to facilitate the understanding of the Article in comment and to draw up short guidelines functional to the identification of the competent authority for applications concerning the enforceability of decisions and for their appeals as well as for the contesting procedures against the latter, consider the following practical case.[8]

Two spouses, who have respectively a Bulgarian and French citizenship, following the divorce, obtain in France a judicial decision concerning their property regime. The decision provides for the assignment to the Bulgarian husband of some real estate situated in Bulgaria against his commitment to pay the French wife a sum in cash. Meanwhile, the husband returns to Bulgaria without fulfilling the decision. Therefore, the wife, after consulting her lawyer, decides to apply in Bulgaria for a declaration of enforceability of the judgment previously handed down in France.[9]

Which Bulgarian authority is competent for receiving this application? Who should the husband turn to in order to lodge the appeal against the future enforceability decision? Finally, which remedies are available

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al Reglamento (UE) 650/2012 (Valencia: Tirant Lo Blanch, 2015), 656.

[8] The case stands as an example of a question relating to the matrimonial property regimes, but the same logic also applies to the case concerning the property consequences of registered partnerships.

[9] The local jurisdiction is determined by Art 44, paras 1 and 2 of Twin Regulations, which establishes that the competent court or authority to deal with the application for a declaration of enforceability shall be those referred to the place of domicile of the party against whom the enforcement is sought, or the place of enforcement. See more on Art 44 in this book.

under Bulgarian national law against the previous decision on the appeal?[10]

On the basis of the information communicated by Bulgaria,[11] it appears that the wife will have to apply for the enforceability of the French judgment to the Provincial Court competent pursuant to Art 623, para 1 of the Bulgarian Code of Civil Procedure. The declaration of enforceability issued by the Bulgarian Court, in the absence of a hearing, will be notified to the opposing party, the husband in this case, who may appeal against that decision to the Court of Appeal of Sofia. Finally, Bulgarian law provides for further contesting procedure against the judgments of the Court of Appeal. Both spouses in fact will have the opportunity to contest the decision given on appeal before the Court of Cassation, as indicated by Art 623, para 6, of the Code of Civil Procedure.

The same logic may apply to the opposite case, namely, where a French spouse and a Bulgarian one, following the divorce, obtain in Bulgaria a judgment concerning their property regime, which is to be enforced in France, where the husband returned.

In this case, according to the information provided by France[12] to the Commission pursuant to Art 64 of the Council Regulation (EU) 2016/1103, the wife will have to lodge the application for the declaration of enforceability of the Bulgarian sentence before the chief register of the Court competent according to Art 509, paras 1 and 2 of

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[10] For more on these specific profiles see, in particular, J. Kramberger Škerl, 'The recognition and enforcement under the Succession Regulation and the Property Regimes Regulations: procedural issues', in M.J. Cazorla González et al eds, *Property relations of cross border couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2020), 136-142. See, also, P. Bruno, *I Regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate. Commento ai Regolamenti (UE) 24 giugno 2016, nn. 1103 e 1104 applicabili dal 29 gennaio 2019* (Milan: Giuffrè Francis Lefebvre, 2019), 263-283; Id, *Le controversie familiari nell'Unione europea. Regole, fattispecie, risposte* (Milan: Giuffrè Francis Lefebvre, 2018), 289-298.

[11] All mentioned information referred to Bulgaria is available at https://e-justice.europa.eu/content_matters_of_matrimonial_property_regimes -559-bg-en.do?init=true&member=1 (last visited 8 June 2021).

[12] All mentioned information referred to France is available at https://e-justice.europa.eu/content_matters_of_matrimonial_property_regimes-559-fr-en.do?init=true&member=1 (last visited 8 June 2021).

the French Code of Civil Procedure. Following the notification of the decision to the opposing party, the latter may submit to the President of the Court that issued the decision of enforceability the appeal against the same, as provided for in Art 509, para 9, of the French Code of Civil Procedure. Finally, the parties may appeal to the Court of Cassation against the decision handed down by the President of the Court on appeal. With regard to other Member States where the Council Regulation (EU) 2016/1103 applies, it should be noted that to date through the European e-Justice Portal[13] it is possible to find information on contact details and procedures available in English about Belgium, Bulgaria, the Czech Republic, Greece, Spain, France, Croatia, Italy, Cyprus, Luxembourg, Netherlands, Austria, Portugal, Finland and Sweden; information concerning Germany is available only in German; while there is no information about Malta and Slovenia. While with regard to the information within the matters of the property consequences of registered partnerships, on the same Portal it is possible to find details in English about Belgium, the Czech Republic, Greece, Spain, France, Croatia, Italy, Cyprus, Luxembourg, Austria, Portugal, Finland and Sweden; information concerning Germany and Netherlands is available only in original language; while there is no information about Bulgaria, Malta and Slovenia.

[13] See, n 5 above.

Article 65
Establishment and subsequent amendment of the list containing the information referred to in Article 3(2)

Karina Zabrodina

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. The Commission shall, on the basis of the notifications by the Member States, establish the list of the other authorities and legal professionals referred to in Article 3(2).	(Same text)
2. The Member States shall notify the Commission of any subsequent changes to the information contained in that list. The Commission shall amend the list accordingly.	
3. The Commission shall publish the list and any subsequent amendments in the *Official Journal of the European Union*	
4. The Commission shall make all information notified in accordance with paragraphs 1 and 2 publicly available through any other appropriate means, in particular through the European Judicial Network in civil and commercial matters.	

Summary: I. The subject matter of the notification and the concept of 'other authorities' and 'legal professionals'. – II. Consequences of the failure to include legal professionals in the list referred to in Article 65. – III. A short description of the available information.

I. The subject matter of the notification and the concepts of 'other authorities' and of 'legal professionals'

In the overview of the different information that Member States are required to provide to the Commission under previous Arts 63 and 64

of the Twin Regulations,[1] particular importance is gained by the duty of Member States referred to in Art 65 to communicate the list of all authorities and legal professionals, other than courts, which are competent in matters relating to matrimonial property regimes and to property consequences of registered partnerships and which, according to national law, exercise judicial functions or act by delegation of power by a judicial authority or under its control. For the purpose of the Property Regimes Regulations, the definition of 'other authorities' and of 'legal professionals' is provided by Art 3, para 2 of both Regulations. Pursuant to such article, the term 'court' used within the scope of the Regulations is subject to the extensive interpretation which includes not only any judicial authorities, but also all other authorities and legal professionals which exercise judicial functions, provided that they can guarantee the impartiality, the right of all parties to be heard, the similar force and effect as a decision of a judicial authority and the possibility to appeal against such decision. The combined interpretation of Arts 3 and 65 therefore shows that the Twin Regulations operate entirely in line with the principle of national procedural autonomy.[2] In fact, in full respect of the different systems dealing with issues relating to matrimonial property regimes

[1] Arts 63 and 64 of the Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L183/1 and of the Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [2016] OJ L183/30, provide for the obligation of the Member State where both Regulations apply to communicate to the Commission information about their national legislation and procedures relating to matrimonial property regimes/property consequences of registered partnerships, including competent authorities and effects of property regimes in respect of third parties; and about competent courts or authorities to deal with applications for a declaration of enforceability, including those competent to deal with appeals against such decisions and those competent to receive the applications contesting the decisions given on appeal. For more on these articles, see in this book.

[2] In this sense, J. Re, 'Article 65 Establishment and subsequent amendment of the list containing the information referred to in Article 3(2)', in I. Viarengo and P. Franzina

and the property consequences of registered partnerships,[3] on the one hand, they allow the attribution of a broad meaning to the concept of 'court' and, on the other one, they provide that all legal professionals who are expressions of it have to be made accessible and easily identifiable by each interested person.

Art 65 entered into force on 29 July 2016, as established under Arts 70, paras 2 respectively of the Council Regulations (EU) 2016/1103 and 2016/1104. In particular, from such date onwards, once the requested information has been received, the Commission is responsible for publishing the list in the *Official Journal of the European Union* and for keeping it amended whenever Member States notify any changes in the information contained therein. Nevertheless, the Commission has a duty to ensure that the information received is as accessible and available to everyone as possible by any appropriate means, in particular through the European Judicial Network.[4]

This is indeed a closure provision relating to the information obligations of the Member States, the fulfilment of which is necessary to facilitate the proper functioning of the instruments of judicial cooperation in civil matters through constant exchange and publicity of procedural and substantive information.[5]

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eds, *The EU Regulations on the Property Regimes of International Couples* (Cheltenham: Edward Elgar, 2020), 475, who highlights that 'in line with the principle of national procedural autonomy, the Property Regimes Regulations do not interfere in the internal legislation of Member States'. See, also, K. Lenaerts et al, *EU Procedural Law* (Oxford: Oxford University Press, 2015), 107.

[3] See Recital 29 of the Twin Regulations which clearly specifies that the Regulations should respect the different systems for dealing with matters of the matrimonial property regime and of the property consequences of registered partnerships applied in the Member States.

[4] Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters [2001] OJ L174 and amended by the European Parliament and the Council Decision 568/2009/EC of 18 June 2009 [2009] OJ L168/35. Information required pursuant to Art 65 is available on the website of the European Judicial Atlas in civil matters (e-justice.europa.eu), under the tabs Matters of Matrimonial Property Regimes and Matters of the Property Consequences of Registered Partnerships (lastvisited 17 June 2021).

[5] In this sense, P. Bruno, *I Regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate. Commento ai Regolamenti (UE) 24 giugno 2016, nn. 1103 e 1104 applicabili dal 29 gennaio 2019* (Milan: Giuffrè Francis Lefebvre, 2019), 316, highlights that the

II. Consequences of the failure to include legal professionals in the list referred to in Article 65

In order to meet the obligation referred to in Art 65, Italy communicated to the Commission that for the purpose of the Art 3, para 2 of the Twin Regulations are to be considered judicial authorities, in addition to judges, also lawyers when they operate under the assisted negotiation regime[6] as well as Civil Registrars when they act under the simplified regime.[7]

However, no indication has been given regarding the activity of the notaries, who in the Italian legal system assume mainly the role of non-judicial authorities allowed by domestic law to deal with matters relating to matrimonial property regimes and to property consequences of registered partnerships.[8] Therefore, in the absence of an express notification and of the inclusion of the notaries in the list published by the Commission, it seems logical to conclude that an

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cooperation instruments could not function correctly whether citizens in particular, but also the legal professionals, including judges, lawyers, notaries or other public officials involved in the application of the property regimes Regulations were not certain of the applicable law (both procedural and substantive) or of the authorities competent for their implementation.

[6] Art 6 of decreto legge 12 September 2014 no 132, converted with amendments by legge 10 November 2014 no 162, provides for the competence of the lawyer to assist the parties, in concluding the 'assisted negotiation convention' (*convenzione di negoziazione assistita*) in order to reach a consensual separation, the cessation of the civil effects of marriage or the dissolution of the marriage as well as the amendment of the conditions of the separation or of the divorce. Note that according to Art 1, para 25 of legge 20 maggio 2016 no 76 the assisted negotiation is applicable also in case of the dissolution of registered partnerships.

[7] Art 12 of decreto legge 12 September 2014, n 8 above, provides for the possibility to conclude before the Civil Registrars (*Ufficiali di Stato Civile*) the agreement on the consensual separation, on the joint request for dissolution or for the cessation of the civil effects of marriage as well as on the amendment of the conditions of the separation or of the divorce. Note that according to Art 1, para 25 of legge 20 maggio 2016 no 76, the above-mentioned Art 12 is applicable also in case of the dissolution of registered partnerships.

[8] See, A.M. Pérez Vallejo, 'Matrimonial property regimes with cross-border implications', in M.J. Cazorla González et al eds, *Property Relations of Cross-Border Couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2020), 22-23.

Italian notary cannot be qualified under Art 3, para 2 as a 'court', namely, as a judicial authority. This conclusion, however, does not appear to be of absolute value.

In a recent case brought before the European Court of Justice, although with a specific regard to the Council Regulation (EU) 2012/650,[9] the so-called Succession Regulation, the European judges have actually been called to rule on a question similar to that dealt with in this contribution. In our case, in fact, there is a need to understand the value of the notification referred to in Arts 65 of the Twin Regulations and, therefore, to understand whether its eventual absence may preclude Italian legal professionals, and more widely also professionals from other Member States, to be qualified as non-judicial authorities exercising judicial functions.

In particular, in the Case-658/17[10] the referring court raised the interpretative doubt relating to Art 79 of the Succession Regulation[11] by pointing out that the content of that provision does not allow to answer clearly to the question whether the obligation to notify provided for in that provision has a constitutive or purely indicative

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[9] The European Parliament and Council Regulation (EU) 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107.

[10] Case C-658/17 *WB* v *Notariusz Przemystava Bac*, Judgment of 23 May 2019, available at www.eur-lex.europa.eu (last visited 22 May 2021). For some notes on this decision, see M.H. Wolde, 'WB en notaris Bac. De Poolse notaris die op eensluidend verzoek van alle betrokkenen een erfrechtverklaring opmaakt is geen "gerecht" in de zin van artikel 3 lid 2 Erfrechtverordening. Is Oberle hiermee herroepen?' *Nederlands internationaal privaatrecht*, 570-577 (2019); A. Wysocka-Bar, 'Polski notariusz nie jest sądem, a akt poświadczenia dziedziczenia nie jest orzeczeniem' *Europejski Przegląd Sądowy*, 37-43 (2019).

[11] Art 79, para 1 of the European Parliament and Council Regulation (EU) 650/2012 provides in identical way as Twin Regulations that 'the Commission shall, on the basis of the notifications by the Member States, establish the list of the other authorities and legal professionals referred to in Article 3(2)'. Such a list, including any subsequent changes, shall be published in the *Official Journal of the European Union* and shall be made publicly available through any other appropriate means. See about this article, A. Zanobetti, 'Article 79. Establishment and Subsequent Amendment of the List Containing the Information Referred to in Article 3(2)', in A.L. Calvo Caravaca et al eds, *The EU Succession Regulation. A Commentary* (Cambridge: Cambridge University Press, 2016), 842-846.

value. In other words, the European Court of Justice has been required to clarify whether the absence of the notification to be made by the Member State relating to the competence of legal professionals (notaries in this case) to exercise the judicial functions referred to in Art 3, para 2 of the Regulation (EU) 650/2012, has a decisive effect on their qualification as judicial authorities.

In setting this interpretative question, the Court moves from the premise that the above-mentioned Art 3 does not provide for the list of authorities and of legal professionals which are considered to be judicial authorities, but specifically sets out the conditions which they must fulfil in order to be able to take up that qualification. Each Member State, for its part, must verify whether the conditions are fulfilled before notifying the Commission in accordance with Art 79. It is precisely on the basis of the prior verification carried out by each Member State that subsequent notification must be considered as creating the presumption that the national authorities declared under Art 79 constitute judicial authorities.

However, the Court specified that the fact that a national authority was not mentioned in the notified list cannot be sufficient, in itself, to conclude that that specific authority does not meet the required conditions, and therefore cannot assume the role of judicial authority. In fact, although there is no specific notification made by a Member State, the legal professional could still fulfil the conditions laid down in Art 3 and in that case it could be qualified as judicial authority, even in the absence of the notification, since it assumes a purely indicative and not constitutive value.

Following the recent decision of the European Court of Justice, it seems reasonable to conclude that the notification provided for in Art 65 of the Twin Regulations is also of purely indicative value. It follows that, independently of such notification, appropriate assessments may be made from time to time to determine whether, on the basis of the acts that legal professionals carry out with regard to matrimonial property regimes and to property consequences of registered partnerships, they may or may not be qualified as judicial authorities within the meaning of Art 3, para 2 of the Twin Regulations.

III. A short description of the available information

Consulting the European Judicial Atlas in civil matters, it may be outlined the following framework on the available information:
A. The Czech Republic, Portugal, Finland and Sweden communicated the exercise of the judicial functions respectively by notarial entities,[12] civil registry offices and notaries,[13] executors appointed by the court[14] as well as estate administrator and enforcement authority.[15]
B. Only Italy designated as judicial authorities lawyers which exercise their function under the assisted negotiation regime.[16]
C. Belgium, Spain, Croatia and Austria notified that pursuant to their national law, there are no other authorities or legal professionals with the characteristics laid down in Art 3, para 2.
D. With regard to Bulgaria, Greece, France, Cyprus and Netherlands, such States declared that Art 65(1) - the list of the other authorities and legal professionals referred to in Art 3(2) is not applicable.
E. With regard to Germany, Luxembourg, Malta and Slovenia no information is available.

