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AUTHORS: Corinne Widmer Lüchinger LUCHINGER

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## İNCELEMELER

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### RECENT DEVELOPMENTS IN INTERNATIONAL FAMILY LAW: AN OVERVIEW\*

Prof. Dr. Corinne Widmer LÜCHINGER\*\*

#### Abstract

*Article 81 (1) of the Treaty on the Functioning of the European Union provides that the Union shall develop judicial cooperation in civil matters with cross-border implications. This includes adopting measures aimed at ensuring “the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction” (Art. 81(2)c)). The unification of international family law matters started much later than in commercial matters and is still ongoing. Measures taken were the introduction of the Brussels II Regulation, the Brussels IIa Regulation, the Rome III Regulation and the Maintenance Regulation. The most recent step in the unification process was the adoption of two new regulations on matrimonial property regimes and the property consequences of registered partnerships, respectively. This article aims to provide an overview of the European Union’s international family law and its impact on non-member states such as Turkey and Switzerland.*

**Keywords:** *Developments in EU international family law, impact of EU developments on non-member states, Brussels IIa, Rome III, Maintenance Regulation, Regulation on Matrimonial Property Regimes, Regulation on the Property Consequences of Registered Partnerships, enhanced cooperation among EU member states.*

### ULUSLARARASI AİLE HUKUKUNDA GÜNCEL GELİŞMELER: GENEL BAKIŞ

#### Öz

*Avrupa Birliği’nin İşleyişi Hakkında Antlaşma’nın 81(1)’inci maddesi, Birliğin sınır dışı etkileri olan medeni hukuka ilişkin konularda devletler arasında adli işbirliğinin geliştirilmesini sağlamakla yükümlü olduğunu düzenlemektedir. Bu yükümlülük, “Taraflar Devletler’de kanunlar ihtilaflı ve milletlerarası yetki konusunda uygulanacak kuralların uyumlaştırılmasını” sağlamayı amaçlayan düzenlemelerin yapılmasını da içermektedir (m.*

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\* This paper is an updated version of the presentation I gave at the International Family Law Conference in Istanbul in May 2015. I have kept the style of the original presentation.

\*\* Corinne Widmer Lüchinger, Prof. Dr. iur., Attorney, Professor and Dean at the University of Basel, Faculty of Law, Basel, Switzerland [corinne.widmer@unibas.ch].

81/(2)c). Uluslararası aile hukukuna ilişkin konuların yeknesaklaştırılması süreci, ticari konulara nazaran daha ge  bir tarihte başlamıştır ve halen de devam etmektedir. Yapılan d zenlemeler; Br ksel II T z    'n n giriř kısmı, Br ksel IIa T z    , Rome III T z     ve Nafaka T z    'd r. Bu yeknesaklaştırma sürecindeki en g ncel adım ise, sırasıyla evlilik mallarına ve tescil edilmiř yařam ortaklıklarının malvarlıksal sonu larına iliřkindir iki yeni t z    n kabul edilmesidir. Bu makale, Avrupa Birli i uluslararası aile hukuku d zenlemelerini ve bu d zenlemelerin T rkiye ve İsvi re gibi Birlik  yesi olmayan devletlere etkisini incelemeyi ama lamaktadır.

**Anahtar Kelimeler:** AB uluslararası aile hukukundaki geliřmeler, AB geliřmelerinin  ye olmayan devletlere etkisi, Br ksel IIa, Rome III, Nafaka T z    , Evlilik Mallarına İliřkin T z    , Tescil Edilmiř Yařam Ortaklıklarının Malvarlıksal Sonu larına İliřkin T z    , AB  ye devletler arasında artan iřbirli i.

## I. Introduction

There have been so many developments in international family law in recent years that it is impossible to give an overview of them all in such a short time. Instead, I will focus on what is particularly relevant for countries such as Turkey, and that is the impact of the European Union's regulations on non-member states. Because of the time constraints, I will leave issues relating to children aside.

