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

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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 81(3) thereof,

Having regard to Council Decision (EU) 2016/954 of 9 June 2016 authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships[(1)],

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Parliament[(2)],

Acting in accordance with a special legislative procedure,

Whereas:

(1) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured. For the gradual establishment of such an area, the Union is to adopt measures relating to judicial cooperation in civil matters having cross-border implications, particularly when necessary for the proper functioning of the internal market.

(2) In accordance with point (c) of Article 81(2) of the Treaty on the Functioning of the European Union (TFEU), such measures may include measures aimed at ensuring the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction.

(3) The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial cooperation in civil matters and invited the Council and the Commission to adopt a programme of measures to implement that principle.

(4) A programme of measures for the implementation of the principle of mutual recognition of decisions in civil and commercial matters[(3)], common to the Commission and to

the Council, was adopted on 30 November 2000. That programme identifies measures relating to the harmonisation of conflict-of-law rules as measures facilitating the mutual recognition of decisions and provides for the drawing-up of an instrument in matters of matrimonial property regimes and the property consequences of the separation of unmarried couples.

(5) The European Council meeting in Brussels on 4 and 5 November 2004 adopted a new programme called 'The Hague Programme: strengthening freedom, security and justice in the European Union'[(4)]. In this programme the Council asked the Commission to present a Green Paper on the conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition. The programme also stressed the need to adopt an instrument in this area.

(6) 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 recognition. This Green Paper launched wide consultations on all aspects of the difficulties faced by couples in Europe when it comes to the liquidation of their common property and the legal remedies available. The Green Paper also addressed all issues of private international law encountered by couples in unions other than marriages, including couples with registered partnerships, and issues specific to them.

(7) At its meeting in Brussels on 10 and 11 December 2009, the European Council adopted a new multiannual programme called 'The Stockholm Programme — An open and secure Europe serving and protecting citizens'[(5)]. In that programme the European Council considered that mutual recognition should be extended to fields that are not yet covered but are essential to everyday life, for example the property consequences of the separation of couples, while taking into consideration Member States' legal systems, including public policy (*ordre public*), and national traditions in this area.

(8) In the 'EU Citizenship Report 2010: Dismantling the obstacles to EU citizens' rights', adopted on 27 October 2010, the Commission announced that it would adopt a proposal for legislation to eliminate the obstacles to the free movement of persons, in particular the difficulties experienced by couples in managing or dividing their property.

(9) 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 partnerships.

(10) At its meeting of 3 December 2015, the Council concluded that no unanimity could be reached for the adoption of the proposals for the regulations on matrimonial property regimes and the property consequences of registered partnerships and that therefore the objectives of cooperation in this area could not be attained within a reasonable period by the Union as a whole.

(11) From December 2015 to February 2016, Belgium, Bulgaria, the Czech Republic, Germany, Greece, Spain, France, Croatia Italy, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden addressed requests to the Commission

indicating that they wished to establish enhanced cooperation between themselves in the area of the property regimes of international couples and, specifically, of the jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and 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 effect. By letter to the Commission in March 2016, Cyprus indicated its wish to participate in the establishment of the enhanced cooperation; Cyprus reiterated this wish during the work of the Council.

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

(13) According to Article 328(1) TFEU, when enhanced cooperation is being established, it is to be open to all Member States, subject to compliance with any conditions of participation laid down by the authorising decision. It is also to be open to them at any other time, subject to compliance with the acts already adopted within that framework, in addition to those conditions. The Commission and the Member States participating in enhanced cooperation should ensure that they promote participation by as many Member States as possible. This Regulation should be binding in its entirety and directly applicable only in the Member States which participate in enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, by virtue of Decision (EU) 2016/954, or by virtue of a decision adopted in accordance with the second or third subparagraph of Article 331(1) TFEU.

(14) In accordance with Article 81 TFEU, this Regulation should apply in the context of the property consequences of registered partnerships having cross-border implications.

(15) To provide unmarried couples with legal certainty as to their property and offer them a degree of predictability, all the rules applicable to the property consequences of registered partnerships should be covered in a single instrument.

(16) The way in which forms of union other than marriage are provided for in the Member States' legislation differs from one State to another, and a distinction should be drawn between couples whose union is institutionally sanctioned by the registration of their partnership with a public authority and couples in de facto cohabitation. While some Member States do make provision for such de facto unions, they should be considered separately from registered partnerships, which have an official character that makes it possible to take account of their specific features and lay down rules on the subject in Union legislation. To ensure the smooth functioning of the internal market, barriers to the free movement of people who have entered into a registered partnership need to be eliminated, particularly those creating difficulties for such couples in the administration and division of their property. In order to achieve those objectives, this Regulation should bring together provisions on jurisdiction, applicable law, recognition or, as the case may be, acceptance, enforceability and enforcement of decisions, authentic instruments and court settlements.