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[12] According to the Czech law, in particular, pursuant to Section 162(2) in conjunction with Sections 100(1) and 103(1) of Act no 292/2013 on special judicial procedures, notarial entities such as court commissioners are competent to exercise judicial functions only on matters relating to matrimonial property regimes. With regard to matters relating to property consequences of registered partnerships, the Czech Republic communicated to the Commission that there are no authorities referred to in Art 3(2).

[13] According to the Portuguese law, the Decree-Law no 272/201 of 13 October 2001 provides Civil Registry Offices with competence in proceedings relating to the designation of the family home, legal separation, conversion of a legal separation into a divorce, and divorce, provided that, in all of the cases referred to above, there is an agreement or a mutual consent between the parties; while the Law no 23/3013 of 5 March 2013 provides notaries with the power to draw up documents and terms of inventory proceedings arising from a separation, divorce, annulment of a marriage.

[14] Finland designated pursuant to Art 3, para 2 executors appointed by the court, both for matters relating to matrimonial property regimes and property consequences of registered partnerships.

[15] Sweden designated pursuant to Art 3, para 2 executors, estate administrators and enforcement authority both for matters relating to matrimonial property regimes and property consequences of registered partnerships.

[16] See, n 7 above.

Article 66
Establishment and subsequent amendment of the attestations and forms referred to in point (b) of Article 45(3) and Articles 58, 59 and 60

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Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
The Commission shall adopt implementing acts establishing and subsequently amending the attestations and forms referred to in point (b) of Article 45(3) and Articles 58, 59 and 60. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 67(2).	The Commission shall adopt implementing acts establishing and subsequently amending the attestations and forms referred to in point (b) of Article 45(3) and Articles 58, 59 and 60. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 67(2).

Summary: I. Facilitating the application of Regulations. – II. Implementing powers of the Commission.

I. Facilitating the application of Regulations

The European legislator, through Art 66 of the Regulation (EU) 2016/1103 and 2016/1104, empowerments the Commission, the main executive body of the European Union, to adopt implementing acts relating to the establishment and subsequent amendment of the attestations and forms referred to in Art 45(3)(b) and Art 58, 59 and 60.

In order to better understand this article, it should be read in conjunction with Recital 70 of the Regulation (EU) 2016/1103 and Recital 68 of the Regulation (EU) 2016/1104 on property regimes.

As will be seen in more detail below, the provisions provide for the adoption of form in order to simplify the application of the Regulations. Therefore, it is up to the Commission to adopt implementing acts establishing these forms, following the comitology procedure provided for in Art 67 of the Regulations.[1]

The legislator emphasises the importance of conferring such implementing powers on the Commission with regard to the establishment and subsequent amendments of the attestations and forms concerning the declaration of enforceability of decisions, court settlements and authentic instruments in order to ensure uniform conditions for the implementing of the Regulation. However, those powers must be exercised in accordance with the Regulation (EU) 2011/182 of the European Parliament and of the Council, which lays down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers.[2]

The establishment of such multilingual forms and attestations, intended to circulate among the participating Member States, is one of the features that has proved most useful for the proper functioning of judicial cooperation instruments in this field. Specifically, reference is made to the establishment of forms, containing information that either reflects the content of the instrument to which they are annexed or supplements it; this establishment, as mentioned above, is carried out by the Commission and the representatives of the participating Member States in the framework of a contradictory procedure that

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[1] S. Marino, 'Article 66. Establishment and subsequent amendment of the attestations and form referred to in point (b) of Art 45(3), and Art 58, 59 and 60', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples* (Cheltenham: Edward Elgar, 2020), 477-478.

[2] The European Parliament and Council Regulation (EU) 2011/182 of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] OJ L55/13. A proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2011/282 was presented in Brussels from 14 to 18 December 2020. For more details, see the inter-institutional file: 2017/0035 (COD), 21 December 2020, available at https://op.europa.eu (last visited 16 June 2021).

takes place in the period between the publication of the Regulation and its entry into force.
However, the useful functionality of such certificates and forms, which allow the use of modern communication technologies, is also noticeable in the Preamble of the Regulations under comment, more precisely in Recital 68 of the Regulation (EU) 2016/1103 and 66 of the Regulation (EU) 2016/1104.[3]

II. Implementing powers of the Commission

As regards enforceability, which relates to the drawing up and subsequent amendments of the certificates and forms, a simplified two-phase procedure is used which consists of a declaration issued following the submission of an application, accompanied by a certified copy of the decision and the certificate issued on the form annexed to the Regulation.[4]

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[3] P. Bruno, *I Regolamenti Europei sui regimi patrimoniali dei coniugi e delle unioni registrate* (Milan: Giuffrè Francis Lefebvre, 2019), 318-319.

[4] The so-called simplified two-phase procedure is carried out without any examination as to the existence of possible grounds for non-recognition or non-enforcement and without any heating with the party against whom the decision is invoked. It is only after service of the declaration of enforceability that either party may lodge an appeal, which will then be examined in the form and with the guarantees of an adversarial procedure, and any appeal against the decision given on that occasion. In both cases of decision, on the appeal and on the appeal, the grounds on which the declaration of enforceability may be refused or withdrawn are only those of non-recognition, namely the 'classic' grounds of manifest infringement of the public policy of the forum; of failure to serve the judgment on the defendant in default of appearance (except in the case of negligence on his part, where he did not challenge the judgment when he had an opportunity to so so); of irreconcilability with another judgment given in proceedings between the same parties in the Member State in which recognition is sought that it is irreconcilable which an earlier judgment given in another Member State or in a non-member country in proceedings involving the same cause of action and between the same parties, provided that the earlier judgments fulfils the conditions necessary for its recognition in the Member State in which recognition is sought. Where the judgment has been given in respect of several matters and the declaration of enforceability cannot be given for all of them, the court or competent authority shall give a declaration of enforceability limited to one or more of them. See, P. Bruno, 'Diritto di famiglia: aggiornamento 2019 - I Regolamenti UE n. 1103/16 e n. 1104/16 sui

Authentic instruments and court settlements which are enforceable in the Member State of origin using the appropriate forms in the annexes to the Regulation (EU) 2018/1935,[5] for decisions on matrimonial property regimes, and the Regulation (EU) 2018/1990,[6] for decisions on the property consequences of registered partnerships. Within the framework of the cooperation instruments, certificates are provided for: the application for enforceability; the acceptance of authentic instruments and their enforceability; the enforceability of court settlements.

With reference to the former, eg concerning the application for enforcement of a foreign judgment pursuant to Art 45(2), Annex I contains the standard form requesting information such as: the Member State of origin of the judgment in question, the court or competent authority issuing the certificate,[7] the court that issued the judgment (only if it is different from the one that issued the certificate), the basic provisions, the enforceability of the judgment and the costs incurred in the proceedings on the merits, with particular regard to legal aid.

The certificate for the acceptance of authentic instruments pursuant to the first paragraph of Art 58 and for the enforceability of such instruments pursuant to the second paragraph of Art 59 is set out in

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regimi patrimoniali della famiglia: struttura, ambito di applicazione, competenza giurisdizionale, riconoscimento ed esecuzione delle decisioni', available at https://www.distretto.torino.giustizia.it (last visited 14 june 2021).

[5] Commission Implementing Regulation (EU) 2018/1935 of 7 December 2018 establishing the forms referred to in Council Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2018] OJ L314/14.

[6] Commission Implementing Regulation (EU) 2018/1990 of 11 December 2018 establishing the forms referred to in Council Regulation (EU) 2016/1104 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [2018] OJ L320/1.

[7] According to Art 3(2) of Council Regulation (EU) 2016/1103, 'court' means, in addition to judicial authorities, all other authorities and legal professionals with competence in matters of matrimonial property regimes who exercise judicial functions or act by delegation of competence os a judicial authority or under its supervision. The list of these other authorities and legal professionals shall be published in the *Official journal of the EuropeanUnion*. See n 5 above, 2.

Annex II to the Regulation, the purpose of which is thus to recognise an authentic instrument in matters of matrimonial property regimes. Once the member State of origin and the authority that drew up the deed and issues the certificate have been indicated, part four of the standard dorm is dedicated to information concerning the authentic of the instrument,[8] while part six deals with the enforceability of authentic instruments, more specifically that of the Regulation (EU) 2018/1935, refers to Art 59 of the Council Regulation (EU) 2016/1103, while part six of the Regulation (EU) 2018/1990 refers to the enforcement of public documents, referred to in Art 59 of the Council Regulation (EU) 2016/1104.

Lastly, 'Annex III' contains the certificate for the enforceability of court settlements pursuant to the second paragraph of Art 60. After indicating the Member State of origin, the court which approved the court settlement or before which it was concluded and which issues the certificate, the form leads to the main section, eg part four, which aims to clarify the rules and conditions laid down for the enforceability of court settlements in the Member States.[9]

The forms are available in all official languages of the union, but it is sufficient that they are filled in one language only. This facilitates the transition and circulation of the forms themselves.[10]

Once the completed forms have been received, an important power of the Commission is to amend the forms according to the same principle followed for their adoption. Thus, in this respect, the work of the Commission can be regarded as essentially technical in nature. The exercise of these implementing powers by the Commission is conferred by the legislator in full compliance with the criteria set out in Art 291(2) of the Treaty on the Functioning of the European Union (TFEU).[11]

In accordance with Art 70(2), Art 66 became applicable on 29 July 2016. The implementing acts were adopted in December 2018, shortly

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[8] Reference is made to the 'acceptance of public acts' in Art 58 of the Council Regulation (EU) 2016/1103.

[9] S. Marino, n 1 above, 478-479.

[10] A. Davì and A. Zanobetti, *Il nuovo diritto internazionale privato europeo delle successioni* (Turin: Giappichelli, 2014), 847.

[11] Recital 2, n 2 above.

before the date of application of the Regulations, so as to ensure full and clear application of the Regulations from the outset. Both implementing the Regulations entered into force on 29 January 2019, the date of application of the Property Regimes Regulations themselves.[12]

Moreover, as specified above, following the production of the documents, once declared enforceable, the judgments can be enforced in any other Member state. Although the court may never review a judgment from another member State on its merits, it may refuse to recognise it if: it is contrary to public policy; it was given against a defendant in default of appearance or if the defendant; it is irreconcilable with an earlier judgment.

The declaration of enforceability may be withdrawn at the appeal stage for the same reasons as those that prevented its recognition.[13]

[12] S. Marino, n 1 above, 478-479.

[13] For more, see on the website of the PSEFS Project - Personalised Solution in European Family and Succession Law, available at https://www.euro-family.eu (last visited 12 June 2021).

Article 67
Committee procedure

Veronica Rita Miarelli

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011. 2. Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply.	1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011. 2. Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply.

Summary: I. Monitoring power of the Committee.

I. Monitoring power of the Committee

With Art 67 of the Regulation (EU) 2016/1103 and 2016/1104 on matrimonial property regimes, the European legislator regulates the committee procedure for the adoption of the acts of enforcement referred to in Art 66. The latter article gives the committee executive powers, regarding the establishment and subsequent amendment of certificates and forms concerning the declaration of enforceability of decisions, court settlements and authentic instruments, with the aim of ensuring uniform conditions for the enforcement of the Regulation.
In this case, an extract of the Member State of origin using the appropriate forms, which are set out in the annexes to the Regulation (EU) 2018/1935,[1] for decisions on matrimonial property regimes, and

[1] Commission Implementing Regulation (EU) 2018/1935 of 7 December 2018 establishing the forms referred to in Council Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2018] OJ L314/14.

Regulation (EU) 2018/1990,[2] for decisions on the property consequences of registered partnerships. Standard forms, adopted in December 2018.[3]

However, since these implementing acts may be of various kinds, Art 67 takes care to specify in para 1 that the Commission shall be assisted by a committee.[4]

It is a committee within the meaning of the Regulation (EU) 2011/182,[5] which lays down the rules and general principles concerning mechanisms for control by Member States when exercising implementing powers conferred on the Commission by a basic act in order to ensure uniform conditions for implementing legally binding Union acts.[6]

According to Art 3 of the Regulation (EU) 2011/182, each committee shall be composed of one delegate from each Member State and a representative of the Commission who shall chair the committee and, while not participating in the vote, nevertheless play an important role; the latter shall convene the meetings, submit the draft implementing act to the committee, which may be subject to amendment until the committee delivers its opinion. However, the representative of the

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[2] Commission Implementing Regulation (EU) 2018/1990 of 11 December 2018 establishing the forms referred to in Council Regulation (EU) 2016/1104 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [2018] OJ L320/1.

[3] S. Marino, 'Art 67 Committee procedure', in Viarengo and P. Franziana eds, *The Eu Regulations on the Property Regimes of International Couples* (Cheltenham: Edward Elgar, 2020), 480.

[4] The primary responsibility for implementing EU law lies with the EU countries. However, in cases rhere uniform conditions of implementing are required (eg taxation, agriculture, internal market, health, food safety, etc.), the Commission (or, exceptionally, the Council) adopts an implementing act after consultation with the Committee. The Committee enables EU countries to monitor the Commission's actions when it adopts an implementing act, a procedure known in EU jargon as 'comitology'. Available at https://ec.europa.eu (last visited 22 May 2021).

[5] The European parliament and Council Regulation (EU) 2011/182 of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] OJ L55/13.

[6] P. Bruno, *I Regolamenti Europei sui regimi patrimoniali dei coniugi e delle unioni registrate* (Milan: Giuffrè Francis Lefebvre, 2019), 319.

Commission is asked to endeavour to find solutions which meet with the widest possible support in the committee.[7]
For the purpose of adopting the implementing act, in relation to the second paragraph of this Article, the Commission will apply the advisory procedure, which is generally used for all implementing measures in the field of culture or for acts referred to in Art 66 of the Regulation.
Art 4 cited in the same paragraph as Art 67 states, in turn, that where the advisory procedure applies, the Committee shall deliver its opinion, possibly by taking a vote, in which case the opinion shall be delivered by a simple majority of its members.
However, when deciding on the implementing act to be adopted, the Commission must take the utmost account of the conclusions reached in the discussions in the committee and the opinion delivered. Therefore, through the advisory procedure, the formal opinion in the form of a vote given by the committee is a non-binding opinion for the Commission, which is free to decide whether or not to adopt the act.[8]

[7] The approval of this Regulation was an important milestone that followed one of the most significant choices made by the EU Member States with the lisbon Treaty, namely the separation between the power 'delegated' to the Commission, now regulated by Art 290 TFEU, and the powers of 'implementation', which according to Art 291 TFEU can be exercised directly by the States, or by the Commission, but in any case under the control of the States through the Committee. I. Ingravallo, 'La nuova comitatologia. Il controllo degli studi sulla Commissione' (2011). Available at https://www.sudineuropa.nel (last visited 18 June 2021).

[8] According to the Commission's latest report on developments in the comitology system, there are around 300 committees covering almost all EU competences)notary agriculture, environment, transport, health and consumer affairs, etc.). In 2013, the Commission adopted more than 1700 implementing acts. Available at https://eur-lex.europa.eu (last visited 22 May 2021).

Article 68
Review clause

Veronica Rita Miarelli

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. By 29 January 2027, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. Where necessary, the report shall be accompanied by proposals to amend this Regulation.	1. By 29 January 2027, a**nd every 5 years thereafter,** the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. Where necessary, the report shall be accompanied by proposals to amend this Regulation.
2. By 29 January 2024, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of Articles 9 and 38 of this Regulation. This report shall evaluate in particular the extent to which these Articles have ensured access to justice.	2. By 29 January 2024, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of Articles 9 and 38 of this Regulation. This report shall evaluate in particular the extent to which these Articles have ensured access to justice.
3. For the purposes of the reports referred to in paragraphs 1 and 2, Member States shall communicate to the Commission relevant information on the application of this Regulation by their courts.	3. For the purposes of the reports referred to in paragraphs 1 and 2, Member States shall communicate to the Commission relevant information on the application of this Regulation by their courts.

Summary: I. Power of control over 'access to justice'. – II. Review in accordance with fundamental principles.

I. Power of control over 'access to justice'

The European legislator, in Art 68 has appropriately equipped the Twin Regulations (EU) 2016/1103 and 2016/1104[1] with a review clause, a common feature of legislative measures adopted in the field of judicial cooperation in civil matters by the Union as provided for and regulated by Art 81 TFEU.[2]

The compromise reached in the Council, at the end of a tortuous negotiation process, required Member States to retain the possibility for their courts to decline jurisdiction - albeit under certain conditions - where national law does not cover marriage or registered partnership specifically concerned by the proceedings; it also required that the grounds for refusing recognise a decision on matrimonial property regimes and the property consequences of a registered partnership be applied without violating the fundamental right and principles recognised by the Charter of Fundamental Right, in particular Art 21 on the principle of non-discrimination.[3]

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[1] Regulations (EU) 2016/1103 and 2016/1104 are the European Union's most recent Regulations in the broad area of family law; these, include a new provision not contained in the previous Regulations, namely Regulation (EU) 2012/650, Regulation (EC) 2002/44, Regulation (EU) 2012/1215, Regulation (EC) 2003/2201 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility. Repealing Regulation (EC) 2000/1347 (the Brussels Ia Regulation) and Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. See the European Parliament and Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1. See L. Ruggeri et al eds, *Family Property and Succession in EU Member States: National Reports on the Collected Date* (Rijeka: Sveučilište u Rijeci, Pravni fakultet/University of Rijeka, Faculty of Law, 2019), 165.

