

Empowering European Families: Towards More Party Autonomy in European Family and Succession Law

Report of the European Law Institute



Report
of the European Law Institute

Empowering European Families

**Towards More Party Autonomy in European Family
and Succession Law**



Prepared by a Project Team from



**Co-financed by the Justice Programme
of the European Union**

The European Law Institute

The European Law Institute (ELI) is an independent non-profit organisation established to initiate, conduct and facilitate research, make recommendations and provide practical guidance in the field of European legal development. Building on the wealth of diverse legal traditions, its mission is the quest for better law-making in Europe and the enhancement of European legal integration. By its endeavours, ELI seeks to contribute to the formation of a more vigorous European legal community, integrating the achievements of the various legal cultures, endorsing the value of comparative knowledge, and taking a genuinely pan-European perspective. As such, its work covers all branches of the law: substantive and procedural; private and public.

ELI is committed to the principles of comprehensiveness and collaborative working, thus striving to bridge the oft-perceived gap between the different legal cultures, between public and private law, as well as between scholarship and practice. To further that commitment it seeks to involve a diverse range of personalities, reflecting the richness of the legal traditions, legal disciplines and vocational frameworks found throughout Europe. ELI is also open to the use of different methodological approaches and to canvassing insights and perspectives from as wide an audience as possible of those who share its vision.

President: Christiane Wendehorst
Vice-President: Sjef van Erp
Treasurer: Denis Philippe
Speaker of the Senate: Reinhard Zimmermann

European Law Institute
Schottenring 16/175
1010 Vienna
Austria
Tel.: + 43 1 4277 22101
Mail: secretariat@europeanlawinstitute.eu Website: www.europeanlawinstitute.eu

ISBN: 978-3-9504549-0-1
© European Law Institute 2019

This publication has been produced with the financial support of the Justice Programme of the European Union. The contents of the publication are the sole responsibility of the University of Vienna, Utrecht University and the ELI and can in no way be taken to reflect the views of the European Commission.



ACKNOWLEDGEMENTS

Reporters

Katharina Boele-Woelki (Professor, Germany)
Wendy Schrama (Professor, Netherlands)
Christiane Wendehorst (Professor, Germany)

Working Group

Anne Barlow (Professor, United Kingdom)
Kerstin Bartsch (Mediator, Germany)
Margareta Brattström (Professor, Sweden)
Pedro Carrión García de Parada (Notary, Spain)
Mark Harper (Solicitor, United Kingdom)
Maarit Jänterä-Jareborg (Professor, Sweden)
Matthias Neumayr (Judge, Austria)
Eve Pötter (Notary, Estonia)
François Trémosa (Notary, France)

ELI Advisory Committee

Tim Amos QC (Lawyer, United Kingdom)
Josep Ferrer-Riba (Professor, Spain)
Richard Frimston (Lawyer, United Kingdom)
Magdalena Haddas (Professor/Lawyer, Poland)
Francisco Javier Jiménez Muñoz (Professor, Spain)
Matthias Klein (Notary, Austria)
Dieter Martiny (Professor, Germany)
Vesna Rijavec (Professor, Slovenia)
Tone Sverdrup (Professor, Norway)
Alexandra Thomas (Judge, Germany)
Alain Laurent Verbeke (Professor, Belgium)

Members Consultative Committee

Elena Bargelli (Professor, Italy) (Chair)
Elena D'Alessandro (Professor, Italy)
Samuel Fulli-Lemaire (Senior Research Fellow, France)
Carmen Jerez Delgado (Professor, Spain)
Hartmut Wicke (Notary, Germany)

National Correspondents

Austria

Henriette-Christine Duursma-Kepplinger (University of Krems)

Claudia Reith (University of Salzburg)

Marianne Roth (University of Salzburg)

Belgium

Renate Barbaix (University of Antwerp)

Thalia Kruger (University of Antwerp)

Frederik Swennen (University of Antwerp)

Bulgaria

Velina Todorova (Plovdiv University)

Croatia

Ines Medić (University of Osijek)

Branka Rešetar (University of Osijek)

Cyprus

Nikitas Hatzimihail (University of Cyprus)

Czech Republic

Milana Hrnčířiková (Palacký University Olomouc)

Lenka Westphalova (Palacký University Olomouc)

Denmark

Anette Kronborg (University of Copenhagen)

Ingrid Lund-Andersen (University of Copenhagen)

José María Lorenzo Villaverde (University of Copenhagen)

Estonia

Karin Sein (University of Tartu)

Triin Uusen-Nacke (Tartu County Court)

Finland

Salla Silvola (Ministry of Justice)

Pekka Tuunainen (The Pekka Tuunainen Law Firm)

France

Sabine Corneloup (Université de Bourgogne)

Vincent Egea (Université de Toulon)

