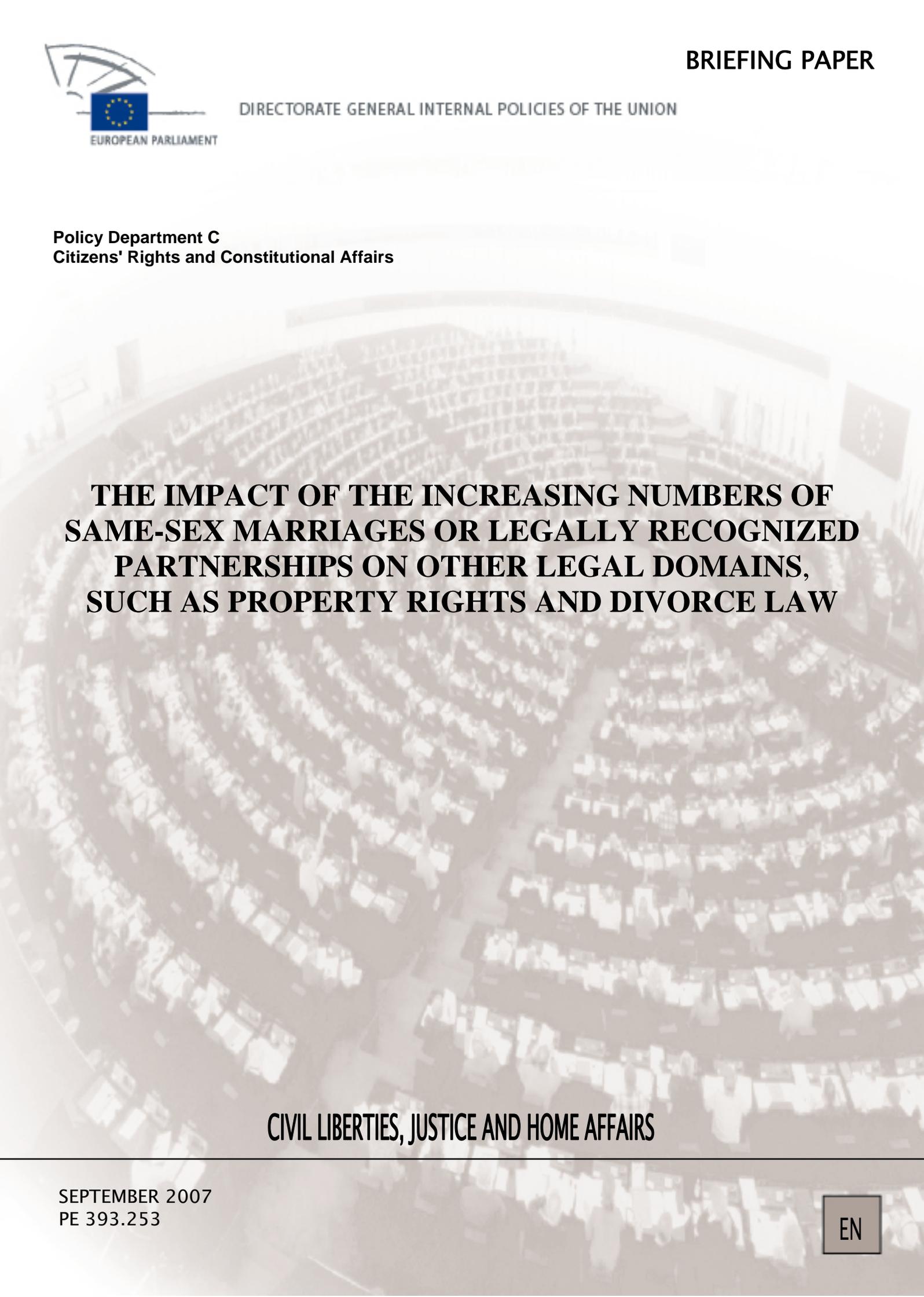


Policy Department C
Citizens' Rights and Constitutional Affairs



**THE IMPACT OF THE INCREASING NUMBERS OF
SAME-SEX MARRIAGES OR LEGALLY RECOGNIZED
PARTNERSHIPS ON OTHER LEGAL DOMAINS,
SUCH AS PROPERTY RIGHTS AND DIVORCE LAW**

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

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BRIEFING PAPER

Abstract: many EU Member States have introduced specific provisions on same-sex marriages and registered partnerships that grant to homosexual couples a number of rights that differ according to certain patterns, depending upon the degree of differentiation from opposite-sex couples. While the effect on the personal status, the personal relationship and the property regime within the same-sex couple is often the same as in heterosexual relationships, the rights arising from the relationship between the couple and their children (either biological or adopted) vary considerably. The same applies to the dissolution of the marriage or partnership, and the conditions and consequences thereof. States that recognise the validity of same-sex marriages and registered partnerships have adopted special conflicts of laws provisions on jurisdiction and the recognition of decisions and on the law applicable to such relationships in order to grant also to non-nationals the possibility to celebrate a marriage or conclude a registered partnership with a same-sex partner and to reduce the consequences of the non-recognition of such couples abroad.

This note was requested by: The European Parliament's Committee on Civil Liberties, Justice and Home Affairs.

This paper is published in the following languages: EN, FR.

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Manuscript completed in September 2007

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Brussels, European Parliament

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THE IMPACT OF THE INCREASING NUMBER OF SAME-SEX MARRIAGES OR LEGALLY RECOGNIZED PARTNERSHIPS ON OTHER LEGAL DOMAINS, SUCH AS PROPERTY RIGHTS AND DIVORCE LAW

INTRODUCTORY REMARKS

Legislators have introduced same-sex relationships follow mainly two different approaches¹ that sometimes coexist within the same legal system:

- (i) the cohabitation approach, that requires only some simple conditions and factual circumstances, i.e. a minimum period of cohabitation, minimum age, residency and exclusivity;²
- (ii) the registration approach, granting certain rights and duties to the couple upon registration of their relationship in accordance with the provisions of domestic substantive law, on which this paper will focus.

