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## Cross-border divorce within the EU (not only)

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## Cross-border divorce within the EU

### Basic questions

- **jurisdiction**
  - Preliminary questions: recognition / *lis pendens*
- **applicable law**
- **cross-border service of judicial and extrajudicial documents**
- **cross-border taking of evidence**

## Jurisdiction - divorce

- **Cross-border divorce – when?**
  - within or outside the EU
- **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 (*Brussels II bis / II A regulation*)**
- Since the application of the rules on parental responsibility often arises in the context of matrimonial proceedings, it is more appropriate to have a single instrument for matters of divorce and parental responsibility.

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## Jurisdiction – Brussels II bis

- **Substantive scope – article 1** of this Regulation covers **civil matters**, whatever the nature of the court or tribunal
- **matrimonial matters** : judgments on **divorce**, legal separation or **marriage annulment** - only to the dissolution of matrimonial ties (**not** issues such as the grounds for divorce, property consequences of the marriage or any other ancillary measures)
- **matters of parental responsibility** : attribution, exercise, delegation, restriction or termination of parental responsibility – all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect (it shall include rights of custody and rights of access)

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## Jurisdiction – Brussel II bis

- **Temporal scope (general) – Art. 72:**
  - regulation shall **enter into force** on 1 August 2004
  - regulation shall **apply** from 1 March 2005, with the exception of Articles 67, 68, 69 and 70, which shall apply from 1 August 2004
- **Temporal scope (for jurisdiction and recognition):**
  - **Art. 64 (1):** The provisions of this Regulation shall apply only to **legal proceedings instituted**, to documents formally drawn up or registered as authentic instruments and to agreements concluded between the parties **after its date of application** in accordance with Article 72
- **Temporal scope (for recognition - specific):**
  - **Art. 64 (2) – (4)**

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## Jurisdiction – Brussel II bis

### Teritorial scope:

- **generally:** territory of EU Member States, where regulations (EU Law) are applicable is regulated by founding treaties (primary EU law) Art. 349 a 355 TFEU
- BUT: OPT IN / OPT OUT for GB, IR, DK
- recital 30 Brussel II bis regulation : The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, *have given notice of their wish to take part in the adoption and application of this Regulation.*
- recital 31 Brussel II bis regulation : Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation and is therefore not bound by it nor subject to its application.
- **Art. 2 (3) 3.** the term "Member State" shall mean all Member States with the exception of Denmark

## Jurisdiction – Brussel II bis - divorce

- **Basic rule:**
- ONLY determining the EU Member State whose courts have jurisdiction to hear the case
- Regulation determines merely the Member State whose courts have jurisdiction, but not the the local competent court within that Member State

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## General jurisdiction (divorce) – Art. 3

Jurisdiction shall lie with the courts of the Member State:

- **in whose territory:**
  - the spouses are habitually resident, or
  - the spouses were last habitually resident, insofar as **one of them** still resides there, or
  - the respondent is habitually resident, or
  - in the event of a joint application, **either** of the spouses is habitually resident, or
  - the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
  - the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there;
- of the **nationality of both spouses** or, in the case of the United Kingdom and Ireland, of the "domicile" of both spouses

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## General jurisdiction (divorce) – Art. 3

- the forums of jurisdiction adopted in the Brussels II bis are in line with the interests of the parties, involve **flexible rules** to deal with mobility and are intended **to meet individuals' needs** without sacrificing legal certainty
- the grounds adopted for establishing jurisdiction are **objective**, **alternative** and **exclusive**
- article 3(1)(a) and (b) of Brussels I bis regulation provides for a number of grounds of jurisdiction, without establishing **any hierarchy** (C-168/08, para 48)
- claimants will only be relevant

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## General jurisdiction (divorce) – Art. 3

- the grounds adopted for establishing jurisdiction are **exclusive**
- Art. 6 (exclusive nature of jurisdiction under Articles 3, 4 and 5):

A spouse who:

- (a) is habitually resident in the territory of a Member State; or
- (b) is a national of a Member State, or, in the case of the United Kingdom and Ireland, has his or her "domicile" in the territory of one of the latter Member States,

**may be sued in another Member State only in accordance with Articles 3, 4 and 5.**

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## Jurisdiction (divorce) under Art. 4 and 5

### ■ Article 4 - Counterclaim

The court in which proceedings are pending on the basis of Article 3 shall **also have jurisdiction to examine a counterclaim**, insofar as the latter comes within the scope of this Regulation.

### ■ Article 5 - Conversion of legal separation into divorce

Without prejudice to Article 3, a court of a Member State that has given a judgment on a legal separation shall also have jurisdiction for converting that judgment into a divorce, if the law of that Member State so provides.

