

European regulation on matrimonial property regimes

Council Regulation (EU) 2016/1103 of 24 June 2016

Implementing enhanced cooperation in the area of jurisdiction, applicable law, recognition and enforcement of judgments in matrimonial matters

Introduction

Europe has several million citizens who interact with each other. They meet, travel, are separated by will or by death.

The different rules from one country to another lead to conflicts of jurisdiction and legislation.

It is therefore important to create European rules applicable to persons in order to avoid legal uncertainty.

After the creation of several tools, in particular in the area of maintenance obligations and succession, to determine the applicable law, jurisdiction and recognition and enforcement, the European institutions adopted two new regulations in 2016 to unify the conflict-of-laws rules between the Member States in the area of matrimonial property regimes and the property effects of registered partnerships.

While Regulation (EU) 2016/1103 is the culmination of several attempts to establish common rules, it also has limitations.

Its wording follows the familiar pattern of dealing successively with jurisdiction, applicable law and recognition and enforcement of decisions.

1. General spirit of the Regulation

Provide security and predictability. The regulation aims to provide binational couples or couples living abroad with a more secure legal framework by allowing them to choose the law applicable to their matrimonial regime.

It thus replaces the Hague Convention of 14 March 1978 on the law applicable to matrimonial property regimes, which provides for an automatic change of the spouses' matrimonial property regime and which has been ratified by only three EU Member States: France, Luxembourg and the Netherlands.

Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law, recognition and enforcement of judgments in matrimonial property regimes aims to ensure legal certainty for married couples **with regard to their property¹ and the liquidation of their property regime**. It should be read in conjunction with Regulation

¹ Recital 15

(EU) 2016/1104 on the property of *registered partners*, which is almost identical, using the numbering and headings of Regulation (EU) 2016/1103.

Although the Regulation provides a definition of the concept of *matrimonial property regime*² as being *all the rules relating to the property relations of the spouses and their relations with third parties which result from the marriage or its dissolution*, it does not define the concept of *marriage* which remains defined by the national law of the Member States.

Similarly, it does not deal with spousal maintenance obligations³ as these are already regulated by Council Regulation (EC) 4/2009, while in matters of succession⁴ reference should be made to Regulation (EU) 650/2012.

This legal certainty is provided by the **Unity**⁵ of the law chosen by the spouses, which applies to all their property under this regime, regardless of the location of this property.

The adoption of this Regulation has not been without difficulties. Several proposals for regulations put forward by the Commission could not be finalised in 2011 and March 2016 due to a lack of agreement between Member States.

It is the use of the enhanced cooperation procedure, adopted by the Council on 9 June 2016⁶, which will allow the implementation between 18 Member States⁷ of the Regulation in the area of jurisdiction, applicable law, recognition and enforcement of judgments in matrimonial matters.

Member States that have not participated in this procedure are considered "third States" within the meaning of the Regulation. They may join the enhanced cooperation at any time in accordance with Article 328 of the Treaty on the Functioning of the European Union (TFEU).

Otherwise, it will be necessary to consider whether there is a convention between the participating State and the third State which will continue to apply.

2. Scope of the Regulation

Already in Article 1^{er}, the Regulation defines its scope in a negative way, and classically excludes tax, customs and administrative matters.

As mentioned above, it also excludes maintenance obligations and the estate of a deceased spouse, but also the legal capacity of the spouses, social security, certain pension or disability rights acquired during the marriage, as well as the nature of rights in rem in property and the entry of such rights in a register, but above all the *existence, validity or recognition of a marriage*, leaving

² Article 3 1. a)

³ Article 1 2. c)

⁴ Article 1 2. d)

⁵ Article 21

⁶ EU Decision 2016/954 of 9 June 2016

⁷ The EU Member States participating in enhanced cooperation are: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, Netherlands, Portugal, Slovenia, Spain and Sweden (April 2019)

the Member States participating in the enhanced cooperation the legal freedom to define the concept of *marriage*.

The concept of *marriage* must be understood in its institutional character. Indeed, because of the existence of same-sex marriages in some Member States, the Regulation had to allow the State that does not recognise the marriage concerned to decline jurisdiction and provide for a substitute jurisdiction⁸.

The regulation concerns the **property rules applicable to spouses**, excluding personal effects. This concerns the day-to-day management of the spouses' property but also its liquidation in the event of death, separation or partition.

Consequently, all agreements by which the spouses organise the property effects of their matrimonial regime are affected by this regulation. This may be a marriage contract, pre-nuptial agreements, or any agreements relating to the liquidation of the matrimonial property regime.

There must of course be a **foreign** or international **element** for the regulation to apply.

