

INTRODUCTION

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**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 (Rome III)**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 81(3) thereof,

Having regard to Council Decision 2010/405/EU of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation,¹

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the European Economic and Social Committee,

Acting in accordance with a special legislative procedure,

1 OJ L 189, 22.7.2010, p. 12.

Whereas:

- (1) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is assured. For the gradual establishment of such an area, the Union must adopt measures relating to judicial cooperation in civil matters having cross-border implications, particularly when necessary for the proper functioning of the internal market.**
- (2) Pursuant to Article 81 of the Treaty on the Functioning of the European Union, those measures are to include measures aimed at ensuring the compatibility of the rules applicable in the Member States concerning conflict of laws.**
- (3) On 14 March 2005 the Commission adopted a Green Paper on applicable law and jurisdiction in divorce matters. The Green Paper launched a wide-ranging public consultation on possible solutions to the problems that may arise under the current situation.**
- (4) On 17 July 2006 the Commission proposed a Regulation amending Council Regulation (EC) No 2201/2003² as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters.**
- (5) At its meeting in Luxembourg on 5 and 6 June 2008, the Council concluded that there was a lack of unanimity on the proposal and that there were insurmountable difficulties that made unanimity impossible both then and in the near future. It established that the proposal's objectives could not be attained within a reasonable period by applying the relevant provisions of the Treaties.**
- (6) Belgium, Bulgaria, Germany, Greece, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia subsequently addressed a request to the Commission indicating that they intended to establish enhanced cooperation between themselves in the area of applicable law in matrimonial matters. On 3 March 2010, Greece withdrew its request.**
- (7) On 12 July 2010 the Council adopted Decision 2010/405/EU authorising enhanced cooperation in the area of the law applicable to divorce and legal separation.**
- (8) According to Article 328(1) of the Treaty on the Functioning of the European Union, when enhanced cooperation is being established, it is to be open to all Member States, subject to compliance with any conditions of participation laid down by the authorising decision. It is also to be open to them at any other time, subject to compliance with**

² Council Regulation (EC) 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 (OJ L 338, 23.12.2003, p. 1).

the acts already adopted within that framework, in addition to those conditions. The Commission and the Member States participating in enhanced cooperation shall ensure that they promote participation by as many Member States as possible. This Regulation should be binding in its entirety and directly applicable only in the participating Member States in accordance with the Treaties.

- (9) This Regulation should create a clear, comprehensive legal framework in the area of the law applicable to divorce and legal separation in the participating Member States, provide citizens with appropriate outcomes in terms of legal certainty, predictability and flexibility, and prevent a situation from arising where one of the spouses applies for divorce before the other one does in order to ensure that the proceeding is governed by a given law which he or she considers more favourable to his or her own interests.
- (10) The substantive scope and enacting terms of this Regulation should be consistent with Regulation (EC) No 2201/2003. However, it should not apply to marriage annulment.

This Regulation should apply only to the dissolution or loosening of marriage ties. The law determined by the conflict-of-laws rules of this Regulation should apply to the grounds for divorce and legal separation.

Preliminary questions such as legal capacity and the validity of the marriage, and matters such as the effects of divorce or legal separation on property, name, parental responsibility, maintenance obligations or any other ancillary measures should be determined by the conflict-of-laws rules applicable in the participating Member State concerned.

- (11) In order to clearly delimit the territorial scope of this Regulation, the Member States participating in the enhanced cooperation should be specified.
- (12) This Regulation should be universal, i.e. it should be possible for its uniform conflict-of-laws rules to designate the law of a participating Member State, the law of a non-participating Member State or the law of a State which is not a member of the European Union.
- (13) This Regulation should apply irrespective of the nature of the court or tribunal seized. Where applicable, a court should be deemed to be seized in accordance with Regulation (EC) No 2201/2003.
- (14) In order to allow the spouses to choose an applicable law with which they have a close connection or, in the absence of such choice, in order that that law might apply to their divorce or legal separation, the law in question should apply even if it is not that of a participating Member State. Where the law of another Member State is designated, the network created by Council Decision 2001/470/EC of 28 May 2001

establishing a European Judicial Network in civil and commercial matters,³ could play a part in assisting the courts with regard to the content of foreign law.

- (15) Increasing the mobility of citizens calls for more flexibility and greater legal certainty. In order to achieve that objective, this Regulation should enhance the parties' autonomy in the areas of divorce and legal separation by giving them a limited possibility to choose the law applicable to their divorce or legal separation.
- (16) Spouses should be able to choose the law of a country with which they have a special connection or the law of the *forum* as the law applicable to divorce and legal separation. The law chosen by the spouses must be consonant with the fundamental rights recognised by the Treaties and the Charter of Fundamental Rights of the European Union.
- (17) Before designating the applicable law, it is important for spouses to have access to up-to-date information concerning the essential aspects of national and Union law and of the procedures governing divorce and legal separation. To guarantee such access to appropriate, good-quality information, the Commission regularly updates it in the Internet-based public information system set up by Council Decision 2001/470/EC.
- (18) The informed choice of both spouses is a basic principle of this Regulation. Each spouse should know exactly what are the legal and social implications of the choice of applicable law. The possibility of choosing the applicable law by common agreement should be without prejudice to the rights of, and equal opportunities for, the two spouses. Hence judges in the participating Member States should be aware of the importance of an informed choice on the part of the two spouses concerning the legal implications of the choice-of-law agreement concluded.
- (19) Rules on material and formal validity should be defined so that the informed choice of the spouses is facilitated and that their consent is respected with a view to ensuring legal certainty as well as better access to justice. As far as formal validity is concerned, certain safeguards should be introduced to ensure that spouses are aware of the implications of their choice. The agreement on the choice of applicable law should at least be expressed in writing, dated and signed by both parties. However, if the law of the participating Member State in which the two spouses have their habitual residence at the time the agreement is concluded lays down additional formal rules, those rules should be complied with. For example, such additional formal rules

