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More or less together: Levels of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners. A comparative study of nine European countries. (Documents de travail n°125)

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Major legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners in Belgium

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Symbols and words used in the national tables:

Applicable answer	Answer code	Color	Points given for calculation of level of legal consequences
The legal consequence applies.	Yes	White	3 pt
The legal consequence applies in a limited way or not in all circumstances, or it can be contracted out of, or courts can set it aside using some general legal principle, etc.	Yes, but	Light pink	2 pt
The legal consequence only applies in a very limited way or in very few circumstances, or it can be established by contract, or by courts using some general legal principle, etc.	No, but	Middle pink	1 pt
The legal consequence does not apply.	No	Dark pink	0 pt
No information was available on this point, or the legal position is unclear.	Doubt	Middle pink	1 pt
The column is not applicable in the country, because this type of relationship is not legally recognised (yet).	X	Dark pink	0 pt

Additional information	Answer code
The legal consequence is only available after the specified number of years.	>x years
The legal consequence is only available after the specified number of months.	>x months
Year of entry into force of the legislation providing the legal consequence (or the particular relationship type), or year of supreme court decision establishing its existence. (Where two years are given, the first indicates the introduction of a more limited version of the consequence; where no year is given, the legal consequence mostly applies since the introduction of the particular relationship type, or already for a long time.)	(Year)

¹ University of Louvain, www.cpdrl.ucl.ac.be/cridho/index.php?pageid=2.

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Introduction

This chapter aims to represent the law as it stood early in 2004.

Civil marriage

In Belgium, the Law of 13 February 2003 had opened civil marriage to persons of the same sex (Loi ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil). The law was published in the *Moniteur Belge* on 28 February 2003. It entered into force on 1 June 2003, according to the terms of Article 23. The differences between same-sex and different-sex marriages relate to parenting; see items A1 (paternity) and A4 and A5 (adoption), and to the possibilities for couples of non-resident foreigners to enter into a marriage in Belgium (see item E10).

Registered partnership

In the comments to the tables above, the expression 'registered partnership' – strictly speaking, such a form of union does not exist in Belgian law – should be understood to refer in fact to the 'legal cohabitation' created by the Law of 23 November 1998 (Loi instaurant la cohabitation légale, *Moniteur Belge*, 12 January 1999). This legislation entered into force on 1 January 2000 after the adoption of the Royal Decree (Arrêté royal) of 14 December 1999, *Moniteur Belge*, 23 December 1999. Where reference will be made to the 'registered partner', therefore, the reader should really understand that what is meant is 'legal cohabitee' in the meaning of this legislation.

In Belgium registered partnership is open to same-sex and to different-sex couples, and even to couples of close relatives (see E11 and E12). It is not quite clear whether it is open to foreigners and/or non-residents (see E2 to E9). Another difference between marriage and registered partnership is that the latter can be dissolved by mutual agreement of the partners, and even unilaterally by one partner – for example by marrying someone else (see G2, G3 and G5).

In its consequences registered partnership is a little stronger than informal cohabitation – see for example items B1 and B2 (joint properties and joint debts), B 13 (inheritance tax) and C8 (continuation of rent). Simultaneously, the consequences of registered partnership are far less numerous than those of marriage – see for example items A1 (paternity), A4 and A5 (adoption), B3 (alimony), B6 (intestacy), B 11 and B12 (pensions), C1 (surname) and C3 (citizenship).

There is hardly any difference between same-sex and different-sex registered partnership.

Informal cohabitation

There is no general law regulating informal cohabitation in Belgium. However, *de facto* couples are taken into account, explicitly or implicitly, in a growing number of legal rules. For examples where same-sex and different-sex cohabitation are treated in the same way, see the items B9 (public health insurance), B13 (inheritance tax in the Flemish region), B16 (basic social security), C2 (residence permits), C5 (domestic violence protection), C6 (next of kin rules for medical purposes). For a few differences between the position of same-sex and different-sex cohabitants, see items A1 (paternity), A4 (second parent adoption) and perhaps B5 (compensation for wrongful death).

Table A (Belgium): Parenting consequences

	Civil marriage		Registered partnership (2000)		Informal cohabitation	
	Different-sex	Same-sex (2003)	Different-sex	Same-sex	Different-sex	Same-sex
1. When female partner gives birth, both partners automatically become legal parents	Yes	No	No, but	No	No, but	No
2. Medically assisted insemination is lawful for women in such a relationship	Yes	Yes	Yes	Yes	Yes	Yes
3. When only one partner is the parent of a child, both partners can have parental authority or responsibilities during their relationship	No	No	No	No	No	No
4. When only one partner is the parent of a child, the other partner can adopt it and thus become its second parent	Yes	No	No, but	No	No, but	No
5. Partners can jointly adopt a child	Yes	No	No	No	No	No
6. One partner can individually adopt a child	Yes	Yes	Yes	Yes	Yes	Yes
7. Partners can jointly foster a child	Yes	Yes	Yes	Yes	Yes	Yes
Level of legal consequences	6x3 + 1x0 = 18	3x3 + 4x0 = 9	3x3 + 2x1 + 2x0 = 11	3x3 + 4x0 = 9	3x3 + 2x1 + 2x0 = 11	3x3 + 4x0 = 9

Notes to table A

A1 – The presumption of paternity established by Art. 315 Civil Code (according to which the husband is presumed to be the father of the child born within marriage or during the 300 days following its dissolution or annulment) is explicitly excluded in the case of marriage between partners of the same sex: see Art. 143 Civil Code, introduced by the Law of 13 February 2003. Moreover, although the male partner of the woman who gave birth to a child (and will be considered legally the mother) may recognize the child (reconnaissance de paternité), such a recognition will not be possible for the female partner, whether she has entered a registered partnership with the mother or whether she lives de facto with her (see Article 313(1) Civil Code). It will be noted that in the remainder of the comments to the tables above, the expression 'registered partnership' – such a form of union does not exist in Belgian law – should be understood to refer in fact to the 'legal cohabitation' created by the Law of 23 November 1998 (Loi instituant la cohabitation légale, *Moniteur Belge* 12 January 1999). This legislation entered into force after the adoption of the Royal Decree (Arrêté royal) of 14 December 1999, *Moniteur Belge* , 23 December 1999. Where reference will be made to the 'registered partner', therefore, the reader should really understand that what is meant is 'legal cohabitee' in the meaning of this legislation.