Walter Jean-Baptiste (Law and Political Science Research Centre (CREDESPO))

Laure Stark (Research Center on Market and International Investment Law (CREDIMI))

Germany

Nina Dethloff (University of Bonn)
Susanne Liliane Gössl (University of Bonn)
Dieter Martiny (European University Viadrina Frankfurt)
Miriam Zschoche (University of Erfurt)

Greece

Elina Moustaira (University of Athens)

Hungary

Orsolya Szeibert (Eötvös Loránd University)

Ireland

Geoffrey Shannon (Law Society of Ireland, Ireland)

Italy

Maria Donata Panforti (University of Modena and Reggio Emilia)

Latvia

Irena Kucina (Ministry of Justice)
Anna Skrjabina (ESF Project Leader)

Lithuania

Inga Kudinavičiūtė-Michailovienė (Mykolas Romeris University)

Luxembourg

Michel Neyens (Ministry of Family, Integration and the Greater Region)
Christoph Müller (Chamber of Notaries)

Malta

Christine Bellizzi (Lawyer)
Francesca Portelli (Notary Public and Commissioner for Oaths)

Netherlands

Wendy Schrama (Utrecht University)

Poland

Agnieszka Frąckowiak-Adamska (University of Wrocław)
Joanna Kosińska-Wiercińska (Kancelaria Adwokacka Dr Joanna Kosińska-Wiercińska)
Jacek Wierciński (University of Warsaw)

Portugal

Guilherme de Oliveira (University of Coimbra)
Cândido Martins (University of Coimbra)

Rocha Ribeiro (University of Coimbra)
Ascensão Silva (University of Coimbra)
Vitor Paula Távora (University of Coimbra)

Romania

Ioana Olaru (Birou notarial INITIO)

Scotland

Jane Mair (University of Glasgow)

Slovakia

Robert Dobrovodský (University of Trnava)

Slovenia

Barbara Novak (University of Ljubljana)

Spain

Cristina González Beilfuss (University of Barcelona)
Monica Navarro-Michel (University of Barcelona)

Sweden

Margareta Brattström (Uppsala University)
Melissa Agaeva Ghefour (Uppsala University)
Maarit Jänträ-Jareborg (Uppsala University)

UK: England and Wales

Anne Barlow (University of Exeter)
Richard Frimston (Russell-Cooke LLP)

Principal Abbreviations

| | |
|------|---|
| CEFL | Commission on European Family Law |
| CNUE | Council of Notariats of the European Union |
| EEF | Empowering European Families |
| ELI | European Law Institute |
| EP | European Parliament |
| ERA | Academy of European Law |
| EU | European Union |
| MCC | Members Consultative Committee |
| MPR | 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 |
| NCs | National Correspondents |
| PRP | 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 |

Country codes used in the toolkits according to ISO-3166

| | | |
|-------------------|---------------|----------------------|
| AT Austria | FI Finland | NL Netherlands |
| BE Belgium | FR France | PL Poland |
| BG Bulgaria | HR Croatia | PT Portugal |
| CY Cyprus | HU Hungary | RO Romania |
| CZ Czech Republic | IE Ireland | SCO Scotland |
| DE Germany | IT Italy | SE Sweden |
| DK Denmark | LT Lithuania | SI Slovenia |
| EE Estonia | LU Luxembourg | SK Slovakia |
| EL Greece | LV Latvia | UK England and Wales |
| ES Spain | MT Malta | |

CONTENTS

| | |
|---|----|
| EXPLANATORY NOTE | 9 |
| 1. Introduction..... | 9 |
| 2. Milestones of the EEF Project..... | 10 |
| 3. Overview of the ELI Report | 11 |
| 3.1. Information Sheet for Couples | 11 |
| 3.2. Toolkits for Legal Advisers | 11 |
| 4. Overview of Additional Content Produced | 12 |
| 4.1. Comparative Materials..... | 13 |
| 4.2. Additional Support for Couples and Legal Advisers..... | 13 |
| 5. Legal Background: Party Autonomy under EU Legal Instruments..... | 13 |
| 5.1. Regulation (EU) No 2201/2003 ('Brussels IIa Regulation')..... | 14 |
| 5.2. Regulation (EU) No 1259/2010 ('Rome III Regulation') | 15 |
| 5.3. Regulation (EU) No 4/2009 ('Maintenance Regulation')..... | 15 |
| 5.4. 2007 Hague Protocol ('Maintenance Protocol') | 16 |
| 5.5. Regulation (EU) No 650/2012 ('Succession Regulation')..... | 17 |
| 5.6. Regulation (EU) No 2016/1103 ('MPR Regulation') | 17 |
| 5.7. Regulation (EU) No 2016/1104 ('PRP Regulation')..... | 18 |
| 6. Legal Background: National Family Law in the Member States | 19 |
| 6.1. General Observations: Types of Recognised Relationships..... | 19 |
| 6.2. Property Regimes | 19 |
| 6.3. Family Home and Household Objects..... | 20 |
| 6.4. Pension Rights | 21 |
| 6.5. Maintenance | 21 |
| Information Sheet for Couples: Moving to Another Country in the EU? | |
| Toolkit A for Advising European Families: Married Couples..... | |
| Toolkit B for Advising European Families: Registered Partnerships | |
| Toolkit C for Advising European Families: Informal Relationships | |