3 OJ L 174, 27.6.2001, p. 25.

may exist in a participating Member State where the agreement is inserted in a marriage contract. If, at the time the agreement is concluded, the spouses are habitually resident in different participating Member States which lay down different formal rules, compliance with the formal rules of one of these States would suffice. If, at the time the agreement is concluded, only one of the spouses is habitually resident in a participating Member State which lays down additional formal rules, these rules should be complied with.

- (20) An agreement designating the applicable law should be able to be concluded and modified at the latest at the time the court is seized, and even during the course of the proceeding if the law of the *forum* so provides. In that event, it should be sufficient for such designation to be recorded in court in accordance with the law of the *forum*.
- (21) Where no applicable law is chosen, and with a view to guaranteeing legal certainty and predictability and preventing a situation from arising in which one of the spouses applies for divorce before the other one does in order to ensure that the proceeding is governed by a given law which he considers more favourable to his own interests, this Regulation should introduce harmonised conflict-of-laws rules on the basis of a scale of successive connecting factors based on the existence of a close connection between the spouses and the law concerned. Such connecting factors should be chosen so as to ensure that proceedings relating to divorce or legal separation are governed by a law with which the spouses have a close connection.
- (22) Where this Regulation refers to nationality as a connecting factor for the application of the law of a State, the question of how to deal with cases of multiple nationality should be left to national law, in full observance of the general principles of the European Union.
- (23) If the court is seized in order to convert a legal separation into divorce, and where the parties have not made any choice as to the law applicable, the law which applied to the legal separation should also apply to the divorce. Such continuity would promote predictability for the parties and increase legal certainty. If the law applied to the legal separation does not provide for the conversion of legal separation into divorce, the divorce should be governed by the conflict-of-laws rules which apply in the absence of a choice by the parties. This should not prevent the spouses from seeking divorce on the basis of other rules in this Regulation.
- (24) In certain situations, such as where the applicable law makes no provision for divorce or where it does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the

law of the court seized should nevertheless apply. This, however, should be without prejudice to the public policy clause.

- (25) Considerations of public interest should allow courts in the Member States the opportunity in exceptional circumstances to disregard the application of a provision of foreign law in a given case where it would be manifestly contrary to the public policy of the forum. However, the courts should not be able to apply the public policy exception in order to disregard a provision of the law of another State when to do so would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof, which prohibits all forms of discrimination.
- (26) Where this Regulation refers to the fact that the law of the participating Member State whose court is seized does not provide for divorce, this should be interpreted to mean that the law of this Member State does not have the institute of divorce. In such a case, the court should not be obliged to pronounce a divorce by virtue of this Regulation.
- Where this Regulation refers to the fact that the law of the participating Member State whose court is seized does not deem the marriage in question valid for the purposes of divorce proceedings, this should be interpreted to mean, *inter alia*, that such a marriage does not exist in the law of that Member State. In such a case, the court should not be obliged to pronounce a divorce or a legal separation by virtue of this Regulation.
- (27) Since there are States and participating Member States in which two or more systems of law or sets of rules concerning matters governed by this Regulation coexist, there should be a provision governing the extent to which this Regulation applies in the different territorial units of those States and participating Member States or to different categories of persons of those States and participating Member States.
- (28) In the absence of rules designating the applicable law, parties choosing the law of the State of the nationality of one of them should at the same time indicate which territorial unit's law they have agreed upon in case the State whose law is chosen comprises several territorial units each of which has its own system of law or a set of rules in respect of divorce.
- (29) Since the objectives of this Regulation, namely the enhancement of legal certainty, predictability and flexibility in international matrimonial proceedings and hence the facilitation of the free movement of persons within the Union, cannot be sufficiently achieved by the Member States and can therefore, by reasons of the scale and effects of this Regulation be better achieved at Union level, the Union may

adopt measures, by means of enhanced cooperation where appropriate, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

- (30) This Regulation respects fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, and in particular by Article 21 thereof, which states that any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. This Regulation should be applied by the courts of the participating Member States in observance of those rights and principles,

HAS ADOPTED THIS REGULATION:

A. FIRST VIEW ON THE SUBJECT MATTER AND THE PURPOSE

The subject matter of divorce and legal separation is at the heart of private international law. Over the course of the last century, some of the most important general principles of private international law have been developed in the context of divorce, before being generalized. Illustrations are numerous: the sanction of fraud (*fraude à la loi*),⁴ the principle of recognition of personal status judgments without any exequatur procedure being required,⁵ the rules governing indirect jurisdiction (i.e. the review of the jurisdiction of the court of origin for the purpose of recognition and enforcement),⁶ the theory of *effet atténué* of public policy,⁷ ... to mention only a few examples from France. **0.01**