A2 – The lawfulness of medically assisted insemination does not mean that it will always be available. The consulted physician will decide according to his/her deontology: see Tribunal de première instance de Courtrai (section jeunesse, chambre civile), 24 June 1997, *Journal des Procès*, 1997, 16, note Versluys, *Journal des tribunaux*, 1998, p. 731, note Massager.

A3 – In Belgian law parental authority continues beyond the marriage or the cohabitation of the parents (Article 372 Civil Code): even where the spouses divorce or are separated, they have joint parental responsibility on the child (on the equality of both parents in that respect, see the Law of 1 July 1974; on the maintenance of this joint parental responsibility beyond divorce or separation, see the Law of 13 April 1995 on the joint exercise of parental authority (Loi sur l'exercice conjoint de l'autorité parentale), *Moniteur Belge* 24 May 1995

and Art. 374 and 376 Civil Code), and this authority is not shared with others (J.-L. Renchon, 'La nouvelle réforme législative de l'autorité parentale', *Revue trimestrielle de droit familial*, 1995, p. 388; J. Sosson, 'L'autorité parentale conjointe. Des vœux du législateur à la réalité', *Annales de droit de Louvain*, 1996, p. 115). Civil marriage has been opened to same-sex couples by the Law of 13 February 2003. But marriage between two persons of the same sex is to have no consequence whatsoever on filiation of parental authority. Therefore, even if married to another woman, a lesbian mother would have sole parental authority on the child, even where the child would be *de facto* raised within the family.

A4 – Article 13 of the Law of 13 February 2003 opening civil marriage to persons of the same sex introduces a modification in Article 345 Civil Code which confirms that, even where one of the spouses is the parent of the child, the other spouse will be authorized to adopt the child only if he/she is of the opposite sex. However, there is some case law that suggests that second parent adoption by a non-married different-sex partner should sometimes be possible. The law of 24 April 2003 (*Moniteur Belge* 16 May 2003; not yet in force) will open the possibility of second parent adoption also to registered or informally cohabiting different sex partners, who are no relatives to each other, and who have cohabited in a permanent and affective manner since a least three years (new Art. 343(1) Civil Code).

A5 – When the Law of 13 February 2003 was adopted, opening civil marriage to same-sex partners, the legislator explicitly excluded any consequences either on filiation or on the possibility to adopt jointly: Article 346 Civil Code, which provided previously that 'Nul ne peut être adopté par plusieurs si ce n'est par deux époux', has been modified to add 'de sexe différent' (Art. 14 of the Law of 13 February 2003), precisely to avoid that spouses of the same sex will seek joint adoption on the basis of this provision of the Civil Code. Neither has the regime of legal cohabitation introduced by the Law of 23 November 1998 any consequence on adoption or filiation. The law of 24 April 2003 (*Moniteur Belge* 16 May 2003; not yet in force) will open the possibility of second parent adoption also to registered or informally cohabiting different sex partners, who are no relatives to each other, and who have cohabited in a permanent and affective manner since a least three years (new Art. 346 Civil Code).

A6 – According to Art. 347 Civil Code, where a married person wishes to adopt a child (in accordance with the forms prescribed in Articles 349 ff. of the Civil Code), the spouse has to consent to the adoption, unless he/she is incapable to do so, is absent, or cannot be found to consent. See also P. Senaeve, *Compendium van het Personen- en Familierecht*, 5de uitgave, Acco, Leuven, 200, n° 907. The law of 24 April 2003 (see comments to A6 above) will apply the same condition to registered and informally cohabitation partners.

A7 – The answers given in the table refer to *de facto* fostering (see P. Borghs, 'Homoseksualiteit en ouderschap. Actuele stand van zaken', *Nieuw Juridisch Weekblad* 2004, p. 299). Aside from *de facto* taking into care of a child in need of protection ('hébergement', 'pleeggezin'), Belgian law knows an institution called 'pleegvoogdij', 'tutelle officieuse', which is regulated by Articles 475bis to 475septies of the Civil Code. Although the Civil Code refers to the 'pleegvoogd' ('tuteur officieux') only in the singular, it is generally agreed that, just like both spouses of a married couple can adopt jointly, they may jointly become the 'tuteurs officieux' of the child (see e.g. Gent (Jk.)(Jeugdrechtbank Gent), 10 December 1975, *Rechtskundig weekblad* 1977-1978, 1259, noot J. Pauwels)). It is still uncertain, however, whether non-married couples, even in legal cohabitation, can become jointly 'tuteurs officieux'. And it is even less certain that same-sex couples, even married, can do so. Generally, this institution is considered rather analogous to adoption, except that no filiation is established with the child ('tuteur officieux'). This would point towards a negative answer. There is no case-law to my knowledge; the institution is very rarely resorted to.