[2] Art 81 of the Treaty on the Functioning of the European Union states: 'The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.'

[3] Charter of Fundamental Right of the European Union of 18 December 2000, Art 21, para 1, states: 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any

Therefore, the legislator with para 3 of Art 68, orders the Member States to inform the Commission about the application of the Regulations by their courts. The rule can be considered as a specification of the principle of loyal cooperation under Art 4, para 3, TEU, given the cooperation between them.[4]

The Commission, generally assisted by a group of experts tasked with identifying and discussing difficulties encountered in the application of the measures monitored - on the basis of information provided by the Member States under Art 68, para 3 - must submit a report to the European Parliament, the Council and the European Economic and Social Committee by 29 January 2017, every five year thereafter, assessing the extent to which these articles have ensured 'access to justice.'[5]

The reports are drawn up with a view to preparing possible subsequent Commission proposals in the measures in question.

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other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.' In this paragraph the Charter sets out a wide range of grounds on which discrimation is prohibited. The most commonly invoked prohibition is against discrimination on grounds of gender, which is also the oldest of these grounds in relation to the prohibition of discrimination; for the areas covered by Regulations (EU) 2016/1103 and 2016/1104 discrimination on the grounds of religion and sexual orientation is also likely to become relevant under Art 38. Separate from the grounds of discrimination listed in para 1, para 2 of Art 21 of the Charter prohibits discrimination on grounds of nationality; this prohibition protects citizens of all EU Member States, not only citizens of the Member States that have joined the enhanced cooperation under which both Regulations were adopted. L. Ruggeri et al eds, n 1 above, 166-167.

[4] Art 4, para 3, states: 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall respect and assist each other in carrying out the tasks which flow from the Treaties.' See Information and Notices of 26 October 2012, [2012] OJ C 326.

[5] Respect for fundamental rights in the EU must be effective, which means that when an individual's rights are violated, he or she has the right to an effective remedy before a court. This right is enshrined in Art 47 of the Charter, which provides that, in the event of a breach of the rights guaranteed by EU law, an individual may bring an action before the courts to have his or her rights respected. Any individual who is a national of an EU Member State is automatically a European citizen. Consequently, EU citizenship brings with it certain rights, which are set out in Arts 18 to 25 of the Treaty on the Functioning of the European Union. Available at https://www.europarl.europa.eu (last visited 15 June 2021).

More precisely, in para 2 of the article, the Commission must submit a special report by 29 January 2024, on the application by courts of Art 9 on alternative jurisdiction, and Art 38 on fundamental rights.
Also on these relationships, the legislator calls upon the Commission to assess whether access to justice, the main objective of these provisions, has been guaranteed. In particular, Art 9 aims to ensure effective judicial protection in sensitive cases where the parties risk being refused recognition of their personal relationship, and consequently, of their property. The purpose of Art 38, on the other hand, is to avoid discrimination in the recognition and enforcement of foreign judgments by ensuring cross-border continuity of the couple's property relationship in the member States.
These rules have no precedent in EU law in the field of judicial cooperation in civil matters. The legislator wished to be able to assess their practical impact on the protection of the right to a fair trial and access to justice. Therefore, the sensitivity of the issues justifies in para 2 the production of a special report before the general report referred to in para 1.
The second paragraph unlike the first one does not mention the power of the Commission to adopt proposals concerning Art 9 or Art 38 but, according to Art 17 TEU, the Commission has the general power to take initiatives for the adoption of Union measures; therefore, the Commission is not precluded from making proposals for the amendment of the above provisions in the light of the findings of the special reports.[6]

II. Review in accordance with fundamental principles

As deliberated in the Regulations (EU) 1103 and 1104 of 2016, the principles of non-discrimination must be observed by the courts and other competent authotities when examining the existence of grounds for non-recognition; this implies that it is necessary to interpret the

[6] S. Marino, 'Article 68 Review Clause', in I. Viarengo and P. Franzina eds, *The EU Regulation on the Property Regimes of International Couples* (Cheltenham: Edward Elgar, 2020), 482.

grounds narrowly.[7] Although Art 38 of both Regulations invokes the Charter, and in particular the prohibition of discrimination, when examining all grounds for non-recognition of a foreign decision, this provision plays a particularly important role in the context of grounds of non-recognition on grounds of public policy. However, in the introductory provisions, the Regulations[8] prohibit courts and other competent authorities from applying public policy to refuse to recognise or enforce a decision, authentic instrument or court settlement from another Member State where this would be contrary to the Charter. Furthermore, Art 21 defines the principle of non-discimination and invokes the similar principle enshrined in Art 18 and 19 of the Treaty on the Functioning of the European Union, and in Art 14 of the European Convention for the Protection of Human Rights.[9]

Given the impossibility of standardising family law, the option of regulation centred on conflict rules circumvents but does not

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[7] F. Dougan, 'Nova evropska pravila o pristojnosti, pravu, ki se uporablja ter priznavanju in izvrševanju odločb na področju premoženjskih razmerij mednarodnih parov - New European rules on jurisdiction, applicable law, and recognition and enforcement of decisions in international matrimonial property relations', in A. Galič and J. Kramberger Škerl eds, *Liber amicorum Dragica Wedam Lukić* (Lubiana: Pravna Fakulteta, 2019), 245; L. Ruggeri et al eds, n 1 above, 167.

[8] See Recital 54 of the Regulation (EU) 2016/1103, Recital 53 of the Regulation (EU) 2016/1104 and Recital 58 of the Regulation (EU) 2012/650.

[9] See Information and Notices of 18 December 2000, [2000] OJ C 364/1, Art 18, para 1, states: 'Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down rules to prohibit such discrimination.' Art 19 states: 'Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.' Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, Art 14 states: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on nay ground such as sex, race, colour, language, religion, political or other opinions, national or social origin, membership of a national minority, property, birth or any other status.'

eliminate the need to continue workingtowards a regulatory framework that is closer to the needs of cross-borde couples and overcomes the current dichotomies (duplication of Regulations; bipartion between Member States that adopt them and States that do not; registered couples and cohabiting couples and, in some States, same-sex couples and herosexual couples).

Overcoming the problem of classification is an important simplification objective which, although not achievable now, is certainly desirable for the future in the hope of an even more synergistic regulatory approach to property regimes. Simplification with regard to the property consequences of registered partnerships is an arduous objective since the Regulation, while taking precedence over any other international convention, does not affect the application of bilateral or multilateral conventions with third States; including Member States that are not part of the enhanced cooperation procedure introduced by the Treaty of Amsterdam of 2 October 1997 and now governed by the Treaty of Lisbon of 13 December 2007, in Art 20 TEU and Arts 326-334 TFEU.

It is clear that the varied and complex intertwining of conflict rules deriving from the Regulation and otherfrom sources of private international law complicates the framework already made complex by *acquis communautaire*, the result of a procedure involving only 18 States.[10]

[10] M. J. Cazorla González et al eds, *Property relations of cross border couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2019), 165.

Article 69
Transitional provisions

Veronica Rita Miarelli

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 29 January 2019 subject to paragraphs 2 and 3.	1. This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 29 January 2019 subject to paragraphs 2 and 3.
2. If the proceedings in the Member State of origin were instituted before 29 January 2019, decisions given after that date shall be recognised and enforced in accordance with Chapter IV as long as the rules of jurisdiction applied comply with those set out in Chapter II.	2. If the proceedings in the Member State of origin were instituted before 29 January 2019, decisions given after that date shall be recognised and enforced in accordance with Chapter IV as long as the rules of jurisdiction applied comply with those set out in Chapter II.
3. Chapter III shall apply only to spouses who marry or who specify the law applicable to the matrimonial property regime after 29 January 2019.	3. Chapter III shall apply only to partners who register their partnership or who specify the law applicable to the property consequences of their registered partnership after 29 January 2019.

Summary: I. Application of Regulations in time and space. – II. Applicable law. – III. Special regulations. – IV. '*Profession iuris*'.

I. Application of Regulations in time and space

In addition to the rules coordinating the moments of entry into force of the different parts of the Twin Regulations (EU) 2016/1103 and

(EU) 2016/1104, the European legislator took care to lay down transitional rules in Art 69 of both texts, providing for an almost 'twin' regime in relation to them.

In view of the need to lay down rules to resolve certain conflicts, the European Commission considered it necessary to regulate the stages of recognition and enforcement of judgments intended for cross-border couples.

The application of these Regulations does not change the rules of each Member State but contributes to determining the jurisdiction and the law applicable to the property consequences of spouses who have married and partners who have registered their union as of 29 January 2019; this means that in all other cases, the previous national rules of private international law will continue to apply.

Art 69 consists of three paragraphs: the first is a general rule; the second and third are special rules which, for a better understanding, must be read in conjunction with the first general rule.

Regulation (EU) 2016/1103 and Regulation 2016/1104, concerning rules on property regimes, are only mandatory for 18 Member States, as it was not possible for all 27 EU countries to agree on the new rules. Therefore, only 18 of them have decided to cooperate on rules regarding property rights of couples; these EU countries are: Belgium, Bulgaria, Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Cyprus, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden. The other EU countries, eg Poland, Hungary, Denmark, Estonia, Ireland, Latvia, Lithuania, Slovakia and Romania, apply their domestic laws with the possibility to join the new rules at any time.[1]

However, in spite of this, by virtue of Art 20 of both Regulations, which lays down the principle of universality,[2] the rules on applicable

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[1] Available at https://ec.europa.eu (last visited 8 June 2021).

[2] Council Regulation (EU) 2016/1103 and Council Regulation (EU) 2016/1104, Art 29: 'Universal application: The law designated and applicable by this Regulation shall apply even where it is not of a Member State.' The universality of the law is not new, but it is a principle that is constantly used in many areas. It is present in the Rome Convention on contractual obligations and consequently in the Rome I Regulation, the Rome II Regulation on non-contractual obligations, the Rome III Regulation on divorce and the Regulation on successions, and the Hague Convention on maintenance obligations. L. Ruggeri, 'Principles of universal application and unity of

law may lead to the designation of the law of a Member State not bound by the Regulations or of a non-Member state.[3] In other words, the universality of the rules on applicable law they lay down means that they are intended to replace *ratione temporis* the corresponding provisions of the Member States, by virtue of the general principle of the supremacy of European Union law over national law.[4]

In contrast to Art 4 of Council Regulation (EU) 1259/2010 of 20 December 2010[5] implementing enhanced cooperation in the area of the law, applicable to divorce and legal separation, the provision cited in the text does not mention the Member States *participating in* the Regulation but *tout court* the *Member States*; the same imprecision applies to Art 20 of Regulation (EU) 2012/650 of the European Parliament and of the Council of 4 July 2012[6] on jurisdiction, applicable law, recognition and enforcement of judgments and acceptance and enforcement of authentic instruments in matters of succession where, given the lack of *opting-in* by the United Kingdom, Ireland and

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applicable law', in M.J. Cazorla González et al eds, *Property relations of cross border couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2020), 72.

[3] A.M. Pérez Vallejo, 'Matrimonial property regimes with cross-border implications: Regulation (EU) 2016/1103', in M.J. Cazorla González et al eds, n 2 above, 18-19.

[4] The affirmation of the *primacy of* European Union law, which entails the disapplication by the court of national law that conflicts with it, dates back in the case-law the Court of Justice to the famous judgment of 9 March 1978, Case C-106/77 *Simmenthal*, 629 et seq. The development of the case-law of the Italian Constitutional Court on the matter is well known, beginning with judgment 8 June 1984 no 170, *Foro Italiano*, I, 2062 (1984). In doctrine, see, for all, U. Villani, *Istituzioni di Diritto dell'Unione Europea* (Bari: Carucci, 2017), 432; A. Albanese, *Le nuove famiglie: unioni civili, convivenza, famiglie ricostituite* (Pisa: Pacin, 2019), 118.

[5] European Parliament and Council Regulation (EU) 2010/1259 of 20 December 2010, implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (OJ 2010, L343), Art 4: 'Universal character: The law designated by this Regulation shall apply even where it is not that of a participating Member State.'

[6] European Parliament and Council Regulation (EU) 2012/650 of 4 July 2012, on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European certificate of Succession [2012] OJ L201/107, Art 20: 'Universal application: The law designated by this Regulation shall apply even where it is not that of a Member State.'

Denmark, reference should have been made to a *Member State not bound* by the Regulation.[7]

In the past, an attempt at international harmonisation was made tith the Hague Convention of 14 March 1978 on the law applicable to matrimonial property regimes; however, given the lack of 'connection' and the subsequent failure of the Convention in terms of ratifications, as only three States (France, Luxembourg and the Netherlands) completed the necessary process of formalising the Convention, the outcome was a reasoned call for harmonisation at EU level.[8]

It is clear that international harmony of solutions is an important value, probably the most general and significant one for every legislator of private international law, since the usefulness of international uniformity is obvious, eg that a certain case is regulated and decided in the same way in the various States to whose judicial authorities it may be submitted. However, when several laws, sometimes uncoordinated, govern the same subject-matter, the rule to be applied to the concrete case.[9] Here are some examples.

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[7] D. Damascelli, 'La legge applicabile ai regimi patrimoniali tra coniugi, uniti civilmente e conviventi di fatto nel diritto internazionale privato italiano ed europeo' *Rivista di Diritto Internazionale*, 1108 (2017).

[8] In various agreements, such as the Hague Convention of 14 March 1978, the earlier Convention of 2 October 1973 in the law applicable to maintenance obligations (Law no 745 of 24 October 1980), and the Rome Convention of 1980 on the law applicable to contractual obligations, the rule is to apply the law referred to in the agreed rules. This obligation is not waived, but it is certainly weakened when the application of the foreign rule, which specifically concerns the individual case, is likely to have consequences that undermine the internal coherence of the system of the forum. More precisely, the public policy limitation is not only formally placed as an exception to the rule deriving from the contractual precept - which is the application of the rule of foreign law referred to - but is also optional. Therefore, clarifications are needed as to how legal systems adapt to the international provision. F. Mosconi, 'La difesa dell'armonia interna dell'ordinamento del foro tra legge italiana, convenzioni internazionali e regolamenti comunitari', in *Studi in onore di Vincenzo Starace*, III (Naples: Editoriale scientifica, 2008), 1509-1528.

[9] Beyond the possible concrete scenarios, it will be up to the national courts to request a preliminary ruling from the Court of Justice on the correct interpretation of the Regulations. For further clarification on the importance of the widespread control of communitariness and constitutionality in a spirit of loyal cooperation, see P. Perlingieri, *Leale collaborazione tra Corte costituzionale e Corti europee. Per un unitario sistema ordinamentale* (Naples: Edizioni Scientifiche Italiane, 2008), 18-21.

Prior to the adoption of the Regulation, from the french perspective, in the absence of a choice of law applicable to the matrimonial regime, the couple was subject to the legal regime of their first habitual residence, eg what is known as community of property increases under French law; on the other hand, from the German perspective, which applied the criterion of the common national law, the couple was subject to deferred community of property increases under German law.

The difficulty is immediately apparent: depending on the country, the couple was not subject to the same matrimonial property regime. From the French legal perspective, the couple were undoubtedly subject to the French legal system (first habitual residence of the couple after marriage), but from the German perspective they were undeniably subject to the German legal system (common nationality of the couple).

Anyone will understand that this divergence in the legal analysis of the same factual situation is a source of dispute, At the time of a divorce or an inheritance, one of the spouses or heirs will have an interest in crystallising the dispute in France in order to benefit from community of property increases, whereas the other spouse or another heir will have an interest in crystallising the dispute in Germany in order to benefit from deferred community of property increases. There is a real risk of obtaining two conflicting judgments.

The difficulty arises solely from the fact that France and Germany did not have the same connecting factor to designate the law applicable to the matrimonial property regime in the absence of a choice by the couple.

