

# **Warming up: Instruments in international family law and terminology**



**13 million**  
Europeans living in another EU  
Member State



**16 million**  
International couples in the EU

**Some 2.2 million marriages and 946 thousand divorces took place  
in the EU in 2016**

Source: [https://ec.europa.eu/eurostat/statistics-explained/index.php/Marriage\\_and\\_divorce\\_statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php/Marriage_and_divorce_statistics)

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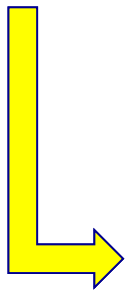
- European e-Justice Portal:  
<https://e-justice.europa.eu/home.do>
- On family matters:  
[https://e-justice.europa.eu/content\\_family\\_matters-44-en.do](https://e-justice.europa.eu/content_family_matters-44-en.do)
- European Judicial Network (EJN) in civil and commercial matters:  
[https://e-justice.europa.eu/content\\_ejn\\_in\\_civil\\_and\\_commercial\\_matters-21-en.do?init=true](https://e-justice.europa.eu/content_ejn_in_civil_and_commercial_matters-21-en.do?init=true)
- EU law:  
<http://eur-lex.europa.eu>
- EU case law:  
<http://curia.europa.eu>
- HCCH (Hague Conference on Private International Law)  
<https://www.hcch.net/en/home>

# 1) The development of EU law in family matters

- 1.a) The free movement of persons  
as background
- 1.b) The EU competence  
in civil judicial cooperation  
as broader context

# 1.a) The free movement of persons as background

- **EU Treaties**
- **EU secondary legislation**



**mutual recognition of personal and  
family status**

- **The EU has stepped into MS competences**  
**two-fold approach:**
  - a) enactment of EU PIL legislation**
  - b) in those areas that remain under the MS' competences (e.g. civil status), national legislations still need to comply with EU law**  
**+ role of the CJEU**

## 1.b) The EU competence in civil judicial cooperation as broader context

- **Purpose** set out in the Treaties: building a European area of justice
- **Tools:** different levels of cooperation (mutual recognition and mutual trust)
- **Benefit** for EU citizens: no complexities
- Evolution of the competence (Amsterdam, Nice, Lisbon – Art. 81 TFEU).



- **Art. 81(3) TFEU:**
  - family law matters with transnational implications
  - **special legislative procedure**
- **Enhanced cooperation** (Art. 20 TEU, Arts. 326 to 334 TFEU)
- Special position of some MS
  - **the UK and Ireland (Protocol No. 21)**
  - **Denmark (Protocol No. 22)**

## **2) The EU PIL secondary legislation in family matters**

- 2.a) Overview of the main EU PIL acts in civil judicial cooperation
- 2.b) The EU PIL instruments governing selected aspects of family law
- 2.c) The interplay with the international legal instruments

## On a preliminary note

### PIL questions:

- a) which **court** has international jurisdiction to hear the case? (*jurisdiction*)
- b) which **law** governs the substantive aspects of the case? (*applicable law*)
- c) under which conditions can a **decision** issued abroad be recognised and enforced in the requested State? (*recognition and enforcement*)

## 2.a) Overview of EU PIL acts in civil judicial cooperation

### Brussels regime

(jurisdiction/  
recognition and enforcement)

- **Brussels Ia** Regulation, for civil and commercial matters (Reg. No. 1215/2012)
- **Brussels IIa** Regulation, for matrimonial matters and parental responsibility (Reg. No. 2201/2003)

### Rome regime

(law applicable)

- **Rome I** Regulation, for contractual obligations (Reg. No. 593/2008)
- **Rome II** Regulation, for non-contractual obligations (Reg. No. 864/2007)
- **Rome III** Regulation, for divorce and legal separation (Reg. No. 1259/2010)

## “Complete” PIL instruments

- Maintenance Regulation (Reg. No. 4/2009)
- Succession Regulation (Reg. No. 650/2012)
- Matrimonial property (Reg. No. 2016/1103)
- Property consequences of registered partnerships (Reg. No. 2016/1104)

# Acts on uniform EU procedures in civil and commercial matters

(alternative to domestic procedures)

- European enforcement orders for uncontested claims (Reg. No. 805/2004)
- European order for payment (Reg. No. 1896/2006)
- European small claims procedure (Reg. No. 861/2007)
- European account preservation order (Reg. No. 655/2014)
  
- **Insolvency proceedings** (Reg. No. 2015/848)
- **Service of documents** (Reg. No. 1393/2007)
- **Taking of evidence** (Reg. No. 1206/2001)

## 2.b) The EU PIL instruments governing selected aspects of family law

- acts of secondary law (Regulations)
- analysis of the respective scope of application and main issues
- focus on
  - Brussels IIa Reg.
  - Maintenance Reg. (and 2007 Hague Protocol)
  - Rome III Reg.

