



**ASSEMBLEIA DA REPÚBLICA  
EUROPEAN AFFAIRS COMMITTEE**

**WRITTEN OPINION**

**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**

**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**

**INTRODUCTORY NOTE**

In accordance with the terms of Articles 6 and 7 of Law 43/2006 of 25 August, governing the process of monitoring, assessment and pronouncement by the *Assembleia da República* in the context of the construction of the European Union, and in line with the procedures for the scrutiny of European initiatives approved on 20 January 2010, the European Affairs Committee received the 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] and 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].

Having regard to their purpose, these two initiatives will be considered together and, because of the dissolution of the *Assembleia da República*, will be scrutinised only by the European Affairs Committee.

**RECITALS**

Article 67(1) of the Treaty on the Functioning of the European Union (TFEU) provides that the Union “constitutes an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States”. Paragraph 4 of that article provides that the Union shall facilitate access to justice, in



**ASSEMBLEIA DA REPÚBLICA  
EUROPEAN AFFAIRS COMMITTEE**

particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

The European Union has been debating the need for cross-border regulation of matrimonial property regimes since 1998. This matter was addressed by the 1998 Vienna Action Plan; the Programme on mutual recognition of decisions in civil and commercial matters adopted by the Council on 30 November 2000; the Hague Programme of 2004; and, lastly, the Stockholm Programme of 2009. All these documents pointed, firstly, to an increase in the number of international couples in Europe and, secondly, to the uncertainty surrounding the property rights of such couples as one of the main obstacles that EU citizens continue to face. Therefore, the two proposals are intended to enable international couples (married couples or registered partners) to understand more easily which courts have jurisdiction to determine matters arising from their property relationships and the law applicable to such relationships, as well as to regulate the recognition and enforcement of decisions in this matter. Taking into consideration the distinctive features of marriage and registered partnerships and the different legal consequences resulting from these forms of union, the Commission is presenting two separate initiatives.

The purpose of these two proposals is to establish a clear legal framework for determining jurisdiction and the law applicable to matrimonial property regimes and facilitating the movement of decisions and instruments among the Member States.

Having regard to the nature of the proposals, it is important to consider the following aspects:

***a) Legal basis***

The legal basis for this proposal is Article 81 of the TFEU. Number 1 of Article 81 states that measures shall be adopted in the field of judicial cooperation in civil matters having cross-border implications, including in particular the adoption of measures for the approximation of the laws and regulations of the Member States, with the objective, in the words of number 2, “ensuring *mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases*” and “*ensuring the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction*”. Number 3 of that Article establishes that in matters concerning family law with cross-border implications the Council shall act unanimously after consulting the European Parliament, in accordance with a special legislative procedure.

In view of the fact that the proposal touches on matters of legal jurisdiction, applicable law and the recognition and enforcement of decisions in matrimonial property cases, which are Family Law in accordance with the European legal tradition and with the majority doctrine, and that the proposed rules apply only to cross-border cases, it appears to us that the EU has a legal basis for the adoption of these two initiatives.



**ASSEMBLEIA DA REPÚBLICA  
EUROPEAN AFFAIRS COMMITTEE**

***b) Special Legislative Procedure***

Recognising that these are EU initiatives concerning family law with cross-border implications, under the terms of Article 81(3) of the TFEU this means that they must be approved unanimously by the Council after consulting the European Parliament. However, the second paragraph of Article 81(3) of the TFEU provides for the possibility of using the “*passerelle clause*” in this situation, meaning that the Council may unanimously adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure and consequently without the requirement for unanimity. Under the terms of the third paragraph of Article 81(3), this change of legislative procedure, namely as regards the majority required for approval, must be notified to national Parliaments, which have six months to make known their opposition to such change. If this happens, the Council must approve the initiatives according to the special legislative procedure and must therefore act unanimously.

In the event of such a situation occurring in relation to the two regulations under consideration, the *Assembleia da República*, irrespective of the points made in this written opinion on the merits of the two proposals, reserves the possibility of further consideration and decision under the terms of the third paragraph of Article 81(3) of the TFEU.

***c) Principle of Subsidiarity***

In the context of the cross-border regulation of matrimonial property regimes and their property consequences, the proposal's objectives, particularly in terms of guaranteeing legal certainty and predictability, would not be adequately achieved at the level of individual Member States and would be better achieved at EU level. Besides, the objective of the initiatives is to harmonise disparate rules of private international law which in some cases are incompatible, what is better achieved through an intervention of the European Union.

***d) Application of the Public Policy Principle***

Lastly, we refer to the provision in both proposals for the possibility of application the public policy principle. Portuguese law provides, in Article 22 of the Civil Code, that “*the provisions of foreign law indicated by the conflict of laws shall not apply when such application undermines the fundamental principles of the international public policy of the Portuguese state*”. A similar provision exists in the legal systems of the majority of EU Member States; the importance of its inclusion in these proposals intended to regulate such a sensitive matter, and with which we agree, cannot therefore be overemphasised.