By harmonising the conflict-of-laws rule, the problem is eliminated. Irrespective of the criterion chosen, the mere fact that France and Germany adopt the same criterion is in itself sufficient to eliminate the problem.[10]

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[10] Therefore, the principle of universality (Art 20 of both Twin Regulations), in order to strengthen legal certainty, is combined with the principle of unity (Art 21), according to which all assets, whatever their type or nature, even if they are located in a third State, are subject to the law that is applicable on the basis of the Regulation. L. Ruggeri, 'Principles of universal application and unity of applicable law', in M.J. Cazorla González et al eds, n 2 above, 73.

In private international law, more than in any other matter, the important thing is not which rule they have, but that they all have the same rule.[11]

II. Applicable law

As explained above, Art 69 consists of three paragraphs: the first is a general rule; the second and third are special rules.
About para 1, the Regulations apply 'only to proceedings instituted, to public documents formally drawn up or registered and to court settlements approved or concluded on or after 29 January 2019.'
Therefore, national law applies to marriages concluded until 28 January 2019. Unless the spouses agree otherwise, the matrimonial property regime is subject to the law applicable to their personal relationships, eg: the common national law, if the spouses are of the same nationality; the law of the State in which the matrimonial life is principally located if they have different nationalities or several nationalities in common (Art 29 and 30 of law 218 of 31 may 1995).
With the adoption of Council Regulation (EU) 2016/1103 of 24 June 2016, there are new rules to establish the law applicable to all marriages contracted on or after 29 January 2019 and to marriages contracted before the date of entry into force of the Regulation, where the spouses have chosen a law applicable to their matrimonial regime on or after 29 January 2019; likewise, Council Regulation (EU) 2016/1104, which establishes which law is applicable to the property of the registered partnership.
Harmonisation of the conflict-of-law rules is achieved thanks to the principle set out above, eg the principle of universality (Art 20), according to which the applicable law may also be that of a third country, which in this case may be either a country that is not a member of the European Union or a Member State that has not participated in the enhanced cooperation procedure. The adoption of the principle of universality has the advantage of identifying the applicable law without being subject to barriers and borders, with the result that regardless of which court has jurisdiction, it will be required

[11] P. Callé, 'Standing by international couples in Europe' *Council of Notaries of the Notaries of the European Union,* 13-14 (2019).

to rule on the applicable law on the basis of the Twin Regulations 2016/1103 and 2016/1104.

Therefore, cross-border couples have the possibility of knowing in advance the national law on the basis of which the competent court will have to decide; they may choose to apply either the law of the State where both, or even only one of them, have their habitual residence, or the law of the State whose nationality they both, or even one of them, have at the time of the conclusion of the agreement. In the absence of a choice, the following hierarchy of connecting factors provided for by Art 26 of the Law of the State may be applied, *inter alia:* the spouses' first common habitual residence after the conclusion of the marriage; filing that, the spouses' common nationality at the time of the conclusion of the marriage, This criterion may not be applied if the spouses have more than one common nationality; failing tat, the law of the State with which the spouses have the closest connection at the time of the conclusion of the marriage.[12]

Therefore, by way of exception and at the request of the spouses, the competent court may decide that the law of a State other than the State where the spouses had their first common habitual residence after the conclusion of the marriage is applicable - Art 22 (3).[13]

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[12] M.J. Cazorla González et al eds, n 3 above.

[13] Until 28 January 2019, spouses could choose the law applicable to their property relationships between the law of a State of which at least one of them is a national or the law of a State in which at least one of them resides. The spouses' agreement on the applicable law is valid if it is considered as such by the chosen law or by the law of the place where the agreement was concluded (Art 30, legge 31 May 1995 no 218). The minimum formal requirement is the written form. The choice-of-law agreement may be concluded or modified at any time, has no retroactive effect, and may be included in the marriage certificate. European Parliament and Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (OJ L 183-1), the Art 22 of provides for the possibility to choose the law of one of the States of which at least one spouse is a national or the law of a spouse's habitual residence at the time of the choice as the law applicable to the matrimonial property regime. This choice may only be validly made as of 29 January 2019, by means of a nuptial agreement or an agreement on the choice of applicable law and in compliance with the formal requirements of Art 23. However, the choice of law applicable to the matrimonial property regime during the marriage shall only have effect for the future, unless the spouses agree otherwise and without prejudice to the rights of third parties. Note

However, in the absence of clarification in Art 69, the relevance of the institution of proceedings at first instance must be taken into account. Thus, the date of the commencement of proceedings must be determined in accordance with Art 14, which sets out the procedural steps to be taken into account in determining the court's jurisdiction.
For example when an ancillary application relating to the property consequences of a registered partnership is made in the context of a succession case under Art 4, the date of institution of the main proceedings must be taken into account. The same applies to cases where jurisdiction can be established separately, such as counterclaims or applications for provisional and protective measures. If the proceedings are instituted on or after 29 January 2019, the validity and effects of such agreements should be assessed in accordance with the Articles of Chapter II - devoted to jurisdiction - of the Property Regimes Regulation, regardless of whether they were concluded before that date.
However, the legislator does not only refer to proceedings but also to 'public acts formally drawn up or registered' and 'court settlements approved or concluded.'
In relation to the former, reference is made to the date on which such documents were formally drawn up or registered. The first date is relevant if the document is immediately valid as an authentic instrument from the date of its conclusion or drafting; on the other hand, the second date must be taken into account if some form of registration is required to confer the status of an authentic instrument on the document.
As regards the letter, eg court settlements, it is first important to understand what the legislature means by this term. Art 3(e) defines 'court settlement' as 'a settlement in matters of matrimonial property regimes which has been approved by a court or concluded before a court in the course of proceedings.' Thus, the wording of Art 69(1) implies a derogation from the rule laid down in Art 3, which refers to the date on which court proceedings were instituted, since settlements

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that, if necessary, additional information can be found at http://www.coupleseurope.eu/it/italy/topics/1-Quale-legge-è-applicabile/ (last visited 28 May 2021) and at https://psfes.euro-family.eu/eu-database (last visited 20 June 2021).

may be recognised or enforced in other Member States even if they are reached in the course of proceedings instituted before 29 January 2019. The ultimate aim is to facilitate the circulation of court settlements as they reflect the common will of the parties. Consequently, they may be recognised and enforced in accordance with the regime set put in the Property Regime Regulation even if they have been approved or concluded before a court whose jurisdiction is not based on one of the grounds set out in the Property Regime Regulation.[14]

III. Special regulations

With reference to the special rules, referred to in para 2, the legislator has decided to regulate the 'temporal' scope of Chapter IV of the Property Regimes Regulations. Specifically, it stipulates that: where judicial proceedings have been commenced before 29 January 2019, judgments subsequently adopted may be recognised and enforced if they are upheld on the basis of rules of jurisdiction 'in accordance with those laid down in the provisions of Chapter II.' Thus, where the general, exclusive and successor titles of jurisdiction have been complied with, there is no reason to remove it from the uniform circulation regime established therein.[15]

In other words, the application of the provisions of Chapter IV of the Property regime Regulations, eg the recognition, enforceability and enforcement of judgments, is possible provided that the grounds of jurisdiction on which the judgment to be recognised or enforced is based are compatible with those laid down in the Property Regime Regulations in Chapters II. Before analysing this paragraph, it is essential to examine the very meaning of compatibility, eg 'to be compatible, of things that can go together, that can be agreed upon.' However, on a mere literal interpretation of the wording suggested by the provisions in Art 69, para 2 the requirement of compatibility of

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[14] G. Biagioni, 'Art 69 Transitional provisions', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples* (Cheltenham: Edward Elgar, 2020), 484-485.

[15] P. Bruno, *I Regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate* (Milan: Giuffrè Francis Lefebvre, 2019), 67.

the grounds of jurisdiction does not imply that the national law of the home Member State must share the same cascading approach used in the Property Regimes Regulations or refer to exactly the same listed grounds of jurisdiction. At this point, interpreting the provisions broadly, it might also be sufficient to establish that the courts of the Member State of origin would have had jurisdiction also under the rules contained in the Regulation. For instance, according to Art 3 of law 31 May 1995 no 218 (reform of the Italian system of private international law), the jurisdiction of the Italian courts is based on the domicile or residence of the defendant; the head of jurisdiction will be compatible with Art 6 of the Property Regime Regulation when the domicile of the defendant corresponds to the common habitual residence of the spouses or partners or to the habitual residence of the Property Regime Regulation. Thus, taking up the notion cited above, the rules of the Italian State will be compatible with the Regulations on property regimes when the choice of court is valid within the meaning of Art 7 of the Regulation on property regimes.

European society has changed in recent decades and this is reflected in the latest forms of family that currently coexist on European territory and whose reality, according to the principle of equility and non-discrimination, was upheld by the European Court of Human Righrs[16] when it ruled in its judgments that a homosexual couple can be included in the concept of 'private life' and 'family life' in the same way as a heterosexual couple in the same situation.[17]

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[16] In the context of the Union's sources of private international law, Regulation 1104 was the first to adopt a definition of 'registered partnership', to be understood - in relation to Art 3(1)(a) - as 'a system of community of life between two persons provided for by law, the registration of which is compulsory under the law and in accordance with the legal formalities prescribed by that law for its creation.' C. Rudolf, 'European Property Regimes Regulations - Choice of Law and the Applicable Law in the Absence of Choice by the Parties' 11 *LeXonomica*, 133 (2019); A. Dutta, 'Beyond husband and wife - new couple regimes and the European Property Regulations', in A. Bonomi and G.P. Romano eds, *Yearbook of private international law Vol. XIX – 2017-2018* (Köln: Verlag Dr. Otto Schmidt, 2018), 148.

[17] A. Paños Pérez and M.J. Cazorla González, 'Matrimonial Property regimes in the absence of choice by the spouses under Regulation (EU) 2016/1103', in M.J. Cazorla González et al eds, n 2 above, 28-30.

IV. 'Professio iuris'

However, with reference to the paragraph of the respective Art 69 of the Twin Regulations on property regimes, the legislature has decided to regulate the temporal application of Chapter III by means of special legislation; the provisions relating to the determination of the applicable law in connection with Regulation (EU) 2016/1103, are only applicable to spouses who have entered into a marriage or who have designated the law applicable to their matrimonial property regime after 29 January 2019. Similarly, the legislature, by means of Regulation (EU) 2016/1104, has established that the provisions in Chapter III shall only be applicable to partners who have registered their partnership or designated the law applicable to the property consequences of their partnership after 29 January 2019.[18]
In the course of time, the laws towards which the *professio iuris* of the spouses may be directed have not undergone any significant modification, suffice it to recall: in Art 69, para 3, of both instruments, the conflict-of-law rules set out therein apply to marriages contracted and, respectively, to unions registered after 29 January 2019, with the clarification that the provisions facultative of the choice of law are also applicable with reference to family groupings constituted before that date, provided that the *professio iuris* is exercised thereafter; with regard, on the other hand, to Art 30, para 1, second sentence, of Law 218/1995, the spouses are allowed to *choose* the law applicable to their property relationships from among the laws of the State of which at least one of them is a national or in which at least one of them resides; in the last sentence of Art In the last sentence of Art 32-*ter* (4) of the same law, same-sex couples in a civil partnership are given the right to choose the law applicable to their property relationships from among the same laws made available to spouses by the second sentence of Art 30 (1) above; to these, must be added 'the law of the state under whose law the registered partnership was formed' referred to in Art 22(1)(c) of Regulation (EU) 2016/1104;[19] a law which, by virtue of Art

[18] P. Bruno, n 16 above, 66-67.

[19] Art 22 governs the choice of applicable law, so that the partners or future partners may designate or change by agreement the law applicable to the property consequences of their registered partnership, provided that the chose law gives property effects to the institution of the registered partnership and that this law is

69(3) below, may be chosen by those who were joined in civil partnership before 30 January 2019, provided they exercise their *professio iuris* in its favour from that date.

However, it is clear that the list of laws to which the *professio iuris* of spouses may be directed is not significantly modified by Art 69(3) of Regulation (EU) 2016/1103, since the laws referred to in Art 22(1) of the latter instrument coincide, in substance, with those referred to in the second sentence of Art 30(1) of Law 218/1995.[20]

In conclusion, analysing the third paragraph of Art 69 of both Regulations, firstly, the provisions on determining the applicable law apply, in principle, only to couples who marry or enter into a registered partnership on or after 29 January 2019. However, as with other measures adopted by the Union in the field of judicial cooperation in civil matters, the application of the conflict-of-law rules in the Property Regimes Regulations does not depend on the date of the commencement of proceedings but on the date of the establishment of the legal relationship in question.

This decision by the legislator can be explained by the need to protect the legitimate expectations of the parties, so as to enable spouses or partners to know in advance which law will apply to their matrimonial property regime or the property consequences of the registered partnership so that they can organise their wishes in advance. Consequently, the EU legislature has ruled out any retroactive application of the Regulations on property regimes, so much so that it has determined that the provisions of both Regulations are only applicable to spouses or partners who have entered into a marriage or

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one of the following (a) the law of the State of the habitual residence of the partners or future partners, or of one of them, at the time of the conclusion of the agreement; (b) the law of a State of which one of the partners or future partners is a national at the time of the conclusion of the agreement; (c) e law of the State under whose law the registered partnership was formed. Unless the partners agree otherwise, a change in the law applicable to the property consequences of their registered partnership, decided in the course of the partnership, has effect only for the future and any retroactive change of law does not affect the rights of third parties under that law. M. Pinardi, 'I Regolamenti europei del 24 Giungo 2016 nn. 1103 e 1104 sui regimi patrimoniali tra coniugi e sugli effetti patrimoniali delle unioni registrate' *Europa e Diritto Privato*, 745-754 (2018).

[20] D. Damascelli, n 7 above, 1129-1130.

registered partnership after 29 January 2019. In the absence of uniform rules to the Regulations on property regines, the date of the ceòebration of the marriage, or the date of the registration of the partnership, must be determined in accordance with the rules of private international law of the forum.

However, again by Art 69, para 3, the application of Chapter III is permitted in respect of couples who entered into a marriage or registered partnership before 29 January 2019, provided that they reflect the law applicable to the matrimonial property regime or the property consequences of the registered partnership after that date. The conflict-of-law rules in the property regimes Regulations are applicable not only if the spouses or partners designate the applicable law for the first time after the relevant date, but also if they amend or supplement an existing agreement. Since the parties cannot expect the national conflict-of-law rules to continue to apply in such situations, they are bound to comply with the rules laid down in the property regimes Regulations themselves as regards the substantive and formal validity of their choice of law.

In contrast, if the parties enter into a new matrimonial property or property partnership agreement after 29 January 2019, but do not enter into or amend an applicable law agreement, the Property Regimes Regulations do not apply.

Finally, in connection with Art 69, we find Art 58(3) - acceptance of authentic instruments - for which Chapter III also applies to proceedings in which an authentic instrument is challenged: 'Any challenge relating to the legal acts or legal relationships recorded in an authentic instrument shall be made before the courts having jurisdiction under this Regulation and shall be decided in accordance with the law applicable pursuant to Chapter III.'

Therefore, reading this article in conjunction with both para 1 of Art 69, eg the general rule of temporal applicability to authentic instruments, and the special rule in para 3 of the same article, it follows that Chapter III applies to challenges to gela acts or legale relationships registered in authentic instruments formally drawn up or registered after 29 January 2019, provided that the couple concludes the marriage or registered partnership, or specifies the applicable law after this date.[21]

[21] G. Biagioni, n 14 above, 488.

Article 70
Entry into force

Karina Zabrodina

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
1. This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.	(Same tex)
2. This Regulation shall apply in the Member States which participate in enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, as authorised by Decision (EU) 2016/954.	
It shall apply from 29 January 2019, except for Articles 63 and 64 which shall apply from 29 April 2018, and Articles 65, 66 and 67, which shall apply from 29 July 2016. For those Member States which participate in enhanced cooperation by virtue of a decision adopted in accordance with the second or third subparagraph of Article 331(1) TFEU, this Regulation shall apply as from the date indicated in the decision concerned.	

Summary: I. Geographical scope. – II. Temporal scope.

I. Geographical scope

Art 70 represents the closing provision that not only establishes the moment from which the Regulations (EU) 2016/1103 and 2016/1104 enter into force (twenty days after their publication in the *Official Journal of the European Union*) and that from which they become applicable in all their parts (29 January 2019), but it also recalls the geographical scope and identifies specific rules with different temporal application.[1]

In particular, from the geographical point of view this provision confirms the scope of the Regulations as outlined in the Decision (EU) 2016/954,[2] and even before identified by Art 20[3] of the Treaty on European Union.

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[1] Similar provisions can be found in Art 72 of the Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2003] OJ L338/1 that is going to be repealed from 1 August 2022 by the Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) [2019] OJ L178/1; in Art 76 of the Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1; in Art 21 of the Council Regulation (EU) 2010/1259 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L343/10; in Art 84 of the European Parliament and Council Regulation (EU) 2012/650 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107.