Table B - part one (Belgium): Material consequences in private law

	Civil marriage		Registered partnership (2000)		Informal cohabitation	
	Different-sex	Same-sex (2003)	Different-sex	Same-sex	Different-sex	Same-sex
1. Properties of each partner are considered joint property	Yes, but	Yes, but	No, but	No, but	No	No
2. Debts of each partner are considered joint debt	Yes, but	Yes, but	No, but	No, but	No	No
3. In case of splitting up, statutory rules on alimony apply	Yes	Yes	No, but	No, but	No, but	No, but
4. In case of splitting up, statutory rules on redistribution of properties apply	No	No	No	No	No	No
5. In case of wrongful death of one partner, the other is entitled to compensation	Yes	Yes	Yes	Yes	Yes (1989)	Doubt
6. When one partner dies without testament, the other is an inheritor	Yes	Yes	No	No	No	No
Level of legal consequences	3x3 + 2x2 + 1x0 = 13	3x3 + 2x2 + 1x0 = 13	1x3 + 3x1 + 2x0 = 6	1x3 + 3x1 + 2x0 = 6	1x3 + 1x1 + 4x0 = 4	2x1 + 4x0 = 2

Notes to table B - part one

B1 – With respect to this question, the situation of legal cohabitation is an intermediate situation between marriage and informal cohabitation. On the one hand, Article 1478 al. 1 Civil Code states that 'Chacun des cohabitants légaux conserve les biens dont il peut prouver qu'ils lui appartiennent, les revenus que procurent ces biens et les revenus du travail'. This contrasts the situation of legal cohabitation with that of marriage – either heterosexual or homosexual –, where the legal regime is that all revenues acquired after the date of the marriage become the joint property of the spouses ('communauté d'acquêts'): this legal regime, codified under Articles 1398-1450 Civil Code, can be modified by the matrimonial convention concluded between the spouses (see Articles 1451 ff. Civil Code); hence the 'Yes, but' which appears in the tables. On the other hand, the regime of legal cohabitation introduced by the Law of 23 November 1998 has material consequences which clearly distinguish it from 'informal cohabitation'. Indeed, according to Art. 1478 al. 2 Civil Code, which forms the major innovation of the Law of 23 November 1998 on legal cohabitation (registered partnership), 'Les biens dont aucun des cohabitants légaux ne peut prouver qu'ils lui appartiennent et les revenus que ceux-ci procurent sont réputés être en indivision'. Thus, a legal presumption of indivision applies to the property of both legal cohabitants, which distinguishes the situation of legal cohabitants from that of unmarried partners living in 'informal cohabitation' ('concubinage' or 'union libre') (see Appeals Court Bruxelles, 6 September 1996, *Revue trimestrielle de droit familial*, 1997, p. 128; Appeals Court Gent, 16 November 1993, *Revue trimestrielle de droit familial*, 1995, p. 343).

B2 – The solidarity with respect to the debts of either partner, unless these debts are excessive, is provided for in identical terms for marriage (Art. 222 Civil Code) and for legal cohabitation (Art. 1477(4) Civil Code). In both institutions, this solidarity extends however only to debts incurred by each spouse or partner for 'les besoins du ménage et l'éducation des enfants' (marriage - Art. 22 Civil Code) or for 'les besoins de la vie commune et des enfants qu'ils éduquent' (registered partnership - Art. 1477(4) Civil Code). From the year 2005 registered partners will, like married partners, be liable for each other tax debts (law of 10 August 2001, *Moniteur Belge* 20 September 2001).

B3 – Although the Civil Code stipulates no right to alimony (pension alimentaire) either in the case of a legal cohabitation or in the case of informal or *de facto* cohabitation (concubinage), there is some case-law which considers that, at least where the cohabitation has lasted for a significant period of time or has entailed certain sacrifices from the partner in need (e.g., left his/her employment to dedicate him- or herself to the home or the upbringing of the child), there is an obligation of the other partner to assist financially the partner

in need (see e.g. Justice of the Peace (Vredesrechter, Juge de Paix) Gent, 4 November 1996, *Revue trimestrielle de droit familial*, 1999, p. 176, *Rechtskundig weekblad*, 1997-1998, p. 266, note F. Aps; Justice of the Peace (Vrederechter, Juge de Paix) Gent, 6 July 1998, *Revue générale de droit civil*, 1998, p. 468; or Rechtbank van eerste aanleg (civiele afdeling) Louvain, 27 September 1996, *Journal des Procès*, 1996, p. 26 – however the case-law remains divided on this issue: see Rechtbank van eerste aanleg (civiele afdeling) Leuven, 3 June 1991, *Rechtskundig Weekblad*, 1992-1993, p. 131).

B4 – See comments to B1.

B5 – The Court of Cassation has decided, in a decision of 1989, that *de facto* cohabitants (non married partners) could be considered to have a right to compensation for the wrongful death of their partner (Cass., 2^{ème} ch., aud. plén., 1^{er} février 1989, *Pas.*, 1989, p. 582; confirmed later by Cass., 1^{ère} ch., 15 février 1990, *Pas.*, 1990, I, p. 694, *Journal des tribunaux.*, 1990, p. 216, *Revue générale assurance et responsabilité*, 1990, n°11.658, note R.O. Dalcq); previously, this was considered unacceptable, as no legal consequences could be attached to a *de facto* situation, that of cohabitation outside marriage. However, this evolution only concerned *de facto* de cohabitants living together outside marriage when their relationship has the appearance of marriage ('apparence de mariage'); it may not extend to *de facto* cohabitation between two persons of the same sex.

B6 – Legal cohabitation, as organized by the Law of 23 November 1998, has no incidence on the rules of inheritance, except for one consequence which applies in the marginal situation where the surviving registered partner is already an inheritor of the deceased partner because of being a close relative (see Art. 1478 al. 3 Civil Code). One should recall that the Law of 23 November 1998 may be relied upon, to organize a form of legal cohabitation, in many situations, including between two persons of the same family who wish to institute this material solidarity between them although they would not be able to marry (a brother and sister, e.g., could register as legal cohabitants).