EXPLANATORY NOTE

1. Introduction

European citizens enjoy freedom of movement within the European Union (EU), a freedom that is encouraged and which enables individuals to lead the sort of life they aspire to in their preferred jurisdiction. As a result, there are currently 16 million international couples in the EU, that is to say where at least one of the partners lives in a country other than his or her country of origin.¹

However, in the absence of a uniform legal regime for families within the EU, international couples, whether married, registered as partners or in an informal relationship, face legal uncertainty and additional costs in the event of separation or death, making it very difficult for them to know which courts have jurisdiction or which laws apply to their case. This is particularly so in the context of the breakdown of the relationship. The implications of a relationship with a cross-border element often hit unsuspecting couples at a time when they are most vulnerable.

EU legislation has already achieved far-reaching unification of the rules concerning applicable law, jurisdiction, recognition and enforcement in family and succession law. However, international couples, still face a number of difficulties.

Some of these problems have their roots in habitual residence as the dominant connecting factor, which means that the applicable law may change once one or both partners move to another country. Existing rights a party has taken for granted may get lost and new rights and obligations may arise. Another problem for international couples within Europe is that existing EU conflict rules tend to encourage forum shopping and a 'rush to court'. This implies that there are incentives for parties to secure proceedings in a particular country whose courts will apply a law that is most favourable to them, thus reducing chances for reconciliation and affecting weaker party protection. More notably still, there are often two or three forums which are competent for the different topics to be decided upon at relationship breakdown. Even in standard cross-border divorce or separation cases a patchwork of applicable laws might exist and the approaches taken by the various laws involved are often incompatible with each other. In sum, this results in additional complexity and uncertainty, making the results of litigation almost unpredictable, and drastically increasing the costs of legal proceedings.

The situation for same-sex marriages and for registered partnerships, and even more so for informal relationships (ie de facto cohabitation), is even worse in terms of certainty and

¹ European Commission, <http://europa.eu/rapid/press-release_MEMO-11-175_en.htm; CNUE, <http://www.notaries-of-europe.eu/index.php?pageID=226>>.

predictability of results in a cross-border setting. In particular as concerns informal relationships this may create severe hardship, and usually so for the weaker party.

Many of these problems could be avoided by way of early choice of court and applicable law under existing EU instruments and national law, and by agreements on substantive law issues, as far as these are possible under the applicable law and enforceable in the forum State.

2. Milestones of the EEF Project

Recognising the need for international couples to be better informed of the legal consequences of relationships with a cross-border element and for their legal advisors to be fully equipped to inform couples of the implications that lie ahead, the Reporters developed the project together with practitioners in the field, responding to an urgent need for more guidance voiced by members of the professional community. With the support of, notably, the Commission on European Family Law (CEFL) and the Council of the Notariats of the European Union (CNUE), an application was lodged before the Commission, resulting in the award of an action grant under the Justice Programme of the European Union being awarded to the Universities of Vienna and Utrecht.

The Empowering European Families – Towards More Party Autonomy in European Family and Succession Law project, was recently adopted by the ELI Council on the recommendation of the ELI's Executive Committee, and after a hearing of the Senate, under [Council Decision \(CD\) 2015/8 of 3 September 2015](#) in accordance with section 8 of the ELI Project Guidelines. The project was carried out as an ELI Report under the regular procedure. It was supported by various ELI bodies, including an Advisory Committee (AC) and a Members Consultative Committee (MCC), both composed of experts of various nationalities that provided valuable input to the project.

National correspondents (NCs) from all EU Member States were asked to provide input through the submission of national reports (with separate reports from England and Wales and Scotland being solicited). The national reports do not form a part of this ELI Report but will be published alongside this Report with Oxford University Press (OUP).

The project ran over a period of 35 months, from January 2016 to December 2018. The project was presented to the public and discussed with relevant stakeholders at several events, inter alia at a series of workshops in Vienna and Utrecht, at ELI General Assemblies, at a workshop hosted by the EP's Legal Affairs Committee and at a Conference at the ERA in Trier.

