

**COMMUNICATION pursuant to Article 23f (4) of the Austrian Constitution**

regarding

**COM (2011) 126 final**

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

and

**COM (2011) 127 final**

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

“The number of transnational marriages and/or registered partnerships in the European Union is increasing continuously. Given the current fragmentation of the legal acquis, many of these couples are uncertain as to which law applies to them. As regards the law applicable to divorce and/or legal separation, the Standing Sub-Committee on European Affairs underlined the advantages of a uniform European regime already on 9 June 2010. However, no such regime has yet been established in the field of property law. As a result, it is difficult for spouses and/or registered partners to know which law applies and which courts have jurisdiction, given the fact that different legal provisions exist in different Member States.

Recognising that measures must be taken to overcome these problems, the Standing Sub-Committee on European Affairs therefore welcomes the present proposal for a Council Regulation.

Notwithstanding its agreement in principle, the Sub-Committee takes a critical position on a number of detailed issues of the proposal submitted by the Commission:

**1. Formal requirements regarding the choice of applicable law**

The possibility of choosing the applicable law by mutual consent allows greater freedom to the persons concerned and serves the cause of legal certainty. At the same time, however, the choice of applicable law always harbours the risk of one party being disadvantaged by the other. Therefore, the proposal provides for minimum formal requirements to be met by an agreement on the choice of applicable law, specifying that such agreement must be expressed in writing and dated. Moreover, reference is made to national requirements regarding the formal validity of marriage contracts. In Austria, the agreement would have to take the form of a notarised authentic act. However, the protective effect of the rules proposed is limited by the fact that the formal requirements to be met are those of the state whose law is to be chosen or in which the agreement is drafted. This also applies in the event of a change of applicable law, which may be decided retroactively with the consent of the parties, as provided for in Article 18. This gives the persons concerned some freedom for mutual agreement, but the risk of one party being disadvantaged by the other still exists.

Therefore, stricter and uniform requirements of form to be met by the agreement on the choice of applicable law (for instance in the form of an authentic act, a legalised authentic act or in accordance with Article 7, paragraphs 3 and 4, of the Rome III Regulation) are considered appropriate.

## **2. Exclusion of the choice of applicable law for registered partnerships (proposed regulation on the property consequences of registered partnerships)**

The Standing Sub-Committee wishes to preface its comments by stating that pursuant to Sect. 27c of the Austrian Act on Private International Law the choice of applicable law for parties is explicitly provided for as regards the property consequences of registered partnerships, with the law of the state in which the partnership was established taking a subsidiary position.

The proposal submitted by the Commission excludes the possibility of a choice of applicable law for the property consequences of registered partnerships, providing for mandatory application of the law of the state in which the partnership is registered. The Sub-Committee fails to understand the grounds for exclusion of the choice of law. As mentioned above, the choice of law offers greater freedom for the parties concerned, not least for reaching mutual agreement. In view of the intended broad scope of the regulation, which is intended to cover all property aspects of registered partnerships, it would be problematic if the choice of law currently existing in Austria pursuant to Sect. 27c of the Austrian Act on Private International Law were to be abolished within the scope of the regulation.

Therefore, the choice of applicable law, modelled on the regime under the Austrian Act on Private International Law, should be provided for in the proposed regulation.

## **3. Definition of “habitual residence”**

In their present form, the proposals do not contain an explicit and uniform definition of habitual residence. However, the notion of habitual residence is the most important connecting factor both for the decision on jurisdiction and – as regards matrimonial property law – the decision on the applicable law. A lack of uniformity of the definitions used in different legal acts or conventions would have a negative impact on legal certainty. In the absence of specific ECJ decisions on this subject, efforts should be made to provide some guidance for the courts concerned through inclusion of appropriate language – be it in a considering – as to the period of time and the criteria on the basis of which habitual residence is to be considered established.

## **4. Connecting factors**

The intention of simplification is of fundamental importance and should apply, in particular, to matrimonial property regimes. The connecting factors for the applicable law should correspond, as far as possible, to the needs and expectations of the spouses (such as common citizenship). Nevertheless, the difference in nature of the subjects of regulation must be taken into account in this context. For the socially underprivileged, it is particularly important to ensure that a change in habitual residence does not automatically result in a change of law. At the same time, however, rigid adherence to the first or last common habitual residence appears to be equally problematic.”