Turkey and Switzerland share a similar position in that when it comes to EU regulations, we are outsiders looking in. However, outsiders though we may be, we are still impacted by EU family law. Depending on your perspective, the impact can be positive or negative. Positive in that, for example, claimants who reside in third states may benefit from additional fora in EU member states, so that they will have a wider range of choice for bringing their claims. And negative in that defendants may be brought before the court of a state within the EU under EU regulations even if they themselves are not resident in the European Union.<sup>1</sup>

## II. General Developments in EU International Family Law

I shall start with a brief overview of the EU regulations on international family law. The unification of private international law in this area started much later than in commercial matters, and is still ongoing.

<sup>1</sup> See below *sub* III.

The first step was the introduction of the Brussels II Regulation<sup>2</sup> in the year 2000, which dealt with the jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses. The Brussels II Regulation has since been repealed by the Brussels IIa Regulation,<sup>3</sup> which will be discussed at length in another presentation. Brussels IIa came into force on March 1, 2005. It has a broader scope in that it deals with matters of parental responsibility regardless of whether they arise in connection with divorce or separation. However, it does not govern ancillary issues such as maintenance or matrimonial property. Brussels IIa is currently in the process of being reformed. A proposal for a revised regulation was adopted by the European Commission on June 30, 2016.<sup>4</sup>

The second step was the introduction, in 2008, of the EU regulation on maintenance obligations<sup>5</sup> (the “Maintenance Regulation”). It came into force on June 18, 2011. Unlike Brussels IIa, the Maintenance Regulation is not only concerned with jurisdiction, recognition and enforcement, but also with the applicable law. It also aims to strengthen the cooperation of member states.

The next step was the Rome III Regulation,<sup>6</sup> which came into force a year later, on June 21, 2012. Rome III provides rules for determining the law applicable to divorce and legal separation. In that respect, it complements the Brussels IIa Regulation. However, unlike Brussels IIa, Rome III does not apply in the entire European Union. The reason for this is that measures

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<sup>2</sup> Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses.

<sup>3</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

<sup>4</sup> Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM(2016) 411 final.

<sup>5</sup> Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

<sup>6</sup> Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

concerning international *family* law can only be adopted with effect for the EU as a whole if there is a unanimous decision within the Council. If there is no unanimous decision, the member states which are in agreement can rely on a mechanism called “enhanced cooperation”, meaning that a Regulation will be passed, but with effect only for those states who wish to participate. Rome III currently only applies in sixteen member states of the European Union.<sup>7</sup> In all other EU member states, the law applicable to divorce and legal separation continues to be determined by domestic law.

The latest step in the unification process was taken only recently, with the adoption of the new regulation on matrimonial property<sup>8</sup> (the “Matrimonial Property Regulation”) and the new regulation on the property consequences of registered partnerships<sup>9</sup> on June 24, 2016. The path leading up to these regulations was rocky. An amended version of the original proposals had already been adopted by the European Parliament in September 2013. However, some member states expressed concern over the political implications of the proposed regulations. In December 2014, a period of internal reflection was announced by the Council. A year later, in December 2015, the Council concluded that despite intensive consultations, no unanimous decision could be reached, and that therefore, the proposed regulations could not be made effective for the EU as a whole. Shortly thereafter, seventeen member states<sup>10</sup> expressed their wish to establish enhanced cooperation between themselves in both areas, and addressed a request to the Commission to that effect.<sup>11</sup> The proposed regulations<sup>12</sup> were adopted by the Council

<sup>7</sup> Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Latvia, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain as of June 21, 2012 (OJ L 343/10, 29.12.2010); Lithuania as of May 22, 2014 (OJ L 323/18, 22.11.2012); and Greece as of July 29, 2015 (OJ L 23/41, 28.1.2014). As of February 2018, Rome III will also apply in Estonia.

<sup>8</sup> Council Regulation (EU) 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.

<sup>9</sup> Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

<sup>10</sup> Sweden, Belgium, Greece, Croatia, Slovenia, Spain, France, Portugal, Italy, Malta, Luxembourg, Germany, the Czech Republic, the Netherlands, Austria, Bulgaria and Finland.

<sup>11</sup> See the Commission’s Explanatory Memorandum, COM(2016) 107 final and COM(2016) 106 final, both at p. 3.

<sup>12</sup> Proposal for a Council Regulation on jurisdiction, applicable law and the recognition

in March 2016.<sup>13</sup> As with Rome III, the new regulations will only apply in those member states which participate in enhanced cooperation in the two respective areas.<sup>14</sup> In all other EU member states, matters of matrimonial property and the property consequences of registered partnerships will continue to be governed by domestic law.

