REFORM OF EU FAMILY LAW

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There are more than 16 million international couples in the EU, according to the European Commission. From January 2019, their rights and obligations will be secured by a European regulation for matrimonial property regimes and the so-called “registered partnerships”.

Erasmus, the Single Market... People across Europe increasingly study, live, work and build families abroad. Until now, however, there was no EU legislation dealing with property regimes for international couples.

Eighteen EU countries have decided to take their cooperation one step further with an EU regulation that will bring certainty for married couples and registered partners to manage their assets in the event of a divorce or the death of one of the spouses.

In this special report, we analyse the main changes the legislation will bring.
International couples will find it easier to break up from 2019. After years of negotiation, 18 European Union countries will introduce an EU legislation to rule the property regimes for marriages and registered partners in the Union thanks to enhanced cooperation.

EU citizens increasingly move across national borders, thanks to the freedom of movement within the Union. This has boosted the number of international marriages or registered partnerships, which the Commission estimated around 16 million in 2011.

However, until now, there was no EU regulation on how to determine jurisdiction and applicable law for matrimonial property regimes and the property consequences of registered partnerships during the common life or in case of divorce, separation or the death of one of the spouses.

Therefore, international couples faced uncertainty when managing their assets in any of those unfortunate events. This will come to an end in 2019, at least in the 18 member states, as two new regulations, one for marriages and one for registered partnerships, will start applying.

The aim of both laws is to help determine which countries’ courts

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should deal with issues concerning the property regimes in case of a dispute, which law is applicable or how to ensure enforcement of judgements and notarial documents in another member state.

The legislation aims to harmonise the procedure, so that just one member state will deal with international couples’ property issues, but does not affect the competence of the national authorities in this area.

These two new regulations will bring legal certainty and make life easier for people and legal practitioners when dealing with matrimonial property conflicts.

“These rules will fill an important gap in the field of Union family law and will allow the full operation of the Union regulations on divorce and succession,” said Commissioner for Justice Věra Jourová.

**KEY POINTS**

Apart from determining which court is competent, these two legislations will facilitate the recognition and enforcement of a judgment in one member state on property matters given in another member state.

However, enforcement, which is also eased by the two legislative instruments, is not automatic. It requires a declaration by the member state of enforcement, which can be refused if the decision violates the country's public policy.

The proposal also introduced the principle of unity of the legal regime applicable to property aspects of registered partnerships, regardless where the property is located.

Both regulations allow the international couple to choose the applicable regimen.

Married couples can opt for the law of their nationality or habitual residence, whilst registered partners may also choose the law of the country where they registered their partnership.

**A LONG DIFFICULT NEGOTIATION**

Although negotiations started in 2011, the adoption of the legislation was blocked for years at the Council. As these regulations concern family law, unanimity is required to take any decision.

The blockage can be explained by the politically sensitive nature of the proposal. Some member states had concerns that this law will lead to recognition of same-sex marriages as well registered partnerships, in countries where those do not exist.

Nevertheless, a group of countries expressed their willingness to move forward in the framework of the enhanced cooperation and the Commission tabled two new proposals in 2016, which are the basis for the regulation.

So far, the following countries have expressed their wish to participate: Sweden, Belgium, Greece, Croatia, Slovenia, Spain, France, Portugal, Italy, Malta, Luxembourg, Germany, the Czech Republic, the Netherlands, Austria, Bulgaria, Finland and Cyprus.

The adopted regulation, which does not deal with the nature of the couple, also includes a series of safeguards to ensure the respect to national legal systems to help cope with some member states' sensitivities.
New rules on property regimes for international couples will enter into force next year. Věra Jourová, the EU’s Justice Commissioner, says the new legal system is “clear, robust and flexible” and hopes more countries will join them once they see the benefits for their citizens.

Věra Jourová is the commissioner for justice, consumers and gender equality. She replied in writing to questions from EURACTIV.com.

Next year, new EU rules on property regimes of international couples will start to apply. What will be the main advantages for Europeans?

In June 2016, the Union adopted rules to help international couples, whether in a marriage or a registered partnership, to manage their property on a daily basis and also share it in the unfortunate case of divorce or death. These rules will apply as of 29 January 2019.