Table B - part two (Belgium): Positive material consequences in public law

	Civil marriage		Registered partnership (2000)		Informal cohabitation	
	Different-sex	Same-sex (2003)	Different-sex	Same-sex	Different-sex	Same-sex
7. Relationship can result in lower property tax	No	No	No	No	No	No
8. Relationship can result in lower income tax	Yes, but	Yes, but	No	No	No	No
9. Public health insurance of one partner covers medical costs of other partner	Yes, but	Yes, but	Yes, but	Yes, but	Yes, but (1996)	Yes, but (1996)
10. Relationship can have positive impact on basic social security payment in case of no income	No	No	No	No	No	No
11. Relationship can have positive impact on statutory old age pension	Yes	Yes	No	No	No	No
12. When one partner dies, the other can get a statutory survivor's pension	Yes, but	Yes, but	No	No	No	No
13. Surviving partner pays no inheritance tax (or less than a mere friend would)	Yes	Yes	Yes, but	Yes, but	No, but	No, but
Level of legal consequences	2x3 + 3x2 + 2x0 = 12	2x3 + 3x2 + 2x0 = 12	2x2 + 5x0 = 4	2x2 + 5x0 = 4	1x2 + 1x1 + 6x0 = 3	1x2 + 1x1 + 6x0 = 3

Notes to table B - part two

B7 – No property tax exists.

B8 – When one married partner has no income, or very little income, or is assisting in the independent business activities of the other spouse, then income tax is a little lower. From 2005 the same tax advantages will also apply to registered partners (law of 10 August 2001, *Moniteur Belge* 20 September 2001).

B9 – The public health insurance mechanism is organized by the Law of 14 July 1994 (*Loi coordonnée relative à l'assurance obligatoire soins de santé et indemnités* – Coordinating Law on the compulsory health insurance). This law is applicable to salaried workers, including public servants. A Royal Decree of 29 December 1997 has partly aligned the rules provided for in the Law of 14 July 1994 to the self-employed (Arrêté royal du 29 décembre 1997 portant les conditions dans lesquelles la loi du 14 juillet 1994 est étendue aux travailleurs indépendants et aux membres des communautés religieuses; last modified by the Arrêté royal du 15 mai 2003 modifiant l'arrêté royal du 29 décembre 1997 portant les conditions dans lesquelles l'application de la loi relative à l'assurance obligatoire soins de santé et indemnités, coordonnée le 14 juillet 1994, est étendue aux travailleurs indépendants et aux membres des communautés religieuses, *Moniteur Belge*, 26 May 2003). The Law of 14 July 1994 provides that the dependants of the workers contributing to the compulsory security scheme (assurance obligatoire soins de santé) will benefit from the same advantages as the contributor him- or herself (Art. 32, al. 1, 17°). These 'dependants' are the non-divorced spouse, even after separation, the children, and the ascendants (Art. 32, al. 1, 19° of the Law of 14 July 1994; Art. 123, 2° of the Royal Decree of 3 July 1996 (Arrêté Royal portant exécution de la loi relative à l'assurance obligatoire soins de santé et indemnités, coordonnée le 14 juillet 1994)). However, the Royal Decree of 3 July 1996 defines as 'dependants' ('personnes à charge') the spouse or the person cohabiting with the worker (Art. 123). Certain exceptions apply.

B10 – Please refer to the comments above, under B7. Where the person having a right to a basic income (revenu d'intégration) in the absence of other revenues cohabits with either a spouse or a de facto cohabitant

or a registered partner (cohabitant légal), the basic income afforded will be of a lesser amount, as it is presumed that living in a shared environment will be less expensive for each.

B11 – In the situation where the spouse effectively cohabits with his/her wife/husband, and receives no social benefit although he/she is dependent, the statutory old age pension will be augmented by 25%. This applies only where the partners are married: it does not apply where they are legal or *de facto* cohabitants. *De facto* cohabitation has no consequence whatsoever on the amount of the statutory old age pension (see Bouille, Etienne, Meunier, Conrardy, Demet, Kreit and Petit, 'Les pensions', *Actualités du droit*, 1993/4, p. 1103).

B12 – A pension is paid to a surviving married partner, if the marriage has lasted at least since one year (or if a child was born from the marriage, or if at the time of death one partner was receiving child benefit, or if death resulted from an accident that took place after the start of the marriage) and the surviving partner has not remarried (Art. 17 Act on Pensions for Employees, and art. 54(1) General Regulation on Pensions for Employees).

B13 – Inheritance tax is regulated by the three regions of Belgium (see Art. 48 Succession Law of Flemish Region, Art. 48 Succession Law of Walloon Region, and Art. 48 Succession Law of Brussels Region). In all regions the same tariffs as for marriage apply in the case of registered partnership, but in the Walloon region only if the partners are no relative, had been registered at least since one year, and were living together at the time of death). In the Flemish region the same tariffs as for marriage also apply in the case of informal cohabitation, but only if the cohabitants at least since one year had a joined household. This does not apply in the Walloon and Brussels regions.

Table B - part three (Belgium): Negative material consequences in public law

	Civil marriage		Registered partnership (2000)		Informal cohabitation	
	Different-sex	Same-sex (2003)	Different-sex	Same-sex	Different-sex	Same-sex
14. Relationship can result in higher property tax	No	No	No	No	No	No
15. Relationship can result in higher income tax	Yes	Yes	No	No	No	No
16. Relationship can have negative impact on basic social security payment in case of no income	Yes	Yes	Yes, but	Yes, but	Yes, but	Yes, but
17. Relationship can have negative impact on statutory old age pension	No	No	No	No	No	No
Level of legal consequences	2x3 + 2x0 = 6	2x3 + 2x0 = 6	1x2 + 3x0 = 2	1x2 + 3x0 = 2	1x2 + 3x0 = 2	1x2 + 3x0 = 2

Notes to table B - part three

B14 – No property tax exists.

