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*Maria Pia Gasperini\**

## **Jurisdiction and Efficiency in Protection of Matrimonial Property Rights\*\***

### **1. Jurisdiction and “Proper Administration of Justice” in EU Regulations No. 1103/2016 and 1104/2016**

Regulations No. 1103 and 1104, which were adopted by the Council of the European Union on 24 June 2016 (enacting, as well known, enhanced cooperation between some Member States)<sup>1</sup> and entered into force on 29 January 2019, constitute one more piece within the complex regulatory architecture of European family law.<sup>2</sup> They were preceded

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<sup>1</sup> After the failure of Member States to reach unanimity on two proposals for regulations, the EU Council, by decision No. 954/2016, authorized the enhanced cooperation, unblocking a negotiation that had been underway for about five years. The will to enact the enhanced cooperation was first notified by Belgium, Bulgaria, Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, Netherlands, Austria, Portugal, Slovenia, Finland and Sweden; subsequently, Cyprus notified its will, too.

<sup>2</sup> Among comments to Regulations No. 1103 and 1104 see Bergquist, Damascelli, Frimston, Lagarde, Reinhartz, *THE EU REGULATIONS ON MATRIMONIAL AND PATRIMONIAL PROPERTY* (2019); Iglesias Buigues, Palao Moreno (eds.), *RÉGIMEN ECONÓMICO MATRIMONIAL Y EFECTOS PATRIMONIALES DE LAS UNIONES REGISTRADAS EN LA UNIÓN EUROPEA* (2019); Corneloup, Egéa, Gallant, Jault-Seseke (eds.), *LE DROIT EUROPÉEN DES RÉGIMES PATRIMONIAUX DES COUPLES: COMMENTAIRE DES RÈGLEMENTS 2016/1103 ET 2016/1104* (2018).

by several key regulations: 1) Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility (Regulation Brussels II-*bis*, recently recast into Regulation (UE) No. 1111/2019), 2) Regulation (EU) No. 1259/2010, concerning law applicable on divorce and legal separation (Regulation Rome III), and 3) Regulation (EU) 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession. The 2016 Regulations include new regulatory texts on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of property regimes of transnational families and registered partnerships, fitting into a legislative patchwork whose application, especially in those Member States without implementing rules, is frequently devolved to domestic case law, with the support of the Court of Justice of the European Union.<sup>3</sup>

While in matters of matrimony and parental responsibility two separate legal instruments cover the issues of jurisdiction, recognition and enforcement of decisions and applicable law, in matters of patrimonial regimes one single text combines all related rules, substantive and procedural.<sup>4</sup> This single text also considers all civil-law aspects of patrimonial regimes, such as the daily management of matrimonial property or property consequences of registered partnership as well as the liquidation of the regime, as a result of the death or dissolution of matrimonial ties or registered union<sup>5</sup>. The adoption of two separate regulatory texts in matters of property regimes is justified on the grounds of the unquestionable peculiarity of the registered union compared to traditional marriage. Thus, Regulation No. 1104 introduces specific rules, both substantive and procedural, as well as rules comparable to those in Regulation No. 1103.

The present article examines some aspects of rules of jurisdiction included in these Regulations, though does not claim to be exhaustive. Given the complexities presented by the increasing number of international couples bound by marriage or by a different kind of registered union,<sup>6</sup> both Regulations pursue the general aim of promoting a “proper administration of justice”.<sup>7</sup> The meaning of this “proper administration” obviously entails the goal of efficient protection of rights, but requires further clarification and explanation. Taking an overview of rules of jurisdiction contained in these Regulations

<sup>3</sup> For this consideration see Viarengo, *Il Regolamento UE sulla legge applicabile al divorzio e il ruolo della volontà delle parti* (2011), p. 601 ff.; Dalla Bontà, *Divorzio transfrontaliero e domande connesse nel diritto dell’Unione Europea* (2016), p. 1490.

<sup>4</sup> See Recitals 15 and 16 of both Regulations.

<sup>5</sup> See Recital 18 of both Regulations.

<sup>6</sup> Regarding the increasing importance of the phenomenon of transnational couples, and about the stages which led to the adoption of Regulations on property regimes, *ex multis* see Pinardi, *I regolamenti europei del 24 giugno 2016 nn. 1103 e 1104 sui regimi patrimoniali tra coniugi e sugli effetti patrimoniali delle unioni registrate* (2018), p. 733 ff.

<sup>7</sup> See Recital 32 of both Regulations.

(which replace the domestic rules of private international law), it is possible to observe that the European legislator followed these guidelines:

1. Certainty of jurisdiction rules, based on genuine connecting factors between the spouses or partners and the Member State where jurisdiction is exercised, reducing the possibility for a creative interpretation by the courts, without prejudice for the autonomy of single Member States;<sup>8</sup>
2. Economic efficiency in administration of justice, meaning that, in the event of a proceeding pending before a court of a Member State for the succession of a spouse or partner, or for legal separation, divorce, annulment of marriage or registered partnership, all claims concerning property regimes should be submitted to a court of the same Member State, thus avoiding duplication of actions before different Member States' courts and the subsequent risk of conflicting judgements;
3. Recognition of the importance of voluntary submission of parties to the exclusive jurisdiction of the courts of a Member State, albeit with limits and conditions, to increase legal certainty and predictability of applicable law, as well as the autonomy of the parties;<sup>9</sup>
4. Coverage of protection, i.e. there must be a court within the European judicial area that declares jurisdiction to rule on claims regarding rights deriving from property regime so that justice is not denied when the court of a Member State has declined its jurisdiction, or when the proceeding cannot reasonably be brought or conducted in a third State with which the case is closely connected.<sup>10</sup>

The following sections explore specific aspects of the jurisdiction provisions articulated in the two Regulations on property regimes that seem more significant in terms of legal certainty, economic efficiency and recognition of party autonomy. First, we examine the principle of concentration of jurisdiction, as well as possible drawbacks deriving from its application. Second, we explore the role played by private autonomy—either through the choice-of-court agreement provided for in Articles 7 or through the acceptance of jurisdiction based on the appearance of the defendant provided for in Articles 8 of both Regulations.