### III. Impact on Non-Member States

Let us now turn to the potential impact of these regulations on persons who are resident in Turkey, Switzerland or other states which are not members of the European Union. The impact is much stronger in family law than in the area of civil and commercial matters. The main reason for this is that unlike the Brussels I Regulation on civil and commercial matters,<sup>15</sup> the European Union's provisions on jurisdiction in international *family* law apply regardless of whether the defendant is resident in an EU member state or in a third state. The Brussels IIa Regulation serves as an illustration of this point.

#### 1. Brussels IIa

Let us assume we have a couple, a husband and wife. They are both Turkish nationals, and, until recently, they were both resident in Germany. The husband has returned to Turkey, where he is now habitually resident. The wife is still living in Germany, where she has applied for divorce. The German court, when deciding whether it has jurisdiction over the divorce application, will apply the Brussels IIa Regulation. It will do so even though the husband is not resident in the European Union.<sup>16</sup>

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

<sup>13</sup> On the developments which led up to the two proposals, see the Commission's Explanatory Memorandum, COM(2016) 107 final and COM(2016) 106 final, both at pp. 2 ff.

<sup>14</sup> On the date of entry into force, see Art. 70 of either regulation.

<sup>15</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>16</sup> See also Daniel Trachsel, *Scheidung im internationalen Kontext: Strategien und Planung*, FamPra.ch 2013.

549, 556 f.

In practice, this means that the wife will be able to rely on the many alternative grounds for jurisdiction which are provided in Article 3 Brussels IIa. These include, for example: the state where the spouses are habitually resident; the state where they were *last* habitually resident, provided one of the spouses still resides there; the state where the *respondent* is habitually resident; the state where the *applicant* is habitually resident if they resided there for *at least a year* immediately before the application; or the state of which both spouses are nationals. It goes without saying that these many alternatives can promote forum shopping.

In my example, the German court would have jurisdiction over the wife's divorce application under Brussels IIa, as the spouses' last habitual residence was in Germany and the wife still lives there.

Let us change the example slightly and assume that the wife, shortly after leaving the marital home, moved to the Netherlands, where she has lived for three months. She wishes to apply for divorce in Germany or in the Netherlands. Under Brussels IIa, neither the German nor the Dutch court will have jurisdiction. The German court does not have jurisdiction under Brussels IIa because the wife no longer resides in Germany; the Dutch court does not have jurisdiction under Brussels IIa as the wife has not lived there for the required amount of time. However, the Dutch and German courts may *still* have jurisdiction over the divorce application under their *domestic procedural laws*. This follows from Article 7 of the Brussels IIa Regulation, which expressly allows the courts to rely on their domestic laws against a spouse who is neither resident in the EU nor a national of the EU if jurisdiction cannot be established under Brussels IIa. In more recent regulations on family law, this residual mechanism has been abolished.

Let us change the example again and assume that the couple lives in Istanbul, and that the husband and wife are both German-Turkish dual nationals. Even though neither spouse lives in the European Union, Brussels IIa still allows either of them to apply for divorce in Germany on the basis of their common German nationality. It does not matter – and this is important – whether the German nationality is also the spouses' "effective" nationality. This point was clarified by the ECJ in the *Hadadi* case in 2009.<sup>17</sup>

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<sup>17</sup> ECJ, 16.7.2009, C-168/08 (*Hadadi*), [2009] ECR I-6871; see also Andrea Bonomi,

## 2. Rome III

If a court in the European Union has jurisdiction to hear the divorce application, it will have to determine the applicable divorce law. If the state in which it is located is a participant in Rome III, then it will do so by applying Rome III. If not, then it will turn to its own domestic law.

Rome III only determines the law which applies to the divorce or separation itself, not, however, the law governing ancillary matters such as parental responsibility, maintenance or the spouses' name.<sup>18</sup>

As pointed out before, Rome III currently only applies in sixteen EU member states. This means that when you are considering whether to apply for divorce in the European Union, you will need to verify whether the court is located in a state that is participating in Rome III, as this will affect the applicable law. This parallel system of unified EU law and domestic private international law can make forum shopping an attractive option.