Currently, in the framework of enhanced cooperation, 18 member states have agreed to apply these new rules: Sweden, Belgium, Greece, Croatia, Slovenia, Spain, France, Portugal, Italy, Malta, Luxembourg, Germany, the Czech Republic, the Netherlands, Austria, Bulgaria, Finland and Cyprus. Any other member state may join the rules at any time.

In case of divorce or death of a partner, the lives of 16 million international couples can become even more difficult through burdensome procedures and unclear legal situations cross-border.

The new rules will help international couples know what courts should deal with matters concerning their property and what national law should apply to such matters.

They will also facilitate the recognition and enforcement of a judgment in one Member State on property matters given in another Member State.

These rules will fill an important gap in the field of Union family law and will allow the full operation of the Union regulations on divorce and succession.

The new regime would give the option to decide what national rules or courts apply in case of divorces or inheritance.

At the same time, not all EU member states are part of the new framework.

Is it the new system clear and robust enough to address discrepancies?

Yes, the system is clear, robust and flexible as well. Let me explain.

Non-participating member states will keep their current status. This means that non-participating member states will continue to apply, as they do today, their national law to cross-
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border situations dealing with the property regimes of marriages and registered partnerships in order to determine what court should deal with a case on these matters and what law should apply to such matters.

Non-participating member states will also continue to apply, as they do today, their national law to the recognition and enforcement of decisions on these matters given in one of the participating Member States.

For their part, participating member states will continue to apply, as they do today, their national law to the recognition and enforcement of decisions given in a non-participating member state.

The situation in the area of the property regimes of international couples will therefore be similar to the situation in other civil justice areas which do not cover all member states, such as divorce and succession.

In any event, the application of the regulations on the property regimes of marriages and registered partnerships will not depend on the nationality of the members of the couple, that is, on whether or not the members of the couple are nationals of a participating member state.

The authorities of the participating member states will apply the regulations on the property regimes of marriages and registered partnerships to all citizens that bring a matter before them regardless of the nationality of the citizens.

There is therefore no potential negative impact of the enhanced cooperation on the internal market.

The new rules will apply only to 18 member states. Some countries including Poland feared that the institutions of marriage and partnership would be altered.

Are you hopeful that other countries would join soon? Or would there be ‘two Europes’ when it comes to family and property laws in the EU?

The first time that the Union used the procedure of enhanced cooperation was to adopt the Rome III Regulation on the law applicable to divorce. The Rome III Regulation was adopted by 14 member states and, subsequently, three others joined the enhanced cooperation.

The regulations on the property regimes of international couples were adopted by 18 member states, and I am hopeful that additional member states will join the enhanced cooperation when they perceive the benefits of the regulations for citizens.

Indeed, the larger the number of members that participate in the enhanced cooperation the larger the number of citizens that will benefit from the regulations.

Last June, the European Court of Justice ruled that certain rights and benefits of spouses are granted regardless of what national laws say when it comes to gay marriages.

What will be the impact of this ruling on countries that did not join the new regime?

In accordance with the EU Treaties, member states are competent in matters of substantive family law. This means that it falls within the competence of member states to define family and marriage and, therefore, to decide whether or not they allow the marriage of persons of the same sex under their national law.

The recognition in a member state of a marriage concluded in another member state is also currently governed by national law. However, member states must apply their national law respecting Union law, including the case law of the Court of Justice, on free movement of citizens within the Union.

On 5 June 2018, the Court of Justice gave a judgment in the Coman case. The judgment does not affect the competence of member states to legislate on substantive family law and, therefore, to decide whether or not to allow same-sex marriage.

As the Court pointed out, the legal issue at the heart is not that of legalisation of marriage between persons of the same sex but that of the freedom of movement of a Union citizen.

Member states are free to provide or not for marriage for persons of the same sex in their internal legal order. Nevertheless, member states may not limit the freedom of movement of a Union citizen, by refusing to grant his or her same-sex spouse, a derived right of residence in their territory.

Given that the ruling in the Coman case does not affect the competence of member states to legislate on substantive family law, the decision of member states on whether or not to join the enhanced cooperation should not be affected by this ruling.

