CITIZENS’ FAMILY LIFE IN EU REGULATIONS,  
WITH PARTICULAR RESPECT TO PROPERTY REGIMES  

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Abstract: European Union law in relation to family life is increasing and developing while continuing to have regard to Member State legislation, social values and traditions. The European perspective is apparent in two proposals for regulations concerning property regimes, two separate acts aimed at considering new forms of union, such as registered partnerships. The Commission has recognised the difficulties encountered by international couples in terms of the management of patrimonial effects and has pursued the objective of ensuring legal certainty. The present paper aims to offer a general analysis of interpretations of the concept of family in Europe, with particular reference to the Italian and English systems. The opinions by the two governments will be examined in order to put in evidence the main questions arising: the recognition and the continuity of civil status. Indeed, the concept of registered partnership is still a debated issue in Italian society, where not all forms of union are accepted, differently from the United Kingdom, which allows same-sex marriages and where civil partnerships are recognised. The need for uniformity in this field, in law and practice, is also remarked in the CEFL Principles regarding property relations between spouses, as well as in other, non-binding, instruments. Finally, despite the questions surrounding the concept of family, certain benefits are likely to accrue to European citizens as a result of the proposals in terms of the predictability of the applicable law and the recognition and enforcement of decisions on property regimes.

Keywords: family law, European Union law, private international law, property regimes, registered partnerships, Italy, United Kingdom.

I. The concept of family in the European Union.

Thanks to the freedom of movement of people and the increasing number of international couples, the concept of family life in Europe is changing, evolving and encompassing new forms of union, not only the traditional model of family founded on marriage between persons of the opposite sex, but also unmarried couples, same-sex couples, registered and civil partnerships. Questions arising cover legal, practical, moral and social aspects linked to national values, ideals and traditions. Family life finds protection in human rights instruments at national, European and international levels, although they fail to provide specific definitions of it.

The EU is empowered to take measures relating to family matters with cross-border implications pursuant to Art. 81, par. 3 TFEU on the basis of a special legislative procedure. The required unanimity emphasises the necessity of a solid consensus of all EU countries in ruling on this delicate subject, whose discipline would otherwise remain to national legislators. Each State order is inspired by divergent principles and values, connected to their own cultural, ethic, social and religious models whose differences lead to legal and practical problems. Cross-border family relationships between people of different nationalities or those living in a State different from that of their nationality should be taken into account by national governments. Citizens could face questions about their relationships in terms of formation, daily management, personal and patrimonial effects, dissolution and recognition in other Member States.

With the aim of offering EU citizens legal certainty in cross-border family law situations, various instruments have been adopted by the EU over recent years which

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2 The terminology can differ from one Member State to another.
3 Art. 81, par. 3, TFEU: ‘Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament. The Council, on a proposal from the Commission, may 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. The Council shall act unanimously after consulting the European Parliament. The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision’.
deal with international private law provisions on specific aspects, such as matrimonial matters and parental responsibility (Regulation No. 2201/2003),\(^5\) maintenance obligations (Regulation No. 4/2009),\(^6\) divorce and legal separation (Regulation No. 1259/2010).\(^7\) Moreover, the proposals for Regulations of 2011 concerning property regimes\(^8\) show increasing EU consideration of many aspects of citizens’ family life. In this context, the European Commission has provided a specific act on registered partnerships. Nevertheless, it does not mean that this form of union is not covered by the other above-mentioned instruments.\(^9\)

With regard to the forms of union considered in EU Member States, only in nine countries is marriage open to both opposite-sex and same-sex couples.\(^10\) Registered partnerships\(^11\) are accepted in 18 EU countries;\(^12\) 17 countries allow same-sex couples

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\(^9\) For instance, on the applicability of Regulation No. 2201/2003 to unmarried couples, see Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 (COM(2014)225 final, Brussels, 15/04/2014), sec. 1.2 ‘The Regulation covers all decisions on parental responsibility independently of any link with matrimonial proceedings in order to ensure equality for all children. This reflects the significant increase of the share of extra-marital births over the last two decades in almost all Member States, which indicates a change in the pattern of traditional family formation’.

