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European Family Property Relations Article by Article Commentary on EU Regulations 1103 and 1104/2016

Editors

Lucia Ruggeri and Roberto Garetto



Edizioni Scientifiche Italiane

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Article-by-Article Commentary on EU Regulations
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<i>Publisher</i>	Edizioni Scientifiche Italiane s.p.a. 80121 Napoli, via Chiatamone 7 Internet: www.edizioniesi.it E-mail: info@edizioniesi.it
<i>Title</i>	European Family Property Relations. Article-by-Article Commentary on EU Regulations 1103 and 1104/2016
<i>Editors</i>	Lucia Ruggeri, Roberto Garetto
<i>Scientific Committee</i>	Stathis Banakas, University of East Anglia Silvia Landini, University of Florence

The book as whole and each individual contribution were double blind peer reviewed.

<i>Publication Year</i>	2021
<i>ISBN</i>	978-88-495-4759-7

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This e-book is published as a part of the EU funded Justice Project “E-training on EU Family Property Regimes (EU-FamPro)” no 101008404-JUST-AG-2020/JUST-JTRA- EJTR-AG-2020), and is available for downloading at the Project website www.euro-family.eu.



This project was funded by the European Union’s Justice Programme (2014-2020)

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Article 39

Prohibition of review of jurisdiction of the court of origin

Maria Cristina Gruppuso

Regulation (EU) 2016/1103

1. The jurisdiction of the court of the Member State of origin may not be reviewed.
2. The public policy (*ordre public*) criterion referred to in Article 37 shall not apply to the rules on jurisdiction set out in Articles 4 to 11.

Regulation (EU) 2016/1104

1. The jurisdiction of the court of the Member State of origin may not be reviewed.
2. The public policy (*ordre public*) criterion referred to in Article 37 shall not apply to the rules on jurisdiction set out in Articles 4 to 12.

Summary: I. Rationale of the provision. – II. Scope of prohibition.

I. Rationale of the provision

The provision of the Regulation under examination is reflected in similar provisions of the Regulation (EC) 2201/2003¹ and of the Regulation (EU) 1215/2012.² This rule is an expression of the favour

¹ Art 24 of 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 [2003] OJ L338/1: ‘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.’

² Art 45, para 3, of European Parliament and Council Regulation (EU) no 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1: ‘Without prejudice to point (e) of paragraph 1, the jurisdiction of the court of origin may not be reviewed. The test of public policy referred to in point (a) of paragraph 1 may not be applied to the rules relating to jurisdiction.’

that the legislator accords to the circulation of the decisions and of the principle of mutual trust, which find expression in the mutual recognition of judicial decisions.³

In the preamble of the Regulations on matrimonial property regimes and on property consequences of registered partnerships, the principle of mutual recognition of decision given in the Member States is represented not only as cornerstone of judicial co-operation in civil matters,⁴ but also as general objective.⁵

In this context, it emerges clearly that the regime of recognition and enforcement of foreign judgments, uniform application thereof, as

³ P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate. Commento ai Regolamenti (UE) 24 giugno 2016, nn 1103 e 1104 applicabili dal 29 gennaio 2019* (Milan: Giuffrè Francis Lefebvre, 2019), 285; C. Ricci, 'Article 39 Prohibition of review of jurisdiction of the court of origin', in I. Viarengo and P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples. A Commentary* (Cheltenham: Edward Elgar, 2020), 361; V. Égée, 'Article 39. Interdiction du contrôle de la compétence de la juridiction d'origine', in S. Corneloup et al eds, *Le droit européen des régimes patrimoniaux des couples. Commentaire des règlements 2016/1103 et 2016/1104* (Paris: Société de législation comparée, 2018), 365. Moreover, compare M.Weller, 'Mutual trust: in search of the future of European Union private international law' 11 *Journal of Private International Law*, 64, 75 (2015), which notes that mutual recognition appears as the predominant practice of granting mutual trust. The same principles have been recalled by the Court of Justice in the context of a dispute the subject of which was the custody of the children and which concerned the interpretation of the Regulation (EC) 2201/2003 regarding jurisdiction and recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. Cf Case C-256/09, *Bianca Parrucker v Guillermo Vallés Pérez*, [2010] ECR I-7353.

⁴ Recital 3 of Regulations (EU) 2016/1103 and 2016/1104: '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 co-operation in civil matters and invited the Council and the Commission to adopt a programme of measures to implement that principle.'