3. Jurisdictional rules

The Regulation shall apply to proceedings commenced on **or after 29 January 2019**.⁹

Concerning jurisdiction over matrimonial property regimes in relation to the **succession of a spouse**, the Regulation refers to Regulation (EU) No 650/2012 on succession.¹⁰

Concerning jurisdiction in matters of divorce, legal separation or marriage annulment, where a court of a Member State is seised, it has jurisdiction to rule on questions relating to the matrimonial property regime.¹¹

In other cases, the court having jurisdiction to rule on the matrimonial property regime of the spouses shall be the court of the Member State in which the spouses are habitually resident at the time the court is seised or, failing that, in the territory where the spouses were last habitually resident, insofar as one of them still resides there at the time the court is seised, or, failing that, in the territory in which the defendant has his or her habitual residence at the time the court is seised, or failing that, of which the spouses are nationals at the time the court is seised.

4. The applicable law

Chapter III of the Regulation lays down the principle of **universal application** of the designated law, even if that law is not that of a Member State.

⁸ Article 9

⁹ Article 69

¹⁰ Article 4

¹¹ Article 5

It also applies to **marriages celebrated on or after 29 January 2019** and to **choices of applicable law made on or after that date**, even if the marriage was celebrated before 29 January 2019;

For the earlier period, a distinction must be made between two periods before and after 1^{er} September 1992.

For couples who were married between 1^{er} September 1992 and 28 January 2019 or who have designated the law applicable to their matrimonial property regime during this period, the conflict of laws rules of the Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes apply.

For the period before 1^{er} September 1992, the law chosen expressly or tacitly by the spouses applies¹².

The Regulation also establishes the **principle of unity** of the law applicable to the property of the matrimonial property regime, regardless of its location.

The **applicable law chosen by the spouses** for their matrimonial regime can be¹³ :

The law of the State in which at least one of the spouses or future spouses has his or her habitual residence at the time the agreement is concluded, or the law of a State of which one of the spouses or future spouses is a national at the time the agreement is concluded.

In the event of a change during the marriage, this change will only have effect for the future unless the spouses agree otherwise.¹⁴

Third parties are also protected because no retroactive change in the law applicable to the matrimonial property regime can affect the rights of third parties under that law.¹⁵

In order to avoid any risk of legal uncertainty in the choice of applicable law, the Regulation provides for the form of the agreement¹⁶ which must be **in writing (it should be noted that any electronic transmission which allows the agreement to be recorded durably is considered to be in writing)**, **dated** and **signed** by the spouses.

The Regulation provides for additional formal rules for matrimonial agreements.¹⁷

In the absence of a choice by the spouses of the law applicable to the matrimonial property regime¹⁸ is: the Regulation defines it as the law of the *first common habitual residence of the spouses after the celebration of the marriage*, failing that, the law of the State of the *common nationality of the spouses at the time of the celebration of the marriage*, failing that, *the law of the*

¹² Gouthertz case law

¹³ Article 22

¹⁴ Article 22 paragraph 2

¹⁵ Article 22 paragraph 3

¹⁶ Article 23

¹⁷ Article 23 paragraph 2, 3 and 4 and Article 25

¹⁸ Article 26

State with which the spouses have the closest connection at the time of the celebration of the marriage, taking into account all the circumstances.

These objective criteria of attachment are fairly simple to determine.

The Regulation also provides for the case of spouses having more than one common nationality at the time of the celebration of the marriage. **Exceptionally**, a judicial authority may authorise the application of the law of the State of the last common habitual residence of the spouses instead of that of their first common habitual residence after the marriage.

5. Recognition and enforcement

The Member States bound by this Regulation recognise and accept it.

Nevertheless, the authority that will be required to enforce its decision will have to ensure that the decision is enforced in a State bound by the Regulation. Otherwise, any bilateral conventions between the State of origin and the State of enforcement will have to be applied.

Recognition is in principle implicit, but there are cases of non-recognition. These are cases of incompatibility with another decision and with public policy. A decision rendered by default is also a ground for non-recognition if the writ of summons or document instituting proceedings was not delivered in time for the defendant to assert his rights.

It should be noted that the Regulation expressly provides that the review of the court's jurisdiction cannot constitute a ground for non-recognition, since this review of jurisdiction is carried out by the court seised.

The registry of the court of origin will be asked by the requesting party to issue the form certifying the enforceability of the decision. The decision, translated into the language of the State of enforcement, accompanied by this certificate, will be deposited with the registry of the court of the State of enforcement so that the latter can establish its enforceability.

If the decision is a notarial deed, the certificate is issued by the notary and the application for a declaration of enforceability is filed with the Chamber of Notaries

Conclusion

Since then, there has been a progressive construction of European family law with several regulations adopted: Regulation No 2201/2003 of 27 November 2003 (Brussels II Bis) concerning jurisdiction and the recognition and enforcement of judgments in **matrimonial matters** and the matters of **parental responsibility**, Regulation (EC) No 1259/2010 of 20 December 2010 (Rome III) implementing enhanced cooperation in the area of the law applicable to **divorce and legal separation**, 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**.

Under the impetus of the European Union, private international family law is undergoing a new attempt to standardise its rules with the regulations 2016/1103 and 2016/1104 on the property effects of registered partnerships.

It is regrettable that these regulations are not binding on all Member States, which may lead to future conflicts of law. It is to be hoped that other Member States will adhere to these regulations, thus creating a real uniformity of private international family law in the European Union.