RECOGNITION OF A STATUS ACQUIRED ABROAD IN THE EU. – A CHALLENGE FOR NATIONAL LAWS FROM EVOLVING TRADITIONAL METHODS TO NEW FORMS OF ACCEPTANCE AND BYPASSING ALTERNATIVES

RECONOCIMIENTO DE UNA SITUACIÓN JURÍDICA RELATIVA AL ESTATUTO PERSONAL VÁLIDAMENTE CREADA O MODIFICADA EN EL EXTRANJERO EUROPEA – UN RETO PARA LA LEGISLACIÓN NACIONAL

Susanne Gössl
Professor of Civil Law and Digitalisation in German, Foreign and Private International Law at Kiel University (Germany)
ORCID ID: 0000-0002-2585-4614

Martina Melcher
Assistant Professor at the Institute of Civil Law Foreign Private Law and Private International Law at Graz University (Austria)
ORCID ID: 0000-0001-7686-9990

in cooperation with*

Florian Heindler (Austria), Natalja Žitkevitš/ Katažyna Bogdzevič (Baltic States), Sarah Den Haese (Belgium), Eva Kaseva (Bulgaria), Tena Hosko (Croatia), Nicole Stybnarova (Czech Republic), Marion Ho-Dac (France), Tamás Szabados (Hungary), Martina Vivirito Pellegrino/Marta Giacomini (Italy), Tess Bens/Mirella Peereboom-van Drunick (Netherlands), Natalja Žitkevitš (Poland), Isabel Lorente Martinez/ María Asunción Cebrián Salvat (Spain), Laima Vaige (Sweden)

Recibido:15.12.2021/Aceptado:21.01.2022
DOI: https://doi.org/10.20318/cdt.2022.6737

Abstract: In view of the ECJ and ECtHR case law on the recognition of names, same-sex marriages and parent-child relationships established abroad, this paper explores how various Member States conform with the resulting obligations. We compared 16 EU jurisdictions and their implementation of the aforementioned case law. Overall, a general tendency in favor of the recognition of a status acquired abroad can be observed; be it by the re-shaping of procedural recognition and private international law rules, or the application of new techniques, or an increasing restraint to reject recognition due to public policy reasons. Irrespective of the technique, however, a methodological struggle to comply with the

* Most national reports, which form the basis of this paper, are published in this issue (CDT (March 2022), Vol. 14, N°1, namely Austria, Baltic States, Belgium, Croatia, France, Germany, Hungary, Italy, Netherlands, Poland, Spain) or will be submitted for publication in the following issue (Sweden). Some national reporters decided not to publish their report but generously allowed us to use their research for our comparative analysis (Bulgaria, Czech Republic).

European obligations is evident. Consequently, the mere registration of a status acquired abroad proves to be of increasing importance in practice.

Keywords: recognition/acceptance, status registration, international surrogacy, international name law, conflict of laws methodology

Resumen: En algunas materias relacionadas con el estatuto de la persona, la jurisprudencia del TJUE y del TEDH ha fomentado el reconocimiento por parte de los Estados de las situaciones jurídicas válidamente creadas o modificadas en otros Estados. Esta jurisprudencia ha cambiado y está cambiando la metodología y práctica propias del Derecho internacional privado de producción interna. Comparamos 16 jurisdicciones de la UE y su aplicación de la jurisprudencia mencionada. En general, se observa una tendencia general a favor del reconocimiento de un estatuto adquirido en el extranjero; ya sea por la reconfiguración de las normas de reconocimiento procesal y de Derecho internacional privado, o por la aplicación de nuevas técnicas, o por una creciente moderación a la hora de rechazar el reconocimiento por razones de orden público. Sin embargo, independientemente de la técnica, es evidente la lucha metodológica para cumplir con las obligaciones europeas. En consecuencia, la mera registración de un estatus adquirido en el extranjero convierte más y más importante en la práctica.

Palabras clave: estatuto personal, Ley personal, reconocimiento, situación jurídica relativa al estatuto personal válidamente creada en el extranjero, maternidad subrogada internacional, derecho internacional del nombre, metodología del Derecho internacional privado.

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I. Introduction

1. Over a decade ago, a series of decisions by the **CJEU** regarding international name law triggered a debate commonly associated with 'recognition or acceptance of status'.[1] At least regarding names, a more or less certain structure has emerged.[2] A name legally acquired and registered in one Member State

[1] A similar discussion came up in international tax law and international company law (see e.g. CJEU 27 August 1988, *Daily Mail*, C-81/87; 9 March 1999, *Centros*, C-212/97; 5 November 2002, *Überseering*, C-208/00; 30 August 2003, *Inspire Art*, C-167/01; 16 December 2008, *Cartesio,* C-210/06; 12 July 2012, *VALE*, C-378/10; 25 October 2017*, Polbud*, C-106/16).

[2] See CJEU, 2 October 2003, *Garcia Avello,* C-148/02; 14 October 2008, *Grunkin-Paul*, C-353/06; 22 December 2010, *Sayn-Wittgenstein*, C-208/09; 12 May 2011, *Runevič-Vardyn*, C-391/09; 2 June 2016, *Bogendorff von Wolffersdorff*, C-438/14; 8 June 2017, *Freitag*, C- 541/15.

has to be recognized in another Member State as long as the recognition does not violate public policy (e.g. abolishment of nobility and related titles). According to the CJEU, having to use a surname in one Member State that is different from the one used in another Member State is liable to hamper the exercise of the right to move and reside freely within the territory of the Member States (e.g. different names in passports, driver's licences etc). Thus, the EU citizens' right to free movement as stipulated in Article 21 TFEU serves as a reason for the recognition of status in EU law. In addition, the principle of mutual recognition and trust facilitates such an approach. So far, these CJEU judgments have even resulted in some new legislative developments, e.g. the EU regulation regarding the circulation of public documents[3]. Furthermore, in 2018, the CJEU extended the aforementioned case law to same-sex marriages validly concluded in one Member State: At least within the context of directive 2004/38, the concept "spouse" has to be extended to same-sex spouses, even if the host Member State in general rejects the concept of a same-sex marriage. The court explicitly referred to Article 21 TFEU and the case law regarding the acceptance of a name.[4] Most recently, the CJEU ruled that any Member State has to recognise the parent-child relationship between a child and the two persons of the same-sex designated as parents in a birth certificate issued by another Member State in the context of free movement – even if it does not know the concept of parenthood of persons of the same sex (e.g. co-motherhood) in its own law.[5] Moreover, it has to issue an identity document, such as a passport, to the child if he/she is a national of the host State.[6]

2. A parallel discussion evolved after the **ECtHR** ruled on the 'recognition' of a certain status on several occasions. Those cases concerned the recognition of a foreign adoption[7] and the parentage of intended parents after surrogacy proceedings[8]. Furthermore, similar considerations applied regarding same-sex marriages concluded abroad.[9] Contrary to the CJEU, the ECtHR justified its decisions by reference to certain human rights, in particular the right to respect for private and family life (Article 8) and the right to marry (Article 12 ECHR).

3. From a broader perspective, one could ask whether the reasoning applied in the CJEU and ECtHR decisions could or should be extended to other cases of status acquisition or other legal relationships *per se*. Similar needs arise not only on the EU and European, but also on the national law level. Furthermore, as the case law leaves a broad margin of appreciation to national institutions (legislative, judiciary), the national 'implementation' and reception of these CJEU and ECtHR judgments may differ, depending also on the legal context.

4. In this regard, we conducted a **comparative analysis** involving young researchers from various EU-Member States.[10] We wanted to find out how the *national* law, courts and other authorities deal with the question of recognition of status and the corresponding obligations and challenges imposed by the CJEU and ECtHR. Thereby, the term 'status' is understood broadly in this paper and refers to a legally relevant characteristic of a person that is of a (more or less) permanent character that ought to be determined by one law for all purposes.[11] Status in that sense is a broad notion including the name and gender of

[3] Regulation (EU) 2016/1191 of 6 July 2016 on promoting the free movement of citizens, OJ L 200, 1.

[4] CJEU, 5 June 2018, *Coman,* C-673/16, esp. recitals 37 et seq.

[5] CJEU, 14 December 2021, *V.M.A. –,Pancharevo'*, C-490/20, recital 49.

[6] CJEU, 14 December 2021, *V.M.A. –,Pancharevo'*, C-490/20, recital 45.

[7] ECHR, 28 June 2007, *Wagner & J.M.W.L. v. Luxembourg*, no. 76240/01; 3 May 2011, *Negropontis-Giannisis v. Greece*, no. 56759/08.

[8] ECHR, 26 June 2014*, Mennesson v. France*, no. 65192/11; 26 June 2014, *Labassee v. France*, no. 65941/1; 24 January 2017, *Paradiso u. Campanelli v. Italy*, no. 25358/12.

[9] ECHR, 14 December 2017, *Orlandi et al. v. Italy*, nos. 26431/12; 26742/12; 44057/12 and 60088/12.

[10] Most national reports, which were drafted to guide our comparison, are published in this issue (CDT (March 2022), Vol. 14, N°1: Austria, Baltic States, Belgium, Croatia, France, Germany, Hungary, Italy, Netherlands, Poland, Spain) and the following issue (Sweden). References to these reports (by marginal numbers (mn)) can be found in many footnotes in this paper; cases and legislation are cited in accordance with the citation styles (e.g. abbreviations) in the national reports. Some national reporters decided not to publish their report but generously allowed us to use their research for our comparative analysis (Bulgaria, Czech Republic).

[11] Cf E. Rabel, The conflict of laws: a comparative study, Vol. IV, Ann Arbor, University of Michigan Law School, 1958,

a person, legal capacity and family relations such as parentage (filiation, adoption, surrogacy), marriage, divorce, conclusion and dissolution of formalised partnerships. 'Recognition'[12] is also understood broadly and encompasses any legal technique which makes a status, that has been acquired abroad, i.e. formed/ conferred in accordance with the laws of another State, valid also as regards the recognizing state.

5. As the CJEU and ECtHR case law set up recognition obligations, without however specifying *how* recognition should be achieved, the methods, which are applied, vary. Generally, academic literature on status recognition differentiates between **three distinct methods of recognition**:

(1) recognition of foreign judgments (which we call 'procedural recognition' in this paper)
(2) recognition by application of the PIL rules (i.e. reference rules)
(3) 'acceptance' of a legal situation as such, without reference to a foreign decision (or other formal requirements) or use of a (classic) connecting factor (i.e. PIL rule).

6. At this point, it must be stressed that **all national legal systems use more than one recognition method**. Most countries adhere (mainly) to a dual system consisting of (extended) procedural recognition and, as a second (subordinate) step, recognition by PIL rules.[13] Some cope with the CJEU/ ECtHR recognition obligations by applying a remodelled version of traditional procedural recognition rules to status decisions and acts. In the absence of recognizable (judicial) decisions, others rather rely on rules providing for the acceptance of foreign status instead of classic reference rules. The systems and their nuances are manifold, and each is unique.

7. First, we are going to take a closer look at how traditional Conflict of Laws methods are used and re-shaped to ensure the recognition of a foreign status in the Member States (see *infra* part II). Second, we are going to present and analyse some national rules which employ a technique of 'acceptance' of a foreign status (see *infra* part III). Third, we are going to show the importance of mere status registration as an alternative or addition to status recognition (see *infra* part IV). Fourth, public policy and related reasons to refuse recognition are examined (see *infra* part V). Finally, we are going to assess our findings and propose some changes from a European perspective to enhance the situation of people living in a cross-border context (see *infra* part VI). Finally, we are going to present our main conclusions from the findings revealed by our comparative study and analysis (see *infra* part VII).

II. Evolving Traditional Conflict of Laws Methods

1. Procedural Recognition: A Traditional Method Reformed

A) General Remarks

8. So far, the rules on 'traditional procedural recognition', i.e. the procedural recognition of foreign judgments, are well established in the Member States and appear to work seamlessly. Typically, a

p. 114; A.E. von Overbeck, "Persons (chapter 15)", in: K.Lipstein/R. David, *International encyclopedia of comparative law*, Tübingen, Mohr Siebeck, 2011, 15-3 et seq.

[12] We are aware of the fact that 'recognition' as a legal term is strongly associated with the 'recognition of judgments'. However, it is also commonly used in a broader sense – by the CJEU (14 October 2008, *Grunkin-Paul*, C-353/06, ECLI:EU:C:2008:559: '…recognize a child's surname…' (ruling)), the ECtHR (14 December 2017, *Orlandi et al. v. Italy*, nos. 26431/12; 26742/12; 44057/12 and 60088/12) and in the aforementioned academic debate (see for example M. Lehmann, "Recognition as a Substitute for Conflict of Laws?", in Leible, *General Principles of European Private International Law*, Alphen aan den Rijn, Wolters Kluwer, 2016, p. 11 et seq).

[13] For example, France (report mn 3, 24 et seq), Austria (report mn 32 et seq), Germany (report mn 18 et seq), Croatia (report mn 16 et seq), Sweden (report mn 14 et seq), Spain (report mn 2, 26, and 28), Poland (report mn 42), Hungary (report mn 22), and Belgium (report mn 33). In Estonia, the rule is acceptance, however, the Supreme Court declared – despite a general prohibition of same-sex marriages in Estonia – that a foreign marriage which was performed in accordance with the laws of the couple's habitual residence must be considered valid in Estonia; this represents a recognition by PIL rules (see report mn 25).

status acquired abroad is recognized only if the status was established by judgment. Thus, the status as divorcee (i.e. court judgment on divorce) or adoptee (i.e. court judgment on adoption) may be recognized this way. However, two developments in the national laws of the Member States alter and broaden our understanding of 'traditional procedural recognition' – and encourage the recognition of legal situations which are *not* created by a judicial decision in the narrower sense.

9. On the one hand, the method of traditional recognition of judgments has been **extended** in some States to also include decisions by other (public) authorities or other (public) acts. This 'extended procedural recognition' applies the (same) rules as are used for the traditional recognition of judicial decisions (II.1.B). On the other hand, in some States, procedural recognition has been **remodelled** in so far that a similar form of procedural recognition is used to recognise a foreign status created by (non-) judicial decisions or only documented/registered by public authorities (II1.C). Furthermore, in practice, the relevance of formal procedural recognition is decreasing in some Member States due to fewer status determination by judgment and a more limited use of recognition proceedings (II.1.D).

10. The advantage of such a reformed (extended or remodelled) procedural recognition is that it – generally – allows public documents to be recognized without a review on the merits, as this is usually not required for procedural recognition.[14] As regards substantive criteria, the procedural methods of recognition tend to rely on a public policy (and *fraus legis*) control only.[15] Besides, the (formal) requirements for recognition are generally quite manageable and ressemble each other in most of the Member States. They include: (some kind of) indirect competence of the foreign authority (e.g. hypothetical competence according to the *lex fori*[16] or to an internationally accepted ground for jurisdiction[17]; no exclusive jurisdiction[18] in the recognizing state; no exorbitant jurisdiction or some kind of substantive connection between the jurisdiction of the foreign court and the dispute[19]); compliance with basic procedural requirements (e.g. 'proper' proceedings[20], lawful service of the defendant[21]; right to be heard for both parties[22]); no irreconcilability (with a conflicting decision or pending case[23] in the recognizing State); finality of the decision[24]. In some Member states, all the criteria apply, in others only parts of the criteria apply[25].

[14] See, for example, for France: Civ. 1re, 20 February 2007, *Cornelissen*, n°05-14082, for details see French report mn 56; and for Bulgaria: Article 121 (1) BCPIL.

[15] However, in the Czech Republic, the factual basis of the foreign court proceedings regarding parentage must have been established in accordance with Czech law, see § 51 (3) Czech PIL. Similarly, section 637 (2) 7) Latvian Civil Procedure law requires the foreign decision to be based on the law which would have been applied according to Latvian PIL rules.