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

[3] In particular, Art 20, para 4 of the Consolidated version of the Treaty on European Union [2012] OJ C326/01.

In other words, acts adopted in the framework of enhanced cooperation are always binding only in the participating Member States and must in any event be applied with due regard for the competences, rights and obligations of non-participating Member States.[4]

It follows that currently the Twin Regulations are applicable in all their parts only in the 18 Member States which acceded to the enhanced cooperation on competence, applicable law, recognition and enforcement of decisions on matrimonial property regimes and the property consequences of registered partnerships. Conversely, the non-participating Member States are free to regulate the property regimes with cross-border implications, according to the rules of private international law, as well as to conclude with other Member States bilateral and multilateral conventions in order to provide a common discipline of such situations. Nevertheless, the non-participating States are also free to join the enhanced cooperation at any time.[5]

Also with regard to geographical profile, it should be clarified that, in accordance with Art 20 of the Treaty on European Union, acts adopted in the framework of enhanced cooperation are not considered to be an *acquis* to be accepted by the States which are candidates for accession to the European Union. This means that the new Member States which are to join the Union will be able to decide freely,

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[4] Art 327 of the Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47. It should be noted that this article provides for a mutual respect of the participating and non-participating Member States. In fact, in view of the obligation of the Member States party to the enhanced cooperation to respect 'the competences, rights and obligations of those Member States which do not participate in it,' there is an opposite duty of the latter to not impede the implementation of such cooperation. In this sense, G. Biagioni, 'Article 70 Entry into force', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples* (Cheltenham: Edward Elgar, 2020), 491, who points out that 'the application of national rules concerning jurisdictional competence, *lis pendens* or applicable law by non-participating Member States will not be an obstacle to the implementation of the uniform rules contained in the Property Regimes Regulations, even if it leads to outcomes that diverge from those to be expected under the EU rules.'

[5] See Arts 326-334 of the Consolidated Version of the Treaty on the Functioning of the European Union.

subsequently, whether or not to express their interest in participation in the instruments of enhanced cooperation and therefore whether or not to be bound by the application of the resulting Regulations.

II. Temporal scope

With regard to the temporal profile, Art 70, in addition to the date from which the property regimes discipline applies in the participating Member States, identifies two additional dates from which apply respectively Arts 65, 66, 67 and Arts 63, 64.
In the first case, the mentioned provisions apply from 29 July 2016 and concern, in particular, some competences of the Commission including the creation and publishing of lists relating to the authorities and legal professionals designated by each Member State as judicial authorities, and the adoption of implementing acts relating to the elaboration of certificates and forms concerning the declaration of enforceability of decisions, court settlements and authentic instruments through the committee procedure referred to in Art 67. In the second case, instead, the mentioned Arts apply from 29 April 2018 and lay down information requirements for each Member State with regard to the communication to the Commission of information relating to their internal rules on property regimes. In particular, Art 63 requires information of a procedural and substantive nature, including, for example, information relating to the competent authority or to the effects in respect of third parties in accordance with Art 28, to be made available. Meanwhile, Art 64 provides for the obligation to notify the national authorities competent to deal with applications for a declaration of enforceability and appeals against decisions on such applications, as well as those authorities competent to deal with further contesting procedures against appeals. Such an approach aimed at identifying specific rules with differentiated temporal application represents an important instrument for facilitating the cooperation between the European Union and the Member States, but also between the Member States

themselves.[6] In fact, on the one hand, it facilitates a gradual adaptation of the Member States to the new framework by enabling them to identify, and thus to communicate to the Commission, the competent national authorities, in accordance with national law, to carry out all those acts provided for by the Twin Regulations. On the other one, this approach provides the Commission with the necessary time for both the development of standardised forms and certificates which facilitate the circulation of documents and acts between different States, and to make available to all citizens the information notificated by the Member States.

Indeed, in this sense is also oriented the European Court of Justice, which pointed out within the Case C-412/10[7] that the European legislator can always legitimately distinguish between the date of entry into force[8] of the act and that of its application, postponing the second compared to the first. This mechanism, in fact, is particularly suited to enabling both the Member States and the European Union itself, following the entry into force of the act, to fulfil all the preconditions laid down in that act, obligations that are essential for the subsequent full application of the act.

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[6] P. Bruno, I Regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate. Commento ai Regolamenti (UE) 24 giugno 2016, nn. 1103 e 1104 applicabili dal 29 gennaio 2019 (Milan: Giuffrè Francis Lefebvre, 2019), 65-66.

[7] Case C-412/10 *Deo Antonio Homawoo* v *GMF Assurances SA*, Judgment of 17 November 2011, available at www.eur-lex.europa.eu. See, L. Idot, 'Applicabilité dans le temps' *Europe*, 54 (2012); C. Brière, 'Conflits de lois' *Journal du droit international*, 693-702 (2012); A. Moreno Sánchez-Moraleda, 'Alcance de la determinación del ámbito de aplicación del Reglamento europeo (Reglamento CE) núm. 864/2007, sobre ley aplicable a las obligaciones extracontractuales. Comentario de la sentencia del Tribunal de la Unión Europea (Sala Cuarta). Sentencia de 17 de noviembre de 2011' *Revista de Derecho Patrimonial*, 658-668 (2012); E. Guinchard, 'Unfinished Business: Rome II in Practice and the need for a Hague Convention on Non-Contractual Obligations' *European Law Review*, 100-109 (2015).

[8] The entry into force of legislative acts is generally indicated by the act itself. However, if there is no indication, Art 297, para 1 of the Consolidated Version of the Treaty on the Functioning of the European Union establishes that the act adopted shall enter into force on the twentieth day following its publication.

Finally, again with regard to the temporal profile, it should be noted that Art 70, para 2 identifies also the moment from which the Twin Regulations apply in those Member States that should join the enhanced cooperation at a later date. More specifically, in order to identify this moment correctly, it should be taken into account not the moment when a State has expressed an interest in participation, but the decision authorising such participation referred to in the second or the third subparagraph of Art 331, para 1 of the Treaty on the Functioning of the European Union.[9] In fact, both Property Regimes Regulations will apply as from the date indicated in the decision concerned.

[9] According to Art 331 of the Consolidated Version of the Treaty on the Functioning of the European Union, 'the Commission shall, within four months of the date of receipt of the notification, confirm the participation of the Member State concerned.' However, it may be possible that 'the Commission considers that the conditions of participation have not been fulfilled' and therefore in this case 'it shall indicate the arrangements to be adopted to fulfil those conditions and shall set a deadline for re- examining the request.' On the expiry of that deadline, the Commission shall re-examine the request. If the conditions of participation have still been considered not fulfilled, the Member State concerned may refer the matter to the Council, which shall decide on the request.

APPENDIX

COUNCIL REGULATION (EU) 2016/1103

of 24 June 2016

implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes

(OJ L 183 8.7.2016, p. 1) *

* The official text of the EU Regulation, in the different Union languages, can be consulted at: https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=CELEX %3A02016R1103-20160708

CHAPTER I

SCOPE AND DEFINITIONS

Article 1

Scope

1. This Regulation shall apply to matrimonial property regimes.

It shall not apply to revenue, customs or administrative matters.

2. The following shall be excluded from the scope of this Regulation:

(a) the legal capacity of spouses;

(b) the existence, validity or recognition of a marriage;

(c) maintenance obligations;

(d) the succession to the estate of a deceased spouse;

(e) social security;

(f) the entitlement to transfer or adjustment between spouses, in the case of divorce, legal separation or marriage annulment, of rights to retirement or disability pension accrued during marriage and which have not generated pension income during the marriage;

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

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

Article 2

Competence in matters of matrimonial property regimes within the Member States

This Regulation shall not affect the competence of the authorities of the Member States to deal with matters of matrimonial property regimes.

Article 3

Definitions

1. For the purposes of this Regulation:

(a) 'matrimonial property regime' means a set of rules concerning the property relationships between the spouses and in their relations with third parties, as a result of marriage or its dissolution;

(b) 'matrimonial property agreement' means any agreement between spouses or future spouses by which they organise their matrimonial property regime;

(c) 'authentic instrument' means a document in a matter of a matrimonial property regime which has been formally drawn up or registered as an authentic instrument in a Member State and the authenticity of which:

(i) relates to the signature and the content of the authentic instrument; and

(ii) has been established by a public authority or other authority empowered for that purpose by the Member State of origin;

(d) 'decision' means any decision in a matter of a matrimonial property regime given by a court of a Member State, whatever the decision may be called, including a decision on the determination of costs or expenses by an officer of the court;

(e) 'court settlement' means a settlement in a matter of matrimonial property regime which has been approved by a court, or concluded before a court in the course of proceedings;

(f) 'Member State of origin' means the Member State in which the decision has been given, the authentic instrument drawn up, or the court settlement approved or concluded;

(g) 'Member State of enforcement' means the Member State in which recognition and/or enforcement of the decision, the authentic instrument, or the court settlement is requested.

2. For the purposes of this Regulation, the term 'court' means any judicial authority and all other authorities and legal professionals with competence in matters of matrimonial property regimes which exercise judicial functions or act by delegation of power by a judicial authority or under its control, provided that such other authorities and legal professionals offer guarantees with regard to impartiality and the right of all parties to be heard, and provided that their decisions under the law of the Member State in which they operate:

(a) may be made the subject of an appeal to or review by a judicial authority; and

(b) have a similar force and effect as a decision of a judicial authority on the same matter.

The Member States shall notify the Commission of the other authorities and legal professionals referred to in the first subparagraph in accordance with Article 64.

CHAPTER II

JURISDICTION

Article 4

Jurisdiction in the event of the death of one of the spouses

Where a court of a Member State is seised in matters of the

succession of a spouse pursuant to Regulation (EU) No 650/2012, the courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that succession case.

Article 5

Jurisdiction in cases of divorce, legal separation or marriage annulment

1. Without prejudice to paragraph 2, where a court of a Member State is seised to rule on an application for divorce, legal separation or marriage annulment pursuant to Regulation (EC) No 2201/2003, the courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that application.

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

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

(b) is the court of a Member State of which the applicant is a national and the applicant is habitually resident there and had resided there for at least six months immediately before the application was made, in accordance with sixth indent of Article 3(1)(a) of Regulation (EC) No 2201/2003;

(c) is seised pursuant to Article 5 of Regulation (EC) No 2201/2003 in cases of conversion of legal separation into divorce; or

(d) is seised pursuant to Article 7 of Regulation (EC) No 2201/2003 in cases of residual jurisdiction.

3. If the agreement referred to in paragraph 2 of this Article is concluded before the court is seised to rule on matters of matrimonial property regimes, the agreement shall comply with Article 7(2).

Article 6

Jurisdiction in other cases

Where no court of a Member State has jurisdiction pursuant to Article 4 or 5 or in cases other than those provided for in those Articles, jurisdiction to rule on a matter of the spouses' matrimonial property regime shall lie with the courts of the Member State:

(a) in whose territory the spouses are habitually resident at the time the court is seised; or failing that

(b) in whose territory the spouses were last habitually resident, insofar as one of them still resides there at the time the court is seised; or failing that

(c) in whose territory the respondent is habitually resident at the time the court is seised; or failing that

(d) of the spouses' common nationality at the time the court is seised.

Article 7

Choice of court

1. In cases which are covered by Article 6, the parties may agree that the courts of the Member State whose law is applicable pursuant to Article 22, or point (a) or (b) of Article 26(1), or the

courts of the Member State of the conclusion of the marriage shall have exclusive jurisdiction to rule on matters of their matrimonial property regime.

2. The agreement referred to in paragraph 1 shall be expressed in writing and dated and signed by the parties. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.

Article 8

Jurisdiction based on the appearance of the defendant

1. Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State whose law is applicable pursuant to Article 22 or point (a) or (b) of Article 26(1), and before which a defendant enters an appearance, shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or in cases covered by Article 4 or 5(1).

2. Before assuming jurisdiction pursuant to paragraph 1, the court shall ensure that the defendant is informed of his right to contest the jurisdiction and of the consequences of entering or not entering an appearance.

Article 9

Alternative jurisdiction

1. By way of exception, if a court of the Member State that has jurisdiction pursuant to Article 4, 6, 7 or 8 holds that, under its private international law, the marriage in question is not recognised for the purposes of matrimonial property regime proceedings, it

may decline jurisdiction. If the court decides to decline jurisdiction, it shall do so without undue delay.

2. Where a court having jurisdiction pursuant to Article 4 or 6 declines jurisdiction and where the parties agree to confer jurisdiction to the courts of any other Member State in accordance with Article 7, jurisdiction to rule on the matrimonial property regime shall lie with the courts of that Member State.

In other cases, jurisdiction to rule on the matrimonial property regime shall lie with the courts of any other Member State pursuant to Article 6 or 8, or the courts of the Member State of the conclusion of the marriage.

3. This Article shall not apply when the parties have obtained a divorce, legal separation or marriage annulment which is capable of being recognised in the Member State of the forum.

Article 10

Subsidiary jurisdiction

Where no court of a Member State has jurisdiction pursuant to Article 4, 5, 6, 7 or 8, or when all the courts pursuant to Article 9 have declined jurisdiction and no court has jurisdiction pursuant to Article 9(2), the courts of a Member State shall have jurisdiction in so far as immoveable property of one or both spouses are located in the territory of that Member State, but in that event the court seised shall have jurisdiction to rule only in respect of the immoveable property in question.

Article 11

Forum necessitatis

Where no court of a Member State has jurisdiction pursuant to Article 4, 5, 6, 7, 8 or 10, or when all the courts pursuant to Article

9 have declined jurisdiction and no court of a Member State has jurisdiction pursuant to Article 9(2) or Article 10, the courts of a Member State may, on an exceptional basis, rule on a matrimonial property regime case if proceedings cannot reasonably be brought or conducted or would be impossible in a third state with which the case is closely connected.

The case must have a sufficient connection with the Member State of the court seised.

Article 12

Counterclaims

The court in which proceedings are pending pursuant to Article 4, 5, 6, 7, 8, 9 (2), 10 or 11 shall also have jurisdiction to rule on a counterclaim if it falls within the scope of this Regulation.

Article 13

Limitation of proceedings

1. Where the estate of the deceased whose succession falls under Regulation (EU) No 650/2012 comprises assets located in a third state, the court seised to rule on the matrimonial property regime may, at the request of one of the parties, decide not to rule on one or more of such assets if it may be expected that its decision in respect of those assets will not be recognised and, where applicable, declared enforceable in that third state.

2. Paragraph 1 shall not affect the right of the parties to limit the scope of the proceedings under the law of the Member State of the court seised.

Article 14

Seising a court

For the purpose of this Chapter, a court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the defendant;

(b) if the document has to be served before being lodged with the court, at a time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court; or

(c) if the proceedings are opened on the court's own motion, at the time when the decision to open the proceedings is taken by the court, or, where such a decision is not required, at the time when the case is registered by the court.

Article 15

Examination as to jurisdiction

Where a court of a Member State is seised of a matter of matrimonial property regime over which it has no jurisdiction under this Regulation, it shall declare of its own motion that it has no jurisdiction.

Article 16

Examination as to admissibility

1. Where a defendant habitually resident in a State other than the Member State where the action was brought does not enter an appearance, the court having jurisdiction pursuant to this Regulation shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in time to arrange for his defence, or that all necessary steps have been taken to this end.

2. Article 19 of Regulation (EC) No 1393/2007 of the European Parliament and of the Council ([1]) shall apply instead of paragraph 1 of this Article if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to that Regulation.

3. Where Regulation (EC) No 1393/2007 is not applicable, Article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted abroad pursuant to that Convention.

Article 17

Lis pendens

1. Where proceedings involving the same cause of action and between the same parties are brought before courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. In the cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised.

3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 18

Related actions

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where the actions referred to in paragraph 1 are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable decisions resulting from separate proceedings.

Article 19

Provisional, including protective, measures

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

CHAPTER III

APPLICABLE LAW

Article 20

Universal application

The law designated as applicable by this Regulation shall be applied whether or not it is the law of a Member State.

Article 21

Unity of the applicable law

The law applicable to a matrimonial property regime pursuant to Article 22 or 26 shall apply to all assets falling under that regime, regardless of where the assets are located.

Article 22

Choice of the applicable law

1. The spouses or future spouses may agree to designate, or to change, the law applicable to their matrimonial property regime, provided that that law is one of the following:

(a) the law of the State where the spouses or future spouses, or one of them, is habitually resident at the time the agreement is concluded; or

(b) the law of a State of nationality of either spouse or future spouse at the time the agreement is concluded.

2. Unless the spouses agree otherwise, a change of the law applicable to the matrimonial property regime made during the marriage shall have prospective effect only.