The subject matter is not only central to private international law, but also highly sensitive. Rules on marriage and divorce depend on religious, social, historical and political factors, varying significantly from one State to another. Domestic laws diverge on issues such as the admissibility of divorce, possible grounds for divorce, substantial and procedural requirements, equal access to divorce for men and women, and even on the very concept of marriage, which **0.02**

4 Cour de cassation, *Princesse de Bauffremont v Prince de Bauffremont* [1878] Sirey 1878.1.193.

5 Cour de cassation, *Bulkley v Defresne* [1860] Sirey 1860.1.210.

6 Cour de cassation, *Fairhurst v Simitch* [1985] Bulletin civil 1985, I, n° 55.

7 Cour de cassation, *Rivière v Roumiantzeff* [1953] Bulletin civil 1953, I, n° 121.

may encompass, or not, same-sex couples. Fundamental rights play an increasing role, by requiring non-discrimination between spouses, self-determination of the individual, the protection of the right to marry and the right to respect for family life. The rules of private international law reflect all these substantive values and political choices. Even within the common judicial area of the European Union, which is built on a common history and a common cultural background, the differences are considerable. Such lack of uniformity inevitably raises tensions, and limping situations are not exceptional.

- 0.03** By creating a clear and comprehensive legal framework in the area of the law applicable to divorce and legal separation, the 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 (Rome III) aims at providing citizens with appropriate outcomes in terms of legal certainty, predictability and flexibility.⁸
- 0.04** Moreover, the introduction of unified conflict of law rules for divorce and legal separation is also designed to prevent the risk of *forum shopping*, which has arisen within the EU due to the combination of several factors. On the one hand, the domestic divorce laws of the Member States are not harmonized. They present significant divergences on important aspects, while, on the other hand, Article 3 of the Brussels II bis Regulation provides for numerous alternative heads of jurisdiction. The applicant thus has the possibility to choose the court according to substantive considerations based on the desired outcome on the merits. Combined with the *lis pendens* rule of Article 19 of the Brussels II bis Regulation, which gives priority to the court first seized, the legal framework has provoked a rush to the courts. Many examples exist, indeed, where one of the spouses applied for divorce before the other one did, in order to ensure that the proceeding was governed by a given law which he or she considered more favorable to his or her own interests. With the harmonization of choice of law rules, on the contrary, the EU seeks to guarantee that, regardless of the court seized, the applicable law will always be the same, depriving the choice of the court of any consequence on the outcome of the proceeding. Unfortunately, this objective has not been fully met, in particular due to the limited scope of application of the Regulation.
- 0.05** The underlying rationale is also of economic nature.⁹ The proper functioning of the internal market requires to increase the mobility of EU citizens.

⁸ Recital 9.

⁹ Horatia Muir Watt, 'La conduite des conduites et le droit international privé de la famille: réflexions sur la gouvernementalité à la lumière du règlement', in Sabine Corneloup (ed), *Droit européen du divorce/European*

According to the Preamble of the Regulation, increasing the mobility of citizens requires more flexibility as well as legal certainty.¹⁰ Normally, the objectives of legal certainty and predictability, on the one hand, and flexibility, on the other hand, are conflicting. Legal certainty calls for precise and rigid conflict of law rules, whereas flexibility, which is introduced into other EU regulations mainly in the form of exception clauses, inevitably reduces the predictability of the applicable law. The Rome III Regulation seeks to strike a fair balance between them by promoting party autonomy. Indeed, by giving the spouses a limited possibility to choose the law applicable to their divorce or legal separation, some flexibility is created. However, unlike exception clauses, party autonomy is a form of flexibility in the hands of the spouses, and not in the hands of the courts. Hence, it furthers at the same time legal certainty and predictability. Spouses can circulate within the EU for professional purposes without having to worry about possible issues linked to divergent divorce laws of the Member States, in case of a breakdown of their marriage. Unfortunately, here again, due to the limited scope of application of the Regulation, the objective of the Regulation has not been fully met.

B. LEGAL BASIS AND LEGISLATIVE HISTORY

The legislative history began in 2005 with the publication of a Green Paper,¹¹ followed in 2006 by the Commission's Proposal for a regulation.¹² The initial idea was to amend the Brussels II bis Regulation, in order to include choice of law rules in the existing instrument. However, as measures concerning family law require a unanimous vote of the Council,¹³ and Member States' views on the subject matter differ substantially, the negotiations failed. In June 2008, the Council concluded that, due to the objections raised by some Member States, unsurmountable difficulties existed, making unanimity impossible at that time and in the foreseeable future.¹⁴ In the following months, 14 Member States (Spain, Italy, Hungary, Luxembourg, Austria, Romania, Slovenia, Bulgaria, France, Germany, Belgium, Latvia, Malta and Portugal) addressed a request to the Commission, under Article 20 TEU and Articles 326 to 334 TFEU, to establish enhanced cooperation between them. In July 2010, the

Divorce Law (LexisNexis 2013) 729; Eric Loquin, 'La création d'un marché européen du divorce', in Sabine Corneloup (ed), *Droit européen du divorce/European Divorce Law* (LexisNexis 2013) 741.