[16] Austria (see, for instance, OGH 26 April 2017, 1 Ob 21/17w); Germany (*Spiegelbildprinzip*, section 109 (1) (1) FamFG); Estonia (§ 620 (1) (6) Estonian Code); Latvia (section 637 (2) (1) Latvian Civil Procedure Law); Bulgaria (Article 117 BCPIL); Hungary (section 109 (1) and (2), 116-119 New PIL Code, report mn 52); Italy (Article 64 (1) (a) PIL, see Italian report mn 42. In contrast, the competence is not verified (anymore) in France (Civ. 1re, 20 February 2007, *Cornelissen,* **n°05-14082, see** report mn 10 and 56), but sufficient proximity of the deciding foreign court and the case is required.

[17] Netherlands regarding divorce, see report mn 20.

[18] Article 25 (1) Belgian Code of PIL; Article 69 PILA (Croatia); Latvia section 637 (2) (1) Latvian Civil Procedure Law; Article 1146 (1) (2) Polish CCP; Article 46 (c) Spanish Law for International Civil Cooperation.

[19] Article 25 (1) Belgian Code of PIL; Article 69 PILA (Croatia); Article 10:100 (1) (a) DCC regarding filiation (Netherlands).

[20] Article 10:100 (1) (b) lit. b DCC regarding filiation (Netherlands).

[21] Poland (Article 1146 (1)(3) CCP, see report mn 31); Bulgaria (Article 117-124 BCPIL); Spain (Article 46 (b) Spanish Law for International Civil Cooperation); Latvia (section 637 (2) (3) Latvian Civil Procedure Law). For Belgium see, in particular regarding default judgments, report mn 25.

[22] All, sometimes included in public policy, sometimes explicitly mentioned. See, for example, Croatia (Art 68 PILA, report mn 37); Hungary (section 109 (4) New PIL Code, report mn 57), Italy (Article 64 (1) (b) PIL, report mn 42).

[23] Austria (report mn 39), Belgium (Article 25 (1) Belgian Code of PIL), Bulgaria (Article 117 BCPIL), Croatia (Art 70 PILA), Germany (Section 109 (1) (3) FamFG), Estonia (§ 620 (1) (3) and (4) Estonian Code), Hungary (section 109 (4) (c-e) New PIL Code), Latvia (section 637 (2) nos. 4-5 Latvian Civil Procedure Law), Spain (Article 46 (d)-(f) Spanish Law for International Civil Cooperation), Italy (Article 64 (1) (a) PIL), Poland (Article 1146 (1)(5) and (6) CCP), Netherlands (Article 10:100 (3) DCC regarding filiation).

[24] Article 25, §1 Belgian Code of PIL; Article 67 PILA (Croatia); § 620 para 2 Estonian Code; section 109 (1) (b) New PIL Code (Hungary, see also report mn 52); section 637 (2) (2) Latvian Civil Procedure Law; Article 1146 (1) (1) CCP (Poland); Art. 117 BCPIL (Bulgaria); Netherlands (Article 10:100 (1) DCC regarding filiation); Italy (Article 64 (1) (e) PIL).

[25] For example, in France, only the hypothetical (indirect) competence of the foreign court is required, see report mn 10.

A) Extended Procedural Recognition

11. In some jurisdictions, e.g. BELGIUM,[26] CROATIA[27] and GERMANY,[28] a 'judicial decision' in the sense of recognition is not limited to decisions made by judges. It includes every authority authorised by the state, as long as the decision is equated with a court decision in the state of origin, i.e. is a binding final decision on the law. Similarly, the rules regarding foreign adoption decisions in the NETHERLANDS apply to all "decisions" taken by a competent authority.[29] In CROATIAN doctrine, there is also the discussion whether religious (i.e. Canonical) courts might issue "foreign decisions".[30] In BULGARIA, bilateral obligations exist which require the recognition of 'judgments' issued by courts as well as civil status authorities and guardianship authorities thereby obviously extending procedural recognition to decisions by status authorities.[31]

12. In other countries, the term **'judicial decision' is even broader**. In POLAND[32], HUNGARY[33] and AUSTRIA[34], the mere involvement of a public authority acting in civil matters (e.g. public notary, civil status registry) seems to be sufficient, e.g. the registration of a status even though this registration is of a declarative nature only. In the NETHERLANDS, a divorce can be recognized 'if it has been decreed by a decision of a court or other authority to whom jurisdiction has been granted'; this authority can even be an ecclesial or other religious authority.[35] In SWEDEN, even a private divorce (*talaq*) may be recognized by application of the procedural recognition rules as long as it is confirmed by a state authority in some form (and a recognition respects the human rights requirements).[36] In LATVIA, it is sufficient that the decision was made by a public authority in civil matters if the recognition is based on European rules or international treaties; otherwise, the public authority must have public powers for the (autonomous) procedural recognition rules to apply.[37]

B) Remodelled Procedural Recognition

13. As indicated above, we speak of a remodelled procedural recognition method, whenever specific procedural and formal requirements are applied for recognition which are, however, not the requirements used by traditional procedural recognition. Naturally, the criteria can be quite similar – but they must not be same; they constitute parallel regimes. Otherwise, we would speak of extended procedural recognition (see *supra* II.1.B). Such remodelled recognition rules can be found especially in ITALY for family relationships and personality rights and in the NETHERLANDS regarding divorce and filiation.

14. ITALIAN law adopts a remodelled procedural recognition method regarding decisions on the existence of family relationships or personality rights (Article 65 PIL): A foreign measure which is

[26] Article 22 § 3 no. 1 Belgian Code of PIL.

[27] Article 66/3 of the PILA, see Croatian Supreme Court, Gž 27/1993-2 of 21 October 1993, Croatian report mn 28.

[28] Report mn 21.

[29] Articles 10:108 and 10:109 DCC, report mn 36.

[30] V. Tomljenović, "The Canonic Marriage - Revision of Croatian Family Law and Its Conflict of Laws Implications", in A. Bainham, *International Survey of Family Law*, Bristol, Jordan Publishing, 2003, pp. 107, 115-117, 120-121.

[31] Article 46 of the Bilateral Treaty between the Republic of Bulgaria and the Union of the Soviet Socialist Republics, promulgated in the Offical Journal of Bulgaria n°12 of 10 February 1976.

[32] Article 1145 CCP, report mn 31.

[33] See section 3 (a) New PIL Code, report mn 11 and 45.

[34] See Austrian report mn 38 and 4 (fatherhood), 15 (adoption), 13 and 55 (surrogacy). Critically, M. Nademleinsky, "Die Anwendung von Anerkennungsregeln auf familienrechtliche Entscheidungen", in *Österreichische Juristen-Zeitung*, No. 23-24, 2016, pp. 1063 et seq. See OGH 27 November 2014, 2 Ob 238/13h with further references; OGH 31 August 2006, 6 Ob 189/06x; 29 January 2010, 1 Ob 138/09i; 13 October 2011, 6 Ob 69/11g. See also OGH 20 December 2018, 6 Ob 142/18b.

[35] Article 10:57 para 1 Dutch Civil Code, report mn 20.

[36] Supreme Court of Sweden NJA 2013 N9; see report mn 9.

[37] Section 636 (2) Latvian Civil Procedure Law.

not a judgment (notary deed, administrative decision/writ) is recognized in Italy when it is *rendered by* the authority of the State whose law is recalled by the Italian PIL provisions or *produces effects* in that system (as long as public policy and basic aspects of 'fair trial' are respected).[38] It is irrelevant whether the foreign authority acted within its competence or applied the law correctly from its point of view.

15. In the NETHERLANDS, a divorce which does not meet the criteria set out by Article 10:57(1) DCC can still be recognized under Article 10:57(2) DCC if both parties consented or accepted the divorce.[39] As this recognition is not based on the rule on (extended) procedural recognition, but still requires some procedure or supervision,[40] it can be categorized as remodelled procedural recognition. Similarly, Article 10:101 which applies parts of the rule on judicial decisions regarding filiation (Article 10:100) to foreign legal facts and legal acts laid down in a certificate in accordance with local regulations is an example of remodelled procedural recognition.[41]

C) Decreasing Impact of Procedural Recognition

16. As a separate recognition proceeding[42] might create an extra burden to the parties, another tendency has evolved on the procedural level, probably also inspired by the EU abolition of exequatur: More and more legal systems only require a recognition proceeding if the validity of the judgment is challenged or it is needed for other purposes (e.g. to obtain specific effects).[43] If a (court) decision or another document forms the basis of recognition, a translation will often be required.[44]

17. Besides, a rising appreciation of private autonomy in the substantive law of the Member States (and other States worldwide) furthers the opportunities to privately 'create' or change a new status without judicial involvement. For example, in many Member States so-called 'private divorces', i.e. divorces based on a party agreement without requiring a judicial or other divorcing decision, are on the rise.[45] Reformed procedural recognition rules may equally encompass such phenomena, thereby facilitating their recognition abroad. Interestingly, the new Brussels IIb Recast Regulation 2019/1111 already addresses this issue in Chapter IV section 4 (Authentic instruments and agreements).

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[38] Several relevant decisions exist in Italy: e.g. Corte di Cassazione No. 19599 of 2016 which recognized and ordered the transcription in the public registry of a birth certificate validly rendered in Spain for a child born by egg donation; Corte di Cassazione No. 14878 of 2017 which ordered the rectification of a transcription in the Italian public registry of a birth certificate that had already been transcribed but that has subsequently been amended in the State of origin (UK); originally only the birth mother was indicated as mother, in the amended version also the other woman was named as mother (the child was the result of a medically assisted procreation technique). For details see Italian report mn 44.

[39] See report mn 20.

[40] See, in contrast, Article 10:58 DCC (report mn 20).

[41] See report mn 33, 34.

[42] As e.g. in the Czech Republic: Foreign public decisions which under the Czech law would have been issued by a court must be recognized by a court (Act on Private International Law no. 91/2012 Coll., §14), see also § 55 and § 62 of the Act on PIL regarding parenthood and adoption; Croatia: Article 66/1 PILA, at least for marriage and parentage, see report mn 18 et seq.

[43] E.g. Austria, §§ 91a et seq AußStrG as amended on 3 August 2009, Austrian Federal Law Gazette I 2009/75, see report mn 37; France, see report mn 9; Belgium, Article 22 § 1 Belgian Code of Private International Law, see report mn 7; Germany: A separate exequatur proceeding is only necessary in marital matters, § 108 (1) Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction, report mn 20; Hungary: s. 122 (1) of the New PIL Code, report mn. 34; Spain: Article 44.2 Law of International Civil Cooperation, report mn 28.

[44] Spain: Article 144 Law of Civil Procedure, report mn 29; Belgium: if the document is not available in Dutch, French or German, see report mn 35.

[45] E.g. France: Article 229 Code Civil, Loi n°2016-1547 du 18 novembre 2016 - article 50; Italy: Article 6 decreto legge: Misure urgenti di degiurisdizionalizzazione ed altri interventi per la definizione dell'arretrato in materia di processo civile (decreto legge Nr. 132, Gazzetta Ufficiale, 12 September 2014), approvato definitivamente 6 November 2014; Greece Article 22 law 4509/2017, GG A 201/22 December 2017, modifying Article 1438 Greek Civil Code; see S. Gössl, "Open Issues in European International Family Law: Sahyouni, "Private Divorces" and Islamic law under the Rome III Regulation", in *The European Legal Forum,* No. 3 - 4, 2017, pp. 68 *et seq*.; S. Gössl, "Überlegungen zum deutschen Scheidungskollisionsrecht nach „Sahyouni"", in *GPR: Zeitschrift für das Privatrecht der Europäischen Union* , Vol. 15, No. 2, 2018, p. 94 *et seq*.

2 Towards a Recognition via PIL

A) General Remarks

18. The second typical way to "recognize" a status is sometimes dubbed "recognition via conflict of laws" or "recognition by PIL rules". The accepting authority uses the connecting factors of the *lex fori* to determine the law under which she reviews the establishment of the status. If the requirements of the domestic law determined by the connecting factors of the *lex fori* are fulfilled, the status is "recognized" or accepted. This method *de facto* leads to the "recognition" of a status whenever the *lex fori* uses connecting factors that are also used in the State establishing the status or whenever the substantive law referred to in the State of origin of the status uses similar requirements as the "recognizing" State. However, if the connecting factor in question refers to a state according to whose law the status in question does not exist/is not valid, the foreign status is not recognized – resulting in a 'limping relationship'. In other terms, recognition via PIL rules is rather a recognition 'by chance'.

19. Formally, some countries require an authentic instrument[46] or certificate or equivalent documentation to recognize a foreign status by PIL.[47] In policy-sensitive cases, sometimes it seems to be preferable for authorities to deny recognition due to a lack of formally correct documents if such documents are required.[48] Other countries, e.g. FRANCE,[49] GERMANY,[50] AUSTRIA[51], SWEDEN, and SPAIN[52] recognize the foreign status (based on PIL) independently of a foreign registration or other documentation, although such a documentation is usually used to help proving the facts of the case, especially if the relevant PIL rule refers to the country where the status was established.[53] If documents are presented, a legalization/apostille and a translation can be useful to prove its content.[54] If no public documentation is required, private acts such as adoption contracts or private/religious marriages or divorces can be recognized if they are validly concluded under the *lex causae*.[55]

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[46] For example, Article 30 Belgian Code of PIL requires that the submitted document is legalized/apostilled to verify the formal authenticity of the document; however, some flexibility (copies, verbal statements) is possible regarding documents from 'failed states', e.g. Somalia (Family Court Ghent, 15 December 2016, in *Tijdschrift@ipr.be,* No. 3, 2017, pp. 96-99), Iraq (Family Court Bruges, 13 January 2017, in *Tijdschrift@ipr.be,* No. 2, 2017, pp. 59-63), Belgian report mn 34 et seq.

[47] Poland (report mn. 41); Sweden (documents serve to convince the authorities of the validity, see e.g. (rejection) Kammarrätten i Göteborg 2964-14).

[48] For Sweden see M. Jänterä-Jareborg, "The Incidental Question of Private International Law, Formalised Same-Sex Relationships and Muslim Marriages", in P. Lindskoug, U. Maunsbach, G. Millqvist (ed.) *Essays in Honour of Michael Bogdan,* Lund, Juristförlaget i Lund, 2013, p. 159; see also migration related cases in the Belgian report mn 35.

[49] French report mn. 24 et seq.

[50] German report mn 35.

[51] Austrian report mn 46 et seq.

[52] E.g. for Spain see article 256 Regulation of the Civil Register (foreign marriage).

[53] For Austria, see BVwG 29 May 2018, W212 2184938-1/5E; VfGH 11 October 2012, B 99/12 ua (surrogacy, Ukraine).

[54] Austria (OGH 31 August 2006, 6 Ob 189/06x); Belgium (Article 8 Wet van 15 juni 1935 op het gebruik der talen in gerechtszaken, BS 22 juni 1935, accessible via http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=1935061501 and Article 1254, §1 Belgian Judicial Code (divorce proceedings). The Law of 18 juni 2018 houdende diverse bepalingen inzake burgerlijk recht en bepalingen met het oog op de bevordering van alternatieve vormen van geschillenoplossing – which entered into force on 1 January 2019 – upholds the right to ask for sworn translations, see (new) Articles 1254, §2 and 1288*bis*, §2 Belgian Judicial Code); France (for instance in case of a "foreign" marriage abroad (*lex locus celebrationis*) including a French spouse https://www.service-public.fr/particuliers/vosdroits/F21614); Hungary (sections 171 (2), 320 (1) of the Hungarian Civil Process Code; section 14 (3) c) of Act on civil status registration procedure and Fővárosi törvényszék 3. K.34.141/2011/7; Fővárosi Ítélőtábla 2.Kf.27.291/2012/8).

[55] Austria: § 26 IPRG and OGH 20 August 1996, 10 Ob 2284/96x (marriage by tribal tradition in Nigeria); OGH 25 March 2014, 10 ObS 16/14x (Jewish marriage); Bulgaria: Decision No. 118 of 1 December2017, Supreme Court of Cassation; France: CA Paris, 16 octobre 2012, n° 11/22096; see question 16, in M. Cresp (coord.), J. Hauser, M. Ho-Dac (coord.), S. Sana, *Droit de la famille,* Bruxelles, Bruylant, 2018, *op. cit*; Germany: Article 17 EGBGB, see also Referentenentwurf, 14 June 2018, Entwurf eines Gesetzes zum internationalen Güterrecht und zur Änderung von Vorschriften des Internationalen Privatrechts, available at https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/IntG%C3%BCRVG.html; see further discussion S. Gössl,"Rom III-VO Art. 1 Anwendungsbereich", in: GSELL/LORENZ/KRÜGER, BeckOGK, München, C.H. Beck, 2018 paras. 47 *et seq*.