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<sup>8</sup> These aspects are emphasized by Bruno, *I REGOLAMENTI EUROPEI SUI REGIMI PATRIMONIALI DEI CONIUGI E DELLE UNIONI REGISTRATE* (2019), p. 73 ff.

<sup>9</sup> See Recitals 36 and 37, respectively, of Regulation No. 1103 and Regulation No. 1104.

<sup>10</sup> In this perspective, the provisions of Articles 9 of both Regulations are particularly meaningful. In order to preserve the autonomy of Member States and avoid any denial of justice, they exceptionally authorize any Member State's court to decline jurisdiction "without undue delay" if it holds that, under its private international law, the marriage or the registered union in question is not recognized for the purposes of matrimonial property regime proceedings; however, the parties are allowed to confer jurisdiction to the courts of any other Member State through a choice-of-court agreement pursuant to Articles 7.

## 2. The Concentration of Jurisdiction in Articles 4 and 5 of Regulations on Matrimonial and Partnership Property Regimes. The Precedent of Article 3 Regulation No. 4/2009 on Maintenance Obligations

Articles 4 and 5 of Regulation No. 1103/2016 establish a general rule of jurisdiction for matrimonial property regime cases, stating that where a court of a Member State is seised in matters of succession of a spouse pursuant to Regulation (UE) No. 650/2012, or to rule on an applications for divorce, legal separation or marriage annulment pursuant to Regulation (CE) No. 2201/2013, the courts of that State shall have jurisdiction on matters of the matrimonial property regime arising in connection with that case or application.

It is a general rule in theory as well as in practice. As commonly pointed out, this criterion of jurisdiction by connection is intended to apply in the majority of cases, since the need to solve disputes about the property regime normally arises at the moment of liquidation of this regime, i.e. in a context of dissolution of matrimonial or partnership ties, because of the death of a spouse or partner, or divorce, legal separation or annulment.

It has to be argued that, in writing these provisions, the European legislator understood jurisdiction by connection between cases to mean jurisdiction of the courts of any Member State with respect to the courts of any other Member State; this does not necessarily indicate that the application of this criterion will actually lead to a concentration of proceedings before the same court.<sup>11</sup> In fact, once the point of jurisdiction has been clarified, domestic procedural rules of competence will determine how to identify and task a court to rule on the merits; these domestic rules may or may not allow the cumulation of cases before that court. For example, when a succession case is already pending in Italy under Regulation No. 650/2012, it is clear that the claim of a surviving spouse in matters of the right to co-ownership of real estate in a community property regime has to be submitted to an Italian court; in such a situation, Italian procedural rules will be applied to identify the court with jurisdiction, as these rules state that the property case may be submitted to a court other than one seised in matters of succession.<sup>12</sup>

There is a significant difference between the two Regulations in matters of patrimonial regimes: while the contents of the respective Articles 4 (about the concentration of jurisdiction in case of death of a spouse or partner) are similar, those of Articles 5 (about jurisdiction by connection in case of pending proceedings for dissolution of marriage or registered

<sup>11</sup> 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 (2017)*, p. 310 f.

<sup>12</sup> Regarding the relation between the factors of jurisdiction provided for by Regulation No. 650/2012 and the criteria of internal competence provided for by Italian procedural law see Widmann, *Competenza giurisdizionale e competenza territoriale interna in materia di controversie successorie. L'incidenza del Regulation UE n. 650/2012 (2018)*, p. 785 ff.

union) differ in important ways, because they grant significant space for party autonomy, albeit allowed to differing degrees according to the type of bond between the parties.

In fact, the provision of a factor of jurisdiction based on the connection between cases is nothing new in the European legislative instruments of judicial cooperation in civil matters. Article 5(2) of Regulation (CE) No. 44/2001, in matters of maintenance obligations, stated that the person domiciled in a Member State may be sued:

“[I]f the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties”.

This provision was subsequently incorporated into Article 3 of Regulation (CE) No. 4/2009, specifically adopted in the field of jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to a maintenance obligation.<sup>13</sup>

Compared to the former provision of Regulation No. 44/2001, Article 3 of Regulation No. 4/2009 recognises the importance of the criterion of jurisdiction by connection in two separate situations, distinguishing cases where the claim in matters of maintenance is ancillary to proceedings concerning the *status* of a person (indent c) from cases where it is ancillary to proceedings concerning parental responsibility (indent d). The express provision of this second situation, in a general context of valorisation of habitual residence of the parties as primary connecting factor of jurisdiction, has been deemed to be a clear sign of the European legislator’s will to facilitate the protection of rights of maintenance creditors, allowing them to address a “near” court, as well as a court which may better assess the economic situation of the parties and, if necessary, the real value of the debtor’s assets.<sup>14</sup>

However, doubts have been raised about the interpretation of this distinction, and the EU Court of Justice has been asked for clarification. The Italian Court of Cassation formally raised doubts regarding the relationship between the circumstances provided for by Article 3(c) and (d) of Regulation No. 4/2009. It posed the situation of when a Member State’s court is seised to rule on an application for legal separation or divorce between parents with minor children, while another Member State’s court is requested

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<sup>13</sup> To preserve the interests of maintenance creditors and to promote the proper administration of justice, the European legislator considered it appropriate to adopt a specific regulation in this matter, by adapting the rules on jurisdiction as they resulted from Regulation (EC) No. 44/2001 (see Recital 15). The maintenance obligations, then, are expressly excluded from the scope of Regulations in matters of matrimonial property regimes and property consequences of registered partnerships (Articles 1(2)(c) of Regulations No. 1103 and 1104).