The different approaches used for registration schemes in the Member States (as well as in some third countries) depend to a great extent upon two necessary interrelated elements: the *conditions* required to establish a legally recognised union and the *rights and duties* attributed to the parties. Several classifications have been proposed. If we compare same-sex relationships with heterosexual relationships, four different systems of registration may be identified:

- (a) both same-sex and opposite sex couples may accede to marriage. This approach is not frequent because it implies a clear choice by the legislator to equate homosexual and heterosexual couples;³
- (b) both marriage and registered partnerships are open to heterosexuals and homosexual couples: this approach has been adopted in Belgium, in the Netherlands and in eleven autonomous communities in Spain (Andalusia, Aragon, Asturias, Balearic Islands, Basque Country, Canary Islands, Catalonia, Extremadura, Madrid, Navarre and Valencia, where partnerships have been granted legal effects even before the introduction of the nation-wide legislation on same-sex marriage).⁴
- (c) registration of a partnership is open to both heterosexuals and homosexuals couples, but only opposite-sex couples can marry, as in France and in Luxembourg;
- (d) same-sex couples have only access to registered partnerships, while opposite-sex couples must refer only to the “traditional” marriage. This parallel system is in force in Denmark, Finland, Germany, Greenland, Iceland, Norway, Sweden, in all the subdivisions of the United Kingdom (England and Wales, Northern Ireland and Scotland) and in Switzerland.⁵

These different approaches reflect the extent of rights and duties recognised to same-sex couples in each State. More precisely, while in groups (a) and (b) the legal regime applicable to same-sex couples is the same as heterosexual couples, expect for very limited aspects, in

¹ Cf. WINTEMUTE, ANDEMÆS (eds.), *Legal recognition of same-sex partnerships. A study of national, European and international law*, Oxford/Portland, Hart, 2001, pp. 759-773.

² In many States this approach has opened the way to the recognition of same-sex relationships and it still constitute an alternative pattern for couples that do not wish to enter into a formal partnership regulated in details by the law.

³ As regards third countries, same-sex marriages are recognised in the territories of Ontario, British Columbia, Yukon, Saskatchewan and Newfoundland in Canada, and in Massachusetts.

⁴ The registered partnership is open both to same-sex and opposite sex couples in Tasmania (Australia), New Zealand, California, Hawai'i, Maine, and New Jersey.

⁵ The same dualistic model is adopted also in Río Negro in Argentina, Connecticut and Vermont.

groups (c) and (d) the degree of similarity of registered partnerships and marriage and the treatment of same-sex and opposite-sex couples can vary considerably from one State to the other.

I. SAME-SEX MARRIAGES

Same-sex marriages have been introduced in the Netherlands in 2000 and in Belgium in 2003, through a modification of the definition of marriage. They produce almost all the effects of the “traditional” marriage, except for automatic creation of family ties between a child born within the marriage and each of the spouses. In these two countries, the introduction of same-sex marriage has impacted mainly on marriage impediments, filiation and parental responsibility, and conflict of laws rules on capacity to marry.

In Spain, following a 2005 national statute, marriage is subject to the same conditions and produces the same effects whatever the sex of the partners. Thus, there is no distinction between same-sex and opposite-sex marriages with regard to all the different areas, including social security benefits and adoption.

Countries having introduced same-sex marriage retain a single marital institution.⁶ Therefore, same-sex marriages have obviously a direct statistical and economic impact, since they lead to an increase in the number of couples capable of marrying and enjoying rights and benefits attached to marital status. As a result, same-sex marriages have a very limited legal impact, since they do not imply any modification of property law, succession law, divorce law, or public law (rent law, social security, and immigration law): the rules on marriage do not change, but they simply apply to a greater number of persons.

I.1. The celebration of same-sex marriages

In these countries the requirements for the validity of same-sex marriages, the impediments (minimum age, consent, prohibition of bigamy) and the consequences of legal faults are the same as those required for “traditional” marriages. For example, Articles 162-163 of Belgian Civil Code have been modified in order to extend the prohibition to marry to relatives and relatives-in-law of the same-sex spouse. In the Netherlands, Belgium and Spain the existence of a previous same-sex marriage prevents the celebration of a new (heterosexual or same-sex) marriage.

I.2. Personal status and family relationships

Same-sex marriages have the same impact on personal status (i.e. on civil status, on name and nationality) and on personal relationships between partners as the “traditional” marriage.

They are registered in civil status registries exactly as the “traditional” marriage and they produce identical effects on the spouses’ names.

Same-sex spouses are bound by the same ties as heterosexual spouses and are subject to the same marital duties: cohabitation, fidelity, mutual assistance and support in Belgium; mutual financial support and contribution to the household costs in the Netherlands; respect and mutual assistance shaped on the family’s interests in Spain.

Same-sex marriages create family ties between each spouse and the other spouse’s relatives, with the exception - in some States – of children.

As concerns filiation, in Spain same-sex marriages have the same impact on the relationship

⁶ CURRY-SUMNER, *Private International Law Aspects of Homosexual Couples: The Netherlands Report*, in *Electronic Journal of Comparative Law*, 2007, n. 11, <http://www.ejcl.org>, § 2.1.

with children as the “traditional” marriage. Same-sex spouses may also jointly adopt and exercise joint custody over a child, as heterosexual couples, and each spouse may adopt the other spouse’s biological or adoptive child.

In the Netherlands and in Belgium, children born from a same-sex married couple do not have *ipso iure* family ties with both partners but only with their biological parent.

