

THE ROLE OF PARTY AUTONOMY UNDER THE
REGULATIONS ON MATRIMONIAL PROPERTY REGIMES
AND PROPERTY CONSEQUENCES OF REGISTERED
PARTNERSHIPS. SOME REMARKS ON THE COORDINATION
BETWEEN THE LEGAL REGIME ESTABLISHED BY THE NEW
REGULATIONS AND OTHER RELEVANT INSTRUMENTS OF
EUROPEAN PRIVATE INTERNATIONAL LAW

IL RUOLO DELL'AUTONOMIA DELLA VOLONTÀ NEI
REGOLAMENTI SUI RAPPORTI PATRIMONIALI TRA
CONIUGI E SUGLI EFFETTI PATRIMONIALI DELLE
UNIONI REGISTRATE. ALCUNE CONSIDERAZIONI SUL
COORDINAMENTO TRA IL REGIME GIURIDICO STABILITO
DAI NUOVI REGOLAMENTI E ALTRI STRUMENTI DI DIRITTO
INTERNAZIONALE PRIVATO EUROPEO

CRISTINA GRIECO

*Ph.D. in International Law and European Union Law, University of Macerata, University
of Cologne*

ORCID ID: 0000-0001-9622-1374

Recibido: 21.02.2018 / Aceptado: 12.04.2018

DOI: <https://doi.org/10.20318/cdt.2018.4384>

Abstract: The new Regulations (No. 2016/1103 and No. 2016/1104) recently adopted through an enhanced cooperation by the European Legislator aim to deal with all the private international law aspects of matrimonial property regimes and property consequences of registered partnerships, both as concerns the daily management of matrimonial property (or partner's property) and its liquidation, in particular as a result of the couple's separation or the death of one of the spouses (or partners). This paper aims to address the prominent role of party autonomy in the two Regulations and to focus on the coordination between the legal system embodied in the new two Regulations, and other relevant instruments of European private international law in force, such as the Succession Regulation and the Bruxelles II- bis Regulation.

Keywords: party autonomy; successions; matrimonial property regime, partnership property regime, applicable law, choice of law, private international law.

Riassunto: I due nuovi regolamenti (No. 2016/1103 e No. 2016/1104), recentemente adottati nell'ambito di una cooperazione rafforzata dal legislatore europeo, si propongono di regolare tutti gli aspetti internazionali privatistici legati ai regimi patrimoniali tra coniugi e alle conseguenze patrimoniali delle partnership registrate, sia per ciò che concerne la regolare amministrazione dei beni sia per ciò che riguarda la liquidazione degli stessi beni facenti parte del regime matrimoniale (o della partnership regi-

strata) nel caso si verificano vicende che ne alterino il normale svolgimento, come la separazione della coppia o la morte di uno degli sposi (o dei partner). Il presente scritto si propone di esaminare il ruolo prominente che, all'interno di entrambi i regolamenti, è riservato alla volontà delle parti e di focalizzarsi sul coordinamento tra i due nuovi strumenti e gli altri regolamenti di diritto internazionale privato europeo attualmente in vigore e, particolarmente, il regolamento sulle successioni transfrontaliere e il regolamento Bruxelles II- bis

Parole chiave: autonomia della volontà; successioni; rapporti patrimoniali tra coniugi; effetti patrimoniali delle unioni registrate; legge applicabile; scelta di legge; diritto internazionale privato.

Summary: I. Introduction. II. An overview of jurisdiction rules in the new legal instruments.

1. Choice of court agreements under the two new Regulations. 2. Some remarks on the coordination between the jurisdiction rules provided under the new Regulations and those provided in other relevant instruments of European private international law. III. The rules concerning the applicable law. 1. The impact of party autonomy on the designation of the applicable law under the two new Regulations. IV. Final remarks.

I. Introduction

1. In the aftermath of the adoption of Regulation No. 650/2012, the EU Institutions have recently intervened with two new Regulations on jurisdiction, applicable law and recognition and enforcement of foreign judgments in matters of matrimonial property regimes and of property consequences of registered partnerships, namely Regulation (EU) No. 2016/1103¹ and Regulation (EU) No. 2016/1104². As Article 70 (in both texts) indicates, according to Article 297 TFEU, both Regulations have entered into force on the twentieth day following their publication. However, the new legal regime shall apply from 29 January 2019 and, undoubtedly, it will mark a new important step towards promoting the mobility of international couples in Europe, since the new Regulations have extended the material scope of European private international law rules concerning family and personal matters³.

2. The need for a specific regulation in the field of matrimonial property regimes was raised starting from the Hague Programme⁴, which aimed to strengthen freedom, security and justice in the European Union. On that occasion, the Council invited the Commission to present a Green Paper on the conflict of laws in matters concerning matrimonial property regimes, including the questions of jurisdiction and mutual recognition. The Hague Programme also stressed the need to adopt an instrument in this area. Thus, on 17 July 2006, the Commission adopted the Green Paper on the conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition⁵. With the said Green Paper, the Commission launched a wide consultation on all aspects of

¹ 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 [2016] OJ L183/1.

² Council Regulation (EU) No. 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law, recognition and enforcement of decisions regarding the property consequences of registered partnerships [2016] OJ L183/30.

³ There are two international conventions of the Hague Conference on Private International Law relevant to this issue, namely the Convention of 17 July 1905 on conflict of laws relating to the effects of marriage on the rights and duties of spouses in their personal relationships and with regard to their estates, and the Convention of 14 March 1978 on the law applicable to matrimonial property regimes. However, only three Member States (France Luxembourg, The Netherlands) have ratified them and they do not offer the solutions needed to deal with the scale of the problems. See H. VAN LOON, "The Hague Conference on Private International Law", in *Hague Justice Journal*, vol. 2, number 2/2007, pp. 8, 9.

⁴ "The Hague Programme: strengthening freedom, security and justice in the European Union", in OJ C 53/1, 3rd march 2005. See C. CLARKSON, E. COOKE, "Matrimonial Property: Harmony in Europe?", *Family Law*, 37, 2007, pp. 920-923.

⁵ Green Paper on the conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition, COM(2006) 400 def. The Green Paper is based on a comparative study led by Asser Institute

the difficulties faced by couples in Europe when it comes to the liquidation of their common property and the legal remedies available.

3. Thereafter, the European Council adopted the new Stockholm Programme⁶. In this occasion, the European Council underlined the opportunity of extending mutual recognition to fields that were not yet covered but are essential to everyday life, such as matrimonial property rights. Subsequently, in its “EU Citizenship Report” adopted on 27 October 2010, the Commission announced that it would have adopted a proposal for legislation to eliminate the obstacles to the free movement of persons, with particular regard to, the difficulties experienced by couples in managing or dividing their property⁷.

4. As a consequence, on 16 March 2011, the Commission adopted a proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and a proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships⁸.

The aim of both Regulations is to overcome the hurdles faced by international couples⁹, due to the fragmentation among the national systems in the field of matrimonial property regimes and property consequences of registered partnerships¹⁰.

5. The reaction of European notaries to these legislative initiatives was particularly supportive. The president of the Council of the Notariats of the European Union (CNUE), in fact, referring to the two legal initiatives commented: «these proposals are going in the right direction: towards improving

and Université Catholique La Louvain-La-Neuve in 2003 called “*Étude sur les régimes matrimoniaux des couples mariés et sur le patrimoine des couples non mariés. dans le droit international privé et le droit interne. des états membres de l’union européenne*” available at http://ec.europa.eu/justice/civil/document/index_en.htm. See S. BARIATTI, I. VIARENGO, “*I rapporti patrimoniali tra coniugi nel diritto internazionale privato comunitario*”, in *Rivista di diritto internazionale privato e processuale (RDIPP)*, 2007, p. 603 ff.

⁶ “*The Stockholm Programme – An open and secure Europe serving and protecting the citizens*”, 17024/09, 2nd December 2009, in OJ C 115/4, 4th May 2010.

⁷ The legal basis for the proposed Council Regulations was Article 81(3) of the Treaty on the Functioning of the European Union. The proposals related to judicial cooperation in civil matters covering ‘aspects relating to family law’. Hence, it was required the unanimity in the Council.

⁸ See Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, 16th March 2011, COM(2011) 126 def. and Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of property consequences of registered partnerships, 16th March 2011, COM(2011) 127 def. See M. BUSCHBAUM, U. SIMON, “*Les propositions de la Commission européenne relatives à l’harmonisation des règles de conflit de lois sur les biens patrimoniaux des couples mariés et des partenariats enregistrés*”, in *Revue critique de droit international privé (RCDIP)*, 2011, n. 4, p. 801 ff.; I. VIARENGO, “*The EU Proposal on matrimonial property regimes. Some general remarks*”, *Yearbook of Private International Law (YPIL)*, 2011, vol. 13, p. 199 ff.; C. GONZÁLEZ BEILFUSS, “*The proposal for a Council Regulation on the property consequences of registered partnerships*”, in *Yearbook of Private International Law (YPIL)*, 2011, vol. 13, p. 183 ff.

⁹ A study carried out by the consortium ASSER-UCL in 2003, “*Study in comparative law on the rules governing conflicts of jurisdiction and laws on matrimonial property regimes and the implementation for property issues of the separation of unmarried couples in the Member States*”, showed the large number of transnational couples within the Union and the practical and legal difficulties such couples face, both in the daily management of their property and in its division if the couple separate or one of its members dies. These difficulties often result from the great disparities between the applicable rules governing the property effects of marriage, both in substantive law and in private international law. http://europa.eu.int/comm/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm.

