

JURISDICTION IN CASES OF DIVORCE, LEGAL  
SEPARATION OR MARRIAGE ANNULMENT

*COMPETENCIA JUDICIAL EN CASOS DE DIVORCIO,  
SEPARACIÓN LEGAL O ANULACIÓN MATRIMONIAL*

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**ABSTRACT:** The subject of coordination is fundamental for the functioning of jurisdictional rules of the Regulation n.2016/1103 on matrimonial property regimes and Regulation n.2016/1104 on the property consequences of registered partnerships. Both Property Regimes Regulations have the purpose of gathering litigation before the courts of one Member State and have the related procedures managed by the courts of the same Member State. Recital 34 of Regulation No. 2016/1103 specifies that matters of matrimonial property regime related to proceedings pending before the court of a member state hearing an application for divorce, legal separation or marriage annulment should be dealt with by the courts of that Member State, "unless the jurisdiction to rule on the divorce, legal separation or marriage annulment may only be based on specific grounds of jurisdiction. In such cases, the concentration of jurisdiction should not be allowed without the spouses' agreement".

Unfortunately, the purpose of concentrating the proceedings is not always met. The Eu system of private international law in family matters has gradually extended its terms of reference from divorce and legal separation to the financial aspects of family life, at least for the Member States that will take part in the enhanced cooperation. Nonetheless, practically these topics are often addressed in the same action for divorce. Issues such as assigning the matrimonial home, and the definition of the obligation of one spouse to support the other financially are strongly and substantially connected to the ruling on divorce, and to the conditions and reasons that ground that ruling. The need to coordinate between the EU instruments becomes apparent because spouses litigate over the financial consequences of divorce. As a result, it seems reasonable and in the parties' interests to have divorce and the related financial aspects handled by the same court.

**KEY WORDS:** Coordination; concentrating proceedings; related procedures; divorce, legal separation or marriage annulment; jurisdiction; international families; agreements.

**RESUMEN:** El tema de la coordinación es fundamental para el funcionamiento de las normas jurisdiccionales del Reglamento núm. 2016/1103 sobre regímenes económicos matrimoniales y el Reglamento núm. 2016/1104 sobre las consecuencias patrimoniales de las uniones registradas. Ambos Reglamentos tienen por objeto reunir los litigios ante los tribunales de un Estado miembro y hacer que los procedimientos correspondientes sean gestionados por los tribunales del mismo Estado miembro. El considerando 34 del Reglamento núm. 2016/1103 especifica que los asuntos de régimen económico matrimonial relacionados con procedimientos pendientes ante el tribunal de un Estado miembro que conozca de una solicitud de divorcio, separación legal o anulación del matrimonio deben ser tratados por los tribunales de ese Estado miembro, "a menos que la jurisdicción para dictaminar sobre el divorcio, la separación legal o la anulación del matrimonio solo pueda basarse en motivos específicos de competencia. En esos casos, no debe autorizarse la concentración de la competencia sin el acuerdo de los cónyuges". Lamentablemente, el objetivo de acumular los procedimientos no siempre se alcanza.

El sistema de la UE de derecho internacional privado en materia de familia se ha ampliado gradualmente en el ámbito del divorcio y la separación legal a los aspectos económicos de la vida familiar, al menos para los Estados miembros que participarán en la cooperación reforzada. Sin embargo, prácticamente estos temas suelen abordarse en una misma demanda de divorcio. Cuestiones como la asignación del hogar familiar y la definición de la obligación de uno de los cónyuges de mantener económicamente al otro están estrecha y sustancialmente relacionadas con la sentencia de divorcio y con las condiciones y razones que la sustentan. La necesidad de coordinar los instrumentos de la UE se hace evidente porque los cónyuges litigan sobre las consecuencias económicas del divorcio. Como resultado, parece razonable y en interés de las partes que el divorcio y los aspectos patrimoniales relacionados sean tratados por el mismo tribunal.

**PALABRAS CLAVE:** Coordinación; concentración de procedimientos; procedimientos relacionados; divorcio; separación legal o anulación matrimonial; competencia; familias internacionales; acuerdos.