B15 – Until 2005 the basic tax free sum is a little higher for an unmarried person than for a married person. Also, until 2005 married couples have a disadvantage with respect to any income from other sources than work: such income is taxed as part of the work income of the spouse with the highest work income (the 'breadwinner'). These disadvantages for the married will be abolished as of 2005 (law of 10 August 2001, *Moniteur Belge* 20 September 2001). See also final comment on B2.

B16 – The relevant rules are in the Law of 26 May 2002 on the right to social integration (loi concernant le droit à l'intégration sociale), *Moniteur Belge*, 31 July 2002. The right to a basic income (called 'revenu d'intégration sociale') guaranteed by this legislation is subsidiary: it is afforded when the individual does not have sufficient revenues from other sources; those revenues are calculated taking into account both the revenues of the individual concerned and the revenues of the person he/she cohabits with. Whether married or not, when a couple cohabits, the revenues of the cohabitant (whether spouse, registered partner or *de facto* cohabitant) will therefore be considered, for the allocation of any basic income to the other partner (see Art. 34(1), al. 2, of the Law of 26 May 2002). Therefore, any form of cohabitation (marriage, legal cohabitation or *de facto* cohabitation) will make it more difficult to receive basic income at the same level as for an isolated person.

Another form under which a minimum income is afforded in Belgium is through the Law of 1 April 1969 instituting a guaranteed income for elderly (Loi instituant un revenu garanti aux personnes âgées). Article 2 of this Law stipulates that married beneficiaries (even in case of separation of less than ten years, and provided a part of the revenue of the beneficiary goes to the separated spouse) will be afforded a higher income; such an advantage does not extend to cases of *de facto* cohabitation or to registered partners.

B17 – See comment on B11.

Table C (Belgium): Other legal consequences

	Civil marriage		Registered partnership (2000)		Informal cohabitation	
	Different-sex	Same-sex (2003)	Different-sex	Same-sex	Different-sex	Same-sex
1. One partner can have or use surname of the other	Yes	Yes	No	No	No	No
2. Foreign partner of resident national is entitled to a residence permit	Yes	Yes	Yes	Yes	Yes (1997)	Yes (1997)
3. Relationship makes it easier for foreign partner to obtain citizenship	>3 years: Yes	>3 years: Yes	No	No	No	No
4. In case of criminal prosecution, one partner can refuse to testify against the other	Yes	Yes	No	No	No	No
5. When one partner uses violence against other partner, specific statutory protection applies	Yes	Yes	Yes	Yes	Yes, but (1997)	Yes, but (1997)
6. In case of accident or illness of one partner, the other is considered as next of kin for medical purposes (even without power of attorney)	Yes	Yes	Yes	Yes	Yes	Yes
7. Organ donation from one living partner to the other is lawful	Yes	Yes	Yes	Yes	Yes	Yes
8. When one partner dies, the other can continue to rent the home	Yes	Yes	Yes	Yes	No	No
9. Partners have a duty to have sexual contact	Yes	Yes	No	No	No	No
Level of legal consequences	9x3 = 27	9x3 = 27	5x3 + 4x0 = 15	5x3 + 4x0 = 15	3x3 + 1x2 + 5x0 = 11	3x3 + 1x2 + 5x0 = 11

Notes to table C

C1 – Article 216(2) of the Civil Code states that the spouse may use the surname of the other spouse in the context of professional relationships, with the agreement of the spouse whose name is used. Once such an agreement is given, it may only be withdrawn for serious reasons. Such a provision exists neither in the rules on registered partnership (legal cohabitation); nor do they apply to *de facto* cohabitation.

C2 – A circulaire adopted on 30 September 1997 by the Ministry of the Interior (Circulaire du 30 septembre 1997 relative à l'octroi d'une autorisation de séjour sur la base de la cohabitation dans le cadre d'une relation durable, *Moniteur Belge*, 14 November 1997) authorizes both Belgian nationals and aliens established in Belgium or authorized to reside in Belgium for periods of more than three months, to be joined in Belgium by the person with whom they have a 'stable relationship' ('relation durable'). This benefits all *de facto* couples, whether heterosexual or homosexual (indeed, the very purpose of the circulaire was to put an end to the discrimination against homosexuals with respect to family reunification, as they had no access to marriage).

Couples living under the regime of legal cohabitation will of course find it even easier to prove the 'longstanding character' of their relationship.

C3 – The foreign spouse of a Belgian national may obtain the Belgian nationality after the couple has resided in Belgium during at least three years, and provided the two spouses still are cohabiting at the time of the declaration of nationality (Art. 16 of the Code de la nationalité belge of 28 June 1984, *Moniteur Belge* 12 July 1984). Although these three years of residency in Belgium is also the period imposed to foreigners who are seeking to be naturalized as Belgians (Articles 18 to 21 of the Codes de la nationalité belge), the foreign spouse of a Belgian national does not have to be 'naturalized' by a formal act of the House of Representatives; rather, provided their declaration meets no opposition, it will automatically result in the obtention of the Belgian nationality.

C4 – See Art. 156 and 322 of the Code d'instruction criminelle (Code of Criminal Procedure), concerning the inadmissibility of testimonies by the spouse: spouses may not testify, neither can they be invited to testify in a criminal case concerning the other spouse. This is not extended either to legal cohabitants or to cohabitants de facto.