Consequently, in the Netherlands there are two types of responsibility over a child raised by a married couple: (i) parental responsibility, which is responsibility exercised by the two parents, and (ii) joint responsibility, that is responsibility exercised by one of the child’s parents and his/her spouse. Since same-sex marriages do not create automatically family ties between each spouse and the child, same-sex spouses do not have parental responsibility over a child, but joint responsibility. Dutch law makes another distinction based on the spouses’ sex. Two married women have joint responsibility over children born within their marriage and not having another parent (“dio-mothers”).⁷ If a child has another parent, joint parental responsibility may be obtained through court proceedings. On the contrary, two married men, one of whom is the child’s biological father, do not automatically have joint responsibility over the child, but may ask that it be judicially conferred (court-conferred joint responsibility). Family ties and parental responsibility may be created only through step-child adoption, i.e. adoption by one spouse of the other spouse’s biological child.⁸ Joint adoption is open to same-sex spouses – although in the Netherlands joint adoption is limited to children habitually resident in the country.

With regard to assisted reproduction, in the Netherlands and in Belgium same-sex spouses are admitted to receive treatments. In Spain the non-biological mother can recognize the children born within a lesbian marriage without any adoption proceedings, on the same foot as the non-biological father in respect of a child born through assisted reproduction techniques by the opposite-sex spouse.

I.3. Matrimonial property

As concerns matrimonial property in the Netherlands, Belgium and Spain same-sex spouses are subject to the same matrimonial property regimes as heterosexual spouses.

In some of these States, the parties may agree on the regime of property rights; lacking any choice, the general regime applies.

I.4. The dissolution of the marriage (divorce/separation)

I.4.a. Grounds for the dissolution (divorce/separation)

The rules on separation and divorce apply both to same-sex and opposite sex marriages; even the judicial procedures for dissolution coincide.

It is worth mentioning that in the Netherlands a marriage can be dissolved through the conversion into a registered partnership.⁹ This has created the “*lightning divorce*” phenomenon: spouses wishing to obtain divorce without starting judicial proceedings convert their marriage into a registered partnership and subsequently dissolve the latter by mutual

⁷ ANTOKOLSKAIA, *Recent developments in Dutch filiation, adoption and joint custody law*, in *Familia*, 2002, pp. 781-804, at p. 801.

⁸ Mere joint responsibility leads to the exclusion of the child from his biological parent’s spouse intestate succession. In this case, a child may only inherit from his biological parent’s spouse only by will .

⁹ See articles 1:149 and 1: 77 Dutch Civil Code and BOELE-WOELKI, *Registered Partnership* cit., p. 49.

consent, presenting a written declaration to the civil status registrar.¹⁰ Conversion of marriage into a registered partnership is also used obtain a quick change of matrimonial property regime.

I.4.b. Custody of children

As mentioned above, under Dutch law parental responsibility within a same-sex marriage is subject to specific rules that differ from the rules applicable to heterosexual couples. Consequently, specific rules are provided concerning child custody in case of divorce of a same-sex couple. Both parents retain parental responsibility unless they ask a court to modify such regime awarding parental responsibility to one parent only.

On the contrary, joint responsibility (that applies when the child's parent is married to a partner who did not adopt the child) may cease through a court decision, discharging the non-parent spouse of the responsibility over the child. Such decision may be issued upon request of one of the spouses or both. In the latter case the non-parent is still obliged to contribute to the child's maintenance for a period equal to the duration of the joint responsibility, while the parent is obliged to support the child until it reaches the age of 18 or 21. If the non-parent was not jointly responsible for the child, his or her obligation to support the child ceases when the marriage ends.

I.4.c. Consequences on maintenance obligations

Ex-spouses are granted the same rights upon the dissolution/annulment of both heterosexual and same-sex marriages.

I. 5. Succession

Since the status acquired through a same-sex marriage is the same as that acquired through a heterosexual marriage, the consequences on successions are the same for both couples, as regards the quality of legal heir of the spouse, and fiscal benefits granted by the law in these cases.

I.6. Additional effects

The benefit granted by the State in social security matters, labour law and tax law are extended to the spouse, irrespective of his/her gender, as well as for immigration law purposes, where family reunification only requires the existence of a genuine marriage and the fulfilment of certain uniform conditions provided under Community law.

I.7. Private international law

I.7.a. The unilateral application of the law of the forum State as to the validity of same-sex marriages and the required "proximity" to the State of celebration

The States that recognise the validity of same-sex marriages have adopted special conflicts of laws provisions that reflect their concern that other States would impair the effects of such

¹⁰ BOELE-WOELKI, *Registered Partnership* cit., p. 49 s.

recognition on public policy grounds.

National legislations normally require that the spouses have a link with the State of celebration through their nationality and/or residence. If the prescribed condition is fulfilled, the marriage may be celebrated even where the national law of one partner does not allow same-sex marriages. In the Netherlands, for example, under Article 2 of the Private International Law (Marriage) Act the celebration of a marriage is permitted if each of the future spouses meets the requirements of Dutch law for the marriage and one of them possesses Dutch nationality or has his/her habitual residence in the Netherlands.¹¹

In Belgium, as a general rule, the national law of each spouse regulates his/her capacity to marry. However, if the national law of one of the spouses does not allow same-sex marriages, such law has to be discarded if at least one of the spouses is a national of, or has his habitual residence in, a State allowing same-sex marriage.¹² The law of the State of celebration regulates marriage formalities (publications, registration of marriage act...)¹³.

Similar rules apply in Spain and thus a marriage between a Spaniard and a foreigner, or between foreigners of the same-sex resident in Spain, shall be validly celebrated under Spanish substantive law, even if the foreigner's national legislation does not recognize the validity of such marriages.

1.7.b. The law applicable to divorce, separation and annulment

In the Netherlands, in Belgium and in Spain the conflicts of laws rules on marriage cover also same-sex marriages.