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## **I. INTRODUCTION.**

The subject of coordination is fundamental for the functioning of jurisdictional rules of the Regulation n.2016/1103 on matrimonial property regimes and Regulation n.2016/1104 on the property consequences of registered partnerships. Both Property Regimes Regulations have the purpose of gathering litigation before the courts of one Member State and have the related procedures managed by the courts of the same Member State.<sup>1</sup> Pursuant to Article 4 and Article 5, if a Court of a Member State is seised to rule on a dissolution or annulment of either a marriage or a registered partnership, the courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime which are connected to dissolution or annulment cases.

Proceedings in matrimonial property regimes usually concern the sell-off of the matrimonial property regime following the termination of the matrimonial relationship through the death of one spouse, legal separation or divorce. On the other hand, it must be assumed that there will be fewer cases in which a decision falling within the scope of the regulations is taken during marriage or a registered partnership.

Where matters of matrimonial property emerge in connection with the application of divorce, legal separation or marriage annulment (which occurs very often), Article 5(1) of Regulation 2016/1103 provides that the court of the Member State seised pursuant to Regulation 2201/2003 on matrimonial matters and matters of parental responsibility has jurisdiction to rule on matters of the matrimonial property regime arising in connection with that application. When the jurisdiction for divorce is based on the first four alternative criteria of Article 3(1) (a) of Regulation 2201/2003 the extension is self-activating. Likewise, jurisdiction over the property matters lies with the courts seised for divorce when it is a court of the Member State of the nationality of both spouses according to Article 3(1)(b) of Regulation 2201/2003. On the contrary, an agreement between the spouses is necessary if the jurisdiction over the divorce is based on other specific

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<sup>1</sup> See Recitals 32-34.

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grounds of jurisdiction: this results when jurisdiction is based on fifth and sixth indent of Article 3 (one year or six months, if national, of habitual residence of the applicant), Article 5 (conversion of legal separation into divorce) and Article 7 (residual jurisdiction). Obviously, while Regulation 2201/2003 binds all Member States, Article 5 of the Property Regulations will only affect the Member States participating in the enhanced cooperation.

Recital 34 of Regulation No. 2016/1103 specifies that matters of matrimonial property regime related to proceedings pending before the court of a member state hearing an application for divorce, legal separation or marriage annulment should be dealt with by the courts of that Member State, “unless the jurisdiction to rule on the divorce, legal separation or marriage annulment may only be based on specific grounds of jurisdiction. In such cases, the concentration of jurisdiction should not be allowed without the spouses’ agreement”.

Unfortunately, the purpose of concentrating the proceedings is not always met. In fact, the main concern regards the fragmentation of the EU legislation on family matters. Currently, the legislation on this matter is fragmented and present in various Regulations and the underneath relations managed are related in a unsystematic way, which is unadvisable for the aimed purpose. Divorce proceedings, maintenance obligations and matrimonial property regimes have been kept conceptually separated in the framework of the European Union’s law, and have been regulated with different regulations, which, in their scope, provide for express and mutual exclusions.

The Eu system of private international law in family matters has gradually extended its terms of reference from divorce and legal separation to the financial aspects of family life, at least for the Member States that will take part in the enhanced cooperation. Nonetheless, practically these topics are often addressed in the same action for divorce. Issues such as assigning the matrimonial home, and the definition of the obligation of one spouse to support the other financially are strongly and substantially connected to the ruling on divorce, and to the conditions and reasons that ground that ruling. The need to coordinate between the EU instruments becomes apparent because spouses litigate over the financial consequences of divorce. As a result, it seems reasonable and in the parties’ interests to have divorce and the related financial aspects handled by the same court.

## **II. ACCESSORY JURISDICTION.**

With the aim of reducing the number of proceedings, Article 5 is based on the principle of accessory jurisdiction. Jurisdiction over matrimonial property regimes

or property consequences of the partnership connected with the dissolution or the annulment of either a marriage or a registered partnership lies with the courts of the Member State where proceedings concerning the said dissolution or annulment are pending<sup>2</sup>. Under this rule, jurisdiction with regard to the main issue can depend, according to the circumstances, on Regulation 2201/2003, or on national jurisdictional rules in force in Member States for registered partnerships.