3. Any retroactive change of the applicable law under paragraph 2 shall not adversely affect the rights of third parties deriving from that law.

Article 23

Formal validity of the agreement on a choice of applicable law

1. The agreement referred to in Article 22 shall be expressed in writing, dated and signed by both spouses. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.

2. If the law of the Member State in which both spouses have their habitual residence at the time the agreement is concluded lays down additional formal requirements for matrimonial property agreements, those requirements shall apply.

3. If the spouses are habitually resident in different Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements for matrimonial property agreements, the agreement shall be formally valid if it satisfies the requirements of either of those laws.

4. If only one of the spouses is habitually resident in a Member State at the time the agreement is concluded and that State lays down additional formal requirements for matrimonial property agreements, those requirements shall apply.

Article 24

Consent and material validity

1. The existence and validity of an agreement on choice of law or of any term thereof, shall be determined by the law which would govern it pursuant to Article 22 if the agreement or term were valid.

2. Nevertheless, a spouse may, in order to establish that he did not consent, rely upon the law of the country in which he has his habitual residence at the time the court is seised if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.

Article 25

Formal validity of a matrimonial property agreement

1. The matrimonial property agreement shall be expressed in writing, dated and signed by both spouses. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.

2. If the law of the Member State in which both spouses have their habitual residence at the time the agreement is concluded lays down additional formal requirements for matrimonial property agreements, those requirements shall apply.

If the spouses are habitually resident in different Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements for matrimonial property agreements, the agreement shall be formally valid if it satisfies the requirements of either of those laws.

If only one of the spouses is habitually resident in a Member State at the time the agreement is concluded and that State lays down additional formal requirements for matrimonial property agreements, those requirements shall apply.

3. If the law applicable to the matrimonial property regime imposes additional formal requirements, those requirements shall apply.

Article 26

Applicable law in the absence of choice by the parties

1. In the absence of a choice-of-law agreement pursuant to Article 22, the law applicable to the matrimonial property regime shall be the law of the State:

(a) of the spouses' first common habitual residence after the conclusion of the marriage; or, failing that

(b) of the spouses' common nationality at the time of the conclusion of the marriage; or, failing that

(c) with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances.

2. If the spouses have more than one common nationality at the time of the conclusion of the marriage, only points (a) and (c) of paragraph 1 shall apply.

3. By way of exception and upon application by either spouse, 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 pursuant to point (a) of paragraph 1 shall govern the matrimonial property regime if 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.

The law of that other State shall apply as from the conclusion of the marriage, unless one spouse disagrees. In the latter case, the law of that other State shall have effect as from the establishment of the last common habitual residence in that other State.

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.

This paragraph shall not apply when the spouses have concluded a matrimonial property agreement before the establishment of their last common habitual residence in that other State.

Article 27

Scope of the applicable law

The law applicable to the matrimonial property regime pursuant to this Regulation shall govern, inter alia:

(a) the classification of property of either or both spouses into different categories during and after marriage;

(b) the transfer of property from one category to the other one;

(c) the responsibility of one spouse for liabilities and debts of the other spouse;

(d) the powers, rights and obligations of either or both spouses with regard to property;

(e) the dissolution of the matrimonial property regime and the partition, distribution or liquidation of the property;

(f) the effects of the matrimonial property regime on a legal relationship between a spouse and third parties; and

(g) the material validity of a matrimonial property agreement.

Article 28

Effects in respect of third parties

1. Notwithstanding point (f) of Article 27, the law applicable to the matrimonial property regime between the spouses may not be invoked by a spouse against a third party in a dispute between the third party and either or both of the spouses unless the third party knew or, in the exercise of due diligence, should have known of that law.

2. The third party is deemed to possess the knowledge of the law applicable to the matrimonial property regime, if:

(a) that law is the law of:

(i) the State whose law is applicable to the transaction between a spouse and the third party;

(ii) the State where the contracting spouse and the third party have their habitual residence; or,

(iii) in cases involving immoveable property, the State in which the property is situated;

or

(b) either spouse had complied with the applicable requirements for disclosure or registration of the matrimonial property regime specified by the law of:

(i) the State whose law is applicable to the transaction between a spouse and the third party;

(ii) the State where the contracting spouse and the third party have their habitual residence; or

(iii) in cases involving immoveable property, the State in which the property is situated.

3. Where the law applicable to the matrimonial property regime between the spouses cannot be invoked by a spouse against a third party by virtue of paragraph 1, the effects of the matrimonial property regime in respect of the third party shall be governed:

(a) by the law of the State whose law is applicable to the transaction between a spouse and the third party; or

(b) in cases involving immoveable property or registered assets or rights, by the law of the State in which the property is situated or in which the assets or rights are registered.

Article 29

Adaptation of rights *in rem*

Where a person invokes a right *in rem* to which he is entitled under the law applicable to the matrimonial property regime and the law of the Member State in which the right is invoked does not know the right *in rem* in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right under the law of that State, taking into account the aims and the interests pursued by the specific right *in rem* and the effects attached to it.

Article 30

Overriding mandatory provisions

1. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

2. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a Member State for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling

within their scope, irrespective of the law otherwise applicable to the matrimonial property regime pursuant to this Regulation.

Article 31

Public policy (*ordre public*)

The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.

Article 32

Exclusion of renvoi

The application of the law of any State specified by this Regulation means the application of the rules of law in force in that State other than its rules of private international law.

Article 33

States with more than one legal system — territorial conflicts of laws

1. Where the law specified by this Regulation is that of a State which comprises several territorial units each of which has its own rules of law in respect of matrimonial property regimes, the internal conflict-of-laws rules of that State shall determine the relevant territorial unit whose rules of law are to apply.

2. In the absence of such internal conflict-of-laws rules:

(a) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to provisions referring to the habitual residence of the spouses, be construed as referring to the law of the

territorial unit in which the spouses have their habitual residence;

(b) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to provisions referring to the nationality of the spouses, be construed as referring to the law of the territorial unit with which the spouses have the closest connection;

(c) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to any other provisions referring to other elements as connecting factors, be construed as referring to the law of the territorial unit in which the relevant element is located.

Article 34

States with more than one legal system — inter-personal conflicts of laws

In relation to a State which has two or more systems of law or sets of rules applicable to different categories of persons in respect of matrimonial property regimes, any reference to the law of such a State shall be construed as referring to the system of law or set of rules determined by the rules in force in that State. In the absence of such rules, the system of law or the set of rules with which the spouses have the closest connection shall apply.

Article 35

Non-application of this Regulation to internal conflicts of laws

A Member State which comprises several territorial units each of which has its own rules of law in respect of matrimonial property

regimes shall not be required to apply this Regulation to conflicts of laws arising between such units only.

CHAPTER IV

RECOGNITION, ENFORCEABILITY AND ENFORCEMENT OF DECISIONS

Article 36

Recognition

1. A decision given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. Any interested party who raises the recognition of a decision as the principal issue in a dispute may, in accordance with the procedures provided for in Articles 44 to 57, apply for the decision to be recognised.

3. If the outcome of the proceedings in a court of a Member State depends on the determination of an incidental question of recognition, that court shall have jurisdiction over that question.

Article 37

Grounds of non-recognition

A decision shall not be recognised:

(a) if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State in which recognition is sought;

(b) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time

and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so;

(c) if it is irreconcilable with a decision given in proceedings between the same parties in the Member State in which recognition is sought;

(d) if it is irreconcilable with an earlier decision given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

Article 38

Fundamental rights

Article 37 of this Regulation shall be applied by the courts and other competent authorities of the Member States in observance of the fundamental rights and principles recognised in the Charter, in particular in Article 21 thereof on the principle of non-discrimination.

Article 39

Prohibition of review of jurisdiction of the court of origin

1. The jurisdiction of the court of the Member State of origin may not be reviewed.

2. The public policy (*ordre public*) criterion referred to in Article 37 shall not apply to the rules on jurisdiction set out in Articles 4 to 11.

Article 40

No review as to substance

Under no circumstances may a decision given in a Member State be reviewed as to its substance.

Article 41

Staying of recognition proceedings

A court of a Member State in which recognition is sought of a decision given in another Member State may stay the proceedings if an ordinary appeal against the decision has been lodged in the Member State of origin.

Article 42

Enforceability

Decisions given in a Member State and enforceable in that State shall be enforceable in another Member State when, on the application of any interested party, they have been declared enforceable there in accordance with the procedure provided for in Articles 44 to 57.

Article 43

Determination of domicile

To determine whether, for the purposes of the procedure provided for in Articles 44 to 57, a party is domiciled in the Member State of enforcement, the court seised shall apply the internal law of that Member State.

Article 44

Jurisdiction of local courts

1. The application for a declaration of enforceability shall be submitted to the court or competent authority of the Member State

of enforcement communicated by that Member State to the Commission in accordance with Article 64.

2. The local jurisdiction shall be determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement.

Article 45

Procedure

1. The application procedure shall be governed by the law of the Member State of enforcement.

2. The applicant shall not be required to have a postal address or an authorised representative in the Member State of enforcement.

3. The application shall be accompanied by the following documents:

(a) a copy of the decision which satisfies the conditions necessary to establish its authenticity;

(b) the attestation issued by the court or competent authority of the Member State of origin using the form established in accordance with the advisory procedure referred to in Article 67(2), without prejudice to Article 46.

Article 46

Non-production of the attestation

1. If the attestation referred to in point (b) of Article 45(3) is not produced, the court or competent authority may specify a time for its production or accept an equivalent document or, if it considers that it has sufficient information before it, dispense with its production.

2. If the court or competent authority so requires, a translation or transliteration of the documents shall be produced. The translation shall be done by a person qualified to do translations in one of the Member States.

Article 47

Declaration of enforceability

The decision shall be declared enforceable immediately on completion of the formalities set out in Article 45 without any review under Article 37. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

Article 48

Notice of the decision on the application for a declaration of enforceability

1. The decision on the application for a declaration of enforceability shall forthwith be brought to the notice of the applicant in accordance with the procedure laid down by the law of the Member State of enforcement.

2. The declaration of enforceability shall be served on the party against whom enforcement is sought, accompanied by the decision, if not already served on that party.

Article 49

Appeal against the decision on the application for a declaration of enforceability

1. The decision on the application for a declaration of enforceability may be appealed by either party.

2. The appeal shall be lodged with the court communicated by the Member State concerned to the Commission in accordance with Article 64.

3. The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.

4. If the party against whom enforcement is sought fails to appear before the appellate court in proceedings concerning an appeal brought by the applicant, Article 16 shall apply even where the party against whom enforcement is sought is not domiciled in any of the Member States.

5. An appeal against the declaration of enforceability shall be lodged within 30 days of service thereof. If the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be 60 days and shall run from the date of service, either on him in person or at his residence. No extension may be granted on account of distance.

Article 50

Procedure to contest the decision given on appeal

The decision given on the appeal may be contested only by the procedure communicated by the Member State concerned to the Commission in accordance with Article 64.

Article 51

Refusal or revocation of a declaration of enforceability

The court with which an appeal is lodged under Article 49 or Article 50 shall refuse or revoke a declaration of enforceability only on one

of the grounds specified in Article 37. It shall give its decision without delay.

Article 52

Staying of proceedings

The court with which an appeal is lodged under Article 49 or Article 50 shall, on the application of the party against whom enforcement is sought, stay the proceedings if the enforceability of the decision is suspended in the Member State of origin by reason of an appeal.

Article 53

Provisional, including protective, measures

1. When a decision must be recognised in accordance with this Chapter, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State of enforcement without a declaration of enforceability under Article 47 being required.

2. The declaration of enforceability shall carry with it by operation of law the power to proceed to any protective measures.

3. During the time specified for an appeal pursuant to Article 49(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.

Article 54

Partial enforceability

1. Where a decision has been given in respect of several matters and

the declaration of enforceability cannot be given for all of them, the court or competent authority shall give it for one or more of them.

2. An applicant may request a declaration of enforceability limited to parts of a decision.

Article 55

Legal aid

An applicant who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled, in any proceedings for a declaration of enforceability, to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the Member State of enforcement.

Article 56

No security, bond or deposit

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for recognition, enforceability or enforcement of a decision given in another Member State on the ground that he is a foreign national or that he is not domiciled or resident in the Member State of enforcement in the Member State of enforcement.

Article 57

No charge, duty or fee

In proceedings for the issue of a declaration of enforceability, no charge, duty or fee calculated by reference to the value of the matter at issue may be levied in the Member State of enforcement.

CHAPTER V

AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS

Article 58

Acceptance of authentic instruments

1. An authentic instrument established in a Member State shall have the same evidentiary effects in another Member State as it has in the Member State of origin, or the most comparable effects, provided that this is not manifestly contrary to public policy (*ordre public*) in the Member State concerned.

A person wishing to use an authentic instrument in another Member State may ask the authority establishing the authentic instrument in the Member State of origin to fill in the form established in accordance with the advisory procedure referred to in Article 67(2) describing the evidentiary effects which the authentic instrument produces in the Member State of origin.

2. Any challenge relating to the authenticity of an authentic instrument shall be made before the courts of the Member State of origin and shall be decided upon under the law of that State. The authentic instrument challenged shall not produce any evidentiary effect in another Member State for as long as the challenge is pending before the competent court.

3. Any challenge relating to the legal acts or legal relationships recorded in an authentic instrument shall be made before the courts having jurisdiction under this Regulation and shall be decided upon under the law applicable pursuant to Chapter III. The authentic instrument challenged shall not produce any evidentiary effect in a

Member State other than the Member State of origin as regards the matter being challenged for as long as the challenge is pending before the competent court.

4. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question relating to the legal acts or legal relationships recorded in an authentic instrument in matters of matrimonial property regimes, that court shall have jurisdiction over that question.

Article 59

Enforceability of authentic instruments

1. An authentic instrument which is enforceable in the Member State of origin shall be declared enforceable in another Member State on the application of any interested party in accordance with the procedure provided for in Articles 44 to 57.

2. For the purposes of point (b) of Article 45(3), the authority which established the authentic instrument shall, on the application of any interested party, issue an attestation using the form established in accordance with the advisory procedure referred to in Article 67(2).

3. The court with which an appeal is lodged under Article 49 or Article 50 shall refuse or revoke a declaration of enforceability only if enforcement of the authentic instrument is manifestly contrary to public policy (*ordre public*) in the Member State of enforcement.

Article 60

Enforceability of court settlements

1. Court settlements which are enforceable in the Member State of origin shall be declared enforceable in another Member State on the

application of any interested party in accordance with the procedure provided for in Articles 44 to 57.

2. For the purposes of point (b) of Article 45(3), the court which approved the settlement or before which it was concluded shall, on the application of any interested party, issue an attestation using the form established in accordance with the advisory procedure referred to in Article 67(2).

3. The court with which an appeal is lodged under Article 49 or 50 shall refuse or revoke a declaration of enforceability only if enforcement of the court settlement is manifestly contrary to public policy (*ordre public*) in the Member State of enforcement.

CHAPTER VI

GENERAL AND FINAL PROVISIONS

Article 61

Legalisation and other similar formalities

No legalisation or other similar formality shall be required in respect of documents issued in a Member State in the context of this Regulation.

Article 62

Relations with existing international conventions

1. This Regulation shall not affect the application of the bilateral or multilateral conventions to which one or more Member States are party at the time of adoption of this Regulation or of a decision pursuant to the second or third subparagraph of Article 331(1) TFEU and which concern matters covered by this Regulation,

without prejudice to the obligations of the Member States under Article 351 TFEU.

2. Notwithstanding paragraph 1, this Regulation shall, as between Member States, take precedence over conventions concluded between them in so far as such conventions concern matters governed by this Regulation.

3. This Regulation shall not preclude the application of the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden containing international private law provisions on marriage, adoption and guardianship, as revised in 2006; of the Convention of 19 November 1934 between Denmark, Finland, Iceland, Norway and Sweden comprising private international law provisions on succession, wills and estate administration, as revised in June 2012; and of the Convention of 11 October 1977 between Denmark, Finland, Iceland, Norway and Sweden on the recognition and enforcement of judgements in civil matters, by the Member States which are parties thereto, in so far as they provide for simplified and more expeditious procedures for the recognition and enforcement of decisions in matters of matrimonial property regime.

Article 63

Information made available to the public

The Member States shall, with a view to making the information available to the public within the framework of the European Judicial Network in civil and commercial matters, provide the Commission with a short summary of their national legislation and procedures relating to matrimonial property regimes, including information on the type of authority which has competence in matters of matrimonial property regimes and on the effects in respect of third parties referred to in Article 28.
The Member States shall keep the information permanently updated.