10 Recital 15.

11 Green Paper on applicable law and jurisdiction in divorce matters, COM (2005) 82 final, of 14 March 2005.

12 Proposal for a Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM(2006) 399 final, of 17 July 2006.

13 Article 81(3) TFEU, previously Article 65 TEC. The unanimity requirement has not changed over the years.

14 Council meeting held in Luxembourg on 5 and 6 June 2008; doc. 9985/08 JUSTCIV 111.

Council gave its authorization,¹⁵ which led to the adoption of the Rome III Regulation five months later, on 20 December 2010. The Regulation became applicable on 21 June 2012. It was the first time that Member States made use of the provisions on enhanced cooperation, which since have proved to be the only way to further develop common rules in family matters. Consequently, the 2016 Regulations on matrimonial property regimes¹⁶ and property consequences of registered partnerships¹⁷ followed the same path. Today, 17 Member States are participating in the Rome III Regulation, as Lithuania, Greece and Estonia later joined the initial group of participating Member States.

0.07 The reasons for the other Member States not to participate were manifold. Member States such as Finland and Sweden, which follow a liberal approach towards divorce, were not willing to apply a foreign law with stricter standards. In other words, their *lex fori* approach and foreign law aversion was based on the reluctance to apply a foreign law less favorable to divorce than the law of the forum, or a foreign law discriminating against one spouse. Procedural considerations were also invoked. The application of foreign law involves additional costs and entails a longer proceeding, whereas quick and inexpensive access to divorce is primarily sought.

0.08 Even though these arguments eventually prevented some Member States from participating in the Regulation, they nonetheless had a significant impact on several of its provisions. First, the combination of the Brussels II bis and the Rome III Regulations frequently results in the applicability of the *lex fori*. This convergence is partly due to the use of the same connecting factors for jurisdiction¹⁸ and the applicable law.¹⁹ Moreover, in situations where divorce is not provided for under the applicable law, the law of the forum applies. The same holds true where the applicable law does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex.²⁰ The general public policy clause adds another instance of application of the law of the forum.²¹ The concern regarding discrimination is also taken into account

15 Decision No 2010/405/EU of 12 July 2010, OJ L 189, 22.7.2010, p. 12.

16 Council Regulation (EU) No 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.

17 Council Regulation (EU) No 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.

18 Article 3 of the Brussels II bis Regulation.

19 Article 8 of the Rome III Regulation.

20 Article 10 of the Rome III Regulation.

21 Article 12 of the Rome III Regulation.

at this stage, since the recourse to the public policy clause is limited by the Charter of Fundamental Rights, and in particular Article 21 thereof, prohibiting all forms of discrimination.²²

Another Member State with a strong *lex fori* tradition, the United Kingdom, also had doubts that the harmonization of choice of law rules on divorce was an appropriate remedy against the rush to the courts.²³ *Forum shopping* is mainly motivated by the consequences of divorce, such as post-divorce maintenance obligations or custody rights over children, which the scope of the Regulation is not comprising anyway. The Regulation only applies to the granting of divorce and legal separation, and to the grounds therefor. National divergences on these questions are rarely a strong motivation for *forum shopping* strategies. According to many experts especially from the common law tradition, the remedy against the rush to the courts would have been to amend the rules on jurisdiction of the Brussels II bis Regulation, rather than to harmonize the rules on choice of law. The doctrine of *forum non conveniens*, possibly combined with a reduction of available fora, was seen as a more appropriate response to the difficulties identified by the European Commission in its proposal than common choice of law rules. **0.09**

The inability of the Member States to agree on the topic has resulted in a situation of ‘variable geometry’ in the European legal landscape.²⁴ Eleven out of 28 Member States apply their own choice of law rules on divorce and legal separation. Some apply a *lex fori* approach, others rely on nationality as the main connecting factor, while still others refer to the habitual residence of the spouses. Under such circumstances, one can hardly speak of a clear legal framework providing citizens with predictable outcomes. Party autonomy, in particular, is generally not allowed in private international law of non-participating Member States. Spouses, who make use of the right to choose the applicable law to their divorce under the Rome III Regulation, often have no guarantee that the competent court will enforce such a choice. Choice of court agreements could have brought the necessary legal certainty, but neither the current Brussels II bis Regulation nor its 2019 recast²⁵ provides for them. Inevitably, the lack of unity has a negative impact on the achievement of some **0.10**

22 Recital 25, and more generally Recital 30, of the Rome III Regulation.

23 Aude Fiorini, ‘Bruxelles sans Rome: La réticence du Royaume-Uni face à l’harmonisation du droit européen du divorce’, in Sabine Corneloup (ed), *Droit européen du divorce/European Divorce Law* (LexisNexis 2013) 701.

24 Matthias Lehmann and Eva Lein, ‘L’espace de justice à la carte? La coopération judiciaire en Europe à géométrie variable et à plusieurs vitesses’, in *Mélanges Bertrand Ancel* (Iprolex-LGDJ 2018) 1093.

25 Council Regulation (EU) No 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), OJ L 178, 2.7.2019, p. 1, which applies from 1 August 2022.

of the fundamental objectives of the Rome III Regulation. The complexity it entails is also a major source of concern.

