



# **EU REGULATIONS 1103/2016 AND 1104/2016 ON MATRIMONIAL PROPERTY REGIMES AND PROPERTY CONSEQUENCES OF REGISTERED PARTNERSHIP**

**ELRN WORKSHOP**

**Tallinn, 1st June 2018**





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- **I.- GENERAL ISSUES**

- 1.- These instruments complements other two existing instruments in matrimonial matters:

- Regulation 2201/2003 Brussels II bis ( under revision at the moment) regarding jurisdiction and recognition of decisions in matters of annulment, separation or divorce.
- Rome III 1259/2010 Council regulation applicable law to divorce and separation

- 2.- Legal grounds art. 81.3 TFUE

By referring art 81.3 as its legal base , the regulation acknowledges that its subject matter belongs to family law: **a special legislative procedure** : Council Decision (EU) 2016/954 of 9 June 2016

authorizing Enhanced Cooperation in REM

- 3.- Two different Instruments

- COUNCIL REGULATION (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and nforcement 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.



## • II.-SCOPE OF APPLICATION

### a) Temporal scope.-

- According to art. 69. *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.*

### b) Territorial scope.-

- This Regulation should be binding and directly applicable only in the Member States which participate in enhanced cooperation, by virtue of Decision (EU) 2016/954 : Belgium, Bulgaria, the Czech Republic, Cyprus, Germany, Greece, Spain, France, Croatia Italy, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden.



### c) **Substantive scope.-**

- The scope of this Regulation 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.
- It does not apply to:
  - revenue, customs and administrative issues.
  - Legal capacity, existence, validity or recognition of marriage/registered partnership, maintenance obligations, succession, social security, rights to retirement or disability pension.
  - **The nature of rights in rem relating to a property**  
**( ECJ C-218/16 Kubicka)**
- 24) This Regulation should allow for the creation or the transfer resulting from the matrimonial property regime of a right in immovable or moveable property as provided for in the law applicable to the matrimonial property regime. It should, however, 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.



- **Any recording in a register of rights in immovable or moveable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register.**
- *(27) The requirements for the recording in a register of a right in immovable or moveable property should be excluded from the scope of this Regulation. It should therefore be the law of the Member State in which the register is kept (for immovable property, the lex rei sitae) which determines under what legal conditions, and how, the recording must be carried out and which authorities, such as land registers or notaries, are in charge of checking that all requirements are met and that the documentation presented or established is sufficient or contains the necessary information.*
- *In particular, the authorities may check that the right of a spouse to a property mentioned in the document presented for registration is a right which is recorded as such in the register or which is otherwise demonstrated in accordance with the law of the Member State in which the register is kept.*
- *In 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 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 competent authority may indicate to the person applying for registration how the missing information or documents can be provided.*
- *(28) The effects of the recording of a right in a register should also be excluded from the scope of this Regulation. 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 immovable 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*



### • III.- 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*





- **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.*



## IV.- APPLICABLE LAW

- **1.- UNIVERSALITY.-** The conflict rule established in this Regulation will substitute national conflict of laws rules, and will be applied in all cases, even if the conflict of law rule designates the law of a third state.
- **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.*
  
- **2.- UNITY.-** The applicable law designated in the regulation will deal with all aspects and all assets included in the matrimonial property regime, wherever they are located.
- **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.*



- **3.- CHOICE OF LAW**

- **Article 22 Choice of the applicable law**

- *(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.- CHANGE of the applicable law**

- *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 26 Applicable law in the absence of choice by the parties**
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- *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*



- **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.*



In the light of the scope of applicable law, which of those acts are registered in your national system?

- transfer of property from one category to another one?
- the distribution or partition of properties between spouses?
- Other acts related with matrimonial property regime ?



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## **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.*



- ART 28.2. 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 immovable 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:
    - the State whose law is applicable to the transaction between a spouse and the third party;
    - the State where the contracting spouse and the third party have their habitual residence; or
    - in cases involving immovable property, the State in which the property is situated.