Unlike many domestic laws, Rome III is very modern in that it allows the parties to choose the applicable divorce law.<sup>19</sup> However, this freedom is limited, and the parties may only choose among the laws specified in Rome III.<sup>20</sup> Also, certain formal requirements must be fulfilled.<sup>21</sup> If the parties have not agreed on the applicable law, then the Regulation provides different connecting factors which will apply in order of precedence.<sup>22</sup>

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*Le Règlement européen sur les successions et son impact pour la Suisse*, in: Paul-Henri Steinauer/Michel Mooser/Antoine Eigenmann (eds.), *Journée de droit successoral*, 2015, Berne 2015, 63, 95; Cristina González Beilfuss, *The Rome III Regulation on the law applicable to divorce and legal separation: much ado about little*, in: Andrea Bonomi/Christina Schmid (eds.), *Droit international privé de la famille*, Lausanne 2014, 29, 41.

<sup>18</sup> See also Trachsel, *FamPra.ch* 2013, 549, 563 f.

<sup>19</sup> See also Dagmar Coester-Waltjen/Michael Coester, *Rechtswahlmöglichkeiten im Europäischen Kollisionsrecht*, in: Ralf Michaels/Dennis Solomon (eds.), *Liber Amicorum Klaus Schurig*, Munich 2012, 33, 35 f., 37 ff.; Ivo Schwander/Tarkan Göksu, *Arbeitskreis 8: Trennung und Scheidung mit Auslandsbezug*, in: Ingeborg Schwenzer/Andrea Büchler/Roland Fankhauser (eds.), *Siebte Schweizer Familienrechtstage*, Berne 2014, 209, 214 f.

<sup>20</sup> See also Coester-Waltjen/Coester, 33, 37 ff.; Trachsel, *FamPra.ch* 2013, 549, 564.

<sup>21</sup> See also Coester-Waltjen/Coester, 33, 44 f.

<sup>22</sup> See also Schwander/Göksu, 209, 215; Trachsel, *FamPra.ch* 2013, 549, 564.



The law which is designated by Rome III applies regardless of whether it is the law of an EU member state or a third state.<sup>23</sup> In other words, it is perfectly possible that a court of an EU member state would apply Turkish or Swiss divorce law under Rome III.

In a controversial decision in 2013, the German appellate court of Hamm held that a choice of law could also be *implied* under Rome III. The case concerned a couple who were originally both Iranian nationals. They had entered into a marriage contract which provided that the wife would also be able to apply for divorce. The reasons for divorce listed in the contract corresponded to provisions in the Iranian civil code. The court concluded that the couple had thereby impliedly agreed that Iranian divorce law should apply.<sup>24</sup>

### 3. Maintenance Regulation

Jurisdiction over maintenance claims is not governed by Brussels IIa but by the Maintenance Regulation, which entered into force in 2011. This regulation also includes provisions on the applicable law, as well as on the recognition and enforcement of court decisions of EU member states.

The Maintenance Regulation provides a number of alternative grounds for jurisdiction. In particular, it allows a concentration of jurisdiction in the court which has jurisdiction over divorce proceedings, *unless* that jurisdiction is based solely on the nationality of one of the parties. Like Brussels IIa, the jurisdictional rules of the Maintenance Regulation apply regardless of whether the defendant is resident in an EU member state or not.

However, the Maintenance Regulation has gone further than Brussels IIa in a number of respects. Firstly, it no longer allows the member states to establish jurisdiction on the basis of their domestic procedural law. It also gives the parties more autonomy than Brussels IIa, as it allows them to agree on the court which shall have jurisdiction over their dispute. This is a major step forward compared both to Brussels IIa and domestic laws. However, only certain courts can be chosen, and no choice is allowed at all where

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<sup>23</sup> Art. 4 Rome III.

<sup>24</sup> OLG Hamm, 7.5.2013, II-3 UF 267/12; see also Tobias Helms, *Konkludente Wahl des auf die Ehescheidung anwendbaren Rechts?*, IPRax 2014, 334 f.

maintenance towards a child under the age of 18 is at issue.