Article 64

Information on contact details and procedures

1. By 29 April 2018, the Member States shall communicate to the Commission:

(a) the courts or authorities with competence to deal with applications for a declaration of enforceability in accordance with Article 44(1) and with appeals against decisions on such applications in accordance with Article 49(2);

(b) the procedures to contest the decision given on appeal referred to in Article 50.

The Member States shall apprise the Commission of any subsequent changes to that information.

2. The Commission shall publish the information communicated in accordance with paragraph 1 in the *Official Journal of the European Union*, with the exception of the addresses and other contact details of the courts and authorities referred to in point (a) of paragraph 1.

3. The Commission shall make all information communicated in accordance with paragraph 1 publicly available through any appropriate means, in particular through the European Judicial Network in civil and commercial matters.

Article 65

Establishment and subsequent amendment of the list containing the information referred to in Article 3(2)

1. The Commission shall, on the basis of the notifications by the Member States, establish the list of the other authorities and legal professionals referred to in Article 3(2).

2. The Member States shall notify the Commission of any subsequent changes to the information contained in that list. The Commission shall amend the list accordingly.

3. The Commission shall publish the list and any subsequent amendments in the *Official Journal of the European Union*.

4. The Commission shall make all information notified in accordance with paragraphs 1 and 2 publicly available through any other appropriate means, in particular through the European Judicial Network in civil and commercial matters.

Article 66

Establishment and subsequent amendment of the attestations and forms referred to in point (b) of Article 45(3) and Articles 58, 59 and 60

The Commission shall adopt implementing acts establishing and subsequently amending the attestations and forms referred to in point (b) of Article 45(3) and Articles 58, 59 and 60. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 67(2).

Article 67

Committee procedure

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply.

Article 68

Review clause

1. By 29 January 2027, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. Where necessary, the report shall be accompanied by proposals to amend this Regulation.

2. By 29 January 2024, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of Articles 9 and 38 of this Regulation. This report shall evaluate in particular the extent to which these Articles have ensured access to justice.

3. For the purposes of the reports referred to in paragraphs 1 and 2, Member States shall communicate to the Commission relevant information on the application of this Regulation by their courts.

Article 69

Transitional provisions

1. This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 29 January 2019 subject to paragraphs 2 and 3.

2. If the proceedings in the Member State of origin were instituted before 29 January 2019, decisions given on or after that date shall be recognised and enforced in accordance with Chapter IV as long

as the rules of jurisdiction applied comply with those set out in Chapter II.

3. Chapter III shall apply only to spouses who marry or who specify the law applicable to the matrimonial property regime on or after 29 January 2019.

Article 70

Entry into force

1. This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

2. This Regulation shall apply in the Member States which participate in enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, as authorised by Decision (EU) 2016/954.

It shall apply from 29 January 2019, except for Articles 63 and 64 which shall apply from 29 April 2018, and Articles 65, 66 and 67, which shall apply from 29 July 2016. For those Member States which participate in enhanced cooperation by virtue of a decision adopted in accordance with the second or third subparagraph of Article 331(1) TFEU, this Regulation shall apply as from the date indicated in the decision concerned.

This Regulation shall be binding in its entirety and directly applicable in the participating Member States in accordance with the Treaties.

COUNCIL REGULATION (EU) 2016/1104

of 24 June 2016

implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships

(OJ L 183 8.7.2016, p. 30) *

* The official text of the EU Regulation, in the different Union languages, can be consulted at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02016R1104-20160708

CHAPTER I

SCOPE AND DEFINITIONS

Article 1

Scope

1. This Regulation shall apply to matters of the property consequences of registered partnerships.

It shall not apply to revenue, customs or administrative matters.

2. The following shall be excluded from the scope of this Regulation:

(a) the legal capacity of partners,

(b) the existence, validity or recognition of a registered partnership,

(c) maintenance obligations,

(d) the succession to the estate of a deceased partner,

(e) social security,

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

(g) the nature of rights in rem relating to a property, and

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

Article 2

Competence in matters of property consequences of registered partnerships within the Member States

This Regulation shall not affect the competence of the authorities of the Member States to deal with matters of property consequences of registered partnerships.

Article 3

Definitions

1. For the purposes of this Regulation:

(a) 'registered partnership' means 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;

(b) 'property consequences of a registered partnership' means the set of rules concerning the property relationships of the partners, between themselves and in their relations with third parties, as a result of the legal relationship created by the registration of the partnership or its dissolution;

(c) 'partnership property agreement' means any agreement between partners or future partners by which they organise the property consequences of their registered partnership;

(d) 'authentic instrument' means a document in a matter of the property consequences of a registered partnership which has been formally drawn up or registered as an authentic instrument in a Member State and the authenticity of which:

(i) relates to the signature and the content of the authentic instrument, and

(ii) has been established by a public authority or other authority empowered for that purpose by the Member State of origin;

(e) 'decision' means any decision in a matter of the property consequences of a registered partnership given by a court of a Member State, whatever the decision may be called, including a decision on the determination of costs or expenses by an officer of the court;

(f) 'court settlement' means a settlement in a matter of the property consequences of a registered partnership which has been approved by a court, or concluded before a court in the course of proceedings;

(g) 'Member State of origin' means the Member State in which the decision has been given, the authentic instrument drawn up, or the court settlement approved or concluded;

(h) 'Member State of enforcement' means the Member State in which recognition and/or enforcement of the decision, the authentic instrument, or the court settlement is requested.

2. For the purposes of this Regulation, the term 'court' means any judicial authority and all other authorities and legal professionals with competence in matters of property consequences of registered partnerships which exercise judicial functions or act by delegation of power by a judicial authority or under its control, provided that such other authorities and legal professionals offer guarantees with regard to impartiality and the right of all parties to be heard, and provided that their decisions under the law of the Member State in which they operate:

(a) may be made the subject of an appeal to or review by a judicial authority; and

(b) have a similar force and effect as a decision of a judicial authority on the same matter.

The Member States shall notify the Commission of the other authorities and legal professionals referred to in the first subparagraph in accordance with Article 64.

CHAPTER II

JURISDICTION

Article 4

Jurisdiction in the event of the death of one of the partners

Where a court of a Member State is seised in matters of the succession of a registered partner under Regulation (EU) No

650/2012, the courts of that State shall have jurisdiction to rule on matters of the property consequences of the registered partnership arising in connection with that succession case.

Article 5

Jurisdiction in cases of dissolution or annulment

1. Where a court of a Member State is seised to rule on the dissolution or annulment of a registered partnership, the courts of that State shall have jurisdiction to rule on the property consequences of the registered partnership arising in connection with that case of dissolution or annulment, where the partners so agree.

2. If the agreement referred to in paragraph 1 of this Article is concluded before the court is seised to rule on matters of the property consequences of the registered partnership, the agreement shall comply with Article 7.

Article 6

Jurisdiction in other cases

Where no court of a Member State has jurisdiction pursuant to Article 4 or 5 or in cases other than those provided for in those Articles, jurisdiction to rule on the property consequences of a registered partnership shall lie with the courts of the Member State:

(a) in whose territory the partners are habitually resident at the time the court is seised, or failing that,

(b) in whose territory the partners were last habitually resident, insofar as one of them still resides there at the time the court is seised, or failing that,

(c) in whose territory the respondent is habitually resident at the time the court is seised, or failing that,

(d) of the partners' common nationality at the time the court is seised, or failing that,

(e) under whose law the registered partnership was created.

Article 7

Choice of court

1. In cases which are covered by Article 6, the parties may agree that the courts of the Member State whose law is applicable pursuant to Article 22 or Article 26(1) or the courts of the Member State under whose law the registered partnership was created shall have exclusive jurisdiction to rule on the property consequences of their registered partnership.

2. The agreement referred to in paragraph 1 shall be expressed in writing and dated and signed by the parties. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.

Article 8

Jurisdiction based on the appearance of the defendant

1. Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State whose law is applicable pursuant to Article 22 or Article 26(1), and before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or in cases covered by Article 4.

2. Before assuming jurisdiction pursuant to paragraph 1, the court shall ensure that the defendant is informed of his right to contest the jurisdiction and of the consequences of entering or not entering an appearance.

Article 9

Alternative jurisdiction

1. If a court of the Member State that has jurisdiction pursuant to Article 4, 5, or point (a), (b), (c) or (d) of Article 6 holds that its law does not provide for the institution of registered partnership, it may decline jurisdiction. If the court decides to decline, it shall do so without undue delay.

2. Where a court referred to in paragraph 1 of this Article declines jurisdiction and where the parties agree to confer jurisdiction to the courts of any other Member State in accordance with Article 7, jurisdiction to rule on the property consequences of the registered partnership shall lie with the courts of that Member State.

In other cases, jurisdiction to rule on the property consequences of a registered partnership shall lie with the courts of any other Member State pursuant to Article 6 or 8.

3. This Article shall not apply when the parties have obtained a dissolution or annulment of a registered partnership which is capable of being recognised in the Member State of the forum.

Article 10

Subsidiary jurisdiction

Where no court of a Member State has jurisdiction pursuant to Articles 4, 5, 6, 7 or 8, or when all the courts pursuant to Article 9 have declined jurisdiction and no court of a Member State has jurisdiction pursuant to point (e) of Article 6, Article 7 or 8, the courts of a Member State shall have jurisdiction in so far as immoveable property of one or both partners are located in the territory of that Member State, but in that event the court seised shall have jurisdiction to rule only in respect of the immoveable property in question.

Article 11

Forum necessitatis

Where no court of a Member State has jurisdiction pursuant to Article 4, 5, 6, 7, 8, or 10 or when all of the courts pursuant to Article 9 have declined jurisdiction and no court of a Member State has

jurisdiction pursuant to point (e) of Articles 6, or Article 7, 8 or 10, the courts of a Member State may, on an exceptional basis, rule on the property consequences of a registered partnership if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the case is closely connected.

The case must have a sufficient connection with the Member State of the court seised.

Article 12

Counterclaims

The court in which proceedings are pending pursuant to Article 4, 5, 6, 7, 8, 10 or 11 shall also have jurisdiction to rule on a counterclaim if it falls within the scope of this Regulation.

Article 13

Limitation of proceedings

1. Where the estate of the deceased whose succession falls under Regulation (EU) No 650/2012 comprises assets located in a third State, the court seised to rule on the property consequences of a registered partnership may, at the request of one of the parties, decide not to rule on one or more of such assets if it may be expected that its decision in respect of those assets will not be recognised and, where applicable, declared enforceable in that third State.

2. Paragraph 1 shall not affect the right of the parties to limit the scope of the proceedings under the law of the Member State of the court seised.

Article 14

Seising a court

For the purpose of this Chapter, a court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the defendant;

(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court; or

(c) if the proceedings are opened on the court's own motion, at the time when the decision to open the proceedings is taken by the court, or, where such a decision is not required, at the time when the case is registered by the court.

Article 15

Examination as to jurisdiction

Where a court of a Member State is seised of a matter concerning the property consequences of a registered partnership over which it has no jurisdiction under this Regulation, it shall declare of its own motion that it has no jurisdiction.

Article 16

Examination as to admissibility

1. Where a defendant habitually resident in a State other than the Member State where the action was brought does not enter an appearance, the court having jurisdiction pursuant to this Regulation shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in time to arrange for his defence, or that all necessary steps have been taken to this end.

2. Article 19 of Regulation (EC) No 1393/2007 of the European Parliament and of the Council ([1]) shall apply instead of paragraph 1 of this Article if the document instituting the proceedings or an

equivalent document had to be transmitted from one Member State to another pursuant to that Regulation.

3. Where Regulation (EC) No 1393/2007 is not applicable, Article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted abroad pursuant to that Convention.

Article 17

Lis pendens

1. Where proceedings involving the same cause of action and between the same parties are brought before courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. In the cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised.

3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 18

Related actions

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where the actions referred to in paragraph 1 are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable decisions resulting from separate proceedings.

Article 19

Provisional, including protective, measures

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

CHAPTER III

APPLICABLE LAW

Article 20

Universal application

The law designated as applicable by this Regulation shall be applied whether or not it is the law of a Member State.

Article 21

Unity of the applicable law

The law applicable to the property consequences of a registered partnership shall apply to all assets that are subject to those consequences, regardless of where the assets are located.

Article 22

Choice of the applicable law

1. The partners or future partners may agree to designate or to change the law applicable to the property consequences of their registered partnership, provided that that law attaches property consequences to the institution of the registered partnership and that that law is one of the following:

(a) the law of the State where the partners or future partners, or one of them, is habitually resident at the time the agreement is concluded

(b) the law of a State of nationality of either partner or future partner at the time the agreement is concluded, or

(c) the law of the State under whose law the registered partnership was created.

2. Unless the partners agree otherwise, a change of the law applicable to the property consequences of their registered partnership made during the partnership shall have prospective effect only.

3. Any retroactive change of the applicable law under paragraph 2 shall not adversely affect the rights of third parties deriving from that law.

Article 23

Formal validity of the agreement on a choice of applicable law

1. The agreement referred to in Article 22 shall be expressed in writing, dated and signed by both partners. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.

2. If the law of the Member State in which both partners have their habitual residence at the time the agreement is concluded lays down additional formal requirements for partnership property agreements, those requirements shall apply.

3. If the partners are habitually resident in different Member States at the time the agreement is concluded and the laws of those States

provide for different formal requirements for partnership property agreements, the agreement shall be formally valid if it satisfies the requirements of either of those laws.

4. If only one of the partners is habitually resident in a Member State at the time the agreement is concluded and that State lays down additional formal requirements for partnership property agreements, those requirements shall apply.

Article 24

Consent and material validity

1. The existence and validity of an agreement on choice of law, or of any term thereof, shall be determined by the law which would govern it pursuant to Article 22 if the agreement or term were valid.

2. Nevertheless, a partner may, in order to establish that he did not consent, rely upon the law of the country in which he has his habitual residence at the time the court is seised if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.

Article 25

Formal validity of a partnership property agreement

1. The partnership property agreement shall be expressed in writing, dated and signed by both partners. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.

2. If the law of the Member State in which both partners have their habitual residence at the time the agreement is concluded lays down additional formal requirements for partnership property agreements, those requirements shall apply.

If the partners are habitually resident in different Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements for partnership property

agreements, the agreement shall be formally valid if it satisfies the requirements of either of those laws.

If only one of the partners is habitually resident in a Member State at the time the agreement is concluded and that State lays down additional formal requirements for partnership property agreements, those requirements shall apply.

3. If the law applicable to the property consequences of a registered partnership imposes additional formal requirements, those requirements shall apply

Article 26

Applicable law in the absence of choice by the parties

1. In the absence of a choice-of-law agreement pursuant to Article 22, the law applicable to the property consequences of registered partnerships shall be the law of the State under whose law the registered partnership was created.

2. By way of exception and upon application by either partner, the judicial authority having jurisdiction to rule on matters of the property consequences of a registered partnership may decide that the law of a State other than the State whose law is applicable pursuant to paragraph 1 shall govern the property consequences of the registered partnership if the law of that other State attaches property consequences to the institution of the registered partnership and if the applicant demonstrates that:

(a) the partners had their last common habitual residence in that other State for a significantly long period of time; and

(b) both partners had relied on the law of that other State in arranging or planning their property relations.

The law of that other State shall apply as from the creation of the registered partnership, unless one partner disagrees. In the latter case, the law of that other State shall have effect as from the establishment of the last common habitual residence in that other State.

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 paragraph 1.

This paragraph shall not apply when the partners have concluded a partnership property agreement before the establishment of their last common habitual residence in that other State.

Article 27

Scope of the applicable law

The law applicable to the property consequences of registered partnerships pursuant to this Regulation shall govern, inter alia:

(a) the classification of property of either or both partners into different categories during and after the registered partnership,

(b) the transfer of property from one category to the other one,

(c) the responsibility of one partner for liabilities and debts of the other partner,

(d) the powers, rights and obligations of either or both partners with regard to property,

(e) the partition, distribution or liquidation of the property upon dissolution of the registered partnership,

(f) the effects of the property consequences of registered partnerships on a legal relationship between a partner and third parties, and

(g) the material validity of a partnership property agreement.

Article 28

Effects in respect of third parties

1. Notwithstanding point (f) of Article 27, the law applicable to the property consequences of a registered partnership between the partners may not be invoked by a partner against a third party in a

dispute between the third party and either or both of the partners unless the third party knew or, in the exercise of due diligence, should have known of that law.