C. SCOPE OF APPLICATION

1. Temporal scope

0.11 The Regulation entered into force on 30 December 2010, the day following its publication in the *Official Journal*. However, its actual date of application is 21 June 2012, with the exception of Article 17 on the information to be provided by the participating Member States, which is applicable from 21 June 2011.²⁶ For the Member States joining the enhanced cooperation at a later stage, the date of application is specified in the decision adopted by the European Commission under Article 331(1) TFEU.²⁷

0.12 More precisely, it follows from the transitional provisions of Article 18 that the Regulation applies only to legal proceedings instituted as from 21 June 2012. Regarding choice of law agreements, only those concluded from that date fall within its scope of application. However, it is specified that effect shall be given to a choice of law agreement concluded before, provided that it complies with the requirements of the Regulation relating to consent and to material and formal validity, according to Articles 6 and 7. On the contrary, the Regulation does not affect choice of law agreements which do not comply with these requirements, if they were concluded before the date of application of the Regulation, in accordance with the law of the participating Member State whose court is seized before 21 June 2012.

2. Personal scope

0.13 The personal scope of application of the Regulation is not subject to any limitation. The Regulation applies regardless of the nationality and the place of habitual residence of the spouses. Since it is an instrument of uniform law with universal character, it determines the applicable law whenever a situation involving a conflict of law arises in a participating Member State, provided that the situation meets the material scope of application.

²⁶ Article 21.

²⁷ 22 May 2014 for Lithuania (Decision No 2012/714/EU of the Commission), 29 July 2015 for Greece (Decision No 2014/39/EU of the Commission), and 11 February 2018 for Estonia (Decision No 2016/1366/EU of the Commission).

3. Material scope

a. Subject matter

The material scope is defined in an extremely narrow manner. The Regulation applies to divorce and legal separation only. Article 1(2) provides a list of excluded matters, which comprises in particular the personal and property consequences of the dissolution or loosening of marriage ties, such as the name of the spouses, parental responsibility, maintenance obligations and the matrimonial property regime. Moreover, and unlike the Brussels II bis Regulation, Rome III does not apply to the annulment of marriage either. Linked to the latter exclusion is added the complementary exclusion of the existence, validity and recognition of a marriage. **0.14**

The definition of the material scope raises difficult issues in particular with respect to private divorces and the divorce of same-sex marriages. Moreover, it results in a highly fragmented legal framework. Each subject matter is covered by a different legal instrument, making the determination of the applicable law a highly complex task for legal practitioners. Increasingly, academics and practitioners are advising the spouses to make use of their party autonomy, provided under the different regulations to a various extent, in order to overcome the shortcomings of legal fragmentation.²⁸ As the legislative ‘piece-meal approach’ does not automatically guarantee a coherent personal status for European citizens, the latter are well advised to create the required coherence and simplification themselves, by combining, whenever possible, choice of law and choice of court. **0.15**

b. Existence of a conflict of laws

Another requirement defining the material scope of application of the Regulation relates to the international element of the situation. Like Rome I and Rome II, the Rome III Regulation does not use the term ‘international’ to describe the situations it is dealing with. Instead, it refers to the concept of ‘situations involving a conflict of laws’.²⁹ These are situations, according to the European Commission, in which there are aspects of the case which take it outside the domestic social life of one country and which may involve several legal systems.³⁰ **0.16**

28 See in particular Christian Kohler, ‘La segmentation du statut personnel comme vecteur de l’autonomie de la volonté’, in Amélie Panet, Hugues Fulchiron and Patrick Wautelet (eds), *L’autonomie de la volonté dans les relations familiales internationales* (Bruylant 2017) 73.

29 Article 1(1).

30 Proposal for a Council Regulation (EU) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, COM(2010) 105 final, of 24 March 2010, p. 6. The wording is based on:

D. LEGAL ENVIRONMENT

0.17 The Rome III Regulation is surrounded by other private international law instruments dealing with the subject matter of divorce and its consequences, be it other European regulations or international conventions. Moreover, as part of European Union law, its application is governed by general principles of EU Constitutional law.

1. Other private international law instruments

0.18 The above-mentioned legal fragmentation in family matters results in the necessity to combine several legal instruments, in order to address all aspects of an international divorce or legal separation. From the perspective of horizontal fragmentation, the Rome III Regulation deals only with choice of law, whereas the jurisdiction of courts in divorce or separation proceedings is defined by the 2003 Brussels II bis Regulation.³¹ The consequences of a divorce on maintenance obligations between former spouses and towards children are governed by the 2009 Maintenance Regulation, which provides rules on jurisdiction and the recognition and enforcement of decisions.³² Regarding the applicable law, the 2009 Maintenance Regulation refers to the 2007 Hague Protocol.³³ The jurisdiction of courts to decide on the exercise of parental responsibility after the divorce is governed by the 2003 Brussels II bis Regulation, whereas the law applicable to parental responsibility is governed by the 1996 Hague Convention on the protection of children.³⁴ And finally, the matters of matrimonial property regime arising in connection with divorce fall within the scope of application of the 2016 Matrimonial Property Regime Regulation.³⁵ It unifies the rules on jurisdiction, applicable law and the recognition and enforcement of decisions, but as it implements an enhanced

Mario Giuliano and Paul Lagarde, *Report on the Convention on the law applicable to contractual obligations*, OJ C282/1 of 31 October 1980.