¹⁰ See O. FERACI, “*L’incidenza del nuovo regime europeo in tema di rapporti patrimoniali tra coniugi e parti di unioni registrate sull’ordinamento giuridico italiano e le interazioni con le novità introdotte dal d.lgs. 7/2017 attuativo della cd. legge Cirinnà*”, *Osservatorio sulle fonti*, vol. 2/2017, pp. 1-48 available at <https://www.osservatoriosullefonti.it/saggi/1100-l-incidenza-del-nuovo-regime-europeo-in-tema-di-rapporti-patrimoniali-tra-coniugi-e-parti-di-unioni-registrate-sull-ordinamento-giuridico-italiano-e-le-interazioni-con-le-novita-introdotte-dal-d-lgs-7-2017-attuativo-della-cd-legge-cirinna/file>; A. DUTTA, “*Das neue internationale Güterrecht der Europäischen Union – ein Abriss der europäischen Güterrechtsverordnungen*”, *Zeitschrift für das gesamte Familienrecht (FamRZ)*, 2016, pp. 1973-1985; S. MARINO, “*Strengthening the european civil judicial cooperation: the patrimonial effects of family relationships*”, *Cuadernos de Derecho Transnacional (CDT)*, vol. 9, n° 1, March 2017, pp. 265-284.

legal certainty for couples in Europe. Furthermore, they will provide a useful complement to the Regulation on international successions»¹¹.

Nevertheless, during its meeting on 3 December 2015, the Council concluded that no unanimity could have been reached for the adoption of the proposals for the two Regulations on matrimonial property regimes and on the property consequences of registered partnerships and that, therefore, the objectives of cooperation in this area could not have been attained within a reasonable period by the Union as a whole¹².

6. Consequently, in accordance with the idea of a multi-speed Europe¹³, a group of Member States addressed a request to the European Commission indicating that they wished to implement an enhanced cooperation between themselves in the area of the property regimes of international couples and, specifically, of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and, respectively of jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, and asking the Commission to submit a proposal to the Council to that effect¹⁴.

Given the above, the new Regulations, differently from the Succession Regulation, have been adopted pursuant to an enhanced cooperation¹⁵ among currently 18 Member States¹⁶.

7. The structure of both Regulations, which as usual is preceded by a preamble¹⁷, just seems particularly close to the scheme that the European Legislator has used for the Succession Regulation, which, obviously, is deemed to be a fortunate experience. This is not a surprise, where it is considered that successions and matrimonial property issues or property consequences of registered partnerships are strictly connected, especially in those cases where partnerships or marriages last until one of the partners or the spouses dies. Furthermore, the dividing line between succession and matrimonial property is often difficult to trace¹⁸. In this regard, the choice made by the European Legislator to exclude the matrimonial regime from the scope of the Succession Regulation seems worthy of criticism. In fact, since most legal systems have uncertain rules concerning the relationship between matrimonial property and succession law¹⁹, and from the characterization of the relevant issues, difficult problems might arise

¹¹ Press release available at <http://www.notariato.it/sites/default/files/cp-regimes-matrimoniaux-partenariats-02-03-16-en.pdf>.

¹² The opportunity of enhanced cooperation in these fields as a proper means for overcoming the difficulty of unanimity in the Council had been assumed by doctrine, see H.-P. MANSSEL, K. THORN, R. WAGNER, “*Europäisches Kollisionsrecht 2015: Neubestimmung*, 2016”, *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)*1, 6.

¹³ ‘Multi-speed’ Europe is the term used to describe the idea of a method of differentiated integration whereby common objectives are pursued by a group of EU countries both able and willing to advance, it being implied that the others will follow later. See P. P. CRAIG, “*Two-Speed, Multi-Speed and Europe’s Future: A Review of Jean-Claude Piris on the Future of Europe*”, *European Law Review*, 2012, Vol. 37, No. 6, pp. 800 ff., 2012, *Oxford Legal Studies Research*, Paper No. 4/2013.

¹⁴ Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, 2nd March 2016, COM(2016) 106 final; Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of property consequences of registered partnerships, 2nd March 2016, COM(2016) 107 final.

¹⁵ On 9 June 2016, the Council adopted Decision (EU) 2016/954 authorising such enhanced cooperation.

¹⁶ Belgium, Bulgaria, the Czech Republic, Germany, Greece, Spain, France, Croatia Italy, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland, Sweden and Cyprus.

¹⁷ On the role of preamble in the European legal instruments see S. LEMAIRE, “*Interrogations sur la portée juridique du préambule du règlement Rome I*”, *Dalloz*, 2008, p. 2157, the preamble is «destiné à informer. À expliquer et, le cas échéant, à justifier certaines dispositions sensibles du dispositif du texte»; ECJ, 9 July, 1969, *Italy c. Commission*, in *Racc.*, 1969, p. 277, point 9. For some remarks concerning the extensive use of recitals as a means of integrating the provisions contained in more recent regulations adopted in the field of European private international law, see A. DAVI, A. ZANOBBETTI, *Il nuovo diritto internazionale privato europeo delle successioni*, Torino, 2014, pp. 23-24, footnote 74.

¹⁸ A. BONOMI, “*The interaction among the future EU instruments on matrimonial property, registered partnerships and successions*”, in *Yearbook of Private International Law (YPIL)*, 2011, vol. 13, p. 217 ff.

¹⁹ One of the main complex problems is the characterization. The usual example of this complexity is the German Civil Code (BGB) concerning the winding-up of the legal property regime of the “*Zugewinnbeteiligung*” Under § 1371 BGB, the matrimonial property rights of a surviving spouse, who lived with the deceased pursuant to the legal property regime of the *Zugewinnsgemeinschaft*, are liquidated in a fixed way through a ¼ increase of his or her part in the succession, irrespective of the actual gains realized by the spouses during the marriage. Even if in Germany the opinions are not unique, courts and a

which may compromise the uniformity of European private international law rules, the application of the same law to both questions would have been more straightforward. Furthermore, it is true, at least in most of the civil law countries where the succession's events are strictly connected with matrimonial ones, that whenever the *de cuius* leaves the spouse or the partner alive, the consistency of the estate is necessarily related to matrimonial property regimes or with the property consequences of registered partnerships respectively. Most legal systems, if not all, are concerned with the financial protection of the surviving spouse or the surviving partner. However, this result can be achieved in different ways.

8. At the same time, it should be borne in mind that according to a specific trend that over recent years has characterized judicial cooperation in civil matters, both Regulations provide ample space for party autonomy. Over the past ten years, this specific trend has characterized fields, such as family and succession law, where party autonomy was traditionally excluded or heavily restricted, given the sensitive nature of the subject matter concerned, especially in some civil law countries. In the light of this complex framework, it is possible to underline that party autonomy, nowadays, is the new widespread cornerstone of European private international law, as it is one of the most common connecting factors relied upon by the European legislator and it is a mirror of a general liberalization within European private international law. Accordingly, both the new Regulations allow the parties to make an *electio fori*²⁰ (Article 7 in both texts) and a *professio iuris*²¹ (Article 22 in both texts).

9. The objective of the two Regulations is to deal with all the civil-law aspects of matrimonial property regimes and property consequences of registered partnerships, both as concerns the daily management of matrimonial property (or partner's property) and its liquidation, in particular as a result of the couple's separation or the death of one of the spouses (or partner). In this last regard, in order to coordinate the different legal instruments adopted by the European legislator, the preamble of both Regulations specifies that as maintenance obligations between spouses are governed by Council Regulation 4/2009, they should be excluded from the scope of the new Regulations, as well as issues relating to the succession to the estate of a deceased spouse that are covered by Regulation 650/2012²². Accordingly, the two Regulations are deemed to have a subsidiary role, being intended to govern those issues which neither of the two pre-existing Regulations governs.

10. Given the broad scope of the two Regulations, this paper aims to address the prominent role of party autonomy in the two new instruments and to focus on the coordination between the new legal system, embodied in the two Regulations, and other relevant instruments of European private internatio-

majority of scholars leans toward matrimonial property characterization. See H. DÖRNER, *Internationales Erbrecht*, Art. 25, 26 EGBGB, in *J. Von Staudingers Kommentar zum Bürgerlichen Gesetzbuch, Einführungsgesetz zum BGB*, Berlin 2007, Art. 25 No. 34. The same solution is proposed from the perspective of Swiss PIL by A. BUCHER, *Le Couple en droit international privé*, Bâle, 2004, no. 661. Similar problems arise with respect to the so-called "*avantages matrimoniaux*" under French or Belgian law. These are financial provisions in favour of the surviving spouse included in a "*contrat de mariage*", which are at the borderline between the laws of contracts and successions. See J.-L. VAN BOXSTAELE, *L'avantage matrimonial et le conflit de lois*, in *Mélanges Roland de Valkeneer*, Bruxelles 2000, pp. 487-506. Another classical characterization issue arises in common law jurisdictions from the traditional rules providing for the revocation of a will in the event of the testator's subsequent marriage. In England and in other common law countries these rules are regarded as pertaining to the law of marriage. Conversely, in other common law jurisdiction, such as the United States, these rules are regarded as pertaining to the law of succession. See L. COLLINS (eds.), et. al., *Dicey, Morris & Collins on the Conflict of Laws*, 14th ed., London 2006, vol. 2, No. 27-087 ff., p. 1264 ff. S. MARINO, "*I diritti del coniuge o del partner superstite nella cooperazione giudiziaria civile europea*", *Rivista di diritto internazionale*, 2012, p. 1114 ff.

²⁰ See *infra* par. 2.

²¹ See *infra* par. 3.

²² The importance to coordinate the succession issues and matrimonial ones has been underlined even by the MAX PLANCK INSTITUTE FOR COMPARATIVE AND INTERNATIONAL PRIVATE LAW, "*Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Authentic Instruments in Matters of Succession and the Creation of a European Certificate of Succession*", *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)*, 2010, p. 528, where it has been underlined «Even if the same law is designated by a future Succession Regulation, this law may be distorted by the simultaneous application of different matrimonial property laws in the member states involved».

nal law, such as the Succession Regulation. The new texts are very similar to one another in structure and in contents, with just a few peculiarities in the Regulation on property consequences of registered partnerships, which are due to the lack of harmonisation among the domestic laws of the different Member States in the field of registered partnerships. Thus, for the sake of clarity, the following remarks shall be referred generally to both the Regulations or to the Regulation on matrimonial property regimes adding the necessary clarifications, where appropriate, on the differences present in the Regulation on property consequences of registered partnerships.