\(^10\) The Netherlands; Belgium; France; Denmark; Luxembourg; the United Kingdom (England and Wales); Spain; Sweden and Portugal (see http://ec.europa.eu/justice/civil/family-matters/marriage/index_en.htm (last consultation on 6 June 2015). Same-sex marriage is soon to be legal in Ireland, following approval of a referendum on 22 May 2015; before entering into force it needs ratification in the Oireachtas, though it is estimated that the first same-sex marriages will take place in summer 2015 (see http://www.justice.ie/en/JELR/Pages/PR15000152).

\(^11\) In Proposal No. 127 cit., p. 3, it is defined as ‘a couple in a stable relationship who formally registers its union with a public authority’; cf. whereas 10 of Proposal No. 127 where no reference is made to same-sex or otherwise but it is established that it must be regulated in accordance with national laws.

\(^12\) Austria, Belgium, Croatia, the Czech Republic, Denmark, Germany, Finland, France, Greece, Hungary, Ireland, Luxembourg, Malta, the Netherlands, Slovenia, some regions of Spain, Sweden and the United Kingdom; Sweden: marriage of same-sex partners has been recognised since 2009 when registered partnerships were abolished, though they continue to exist if concluded before May 2009 (see http://ec.europa.eu/justice/civil/family-matters/marriage/index_en.htm; last consultation on 6 June 2015).
to register partnerships and five countries permit both same-sex and opposite-sex couples to register.\textsuperscript{13}

Differences between EU Member States in this context could affect the possibilities they offer and the extent to which partnerships validly contracted abroad are recognised.\textsuperscript{14} With regard to registered relationships it seems clear that they are ‘subject to an extraordinary variety of national approaches with regard to denomination and substantive law’.\textsuperscript{15} The ‘heterogeneity of the Member States’ substantive and conflict rules leads to limping relationships, which are valid and effective according to the legal order of one Member State, but not recognised in another’.\textsuperscript{16} In addition, questions and difficulties arise regarding tax and social security benefits.\textsuperscript{17}

Courts will not enforce a right when recognition would violate the public policy of the forum, which could have a stronger role in dealing with more sensitive political rights.\textsuperscript{18} Although it is for national legislators to define the notion of marriage, it is equally within the discretion of the Member States to determine, in compliance with EU law, the content of their public policy. ‘The non-recognition of a family law status within the European Union might also result in a (unjustifiable?) restriction of the free movement of EU citizens as provided for in Art. 21 TFEU’.\textsuperscript{19}

Considering the EU action in this field aimed at ensuring citizens’ rights, the European Commission’s Green Paper of 2010\textsuperscript{20} suggested ‘automatic recognition, in a Member State, of civil status situations established in other Member States. Such recognition would not involve the harmonisation of existing rules and would leave

\begin{footnotesize}
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\item Belgium, France, Luxembourg, Malta and the Netherlands (see http://ec.europa.eu/justice/civil/family-matters/marriage/index_en.htm; last consultation on 6 June 2015).
\item M. Melcher, \textit{(Mutual) Recognition} cit., p. 150.
\item J. Kuipers, \textit{Cartesio and Grunkin-Paul: Mutual Recognition as a Vested Rights Theory Based on Party Autonomy in Private Law}, p. 93 ss. (available at http://www.ejls.eu), which affirms that ‘It seems unlikely that the ECJ will use European Citizenship to settle such a politically sensitive question’.
\item M. Melcher, \textit{(Mutual) Recognition} cit., p. 150. The author provides a deep analysis of the recognition of registered relationships in the European Union, \textit{ibidem}, p. 152 ss.
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Member States’ legal systems unchanged. This would mean that each Member State would accept and recognise, on the basis of mutual trust, the effects of a legal situation created in another Member State.\textsuperscript{21} Moreover, with specific reference to registered partnerships, automatic recognition has been provided for in international instruments, such as the Hague Convention of 1978,\textsuperscript{22} which states that a foreign marriage has to be recognised in the participating State, and the CIEC Convention of 2007,\textsuperscript{23} prescribing the recognition of the status of registered partnerships, instead of private international law rules.

