FRA EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

FRA Opinion – 1/2012
Property consequences of registered partnerships

Vienna, 31 May 2011

Opinion

of the

European Union Agency for Fundamental Rights

on the

Proposal for a regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships

THE EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA),

Bearing in mind the Treaty on the European Union, in particular Article 6 thereof,

Recalling the obligations set out in the Charter of Fundamental Rights of the European Union,

In accordance with Council Regulation 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, in particular, Article 2 with the objective of the FRA 'to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights',[1]

Having regard to Article 4 (1) (d) of Council Regulation 168/2007, with the task of the FRA to 'formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission',

Having regard also to Recital 13 of Council Regulation 168/2007, according to which 'the institutions should be able to request opinions on their legislative proposals or positions taken in the course of legislative procedures as far as their compatibility with fundamental rights are concerned',

Acknowledging the Opinion of the European Economic and Social Committee SOC/416 and SOC/417 of 21 September 2011,

In response to the request received on 2 May 2012 and dating from 25 April 2012 from the European Parliament for an Opinion on the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships COM(2011) 127 final – 2011/0060 (CNS),

SUBMITS THE FOLLOWING OPINION:

[1] OJ 2007 L 53/1.

1. Introduction

1.1. Background to the legislative proposal

European Union (EU) law plays a prominent role in the promotion of free movement and the fundamental rights of EU citizens – objectives which the EU institutions involved in the legislative process at the EU level share and aim to support. In 2004, the European Council called, in the Hague Programme,[2] on the European Commission to submit a Green Paper on *"the conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition"*, and stressed the need to adopt legislation by 2011. Two years later a green paper was presented, dealing with matrimonial property regimes, as well as with registered partnerships and Non-marital cohabitation.[3]

On 16 March 2011, the European Commission tabled two distinct legislative proposals on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of property in the area of family law. One of the two proposed regulations relates to "*matters of matrimonial property regimes*" (COM(2011) 126 final), whereas the other proposed regulation deals with the "*property consequences of registered partnerships*" (COM(2011) 127 final).

Before the two legislative proposals were drawn up, the European Commission undertook consultations with EU Member States, EU institutions and the public, including expert meetings and a public hearing in 2010 involving several hundred participants. Finally, the Commission conducted a joint impact study on the proposals for Regulations on matrimonial property regimes and the property consequences of registered partnerships.[4]

In the impact assessment of these two proposals, the European Commission underlined that in 2007 307,158 marriages of 2.4 million new marriages were international; this corresponds to about 13 % of new marriages being international. The number and proportion of international divorces has steadily increased since 2000. Similarly, 41,000 of 211,000 registered partnerships in the EU concerned international couples. Of these, 8,500 (4%) end in separation and 1,266 (0.6%) end in death each year. The Commission stated that, admitedly, it is difficult to compare the number of registered partnerships. However, it stressed that these numbers are increasing significantly.[5] In this sense, there was a perceived need to address – and hence provide legal clarity – to property regimes both in the context of marriages as well as in registered partnerships.

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2 OJ L 53, 3.3.2005, p. 1. See also the Stockholm Programme as of 11 December 2009, OJ 2010 C 11, 4 May 2010, p. 13.
3 COM(2006) 400 final, 17 July 2006.
4 SEC(2011) 327 final, 16 March 2011.
5 *Ibid.*, pp. 8, 12 and 14.

The legal institution of "registered partnership" is a recent one, but one which is growing steadily both in terms of its recognition by EU Member States as well as its use in practice. The registered partnership institution is often used to address the situation of same-sex couples. Currently, the landscape within the EUoffers four different legal approaches to same-sex couples. Five Member States have given same-sex partners access to marriage (the Netherlands since 2001, Belgium since 2003, Spain since 2005, Sweden since 2009 and Portugal since 2010). In 10 Member States, same-sex relationships can be legally formalised through a "registered partnership" – a legal institution that in these countries is open only to such couples (Austria, the Czech Republic, Denmark, Finland, Germany, Hungary, Ireland, Slovenia, Sweden and the United Kingdom). In four Member States, the legal institution of registered partnership is also open for opposite-sex couples (Belgium, France, Luxembourg and the Netherlands).[6] Finally, there are systems where same-sex couples find a certain level of recognition for specific aspects of their relationship (such as the possibility to conclude an agreement establishing a specific property regime regulating their corresponding rights and duties) although a fully-fledged legal institution and regulatory framework such as those that marriage or registered partnership provide are not available to them.