II. An overview of jurisdiction rules in the new legal instruments

11. Replicating the model offered by the Succession Regulation²³, the rules concerning the applicable law contained in the new Regulations, just as in other earlier relevant instruments²⁴, shall apply universally or *erga omnes*²⁵, including where they point to the law of a third country or of a Member State not bound by the relevant instruments²⁶. Conversely, the rules on jurisdiction regulate only the jurisdiction of courts belonging to the Member States subject to the relevant legal instruments. Similarly, the rules concerning the recognition and enforcement of judgments and the acceptance of authentic instruments apply only among the Member States subject to the relevant instruments²⁷.

12. The rules concerning jurisdiction contained in the new Regulations follow the model provided by the Succession Regulation²⁸ rather than the one offered by the Brussels I Regulation. In fact, the new legal instruments provide for grounds of jurisdiction which apply equally where none of the parties presents a personal connection to one or more Member States. This excludes any subsidiary role for national rules of jurisdiction of the Member States bound by the relevant instrument, in respect of disputes falling within its substantive scope of application²⁹.

13. This aim is pursued by the new Regulations, not too differently from the Succession Regulation, by providing for autonomous subsidiary rules of jurisdiction (e.g. Article 10)³⁰. Consequently,

²³ See F. MARONGIU BUONAIUTI, “*The EU Succession Regulation and third country courts*”, *Journal of Private International Law*, 2016 Vol. 12, No. 3, pg. 545–565.

²⁴ Art. 20, Regulation (EU), No. 650/2012 on succession issues (Rome IV); Art 4, Regulation (EU) No. 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III); Art 2, Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I); Art. 3, Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II).

²⁵ See *infra* par. 3.

²⁶ Article 20 Regulation (EU) No. 2016/1103 and No. 2016/1104.

²⁷ The same structure is provided, as noted before, for the Succession regulation but also for the Regulation (EU) No. 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), 2015, OJ L141/19, and for the Council Regulation (EC) No. 4/2009 on maintenance obligations. In this last peculiar case, as well known, the rules concerning applicable law are actually contained in an international convention, the Hague Protocol of 2007, to which the Regulation refers (Article 15).

²⁸ See A.-L.- CALVO CARAVACA, in A.L.- Calvo Caravaca, A. Davì, H.-P. Mansel (eds.), Cambridge, 2016, *Article 4*, pp. 127-147; F. MARONGIU BUONAIUTI, in A.L.- Calvo Caravaca, A. Davì, H.-P. Mansel (eds.), Cambridge, 2016, *Article 5*, p. 149 ff. and also A. LEANDRO, *La giurisdizione nel regolamento dell’Unione Europea sulle successioni mortis causa*, in P. Franzina, A. Leandro (eds.), *Il diritto internazionale privato europeo delle successioni mortis causa*, Milano, 2013, p. 59 ff.

²⁹ See F. MARONGIU BUONAIUTI, “*The EU Succession Regulation and third country courts*”, pp. 545–565 and O. FERACI, “*L’incidenza del nuovo regime europeo in tema di rapporti patrimoniali tra coniugi e parti di unioni registrate sull’ordinamento giuridico italiano e le interazioni con le novità introdotte dal d.lgs. 7/2017 attuativo della cd. legge Cirinnà*”, p. 20 ff. See also, referring specifically to the Succession Regulation, A. DAVÌ, A. ZANOBETTI, “*Il nuovo diritto internazionale privato delle successioni nell’Unione europea*”, *Cuadernos de derecho transnacional CDT*, 2013, 2, 5, p. 113; A. DAVÌ, A. ZANOBETTI, *Il nuovo diritto internazionale privato europeo delle successioni*, p. 198. The rules on jurisdiction contained in the Succession Regulation, in presupposing the establishment of the habitual residence of the deceased at the moment of death, are inapplicable in respect of disputes concerning a future succession which might arise during the lifetime of the *de cuius*, for example, concerning an agreement as to succession or an anticipatory waiver of succession rights. Accordingly, domestic rules of jurisdiction will continue to apply as concerns such disputes.

³⁰ Articles 10 and 11 of Regulation (EU) No. 650/2012 in matters of succession. The same approach characterizes also

the new Regulations contemplate autonomous grounds of jurisdiction in respect of cases different from those contemplated by Articles 4 and 5. These articles provide for the coordination between the jurisdiction rules contained in the new Regulations, the jurisdiction in matters of succession and the jurisdiction in case of divorce, legal separation or marriage annulment or dissolution or annulment of a registered partnership, respectively.

14. These autonomous jurisdiction rules provide a series of hierarchic criteria listed in Article 6 to guarantee the broader establishment of jurisdiction, where the connecting factor listed for one of the two related subjects of dispute (the common habitual residence of the spouses or partners), may not be applied, as well as subsidiary rules. These are completed by Article 7, which provides the discipline of a choice of court agreement, and Article 8, which provides for jurisdiction based on appearance by the defendant.

15. For the purposes of coordinating the various legal instruments in force and avoid negative conflicts of jurisdiction, by way of exception, Article 9 of both the Regulations provides also for a mechanism of limitation of jurisdiction. This provision authorizes Member State courts to decline their competence over the proceedings concerning the matrimonial property regime or the property consequences of registered partnership whenever their private international law rules do not recognize the marriage or the registered partnership. In these cases, in light of the principle of mutual trust³¹, it is just required for the courts to recognize the decisions adopted by the other Member States and by third country courts over the assets owned by the spouses or partners before the conclusion of the marriage or the registered partnership and those purchased in the meanwhile as well³². Furthermore, similarly to what happens with the Succession Regulation, there is a provision concerning *forum necessitates* (Article 11), to be relied upon in those exceptional cases where a fair trial of the action would not be available before the courts of a third country presenting a close connection with the case.

16. Nonetheless, it should be pointed out that the co-existence of all these different grounds of jurisdiction could facilitate the occurrence of parallel judicial proceedings. For this reason, the Regulations, along with the coordination provisions concerning succession and divorce issues, provide also rules concerning *lis pendens* and related actions³³. The model is that provided by the Brussels I Regu-

the Regulation (EC) No. 4/2009 on maintenance obligations, namely Articles 6 and 7. Concerning the former, see, among others, A. DAVI, A. ZANOBETTI, “*Il nuovo diritto internazionale privato delle successioni nell’Unione europea*”, pp. 10, 16; A. DAVI, A. ZANOBETTI, *Il nuovo diritto internazionale privato europeo delle successioni*, pp. 195-196; A.-L.- CALVO CARAVACA, *Article 4*, in *The EU Succession Regulation, A Commentary*, pp. 127-147; F. MARONGIU BUONAIUTI, *Article 10*, in *The EU Succession Regulation, A Commentary*, p. 186 ff.; A. BONOMI, *Introduction au Chapitre II – Compétence*, in A. Bonomi and P. Wautelet (eds), *Le droit européen des successions. Commentaire du règlement n° 650/2012 du 4 juillet 2012*, 2013, 165-166; H. GAUDEMET-TALLON, *Les règles de compétence judiciaire dans le règlement européen sur les successions*, in G. Khairallah and M. Revillard (eds), *Droit européen des successions internationales. Le règlement du 4 juillet 2012*, Paris, 2013, 127, 130; M. HELLNER, *El futuro reglamento de la UE sobre sucesiones. La relación con terceros estrado*, in *Anuario español de derecho internacional privado*, 2010, pp. 379, 382-386; B. HESS, *Die internationale Zuständigkeit nach der Erbrechtsverordnung*, in A. Dutta and S. Herrler (eds), *Die Europäische Erbrechtsverordnung*, München, 2014, pp. 131, 133-34. Concerning the latter, among others, M. CASTELLANETA, A. LEANDRO, “*Il regolamento CE n. 4/2009 relativo alle obbligazioni alimentari*”, *Le nuove leggi civili commentate*, 2009, pp. 1051, 1073-76; B. ANCEL, H. MUIR-WATT, “*Aliments sans frontières. Le règlement n° 4/2009 du 18 décembre 2008 relatif à la compétence, la loi applicable, la reconnaissance et l’exécution des décisions et la coopération en matière d’obligations alimentaires*”, *Revue critique de droit international privé (RCDIP)*, 2010, pp. 457, 463-468.

³¹ The mutual confidence principle is considered as a general principle which regulates the judicial civil cooperation among Courts of different member States. V. F. MARONGIU BUONAIUTI, “*La Revisione del Regolamento sulle Procedure di Insolvenza / The Eu Regulation On Insolvency Proceedings (Recast) Il Coordinamento tra Procedure D’insolvenza Basato sulla Prevalenza della Procedura Principale nel Regolamento (Ue) N. 2015/848*”, *Quaderni di SIDIBlog*, vol. 2, 2015, pp. 22-37 available at <http://www.sidiblog.org/2016/01/18/dibattito-sul-sidiblog-la-revisione-del-regolamento-sulle-procedure-di-insolvenza-the-eu-regulation-on-insolvency-proceedings-recast-3-il-coordinamento-tra-procedure-dinsolvenza-basato/>.

³² See also Recital 38 of Regulation No. 2016/1103 and 36 of Regulation No. 2016/1104.

³³ See Articles 17 and 18 Regulation No. 2016/1003 and No. 2016/1104.

lation³⁴, and it presents the inherent limitation of being applicable only in respect of actions pending before the courts of the other Member States which are bound by the relevant instruments³⁵.

17. Following once more the model set by the Succession Regulation³⁶, the main purpose of both the new legal instruments is to guarantee the unity of jurisdiction in respect of the entire spouses' or partners' property. In this regard, in order to reflect the increasing mobility of couples during their married life or partnership and facilitate the proper administration of justice, in the preamble of both legal instruments it is suggested that the rules on jurisdiction set out in either Regulation should enable citizens to have their various related proceedings handled by the courts of the same Member State. To that end, the two Regulations seek to concentrate the jurisdiction on matrimonial property regimes or property consequences of registered partnerships in the Member State whose courts are called upon to handle cases of divorce, legal separation, marriage annulment or jurisdiction in cases of dissolution or annulment of the registered partnership and the succession of a spouse or a partner respectively³⁷. In this regard, coordination is needed for several reasons, practical as well as legal ones, in order to protect the interests of the parties concerned³⁸ and to guarantee legal certainty³⁹.