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## Residual jurisdiction (divorce)

### ■ Article 7:

1. Where **no court of a Member State has jurisdiction** pursuant to Articles 3, 4 and 5, **jurisdiction shall be determined**, in each Member State, by the laws of that State.
2. As against a respondent who is not habitually resident and is not either a national of a Member State or, in the case of the United Kingdom and Ireland, does not have his "domicile" within the territory of one of the latter Member States, any national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State.

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## Examination as to **jurisdiction**

### ■ Article 17:

Where a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation and over which a court of another Member State has jurisdiction by virtue of this Regulation, it shall declare of **its own motion** that it has no jurisdiction.

- **seised court** has no jurisdiction BUT
- court of another Member State has jurisdiction by virtue of Brussel II bis Regulation

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## Examination as to **admissibility**

### ■ Article 17:

1. Where a **respondent habitually resident in a State other than the Member State where the action was brought** **does not enter an appearance**, the court with jurisdiction shall stay the proceedings so long as it is not shown that the respondent has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

2. Article 19 of Regulation (EC) No 1348/2000 shall apply instead of the provisions of paragraph 1 of this Article if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to that Regulation.

3. Where the provisions of Regulation (EC) No 1348/2000 are not applicable, Article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted abroad pursuant to that Convention.

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## [ Lis pendens and dependent actions ]

- **Article 19 (1):**

Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the **court second seised shall of its own motion stay its proceedings** until such time as the jurisdiction of the court first seised is established.

- **Article 19 (3):**

Where the **jurisdiction of the court first seised is established**, the court **second seised shall decline jurisdiction** in favour of that court.

In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised.

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## [ Recognition – Brussel II bis ]

- **Recognition of a judgment: Article 21**

A judgment given in a Member State **shall be recognised** in the other Member States **without any special procedure being required**.

- no special procedure shall be required for updating the civil-status records of a Member State on the basis of a judgment relating to divorce, legal separation or marriage annulment given in another Member State, and against which no further appeal lies under the law of that Member State.

Any interested party may, in accordance with the procedures provided for in Section 2 of this Chapter, **apply for a decision that the judgment be or not be recognised**.

Where the recognition of a judgment is raised as an **incidental question** in a court of a Member State, that court may determine that issue.

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## [ Recognition – Brussel II bis ]

### ■ Grounds of non-recognition : Article 22

(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought;

(b) where it was given in default of appearance, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence unless it is determined that the respondent has accepted the judgment unequivocally;

(c) if it is irreconcilable with a judgment given in proceedings between the same parties in the Member State in which recognition is sought; or

(d) if it is irreconcilable with an earlier judgment given in another Member State or in a non-Member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

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## [ Recognition – Brussel II bis ]

### ■ Prohibition of review of jurisdiction of the court of origin: Article 24

The jurisdiction of the court of the Member State of origin **may not be reviewed**. The test of public policy referred to in Articles 22(a) and 23(a) may not be applied to the rules relating to jurisdiction set out in Articles 3 to 14.

### ■ Differences in applicable law : Article 25

The recognition of a judgment **may not be refused** because the law of the Member State in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts.

### ■ Non-review as to substance: Article 26

Under **no circumstances** may a judgment be reviewed as to its substance.

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## Recognition – Brussel II bis

### ■ Stay of proceedings : Article 27

1. A court of a Member State in which recognition is sought of a judgment given in another Member State may stay the proceedings if an ordinary appeal against the judgment has been lodged.
2. A court of a Member State in which recognition is sought of a judgment given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the Member State of origin by reason of an appeal.

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## Recognition – Brussel II bis

### ■ Documents: Article 37

1. A party **seeking or contesting recognition** or applying for a declaration of enforceability **shall produce**:
  - (a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and
  - (b) the **certificate** referred to in Article 39.
2. In addition, in the case of a judgment given in default, the party seeking recognition or applying for a declaration of enforceability shall produce:
  - (a) the original or certified true copy of the document which establishes that the defaulting party was served with the document instituting the proceedings or with an equivalent document; or
  - (b) any document indicating that the defendant has accepted the judgment unequivocally.

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## Recognition – Brussel II bis

### ■ Absence of documents: Article 38

1. If the documents specified in Article 37(1)(b) or (2) are not produced, the court may specify a time for their production, accept equivalent documents or, if it considers that it has sufficient information before it, dispense with their production.
2. If the court so requires, a translation of such documents shall be furnished. The translation shall be certified by a person qualified to do so in one of the Member States.