1.2. The question submitted to FRA

On 25 April 2012, the President of the European Parliament requested the European Union Agency for Fundamental Rights (FRA) to deliver an opinion with regard to the proposed regulation dealing with the property consequences of registered partnerships (COM(2011) 127 final).[7] The request is based on an initiative of the Committee responsible for the legislative file, the Committee on legal affairs.

The President of the European Parliament in its request to the agency states:

> *"Since the question arose whether the proposal on registered partnerships might, in this respect, infringe the principle of equality before the law under Article 20 of the Charter of Fundamental Rights of the Union and the principle of non-discrimination under Article 21 of the Charter, the Committee decided to ask the European Union Agency for Fundamental Rights for an opinion in this context.*
>
> *Given that negotiations in Council are ongoing, and the Legal Affairs Committee shall soon start preparing Parliament's opinion in the consultation procedure, I would appreciate if the Fundamental Rights Agency could provide its opinion at its earliest convenience, at the latest by end of May 2012."*

[6] See Opinion of the European Economic and Social Committee SOC/416 and SOC/417 of 21 September 2011.

[7] Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships.

In the request, the President of the European Parliament refers in particular to an issue highlighted by the rapporteur of the Committee on legal affairs: whereas married couples can choose the applicable law under Articles 16 and 18 of the Commission proposal concerning matrimonial property regimes,[8] the proposal for registered partnerships[9] does not allow a comparable choice of law for registered partnerships. The latter refers instead in its Article 15 to the "*law of the State in which the partnership was registered*" as the only applicable law.[10]

Given that marriage and registered partnerships are two different institutions, and that the situation concerning the legal recognition of registered partnerships varies significantly within the EU, the separate treatment in two distinct regulations does not constitute per se an act of discrimination.[11] This opinion does not deal with the draft regulation on matrimonial property regimes. It focuses instead on the fact that the draft regulation regarding property consequences of registered partnerships provides no choice of the applicable law, while such a choice is provided in the parallel proposal on matrimonial property regimes.

2. Relevant fundamental rights standards

In line with the European Parliament's request, this opinion restricts itself to an assessment of the proposal for a regulation concerning the property consequences of registered partnerships under Articles 20 and 21 of the Charter of Fundamental Rights of the European Union (hereafter 'Charter').

2.1. Discrimination (Article 21 of the Charter)

The less favourable treatment provided for in Article 15 of the proposal relating to the property consequences of registered partnerships affects certain groups of people more than others. The divergent texts of the two proposals lead to a differential treatment affecting the non-discrimination principle of Article 21 of the Charter.

Therefore, it is Article 15 of the proposal for a regulation concerning the property consequences of registered partnerships which, by depriving the partners concerned of a certain amount of autonomy as to the shaping of their private life, requires justification.

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8 COM(2011) 126 final.
9 COM(2011) 127 final.
10 See PE475.883v01-00 as of 11 November 2011. This issue was also stressed by the draft opinion of the LIBE Committee, see PA\892209EN.doc, 13 February 2012.
11 See, however, PE473.957v01-00, 13 February 2012.

Given that marriage with its more persisting and weightier legal obligations on partners has a relatively stronger impact on their private lives as compared to the more flexible provisions of registered partnerships, it follows that the favourable treatment of married couples disadvantages persons who, while in need of a certain formal acknowledgement of their partnership, still as a matter of "*a political or any other opinion*" attach importance to leading their private and family life with a maximum of private autonomy and a minimum of state interference. The dissolution, for example, of a civil partnership under French law does not require judicial divorce proceedings but simply a joint declaration of both partners or a unilateral decision by one partner which is served on the other (Article 515-7 *Code Civil*e). Hence, in those Member States where registered partnership is a legal institution open to both different-sex and same-sex couples, a negation of any choice of applicable law under this institution would tend to disadvantage those persons who, for the very reason of their "*political or any other opinion*", would like to opt for the less intrusive partnership institution as opposed to the more stringent institution of marriage.