In the Netherlands, under the Dutch Private International Law (Divorce) Act, the parties enjoy party autonomy in this respect. Lacking any choice by the parties Article 1(1)-(3) of the Act apply.¹⁴

In Belgium, divorce and legal separation are governed by the law of the State of spouses' common residence at the time when the petition for divorce or separation is filed, or by the law of the State of last common residence, if one of the spouses still resides there, or by the law of the State of common nationality of the parties at the time when the petition is filed, or, eventually, Belgian law. Spouses may choose to apply to divorce or separation the law of their common nationality at the time where the divorce or separation petition is lodged, or Belgian law.¹⁵

In Spain, legal separation and divorce are governed by the law of common nationality of the spouses at the time the petition is filed and, lacking a common nationality, by the law of the habitual residence of the spouses or, failing this, by the law of the last common residence of the spouses if one of them still resides habitually in that State.

In any case, Spanish Law applies when one of the spouses is Spanish or is habitually resident in Spain (a) if none of the laws mentioned above is applicable; (b) if the claim is brought before a Spanish Court and the legal separation or divorce is requested by both spouses or by one with the consent of the other; (c) if the laws indicated in litt. (a) did not recognize separation or divorce or do that in a discriminatory way or against public order.

The termination of the marriage is governed by contracts and agreements between the

¹¹ See ANTOKOLSKAIA, BOELE-WOELKI, *Dutch Family Law in the 21st Century: Trend-Setting and Stragglng Behind at the Same Time*, in *Electronic Journal of Comparative Law*, 2002, n. 6.4 <http://www.ejcl.org>, § 1.1; CURRY-SUMNER, *Private International Law* cit., § 3.1.3.

¹² See art. 46 Belgian Private International Law Code. Ministry of Justice *Circulaire* of 23 September 2004 on Private International Law Code, *sub* Articles 46 and 44 of the Code. As regards consequences of setting aside a foreign law contrary to public policy, according to article 21 of the Code, another provision of the designated foreign law, or, residually, Belgian law shall apply.

¹³ Article 47 Belgian Code of Private International Law.

¹⁴ CURRY-SUMNER, *Private International Law* cit., § 3.2.2.

¹⁵ Article 55 Belgian Private International Law Code.

spouses, to the extent that they conform to the law applicable to matrimonial matters, as well as the law of the country of habitual residence of either party at the time when the decision is granted.

I.7.3. Jurisdiction criteria in matters of divorce, separation and annulment of the marriage

While the application of the Brussels II-a Regulation to same-sex marriages is questionable, the Netherlands have unilaterally extended its rules to cases falling outside the scope of the Regulation.¹⁶ No *forum necessitatis* has been provided in order to allow same-sex couples married in the Netherlands to have their marriage dissolved in this State if no other State retains jurisdiction.¹⁷

In Belgium and Spain jurisdiction rules on the dissolution of marriage apply to proceedings related to divorce, separation and annulment of same-sex marriages too.

Therefore, Belgian judicial authorities are competent to pronounce divorce if: in case of joint application, one of the spouses is habitually resident in Belgium at the time when the petition is filed; spouses had their last common residence in Belgium less than twelve months before the divorce or separation petition is filed; the applicant spouse is resident in Belgium since at least twelve months before the divorce or separation petition is lodged; spouses have Belgian nationality at the time when the divorce or separation petition is lodged.¹⁸ Belgian authorities are also competent to convert a legal separation pronounced in Belgium into divorce or to re-examine a divorce or separation decision rendered in Belgium. They are finally competent to decide on the annulment of a marriage, if it was celebrated in Belgium or if one of the spouses is Belgian or resident in Belgium at the time when the request is filed.

In Spain, as a general rule, under Article 22 LOPJ, the Spanish judge will be competent (i) if both spouses have their habitual residence in Spain at the time the proceedings start, or (ii) if the applicant is a Spanish national or habitually resident in Spain, or (iii) in case of joint filing for divorce, if both spouse are Spanish nationals, irrespective of their residence.

II. REGISTERED PARTNERSHIPS

In those States where registered partnerships have been adopted some common patterns suggest a classification based upon the similarity with marriage.

- (a) a first group is composed of those countries where registered partnerships are subject to the same provisions on marriage, unless otherwise specified, such as the Scandinavian countries. The relevant legislation usually contains a general clause according to which “registration of partnership has the same legal effects as marriage” and “provisions relating to marriage and spouses shall apply to registered partnership and registered partners”¹⁹, with the exception of some rules on marriage applicable to a spouse exclusively by virtue of his/her sex, mainly on labour and social security matters.²⁰ Also Germany and the United Kingdom belong to this group, and make reference to marriage model as a general approach for same-sex partnerships, with some special solutions. With regard to non-EU Member States, a similar attitude can be found in Switzerland, where same-sex couples are granted the same rights and

¹⁶ CURRY-SUMNER, *Private International Law* cit, § 3.2.1.

¹⁷ *Ibidem*.

¹⁸ Article 42 Belgian Private International Law Code.

¹⁹ See Sections 3.1 and 3.2 of the Danish Act on Registered Partnerships; Chapter 3, Section 8.1-4 of the Finnish Act on Registered Partnerships; Chapter 3, Sections 1 and 3 of the Swedish Registered Partnership Act; Section 3 of Norwegian Partnership Act of 30 April 1993; article 5 Icelandic Act on Registered Partnership of 12 June 1996.

²⁰ Section 3.2 of the Danish Act on Registered Partnerships;

protections as heterosexual married couples, except for adoption, assisted reproduction treatments and the name.

- (b) The Netherlands and eleven autonomous communities in Spain belong to a second group, where registered partnerships are open to both opposite and same-sex couples. While the reference to marriage is less explicit, the legal regime of same-sex registered partnership is very close.
- (c) The third group is composed of France, Luxembourg and Belgium, where registered partnerships (*pacte civil de solidarité*, *partenariat*, or *cohabitation légale*) are open to both heterosexual and same-sex couples, but the legal regime is quite different from marriage. The relevant legislation usually contains *ad hoc* provisions determining the impact of registered partnership on various fields of law (property law, public law, succession law, private international law).