C5 – A Law of 24 November 1997 introduced a specific protection for the victim of intra-family violence in Article 410 of the Code pénal. This provision has been expanded by the Law of 28 November 2000, to include within that protection not only the spouse, but also the registered partner (legal cohabitant) and any *de facto* cohabitant with whom the author of the violent act entertains a durable affective and sexual relationship. See A. Jacobs, 'Les violences au sein du couple', in: *Formation permanente CUP*, February 2000, pp. 178-179. The protection of the spouse or registered partner (legal cohabitant) has also been recently ameliorated by a legislation attributing the common residence of the couple to the partner against whom abuse has been committed: see the Law of 28 January 2003 on the attribution of the family home to the spouse or the registered partner who is a victim of acts of physical violence from his/her partner and completing Article 410 of the Penal Code (Loi du 28 janvier 2003 visant à l'attribution du logement familial au conjoint ou au cohabitant légal victime d'actes de violence physique de son partenaire et complétant l'article 410 du Code pénal, *Moniteur Belge* 12 February 2003).

C6 – See Article 14(2) Law on the Rights of Patients.

C7 – Organ donation is regulated in Belgium by a Law of 13 June 1986 (Loi du 13 juin 1986 sur le prélèvement et la transplantation d'organes; see also Arrêté royal du 24 novembre 1997 relatif au prélèvement et à l'allocation d'organes d'origine humaine, *Moniteur Belge* du 23 December 1997). No distinction is made between organ donation between spouses or other persons, including *de facto* cohabitants or registered partners. The same rules (free and informed consent, purely altruistic purposes in particular) apply in all cases.

C8 – See Article 215(2) Civil Code, which concerns marriage, and which Article 1477(2) Civil Code makes applicable to the legal cohabitation.

C9 – The duty of spouses to live together (Art. 213 Civil Code) is deemed to imply a duty to have sexual contact.

Table D (Belgium): Types of discrimination by employers or service providers that are prohibited in anti-discrimination legislation

	Between married spouses and registered partners (2003)	Between married spouses and informal cohabitants (2003)	Between registered partners and informal cohabitants (2003)	Between same-sex and different-sex partners (with same status) (2003)
1. With respect to housing	Yes	Yes	Yes	Yes
2. With respect to life insurance	Yes	Yes	Yes	Yes
3. With respect to health insurance	Yes	Yes	Yes	Yes
4. With respect to medically assisted insemination	Yes	Yes	Yes	Yes
5. With respect to other services	Yes	Yes	Yes	Yes
6. With respect to an occupational survivor's pension	Yes	Yes	Yes	Yes
7. With respect to other spousal benefits in employment	Yes	Yes	Yes	Yes

Notes to table D

D1 – Under Article 2(4) the Federal Law of 25 February 2003 prohibiting discrimination and modifying the Law of 15 February 1993 creating the Centre for Equal Opportunities and Fight against Racism, which is the main legislation implementing Directive 2000/78/EC in the Belgian legal order, the prohibition of direct and indirect discrimination extends to: the provision or offering to the public of goods and services; access to employment or to self-employment, and working conditions, in both the private and the public sector; the nomination or promotion in the public service, or the assignment of a public servant to a particular service; any mention in official documents; distribution, publication or public exposition of a text or sign under any other form; access, participation in, and any exercise of an economic, social, cultural or political activity open to the public. Moreover, not only discrimination based on *sexual orientation*, but also discrimination based on *civil status* (e.g., between married couples and legal cohabitants, or *de facto* cohabitants and legal cohabitants...) is prohibited by this legislation. It should be emphasized however that – and this somewhat compensates for the broad material scope of application of the Law as well as for the long list of prohibited grounds of discrimination – direct discrimination is defined as any distinction (based on a suspect ground) which *lacks a reasonable and objective justification* (Art. 2(2)).

D2 – See comment to D1.

D3 – See comment to D1.

D4 – See comment to D1.

D5 – See comment to D1.

D6 – See comments to D1.

D7 – See comment to D1.

Table E (Belgium): Types of couples that qualify for starting a civil marriage or registered partnership in the country itself

		Civil marriage		Registered partnership (2000)	
		Different-sex	Same-sex (2003)	Different-sex	Same-sex
Resident national with:	1. Resident national	Yes	Yes	Yes	Yes
	2. Non-resident national	Yes	Yes	Doubt	Doubt
	3. Resident foreigner	Yes	Yes	Doubt	Doubt
	4. Non-resident foreigner	Yes	Yes	Doubt	Doubt
Non-resident national with:	5. Non-resident national	Yes	Yes	Doubt	Doubt
	6. Resident foreigner	Yes	Yes	Doubt	Doubt
	7. Non-resident foreigner	Yes	Yes	Doubt	Doubt
Resident foreigner with:	8. Resident foreigner	Yes	Yes	Doubt	Doubt
	9. Non-resident foreigner	Yes	Yes	Doubt	Doubt
Non-resident foreigner with:	10. Non-resident foreigner	Yes	No, but	Doubt	Doubt
11. Sister or brother with sister or brother		No	No	Yes	Yes
12. Parent with child		No	No	Yes	Yes

Notes to table E

E1 – See comments to E2.

E2 – Under Article 1476 Civil Code, which is located in Title Vbis (De la cohabitation légale) of Book III (Des différentes manières dont on acquiert la propriété), the two persons wishing to declare that they intend to define their relationship as 'legal cohabitation' must declare their common domicile. The 'cohabitation légale' consists in a declaration before the 'officier de l'état civil' of the municipality in which the partners have chosen to share their common domicile (Art. 1476(1) Civil Code: 'Une déclaration de cohabitation légale est faite au moyen d'un écrit remis contre récépissé à l'officier de l'état civil du domicile commun'). Indeed, the institution is specifically set up to facilitate a form of material solidarity between two persons sharing the same roof. Therefore, the hypothesis of a 'legal cohabitation' being contracted by a non-resident, although not explicitly excluded in the Civil Code, would seem not to correspond to the purpose of the institution. It should also be noted that the Belgian diplomatic or consular agents are not explicitly given a competence to receive a declaration of registered partnership ('cohabitation légale'), although they do have such a competence with respect to celebrating marriage.