Changes to legislation: *There are currently no known outstanding effects for the Council Regulation (EU) 2016/1104. (See end of Document for details)*

(17) The Regulation should cover matters arising from the property consequences of registered partnerships. 'Registered partnership' should be defined here solely for the purpose of this Regulation. The actual substance of the concept should remain defined in the national laws of the Member States. Nothing in this Regulation should oblige a Member State whose law does not have the institution of registered partnership to provide for it in its national law.

(18) The scope of this Regulation should include all civil-law aspects of the property consequences of registered partnerships, both the daily management of the partner's property and its liquidation, in particular as a result of the couple's separation or the death of one of the partners.

(19) This Regulation should not apply to areas of civil law other than the property consequences of registered partnerships. For reasons of clarity, a number of questions which could be seen as having a link with the property consequences of registered partnerships should be explicitly excluded from the scope of this Regulation.

(20) Accordingly, this Regulation should not apply to questions of general legal capacity of the partners; however, this exclusion should not cover the specific powers and rights of either or both partners with regard to property, either as between themselves or as regards third parties, as these powers and rights should fall under the scope of this Regulation.

(21) This Regulation should not apply to other preliminary questions such as the existence, validity or recognition of a registered partnership, which is covered by the national law of the Member States, including their rules of private international law.

(22) As maintenance obligations between spouses are governed by Council Regulation (EC) No 4/2009[(6)], they should be excluded from the scope of this Regulation, as should issues relating to the succession to the estate of a deceased partner, since they are covered by Regulation (EU) No 650/2012 of the European Parliament and of the Council[(7)].

(23) Issues of entitlements to transfer or adjustment between partners of rights to retirement or disability pension, whatever their nature, accrued during the registered partnership and which have not generated pension income during the registered partnership are matters that should be excluded from the scope of this Regulation, taking into account the specific systems existing in the Member States. However, this exclusion should be strictly interpreted. Hence, this Regulation should govern in particular the issue of classification of pension assets, the amounts that have already been paid to one partner during the registered partnership, and the possible compensation that would be granted in case of pension subscribed with common assets.

(24) This Regulation should allow for the creation or the transfer resulting from the property consequences of registered partnerships of a right in immovable or movable property as provided for in the law applicable to the property consequences of registered partnerships. It should, however, not affect the limited number ('*numerus clausus*') of rights *in rem* known in the national law of some Member States. A Member State should not be required to recognise a right *in rem* relating to property located in that Member State if the right *in rem* in question is not known in its law.

(25) However, in order to allow the partners to enjoy in another Member State the rights which have been created or transferred to them as a result of the property consequences of a registered partnership, this Regulation should provide for the adaptation of an unknown right *in rem* to the closest equivalent right under the law of that other Member State. In the context of such an adaptation, account should be taken of the aims and the interests pursued by the specific right *in rem* and the effects attached to it. For the purposes of determining the closest equivalent national right, the authorities or competent persons of the State whose law is applied to the property consequences of a registered partnership may be contacted for further information on the nature and the effects of the right. To that end, the existing networks in the area of judicial cooperation in civil and commercial matters could be used, as well as any other available means facilitating the understanding of foreign law.

(26) The adaptation of unknown rights *in rem* as explicitly provided for by this Regulation should not preclude other forms of adaptation in the context of the application of this Regulation.

(27) The requirements for the recording in a register of a right in immoveable or moveable property should be excluded from the scope of this Regulation. It should therefore be the law of the Member State in which the register is kept (for immoveable property, the *lex rei sitae*) which determines under what legal conditions, and how, the recording must be carried out and which authorities, such as land registers or notaries, are in charge of checking that all requirements are met and that the documentation presented or established is sufficient or contains the necessary information. In particular, the authorities may check that the right of a partner to a property mentioned in the document presented for registration is a right which is recorded as such in the register or which is otherwise demonstrated in accordance with the law of the Member State in which the register is kept. In order to avoid duplication of documents, the registration authorities should accept such documents, drawn up in another Member State by the competent authorities the circulation of which is provided for by this Regulation. This should not preclude the authorities involved in the registration from asking the person applying for registration to provide such additional information, or to present such additional documents, as are required under the law of the Member State in which the register is kept, for instance information or documents relating to the payment of revenue. The competent authority may indicate to the person applying for registration how the missing information or documents can be provided.

(28) The effects of the recording of a right in a register should also be excluded from the scope of this Regulation. It should therefore be the law of the Member State in which the register is kept which determines whether the recording is, for instance, declaratory or constitutive in effect. Thus, where, for example, the acquisition of a right in immoveable property requires a recording in a register under the law of the Member State in which the register is kept in order to ensure the *erga omnes* effect of registers or to protect legal transactions, the moment of such acquisition should be governed by the law of that Member State.