II.1. The conclusion of the partnership

Under both groups (a) and (b) the conditions for registering a partnership are the same as the conditions to marry. The existence of a previous partnership hinders both marriage and the registration of a new partnership.

It is worth mentioning that under Dutch law a partnership may be converted into marriage.

(c) In States belonging to group (c) the impediments to the registration of a partnership are specifically laid down and are largely modelled on the impediments to marry. even if the open nature of a partnership implies that, for example, Belgian law does not prohibit a registered partnership between relatives, since a partnership may be established also by friends, relatives etc. Moreover, previous registration of a partnership does not constitute an impediment to the celebration of a marriage.

II.2. Personal status and family relations

II.2.a. *Personal Status*

A partnership entails a modification of partners' civil status in all the countries considered, even if it does not normally attribute marital status. In some cases, registered partnerships are registered in civil status registries (either the same registry for marriages,²¹ or a specially designed one) in other cases they are annotated in the birth act,²² or on other public records such as the population registry of the registry of natural persons.²³ Such annotations are generally necessary to render the partnership opposable to third parties.²⁴

The consequences on the name of the partners may differ, in some States they are subject to the same rule applicable to marriage, in other States the partners may choose their common name, and in some other States they may not acquire a common name. The common name may be registered in the official register or not, according to each State's legislation.

²¹ In Luxembourg a registered partnership is annotated by the civil registrar (*officier d'état civil*) in the Civil Records Registry (*répertoire civil*): article 3 of Luxembourg Act on legal effects of certain partnerships.

²² This is so in France: see article 515-3 Civil Code.

²³ In Belgium *cohabitation légale* is annotated in the *Registre de la population* and, since the *Arrêté royale* of 8 January 2006, also in the *Registre des personnes physiques*.

²⁴ See article 515-3 French Civil Code; article 3 of Luxembourg Act on legal effects of certain partnerships.

II.2.b. *Personal relationships*

As concerns the establishment of personal relationships between each partner and the other partner's relatives, in States belonging to groups (a) and (b) a registered partnership has the effect of creating family ties, opposite to group (c) States.

II.2.c. *Parental relationships*

The impact of registered partnerships impact on filiation and parental responsibility varies considerably from one State to another and even within the same group.

(a) In Denmark, Norway, Finland and Switzerland registered partners may not adopt children jointly; in the first two countries a partner may adopt the other partner's biological child (stepchild adoption); while, in Finland each partner can obtain a sole adoption, even if the other partner may only obtain the custody on the same child and the registered partner has to support the his/partner having a biological child in properly performing maintenance obligations as well as in the exercise of parental authority.

In Sweden partners may neither jointly nor individually adopt children. They cannot be appointed to jointly exercise custody either: one sole-custody can be awarded, as in Denmark. In Germany partners are not entitled to joint adoption, but pursuant to the 2004 Reform Act, a partner may adopt his/her partner's child. Also in the UK partners are able to acquire parental responsibilities as a step-parent, which entails the duty to provide reasonable maintenance even after the dissolution of the partnership. At the same time, British adoption provisions have been amended so that partners are treated in the same way as married couples. Icelandic law also allows registered partners to joint adoption.

Some peculiar provisions are provided for custody in Finland where there are no restrictions as to the number, sex, sexual orientation, age or civil status of the custodians; the sole condition is the best interest of the child. Thus, registered partners may obtain joint custody of a child in place of the biological parents, or one of the partners may obtain custody of his partner's child together with the other biological parent. Moreover, as to paternity, the presumption of paternity rule should be excluded where a female partner gives birth to a child, thus the other partner does not become the legal parent and does not acquire any parental rights or duties as in the case of a child born within the wedlock. The same rules can be found in Sweden.

(b) In the Netherlands partners are subject to the same rules that apply to filiation and parental responsibility in same-sex marriages. The Spanish legislation on adoption is quite liberal and it allows the adoption of children both by unmarried opposite-sex couples and by singles without considering their sexual orientation.

(c) French PACSes do neither entail parental responsibility nor give access to adoption. Partners are not entitled to joint adoption and case-law has also excluded that a partner may consent stepchild adoption (*adoption simple*) of his/her biological child in favour of his/her partner. Current practice allows the use of existing arrangements on parental responsibility, such as partial delegation of parental responsibility (*délégation de l'autorité parentale*) by the biological parent to his/her partner in order to formalise the *de facto* exercise of family responsibility in homosexual PACS. Similarly, in Luxembourg partners do not enjoy the right to joint or individual adoption (neither *adoption plénière*, nor *adoption simple*), while in Belgium same-sex partners can jointly or separately adopt (both *adoption simple* and *adoption plénière*).

II.2.d. Access to assisted reproduction techniques

Access to assisted reproduction varies in all the countries without any specific pattern. In some countries homosexual partners may not accede to such techniques, that are only open to married and heterosexual *de facto* couples.

In other countries, as the Netherlands and Iceland, same-sex registered partners may undertake assisted reproduction treatments.

II.3. Property Regimes

All national legislations allow partners to conclude agreements on the economic aspects of their partnership.

(a) and (b) In the Scandinavian countries, in the Netherlands and in Spain registered partnerships have the same effects of marriage also as regards property regimes. The applicable legal regime is generally community of assets (as in the UK and in Switzerland) but the parties can dispose differently, even if some limitations to the disposition of the common house and pertaining movables are foreseen. Thus, in Norway a partner may ask for the annulment of acts performed by the other partner in violation of such prohibitions. The same applies in Iceland, where, additionally, if an act of disposition of immovables requires registration in a public record, the act shall mention whether the issuer is in a registered partnership (as in Switzerland) and whether the property is used or intended for use as the family house. If a partner disposes of the common house without the other partner's approval, then the other partner may ask for the judicial annulment of the relative act.