<sup>14</sup> In this regard, see Villata, *Obblighi alimentari e rapporti di famiglia secondo il Regolamento n. 4/2009* (2011), p. 739 ff.; Pocar, Viarengo, *Il Regolamento (CE) n. 4/2009 in materia di obbligazioni alimentari* (2009), p. 809 ff.



to rule in matters of parental responsibility in relation to the same children, and asked whether the dispute on the maintenance of those children may be solved by both courts (based on a chronological criterion) since it is ancillary either to the case on legal separation/divorce or to the case in matters of parental responsibility.<sup>15</sup> In this regard, the EU Court of Justice interpreted these provisions in the light of the objectives pursued by European legislator (with special attention to the best interests of the minor) and stated that the dispute in matters of maintenance of minor children is ancillary only to the case concerning parental responsibility, so that the court seised to rule on it is the court with exclusive jurisdiction on the dispute regarding the maintenance of the children.<sup>16</sup>

### 3. Jurisdiction by Connection with a Succession Case under Regulation No. 650/2012

Returning to rules of jurisdiction contained in the 2016 Regulations on property regimes and focusing on the “twin” provisions referred to Articles 4, it is important to note the exclusive character of the factor of jurisdiction based on the connection of cases. This means that when a proceeding in matters of succession pursuant to Regulation No. 650/2012 is pending before a court of a Member State, all claims on matrimonial or partnership property regime that have arisen in connection with the succession case are subject only to this criterion, to the exclusion of any other potentially applicable one.<sup>17</sup>

Specifically, this excludes the importance of an agreement of parties (spouses or partners and other potential heirs), whenever or in whatever way it occurs. More precisely, the interested parties cannot legitimately agree in advance to exclude the application of

<sup>15</sup> In this case, giving rise to a preliminary referral to the EU Court of Justice, the Italian Court of Cassation had been seised with an appeal against a decision of the Court of Milan which, asked to rule on an application for legal separation submitted by a spouse, had declined jurisdiction on the claim in matters of maintenance of minor children habitually resident in the United Kingdom, deeming this claim ancillary to the dispute in matters of parental responsibility, promoted by the other spouse before the High Court of Justice in London.

<sup>16</sup> Judgment of 16 July 2015, *A. vs. B*, C-184/14, ECLI:EU:C:2015:479. The EU Court notes (pts. 42 and 43) that, in the perspective of a “proper administration of justice”, a claim related to maintenance obligations in favour of minor children is not necessarily connected with a case of divorce or legal separation, whereas the court seised to rule on parental responsibility may be in a better position to assess the interests underlying a claim in matters of maintenance of minor children, and to determine the amount of such obligation, intended to cover expenses for maintenance and education of minors themselves.

<sup>17</sup> Bruno, *I REGOLAMENTI EUROPEI*, op. cit., p. 76, notes that this is the first time a European regulation in the field of jurisdiction links its own connecting factors to ones provided for by another regulation. Similarly Marino, *Strengthening the European civil judicial cooperation: the patrimonial effects of family relationships* (2017), p. 270.

this criterion by concluding a choice-of-court agreement to attribute exclusive jurisdiction on property regime disputes to a Member State's court, regardless of whether a succession case is pending before a court of another Member State. Similarly, this criterion of connection of cases cannot be excluded when the surviving spouse or partner appears before the court of a Member State, seised to rule on issues related to property regime, and there is also a succession case pending in another Member State. Indeed, if on the one hand, the right to choose a forum is limited by Article 7 to "cases which are covered by Article 6" (i.e. cases where the factor of jurisdiction by connection cannot operate, in the absence of a pending case of succession), on the other hand, an attribution of jurisdiction based on the appearance of the defendant is expressly excluded by Article 8 "in cases covered by Article 4" (i.e. whenever the appearance of the defendant could mean that the court seised in matters of succession could be deprived of jurisdiction to rule on related property regime issues).<sup>18</sup>

As already emphasised, the criterion of jurisdiction by connection looks set to be broadly applied in disputes between spouses or partners related to the liquidation of the property regime. Nevertheless, it seems possible to identify some circumstances in which it cannot operate and further situations where its application may be uncertain to some extent.