The goal of the new framework aimed at clarifying what rules and courts are applicable to cross-border couples and properties. But the situation will become more complex after the UK’s departure from the EU. Are you concerned about the impact of Brexit in this area?

The UK decided not to join into the enhanced cooperation that led to the adoption of the two regulations on the property regimes of international couples.

As is the case of other Union instruments on civil law, non-participating member states are treated as a non-EU country for the purposes of these regulations.

This means that the treatment of the UK in this context will not change after Brexit.
New property rules for international couples greeted as ‘achievement’

By Jorge Valero | EURACTIV.com

The new regulations on property regimes for international couples were welcomed on Tuesday (23 October) by professionals and academists as a step forward that will benefit European citizens, but some questions remain ahead of their entry into force in January 2019.

In 2016, 18 member states decided to move forward and clarify the applicable rules and courts in case of divorce or the decease of one of the spouses for handling the property of international marriages or registered partnerships in the EU.

The participating countries in the enhanced cooperation are Sweden, Belgium, Greece, Croatia, Slovenia, Spain, France, Portugal, Italy, Malta, Luxembourg, Germany, the Czech Republic, the Netherlands, Austria, Bulgaria, Finland and Cyprus.

Around 16 million were living in the bloc in 2011, according to the European Commission.

“We are very happy to see these regulations”, said Christiane Wendehorst, president of the European Institute of Law during a conference on this topic held in Brussels on Tuesday.

In her view, the two new laws represent an “achievement” that will bring “great benefits” to European citizens.

These are ambitious regulations, given the level of harmonisation that would bring, added Patrick Wautelet, a professor at the University of Liege.

“We like new rules that solve more problems than they create”, summarised Paolo Pasqualis, an

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Italian notary and former president of Notaries of Europe.

But despite the general consensus on the progress made, Ilaria Viarengo, a professor at the University of Milan, pointed out that “some questions” remain open.

The new rules aim to harmonise the procedure for those member states that were part of the enhanced cooperation when dealing with the property regimes of international couples.

After four years of negotiations, 10 member states refused to move forward with the majority as some of them were concerned about the impact of the new rules on the recognition of marriages, in particular of gay couples.

The new rules introduced procedures to clarify the applicable law and the competent court. However, some issues would require further clarification when it comes to implementing the new rules, including how to deal with non-participating countries.

Some lack of clarity was due to the political sensitivity of the topic, as the definition of marriage or registered partnerships was not included in the regulation for not interfering with national law.

“A lot of leeway was given to member states in this field”, said Wautelet.

However, a landmark decision by the EU Court of Justice on a case brought by a Romanian gay couple, whose freedom of movement was limited because their marriage was not recognised in the country, was seen as an early signal of further harmonisation down the road.

In the longer term, Wautelet predicted that EU judges would dislike cases where marriages are not recognised across the Union, reducing in practice the leeway given to member states.

In the new rules, the applicable law prioritises the national law of where the spouses live, and secondly their common nationality.

But if the couple lacks a common residence or common nationality, or when one or both have double nationality, the new rules also leave room for interpretation.

CERTIFICATE

“The discretion is going to exist”, commented Pedro Carrión, a public notary in Spain.

In order to address some of the shortcomings of the regulation and facilitate the work of professionals, Carrión proposed to issue certificates to clarify what the couple’s regime is and what it implies in the applicable national law, both if they have chosen it and if it is applicable in the absence of choice.

His proposal was welcomed by many of his peers.

“It would state the matrimonial regime, if you are separate property system or community property system, and it would be very helpful for those who are not law experts”, said Pasqualis.

For example, bankers would know what spouses’ signatures are required for different procedures, depending on the regime.

Cristina González, a professor at the University of Barcelona, agreed that this certificate would be “meaningful”.

However, she warned that people should first get informed of their regimes and their consequences, a role that notaries could play. In Spain, notaries are also allowed to marry couples.

“People don’t know what is a matrimonial regime, and even if they do, they are not familiar with theirs”, Pasqualis pointed out.

The issue of the certificate was not raised during the long negotiations, Commission officials commented.

Salla Saastamoinen, director at Directorate-General Justice at the European Commission, said that the institution will collect all issues raised during the implementation.