### ■ Certificate concerning judgments in matrimonial matters : Article 39

The competent court or authority of a Member State of origin shall, at the request of any interested party, issue a certificate using the standard form set out in Annex I (judgments in matrimonial matters) or in Annex II (judgments on parental responsibility).

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## Applicable Law

### ■ Cross-border divorce :

- application of Brussel II bis regulation
- automatically linked to the issue of applicable law

### How do I know which applicable law is relevant?

- Via EU law – if such law exists...
- Via national law and/or international law

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## Applicable Law – Divorce EU LAW

- 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** (Rome III Regulation)
- Belgium, Bulgaria, Germany, Greece, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia - request to the Commission indicating that they intended to establish **enhanced cooperation** between themselves in the area of applicable law in matrimonial matters (on 3 March 2010, Greece withdrew its request) - 12 July 2010 the Council adopted Decision 2010/405/EU authorizing enhanced cooperation
- EC Decision (EU) 2012/714 of 21 November 2012 - **Latvia**
- EC Decision (EU) 2014/39 of 27 January 2014 – **Greece**
- EC Decision (EU) 2016/1366 of 10 August 2016 - **Estonia**
- **EU Member states that do not participate in this Regulation continue to apply their own rules to determine which national law should apply to a divorce**

## Rome III regulation

- **Substantive scope:** ...should be consistent with Regulation Brussel II bis - however, it should **not apply to marriage annulment**.
- Rome III Regulation shall apply, in situations involving a conflict of laws, to divorce and legal separation (**art. 1**)
  - **Not** (*even matters if they arise merely as a preliminary question within the context of divorce or legal separation proceedings*): the existence, validity or recognition of a marriage, the annulment of a marriage, the property consequences of the marriage, maintenance obligations
- **Teritorial scope: participating Member State**
- **Temporal scope: from 21 June 2012**, with the exception of Article 17, which shall apply from 21 June 2011 <sup>24</sup>

## [ Rome III regulation ]

- Art.4: The law designated by this Regulation shall apply whether or not it is the law of a participating Member State
  
- The applicable law can be:
  1. The law of the member state participating in enhanced cooperation
  2. The law of that member state who is not participating in enhanced cooperation
  3. The law of that state who is not the member of the EU

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## [ Rome III regulation ]

- Choice of applicable law by the parties (art. 5):
  - 1) the law of the State where the spouses are habitually resident at the time the agreement is concluded; or
  - 2) the law of the State where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded; or
  - 3) the law of the State of nationality of either spouse at the time the agreement is concluded; or
  - 4) the law of the forum.

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## [ Rome III regulation ]

- **Choice of applicable law by the parties (art. 5):**
  - agreement designating the applicable law may be **concluded and modified at any time, but at the latest at the time the court is seized (under BII bis) BUT**
  - If the law of the forum so provides, the spouses may also designate the law applicable before the court during the course of the proceeding. In that event, such designation shall be recorded in court in accordance with the law of the forum

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## [ Rome III regulation ]

- **Choice of applicable law by the parties (art. 5):**
  - Rec. 16: The law chosen by the spouses must be consonant with the fundamental rights recognised by the Treaties and the Charter of Fundamental Rights of the European Union
  - Rec. 18: The informed choice of both spouses is a basic principle of this Regulation. Each spouse should know exactly what are the legal and social implications of the choice of applicable law. The possibility of choosing the applicable law by common agreement should be without prejudice to the rights of, and equal opportunities for, the two spouses. **Hence judges in the participating Member States should be aware of the importance of an informed choice on the part of the two spouses concerning the legal implications of the choice-of-law agreement concluded.**

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## [ Rome III regulation ]

- **Applicable law in the absence of a choice by the parties (art. 8):**

1) where the **spouses are habitually resident** at the time the court is seized; or, failing that

2) where the **spouses were last habitually resident**, provided that the period of residence did not end more than 1 year before the court was seized, in so far as one of the spouses still resides in that State at the time the court is seized; or, failing that

3) of which **both spouses are nationals** at the time the court is seized; or, failing that

4) **where the court is seized.**

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## [ Rome III regulation ]

- **Application of the law of the forum (art. 8):**

Where the law applicable pursuant to Article 5 or Article 8 makes **no provision for divorce** or **does not grant one of the spouses equal access to divorce** or legal separation on grounds of their sex, **the law of the forum shall apply.**

- **Public policy (art. 12):**

Application of a provision of the law designated by virtue of this Regulation **may be refused** only if such application is **manifestly** incompatible with the public policy of the forum.

- **Differences in national law (art. 13):**

Nothing in this Regulation shall oblige the courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation.

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