## ART 28

*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 immovable 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.*



- How the matrimonial property regime of a registered owner affects/limits/restricts the transmission of his/her property right in your land registration system?
- In that case, does the land registry give information about this situation? ( In ELRD we agreed to reflect it either as a common proprietorship, or as a restriction)
- National rules to disclose REM?

- **a) Adaptation of rights in rem. Art. 29**
- *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.*
- **b) Overriding mandatory provisions Art 30**
- *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.*



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Typical case of overriding mandatory rules are those to preserve and protect the family home.

Is there any provision about this issue in your civil law?

How this rules affect/ limit / restrict registration acts on the family home property ?



- V.- RECOGNITION AND ENFORCEMENT.

Recognition.- Is the process by which a foreign decision produces effects in another member state. Automatic recognition is not lack of recognition, but means that recognition must be given directly by the national authority before who the decision is presented seeking to produce its effects: in the land registry, this authority is the registrar.

a) General rule.- Mutual trust: automatic recognition. Is not lack of recognition.

*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.*



- **b) Grounds for not recognition.- art. 37A 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
- According to Art. 39 The jurisdiction of the court of the Member State of origin may not be reviewed



- **2<sup>o</sup>.- Formal requirements:**

A) No legalization is needed. Article 61

B) Authenticity

*Art. 45. 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;*

C) Attestation.-

*Art. 45. 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),*

Although it is compulsory for the interested party, the national authority, the registrar, might dispense with its production ( art. 46.1)

D) Translation.- ( art. 46.2)

*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*



- **3<sup>o</sup> Examination of the decision**
- A).- The decision can not be examined in its substance. *Art. 40 Under no circumstances may a decision given in a Member State be reviewed as to its substance.*
- B) However the decision must be check in the light of the land registration law:
  - *If, according to its nature, it is suitable to modify the registry,*
  - *if it contains all pieces of information needed for its registration*
  - *if it is compatible with existing entries in the land book ( continuity principle)*
  - *if the property right is known by the forum law ( adaptation principie)*
  - *if there are mandatory rules to be observed ( overriding mandatory provisions)*
  - *.... any other nacional provision in the field of land registration that must be observed*
- One limitation: duplicity is avoided





- **4° Enforcement.-**
- The regulations contain a special proceeding ( EXEQUATUR) to obtain the declaration of enforceability art. 42 to 52.
- However this proceeding will always be produced before the nacional court designated by each MS. Once obtained the declaration of enforcement, the decision must be enforced in the MS where the LR is located, always before its nacional court,.
- **5° Provisional, including protective, measures.- ART 53**
- According to art. 19, *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.*
- No ex parte measures



## VI.- AUTHENTIC INSTRUMENTS

- Authentic documents circulate under this regulation, since a significant number of acts related to matrimonial property regime are performed before a notary or another legal professional in Europe
- Authentic documents, are not judicial decisions, so they are not recognized ( they don't produce a res iudicata effect, the final text use the expression of "acceptance of authentic act" ( art. 58). This means that no recognition procedure is needed.
- The authentic instrument will produce in the member state of destination the most comparable evidentiary effects, but never more effects, that those given to that instrument in the MS of origen:

*Art. 58 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.*



- The evidentiary effects of the authentic instrument are suspended in case of the document is challenged, ( art. 58.2 y 3)

either as to its authenticity

- *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.*

or as to the substance or the legal acts contained.

- *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.*

- **Requirements:**

- 1.- it must be an authentic act. According to the definition contained in art. 3
- *(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*
- 2.- it is not needed of legalization nor other formalities, according to art Article 61
- *No legalisation or other similar formality shall be required in respect of documents issued in a Member State in the context of this Regulation*
- 3.- It must be accompanied of specific form filled by the issuing authority.
- *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*



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- **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*

A task for ELRN?

Although ELRN is an informal Network, it is in fact the only source of knowlwdge in the field land registration,



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THANK YOU FOR YOUR ATENTION

Questions can be sent to

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