

COMMENTS AND PROPOSALS OF THE 14TH STANDING COMMITTEE

(European Union Policies)

Pursuant to Article 144(1) of its Rules of Procedure

(Rapporteur: FLERES)

Rome, 25 May 2011

Comments on the Community act:

Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (COM(2011) 126 final)

The 14th Committee, having examined document COM(2011) 126 final,

whereas one of the objectives of the European Union is to create a judicial area based on the principle of mutual recognition of decisions;

bearing in mind that the free movement of decisions is a response to a social need arising from the fact that an ever increasing number of persons move from one Member State to another and, consequently, a growing number of families are composed of persons of different nationalities or who are resident in different States;

having examined the difficulties faced by international couples because of the diversity of national legal systems, above all when the marriage ends through separation, divorce or the death of a spouse;

bearing in mind that in order to overcome these obstacles the European Union has recently adopted a Regulation concerning the law applicable to divorce and separation and is at the negotiation phase on a regulation concerning matters of succession, and that this legislation establishes objective criteria for determining the applicable law and the court with jurisdiction in the event of separation, divorce or succession among international couples;

whereas the act in question is intended to supplement this legal framework as it governs issues concerning property relations between the spouses, and in particular contains provisions on: (a) jurisdiction; (b) applicable law; (c) free movement of decisions;

whereas the European Commission classifies the proposal under "family law", of which there is no clear legal definition in EU law, although, "for the purposes of this Directive", Article 2 of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States includes in its definition of "family members" "(a) the spouse; ...";

whereas the concept of marriage varies from one Member State to another and in the proposal "marriage contract" is defined as "any agreement by which spouses organise their property relationships between themselves and in relation to third parties." This, then is a strictly property-based concept, concerning the aspect of marriage understood as "relationship"; it seems, however, to have nothing to do with marriage understood as an act, which is left to the internal law of the Member States, as pointed out in recital 10 of the proposal;

recalling the first paragraph of Article 29 of the Italian Constitution, which affirms that the Republic recognises the rights of the family as a natural society based on marriage;

also recalling that in its judgment No 138 of 15 April 2010 the Constitutional Court ruled that the definition of marriage in the 1942 Civil Code "established (and still establishes) that the spouses must be persons of different sexes". Moreover, the entry into force of the Treaty of Lisbon, which gives the same legal weight to the Charter of Fundamental Rights as to the Treaties, cannot be the basis for an incompatibility with the provisions of the Civil Code governing the institution of marriage as a union of persons of different sexes. It is true that Article 9 of the Charter, by reaffirming the "right to marry and right to found a family" already contained in Article 12 of the European Convention on Human Rights

(ECHR) for "men and women of marriageable age" seems to represent progress towards recognising marriages between persons of the same sex; however, Article 9 of the Charter, like Article 12 of the Convention, leaves the specific rules to "national laws", thereby placing the matter at the discretion of the Parliament. And, as the Constitutional Court adds in the above judgment, there are "explanations" attached to Article 9 of the Charter, which, although they do not have the status of law, undoubtedly constitute an instrument of interpretation. The "explanation" for Article 9 clarifies that the "Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex";

therefore considering it necessary that this situation be brought to the attention of the European legislative instances in order that it be taken into account in subsequent negotiation and to avoid disputes and doubts concerning the scope of the relevant definitions, which would create a situation of uncertainty;

and, lastly, recalling that in the judgment of 1 April 2008 in Case C-267/06, *Makuro*, the Court of Justice states that "civil status" and the benefits flowing from it are matters which fall within the competence of the Member States and Community law must not detract from that competence. However, it also points out that the Member States must, in the exercise of that competence, comply with Community law, and in particular the provisions relating to the principle of non-discrimination, in this case the provisions of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation;

hereby, within the scope of its competence, comments unfavourably on the proposal, highlighting the following points:

the European Commission states that the legal basis for the proposal is Article 81(3) of the TFEU, which confers on the Council the power to adopt measures, following the special legislative procedure, acting unanimously and after consulting the European Parliament, on matters concerning "family law" with cross-border implications. As has been said, Article 29 of the Italian constitution classifies the family as a natural society based on marriage and there are therefore no objections to the choice of legal basis for the proposal, which governs certain property issues involved in the marital relationship. However, the legal basis proposed has problematic aspects regarding the inclusion of unions between persons of the same sex in the concept of family;

the proposal raises some doubts regarding the principle of subsidiarity. It is true that the objectives of facilitating the free movement of persons in the European Union, enabling spouses to organise their property relations and, generally, increasing legal certainty, can only be achieved through common provisions at EU level. It is also true that the proposal does not include harmonisation of the substantive provisions on the property rights of spouses or affect the national tax legislation of the Member States. However, the problems regarding the legal basis call for further reflection on how well the proposal complies with the principle of subsidiarity;

without prejudice to the foregoing, the proposal does not seem to breach the principle of proportionality, as it does not go beyond what is necessary to achieve its objectives and, according to the European Commission's estimates in the impact assessment, should, along with the proposal set out in COM(2011) 127 final, result in a reduction by EUR 0.4 billion of the costs entailed by the present situation;

in this context, in order to avoid uncertainties, the concept of marriage should be more precisely defined. In view of the position adopted by the Constitutional Court in its judgment No 138 of 15 April 2010, referred to above, it would be difficult for Italy to consider a matrimonial partnership between persons of the same sex as "marriage" or, therefore, to recognise the property rights which the Regulation attributes to the "spouses". Such "marriage" would be inconsistent with Article 29 of the Constitution, also as interpreted by the Constitutional Court in 2010.

To resolve the problems set out above, maintain the possibility for same-sex couples to regulate their property relations and apply Article 21 of the Charter of Fundamental Rights regarding the principle of non-discrimination, it is proposed that "marriages between persons of the same sex" should be covered - at least for Italy - by the system set out in the other proposal (COM(2011) 127 final) on the property consequences of registered partnerships, which is also under consideration.

Alternatively, consideration should be given to the desirability of: (a) including in Article 5 of the proposal a clause - along the lines of the second paragraph of Article 5 of the proposal on the property consequences of registered unions set out in COM(2011) 127 final - whereby the courts with jurisdiction on issues concerning property relations between spouses, on the basis of various criteria centering on the concept of "habitual residence", may refuse this extension of jurisdiction if the domestic law of the State concerned does not provide for the institution of marriage between persons of the same sex; (b) amending Article 23 to allow Member States that have specific constitutional problems with recognising marriages between persons of the same sex to include this impediment in what is judged to be manifestly incompatible with the public policy of the forum; (c) amending Article 27 to allow Member States that have specific constitutional problems with recognising marriages between persons of the same sex to provide for a further ground for non-recognition of decisions.

Signed: Salvatore Fleres