- 31 Council Regulation (EC) 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; and its recent recast, which applies from 1 August 2022: Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), OJ L 178, 2.7.2019, p. 1.
- 32 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.
- 33 Hague Protocol on the law applicable to maintenance obligations, 23.11.2007.
- 34 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 19.10.1996.
- 35 Council Regulation (EU) No 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.

cooperation, it does not bind all Member States. Consequently, depending on the Member State and the issue at stake, this already complex legal landscape is furthermore to be supplemented with national private international law to various extents.

From the perspective of vertical fragmentation, the Rome III Regulation is superseded by international conventions, in particular bilateral agreements, participating Member States had concluded before the adoption of the Rome III Regulation. According to Article 19 of the Rome III Regulation, such international conventions, in so far as they lay down conflict of laws rules relating to divorce or separation, have precedence over the Regulation if they were ratified at least by one State which is not a participating Member State. **0.19**

The fragmentation has reached a point where concerns not only about the complexity, but also about the consistency of the legal framework are legitimately raised. In order to avoid inconsistencies with the Brussels II bis Regulation, Recital 10 of the Rome III Regulation states that the substantive scope and enacting terms of the Regulation should be consistent with the Brussels II bis Regulation. Previously, similar recitals had been included in the Rome I and Rome II Regulations, with the goal of promoting coherence in civil and commercial matters with the Brussels I bis Regulation.³⁶ In this respect, the Court of Justice of the European Union has developed an increasing body of case-law over the last years.³⁷ It is to be expected that the principle of consistent interpretation receives the same attention in matters relating to divorce, where the perspective however should be broadened beyond Rome III and Brussels II bis, in order to encompass other connected family matters. **0.20**

2. EU constitutional law

As a piece of EU law, the Rome III Regulation is governed by general principles of Union law. As already explained (see *supra*, section B), it was adopted on the legal basis of Article 81(3) TFEU, combined with the provisions on enhanced cooperation. With its adoption, the participating Member States lost their competence to conclude international agreements with Third States in the area of the law applicable to divorce and legal separation. Indeed, according to Article 3(2) TFEU, the Union acquires **0.21**

³⁶ Recital 7 of Regulation No 593/2008 Rome I and Regulation No 864/2007 Rome II. Maciej Szpunar, 'Droit international privé de l'Union: cohérence des champs d'application et/ou des solutions?' [2018] Rev. crit. DIP 573.

³⁷ See for instance on the concept of 'overriding mandatory provisions', case C-149/18 *da Silva Martins* [2019] ECLI:EU:C:2019:84.

exclusive external competence for the conclusion of international agreements when their conclusion may affect common rules or alter their scope.³⁸ For some participating Member States, the loss of competence proves problematic as it makes the revision of outdated bilateral agreements with Third States, which are still relevant in practice, impossible.

- 0.22** The Regulation is directly applicable in the participating Member States and prevails over national (private international) law, according to the principles of direct effect and primacy. Its interpretation is subject to the general interpretation methods of Union law, according to which the context and the objectives play an important role,³⁹ in addition to the specific principle of consistent interpretation with the Brussels II bis Regulation, and the principle of European-autonomous qualifications.⁴⁰
- 0.23** The hierarchy of Union norms requires the Rome III Regulation to be in conformity with primary law, in particular with the Charter of Fundamental Rights of the European Union. Accordingly, several provisions and recitals of the Regulation reflect the concern for the respect of fundamental rights. Recital 30 contains the traditional statement included in all instruments of secondary law, that the Regulation respects fundamental rights and observes the principles recognized by the Charter. The prohibition of any form of discrimination laid down in Article 21 of the Charter receives a specific mention.⁴¹ The law chosen by the spouses must be consonant with the fundamental rights recognized by the Charter according to Recital 16, whereas Recital 25 states that the public policy exception cannot be applied in order to disregard a provision of the law of another State when to do so would be contrary to the Charter, and in particular with the prohibition of discrimination. Interestingly, Recital 16 uses the term ‘must’, and not the conditional ‘should’, which is normally used in the preambles of EU secondary law, thereby linguistically strengthening the imperative.
- 0.24** The Rome III Regulation is also to be read in the light of the TFEU. Adopted under the provisions on freedom, security and justice, it relies on the

38 See ECJ, case 22/70 *Commission v Council (AETR)* [1971] ECR 263; CJEU, Opinion 1/03 [2006] ECR I-1145, ECLI:EU:C:2006:81.

39 See for instance Koen Lenaerts and José A. Gutiérrez-Fons, ‘To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice’ (2013–14) 20 *Columbia Journal of European Law* 3.

40 On the interaction between qualification and public policy in EU family law, see Petra Hammje, ‘Libres propos sur les interactions entre qualification et ordre public’, in *Mélanges Bertrand Ancel* (Iprolex-LGDJ 2018) 867.

41 Article 21 prohibits any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.

fundamental assumption of mutual trust between Member States and forms part of the common area of justice, which is based on the principle of mutual recognition of decisions.