Party autonomy is also strengthened by the fact that the Regulation has completely incorporated the Hague Protocol of 2007 on the law applicable to maintenance obligations. The Hague Protocol allows the parties to choose certain laws to apply to a maintenance obligation.<sup>25</sup>

The Maintenance Regulation has also weakened the influence of nationality on jurisdiction. Unlike under Brussels IIa, jurisdiction of the state of the parties' common nationality is no longer an *alternative* basis of jurisdiction, but, instead, only *subsidiary*. It is not available where a different EU member state has jurisdiction under the general rules of the Regulation, and it is *also* not available if a member state of the Lugano Convention, such as Switzerland, has jurisdiction.<sup>26</sup>

#### 4. Regulation on Matrimonial Property

Finally, let us turn to the new Matrimonial Property Regulation<sup>27</sup> adopted in June 2016.<sup>28</sup> As is the case under Brussels IIa and the Maintenance Regulation, the Matrimonial Property Regulation also applies regardless of whether the defendant is resident in a participating member state.

The regulation seeks to ensure that the same courts called on to handle a spouse's succession in case of death or an application for divorce (or legal separation or marriage annulment) may also deal with issues of matrimonial property.<sup>29</sup> In case of an application for divorce (or legal separation or marriage annulment), the courts of that state shall have jurisdiction which have jurisdiction to rule on the divorce application under Brussels IIa. In certain cases, however, this concentration of jurisdiction is not automatic,

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<sup>25</sup> See also Coester-Waltjen/Coester, 33, 35 f., 40.

<sup>26</sup> Art. 6 Maintenance Regulation.

<sup>27</sup> Council Regulation (EU) 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.

<sup>28</sup> See above *sub* II.

<sup>29</sup> Arts. 4, 5 Matrimonial Property Regulation; see also (on the proposal) Anatol Dutta/Frauke Wedemann, *Die Europäisierung des internationalen Zuständigkeitsrechts in Gütersachen*, in: Reinhold Geimer/Rolf Schütze (eds.), *Recht ohne Grenzen*, Festschrift Athanassios Kaissis, Munich 2012, 133, 134 ff.

but must be agreed on by the spouses.<sup>30</sup> For matrimonial property issues arising *outside* of divorce, separation or death of a spouse, the regulation grants the parties a certain freedom to choose the forum.<sup>31</sup>

Where no member state has jurisdiction, the Regulation provides for subsidiary jurisdiction over property located in the territory of a member state, *but only* in so far as immovable property of one or both spouses is concerned.<sup>32</sup> Unlike Brussels IIa, the regulation does not allow the member states to rely on their domestic procedural law to establish jurisdiction.

The applicable law applies to all of the spouses' property under their matrimonial property regime, regardless of its location.<sup>33</sup> Within limits, the regulation allows the parties to choose the applicable law.<sup>34</sup>

### Conclusion

EU regulations on international family law can have a strong impact on defendants in third states, as they apply regardless of the defendant's residence. Lawyers who are consulted by residents in third states need to be aware of these implications. This can be challenging, as international family law within the European Union is still work in progress. The current regulations do not cover all areas of international family law. Some regulations have only just been adopted, while others are already in the process of being reformed.

Matters are made more complicated by the fact that those regulations which are currently in force differ with respect to certain central issues, such as the role of domestic procedural law, the role of the parties' nationality, or the possibility to choose the competent court.

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<sup>30</sup> Art. 5 Matrimonial Property Regulation; see also (on the proposal) Dutta/Wedemann, 133, 135 f.

<sup>31</sup> Arts. 6, 7 Matrimonial Property Regulation; see also (on the proposal) Dutta/Wedemann, 133, 136 f.

<sup>32</sup> Art. 10 Matrimonial Property Regulation; see also (on the proposal) Dutta/Wedemann, 133, 137.

<sup>33</sup> Art. 21 Matrimonial Property Regulation.

<sup>34</sup> Art. 22 Matrimonial Property Regulation.

A particular challenge from the perspective of third states is that the regulations on international family law do not deal with the effect of parallel proceedings in third states. This issue is left to the domestic procedural law of the respective court.

On the other hand, the regulations also open interesting opportunities for residents in third states. Seising a court in the European Union can be attractive for claimants from third states, especially as EU decisions are easier to enforce within the EU. An additional bonus is the importance given to party autonomy in many of the regulations, as this allows the parties to play a more active role. It has even been said that these advantages could result in a shift of court cases away from third states to the courts of the European Union.

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