Here it is an example.

A French husband and a Portuguese wife, after having lived in France, move to Spain, where, after several years, they apply for divorce. Regarding jurisdiction, the proceedings can be concentrated in one single court. The Spanish court is competent pursuant Article 3(1)(a) first indent of Regulation 2201/2003, and Article 5(1) of Regulation 2016/1103, which provides that the court of Member State seised to rule on an application for divorce has jurisdiction to rule on matters of the matrimonial property regime arising in connection with that application.

On the contrary, if the husband, after the couple lived together in France and then in Spain, moves to another country, such as Germany and, after one year, he files for divorce there, the concentration of the proceedings in the same jurisdiction is still possible, but not automatic. The jurisdiction of the Germany court is based on Article 3(1)(a) fifth indent of Regulation 2201/2003, because it is the court in which the applicant is habitually resident for at least a year immediately before the application. In order to have the related matrimonial property issues also handled by the French court, a choice-of-court agreement is needed, pursuant to Article 5(2)(a) of Regulation 2016/1103.

Article 5 states that cases of matrimonial property regimes arising in connection with proceedings pending before the court of a Member State seised for divorce, should be dealt with by the courts of that Member State, unless the jurisdiction to rule on the divorce is based on the specific grounds of jurisdiction listed in Article 3(1), fifth and sixth indent of Regulation 2201/2003. In such cases, the concentration of jurisdiction is not allowed without the spouses' agreement. Without such an agreement, the Spanish courts would have jurisdiction to rule on the couple's estate, while the German courts would pronounce the divorce.

If the couple is not married, again, we have to consider that matters in respect of property regimes are treated as accessory to the principal proceedings regarding the dissolution or annulment of the partnership. However, the extension of the jurisdiction of the principal matters is subject to the parties' agreement.

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<sup>2</sup> Recitals 34 and 33 of, respectively, Regulation n .2016/1103 and Regulation n.2016/1104.

Supplementary jurisdiction requires that divorce or dissolution of partnership proceedings must already be pending before or concurrently with the property regimes cases. Therefore, if an issue linking to the matrimonial property regime or the property consequences of a partnership emerges, Article 5 allows the matter to be heard by the Member State's courts already seised for the principal purpose of the dissolution of the union.

The expression 'court' in the Property Regimes Regulations seems to be understood in a larger meaning than in Regulation 2201/2003. Article 3(2) refers to 'any judicial authority and all other authorities and legal professionals with competence in matters of matrimonial property regimes which exercise judicial functions or act by delegation of power by a judicial authority or under its control'<sup>3</sup>.

Anyway, for the purposes of Article 5 a court must be seised pursuant to Regulation 2201/2003 as defined in its Article 2(1).

As Article 4, Article 5 provides for a general reference to the courts of a given Member State. The regulation does not affect the freedom of the Member States to regulate the competence of their authorities in matters of property regimes. As a result, different courts may have jurisdiction, according to the local procedural law, with regard to divorce/dissolution issues on one hand and to the matrimonial property regime (or the property consequences of a partnership) on the other.

### III. COORDINATION WITH MAINTENANCE PROCEEDINGS.

Coordination between divorce proceedings or the dissolution of a partnership and related property regimes proceedings is a concern of the Property Regimes Regulations. On the contrary, there is no provision regarding to the coordination of the latter with proceedings on matters of maintenance obligations. Regardless, separating maintenance and property for jurisdictional purpose could be very difficult, and not only for characterization problems. As already said, the liquidation of property regimes is frequently raised together with the maintenance claims in the same action for divorce or dissolution.