As regard the first kind of circumstances, if one considers the wording of Articles 4 of both Regulations of 2016 where they assign jurisdiction over property regime disputes to the Member State's court seised to rule on the succession of a spouse or partner pursuant to Regulation No. 650/2012, it may be argued that the *vis attractiva* cannot operate, firstly, if the succession case is pending before a court of a third State (not belonging to the European Union, or belonging to the European Union but not participating in the enhanced cooperation that led to the adoption of the two Regulations), or if the court asked to rule on the succession case has declined jurisdiction not based on Regulation No. 650/2012, but based on domestic rules of private international law, e.g. assuming that the submitted case in matters of succession falls outside the scope of this Regulation.<sup>19</sup>

The possible uncertainties in the application of the criterion are related to the judicial assessment of an actual connection between the succession case and the issues in matters of matrimonial or partnership property regime. Thus, it can be expected that the EU Court of Justice will be asked to clarify what the European legislator meant by a "succession case" which, if pending, could attract related property regime cases to the jurisdiction of the court of the same Member State. Indeed, when the pending case regards

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<sup>18</sup> The choice-of-court agreement provided for by Articles 7 of the Regulations in matters of property regimes is clearly an agreement between the spouses or partners only, to the exclusion of any other subjects who may have inheritance interests. The death of one of the parties, therefore, produces the loss of the effects of the agreement in question.

<sup>19</sup> For this example see Peiteado Mariscal, *Competencia internacional por conexión*, op. cit., p. 309, who refers to the possibility that the court of a Member State asked to rule on a succession case may mistakenly exclude the transnational character of the succession in question.

a whole succession, the *ratio* of connection as factor of jurisdiction is unassailable,<sup>20</sup> but significant doubts can arise when the case concerns a single hereditary asset claimed by the surviving spouse or partner based on property regime, even if this case is pending before a Member State's court having jurisdiction pursuant to Regulation No. 650/2012.<sup>21</sup>

Some doubts could also arise with respect to the chronological relation between the succession case and the property regime case, where the latter is previously pending before a Member State's court and, as a consequence of the death of a party (spouse or partner), one or more heirs subsequently initiate a proceeding in matter of succession before the court of another Member State. In this situation, the court seised to rule on the property regime case could have already assessed jurisdiction based on connecting factors provided for by Articles 6 of Regulations No. 1103 and 1104, or a valid choice-of-court agreement. However, considering the needs of concentration and economic efficiency underlying the exclusive and imperative character of the criterion of connection, it could be argued that jurisdiction may be removed from the court first seised for the property regime case, and consequently transferred to the second court seised to rule on the succession case.<sup>22</sup>

In general, the choice of the 2016 Regulations to concentrate succession cases and property regime cases before a court of the same Member State has been considered favourably because of the close relationship between inheritance issues and matrimonial or partnership property regime disputes.<sup>23</sup> Nevertheless, this choice may involve some drawbacks from the perspective of access to justice for the surviving spouse or partner.

First, in accordance with Article 4 Regulation No. 650/2012, jurisdiction in matters of succession is generally allocated to the courts of the Member State where the deceased had the habitual residence at the time of death, and this criterion makes it difficult for a

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<sup>20</sup> In this regard, it has to be recalled that Regulation No. 650/2012, in regulating the connecting factors of jurisdiction, refers to a "succession as a whole" (Article 4(e)(10)(1)).

<sup>21</sup> Peiteado Mariscal, *Competencia internacional*, op. cit., p. 317 f., with specific reference to the situation provided for in Article 10(2) of Regulation No. 650/2012 (the jurisdiction of a court of the Member State where the estate assets are located, to rule on those assets, where no court in a Member State has jurisdiction on the whole succession pursuant to par. 1), excludes the application of the criterion of connection to the property regime cases, since in this situation there is not a "succession case" in the sense of Articles 4 of Regulations No. 1103 and 1104.

<sup>22</sup> *Ibid.*, op. cit., p. 325, excludes that this situation may occur, although Articles 4 of the Regulation are not clearly worded in the sense of limiting the *vis attractiva* only to the case of previous pending of a succession case.

<sup>23</sup> Some authors have noted that it would have been preferable to combine succession and property regime matters in a single legislative instrument (cf. Lagarde, *Règlements 2016/1103 et 1104 du 24 juin 2016 sur les régimes matrimoniaux et sur le régime patrimonial des partenariats enregistrés* (2016), p. 677; Bruno, *I REGOLAMENTI EUROPEI SUI REGIMI PATRIMONIALI*, op. cit., p. 76).

surviving spouse or partner to submit a claim about the property regime before the same court, seized by other heirs to rule on the succession.<sup>24</sup>

Furthermore, Article 6(a), of Regulation No. 650/2012 should be taken into account when a difference between the nationality of the deceased and his last habitual residence can lead to complications in succession cases. According to this provision, if the deceased had previously chosen to have his succession governed by the law of the Member State whose nationality he possessed at the time of choice or the time of death (the Member State of chosen law), under Article 22 of Regulation No. 650/2012, and if instead a succession case has been brought before a court of the Member State of last habitual residence, different from that of his nationality, each party may ask this court to decline jurisdiction in favour of the Member State whose nationality the deceased possessed (given that the courts of the Member State of the chosen law are better placed to rule on the succession, taking into account the practical circumstances of the succession, such as the habitual residence of the parties and the location of the assets). However, a unilateral request put forth by a party in conflict with the surviving spouse or partner may also lead to the case related to property regime being heard before a court not easily “accessible” for the spouse or partner. In this case, the judge must carefully weigh the decision of whether to deny jurisdiction, to counteract any possible “unfair” behaviour of the parties in the proceeding.

#### **4. Jurisdiction by Connection with a Matrimonial Case under Regulation No. 2201/2003 or a Registered Union Annulment Case**

The 2016 Regulations grant significant space to a choice-of-court agreement as a condition for the allocation of jurisdiction (crucial in the Regulation No. 1104 in matters of registered unions), in the context of jurisdiction by connection as regulated with respect to the relationship between property regime proceedings and dissolution of marriage or registered partnership proceedings.