***e) Content of the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes***



**ASSEMBLEIA DA REPÚBLICA  
EUROPEAN AFFAIRS COMMITTEE**

*i. Scope of application: gifts between spouses*

With regard to Article 1 of this proposal, the Committee has some reservations about the exclusion “*tout court*” of gifts between spouses from the scope of the proposal. Although this matter is regulated by Regulation (EC) 593/2008, the specificities of gifts between spouses and their implications in the context of matrimonial property regimes arise directly from the law and, in most Member States, from the provisions governing the property aspects of marriage. Having regard to this fact and to the natural implications that gifts between spouses may have in the spouses estate, the option set out in the proposal gives rise to some reservations on our part.

*ii. Referrals*

With regard to the rules on jurisdiction, the legislative device of referral to a legislative instrument that is currently under revision (Regulation (EC) 44/2001) and to a Proposal for a Regulation that is still being debated in the European legislative process (as is the case with the Proposal for a Regulation on the conflict of laws in matters of succession) it may be inappropriate. It would be preferable in both cases to include in this proposal the rules whose application is effectively intended.

*iii. Related actions*

In relation to Article 13 of the proposal, on related actions, it is necessary to question the option of consolidating actions before the courts of different Member States. Besides the reservation which this gives rise to on our part in view of the fact that this possibility is not provided for in Portuguese law, we would also comment that the article does not provide a solution or alternative in those cases where national law does not provide for that possibility other than by the staying of the proceedings. An alternative solution should therefore be provided for.

*iv. Provisional, including protective, measures*

Article 14, which provides for recourse to the provisional, including protective, measures, appears to endorse the possibility of “*forum shopping*”, that is, the possibility for an applicant to make a request to the courts of an unrelated Member State which probably does not have jurisdiction in the matter. In this respect, it is worrying that no limit is placed on the choice of court in which to bring an application for provisional, including protective, measures, even though the rule may have only a distant connection with the situation.

*v. Applicable law*

In what concerns to applicable law, the order established for the connecting factors gives rise to some concern, in particular the use of the spouses’ first common habitual residence after their marriage as the preferred criterion. In fact, Article 52(2) of the



**ASSEMBLEIA DA REPÚBLICA  
EUROPEAN AFFAIRS COMMITTEE**

Portuguese Civil Code decides on to apply in first place the law of the State of nationality of the common habitual residence. The choice of the law of the State of the spouses' first common habitual residence after their marriage is accordingly not sufficiently justified.

*vi. Change of applicable law*

Having regard to the immutability of the marital property regime in Portuguese law (see Articles 1714 and 1715 of the Civil Code) and Article 54 of the Civil Code, the rules on change of applicable law (Article 18 of the proposal) also give rise to some reservations. The proposal appears to allow two Portuguese nationals who are normally resident in Portugal to change their marital property regime under a different law if one of the spouses resides even temporarily in another country that allows it, by choosing that other law. Such a change could, within certain limits, have retroactive effects and will be valid even if both nationals return to live in Portugal. If this option is confirmed, it would overturn the principle of immutability enshrined in Portuguese law and give rise to well-founded concerns about whether the objectives of legal certainty and predictability, which the proposal aims to achieve, are secured by this route.

***F) Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships***

In relation to this proposal, and having regard to the fact that this concept does not exist in Portuguese law and the legal construct that most resembles it is that of the 'de facto union', which does not have property consequences (see Law 7/2001 of 11 May, as amended and republished by Law 23/2010 of 30 August), it seems to us that this Regulation will not apply to situations originating in Portuguese law.

In the light of what is stated, we would comment, in relation to the jurisdiction criteria in the context of this proposal, that we have considerable reservations about Article 5. In fact, we believe that the preferred jurisdiction in the context of this article should be that of the Member State of registration of the partnership. However, in view of the great differences between the legal systems of Member States and the fact that, under the terms of Article 3(2) and Article 5(2), it will be admissible for a court to decline jurisdiction if its law does not recognise the institution of registered partnership, it does not appear to be practical to oblige the parties to apply in the first instance to authorities that may eventually decline jurisdiction [see sub-paragraph a), b) and c)] rather than going directly to the authorities of the Member State where the partnership was registered. We would add that, under the terms of Article 15, the sole applicable law in this matter, with no possibility of choice, is precisely the law of the State where the partnership was registered. Accordingly, it would be logical that the authorities of the Member State where the partnership has been registered should be the preferred forum in the context of Article 5.



**ASSEMBLEIA DA REPÚBLICA  
EUROPEAN AFFAIRS COMMITTEE**

**OPINION**

1. Having regard to the recitals set out in the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, the European Affairs Committee is of the opinion that **these proposals do not breach the principle of subsidiarity since their objectives will be more effectively achieved by EU action.**
2. In relation to the issues raised in the recitals, the *Assembleia da República* emphasises the reservations it has expressed and will continue to monitor the legislative process concerning these Proposals for a Regulation during the next Legislature.
3. Similarly, in the event that the Council resorts to use of the “*passerelle clause*”, the *Assembleia da República*, irrespective of the points made in this written opinion on the merits of the two proposals, reserves the possibility of further consideration and decision under the terms of the third paragraph of Article 81(3) of the TFEU.

São Bento Palace, 17 May 2011

**Opinion drawn up by MP Pedro Duarte**

**Chairman of the Committee – MP Vitalino Canas**