However, the aim to permit disputes concerning an international family to be dealt with by a single court in one place and forum may be pursued through the combined application of Article 5 of the Property Regimes Regulations, and Article 3(c) of Regulation 4/2009 on matters relating to maintenance obligations, which provides also for ancillary jurisdiction, with regard to situations where maintenance

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<sup>3</sup> See VIARENGO I.: *Jurisdiction in cases of divorce, legal separation or marriage annulment [in cases of dissolution or annulment]*, in *The EU Regulations on the Property Regimes of International Couples – A Commentary*, p. 67, edited by I. VIARENGO, P. FRANZINA, *Elgar Commentaries in Private International Law*, 2020.

obligations are subsidiary to proceeding concerning personal status. Although this ground of jurisdiction may not be used, it allows the coordination between divorce or similar proceedings and maintenance proceedings. As a consequence, the court having jurisdiction under the Regulation 2201/2003 or over the dissolution of the partnership will likewise have jurisdiction to rule on property effects of the marriage or of the partnership as well as on maintenance matters, provided that the partners, and the spouses so agree (if needed). In brief, the rule of accessory jurisdiction of Article 5 of the Property regimes Regulations together with Article 3 of Regulation 4/2009 may ensure a concentration of proceedings.

#### **IV. VOLUNTARY CONCENTRATION OF PROCEEDINGS.**

In Regulation 2016/1103, the consent of both spouses is required where the court seised according to Regulation 2201/2003 is a possibly 'remote' forum. This occurs when jurisdiction is based:

- on the habitual residence of the applicant for one year or six months, if national, according to the fifth and sixth indent of Article 3;
- on the conversion of legal separation into divorce as provided in Article 5;
- on domestic grounds for jurisdiction applying residually in accordance with Article 7.

In these cases, the absorption of proceedings is voluntary and not compulsory.

The mandatory concentration of proceedings when the jurisdiction for divorce is founded on the first four alternative criteria of Article 3(1)(a) of Regulation 2201/2003 appears to be reasonable by the different asset of those criteria.

Notice that the identical factors are offered in Article 6 regulating jurisdiction where matters of matrimonial property regime are not related to proceedings pending before the court of a Member State on the succession of a spouse or on divorce, legal separation or marriage annulment. Recital 35 clarifies that 'these connecting factors are set in order to ensure that a genuine connecting factor exists between the spouses and the Member State in which jurisdiction is exercised'.

Lacking an agreement between the spouses or the partners, jurisdiction appears to be ruled by Article 6 of both Property Regimes Regulations, even if, dissimilar in the Commission Proposal, it is not expressly provided. Article 6 sets down a 'ladder' of grounds of jurisdiction and it provides for a special additional ground for registered partnership, such as 'the courts of the Member State under whose law the registered partnership was created'. It indicates that different courts

may have jurisdiction, which reverses the purpose of the new Property Regime Regulations to reduce the fragmentation of proceedings.

Think of a case where the jurisdiction for divorce is based on the habitual residence of the applicant (according to Article 3(1)(a) fifth or sixth indent of Regulation 2201/2003) and it isn't the last habitual residence of the spouses, or with the habitual residence of the defendant or with the spouses' common nationality at the time the court is seised (as provided in Article 6(b)(c) and (d) of Regulation 2016/1103). Evidently, this lack of coordination could be reduced, or even avoided, if the grounds of jurisdiction set in Article 3 of Regulation 2201/2003 were placed in a hierarchical order. Unfortunately, they are supposed to remain equal, since the topic has not been addressed in the recast of Regulation 2201/2003.

In Regulation 2016/1104, Article 5 provides that a court of a Member State seised to rule on the dissolution or annulment of a registered partnership will also rule on the property consequences of the registered partnership only if both partners so agree.

In this case again, the Regulation intentions are concentrating litigation before the courts of one State.

Nonetheless, an agreement between the partners is always needed, while as to matrimonial property the agreement of the spouses is needed only in some cases.

In fact, it is generally agreed that cases of dissolution or annulment of a registered partnership fall outside the scope of Regulation 2201/2003. Thus, the opportunity of a reference as in Regulation 2016/1103, to common grounds of jurisdiction to decide the 'principal' matter is not possible.

Some Member States provide special provisions for the dissolution or annulment of a registered partnership.

Other member States apply the same jurisdictional rules set out for divorce or legal separation.

## **V. THE AGREEMENT.**

With the effective date of the Property Regimes Regulations, it is possible to arrange a planning of property relations which are internationally involved.