First, Article 5(1) of Regulation No. 1103 restates that where a court of a Member State is seized 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

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<sup>24</sup> Considering these drawbacks, during the negotiations, which led to the adoption of Regulations No. 1103 and 1104, it was proposed to subject the concentration of jurisdiction in matters of succession and property regimes to agreement of the surviving spouse or partner. Nevertheless, this proposal was rejected, since it would have involved similar drawbacks for the other heirs, putting them, in turn, in a subordinate position to the surviving spouse or partner (Peiteado Mariscal, *Competencia internacional*, op. cit., p. 315; Bruno, *I REGOLAMENTI EUROPEI SUI REGIMI PATRIMONIALI*, op. cit., p. 80).

with that application. However, this rule turns out to be considerably reduced in the following par. 2, which provides that, where the *status* proceeding is submitted to a court of a Member State based on individually listed connecting factors (clearly deemed to be “weaker”)<sup>25</sup> or in some particular situations (conversion of legal separation into divorce, or residual jurisdiction pursuant to Article 7 of Regulation No. 2201/2003),<sup>26</sup> the assignment of jurisdiction in matters of property regimes shall be subject to an agreement of the parties. The *ratio* of this provision is related to the fact that, since Regulation No. 2201/2003 offers the claimant spouse a range of options in the choice of court, it was deemed appropriate to introduce some restrictions, in order to discourage unfair choices of a party in prejudice of the other one.<sup>27</sup>

On the other hand, in Article 5 of Regulation No. 1104, the allocation of jurisdiction based on the connection of cases is always subject to the agreement of parties. This is the wording of Article 5(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.”

In the lack of a common legislative instrument that provides for connecting factors of jurisdiction with regard to the *status* case, and allows a possible distinction between “strong” or “weak” connecting factors, it was considered appropriate to request the agreement of parties in any case; otherwise, the applicable connecting factors shall be those mentioned by Article 6.<sup>28</sup>

<sup>25</sup> The reference is to the circumstances specified by indents a) and b) of mentioned article: the agreement of parties is requested where the court seised to rule on the *status* case “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” (indent a), or “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” (indent b).

<sup>26</sup> These are cases provided for, respectively, by indents c) and d) of the same article.

<sup>27</sup> Lagarde, Règlements 2016/1103 et 1104 du 24 juin 2016 sur les régimes matrimoniaux, op. cit., p. 679.

<sup>28</sup> See Viarengo, Effetti patrimoniali delle unioni civili transfrontaliere: la nuova disciplina europea (2018), p. 42, who observes that the choice of Regulation No. 1104/2016 to subject in any case the allocation of jurisdiction by connection to the agreement of parties is easy to understand, given that the dissolution of a registered union is covered by the common rules of Regulation No. 2201/2003 only when the union in question is a marriage, whereas the dissolution of a registered partnership continues to be subject to different domestic regulations. Similarly, Feraci, L’incidenza del nuovo regime europeo in tema di rapporti patrimoniali tra coniugi e parti di unioni registrate sull’ordina-

Therefore, regarding the allocation of jurisdiction where a matrimonial property regime case is connected with an application for divorce, legal separation or a marriage annulment pending before a Member State's court having jurisdiction based on "strong" connecting factors mentioned by Regulation No. 2201/2003 (habitual residence of spouses; last habitual residence insofar as one of them still resides there; habitual residence of the defendant or either of the spouses in the event of a joint application; nationality of both spouses), the exclusive and imperative character of this criterion must be remembered. Accordingly, the spouses cannot agree to exclude it in advance by attributing exclusive jurisdiction on property regime cases to a Member State's court even if a *status* case is pending before a court of another Member State.

Indeed, the spouses are entitled to conclude a choice-of-court agreement in the cases covered by Article 7 of Regulation No. 1103/2016, i.e. with reference only to matrimonial regime disputes, without excluding the application of jurisdiction by connection with any forthcoming *status* case. However, if such a case should arise before a Member State court that has jurisdiction by connection, pursuant to Article 5(1), the seised court should not take into account a choice-of-court agreement for a court in a different Member State.<sup>29</sup>

According to one author, there should be no problems when the matrimonial property regime case arises after the closing of the *status* proceeding, for example, because one of the spouses submits an application for the liquidation of property regime after the judgment of divorce. In fact, in this situation it is inappropriate to invoke the application of the criterion of connection to justify the attribution of jurisdiction to a court, which has completed its ruling task on the *status* case; after all, it would be contrary to the *ratio* underlying this criterion, whose application has meaning if related to simultaneously pending proceedings.<sup>30</sup>

## 5. The Choice-of-court Agreement (Articles 7)

Articles 7, providing for the agreement of parties to attribute to a Member State's court the exclusive jurisdiction to rule on property regime disputes, is similarly worded in Regulations No. 1103 and 1104, and similarly reasoned, as Recitals 36 and 37 of both

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mento giuridico italiano e le interazioni con le novità introdotte dal d.lgs. 7/2017 attuativo della cd. Legge Cirinnà (2017), p. 38 f.

<sup>29</sup> Bruno, I REGOLAMENTI EUROPEI, op. cit., p. 102; Marino, Strengthening the European civil judicial cooperation, op. cit., p. 27. Both authors note that the event of loss of effects of a choice-of-court agreement has a significant impact on the effectiveness of choice as well as on the confidence placed by parties in the choice itself, so that it does not facilitate the predictability expressly pursued by the European legislator.

<sup>30</sup> Peiteado Mariscal, Competencia internacional, op. cit., p. 311.