The completion of the project is timely, in light of the entry into force of two new Regulations ((EU) 2016/1103 and (EU) 2016/1104 on matrimonial property regimes and the property consequences of registered partnerships respectively) on 29 January 2019. The above are part of an enhanced cooperation involving 18 Member States: Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Cyprus, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, the

Netherlands, Portugal, Slovenia, Spain and Sweden. A conference on 29 January, organised by the ELI and the Austrian Chamber of Civil Law Notaries marked a further occasion to promote the Report, solicit input and highlight the entry into force of the above Regulations.

3. Overview of the ELI Report

The present ELI Report aims at:

- Raising awareness of the intricate legal issues raised by cross-border family relationships among citizens and legal professionals;
- Encouraging citizens to seek legal advice and discuss legal implications as early as possible in their relationship;
- Assisting legal professionals in providing high quality legal advice to international couples within the EU;
- Reducing obstacles faced by international families in the EU;
- Facilitating free movement of citizens by providing better certainty and predictability of results and reducing the costs of litigation in matters of family and succession law; and
- Promoting the use of family mediation in the EU.

The ELI Report seeks to achieve these objectives by providing:

- an information sheet for couples; and
- three toolkits for their legal advisers.

As mentioned, in addition to being made available to download freely on the ELI website, the ELI Report will be accompanied by comparative materials to be published separately by OUP. Moreover, additional materials designed to support couples and legal advisers alike, and which will be further developed on an ongoing basis, will be made available.

3.1. Information Sheet for Couples

The information sheet is addressed at the couples themselves and highlights the implications of cross-border relationships in very simple and illustrative language. The sheet also contains practical advice on how to prepare for the first meeting with a legal adviser.

3.2. Toolkits for Legal Advisers

The toolkits are templates designed with a view to assisting legal professions in advising international couples within the EU. They are focused on the economic consequences of the relationship and its potential dissolution through divorce, separation or death. The templates do not deal with issues related to children, since there is little autonomy for the partners. The Project Team made use of a professional in the field of design and use of effective and simple language.

Toolkits exist for all three categories of couples examined in this project:

- **Married couples:** couples who have entered into a legal regime governing the shared life of two people which is provided for in law and considered as 'marriage' under the relevant law.
- **Registered partnerships:** the regime other than a marriage governing the shared life of two people which is provided for in law, the registration of which is mandatory under that law and which fulfills the legal formalities required by law for its creation.
- **Informal relationships:** partners who are living together as a couple but have not entered into a formalised partner relationship with each other.

Each toolkit includes an optional checklist with non-exhaustive points that legal professionals may wish to take into account in advising international couples. The desirability of each party seeking (independent) legal advice before an agreement is signed is emphasised.

The main part of each toolkit is a model agreement, the first page of which is a fact sheet to be filled in by the parties jointly with their legal adviser. The factsheet serves to remind all individuals involved of the minimum information that should be available before making decisions, but also helps the legal adviser to demonstrate to the parties why it is important that they disclose particular facts about their private life.

The model agreement as such covers applicable law; substantive law issues with respect to property relations (including the family home), pension rights and maintenance; dispute resolution; jurisdiction; as well as other matters. The various available options under each heading are detailed and the jurisdictions that provide for such regimes are listed. Usually, parties and their legal advisers can choose between two options ((a) or (b)) for each of the legal issues raised: either they opt, in principle, in favour of the statutory default regime and possibly modify this regime or agree on additional points (option (a)), or they create their own solution and make use of the much more detailed options with tick boxes and blanks provided in the templates (option (b)). Even in the latter case, the otherwise applicable law works as the 'background law' that governs all details and the issues not dealt with by the parties themselves.

The toolkit on informal relationships also includes **draft mandates**. These give partners who live in a non-formalised relationship the opportunity to give the other party power of representation for legally relevant actions. There is a draft mandate for everyday matters to facilitate their joint life and also a draft mandate for the case of lack of capacity.

As legal advisers who do not deal with international cases on a regular basis may wish to know more about the legal background of choices suggested there are also endnotes containing useful additional information.

4. Overview of Additional Content Produced

Again, apart from the information sheet and toolkits that are part of the ELI Report, the Project Team has also produced further content that will be published separately.

4.1. Comparative Materials

The country reports for married couples and registered partners have been summarised in comparative tables: one on matrimonial and partnership property law and one on maintenance law in the different jurisdictions of the EU. The tables contain summarised information of the country reports and do not explicitly aim at providing a complete overview of the law in a particular jurisdiction. The goal is to provide legal professionals with information which is easily accessible and provides a good starting point for advising international clients. The tables should always be read together with the country reports and the toolkits for married couples and registered partners. Most of the legal terminology used in the table is based on the country reports. The tables are ordered alphabetically and first address the statutory regime in each jurisdiction, and then the law regarding party autonomy. In the left column, the country abbreviation has been included, for instance AT for Austria. These country abbreviations are also used in the draft agreement and in the notes in the toolkit, where references are made to options existing under the law of specific jurisdictions. The tables present the legal information for married and registered couples at 1 July 2017. Some later important changes have been taken into account. The tables also summarise the existing options under substantive family: marriage and registered partnership for partners of opposite-sex and/or same-sex and whether the same or different rules apply to registered partnership.