Although the diverse scenery of national laws shows the difficulty of finding a uniform tendency, because of the EU Member States’ competence in this field, the protection of the family is guaranteed at European level through human rights charters. Indeed, ‘the continuity of a once validly acquired status might also be entitled to protection under human rights law, especially with regard to the protection of private and family life (Art. 7 EU Charter,\textsuperscript{24} Art. 8 ECHR\textsuperscript{25}) and the prohibition from discrimination (Art. 21 EU Charter, Art. 14 ECHR)’.\textsuperscript{26} Moreover, Art. 12 ECHR\textsuperscript{27} and Art. 9 EU Charter\textsuperscript{28} establish the right to marry and, with specific reference to the second provision, the right to found a family, that shall be governed by national laws.\textsuperscript{29} The formulation of these provisions reflects the need to separate the recognition of rights from the guarantee of the rights themselves. The reason for such a division lies in awareness of the deep social, cultural and legal differences relating to the EU Member States regulations.\textsuperscript{30} As reaffirmed in the case-law, the cited Articles do not impose an obligation on the States to provide same-sex marriage. Because of it, the lack of

\textsuperscript{21}\textit{Ibidem}, section 4.3.b).
\textsuperscript{23} Commission Internationale de l’Etat Civil (CIEC), Convention No. 32 on the recognition of registered partnerships of 5 September 2007 (available at http://ciec1.org/ListeConventions.htm): it deals with formation, dissolution and annulment, but not with non-civil status matters such as the applicable law and property regimes.
\textsuperscript{24} European Union Charter of Fundamental Rights, proclaimed on 7 December 2000, it has become legally binding on the EU with the entry into force of the Treaty of Lisbon, in December 2009 (available at http://eur-lex.europa.eu).
\textsuperscript{26} M. MELCHER, (Mutual) Recognition cit., p. 151.
\textsuperscript{27} Art. 12 ECHR: ‘Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right’.
\textsuperscript{28} Art. 9 EU Charter: ‘The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights’.
\textsuperscript{29} See V. SCALISI, Famiglia e famiglie in Europa, in Rivista di Diritto civile, 2013, n. 1, p. 8 ss.
\textsuperscript{30} See G. IORIO, La trascrizione dei matrimoni tra persone dello stesso sesso: fra ordinamento vigente e giurisprudenza ‘creativa’, in Lo Stato civile italiano, febbraio 2015, p. 11.
provisions cannot be considered in contrast or in violation of such rights. In ECHR case law the concept of family has been defined through the interpretation of Art. 8 with regard to actual circumstances and independently of national definitions, thus including registered partnerships, de facto union, between both opposite-sex and same-sex couples.31

2. The Italian and English systems.

The concept of family in the jurisprudential and normative situations of Italy and United Kingdom is clearly expressed.

The Italian legal system puts the institution of marriage at the centre of family law, as stated in Art. 29 of the Constitution where ‘family’ is deemed ‘a natural society founded on marriage’.32 Like other constitutional provisions,33 there is no reference to the gender of the spouses. Italian law accepts opposite-sex marriages and does not provide rules for registered partnerships, which actually are the subject of a proposed legal act.34 This regulation refers to civil unions composed only of same-sex partners, without contemplating other forms such as opposite-sex unions or same-sex marriages. It is based on judges’ insistence on the legal necessity to provide for a regulation on the rights and duties of same-sex partners. In the draft text the civil union is deemed a peculiar and different legal institution from marriage, even if they share similar features.