Regulations state that the right to choose the courts of the Member State of applicable law or of the Member State of the conclusion of marriage or under whose law the union was created is in accordance with the needs of legal certainty, predictability and party autonomy.

These provisions refer to an extra-judicial agreement that may be concluded by parties before starting a proceeding regarding property regime, with a view to possible forthcoming litigation. Some formal requirements for this kind of agreement are indicated in Articles 7(2), which state that it must be expressed in writing, dated, and signed by the parties, with the added point that communication by electronic means that provide a durable record of the agreement is to be considered equivalent to typewritten or handwritten forms (requirements also noted in the corresponding provisions of Regulations No. 650/2012, 1215/2012 and 4/2009).<sup>31</sup>

It is also worthwhile to examine the limits set by the 2016 Regulations to the will of the parties and, consequently, the effective scope of such agreements.

First, there is a limit regarding the choice of the court, which the parties may express in the agreement. Spouses or partners can agree to attribute exclusive jurisdiction on property regime disputes, pursuant to Articles 7, to a Member State's court of applicable law (the law chosen by the parties themselves, or the law of the State indicated in Articles 26 of both Regulations), or to the courts of the Member State of the conclusion of the marriage, or under whose law the registered partnership was created. In fact, it is a choice conditioned by a former choice (the choice of law), or directly by law. Thus the will of the European legislator clearly was to promote the union of *forum* and *ius*, so that the court of each Member State asked to rule on claims in matters of matrimonial or partnership property regimes can apply domestic law, and wherever possible avoid declining jurisdiction for the reason that its own law does not recognise the marriage or partnership in question.<sup>32</sup>

<sup>31</sup> In this regard see Judgment of 21 May 2015, *Jaouad El Majdoub vs. CarsOnTheWeb.Deutschland GmbH*, C-322/14, ECLI:EU:C:2015:334, which has stated that Article 23(2) of Regulation (CE) No. 44/2001 must be interpreted as meaning that the method of accepting the general terms and conditions of a contract for sale by 'click-wrapping', such as that at issue in the main proceeding, concluded by electronic means, which contains an agreement conferring jurisdiction, constitutes a communication by electronic means which provides a durable record of the agreement, within the meaning of that provision, where that method makes it possible to print and save the text of those terms and conditions before the conclusion of the contract.

<sup>32</sup> Bruno, I REGOLAMENTI EUROPEI SUI REGIMI PATRIMONIALI, op. cit., p. 103, criticizes, however, the choice of the 2016 Regulations to address the will of the parties to courts identified by reference to Articles 26 of Regulations themselves, providing for connecting factors related to circumstances of the couple's past (habitual residence after the marriage, common nationality at the moment of marriage, State of creation of the registered partnership), since in the meanwhile the couple could have lost contact with those States.

Second, there is a limit to the operative scope of the choice-of-court agreement. Articles 7 of both Regulations expressly refer to the “cases which are covered by Article 6”, that is—as previously observed—residual cases where the European legislator provided for some additional connecting factors in the absence of a pending case of succession or dissolution of marriage or registered partnership. In other words, pursuant to Articles 7, the parties may conclude a choice-of-court agreement only for property regime disputes, and even if the property regime case is connected to a *status* case subsequently filed at another State’s court, the latter cannot be taken into consideration in the proceedings.

Thus, considering Articles 7, a choice-of-court agreement seems to be of insignificant importance, since—as already noted—the need to solve property regime disputes normally arises in the context of a dissolution of the matrimonial tie or partnership because of death, legal separation or divorce. Nevertheless, these provisions are not exhaustive in defining the limits of private autonomy in this matter, and others should be also taken into consideration.

As highlighted regarding jurisdiction by the connection between matrimonial (or partnership) disputes and related property regime disputes, the will of the parties also plays an essential role in the choice of court. On the one hand, Article 5(2) of Regulation No. 1103/2016 lists some circumstances in which jurisdiction of a Member State’s court in property regimes, if seised for divorce, legal separation or annulment of marriage, requires the agreement of parties; on the other hand, in Article 5 of Regulation No. 1104/2016 this agreement is always required, and thus the court of a Member State seised to rule on annulment of a registered partnership may have jurisdiction in related property regime disputes.

It is important to note that both articles include a similar provision (Article 5(3) of Regulation No. 1103; Article 5(2) of Regulation 1104) stating that this agreement may be concluded even before a dispute on property regimes arises, in compliance with the formal requirements mentioned in Articles 7(2). Therefore, in this case, the parties may also conclude a choice-of-court agreement, enabling the Member State’s court seised to rule on the dissolution of marriage or registered partnership to rule on the related property regime issues as well.

On the other hand, it must be restated that when a succession case is pending, the agreement of the parties cannot affect the jurisdiction by connection, so that the Member State’s court seised in matters of succession of a spouse or partner under Regulation No. 650/2012 has an imperative jurisdiction to rule on property regimes. And even if Article 5 of Regulation 650/2012 itself provides for a choice-of-court agreement between interested parties, which may agree to confer on a Member State’s court the exclusive jurisdiction to rule on any succession matter (so it is possible to say that the choice of court in matters of succession includes a choice of court in matters of property regime related



issues),<sup>33</sup> it has to be considered that, pursuant to Article 5 itself, the choice of the court could be made only in favour of a court of a Member State whose law had been chosen by the deceased as the law governing his succession (under Article 22 of Regulation No. 650/2012). In other words, for parties involved in a succession dispute, the only circumstance in which they can make a choice-of-court agreement that impacts jurisdiction in matters of succession and property regime related questions is when the deceased had previously made a choice of law.