In Germany, partners must choose a regime *before* the registration of the partnership either: (i) by concluding in writing a formal life partnership contract in front of a notary in the presence of both parties, but in case the contract is invalid, the separation of property regime shall apply; or (ii) by an informal agreement through which the partners declare to chose the "community of equalisation" (*Ausgleichsgemeinschaft*), the properties of each remains separated but, at the end of the partnership the capital gains realised by both partners during their lifetime together are compared and equally distributed between them (or in case of one partner's death they increase the quota of the survivor). Except for the *nomen juris* created *ad hoc* by the legislator, the community of equalisation is identical to the regime provided for married couples (namely community of accrued gain). The law favours the community of equalisation requiring only an informal agreement, as opposed to the first agreement that must be formally concluded. Another important difference in comparison with the rules on marriage lies in the fact that in order to safeguard the economic basis of the partnership, a partner may not dispose of all his own assets or of a large part of them or of all household items without the consent of the other partner, irrespective of the property regime chosen, whereas as regards marriage these rules do not apply to separate property regime.

(c) In France, Luxembourg and Belgium the legal regime of registered partnership for property is the separation of assets. If the right over an asset may not be proven, the partners share the property. Partners may conclude agreements on their property regime, that are normally opposable to third parties upon accomplishment of publicity formalities. In France, for example, partners may choose a joint property regime (*régime de l'indivision des biens*) - which differs from the matrimonial property regime - where partners have joint ownership over assets jointly or separately purchased after registration of their union. Even in this case, however, partners retain individual ownership of some assets specified by the law. Under this regime, each partner may sell movable assets only for needs related to normal utilization of undivided assets. Immovable assets shall be sold on unanimous agreement only.

II.4. Additional effects

Registration of a partnership usually entails access to a series of benefits which the law grants to spouses (in matters of labour, tax, and social security facilities, rights on the common house rent, residence rights under immigration law, access to hospitals to assist the partner, a.s.o.).

Spousal benefits may be granted to partners:

- through the general clause equalising registered partnerships and marriages, typical in the legislation of the States included in group (a); an exception can be found in Germany where the surviving partner inheritance is taxed like that of a person not related to the deceased;
- through specific provisions scattered in the relevant legislation, as it happens mostly within group (c); for example, as regards social security and labour law, *ad hoc* provisions have been inserted in the French special legislation, granting the partner the right to succeed in the rent in case the other partner leaves the domicile or dies; the right to family and housing allowances; the right to have the partner's leave periods taken into consideration when annual leave is accorded.

In the Netherlands, the surviving partner of a registered couple is eligible for a dependant's retirement pension after the death of their partner.

The above mentioned countries maintain a differentiated approach as regards immigration. In such countries, national provisions must be coordinated with EC directive No 2004/38 on free movement of European citizens, according to which the registered partner of a EU citizen exercising his freedom of movement enjoys the right of residence in the host State²⁵ if the partnership had been registered on the basis of the legislation of a Member State, and the host State's legislation treats registered partnerships as equivalent to marriage.

As regards naturalisation and resident status, registered partners are considered as spouses in group (a) countries, and consequently they enjoy the same rights. In the Netherlands the registration of the partnership cannot be used as a means to obtain a residence permit since for non-Dutch nationals legal residence in the country is a condition for registration.

(c) In France, the conclusion of a PACS is taken into consideration in the assessment of personal relationships for obtaining a leave to stay. In Belgium, the partner of a foreign citizen who has the right to reside in Belgium is eligible for family reunification.

II.5. The dissolution of the registered partnership

While the rules on dissolution of a registered partnership mirror in principle those applicable to the termination of a marriage (annulment, divorce, separation) in countries belonging to group (a), *ad hoc* dissolution procedures are provided for registered partnership in countries belonging to groups (b) and (c).

II.5.a. *Grounds for dissolution (termination and separation)*

(a) In Scandinavian countries the grounds for dissolution of marriage apply to registered partnerships as well. In Germany a simple declaration by one or both partners of the intention to interrupt the relationship seems sufficient to this end, but divorce is much faster since such declaration has to be publicly recorded and termination is effective several months afterwards.

²⁵ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, *O.J.* L 158, 30.4.2004, p. 77–123, Article 2(2) litt. *b*.

Infidelity is not per se sufficient for dissolving a partnership, but it can be considered relevant for the determination of the amount of the maintenance obligation in Germany, or a factor contributing to the irretrievable breakdown in UK.

As to legal separation, in UK and in Switzerland each partner may be authorised by the judge to suspend the common living for serious reasons or when the other partner refuses unreasonably to cohabit for a certain period (irretrievable breakdown is not required).

(b) Dutch law provides a range of dissolution grounds, including the joint or unilateral request and the conversion of the partnership into marriage (between the same persons). Marriage of a partner with a third person implies the dissolution of a partnership only when it has taken place after the other partner has “gone missing”. Legal separation is not open to registered partners.

In Spain the grounds for dissolution are the same in the different communities: mutual agreement; unilateral decision of one of the partners duly notified to the other one; death of one of the partners; separation for more than one year; marriage of one partner.

(c) A partnership may terminate upon the death of one partner, a declaration of both or one of the partners, or by marriage of one of the partners.²⁶

II.5.b. *The procedure for the dissolution*

(a) In Denmark, Norway, Finland and Sweden the procedure for the dissolution of a partnership is the same that applies to the dissolution of marriage. In Iceland, on termination of a partnership the competent authority shall endeavour to bring about a mutual agreement of the partners concerning custody of children, support payments, and other terms.

(b) Under Dutch law the dissolution of a registered partnership by mutual consent of the partners does not require any judicial proceedings. Partners shall submit to the registrar of births, deaths, marriages and registered partnerships a dated agreement signed by both parties and one or more lawyers or notaries. Such agreement must state the irretrievable breakdown of the relationship and the partners’ wish to terminate it. The agreement shall provide maintenance payment for the weaker partner; arrangements regarding the common home; the division of any community entered into by partners or compensation between them; equalisation or compensation of pension rights. The registered partnership is terminated upon registration of the agreement, which should take place within three months. If a partnership ends by conversion into marriage, the registrar draws up a deed of conversion, which is entered in the marriage register in the municipality where one of the parties is resident. The conversion does not affect any parental relationships with children born prior to it. .