Moreover, strong links exist as well with the citizenship of the Union and the free movement of persons. Increasing the mobility of citizens is one of its objectives, which is also in line with the economic rationale of the internal market (see *supra*, section A). An interpretation of the Regulation, which would result in an obstacle to the free movement of persons, could be considered incompatible with the Treaty. This raises concern in particular with respect to the non-recognition of same-sex marriage and the impossibility it may entail for the spouses to apply for a divorce. Article 13 of the Rome III Regulation clarifies that nothing in the Regulation shall oblige the courts of a participating Member State whose law does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce. However, in the light of the recent *Coman* ruling of the Court of Justice on the right of residence,⁴² it cannot be excluded that the right of Union citizens to free movement may also impact the interpretation of the Rome III Regulation in the future. The rights, which nationals of Member States enjoy under Article 21(1) TFEU, include the right to lead a normal family life, together with their family members, both in the host Member State and in the Member State of which they are nationals. The effectiveness of the right to free movement is considerably diminished, if the marital status is not recognised and a divorce made impossible. **0.25**

According to the principle of conferral laid down in Article 5(2) TEU, competences not conferred upon the Union remain with the Member States. In the absence of EU law provisions, the procedural implementation and enforcement of Union law on the national level falls within this category, as part of the procedural autonomy of the Member States. The treatment of foreign law, and in particular the mandatory or facultative application of EU conflicts rules, is considered to be one of those procedural matters governed by the law of each participating Member State. In other words, the question whether a court must apply *ex officio* the Rome III Regulation, if no party pleads the application of foreign law, is not harmonized.⁴³ The distribution of roles during the proceeding between the judge and the spouses is enshrined in domestic procedural law. Article 5(2) and (3) of the Rome III Regulation can be seen as an expression of this principle. According to these provisions, the **0.26**

42 Case C-673/16 *Coman* [2018] ECLI:EU:C:2018:385, providing for an obligation to recognise same-sex marriages for the sole purpose of granting a derived right of residence to a third-country national.

43 For a comprehensive, comparative analysis of national practices, see Yuko Nishitani (ed), *Treatment of Foreign Law – Dynamics towards Convergence?* (Springer 2017).

Regulation grants the spouses the right to choose the law applicable to divorce until the time the court is seized. During the course of the proceeding, on the contrary, they can only conclude a choice of law agreement if the law of the forum provides so.

- 0.27** The procedural autonomy of the Member States is not unlimited, as it is governed by the principles of equivalence and effectiveness.⁴⁴ However, so long as the Court of Justice has not directly ruled on the limits of procedural autonomy with respect to European conflict of laws rules, the precise implications of the dual requirement of equivalence and effectiveness are not clear.⁴⁵
- 0.28** Methods of ascertaining foreign law are not harmonized either and significant differences also exist in this respect. Recital 14 of the Rome III Regulation mentions the European Judicial Network in civil and commercial matters, which could play a part in assisting the courts with regard to the content of foreign law.

E. BASIC PRINCIPLES AND UNDERLYING POLICY

1. Main rules

a. Overview

- 0.29** In order to take account of mandatory norms that still play an important role with regard to personal status and family relations, the Rome III Regulation creates a legal framework combining the traditional choice of law methodology with less traditional provisions. Indeed, as the Regulation introduces party autonomy in a matter in which rights are traditionally not at the free disposal of the parties, tools are needed to regulate the choice of law by the spouses.⁴⁶ Rather than focusing on the nature of the rights at stake, the emphasis is put on appropriate limitations. Hence, party autonomy is permitted, but limited by proximity requirements (proximity with the parties or proximity with the dispute, Article 5). The drafters of the Regulation also were aware that

⁴⁴ For a critical analysis see Michal Bobek, 'Why There is No Principle of "Procedural Autonomy" of the Member States', in Bruno de Witte and Hans Micklitz (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2011) 305.

⁴⁵ From a French perspective: Sabine Corneloup, 'L'application facultative de la loi étrangère dans les situations de disponibilité du droit et l'application uniforme des règles de conflit d'origine européenne', in *L'application du droit étranger* (Société de législation comparée 2018) 75.

⁴⁶ Hugues Fulchiron, 'Disponibilité/indisponibilité: quelques réflexions de synthèse à la lumière d'une étoile morte', in Amélie Panet, Hugues Fulchiron and Patrick Wautelet (eds), *L'autonomie de la volonté dans les relations familiales internationales* (Bruylant 2017) 283.

sometimes one spouse is weaker than the other; additional safeguards are then needed (Recital 18, insisting on the existence of equal opportunities for both spouses and the importance of an informed choice on the part of the two spouses).

The conflict of laws rules in the absence of a choice are bilateral and based on the principle of proximity (Article 8). *Renvoi* is excluded (Article 11). The traditional public policy exception is included (Article 12), but it is supplemented by an additional provision providing for the application of the law of the forum in two specific instances (special public policy clause, Article 10). Courts of a participating Member State whose law does not deem the marriage in question valid, for instance because it is a same-sex marriage, are not obliged to pronounce the divorce or legal separation (Article 13). **0.30**

b. Choice of law

In order to promote flexibility as well as legal certainty for the spouses, party autonomy is the principle, but the freedom of choice is limited to the laws of four States, with which the spouses have a close connection. According to Article 5, they can only choose the law of the country of their common habitual residence at the time the agreement is concluded, the law of the country of their last common habitual residence in so far as at least one spouse still resides there at the time of the agreement, the law of the country of the nationality of either spouse at the time of the agreement, or the law of the forum. In other words, the European legislators preselected on the basis of the principle of proximity the laws among which the spouses can choose and excluded the choice of a neutral law. In doing so, the Regulation departs from the approach implemented in civil and commercial matters by Regulations Rome I and Rome II. **0.31**