1. Choice of court agreements under the two new Regulations

18. As a preliminary point, both the Regulations emphasize the role of party autonomy as concerns jurisdiction issues. In this respect, in the preamble⁴⁰ of both Regulations, in order to increase legal certainty, predictability and party autonomy, the opportunity is underlined to enable spouses or partners to conclude a choice of court agreement in favor of the courts of the Member State of the applicable law or of the courts of the Member State of the conclusion of the marriage or of the registered partnership. Hence, in accordance with Article 7 of Regulation No. 2016/1103, the parties may agree, in cases which are covered by Article 6⁴¹, that the courts of the Member State whose law is applicable pursuant to Article 22 (which provides for the possibility of making a choice of the applicable law by the involved parties), or point (a) or (b) of Article 26(1) (which, in the absence of a choice-choice-of-law agreement,

³⁴ The risk of fragmentation of litigation concerning the succession in cases presenting connections with third countries is likely to be increased by the absence within the Succession Regulation of rules addressing cases of *lis alibi pendens* and related actions pending before third country courts, like those found in the Brussels I Recast Regulation Art. 33 and 34, Regulation (EU) No. 1215/2012 (Brussels I Recast Regulation), OJ L351/1, 2012 see F. MARONGIU BUONAIUTI, "Lis alibi pendens and Related Actions in the Relationships with the Courts of Third Countries in the Recast of the Brussels I Regulation", 2013/2014, *Yearbook of Private International Law (YPIL)*, pp. 87, 89–111; P. FRANZINA, "Lis alibi pendens Involving a Third Country Under the «Brussels I-bis» Regulation: An Overview", *Rivista di diritto internazionale privato e processuale (RDIPP)*, 2014 pp. 23, 25–41. It should be pointed out that for the new Regulations the risk is even greater due to the enhanced cooperation system.

³⁵ See F. MARONGIU BUONAIUTI, "The EU Succession Regulation and third country courts", p. 549 ff. and O. FERACI, "L'incidenza del nuovo regime europeo in tema di rapporti patrimoniali tra coniugi e parti di unioni registrate sull'ordinamento giuridico italiano e le interazioni con le novità introdotte dal d.lgs. 7/2017 attuativo della cd. legge Cirinnà", p. 40 ff.

³⁶ P. LAGARDE, "Règlements 2016/1103 et 1104 du 24 juin 2016 sur les régimes matrimoniaux et sur le régime patrimonial des partenariats enregistrés", *Rivista di diritto internazionale privato e processuale (RDIPP)*, vol. 52, n. 3, 2016, pp. 676–686.

³⁷ See recital 32 in both Regulations.

³⁸ As underlined by A. BONOMI, *The interaction among the future EU instruments on matrimonial property, registered partnerships and successions*, p. 218, «The administration and distribution of the estate of the deceased generally require, as a preliminary issue, the exact identification of the property rights of his or her surviving spouse or partner. To wind up a matrimonial property regime or to fix the rights of the partner is, therefore, a necessary precondition to determine the composition of the estate. Hence, it is very important that these issues are settled by the same authority in charge of the administration of the estate. It would be extremely inconvenient for parties claiming rights in the succession (heirs, legatees) to be obliged to seize separate authorities in two different Member States».

³⁹ For further remarks on the coordination among different regulations see *infra* par. 2.2.

⁴⁰ Recitals 36 of Regulation No. 2016/1103 and 37 of Regulation No. 2016/1104.

⁴¹ According to Article 6 «(omissis) jurisdiction to rule on a matter of the spouses' matrimonial property regime shall lie with the courts of the Member State: a) in whose territory the spouses are habitually resident at the time the court is seised; or failing that b) in whose territory the spouses were last habitually resident, insofar as one of them still resides there at the time the court is seised; or failing that c) in whose territory the respondent is habitually resident at the time the court is seised; or failing that d) of the spouses' common nationality at the time the court is seised».

provide for different connecting factors) or the courts of the Member State of the conclusion of the marriage shall have exclusive jurisdiction to rule on matters of their matrimonial property regime.

19. Partially different is the provision contained in Article 7 of Regulation No. 2016/1104 where it is specified that the parties may agree, in cases which are covered by Article 6⁴², that the courts of the Member State whose law is applicable pursuant to Article 22 (choice of law agreement) or Article 26(1)⁴³ (which, in the absence of a choice-of-law agreement, provide for a different connecting factor) or the courts of the Member State under whose law the registered partnership was created shall have exclusive jurisdiction to rule on the property consequences of their registered partnership.

20. In this case, the jurisdiction criteria provided by the two Regulations are different, because the list of connecting factors provided under Article 26 to which Article 6 refers is different in both texts, reflecting, respectively, the inherent differences between marriages and registered partnerships. Namely, as concerns Regulation No. 2016/1103, in the absence of a choice-of-law agreement pursuant to Article 22, the other connecting factors listed by Article 26(1) lett. a) and b) refer, respectively, to the spouses' first common habitual residence after the conclusion of the marriage or, failing that, to the spouses' common nationality at the time of the conclusion of the marriage. While, as concerns Regulation No. 2016/1104, in the absence of a choice-of-law agreement pursuant to Article 22, the other connecting factor provided refers only to the law of the State under whose law the registered partnership was created.

21. According to Article 7, the choice of court agreement contemplated by the rule may designate just the courts of a Member State bound by the relevant Regulation, which, considering that both Regulations are in force among just 18 Member States now participating to the enhanced cooperation, restricts rather the scope within which the instrument is available. It should be noted that Article 7 in both texts refers generally to Article 6, where, at the beginning, it is explicitly specified: «where no court of a Member State has jurisdiction pursuant to Article 4 or 5». By referring generally to the cases covered by Article 6, without any express reference to letters comprised between a) and e), it seems that the Regulation intends to convey the meaning that a choice of court agreement is allowed solely where no court of a Member State has jurisdiction pursuant to Article 4 or 5 (thus, jurisdiction in the event of the death of one of the spouses or partners and jurisdiction in cases of dissolution or annulment of a registered partnerships and in cases of divorce, legal separation or marriage annulment). The provision seems straightforward enough and it appears truly difficult to hypothesize a different interpretation. That said, it should be pointed out that in this case, the European legislator, in defiance of a general trend, has decided to prioritize the requirements of coordination among the different legal instruments in matters of family and succession law, the unity of jurisdiction and legal certainty, rather than the autonomy of the involved parties.

22. However, it should be pointed out that, in this way, the possibilities for the involved parties to make an *electio fori* seem particularly narrow. In fact, given that generally the main issues connected with matrimonial property regimes and property consequences of registered partnerships arise when the

⁴² According to Article 6 «(omissis) jurisdiction to rule on the property consequences of a registered partnership shall lie with the courts of the Member State: a) in whose territory the partners are habitually resident at the time the court is seised, or failing that, b) in whose territory the partners were last habitually resident, insofar as one of them still resides there at the time the court is seised, or failing that, c) in whose territory the respondent is habitually resident at the time the court is seised, or failing that, d) of the partners' common nationality at the time the court is seised, or failing that, e) under whose law the registered partnership was created».

⁴³ The content of Article 26 is different in the two Regulations. Less wide in the Regulation concerns property consequences of registered partnerships, it is provided that in the absence of a choice-of-law agreement pursuant to Article 22, the law applicable to the property consequences of registered partnerships shall be only the law of the State under whose law the registered partnership was created. While in the Regulations on matrimonial property regime, several options are provided in the absence of a choice of law agreement pursuant to Article 22. Namely the law of the State of the spouses' first common habitual residence after the conclusion of the marriage; or, failing that of the spouses' common nationality at the time of the conclusion of the marriage; or, failing that with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances.

marriage or partnership bond, for some reason, has to be dissolved, more frequent than not it may happen that proceedings for succession of a spouse or partner or for divorce are already in front of a court. In these cases, and when the attraction of jurisdiction is not subject to the parties' consent, an *electio fori* will not be allowed. As concerns succession jurisdiction, given that neither of the new Regulations requires the parties' consent, whenever proceedings are pending in front of a court designated through the criteria provided by the Succession Regulation, a choice of court agreement made in accordance with the new Regulations shall be considered as ineffective.

23. It appears clearly that the attempt by the European legislator, again similarly to the Succession Regulation, is aimed to ensure coincidence between *forum* and *ius*, in order to guarantee in the broadest number of cases that the court shall decide the case by applying its own law. However, it should be pointed out that, as it will be explored in greater detail, that under the new Regulations this coincidence is anything but self-evident. The identification of the parties concerned for the purposes of a choice of court agreement, in this case, is far easier than under the Succession Regulation. In fact, under the new Regulations, the involved parties are necessarily the spouses or the partners.

24. As concerns formal validity of a choice of court agreement, Article 7 lists the minimum elements required. The rule requires, under both Regulations, that the agreement in question must be expressed in writing, adding, as a further requirement, that it must be dated and signed by the involved parties. Concerning the former specification it should be borne in mind that usually, in comparative law, the written form is a basic validity condition for a choice of court agreement⁴⁴ and also in European private international law, according to the provision contained in the Bruxelles I *bis* Regulation (Article 25), among the other possible formal conditions for the validity of an agreement listed in the provision, the written form or an evidenced in writing falls among them⁴⁵.

25. Concerning the moment where the agreement shall be considered as concluded, both the Regulations remain silent. In particular, it is not specified whether such choice of court agreements shall be concluded before the commencement of possible proceedings before the courts of the Member State of the applicable law, according to Article 22 or before the courts of the Member State of the conclusion of the marriage under point (a) or (b) of Article 26(1), or in case of registered partnership the courts of the Member State under whose law the registered partnership was created, under Article 26(1). However, it shall be argued that the possibility to make a choice of court agreement is ongoing up to the moment that a court has been seised. Nonetheless, if the seised court finds that it has no jurisdiction according to the Regulations, once the proceedings have been dismissed, generally it would be again possible for the spouses or the partners to conclude a choice of court agreement.

