SUMMARY

Notarial Academy of the Commission for European Affairs (CAE)

Final summary

Conclusions and recommendations on the regime of unmarried couples in Europe

Barcelona, 17 October 2024 6 min read Original language: French

1 The Notarial Academy of the Commission for European Affairs held in Barcelona on 17 October 2024, on the subject of unmarried couples in Europe, and in particular registered partnerships, brought out a first obvious finding:

2 There is a very wide variety of “couples”, “partnerships”, “unions” and regimes for unmarried couples in Europe.

3 First of all, the very definition of “partnership” or “registered union” is not uniform. While many countries define a “registered partnership” in line with European Regulation 2016/1104 on registered partnerships, as the “regime governing the shared life of two people, the registration of which is mandatory and which fulfils the legal requirements laid down by law for its creation” [1], others adopt a much broader definition in their domestic national law. This is the case in particular of Slovenia and of certain Spanish Autonomous Communities [2], such as Catalonia, which do not require the partnership to be “registered” with an authority in order to exist as a “partnership” and produce legal effects. Proof of factual elements, such as a shared life over a certain period of time, will thus be sufficient to demonstrate the existence of the partnership in those countries.

4 Beyond the different classifications, the regimes attached to these couples are also extremely varied: from the conditions for forming the partnership to those for dissolving it, including the personal and property effects it produces, no “standard” regime prevails.

5 This great diversity is in fact not surprising: each body of legislation on couples has been built in the light of the needs and the social, cultural and historical realities of its country.

6 Despite this great heterogeneity, we could nevertheless attempt a classification of the various regimes that exist in Europe.

7 It should be made clear beforehand, however, that some countries have never yet legislated on partnerships. This form of union thus does not exist in Bosnia and Herzegovina, Bulgaria, Georgia, Lithuania, North Macedonia, Poland, Romania, Serbia, Slovakia, Turkey and Ukraine, which know only the regime of marriage or that of the simple de facto union.

8 As regards the others, we could classify them into three groups.

9 First, there are the countries that have found in the partnership an alternative to marriage between persons of the same sex. Some European States have not opened marriage to persons of the same sex, for social, religious or cultural reasons. They are nonetheless required to offer these couples the same rights as different-sex couples, failing which equality between them would be breached. This is how Italy, Croatia, the Czech Republic, Montenegro and Austria created a new form of union, solely for same-sex couples, called a "civil union" or "partnership", the regime of which is extremely close to that of marriage but does not bear its name. These unions are, moreover, generally concluded before the civil registrar, as in the case of marriage.

10 Next, there are the countries that first created the partnership regime, modelled on that of marriage, and then opened marriage to same-sex couples. These include, for example, Spain, the United Kingdom, Greece, Malta, Germany and Switzerland.

11 Following the opening of marriage to persons of the same sex, these countries nevertheless took different paths as regards their legislation on partnerships.

12 Some, such as Germany and Switzerland, chose purely and simply to repeal this form of union. Since it offered all couples the same regime as marriage (itself open to all couples), and although it was classified differently, the partnership came to be seen as unnecessary.

13 The others made a different choice: they allowed the partnership regime to remain even though marriage was now open to all couples. These bodies of legislation therefore offer couples a practically single regime, under different classifications. The explanation is no doubt more social than legal: society has remained attached to the figure of the partnership, seen as a more flexible model, less "conventional" and less religiously "marked" than marriage.

14 In these countries, and in particular in Spain, the legislature and the case law tend to apply to all couples, whether married, partners or cohabitants, in other words whatever their classification and conditions of formation, the same regime, in the name of a principle of equality between couples. Thus in Catalonia, partners, even unregistered ones, who have shared a life together for more than two years are legal heirs in each other's succession.

15 Lastly, there are the countries that have created a registered partnership regime, alongside that of marriage, without copying it completely. The partnership is thus presented, in form as in substance, as a different proposal for a union. The opening of marriage to persons of the same sex in these countries has therefore had no consequence for the existence of the partnership. These include, for example, France and Belgium, which offer a form of union that could be described as contractual rather than institutional. Thus in France, a partner in a PACS is not a legal heir in the succession of the other partner. Nor does the PACS have any effect on filiation. It is also much easier to undo than marriage: a wish, even a unilateral one, is enough to end the partnership. At the same time, it is also less protective: no compensatory allowance is due in the event of separation. The same applies to the Belgian contract of legal cohabitation.

Recommendations of the CAE

16 At the close of this analysis and of the round table held in Barcelona on 17 October 2024 on “The regime of unmarried couples in Europe: de facto unions, civil unions and registered partnerships”, the Commission for European Affairs, chaired by notary Valentina Rubertelli, makes the following recommendations to legislators and to the member Notariats:

Need for legal certainty and predictability for couples

17 In order to ensure that partners are aware of the legal consequences of their factual situation (shared life), all the more so if they are very similar to those of marriage, the Commission for European Affairs recommends setting clear and tangible criteria for the formation of the partnership.

18 This may be a formality of registering the partnership with a public authority (such as the civil registrar or the notary) or a joint declaration before a notary, in an authentic instrument. What matters is to determine clearly when the partnership takes effect and therefore the legal regime to which the couple is subject. This act of will of the parties before a public official will ensure that they are not made subject to a regime they did not choose or of which they were unaware. The rights and duties arising from it will also be all the clearer for the partners.

Need for security and control for the State

19 To prevent fraud, “sham partnerships” formed for the sole purpose of obtaining certain effects of the partnership (tax advantages, obtaining a residence permit…), the State may entrust notaries with two tasks:

20 That of forming and registering the partnership. The couple will thus have to appear before the notary, who will record the parties’ wish to enter into the partnership.

21 That of receiving, by authentic instrument, the partners’ joint declaration of cohabitation, or possibly of requiring proof of cohabitation.

Need for advice for couples on the choice of their property regime

22 In order to inform partners of the legal consequences of their union and to enable them to choose a property regime suited to their personal and family situation, the CAE recommends that property agreements between partners be concluded by notarial authentic instrument, in the same way as marriage contracts for married couples.

23 The notary, a qualified and accessible legal professional, is indeed in a position to advise the parties on a tailor-made regime suited to their needs.

24 Where there is a cross-border element, the notary will also determine the law applicable to the property consequences of their registered partnership and will advise them, where appropriate, on the choice of another law, in accordance with European Regulation 2016/1104.

Notes

1 Article 3 of Regulation 2016/1104

2 In Spain, the regime for “unmarried couples” is not regulated at State level, but at the level of each Autonomous Community. Each region has thus defined, or not, a regime for partnerships.