20. Interestingly, two trends in national legislation reduce this randomness and *de facto* promote a recognition of foreign status: First, conflict of law rules are often drafted specifically to ensure recognition and avoid limping relationships, e.g. by using the place of registration as connecting factor. Some Member States have already used this approach before the issue of recognition or acceptance of legal situations was fueled by the recent CJEU and EctHR cases (e.g. regarding marriage). More recently, not widely known legal phenomena, such as registered partnerships, increased the number of such rules, as some States seek to promote such partnerships and their recognition in cross-border cases (II.2.B).

21. Second, party autonomy and choice of law as well as a variety of alternative connecting factors is also used to *de facto* enable recognition. This way, the expectations and wishes of the persons concerned are given significant weight (II.2.C).

22. Third, in some Member States remodelled PIL rules exist which do not comply with the structure and application of traditional PIL rules (II.2.D). On the one hand, there are rules where the validity of a status in a certain law is key (II.2.D)a), on the other hand, the German "Blockverweisung" requires a status to having been established in conformity with its law of origin (II.2.D)b).

B) Connecting Factors *De Facto* Ensuring Recognition

23. Foremost among the connecting factors which basically ensure recognition are those which result in the application of the law which governed the establishment of the foreign status in the first place. In particular, as regards the question whether a person is married or not, many Member States apply the *lex loci celebrationis* **(or** *lex registri***)**;[56] for FRANCE and the NETHERLANDS even religious marriages are included if they are concluded in accordance with the law at the place of celebration.[57] Some Member States apply the *lex loci celebrationis* only 'imperfectly' as this connecting factor is used only to assess the formal validity of a marriage.[58] Whereas the *lex loci celebrationis* was often chosen for reference rules before questions of status recognition were dealt with in CJEU/ECtHR cases, it regained particular attention in the context of same-sex marriages: In AUSTRIA, for example, a special PIL rule referring to the law under which the marriage is (to be) established would apply if the law of the nationality of the spouse(s) didn't allow the marriage due to the gender of the (future) spouses.[59]

24. § 54 (3) CZECH PIL Act provides a subordinate acceptance or PIL rule (i.e. parentage would be accepted/valid if it was established in accordance with the law of the state where it was established) if the normal PIL rule (referring to the law of the citizenship of the child) led to the non-recognition of parentage established abroad. The Constitutional Court applied this rule to accept the parentage of

[56] E.g. Netherlands (Article 10:31 (1) Dutch Civil Code), Latvia (The Law on Registration of Civil Status Documents of 29 November 2012, "Latvijas Vēstnesis", 197 (4800), 14.12.2012), Baltic States report mn. 23; France (report mn 25), Germany for same-sex marriages (Article 17b Einführungsgesetz zum Bürgerlichen Gesetzbuche), Croatia (article 32/1 PILA), Sweden (SFS 1904:26 Lag (1904:26 s.1) om vissa internationella rättsförhållanden rörande äktenskap och förmynderskap, see in particular 1 kap. 7 §; report mn 14).

[57] Netherlands (report mn 23), see Article 10:31 para 1 Dutch Civil Code and A. Vonken/F. Ibili, *Asser 10-II Internationaal personen-, familie- en erfrecht*, Alphen aan den Rijn, Wolters Kluwer, 2021, par. 100; France (report mn 25), see in particular Article 171-1 and 202-2 Code Civil. Germany regarding heterosexual marriages, see Article 11 Einführungsgesetz zum Bürgerlichen Gesetzbuche. For Croatia, for religious marriages to be 'recognized' this way, a civil status certificate (state records) must be issued by the State in question (see report mn 32 et seq with further references).

[58] In Austria (see §§ 17, 18 IPRG) and the Czech Republic (§ 48 PIL Act,), the material validity is determined for each spouse in accordance with their personal status (i.e. nationality); in Bulgaria, only the legal form of the marriage is governed by the *lex loci celebrationis*, see Article 75 (1) BCPIL; also in Germany the *lex loci celebrationis* applies to the formal requirements of different-sex spouses only (Article 11 Einführungsgesetz zum Bürgerlichen Gesetzbuche); a similar rule exists also in Italy (Article 28 PIL).

[59] § 17 (1a) IPRG.

a Czech-Danish same-sex couple due to surrogacy in the US.[60] Interestingly though, the parties asked for a recognition of the Californian decision on their parenthood based on §§ 55 and 51 PIL Act which regulates procedural recognition.

25. Similarly, registered partnerships (and/or their dissolution[61]) are regularly "recognized" by the application of PIL rules, because very often the *lex (loci) registrationis* is applied as a connecting factor – usually, precisely for the purpose to ensure the recognition of such a (foreign) status which is not yet known in all States.[62] In CROATIA, moreover, informal relationships will be 'recognized' if the law to which the closest connection exists sees them as valid/existing.[63]

26. A special variation of this trend towards an enhancement of the recognition by PIL rules shows Article 15 (2) POLISH PIL Act 2011 regarding names: While international name law is governed by the law of the nationality, the law applicable to the acquisition or change of a name or surname abroad is the law that is applicable to the relevant event (except for marriage or divorce as events).[64]

C) Connecting Techniques *De Facto* Ensuring Recognition

27. The use of **several alternative connecting factors together with a 'favor principle' or party autonomy** also significantly increases the probability of the 'recognition' of a status. The connecting techniques with the possiblity to choose between alternative connecting factors are especially used in questions of name law in several countries: For example, as regards **names**, CROATIA provides various alternatives to apply Croatian law (e.g. habitual residence, nationality), as an alternative to the law of the foreign nationality, and allows a very liberal choice of names in substantive law (Article 8 Personal Name Act); this results in a kind of party autonomy as a domestic law solution (e.g. parties may choose the law of the foreign nationality of a spouse in order to allow for the names of the spouses to be spelled in a masculine and femine form in accordance with this law).[65] Similarly, the BELGIAN PIL rule regarding names allows recognition by applying the nationality which the (multi-national) person concerned choses.[66] In HUNGARY, the New PIL Code provides a possibility of choice (for the parties) concerning the bearing of the birth as well as the married name: for example, a person of double nationality may choose the law of any of his citizenships to determine his/her birth name and, in the context of marriage, the parties may request (jointly) the law of the citizenship of any of the spouses or Hungarian law to apply to the married name.[67] Interestingly, this choice in Hungarian law is not limited to EU citizens and thus goes beyond the requirements of the CJEU case law. Article 10 EGBGB will allow a limited choice of law in name law in GERMANY if the spouses or parents of a child have different nationalities (between those nationalities). Furthermore, the spouses or parents can opt for German law, if one of them has the habitual residence in Germany. In FRANCE, Article 311-24-1 Code Civil allows the parents to choose French law to apply to the name of their child although it was born outside France and given a name in accordance with the law of that place (name of origin).[68]

[60] See I. ÚS 3226/16. In contrast, this rule could not be relied upon in the case of a female same-sex couple, where the Czech citizenship could not be derived from the birthmother but from the other parent as it contradicts the Act on Czech Citizenship according to which a mother is (only) the woman giving birth to the child, see report mn 46 et seq.

[61] E.g. in the Netherlands according to Article 10:88 (1) DCC for consensual dissolution of a registered partnership.

[62] See for example Austria (§§ 27a et seq IPRG); France (Article 515-7-1 Code Civil, report mn 51), Croatia (Article 39 para 2 PILA, report mn 23).

[63] Article 38 and 39 para 3 (for informal partnerships) Croatian PILA, report mn 24.

[64] See also Poland report mn 3.

[65] Article 18 Croatian PILA, report mn 21.

[66] Belgian report mn 11.

[67] See section 16 (2) and (3) of the New PIL Code; see report mn 15 and 38, 39.

[68] See French report mn 55.

28. Furthermore, in SWEDEN, a foreign marriage will be fomally and materially valid if it is (formally) valid in the country of celebration, or of the habitual residence, or of the nationality of the spouses. Similarly, in ITALY, the law of the place of the celebration, the domestic law of at least one of the partners at the time of celebration, and the law of the State in which both partners were resident at the time of celebration are alternatives pursuant to Article 32ter Italian PIL regarding the formal validity of a civil partnership.[69]

29. The 'favor principle' is mainly used in questions of parentage to pursue the best interest of the child: In ITALY, either the law of nationality of the child or, if it is more favorable, the law of the nationality of the parent at the date of birth apply to the question of parentage.[70] In GERMANY, Article 19 EGBGB provides the alternatives of the habitual residence of the child at the time of the birth or the nationality of each respective parent or – in case the parents are married – the law applicable on the marriage. In BULGARIA, notwithstanding the *lex patriae*, which is usually applied to questions of parentage, the law of the State in which the child is habitually resident at the time of establishment of parentage or the law applicable to the relationship in personam between the parents at the time of birth may be applied if it is more favorable.[71] Similarly, in case of differences, instead of an application of the common *lex patriae* the *lex patriae* of either the adopting person or the adopted person is possible.[72]

D) Remodelled PIL rules

a) Result-oriented PIL rules

30. Sometimes, rather **results-oriented PIL rules** are employed which explicitly determine the validity of a status by reference to a connecting factor but do not provide for an entire control of legal validity. Basically, such rules accept a foreign status as "valid" (for domestic purposes) if it is valid according to the law determined by a certain connecting factor. For example, in the NETHERLANDS, Article 10:58 DCC regarding a dissolution of a marriage that has been proclaimed without a public procedure or supervision requires its validity under the national law of the spouse who has dissolved the marriage one-sided.[73] Similarly, Article 10:88 (1) DCC provides for the recognition of the dissolution of a registered partnership by mutual consent if the dissolution is valid according to the law of the disolving State.[74] Also, as regards marriage, Article 10:31 DCC provides that a marriage contracted abroad is recognised if (among other criteria) it is valid according to the law of the State where it took place.[75] In SWEDEN, according to special rules that apply to proxy marriages, their 'recognition' (i.e. validity for the purposes of Swedish law) is not determined by the *lex loci celebrationis*-rule which is generally applied to foreign marriages, but the relevant rules actually bind the validity from the perspective of Swedish law to the validity in the State that issued the documents.[76]A similar rule exists in BULGARIA – Article 75 (3) BCPIL stipulates that 'a marriage concluded abroad shall be recognized' if the form complies with the *lex loci celebrationis* – and in LATVIA, where a marriage concluded abroad and in conformity with the law of the place of the conclusion "shall be valid".[77]

[69] See also Italian report mn 26.

[70] Article 33 (1) PIL, see Italian report mn 2.

[71] Article 83 BCPIL.

[72] Article 84 BCPIL.

[73] Report mn 20, 21.

[74] See report mn 38.

[75] Report mn 22. A similar rule applies to the establishment of foreign registered partnerships.

[76] See chapter 1 section 7 § of SFS 1904:26 Lag (1904:26 s.1) om vissa internationella rättsförhållanden rörande äktenskap och förmynderskap, report mn 23, 26.

[77] See the Law on Registration of Civil Status Decuments of 29 November 2012, for details see Baltic States, report mn 23.

b) The German Way: *Blockverweisung* in EU Free Movement Cases

31. GERMANY applies a modified PIL analysis in EU free movement cases only. Recognition or acceptance in an EU context does not mean that courts or other authorities will not look at the merits of the case. They do not apply German PIL rules to see whether a status has been established in another EU Member State,[78] but they analyse whether the status was established in conformity with the law of the State of origin.[79] E.g., one court refused acceptance as the foreign registering civil status employee determined the law applicable incorrectly.[80] Indirectly, this reasoning was confirmed in 2019 by the Supreme Court.[81] So, the "law of the State of origin" refers to national law including the national PIL rules of the State of origin. Sufficient, nevertheless, is the point of view of the foreign State: The State must regard the name as validly established or acquired.[82] In academic literature, this approach is called "*renvoi en bloc*" (*Blockverweisung*), as it refers to the complete foreign legal system as such, including its private international law referrals and forms of renvoi.[83]

3 First Interim Conclusions

32.

1. There is a general tendency in modern Private International Law to enable the recognition of a status acquired abroad, using the traditional models of "recognition" in Private International Law.
2. On the formal side, barriers to recognize a status are increasingly abolished, e.g. by allowing an "incidental" recognition without a separate exequatur proceeding.
3. On the substantive side, there is a tendency to reduce a control on the merits by extending the traditional recognition of court decisions. The traditional recognition of court decisions has been extended in two ways:

   a) There is a tendency to understand the concept of a "decision" in a very broad way, in some jurisdictions even as only requiring some kind of involvement of a foreign authority (e.g. status registration)('extended procedural recognition'). Consequently, such "decisions" may be recognized without an analysis of the merits and are subject to a formal control only, except for the public policy exception.
   b) Moreover, the procedure of recognition of judgments (procedural recognition) has been used in some jurisdictions as a model to establish a similar procedure ('re-modelled pro-

[78] KG 23 September 2010, 1 W 70/08, *Praxis des Internationalen Privat- und Verfahrensrechts*, Vol. 31, No. 1, 2011, p. 70.

[79] German report mn 29-34; BGH 20 February 2019, XII ZB 130/16, *Das Standesamt*, 2019, p. 207.

[80] KG 19 January 2016, 1 W 460/15, *Zeitschrift für das gesamte Familienrecht*, Vol. 63, 2016, p. 1280; similar F. Wall, Fachausschuss-Nr. 4073, *Das Standesamt*, 2017, pp. 119, 122-124. The name in question was established under the *lex registri* even though the person was not a national of that law (and that was the connecting factor under the foreign conflict of laws rules).

[81] BGH 20 February 2019, XII ZB 130/16, *Das Standesamt*, 2019, p. 207.

[82] OLG München 19 January 2010, 31 Wx 152/09, *Praxis des Internationalen Privat- und Verfahrensrechts*, Vol. 30, No. 5, 2010, p. 452; OLG München 30 January 2012, 31 Wx 534/11, *Zeitschrift für das gesamte Familienrecht*, Vol. 60, 2013, p. 412; BGH 20 July 2016, XII ZB 489/15, *NJW Rechtsprechungs-Report Zivilrecht*, Vol. 28, No. 24, 2016, p. 1473; OLG Naumburg 9 September 2014, 2 Wx 85/13, *Zeitschrift für das gesamte Familienrecht*, Vol. 62, 2015, p. 210; KG 14 October 2014, 1 W 554/13, *Das Standesamt*, 2015, p. 142; AG Wuppertal 24 September 2015, 110 III 3/15 *BeckRS 2016, 05232*, *Das Standesamt*, 2016, p. 86; see also H. Kraus, Fachausschuss-Nr. 4004, *Das Standesamt*, 2014, pp. 348, 351; F. Wall, Fachausschuss-Nr. 4008, *Das Standesamt*, 2014, p. 119.

[83] S. Gössl, "Ein weiterer Mosaikstein bei der Anerkennung ausländischer Statusänderungen in der EU oder: Wann ist ein Name „rechtmäßig erworben"?", in *Praxis des Internationalen Privat- und Verfahrensrechts*, Vol. 28, No. 4, 2018, pp. 376-382, 379 *et seq*.; H-P. Mansel, "Anerkennung als Grundprinzip des Europäischen Rechtsraums", in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, Vol. 70, No. 4, 2006, pp. 651, 705; P. Siehr, "Paolo Picone: Gesammelte Aufsätze zum Kollisionsrecht und die Blockverweisung auf die „zuständige Rechtsordnung" im IPR", in *Praxis des Internationalen Privat- und Verfahrensrechts*, Vol. 25, No. 3, 2005, pp. 155, 157.

cedural recognition') to recognize a foreign status. Again, only a limited formal control and the public policy exception are required to recognize a status in these proceedings.