Rules on the material (Article 6) and formal (Article 7) validity of the agreement on choice of law aim at facilitating an informed choice with respect to both spouses. However, given the insufficient harmonization of the requirements on formal validity, which is limited by the Regulation to a minimum, combined with the inaction of national legislators of most of the participating Member States to impose additional conditions, one may doubt that this objective of an informed choice has been achieved.⁴⁷ **0.32**

⁴⁷ See for instance Sabine Corneloup and Natalie Joubert, 'Autonomie de la volonté et divorce: le règlement Rome III', in Amélie Panet, Hugues Fulchiron and Patrick Wautelet (eds), *L'autonomie de la volonté dans les relations familiales internationales* (Bruylant 2017) 179; for a less critical analysis see Tobias Helms, in Thomas Rauscher (ed), *EuZPR – EuIPR* (Otto Schmidt 2016) Art 7 Rom III-VO 4.

c. *Law applicable in the absence of a choice*

- 0.33** In the absence of a valid choice of law, Article 8 provides for a bilateral conflict rule based on a scale of four successive connecting factors reflecting the principle of proximity.⁴⁸ Its objective is to guarantee legal certainty and predictability. In principle, divorce and legal separation are governed by the law of the common habitual residence of the spouses. If a common habitual residence no longer exists at the time the court is seized, the law of the last common habitual residence is applicable, provided that the period of residence did not end more than one year before the court was seized and one spouse still resides there. If these requirements are not met either, the law of the country of the spouses' common nationality applies. And finally, in the last resort, the Regulation refers to the law of the forum.
- 0.34** Unlike other EU Regulations on choice of law, the Rome III Regulation does not provide for an exception clause. Recital 21 explains that the applicable law is designated on the basis of 'a' close connection; it does not refer to 'the closest' connection. Nationality has not been discarded as a possible connecting factor, provided that the spouses have a common nationality and that the applicable law cannot be determined on the basis of habitual residence. This confirms the subsidiary role nationality plays in contemporary private international law. Considerations of equal treatment, non-discrimination and social integration of mobile European citizens and third country nationals in their host societies prevail over the concept of cultural identity reflected by the spouse's nationality.

2. The underlying *favor divortii*

- 0.35** From a political point of view, similarly to other Regulations in family matters, the Rome III Regulation is not neutral but conveys a European vision of family relationships.⁴⁹ The EU legislators seek to promote a certain concept of divorce: an egalitarian, as well as a simplified and easily accessible divorce.⁵⁰ The focus of the EU is on individual rights of citizens and their cross-border effectiveness. Party autonomy and public policy are used as tools to promote this European understanding of substantive policy goals and the cross-border stability of legal situations of citizens. The Regulation's underlying policy is a policy in favor of divorce, conceived as an individual right. This follows clearly

48 Recital 21.

49 Hugues Fulchiron, 'Existe-t-il un modèle familial européen?' (2005) Defrénois 1461.

50 Petra Hammje, 'Ordre public et lois de police, limites à l'autonomie de la volonté?', in Amélie Panet, Hugues Fulchiron and Patrick Wautelet (eds), *L'autonomie de la volonté dans les relations familiales internationales* (Bruylant 2017) 111.

from Article 10, which grants a genuine right to divorce by discarding the applicable law if it makes no provision for divorce. Such replacement by the law of the forum also applies in the case where the spouses made a choice of the applicable law, which means that the Regulation's underlying right to divorce even trumps the spouses' choice.⁵¹ The combination of Regulations Brussels II bis and Rome III further confirms this interpretation. Article 3 of the Brussels II bis Regulation provides for a wide range of available fora by its long list of alternative heads of jurisdiction, allowing the spouse who wants to divorce to choose the court which is the most likely to accede to the request with minimum requirements. Rome III adds to this favor the possibility for the spouses to choose the applicable law and thus to opt for a liberal regime.

In the future, this European private international law framework may well result in a certain harmonization also on the level of substantive family law, by aligning the fundamental principles of the laws of the participating Member States on the basis of the most liberal model.

The *favor divortii* and individual rights-based approach characterizing EU private international law is not unproblematic, especially from the perspective of the child. Indeed, if the spouses have children, one may wonder whether it is appropriate to favor, accelerate and simplify, at any price, the divorce. A more balanced approach could have been based, for instance, on the establishment of a period of reflection, or other similar measures. Since parental separations often result in disputes over parental responsibility and child abductions, they have important consequences for children. Therefore, the EU's inclination to neglect the collective dimension of family relationships gives rise to well-founded criticism. **0.36**

51 Natalie Joubert, 'Commentary of Article 10 Rome III Regulation', in Sabine Corneloup (ed), *Droit européen du divorce/European Divorce Law* (LexisNexis 2013); Sabine Corneloup and Natalie Joubert, 'Autonomie de la volonté et divorce: le règlement Rome III', in Amélie Panet, Hugues Fulchiron and Patrick Wautelet (eds), *L'autonomie de la volonté dans les relations familiales internationales* (Bruylant 2017) 179, 194.