The doubt will disappear when the new Code of Private International Law ('Loi portant le Code de droit international privé' of 16 July 2004, *Moniteur Belge*, 27 July 2004), will take effect on 1 October 2004. Article 59 of the new Code provides that registration in Belgium can only take place is, at the moment of registration, both partners have their habitual residence in Belgium. Article 60 adds that Belgian law will be applicable to such a registration.

E3 – At first, same-sex marriage in Belgium was only open to Belgians or foreigners whose national law makes it possible for them to contract such a marital relationship. This was not stated explicitly in the Law of 13 February 2003 opening marriage to persons of the same sex, but was unanimously recognized in legal doctrine. This was done on the basis of an application by analogy of Article 170ter Civil Code, explicitly concerned only with the recognition of foreign marriages (concluded in foreign jurisdictions), and which subordinates the validity of marriage to the conditions imposed by the national law of the concerned persons (according to Article 170ter of the Civil Code: 'Les mariages visés à l'article 170 [these are the marriages celebrated under foreign jurisdictions] seront, quant au fond, valables en Belgique, si les parties contractantes ont satisfait aux conditions prescrites à peine de nullité par leur statut personnel pour pouvoir contracter mariage'). That solution was confirmed by the preparatory works of the Law. However, in a circular of 23 January 2004 (*Moniteur Belge*, 24 January 2004) the Minister of Justice made it clear that any foreign legal prohibition on same-sex marriage must be considered discriminatory and contrary to Belgian public order, and therefore should not be applied. The circular goes on to say that in such cases Belgian law should be applied if at least one of the future spouses is either a Belgian citizen or a habitual resident of Belgium. This means that Dutch nationals (and perhaps citizens of Canada or Massachusetts) are no longer the only foreigners who have access to same-sex marriage in Belgium.

The content of the circular has been codified into a new Code of Private International Law ('Loi portant le Code de droit international privé' of 16 July 2004, *Moniteur Belge*, 27 July 2004), that will take effect on 1 October 2004. Article 44 of the new Code provides that a marriage can be contracted in Belgium if one of the future spouses is a Belgian citizen or has his or her domicile or (since at least three months) his or her habitual residence in Belgium. Article 46 of the new Code provides that validity of marriage will be considered according to the national law of each future spouse; but it also provides that foreign legislation prohibiting same-sex marriages will not be taken into account if one of the spouses has the citizenship of a country allowing same-sex marriages, or if one of the spouses has his or her habitual residence in such a country.

With regard to the availability to foreigners, either resident or non-resident in Belgium, of the registered partnership organized in Belgium under the Law of 23 November 1998 on legal cohabitation, two opinions may be defended. Some would reason by analogy with the private international law rule governing access to marriage (see Article 170ter Civil Code mentioned in the comment to E3): whether they reside or not in Belgium, the regime of registered partnership ('cohabitation légale') would be accessible only to foreigners provided that their national law organizes a similar institution (such as the French *pacte civil de solidarité*, the Swedish registered partnership, etc.). This position (which appears to be defended by L. Barnich, in *L'union libre et les unions légales en droit international privé*, *L'Union libre – commentaire pratique*, 2002, V.1.6.) however underestimates the difficulty to make such comparisons between institutions of different countries – in which sense precisely can it be said that the French PACS sufficiently approximates the Belgian 'cohabitation légale' so that this institution should be accessible to French nationals in Belgium? More importantly, it assimilates the 'cohabitation légale' to a form of 'civil union' or 'registered partnership', despite the fact that the institution was deliberately crafted by the Belgian legislator to be a purely material arrangement, with no consequences on civil status or obligations which would relate to an *affectio maritalis* between the partners. Therefore, doubts remain on the availability to foreigners of the institution of 'cohabitation légale' created in Belgium by the Law of 23 November 1998.

The doubt will disappear in October 2004 (see the comments to E2).

E4 – See comments to E2 and E3.

E5 – See comments to E2 and E3.

E6 – See comments to E2 and E3.

E7 – See comments to E2 and E3.

E8 – See comments to E2 and E3.

E9 – See comments to E2 and E3.

E10 – Although foreigners may celebrate their marriage in Belgium (see Articles 63 to 75 Civil Code on the celebration of marriage and its conditions), the officier de l'état civil in charge, within the municipal administration, of celebrating the marriage, will have to verify whether each of the spouses complies with the requirements of his/her national law with respect to the conditions of marriage. The exception discussed in the comments to E3 does not apply in the case of two non-resident foreigners. Only very few same-sex couples of non-resident foreigners could marry in Belgium: for example a couple of Dutch citizens.

E11 – The Law of 23 November 1998 limitatively enumerates the conditions which the parties have to fulfill to be able to register under the regime of 'cohabitation légale', in inserting in Article 1475(2) of the Civil Code that 'Pour pouvoir faire une déclaration de cohabitation légale, les deux parties doivent satisfaire aux conditions suivantes :

1° ne pas être liées par un mariage ou par une autre cohabitation légale;

2° être capables de contracter conformément aux articles 1123 et 1124'.

The possibility for a brother and sister, two brothers, or a parent and child, to form such a registered partnership has explicitly been envisaged in the preparatory works of the Law of 23 November 1998: the purpose was to remove the institution from anything which would tend to make it similar to marriage – although, in what has been denounced by a number of authors as anomalous, the 'cohabitation légale' still remains restricted to two, unmarried individuals.

E12 – See comments to E11.