4. As regards "recognition by PIL rules", a tendency to encourage "recognition" or acceptance by a reshaping of connecting factors and techniques can be observed:

   a) Newer conflict of law rules use connecting factors which promote an acceptance by PIL, e.g. applying the *lex loci celebrationis* or *lex registri*.
   b) Connecting techniques that rely on more than one connecting factor facilitate the recognition of a status acquired abroad, either by giving room to party autonomy or introducing a "favor-principle".
   c) Some PIL rules have been remodelled insofar as they are structured differently from traditional PIL rules and recognize a foreign status if it is valid according to its law of origin.

III. Acceptance ('Simple Recognition') As a New, Gap-Filling Technique

1. General Remarks

33. Besides the (evolved) traditional conflict of laws methods to recognize a foreign status, namely procedural recognition and recognition by PIL rules, a third methodological category can increasingly be detected in national law and, in particular, national judicial and administrative decisions. This method is rather new and has been used in most countries to comply with the requirements set by CJEU and ECtHR case law – but is not limited to this use. It is not procedural as it does not use any of the formal requirements that are prescribed by procedural recognition rules. Neither does it refer to a foreign law by relying on connecting factors like classic PIL rules.

34. On the one hand, this method is used in explicit acceptance rules established by some Member States either in reaction to the CJEU and ECtHR cases and their recognition requirements, or independent from international influence to enhance the portability of status. These rules can be found in particular in name law (III.2). On the other hand, this method is used by the courts and other public authorities – often without explicit methodological explanation (III.3).

2 Acceptance as Additional Codified Method in National Legislation

35. Typically, only **single rules regulating acceptance for particular legal areas** exist. Member States tend to limit these rules to status **acquired in another EU Member State** as it usually serves to comply with EU obligations (i.e. fundamental freedoms).[84] Sometimes a **publicly documented status** is required.[85] Sometimes a special connection must be in place.[86]

36. The legislative approach can be observed regarding **names that have been acquired abroad**. For example, in SWEDEN, section 30 of the Act on personal names (2016) provides for the recognition of names that have been acquired abroad.[87] Similarly, in FRANCE, Article 61-3-1 (and 311-24-1) Code

[84] See for example Germany: Article 48 EGBGB; Sweden: section 30 of the new act of 2016 (SFS 2016:1013 Lag (2016:1013) om personnamn) (EU Member State and Switzerland). No limitation to names from other Member States: Hungary (report mn 13) and the Netherlands (report mn 26 *et seq*.).

[85] For example, in Germany, Article 48 EGBGB applies to names *registered* abroad; Hungary: section 16 (5) New PIL Code, see report mn 16; Netherlands: Article 10:24 DCC (certificate required).

[86] Germany: person concerned must have had their habitual residence in the state in question (Article 48 EGBGB); Sweden: a connection established by habitual residence, nationality or another connection is required, see report mn 36.

[87] The rule does not refer to recognition *per se* but gives the person the 'right to acquire that name also in Sweden' by notice

Civil allows a change of name in the French Civil Registry to comply with a name legally accepted in a foreign Civil Registry (if certain requirements are met and there is no opposition).[88] In GERMANY, to comply with the EU case law, Article 48 EGBGB was established that allows the acceptance of a name acquired in another EU Member State.[89] Furthermore, the acquision of a name in another State and the avoidance of "limping names" forms a reason to change a name under substantive name law (§§ 1, 3 NamÄndG) .[90] In the NETHERLANDS, a foreign name acquired at birth or due to a civil status change shall be recognized if it is laid down in a certificate drawn up by a competent authority.[91] Similarly, in HUNGARY, names of Hungarian citizens are recognized if they have been validly registered under the law of another state if the Hungarian citizen involved or his spouse also have the nationality of the registering state or the Hungarian citizen has his/her habitual residence in the registering state.[92] Even though the rule is not limited to citizens from EU Member States, the rule was drafted with explicit reference to *Grunkin & Paul* in the legislative justification.[93] In AUSTRIA and SPAIN, free movement (and the corresponding case law) as a possible reason to merely accept a status is indicated in the guidelines for registrars regarding names.[94]

37. Furthermore, there are some States that simply accept a status without a special reference to EU law. In the NETHERLANDS, the 'principle of fait accompli' seems to pave the way for a simple acceptance of a foreign status despite the codified rules if it corresponds with the legitimate expectation(s) of the party/ies.[95] Similarly, in GERMAN name law, the use of a name over a certain period of time helps to make it 'acceptable'.[96] Aditionally, POLISH law 'recognizes' names that have been acquired abroad by applying PIL rules which use the nationality of the person concerned as connecting factor. However, any person may apply for a change of name in accordance with Article 4 of the Law on change of name and surname if she/he constantly uses the aspired name abroad.[97]

38. A marriage that has been validly concluded abroad shall be recognized in LITHUANIA except in cases of fraus legis (i.e. evasion of grounds for nullity pursuant to Lithuanian law) if both spouses are domiciled in Lithuani[a].[98] Similarly, in LATVIA a dissolution or annulment of a marriage

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to the Swedish tax agency (Skatteverket), provided that certain limitations do not apply (SFS 2016:1013 Lag (2016:1013) om personnamn). See also, regarding section 49a Act of personal names (previous, but very similar rule): For an overview of the situation at that time in English, see L. Håkansson, *Your Europe – your name? An analysis of the compatibility of Swedish private international law with European Union law in name matters*, 2012, https://www.uppsalajuristernasalumnistiftelse.se/wp-content/uploads/2014/11/Linnea- H%C3%A5kansson.pdf

[88] „Toute personne qui justifie d'un nom inscrit sur le registre de l'état civil d'un autre Etat peut demander à l'officier de l'état civil dépositaire de son acte de naissance établi en France son changement de nom en vue de porter le nom acquis dans cet autre Etat.[…]". Technically, it is, however, not considered to apply the method of ‚acceptance', for a detailed analysis see report mn 54 and 55.

[89] See also German report mn 26.

[90] Gesetz über die Änderung von Familiennamen und Vornamen (Namensänderungsgesetz - NamÄndG), BGBl. 2021 I, 738, see S. Gössl, „Ein weiterer Mosaikstein bei der Anerkennung ausländischer Statusänderungen in der EU oder: Wann ist ein Name „rechtmäßig erworben"?", in *Praxis des Internationalen Privat- und Verfahrensrechts*, Vol. 28, No. 4, 2018, pp. 376-382, 379.

[91] Article 10:24(1) DCC, see report mn 28.

[92] Section 16 (5) New PIL Code, see report mn 16.

[93] Legislative justification to s. 16 of the New PIL Code, see report mn. 17.

[94] See, for instance, Austria: BMI-VA1300/382-III/4/b/2014, 59, for further details see the Austrian report mn 29, 30 and 53; Spain: Instruction of the authority in charge of Civil registers ("Instrucción") DGRN 24 February 2010, sobre reconocimiento de los apellidos inscritos en los Registros Civiles de otros países miembros de la UE, see decisions such as RDGRN [3ª] 27 enero 2014, RDGRN [2ª] 27 November 2013, Art 56 of the new law on the Civil Registry – for details see report mn 18.

[95] Article 10:9 DCC, see report mn 30.

[96] E.g. German courts accepted a name that was established incorrectly by the foreign registrar (under the state of origin's PIL rule and the subsequent *lex causae*) by taking account of the fact that the person lived in that foreign State under that name for a long period of time. See AG Berlin-Schöneberg 24 January 2012, 70 III 472/11, *Das Standesamt*, 2013, p. 21, For further details see German report mn 38.

[97] However, substantive limits may apply, e.g. according to a decision by the Regional Administrative Court the name of a same-sex partner cannot be chosen. For details see Poland report mn 7.

[98] Article 1.25 (4) Civil Code, see also Baltic States report mn 58.

of citizens of Latvia in another state is recognized except for conflicts with Latvian law regarding the grounds on which it is based or regarding social or moral standard of Latvi[a].[99] In ESTONIA, a foreign registered partnership is 'valid in Estonia in accordance with the provisions of the Private International Law Act'.[100]

3. Courts as the Motors of Implementation

39. As national rules do not suffice to implement the CJEU/ECtHR obligations, courts play a pivotal role to overcome such barriers. Thus, free movement, human rights arguments, the ECtHR case law and public policy reasoning are used in some States to simply accept a foreign status although it could not be recognized by the available standard legal methods (e.g. no procedural recognition due to the lack of a court decision and no recognition by PIL rules as the law applicable does not lead to the establishment of the status). Most often, reference is simply made to (a) particular CJEU judgment(s). For example, in BULGARIA and LITHUANIA, same-sex marriages are recognized (for the purposes of free movement/residence) by reference to the Coman decision of the CJEU.[101]

40. As an example, one may point to AUSTRIA: Two decisions by the Constitutional Court resulted in the recognition of the parentage of Austrian parents to children born by a surrogate mother in the US and in the Ukraine respectively.[102] While the Constitutional Court mainly based its decision on a human rights reasoning arguing that public policy could not prevent recognition, it is silent regarding the method of recognition, and only later decisions of lower instance civil courts suggest that the parentage as stipulated in the birth certificate is recognized by (extended) procedural recognition.[103]

41. In general, policy issues and human rights arguments seem to have some effect on the outcome of a status recognition, especially in jurisdictions where courts are not strictly bound by unflexible law. In BELGIUM, in general, courts enjoy some flexibility to overcome the outcome of a case by a general assessment of the case and the interests and rights involved by the court's discretion as such.104 Similarly, SWEDISH courts seem to have some discretion to also consider the consequences of their decision from a policy-oriented point of view.[105] An important question is the recognition of parenthood in case of surrogacy – very often the crucial issue is whether the recognition/acceptance of the parentage of the intended parents violates public policy. Scrutinizing the public policy exception usually gives wide discretion to national courts. An increasing number of Member States agree that (usually) the best interest of the child (and/or the right to family life of the child) outweighs national rules that pro-

[99] Article 12 Introduction to Latvian Civil Law, see Baltic States report mn 23.

[100] Baltic States report mn 13.

[101] Bulgaria: see Administrative court Sofia-city, 29 August 2018; Supreme Administrative Court, 24 July 2019, n°11558/2018. Lithuania: KT 11 January 2019, ruling n° KT3-N1/2019, case n°16/2016, see Baltic States report mn 12.

[102] VfGH 14 December 2011, B 13/11 (surrogacy, USA); 11 October 2012, B 99/12 (surrogacy, Ukraine).

[103] See Austrian report mn 54, 55.

[104] See for example: Court of first instance Brussels, 13 May 2014, *Tijdschrift@ipr.be,* No. 3, 2017, pp. 87, 89-90 and Court of Appeal Ghent, 20 April 2017, *Tijdschrift@ipr.be,* No. 3, 2017, pp. 71, 84-86.

[105] See Kammarrätten i Stockholm mål nr 862-14, KamR 862-142014-11-06, 2014-01-16. The Irish citizens and residents wanted to enter a same-sex marriage in Sweden. The court found that although this is an evasion of Irish law, the interest of the Irish men to marry had greater significance and hence, there were special reasons (särskilda skäl) to apply the Swedish law. It must be noted that Ireland at the moment had a possibility to enter into a registered same-sex partnership and the court relied on the presumption that the same-sex marriage in Sweden would had been recognized as such, rather than be completely denied recognition. However, two Polish nationals on holiday in Sweden and without any connection to Sweden would not be allowed to enter into same-sex marriage because that marriage would not be recognized in the state of their habitual residence and nationality. For instance, see M. Jänterä-Jareborg, "The Incidental Question of Private International Law, Formalised Same-Sex Relationships and Muslim Marriages", in P. Lindskoug, U. Maunsbach, G. Millqvist (ed.) *Essays in Honour of Michael Bogdan*, Lund, Juristförlaget i Lund, 2013, p. 156; M. Bogdan and U. Maunsbach , "Sweden", in *Cross-Border Litigation in Europe, Studies in Private International Law* (eds. Beaumont, Danov, Trimmings and Yüksel), London, Hart Publishing, 2017, p. 461.

hibit surrogacy,[106] but not all.[107] A compromise has been found in FRANCE: Due to the case law of the ECtHR, the Court of Cassation now allows the registration of the biological intended fatherhood based on Article 47 Code Civil.[108] As this rule grants probative force only and does not result in a recognition of the status per se, parentage may (theoretically) still be challenged legally, but without any prospect of success given that only the biological parentage is accepted this way.[109]

4. Second Interim Conclusions

42.

1. Some legal systems provide explicit rules that can neither be classified as procedural recognition nor as recognition by PIL rules. Such rules simply accept a status established abroad without further requirements (or limited to a public policy control). Especially in questions of name law these rules were introduced as a reaction to the respective CJEU decisions.
2. Courts developed similar techniques to comply with EU law or ECHR obligations. Often the method employed is uncertain as courts struggle to overcome existing rules and primarily base their decisions on human rights arguments or references to CJEU case law without explaining their methodological approach.
3. Especially in cases of filiation after surrogacy, courts tend to argue in a result-oriented way in order to come to a decision that balances the best interest of the child and policy goals of the lex fori.

IV. Registration as an Alternative To Recognition?

1. General Remarks

43. Even though a registration or transcription does not lead to the recognition of the corresponding status (IV.3), it can enhance the free movement of citizens and de facto lead to a result similar to recognition as long as nobody challenges the registration (IV.2). Therefore, some States require certain conditions to be met or establish a public policy control for the mere registration/transcription (IV.4).

44. In this context, the EU Regulation 2016/1191 on the circulation of public documents did not attract a lot of attention. In ESTONIA, BELGIUM, BULGARIA, CZECH REPUBLIC, POLAND,

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[106] Germany: BGH 10 December 2014, XII ZB 463/13, *Praxis des Internationalen Privat- und Verfahrensrechts*, Vol. 35, No. 3, 2015, p. 261, German report mn. 12; Austria: VfGH 14 December 2011, B 13/11 (surrogacy, USA); 11 October 2012, B 99/12 (surrogacy, Ukraine); Belgium: Court of first instance Brussels 13 May 2014, *Tijdschrift@ipr.be,* No. 3, 2017, pp. 87, 89-90; Court of Appeal Ghent 20 April 2017, *Tijdschrift@ipr.be*, No. 3, 2017, pp. 71, 84-85 and Court of Appeal Brussels 10 August 2018, *Tijdschrift@ipr.be*, No. 4, 2018, pp. 15-21, report mn 19, 29; Czech Republic: Constitutional Court, I. ÚS 3226/16 and District Court in Prostejov, 0 Nc 4714/2015 – 85; France: report mn 58.

[107] Spain: Decision of the Supreme Court, 6 February 2014, report mn 10 et seq; Sweden: HD PT mål nr Ö 2680/18, HD PT mål nr Ö 3462/18 (both cases are based on the same facts, one concerns the refusal to recognize the court decision from the USA, and another the adoption of the child in Sweden; at the time the first version of the Swedish report was finished in 2020, the cases were pending at the Supreme Court). The issue is still unsettled in Hungarian law, but see First instance court, Fővárosi törvényszék 3. K.34.141/2011/7; Metropolitan Regional Court Fővárosi Ítélőtábla 2.Kf.27.291/2012/8 (also referring to the best interest of the child and hes human rights), cf. Z. Navratyl, „Az anyaság útvesztői A dajkaanyaság és béranyaság rejtelmei a jogi szabályozásban, különös tekintettel az Egyesült Államokra”, in *Iustum Aequum Salutare*, 2010, pp. 189, 210-211.

[108] See Ass. plén., 3 July 2015, n° 14-21.323, ECLI:FR:CCASS:2015:AP00619. See Question (137), in M. Cresp (coord.), J. Hauser, M. Ho-Dac (coord.), S. Sana, *Droit de la famille,* Bruxelles, Bruylant, 2018, *op. cit.* See also Civ. 1re, 5 July 2017, nº 16-16901 and n°16-50025 ECLI:FR:CCASS:2017:C100825 (the use of surrogacy in a foreign country does not imply the refusal of transcript of the foreign birth certificate which complies with the reality, *i.e.* biological fatherhood, under article 47 of the French Civil Code); Ass. plén., 5 October 2018, n° 12-30.138.