2. The third party is deemed to possess the knowledge of the law applicable to the property consequences of the registered partnership, if:

(a) that law is the law of:

(i) the State whose law is applicable to the transaction between a partner and the third party,

(ii) the State where the contracting partner and the third party have their habitual residence or,

(iii) in cases involving immoveable property, the State in which the property is situated;

or

(b) either partner had complied with the applicable requirements for disclosure or registration of the property consequences of the registered partnership specified by the law of:

(i) the State whose law is applicable to the transaction between a partner and the third party,

(ii) the State where the contracting partner and the third party have their habitual residence, or

(iii) in cases involving immoveable property, the State in which the property is situated.

3. Where the law applicable to the property consequences of a registered partnership cannot be invoked by a partner against a third party by virtue of paragraph 1, the property consequences of the registered partnership in respect of the third party shall be governed:

(a) by the law of the State whose law is applicable to the transaction between a partner and the third party; or

(b) in cases involving immoveable property or registered assets or rights, by the law of the State in which the property is situated or in which the assets or rights are registered.

Article 29

Adaptation of rights in rem

Where a person invokes a right *in rem* to which he is entitled under the law applicable to the property consequences of a registered partnership and the law of the Member State in which the right is invoked does not know the right *in rem* in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right under the law of that State, taking into account the aims and the interests pursued by the specific right *in rem* and the effects attached to it.

Article 30

Overriding mandatory provisions

1. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

2. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a Member State for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the property consequences of a registered partnership pursuant to this Regulation.

Article 31

Public policy (ordre public)

The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.

Article 32

Exclusion of renvoi

The application of the law of any State specified by this Regulation means the application of the rules of law in force in that State other than its rules of private international law.

Article 33

States with more than one legal system — territorial conflicts of laws

1. Where the law specified by this Regulation is that of a State which comprises several territorial units each of which has its own rules of law in respect of the property consequences of registered partnerships, the internal conflict-of-laws rules of that State shall determine the relevant territorial unit whose rules of law are to apply.

2. In the absence of such internal conflict-of-laws rules:

(a) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to provisions referring to the habitual residence of the partners, be construed as referring to the law of the territorial unit in which the partners have their habitual residence;

(b) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to provisions referring to the nationality of the partners, be construed as referring to the law of the territorial unit with which the partners have the closest connection;

(c) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to any other provisions referring to other elements as connecting factors, be construed as referring to the law of the territorial unit in which the relevant element is located.

Article 34

States with more than one legal system — inter-personal conflicts of laws

In relation to a State which has two or more systems of law or sets of rules applicable to different categories of persons in respect of the property consequences of registered partnerships, any reference to the law of such a State shall be construed as referring to the system of law or set of rules determined by the rules in force in that State. In the absence of such rules, the system of law or the set of rules with which the partners have the closest connection shall apply.

Article 35

Non-application of this Regulation to internal conflicts of laws

A Member State which comprises several territorial units each of which has its own rules of law in respect of the property consequences of registered partnerships shall not be required to apply this Regulation to conflicts of laws arising between such units only.

CHAPTER IV

RECOGNITION, ENFORCEABILITY AND ENFORCEMENT OF DECISIONS

Article 36

Recognition

1. A decision given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. Any interested party who raises the recognition of a decision as the principal issue in a dispute may, in accordance with the

procedures provided for in Articles 44 to 57, apply for the decision to be recognised.

3. If the outcome of the proceedings in a court of a Member State depends on the determination of an incidental question of recognition, that court shall have jurisdiction over that question.

Article 37

Grounds of non-recognition

A decision shall not be recognised:

(a) if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State in which recognition is sought;

(b) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so;

(c) if it is irreconcilable with a decision given in proceedings between the same parties in the Member State in which recognition is sought;

(d) if it is irreconcilable with an earlier decision given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

Article 38

Fundamental rights

Article 37 of this Regulation shall be applied by the courts and other competent authorities of the Member States in observance of the fundamental rights and principles recognised in the Charter, in particular in Article 21 thereof on the principle of non-discrimination.

Article 39

Prohibition of review of jurisdiction of the court of origin

1. The jurisdiction of the court of the Member State of origin may not be reviewed.

2. The public policy (*ordre public*) criterion referred to in Article 37 shall not apply to the rules on jurisdiction set out in Articles 4 to 12.

Article 40

No review as to substance

Under no circumstances may a decision given in a Member State be reviewed as to its substance.

Article 41

Staying of recognition proceedings

A court of a Member State in which recognition is sought of a decision given in another Member State may stay the proceedings if an ordinary appeal against the decision has been lodged in the Member State of origin.

Article 42

Enforceability

Decisions given in a Member State and enforceable in that State shall be enforceable in another Member State when, on the application of any interested party, they have been declared enforceable there in accordance with the procedure provided for in Articles 44 to 57.

Article 43

Determination of domicile

To determine whether, for the purposes of the procedure provided for in Articles 44 to 57, a party is domiciled in the Member State of

enforcement, the court seised shall apply the internal law of that Member State.

Article 44

Jurisdiction of local courts

1. The application for a declaration of enforceability shall be submitted to the court or competent authority of the Member State of enforcement communicated by that Member State to the Commission in accordance with Article 64.

2. The local jurisdiction shall be determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement.

Article 45

Procedure

1. The application procedure shall be governed by the law of the Member State of enforcement.

2. The applicant shall not be required to have a postal address or an authorised representative in the Member State of enforcement.

3. The application shall be accompanied by the following documents:

(a) a copy of the decision which satisfies the conditions necessary to establish its authenticity;

(b) the attestation issued by the court or competent authority of the Member State of origin using the form established in accordance with the advisory procedure referred to in Article 67(2), without prejudice to Article 46.

Article 46

Non-production of the attestation

1. If the attestation referred to in point (b) of Article 45(3) is not produced, the court or competent authority may specify a time for its production or accept an equivalent document or, if it considers that it has sufficient information before it, dispense with its production.

2. If the court or competent authority so requires, a translation or transliteration of the documents shall be produced. The translation shall be done by a person qualified to do translations in one of the Member States.

Article 47

Declaration of enforceability

The decision shall be declared enforceable immediately on completion of the formalities set out in Article 45 without any review under Article 37. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

Article 48

Notice of the decision on the application for a declaration of enforceability

1. The decision on the application for a declaration of enforceability shall forthwith be brought to the notice of the applicant in accordance with the procedure laid down by the law of the Member State of enforcement.

2. The declaration of enforceability shall be served on the party against whom enforcement is sought, accompanied by the decision, if not already served on that party.

Article 49

Appeal against the decision on the application for a declaration of enforceability

1. The decision on the application for a declaration of enforceability may be appealed by either party.

2. The appeal shall be lodged with the court communicated by the Member State concerned to the Commission in accordance with Article 64.

3. The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.

4. If the party against whom enforcement is sought fails to appear before the appellate court in proceedings concerning an appeal brought by the applicant, Article 16 shall apply even where the party against whom enforcement is sought is not domiciled in any of the Member States.

5. An appeal against the declaration of enforceability shall be lodged within 30 days of service thereof. If the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be 60 days and shall run from the date of service, either on him in person or at his residence. No extension may be granted on account of distance.

Article 50

Procedure to contest the decision given on appeal

The decision given on the appeal may be contested only by the procedure communicated by the Member State concerned to the Commission in accordance with Article 64.

Article 51

Refusal or revocation of a declaration of enforceability

The court with which an appeal is lodged under Article 49 or Article 50 shall refuse or revoke a declaration of enforceability only on one of the grounds specified in Article 37. It shall give its decision without delay.

Article 52

Staying of proceedings

The court with which an appeal is lodged under Article 49 or Article 50 shall, on the application of the party against whom enforcement is sought, stay the proceedings if the enforceability of the decision is suspended in the Member State of origin by reason of an appeal.

Article 53

Provisional, including protective, measures

1. When a decision must be recognised in accordance with this Chapter, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State of enforcement without a declaration of enforceability under Article 47 being required.

2. The declaration of enforceability shall carry with it by operation of law the power to proceed to any protective measures.

3. During the time specified for an appeal pursuant to Article 49(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.

Article 54

Partial enforceability

1. Where a decision has been given in respect of several matters and the declaration of enforceability cannot be given for all of them, the court or competent authority shall give it for one or more of them.

2. An applicant may request a declaration of enforceability limited to parts of a decision.

Article 55

Legal aid

An applicant who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled, in any proceedings for a declaration of enforceability, to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the Member State of enforcement.

Article 56

No security, bond or deposit

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for recognition, enforceability or enforcement of a decision given in another Member State on the ground that he is a foreign national or that he is not domiciled or resident in the Member State of enforcement.

Article 57

No charge, duty or fee

In proceedings for the issue of a declaration of enforceability, no charge, duty or fee calculated by reference to the value of the matter at issue may be levied in the Member State of enforcement.

CHAPTER V

AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS

Article 58

Acceptance of authentic instruments

1. An authentic instrument established in a Member State shall have the same evidentiary effects in another Member State as it has in the Member State of origin, or the most comparable effects, provided

that this is not manifestly contrary to public policy (*ordre public*) in the Member State concerned.

A person wishing to use an authentic instrument in another Member State may ask the authority establishing the authentic instrument in the Member State of origin to fill in the form established in accordance with the advisory procedure referred to in Article 67(2) describing the evidentiary effects which the authentic instrument produces in the Member State of origin.

2. Any challenge relating to the authenticity of an authentic instrument shall be made before the courts of the Member State of origin and shall be decided upon under the law of that State. The authentic instrument challenged shall not produce any evidentiary effect in another Member State for as long as the challenge is pending before the competent court.

3. Any challenge relating to the legal acts or legal relationships recorded in an authentic instrument shall be made before the courts having jurisdiction under this Regulation and shall be decided upon under the law applicable pursuant to Chapter III. The authentic instrument challenged shall not produce any evidentiary effect in a Member State other than the Member State of origin as regards the matter being challenged for as long as the challenge is pending before the competent court.

4. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question relating to the legal acts or legal relationships recorded in an authentic instrument in matters of property consequences of registered partnerships, that court shall have jurisdiction over that question.

Article 59

Enforceability of authentic instruments

1. An authentic instrument which is enforceable in the Member State of origin shall be declared enforceable in another Member State on the application of any interested party in accordance with the procedure provided for in Articles 44 to 57.

2. For the purposes of point (b) of Article 45(3), the authority which established the authentic instrument shall, on the application of any interested party, issue an attestation using the form established in accordance with the advisory procedure referred to in Article 67(2).

3. The court with which an appeal is lodged under Article 49 or Article 50 shall refuse or revoke a declaration of enforceability only if enforcement of the authentic instrument is manifestly contrary to public policy (*ordre public*) in the Member State of enforcement.

Article 60

Enforceability of court settlements

1. Court settlements which are enforceable in the Member State of origin shall be declared enforceable in another Member State on the application of any interested party in accordance with the procedure provided for in Articles 44 to 57.

2. For the purposes of point (b) of Article 45(3), the court which approved the settlement or before which it was concluded shall, on the application of any interested party, issue an attestation using the form established in accordance with the advisory procedure referred to in Article 67(2).

3. The court with which an appeal is lodged under Article 49 or 50 shall refuse or revoke a declaration of enforceability only if enforcement of the court settlement is manifestly contrary to public policy (*ordre public*) in the Member State of enforcement.

CHAPTER VI

GENERAL AND FINAL PROVISIONS

Article 61

Legalisation and other similar formalities

No legalisation or other similar formality shall be required in respect of documents issued in a Member State in the context of this Regulation.

Article 62

Relations with existing international conventions

1. This Regulation shall not affect the application of the bilateral or multilateral conventions to which one or more Member States are party at the time of adoption of this Regulation or of a decision pursuant to the second or third subparagraph of Article 331(1) TFEU and which concerns matters covered by this Regulation, without prejudice to the obligations of the Member States under Article 351 TFEU.

2. Notwithstanding paragraph 1, this Regulation shall, as between Member States, take precedence over conventions concluded between them in so far as such conventions concern matters governed by this Regulation.

Article 63

Information made available to the public

The Member States shall, with a view to making the information available to the public within the framework of the European Judicial Network in civil and commercial matters, provide the Commission with a short summary of their national legislation and procedures relating to the property consequences of registered partnerships, including information on the type of authority which has competence in matters of the property consequences of registered partnerships and on the effects in respect of third parties referred to in Article 28.

The Member States shall keep the information permanently updated.

Article 64

Information on contact details and procedures

1. By 29 April 2018, the Member States shall communicate to the Commission:

(a) the courts or authorities with competence to deal with applications for a declaration of enforceability in accordance

with Article 44(1) and with appeals against decisions on such applications in accordance with Article 49(2);

(b) the procedures to contest the decision given on appeal referred to in Article 50;

The Member States shall apprise the Commission of any subsequent changes to that information.

2. The Commission shall publish the information communicated in accordance with paragraph 1 in the *Official Journal of the European Union*, with the exception of the addresses and other contact details of the courts and authorities referred to in point (a) of paragraph 1.

3. The Commission shall make all information communicated in accordance with paragraph 1 publicly available through any appropriate means, in particular through the European Judicial Network in civil and commercial matters.

Article 65

Establishment and subsequent amendment of the list containing the information referred to in Article 3(2)

1. The Commission shall, on the basis of the notifications by the Member States, establish the list of the other authorities and legal professionals referred to in Article 3(2).

2. The Member States shall notify the Commission of any subsequent changes to the information contained in that list. The Commission shall amend the list accordingly.

3. The Commission shall publish the list and any subsequent amendments in the *Official Journal of the European Union*.

4. The Commission shall make all information notified in accordance with paragraphs 1 and 2 publicly available through any other appropriate means, in particular through the European Judicial Network in civil and commercial matters.

Article 66

Establishment and subsequent amendment of the attestations and forms referred to in point (b) of Article 45(3), and Articles 58, 59 and 60

The Commission shall adopt implementing acts establishing and subsequently amending the attestations and forms referred to in point (b) of Article 45(3) and Articles 58, 59 and 60. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 67(2).

Article 67

Committee procedure

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply.

Article 68

Review clause

1. By 29 January 2027, and every 5 years thereafter, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. Where necessary, the report shall be accompanied by proposals to amend this Regulation.

2. By 29 January 2024, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of Articles 9 and 38 of

this Regulation. This report shall evaluate in particular the extent to which these Articles have ensured access to justice.

3. For the purposes of the reports referred to in paragraphs 1 and 2, Member shall communicate to the Commission relevant information on the application of this Regulation by their courts.

Article 69

Transitional provisions

1. This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 29 January 2019 subject to paragraphs 2 and 3

2. If the proceedings in the Member State of origin were instituted before 29 January 2019, decisions given on or after that date shall be recognised and enforced in accordance with Chapter IV as long as the rules of jurisdiction applied comply with those set out in Chapter II.

3. Chapter III shall apply only to partners who register their partnership or who specify the law applicable to the property consequences of their registered partnership on or after 29 January 2019.

Article 70

Entry into force

1. This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

2. This Regulation shall apply in the Member States which participate in enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, as authorised by Decision (EU) 2016/954.

It shall apply from 29 January 2019, except for Articles 63 and 64 which shall apply from 29 April 2018, and Articles 65, 66 and 67, which shall apply from 29 July 2016. For those Member States which participate in enhanced cooperation by virtue of a decision adopted in accordance with the second or third subparagraph of Article 331(1) TFEU, this Regulation shall apply as from the date indicated in the decision concerned.

This Regulation shall be binding in its entirety and directly applicable in the participating Member States in accordance with the Treaties.

([1]) Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 (OJ L 324, 10.12.2007, p. 79).

Naples, November 2021

The new European regulatory framework on family property relations (Regulations 1103 and 1104/2016) has come into effect on 29 January 2019. All cross-border couples in the 19 EU Member States involved in the enhanced cooperation which was adopted for these Regulations enjoy a freedom of choice and benefit of a proximity justice. The new rules regarding the choice of law and jurisdiction can simplify the management of the property regimes for married couples and property consequences for registered partnerships.

This Commentary would offer a path to know and better understand article-by-article the two Regulations.

A team of law experts, among them lawyers, notaries and scholars, analyses through a synoptic view the text of each article of each Regulation. The authors focus on the new provisions as well as on the existing case law by the European Court of Justice and courts of the Member States.

Lucia Ruggeri is Full Professor of Private Law and Director of the School of Specialization in Civil Law at the University of Camerino. She was the coordinator of the EU Consortium PSEFS 'Personalized Solution in European Family and Succession Law PSEFS'. Currently, she is the coordinator of the EU Consortium EU-FamPro 'EU-FamPro: E-Training on EU Family Property Regimes' and she is also the coordinator of the Observatory in European Family and Succession Law.

Roberto Garetto is a Research Fellow in private law at the University of Camerino. He was a team member of the project 'Personalized Solution in European Family and Succession Law – PSEFS' and is a team member of the projects 'E-training on EU Family Property Regimes – EU-FamPro'.

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