The Italian Court of Cassation in the recent sentence No. 2400 of 201535 has reaffirmed that the Italian legislator has no obligation to provide the same-sex marriage and that the lack of provision is not contrary to the constitutional principles or to the ECHR. With regard to the former sentences,36 it has been stressed that the notion of social union set forth in Art. 2 of the Italian Constitution includes same-sex relationships, defined as stable cohabitation between two same-sex persons who have the fundamental right to live freely as a couple, with the consequent possibility of

32 Art. 29 of the Italian Constitution: ‘The Republic recognises the rights of the family as a natural society founded on marriage. Marriage is based on the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family’.
33 See Arts. 30 and 31 of the Italian Constitution.
34 See Disegno di legge n. 14, XVII Legislatura, presented on 15 March 2013, in joined exam with other proposals, available at www.senato.it.
having their rights and duties recognised. The right to live together could be recognised even without invoking the institution of marriage.

Same-sex marriage is deemed as a social union protected by the Constitution and not in contrast with the national legal order, but it cannot be effective in the Italian system since it has not been regulated. The question of non-recognition based on the ground of incompatibility with national public policy arises in the case of recognition (and transcription) of a marriage validly contracted abroad between same-sex persons. Recently, the debate about foreign same-sex marriages has increased, highlighting the diverse interpretations of prefectures, registrars, mayors, judges and citizens.³⁷ There has been a frank exchange of opinions: on the one hand, the lack of regulations regarding same-sex couples has been cited as the justification for non-recognition (and non-transcription) and, on the other hand, the acknowledgement of private and family life as a fundamental right is more prevalent, thus allowing the continuity of personal status. Finally, to the Parliamentary question about the transcription of same-sex marriages in Italy,³⁸ the Commission answered that ‘no obligation upon Member States can be drawn from existing EU rules with regard to the introduction, regulation or recognition of same-sex marriages and registered partnerships’.³⁹

Under English law, a civil partnership is a legal relationship which can be registered by two people of the same-sex.⁴⁰ The protection of same-sex couples can be found in the Human Rights Act 1998 whose provisions clearly recall Arts. 8 and 14 ECHR.

From 13 March 2014, in England and Wales the Marriage (Same Sex Couples) Act 2013, introduced by the government as an equality measure, legalised same-sex marriage.⁴¹ Civil partnership remains available for same-sex couples, but not for
opposite-sex partners.\textsuperscript{42} Since 10 December 2014 couples who have registered their civil partnership in England and Wales can convert it into a marriage.\textsuperscript{43} In Scotland, since 16 December 2014 same-sex couples have been able to marry,\textsuperscript{44} whereas they cannot do so in Northern Ireland. Thus, same-sex spouses who marry in England and Wales will be treated as civil partners in Northern Ireland. Finally, since 13 March 2014 same-sex partners who marry abroad under foreign law have been recognised as being married in England and Wales.

The lack of recognition of opposite-sex civil partnerships has been cited in the \textit{Ferguson} case\textsuperscript{45} before the European Court of Human Rights concerning eight British couples as part of the ‘equal love’ campaign, then declared inadmissible.\textsuperscript{46} In the application they claimed that if same-sex couples are granted the right to marry it follows that to eliminate discrimination based on sexual orientation different-sex couples should have access to civil partnerships based on Arts. 8 and 14 ECHR.

In conclusion, it can be asserted that the UK regime for civil partnerships should be extended to opposite-sex couples on the grounds of equality, privacy, dignity and autonomy; in Italy the upcoming civil unions should be available for opposite-sex couples too. Discrimination seems to be the overwhelming issue in modern societies where democratic values and principles should play the main role.