[109] For details see report mn 58.

FRANCE, and the NETHERLANDS no implementing rules have been issued.[110] In AUSTRIA, HUNGARY, LITHUANIA, LATVIA, THE NETHERLANDS, SWEDEN, CROATIA, and GERMANY small legislative amendments are in preparation or have already been enacted.[111] Literature is also scarce and mainly descriptive.[112]

2. Link between Registration and Recognition

45. Despite their separate and distinct legal nature, very often, the question of status recognition comes up in the context of the registration of the foreign status.[113] On the one hand, a status documented in a foreign certificate may not even be registered if a recognition of said status is impossible.[114] On the other hand, the registration of a foreign status (or even a foreign certificate as such[115]) may create a presumption of validity, i.e. the registered status is treated as a matter of proof of its content – with the consequence that the status is regarded as if it were recognized as long as nobody contests it.[116] If the latter is the case, the status has to be "recognized" by the corresponding rules.[117] In the BALTIC STATES, in practice, the civil registrar does not check whether a foreign authority issuing the document had competence or applied the proper law (i.e. no application of PIL reference rules)[118] – so basically, it seems as if recognition and in particular its preconditions can be bypassed in a way.

[110] Belgium: The 'Flemish Association of Civil Servants and Officers of the Births, Marriages and Deaths Registration Office' Vlaamse Vereniging van Ambtenaren en Beambten Burgerlijke Stand ('Vlavabbs') (www.vlavabbs.be) organized a brainstorm session about the implementation of the Regulation in November 2016 with low attendance rate, see report mn 14; France: report mn 50; Netherlands (only nomination of the authority): report mn 10; Poland: report mn 15.

[111] Austria: report mn 75; Croatia: Decision on the nomination of three central authorities, see report mn. 4; Germany: Gesetz zur Förderung der Freizügigkeit von EU-Bürgerinnen und -Bürger sowie zur Neuregelung verschiedener Aspekte des Internationalen Adoptionsrechts v. 31 January 2019, BGBl. I, 54; Latvia: Dokumentu legalizācijas likums, Law of 22 March 2007, „Latvijas Vēstnesis", https://www.vestnesis.lv/ta/id/155411-dokumentu-legalizacijas-likums56 (3632); Lithuania: LR Vyriausybė 29.06.2018, Lietuvos Respublikos Vyriausybės nutarimo „Dėl institucijų, atsakingų už Europos parlamento ir tarybos reglamente (ES) Nr. 2016/1191 nustatytų funkcijų vykdymą, paskyrimo" projektas, available at https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/28ac-2c607b5c11e89188e16a6495e98c?positionInSearchResults=2&searchModelUUID=4558449a-adf6-4d9a-980e-db2c5f73b4e1.

[112] E.g. Austria: W. Rechberger, Die Europäische öffentliche Urkunde – ein Eckpfeiler der vorsorgenden Rechtspflege? in: Rechberger, *Brücken im europäischen Rechtsraum. Europäische öffentliche Urkunde und Europäischer Erbschein – 21. Europäische Notarentage 2009*, Wien, Manz-Verlag, 2010, p. 5; mostly descriptive: e.g. Reithofer, "EU-Urkundenverordnung – Neuerungen im Personenstandswesen", in ÖStA 2016, p. 155; M. Nademleinsky/M. Neumayr, *Internationales Familienrecht*, Wien, Facultas, 2017, p. 38; Czech Republic: K. Holubová, V. Steininger, *Konec apostil u veřejných listin o osobním stavu aneb soumrak apostilování v EU?,* published online on epravo.cz (accessed in February 2019, here: https://www.epravo.cz/top/clanky/konec-apostil-u-verejnych-listin-o-osobnim-stavu-aneb-soumrak-apostilovani-v-eu-108239.html?mail), 17 October 2018 (End of apostille on public documents proving personal status – the down of apostilling in the EU?); France: Bonifay, *JDI* 2017, n° 2 ; Sweden: M. Bogdan, „Svensk och EU-domstolens rättspraxis i internationell privat- och processrätt 2013-2014", in *SVJT*, 2015, pp. 573-623

[113] See, for example, Sweden (report mn 17); France (report mn 15 et seq) on conflict of authorities and the (additional) reference to connecting factors; Netherlands (report mn 41 et seq); Spain report mn 10 et seq (Decision of the Supreme Court, 6 February 2014).

[114] For example, in the Czech Republic, see also the Decision of Regional Court in Brno: 29 A 122/2015 – 34, §24; A. Belohlavek, „Uzavírání sňatků v zahraničí", in *Právní rádce*, 2006, no. 7 (Enclosing marriages abroad). Similarly, in Spain registration seems to entail the application of PIL rules in the special case of the registration of a marriage, see report mn 31 (legal flashback system), however, in the Supreme Court decision from 6 February 2014 (which addressed status registration rather than status recognition) substantive control was limited to a public policy control, see report mn 16.

[115] See, for example, the Netherlands where a marriage is presumed to be valid if a marriage certificate has been issued by a competent authority (see Article 10:31 (4) DCC), report mn 23). Cf also Poland: Supreme Court, 20 November 2012, III CZP 58/12, OSNC, No. 5, item 55, report mn 17, regarding the certificate as 'proof of an event' which can be contested at court; see also §12(1) Czech PIL Act: ,,foreign public documents, issued by foreign courts and public bodies, when stamped and verified in accordance with applicable requirements, are having the proving strength of a legal situation as much as Czech public documents are".

[116] For instance, for France ('probative force' of (authenticated) foreign public documents on civil status according to Article 47 C.Civ) : Civ. 1re, 12 January 1994 ; Civ. 2e, 12 February 2015, n° 13-19751, for details see report mn 21; in Sweden, once a status, i.e. married status, is registered in the Swedish population registry, the marriage is considered as 'existing' (with all consequences, e.g. prohibition to marry twice), but its validity may be disproved, see report mn 17 et seq.

[117] For instance, on parentage in France: Civ. 1re, 20 November 1979, n° 77-13297, for details see report mn 22.

[118] Baltic States report mn 40, 43.

46. As the issue of registration normally concerns foreign status which is not created by a judgment (or equivalent) the link is particularly evident regarding recognition by application of PIL rules or simple acceptance. Often even the competent authorities coincide in these situations, i.e. the registering office is also competent as regards the recognition of the foreign status.[119]

3. Registration as a Separate Legal Act

47. Many legal systems allow an easy transcription or "recognition" of (the authenticity of) a foreign certificate or other state record insofar as they can be used as national status registrations/certificates or form the basis for a national one;[120] often such transcriptions serve evidentiary purposes. Such a transcription or registration of a foreign status (generally) does not entail the recognition of the documented status but is limited to the registration of the status embodied by the foreign legalised/apostilled[121] public document.[122] It is usually of a mere administrative nature and the applied substantive domestic laws (for status registration and recognition) differ. For example, BELGIAN authorities may accept, first, the mere existence of a foreign document (authentic instrument or judgment) ('factual effect') or, second, the formal authenticity of the foreign document (if certain requirements are met, the document may serve as external or internal evidence) or, third, fully recognize the foreign status (by application of the criteria stipulated in Article 22 (judgments) or Article 27 (authentic instrument) of the Belgian PIL Code.[123] However, as regards the BALTIC STATES, transcription/registration of a foreign status seems to result in its de facto recognition as (additional) PIL rules are not applied by the authorities in these cases.[124] Hence, the document proving the foreign status is crucial and often its contents are transcribed without examination in LITHUANIA and ESTONIA.[125]

48. Sometimes a domestic registration (i.e. the transcription of a foreign certificate) is legally required if a national is concerned;[126] sometimes it is a mere option which is open to the persons concerned[127].

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[119] Czech Republic: competence of the Special Civil Registry regarding registration of a foreign status, see in particular the Decision of Regional Court in Brno: 29 A 122/2015 – 34.

[120] Croatia: M. Dika, G. Knežević, S. Stojanović, *Komentar Zakona o međunarodnom privatnom i procesnom pravu*, Belgrade, Nomos, 1991, p. 116, see report mn 18; Poland: Article 104 Law on Civil Status Registry (see also report mn 12 and 25 et seq.); Spain: Articles 60, 61 Law for International Cooperation, Article 23 Law on Civil Registry and Article 85 Regulation on Civil Registry, see report mn 16; Czech Republic: Act on Civil Register, Name and Surname no. 380/2008 Coll); France: see report mn 21.

[121] Croatia: Article 3 of the Act on Legalization of Documents in International Transactions, Narodne novine (Official Gazette), no. 53/1991; France (legalisation is sufficient in practice, although legally the local foreign form requirements have to be respected to give "full faith" to the document), see report mn 23 with reference to Civ. 1re, 13 avril 2016, n° 15-50018. Other form requirements are scarce: Croatia provides the possibility for Croatian authorities to clarify whether the foreign authority acted within her competence, but there is no rule what the consequences of a violation are (see Article 4/1 of the Act on Legalization of Documents in International Transactions), report mn 25; Poland: legalized or compliance with the Hague Convention of 5 October 1961, report mn 41; Hungary: report mn 50. Estonia and Latvia: Baltic States report mn 40. The EU Regulation 2016/1191 on the Circulation of Public Documents can overcome such a formal requirement for documents issued in Member States.

[122] See Croatian report mn 25, French report mn 19, Polish report mn 17, 18; Spanish report mn 29 et seq.; Swedish report mn 17 et seq.

[123] See report mn 30 et seq.

[124] Baltic States report mn 43.

[125] Baltic States report mn 61.

[126] E.g. in Croatia, a status acquired abroad has to be entered into the Croatian State records if the person concerned is Croatian, see Croatian report mn 26; Italy (report mn 59); Bulgaria (Articles 71-72 Bulgarian Civil Registration Act), Hungary (report mn 46); Belgium (report mn 53 – of 1 January 2019 onwards Belgian civil servants will be obliged to register foreign judgments and authentic instruments establishing a (change in) personal status of Belgian citizens in the Database of Person Status Records; the same applies if a Belgian judge has declared a foreign document recognizable); Poland: a Polish passport requires the transcription of a foreign birth/marriage certificate (report mn 18 et seq, 38, see also Article 104 (5) Law on Civil Status Registry).

[127] France (report mn 20; "may ask for registration").

49. In most cases, the content is transcribed without any modifications. However, in SPAIN, legal status that are unknown to Spanish law may be adapted (challengable by the party concerned).[128] In the CZECH REPUBLIC, following the recognition of parentage of two male same-sex fathers due to a surrogacy agreement, the birth registry entry of their child names one of them as father and declares in a footnote that the child has two fathers and names both of them, as the field for "mother" could not be used.[129] In GERMANY there is the possiblity to attach a "note" (Hinweis) to the registration stating that a certain status only exists under foreign law.[130] In POLAND, foreign names may be subject to a different spelling, if they are, in particular, the names of Polish citizens.[131]

4. Control of the Underlying Status

50. Furthermore, public policy issues may prevent the registration of a foreign certificate. For example, in POLAND, even a transcription may be refused due to Article 107 Law on Civil Status Registry (e.g. registered partnership certificates, same-sex marriage certificates).[132] A recent more liberal approach[133], which required the registration of the birth certificate of children of same-sex parents in Poland just for the purpose to allow them to attain the Polish nationality, seems to have been overruled. Instead the foreign document should be given evidential value so that a Polish identity document can be issued however without registering a child whose parents are in a same-sex marriage as this would create an unwanted corresponding Polish marriage certificate.[134] In contrast, the Regional Administrative Court reasoned in a recent case from 2019 that Article 18 of the Constitution did not prevent the transcription of a foreign marriage certificate if marriage as a same-sex union is envisaged in the state of origin.[135] The case was pending at the Supreme Administrative Court when the national report was concluded in 2020. In SPAIN, the 'legal requirements of validity' must be fulfilled for the (mere) registration of a marriage.[136] While such a legality control was also necessary for the registration of a status in other areas according to Article 23 Regulation of the Civil Register, now the Supreme Court seems to have introduced a shift and limits the control to the public policy exception:[137] In a surrogacy case regarding the registration of two babies born to a surrogate mother in California and a Spanish same-sex couple the Supreme Court applies the requirements for (extended) procedural recognition rather than the PIL rules as there was already a decision by a Californian administrative authority which registered the birth of the children.[138] Nevertheless, this control can only lead to the registration of the status, not its recognition for the Spanish system.[139] In this particular case, registration was denied due to public policy reasons. Similarly, in the CZECH REPUBLIC, the Special Civil Registry may reject registration due to an incompliance with the Czech legal order[140] or if a

[128] Spain (report mn 43), see Article 61 Law for International Civil Cooperation.

[129] This information about current practices was provided by the Czech Republic report. Unfortunately, the author decided not to publish the report.

[130] Kammergericht, 4 July 2017 – 1 W 153/16, *Zeitschrift für das gesamte Familienrecht*, Vol. 2017, pp. 1693-1698, 1696 *et seq*.; see S. Gössl, "Materiellprivatrechtliche Angleichung der personenstandsrechtlichen Eintragung bei hinkenden Statusverhältnissen", in *Praxis des Internationalen Privat- und Verfahrensrechts*, Vol. 35, No. 3, 2015, pp. 273-277, 276.

[131] See report mn 34 et seq.

[132] See report mn 14, 25 et seq.

[133] Supreme Administrative Court of 10 October 2018, ref. no. II OSK 2552/16, and of 30 October 2018, ref. no. II OSK 1868/16, II OSK 1869/16, IIOSK 1870/16, II OSK 1871/16, see report mn 19, 20. The argument for transcription/registration is as follows: registration is obligatory to receive Polish citizenship. The registration of the child does not entail the recognition of the parentage or of the relationship status of the parents.

[134] Resolution of the Supreme Administrative Court, 2 December 2019, ref no. II OPS 1719, see report mn 23.

[135] Regional Administrative Court in Warsaw ref. no. IV SA/Wa 2618/18, see report mn 28.

[136] Article 65 Código Civil Law of the Spanish Registry in conjunction with Article 256 Real Decreto de 24 July 1889 por el que se publica el Código Civil, Gaceta de Madrid, n. 206, 25 July 1889 (Regulation of the Civil Register), see report mn 31.

[137] Spanish report mn 10 et seq.

[138] Tribunal Supremo de 6 de febrero de 2014, N. 247/2014, CENDOJ 28079119912014100001 (the court explicitly calls the legal technique that is applied "recognition"). See report mn 10 et seq.

[139] See Spanish report mn 11 and 16.

[140] § 87 Act on Civil Registry. See also Regional Court in Brno 29 A 122/2015-34.

name does not comply with the grammatical requirements of the Czech language. Also, in LITHUANIA and LATVIA public policy was/is referred to in case of a refusal of a transcription of names as the spelling as a very cultural-sensitive issue might violate national public policy. [141]

51. In LITHUANIA and LATVIA, the transcription of names into the domestic civil registry/ID document or certificate is a rather sensitive issue. In essence, not the name itself but rather its spelling causes problems. Early on, the registration (recognition) of names acquired abroad was often refused due to public policy reasons in LITHUANIA as Lithuanian spelling was considered to be of Constitutional value.[142] However, more recently, the authorities in LITHUANIA tend to allow the issuance of a (Lithuanian) birth or marriage certificate in accordance with the foreign one now (and do not apply the rule on public policy any more[143]); they refer to CJEU, ECtHR case law and the Raihman decision of the UN Human Rights Committee,[144] thus giving more consideration to the legitimate expectations of the parties. In contrast, LATVIAN authorities (still) refuse to spell the names in Latvian birth or marriage certificates in the original (foreign) form.[145] Latvian courts do not see a disproportionate impediment for EU citizens to bear a "latvianized" name in Latvian documents, as the Latvian passport contains both forms of the name and the spelling/use of Latvian language is regarded as highly important.[146]

5. Third Interim Conclusions

52.