4.2. Additional Support for Couples and Legal Advisers

Awareness raising among international couples is an important element of the project. Without couples knowing that they need to act in order to make use of their party autonomy, not much effect of the toolkits can be expected. The information sheet is part of the awareness raising campaign, but additionally a pilot online legal wedding planner has been developed. This website aims not only to inform international couples of their rights and of the implications of their decisions, but also to engage them. It contains a checklist which couples can use to check whether they are an international couple fitting the target group of the website. Very basic information is provided in lay man's language. A case study is included which seeks to illustrate the implications that arise with respect to a specific couple depending on which law is applicable. It also makes clear that a prior agreement by the couple as to which law should apply can provide a more suitable solution for the couple. Furthermore, a simple test your knowledge quiz has been included. This activates people and makes them understand that they need to see a legal professional. The pilot website, which is yet to go live, will be further developed in order to also target informal couples.

5. Legal Background: Party Autonomy under EU Legal Instruments

Recent EU legislation has taken important steps towards the fostering of party autonomy in family law matters. The following overview will focus on issues potentially relevant for this ELI Report. Just as the ELI Report, it will not address issues of parental responsibility: even though party autonomy plays an ever more important role when it comes to reaching an agreement at the point in time a measure needs to be taken, agreements made by the parents in advance, maybe many years in advance, are usually not considered to have any binding force vis-à-vis the all-dominating principle of ensuring the best interests of the child.

5.1. Regulation (EU) No 2201/2003 ('Brussels IIa Regulation')

Regulation (EU) No 2201/2003 (commonly referred to as the 'Brussels IIa Regulation')² provides for uniform rules of jurisdiction and of the recognition and enforcement of judgments as well as enforceable authentic instruments and agreements in matters of divorce, legal separation or marriage annulment and in matters of the attribution, exercise, delegation, restriction or termination of parental responsibility. Among the matters excluded from the scope of the Regulation are maintenance obligations and property consequences³ in the context of the dissolution of a marriage, the establishment or contesting of a parent-child relationship, trusts and succession.

When it comes to proceedings for the dissolution of a marriage, Article 3 Brussels IIa lists seven alternative grounds of jurisdiction among which the applicant may choose at his or her discretion, with Article 19 establishing priority of the court first seised (*lis pendens* rule). There is currently no possibility for the parties to designate in advance the Member State whose courts shall have jurisdiction to hear their case (choice of court).

Even though the Commission had initially recommended introducing choice of court in the Brussels IIa Regulation⁴, the Proposal for a Brussels IIa recast submitted in 2016⁵ did not touch upon the issue of choice of court. The absence of such choice drastically reduces the possibilities for parties to have certainty about their legal situation, as no party can be sure

² Council Regulation (EU) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, p 1. The Regulation applies in all Member States except Denmark.

³ Recital 8.

⁴ Report of 15 April 2014 from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, COM (2014) 225 final, p 5.

⁵ COM (2016) 411 final.

the other will not rush to court and seek to establish jurisdiction in a forum under Article 3 of Brussels IIa, which may be rather remote and which may have been chosen for purely strategic reasons in order to undermine choices the parties have made with regard to the applicable law and to substantive law issues. This problem can not be solved by the proposed ELI Report.

5.2. Regulation (EU) No 1259/2010 ('Rome III Regulation')

Regulation (EU) No 1259/2010 (commonly referred to as the 'Rome III Regulation')⁶ provides for uniform rules to determine the law applicable to divorce and legal separation. Excluded from the scope of the instrument are, *inter alia*, property consequences, maintenance, trusts and succession. The Rome III Regulation implements enhanced cooperation between originally 14 Member States. As of today, the following Member States participate in Rome III: Austria, Belgium, Bulgaria, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain.

The law applicable to divorce and legal separation is primarily the law designated by the parties, who may choose: the law of the State where the spouses are habitually resident at the time the agreement is concluded; the law of the State where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded; the law of the State of nationality of either spouse at the time the agreement is concluded; or the law of the *forum*.

In the absence of a choice by the parties, divorce and legal separation are governed by the law of the State: (a) where the spouses are habitually resident at the time the court is seized; or, failing that (b) where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seized, in so far as one of the spouses still resides in that State at the time the court is seized; or, failing that (c) of which both spouses are nationals at the time the court is seized; or, failing that (d) where the court is seized.