3. The proposals on property regimes.

The need to ‘build bridges between Europe’s different systems to ease the daily life of international couples’\textsuperscript{47} has been the basis of the two draft proposals on matrimonial property regimes and property consequences of registered partnerships.\textsuperscript{48}

\textsuperscript{42} Civil Partnership Act 2004, which entered into force on 5 December 2005, allows same-sex couples to obtain essentially the same rights and responsibilities as civil marriage partners, available at www.legislation.gov.uk.
\textsuperscript{43} See www.gov.uk.
\textsuperscript{44} Scotland’s Marriage and Civil Partnership Act 2014 (available at www.legislation.gov.uk).
\textsuperscript{45} \textit{Ferguson and Others v. United Kingdom}, Application No. 8254/11 (available at http://www.petertatchellfoundation.org).
\textsuperscript{46} No reference can be found on the HUDOC database. A notice can be read in the Department for Culture, Media & Sport, Civil Partnership Review (England and Wales) - Report on Conclusions, par. 3.1: ‘We have also learned that the application to the European Court of Human Rights challenging the availability of civil partnership only to same-sex couples was declared inadmissible on 12 December 2013’ (available at https://www.gov.uk).
\textsuperscript{47} See the speech of the EU Justice Commissioner V. Reding in \textit{Commission proposes clearer property rights for Europe’s 16 million international couples}, Brussels, 16/03/2011 (IP/11/30; MEMO/11/175).
\textsuperscript{48} See Proposals No. 126 and No. 127 cit.
Their purpose is to assist international couples in managing their property rights in the event of divorce, separation, or death of a spouse or partner.

In the Communication of 2011 on legal clarity regarding property rights, the European Commission noted that ‘the differences between national legal systems often produce unexpected and sometimes unwelcome consequences for international couples when it comes to the management of their property’. Then, Proposal No. 127 underlined ‘the practical and legal difficulties’ that new forms of union, such as registered partnerships, face ‘in the daily management of their property and in its division if the couple separate or one of its members dies’. The EU Citizenship Report of 2010 recognised that the uncertainty about the property rights of international couples is one of the main obstacles faced by EU citizens when they try to exercise the rights conferred on them by the EU across national borders. Moreover, in the Stockholm Programme of 2010 the European Council asked that mutual recognition be extended to areas crucial to citizens' everyday lives, among them issues relating to matrimonial property regimes and the property consequences of the separation of couples. The European Parliament has stressed ‘that the priorities in the field of civil justice should be to fulfil the needs of citizens by simplifying judicial machinery and introducing simpler, more transparent and more accessible procedures’.

Proposals No. 126 and No. 127 are designed to regulate jurisdiction and applicable law as they apply both to the daily management of the property of spouses and registered partners and to how issues relating to the distribution of assets in cross-border situations are handled following the ending of a couple’s relationship through divorce, separation or death. In relationships with an international connection, it is difficult for people to know which courts have jurisdiction and which laws apply to their personal situation and to their property when their relationship ends. The

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49 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Bringing legal clarity to property rights for international couples, Brussels, 16/03/2011 (COM(2011)125 final).
50 Proposal No. 127 cit., p. 3.
Commission’s objective is to ensure legal certainty for parties in order to prevent parallel proceedings and to discourage forum shopping.

The substantive law of matrimonial property regimes varies from one Member State to another. In general, there are legal regimes and contractually agreed regimes, the community-of-property and the separation-of-property. Like marriage, a registered union has effects on the property relationship of the parties, which are governed by national law. Differences between national laws are even more evident here than in the case of matrimonial property regimes. This point was underlined by the EU Agency for Fundamental Rights (FRA) in its Opinion of 2012 where it clearly recognised that a greater number of States apply the principle of common property, a few States are governed by the opposite principle of separation of property and common-law countries do not have a concept of matrimonial property at all.