## 6. Jurisdiction Based on the Appearance of the Defendant (Articles 8)

Similar effects on jurisdiction may be produced by the appearance of the defendant before the seised court if this person does not formally contest jurisdiction (Articles 8 of both Regulations). More specifically: in the same cases where spouses or partners may conclude a choice-of-court agreement to attribute exclusive jurisdiction to a Member State's court to solve property regime disputes, the allocation of jurisdiction may occur—in the absence of a previous choice of the court pursuant to Article 7—as a consequence of following conditions: a) a case in matters of property regime has been lodged by a spouse or a partner before the court of a Member State; b) the Member State of the seised court is also the Member State of applicable law or the State under whose law the registered union was created; c) the defendant spouse or partner enters an appearance without contesting jurisdiction of the seised court.<sup>34</sup>

If the defendant does not specifically contest it, a seised court that does not have jurisdiction based on general connecting factors can have jurisdiction to deal with and rule on the submitted case. This is a common mechanism established in European civil-law regulatory texts in matters of jurisdiction and the majority of procedural laws of EU Member States, as it enables the parties to promote and benefit from economy of proceeding.

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<sup>33</sup> Because of the impact that a choice-of-court agreement in matters of succession may have on jurisdiction over matrimonial property regimes, it has been observed that, pursuant to Article 5 of Regulation No. 650/2012, the surviving spouse should always be considered interested in the conclusion of such agreement, whether or not he or she is directly involved in the merits of the succession case (Peiteado Mariscal, *Competencia internacional*, op. cit., p. 316 f.).

<sup>34</sup> Marino (*Strengthening the European civil judicial cooperation*, op. cit., p. 273) points out that in the Regulation No. 1103/2016 there is not a full overlay between cases where parties may conclude a choice-of-court agreement, pursuant to Article 7, and cases of allocation of jurisdiction as a consequence of the appearance of the defendant, pursuant to Article 8. In fact, this appearance cannot produce the attribution of jurisdiction to a court of the Member State of the celebration of marriage (to which parties, on the contrary, can attribute an exclusive jurisdiction based on a choice-of-court agreement concluded pursuant to Article 7).

Such a situation may be framed as a procedural agreement on jurisdiction, resulting from actions of the parties that conclusively show their will to submit to the jurisdiction of the seised court, by accepting it.<sup>35</sup>

Similarly, to the extrajudicial agreement of Articles 7, the procedural agreement of Articles 8 has little importance in relation to disputes on property regimes connected with a succession case. Instead, the defendant's behaviour in the proceeding may be significant for the jurisdiction to rule on a succession case, as provided by Article 9(1) of Regulation No. 650/2012: pursuant to this article, if in the course of proceedings before a court of a Member State exercising jurisdiction based on a choice-of-court agreement, it appears that not all the parties to those proceedings were party to that agreement, the court shall continue to exercise jurisdiction if the parties to the proceedings who were not party to the agreement enter an appearance without contesting the jurisdiction of the court.

The most interesting issue, dealt with by the EU Court of Justice in various cases, is the meaning to be attributed to the appearance of the defendant without express acceptance of jurisdiction. From this point of view, it should be observed that the similar wording of Articles 8 of Regulations No. 1103 and 1104; Article 26(1) of Regulation No. 1215/2012; Article 9(1) of Regulation No. 650/2012; Article 5 of Regulation No. 4/2009, echoes the broad interpretations of the Court whereby jurisdiction could be based also on its tacit acceptance by the defendant, to be deduced from an appearance entered to carry out a defence on the merits, and in particular from the lack of contested jurisdiction in what is the first response of the defendant according to the forum procedural law.<sup>36</sup>

As a “counterbalance” to this interpretation,<sup>37</sup> Article 8(2) specifies that, before assuming jurisdiction, 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. This provision, particularly significant in case of *absentia* of the defendant, may involve problems in those procedural laws (such as those in Italy) where, in such a situation, the judge need only ascertain that the defendant had been served with the document that instituted the proceeding, even though in the document the plaintiff is

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<sup>35</sup> Article 4(1), L. 31 May 1995, No. 218, in matters of reform of Italian Private International Law, expressly qualifies this event in terms of “acceptance” of jurisdiction.

<sup>36</sup> Judgment of 27 February 2014, *Cartier Parfums – Lunettes SAS e Axa Corporate Solutions Assurances SA vs. Ziegler France SA and others*, C-1/13, ECLI:EU:C:2014:109, according to which Article 27(2) of Regulation (CE) No. 44/2001 must be interpreted as meaning that, except in the situation where the second court seised has exclusive jurisdiction by virtue of that regulation, the jurisdiction of the first court seised must be regarded as being established, within the meaning of that provision, if that court has not declined jurisdiction of its own motion and none of the parties has contested its jurisdiction prior to or up to the time at which a position is adopted that is regarded in national procedural law as being the first defense on the substance submitted before that court.