26. Moreover, similarly to the Succession Regulation (Article 9), it should be borne in mind that, under both the Regulations, it is provided pursuant to Article 8, a possibility of acceptance of the jurisdiction of the court seised, based on appearance by the defendant. In such cases, jurisdiction is conferred upon a court of a Member State whose law is applicable pursuant to Article 22, or Article 26 (1), lett. (a) or (b), as concerns Regulation No. 2016/1103, or Article 26(1) as concerns Regulation No. 2016/1104), and before which a defendant enters an appearance, of course except for the hypothesis in which the appearance is aimed just to contest the jurisdiction.

⁴⁴ See the critic point of view expressed by F. MARONGIU BUONAIUTI, *Article 5*, in *The EU Succession Regulation, A Commentary*, p. 157, where the Author underlines the tautological nature of this specification in the Succession Regulation.

⁴⁵ However, differently from the new Regulations that require exclusively the written form, Article 25 of Bruxelles I *bis* Regulation, reflecting the larger scope granted to party autonomy in the subject area that of civil and commercial matters falling within its scope of application, provides also other alternative possibilities such as «b) a form which accords with practices which the parties have established between themselves»; or c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned».

27. Nonetheless, as already underlined as concerns choice of court agreements, in order to guarantee unity of jurisdiction and the coherence of the European private international law system, in some cases the possibility of prorogation of jurisdiction based on appearance by the defendant is excluded. Namely, as concerns Regulation No. 2016/1103, whenever the jurisdiction is based on Article 4 or 5(1) or, as concerns Regulation No. 2016/1104, in those cases covered by Article 4 (jurisdiction in the event of the death of one of the partners) but not in those cases covered by Article 5 (jurisdiction in the event of dissolution of the partnerships).

This difference between rules contained in the two Regulations, as underlined above, is explainable by taking into account that in case of registered partnerships, differently from matrimonial property regimes, the attraction of jurisdiction provided by Article 5 (jurisdiction in cases of dissolution or annulment of a registered partnership) is possible just with the partners' consent. For this very reason, Article 8(1) under Regulation No. 2016/1104, does not refer to Article 5. A different provision, in fact, would be in contrast with the same content of Article 5.

Like other EU private international law instruments⁴⁶ and in order to reflect the ongoing technological developments in the field of communications, Article 7 in both Regulations considers an agreement concluded through electronic means as equivalent to an agreement concluded in writing, as long as the means used provides a durable record of the agreement. However, in the light of the fact that the signature of the parties is required, it is possible to argue that a simple exchange of e-mails shall be not sufficient. Instead, an exchange of certified e-mails would be sufficient, since this provides the digital signature of the authors⁴⁷.

28. Another issue concerning choice of court agreements under the two Regulations concerns the substantial validity of the agreement. Namely, in these cases, as in other relevant legal instruments, it may be necessary to establish which law is applicable to assess the validity of the parties' consent. Similarly to the Succession Regulation⁴⁸, the new legal instruments do not regulate the substantive validity of such agreements. In this respect, the repeated choice by the European legislator not to include a provision comparable to that provided by the Bruxelles I-bis Regulation is worthy of criticism. As it is well known, Article 25(1), Bruxelles I-bis Regulation provides, albeit in negative terms, that the substantial validity of a choice of court agreement is established in accordance with the law of the country of the chosen court. Even though until the moment in which the European Court of Justice will have an opportunity to rule on this specific issue a unique answer is not possible, it is worth pointing out that the application of the law of the country of the chosen court in order to establish the validity of the parties' consent would be more straightforward in view of ensuring the coherence of the system and legal certainty. Furthermore, in this way, it is possible to guarantee a coincidence between *forum* and *ius*⁴⁹.

⁴⁶ Article 25, par. 2, of the Bruxelles I-bis Regulation and article 5 par. 2 of the Succession Regulation.

⁴⁷ See A. DAVI, A. ZANOBETTI, *Il nuovo diritto internazionale privato europeo delle successioni*, p. 204 footnote 20, where the Authors underline that as regards electronic signature it shall refer to the Electronic Signatures Directive 1999/93/EC of the European Parliament and the Council which was a European Union Directive on the use of electronic signatures (e-signatures) in electronic contracts within the European Union. At present, the directive has been repealed by the eIDAS Regulation (EU) No 910/2014 which has started to be applied since 1st of July 2016. See also F. MARONGIU BUONAIUTI, *Article 5*, in *The EU Succession Regulation, A Commentary*, p. 158 and H. GAUDEMET-TALLON, *Les règles de compétence judiciaire dans le règlement européen sur les successions*, p. 131. An opposing view is held by J. SCHMIDT, *EuErbVO Artikel 5*, in C. Budzikiewicz, M. Weller and W. Wurmnest (eds.), *Beck-online Grosskommentar, EuErbVO*, München, 2014, par. 16.

⁴⁸ The doctrinal debate around this issue is particularly interesting. According to A. BONOMI, R. DI IORIO, *Articolo 5*, in A. Bonomi, P. Wautelet (eds.), *Il Regolamento Europeo sulle Successioni*, 2015, Milano, p. 136 ff. as in the Bruxelles I-bis Regulation, the substantial validity of a choice of court agreement shall be established in accordance with the law of the country of the chosen court. Similar position is supported by A. DUTTA, *Das neue internationale Erbrecht*, p. 6 and F. MARONGIU BUONAIUTI, *Article 5*, pp.159-160. Conversely, according to A. DAVI, A. ZANOBETTI, *Il nuovo diritto internazionale privato europeo delle successioni*, p. 205, albeit this position would have several advantages, in the absence of a specific disposition, since the choice of court agreement is a procedural agreement, by means of a strict interpretation, the *lex fori* shall be applied.

⁴⁹ About the same issue concerning the Succession Regulation, see A. BONOMI, R. DI IORIO, *Articolo 5*, in *Il Regolamento europeo sulle successioni*, p. 136. The Authors point out that in many cases the issue concern the existence of the parties' consent might be consider as incorporated in the general one concerns the formal validity. In fact, since the Regulations require an agreement in writing and the signatures of the involved parties is unlikely to argue that the consent does not exist or it is invalid. However in this respect it should be borne in mind that concerning the parties' consent several issues can affect the its validity.

2. Some remarks on the coordination between the jurisdiction rules provided under the new Regulations and those provided in other relevant instruments of European private international law

29. With particular regard to the coordination between the new Regulations and other relevant instruments of European private international, the regime provided under the two new Regulations is partially different⁵⁰. As concerns the relationship between the legal regime established by the new Regulations and the succession Regulation, the preamble of both the new legal instruments emphasizes the need to ensure a broad coordination. Particularly, recitals 32 and 33 underline that where the proceedings on the succession of a spouse or partner are pending before the court of a Member State seized under the Succession Regulation, the courts of that State should have jurisdiction to rule on matters of matrimonial property regimes⁵¹ or property consequences of registered partnerships arising in connection with that succession case. This suggestion has been included in the text of both the Regulations. In fact, Article 4 provides that where a court of a Member State is seized in matters of the succession of a spouse or a partner pursuant to Regulation No. 650/2012, the courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that succession case. Furthermore, in accordance with Article 8, jurisdiction based on appearance is excluded whenever the jurisdiction shall be established pursuant to Article 4, namely, in case of jurisdiction based on the connecting factors provided by Regulation No. 650/2012. Due to the lack of any further specification, it is possible to assume that every ground of jurisdiction provided by the Succession Regulation is included in this reference. In these cases, the coordination between the succession Regulation and the new instruments does not require the parties' consent. The attraction under the grounds of jurisdiction based on Regulation No. 650/2012 of the aspects concerning matrimonial property regimes and property consequences of registered partnerships is automatic. Moreover, differently from what it will be emphasized later concerning the coordination with rules of jurisdiction in international matters, in these hypotheses, both the Regulations provide for the same rules, without any role being attributed to the parties' consent.

30. By virtue of the mentioned provisions, the court with jurisdiction over the administration and distribution of the estate of a spouse or of a partner also has jurisdiction to rule on the winding up of the matrimonial property regime and on the property consequences of registered partnerships. These provisions tend to ensure the desired coordination. Given the above, it seems that the jurisdiction provided by both Regulations presents some sort of a subsidiary nature, since, as a matter of fact, matrimonial property regimes and property consequences of registered partnerships are strictly connected with other relevant aspects of personal or family relationships, such as divorce, legal separation, marriage annulment, or succession.

31. As explained in the preamble to the Regulation No. 2016/1103 (recitals 32 and 34), Article 5 specifies that issues related to matrimonial property regimes arising in connection with proceedings pending before the court of a Member State seized for divorce, legal separation or marriage annulment under Regulation No. 2201/2003, should be dealt with by the courts of that Member State, unless jurisdiction to rule on divorce, legal separation or marriage annulment may only be based on certain specified grounds of jurisdiction. However, in these cases, the two Regulations provide a different regime for matrimonial property regimes and for property consequences of registered partnerships respectively.

32. In fact, under Regulation No. 2016/1103, Article 5 provides, as a general rule, that concentration of jurisdiction, apart from specific cases where the parties' consent is necessary⁵², depends only

An example is the capacity of the parties to conclude such agreement. In fact, even if the issues concerning the *status* or legal capacity of natural persons are expressly excluded from the scope of application of both the Regulations (or the Succession Regulation) it does not mean that the incapacity of one of the parties concerned to conclude a choice of court agreement may not affected its validity.

⁵⁰ See A. BONOMI, *The interaction among the future EU instruments on matrimonial property, registered partnerships and successions*, p. 217 ff.

⁵¹ See. B. CAMPUZANO DÍAZ, "The coordination of the EU Regulations on divorce and legal separation with the proposal on matrimonial property regimes", *Yearbook of Private International Law (YPIL)*, 2011, vol. 13, p. 233 ff.