But she recalled that this is only the beginning of a long process, given that member states will only start applying the new rules next January.

The EU executive also poured some cold water on finetuning the rules any time soon, given how difficult it was to reach an agreement and the benefits that the new rules would already bring once they are in place.
Every person from birth to death enters into relationships with others. These relationships, whatever their type, need to be regulated in order to coexist well, argues Pedro Carrión García de Parada, on the occasion of the European Day of Justice.

Pedro Carrión García de Parada is President of the Working Group on Family Law at CNUE, the Council of Notaries of the European Union.

The best thing would be for one's own wishes to play an important part in their regulation, for there to be autonomy in their development, for the individuals themselves to determine and regulate these relationships, always with the most scrupulous respect for the limits set by law and with full respect for the rights of others.

In the area of family law, a person may wish to regulate his or her relationships as a couple – whether within a marriage or a stable union – or a possible crisis in the relationship, or living together with his or her children or with the other parent, or his or her parenthood by assisted fertilisation or by adoption or as a consequence of surrogacy, or the protection of people with disabilities, including possible future incapacity.

It is true that the European legislator does not have a comprehensive regulatory framework of which citizens can avail themselves. In many matters, in the absence of common European rules, it is necessary to resort to the law of the State of which one is a national, the solution varying according to which regulation is applied, which can provoke, in case of conflict, an unbridled race in search of the most suitable jurisdictional body or the law that is of most interest.

Logically, this is not good for legal certainty, nor for social peace or for the economy in general. This legal uncertainty causes citizens to waste a great deal of time and money. The European Union has been trying for some time to put a stop to this situation.

The solution that has been chosen in the field of family law, ruling out the drafting of a single body of legislation, either with rules of substantive content or with rules of private international law, has been to provide sectoral responses, to resolve specific issues, adopting conflict rules which, respecting the legislative autonomy of each Member State, determine the competent court, the applicable law and which documents can be recognised, accepted and enforced.

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beyond the borders of the State in which they were born.

Although I personally believe that it should not be so difficult to agree on common substantive rules, if there really is a genuine and firm desire to put aside nationalism, the solution adopted does not seem bad to me: adopting conflict rules which resolve which national law will be applicable, which court or authority will have to resolve the conflict and which documents will be able to have effects in Member States other than the one in which they were generated.

Nor do I think it bad that it was decided to resort to the enhanced cooperation procedure because it was impossible for all the EU Member States to reach agreement. It would be preferable for them all to be participating Member States, but in the face of the rigidity of some and the continuing opposition of others, who have nevertheless been given too much room, it is best for the process of creating a Europe of law that common texts are adopted by a substantial majority. In many cases, I am convinced that the social developments that will inevitably take place in non-participating Member States will lead them to join as well. It is a matter of time.

On the other hand, I am not in favour of the obsession with developing standard models, however optional they may be, to which citizens can adjust when they conduct their business or express their will. These models do not exclude the need for advice, they do not shorten or reduce the cost of any procedure and they represent a tightening of the law, they restrict party autonomy, the diversity of rules and of life itself by not being able to foresee all the situations that may arise.

These models do not prevent, on the contrary they exacerbate, the danger of adopting solutions that are neither wanted nor well known, and that lead one to believe that no advice is needed. The forms could lend themselves to abuse, fraud, imbalances, impositions, ignorance, errors, false expectations, resulting in a will that can easily be attacked and challenged, thereby breaking the legal certainty and social peace that are the objective of these common European rules.

I would like to highlight as provisions already adopted, some of which are in the process of being reformed, Regulation No 2201/2003 of 27 November 2003 (Brussels Ia) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, which deals with marital crises, the competent court and the recognition and enforcement of authentic decisions and documents. It is supplemented by another Regulation, Council Regulation (EC) No 1259/2008 of 20 December 2008 (OJEU 29/12/2008) and the two Regulations of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJEU 10.01.2009), to which I add the Directive on mediation in civil and commercial matters of 21 May 2008 (OJEU 24.5.2008) and the two Regulations which were the subject of a conference held in Brussels on 23 October 2018, organised by the Commission with the collaboration of the CNUE, which will become applicable on 29 January 2019 and which are Council Regulation 1103/2016 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 and Council Regulation No 1104/2016 of the same date, of identical content, but relating to the property consequences of registered partnerships.