<sup>37</sup> Bruno, I REGOLAMENTI EUROPEI, op. cit., p. 97.

not required to include any specific information about the consequences of failing to contest jurisdiction.<sup>38</sup>

In this regard, it should be pointed out that, under Article 16(1) of Regulations No. 1103 and 1104 (see also Article 16(1) of Regulation No. 650/2012; Article 28(2) of Regulation No. 1215/2012; Article 11(1) of Regulation No. 4/2009; Article 18(1) of Regulation No. 2201/2003), when 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 under these Regulations shall stay the proceedings until it has been shown that the defendant has received 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.<sup>39</sup>

## 7. Concluding Remarks

In regulating jurisdiction on matrimonial property regimes and registered partnership property consequences, Regulations No. 1103 and 1104 of 2016 adopt classical solutions as well as a criterion of jurisdiction by connection, to promote the assignment of jurisdiction in property regime disputes to the Member State's court having jurisdiction to rule on the succession case, or on applications for divorce, legal separation or dissolution of registered partnership. Remarkably, the European legislator seeks to concentrate *status* cases and property regime cases before the courts of the same Member State, without ensuring the cumulation of all of them before the same court, which may occur only if permitted by domestic procedural laws of Member States.

The introduction of connection of cases as a factor of jurisdiction is a positive development. If there is a pending succession case or a pending proceeding in matters of matrimonial *status* or partnership, it is reasonable that the court having jurisdiction on property regime disputes should also be the Member State's court requested to rule on the *status* case to which the property regime case is connected. It is also reasonable that the degree of party autonomy allowed in choosing a court should differ according to the matters involved. In matters of succession, in fact, the compelling character of jurisdiction by connection is justified on the grounds of the complexity of succession cases,

<sup>38</sup> See Article 163(3)(7), as well as Article 167 of Italian Civil Procedure Code.

<sup>39</sup> The importance of verification of the regularity of service is pointed out by Bruno (I REGOLAMENTI EUROPEI, op. cit., p. 135), who emphasizes the provision of Article 37(b), of both Regulations in matter of property regimes, according to which a decision shall not be recognized “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”.

which normally involve various parties in an entirely different position from surviving spouse or partner.

As noted, the practical application of this connecting factor provided by Regulations may have some drawbacks, particularly in the field of connection with succession disputes. However, these problems, which are to some extent unavoidable, could be mitigated by the informed choice of the parties (choice of court and, even before that, choice of law). The efficiency of jurisdiction, from the perspective of the certainty of rules for a choice of court, passes through the enhancement of the knowledge of parties in exercising private autonomy. This is a crucial challenge in the effort to create a “judicial area” that offers real protection of the rights of European citizens.

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*Maria Pia Gasperini*

### **Pristojnost in učinkovitost pri varstvu pravic skupnega premoženja**

Prispevek obravnava nekatere vidike pravil o pristojnosti iz uredb št. 1103 in 1104, ki jih je sprejel Evropski svet 24. junija 2016 in ki obravnavata premoženjska razmerja parov z različnimi državljanstvi. Najpomembnejši vidik teh pravil je koncentracija pristojnosti v primeru tekočih postopkov v zadevah dedovanja, sporih glede statusa v zakonski zvezi ali prenehanja registrirane zveze. V dednopравnih zadevah obe uredbi to merilo postavljata na prvo mesto, s čimer se zagotavlja pravna varnost in ekonomičnost postopka. Po drugi strani pa lahko avtonomija strank na področju sodnih sporov, povezanih s partnersko ali zakonsko zvezo, pomembno vpliva na pristojnost. Uredba 1103/2016 določa nekatere primere, v katerih je dodelitev pristojnosti za primere premoženjskih razmerij odvisna od sporazuma med zakoncema. V Uredbi 1104 se sporazum strank celo vedno zahteva, tako da sodišče države članice, ki odloča o registriranem partnerstvu, lahko pristojnost razširi tudi na premoženjske posledice. Prispevek obravnava tudi vpliv avtonomije strank, ki se izraža tako s sporazumom o izbiri sodišča kot tudi s sprejemanjem pristojnosti na podlagi nastopa toženca. Čeprav lahko v praksi pravila o pristojnosti prinesejo nekatere težave, jih je mogoče odpraviti z izobraževanjem strank, tako da se lahko pri uveljavljanju svoje avtonomije glede izbire prava in pozneje tudi sodišča informirano odločijo.

**Ključne besede:** pravosodno sodelovanje v civilnih zadevah na ravni EU, družinsko pravo, dedno pravo, zakonska in partnerska premoženjska razmerja, pristojnost, povezovanje zadev, avtonomija strank.

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### **Jurisdiction and Efficiency in Protection of Matrimonial Property Rights**

The present paper explores some aspects of rules of jurisdiction included in Regulations No. 1103 and 1104 adopted by the European Council on 24 June 2016 in the field of property regimes of transnational couples. The most significant aspect of these rules is concentration of jurisdiction in the event of pending proceedings in matters of succession, matrimonial status or dissolution of a registered union. In matters of succession, both Regulations give this criterion an imperative character, to satisfy the need for certainty and procedural economy. On the other hand, in the field of litigation related to matrimonial or partnership crisis, the autonomy of parties may have a significant impact on jurisdiction by connection. Indeed, Regulation 1103/2016 provides some cases in which the allocation of jurisdiction on property regime cases shall be subject to the agreement of the spouses, and even in Regulation 1104 the agreement of the parties is always requested so that a court of a Member State seised to rule on a registered partnership may extend its jurisdiction to rule on property consequences as well. Another issue investigated is the significance of party autonomy, expressible through a choice-of-court agreement as well as the acceptance of jurisdiction based on the appearance of the defendant. Although the practical functioning of rules of jurisdiction may present some problems, these difficulties can be addressed by educating the parties so they can make well-informed decisions in the exercise of their private autonomy through the choice of Law and later, the choice of Court.

**Keywords:** EU civil judicial cooperation, family law, succession law, matrimonial and partnership property regime, jurisdiction, connection of cases, party autonomy.