⁵² Namely, jurisdiction in matters of matrimonial property regimes under paragraph 1 shall be subject to the spouses' agree-

on the fact that a court of a Member State has been seised to rule on divorce, legal separation or marriage annulment pursuant to Regulation No. 2201/2003 in respect of the same spouses. Thus, the courts of that Member State shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with those actions, without the need for a specific consent by the spouses.

33. On the contrary, a different solution is provided under Regulation No. 2016/1104. Article 5 states that where a court of a Member State is seised to rule on the dissolution or annulment of a registered partnership, the courts of that State shall have jurisdiction to rule on the property consequences of the registered partnership arising in connection with that case of dissolution or annulment, but only with the partners' consent. Moreover, under Regulation No. 2016/1104, obviously, there are no references to Regulation No. 2201/2003, because in principle Regulation No. 2201/2003 does not concern registered partnerships, but, insofar as it applies to matrimonial disputes, it presupposes a notion of marriage that cannot encompass registered partnerships⁵³.

Basically, while under the Regulation on matrimonial property regimes the spouses' consent is necessary just for certain limited hypotheses⁵⁴, under the Regulation on property consequences of registered partnerships this consent is always required. Yet again, this dissimilarity may be justified by taking into account the differences which characterize the national legal systems concerning the Regulation of registered partnerships as opposed to the comparably more homogeneous framework concerning marriage, as a consequence of which no corresponding EU instrument exists concerning jurisdiction on the dissolution of partnerships.

III. The rules concerning the applicable law

34. Differently from jurisdiction rules, those concerning the applicable law, according to Article 20, have universal application. This scheme is generally common to all instruments of European private international law, including the Succession Regulation, considered as a frame of reference. As mentioned above and according to a general trend which characterised European private international law instruments⁵⁵, both the Regulations provide ample space for party autonomy even as concerns the applicable law and, on the same terms as the Succession Regulation, they apply the monist principle

ment where the court that is seised to rule on the application for divorce, legal separation or marriage annulment: is the court of a Member State in which the applicant is habitually resident and the applicant had resided there for at least a year immediately before the application was made, in accordance with the fifth indent of Article 3(1)(a) of Regulation (EC) No 2201/2003; is the court of a Member State of which the applicant is a national and the applicant is habitually resident there and had resided there for at least six months immediately before the application was made, in accordance with sixth indent of Article 3(1)(a) of Regulation (EC) No 2201/2003; is seised pursuant to Article 5 of Regulation (EC) No 2201/2003 in cases of conversion of legal separation into divorce; or is seised pursuant to Article 7 of Regulation (EC) No 2201/2003 in cases of residual jurisdiction.

⁵³ See O. FERACI, "L'incidenza del nuovo regime europeo in tema di rapporti patrimoniali tra coniugi e parti di unioni registrate sull'ordinamento giuridico italiano", p. 39.

⁵⁴ According to Article 5(1) where a court of a Member State is seised to rule on an application for divorce, legal separation or marriage annulment pursuant to Regulation (EC) No 2201/2003, the courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that application. However, according to paragraph 2 in some specific cases the spouses' agreement is required, namely: «where the court that is seised to rule on the application for divorce, legal separation or marriage annulment: a) is the court of a Member State in which the applicant is habitually resident and the applicant had resided there for at least a year immediately before the application was made, in accordance with the fifth indent of Article 3(1)(a) of Regulation (EC) No 2201/2003; b) is the court of a Member State of which the applicant is a national and the applicant is habitually resident there and had resided there for at least six months immediately before the application was made, in accordance with sixth indent of Article 3(1)(a) of Regulation (EC) No 2201/2003; c) is seised pursuant to Article 5 of Regulation (EC) No 2201/2003 in cases of conversion of legal separation into divorce; or d) is seised pursuant to Article 7 of Regulation (EC) No 2201/2003 in cases of residual jurisdiction».

⁵⁵ E. JAYME, "Party Autonomy in International Family and Succession Law: New Tendencies", *Yearbook of Private International Law (YPIL)*, 2009, vol. 11, p. 1 ff.; P. FRANZINA, "L'autonomia della volontà nel regolamento sui conflitti di legge in materia di separazione e divorzio", *Rivista diritto internazionale (RDI)*, 2011, p. 488 ff.; O. FERACI, "L'autonomia della volontà nel diritto internazionale privato dell'Unione Europea", *Rivista diritto internazionale (RDI)*, 2013, p. 424 ff.; S.M. CARBONE, "Autonomia privata nel diritto sostanziale e nel diritto internazionale privato: diverse tecniche e un'unica funzione", *Rivista di diritto internazionale privato e processuale (RDIPP)*, 2013, p. 569 ff.

with no exceptions⁵⁶. As underlined under recital 43, in the preamble to Regulation No. 2016/1103 and under recital 42 in the preamble to Regulation No. 2016/1104, it is important that the main rule concerning applicable law ensures that the matrimonial property regime is governed by a predictable law with which it is closely connected⁵⁷. To that end, in order to guarantee legal certainty and to avoid the fragmentation of the matrimonial property regime or of the property consequences of registered partnerships, the applicable law should govern the matrimonial property regime or the property consequences of a registered partnership as a whole. Thus, all the relevant property, irrespective of the nature of the assets and regardless of whether they are located in another Member State or in a third country will be subject, in principle, to the same law.

35. Nonetheless, differently from the Succession Regulation, where the *professio iuris* is only a possibility granted to the *de cuius* (Article 22) while the main connecting factor is her/his last habitual residence (Article 21), in the two new instruments the choice of the applicable law is the main connecting factor. This may be noticed already from the structure of both the texts. In fact, Article 22, immediately after the general rule providing for universal application and unity of the applicable law, provides for the possibility to make a *professio iuris*. Only subsidiarily, namely under Article 26 of both Regulations, a series of hierarchical criteria to be relied upon in the absence of choice by the parties are provided. In this respect, it should be pointed out that the structure is more similar to that provided under the Rome I Regulation⁵⁸, where party autonomy, as it is well known, is the main connecting factor⁵⁹.

36. Before considering how a valid *professio iuris* may be made under the new texts⁶⁰, some considerations on the other criteria provided by Article 26 seem appropriate in order to appreciate the impact of the choice of the applicable law by the parties in the overall system of the two Regulations. Concerning the latter point, it appears necessary to make a distinction between the rules provided under the Regulation on matrimonial property regimes and that envisaged by the Regulation on property consequences of registered partnerships. The latter, in the absence of a *professio iuris* made pursuant to Article 22, provides for just one main further criterion. Conversely, the former envisages, in the absence of a *professio iuris* made pursuant to Article 22, a series of hierarchically applicable criteria. According to Article 26 of Regulation No. 2016/1103, in fact, the law applicable to the matrimonial property regime shall be the law of the Country of the spouses' first common habitual residence after the conclusion of the marriage. Thus, reflecting the role attributed to the habitual residence of the deceased in the Succession Regulation, in the Regulation on matrimonial property regime, the criterion of the habitual residence of the spouses takes priority, apart from party autonomy. Nevertheless, differently from the Succession Regulation, where Article 21 refers to the last habitual residence of a single person, namely the *de cuius*, in this case, Article 26, reflecting the substance of the legal relationship to be regulated, refers to the first common habitual residence of the spouses, after the conclusion of the marriage. This means that, even in the absence of an *optio legis* made by the involved parties, since the time reference to determine the applicable law is different, a subsequent change of the habitual residence of the spouses during the marriage, given the immutability of the rule, might lead to a dissociation between the law applicable to the matrimonial property regime and the law governing the succession. In fact, the former will be governed by the law of the first common habitual residence of the spouses, the latter by the law of the last habitual residence of the deceased⁶¹. This problem was raised firstly with respect to the proposal presented by the European Commission for the Regulation on matrimonial property regimes, namely re-

⁵⁶ See Article 21 in both Regulations. See P. LAGARDE, *Reglements 2016/1003 et 1104 du 24 juin 2016*, p. 681.

⁵⁷ D. DAMASCELLI, "La legge applicabile ai rapporti patrimoniali tra coniugi, uniti civilmente e conviventi di fatto nel Diritto internazionale privato italiano ed europeo", *Rivista di diritto internazionale privato e processuale (RDIPP)*, 2017, 4, pp. 1103 ff.

⁵⁸ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6–16.

⁵⁹ Article 3 of Rome I Regulation. See for general remarks among others, U. MAGNUS, P. MANKOWSKI (eds.), *Rome I Regulation – Commentary*, vol. 2, 2016, *passim*.

⁶⁰ See *infra* par. 3.1.

⁶¹ See A. BONOMI, *The Interaction among the Future EU Instruments*, pp. 226, 227.

ferring to its Article 17⁶². In order to overcome this difficulty, in the adopted text there has been included a further paragraph, n. 3, where it is specified that «by way of exception and upon application by either spouse, the judicial authority having jurisdiction to rule on matters of the matrimonial property regime may decide that the law of a State other than the State whose law is applicable pursuant to point (a) of paragraph 1 shall govern the matrimonial property regime if the applicant demonstrates that: the spouses had their last common habitual residence in that other State for a significantly longer period of time than in the State designated pursuant to point (a) of paragraph 1; and both spouses had relied on the law of that other State in arranging or planning their property relations». So, in this case, but just by the way of exception and when the spouses have not concluded a matrimonial property agreement before the establishment of their last common habitual residence in that other State, a special role is recognised upon the court and upon the involved parties. In fact, if the parties agree, the judge may decide that the law of the State of the last habitual residence may be applied. This is a discretionary decision. Nonetheless, this possibility shall be subject to the evidence, provided by the involved parties, that the spouses had their last common habitual residence in that other State for a significantly longer period of time than in the State of the first habitual residence after marriage. However, if this change is permitted, it is provided that, unless the spouses disagree, the law of that other State shall have effects only from the moment where the spouses have established their common habitual residence in that other State, in order not to jeopardise the rights of third parties. Nonetheless, it shall be pointed out that this exceptional provision does not apply if the spouses have concluded a matrimonial property agreement before establishing their common habitual residence in a different Member State.