5.3. Regulation (EU) No 4/2009 ('Maintenance Regulation')

Regulation (EC) No 4/2009⁷ (commonly referred to as the 'Maintenance Regulation') provides uniform rules of jurisdiction and a range of further measures aimed at facilitating maintenance claims in cross-border situations. Maintenance obligations covered by the

⁶ Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343, 29.12.2010, p 10.

⁷ Council 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: OJ L 7, 10.1.2009, p 1. The Regulation is applicable in all Member States except Denmark, which has, however, confirmed its intention to implement its content.

Regulation may arise from a family relationship, parentage, marriage or affinity. According to Article 3, jurisdiction shall, alternatively, lie with the court of the place where the defendant or the creditor is habitually resident or with the court which has jurisdiction to entertain proceedings regarding the status of a person (eg a divorce) or parental responsibility if the matter relating to maintenance is ancillary to those proceedings.

Except for disputes relating to a maintenance obligation towards a child under the age of 18, the parties may, under the conditions spelt out in Article 4, agree on court or the courts of a Member State whose courts shall have exclusive (or, in fact, non-exclusive) jurisdiction to hear the matter. Parties may choose among the Member State in which one of the parties is habitually resident or of which one of the parties has the nationality, in the case of maintenance obligations between spouses or former spouses also the court which has jurisdiction to settle their dispute in matrimonial matters, or the Member State which was the State of the spouses' last common habitual residence for a period of at least one year. Any such choice of court agreement must be in writing, including by durably recorded electronic communication.

5.4. 2007 Hague Protocol ('Maintenance Protocol')

As to the applicable law, the Maintenance Regulation refers to the uniform rules concerning the applicable law contained in the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations ('the 2007 Hague Protocol').⁸ Under Article 3 of the 2007 Hague Protocol, maintenance obligations shall be governed by the law of the State of the habitual residence of the creditor. However, in the case of a maintenance obligation between spouses, ex-spouses or parties to a marriage which has been annulled, if one of the parties objects and the law of another State, in particular the State of their last common habitual residence, has a closer connection with the marriage, the law of that other State shall apply (Article 5).

Except as concerns maintenance obligations towards minors or other vulnerable persons, the parties may agree on the applicable law, provided this is the law of a State of which either party is a national or in which either party has their habitual residence at the time of the designation, or the law designated as applicable or in fact applied to the parties' property regime or divorce or legal separation. However, the question of whether the creditor can renounce his or her right to maintenance is determined by the law of the State of the habitual residence of the creditor at the time the agreement is made. There is also the possibility for the court to set aside a choice of the applicable law where that law would lead to manifestly unfair or unreasonable consequences for any of the parties and the parties were not fully informed and aware of the consequences.

⁸ The 2007 Hague Protocol is, since 1 August 2013, applicable in all Member States except Denmark and the United Kingdom.

5.5. Regulation (EU) No 650/2012 ('Succession Regulation')

Regulation (EU) No 650/2012⁹ (commonly referred to as the 'Succession Regulation') contains uniform rules about jurisdiction, applicable law, recognition and enforcement in matters of succession and introduces a European Certificate of Succession.

According to Article 21, the law applicable to the succession as a whole is normally the law of the State in which the deceased had his habitual residence at the time of death unless, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with another State, in which case that other law applies. A person may choose as the law to govern his succession the law of any State whose nationality he possesses at the time of making the choice or at the time of death.

Jurisdiction is normally with the courts of the Member State in which the deceased had his habitual residence at the time of death (Article 4). The deceased himself cannot directly make a choice concerning jurisdiction, but where he has chosen the applicable law the surviving parties concerned may agree that the courts of the State whose law is applicable shall hear the case, or the court first seised may, upon the request of one of the parties, decline jurisdiction in favour of the courts of that State.

5.6. Regulation (EU) No 2016/1103 ('MPR Regulation')

The Matrimonial Property Regime (MPR) Regulation¹⁰ governs jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and is applicable from 29 January 2019. It also includes a rule on the formal validity of matrimonial property agreements.

The MPR has been established under a scheme of enhanced cooperation. As of today, the 18 Member States listed in section 2 above have agreed to participate in the MPR.

Spouses or future spouses may agree to designate the law applicable to their matrimonial property regime, provided that it is the law of the State where at least one of the spouses is habitually resident or the law of a State of nationality of either spouse at the time the agreement is concluded. Unless the spouses agree otherwise, a change of the law applicable

⁹ Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012, p 107.