Moreover, the less favourable treatment envisaged in the proposal relating to registered partnerships will affect same-sex partners to a stronger degree than different-sex couples. While it is true that under the laws of some EU Member States marriage and registered partnerships are open to both same-sex and different-sex couples, in a far greater number of Member States registered partnerships are the one and only option available to same-sex couples, who therefore would – as opposed to different-sex couples – be faced with a negation of any choice of applicable law. This amounts to different treatment on the ground of sexual orientation. It should be recalled that the ECtHR assumes under well-established case law that "difference based on sexual orientation require particularly serious reasons by way of justification".[12]

These examples serve to demonstrate that the substantially different provisions of the two proposed regulations may lead to indirect discrimination against persons belonging to certain groups. In the end, however, these aspects can be captured and should be assessed in the light of the overarching principle of equal treatment.

2.2. Equality before the law (Article 20 of the Charter)

According to the well-established case law of the Court of Justice of the European Union (CJEU), prohibitions of discrimination are merely specific expressions of the principle of equal treatment, which is a general principle of Union law and which requires that comparable situations are not treated differently and different

[12] ECtHR *Karner v. Austria* (No. 40016/98), para. 37 and the cases cited there.

situations are not treated alike unless such treatment is objectively justified.[13] This principle is binding in all legislative activities of EU institutions.

The CJEU has declared provisions of a regulation invalid because they were not of a nature as to secure the principle of equal treatment.[14] A provision adopted in disregard of this principle is "vitiated by illegality"[15] and can thus be declared null and void. In other words, unless the situation of individuals is significantly different, these individuals are entitled to equal legal treatment; yet, if there is a significant difference in situation, then differential treatment reflecting that very difference is imperative.

The two draft regulations under scrutiny, however, treat married couples and registered partners differently. This differential treatment is indeed significant. The legislative proposal concerning matrimonial property points out that the right of spouses to choose the applicable law – and in particular the possibility to opt for the law of the Member state of their residence – facilitates the management of their property, allows them to bring the legal regime governing their property in line with the life they lead, and thereby serves the couple's right of free movement.

The recitals of the two draft regulations in question are also relevant in this context. Recital 19 of the draft Regulation on matrimonial property rights reads:

> *"To facilitate spouses' management of their property, this Regulation will authorise them to choose the law applicable to all the property covered by their matrimonial property regime, regardless of the nature or location of the property, among the laws with which they have close links because of residence or their nationality. This choice may be made at any moment, at the time of the marriage or during the course of the marriage."*

While this text equally acknowledges links established by residence and by nationality, Article 17 of the draft Regulation gives, in cases where the spouses have not made a choice under Article 16, priority to the law of the state of the spouses' first common habitual residence. The explanatory memorandum to Article 17 stresses the significance of "the life actually lived by the couple, especially the establishment of their first common habitual residence". Likewise, Recital 21 invokes the necessity to give consideration to "'the life actually lived by the couple"', arguing that the first common habitual residence of the spouses after marriage should constitute the first criterion for establishing the applicable law, ahead of the law of the spouses' common nationality at the time of their marriage. In the same sense, Recital 14 underlines the necessity to take into account "the increasing mobility of couples during their married life" and Recital 7 recalls that in the *EU Citizenship Report 2010: Dismantling the obstacles to EU citizens' rights* the European Commission announced it would "adopt a proposal for legislation to

[13] CJEU, Joined Cases C-117/76 and 16/77, *Ruckdeschel*, para. 7; C-292/97, *Karlsson and Others,* para. 39.
[14] CJEU, C-41/84, *Pinna*, para. 25.
[15] CJEU, C-52/02, *Rinke*, para. 27.

eliminate the obstacles to the free movement of persons, in particular the difficulties experienced by couples in managing or dividing their property".

All these quotations point in the same direction: allowing spouses to choose the law of the state of their residence enables couples to reconcile the life they actually live with the legal regime under which they live.

The draft Regulation on property consequences of registered partnerships states, however, in Recital 18:

> *"To facilitate the partners' management of their property, the law of the Member State where the partnership was registered will apply to all the partners' property, even if this law is not the law of a Member State."*

Exactly the same argument – namely the facilitation of property management – which is used by the draft Regulation on matrimonial property rights to account for the right of spouses to choose the applicable law is used by the draft Regulation on property consequences of registered partnerships to substantiate the denial of such a right to partners. It remains yet to be shown how the lack of a right to choose the applicable law makes the life of registered partners easier, whereas the existence of such a right in the case of married couples achieves the same result.[16]

The fact that Article 15 of the draft regulation concerning registered partnerships does not allow partners any choice of applicable law, while Articles 16 and 18 of the draft regulation on matrimonial property regimes do open to spouses a certain margin of choice constitutes a significantly differential treatment. The decisive question remains whether this differential treatment mirrors significant differences in the situations of registered partners on the one hand as compared to spouses on the other and can be justified on that basis.