(c) In France, Luxembourg, and Belgium no judicial procedure is required either. Both joint and unilateral declarations are filed with the civil registrar, while the latter is also served to the other partner.

II.5.c. *Effects on child custody*

(a) In most States the custody and maintenance of children upon the dissolution of a same-sex registered partnership are subject to the general provisions that apply to other relationships.

(b) In the Netherlands, where special rules are provided for responsibility over children in homosexual partnerships, the dissolution of the partnership has no effect on parental responsibility (eg. created by adoption), while joint responsibility may terminate upon dissolution through a judicial decision. In this case, the non-biological parent, although divested of responsibility, is still obliged to contribute to the child’s maintenance for a period

²⁶ See article 515-7 French Civil Code; article 13 Luxembourg Act on legal Effects of Certain Registered Partnerships; article 1476 Belgian Civil Code.

equal to the duration of the joint responsibility. The parent is obliged to support the child up to the age of 18 or 21. If the non-biological parent was not jointly responsible for the child, his or her obligation to support the child's ceases when the registered partnership ends.

(c) In those countries where registered partnerships have no effect on filiation (France, Luxembourg), no particular consequences are attached to its dissolution as regards effects on child custody.

II.5.d. *Consequences on maintenance obligations*

(a) and (b) Under Norwegian, Dutch and Spanish law, the duty of mutual cooperation and support between partners ceases upon dissolution of the partnership. If the earning capacity of one partner has been reduced due to caring for children of the couple or the distribution of joint tasks during cohabitation, the other partner may be ordered to pay maintenance. In other cases maintenance may only be ordered on special circumstances and for a period not exceeding three years. The right to maintenance lapses if the person entitled thereto remarries (or contracts another partnership).

In Iceland, after termination of a partnership one partner shall not be ordered to pay maintenance to the other, save in very exceptional circumstances. In any case, the duty to pay alimony shall cease when the beneficiary marries/contracts a partnership again, or upon death of either of the former partners.

(c) In France, it does not seem that a partner may ask for maintenance after dissolution of a PACS, but he/she may ask reparation for damages, and rules on compensation of spouses' credits apply. In Luxembourg, unless otherwise agreed or judicially stated, economic support between partners ceases. Judicial authorities may exceptionally establish maintenance obligations, proportionate to needs and financial possibilities of the partners. Such decision is subject to revision upon changes in circumstances. Maintenance is no longer due if the creditor contracts a marriage or a new partnership. In Belgium, partners may ask the *juge de la paix* of their last common domicile to order suitable urgent and provisional measures within three months following the dissolution of the *cohabitation légale*. Such measures cannot extend over one year. In case of a dispute, the same proceedings applicable to spouse's disputes relating to rights, obligations and matrimonial property regime apply.

II.5.e. *Consequences on property*

(a) In the States belonging to this group the consequences of the dissolution of the registered partnership mainly depend upon the property regime chosen, but it usually mirrors the dissolution of marriage regime.

(b) In the Netherlands, the parties are required to fully regulate the economic consequences of the termination of the partnership in their declaration of dissolution.

(c) Generally, lacking an agreement, the judge decides on the financial consequences of the dissolution and may order urgent and temporary measures. In case of a dispute, the same proceedings applicable to spouse's disputes relating to rights, obligations and matrimonial property regime apply. Dissolution of a partnership entails no consequences on succession since the partner is not included among heirs-at-law.

II.6. **Succession**

(a) and (b) Partners are included among heirs-at-law and have the same succession rights as the surviving spouse.

(c) A partner is not included among heirs-at-law. Nevertheless, he may enjoy some rights. For example, in France the surviving partner is entitled to a preferential assignment (*attribution préférentielle*) of the family house by the heirs pursuant to Article 831-3 of the Civil Code if the deceased has so provided by testament. Partners may also inherit by will. In this case, Luxembourg and Belgian law provide that joint property owned by the partners shall be considered as a donation in respect of *héritiers réservataires*.

II.7. Private international law

II.7.a. *The unilateral application of the law of the forum State as to the validity of same-sex registered partnerships and the required “proximity” to the State of celebration*

In order to avoid “registration shopping”, most legislations on registered partnership admit registration only for couples connected to the State of registration by means of their residence and/or nationality.

(a) The laws of the Scandinavian countries admit the registration of a partnership only if at least one of the parties is a national of the State of registration and resides there, or if one or both parties have resided in such State for the two years preceding registration. As opposed to this approach, there are no requirements concerning the nationality or habitual residence for the constitution of a life partnership in Germany: therefore, foreign citizens or German citizens resident abroad can become “life partners” when registered in Germany.

In the Scandinavian countries, no specific conflict-of-laws rule regulates partners’ capacity to register a partnership. Some commentators favour the application of conflict-of-law rules regarding marriage; others suggest the application of the law of the State of registration even in international cases.²⁷

(b) A partnership may be registered in the Netherlands only if at least one of the parties is a Dutch national or is habitually resident or domiciled in the country.²⁸ The parties’ capacity to enter into a registered partnership is governed by Dutch law.²⁹

(c) A residence requirement is imposed in Luxembourg to non-EC nationals who wish to register a partnership in the country.³⁰ French law does not explicitly impose any residence or nationality requirements for registration of a PACS.³¹ However, an implicit requirement of common residence or domicile in France and in Belgium derives from the respective provisions that establishes the competence of the register of the common residence/domicile.³²

II.7.b. *The law applicable to the partnership and to its dissolution*

(a) In this group of States no specific choice-of-law rules are provided with the exception of

²⁷ JÄNTERÄ-JAREBORG, *Registered Partnerships in Private International Law: The Scandinavian Approach*, in BOELE-WOELKI, FUCHS (eds.), *Legal Recognition* cited, p. 137 ss.; contra ROSSOLILLO, *Registered partnerships e matrimoni tra persone dello stesso sesso: problemi di qualificazione ed effetti nell’ordinamento italiano*, *Riv. dir. int. priv. proc.*, 2003, pp. 363-398, note 32.