Actually, the party autonomy provided in the EU Regulations on family matters can facilitate the consolidations of proceedings in related family matters.



Divorce proceedings founded on Article 3 of Regulation 2201/2003 may be unified with those relating to maintenance obligations and matrimonial property regimes through the application of the following rules:

- Article 5 of Regulation 2016/1103, which automatically connects divorce proceedings with proceedings on related matters of matrimonial property or allows connecting the proceedings on the basis of the spouses' choice-of-court agreements

- Article 4(1)(c)(i) of Regulation 4/2009, which enables the spouses or former spouses to confer jurisdiction on maintenance matters to the court which has jurisdiction to settle their dispute in matrimonial matters.

It is expected that choice-of-court agreements are mainly agreed upon before a dispute actually arises (e.g., immediately after the marriage or in an original matrimonial property agreement).

According to the Regulation 2016/1103 the parties may conclude a choice-of-court agreement for proceedings concerning matrimonial property in case of divorce before the court is seised.

This is supported in Article 5(3), which states that Article 7(2) must be complied with whenever the agreement 'is concluded before the court is seised'.

However, since Regulation 2201/2003 does not allow a prorogation of court, the parties at the pre-dispute stage cannot foresee which court will exercise jurisdiction in all subject matters. Regulation 2201/2003, as is well known, provides for uniform rules to settle conflicts of jurisdiction between Member States, and lay down a multitude of fora in Article 3, whereas it does not allow the spouses to designate the competent court by common agreement.

Consequently, even the operation of Article 4 of the Maintenance Regulation is weakened.

The parties may will agree, according to Article 4(1)(c)(i) of regulation 4/2009 to concentrate maintenance proceedings and property regimes proceedings before the courts which have jurisdiction for the latter.

However, they are not able to secure, by way of agreement, the court of the State that has jurisdiction. As a matter of fact, the court ruling on matters of matrimonial property which arise in connection with an application for divorce or legal separation may not be determined in advance.

It is essential that the parties are aware of the fact that such an agreement can encourage the rush to the courthouse or abusive tactics and that the spouse may rush to file the claim before the court that will apply the most beneficial substantive rules concerning the financial consequences of their divorce.

The same conclusions are valid for Article 5 of Regulation 2016/1104, unless the national rules regarding the jurisdiction over the dissolution or annulment of registered partnerships provides for a choice of court or otherwise ensure that the courts of a certain Member State have jurisdiction.

In order to come to the agreement, Article 5(2) combined with Article 7(2) wants that when 'concluded before the court is seised', the consensus shall be 'expressed in writing and dated and signed by the parties'.

Additionally, 'any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing'.

Consequently, no particular form is required when the agreement is concluded during the proceedings.

Once the court is seised under Regulation 2201/2003 or for the dissolution of the partnership both spouses or partners can accept the court extending its jurisdiction in order to cover the connected property regimes matter.

The rule suggests that the agreement can also be signed during the course of the proceedings but does not differentiate between two situations that could abstractly arise: the first, concerns the agreement prior to the commencement of the matrimonial proceedings, but subsequent to the commencement of the matrimonial proceedings; the second, concerns the agreement prior even to the commencement of the matrimonial proceedings, and therefore substantially a prenuptial agreement.

Without any specific indication in the Property Regimes Regulations, it is reasonable <sup>4</sup>to argue that, in the first case, the agreement may be tacit (being realized through the acceptance of the jurisdiction wrongly chosen by the party bringing the action) while in the second case, since article 7 limits the forum scene to the courts of the member states whose law is applicable or of conclusion of the marriage, that of Article 5(2) is in fact not an agreement by which the authorities of any member state can be designated but only those on the list contained in the same paragraph 2 of Article 5, since we are still moving in the area of jurisdiction by connection between the two matters (matrimonial and patrimonial).

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<sup>4</sup> See BRUNO P.: *I Regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate*, Milano, 2019.

On the contrary, the choice of court agreement referred to in Article 7 shall apply only in the cases referred to in Article 6, i.e. those cases in which there is no connection with a succession or matrimonial

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