It should be recalled that under the well-established case law of the ECtHR, discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations. A difference in treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[17] The ECtHR has, on several occasions, underlined an essential similarity of marriage and civil partnerships as legally recognised relationships, thereby highlighting the just as fundamental difference between, on the one hand, legally and publicly formalised relationships and, on the other hand, strictly informal relationships. "Rather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual

[16] The impact assessment deals with fundamental rights under 12.4. and states under 12.4.1. that both proposals "will be beneficial for the exercise of the right of free movement and of residence by European citizens". See SEC(2011) 327 final, p. 44. While it is easy to understand that the right to opt for the application of the law of the state of residence is beneficial for free movement, it is difficult to understand why the denial of this right to partners would be beneficial as well.

[17] ECtHR *Şerife Yiğit v. Turkey* (No. 3976/05), para. 67.

nature." Therefore, "there can be no analogy between married and Civil Partnership Act couples, on one hand, and heterosexual or homosexual couples who choose to live together but not to become husband and wife or civil partners, on the other hand".[18]

In the light of this basic similarity between marriages and registered partnerships underlined by the ECtHR, the burden on the EU legislator to explain the grounds for the different treatment of matrimonial property rights and such rights relating to registered partnerships increases.

In this regard, the European Commission offers three explanations:

- Firstly, it bases the exclusion of any choice of applicable law on the "*the differences between the national laws of those Member States that make provision for registered partnerships*".[19]

- Secondly, it argues that the principle that the property consequences of registered partnerships should be governed by the law of the state of partnership registration is *"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*."[20]

- And, thirdly, it is underlined that a number of EU Member States have not recognised the legal institution of registered partnership and that therefore "*the extent of the choice of law could not be the same for married couples and couples in a registered partnership*".[21]

These arguments are addressed below.

2.2.1. The differences between national laws on registered partnerships

What does indeed seem to argue for the differential treatment under scrutiny here is the fact that, while there is a (to some extent) common notion of marriage in all EU Member States accompanied by (somewhat) similar legal regulations governing that institution, registered partnerships beyond doubt differ widely as to their underlying concepts and guiding principles. This seems to support the approach of

[18] ECtHR (Grand Chambre) *Burden v. United Kingdom* (No. 13378/05), para. 65 and the case of *Shackell v. United Kingdom* (dec.) (No. 45851/99), 27 April 2000; see also ECtHR *Şerife Yiğit v. Turkey* (see fn 17), where the absence of an officially recognised relationship was key to the successful justification of a different approach to inheritance for persons.

[19] COM(2011) 127 final, p. 8.

[20] Section 5.3 of the Explanatory Memorandum, COM(2011) 127 final, p. 8.

[21] Section 9.4 of the Impact Assessment document, SEC (2011) 327 final, p. 27.

dealing with a partnership in the spirit of the law of its making while allowing for more flexibility and transitions with marriages.

The draft regulations in question, however, are not about the legal provisions constituting marriage or registered partnerships but about property rights linked to these institutions. When it comes to matrimonial property regimes, EU Member State laws differ widely. A majority of legal systems are based on the principle of common property, but there are also laws governed by the opposite principle of separation of property, and common law countries do not have the concept of matrimonial property at all.[22]

For good reasons, the European Commision points to practical difficulties arising "*from the great disparities between the applicable rules of substantive law*" to underline the necessity to adopt a common legal framework for determining jurisdiction and the law applicable to matrimonial property.[23] There is reason to believe that the same principle should apply to registered partnerships. In line with this argument, it can be maintained that it is exactly "*the differences between the national laws of those Member States that make provision for registered partnerships*"[24] which create, in the first place, the need to set up a coordinating legal instrument and which, in addition, give weight to the question of choice of the applicable law. Arguably, to have a choice of the applicable law might be even more relevant against a background that offers a higher degree of diversity compared to one where the applicable laws differ to a lesser degree. The draft Regulation on registered partnerships considers the jurisdiction to rest with the Member State of registration as a last option in its Article 5. Hence, the emergence of a common legal framework for determining the jurisdiction and applicable law becomes difficult in the case of registered partnerships, unless the choice of the applicable law is given to partners.