¹⁰ Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183, 8.7.2016, p 1. See also the Commission Implementing Regulation (EU) 2018/1935 of 7 December 2018 establishing the forms referred to in Council Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

to the matrimonial property regime made during the marriage shall have prospective effect only. In the absence of an agreement on the law applicable to the matrimonial property regime, there is a cascade of connecting factors, starting with the spouses' first common habitual residence after the celebration of marriage. However, there is also an escape clause, ie the law of the State of the last common habitual residence prevails where the spouses had lived in that other State for a significantly longer period and both spouses had relied on the law of that other State in arranging or planning their property relations

Jurisdiction lies with the courts that have jurisdiction concerning divorce, legal separation or marriage annulment, or succession, according to the Brussels IIa or Succession Regulation (mandatory concentration of proceedings). Only where the forum chosen by the applicant under the Brussels IIa Regulation is a potentially rather remote forum does concentration of proceedings require the consent of both parties (voluntary concentration of proceedings). Where there is no mandatory concentration of proceedings the parties may agree that the courts of the Member State whose law is applicable or the Member State where the marriage was concluded have exclusive jurisdiction to rule on matters of their matrimonial property regime. In the absence of (mandatory or voluntary) concentration of proceedings or a choice by the parties there is a cascade of grounds of jurisdiction, starting with courts of the Member State in whose territory the spouses are habitually resident at the time the court is seised, or failing that, in whose territory the spouses were last habitually resident, insofar as one of them still resides there at the time the court is seised.

5.7. Regulation (EU) No 2016/1104 ('PRP Regulation')

The Property in Registered Partnerships (PRP) Regulation,¹¹ applicable from 29 January 2019, is very similar to the MPR Regulation, but the law of the State under whose law the registered partnership was created plays a special role, eg as a law which the partners may designate to govern their property relations and which is the only law, besides the law applicable by virtue of the escape clause, that governs the property relations in the absence of a valid choice by the partners.

There is no mandatory concentration of proceedings except in succession cases, so party autonomy plays a much more important role when it comes to jurisdiction for issues of partnership property.

¹¹ Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183, 8.7.2016, p 30. See also Commission Implementing Regulation (EU) 2018/1990 of 11 December 2018 establishing the forms referred to in Council Regulation (EU) 2016/1104 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of property consequences of registered partnerships.

6. Legal Background: National Family Law in the Member States

6.1. General Observations: Types of Recognised Relationships

In the last decades, national substantive family law in the area of legal recognition of relationships has changed remarkably within Europe. Two developments can be discerned: equal rights for same-sex couples and informal cohabitation. Same-sex couples' equal rights started off with Denmark which in 1995 created registered partnership for same-sex couples. Three decades later, same-sex couples have an option to marry or register as partners in many jurisdictions. The trend regarding informal relationships is that in the last decades, an increasing number of jurisdictions have designed *lex specialis* rules. These two developments have jointly resulted in a quite diverse picture of relationship law within Europe. There are currently about 10 different 'models' regarding relationships in the Member States of the EU. On the one hand in some legal systems not a lot has changed in the last decades: they still only recognise marriage between opposite-sex couples, not allowing for same-sex couples to marry or register a partnership and do not provide for specific legislation for informal couples (such as Greece, Slovakia). At the other side of the spectrum some jurisdictions have a legal regime for all types of relationships. For instance, Finland, Scotland, Ireland and Sweden offer all couples the option to marry, while taking into account informal couples by means of a specific law. The 'registered partnership' concept has been introduced in numerous countries but is perhaps on its way out: in several jurisdictions, it is no longer available for new couples. The already existing registered partnerships will continue to exist (Denmark, Finland, Germany, Ireland, Sweden). Depending on how one would define what a *lex specialis* for informal couples entails, 10 jurisdictions (plus autonomous regions in Spain) have such a law. The conditions and legal effects are quite different. In Slovenia and Croatia informal cohabitation has extensive legal effects similar to marriage. In most other jurisdictions, the legislator opted for more limited effects, such as protection of the family home, limited maintenance rights and rules on financial adjustment at separation.

In short: from the perspective of the Empowering European Families project this implies that substantive family law differs considerably and that the picture is quite complex. This is why the toolkits include choices regarding substantive family law and have different models for on the one hand married and registered partners and informal couples on the other hand.

6.2. Property Regimes

Once married, the legal effects regarding property and finances differ considerably within the Member States of the European Union. In many jurisdictions, the same is true for registered partners, but in some countries this is not the case (eg Belgium, France). Property regimes range from a universal community of property in the Netherlands (although for marriages concluded after 1 January 2018 a more limited community regime applies) to more limited participation systems to full separation of property. In common law jurisdictions, there is no statutory body of law regulating a 'regime' as such, but the law contains different mechanism

to address property and financial matters via court orders. Not only does the extent of the effects differ, but this is also the case with the technical choices too (property systems with rights *in rem* versus participation systems on rights *in personam*). There are community of property systems, participation in acquisitions regimes, deferred community systems and separation of property regimes, which are combined with distribution of property by the competent authority in common law jurisdictions. Differences exist as to how specific assets and debts are classified and whether they will be divided or shared at relationship breakdown. In general, assets inherited and acquired as a gift will be separate.