In particular, Proposal No. 127 proposes the mutual recognition of decisions concerning property rights of registered partnerships’ members, thus avoiding the rejection of its validity in those Member States where the national system does not recognise such forms of union. As underlined in the assessment of the impact on fundamental rights, the Proposal is aimed at strengthening the right to property under Art. 17 EU Charter and it does not affect the right to respect for private and family life or the right to marry and to found a family according to national laws, as provided for in Arts. 7 and 9 EU Charter. With regard to Arts. 20 and 21 EU Charter, the FRA stated that Art. 15 of Proposal No. 127 provides for less favourable treatment, since it does not allow a comparable (with married couples) choice of law for registered partnerships, as it refers to the law of the State in which the partnership was registered. Consequently, same-sex partners will be affected more than opposite-sex couples. As mentioned before, ‘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

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54 Communication COM(2011)125 cit., p. 4 ss.
55 FRA Opinion No. 1/2012 on the Proposal for a regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, Vienna, 31/05/2012 (available at http://fra.europa.eu). FRA analyses the differences between the two Proposals, affirming the violation of Art. 20 EU Charter; see p. 7 ss.
56 See Sect. 3.1 of the Commission’s impact assessment, Accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Bringing legal clarity to property rights for international couples (SEC(2011)327 final, Brussels, 16/03/2011), p. 11.
57 See Proposal No. 127 cit., p. 5.
58 FRA Opinion cit.
different-sex couples – be faced with a negation of any choice of applicable law’. 59
Finally, the FRA considered that the differences between national laws on registered partnerships ‘beyond doubt differ widely as to their underlying concepts and guiding principles’. 60

The equality issue has also been debated in the Report of the European Parliament of 2013 61 where, considering the practical utility of two separate acts and criticising Proposal No. 127 for not allowing a choice of applicable law for registered partnerships, it has recommended ‘parallel regulation, in so far as this appears advisable for political reasons’.

4. The opinions by the Italian and English governments.

The opinions communicated by Italy and the United Kingdom evidence divergent points of view concerning the two proposals. On the one hand, the Italian system does not provide for regulation on registered partnerships 62 and the traditional model of family based on marriage between opposite-sex persons remains the main form of union socially and legally recognised; 63 on the other hand, under the law of the United Kingdom, which decided not to opt in, 64 same-sex civil partnerships are regulated for, 65 whereas the concept of a matrimonial property regime does not exist in the sense understood in most other Member States.

60 Ibidem, p. 10. In its Concluding observations, p. 15 ss., the FRA declared that ‘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’.
62 See Disegno di legge n. 14 cit.
63 Cf. XIV Commissione permanente (Politiche dell’Unione europea), annexed to Risoluzione della 2ª Commissione permanente (Giustizia), approved on 31 May 2011, on Proposal No. 126 (available at www.senato.it).
64 The Parliamentary Under-Secretary of State for Justice’s (Jonathan Djanogly) written ministerial statement of 30 June 2011, available at www.parliament.uk.
The XIV Commission of the Italian Camera dei deputati observed that the two proposals could allow the recognition in the Italian system of decisions adopted abroad relating to patrimonial effects of same-sex married couples or registered partnerships which are not recognised in the national legal scheme.\(^{66}\) In particular, it noted the risk, through the recognition of such foreign decisions, of applying different treatment with respect to de facto union, whether same-sex or opposite-sex, whose patrimonial effects are not recognised in Italy.\(^{67}\) Thus, the only limitation on these decisions is compatibility with national public policy.

About the Proposal No. 126, taken into account Art. 29 of the Italian Constitution and given the Italian Constitutional Court sentence No. 138 of 14 April 2010, the Institution concluded that there could be a marriage only between opposite-sex partners. However, it stated that the interpretation of Art. 9 EU Charter seems to lead to a wider notion of marriage, including same-sex marriages. Indeed, the disposition clearly leaves to national laws the regulation of matrimonial unions, without providing for a specific form of union.\(^{68}\) In conclusion, it reaffirmed the necessity to introduce a specific definition of marriage.