2.2.2. The choice of law at Member State level

Due to the limited time available to elaborate this FRA Opinion, it was impossible to analyse the legal situation in all EU Member States. There is still sufficient evidence to challenge the general assumption that Member States exclude, as a matter of principle, any option for registered partners to choose any law other than the state of partnership registration.

For instance, the relevant provision in *Austrian* law is Article 27c of the law on international private law (*IPR-G*). Article 27c IPR-G states that the legal regime concerning property rights relating to registered partnerships is the law explicitly

[22] For a comparison of legal regimes in all Member States see Section 3.1 of the Commission's impact assessment, SEC(2011) 327 final, p. 11.
[23] Section 1.2 of the Explanatory Memorandum, COM(2011) 126 final, p. 3.
[24] Section 5.3 of the Explanatory Memorandum, COM(2011) 127 final, p. 8.

agreed by the partners, and in case that no such choice has been made the law of the state where the partnership has been established.[25]

Therefore, the Austrian law affords partners a range of choice that goes even beyond the provisions of the draft Regulation on matrimonial property.

The decisive provision of *Dutch* law is Article 6 of the Law on international law on registered partnerships (*Wet conflictenrecht geregistreerd partnerschap*).[26] This provision, too, allows partners within certain limits to choose the applicable law.

Since 1 May 2009, when *Sweden* opened marriage to same-sex couples, partnerships can no longer be registered; partners who had registered earlier had the option either to marry or to retain their status as registered partners. Therefore, a relevant number of registered partnerships remains in Sweden. According to Chapter 3 Section 1 of the Swedish Registered Partnership Act of 23 June 1994 provisions of international private law relating to marriage apply to registered partnerships. Under Section 3 of the Act on Certain International Questions relating to Married People's Property (1990:272) spouses are entitled to draw up a written agreement which would choose as their matrimonial property regime the law of a state of which one of them is a resident or a national. Therefore, the current Swedish legal situation also gives registered partners a choice.

With these examples of the legal situation in Austria, the Netherlands and Sweden the general statement that EU Member States do not grant registered partners a right to choose the applicable law on issues of their property rights appears less suited to form the basis of a wider argument. In addition, it is relevant to see that other Member States which provide for the application of the law of the state where the partnership was concluded have given thought to problems created by the mobility of partners.

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[25] Article 27c of the law on international private law *(Bundesgesetz vom 15. Juni 1978 über das internationale Privatrecht, BGBl. Nr. 304/1978, IPR-Gesetz)* reads*: „Das Güterrecht der eingetragenen Partnerschaft ist nach dem Recht zu beurteilen, das die Parteien ausdrücklich bestimmen, mangels einer solchen Rechtswahl nach dem Recht des Staates, in dem die eingetragene Partnerschaft begründet worden ist."*

[26] Article 6 of the *Wet van 6 juli 2004, houdende regeling van het conflictenrecht met betrekking tot het geregistreerd partnerschap (Wet conflictenrecht geregistreerd partnerschap)* is titled *‚Het partnerschapsvermogensregime'* and reads:
„1. Op het vermogensregime van een in Nederland of buiten Nederland aangegaan geregistreerd partnerschap is van toepassing het recht dat de partners vóór het geregistreerd partnerschap hebben aangewezen.
2. De partners kunnen uitsluitend een rechtsstelsel aanwijzen dat het instituut van het geregistreerd partnerschap kent.
3. Het aldus aangewezen recht is van toepassing op hun gehele vermogen.
4. De partners kunnen echter, ongeacht of zij tot de aanwijzing, bedoeld in het eerste lid, zijn overgegaan, met betrekking tot het geheel of een gedeelte van de onroerende zaken het recht aanwijzen van de plaats waar die zaken zijn gelegen, mits dit rechtsstelsel het instituut van het geregistreerd partnerschap kent. Zij kunnen eveneens bepalen dat op onroerende zaken die later worden verkregen, het recht van de plaats waar die zaken zijn gelegen van toepassing zal zijn, mits dit rechtsstelsel het instituut van het geregistreerd partnerschap kent."