Predecessor:

**Convention on Jurisdiction and the  
Recognition and Enforcement of  
Judgments in Matrimonial Matters of 28  
May 1998 (Brussels II Convention)**

- **never ratified nor come into force**
- **limited scope of application regarding parental responsibility**



## Reg. 1347/2000 (Brussels II)

- **Advantages** of a EU Regulation over an international Convention
- 1999 proposal based on the **Brussels II Convention** → **Reg. 1347/2000** on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses
  - Adopted: 29.5.2000. In force: 1.3. 2001
  - Scope of application

## Reg. 2201/2003 (Brussels IIa)

- repealing Reg. 1347/2000 (Brussels II)
- concerning **jurisdiction and recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility**
- In force: 1 March 2005
- binding on all EU MS (including the UK and Ireland) with the exception of Denmark

## Reg. 2201/2003 (Brussels IIa)

### • **Scope of application – Art. 1(1)**

- Divorce, legal separation or marriage annulment
- Attribution, exercise, delegation, restriction or termination of parental responsibility

### Unresolved issues

- 1) Definition of “marriage”
- 2) enforcement procedures
- 3) difficult interplay with the 1980 Hague Convention (Art. 11 BIIa)
- 4) no provisions on the applicable law
  - divorce/separation: Rome III Reg.
  - parental responsibility: 1996 Hague Convention

# Maintenance obligations

- **Jurisdiction:** originally Brussels I regime (Art. 5 of Reg. 44/2001)
- Key aspect: **applicable law** - negotiations between the **EU** and the **HCCH**
- **Scope of application:** maintenance obligations arising from a family relationship, parentage, marriage or affinity
- entry into force: 30.1.2009; applying since 18.6.2011
- binding on all EU MS (no Denmark)
- Complete PIL legal instrument, but **2 procedures on recognition and enforcement** (MS bound by the 2007 Hague Protocol or not)

## Law applicable to separation/divorce claims

- 14 March 2005: **Commission's Green paper** on applicable law and jurisdiction in divorce matters (COM(2005)82 final)
- 17 July 2006: proposal complementing the BIIa Reg. (**COM(2006)399**), **withdrawn** by the Commission (lack of unanimity in the Council as required by Art. 81(3) TFEU)

## Reg. 1259/2010 (Rome III)

- **enhanced cooperation** in the area of the **law applicable to divorce and legal separation**
- **17 MS** participating
  - originally, 14 MS (Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia)
  - 3 MS joined at a later stage (Lithuania, Greece, Estonia)

## Reg. 650/2012 (Succession)

- concerning **jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments** in matters of succession, and the creation of a **European Certificate of Succession**
- it applies to deaths on or after 17 August 2015
- UK, Ireland and Denmark opted out

## Reg. 2016/1103 (Matrimonial property)

- **enhanced cooperation** in the area of **jurisdiction, applicable law** and the **recognition and enforcement of decisions** in matters of matrimonial property regimes
- it applies as of 29 January 2019
- **18 MS** participating
  - Belgium, Bulgaria, Cyprus, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, Netherlands, Austria, Portugal, Slovenia, Finland and Sweden
  - Estonia announced its intention to take part



## Reg. 2016/1104 (Property registered partnerships)

- **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
- it will apply as of 29 January 2019
- **18 MS** participating
  - Belgium, Bulgaria, Cyprus, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, Netherlands, Austria, Portugal, Slovenia, Finland and Sweden
  - Estonia announced its intention to take part

## 2.c) The interplay with the international legal instruments

### 1980 Hague Convention (Child abduction)

- entered into force on 1 December 1983
- 100 Contracting States (**all EU MS**; most recently: Tunisia since 1.10.2017, Cuba 1.12.2018, Guyana 1.5.2019, Barbados 1.10.2019)
- interplay with **BIIa Reg.** with regard to child abduction (the Reg. **complements** the 1980 Hague Conv. **in intra-EU cases**)

## 1996 Hague Convention (Child protection)

- entered into force on 1 January 2002
- 49 Contracting States (**all EU MS**; most recently: Cuba since 1.12.2017, Honduras 1.8.2018, Fiji 1.4.2019, Paraguay 1.7.2019; only signatory States: USA, Canada, Argentina)
- interplay with **BIIa Reg.** with regard to the **law applicable to parental responsibility matters** (not governed by the Reg.)