Table F (Belgium): Authority for starting a civil marriage or registered partnership

	Civil marriage		Registered partnership (2000)	
	Different-sex	Same-sex (2003)	Different-sex	Same-sex
1. Registry of births, marriages and deaths	Yes	Yes	Yes	Yes
2. Local population administration	No	No	No	No
3. Church	No	No	No	No
4. Court	No	No	No	No
5. Private person with special authorisation	No	No	No	No
6. Public notary	No	No	No	No
7. Administrative magistrate	No	No	No	No

Notes to table F

F1 – The 'cohabitation légale' instituted by the Law of 23 November 1998 was presented by the legislator as an essentially patrimonial arrangement, excluding almost any affective or sexual elements (except that the 'legal cohabitants' must be two and no more, and that the marriage of either legal cohabitants or of the cohabitants together automatically ends the legal cohabitation). Therefore, the 'cohabitation légale' is registered on the local registry of the population, held in the local municipality; in contrast to what was proposed when a form of 'civil union', equivalent to a registered partnership, was proposed in Belgium (Proposition de loi instituant l'union civile, *Doc. parl.*, Ch. repr., 1995-1996, n° 372/1), there is no notification in the margin of the birth act. Nevertheless, the competent authority is the same, before which both marriage and 'cohabitation légale' are passed: this is the *officier de l'état civil* of the municipal administration where the spouses / partners have their common domicile. See Article 75 of the Civil Code with respect to the celebration of marriage by the *officier de l'état civil*. See Article 1475(1) of the Civil Code, introduced by the Law of 23 November 1998, for registered partnership (cohabitation légale).

F2 – Neither persons who wish to marry nor those wishing to register their partnership as 'cohabitation légale' have the choice to go before another authority than the *officier de l'état civil* mentioned in F1.

F3 – Article 21 of the Belgian Constitution states that the religious celebration of marriage cannot precede the civil marriage by the public officer (*officier de l'état civil*). Religious marriage is without any legal effect. It is neither a substitute for, nor a condition of, civil marriage.

F4 to F7 – Articles 75 and 1475, respectively concerning marriage and registered partnership ('cohabitation légale'), stipulate that the *officier de l'état civil* is exclusively competent to celebrate marriage or to receive a declaration that partners intend to enter into a registered partnership. No other possibility is provided by the law.

Table G (Belgium): Means of ending a marriage or registered partnership

	Civil marriage		Registered partnership (2000)	
	Different-sex	Same-sex (2003)	Different-sex	Same-sex
1. By court decision (after joint or individual petition)	Yes	Yes	No	No
2. By mutually agreed contract (outside court)	No, but	No, but	Yes	Yes
3. Unilaterally by one partner (outside court)	No	No	Yes	Yes
4. By conversion of marriage into registered partnership, or vice versa (outside court)	No	No	No	No
5. By one registered partner marrying a third person (or starting a registered partner with a third person)	No	No	Yes	Yes
6. By the registered partners marrying each other (or by the married partners starting a registered partnership together)	No	No	Yes	Yes
7. By administrative decision (after joint or individual petition)	No	No	No	No

Notes to table G

G1 – An end can be put to a registered partnership ('cohabitation légale') upon the unilateral will of any of the partners, without the need for any particular justification (Article 1476(2) of the Civil Code: 'Il peut être mis fin à la cohabitation légale, soit de commun accord par les cohabitants, soit unilatéralement par l'un des cohabitants au moyen d'une déclaration écrite qui est remise contre récépissé à l'officier de l'état civil (...)'); the officier de l'état civil simply registers this unilateral notification by one partner, who simply must declare explicitly his/her desire to end the partnership but is not even required to give a justification). Therefore, there will never be any need to resort to the judge to end the registered partnership. Of course, the consequences of a cessation of the registered partnership may be disputed, and end up in being litigated.

G2 – Divorce is always pronounced by a tribunal. However, the spouses can mutually consent to the divorce, and the convention organizing their separation can be passed before a public notary. The role of the judge is then simply to ratify this agreement.

G3 – See comment on G1.

G4 – See comment on G5

G5 – Under Article 1476(2) of the Civil Code, the marriage of either of the partners registered within a 'cohabitation légale', or the marriage of these partners with one another, automatically puts an end to the partnership.

G6 – See comment on G5.

G7 – See comments on G1, G2 and G3.

Some literature in English

- Olivier De Schutter and Anne Weyembergh, ' "Statutory Cohabitation" under Belgian Law: A Step Towards Same-Sex Marriage?', in: Robert Wintemute & Mads Andenaes (eds.), *Legal Recognition of Same-Sex Partnerships*, Oxford: Hart Publishing, 2001, p. 465-474.
- Yuval Merin, *Equality for Same-Sex Couples. The legal recognition of gay partnerships in Europe and the United States*, Chicago/London: The University of Chicago Press, 2002, p. 147-150.
- Kees Waaldijk, 'Others may follow: the introduction of marriage (and quasi-marriage or semi-marriage) for same-sex couples in European countries', 38 *New England Law Review* 2004, p.569-589.

Some literature in French

- P. Borghs, 'Quel statut pour les parents de même sexe?', *Journal de Procès*, 4 April 2003, p. 14.
- N. Dandoy and F. Taimont, 'Contours de la loi du 23 novembre 1998 instaurant la cohabitation légale', *Revue régionale de droit*, 1995, p. 267.
- O. De Schutter and A. Weyembergh, 'La cohabitation légale: une étape dans la reconnaissance des unions entre personnes de même sexe', *Journal des tribunaux*, 2000, p. 98.
- Y.-H. Leleu, 'La loi du 23 novembre 1998 instaurant la cohabitation légale (Le régime juridique de la cohabitation légale)', in *Actualités du droit familial 1997-1999*, Formation permanente CUP, octobre 1999, p. 55.
- J.-L. Renchon, 'La régulation par la loi des relations juridiques du couple non marié', in X, *Le couple non marié à la lumière de la cohabitation légale*, Bruxelles, Bruylant, 2000, p. 33.