⁵ See Recital 56 of Regulation (EU) 2016/1103 and Recital 55 of Regulation (EU) 2016/1104, which state: 'In the light of its general objective, which is the mutual recognition of decisions given in the Member States (...) this Regulation should lay down rules relating to the recognition, enforceability and enforcement of decisions similar to those of other Union instruments in the area of judicial co-operation in civil matters.'

well as the restrictive interpretation of the grounds of non-recognition, are functional in the pursuit of mutual recognition.⁶

Art 39 of the Regulations in matters of matrimonial property regimes and of the property consequences of registered partnerships is certainly to be read, not only in the light of the provisions in matters of *lis pendens* and related actions - which are aimed at management and resolution of conflicts deriving from the proceedings simultaneously pending in different Member States - but also as corollary of Art 15 of the Regulations, which provides that where a court of a Member State is seised of a matter of matrimonial property regime or property consequences of a registered partnership over which it has no jurisdiction under the Regulations, it shall declare of its own motion that it has no jurisdiction.⁷

II. Scope of prohibition

Art 39 states the prohibition for the court of the State where recognition is sought to proceed to the review of the jurisdiction of the court of the Member State of origin and to avail itself of the exception of public policy in the case where wrong application of the provisions on jurisdiction is noted.

The above prohibition is not applicable to decisions that deal with questions that do not fall within the scope of material application of the Regulations or that come from a non-participating Member State or from third State.⁸

The Court of Justice, already with reference to the interpretation of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, has recognised as ‘fundamental principle’ the prohibition for the court seised to proceed to verification of the competence of the court of the State of origin, with the consequence that the public policy of the

⁶ See the analysis under Art 37 in this Commentary. Moreover, compare M. Pertegás, ‘Recognition and enforcement of judgments in family and succession matters’, in A. Malatesta et al eds, *The external dimension of EC private international law in family and succession matters* (Padua: CEDAM, 2008), 179.

⁷ P. Bruno, n 3 above, 285; V. Égéa, n 3 above, 365.

⁸ *Amplius* C. Ricci, n 3 above, 364.

State in which enforcement is sought cannot be raised as a bar to recognition or enforcement of a judgment given in another Contracting State solely on the ground that the court of origin failed to comply with the rules related to jurisdiction.⁹ As regards the effective scope of prohibition, given that Art 39 provides that the public policy (*ordre public*) criterion does not apply to the rules on jurisdiction set out in Arts 4 to 11 (and 4 to 12), in the doctrine the doubt has been raised concerning the exclusion in the formulation of the provision under examination of the rules in matters of *lis pendens* and related actions.¹⁰ However, also in this regard, the Court of Justice has recently ruled. The question of interpretation resolved by the Luxembourg Court, albeit inherent in the Regulation (EC) 2201/2003 and concerning Art 24, in view of the tenor of the above provision that is altogether similar to what is laid down in Art 39 of the Regulations under examination, can assume significance also in the present context. The referring court, in the case in point, brought before the Court of Justice the question as to whether, for what is here of interest, ‘the rules of *lis pendens* (...) must be interpreted as meaning that, where (...) the court second seised delivers a judgment which becomes final, in breach of those rules, the courts of the Member State in which the court first seised is situated may refuse to recognise that judgment on the ground that it is manifestly contrary to public policy.’¹¹

The Court of Justice, after noting that the check on respect of the rules of *lis pendens* necessarily implies review of the jurisdiction, by applying leverage on the principle of mutual recognition of the judicial decisions as ‘cornerstone for the creation of a genuine judicial area,’ as well as on the premise that - as anticipated previously - the grounds

⁹ Case C-7/98, *Dieter Krombach v André Bamberski*, [2000] ECR I-1935, paras 31-32.

¹⁰ P. Bruno, n 3 above, 286.

¹¹ Case C-386/17, *Stefano Liberato v Luminita Luis Grigorescu*, Judgment of 16 January 2019, para 32, available at www.eur-lex.europa.eu (last visited 6 October 2021).

for prohibiting recognition 'should be kept to the minimum required,' has instituted that breach of the rules of *lis pendens* cannot in itself warrant non-recognition of a judgment on the ground that it is manifestly contrary to public policy of the Member State where recognition is sought.¹²

¹² *ibid.*