²⁸ BONINI BARALDI, *Le nuove convivenze tra discipline straniere e diritto interno*, IPSOA, 2005, p. 192.

²⁹ Article 1 *Wet conflictenrecht geregisteerd partnerschap*.

³⁰ See article 4 of Act on legal effects of certain partnerships.

³¹ REVILLARD, *Le PACS, les partenariats enregistrés et les mariages homosexuels dans la pratique de droit international privé*, in *Répertoire du Notariat Défrinois*, 2005, p. 461 ss.

³² BONINI BARALDI, *Le nuove convivenze* cit., p. 193. According to article 515-3 French Civil Code, partners wishing to register a PACS “shall make a joint declaration at the registry of the *Tribunal d’instance* of the jurisdiction where they fix their common residence”. Under Article 1476 Belgian Civil Code partners make their common partnership declaration before the civil register of their common domicile.

Germany (Art. 17(b) EGBGB), and Switzerland. Contrary to the conflict of law rules on marriage (that refer to nationality or to the habitual residence of the spouses), under German law the registration of a partnership, its formalities as well as its conditions are subject to the law of the State of registration (Art. 17(b)(1)(1) EGBGB): renvoi is excluded. With regard to maintenance and succession, the common conflict of law rules apply (Art. 17(b)(1)(2) EGBGB), unless the partner has no right of action under the designated law (namely the law of the habitual residence of the claimant and the national law of the deceased, respectively). In the latter case, the law of the place of registration shall apply. The German legislator has also inserted a rule to solve the case of multiple registrations,³³ according to which the law of the place of the last registration shall apply (Art. 17(b)(1)(2) EGBGB). Article 17(b)(4) EGBGB provides for the public policy exception and limits the effects of partnership registered abroad to those which are provided under German law. Consequently, a same-sex couple would not enjoy the right to adopt in Germany even if the State of registration or of origin would have granted such right. The extent to which the rights of same-sex partners may be limited in Germany depends upon the interpretation of public policy.

Swiss conflict of laws rules provide for the application of the law applicable to the dissolution of marriage (Art. 65(c) LDIP). With regard to the law applicable to property rights, the parties may choose the law of the State of registration (Art. 65(c)(2) LDIP), or the law of the common domicile, or the law of the nationality of one of the partner (Art. 52(2) LDIP). In case the applicable law has no provisions on registered partnerships, Swiss law shall apply. The 1973 Hague Convention on maintenance applies (Art. 65(c)(1) LDIP).

(b) Dutch law applies to the dissolution of partnerships registered in the country, as well as to the dissolution of partnerships registered abroad, but in the latter case the partners may not choose the *lex loci registrationis* instead.³⁴

(c) States in this group do not provide any specific choice-of-law rules, with the exception of Belgium, where the law of the State of registration governs the grounds and conditions of the dissolution of a partnership.³⁵

II.7.c. *Jurisdiction criteria in matters of dissolution of partnerships and the recognition of judgments*

Even if some scholars deem that Regulation No 2201/2003 applies to registered partnerships or at least that their automatic recognition could be based on its Article 39,³⁶ this issue is highly questionable. Actually, Member States that have adopted rules on registered partnerships have also adopted specific provisions on jurisdiction and/or the recognition of judgments. Some of them have made recourse to all or some of the provision of the Regulation, which proves that they do not consider that it would apply directly without such reference

In the United Kingdom Article 219 of the *2004 Civil Partnership Act* provides that the Community rules apply to conflicts of jurisdiction on divorce, separation and annulment of registered partnerships and has set national uniform rules on recognition of decisions related to these matters drafted on the Brussels II-a model. In the Netherlands, article 4(4) of the Dutch Code of Civil Procedure provides for the application of the Brussels II-a regime for determining jurisdiction with respect to the dissolution of registered partnerships. An

³³ The partners can change the law applicable to their legal relationship by a new registration in another State, for example to reduce the requisites for termination that in Germany are quite burdensome.

³⁴ CURRY SUMNER, *Private International Law* cit., § 4.2.2. Dutch law also regulates dissolution of a foreign partnership upon unilateral request of one partner, unless both parties have chosen the *lex loci registrationis* (or one party has chosen such law and the other does not contest such choice, or else both parties have close ties with the State of registration).

³⁵ Article 60 Belgian Civil Code.

³⁶ TONOLO, *Le unioni civili nel diritto internazionale privato*, p. 86 ss., especially at p. 91.

additional criterion establishes the competence of the Dutch authorities to dissolve a partnership registered in the Netherlands.³⁷

In other States the provisions on registered partnership provides a *forum necessitatis*, i.e. the authorities of the State of registration have always jurisdiction to dissolve a partnership, even in the absence of any further connection with that State.³⁸ Under Swiss Law, the place of the domicile is the preferred connection, but the Swiss court of the place of registration has jurisdiction over the dissolution when the partners are neither domiciled in Switzerland nor are Swiss citizens (Art. 65(b)).

Most States recognise partnerships registered abroad as equivalent to those registered in their territory: a list of these States/partnerships is contained in the same laws or either provided (and updated) by the competent authority. The Swiss amended LDIP explicitly and generally provides that same-sex marriages/partnerships validly celebrated abroad are recognised as domestic registered partnerships (Art. 45(3)).

³⁷ CURRY SUMNER, *Private International Law* cit., § 4.2.1.

³⁸ See article 59 Belgian Private International Law Code.