The German law on registered partnerships[27] is supplemented by provisions in other laws, including Article 17b of the Introductory Law to the Civil Code (EGBGB).[28] Article 17b EGBGB reflects in paragraph 3 on the fact that, unlike the case with marriage, a partnership can, depending on the substantive provisions existing in a Member State, be registered in more than one country. Therefore, a couple who first had their partnership registered in Germany and later moved on to another country may then decide to register their partnership also there. In this case what applies under German law is not the law of the state where the partnership was *first* established (Germany) but where it *last* was registered.[29] The motives given in the explanatory memorandum of the motion point, firstly, to the fact that a rule is needed in order to avoid a conflict of laws among the legal regimes of the two countries where the partnership was registered. The decision to give priority to the law of the state where the partnership was registered last is motivated by the wish to acknowledge the intention of the couple to live under the regime of another country. The explanatory memorandum suggests that this regulation comes close to allowing the couple to choose the law of the state of their new residence.[30] Indeed, as long as they do not register, German law would apply; as soon as they also register their partnership in the country of residence, the law of this country applies. So, it is in the hands of the partners to choose.

Article 515-7-1 of the *French* Civil Code, which was introduced by Article 1 of the law no. 2009-526 of 12 May 2009, simply states that the legal effects of a registered partnership shall be dealt with under the substantive law of the state whose authorities have registered the partnership.[31] It seems that the introduction of this provision was motivated by reasons quite distinct from those which gave rise to the German move. Unlike German law, French legislation does not allow persons who have registered their partnership in another country, to subsequently also register their partnership under French law. Article 515-2 of the French Civil Code prohibits the conclusion of a PACS (*pacte civile de solidarité,* PACS) if at least one of the partners has already entered into such a partnership. This created the specific problem that partners who had registered their partnership under a foreign law and then moved to France had no means of having their partnership recognised under French law. In order to be registered in France, the partners would have to

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[27] The German *Gesetz über die Eingetragene Lebenspartnerschaft* of 16 February 2001, BGBl. I S. 266, entered into force on 1 August 2001 and was last amended by Article 7 of the law of 6 July 2009, BGBl. I S. 1696, 1700, by 1 September 2009.

[28] *Einführungsgesetz zum Bürgerlichen Gesetzbuche in der Fassung der Bekanntmachung vom 21. September 1994 (BGBl. I S. 2494; 1997 I S. 1061),* last amended by Article 2 of the law of 27 July 2011 (BGBl. I S. 1600, 1942).

[29] Arcile 17b para. 3 EGBGB reads: *„(3) Bestehen zwischen denselben Personen eingetragene Lebenspartnerschaften in verschiedenen Staaten, so ist die zuletzt begründete Lebenspartnerschaft vom Zeitpunkt ihrer Begründung an für die in Absatz 1 umschriebenen Wirkungen und Folgen maßgebend."*

[30] *„Im Ergebnis legt Absatz 3 dem Vorgang damit ähnlicheWirkungen bei wie einer Rechtswahl zugunsten des Rechts am neuen Eintragungsort." Entwurf eines Gesetzes zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften (Lebenspartnerschaftsgesetz – LPartG), Bundestags-Drucksache* 14/3751 of 4 July 2000, p. 61.

[31] *"Les conditions de formation et les effets d'un partenariat enregistré ainsi que les causes et les effets de sa dissolution sont soumis aux dispositions matérielles de l'État de l'autorité qui a procédé à son enregistrement."*

first dissolve their partnership concluded in another state. In fact, most of the countries surrounding France have either PACS or another form of registered partnership or same-sex marriage. Therefore, the intention was to allow French authorities to acknowledge the partnership under the law of its making, thereby claiming to follow the German example.[32]

It appears that the move of the French legislator was concerned more with allowing French authorities to acknowledge *at all* partnerships established in another state than with a choice of legal regimes. What is of interest here, though, is the fact that the motivation of the French legislator apparently was to solve problems of couples moving to France, problems which arose because of the disparities under national laws.

It must be recalled that the EU legislator is in a different position than legislators of EU Member States. While national legislation in the field of international private law aims to avoid conflicts of law by fitting national legal systems and jurisdictions into an international legal order, EU legislation answers to the specific claims of European integration. EU law is expected to fulfil objectives like the promotion of free movement and of the fundamental rights of EU citizens. This also applies in this concrete context, where, as demonstrated above, national legislators already pay considerable attention to issues linked to the mobility of registered partners and to an increasing number of couples whose families live across borders. In this regard EU legislation is challenged to meet even higher standards.