Both have the same structure, recognise as competent both the jurisdictional bodies, which do not necessarily need to be courts, and other authorities, accept the agreement both to determine the competent body or authority and the applicable law and declare their respect for judicial decisions and for authentic public documents for which they provide for a regime of recognition/acceptance and simple and rapid execution, with few grounds for opposition, dispensing with legalisations, apostilles and similar formalities.

I welcome these texts, which recognise the importance of the form that agreements should take, as an instrument for achieving duly informed consent, and recall the role that the notary plays in this regard by giving authenticity to the document.

Hopefully, more texts will arrive. There are matters that knock at the door, such as, for example, the protection of people in vulnerable situations or, more controversial, surrogacy.

What is important is that the European legislator persists in its work and gives citizens the tools to regulate the relationships they encounter throughout their lives, making their lives easier.
How family law will change our lives: a practical case

By Beatriz Rios | EURACTIV.com

In January next year, a new regulation will govern matrimonial property across 18 member states. We analyse how a real case would have been different with the new legislation in place.

In 2007, Mr Iliev and Ms Ilieva got married in Bulgaria. Eight years after tying the knot, the couple split, and soon after their divorce, Mr Iliev brought an action to the District Court of Varna seeking the liquidation of a motor vehicle, purchased by his ex-wife and registered in her name while they were still married.

He argued that even if the motorbike was registered in Italy and in her ex-wife’s name, it was purchased with joint funds. Conforming to the Bulgarian Family law, spouses have indeed the same rights over property acquired jointly during the marriage.

Both partners were registered as permanent residents in Bulgaria but habitually residing in Italy on the date of their marriage, of their divorce, and when they acquired the vehicle.

His ex-wife did not contest the decision of Mr Iliev to introduce a lawsuit but to bring the case to a Bulgarian court. According to Ms Ilieva, the Italian courts would have had jurisdiction in the case.

She argued that the so-called ‘Brussels Convention’ on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters would apply in this case.

According to this EU regulation, “persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member

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State.” Ms Ilieva did not only hold an Italian passport but lived in Italy too.

However, Bulgaria’s family law states that Bulgarian tribunals shall have international jurisdiction when the applicant is a Bulgarian national. The Court of Varna then referred the case to the European Court of Justice (ECJ) for clarifications.

ECJ RULING PREVIOUS TO NEW FAMILY LAW

The key point in this case was whether or not the courts would consider the case as a matter of matrimonial property, because these were not governed at the time by EU law, but by national regimes.

The European tribunal ruled indeed that the Brussels Convention was not applicable in this case in 2017, as the matter dealt with matrimonial property issue.

The convention does not apply to “the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession,” the ECJ confirmed.

The Court, however, did not clarify which court was competent for the case, as at the time there was not EU regulation. From January 2019, there will be.

HOW WOULD THE CASE CHANGE WITH THE NEW REGULATION?

As from January 2019, thanks to the enhance cooperation mechanism, at least 18 out of 28 member states will share a common EU regulation in this matter.

The law will help establishing the criteria to determine which countries’ courts should deal with issues concerning the property regimes, which law is applicable, or how to ensure enforcement of judgments and notarial documents in another member state.

The new regulation establishes that where a court of a Member State is seized to rule on an application for divorce, legal separation or marriage annulment pursuant, “the courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that application.”

With this regulation in place, it would have been well the Bulgarian court dealing with the dispute between Mr Iliev and Ms Ilieva and not the Italian tribunals, as she argued.

It gives the opportunity to the international couples as well to decide to apply whatever legislation suits them better; the law of the state where the spouses, or one of them, is habitually resident or the law of a State of nationality of either partner.

The new regulation starting to apply from January next year will hence bring more legal certainty for people dealing with matrimonial property issues.

However, so far, only 18 out of 28 EU members have expressed their wish to participate: Sweden, Belgium, Greece, Croatia, Slovenia, Spain, France, Portugal, Italy, Malta, Luxembourg, Germany, the Czech Republic, the Netherlands, Austria, Bulgaria, Finland and Cyprus.