1. The registration or the transcription of a status in the national registry can be crucial for the parties to exercise their rights. Some States therefore apply special proceedings to the registration of a status established abroad which do not necessarily lead to a recognition of the underlying status.
2. ´Some Member States require additional conditions to be met before the registration of a status, especially a public policy control or a limited control of the merits of the underlying status.
3. Sometimes an unknown status can cause problems in so far as the registry does not provide a corresponding field (e.g. for co-mother/co-father) or spelling is different for certain names. Some registries already address these issues by allowing more flexibility, e.g. to adapt the statuts or to attach information in an international context.

1. Public Policy and Similar Substantive Obstacles to Recognition

53. All States refer to their ordre publ*ic/public polic*y to prevent the recognition of a foreign status/legal situation that conflicts with essential principles of domestic law.[147] In some States there are

[141] See Baltic States report mn 6 (for Lithuania). In contrast, Estonian authorities allow the spelling of a foreign name in accordance with the nationality of a person as stated in a birth certificate even if the person is also an Estonian national without problems, see Baltic States report mn 11, 21, see also *infra* at V. 1. C).

[142] See Baltic States report mn 7, 33, in particular KT 21 October 1999, Case n°14/98.

[143] See, in particular, KT 27 February 2014, Case n°14/98 (change in attitude towards foreign names), Baltic States report mn 9, 33.

[144] Baltic States report mn 10, 19 and 33.

[145] See Judgment of the Supreme Court of Latvia of 1 November 2017, No A420398814, available at: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi; judgment of the Administrative Regional Court of Riga of 4 March 2014, No. A420383312; judgment of the Administrative District Court in Riga of 19 July 2013, No. A420383312; judgment of the Supreme Court of Latvia of 9 July 2012, No A420598410. See also Judgment of the Administrative Regional Court in Riga of 26 April 2016, No A420579912, despite the UN Human Rights Committee decision 28 October 2010, Raihman v. Latvia, No 1621/2007. For further details, see Baltic States report mn 8.

[146] See Latvian Constitutional Court, 21 December 2001, No. 2001-04-0103, see Baltic States report mn 34

[147] E.g. Belgium: Article 27 and 21 Belgian PIL Code; Croatia: Article 71 PILA; Italy: Articles 64 and 65 PIL; Latvia: Article 637 (2) N. 6 of the Civil Procedure Law of Latvia; Germany: Article 6 EGBGB; Czech Republic: Decision of the Regional

also specific rules regarding the 'non-recognition' of a certain foreign status in place. In the context of an ordre public test, courts often have to resolve the tension between a legally unknown or unwanted legal institution/status and human rights requirements, such as the right to private and family life, as well as the best interest of the child in filiation cases. In a very similar way, human rights (and fundamental freedoms) are also used to achieve recognition despite national rules which dictate non-recognition (e.g. no recognition by PIL rules).[148]

54. In case of unknown legal status/phenomena, the Member States either reject recognition[149] or transform the foreign status in accordance with the domestic law (see V.2).

A) Same-sex Marriages and Establishments of Registered Partnerships

55. Especially same-sex marriages/civil unions are very public policy-sensitive in Member States which do not know this concept. In POLAND, for example, a constitutional provision (Article 18) prohibits same-sex marriages, and this rule is also referred to in order to refuse the recognition of foreign same-sex marriages.[150] No information about such a relation is entered into the Polish Civil Status registry and same-sex spouses or registered partners are treated as being in an informal relationship.[151] References to ECtHR case law (i.e. Schalk and Kopf v Austria) are made. Not even the name of a (same-sex) partner could be recognized in Poland as this would create a presumption that same-sex partnerships were allowed in Poland;[152] however it might be recognized due to its constant use abroad (and not because it is the surname acquired by same-sex marriage or partnership)[153]. Only very recently, the Regional Administrative Court in Warsaw issued a somewhat dissenting opinion by stating that Article 18 of the Constitution does not constitute an obstacle to the transcription of a foreign marriage certificate, if such an institution is envisaged by the foreign substantive law concerned.[154] Also the courts in the CZECH REPUBLIC, and HUNGARY decline recognition of same-sex marriages.[155]

56. Following the Coman decision of the CJEU, some States have (slightly) altered their approach: In LITHUANIA, it was declared unconstitutional to deny a residence permit to the partner in a same-sex marriage.[156] A similar development seems to have taken place in BULGARIA.[157] For the purpose of free movement, the right of entry for all persons in a registered partnership with a Polish national (irrespective their sex) had already been accepted in POLAND before the Coman judgment.[158]

57. In ESTONIA, instead of a strict rejection of same-sex marriage as an institution contrary to public policy, Estonian courts seem to warm up to the idea of recognising foreign same-sex marriages in a step-by-step-approach: A residence permit has to be issued to a same-sex spouse according to a Supre-

Court in Brno: 29 A 122/2015 – 34, §24; Netherlands: Article 10:59 DCC (re divorce), Article 10:32 DCC (re marriages), Article 10:101(2) DCC (re filiation); France: report mn 11, but there is a 'limited' effect of public policy based on the Rivière Case to ensure the effectiveness of legal situations created abroad although they could not have been created in France.

[148] See already *supra* at III. 3.

[149] E.g. the Austrian Supreme Court (OGH) did not recognize rights stemming from a cohabitation under Israeli law as that concept was not known in Austria (see OGH 25 March 2014, 10 ObS 16/14x), for details see report mn 23.

[150] See report mn 9, 25. A similar rule exists in Latvia (Article 110 Constitution), see Baltic States report mn 12.

[151] See report mn 25.

[152] See report mn 7, 25 *et seq*., 39.

[153] See report mn 7.

[154] Regional Administrative Court in Warsaw, ref. no. IV SA/Wa 2618/18, see report mn 28.

[155] Czech Republic: Regional Court in its decision 29 A 122/2015 – 34 interpreted that the provisions of §42-43 of Act on Civil Registry in conjunction with provisions of §47-49 Act on Private International Law should be read as stipulating that a marriage can only be a relation between a man and a woman. Hungary: see report mn 28.

[156] KT 11 January 2019, ruling n° KT3-N1/2019, case n°16/2016; see Baltic States report mn 12, 22.

[157] See Supreme Administrative Court, 24 July 2019, n°11558/2018.

[158] See report mn 29. See also the guidelines issued by the Border Guard Commander-in-Chief in 2013; Article 3(2) of the free movement Directive shall be applied directly.

me Court decision of 2019 and the Estonian Supreme Court declared already 2017 that same-sex spouses enjoy the constitually protected right to family life.159 Furthermore, the Circuit Court of Tallinn already required the competent authorities to enter a same-sex marriage into the population register.[160]

58. A registered partnership can be recognized in the NETHERLANDS only if it was registered by a competent authority at the place of registration and the partnership is of a sort that it excludes the existence of a marriage or another legally regulated form of cohabitation with a third person, and creates duties (obligations) between the partners that in essence correspond with the marital duties of spouses that the law connects to a marriage.[161]

59. Irrespective the issue of same-sex marriages, several Member States require foreign marriages to fulfil further substantive requirements for recognition often phrased as prohibitions, such as a prohibition of polygamy[162], incestuous marriage[163], child marriage[164], incapacity or forced marriages.[165] Proxy marriages are not recognized in Sweden and Austria[166], unless the parties are foreign nationals only and did (at the time of the marriage) not have their habitual residence in Sweden and their marriage is legally valid in the country of celebration.[167]

60. In general, it can be noticed that the case law of the CJEU has nudged courts to a more open approach regarding the recognition of same-sex marriage or at least the recognition of some of their aspects.

B) Filiation Including Surrogacy and Adoption

61. Another public policy sensitive issue is filiation, in particular by surrogacy. States have to balance their public policy goals to prohibit surrogacy and the international obligation to protect the child in question. While some States in the best interest of the child recognize a parenthood established abroad, other States use public policy to avoid a full status recognition. In POLAND, in 2015 the Supreme Administrative Court refused to recognize an American judgment regarding a child born by

[159] Supreme Court decision of 21 June 2019, no. 5-18-5 (https://www.riigikohus.ee/et/lahendid/?asjaNr=5-18-5/17 [in Estonian]), see also Baltic States report mn 30; Decision of the Supreme Court of Estonia 3-3-1-19-17 (an verview of the decision in English is available at: https://www.riigikohus.ee/en/news-archive/same-sex-couples-also-have-right-protection-family-life) see report mn 15.

[160] See V. Vooglaid, "Judicial Activism in Distortion of the Concept of Marriage. Comment to the Tallinn Circuit Court Ruling from 24 November 2016 on the Case Ats Joorits vs Harju County Government (3-15-2355)", in *Juridica,* Vol. 1, 2018, pp. 67 - 77, for details see Baltic States report mn 15, 25.

[161] Article 10:61 para. 5 Dutch Civil Code, see report mn 38.

[162] Netherlands (Article 10:32 DCC); Italy, report mn 23.

[163] Italy, report mn 23.

[164] Sweden: Lag (1904:26 s.1) om vissa internationella rättsförhållanden rörande äktenskap och förmynderskap, with recent changes made in 2018, SFS 2018:1973. An investigation to allow a similar non-recognition for polygamous marriages is ongoing: Kommittédirektiv Strängare regler om utländska månggiften, Dir. 2018:68, see also report mn 1. Germany: BGH, 14 November 2018, XII ZB 292/16, *Zeitschrift für das gesamte Familienrecht*, Vol. 66, 2019, p. 181; S. Gössl,"Ist das Gesetz zur Bekämpfung von Kinderehen verfassungswidrig?", in *Bonner Rechtsjournal*, Vol. 12, No. 1, 2019, pp. 6-11. Italy: report mn 23).

[165] Netherlands (Article 10:32 DCC); similarily, Lithuania (Articles 3.12- 3.17 LCC; report mn 38); Czech Republic (§ 87 Act on Civil Registry).

[166] See for example, for Austria (report mn 57), BVwG 30 May 2018, W165 2178103-1/3E (Syrian marriage; groom was not present); BVwG 29 May 2018, W212 2184938-1/5E (Syrian marriage, groom was not present); contrary to the findings of the court, academic literature distinguishes between two situations: (i) marriages where a third party merely acts as proxy for the groom/bride (Handschuhehe) should not trigger the public policy clause (see B. Verschraegen, in: P. Rummel, *ABGB*, Wien, Manz-Verlag, 2004, § 16 n. 4; F. Schwind, *Internationales Privatrecht*, Wien, Manz, 1990, p. 118 et seq; M. Nademleinsky/M.Neumayr, *Internationales Familienrecht*, Wien, Facultas, 2017, p. 49); (ii) if a representative is conferred the power to decide on the marriage, however, the public policy clause can be invoked (see B. Verschraegen, in P. Rummel, *ABGB*, Wien, Manz-Verlag, 2004, § 16 n. 4; M. Nademleinsky/M.Neumayr, *Internationales Familienrecht*, Wien, Facultas, 2017, p. 42.

[167] In contrast, such a marriage can be recognized in Belgium, cf. Family Court Brussels, 7 March 2017, *Tijdschrift@ipr.be,* No. 2, 2017, pp. 64, 67 or Family Court Brussels, 6 December 2016, *Tijdschrift@ipr.be,* No. 1, 2017, pp. 80-82 (but denied for reasons of fraud), see also report mn 27.

a surrogate mother and the parentage of a same-sex couple. It argued that fundamental principles were violated, and that the child cannot be the subject of a civil contract and be deprived of its biological identity.[168] However, in October 2018, the Supreme Administrative Court allowed the acquisition of Polish nationality by children born by a surrogate mother to a Polish citizen as the right to citizenship is a human right.[169]

62. Interestingly, also in SPAIN, the Supreme Court did not recognize the parentage of the two Spanish men due to reasons of public policy (balancing against the best interests of the child; dignity of the surrogate mother).[170] However, the decision was critizised as public policy was allegedly applied in an abstract way while it was supposed to be applied with particular reference to the case at hand.[171] In view of the ECtHR judgment in Paradiso and Campanelli, the ITALIAN Supreme Court only recently found the recognition of a foreign status related to surrogacy to be contrary to public policy;[172] families ties could be preserved by adoption "in special cases".[173] However, in April 2021 a draft law regarding surrogacy and its legal consequences has been submitted to be discussed in Parliament.[174]

63. The NETHERLANDS consider filiation as incompatible with public policy if the child already has two legal parents. Furthermore, the recognition of foreign adoptions has been temporarilly suspended due to pending legislation since 8 February 2021 as a report showed several cases of abuse.[175]

64. Similarly sensitive of that matter, § 63 (1) CZECH Act on PIL stipulates that a foreign court order on adoption can be recognized only if the adoption is possible according to Czech substantive law. In (at least) one case, however, this requirement was set aside as the Czech substantive rule in question (i.e. no adoption for registered partners) was already under scrutiny for unconstitutionality.[176] The Czech adoption rule was considered not to be part of the Czech public order and that the best interest of the child, which is part of the public order, required a recognition. Similarly, in a case regarding the recognition of a foreign surrogacy decision, public policy arguments were put forward to reject recognition but equally dismissed due to the overruling best interest of the child and the continuation of an existing family life.[177]

C) Names

65. As already mentioned in the context of registration (see IV.4 supra), the transcription of names is a very sensitive issue in LITHUANIA and LATVIA that frequently raises public policy questions. Similarly, in BULGARIA, a US-court decision regarding the change of the middle and last name of a Bulgarian national to the name(s) of her mother's new husband was not recognized due to public policy reasons as these names did not indicate the father of the child (as is usual in Bulgaria).[178] The CZECH law has special rules regarding the rejection of recognition if a name does not comply with certain grammatical requirements.[179]

[168] Supreme Administrative Court of 6 May 2015, ref. no. II OSK 2372/13 and II OSK 2419/13.

[169] Supreme Administrative Court of 30 October 2018, ref. No. II OSK1868/16, II OSK 1869/16, II OSK 1870/16, II OSK 1871/16, report mn 19. See also Supreme Administrative Court of 10 October 2018, ref. no. II OSK 2552/16.

[170] Tribunal Supremo, 6 Febraury 2014, N. 247/2014, CENDOJ 28079119912014100001 (recognition denied for public policy reasons), see Spanish report mn 10 et seq.

[171] Report mn 36 with further reference.

[172] Corte cass. No. 12193/2019, see Italian report mn 8–11.

[173] Corte cass. No. 12193/2019; Corte Cost. No 230/2020.

[174] See Italian report mn 11.

[175] Rechtbank Den Haag 4 October 2018, ECLI:NL:RBDHA:2018:11885, see report mn 13, 35 *et seq*.

[176] See District Court in Prostejov, 0 Nc 4714/2015 – 85.

[177] See Constitutional Court, I. ÚS 3226/16.

[178] Sofia city court, Decision n°2123 from 15 March 2016 (civil case 7844/2012).

[179] § 72 (3) Act on The Civil Registry, The Name And Surname (*o matrikách, jménu a příjmení*)

66. In BELGIUM, with regard to names, a specific problem comes up for Belgium mono-citizens. According to Article 36 Belgian Code of PIL only the Federal Public Service for Justice is competent to change the (sur)name of Belgian nationals. As a consequence, a change in surname validly obtained abroad by a Belgian national will not be recognized in Belgium.[180] If the person concerned wishes to carry the acquired name, he or she has to start proceedings before the Federal Public Service for Justice.[181]

67. In name law, in accordance with the CJEU decision in the case Sayn-Wittgenstein, titles of nobility cannot be recognized for reasons of public policy in GERMANY[182], HUNGARY[183] and AUSTRIA[184].

D) Divorce/Dissolution of Registered Partnership

68. Article 10:58 Dutch Civil Code requires the acceptance or (at least) tacit consent of the non-dissolving spouse for the recognition of a unilateral divorce that has not been issued under the supervision of a public authority.

69. Article 12 of the Introductory part to the Latvian Civil Law provides that "A dissolution or declaration as annulled of a marriage of citizens of Latvia, done in a foreign state, shall also be recognized in LATVIA, except in a case where the grounds submitted as the basis therefore do not conform to Latvian law and are in conflict with the social or moral standards of Latvia".