2.2.3. The absence of registered partnerships in many Member States

A key argument favouring differential treatment of registered partnerships and marriage is the fact that while all Member States have laws on marriage this is not the case with registered partnerships.

The fact that the scope of choice is restricted in the case of registered partnerships, however, does not imply that even such a restricted choice should be excluded. While it is right to assume in the context of registered partnerships that the range of possible choice is limited to property regimes tying in with existing provisions for the establishment of registered partnerships, this fact does not lend itself to an argument denying the right to choose even among the qualifying legal orders.

[32] *"Afin de ne pas inciter à la rupture de ces partenariats, il convient, à l'instar de la législation allemande, de soumettre ces partenariats à la loi de l'État dont l'autorité a procédé à son enregistrement." Exposé des motifs de la proposition de loi tendant à permettre la reconnaissance et la production d'effets en France des partenariats et unions civiles enregistrés à l'étranger, Sénat n° 121 (2008–2009),* Annex to the minutes of the meeting of 3 December 2008.

3. Concluding observations

Acting under Article 4 (1) (d) of Council Regulation 168/2007, the European Union Agency for Fundamental Rights is with this Opinion responding to the request of the European Parliament of 25 April 2012 concerning the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships.

Specifically, the European Parliament poses the question, whether the legislative proposal mentioned might infringe upon the principle of equality before the law under Article 20 of the Charter of Fundamental Rights of the Union and the principle of non-discrimination under Article 21 of the Charter. This required examining the fact that the draft regulation concerning registered partnerships does not allow partners any choice of applicable law, while the draft regulation on matrimonial property regimes opens to spouses a certain margin of choice. It also implied examining whether this differentiation mirrored significant differences in the situations of registered partners on the one hand, and married spouses on the other, which would give an objective justification to their differential treatment.

As mentioned above, in line with the European Parliament's request this opinion thematically limits itself to assessing the draft regulation concerning registered partnerships under Articles 20 and 21 of the Charter.

The prohibition of discrimination in Article 21 of the Charter would interdict a treatment that is, regarding the choice of applicable law, favourable to married couples but disadvantaging persons who, while in need of recognition for their partnerships, as a matter of political or other opinion, attach importance to leading their private and family lives with a maximum of private autonomy. In addition, given that in many Member States the institution of registered partnership is the only option available to same-sex couples, the indirect discrimination leading to this situation of disadvantage would especially affect same-sex couples among the EU population.

Ultimately, Article 20 of the Charter, which enshrines the principle of equality before the law, raises the question of whether significant differences in the treatment of registered partners and married couples would be justified on the basis of the significant differences existing between their respective institutions – and more specifically in the regulation of their respective property regimes – by the Member States.

In this regard, it should be borne in mind that disparities between the substantive rules of law applicable to property in different EU Member States affect both marriage and registered partnerships. The applicable laws in the Member States with regard to registered partnerships differ to a greater extent than with regard to marriage. Accordingly, if the draft Regulation concerning the property of married couples establishes as its legitimate aim the coordination of the legal framework for

determining jurisdiction and the applicable law, such an aim would be even more relevant with regard to registered partnerships. Hence, the possibility to choose the applicable law becomes all the more relevant with regard to registered partnerships.

In addition, the existing practice across EU Member States indicates that there is not a general principle of exclusion of the option for registered partners to choose an applicable law (other than that of the State of registration of their partnership). The specific role of the EU legislator with regard to objectives such as the promotion of free movement and the fundamental rights of citizens would seem to call for an approach that provides more rather than less flexibility when it comes to the choice of law.

Finally, the fact that while all EU Member States have the institution of marriage, not all have the institution of registered partnership, and therefore the scope of choice of applicable law with regard to registered partnerships would necessarily be reduced to those Member States which have such an institution, does not constitute an argument to exclude such choice of applicable law for all Member States laws, irrespective of whether or not they have registered partnerships.

On the basis of what is said above, it can be concluded that in order to restrict the choice of applicable law in the case of registered partnerships appropriate justifications would be required which cannot be derived from the reasons given in the draft legislation under consideration. Accordingly, the exclusion of any choice of law does not appear to be in line with the principle of equality (Article 20 of the Charter of Fundamental Rights) and generates potentially problematic effects with regard to the prohibition of discrimination (Article 21 of the Charter of Fundamental Rights).

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