If the different habitual residence coincides with the last habitual residence at the moment of death of one of the spouses, the coincidence between the succession law and the law applicable to matrimonial property regimes may be re-established. Moreover, if the proceedings concerning one of the spouses' succession have been previously opened, due to the attraction of jurisdiction on matrimonial property regimes under the succession jurisdiction provided for under Article 4, the court may rule on the case by applying its own law, with all the related advantages.

37. Article 26 provides also other hierarchically ordered criteria. Namely, if the involved parties have not a common habitual residence after the conclusion of marriage, the further criterion contemplated under letter b), is the spouses' common nationality at the time of the conclusion of the marriage, or, as a last resort, under letter c), the law with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances. The former criterion allows a coincidence between the succession law and the law applicable to the matrimonial property regime, whenever one of the spouses has made, according to Article 22 of the Regulation No. 650/2012⁶³, a *professio iuris* in favour of the law of his/her nationality, which may even include a future nationality. This is because, under Regulation No. 650/2012, an *optio legis* may be made in favour of a present or a future nationality, and more importantly, if one of the spouses has made a *professio iuris* in order to determine the law applicable to his or her succession before or at the time of the conclusion of the marriage, a future change of nationality does not affect the validity of the choice. Under paragraph 2, a solution is also provided for those cases where the spouses have more than one common nationality

⁶² Article 17 states that where no choice is made «1. If the spouses do not make a choice, the law applicable to the matrimonial property regime shall be: (a) the law of the State of the spouses' first common habitual residence after their marriage or, failing that, (b) the law of the State of the spouses' common nationality at the time of their marriage or, failing that, (c) the law of the State with which the spouses jointly have the closest links, taking into account all the circumstances, in particular the place where the marriage was celebrated. 2. Paragraph 1(b) shall not apply if the spouses have more than one common nationality». See A. BONOMI, *The Interaction among the Future EU Instruments*, pp. 226, 227.

⁶³ See on *professio iuris* under the Succession Regulation, among others, E. CASTELLANOS RUIZ, in A. Calvo Caravaca, A. Davi, H.-P. Mansel (eds.), *The Eu Succession Regulation, A Commentary, Article 22*, p. 324; J.M. FONTANELLAS MORELL, *La professio iuris sucesoria*, Madrid, 2010 pp. 29-55; H.-P. MANSEL, *Party Autonomy, Legal Doctrine on Choice of Law, and the General Section of the European Conflict of Laws*, in *General Principles of European Private International Law*, in S. Leibe (eds), Alphen aan den Rijn, 2016, p. 143 ff.; A. BONOMI, *Article 22*, in A. Bonomi, P. Wautelet, *Le droit européen des successions*, 2^e ed., 2016, Bruxelles, p. 321 ff. and D. LOOSCHELDERS, in Hußtege, Mansel, *BGB Kommentar*, 2^a ed., Baden Baden, 2015 p. 916 ff.

at the time of the conclusion of the marriage. In this case, only points (a) and (c) of paragraph 1 shall apply, hence the first common habitual residence of the spouses after marriage and, subsidiarily, the law with which the spouses jointly have the closest connection at the time of the conclusion of the marriage.

38. Another issue, which might affect the consistency of either the matrimonial property regime or the property consequences of registered partnerships, regards the case of simultaneous death or *commorientes* of the spouses or partners. This because, the establishment of the prior death of one of the spouses or partner may mean that the other spouse or partner will become beneficiary of the estate, according to the rules which regulate the winding up of the inheritance. In case of *commorientes*, usually, none of the deceased persons has any rights to the succession of the other, but in case of spouses or partners, especially in those cases where the couples are married or united in a partnership in a community of property, this separation may origin criticisms. Given that no rules regarding this specific issue are provided under the letter of the Regulations, the solution to such a problem shall be dictated by the Succession Regulation (Article 32⁶⁴).

39. Regarding, in particular, the issues concerning the applicable law, in case of *commorientes*, in fact, if the spouses have a different nationality and both have made a *professio iuris* in favour of the law of his/her nationality in accordance with Article 22 of the Succession Regulation, the result may prove complicated. The winding up of the assets, in fact, might be adjudicated by two different courts under two different laws. According to the content of Article 32 of the Succession Regulation, it is legitimate to wonder whether in this case the inheritance rights of each spouse should be considered or not? Article 32 of the Succession Regulation, which has been considered as a substantive rule⁶⁵, provides that whenever two persons whose successions are governed by different laws die in circumstances in which it is uncertain in what order their deaths occurred, and where those laws provide differently for that situation or make no provision for it at all, none of the deceased persons shall have any rights to the succession of the others. Given the above, in these cases, the inheritance rights of each spouse should be excluded. As a result, the frame will be up to two different courts which shall deal with two successions, different but inevitably strictly connected, by applying, in most cases, two different laws.

40. The above consideration, with some peculiarities, may be referred also to Regulation No. 2016/1104 on property consequences of registered partnership. In this case, Article 26 envisages only one general additional criterion. Namely, in the absence of a choice of the applicable law pursuant to Article 22, the law applicable to the property consequences of registered partnerships shall be the law of the State under whose law the registered partnership was created. Given that, as matter of the fact, more frequently than not the place where a registered partnership is created is also the place where the partners (either both or one of them) have their habitual residence, it is strongly probable, in case of change of the habitual residence, that the law applicable to the succession will be different from the law applicable to the property effects of the partnership. This is true except for the case where the partners have made a *professio iuris* under the Succession Regulation and the law of their nationality is the same as the law of the place where the registered partnership was created. In this case, in fact, a future change of habitual residence, under both the Regulations, does not affect this coincidence, absent a deliberate change made by the parties concerned.

1. The impact of party autonomy on the designation of the applicable law under the two new Regulations

41. As already mentioned, under both the Regulations the parties are granted the possibility to choose the law applicable to the matrimonial property regime and to the property consequences of registered partnerships. Recitals 45 under Regulation No. 2016/1103 and 44 under Regulation No. 2016/1104

⁶⁴ See E. CALZOLAIO, in A.-L. Calvo Caravaca, A. Davì, H.-P. Mansel (eds.), *The Eu Succession Regulation, A Commentary*, Article 32 (*commorientes*), p. 452 ff.

⁶⁵ See E. CALZOLAIO, Article 32 (*commorientes*), p. 452 ff.

respectively underline that, in order to facilitate spouses or partners in the management of their property, either Regulation should authorize them to choose the law applicable to their matrimonial property regime or to the property consequences of their registered partnership, regardless of the nature or location of the property. It is appropriate, according to the preambles of both texts, that the choice falls among the laws with which the spouses or the partners have close links, because of their habitual residence or their nationality. Moreover, in accordance with a recognized general freedom in managing personal relationships which characterizes domestic laws⁶⁶, the choice may be made at any moment, before the marriage or the registration of the partnership, at the time of conclusion of the marriage or registration of the partnership, or during the course of the marriage or of the registered partnership.

42. According to Article 22 of Regulation No. 2016/1103, the spouses or the future spouses may choose, or change their earlier choice, between two alternatives: «

(a) the law of the State where the spouses or future spouses, or one of them, is habitually resident at the time the agreement is concluded; or (b) the law of a State of nationality of either spouse or future spouse at the time the agreement is concluded». Even if both the Regulations embrace the possibility to modify the matrimonial or partnership regimes⁶⁷, according to Article 22, paragraph 2, unless the spouses agree otherwise, a change of the law applicable to the matrimonial property regime, which is made during the marriage, shall have prospective effects only. However, even if the spouses agree for retroactive effects, according to paragraph 3, they may not adversely affect the rights of third parties deriving from that law⁶⁸.

43. Same conditions are provided under Regulation No. 2016/1104, with only one additional criterion⁶⁹. Namely, according to Article 22 the partners or future partners may agree to designate or to change the law applicable to the property consequences of their registered partnership, under the condition that the chosen law attaches property consequences to the institution of the registered partnership, among the following laws: «(a) the law of the State where the partners or future partners, or one of them, is habitually resident at the time the agreement is concluded; (b) the law of a State of nationality of either partner or future partner at the time the agreement is concluded, or (c) the law of the State under whose law the registered partnership was created». This choice may be made at any moment, before the registration of the partnership, at the time of the registration of the partnership or during the course of the registered partnership.

44. Similarly to the Regulation on matrimonial property regimes, paragraph 2 provides that unless the partners agree otherwise, a change of the law applicable to the matrimonial property regime, which is made during the marriage, shall have prospective effects only (*ex nunc* effects). In this case

⁶⁶ See for general remarks I. VIARENGO, *Autonomia della volontà e rapporti patrimoniali tra coniugi nel diritto internazionale privato*, Padova, 1996, *passim*.

⁶⁷ See for a comparison between the new Regulation and art. 30 of the Italian PIL No. 218/1995 O. FERACI, “*L’incidenza del nuovo regime europeo in materia di rapporti patrimoniali tra coniugi e parti di unioni registrate sull’ordinamento giuridico italiano*”, p. 21 and particularly footnote 45. For more general remarks see, R. CLERICI, *Articolo 30 (Rapporti patrimoniali tra coniugi)*, in F. Pocar, T. Treves, S.M. CARBONE, A. GIARDINA, R. LUZZATTO, F. MOSCONI, R. CLERICI, *Commentario del nuovo diritto internazionale privato*, Padova, 1996, p. 157 ff.

⁶⁸ See P. LAGARDE, *Reglements 2016/1103 et 1104 du 24 juin 2016 sur les regimes matrimoniaux et sur le regime patrimonial des partenariats enregistres*, p. 682.

