

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

ELRA Statement

It is crucial for a third party who enters in a legal relation with a married person, to know what his/her matrimonial property regime is.

According to the Regulation the applicable law shall apply to all assets falling under that regime, regardless of where the assets are located – principle of the unity of the applicable law.

The requirements for the registering a right in immovable property is excluded from the scope of the Regulation – paragraph h) point 2 of article 1.

Due to the third-party protective effect derived from the land registry, the provided information on the matrimonial property regime of the owner needs to be accurate, especially when the applicable law is not the one of the countries where the immovable is located.

The issue is more sensitive in the situations when only one member of the couple acquires, burdens or transmits a property right on a registered immovable and there is a need for the conveyancer to legitimate the legal transaction.

Following the questionnaires and debates among the ELRA contact points we found a great diversity among MS whether information about REM (default or chosen regime) is checked, registered or disclosed by the land registry, notary or any other public organ:

- Although there might exist restrictions derived from the matrimonial property regime, in about 50% of the MS registration will be granted individually and no investigation or information about restriction or matrimonial property regime will be visible in the land register.

- Almost half of the MS do not have means or a legal base to disclose or register the matrimonial property regime of a foreign couple for the purpose of paragraph b) point 2 of article 28.

Considering the rules contained in the Regulation, we fear that due to the lack of disclosure or registration of the matrimonial property regime, the applicable law as regards to this regime, when conveyancing immovable properties located abroad, will often be the one of the State in which the property is situated - paragraph b) point 3 of article 28.

Although this arises from the fundamental principle of third party protection effect, it also means that the principle of the unity of the applicable law to the matrimonial property regime stated in article 21 of the Regulation will fail whenever a couple buys an immovable property in a different member State and that state doesn't allow them to register or disclose their otherwise applicable foreign REM.

If the spouses' applicable law and REM can be invoked against a third party or not is dependent upon the possibility to register or disclose their foreign REM in the country where the property is situated. A situation can therefore arise where the spouses have chosen a specific matrimonial property regime and complied with the requirements for its registration in accordance with that law, but it will still not be invoked against a third party when conveyancing an immovable property situated in a different MS. This could lead to a situation where the sale of a property is allowed without the consent of one of the spouses. All because registration or disclosure of foreign REM is not available in the MS where the immovable is located.

In order to accomplish the principle of the unity of the applicable law, for the purpose of protecting not only the spouses, but also third parties in immovable transactions, the possibility to disclose or register foreign matrimonial property regimes (either the default or a chosen one) should be improved within MS. Technological tools or mechanisms could also be developed to exchange this sort of information.