2. Recognition or Rejection, but not quite: Transformation and Renewal of Status

70. As regards the recognition of a foreign status (irrespective the specific) method, its reception – understood as the recognition of a foreign status as it is in foreign law – seems to be the rule, in particular for status elements that are generally known in the legal systems of the Member States (V.2.A). Sometimes, a status acquired abroad is explicitly treated as a domestic status (as regards its effects) once it is fully recognized.[185] In the other cases, though a rejection due to the unknowness of the status is possible, it is scarce. More often, an unknown status is subject to transformation.[186] Some States require the formal establishment of an equivalent status or its renewal (V.2.B).

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[180] . Article 36 j° 39 Belgian Code of PIL, see report mn 44.

[181] Article 2, §2 Wet 15 mei 1987 betreffende de namen en voornamen, BS 10 juli 1987 (accessible via http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1987051531&table_name=wet). This Article has been replaced by the (new) Article 370/3, §2 Belgian Civil Code of 1 January 2019. (See Article 62 Wet van 18 juni 2018 houdende diverse bepalingen inzake burgerlijk recht en bepalingen met het oog op de bevordering van alternatieve vormen van geschillenoplossing, BS 2 juli 2018). According to the new provision, every Belgian person who wants to change their name, e.g. becausee s/he wishes to carry the surname of his or her spouse married abroad, s/he has to start a proceeding before the Federal Public Service for Justice. See Belgian report mn 44.

[182] German report mn 37; see case CJEU 2 June 2016, *Bogendorff von Wolffersdorff,* C-438/14. BGH, 9 January 2019, XII ZB 188/17, ECLI:DE:BGH:2019:090119BXIIZB188.17.0; 14 November 2018, XII ZB 292/15, ECLI:DE:BGH:2018:141118BXIIZB292.15.0.

[183] Hungarian report mn 14; see Hungarian Constitutional Court 1231/E/2007. AB határozat.

[184] Austrian report mn 58, see, for instance, VfGH 27 November 2003, B 557/03.

[185] See, for example, in Belgium (report mn 49 et seq.) and in Sweden (M. Jänterä-Jareborg, The Incidental Question of Private International Law, Formalised Same-Sex Relationships and Muslim Marriages, in P. Lindskoug, U. Maunsbach, G. Millqvist (ed.) *Essays in Honour of Michael Bogdan,* Lund, Juristförlaget i Lund, 2013, p. 157. This is particularly relevant for the effects as these are determined in the same way as for a 'Swedish' status, cf Sweden. See also report mn 32).

[186] In Germany, the *BGH* (German Supreme Court) and a second instance court decided that name compilations unknown under German name law (Danish middle name [see BGH 26 April 2017, XII ZB 177/16, *Das Standesamt*, 2017, p. 270], Bulgarian fathers name [KG 18 January 2018, 1 W 563/16, *Zeitschrift für das gesamte Familienrecht*, Vol. 65, 2018, p. 1000]) still have to be recognized, see report mn 52; Czech Republic: § 49 Act on PIL provides the possibility of transformation or rejection.

A) Transformation as a Compromise

71. The issue of transformation as regards the status itself comes up primarily in the context of same-sex marriages: Some Member States transform same-sex marriages into civil unions or registered partnerships.[187] More recently – probably due to the abolishment of the institute of 'registered partnership' in several Member States in favour of a same-sex marriage – some Member States 'transform' foreign registered partnerships into same-sex marriages. For example, (today) in SWEDEN[188] and BELGIUM[189], foreign registered partnerships that are equivalent to marriages may be recognized ("upgraded") as same-sex marriages. An interesting variant can be found in ITALY: Foreign registered partnerships are considered to be ITALIAN civil unions according to Article 32quinquies PIL Act if the same-sex partners are both Italian and are habitually resident in Italy.

72. In contrast, in CROATIA, the Act on Life Partnership between persons of the same sex explicitly provides that same-sex marriages and partnerships between EEA citizens (or an EEA citizen and a third country national) validly concluded in an EEA Member State are treated equally as a heterosexual marriage in the freedom of movement area.[190]

73. Another area where transformation plays a role are foreign forms of adoption, such as kafala. Although BELGIAN courts have shown little willingness to convert kafala agreements into adoptions in the past, since the entry into force of the 1996 Hague Convention, foreign kafala arrangements should be recognized in BELGIUM by operation of law.[191] In contrast, in FRANCE, foreign situations (status) that are different from adoption (i.e. kafala) may not be considered as French adoption (transposition is not allowed).[192] In some Member States, transformation is used in case of child adoption abroad, when the issue of its effects is raised (simple or full adoption).[193]

A) Variants: Renewal of Status or Establishment of a Similar Alternative Status

74. In some countries, it is possible to acquire a certain status according to the law in the 'recognizing State' if a foreign status or its validity for domestic purposes is not given or unclear. In HUNGARY for example, the status of same-sex spouses is not recognized, but they may enter into a new registered partnership in Hungary to formalize their relationship also in Hungary.[194] Evidently, this entails a downgrading of the relationship to a 'mere' registered partnership for the purposes of Hungarian law. Similarly, in ESTONIA same-sex spouses may enter into a cohabitation agreement to protect the family life without technically 'recognizing' the foreign same-sex marriage.[195]

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[187] E.g. Croatia: Article 32/2 of the PILA; also, Article 75 of the Act on Life Partnership between Persons of Same Sex, but no regulation of the recognition of heterosexual civil unions. Czech Republic: Decision of Regional Court in Brno: 29 A 122/2015 – 34; 8 As 230/2017 – 41 of the Highest Administrative Court; Italy: Article 32bis PIL, see report mn 18 with further references, 24 and 56). A similar transformation was present in Germany (see Article 17b para 4 EGBGB), before German law opened marriage to same-sex couples (see German report mn 53 and also S. Gössl/J. Verhellen, "Marriages and Other Unions in Private International Law – Separate but Equal?", in *International Journal of Law, Policy and the Family*, Vol. 31, No. 2, 2017, p. 174), as well as in Sweden (prior to the introduction of the Swedish same-sex marriage: RÅ 2008 ref 82 (regarding a Canadian marriage), report mn 41); and in Austria (see Austrian report mn 63).

[188] Swedish report mn 41.

[189] Belgian report mn 16, 50.

[190] Article 74 of the Act on Life Partnership between Persons of Same Sex.

[191] Belgian report mn 52.

[192] Civ. 1re, 15 décembre 2010, n°09-10439, see report mn 34.

[193] France: Article 370-5 Code Civil, see report mn 34, with further reference to question 155 in M. Cresp (coord.), J. Hauser, M. Ho-Dac (coord.), S. Sana, *Droit de la famille*, Bruxelles, Bruylant, 2018, p. 747 et seq; Croatia: Article 43/5 PILA.

[194] Report mn 26, amending proposals (e.g. transformation into a registered relationship at request have been rejected).

[195] See Baltic States report mn 32.

75. In ITALY, the rules on adoption 'in special cases' (i.e. Article 44 Law no. 184/1983) may be used to preserve the family link and to protect the best interest of the child if parentage based on surrogacy or a foreign institute, such as the Islamic kafala, cannot be recognized.[196] Similarly, in FRANCE (and ESTONIA[197]), the adoption of the child by the intended mother (or co-parent) permissibly circumvents the refusal of French authorities to recognise the parenthood of the intended parent in a surrogacy context.[198] In other words, in both countries, instead of recognizing an existing family link, it can be (re-) created by adoption – an option which is in conformity with the ECtHR case law.

76. In AUSTRIA an existing status relationship can be renewed if such a status exists in Austrian law; hence, same-sex spouses could not re-marry each other in Austria in 2014,[199] but can do so as of 2019.

3. Other reasons to refuse recognition: Fraus leg*is and Missing Connection*

77. Several States name the evasion of domestic law or the law designated to be applicable by the domestic law (fraus legis)[200] as reasons to refuse recognition.[201] However, this exception is rarely used even if evasion is almost evident, especially in surrogacy cases.[202]

78. Similarly, legal systems sometimes require that the case has some kind of connection to the legal system that established the status – either as an explicit requirement[203] or as a part of the evasion of law/fraus legis exception (which can be part of the ordre public[204]).[205] Among the sufficient 'links' reported for Germany were the habitual residence[206] at the time of the registration, the nationality of the registering state[207], a combination of both,[208] place of birth in the country of registration and the fact that a person lived under the name in that State.[209] In AUSTRIA, in surrogacy cases a connection to the case was not discussed explicitly, but a connection between the registration/origin of the status and the case can influence the readiness of courts to reconcile differences.[210]

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[196] Italian report mn 7 et seq and 15.

[197] Adoption is possible to maintain family relations in case of same-sex parentage, see Baltic States report mn 32.

[198] Cour de Cassation, Civ. 1re, 5 July 2017 n°16-16.455 and n°16-16.901. For details see French report mn 59, 60.

[199] In this regard, the Austrian Constitutional Court refused a request made by same-sex spouses, who had married in the Netherlands, to re-marry in Austria, see VfGH 12 March 2014, B 166/2013 (Austrian report mn 67).

[200] For example, Belgium (Article 18 Belgian PIL Code), report mn 8, 18, 33.

[201] For example, France (see report mn 4 'general fraud exception'); Poland regarding foreign marriages and surrogacy (see report mn 44); Lithuania regarding marriages (Article 1.25 Lithuanian Code Civil; report mn 22); possibly Hungary (see arguments in Kúria BH2018. 174 regarding an adult adoption, report mn 60); and Germany, see report mn 43 et seq.

[202] Belgium (see report mn 19); Lithuania/Estonia (see report mn 61; limited to surrogacy cases).

[203] For example, in Sweden a personal name acquired in another EU Member State or Switzerland due to a change of civil status is recognized if the person had the habitual residence in, or the nationality of, or another special connection to that state at the relevant time (see section 30 Act on personal names).

[204] E.g. Croatia, see report mn 35.

[205] For France see 1re Civ., 6 February 1985, Bull., I, n° 55 (report mn 10); for Germany see VGH München 17 September 2014, 5 ZB 13.1366, *Das Standesamt*, 2015, 150 (report mn 42 et seq).

[206] BGH 26 April 2017, XII ZB 177/16, *Das Standesamt*, 2017, p. 270.

[207] AG Wuppertal 24 September 2015, 110 III 3/15, *BeckRS 2016, 05232*, *Das Standesamt*, 2016, p. 86; OLG München 30 January 2012, 31 Wx 534/11, *Zeitschrift für das gesamte Familienrecht*, Vol. 60, 2013, p. 412 (even nationality of the husband sufficient, if husband's name is chosen family name)

[208] AG Karlsruhe 19 August 2016, UR III 26/13, *Das Standesamt*, 2017, p. 111.

[209] BGH 20 July 2016, XII ZB 489/15, *NJW Rechtsprechungs-Report Zivilrecht*, Vol. 31, No. 24, 2016, p. 1473; OLG München 19 January 2010, 31 Wx 152/09, *Praxis des Internationalen Privat- und Verfahrensrechts*, Vol. 30, 2010, p. 452.

[210] See OGH 25 March 2014, 10 ObS 16/14x (recognition of a Jewish marriage); VwGH 6 July 2016, Ro 2014/01/0018 (*obiter*, as part of an accepted statement of the lower instances).

4. Conflicting Status: Almost No Case Law

79. It is possible that conflicting status situations arise. For example, a foreign status acquired in State A may be recognized in State B, but not recognized in State C. However, such conflicts receive relatively little attention and are usually only addressed if such a limping relationship concerns a State directly. In total, there is very little case law and practice available in the States. In BELGIUM, there is no general rule but courts try to come to a practical solution on a case-by-case basis.[211] In LITHUANIA, by choosing the documents to present (without being questioned by the court), the parties can actually choose which status will be recognized and thus will prevail over another, as the authorities will not question the status documented even in cases of strong indications that the status might not be established correctly.[212] In contrary, in GERMANY courts tend to a principle of priority: Only the first registered status will be recognized and courts seem to try to avoid a situation where the parties can choose between two registrations.[213]

5. Fourth Interim Conclusions

80.

1. Public policy – as one might expect – shows a broad spectrum of approaches and national particularities. Huge discrepancies can be found regarding the recognition of same-sex marriages/partnerships and filiation links after surrogacy. Furthermore, in some Eastern European States, the grammatical or orthographic composition of a name can be highly culturally sensitive.
2. The case law of the CJEU/ECtHR nudged some Member States to change their attitute from a strict rejection of recognition of any effects regarding the aforementioned questions to a careful opening and the recognition of at least some effects of e.g. a same-sex marriage.
3. Some Member States do not provide any possibility to recognize or register an unknown status. Nevertheless, there is a tendency to allow a transformation or adaptation to the requirements of domestic law.
4. Regarding conflicting status there is little case law. One possible solution, party autonomy, seems to be accepted in LITHUANIA but rejected in GERMANY.

VI. Towards Recognition: General Observations and Critical Assessment

1. General Remarks

81. A tendency favoring the recognition of status can be noticed in all Member States, be it in the appearance of new rules, be it in the recognition-friendly application of existing rules by national courts. Procedural hurdles are gradually abolished or diminished and courts show more openness towards unknown or cultural-sensitive legal situations resulting in fewer referencens to the public policy exception and fraus legis rules to prevent recognition. Generally, it can be observed that legislative and judicial action balance each other: If there is legislation enabling recognition, respective higher instance judgments are rare, whereas judicial and administrative action dominate if legislative attention to a certain area is low/non-existent.

82. Besides numerous smaller, often surprising and sometimes expected, findings, three major conclusions can be drawn from our comparative study which deserve further analysis and discussion.

[211] Belgian report mn 45 regarding a Belgian-Moroccan-Spanish marriage situation.
[212] Baltic States report mn. 61, 64.
[213] Report mn 48 et seq.

First, we are going to take a closer look at the disparate impact of CJEU and ECtHR cases, its causes and possible ways to adjust (see VI.2). Second, we are going to reflect about the great methodological variety in face of recognition obligations and suggest a way to cope with the associated challenges (see VI.3). Third, we are going to address the somewhat neglected role of registration and how to better integrate it into the process of status recognition (see VI.4).

2. Huge but Nuanced Impact of CJEU and ECtHR Cases

83. The aforementioned recognition-friendly tendency is particularly strengthened by the CJEU/ECtHR case law. This includes a decrease in successful references to the public policy exception to refuse recognition. Although all States exercise a certain control on the merits of the status with surrogacy and filiation, same-sex marriages/civil unions and the grammar/orthography of foreign names being particularly sensitive issues, the case law of the CJEU and ECtHR has a harmonizing effect. Despite its generally huge impact, the case law did not have the same effect everywhere. Disparities exist along the lines between legal areas on the one hand and Member States on the other hand.

84. Whether the ECHR and ECtHR cases or the TFEU and CJEU cases are referred to often depends on the legal area, i.e. for names EU law[214] and for surrogacy rather ECHR law[215]. In the years following Garcia Avello, Grunkin & Paul etc., several countries changed or amended their respective laws or administrative instructions to encourage recognition at least for EU citizens.[216]

85. In questions of surrogacy and subsequent paternity, an increasing awareness to the human rights of the child can be detected due to the case law of the ECtHR. Probably the "Pancharevo" case will lead to more awareness and recognition in questions of filiation regarding EU law. Already, the discussion about legislative steps to ensure the recognition of parentage gained momentum at EU level[217]

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[214] See, for example, Austria: VwGH 27 February 2018, Ra 2018/01/0057; a similar decision was adopted by the same court with reference to CJEU case law in VwGH 25 November 2008, 2008/06/0144; see also VfGH 26 June 2014, B 212/2014, referring to CJEU and ECtHR cases when deciding about the use of titles of nobility in names; Netherlands: report mn 11. Germany has a vivid practice of discussing EU primary law in questions of name recognition in courts and advisory opinions for the civil status registrars (*Standesbeamten-Fachausschüsse*), e.g. K. Krömer, Fachausschuss-Nr. 4027, *Das Standesamt*, 2015, p. 190; H. Kraus, Fachausschuss-Nr. 3935, *Das Standesamt*, 2012, pp. 24, 26 *et seq*.; H. Kraus, Fachausschuss-Nr. 3930, *Das Standesamt*, 2011, p. 346; F.Wall, Fachausschuss-Nr.4041, *Das Standesamt*, 2016, p. 54, for details see German report mn 8; Hungary: 26/2015. (VII. 21.) AB határozat. In contrast, Latvian courts rather refer to ECtHR cases regarding names: Judgement of the Supreme Court of Latvia of 1 November 2017, No A420398814, available at: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi; judgement of the Administrative Regional Court of Riga of 4 March 2014, No. A420383312;judgement of the Administrative District Court in Riga of 19 July 2013, No. A420383312; judgement of the Supreme Court of Latvia of 9 July 2012, No A420598410. In Lithuania, both, the CJEU and ECtHR cases are referred to.