In many jurisdictions there is at least some level of party autonomy, but in common law jurisdictions, the status of prenuptial and post-nuptial agreements is rather relative. They do not have a binding nature, but a court can take them into account if certain conditions are met. In a number of countries there is almost full party autonomy, whereas in others spouses or partners can opt only for specific statutory regimes.

Regarding informal relationships, in most jurisdictions, no specific property or participation regime has been put into place. Only in some of the jurisdictions with *lex specialis*, do specific rules apply regarding the couple's property, such as in Slovenia. Party autonomy exists in many jurisdictions to take care of financial matters through a contract, but this freedom seems not to be used very often. In many countries there is no culture or practice of drawing up cohabitation agreements, the Netherlands being an exception with 50% of the informal couples having concluded a cohabitation agreement.

Having regard to the comparative analysis, the toolkits pay detailed attention to property issues, thus optimising party autonomy.

6.3. Family Home and Household Objects

The family home and household objects are essential assets for couples. Whether spouses, or partners are allowed to dispose of the family home during the relationship depends on the jurisdiction. In a majority of jurisdictions (such as Belgium, Bulgaria, Estonia, Finland, France, Hungary, Ireland, Latvia, Lithuania, the Netherlands, Portugal, Poland, Sweden), selling, leasing, mortgaging the family home, regardless of who the owner is, requires consent of the other partner. In most of these jurisdictions, household objects enjoy the same protection, but in some jurisdictions they do not. In a number of countries, the law gives rules on occupancy rights at divorce. Courts may grant orders allowing a former spouse to use the family home after divorce (eg Belgium, Bulgaria, England & Wales, Germany). In balancing factors, the court has to take into account the interests of children to stay in the common dwelling in some jurisdictions (eg Italy, Lithuania, Poland). It appears that most of the protective rules are of a mandatory nature and that there is little room for party autonomy. Regarding informal relationships in most jurisdictions there is no protection of the family home and households objects, but in some there is (eg Croatia, Hungary, Portugal, Slovenia, Sweden). The toolkits for all couples are based on the idea that protection of the family home and household objects are important to consider; if not by means of the applicable law then

through an agreement of the partners.

6.4. Pension Rights

Regarding pension rights of married couples and registered partners, very little comparative law analyses have been carried out so far. From the national reports follows that this topic needs further attention in future research. National reporters with expertise in the field of family law had to deal with a topic not within their regular field of expertise. There are vast differences between the EU Member States in the field of pension law relating to married couples. Only in Germany and the Netherlands do specific provisions protect spouses by conferring them the right to share/split pension rights accrued during marriage. In other legal systems, pension rights depend on first, second or third pillar pension rights and combinations thereof. There is little information regarding party autonomy on pension rights in the country reports. However, it is clear that pension rights are a substantial part of married couples' assets and that is why pension rights clauses have been included in the toolkits for married and registered couples.

6.5. Maintenance

Spousal maintenance is an exception to the general principle of self-sufficiency. A comparative analysis shows that spousal maintenance exists in all countries, but that the extent to which it is granted in practice, and the role it plays, is quite different. In Scandinavian jurisdictions, maintenance plays only a limited role after divorce, whereas in other jurisdictions, maintenance is not limited in time and can even pass to heirs. In general, the entitlement to maintenance after divorce (or during separation) is dependent on the needs of the creditor and the financial capacity of the maintenance creditor. The way in which this is operationalised in national jurisdictions differs. The nature of the obligation, compensation or more solidarity based grounds, is different too. The extent to which parties can agree on maintenance after divorce or dissolution is limited in some jurisdictions, but in most legal systems there is quite some room for party autonomy. Differences exist regarding the time when a contract may be concluded (before, during or after the end of the legal relationship) and whether a waiver of maintenance rights is allowed. Maintenance agreements are often subject to some control by a competent authority, either at the time of their conclusion or at the end of the legal relationship. The toolkits for all types of relationships are designed in such a way that self-sufficiency of former partners is taken as a point of departure, but to avoid unfair economic consequences after the end of the relationship, parties should consider what options best suit them. In the toolkits an elaborate provision of choices is presented to legal professionals and parties.

The European Law Institute (ELI) is an independent non-profit organisation established to initiate, conduct and facilitate research, make recommendations and provide practical guidance in the field of European legal development. Building on the wealth of diverse legal traditions, its mission is the quest for better law-making in Europe and the enhancement of European legal integration. By its endeavours, ELI seeks to contribute to the formation of a more vigorous European legal community, integrating the achievements of the various legal cultures, endorsing the value of comparative knowledge, and taking a genuinely pan-European perspective. As such, its work covers all branches of the law: substantive and procedural; private and public.



ELI

EUROPEAN
LAW
INSTITUTE