## 2007 Hague Protocol (law applicable to maintenance obligations)

- entered into force on 1 August 2013
- 30 Contracting States (**all EU MS, except the UK and Denmark**, + Serbia, Kazakhstan and Brazil; Ukraine signed on 21.3.2016)
- interplay with **Maintenance Reg.** with regard to the **law applicable to maintenance obligations** (Art. 15 of the Reg. directly refers to the Protocol)

# 3) The EU family law instruments 'in action'

3.a) The uniform interpretation  
of the CJ

3.b) The autonomous concepts  
under EU law

## 3.a) The uniform interpretation of the CJ

### I. Reference for a preliminary ruling (Art. 267 TFEU)

- national court or tribunal
- Role of the parties
- Requirements
- costs and legal aid

### II. Urgent preliminary ruling procedure (Arts. 107-114 of the Rules of Procedure of the CJ, [https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp\\_it.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_it.pdf))

- **AFSJ** (in particular, parental responsibility cases)
- shorter deadlines in the procedure

## 3.b) The autonomous concepts under EU law

(I) common definitions to overcome (at least partially) the **differences** in national legislations (+ clarification by the CJ):

i. **COURT** (Art. 2 BIIa, Art. 2 Maint., Art. 2 RIII, Art. 3 Succ.)

CJ, 20.12.2017, C-372/16, *Sahyouni*

ii. **JUDGMENT** or **DECISION** (Art. 2 BIIa, Art. 2 Maint., Art. 3 Succ.)

### iii. LIS PENDENS (Art. 19 BIIa, Art. 12 Maint., Art. 17 Succ.)

- False lis pendens (divorce/separation)
- CJ, 6-10-2015, case C-489/14, *A v B*

### iv. SEISING OF A COURT (Art. 16 BIIa, Art. 9 Maint., Art. 14 Succ.)

- Interaction **Reg. No 1393/2007** on **service of documents**
- CJ, 22-6-2016, case C-173/16, *M.H. v M.H.*



## (II) uniform notions

### HABITUAL RESIDENCE (HR)

- **BIIa**: used as ground of jurisdiction in both matrimonial and parental responsibility matters
- **Maint.**: used as ground of jurisdiction, and by reference to the 2007 Hague Protocol, also as a connecting factor to determine the applicable law
- **RIII**: used as connecting factor for a choice of law, as well as in the absence of a choice
- **Succ.**: used both as general ground of jurisdiction and general connecting factor

**BUT in none of them the notion is defined**

- **Only** the **Succ. Reg.** provides **guidance on the determination of HR** of the deceased at the time of death (Recital 23)
- **overall assessment** of the circumstances of the life of the deceased during the years preceding his death and at the time of his death
  - relevant factual elements, in particular: duration and regularity of the deceased's presence in the State concerned, and conditions and reasons for that presence
- a **close and stable connection** with the MS must be established
- **possible inter-instrumental interpretation? NO**, given the specific subject matter dealt with in this Reg.

## Case law on habitual residence

- a) CJ, 15-9-1994, case C-452/93, *Pedro Magdalena Fernandez*, para. 22, regarding an **expatriation allowance**
- b) CJ, 2-4-2009, case C-523/07, *A*, paras. 37-42 on the **HR of a child**
- c) CJ, 15-2-2017, case C-499/15, *W and V v Z*, paras. 60-66, on the **HR of a child**
- d) CJ, 28-6-2018, case C-512/17, *HR v KO*, on the **HR of a child** (MS of dual nationality or MS of residence)

- e) CJ, 22-12-2010, case C-497/10 PPU, *Mercredi*, para. 56 on the **HR of an infant**
- f) CJ, 8-6-2017, case C-111/17 PPU, *OL v PQ* on the **HR of an infant** born in a MS other than the parents' HR
- g) CJEU, 9-10-2014, case C-376/14 PPU, *C v M*, para. 54 on the **HR of a child** in an **child abduction case**

# Summarising conclusions

When addressing an intra-EU cross-border family dispute:

	jurisdiction	applicable law	recognition & enforcement
<b>matrimonial matters</b>	Brussels Ila Reg.	Rome III Reg.	Brussels Ila Reg.
<b>parental responsibility</b>	Brussels Ila Reg.	1996 Hague Conv.	Brussels Ila Reg.
<b>maintenance</b>	Maintenance Reg.	Maintenance Reg. + 2007 Hague Protocol	Maintenance Reg. + 2007 Hague Protocol
<b>international child abduction</b>	1980 Hague Conv. + Brussels Ila Reg.		1980 Hague Conv. + Brussels Ila Reg.