[215] Austria (surrogacy): VfGH 14 December 2011, B 13/11 (surrogacy, USA); 11 October 2012, B 99/12 (surrogacy, Ukraine); Netherlands: Hoge Raad 13 March 2016, ECLI:NL:HR:2016:452.

[216] Belgium: Articles 49 and 50 Wet 6 July 2017 houdende vereenvoudiging, harmonisering, informatisering en modernisering van bepalingen van burgerlijke recht en van burgerlijk procesrecht alsook van het notariaat, en houdende diverse bepalingen inzake justitie, BS 24 July 2017; Croatia: Article 6/5 of the Personal Name Act; F. Staničić, "Donosi li Prijedlog novog zakona o osobnom imenu preveliku liberalizaciju?", *Informator,* 60, 2012, p. 1, 1; France: Art 61-3-1 and 311-24-1 C. civ, https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006070721&idArticle=LEGIARTI000033437840; Germany: Article 48 Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche - EGBGB*), see report mn 6; Poland: Article 15 Polish Legal Act on Private International Law of 2011; Hungary: section 10 (2) Old PIL Code/section 16 New PIL Code. The Austrian Ministry of the Interior makes reference to CJEU Case law (C-353/06 *Grunkin-Paul*) in its Instructions for Registry Offices (*Durchführungsanleitung für die standesamtliche Arbeit*) as of October 2014, BMI-VA1300/382-III/4/b/2014, 59; Spain's "Dirección General de los Registros y el Notariado" (hereinafter, "DGRN") – the autority in charge of the Civil Registers – included the CJEU case law regarding names in their administrative directives, see the Instruction ("Instrucción") DGRN 24 febrero 2010, sobre reconocimiento de los apellidos inscritos en los Registros Civiles de otros países miembros de la UE. See decisions such as RDGRN [3ª] 27 enero 2014, RDGRN [2ª] 27 noviembre 2013. In 2021, a new Law on the Civil Registry came into force which addresses this issue in its article 56, see Spanish report mn 18.

[217] European Commission Initiative on recognition of parenthood between Member States, see https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12878-Cross-border-family-situations-recognition-of-parenthood_en.

and national level, e.g. in ITALY in April 2021 a draft law regarding surrogacy and its legal consequences has been submitted to be discussed in Parliament[218].

86. Regarding same-sex marriages, the CJEU case law on the free movement of EU Citizens, especially the Coman case, at least resulted in a partial recognition of some effects of the marriage in countries that are generally sceptical towards same-sex marriages. In CROATIA, the Act on Life Partnership between Persons of Same Sex explicitly provides that same-sex marriages and partnerships between EEA citizens (or an EEA citizen and a third country national) validly concluded in an EEA Member State are treated equally as a heterosexual marriage in the freedom of movement area.[219]

87. Interestingly, some national courts seem to display a general preference for CJEU or ECtHR cases. For example, in GERMANY, ECtHR cases appear to play a less important role and are usually used to support already existent fundamental rights arguments (esp. in constitutional arguments based on the German constition within an analysis of the public policy exception).[220] Similarly, BULGARIAN courts – at least since the Coman judgement – seem to be more aware of CJEU cases on free movement in questions of status while decisions referring to the ECtHR are rather scarce.[221] In LITHUANIA, the CJEU cases are referred to even in non-EU situations (e.g. regarding the transcription of the surname of a Lithuanian-Syrian citizen living in Dubai).[222] FRENCH courts regularly assess the compatibility of French provisions with Art. 8 ECHR on questions of status but – curiously – do not refer to the case law on free movement.

88. The main reason for a rather nuanced impact of the case law depending on the legal area concerned is probably that there are still a lot of gaps regarding questions of status where until today a CJEU (or ECtHR) decision is missing. This issue may be addressed by creating more awareness about the general lines behind the judgements regarding the recognition of status in the EU – not requiring involved parties always to sue until the CJEU to get a decision respecting their human rights and rights as EU citizens. As the reasoning of the case law – impediments for the free movement of citizens due to conflicting status in different Member States – can be extended to all questions of status, a general recommendation at EU level might be a way to increase cross-disciplinary awareness.

89. Furthermore, while the public policy exception is something crucial for legal systems to maintain their national identity and also accepted by CJEU and ECtHR, its possible and often unforseeable use by national courts creates uncertainty for the parties involved – sometimes they have to go up to the CJEU or the ECtHR (and back to the national system) to achieve clarity whether their status will persist the crossing of a border. In this regard, the legitimate expectations of the persons concerned should be given more attention. Foremost among their expectations will be the persistence of a status that has been tolerated, but not recognized, already for a longer period of time. Thus, the establishment of a time limit to the public policy control – similar to the one proposed regarding the registration/transcription of a status (see supra IV.5) and similar to the Dutch doctrine of fait accompli – might ensure more legal certainty and satisfy the legitimate expectations involved. Whenever the parties lived under and used a status for a certain period of time (e.g. five years) and had public authorities accepting that status, e.g. by issueing documents declaring it, then we propose that the public policy exception should be exempt.

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[218] Draft law from 21 April 2021, for details see Italian report mn 11.

[219] Article 74 of the Act on Life Partnership between Persons of Same Sex. Although this rule was not adopted as a direct consequence of ECtHR and ECJ case law, the explanatory memo shows that it was influenced by the development of the case law.

[220] See German report mn 17, regarding surrogacy see, e.g., BGH 10 December 2014, XII ZB 463/13, *Praxis des Internationalen Privat- und Verfahrensrechts*, Vol. 35, No. 3, 2015, p. 261, for a comment in English, see S. Gössl, "The Recognition of a "judgment of paternity" in a case of cross-border surrogacy under German law", in *Cuadernos de Derecho Transnacional*, Vol. 7, No. 2, 2015, p. 448 paras. 14 *et seq*.; OLG Braunschweig 12 April 2017, 1 UF 83/13, *Zeitschrift für das gesamte Familienrecht*, Vol. 64, 2017, p. 972; OLG Celle 20 February 2015, 17 UF 131/16, *BeckRS 2017, 125339*.

[221] See Administrative court Sofia-city, 29 June 2018

[222] See Baltic States report mn 52.

3. A Myriad of Methods and Techniques to Cope with the Challenges of Recognition

90. In general, the Member States seem to be rather reluctant to embrace new methods, i.e. acceptance of a legal situation, and prefer to reinterpret/reshape standard conflict of laws techniques. Traditional recognition of judgments is gradually opened to other public acts or similar procedural techniques are applied to recognize a foreign status (see II.1). Using classical PIL rules as an indirect way of recognition is a popular legal method in most Member States, but their structure and content more and more reflects the desire to 'recognize' foreign status, be it by establishing appropriated connecting factors, such as the place of registration, or by establishing connecting techniques (e.g. alternative connections, party autonomy) that are more likely to ensure the cross-border validity of a status.(II.2). The German renvoi en bloc (II.2.D)b) can be regarded as a variant of a new connecting technique given that it assesses the establishment of the status from the perspective of the registering authority – that most probably acted in accordance with its own domestic law.

91. Besides the traditional methods, a new method, termed 'acceptance' or 'simple recognition' for our purposes, can be detected in national law. Generally, a precise methodological discourse is lacking but it is characterized by its straightforward acceptance of a legal situation (sometimes incorporated in registered acts). It is usually employed only when the traditional conflict of laws methods do not achieve the desired or required result, namely recognition of a foreign status. Thus, it is often fueled by the ECJ case law on free movement which demands a certain outcome without specifying the means. Some Member States established explicit acceptance rules; in others, implicit rules or administrative guidelines exist (see III.2) As regards the use of this method by the courts, it can be observed that a significant number of decisions deliberately focus on the justification of recognition (e.g. best interest of the child) rather than the methodological soundness of the decision. In such situations, it is difficult to determine whether the resulting decision is based on the existing ('traditional') domestic conflict of laws rules or whether the deciding authority 'accepted' the foreign legal situation irrespective the traditional methods. In any case, the courts have a crucial role in implementing the case law (see III.3).

92. The openness towards different methods and the result-oriented methodological flexibility that can be detected in national jurisdictions is certainly welcome to enhance cross-border recognition of status. However, very often, it is difficult to classify national methods according to the standard categories. For one thing, the distinction between these categories is not based on a consistent criterion for differentiation as the first category is – traditionally – determined by reference to the 'source', i.e. judicial decision/judgment, but the other two categories by reference to the method employed. Furthermore, national techniques to ensure recognition have evolved and surpassed a narrow understanding of the classic methods. It is possible that various vastly divergent rules technically fit into the same category. Besides, much depends on the activeness of the competent authorities: In some States[223] they are rather active and eager to make sure that obstacles to recognition (or registration) are noted (and properly dealt with), in other States[224] authorities are rather reluctant to ensure compliance (even if non-compliance is evident), therby minimizing the 'risk' of non-recognition. Finally, administrative and judicial decisions, which apply the national laws, often do not explicitly refer or explain the method employed, so that scholars can only interpret. In this regard, one might also take into consideration that Constitutional courts, which are no experts in civil matters and conflict of laws, relatively often have a final say, so that the methodological foundation of some decisions is dubious.[225]

[223] For example, Austria where public authorities became suspicious regarding the probable filiation by surrogacy in two cases which ended at the Constitutional court (see report mn 8 et seq).

[224] For example, Lithuania and Estonia, see Baltic States report mn 61.

[225] For example, Austria: see report mn 54, 55 regarding VfGH 14 December 2011, B 13/11 (surrogacy, USA); 11 October 2012, B 99/12 (surrogacy, Ukraine).

93. Furthermore, irrespective the method, the Member States face a methodological struggle to comply with the recognition obligations demanded by the EU fundamental freedoms and human rights as set out by the respective case law of the CJEU and ECtHR. Very often, legislative actions are lacking and the courts and authorities are struggling to work with the resources and methods they have in the national laws. Internal inconsistencies and imbalances further complicate the recognition of a status acquired abroad in a methodologically sound way. Sometimes the affiliation (i.e. nationality or habitual residence) of the person(s) determines the applicable methods to recognize a foreign status.[226] Often the choice between two national methods depends on the 'source' (i.e. judicial decision, administrative decision or act, certificate) of the status and the status category. For example, in AUSTRIA, parental affiliation as established by a foreign birth certificate may be procedurally recognized, whereas the marital status of a person as stipulated by a foreign marriage certificate may be recognized by PIL rules (only).

94. To remedy this situation and come to terms with the "myriad of methods", a clear and consistent methodology is crucial. The preconditions, detailed application and the relation to other methods should be specified precisely to enhance reliability and foreseeability. In this regard, legislative rules rather than case law should be the preferred means. As the use of divergent methods and an often quite diverse and inconsistent system at national level are often the result of international and European influences[227], a solution should be found on the same level: The EU legislator could give some guidelines on how to draft connecting factors or procedural rules or acceptance rules, thereby enabling a 'harmonizing' effect and providing assistance to courts and national legislators that would like to comply with EU law but are not sure how to. Similarly, it would be helpful if the ECtHR could show more sensitivity to PIL methods and develop some proposals how a PIL rule might be in conformity with the ECHR.

4. Status Registration as a Neglected Issue

95. Registration (generally) does not (directly) entail the recognition of a legal situation but is often a necessary step to 'integrate' a foreign status into a domestic legal system and might even seem to be a less-tedious, practical alternative to recognition: First, the registration of a foreign status is often linked to the granting of citizenship and domestic allowances as doubts regarding the recognition of the corresponding foreign status often arise in this context. Second, as long as nobody contests the registration for invalidity of the underlying status, the registration is often treated as 'true' and therefore as if the status was recognized. Parties therefore can have a strong interst in the registration/transcription of a status without the legal recognition of it.

96. Unfortunately, the practical role and impact of a domestic status registration on the (legal) recognition of a status acquired abroad is rarely discussed in the PIL literature. It deserves more attention, at least in some States. At best, issues of registration and questions of recognition should not be dealt with separately, in person and in substance, as far as a foreign status is concerned. Legal scholarship as well as practitioners, courts and other public authorities must pay attention to the subtle nuances of both areas and their unintentional overlap and distinguish both techniques precisely.

97. Furthermore, the 'illusory legal certainty' provided by a successful status registration is problematic. As a status registration usually does not entail its legal recognition the underlying status may be challenged at any time. This issue must be addressed by the national legislators or even the EU legislator, not least in order to protect the legitimate expectations of the parties. Maybe some inspiration can be drawn from national case law: In GERMAN name law, the use of a name over a certain period

[226] There are, for example, separate rules in the Netherlands regarding the recognition of adoptions depending on whether the prospective parents were habitually resident in the Netherlands at the relevant time (see Article 10:108 DCC, Article 10:109 DCC).

[227] This is particularly obvious regarding the Netherlands as the Dutch legislator is keen "to accept multilateral instruments to the largest extent possible", see Netherlands report mn 15.

of time can overcome the rejection of a recognition to protect legal expectations and the personality right of the person that lived under that name for several years.[228] Similarly, the DUTCH doctrine of fait accompli[229] protects the legal expectations of the parties and can overcome deficiencies of the usual method of recognition.

98. Accordingly, we propose that after a certain period of time (e.g. five years), a general impediment to challenge the registration/transcription and its underlying status should be introduced by the national legislators. Such a rule would provide legal certainty regarding the durability of a registration and, thus, enhance the portability of a status and the trust put into public authorities and their registrations.[230] At the same time, it would encourage the competent authorities to assess the recognizability of a foreign status already before its registration.

99. Furthermore, to ease the registration of a foreign status, more flexibility should be applied in standard forms. Thus, any problem caused by the lack of a corresponding field (e.g. for co-mother/co-father) or different spelling of names could be attenuated. Already, some Member States have found ways to cope by adding fields to standard forms or permitting the attachment of additional information in an international context (see IV.3 supra).

VII. Conclusions and Suggestions

100.

1. In general, national legislators and courts favor the recognition of a status acquired abroad. The CJEU/ECtHR case law accelerated and catalysed this tendency.
2. The various approaches to "recognize" and "accept" a status show that the EU, also in this respect, is "united in diversity". It also shows the struggle of the national legislators and courts to comply with the CJEU/ECtHR case law.
3. The impact and effect of status registration is still an underestimated and neglected issue in the context of the recognition of a foreign status, thus creating legal uncertainties and inconsistencies.
4. To further the recognition of foreign status

    a. more attention should be paid to "how" recognition is attained methodologically and also to the (spill-over) effect of status registration. This can be achieved by an increased methodological awareness and transparency on the national level (decisions, legislation) as well as general recommendations and guidelines at EU/ECtHR level to expose the common requirements of status recognition beyond single cases and provide some guidance to the Member States.
    b. more attention should be paid to the legitimate expectations of the persons concerned and to increase long-time legal certainty. This can be achieved by more legal and administrative flexibility to incorporate foreign (unknown) status at the best and by setting a time-limit to challenge the recognition of a status acquired abroad that has already been registered domestically.

[228] See *supra* at note 96 (III. 2).

[229] Article 10:9 DCC, see report mn 30.

[230] See to this proposal already S. Gössl, M. Melcher, "The Obstacle to Free Movement of Family Status in Europe" in Bernard et al. (Eds.), *La famille dans l'ordre juridique de l'Union européenne*: *Family within the Legal Order of the European Union*, Bruxelles, 2020, pp. 343–359.