In giving its opinion on the Proposal No. 127,\(^{69}\) first of all, the Italian government considered the lack of a definition of family law under EU law. It noted reference in Directive 2004/38/EC that includes ‘the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State’.\(^{70}\)

The absence of any provisions regarding same-sex couples in the Italian order causes difficulties in recognising their duties and rights. Incidentally, Art. 24 of

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\(^{67}\) Ibidem.

\(^{68}\) In the Explanations to the EU Charter it is stated that: ‘this Article is based on Article 12 of the ECHR’ and ‘the wording of the Article has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family. This Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same-sex. This right is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides’.

\(^{69}\) Parere della 14\(^{a}\) Comissione permanente (Politiche dell’Unione europea), annexed to the Risoluzione della 2\(^{a}\) Commissione permanente (Giustizia) approved on 31 May 2011, on Proposal No. 127 (available at www.senato.it).

Proposal No. 127 excludes lack of consideration in the national system of registered partnerships being used to avoid the recognition of foreign decisions about patrimonial effects, a limitation for States like Italy.

As mentioned before, the United Kingdom made no notification under Art. 3 of Protocol No. 21, annexed to TEU and TFEU, on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice. The government in its written ministerial statement of 30 June 2011 said that it would not be opting into the proposals.71 A number of difficulties were identified, among them the non-existence of the concept of a matrimonial property regime (or equivalent for civil partners) under UK law. It follows that ‘if the UK was to opt in it would be more difficult for our courts to deal with all aspects of the financial provision of international couples on divorce or dissolution in cases which fall within the scope of these Proposals’.72

In an impact assessment of 15 April 201173 the Ministry of Justice noted that ‘UK jurisdictions do not have a codified regime applicable to the ownership of property between a couple during marriage (a marital property regime) or the property relating to a registered partnership (in the UK a civil partnership; although Scotland does have a provision dealing with international disputes on matrimonial property). England and Wales and Northern Ireland do have regimes for resolution of property issues upon dissolution of the marriage or civil partnership, but those regimes are based on a wide redistributive discretion ranging over the entirety of the couple’s resources, and so would probably not reflect the more codified regimes in the civil law systems. Upon death of a partner or spouse, the rules which apply are largely those which apply to succession in general – there is not a separate regime for spouses and partners to the regime for the rest of the estate, again, in contrast to most civil systems’.

5. The need for a uniform concept of family in law and practice.

The need for clear rules concerning which courts have jurisdiction and which law applies to property rights is evident.

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71 The Parliamentary Under-Secretary of State for Justice’s (Jonathan Djanogly) written ministerial statement of 30 June 2011 (available at www.parliament.uk).
72 Ibidem.
Some developments towards clarity and uniformity at a substantial level can be found in the CEFL Principles on Property Relations between Spouses which are intended, among other objectives mentioned in the Preamble, ‘to contribute to common European values regarding the equality of spouses’ and ‘to the harmonisation of family law in Europe and to strengthen the rights of its citizens’.

The legal consequences with respect to the different forms of union are still widespread also in relation with conflict of laws rules that negatively affect the circulation of personal status and the recognition of such relationships. In particular, it is deemed that the recognition of a registered partnership and its personal legal effects, thus allowing the continuity of personal status, could be achieved through unified conflict rules. Incidentally, automatic recognition would also have the advantage of providing the legal certainty which citizens expect when they exercise their right to freedom of movement. Moreover, it has been suggested that a new EU act on the law applicable to registered relationships should be drafted.

In conclusion, with regard to practical issues regarding property regimes it seems that more attention should be paid to the protection of fundamental rights. Clarity on the concept of family and the consequent recognition of partnerships, whatever they are, appear to be the preconditions for regulations. It seems indisputable that a uniformity in law would contribute to better management in practice.

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75 M. MELCHER, (Mutual) recognition cit., p. 156.
77 M. MELCHER, (Mutual) recognition cit., p. 157 ss., where an outline of an EU PIL Regulation on Registered Relationships is offered.