⁶⁹ It seems appropriate to point out, that in the first proposal (COM(2011) 127 def.) the choice of the applicable law has been completely excluded with respect to the property consequences of registered partnership due to the differences among the national laws of those Member States that make provision for registered partnerships. In this respect, article 15 of the first proposal provided that «the law applicable to the property consequences of registered partnerships is the law of the State in which the partnership was registered». According to the explanatory memorandum, this principle would have been in line with the Member States’ laws on registered partnerships, which usually provide for application of the law of the State of registration, and do not offer partners the option of choosing any law other than the State of registration, even though they may be entitled to conclude agreements between themselves. See on this specific point the critical position expressed by A. BONOMI, *The Inter-ecation among the Future EU instruments*, pp. 230-231.

as well, «any retroactive change of the applicable law under paragraph 2 shall not adversely affect the rights of third parties deriving from that law»⁷⁰. The partial difference, between the rules provided under the two Regulations, depends on the dissimilarities among domestic laws in each Member State in relation to this specific field. In this respect, as already mentioned, recital 44 underlines that in order to facilitate the partners' management of their property, the Regulation should authorize them to choose the law applicable to the property consequences of their registered partnership, regardless of the nature or location of the property, among the laws with which they have close links such as because of their habitual residence or nationality. Nevertheless, in order to avoid depriving the choice of law of any effect and thereby leaving the partners in a legal vacuum, such choice of law should be limited to a law that attaches property consequences to registered partnerships. Obviously, the same issue does not arise for marriage, given that legislation in all Member States regulates marriage and matrimonial property regimes, albeit in different ways. At most, the differences are connected with the matrimonial status and the matrimonial property regimes.

45. Regarding the formal requirements for a *pactum de lege utenda*, both the Regulations provide the same essential conditions for a choice of the applicable law. Under Article 23 it is stated (in both texts), that the agreement referred to in Article 22 «shall be expressed in writing, dated and signed by both spouses (or partners)». Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing. As already mentioned concerning the choice of court agreements⁷¹, in order to reflect the ongoing technological developments in the field of communications, Article 23, under both Regulations, considers an agreement concluded through electronic means as equivalent to an agreement concluded in writing, as long as the means used provide a durable record of the agreement.

Nonetheless, in both the new legal instruments further additional formal requirements are established. Particularly, if the law of the Member State of the common habitual residence of the spouses or the partners, or, failing a common habitual residence, the law of one of the Member State, of the habitual residence of the spouses or partners at the time the agreement is concluded lays down additional formal requirements for matrimonial property agreements (or partnership property agreements), those requirements shall apply. In case just one of the spouses or the partners has his/her habitual residence in one Member State and the other in a third country, both the Regulations just take into account the formal requirements provided by the law of the relevant Member State, without taking into account the ones provided by the law of the involved third country⁷². Moreover, given that a *professio iuris* is a private act of party autonomy, in order to designate the applicable law it must be not only formally but also materially valid. The issue concerning the material validity of the agreement on a choice of the applicable law is referred basically to the consent of the spouses or of the partners, which, usually, is not expressly regulated by means of private international law rules⁷³.

46. Pursuant to Article 24 of both Regulations, the existence and validity of an agreement on the choice of law, or of any term thereof, shall be determined by the law which would govern it pursuant to Article 22 if the agreement or term were valid. Therefore, the Regulations refer to the *lex voluntatis* and the conditions of validity of the parties' consent are delegated to the chosen law⁷⁴. Again the scheme is the

⁷⁰ See P. LAGARDE, *Reglements 2016/1103 et 1104 du 24 juin 2016 sur les regimes matrimoniaux et sur le regime patrimonial des partenariats enregistres*, p. 682.

⁷¹ Above par. 2.1.

⁷² As underlined by P. LAGARDE, *Reglements 2016/1103 et 1104 du 24 juin 2016 sur les regimes matrimoniaux et sur le regime patrimonial des partenariats enregistres*, p. 682, «concrètement, ces règles signifient que la convention conclue par acte sous seing privé, conformément à la loi du lieu de conclusion sera nulle en la forme si la loi de l'Etat membre de la résidence habituelle commune ou de la résidence habituelle de l'un des époux ou partenaires exige un acte notarié, voire la présence de deux notaires».

⁷³ See A. WYSOCKA, "How can a valid *professio iuris* be made under the EU Succession Regulation", *Netherlands Internationaal Privaatrecht (NiPR)*, 2012, p. 573.

⁷⁴ See O. FERACI, "L'incidenza del nuovo regime europeo in tema di rapporti patrimoniali tra coniugi e parti di unioni registrate sull'ordinamento giuridico italiano", p. 26.

same as under the Succession Regulation. Nonetheless, even in this case, as the doctrinal debate has noticed about the Succession Regulation, there is an open question. The material validity of a *professio iuris* should be determined according to the substantive law of the *forum* or by the law chosen by the involved parties? The first solution, which seems more reliable, has been criticised by part of the doctrine as leading to a logical error⁷⁵. In fact, as it is intended, it is not possible to verify the validity of a choice of the applicable law in accordance with the law chosen, if it is not yet proven that that choice was indeed validly made. Nonetheless, this criticism may be considered satisfactorily answered by means of the hypothetical law mechanism. Moreover, this objection has been overcome by the Regulations since, according to the content of Article 24, the conditions of validity of the parties' consent shall be delegated to the chosen law.

47. A further requirement which affects the material validity of a *professio iuris* is posed regarding Regulation No. 2016/1104. In case of registered partnerships and in order to avoid legal loopholes and ensure legal certainty, it is provided that in order for a *professio iuris* to be effective it shall designate a law which attaches property consequences to the institution of a registered partnership. It means that, whenever, by means of a *professio iuris*, the involved parties have chosen a law which does not recognize any effects to the registered partnership, this choice shall be considered ineffective and the issues concerning the applicable law shall be dealt with under the other criteria provided by the Regulation in the absence of a choice.

48. About the coordination between a *professio iuris* made under the new Regulations and a *professio iuris* made in accordance with the Succession Regulation, it is possible to make a few remarks. Differently from the provisions concerning jurisdiction⁷⁶, there is no specific provision allowing to connect a *professio iuris* made in accordance with Article 22 of the Succession Regulation and one made pursuant to Article 22 of the new Regulations. Moreover, the choice allowed under the Succession Regulation is much more restricted than that provided under the Regulations on matrimonial property regimes and property consequences of registered partnerships, since the *de cuius* may only opt for the law of the State of his/her present or future nationality and neither for the law of the State of his/her habitual residence at the moment of choice nor for the law applicable to the matrimonial property regime or the property consequences of a registered partnership. In this latter regard, as already pointed out, criticism was raised concerning the choice by the European legislator to exclude, from the scope of the Succession Regulation, the matrimonial property regimes and the property consequences of registered partnerships, since these are closely related aspects⁷⁷. As a consequence, at present, the possibility to submit the matrimonial property regimes or the property consequences of registered partnerships to the succession law implies the previous knowledge of that law (which, usually, whenever the *de cuius* has made a *professio iuris*, is unknown till the moment of his death, unless he or she has disclosed it). On the contrary, it is not allowed to submit the succession to the law which is designated to govern the matrimonial property regime or the property consequences of a registered partnership, due to the limitation of the scope of a *professio iuris* under the Succession Regulation.

IV. Final remarks

49. In the end, the resulting general framework concerning the allocation of jurisdiction in family and succession issues under the EU instruments so far adopted appears quite complicated. In fact, in spite of the effort of the European legislator to ensure a unique ground of jurisdiction for issues that, however strictly connected, are different, the resulting situation, by applying the different connecting factors contemplated by the relevant Regulations, is currently fragmented.

⁷⁵ See A. WYSOCKA, "How can a valid *professio iuris* be made under the EU Succession Regulation", pp. 573-574.

⁷⁶ See above par. 2.2.

⁷⁷ See A. BONOMI, *The Interaction among the Future EU Instruments*, p. 230, who underlines, in the early stage of the adoption of these instruments, that «to avoid such restrictions, it would be desirable to include, in the future Succession Regulation, the possibility to submit the succession to the law applicable to the matrimonial property regime».

On the one hand, due to the coordination provided between the grounds of jurisdiction under Regulation No. 2201/2003 and those under Regulation No. 2016/1103, it is more probable than not that several different grounds of jurisdiction will co-exist, and different courts will be called upon to rule on different aspects of a same legal relationship, with the concrete risk of a positive conflict of judgements.

On the other hand, as concerns the coordination between the Succession Regulation and the two new Regulations, even if it is more probable than not that a single ground of jurisdiction will apply, thanks to the rules of coordination just mentioned, the courts shall rule by applying different laws. In fact, in both the new Regulations there does not exist a rule similar to Article 6⁷⁸ of the Succession Regulation. This provision, under some conditions, allows the courts seized under the general or subsidiary rules to declare jurisdiction in case the *de cuius* has made a *professio iuris*. As a consequence, whenever a *de cuius* has made a *professio iuris* in favour of the law of his or her nationality pursuant to Article 22 of Regulation No. 650/2012, and the spouses or partners have made a *professio iuris* according to Article 22 of the new Regulations, it may happen that, after jurisdiction on property aspects is attracted to the courts having jurisdiction as concerns the succession, the risk exists for the court to being called to rule applying two different laws, except where there is a fortunate coincidence between these laws. The situation that the courts will face in these cases is closer to the one which may arise in the field of contractual obligations, where *dépeçage* allows that different issues related to the same contract may be governed by different laws. Nonetheless, in the field of family and succession matters, it may be argued that this fragmentation, given the high complexity of the related issues, is not in the best interests of the involved parties as well as of legal certainty. In the light of this potential difficulties in coordination, the shortcomings inherent in the European Legislator's choice not to allow under the Succession Regulation a *professio iuris* by the *de cuius* in favour of the law of his habitual residence at the moment of choice or in favour of the law of the matrimonial property regime or of the property consequences of a registered partnership appear even more serious.

Nevertheless, in order to realise the effects of this fragmentation in concrete terms, it is necessary to wait for the first cases to be submitted to the ECJ for a preliminary ruling. However, at a first glance, due to the special effort that the European legislator has spent to guarantee the coincidence between *forum* and *ius* under the Succession Regulation, it should be pointed out that this fragmentation might increase legal uncertainty.

⁷⁸ See Article 6 Regulation No. 650/2012 and F. MARONGIU BUONAIUTI, *Article 6*, in *The EU Succession Regulation, A Commentary*, p. 162 ff.